1.1.1 Administrative Law – Interpretation of Law – Generally. To the extent that LUBA's holding in *Perry v. Yamhill County*, 26 Or LUBA 73, 80, *aff'd*, 125 Or App 588, 865 P2d 1344 (1993), that the reasoning in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), extends to a local government's interpretation of a prior land use decision, was correct, it was superseded by ORS 197.829(1), which requires LUBA to affirm "a local government's interpretation of its comprehensive plan and land use regulations" but does not require LUBA to affirm a local government's interpretation of a prior land use decision, findings adopted in support thereof, or conditions of approval attached thereto, which LUBA reviews under ORS 197.835(9)(a)(D) to determine whether the local government "[i]mproperly construed the applicable law." *M & T Partners, Inc. v. City of Salem*, 80 Or LUBA 221 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a significant resource overlay zone provision requires that (1) resource sites not be altered or impacted to a degree that destroys their significance, (2) the proposed development not result in the loss of habitat for threatened or endangered species, (3) all feasible alternatives to the development that would not result in a substantial adverse impact on identified resource values be considered and rejected, (4) the development be sited on the property in such a manner that minimizes adverse impacts on identified resources, and (5) documentation be provided regarding requirements for state or federal permits or licenses and that appropriate resource management agencies have reviewed the development proposal against their plans, policies, and programs, the local government does not err in concluding that that provision applies at the development stage rather than the PAPA stage. *VanSickle v. Klamath County*, 80 Or LUBA 241 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Although the holding in *Beaver State Sand and Gravel vs. Douglas County*, 187 Or App 241, 65 P3d 1123 (2003), determined that ORS 215.298(2) prohibits surface mining on EFU-zoned lands unless the property is included on a Goal 5 inventory of significant aggregate resources, nothing in OAR 660-023-0180 prohibits a local government from otherwise maintaining a "Non-Significant Mining Mineral and Aggregate Inventory," adding properties to that inventory, or allowing surface mining on properties included on that inventory pursuant to local code provisions regulating surface mining, and a local government is not required to apply any rules implementing Goal 5 to its decision to add property to that inventory. *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 252 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local code provision requires that a minimum of 250 square feet of "outdoor area" be provided for each residential lot and specifically states that the outdoor area may include "decking" and a "covered patio," as long as that covered patio is not "fully enclosed," the local government does not err by concluding that a covered deck that is attached to the dwelling, but not enclosed, can satisfy the minimum outdoor area requirement. *Bohan v. City of Portland*, 80 Or LUBA 263 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local code provision generally prohibits development and grading in "areas of land movement," LUBA will affirm a hearings officer's interpretation of that provision to prohibit development and grading in "an area where a land slide or some other earth movement has already occurred—not an area where such activity *could* occur." *Chang v. Clackamas County*, 80 Or LUBA 321 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government errs by finding that compliance with a local code provision prohibiting diversion of storm water into areas with steep slopes and "areas of land movement, slump or earth flow, and mud or debris flow" is satisfied by compliance with a separate local code provision requiring development to provide "[p]ositive drainage and adequate conveyance of surface water * * * from roofs, footings, foundations, and other impervious or near-impervious surfaces to an appropriate discharge point." *Chang v. Clackamas County*, 80 Or LUBA 321 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. The planning commission's conclusion that the subject properties are subject to "site review requirements" is not supported by anything in the text of the Old Code, Ordinance 20224, or the New Code. *Simons Investment Properties, LLC v. City of Eugene*, 80 Or LUBA 458 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. In the context of an application to construct a 94-unit apartment complex, where a local code provision defines "net density" to mean "the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development, such as common open space or recreation facilities," while a maintenance building and internal parking circulation areas are properly included in the net density calculation, a leasing office should be excluded from the acreage used to calculate net density. *Hulme v. City of Eugene*, 80 Or LUBA 488 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the Court of Appeals determines that LUBA's decision was "unlawful in substance" pursuant to ORS 197.850(9)(a) because LUBA affirmed the city's interpretation of Goal 8, Policy 1, and according to the court, the city's interpretation of Goal 8, Policy 1 is not affirmable under ORS 197.829(1) because the city's interpretation does not "plausibly account for the text and context of the policy," the appropriate disposition according to OAR 661-010-0071(2)(d) is for LUBA to remand the decision to the city for further proceedings, specifically for the city to adopt a sustainable interpretation of Goal 8, Policy 1, and apply that policy, as interpreted to the application before it. *Crowley v. City of Hood River*, 79 Or LUBA 77 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local code provision prohibits uses that "alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties," a hearings officer errs in reducing the inquiry into a single inquiry into whether the proposed use makes the use of nearby properties "substantially worse," since the words "limit" and "impair' have different meanings and since, where a local code uses two different terms in the same provision, it is presumed that the enacting body intends two different meanings. *York v. Clackamas County*, 79 Or LUB 278 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local code provision requires a finding that a proposed use "will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel," the proper comparison is between the proposed use and the pre-existing use, not between the proposed use and typical uses of the same type. *York v. Clackamas County*, 79 Or LUB 278 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the predominant use of a proposed facility controls whether it is permitted in a zone, a local government does not err in concluding that the allocation of two-thirds of the physical space in a building to office uses makes the office use the predominant use of the building, even where the primary purpose of the office uses is to facilitate other uses in the building which are not allowed in the underlying zone. *Sky Lakes Medical Center, Inc. v. City of Klamath Falls*, 79 Or LUBA 490 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. The fact that a proposed second dwelling would have a smaller footprint, less square footage, and fewer bedrooms than an existing dwelling on the same lot is by itself insufficient to establish that the second dwelling is "accessory to" the existing dwelling for purposes of ORS 197.312(5). *Kamps-Hughes v. City of Eugene*, 79 Or LUBA 500 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. The fact that a proposed second dwelling would be located on the same lot as an existing dwelling is sufficient to establish that the second dwelling is "used in connection with" the existing dwelling for purposes of ORS 197.312(5), regardless of whether either dwelling is occupied by the owner of the lot. *Kamps-Hughes v. City of Eugene*, 79 Or LUBA 500 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local code amendment is not inconsistent with an administrative rule, so as to require reversal or remand of the amendment decision, merely because the amendment uses the phrase "ministerial decision" while the rule uses the phrase "administrative decision," where the code does not treat those phrases differently. In addition, a local code amendment is not inconsistent with an administrative rule authorizing counties to grant extensions of permits if they determine the applicant was unable to begin or continue development "for reasons for which the applicant was not responsible" merely because the amendment provides a list of examples of such reasons, especially where the rule provides no definition or guidance for that phrase. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. While a variance should not be used as a substitute for rezoning, a local government does not err in granting a variance without a showing that strict application of the zoning ordinance would cause "practical difficulties or unnecessary hardships because of exceptional or extraordinary circumstances or conditions affecting the applicant's property" in a zone which the local code specifically exempts from that standard. *City of Albany v. Linn County*, 79 Or LUBA 528 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the only variable between multiple Urban Growth Area-Urban Growth Management (UGA-UGM) zones is lot size, and where a county code provision provides that "[t]he density of one UGA-UGM zoning district is not interchangeable with the density of another UGA-UGM zoning district without prior review and approval by the affected city and * * * County," an interpretation by the county that the provision applies to zone changes of the subject property or changes to the underlying density of the zone in which the subject property is located, but that it does not apply to lot size variances, is inconsistent with the express language of the provision. In such cases, where the local code does not define "density" and the dictionary defines "density" as the quantity or number per unit of area, LUBA will make its own determination that a lot size variance in a UGA-UGM zone may qualify

as an "interchange[]" with the density of another UGA-UGM zone, thereby requiring city review and approval. *City of Albany v. Linn County*, 79 Or LUBA 528 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local code provision provides that "[a]pproval of [a] variance is limited to the minimum necessary to permit otherwise normal development of the property for the proposed use," an interpretation by the local government that the provision means a variance may be approved if it permits development consistent with the surrounding land use pattern and the uses permitted in the underlying zone, and that it does not mean a variance may only be approved if it is necessary to permit development that is allowed in the zone, is not inconsistent with the language of the code or the purposes or policies underpinning the provision. *City of Albany v. Linn County*, 79 Or LUBA 528 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. The fact that a tentative plan for a destination resort proposes a different pace of development than the final master plan, such as by sub-phasing development, does not materially affect the findings of fact on which the final master plan approval was based so as to constitute a "substantial change" to the final master plan, thereby requiring a new application, where neither the final master plan nor applicable regulations require that all development authorized in the first phase of the final master plan occurs at the same time. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the final master plan for a destination resort includes a mitigation plan requiring the applicant to replace the water consumed by the resort with a quantity and quality of water that will maintain fish habitat in an impacted stream, the fact that the tentative plan for one phase of development modifies the timing, but not the overall amount, of the mitigation water required to be provided does not materially affect the findings of fact on which the final master plan approval was based so as to constitute a "substantial change" to the final master plan, thereby requiring a new application, where there is no evidence that such modification will impact the efficacy of mitigation and there is evidence that such modification will result in more gradual, spread out impacts. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local code provision provides that issuance of a conditional use permit requires a determination that "[t]he proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone," an interpretation by the local government that it need not consider the impact of the proposed use on property values and neighbor peace of mind is not inconsistent with the provision's express language or underlying policies. *Currie v. Douglas County*, 79 Or LUBA 585 (2019).

1.1.1 Administrative Law – Interpretation of Law – Generally. When the county is entitled to deference under ORS 197.829(1), the decision can be reversed only if the interpretation is inconsistent with the express language, purpose or policy underlying the relevant code language. Under a non-deferential standard of review petitioner must demonstrate that the commissioners' interpretation is reversible. *Oregon Coast Alliance v. Curry County*, 78 Or LUBA 81 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. A petitioner may not also operate an exotic animal rescue facility, which is undisputedly not a "farm use," on EFU land where the petitioner uses his or her EFU-zoned property for certain "farm uses," under ORS 215.203. The existing "farm use[s]" do not "legitimize" the concurrent unpermitted uses, nor do they shield the unpermitted uses from county code enforcement action. *A Walk on the Wild Side v. Washington County*, 78 Or LUBA 356 (2018).

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

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer's interpretation is inadequate for review before LUBA where the hearings officer finds that that a proposed bed and breakfast inn designed for occupancy by an employee caretaker and up to eight non-resident guests qualifies as a "bed and breakfast inn," without explaining how a caretaker occupancy is consistent with the county code which defines a bed and breakfast inn as an "owner-occupied" "single-family dwelling unit." *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. A county hearings officer errs in denying a forest template dwelling application on the sole basis that petitioner had not provided a fire safety inspection, where the applicable ordinance provision entitled "Wildfire Safety Requirements" requires "[o]ther measures as recommended by the fire agency commenting on the application or the County Fire Safety Inspector," and no fire agency recommended any measures or a fire inspection in any submitted comments. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. Even though an applicant provides evidence of ownership of 200 or more acres in western Oregon after the application is deemed complete, a hearings officer correctly concludes that an application for a forest template dwelling satisfies ORS 215.740(3), where nothing in the statute or local development ordinances requires an applicant for a large tract forest dwelling to prove ownership of the parcel at the time an application is submitted. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer correctly interprets ORS 215.740(3) in concluding that the minimum acreage requirement that applies to an application for a forest template dwelling is the minimum acreage for the applicant's tracts located in western Oregon where the forest template dwelling is proposed to be located, rather than the non-contiguous parcel located in an adjacent county designated as eastern Oregon. ORS 215.740 allows an owner seeking a dwelling on a tract that is located in western Oregon to rely on non-

contiguous land in another adjacent county to meet the minimum acreage requirements; it does not require that the minimum acreage requirements for the non-contiguous county be the applicable standard. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. Petitioner's argument that the county hearings officer's failure to adopt findings of compliance with a county code provision (Washington County Development Code (CDC 421-7.8)) is not a position presented "without probable cause" sufficient to entitle an award of attorney fees against a non-prevailing party, where LUBA agreed with petitioner that the hearings officer's failure to adopt any findings explicitly addressing CDC 421-7.8 would warrant remand, unless, as occurred here, other findings with respect to other standards (CDC 422) in the hearings officer's decision were sufficient to address the substantive standards set forth in CDC 421-7.8, and therefore the hearings officer's failure to adopt findings addressing CDC 421-7.8 was harmless error. *McAndrew v. Washington County*, 78 Or LUBA 1094 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. That different setbacks standards with different language are interpreted to require the same setback distance does not run afoul of the general interpretative requirement to give different effect to different words used in the same statute, where the local government shows that the different words nevertheless support requiring the same setback distance. *Brannon v. Multnomah County*, 77 Or LUBA 275 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. The undefined standard categories "site-related development standards" and "use-related development standards" are ambiguous; a front setback standard and a maximum height standard could fall into either category. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a general category called "use-related development standards" is followed by a nonexclusive list of examples, and minimum front setback and maximum height standards are not included on the list, that is some support for concluding that minimum front setback and maximum height standards are not use-related development standards. But where one of the specified examples of a general category called "use-related development standards" is "size of use standards," it is certainly possible that a maximum height standard qualifies as a "size of use standard" and thus could qualify as a "use-related development standard." *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a hearings officer's findings provide an inadequate explanation for why he concluded minimum front setback and maximum building height standards qualify as "site-related development standards," that prior city hearings officers and the city council have reached the same conclusion is some support for the hearings officer's conclusion. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. Although local legislative history is generally not subject to official notice by LUBA and cannot be considered on appeal if it is not included in the local record, where the legislative history is contemporary commentary that was adopted by the city council when it adopted the legislation, LUBA will consider the commentary. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a prior version of the zoning ordinance only allowed modifications for setback and height standards, and the zoning ordinance was amended to allow a general category of standards, that lends some support to the local government's position that the general category of standards includes setback and height standards. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. Although LUBA may take official notice of commentary that was adopted with an ordinance, where that ordinance does not enact or amend the ambiguous zoning ordinance language at issue, it is of no significance in resolving the ambiguity. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer's findings cannot be faulted for failing to address the impacts of a modification (variance) on petitioner's nearby residence, where the findings expressly address those impacts and the relationship between the proposed structure and petitioner's residence and point out that the proposed structure is downslope and offset from petitioner's residence. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer's failure to adopt findings that address potential impacts of a proposed building on one nearby dwelling in granting a maximum height modification (variance) is not a basis for remand, where the "on balance" nature of the modification (variance) approval standard does not necessarily require individual findings for every nearby residence, a public walkway between that dwelling and the proposed dwelling reduces any legitimate expectation of privacy, and the topography and scale of the proposed building is such that where the two structures adjoin each other they will be of similar height. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. Oregon Laws 2008, chapter 12, legislatively overruled the holding in *Phillips v. Polk County*, 53 Or LUBA 194, *aff'd*, 213 Or App 498, 162 P3d 338 (2007), which provided that it was unlawful to adjust property boundaries in a way that results in parcels that fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, authorizes property line adjustments of substandard size lots and parcels, even if the resulting lots or parcels continue to fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, section 6 made that legislation retroactive to "property line adjustments approved before, on or after the effective date of this 2008 Act." Therefore, Oregon Laws 2008, chapter 12 applies to a property line adjustment that took place in 2007, because the property line adjustment was "approved * * * before, on or after" the effective date of the 2008 Act. *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. Petitioner fails to meet her burden to demonstrate that LUBA has subject matter jurisdiction over a city council's decision to remove 35 trees from a city park, where petitioner argues the decision constitutes "logging" because it was motivated at least in part to generate revenue, and "logging" is not authorized under the Public Open Space zone that applies to the park. Simply because a city decides to offset the costs of removing hazardous trees to avoid the cost of treating and maintaining other compromised

trees that are not yet hazardous does not convert the tree removal proposal into a logging operation, or otherwise make the decision a "land use decision." *Carlson v. City of Brookings*, 77 Or LUBA 497 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. Petitioner has not demonstrated that a city's decision to remove 35 trees from a 33-acre city park will have a significant qualitative or quantitative impact on present or future land uses. The decision does not alter any of the land uses allowed in the park's zone or any of the present or future land uses in the park, and the trees themselves are not land "uses" in any legally cognizable sense. *Carlson v. City of Brookings*, 77 Or LUBA 497 (2018).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will reject an argument that a legislative text amendment prohibiting new or expanded fossil fuel terminals is inconsistent with the Metro Framework Plan and Metro Transportation Plan where the city's code requires only that code text amendments are consistent with Metro's Urban Growth Management Functional Plan. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer errs in interpreting a condition of approval for a multi-phase planned unit development (PUD), which requires that the applicant for final phase approval submit a traffic stud y to determine if additional improvements are necessary to comply with the Transportation Planning Rule, to effectively supersede a different condition of approval applicable to all phases of the PUD that limits maximum development on the site to produce no more than a specified number of vehicle trips, where the two conditions can instead be interpreted to give effect to both. *Willamette Oaks LLC v. City of Eugene*, 76 Or LUBA 187 (2017).

1.1.1 Administrative Law – Interpretation of Law – Generally. A county reasonably interprets its road vacation ordinance to apply to vacation of public easements, notwithstanding that the ordinance does not expressly refer to the vacation of public easements, where the ordinance implements ORS 368.326, a statute that authorizes counties to establish vacation procedures for, among other things, public easements. *Neighbors for Smart Growth v. Washington County*, 76 Or LUBA 319 (2017).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a comprehensive plan policy calls on the city to "[m]aintain the existing residential housing stock in established older neighborhoods by maintaining existing Comprehensive Plan and zoning designations <u>where appropriate</u>," and the city commission adopts a number of reasons why it believes maintaining existing planning and zoning designations is "not appropriate," a petitioner must do more than set out reasons why he thinks maintaining the existing planning and zoning is appropriate without directly challenging the city commission's reasoning. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a comprehensive plan policy requires that a city "ensure that potential loss of affordable housing is replaced" when changing comprehensive plan and zoning map designations, city findings that city-wide efforts to encourage affordable housing will be sufficient to make up for the loss of five dwellings through

construction of a medical center made possible under new comprehensive plan and zoning map designations are sufficient to demonstrate the policy will not be violated. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. A comprehensive plan goal of "protecting and maintaining neighborhoods" is not necessarily violated by a development that will displace five existing houses. A city commission interpretation that the proposal complies with the goal, notwithstanding the loss of the five houses, so lo ng as the proposal will otherwise protect and maintain the nearby neighborhood, is not reversible under ORS 197.829(1). *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the zoning code does not define "hospital structures" but does separately list "Hospitals" and "Medical and dental clinics, outpatient; [and] infirmary services" as permitted uses, a city does not misconstrue the zoning code by concluding that a "medical office building "does not qualify as a "hospital" and therefore need not have a backup source of electricity, which hospitals are required to have under the zoning code. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 475B.340(2) and ORS 475.500(2) allow local governments to adopt "reasonable regulations" on marijuana production, processing, and sales. A county zoning ordinance that prohibits marijuana production in a rural residential zone while al lowing marijuana production in an exclusive farm use zone and on lands zoned farm and forest, which together include more than one million acres in the county, is a "reasonable regulation" within the meaning of the statutes. *Diesel v. Jackson County*, 74 Or LUBA 286 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will affirm a hearings officer's interpretation of a code provision that prohibits the filing of an application within two years that is "substantially similar" to an application that the county denied as requiring a high degree of similarity. Under the rules of interpretation, LUBA will affirm the hearings officer's conclusion that an application to develop a 62-lot subdivision on land zoned R 10 is not substantially similar to a previously denied application to develop a 72-lot subdivision on land zoned R 10, where the new subdivision proposes approximately 15 percent fewer lots, an increase in average lot size of approximately 20 percent, a decrease of approximately 100 daily trips, an increase in on-street parking, and wider streets. *Reinert v. Clackamas County*, 74 Or LUBA 427 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will affirm a hearings officer's interpretation of a code provision that requires the county to (1) incorporate tree preservation into a development plan "wherever feasible," and (2) balance the preservation of natural features with the needs of development provided such balancing shall not require a reduction in the number of lots or dwelling units that would otherwise be permitted, to not require additional trees beyond the 90 of 423 that were proposed to be preserved where preservation of the additional trees would require a reduction in the number of lots or dwelling units that would otherwise be permitted. *Reinert v. Clackamas County*, 74 Or LUBA 427 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where an assignment of error challenges an interpretation that the decision on appeal does not adopt, the assignment of error does not establish a basis for reversal or remand. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. In some circumstances a local government may have to provide some interpretation or findings explaining its understanding of a subjective standard such as a requirement to adopt buffers that "ensure compatibility" between urban and rural agricultural uses. However, in the context of a legislative proceeding to adopt regulations for such buffers there is no inherent obligation to adopt an interpretation of the standard, and the failure to adopt an interpretation is not in itself a basis for reversal or remand. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where one of seven factors that the comprehensive plan describes as "guid[ing] the determination of the most appropriate zone" guides the county to consider "[a]vailability of transit" and provides that "land within walking distance (approximately one-quarter mile) of a transit stop should be zoned for smaller lots," a hearings officer errs in concluding that land within approximately one-quarter mile of a transit stop is not within "walking distance" because sidewalks are not present. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the comprehensive plan sets out seven factors that "guide the determination of the most appropriate zone," a hearings officer errs in weighing some of the factors as less important than other factors without any support for that weighting in the express language of the factors or other parts of the comprehensive plan. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where one of seven factors that the comprehensive plan describes as "guid[ing] the determination of the most appropriate zone" guides the county to consider "proximity to jobs, shopping, and cultural activities" and guides that areas in proximity to jobs, shopping and cultural activities should be considered for smaller lots, a hearings officer errs in concluding that land that is proximate to jobs and shopping should not be zoned for smaller lots based on the hearings officer's negative assumptions about the quality of the jobs and shopping. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where one of seven factors that the comprehensive plan describes as "guid[ing] the determination of the most appropriate zone" guides that areas that have historically developed on large lots should "remain zoned consistent with the existing development pattern, "and the hearings officer interprets the "existing development pattern" to be synonymous with the existing zoning, remand is required in order for the hearings officer to explain why a change from 10,000-square-foot lots to 8,500-square-foot lots in an area with some 8,500-square-foot lots is not "consistent with the existing development pattern." *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the comprehensive plan sets out seven factors that "guide the determination of the most appropriate zone," and the factors

are not competing policies and do not work at cross purposes, a hearings officer errs in weighting some of the factors as less important than other factors without any support for that weighting in the express language of the factors or other parts of the comprehensive plan. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer correctly interprets the provisions of the comprehensive plan's Housing chapter as not applying to an application for a zone change because a residential zone change proposes only a change in the zoning and possible density of housing but does not propose a particular type of housing. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer correctly interprets the provisions of the comprehensive plan's Public Facilities and Services chapter as not applying to an application for a zone change, where the chapter's policies are directed at development, and the adopted land use regulations implement the policies and apply at the time of development. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. A county finding that wind turbines are a conditional use in a commercial zone is not reversible error, even though wind turbines are not listed as a conditional use in the zone, where the balance of the decision clearly demonstrates the county in fact utilized its authority to approve uses that are similar to listed permitted and conditional uses in the zone to approve the wind turbines. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where LUBA sustains three assignments of error, but denies a fourth assignment of error, rejecting petitioner's challenge to a county commissioners' interpretation that a permit expiration standard that requires a finding that the applicant is not at fault for failing to complete the use authorized by the permit is met because the county's multi-stage destination resort process is so complicated, and LUBA's decision is reversed on appeal, with the Court of Appeals concluding that making the complexity of the multi-stage resort process the *only* consideration in applying the standard is an implausible interpretation of the standard, LUBA will sustain the fourth assignment of error as well. *Gould v. Deschutes County*, 72 Or LUBA 258 (2015).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer is not required to interpret and apply a county code provision that is similar, but not identical, to a different county code provision that was at issue in a thirteen-year-old board of county commissioner's decision that applied to a different application and property in the same way that the board of commissioners previously applied the different code provision. *Head v. Lane County*, 72 Or LUBA 411 (2015).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the word "property" is not defined in the local code, the county correctly considers context provided by the definitions of "property line adjustment" and "property line," both of which include reference to a "lot of record," in order to interpret the meaning of "property" to refer generally to whatever units of land (parcel,

lot, or lot of record) that are subject to a property line adjustment. *LaBare v. Clackamas County*, 71 Or LUBA 25 (2015).

1.1.1 Administrative Law – Interpretation of Law – Generally. Under ORS 197.829(2), LUBA is authorized to interpret county land use regulations in the first instance in cases where the local government has failed to do so. Where a party raises an argument that a building used to board horses is authorized as a permitted use under the zoning and development ordinance, and the hearings officer does not consider the argument and does not adopt findings in response to the party's argument, LUBA may interpret the zoning ordinance and determine whether the building used to board horses is a permitted or conditional use in the zone. *Stavrum v. Clackamas County*, 71 Or LUBA 290 (2015).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a city's code does not expressly provide that the city's decisions are "final" for purposes of appeal to LUBA on the date notice is mailed to the parties, but a city code provision directs the planning director to include a statement in the notice of decision that the decision is final and may be appealed to LUBA within 21 days of the date of mailing, LUBA will interpret the code provision as intended to make the city's decisions final on the date of mailing for purposes of OAR 661-010-0010(3), which authorizes local governments to determine the date of finality by local rule or ordinance. *Stevens v. City of Island City*, 71 Or LUBA 373 (2015).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer correctly concludes that an isolated wetland is not a "riparian corridor," where the code defines riparian corridor as "an area, adjacent to a water area," and the isolated wetland is not "adjacent to a water area." *Carver v. Washington County*, 70 Or LUBA 23 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the Court of Appeals interpreted similar operative language in a county's code to determine that "riparian zones" are areas adjacent to water areas designated in a community plan, a hearings officer correctly interprets the term "riparian corridor" in that code to apply only to riparian areas that are proximate to designated water areas. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local code provision authorizing a private street if the street is "not needed to provide access to other properties in the area" is not violated by a required pedestrian/bicycle connection between the proposed private street and offsite transit facilities, because "other properties in the area" does not refer to transit facilities in a public right-of-way. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer's approval of an extension of a PUD construction schedule that has been modified several times since the original PUD approval is consistent with a code section governing extensions of PUDs, where nothing in the original PUD approval or a condition of approval requiring the parties to enter into a Performance Agreement detailing the construction schedule prohibits extending the construction schedule. *Goodpasture Partners LLC v. City of Eugene*, 70 Or LUBA 59 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. A later-enacted section of the city's development code governing PUD modifications that includes similar provisions to a prior superseded version of the development code is the "corresponding provision" of the superseded code for purposes of the new code provision applicable to PUD modifications. *Goodpasture Partners LLC v. City of Eugene*, 70 Or LUBA 59 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. Generally use of the same phrase in different provisions of the same statute indicates that the phrase has the same meaning. Because ORS 197.772(1) uses the term "property owner" to refer to the property owner at the time that the property is designated a historic resource, the use of the same term in ORS 197.772(3), which allows a property owner to request removal of the designation, suggests that "property owner" as used in ORS 197.772(3) refers to the owner at the time of designation, not subsequent purchasers of the property. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. Notwithstanding that ORS 197.772(1) and (3) both use the same phrase "property owner," the two sub-sections operate in entirely different, non-overlapping circumstances, which suggests that "property owner" as used in ORS 197.772(3) may not be limited by context, as is ORS 197.772(1), to the property owner at the time property is designated a historic resource. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where legislative history of ORS 197.772(3) indicates that the legislators proposing that section believed the phrase "property owner" as used in that provision referred only to the property owner at the time property was designated for historic resource, and did not include subsequent purchasers, and an amendment intended to specify that "property owner" also included subsequent purchasers was later deleted in conference, the strongest inference is that the legislature intended "property owner" as used in ORS 197.772(3) to include only the property owner at the time of designation, and not subsequent purchasers. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where legislative history of ORS 197.772(3) indicates that legislators intended to offer remedial relief to property owners who were "coerced" into having their property designated as a historic resource, but the legislative history does not indicate that the legislature was equally concerned with subsequent purchasers who acquire the property knowing it is designated as a historic resource, that legislative history supports the conclusion that "property owner" as used in ORS 197.772(3) is limited to owners at the time the property was designated, not subsequent purchasers. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer correctly rejects an interpretation that connecting two dwellings by a causeway creates a single "dwelling," with two or more "dwelling units," based on a general code definition of "dwelling," where a narrower definition of dwelling that limits "dwelling" to a single dwelling unit applies in the zone. *Macfarlane v. Clackamas County*, 70 Or LUBA 126 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will affirm a planning commission's interpretation of a code net density calculation requirement to exclude "public and private streets and alleys, public parks, and other public facilities "as not requiring the exclusion of acreage that is encumbered by easements for sewer and water lines where the phrase "other public facilities" is not defined and the applicable code provision does not use the word "easement." *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. A planning commission improperly construes a requirement in the local code to adequately screen a proposed PUD from adjacent properties when it concludes that existing open space provides adequate screening, where it does not require the PUD to be visually shielded or obscured from the adjacent property through any of the means specified in the definition, because it fails to give meaning to the word "screening." *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. Legislative Counsel's decision to renumber as ORS 215.284(1) to (6) what the legislature enacted as ORS 215.283(3) to (8) does not change the fact that what is now codified at ORS 215.284(1) to (6) was enacted by the legislature as part of ORS 215.283 and 215.283. ORS 215.283 is the statutory regime that applies to non-marginal lands counties rather than marginal lands counties. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will affirm a hearings officer's interpretation of provisions of the city's development code and the city's utility licensing code section that apply to wireless communications facilities to exempt a wireless communication facility tower (WCF Tower) that is proposed to be located in the public right-of-way, where all of the applicable provisions, read together, support a conclusion that the city intended to exempt WCF towers located in the public right-of-way from special use review under the city's development code. *Weston Kia v. City of Gresham*, 70 Or LUBA 483 (2014).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a decision maker identifies the dictionaries relied on to clarify the meaning of ambiguous terms, it is not error to fail to identify which edition of those dictionaries was used where the dictionary definitions are generally consistent with the definitions of those terms in the 2002 unabridged edition of Webster's Third New Int'l Dictionary. *Schnitzer Steel Industries Inc. v. City of Eugene*, 68 Or LUBA 193 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. It is not error to consult dictionary definitions of the component terms of a larger complete term, where the larger complete term is not defined by local land use code that uses the larger complete term. *Schnitzer Steel Industries Inc. v. City of Eugene*, 68 Or LUBA 193 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where it can be established that a local government intended a technical or industry-based meaning for an ambiguous term, it is error to instead rely on general dictionary definitions. However, it is not error to rely on general dictionary definitions where the record does not establish a technical or industry-based meaning was intended. *Schnitzer Steel Industries Inc. v. City of Eugene*, 68 Or LUBA 193 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where there is nothing in the record to suggest the enacting city council understood the separate steps in metals recycling or the industry understanding of the scope of activities in scrap and recycling facilities, there is no reason to believe the enacting local government's understanding of the scope of "scrap and dismantling yard" was influenced by the industry's understanding of the meaning of that term. *Schnitzer Steel Industries Inc. v. City of Eugene*, 68 Or LUBA 193 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where there is no reason to believe the enacting governing body was aware of or considered statutes and rules governing dismantling of scrap metal processing yards when it enacted the local term "scrap and dismantling yard," the fact that those statutes and rules exclude metal shredders is not context for determining whether the local term "scrap and dismantling yard" includes metal shredders. *Schnitzer Steel Industries Inc. v. City of Eugene*, 68 Or LUBA 193 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the city zoning listing of permitted uses includes "scrap and dismantling yard," and the zoning ordinance provides that "'or' may be read as 'and' and 'and' may be read as 'or,' if the sense requires it," it is questionable whether the permitted use must both accept scrap and engage in dismantling. *Schnitzer Steel Industries Inc. v. City of Eugene*, 68 Or LUBA 193 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the record is such that a reasonable decision maker could have concluded that a metal shredder is a sufficiently unique step in metals recycling that it should be viewed as different in kind and therefore a different use from a "scrap and dismantling yard," but the record and dictionary definitions also would permit a reasonable decision maker to view a metal shredder as simply a different piece of equipment to allow more complete recycling, LUBA will conclude that the local decision maker did not "[i]mproperly construe the applicable law" in adopting the latter view. *Schnitzer Steel Industries Inc. v. City of Eugene*, 68 Or LUBA 193 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where some zoning ordinances take a "laundry list" approach and include an exhaustive list of allowed uses and other zoning ordinances list more generally allowed categories of uses, followed by a non-exclusive listing of examples, it may be more appropriate to narrowly construe uses listed in zoning ordinances taking the former approach and more broadly construe uses listed in zoning ordinances taking the latter approach. But where a zoning ordinance is not easily categorized into either approach, and includes elements of both, a local decision maker does not err by failing to adopt a narrow construction of the term "scrap and dismantling yard." *Schnitzer Steel Industries Inc. v. City of Eugene*, 68 Or LUBA 193 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local code definition of "lot" as an "area of land owned by or under the lawful control and in the lawful possession of one distinct ownership" does not have the legal effect of aggregating adjacent, separately owned areas of land. *Mackenzie v. Multnomah County*, 68 Or LUBA 327 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will affirm as correct a hearings officer's interpretation that a local code provision that requires aggregation of contiguous parcels in common ownership for development of a "Lot of Record" in a particular zoning district is not self-effecting. Such a code provision does not have the effect of aggregating contiguous parcels in common ownership merely because the parcels were, for three years, included in the particular zoning district, where no development was proposed or completed during the three-year period when the property was included in the zoning district. *Mackenzie v. Multnomah County*, 68 Or LUBA 327 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will affirm as correct a hearings officer's conclusion that a prior dwelling approval for one property did not aggregate adjacent contiguous parcels in common ownership, where nothing in the local code criteria that applied to the prior dwelling approval required aggregation in order to obtain a development permit, and the dwelling approval was not conditioned on aggregation of the parcels. *Mackenzie v. Multnomah County*, 68 Or LUBA 327 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the language of a development code is such that it anticipates an application for declaratory ruling will be submitted by a single owner of a single property, the development code is therefore ambiguous regarding whether an application for a declaratory ruling is possible when the application concerns more than one property and is ambiguous regarding whether the application must be signed by all property owners or may be signed by any property owner. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where competing interpretations of a development code are equally plausible, and there is some contextual support for the interpretation selected by a hearings officer, LUBA will conclude that the hearings officer did not "[i]mproperly construe[] the applicable law," within the meaning of ORS 197.835(9)(a)(D). *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government errs in construing a previous decision that deferred finding compliance with an applicable approval criterion to final planned unit development stage to restrict the local government's obligation to determine whether the applicable criterion that was deferred is satisfied by only considering whether the information required by a condition of approval was submitted, where the previous decision makes clear that the local government completely deferred making a determination of compliance with the applicable criterion to the final PUD stage. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 33 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will not consider whether a county has authority to approve conditional zoning where the applicant modified its proposal making conditional zoning unnecessary before the board of commissioners could make a decision about whether the county had such authority. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will affirm a planning commission's conclusion that ponds and a slough area were included within the city's Willamette River Greenway boundary for their important natural values, and not because the area is a "channel" of the Willamette River, where the city's adopted greenway boundary map and a study the city relied on in setting the boundaries support the city's conclusion. *Willamette Oaks, LLC v. City of Eugene,* 67 Or LUBA 351 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the county zoning that applied to recently annexed territory inside a city's urban growth boundary provided that dwellings were allowed only if the property "was designated for residential use by the city," and the city took the position in its brief that the property was not designated for residential use, LUBA will assume that the city is correct where (1) petitioners do not argue in their petition for review that property was designated for residential use and (2) petitioners fail to respond to the city's argument in its brief. *Knaupp v. City of Forest Grove,* 67 Or LUBA 398 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will not interpret a statute differently than the Court of Appeals interpreted the statute, based on legislative history that the Court of Appeals may not have considered, where LUBA cannot determine from the Court of Appeals' decision whether it declined to consider the legislative history under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), because it found the statutory meaning was resolved by examining the text and context, or whether the Court of Appeals simply found the legislative history unpersuasive or not sufficient to overcome the text and context. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will affirm a city decision that an applicant's methodology for estimating trip generation from a proposed discount superstore is consistent with the guidelines set out in an applicable traffic generation manual, where nothing in the manual requires that another method be used where no similarly situated store is located in the city, or calls into question the extrapolation method that the traffic engineer used. *Neighbors for Dallas v. City of Dallas*, 66 Or LUBA 36 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will affirm a city council's interpretation of local code provisions governing when a traffic impact analysis (TIA) is required for a land use application that concludes that a TIA is not required where ODOT is the road authority with jurisdiction over the affected roads, and petitioners merely disagree with the city's interpretation but do not explain why the interpretation is not plausible. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). *Neighbors for Dallas v. City of Dallas*, 66 Or LUBA 36 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. A one-half-acre size requirement threshold for requiring PUD approval is not a mere application requirement that can be overlooked to require PUD approval for proposals of less than one-half acre. Even if the city intended to delete that threshold for PUD proposals near transit stations, where the threshold clearly applies it cannot be overlooked to give effect to an intent that is inconsistent with the text of the zoning ordinance. *Mintz v. City of Beaverton,* 66 Or LUBA 118 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. A petitioner fails to establish that a city erroneously interpreted a county "ten percent/10,000 square foot" limitation on commercial development in a mixed-use zone to apply to individual development proposals rather than the larger comprehensive plan areas when a large number of small developments might be proposed where there is textual support f or both the city's and petitioner's interpretation. *Mintz v. City of Beaverton*, 66 Or LUBA 118 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. Unless presented with some evidence to the contrary, a city decision maker could reasonably assume that proposed residential development will generate negligible air and noise pollution. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the issue in an appeal of a decision authorizing expansions to a winery under the ORS 215.283(2)(a) authority for "commercial activities that are in conjunction with farm use" is whether that expansion exceeds the judicially created requirement that such winery activities must be incidental and secondary activities that are supportive of vineyards, the legislature's treatment of wineries in different subsequently enacted statutes that specifically authorize wineries in EFU zones is relevant, even though those subsequently enacted statutes are not part of the statutory context of ORS 215.283(2)(a). *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. In resolving ambiguities in the text of an ordinance that amends a local government's zoning ordinance, the title of the amending ordinance may be considered. *Cassidy v. City of Glendale*, 66 Or LUBA 314 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. Under *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009), LUBA is free to consider any legislative history it considers useful and where the available legislative history is completely consistent with the city's interpretation and completely inconsistent with petitioner's interpretation, the legislative history is useful in resolving the different interpretations. *Cassidy v. City of Glendale*, 66 Or LUBA 314 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. Before it is appropriate to consider the non-regulatory ESEE Consequences Determination portion of Goal 5 planning for a site as context for interpreting the regulatory Resource Protection Program there must first be an ambiguity in the Resource Protection Program. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. Text of an acknowledged Resource Protection Program may be unambiguous when read in isolation but may be ambiguous when read in context with the ESEE Consequences Determination. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. Representations by a former owner that it only intended to mine 25 acres of an 80-acre site are insufficient legislative history to establish that the acknowledged Resource Protection Program for the site limits mining to 25

acres, where the programs for other sites expressly limited mining geographically but the program for the 80-acre site zoned all 80 acres for mining and imposed no express geographical limits. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will remand a decision where the findings are inadequate to explain why a hearings officer interprets setback provisions that require a 100-foot setback to apply only to a proposed new kennel building and to not apply to outdoor dog play areas. *Butcher v. Washington County*, 65 Or LUBA 263 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a zoning ordinance would allow a VA outpatient clinic use as "Government Services" uses only if the use is not "specifically listed" uses in other zoning districts, and the zoning ordinance authorizes "Medical Health Facilities" in other zoning districts, the critical question is whether authorizing "Medical Health Facilities" in those other zones is sufficient to "specifically list" the proposed VA outpatient clinic use. In resolving that question, the maxim of statutory construction in ORS 174.020 that calls for selection of a particular provision over a more general provision where they conflict is of no particular assistance. *Randazzo v. City of Eugene*, 65 Or LUBA 272 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. Whether a city council initially tries to reverse a hearings official's interpretation of the city zoning code by amending the zoning code has no bearing on whether the city council could also effectively reverse the hearings official's interpretation by adopting an interpretation of its own. *Randazzo v. City of Eugene*, 65 Or LUBA 272 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the applicable approval criteria require an applicant to demonstrate that noise from its operations will not create a significant health or safety risk to nearby uses, and the evidence in the record shows that noise from its operations will satisfy the ongoing operating standard, LUBA will reject an argument that the applicable approval criteria require the applicant to demonstrate that total noise from all noise sources in the area will satisfy the applicable criteria. *Cottonwood Capital Property Mgmt. LLC v. City of Portland*, 65 Or LUBA 370 (2012).

1.1.1 Administrative Law – Interpretation of Law – Generally. In interpreting a zoning standard that requires a permit applicant to "[i]nsure that natural features of the landscape, such as land forms, natural drainageways, trees and wooded areas, are preserved as much as possible and protected during construction," the doctrine of the last antecedent would suggest that the obligation that natural features be "preserved as much as possible and protected" is not limited to the period of "construction." *Tonquin Holdings LLC v. Clackamas County*, 64 Or LUBA 68 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. The terms "commercial use" and "industrial use" are plainly general categories of uses that include more than one individual member. Where the zoning code defines "industrial use" to include the use of land for "processing primary, secondary, or recycled materials into a product, "that definition is sufficiently broad to include a proposed aggregate mine where the application states that "[e]xtracted material will be processed through a crusher to make the aggregate product desired." *Tonquin Holdings LLC v. Clackamas County*, 64 Or LUBA 68 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a zoning code expressly states that "a dimensional or development standard" set out in a latter part of the zoning ordinance applies in place of standards in an earlier part of the zoning ordinance when the earlier and latter standards "differ," a hearings officer erroneously interprets the zoning ordinance in concluding that the latter standards wholly displace the earlier standards without first establishing that they "differ." *Tonquin Holdings LLC v. Clackamas County*, 64 Or LUBA 68 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. A 1996 special siting statute for light rail projects specifically authorizes highway improvements and therefore may be used to site a light rail extension that includes substantial highway bridge and freeway improvements. *Weber Coastal Bells v. Metro*, 64 Or LUBA 221 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. It is not error to rely in part on compensation at fair market value when property must be condemned and relocation assistance for displaced businesses, as mitigation, when siting a regional light rail facility under a special siting statute. *Weber Coastal Bells v. Metro*, 64 Or LUBA 221 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a zoning ordinance requires that a notice of local appeal "include" "a clear and distinct identification of the specific grounds" for appeal and that compliance with that requirement is "jurisdictional," a local government may insist on strict compliance with the zoning ordinance requirements of a local notice of appeal. It is not inconsistent with the text of the zoning ordinance to conclude that a local appeal should be dismissed where the notice of intent to appeal includes no grounds for appeal and instead attempts to incorporate by reference legal issues stated in a different document that was created for a different reason, without attaching a copy of that document. *Lang v. City of Ashland*, 64 Or LUBA 250 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a city zoning ordinance delegates authority to a hearings official to "interpret" the zoning ordinance, the hearings official does not err by interpreting that delegation not to authorize the hearings official to declare city land use legislation ineffective to achieve the purpose it was clearly adopted to accomplish. Such a request is not a request for an "interpretation." *Goodpasture Partners LLC v. City of Eugene*, 64 Or LUBA 258 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a city zoning ordinance delegates authority to a hearings official to "interpret" the zoning ordinance, without expressly limiting such interpretations to ambiguous zoning text, that delegation nevertheless does not authorize the hearings official to interpret unambiguous zoning text to say what it does not say. *Goodpasture Partners LLC v. City of Eugene*, 64 Or LUBA 258 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. A city council's interpretation that a comprehensive plan policy that requires adequate off-street parking is fully implemented by code off-street parking standards is plausible and LUBA will affirm the interpretation. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. In conducting the alternatives analysis required under the local code for a proposal to develop access to a property over an unimproved right-of-way in an environmentally sensitive zone, a hearings officer correctly limits the alternatives analysis required under the local code to those alternatives that provide access to the location of the approved home site on the subject property, and correctly rejects alternatives that provide access to potential home sites in different locations on the property that have not received county approval. *Mackenzie v. City of Portland*, 63 Or LUBA 148 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. Under DEQ's noise regulations a wind energy generation facility may add 10 decibels to the background ambient noise level. In determining whether the facility violates that noise standard the operator may assume that the background ambient noise level is 26 decibels or actually measure the background ambient noise level and the operator's selection of the assumed 26 decibel background ambient noise level at one measuring location and time does not preclude the operator from selecting actual measured background ambient noise level at other measurement locations and times. *Mingo v. Morrow County*, 63 Or LUBA 357 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. Under *Flying J. Inc. v. Marion County*, 49 Or LUBA 28, 36-37, *aff'd*, 201 Or App 99, 117 P3d 1027 (2005), where the text of an ordinance that adopts zoning designation amendments expresses a clear intent that the prior zoning for a parcel be retained but the map attached to the ordinance shows a change in zoning, that conflict is resolved in favor of the text. *Turner v. Jackson County*, 62 Or LUBA 199 (2010).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where one sentence of a zoning ordinance provides that "any dispute" concerning the zoning of property is to be resolved by reference to the official zoning map, but that sentence appears immediately after a sentence that states that initial zoning boundary determinations are to be made based on maps generated by the local government's GIS system, those sentences should be read together to require that any disputes that arise based on the GIS maps or facts that arise after the zoning ordinance was adopted be resolved in favor of the official zoning map. But those sentences of the zoning ordinance do not require that a text/map conflict in the enacting zoning ordinance itself be resolved in favor of the official zoning map, where it is clear the new zoning shown for a property on the official zoning map was a mistake, and the text of the enacting ordinance clearly states that the zoning of the property was not changed by the ordinance. *Turner v. Jackson County*, 62 Or LUBA 199 (2010).

1.1.1 Administrative Law – Interpretation of Law – Generally. An interpretation of a city landslide hazard regulation that gives no effect to the main clause of the regulation and only gives effect to the subordinate clause arguably runs afoul of the interpretive principle embodied in ORS 174.010, which prohibits interpreting statutes in a way that omits statutory language that has been included in the statute. *Gravatt v. City of Portland*, 62 Or LUBA 382 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the Goal 4 rule incorporates a definition in the Oregon Structural Specialty Code, the version of the Code in effect when the Goal 4 rule was adopted controls, not the Code as subsequently amended, to avoid running afoul of constitutional prohibitions on delegating legislative authority. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 443 (2011).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where one section of a zoning ordinance permits the city engineer to approve more than one driveway access to lots and parcels "subject to access requirements," and another section of the zoning ordinance setting out the city's access requirements generally prohibits direct access to arterials where a lot or parcel already has access to a lower category roadway, a city correctly denies the request for the direct arterial access. In that case the two sections of the zoning ordinance do not conflict; the contingent authority to grant more than one driveway is simply limited by the section setting out access requirements. *Athletic Club of Bend, Inc. v. City of Bend*, 61 Or LUBA 349 (2010).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government's interpretation of its ordinance is not "inconsistent" with the language of the ordinance, within the meaning of ORS 197.829(1)(a), if the interpretation is plausible, given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010).

1.1.1 Administrative Law – Interpretation of Law – Generally. In determining whether a local government's interpretation of local land use law is inconsistent with the "express language" of the local land use law, LUBA and the appellate courts apply the statutory construction principles in ORS 174.010, which preclude interpretations that insert or delete words. *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government's interpretation of its own land use laws to allow the planning commission complete discretion to grant an unlimited number of one-year permit approval extensions will not be affirmed under ORS 197.829(1), where the local government's interpretation adds language that is not present in the local land use law, and the interpretation defeats the purpose of the local land use law, which is to limit the life of a permit decision that is not acted on. *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010).

1.1.1 Administrative Law – Interpretation of Law – Generally. Land use regulations that simply require that permit applications comply with "applicable" provisions in the land use regulations are frequently ambiguous, since they require an unguided review of the land use regulations to determine which provisions are "applicable." *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

1.1.1 Administrative Law – Interpretation of Law – Generally. The applicability of a local government's land use regulations, viewed in isolation, may be unambiguous. However, when those same land use regulations are viewed in context with others parts of the local government's land use regulations, the applicability of those land use regulations may be qualified or limited. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government misinterprets an ordinance that implements the OAR 660-023-0090(8) safe harbor provision that allows alterations to occupy up to 50 percent of the "width" of certain riparian corridors to mean

alterations that take up less than 50 percent of the entire riparian area are permitted. The proper interpretation is that alterations may only occur within the 50 percent of the riparian corridor farthest from the river. *ODFW v. Josephine County*, 59 Or LUBA 174 (2009).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a code provision prohibits development approval for property that is not in full compliance with all code requirements and prior approvals, unless the approval results in the property coming into full compliance, a hearings officer does not err in interpreting the code to require the applicant to apply for all permits and approvals necessary to correct all code or permit violations as part of the development application, and to reject as insufficient the applicant's willingness to seek future permit approvals. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

1.1.1 Administrative Law – Interpretation of Law – Generally. A street connectivity standard that requires that development must "include street connections to any streets that abut, are adjacent to, or terminate at the development site" is not correctly interpreted to allow a development proposal that would extend an abutting street a short distance into the development and then terminate the street without connecting it to an adjoining street. *Konrady v. City of Eugene*, 59 Or LUBA 466 (2009).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings official does not err by finding that a street connectivity standard that requires that development street systems not create "excessive travel lengths" is violated by a subdivision proposal that will result in eleven existing residents and the residents of three of the proposed lots having to drive one quarter of a mile out of direction to make certain trips. While the hearings official likely could have adopted a more permissive reading of the standard, it was not error to adopt the strict interpretation that the hearings official adopted. *Konrady v. City of Eugene*, 59 Or LUBA 466 (2009).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will remand a decision determining that a conditional use is inconsistent with one of seven purposes of the underlying zone, where it is not clear whether the county must address each of the seven purposes and determine whether the proposed use is, on balance consistent with those purposes, or whether inconsistency with a single zone purpose is sufficient to deny the application, and the county's decision does not address the issue. *Davis v. Polk County*, 58 Or LUBA 1 (2008).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government does not misconstrue its ordinance when it interprets the term "contiguous" to mean lands adjacent to and within 2000 feet of the subject property. *Hermanson v. Lane County*, 56 Or LUBA 433 (2008).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government does not err in determining that a holder of an option to purchase property is not an "owner" for purposes of the local code definition of owner where the definition restricts owners to legal title holders or entities purchasing property under a written contract. *Vilks v. Jackson County*, 56 Or LUBA 451 (2008).

1.1.1 Administrative Law – Interpretation of Law – Generally. A code provision allowing a "property owner" to request a declaratory ruling related "to the use of the owner's property" does

not permit a neighborhood association to request a declaratory ruling related to the use of property that the association does not own. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

1.1.1 Administrative Law – Interpretation of Law – Generally. Remand is necessary where entitlement to initiate a declaratory ruling request rests on whether the applicant is the "permit holder," use of the subject property was arguably authorized by a number of different permits, and the hearings officer rejected a neighborhood's association's claim to be a "permit holder" without determining which permits are at issue and which persons hold those permits. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

1.1.1 Administrative Law – Interpretation of Law – Generally. Interpretations of a local code provision offered for the first time in a response brief at LUBA are not interpretations made by the local government. *Munkhoff v. City of Cascade Locks*, 54 Or LUBA 660 (2007).

1.1.1 Administrative Law – Interpretation of Law – Generally. Under *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), *adh'd to as modified*, 179 Or App 409, 40 P3d 532 (2002), if directly applicable legislation expressly requires that an analysis of existing lots or parcels must be limited to an analysis of *legally created* lots or parcels, then it follows that only lawfully created lots or parcels can be considered. However, even if the directly applicable legislation does not expressly require that lots or parcels have been legally created, that requirement may be found in related enactments and the legislative context in which the directly applicable legislation appears. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. When the local code requires a comparison to densities suggested in the comprehensive plan but the decision does not address any suggested densities, remand is necessary to determine if the comprehensive plan includes any suggested densities and, if so, either address them or explain why they need not be addressed. *Coquille Citizens for Resp. Growth v. City of Coquille*, 53 Or LUBA 186 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. When a code provision regarding riparian corridors could plausibly be required to be satisfied at the stage of the challenged decision or at a later stage, the issue was raised below, and the decision does not address the issue, the decision must be remanded for the local government to address the issue. *Coquille Citizens for Resp. Growth v. City of Coquille*, 53 Or LUBA 186 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. When a local government imposes a condition of approval based on a code provision regarding excessive demand created by a proposed development, but the local government does not find that the proposed development will cause excessive demand, ignores the developer's proposed interpretation of excessive demand, and does not provide its own interpretation, the decision must be remanded. *PacWest II, Inc. v. City of Madras*, 53 Or LUBA 241 (2007).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the text of a city's development code only requires that the city not provide certain services in the absence of an annexation agreement, the city's interpretation of its code to allow it to require an annexation agreement at the time of partition approval, while not required by the text of the development code,

is not inconsistent with the text of the development code. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

1.1.1 Administrative Law – Interpretation of Law – Generally. A city's interpretation of a development code provision to allow it to require execution of an annexation agreement at the time of partition, rather than waiting until the property is developed, is consistent with contextual development code provisions that require annexation agreements at the time of partition approval without regard to whether development is proposed at the time of partition approval. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

1.1.1 Administrative Law – Interpretation of Law – Generally. A county does not err by interpreting a development code approval criterion that requires that proposed uses must be shown to be compatible with surrounding uses to require consideration of only the existing surrounding uses and not potential future uses. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

1.1.1 Administrative Law – Interpretation of Law – Generally. A county does not err by interpreting a development code compatibility standard for the first time in its written decision, where the interpretation was not beyond the range of interpretations that could reasonably have been anticipated during the evidentiary phase of the county's proceedings, and petitioners do not demonstrate (1) that there is specific evidence that they could present that differs in substance from the evidence that they already submitted or (2) that the new evidence is directly responsive to the county's interpretation. *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998). *Clark v. Coos County*, 53 Or LUBA 325 (2007).

1.1.1 Administrative Law – Interpretation of Law – Generally. Even assuming a local government must evaluate the combined effect of multiple misstatements in the application that individually are immaterial, in determining whether to refer a revocation request to a hearing, where the alleged misstatements of fact have no relation to each other, there can be a "combined effect" to evaluate. *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. A county's interpretation that a comprehensive plan policy, which implements Statewide Planning Goal 18 (Beaches and Dunes) and provides criteria for a determination whether development is appropriate in a beaches and dunes area, requires the county to address only adverse geologic or geotechnical impacts and not general development issues, is consistent with the text and context of the policy and the goal. *Borton v. Coos County*, 52 Or LUBA 46 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. A county's interpretation that a comprehensive plan policy, which implements Statewide Planning Goal 7 (Natural Disasters and Hazards), requires regulation of development in known areas potentially subject to natural disasters and is aimed at reducing risks to life and property that are *caused by natural hazards*, is not applicable in the context of a determination whether development is appropriate in a beaches and dunes area, pursuant to a comprehensive plan policy that implements Statewide Planning Goal 18 (Beaches and Dunes), which is aimed at reducing impacts that may be *caused by the proposed development*. *Borton v. Coos County*, 52 Or LUBA 46 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. A county grading permit standard stating that grading activities "shall also occur pursuant to" the standards of the local sanitary sewer agency does not incorporate those standards into the code or require that the county determine whether the grading permit complies with the agency's standards. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where no county approval was required to create parcels of more than 20 acres in a transitional timber zone if the parcel was to be used for forest use and the question is whether a parcel that was created 16 years ago was created for forest use, the fact that the parcel was used only for growing trees for 16 years is sufficient to show the parcel was created for forest use and it does not matter that no trees were harvested during that 16-year period. *Neal v. Clackamas County*, 52 Or LUBA 248 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. The broad statutory definition of "owner" under statutory lot-of-record provisions, which includes certain relatives of the fee title owner as the owner, does not apply in determining whether parcels are part of the same "tract" for purposes of approving a forest template dwelling. *Neal v. Clackamas County*, 52 Or LUBA 248 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. As a general rule there is no reason why a local government could not interpret an "orderly development" land division criterion to impose a more stringent standard than Oregon Department of Transportation's standard that the performance of failing intersections not be worsened by a proposal. However, where such an interpretation appears to be inconsistent with other city criteria and those apparent inconsistencies are not addressed in the decision maker's findings, LUBA will reject the interpretation as incorrect. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government's authority to interpret the scope and meaning of land use regulations adopted to implement statewide planning goals and administrative rules is constrained by ORS 197.829(1)(d), which requires LUBA to reverse an interpretation of a local regulation contrary to the goal, statute or rule it implements, notwithstanding the acknowledged status of that regulation. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. Under *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 250 (1996), LUBA may apply ORS 197.829(1)(d) to review a local government's interpretation of an acknowledged code provision that implements a statewide planning goal, statute or rule only if the code provision is ambiguous. If the code provision is subject to more than one reasonable interpretation, one of which is consistent with the goal, statute or rule implemented, the local government cannot choose an interpretation that is inconsistent with the goal, statute or rule implemented. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the local code fire siting standards require that secondary fuel breaks (*i.e.*, a fuel break extending 130 feet in all directions around structures) "or their equivalent" apply to new residences, the county does not err in

determining that secondary fuel breaks are not required in the riparian setback area, where the findings adopted in support of the riparian vegetation setback regulations acknowledge that riparian vegetation provides a sufficient natural barrier against the spread of fire. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. The Oregon Laws 1987, chapter 737, section 3 standard requiring that property have "sewer and water lines paid for and installed by the property owner" is not correctly interpreted to require that the property have a "significant amount" of sewer and water lines paid for and installed by the property owner. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. The Oregon Laws 1987, chapter 737, section 3 standard requiring that property have "sewer and water lines paid for and installed by the property owner" is not correctly interpreted to require that the sewer and water lines also be installed off-site. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. Oregon Laws 1987, chapter 737, section 3 does not unambiguously provide that lateral sewer and water lines may qualify as "sewer and water lines paid for and installed by the property owner "and thus satisfy one of the law's requirements to qualify for protection from nonconsensual annexation. Therefore, resort to legislative history is appropriate. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. The Oregon Laws 1987, chapter 737, section 3 standard requiring that property have "sewer * * * lines paid for and installed by the property owner" is not satisfied where the property owner merely relocated sewer lines that were originally installed and paid for by a special district. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the definition of "home occupation" in the local code includes a business activity that is conducted in a *dwelling* or *accessory building* normally associated with the primary uses allowed in the underlying zone, a local government need not determine whether the proposed *business* is normally associated with the permitted uses allowed in the zone. *Watts v. Clackamas County*, 51 Or LUBA 166 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the local noise standard applicable to home occupations provides that the proposed home occupation "shall not create noise that, when measured off the subject property, exceeds the greater of 60 dba or the ambient noise level," the hearings officer errs in interpreting that provision to allow noise spikes in excess of 60 dba. *Watts v. Clackamas County*, 51 Or LUBA 166 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local home occupation standard prohibits external evidence of a home occupation, an interpretation of that standard that allows a vehicle related to the home occupation to traverse the subject property to access an accessory structure in which the vehicle will be stored is reasonable. *Watts v. Clackamas County*, 51 Or LUBA 166 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where access from a county road to a home occupation is obtained via a driveway located on the pole portion of the subject property, the county does not err in determining that a local standard requiring that "the subject property have frontage on, and direct access from, a constructed public, county or state road" is satisfied, notwithstanding that the driveway crosses an existing easement providing access to neighboring properties. *Watts v. Clackamas County*, 51 Or LUBA 166 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. When the approval criterion calls for a tree survey that "provides the location of all trees" of certain specifications, the local government may not use a one-acre sample to extrapolate for a 70-acre site without a showing that it is representative of the entire site. *Butte Conservancy v. City of Gresham*, 51 Or LUBA 194 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a city is required by the Metro Code to prepare and release a report prior to annexation that describes how the annexation is consistent with agreements that the city is not a party to, but the Metro Code review criteria that govern review of the annexation on appeal do not require that the annexation be consistent with agreements the city is not a party to, Metro may not deny the annexation ordinance based on the city's failure to comply with the report requirement without explaining why that violation of the report requirements has the same status as a violation of one of the review criteria and provides a basis for denial. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. Some caution is warranted in determining the intended scope of a term based on dictionary definitions, given the descriptive and all-inclusive nature of modern reference dictionaries. In many cases, the text and context of the code term may indicate that the governing body did not intend the term to encompass all possible dictionary meanings. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a variance criterion requires the city to find that "public need" outweighs "adverse impacts" of developing wetlands and a party argues there is no market demand for the commercial development that the variance would allow, the city must address in its findings the role, if any, that market demand plays under the variance criterion and explain why the public need, as the city interprets those words, outweighs the identified potential adverse impacts. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. The legislature's use of different terms to describe the actions required to have standing to appeal to LUBA is some indication that the legislature intended to impose different standing requirements. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. To have standing to appeal a post-acknowledgment plan amendment under ORS 197.620(1) an appellant must have "participated" during the local proceedings, whereas to have standing to appeal under ORS 197.830(2) an appellant must have "appeared." The dictionary definitions of "participated" and

"appeared" suggest more is required to participate than to appear, but those definitions do not identify what more is required. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572 (2006).

1.1.1 Administrative Law – Interpretation of Law – Generally. A comprehensive plan policy that merely describes the county's resource designations is not a mandatory tentative subdivision plan approval criterion, and the county was therefore not required to adopt findings addressing it. *Doob v. Josephine County*, 50 Or LUBA 209 (2005).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where "tract," "lot" and "parcel" are defined terms and a comprehensive plan policy uses the undefined term "ownership," a county decision that applies that policy as though "ownership" meant the same thing as "lot" or "parcel" but does not explain why must be remanded so that the county can explain its interpretation of the undefined term. *Just v. Lane County*, 50 Or LUBA 399 (2005).

1.1.1 Administrative Law – Interpretation of Law – Generally. A general code standard requiring streets to be improved with curbs and other facilities "if required" is not properly interpreted to require curbs for a private street, where the specific standards governing private streets do not require curbs. *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where an interpretation of an ambiguous code standard that bars variances in some circumstances is needed to explain why the local government believes that standard did not bar an approved variance, and the appealed decision does not include either an express or implied interpretation of the code standard, remand is required. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

1.1.1 Administrative Law – Interpretation of Law – Generally. Although LUBA is authorized to interpret ambiguous local land use legislation in the first instance if the local government fails to adopt a needed interpretation, where interpreting the land use legislation in a way that would be consistent with the local government's decision is problematic, LUBA will not attempt to interpret the legislation in the first instance. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

1.1.1 Administrative Law – Interpretation of Law – Generally. If a local government wishes to interpret and apply traditional variance standards differently than those standards have traditionally been interpreted and applied, it must articulate an interpretation of those standards that is sufficient for review. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government does not lose its inherent authority to interpret or reinterpret an ambiguous code provision in a quasi-judicial context when it decides to initiate a legislative code amendment process to resolve the code ambiguity. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

1.1.1 Administrative Law – Interpretation of Law – Generally. While ORS 227.178(3), as interpreted in *Holland v. City of Cannon Beach*, 154 Or App 450, 926 P2d 701 (1998), prohibits a local government from changing its position with respect to the applicability of approval standards during the proceedings on a permit application, neither the statute nor *Holland* prohibit a local

government from reinterpreting the meaning of indisputably applicable approval standards. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

1.1.1 Administrative Law – Interpretation of Law – Generally. References in contextual laws that the Metropolitan Service District is to work cooperatively and use non-mandatory approaches in requiring action by cities and counties do not provide much assistance in determining whether a statute that specifically authorizes the Metropolitan Service District to require that city and county comprehensive plans and land use regulations be amended authorizes Metro to mandate such changes in a particular case. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

1.1.1 Administrative Law – Interpretation of Law – Generally. Express statutory authority for the Metropolitan Service District to take over local services if properly authorized to do so and to require changes in city and county land use regulations to address particular housing needs, patterns and practices of improper decision making does not necessarily mean that other statutes do not grant the Metropolitan Service District general authority to mandate changes in city and county land use regulations in other circumstances. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

1.1.1 Administrative Law – Interpretation of Law – Generally. A comprehensive plan citizen participation provision that requires appointment of a three-person citizens' advisory committee when the planning commission is considering a major change to the local government's land use regulations is not correctly interpreted to give the planning commission unlimited discretion in deciding what changes constitute major changes. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

1.1.1 Administrative Law – Interpretation of Law – Generally. A city code that requires planned development proposals to preserve trees "to the greatest degree possible" does not require that the applicant fundamentally change the nature of the application to maximize tree preservation. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

1.1.1 Administrative Law – Interpretation of Law – Generally. A city may not interpret a code exception for tree cutting permits to exempt a subdivision from a separate local code requirement for a tree protection plan, where the exemption for tree cutting permits has nothing to do with the separate tree protection plan requirement. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

1.1.1 Administrative Law – Interpretation of Law – Generally. A city does not err by interpreting a code requirement that 20 percent of the site for a planned development be landscaped to allow an applicant to include areas of the site that will be included in common open space and left in their natural state. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

1.1.1 Administrative Law – Interpretation of Law – Generally. A city council's conclusion that a tennis facility is accessory to residential use of a property is inconsistent with the text and context of its code, where the code defines an accessory use as uses incidental and subordinate to the primary use, and a city interpretation relies on the seasonal and nonprofit characteristics of the tennis facility and ignores other characteristics that demonstrate that the tennis facility is of much

greater scale and intensity than the residential uses located on the property. *McCormick v. City of Baker City*, 46 Or LUBA 50 (2003).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local code requirement that a house could only be allowed in a floodplain if "no alternative exists on the subject property which would allow the structure to be placed outside of the flood plain," does not require that an applicant reconfigure the proposed house or reduce the size of its footprint to locate the house outside the floodplain. *Bonnett v. Deschutes County*, 46 Or LUBA 318 (2004).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will affirm a city decision that interprets a comprehensive plan community park policy to describe a type of park and not to impose approval criteria for particular park developments, where relevant plan policies describe four categories of parks within the city, but neither the plan nor the zoning code includes minimum standards for the development of parks. *Monogios and Co. v. City of Pendleton*, 46 Or LUBA 356 (2004).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the challenged decision does not explain why the area of large covered porches attached to approved dwellings was not included in calculating the maximum "buildable area," and relevant code definitions suggest that such accessory structures are part of "buildings," remand is necessary to interpret the code and determine whether such structures should be included in calculating the buildable area. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a county code defines "owner" to be the "legal owners(s) of record as shown on the tax rolls of the County," an interpretation that the fee simple owners are not owners because the value of the fee ownership is minimal in comparison to the value of the easement that crosses that property is not sustainable. *Baker v. Washington County*, 46 Or LUBA 591 (2004).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a standard requires that a developer design a subdivision to "minimize" its impact on significant natural areas, and a hearings officer interprets that standard not to limit the developer to the minimum number of lots allowed in the zone, that interpretation is reasonable, where the text and context of the standard show that the "minimization" envisioned by the standard is modification to site design, and not to the number of lots in the development. *Neketin v. Washington County*, 45 Or LUBA 495 (2003).

1.1.1 Administrative Law – Interpretation of Law – Generally. Local code requirements that a recreational use "shall not be the primary enterprise" of the property and that the recreational use must "be subordinate to the commercial agricultural operation in scope, scale and impact," need not be interpreted to require that the commercial agricultural use generate more income than the recreational use. A county's interpretation of those code requirements to necessitate comparison of the physical characteristics of the recreational use and the commercial farm use instead is not inconsistent with the language of the code. *Underhill v. Wasco County*, 45 Or LUBA 566 (2003).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer's interpretation of a local code to conclude that a "wholesale nursery" is properly viewed as an

"agricultural use" is consistent with the text of the code's definition of "agricultural use," where the term is expressly defined to include "horticultural use." *Lorenz v. Deschutes County*, 45 Or LUBA 635 (2003).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government interpretation that the subject property constitutes a "neighborhood" for the purpose of determining whether a proposed development is consistent with a plan policy that requires maintaining existing residential density levels within existing neighborhoods is not subject to deference under ORS 197.829(1) because it is inconsistent with the definition of "neighborhood" set out in the zoning ordinance and the dictionary definition of that term. *Roberts v. Clatsop County*, 44 Or LUBA 178 (2003).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government interpretation that defines "existing residential density levels" as the maximum density allowed in the most intensive residential zoning district within the neighborhood is inconsistent with the text and apparent purpose of a policy that requires the local government to maintain existing residential density levels in established neighborhoods, because it does not take into account the majority of the property in the neighborhood that is zoned and developed at substantially lower density levels. *Roberts v. Clatsop County*, 44 Or LUBA 178 (2003).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where LUBA and the Court of Appeals have already decided that local ordinance provisions require that an applicant for a lot line adjustment demonstrate that the proposed use of the property after the lot line adjustment is served by adequate public facilities and is compatible with comprehensive plan policies, a city may not interpret those same provisions in such a way as to relieve an applicant of that burden. *Robinson v. City of Silverton*, 44 Or LUBA 308 (2003).

1.1.1 Administrative Law – Interpretation of Law – Generally. A city did not err in interpreting a local code criterion that requires that "walkways" connect to "areas of the site such as * * * adjacent streets" to require that petitioner deed an easement to the city for a sidewalk crossing in front of petitioner's building through the center of its property in order to connect with adjacent streets on each side, where the city's definition of "walkway" requires that walkways be "accessible to the public." *Hallmark Inns v. City of Lake Oswego*, 44 Or LUBA 605 (2003).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local governing body's interpretation of its ordinance to allow it to impose conditions of approval when a dwelling is approved through the county's conditional use process, to address the impacts that the dwelling may have on big game habitat, is within the interpretive discretion afforded by ORS 197.829(1) and will be afforded deference by LUBA. *Botham v. Union County*, 43 Or LUBA 263 (2002).

1.1.1 Administrative Law – Interpretation of Law – Generally. The noise standard at OAR 340-034-0035(1)(b)(B) applies to a proposal to expand an existing aggregate mining site onto a neighboring property that has not been used for either industrial or commercial purposes within the 20-year period immediately preceding the application to mine the property. *Morse Bros., Inc. v. Linn County*, 42 Or LUBA 484 (2002).

1.1.1 Administrative Law – Interpretation of Law – Generally. The noise standard at OAR 340-034-0035(1)(b)(B) applies to a proposal to expand an existing aggregate mining site onto a neighboring property that has not been used for either industrial or commercial purposes within the 20-year period immediately preceding the application to mine the property. *Morse Bros., Inc. v. Linn County*, 42 Or LUBA 484 (2002).

1.1.1 Administrative Law – Interpretation of Law – Generally. A planning director's interpretation that the base point from which a building height is calculated is established by determining the elevation of property after fill has been placed on the property is correct where the context makes it clear that some manipulation of the elevation may be done so long as the fill has been placed pursuant to approved grading plans. *Tirumali v. City of Portland*, 41 Or LUBA 231 (2002).

1.1.1 Administrative Law – Interpretation of Law – Generally. A governing body's interpretation of a local provision is adequate for review where its findings articulate or demonstrate the governing body's understanding of the provision to a degree sufficient to resolve the issues raised in the petition for review. *Huff v. Clackamas County*, 40 Or LUBA 264 (2001).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a county ordinance requires that "major service activity areas" be "oriented away from existing dwellings," it is reasonable and correct to interpret the ordinance to be satisfied by modification and conditions that direct impacts of service activities away from existing dwellings. *Knudsen v. Washington County*, 39 Or LUBA 492 (2001).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the first clause of a local code provision requires that design review comply with a set of criteria used to rezone property and the second clause requires that design review also comply with those criteria addressed at the time the subject property was rezoned, a hearings officer's interpretation limiting design review to the subset of criteria addressed at the time the property was rezoned fails to give effect to the first clause of the code provision, and is therefore not reasonable and correct. *Blazer Construction, Inc. v. City of Eugene*, 36 Or LUBA 391 (1999).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government errs in declaring that an intergovernmental agreement no longer controls whereby the terms of that agreement it governs until specified recommendations are implemented, and the record shows that the recommendations have been only partially implemented. *City of Salem/Marion County v. City of Keizer*, 36 Or LUBA 262 (1999).

1.1.1 Administrative Law – Interpretation of Law – Generally. An interpretation of a zoning ordinance that shifts the burden of demonstrating compliance with minimum lot size approval standards to opponents of the application is erroneous. *Wood v. Crook County*, 36 Or LUBA 143 (1999).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a code provision requires an applicant for expansion of a golf course on EFU-zoned land to demonstrate that alternative urban sites are not available and an applicant applies to expand an existing golf course,

a hearings officer's interpretation of the provision as limiting the requisite alternative site analysis to locations where the existing golf course can expand is reasonable and correct. *DLCD v. Jackson County,* 36 Or LUBA 88 (1999).

1.1.1 Administrative Law – Interpretation of Law – Generally. A city council's implicit interpretation that a planning director's letter is not an "action or ruling" that may be appealed to the planning commission is inadequate for review, when LUBA cannot determine the legal basis for the city council's determination. *Schultz v. City of Forest Grove,* 35 Or LUBA 712 (1999).

1.1.1 Administrative Law – Interpretation of Law – Generally. The term "farm use" as defined in ORS 215.203(2)(a) is not a "delegative term," and a county commits no error by failing to adopt county legislation to clarify the meaning in advance of making a decision about whether a particular use qualifies as a "farm use." *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

1.1.1 Administrative Law – Interpretation of Law – Generally. In determining whether a particular use qualifies as an "other agricultural or horticultural use," as that phrase is used in ORS 215.203(2)(a), there is no requirement that a county hearings officer develop a list of salient characteristics of such uses. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

1.1.1 Administrative Law – Interpretation of Law – Generally. A proposal to site a drug and alcohol recovery facility within a single-family dwelling in a residential zone must be permitted when the relevant code provision permits outright those activities that are conducted in buildings "designed or used for the occupancy of one family" and the proposed recovery facility is to be located in such a structure. *Recovery House VI v. City of Eugene,* 35 Or LUBA 419 (1999).

1.1.1 Administrative Law – Interpretation of Law – Generally. A legislative enactment supersedes all of an administrative rule only if the enactment specifically and comprehensively contradicts all or nearly all of the critical components of an administrative rule. *Northwest Aggregates Co. v. City of Scappoose,* 35 Or LUBA 30 (1998).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 222.170(4) applies only to annexations conducted under ORS 222.170(1) and is not applicable to annexations conducted under ORS 222.125. *Northwest Aggregates Co. v. City of Scappoose,* 34 Or LUBA 498 (1998).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local code requires that sewer facilities be "available" as a condition of approval for annexation, the local government's interpretation of the "available" criterion as being met where extension of sewer services is feasible within the current planning period is not clearly wrong. *Northwest Aggregates Co. v. City of Scappoose,* 34 Or LUBA 498 (1998).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA's analysis of a local government's interpretation of a local ordinance is not limited to the text and context of the provisions, but may also consider their purpose, and the effects thereon of a literal interpretation. *Recovery House VI v. City of Eugene,* 34 Or LUBA 486 (1998).

1.1.1 Administrative Law – Interpretation of Law – Generally. A code requirement that each lot in a subdivision be approved with provisions for sewage disposal is reasonably interpreted as not applying to lots that are not to be developed. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

1.1.1 Administrative Law – Interpretation of Law – Generally. There is no basis for applying the doctrine of unique circumstances to local land use decisions. If local regulations make failure to timely file an appeal a jurisdictional defect, LUBA has no authority to develop an equitable remedy that overcomes such a defect. *Mountain Gate Homeowners v. Washington County*, 34 Or LUBA 169 (1998).

1.1.1 Administrative Law – Interpretation of Law – Generally. Amendments to ORS 197.830(6) that shorten the statutory deadline for filing a motion to intervene in a LUBA appeal impair the existing right to participate in an appeal. Thus, the statute applies prospectively in the absence of an expression of legislative intent to the contrary. *Gutoski v. Lane County*, 33 Or LUBA 866 (1997).

1.1.1 Administrative Law – Interpretation of Law – Generally. Generally, where the legislature fails to express any intention concerning the retroactivity of a statute, the statute applies only prospectively if the statute will impair existing rights, create new obligations or impose additional duties with respect to past transactions. *Gutoski v. Lane County*, 33 Or LUBA 866 (1997).

1.1.1 Administrative Law – Interpretation of Law – Generally. Although LUBA may interpret a local ordinance, it is not required to do so. *Opp v. City of Portland*, 33 Or LUBA 654 (1997).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where local code includes two different definitions of "campgrounds," a county decision approving a campground must address both definitions and determine whether one or both definitions apply and whether the proposed use complies with whatever definition applies. *Donnelly v. Curry County*, 33 Or LUBA 624 (1997).

1.1.1 Administrative Law – Interpretation of Law – Generally. The text and context of ORS 215.750 establish that a governing body may impose standards in addition to those in ORS 215.750. *Evans v. Multnomah County*, 33 Or LUBA 555 (1997).

1.1.1 Administrative Law – Interpretation of Law – Generally. While LUBA does not formally defer to agency interpretations, it may properly look to agency interpretations for guidance in interpreting agency rules. *DLCD v. Jackson County*, 33 Or LUBA 302 (1997).

1.1.1 Administrative Law – Interpretation of Law – Generally. The word "shall," used in a regulation, expresses what is mandatory. A local government interpretation to the contrary is indefensible and will not be affirmed by LUBA. *DLCD v. Tillamook County*, 33 Or LUBA 163 (1997).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 215.705 precisely states comprehensive criteria that govern when a lot-of-record dwelling may be allowed. Under ORS 183.400 and ORS 215.304(3), OAR 660-33-020(4) cannot be interpreted to prohibit what the statute otherwise allows. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 215.705 cannot be interpreted or supplemented by LCDC rule to provide that the reconfiguration of a tract through the sale of one or more lots extinguishes the right to build a dwelling on at least one of the lots of record within the original tract. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

1.1.1 Administrative Law – Interpretation of Law – Generally. Lot-of-record provisions should be interpreted as limited in their application to property owners who had a reasonable expectation in 1985 of a right to build a home. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

1.1.1 Administrative Law – Interpretation of Law – Generally. The term "present owner," as it is used in ORS 215.705(1)(a), refers to a land sale contract vendee, not a land sale contract vendor. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

1.1.1 Administrative Law – Interpretation of Law – Generally. The word "owner," as it is used in ORS 215.705, is not defined, and when applied to land generally, has no fixed and inflexible meaning. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

1.1.1 Administrative Law – Interpretation of Law – Generally. A requirement that a *significant* amount of firearms training occur at a firearms training facility is not demanding enough under OAR 660-06-025(4)(m), because it places no limitation on other activities not directly related to or justified by firearms training. *J.C. Reeves Corp. v. Washington County*, 31 Or LUBA 115 (1996).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will not defer to the opinion of an agency official, given informally after the adoption of an administrative rule, as to the meaning of that rule. *J.C. Reeves Corp. v. Washington County*, 31 Or LUBA 115 (1996).

1.1.1 Administrative Law – Interpretation of Law – Generally. A zoning ordinance provision that states land use districts may "float" within the boundaries of a proposed planned development can be interpreted to mean that such districts may be dissolved and totally reconfigured, with densities reallocated. *Huntzicker v. Washington County*, 30 Or LUBA 397 (1996).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 197.829(2) permits LUBA, in cases where a local government fails to interpret adequately a provision of its land use regulations, to make its own determination of whether the local government decision is correct. *Thompson v. City of St. Helens*, 30 Or LUBA 339 (1996).

1.1.1 Administrative Law – Interpretation of Law – Generally. A comprehensive plan policy that does not set out approval criteria for a land use permit decision may nevertheless state an underlying purpose or policy with which the county's interpretation of its zoning ordinance must be consistent. *DLCD v. Tillamook County*, 30 Or LUBA 221 (1995).

1.1.1 Administrative Law – Interpretation of Law – Generally. Although ORS 197.829(2) allows LUBA, in certain circumstances, to interpret a local ordinance to the extent necessary to determine whether a local land use decision is correct, it is still the local government's responsibility to interpret its own comprehensive plan and land use regulations in the first instance, and LUBA is not required to do so. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 197.835(9)(b) and 197.829(2) authorize LUBA to remedy minor oversights and imperfections in local government land use decisions, but do not permit or require LUBA to assume the responsibilities assigned to local governments, such as the weighing of evidence, the preparation of adequate findings and the interpretation of comprehensive plans and local land use regulations. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

1.1.1 Administrative Law – Interpretation of Law – Generally. When petitioners fail to satisfy the county's jurisdictional appeal provision requiring local appellants to state the basis of their standing, the county is not at liberty to take notice of petitioner s' standing or to excuse their failure satisfy the requirement as "harmless error." *Tipton v. Coos County*, 29 Or LUBA 474 (1995).

1.1.1 Administrative Law – Interpretation of Law – Generally. When a county zoning ordinance provision states that a local appeal will be dismissed if the requirements of the provision are not satisfied, the provision is jurisdictional. An appellant's failure to satisfy a jurisdictional requirement results in dismissal of the appeal. *Tipton v. Coos County*, 29 Or LUBA 474 (1995).

1.1.1 Administrative Law – Interpretation of Law – Generally. Code demolition permit pre-application requirements that the owner of historic property "endeavor to prepare an economically feasible plan" for preservation and "solicit purchase offers" must be interpreted in light of other code demolition permit provisions which clearly leave the decision to sell or not sell the historic property up to the property owner. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335 (1995).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local government's zoning ordinance establishes a process for administrative actions to determine the existence of nonconforming uses, and another local ordinance gives a compliance hearings officer jurisdiction over complaints regarding violations of the zoning ordinance, it is reasonable and correct to interpret these ordinances to require that the existence of a nonconforming use be determined through an administrative action, not raised as a defense in a compliance proceeding. *Watson v. Clackamas County*, 28 Or LUBA 602 (1995).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local code requires that a second farm dwelling be shown "conclusively" to be "necessary for the operation of the commercial farm," but does not define the term necessary, it is appropriate to use the dictionary definition of the term "necessary." *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA assigns no particular weight to a post-enactment statement by an agency administrator concerning the meaning of an administrative rule. *Sensible Transportation v. Washington County*, 28 Or LUBA 375 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. Documents prepared during the proceeding leading to the adoption of an administrative rule are legitimate administrative history which LUBA may consider in interpreting the administrative rule. *Sensible Transportation v. Washington County*, 28 Or LUBA 375 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the local code defines the term "feedlot" to involve animals that are prepared for shipment to "market," it is neither reasonable nor correct to interpret "market" to mean only the "final" market to which the animals are shipped. *Derry v. Douglas County*, 28 Or LUBA 212 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. A county does not err by interpreting a local code provision allowing "commercial or processing activities that are in conjunction with timber and farm uses," in a rural residential zone, in the same way the Oregon Supreme Court has interpreted similar language in the exclusive farm use zoning statutes. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. A hearings officer correctly construes a local code provision allowing "commercial or processing activities that are in conjunction with timber and farm uses "in the relevant rural area to require that a landscaping business' sales and purchases be primarily to customers and from suppliers that constitute timber or farm uses in the relevant rural area. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the term "farm use" is defined in a rural residential zone to include noncommercial farms, and it appears from the challenged decision that the hearings officer may not have considered noncommercial farms in determining whether a landscaping business qualifies as a commercial or processing activity "in conjunction with timber and farm uses," the decision will be remanded. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local government decision amending its land use regulations does not interpret comprehensive plan goals and map designations as being inapplicable to such amendments, but rather explains how the proposed amendment implements certain comprehensive plan goals and is consistent with certain plan map designations, it is clear the governing body interprets those plan goals and map designations as being applicable to the land use regulation amendment. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 197.307(5)(d) expresses an alternative standard that is satisfied if the exterior materials of a manufactured home *either* (1) are similar those commonly used on dwellings in the community, *or* (2) are comparable to those used on surrounding dwellings. Because local governments cannot adopt standards more restrictive than those set out in ORS 197.307(5), a city cannot interpret a local regulation

implementing ORS 197.307(5)(d) as allowing it to require, in a particular instance, that a manufactured home *must* satisfy the second alternative. *Brewster v. City of Keizer*, 27 Or LUBA 432 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 215.316(1) (1993) expresses a legislative intent to retroactively prohibit counties from designating resource lands as marginal lands, and from adopting plan and code provisions allowing additional nonresource uses on such marginal lands, after January 1, 1993. ORS 215.316(1) (1993) does not express an intent to retroactively prohibit counties that have *not* designated marginal lands from applying either ORS 215.283 (1991) or the supposedly stricter provisions of 215.213(1) to (3) (1991) to their exclusive farm use zones. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. Under ORS 197.829, LUBA is required to defer to a local government's interpretation of its own enactments, unless the local interpretation is contrary to the express words, purpose or policy of the enactment, or is inconsistent with a statute, goal or rule that the enactment implements. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. The comprehensive plan provisions comprising a city's urban growth management program are clearly designed to implement Statewide Planning Goals 11 and 14. Therefore, a city errs in interpreting such plan provisions to allow the extension of urban sewage treatment service outside an urban growth boundary. *DLCD v. City of Donald*, 27 Or LUBA 208 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a code provision requires that effects on an area's "appearance and function" be determined based specifically on factors set out in that provision, a local government may interpret the code provision to be satisfied by a determination based solely on those factors, even if the code also provides that words have their "normal dictionary meaning," and the dictionary definitions of "appearance" and "function" suggest additional factors are relevant. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 197.829(1), (2) and (3) essentially codify the standard of review imposed by *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). ORS 197.829(4) limits or qualifies the *Clark* standard of review in certain circumstances. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government interpretation of one of its forest zones in a manner that would permit asphalt batch plants to operate permanently, so long as there were periodic interruptions, does not conflict with the Goal 4 rule, which envisions both permanent and temporary asphalt batch plants. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. Absent some specific indication of contrary intent, terms are read consistently throughout a statute. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where an exclusive farm use zone does not allow asphalt batch plants or their accessory uses, and petitioner contends the county erred by permitting a private access road across exclusive farm used zoned property to serve an asphalt batch plant, the county must respond in its decision to that interpretive question. Where the county fails to do so and simply concludes such roads are allowable, the decision must be remanded so that the county can adopt an interpretive response adequate for LUBA review. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.1.1 Administrative Law – Interpretation of Law – Generally. A county surface mining ordinance that retains several operating and reclamation standards from the prior surface mining ordinance did not "repeal" the prior ordinance, because the new ordinance does not "supersede all material particulars" of the prior ordinance. *Oregon City Leasing, Inc. v. Columbia County*, 26 Or LUBA 203 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local government has not adopted traditional, strict variance standards, it may interpret a variance approval standard requiring a variance to be "the minimum variance necessary to make reasonable use of the property" as requiring that (1) the proposed use be a reasonable use of the subject property, and (2) the requested variance be the minimum necessary to allow the proposed use. *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government cannot simply conclude its failure to list shopping centers as a permitted or conditional use in any existing zoning district creates an ambiguity and, on that basis, determine it will allow shopping centers as a conditional use in a particular zoning district. Such an action constitutes improperly amending the zoning ordinance in the guise of interpreting it. *Loud v. City of Cottage Grove*, 26 Or LUBA 152 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. Under ORS 215.448(1)(c), home occupations may not be conducted outside the dwelling and other buildings normally associated with permitted uses in the zone. ORS 215.448(1)(c) does not provide for a *de minimis* exception to that requirement. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local code provision requiring that "consideration * * * be given to [certain specified] factors" does not establish mandatory approval standards for local government decisions, but rather merely lists "factors" which the local government must consider. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA must defer to a local government's interpretation of its own land use regulations unless the interpretation is clearly wrong. A county interpretation that a facility for an annual equestrian event qualifies as a "rodeo" or a "livestock arena" is not clearly wrong. *Cooley v. Deschutes County*, 25 Or LUBA 350 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA is not bound by legal precedents established by circuit court decisions in unrelated cases. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the local code requires that the subject property be reasonably suited for the "use proposed," a local government does not err by determining the suitability of the entire parcel for the proposed use and not just the site of the proposed residence. *Clarke v. City of Hillsboro*, 25 Or LUBA 195 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government interpretation of a local code provision which prohibits direct access to major collectors by commercial, industrial and institutional uses with more than 150 feet of frontage as not applying to proposed residential subdivisions with more than 150 feet of frontage is reasonable. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local government may interpret the term "processing of aggregate," as used in an industrial zoning district of its code, to include asphalt plants, even though the code language was adopted at a time when LUBA had interpreted similar language in the EFU statute not to include asphalt plants. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. While a local government is not obliged to respond to a taking claim raised during the local proceedings, the local government should, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should have the opportunity to adopt an interpretation that is constitutional. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. A requirement in a local code that development be "consistent" with comprehensive plan policies and standards, is a general requirement that does not transform otherwise nonmandatory plan standards into approval standards. *McGowan v. City of Eugene*, 24 Or LUBA 540 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. While a local government is not *obliged* to respond to a taking claim raised during the local proceedings, the local government should, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should at least have the opportunity, if possible, to adopt an interpretation that is constitutional. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

1.1.1 Administrative Law – Interpretation of Law – Generally. It is clearly contrary to the express terms of a local ordinance standard requiring a determination that "the type of farm products produced on the applicant's farm" be unrepresented within a particular area, to determine the standard is satisfied by a showing that there are no similar farm management methodologies employed on farms in the designated area. *Giesy v. Benton County*, 24 Or LUBA 328 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. That area farms produce either purebred cattle or sheep, rather than a combination of purebred cattle and she ep, is not a basis for determining there are no similar farm products produced in the designated area. *Giesy v. Benton County*, 24 Or LUBA 328 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a "substantial construction" standard in a local code is clear enough for an applicant to know what he must show during the application process, such a standard is not impermissibly vague. *Columbia River Television v. Multnomah County*, 24 Or LUBA 82 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. In evaluating the compliance of an application for a conditional use permit for a bed and breakfast with a local traffic impacts approval standard, it is proper to evaluate the impacts of a reasonable residential use of the dwelling, together with the proposed bed and breakfast use. *Adler v. City of Portland*, 24 Or LUBA 1 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the local code lists uses as conditionally permitted, such listing does not, of itself, imply that the local government must approve all applications for conditional uses or that it is limited to the imposition of conditions of approval. *Adler v. City of Portland*, 24 Or LUBA 1 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. Subsequent changes in county ordinances do not affect an energy facility for which a site certificate has been approved by EFSC. Under ORS 469.400(5), a county is required to issue the "appropriate permits" for such an energy facility, regardless of whether a subsequent change in county ordinances makes the "appropriate permit" a type different from that which was appropriate when the site certificate was approved. *McDole v. Lane County*, 23 Or LUBA 500 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the maximum penalty for each separate violation of an ordinance is 500 dollars, and there is no possibility of imprisonment for violating the ordinance, the penalties provided by the ordinance are civil, not criminal, in nature. Therefore, a vagueness challenge based solely on the constitutional vagueness analysis applied where criminal sanctions are possible, provides no basis for reversal or remand of such ordinance. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local ordinance that prohibits the short term rental use of dwellings in residential zones is not an unlawful rent control regulation under ORS 91.225. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local code jurisdictional requirement that the local appeal document, which under the code includes the required appeal fee, be "signed" but which does not state *where* such signature must be located, is satisfied by the local appellant's signature on his personal check submitted as the filing fee. *Breivogel v. Washington County*, 23 Or LUBA 143 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. The language in ORS 197.247(1)(a) that "[t]he proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983 * * *" applies to forest as well as farm operations. *DLCD v. Lane County*, 23 Or LUBA 33 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a local government elects to limit the length of cul-de-sac streets, it may also establish how the length of such streets is to be measured. However, where no particular method of measuring the length of cul-de-sac streets is specified in its land use regulations, the local government must determine length applying the regulations as they are written and applying the plain and ordinary meaning of the operative term "length." *Sully v. City of Ashland*, 23 Or LUBA 25 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local code requirement that a review body may not consider a request for a conditional use permit within one year following a previous denial of "such" request, prohibits submission of a conditional use permit application for the same use on the same property as previously denied. It does not prohibit the submission of a conditional use permit application for a different use of the property. *Silani v. Klamath County*, 22 Or LUBA 734 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a proposed residential detoxification facility will take blood pressure and body temperature of potential admittees, but will refuse to admit anyone in need of medical attention and will not provide any medication or medical treatment on site, a local government's determination that the proposed facility will provide "primarily" health care is erroneous as a matter of law. *Harmony House, Inc. v. City of Salem*, 22 Or LUBA 629 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. A permit condition stating all log trucks must "depart the [subject] property as near to 4:00 a.m. as possible "is correctly interpreted to require that all log trucks must leave the subject property at 4:00 a.m., unless it is not possible to do so. Such a condition is violated where log trucks departed from the property on several occasions at 6:30 a.m. for the convenience of the applicant's logging operation. *Marson v. Clackamas County*, 22 Or LUBA 497 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. A statutory change in the tribunal with appellate jurisdiction affects the legal rights and obligations of parties arising out of past transactions, and retrospective application of such a change in jurisdictional statutes to pending appeals is not appropriate. *Schultz v. City of Grants Pass*, 22 Or LUBA 457 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. The factors listed in ORS 822.140(3)(a) to (f) are considerations for the adoption of ordinances regulating the siting or expansion of wrecking yards. These factors are not approval standards for applications for local approval of individual Department of Motor Vehicles wrecking certificates. *Bradbury v. City of Independence*, 22 Or LUBA 398 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. A comprehensive plan provision requiring that conflicts between conditional uses and airports be "minimized" is not

violated by approval of a proposed conditional use simply because other possible uses allowed in the zone would have *fewer* conflicts with airports. So long as conflicts between the proposed conditional use and airports are minimized, that other possible uses might have fewer conflicts is irrelevant. *Waker Associates, Inc. v. Clackamas County*, 22 Or LUBA 233 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. Whether the provisions of a zoning ordinance "purpose" section are approval criteria for individual land use decisions depends on the wording of the specific provisions and their context. *Tylka v. Clackamas County*, 22 Or LUBA 166 (1992).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a zoning ordinance definition of "motel" is broad enough to include transient housing available only to groups using a convention center, the city may properly consider such transient housing as motel units available to satisfy temporary housing demand. *Hay v. City of Cannon Beach*, 21 Or LUBA 364 (1991).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA cannot take official notice of local legislative history. Therefore, because LUBA's review is confined to the record of the local proceeding, LUBA cannot consider local legislative history if it is not in the record. *19th Street Project v. City of the Dalles*, 20 Or LUBA 440 (1991).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the comprehensive plan requires an "urban level of service" of schools, but does not define "urban level of service," a city does not err in interpreting that term consistent with the school district's "considerations" for providing adequate school facilities. However, because those school district considerations were not adopted by the city as standards, the city did not err by failing to adopt findings specifically addressing each consideration when approving a development. *Axon v. City of Lake Oswego*, 20 Or LUBA 108 (1990).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where plan standards identify nonfarm uses that may be allowed in the county's exclusive farm use zone and require that such uses be "minimized," a plan standard requiring that "development" not occur on lands capable of sustaining accepted farming practices is properly interpreted as not applying to the nonfarm uses specifically allowed in the exclusive farm use zone. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

1.1.1 Administrative Law – Interpretation of Law – Generally. There is no irresolvable conflict between a plan standard directing that golf courses be allowed in an exclusive farm use zone and a plan standard providing that development may not occur on lands capable of sustaining accepted agricultural practices. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the comprehensive plan is defined as including the plan policy document, plan map, zoning map and zoning and subdivision ordinances, as well as a number of other documents, a local code provision requiring that individual land use decisions comply with the comprehensive plan is not correctly interpreted as requiring compliance with only the zoning map and zoning and subdivision ordinances. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

1.1.1 Administrative Law – Interpretation of Law – Generally. The legislative history of a bill includes all items in the official state records documenting its enactment, including staff measure analyses and exhibits to legislative committee hearing minutes. *Foland v. Jackson County*, 18 Or LUBA 731 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. The destination resort statute was intended to codify the parallel provisions of Goal 8, as they were interpreted when the statute was enacted; and, therefore, the administrative history of those Goal 8 provisions is relevant to interpretation of the destination resort statute. *Foland v. Jackson County*, 18 Or LUBA 731 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. LUBA will consider legislative or administrative history materials, when such materials are necessary to its interpretation of statutes, administrative rules or ordinances, regardless of whether the materials are in the record of the proceedings below. *Foland v. Jackson County*, 18 Or LUBA 731 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Some weight should be given, in interpreting the destination resort statute, to DLCD's interpretations of the identical Goal 8 provisions, as DLCD is charged with adopting and administering the statewide planning goals. *Foland v. Jackson County*, 18 Or LUBA 731 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. When LUBA interprets a provision of a comprehensive plan or zoning ordinance, it construes the plan or ordinance as a whole and gives effect to its overall policy. *Beck v. City of Tillamook*, 18 Or LUBA 587 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. The meaning of local legislation is a question of law which must be decided by LUBA on appeal. *Beck v. City of Tillamook*, 18 Or LUBA 587 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where city ordinance (1) allows "public facility" as a conditional use in a commercial zone, (2) defines public facility as a facility deemed necessary for "the maintenance of public purposes," (3) does not distinguish between residential and nonresidential "public facilities," and (4) lists hospitals and nursing homes as examples of uses considered to be "public facilities," "public facility" can include uses which are residential in nature, such as a homeless shelter. *Beck v. City of Tillamook*, 18 Or LUBA 587 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where county comprehensive plan policies provide that structural methods of shoreline stabilization will only be allowed if (1) an existing structure is threatened by erosion, (2) that threat creates a critical need to protect the structure, and (3) higher priority methods will not work to provide adequate protection to the structure, LUBA interprets "critical need to protect the structure" to mean that it is reasonably probable that the structure will suffer damage due to the threatened erosion in the near future. *Gray v. Clatsop County*, 18 Or LUBA 561 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. When LUBA interprets a provision of a comprehensive plan or zoning ordinance, it construes the plan or ordinance as a whole and gives effect to its overall policy. Also, where possible, LUBA reads plan or ordinance provisions together in a manner which gives meaning to all their parts. *Gray v. Clatsop County*, 18 Or LUBA 561 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. The correct interpretation of local ordinance provisions is a question of law. The provisions of a comprehensive zoning ordinance should be construed as a whole, and effect given to the ordinance's overall policy. *Miller v. City of Dunes City*, 18 Or LUBA 515 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where standards embodied in a local comprehensive plan goal and the policies that follow the goal are subjective and generally worded, the local government applying such goa ls and policies enjoys significant discretion in determining whether particular factors are sufficient to show that a proposal is consistent with or supportive of the goal. *Henry v. City of Portland*, 18 Or LUBA 440 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Internally contradictory and generally worded local planning goals must be read as a whole, so that the overall public policy expressed in the goal is not frustrated. *Henry v. City of Portland*, 18 Or LUBA 440 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. The application of a particular zoning designation to a parcel is not the equivalent of a determination that an existing use on such parcel conforms with the particular zoning designation applied. *Moorefield v. City of Corvallis*, 18 Or LUBA 95 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where an ordinance provision requires *both* that a proposed use comply with all "local, state and federal standards," and that the proposed use not "create a nuisance," the local government's determination that the proposed use complies with DEQ regulations does not remove the necessity for an independent determination that the proposed use will not "create a nuisance." *Moorefield v. City of Corvallis*, 18 Or LUBA 95 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 215.448(1)(c) requires only that an existing building proposed to be used for a home occupation, be a *structure* normally found in association with uses permitted in the zone. It does not require, in an exclusive farm use zone, that any part of such building be used for farm use concurrently with its use for the home occupation. *Joseph v. Lane County*, 18 Or LUBA 41 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where local government ordinance provisions are drafted to correspond to a state statute, it is appropriate to construe those ordinance provisions consistently with the statute. *Joseph v. Lane County*, 18 Or LUBA 41 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 215.448(3) limits the approval of new buildings for use for home occupations. It does not impose additional limitations

on the use of existing buildings for home occupations. *Joseph v. Lane County*, 18 Or LUBA 41 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the county code provides that types of uses not otherwise permitted in an exclusive farm use zone may be allowed as home occupations, it is incorrect to interpret a code requirement that a home occupation not interfere with nearby existing uses or with other uses permitted under the exclusive farm use zone as presuming that noise not agricultural in nature constitutes interference with adjoining uses. *Joseph v. Lane County*, 18 Or LUBA 41 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. A plan policy which provides guidance as to which zoning district to apply to a given area is not an approval criterion for conditional use permits. *Highway 213 Coalition v. Clackamas County*, 17 Or LUBA 1284 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. The wording and context of a specific code intent and purpose statement determines whether that provision should be interpreted to impose mandatory approval criteria. *Randall v. Washington County*, 17 Or LUBA 1202 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. The legislature's use of the term "may" in ORS 443.600(3), 215.213(2)(m) and 215.283(2)(n), with regard to allowing "residential homes" on land zoned for exclusive farm use, demonstrates that the legislature did not intend to *require* counties to authorize "residential homes" as a conditional use on EFU zoned land. *Mental Health Division v. Lake County*, 17 Or LUBA 1165 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. A county interpretation that a notice of appeal from a planning commission decision is properly filed prior to the date the planning commission decision became final, is a correct interpretation of the ordinance, absent ordinance language requiring the decisions of the planning commission be reduced to writing before those decisions may be considered final for purposes of appeal. *Thompson v. Columbia County*, 17 Or LUBA 818 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. A local code that is internally inconsistent is ambiguous. *Kenton Neighborhood Assoc. v. City of Portland*, 17 Or LUBA 784 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. The courts and LUBA are finally responsible for the interpretation of local enactments. However, where an erroneous interpretation of other code provisions results in a city failing to interpret and apply an ambiguous provision of its code, LUBA will remand the decision to the city for it to interpret and apply the applicable provision in the first instance. *Great Northwest Towing v. City of Portland*, 17 Or LUBA 544 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. To find a proposed conditional use is "appropriate," as required by local standards governing conditional uses, does not require a finding that there will be no adverse impacts. *Coffey v. City of North Bend*, 17 Or LUBA 527 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where an ordinance expressly provides that listed examples are not an inclusive list of "governmental structures or land uses," a public educational facility and county office building may be considered governmental structures of land uses. *Bennett v. City of Dallas*, 17 Or LUBA 450 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a city ordinance provides that structures must have "comparable scale" and "comparable architectural features" to the existing structures in the neighborhood, LUBA cannot agree with the city that a proposed 110-foot water tower and adjacent houses have comparable scale and architectural features. *Sunburst II Homeowners v. City of West Linn*, 17 Or LUBA 401 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. An approval criterion which requires the provision of an adequate buffer and that certain factors be assessed in determining the adequacy of such buffer, vests considerable discretion in the approval authority. *Sunburst II Homeowners v. City of West Linn*, 17 Or LUBA 401 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the county code's "commercial activities that are *exclusively* used in conjunction with farm use" (emphasis added) standard is worded more stringently than ORS 215.283(2)(a), it is appropriate to interpret the code provision to restrict severely the commercial activities allowed. The county's interpretation of its code standard not to include a use which would process an unspecified amount of minerals, and other materials that are not farm or forest products, is both reasonable and correct. *Kellogg Lake Friends v. Clackamas County*, 17 Or LUBA 369 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where local government ordinance was drafted to implement a state statute or statewide planning goal, and adopts the statutory or goal language without expressing an intent to deviate from the statutory or goal intent, it is proper to construe the ordinance provisions consistently with the statute or goal. *Kellogg Lake Friends v. Clackamas County*, 17 Or LUBA 277 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Interpreting the county's Willamette River Greenway zoning district requirement for a setback from "mean low water level" to refer only to the Willamette River, and not to other bodies of water within the Greenway, is reasonable and consistent with other related plan and ordinance provisions. *Kellogg Lake Friends v. Clackamas County*, 17 Or LUBA 277 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where local ordinance language corresponds to the overall "Goal" statement of Statewide Planning Goal 15 (Willamette River Greenway), and there are no other local plan or ordinance provisions or legislative history which indicates an intent that the ordinance phrase "lands along the Willamette River" be interpreted differently than the same phrase in Goal 15, the phrase is interpreted to include all land within the Greenway. *Kellogg Lake Friends v. Clackamas County*, 17 Or LUBA 277 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. After-the-fact testimony from persons involved in the legislative process concerning their opinion as to what legislators intended

when they enacted legislation is incompetent for the purpose of determining legislative intent. *Kellogg Lake Friends v. Clackamas County*, 17 Or LUBA 277 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a provision of county ordinance was drafted to correspond to a state statute, it is appropriate to construe that ordinance provision consistently with the statute, in light of any existing authority analyzing or applying that statute. *McCaw Communications, Inc. v. Marion County*, 17 Or LUBA 206 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. The amendment of ORS 215.213(1)(d) by Oregon Laws 1983, chapter 827, section 27b was clearly intended to *limit* transmission towers, previously allowable in EFU zones as "utility facilities necessary for public service," to those 200 feet or less in height. *McCaw Communications, Inc. v. Marion County*, 17 Or LUBA 206 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where the county code defines a structure as "anything * * * constructed and located on * * * the ground," and exemptions from the requirement for a development permit for certain accessory uses apply only if no structure is permitted, LUBA will conclude that a bridge and sidewalk incidental to residential construction are subject to the development permit requirement. *Peyton v. Washington County*, 17 Or LUBA 92 (1989).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where ORS 215.213(2), together with the county code, require that commercial activities in conjunction with farm use comply with the purpose and intent of the county's EFU zone, the county properly concluded a proposed restaurant in conjunction with a winery was inconsistent with the intent and purpose of the EFU zone, unless conditioned to make the restaurant subordinate and auxiliary to the winery. *Flynn v. Polk County*, 17 Or LUBA 68 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Statutory prohibitions against retroactive land use regulations protect uses that *exist* when the regulations are adopted, not uses that could have been, but were not, initiated. *Schoonover v. Klamath County*, 16 Or LUBA 846 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Under ORS 197.605 to 197.635 (1981), the running of the 30-day period for filing objections to or appeals of post-acknowledgment amendments is contingent upon the objector or appellant being given the notice of the decision required by ORS 197.615. *Kellogg Lake Friends v. City of Milwaukie*, 16 Or LUBA 755 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. An ordinance provision which states that a county appellate body overturning or modifying a previous decision must make certain findings will not be interpreted to alter the general authority given by the ordinance to county decision makers to impose conditions when approving land use actions. *Sevcik v. Jackson County*, 16 Or LUBA 710 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. The interpretation of local ordinance provisions is a question of law which LUBA reviews for correctness. *Sevcik v. Jackson County*, 16 Or LUBA 710 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. County interpretation of a condition of partition approval requiring dust free maintenance of a road to apply only during construction is incorrect because such interpretation is inconsistent with the common meaning of "maintenance" and the use of that term elsewhere in the county code. *Barbee v. Josephine County*, 16 Or LUBA 695 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where neither county plan nor implementing ordinances identify Douglas fir as the sole indicator species for determining whether land is "commercial forest land," the plan's definition of "commercial forest land" cannot be interpreted as encompassing only production of Douglas fir. *Holland v. Lane County*, 16 Or LUBA 583 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. The city's decision to allow use of the subject property for other than a school is not error where the city comprehensive plan and zoning maps identify the subject property as a future school site, but the plan text clearly provides that school sites are intended to indicate general locations and not specific sites. *Dickas v. City of Beaverton*, 16 Or LUBA 574 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. It is reasonable and correct to interpret an ordinance standard that a proposed use "at the particular location is desirable to the public convenience and welfare" as requiring determinations that (1) there is a public need for the proposed use, and (2) the proposed location is suitable for meeting that public need. *Tournier v. City of Portland*, 16 Or LUBA 546 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. City's interpretation of its code to require compliance with both preexisting use reestablishment standards and current Greenway Scenic Development Overlay (WSD) standards applicable to changes and intensification is reasonable. *Sellwood Harbor Condo Assoc. v. City of Portland*, 16 Or LUBA 505 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where ambiguity exists in acknowledged comprehensive plan and code provisions, the county's reasonable interpretation of the provisions will be upheld. *Bergstrom v. Klamath County*, 16 Or LUBA 435 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. An ordinance requirement that a proposed nonfarm partition and dwelling "does not materially alter the stability of the overall land use pattern of the area" is not satisfied by consideration only of parcels adjoining the proposed development site or the access road leading to the proposed development site, as such consideration would not provide analysis of the "overall land use pattern of the area." *Morley v. Marion County*, 16 Or LUBA 385 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Zoning ordinance provision requiring that development be compatible with the "scenic view" does not require city to consider

compatibility of a proposed motel with other existing structures in the vicinity. *Marineau v. City of Bandon*, 16 Or LUBA 375 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where city comprehensive plan includes policies promoting development along a bluff above the ocean and policies which address the view of the ocean from this bluff, the city may interpret its zoning ordinance provision requiring that development on the bluff be compatible with the "scenic view" to protect only the view of the Pacific Ocean from the bluff, not the scenic view of the bluff from the beach. *Marineau v. City of Bandon*, 16 Or LUBA 375 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Absent clear language limiting the time a waiver may be granted under a code section providing for waiver of appeal fees, the county's interpretation of that provision to allow waiver of the appeal fee after the appeal period has run is reasonable and LUBA will defer to it. *Rustrum v. Clackamas County*, 16 Or LUBA 369 (1988).

1.1.1 Administrative Law – Interpretation of Law – Generally. Absent a showing that a residential PUD will increase noise levels beyond those expected of residential development permitted by right in the subject zone, there can be no violation of a city policy which protects neighborhoods from "detrimental noise pollution." *Semler v. City of Portland*, 16 Or LUBA 320 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. It is reasonable to interpret an ordinance permit approval criterion that the proposed use "not have a significant adverse impact on identified fish or wildlife habitat "to refer only to sensitive fish or wildlife habitat areas identified as such on maps in the county's comprehensive plan. *McCoy v. Linn County*, 16 Or LUBA 295 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. "Compatibility," as used in the planning and zoning context, requires that uses be capable of co-existing harmoniously, not that there be no adverse impact or interference of any type. *McCoy v. Marion County*, 16 Or LUBA 284 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a county ordinance prohibits "contamination or impairment" of groundwater aquifers, but neither "contamination" nor "impairment" is defined in the county plan or ordinances, a county interpretation that there is no "contamination" or "impairment" so long as the turbidity increase does not exceed 10 percent is reasonable. *Lousignont v. Union County*, 16 Or LUBA 272 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. A road vacation petition signed by contract purchasers, rather than owners, of subject and abutting property does not authorize a county to conduct summary road vacation proceedings under ORS 368.351, even if the county makes the vacation contingent upon completion of purchase. *Harding v. Clackamas County*, 16 Or LUBA 224 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. ORS 368.351 allowing a shortened procedure for vacation of county roads, without notice and hearing, when "owners of 100% of any private property proposed to be vacated and * * * owners of 100% of the property abutting any public property proposed to be vacated" consent to the vacation, is available only when all owners of all recorded interests consent to the street vacation. *Harding v. Clackamas County,* 16 Or LUBA 224 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where county ordinance defines mobile homes as structures manufactured after a certain date, a unit manufactured before that date is not a mobile home within the definition of the county's ordinance. *Schnidrig v. Hood River County*, 16 Or LUBA 215 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where county ordinance describes a double-wide mobile home as affixed to real property by a continuous concrete wall foundation or other appropriate foundation, LUBA will sustain the county in its interpretation that this foundation requirement is a set-up requirement, not a feature defining whether a particular unit is or is not a double-wide mobile home. *Schnidrig v. Hood River County*, 16 Or LUBA 215 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where county ordinance does not define the width of double-wide mobile homes, and nothing in the ordinance suggests the width of a particular structure meets or does not meet the definition of a single-wide or a double-wide mobile home, petitioner's claim that the county erred in applying its definitions of single-wide and double-wide mobile homes by failing to make findings on the width of a particular mobile home will fail. *Schnidrig v. Hood River County*, 16 Or LUBA 215 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a county ordinance defines a double-wide mobile home as a combination or joining of two or more chassis or sections, but does not define "chassis," a county interpretation that each section of a type of mobile home which is single width when transported, but which extends along its full length when installed in the ground, is supported by its own chassis is reasonable and not contrary to the language of the ordinance. *Schnidrig v. Hood River County*, 16 Or LUBA 215 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. A city is entitled to weigh conflicting provisions in its planning documents, particularly where the provisions are stated in general terms rather than as approval standards applicable to all development. *Marshall v. City of Eugene,* 16 Or LUBA 206 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. City tentative PUD approval of a golf course does not violate a charter provision authorizing use of bond proceeds to acquire property for "recreational uses." *Marshall v. City of Eugene,* 16 Or LUBA 206 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. Increasing the types of uses authorized in existing commercial areas does not violate plan policy that areas for commercial centers should not be increased without a showing of need. *Greenwood Inn v. City of Beaverton,* 16 Or LUBA 177 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. Plan provision describing the effect on auto use from limited commercial development in CI zone is a description, not a goal or policy, and therefore not a criterion for the selection of types of commercial use appropriate in the CI zone. *Greenwood Inn v. City of Beaverton*, 16 Or LUBA 177 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. Adding hotels to the list of authorized commercial uses in the CI zone is not inconsistent with zone provision that all new commercial uses, including those listed, offer products or services primarily for the convenience or necessity of employees and businesses in the CI zone. *Greenwood Inn v. City of Beaverton*, 16 Or LUBA 177 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. Given a comprehensive plan policy allowing a limited number of complementary commercial uses in industrial parks, the city may interpret the policy to allow hotels in its Campus Industrial (CI) zone. *Greenwood Inn v. City of Beaverton*, 16 Or LUBA 177 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. Because nothing in Goal 15 or case law suggests that "greatest possible degree," as used in Goal 15, means something more restrictive than the city's definition, the city's interpretation is reasonable and LUBA will not overturn it. *Urquhart v. City of Eugene*, 16 Or LUBA 102 (1987).

1.1.1 Administrative Law – Interpretation of Law – Generally. Where a city's plan provides that planning decisions must be in accord with the "policies of the comprehensive plan," LUBA will interpret the plan policies as mandatory standards rather than mere guidelines. *Hummel v. City of Brookings*, 16 Or LUBA 1 (1987).

1.1.1 Administrative Law – Interpretation of Law. Where a county ordinance provides considerable discretion in deciding whether a proposed use will have more than a "minimal" impact on the area, LUBA is not empowered to substitute its judgment for the county's on matters of aesthetics and ordinance interpretation, providing the county's interpretation is reasonable. *Valley View Nursery v. Jackson County*, 15 Or LUBA 591 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where county ordinance and ORS 215.283(1)(f) allow "dwellings and other buildings customarily provided in conjunction with farm use" as permitted uses, a county determination as to whether a proposed dwelling is "customarily provided in conjunction with farm use" involves the exercise of judgment and discretion and, therefore, a building permit for such a proposed dwelling falls within the definition of "permit" found in ORS 215.402(4). *Doughton v. Douglas County*, 15 Or LUBA 576 (1986).

1.1.1 Administrative Law – Interpretation of Law. LUBA will deter to a county's interpretation of ambiguous provisions in its ordinance providing the interpretation is not contrary to the express language of the ordinance. *Mill Creek Glen Protec. Assn. v. Umatilla County*, 15 Or LUBA 563 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where city ordinance provides that variances "ordinarily" should not be granted if the special circumstances upon which the applicant relies are

a result of actions of the applicant, owner or previous owner, the city may approve a variance even where the exceptional circumstances relied upon are self-created. *Cope v. Cannon Beach*, 15 Or LUBA 546 (1986).

1.1.1 Administrative Law – Interpretation of Law. An ordinance variance standard that there be "exceptional or extraordinary circumstances or conditions * * * which do not apply generally to other properties in the same zone" requires a strict interpretation, that the "exceptional or extraordinary circumstances "must arise out of the land itself. *Cope v. Cannon Beach*, 15 Or LUBA 546 (1986).

1.1.1 Administrative Law – Interpretation of Law. Comprehensive plan policies which are described in the plan as serving "as a guide" to land use decision s are not mandatory approval standards, and therefore nonconformance with such policies is not grounds for remand by LUBA. *Citizens for Better Transit v. Metro Service Dist.*, 15 Or LUBA 482 (1986).

1.1.1 Administrative Law – Interpretation of Law. Ordinance which uses but does not define "special education," and refers to the financial impact on school districts imposed by state law but makes no reference to federal law, will be interpreted to use the definition of special education found in state law. *Lane County School Dist. 71 v. Lane County*, 15 Or LUBA 476 (1986).

1.1.1 Administrative Law – Interpretation of Law. Although public rights-of-way are generally assumed to be permitted in every zone, ordinance Greenway zone purpose and setback provisions limiting this zone designation to uses which are clearly water-dependent or water-related, together with an express provision that roads are not generally considered dependent on or related to a water location, make a city's interpretation of its Greenway zone as permitting freeways unreasonable. *Allen v. City of Portland*, 15 Or LUBA 464 (1986).

1.1.1 Administrative Law – Interpretation of Law. A city's interpretation of an ordinance Greenway exemption provision as applying to a freeway on-ramp is not reasonable where the ordinance provision reads as an exhaustive list of exempt uses, rather than as a guide to interpreting the ordinance, and freeway systems are not listed as exempt. *Allen v. City of Portland*, 15 Or LUBA 464 (1986).

1.1.1 Administrative Law – Interpretation of Law. A local government is entitled to interpret ambiguous provisions of its zoning code, and LUBA will defer to that interpretation if it is reasonable. *Hood River Valley Residents Comm. v. City of Hood River*, 15 Or LUBA 458 (1986).

1.1.1 Administrative Law – Interpretation of Law. Under county ordinance definition of "lot," adjacent t ax lots under common ownership do not constitute separate "lots." *Hopper v. Clackamas County*, 15 Or LUBA 413 (1986).

1.1.1 Administrative Law – Interpretation of Law. Under county ordinance definition of "lot," property under common ownership does not lose its unitary character as one lot simply because it happens to be divided by a road. *Hershberger v. Clackamas County*, 15 Or LUBA 401 (1986).

1.1.1 Administrative Law – Interpretation of Law. Land division ordinance street alignment requirement will be interpreted as applying to preexisting streets serving the proposed land division, absent specific ordinance language to the contrary. *Jarvis v. Wallowa County*, 15 Or LUBA 390 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where a governing body is not required to take action on a submitted amendment to an urban renewal plan, its proceedings to consider the proposed amendment are legislative in nature. *Estate of Paul Gold v. City of Portland*, 15 Or LUBA 385 (1986).

1.1.1 Administrative Law – Interpretation of Law. City ordinance definition of multi-family dwelling will not be interpreted as including motels where such interpretation would allow motels in the city's residential zone, a result clearly inconsistent with the purpose of that zone. *Marineau v. City of Bandon*, 15 Or LUBA 375 (1986).

1.1.1 Administrative Law – Interpretation of Law. Ordinance design standard which expressly applies to "subdivisions, attached un it residential developments and commercial developments" will not be interpreted as applying to mobile home parks, because to do so would be adding words to the ordinance that are plainly not there. *Everts v. Washington County*, 15 Or LUBA 358 (1986).

1.1.1 Administrative Law – Interpretation of Law. In the absence of a provision in a new ordinance preserving approval procedures in the former ordinance, the new ordinance will control approval of all subdivision plats, including those plats receiving preliminary approval prior to the effective date of the new ordinance. *Rosenfeld v. City of Lake Oswego*, 15 Or LUBA 312 (1986).

1.1.1 Administrative Law – Interpretation of Law. County ordinance criterion for partitioning of an existing dwelling on forest land; which requires a finding that the dwelling "will not be needed to house forest help, does not require that a partition be denied because an existing dwelling might someday be needed to house forest workers. Such a criterion does require consideration of present use of the subject property, and perhaps of probable uses in the near future. *Rex v. Marion County*, 15 Or LUBA 293 (1986).

1.1.1 Administrative Law – Interpretation of Law. City's "judicial notice" of prior city approvals does not encompass supporting evidence submitted during the prior proceedings. *McNulty v. City of Lake Oswego*, 15 Or LUBA 283 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where an ordinance provision is unambiguous, LUBA will not go beyond its plain language to create additional standards based upon speculation about legislative intent. *Wagner v. Marion County*, 15 Or LUBA 260 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where the property petitioners wished the county to accept as a county road was not offered for dedication in the subdivision plat, approval of the subdivision did not constitute acceptance of the roadway. *Kegg v. Clackamas County*, 15 Or LUBA 239 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where city ordinance imposed standard that there be no "objectionable conditions" associated with the proposed development, a city interpretation of this standard to allow consideration o f demands the use would impose on public safety services was reasonable, and a city finding that the proposal would overburden the city's police protection services is a proper basis for denial of the development application. *Texaco, Inc. v. King City*, 15 Or LUBA 198 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where the text of an ordinance is clear, but the description of the text in an order applying the ordinance is incorrect, the text of the ordinance will control. *Texaco, Inc. v. King City*, 15 Or LUBA 198 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where an ordinance can reasonably be interpreted in several ways, the interpretation by the body responsible for enacting it should control, especially where its interpretation is consistent with the ordinance as a whole. *Texaco, Inc. v. King City*, 15 Or LUBA 198 (1986).

1.1.1 Administrative Law – Interpretation of Law. The term "automobile service station" is ambiguous, and therefore susceptible to more than one reasonable interpretation. *Texaco, Inc. v. King City*, 15 Or LUBA 198 (1986).

1.1.1 Administrative Law – Interpretation of Law. A plan statement that "one aspect of flood plain management involves balancing the economic gain from flood plain development against the increase in flood hazard" need not be read as a plan policy or an approval standard. *Storey v. City of Stayton*, 15 Or LUBA 165 (1986).

1.1.1 Administrative Law – Interpretation of Law. Applicable plan policies which refer to "vacant lands within the corporate city limits" and "the city's useable land" require the city to consider all undeveloped land in the city, not just land in a single zoning district. *Storey v. City of Stayton*, 15 Or LUBA 165 (1986).

1.1.1 Administrative Law – Interpretation of Law. Ordinance provisions requiring conformity with the comprehensive plan generally and with specific plan provisions listed in the ordinance require consideration of the entire comprehensive plan. *Storey v. City of Stayton*, 15 Or LUBA 165 (1986).

1.1.1 Administrative Law – Interpretation of Law. Plan policy calling for referral of land use applications to agencies providing services to subject area does not suggest that the county loses jurisdiction over the application if the affected agencies are not notified, the policy is interpreted as a procedural requirement. *Lane County School Dist. 71 v. Lane County*, 15 Or LUBA 150 (1986).

1.1.1 Administrative Law – Interpretation of Law. Ordinance provision requiring governing body to request a report and recommendation from the planning commission before taking action on a comprehensive plan amendment will not be interpreted as applying to a plan amendment which has been remanded to the governing body from a reviewing body such as LUBA. *Lane County School Dist. 71 v. Lane County*, 15 Or LUBA 150 (1986).

1.1.1 Administrative Law – Interpretation of Law. Plan policy requiring proposed recreational uses to be compatible with surrounding development is not met by findings addressing compatibility only with adjacent EFU-zoned agricultural land. *Leonard v. Union County,* 15 Or LUBA 135 (1986).

1.1.1 Administrative Law – Interpretation of Law. Statutes allowing preexisting uses to continue after restrictive regulations are adopted do not permit expansion of the preexisting use. *Cantrell v. Wasco County,* 15 Or LUBA 127 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where city ordinance distinguishes between "conventional subdivision" and "mobile home subdivision" but does not define either term, city refusal to redesignate a subdivision which included a conventionally built home to a mobile home subdivision was proper. *Joy v. City of Talent,* 15 Or LUBA 115 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where a prior major partitioning included [in] a condition limiting the number of dwellings on a parcel, a division of the parcel will not defeat the prior condition. *Enderson v. Marion County,* 15 Or LUBA 60 (1986).

1.1.1 Administrative Law – Interpretation of Law. A county may consider the effect of partition applications against possible future applications under a criterion requiring that a nonfarm dwelling "not materially alter the stability of the overall land use pattern of the area." *Enderson v. Marion County,* 15 Or LUBA 60 (1986).

1.1.1 Administrative Law – Interpretation of Law. A finding that a proposed dwelling will have an adverse impact on farming or forest practices requires an explanation of the alleged adverse impact. *Enderson v. Marion County,* 15 Or LUBA 60 (1986).

1.1.1 Administrative Law – Interpretation of Law. A nonfarm dwelling may be sited on land generally not suitable for farm use although a majority of the parcel is suitable for farm use. The county should review the whole parcel for farm use suitability but may not insist the whole parcel be found unsuitable for farm use. *Enderson v. Marion County,* 15 Or LUBA 60 (1986).

1.1.1 Administrative Law – Interpretation of Law. Decisionmaker's requirement of a "heightened burden of proof" because of the magnitude of the requested change does not render proceeding constitutionally defective. *City of Wilsonville v. Metropolitan Service District,* 15 Or LUBA 44 (1986).

1.1.1 Administrative Law – Interpretation of Law. Denial of a requested zone change is not a de facto amendment of the comprehensive plan. *Robert Randall Company v. City of Wilsonville,* 15 Or LUBA 26 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where a city plan designates particular geographic areas as "areas of special concern" to which special design criteria apply, the city must identify the area of special concern within which the affected property lies and the particular criteria to be applied. *Robert Randall Company v. City of Wilsonville,* 15 Or LUBA 26 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where a city code does not state clearly that either "objectives" or "policies" must be satisfied but only requires compliance with comprehensive plan generally, a decision may be based on consideration of both plan "objectives" and "policies." *Robert Randall Company v. City of Wilsonville*, 15 Or LUBA 26 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where a city comprehensive plan provides a method to resolve conflict between plan provisions, LUBA will sustain a city's reasonable interpretation utilizing the plan policy. *Robert Randall Company v. City of Wilsonville*, 15 Or LUBA 26 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where city ordinance required that a structure be "complementary" to the "built environment" and the "natural environment," the city's findings stating only conclusions that the temple design meets the standard are not sufficient. *McNulty v. City of Lake Oswego*, 15 Or LUBA 16 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where a provision of city's building design standard is not clear and unambiguous, LUBA may defer to a local government interpretation which is reasonable and not contrary to the ordinance. *McNulty v. City of Lake Oswego*, 15 Or LUBA 16 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where governing body is not required to take action on an urban renewal amendment, LUBA will consider the amendment procedure to be legislative in nature. *Union Station Business Community Association v. City of Portland*, 15 Or LUBA 4 (1986).

1.1.1 Administrative Law – Interpretation of Law. ORS 197.835(8)(a)(C) authorizes relief where the decision is unsupported by substantial evidence, but does not require that there be substantial evidence addressing "issues" raised during permit hearings. *Oatfield Ridge Residents Rights v. Clackamas County*, 14 Or LUBA 766 (1986).

1.1.1 Administrative Law – Interpretation of Law. Statutes authorizing creation of parcels for nonfarm dwellings must be read in conjunction with ORS 215.243(3), which states a policy of preserving the maximum amount of agricultural land in large blocks. *Hearne v. Baker County*, 14 Or LUBA 743 (1986).

1.1.1 Administrative Law – Interpretation of Law. A code provision allowing modification of off-street parking requirements if "substantially equal protection to the surrounding properties is afforded," requires consideration of the number of spaces and their location. *Callahan v. City of Portland*, 14 Or LUBA 678 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where city parking regulation requires "legal evidence * * * that property is and will remain available for use as off-street parking space," an agreement permitting the parking space owner to cancel at will does not meet the regulation requirement. *Callahan v. City of Portland*, 14 Or LUBA 678 (1986).

1.1.1 Administrative Law – Interpretation of Law. The date the county mails statutorily required written notice of a permit decision is the date the decision becomes final for purposes of tolling the 21-day period of appeal under ORS 197.830(7). *Bainbridge v. Lane County*, 14 Or LUBA 546 (1986).

1.1.1 Administrative Law – Interpretation of Law. Although ORS 197.015(10) empowers a "local government" to make land use decisions, LUBA interprets ORS 215.050 and ORS 215.060 to grant exclusive responsibility for comprehensive plan adoption and amendments to county governing bodies rather than county planning commissioners or hearings officers. *1000 Friends of Oregon v. Washington County*, 14 Or LUBA 416 (1986).

1.1.1 Administrative Law – Interpretation of Law. A county comprehensive plan map amendment is not a "contested case" within the meaning of ORS 215.402(1) which can be decided by a planning commission under ORS 215.406. *1000 Friends of Oregon v. Washington County*, 14 Or LUBA 416 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where a city comprehensive plan is ambiguous on question of whether a variance from a restriction may be allowed, the city's interpretation that a variance is allowable can be sustained if it is not clearly contradictory to the express language and intent of the plan. *Downtown Community Association v. City of Portland*, 14 Or LUBA 382 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where comprehensive plan calculates parking spaces in mixed-use building based on floor area for office uses in the building, city cannot approve the parking spaces while allowing developer the option of not constructing the office-use component of the building. *Downtown Community Association v. City of Portland*, 14 Or LUBA 382 (1986).

1.1.1 Administrative Law – Interpretation of Law. Where a component of a city's comprehensive plan expresses parking ratio regulations in unambiguous, mandatory language, LUBA will not interpret these regulations as advisory despite other references to the ratios as "guidelines." *Downtown Community Association v. City of Portland*, 14 Or LUBA 382 (1986).

1.1.1 Administrative Law – Interpretation of Law. A city is not required to read a comprehensive plan goal in isolation, but may balance one goal with another in determining whether a project complies with the comprehensive plan. *Downtown Community Association v. City of Portland*, 14 Or LUBA 382 (1986).

1.1.1 Administrative Law – Interpretation of Law. Greenway policy in ORS 390.314 does not limit intensification of land use to "existing residential, commercial and agricultural uses" but rather declares the necessity of restriction on all development within the Greenway to preserve its "natural, scenic, historical and recreational qualities." *Urquhart v. LCOG and City of Eugene*, 14 Or LUBA 335 (1986).

1.1.1 Administrative Law – Interpretation of Law. An airstrip used by the owner as a base for owner's one airplane used in owner's logging business is a personal use airport as defined in ORS 215.213(2)(h). *Todd v. Douglas County*, 14 Or LUBA 307 (1986).

1.1.1 Administrative Law – Interpretation of Law. A City's reasonable interpretation of its comprehensive plan will be upheld. *Hannon v. Gresham*, 14 Or LUBA 192 (1986).

1.1.1 Administrative Law – Interpretation of Law. ORS 215.416(8) requires only that county standards for approval or denial of a permit application be clear enough for an applicant to know what must be shown during the application process. *Columbia River Television v. Marion County*, 14 Or LUBA 179 (1986).

1.1.1 Administrative Law – Interpretation of Law. Plan policies which prescribe performance or evaluation standards for specific actions or projects must be applied in the review of subdivision applications; county cannot disregard such plan policies on grounds zoning ordinance defines lands subject to regulation. *McCoy v. Tillamook County*, 14 Or LUBA 108 (1985).

1.1.1 Administrative Law – Interpretation of Law. Not all segments of a plan are intended to serve as decision making criteria. The legal effect of particular plan language depends largely on the text itself. *McCoy v. Tillamook County*, 14 Or LUBA 108 (1985).

1.1.1 Administrative Law – Interpretation of Law. Statute permitting a dwelling "customarily provided in conjunction with farm use" requires a showing that the dwelling will be sited on a parcel wholly devoted to farm use. *Matteo v. Polk County*, 14 Or LUBA 67 (1985).

1.1.1 Administrative Law – Interpretation of Law. LUBA will not read comprehensive plan and implementing ordinances to have retroactive effect without some provision in the plan and ordinances suggesting such a reading is required. *Warren v. Lane County*, 14 Or LUBA 36 (1985).

1.1.1 Administrative Law – Interpretation of Law. Zone change criterion requiring that proposed mining site be in closest proximity to utilization area is not impermissibly vague and does not require refinement before it can be applied in decision making process. *Panner v. Deschutes County*, 14 Or LUBA 1 (1985).

1.1.1 Administrative Law – Statutory Interpretation – Clinic. In the absence of a statement of reasons explaining why the facts found led the county to conclude that a sole practitioner's dental office constituted "a clinic" within the meaning of the county's ordinance, it could not be said that the county correctly applied its ordinance. *Theland v. Multnomah County*, 4 Or LUBA 284 (1981).

1.1.1 Administrative Law – Statutory Interpretation – Delegative Term. The court's function on review of an agency's refinement of delegative terms is to ascertain whether the refinement and application to specific facts falls within the generally expressed policy of the statute. *Theland v. Multnomah County*, 4 Or LUBA 284 (1981).

1.1.1 Administrative Law – Statutory Interpretation – Inexact Term – Findings. When dealing with an inexact term, the reasoning of the agency as to what a particular term means and why a particular set of facts falls within the "compass" of the term must, in a contested case proceeding, be set forth in the agency's order. *Theland v. Multnomah County*, 4 Or LUBA 284 (1981).

1.1.1 Administrative Law – Interpretation of Statutory Terms – Classes of Terms. The responsibility of a judicial or quasi-judicial body in the review of administrative decisions requiring interpretation of statutory terms hinges on whether the term is a "term of precise meaning," an "inexact term," or a "term of delegation." *Theland v. Multnomah County*, 4 Or LUBA 284 (1981).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a city's minimum lot size requirements are based, in part, upon a code provision which requires a measurement of a lot's "slope," and the city interprets the term "slope" to be determined using post-development grades, rather than pre-development grades, LUBA will uphold the city's interpretation as "plausible" subject to *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), where the city found that "slope" is an ambiguous term, and the city interprets the term in a manner consistent with its interpretation of the text and in context of historical application of the code provision. An ambiguous code provision term is one with more than one possible construction of the term, and the local government interprets such a term in a "plausible" manner when read consistently with the express language of the code, as read in context. *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a code provision states that the "provisions of this code shall be interpreted as minimum requirements. When this code imposes a greater restriction than is required by other provisions of law * * * the provisions of this code shall control," and petitioners argue that the city erred in applying the least restrictive, rather than the most restrictive interpretation of the city's code requirement that minimum lot size be determined by "slope," by allowing project applicants to measure slope after grading, rather than before grading, to maximize their potential minimum developable lot size, but petitioners do not identify what other provision of law imposes a lesser restriction as regards to minimum lot size that the city should have applied, petitioners have not provided a basis for reversal or remand. *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Even if a local government's interpretation of its code were less plausible than petitioners' preferred interpretation, the "existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible' under the *Siporen*[*v. City of Medford*, 349 Or 247, 243 P3d 776 (2010),] standard." *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012). *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a local code provision prohibits uses that "alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties," a hearings officer errs in reducing the inquiry into a single inquiry into whether the proposed use makes the use of nearby properties "substantially worse," since the words "limit" and "impair" have different meanings and since, where a local code uses two different terms in the same provision, it is presumed that the enacting body intends two different meanings. *York v. Clackamas County*, 79 Or LUB 278 (2019).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a local code provision prohibits a "[p]layground, recreation facility or community center owned and operated by a government agency or nonprofit community organization," a local governing body does not misconstrue the provision by interpreting the phrase "owned and operated by a government agency or nonprofit community organization" as applying to each antecedent rather than just to the last antecedent, community centers, and therefore as permitting a private recreation facility in the zone, where (1) the provision's language implements state law, which is concerned only with public

facilities, (2) the code sets out a separate use category for "recreation-oriented facility," and (3) the local government has historically viewed the provision to encompass only public facilities. *Bishop v. Deschutes County*, 79 Or LUBA 380 (2019).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA will affirm as correct a city planning commission's interpretation that a city code provision that prohibits "grading" on portions of a site that contains steep slopes does not prohibit all development activities that disturb soil, where the city's code does not define the terms "grading" and "excavating," but does define "development" as including both "grading" and "excavating" as separate terms. LUBA will affirm the city planning commission's conclusion that the grading prohibition is not violated by a PUD site plan that requires digging holes to install support posts for cantilevered dwellings and digging and refilling trenches to install water lines in areas containing steep slopes because those activities constitute excavation and not grading. *Fairmount Neighborhood Assoc. v. City of Eugene*, 78 Or LUBA 418 (2018).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the city's code provides that development application materials "shall reflect that consideration has been given to [tree] preservation," the city does not err in finding that the code requirement is met when the applicant's submissions demonstrate that consideration was given to tree preservation through a tree survey and site design that preserves trees within a stand on slopes greater than 25 percent, contains yard sizes that decrease critical root zone impacts, and preserves trees between and around homes. Those application materials reflect that consideration was given to tree preservation even though some high and moderate priority trees must be removed to develop streets, utilities and building pads, and preservation of trees on residential lots would be left to the discretion of future lot owners. The code does not require the actual preservation of trees; instead, the code requires a project applicant to consider tree preservation and submit evidence to demonstrate that such consideration occurred. *Fairmount Neighborhood Assoc. v. City of Eugene*, 78 Or LUBA 418 (2018).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Extension and improvement of a residential access road over an existing public right-of-way is not subject to a city code section that requires streets that are "dedicated to the public by the applicant * * * conform" with adopted street right-of-way maps. A proposed improvement of a type of street that is not depicted on the city's adopted street right-of-way map does not fail to "conform" with that map. *Fairmount Neighborhood Assoc. v. City of Eugene*, 78 Or LUBA 418 (2018).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. That different setbacks standards with different language are interpreted to require the same setback distance does not run afoul of the general interpretative requirement to give different effect to different words used in the same statute, where the local government shows that the different words nevertheless support requiring the same setback distance. *Brannon v. Multnomah County*, 77 Or LUBA 275 (2018).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA will deny a petitioner's challenge to a county board of commissioners' conclusion that a marijuana production project applicant had satisfied the requirement to provide proof that water is available

to the property by providing a "statement that water is supplied from a public or private water provider," by providing a letter from a private company stating it would supply water to the property where petitioner argues the letter is insufficient because the private water provider does not hold a water right. Based on its plain language, the county code does not require such a statement, but only requires a statement from a "private water provider" that they will provide water for the operation. *King v. Deschutes County*, 77 Or LUBA 339 (2018).

1.1.2 Administrative Law – Interpretation of Law – Generally. LUBA will deny petitioner's challenge that the provider of water must have "an authorized source of water under Oregon Water Law" where county code requires an applicant for marijuana production to provide proof that water is available to the property by providing a statement that "water is supplied from a public or private water provider," the county code does not further define "provider of water," and the county imposed a condition of approval requiring "the use of water from any source for marijuana production shall comply with all applicable state statutes and regulations including ORS 537.545 and OAR 690-340-0010." *King v. Deschutes County*, 77 Or LUBA 339 (2018).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A local government does not misinterpret the term "substation" by interpreting it to be an example of the use category "utilities" that is broad enough to include a wireless transmission tower. And it does not matter that the wireless transmission tower is a cell tower and that there were no cell towers in 1984 when the legislation defining substation and utilities was adopted. There were radio transmission and communication towers in 1984, which are similar to cell towers, and it is not unusual for new uses to come into existence and fall into existing broad use categories. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A local governing body's conclusion—that the general category of utility "[d]istribution plants and substations" adopted in 1984 is broad enough to include a wireless transmission tower—is not inconsistent with contemporary and other dictionary definitions of "distribution," "plant" and "substation." *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A local governing body does not err by refusing to view the term "distribution plants and substations" as a technical term or term of art. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. When a local government adopts a new rule of interpretation it is not limited to applying that new rule of interpretation to subsequently enacted legislation. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. ORS 215.750 and OAR 660-006-005(5) allow a county to approve a forest template dwelling if, after applying a 160-acre template centered on the subject property, at least 11 other "lots or parcels that existed on January 1, 1993, are" within the 160-acre area. A hearings officer's finding that the applicant met the 11-lot requirement by counting three parcels with boundaries that were later reconfigured pursuant to property line adjustment after January 1, 1993, as long as the parcels as they existed

on January 1, 1993 were "partly or completely within the template boundaries," and counting a fourth parcel that was partitioned into two parcels after January 1, 1993 as one parcel is consistent with the statute and the rule, where the administrative rule history of OAR 660-006-0005(5) indicates the Land Conservation and Development Commission (LCDC) did not intend to prohibit an applicant from relying on the January 1, 1993 configuration of a later-reconfigured parcel so long as "the effect of" later properly line adjustments was not "to qualify a lot, parcel or tract for the siting of a dwelling." *Landwatch Lane County v. Lane County*, 75 Or LUBA 151 (2017).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A 1983 Oregon Department of Land Conservation and Development (DLCD) memorandum stamped "preliminary draft subject to revision" is not competent legislative history LUBA can rely on in determining the intent of the legislature in enacting a statute. *Landwatch Lane County v. Lane County*, 75 Or LUBA 258 (2017).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA will reject an interpretation of a county Wildlife Area overlay zone, which implements Statewide Planning Goal 5 to protect winter range in part by prohibiting new churches in winter range, to the effect that the WA overlay zone prohibits churches in winter range areas only where the underlying base zone categorizes churches as a conditional use, but that interpretation would allow churches in winter range areas if the underlying base zone categorizes churches as something other than a conditional use, given that conflicts between churches and winter range are the same whether churches are categorized as permitted or conditional uses. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A hearings officer Misconstrues the text and context of a county's Wildlife Area (WA) overlay zone, in concluding that prohibitions on certain new uses, including churches, in winter range areas are limited exclusively to areas where the underlying base zone categorizes such uses as conditional uses, where other provisions of the WA overlay zone make it clear that the prohibition on new uses in winter range is not limited to uses categorized as conditional uses in the underlying base zone. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. An amendment to require that vacation rental dwellings must have at least one parking place per bedroom does not conflict with the zoning ordinance's requirement that all residences must have two parking places, where the text and context of the zoning ordinance and amendment make it clear that the one parking space per bedroom requirement applies only to residences that are used as a vacation rental dwelling. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the text of a county comprehensive plan policy limits redevelopment of areas developed as golf courses or designated open space or common area within a resort, but includes no language prohibiting redevelopment of other areas within the resort, interpreting the policy to implicitly prohibit new residential development anywhere within the resort would impermissibly insert what has been omitted pursuant to ORS 174.010, and may not survive even the deferential review required under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Kine v.*

Deschutes County, 75 Or LUBA 419 (2017).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. OAR 660-033-0140(1) provides that a discretionary permit on resource land is void two years from the date of the final decision "if the development action is not initiated within that period." However, reading OAR 660-033-0140(1) to allow the permit approval to remain valid indefinitely once it is initiated within the two-year period is inconsistent with OAR 660-033-0140(2), which allows an extension for one year if the applicant was unable to begin or "continue development during the approval period." The requirement to show that the application was unable to "continue development during the approval period" indicates that simply initiating the development within the two-year period is not sufficient in itself to render the permit valid indefinitely, without the need to seek an extension. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Interpreting OAR 660-033-0140(1) to allow a discretionary permit approval to remain valid indefinitely once it is initiated within the initial two-year approval period is inconsistent with OAR 660-033-0140(4), which provides that additional extensions beyond one year may be authorized where applicable criteria have not changed. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA will reject a proposed interpretation of a city code site review provision that would broadly apply to all proposed needed housing, including single-family dwellings, and result in imposition of discretionary standards and lengthy procedures that could easily have the effect of discouraging needed housing, contrary to ORS 197.307(4), where there is an alternative interpretation that harmonizes the relevant text and context and does not force the city's code into conflict with ORS 197.307(4). *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a city's code offers a path for developers to qualify proposed housing as "needed housing," in order to obtain waiver of certain standards that would otherwise apply, LUBA will similarly interpret a related code provision requiring that site review provisions be applied when "the application proposes needed housing," to the effect that the site review provisions apply only if the applicant seeks to qualify the proposed housing as "needed housing." *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA's conclusion that a planning commission's procedural error in failing to grant the continuance or open record period dictated by ORS 197.763(6)(a) through (c) provides no basis for reversal or remand, where the city council took corrective action to avoid prejudice to petitioner's substantial rights, does not improperly insert missing text into a development code that duplicates ORS 197.763(6)(a) through (c). *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A development ordinance that links the terms "mining" and "quarrying" suggests the term "mining" should not be limited to removal of minerals that exclude rock, where dictionary definitions of "quarrying"

frequently define that term to include rock removal. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a development code states that "minerals" include three general categories: solids, liquids, and gases, but these general categories are followed by specific examples: "coal and ores," "crude petroleum" and "natural gases," the rule of statutory construction *ejusdem generis* lends some support for interpreting the word "minerals" to be a narrow category of precious and/or valuable substances, as opposed to mere rock or aggregate. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a development code definition of the term "excavation" separately lists removal of "minerals" and "rock" as possible examples of "excavation," that suggests "minerals" and "rock" are different things and that "minerals" do not include "rock." *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a development code definition of "surface mining" duplicates a statute that defines "surface mining" to include mining of "minerals," without expressly incorporating the broad statutory definition of "minerals" or the statutory exceptions to that broad definition of "minerals" the development code definition of "surface mining" lends some support to the position that the enactors of the development code intended the word "minerals" to have a more narrow meaning than the statutory definition of that term. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. One possible inference when a development code definition of "surface mining" duplicates a statute that defines "surface mining" to include mining of "minerals," is that the enactors of the development code intended the word "minerals" to have its statutory meaning, even if the enactors did not expressly incorporate the broad statutory definition of "minerals" or the statutory exceptions to that broad definition of "minerals" into the development code. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. There is nothing inherently inappropriate about a local government distinguishing between acceptable excavations that are necessary for development and excavations that are of a nature and extent that constitutes mining. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. While dictionaries are not always a reliable way to determine the intended meaning of an undefined term like "minerals," where the development codes expressly directs that undefined terms "have the normal dictionary meaning" it is appropriate to rely on dictionary definitions to interpret the word "minerals" to include basalt rock. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. ORS 197.770, which provides that existing firearms training facilities may continue, is silent regarding the

expansion of an existing firearms training facility. Because the statute is silent on expansion, it does not prohibit expansion, if expansion is otherwise authorized and consistent with other applicable law. *H.T. Rea Farming Corp. v. Umatilla County*, 71 Or LUBA 125 (2015).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. While a county governing body cannot be faulted for not considering dictionary definitions that were not cited to it below, the county governing body can be faulted for relying on a general on-line dictionary definition of "penstock," when a party asserted that term has a technical meaning and cited two treatises in support its position that the term has a narrower meaning that the on-line general dictionary definition. *Pacificorp v. Deschutes County*, 70 Or LUBA 89 (2014).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Generally use of the same phrase in different provisions of the same statute indicates that the phrase has the same meaning. Because ORS 197.772(1) uses the term "property owner" to refer to the property owner at the time that the property is designated a historic resource, the use of the same term in ORS 197.772(3), which allows a property owner to request removal of the designation, suggests that "property owner" as used in ORS 197.772(3) refers to the owner at the time of designation, not subsequent purchasers of the property. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Notwithstanding that ORS 197.772(1) and (3) both use the same phrase "property owner," the two sub-sections operate in entirely different, non-overlapping circumstances, which suggests that "property owner" as used in ORS 197.772(3) may not be limited by context, as is ORS 197.772(1), to the property owner at the time property is designated a historic resource. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where legislative history of ORS 197.772(3) indicates that the legislators proposing that section believed the phrase "property owner" as used in that provision referred only to the property owner at the time property was designated for historic resource, and did not include subsequent purchasers, and an amendment intended to specify that "property owner" also included subsequent purchasers was later deleted in conference, the strongest inference is that the legislature intended "property owner" as used in ORS 197.772(3) to include only the property owner at the time of designation, and not subsequent purchasers. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where legislative history of ORS 197.772(3) indicates that legislators intended to offer remedial relief to property owners who were "coerced" into having their property designated as a historic resource, but the legislative history does not indicate that the legislature was equally concerned with subsequent purchasers who acquire the property knowing it is designated as a historic resource, that legislative history supports the conclusion that "property owner" as used in ORS 197.772(3) is limited to owners at the time the property was designated, not subsequent purchasers. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Legislative Counsel's decision to renumber as ORS 215.284(1) to (6) what the legislature enacted as ORS 215.283(3) to (8) does not change the fact that what is now codified at ORS 215.284(1) to (6) was enacted by the legislature as part of ORS 215.283 and 215.283. ORS 215.283 is the statutory regime that applies to non-marginal lands counties rather than marginal lands counties. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A comprehensive plan provision is ambiguous if it can be interpreted in more than one way. *Northgreen Property LLC v. City of Eugene*, 68 Or LUBA 76 (2013).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A comprehensive plan policy that requires the city to extend "key urban services and facilities in an orderly and efficient manner" is relevant context for interpreting a comprehensive plan provision that requires the local government to design and locate public and private facilities such as cellular communications towers in a manner that "preserves and enhances desirable features of local and neighborhood areas" and "promotes their sense of identity," where the two policies deal with the same subject matter. *Northgreen Property LLC v. City of Eugene*, 68 Or LUBA 76 (2013).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A standard that requires mitigation of permanent disturbances to wetlands is not properly construed to apply to the entirety of a parcel that contains a wetland area, such that the standard is applied to disturbances elsewhere on the parcel that have no impact on the wetland area. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. ORS 197.829(1)(d) effectively obligates a local government to interpret an ambiguous code provision if possible in a manner not contrary to the applicable statewide planning goals and administrative rules, not only where the code provision directly implements a goal or rule protecting resource lands, but also where the code provision is a general provision applicable to all zones, including resource zones, and is not intended to implement any particular goal or rule. *White v. Lane County*, 68 Or LUBA 423 (2013).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where one plan strategy directs that lands subject to flooding be designated "Floodplain" and the following plan strategy directs that no permanent structures may be erected in lands subject to flooding unless the structure complies with the "Floodplain" criteria, a local governing body's interpretation of those plan strategies to require application of the "Floodplain" criteria only in areas that have already been designated "Floodplain" runs afoul of ORS 174.010 by failing to "give effect" to the second strategy and by "inserting what has been omitted" in the second strategy by inserting a requirement that the lands subject to flooding must have been zoned "Floodplain." *Friends of the Hood River Waterfront v. City of Hood River*, 68 Or LUBA 459 (2013).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the language of a development code is such that it anticipates an application for declaratory ruling will be submitted by a single owner of a single property, the development code is therefore ambiguous

regarding whether an application for a declaratory ruling is possible when the application concerns more than one property and is ambiguous regarding whether the application must be signed by all property owners or may be signed by any property owner. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a zoning ordinance would allow a VA outpatient clinic use as "Government Services" uses only if the use is not "specifically listed" uses in other zoning districts, and the zoning ordinance authorizes "Medical Health Facilities" in other zoning districts, the critical question is whether authorizing "Medical Health Facilities" in those other zones is sufficient to "specifically list" the proposed VA outpatient clinic use. In resolving that question, the maxim of statutory construction in ORS 174.020 that calls for selection of a particular provision over a more general provision where they conflict is of no particular assistance. *Randazzo v. City of Eugene*, 65 Or LUBA 272 (2012).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Construed in context with related code language and relevant statutes governing local appeals, a county's code is not correctly interpreted to bar non-applicant parties who participated in the evidentiary phase of a local permit proceeding from participating in an on-the-record appeal filed by the applicant to challenge permit conditions of approval. *Families for a Quarry Free Neighborhood v. Lane County*, 64 Or LUBA 297 (2011).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Post-enactment statements made by a currently serving member of a local decision making body who was also a member of a local legislative body at the time a land use regulation was enacted are not legislative history. *Siegert v. Crook County*, 63 Or LUBA 379 (2011).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Under *Flying J. Inc. v. Marion County*, 49 Or LUBA 28, 36-37, *aff'd*, 201 Or App 99, 117 P3d 1027 (2005), where the text of an ordinance that adopts zoning designation amendments expresses a clear intent that the prior zoning for a parcel be retained but the map attached to the ordinance shows a change in zoning, that conflict is resolved in favor of the text. *Turner v. Jackson County*, 62 Or LUBA 199 (2010).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where one sentence of a zoning ordinance provides that "any dispute" concerning the zoning of property is to be resolved by reference to the official zoning map, but that sentence appears immediately after a sentence that states that initial zoning boundary determinations are to be made based on maps generated by the local government's GIS system, those sentences should be read together to require that any disputes that arise based on the GIS maps or facts that arise after the zoning ordinance was adopted be resolved in favor of the official zoning map. But those sentences of the zoning ordinance do not require that a text/map conflict in the enacting zoning ordinance itself be resolved in favor of the official zoning map, where it is clear the new zoning shown for a property on the official zoning map was a mistake, and the text of the enacting ordinance clearly states that the zoning of the property was not changed by the ordinance. *Turner v. Jackson County*, 62 Or LUBA 199 (2010).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The inference described in *Sarti v. City of Lake Oswego*, 20 Or LUBA 387, *rev'd*, 106 Or App 594, 809 P2d 701 (1991)—that provision for a specific listed use in one zone precludes that use from being authorized in a different zone under a broader use category—has no role in reviewing local government code interpretations under ORS 197.829(1), where the proper question is whether the interpretation is consistent with the text and context of the code language. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. An interpretation of a city landslide hazard regulation that gives no effect to the main clause of the regulation and only gives effect to the subordinate clause arguably runs afoul of the interpretive principle embodied in ORS 174.010, which prohibits interpreting statutes in a way that omits statutory language that has been included in the statute. *Gravatt v. City of Portland*, 62 Or LUBA 382 (2011).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where one section of a zoning ordinance permits the city engineer to approve more than one driveway access to lots and parcels "subject to access requirements," and another section of the zoning ordinance setting out the city's access requirements generally prohibits direct access to arterials where a lot or parcel already has access to a lower category roadway, a city correctly denies the request for the direct arterial access. In that case the two sections of the zoning ordinance do not conflict; the contingent authority to grant more than one driveway is simply limited by the section setting out access requirements. *Athletic Club of Bend, Inc. v. City of Bend*, 61 Or LUBA 349 (2010).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Land use regulations that simply require that permit applications comply with "applicable" provisions in the land use regulations are frequently ambiguous, since they require an unguided review of the land use regulations to determine which provisions are "applicable." *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The applicability of a local government's land use regulations, viewed in isolation, may be unambiguous. However, when those same land use regulations are viewed in context with others parts of the local government's land use regulations, the applicability of those land use regulations may be qualified or limited. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A local governing body's interpretation of its land use regulations to limit the scope of review of a site plan and architectural review committee is inconsistent with the text of the land use regulations where the governing body ignores and fails to give effect to land use regulation text that is inconsistent with its interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A local government's interpretation of its land use regulations to limit application of (1) its land use regulation's requirement for preparation of a transportation impact analysis and (2) its minimum level of service standard to zone change decisions and certain planned unit development decisions

cannot be sustained, where the text of the relevant land use regulation sections is inconsistent with that interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a comprehensive plan in one instance says the city's level of service standard applies to zone changes, but does not state that the standard applies *exclusively* to zone changes, and in another instance the comprehensive plan states that the level of service standard applies when changing land use designations and to development, the comprehensive plan text does not support the city's ultimate interpretation that the level of service standard applies only to zone changes. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A local ordinance providing that use of a verb in the present tense includes the future tense is not controlling where the disputed term is used as an adjective that does not convey a tense or refer to a past completed action. *Paddock v. City of Lafayette*, 58 Or LUBA 498 (2009).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. When an applicable local provision requires that road improvements associated with a partition be constructed or bonded for "before a dwelling may be authorized," the local governments errs by requiring the improvements to be constructed or bonded for as a condition of approval of the partition itself. *Sperber v. Coos County*, 58 Or LUBA 570 (2009).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a county attempts to take advantage of the riparian corridor safe harbor authorized by OAR 660-023-0090(8) but defines "water dependent" and "water related" slightly differently than the statewide planning goal definitions of those terms, any ambiguity created by the different wording must be resolved consistently with the statewide planning goal definitions. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Exclusive farm use and forest zoned lands are subject to statutory minimum parcel sizes. A generally applicable zoning ordinance definition of "lot size" that would allow internal rights-of-way to be included in computing lot size is not necessarily inconsistent with the statutory minimum parcel size requirements where the statutes are silent about how to treat internal rights-of-way. If it turns out that internal rights-of-way must be excluded when applying statutory minimum parcel size requirements in exclusive farm use and forest zoned lands, the statutory requirement would have to be satisfied notwithstanding the general zoning ordinance definition. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Under ORS 197.445(4), destination resorts must provide at least 150 units of "overnight lodging." Where a zoning ordinance that was adopted to implement ORS 197.445(4) is ambiguous, such that the zoning ordinance could be interpreted to be inconsistent with ORS 197.445(4) or consistent with ORS 197.445(4), the county would be required to interpret the zoning ordinance to be consistent with ORS 197.445(4). *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. ORS 197.445(5) limits commercial uses to "types and levels of use necessary to meet the needs of visitors" to destination resorts. A zoning ordinance that allows "commercial and entertainment" uses in destination resorts is likely consistent with ORS 197.445(5) since entertainment uses are likely to be commercial uses. But if an entertainment use were proposed that was not a commercial use, the county would be obligated to interpret the term entertainment consistently with ORS 197.445(5) and deny the proposed entertainment use. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a zoning ordinance amendment that potentially allowed more individual lots or units in a destination resort than permitted under applicable statutes at the time the zoning ordinance amendment was adopted, the decision need not be remanded where the statute was subsequently amended to allow the number of individual lots or units authorized by the zoning ordinance amendment. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. ORS 197.445(1) requires a minimum site size of 160 acres for destination resorts. A zoning ordinance that allows internal rights-of-way to be included in determining whether a proposed destination resort complies with the ORS 197.445(1) 160-acre minimum site size does not violate the statute, because ORS 197.445(1) does not expressly require that rights-of-way be excluded when computing site size and even if the statute did require that rights-of-way be excluded, the statutory requirement would have to be satisfied. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The purpose of a zoning limitation that commercial development in a specified area should consist of "retail that is small in scale" could be to limit floor space area and it could also be to require that commercial uses have "a small or local market area." *Loprinzi's Gym v. City of Portland*, 56 Or LUBA 358 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where zoning ordinance commentary states that the purpose of a zoning ordinance limitation is to encourage "a local scale of retail," and encourage businesses that are "local serving rather than providing a regional draw," a city does not err in finding that the purpose of a zoning regulation that limits commercial uses to 10,000 square feet is to encourage locally oriented businesses rather than businesses of any particular size. *Loprinzi's Gym v. City of Portland*, 56 Or LUBA 358 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Findings in support of an adjustment to a 10,000-square-foot maximum floor space limit to allow a 33,000-square-foot health club are inadequate to demonstrate that granting the adjustment will "equally or better" meet the purpose of the adjusted regulation, where the purpose of the adjusted regulation is to assure the resulting business is "locally serving" and the findings offer no working explanation of what the city thinks "locally serving" means and the findings do not address the "equally or better" requirement at all. *Loprinzi's Gym v. City of Portland*, 56 Or LUBA 358 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A zoning ordinance provision that simply says duplexes and triplexes may be allowed through a Type I

(nondiscretionary) procedure if certain specified nondiscretionary standards are met is not properly interpreted to render inapplicable other apparently applicable nondiscretionary approval criteria. *Tallman v. City of Bend*, 56 Or LUBA 398 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A checklist prepared by a city's planning department to identify which criteria apply when approving a duplex or triplex does not render apparently applicable zoning criteria that are not identified on the checklist inapplicable to an application for approval of a duplex. It is the zoning ordinance that determines which standards apply, not the checklist. *Tallman v. City of Bend*, 56 Or LUBA 398 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. When a local code provision prevents the filing of the same or "substantially similar" application within a certain time period after a previous application is denied, the plain ordinary meaning of "substantially similar" means that a second application is barred only when there is a high degree of similarity. *Henkel v. Clackamas County*, 56 Or LUBA 495 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a hearings official interprets a street connectivity standard to include a balancing test where the city would determine whether wetland values should take "precedence over the connectivity standards" or whether "it is more appropriate to meet the connectivity standards than to preserve wetlands," but the street connectivity standards themselves provide no textual support for that interpretation, LUBA will remand for a correct interpretation and application of the street connectivity standards. *GloryBee Foods, Inc. v. City of Eugene*, 56 Or LUBA 729 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a text and context analysis does not clearly answer an interpretive question, under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), it is appropriate to consider legislative history and maxims of statutory construction. Where there is no legislative history or relevant maxim of statutory construction, and the interpretive question therefore turns on which of several dictionary meanings of the term "preclude" should apply, LUBA will remand for the hearings officer to select the appropriate dictionary definition, considering other parts of the ambiguous zoning ordinance standard and other relevant context. *GloryBee Foods, Inc. v. City of Eugene*, 56 Or LUBA 729 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. To resolve conflicts between statutes, courts apply the legislative presumption that the more specific statute prevails over the more general statute, and may also apply a similar maxim of statutory construction, that where a conflict between two statutes cannot be reconciled, the later adopted statute prevails over the earlier statute. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. In circumstances where the goal-post statute at ORS 215.427(3)(a) conflicts with Ballot Measure 37 (ORS 197.352), the latter prevails, because ORS 197.352 is the more specific and later-adopted statute. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A comprehensive plan policy that uses the word "should" is generally not a mandatory approval criterion. *Wolfgram v. Douglas County*, 54 Or LUBA 54 (2007).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a zoning ordinance allows "roadside stands," that sell "agricultural produce," a land use hearings officer correctly applies the *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993) template and the county zoning ordinance by applying dictionary definitions of "agricultural" and "produce" to conclude that a roadside stand may not include an espresso cart. The hearings officer correctly concluded from those definitions that while coffee beans are agricultural produce, espresso coffee drinks are not. *Collver v. Lane County*, 54 Or LUBA 147 (2007).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A local government misconstrues its code when it finds that an ambiguity in the exhibits to an ordinance creates an inconsistency between the ordinance and the official zoning map. *Brown v. Lane County*, 54 Or LUBA 281 (2007).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. When a land development ordinance requires multi-stage approvals and imposes time limits for securing approvals and filing additional applications, but does not suspend the time limits if individual stage approval decisions are appealed, a local government misinterprets its land development ordinance by introducing the concept of "initial" and "final" approval decisions for each stage to extend the deadlines for filing subsequent applications and securing subsequent stage approvals. *Foland v. Jackson County*, 54 Or LUBA 287 (2007).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the text of a city's development code only requires that the city not provide certain services in the absence of an annexation agreement, the city's interpretation of its code to allow it to require an annexation agreement at the time of partition approval, while not required by the text of the development code, is not inconsistent with the text of the development code. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A city's interpretation of a development code provision to allow it to require execution of an annexation agreement at the time of partition, rather than waiting until the property is developed, is consistent with contextual development code provisions that require annexation agreements at the time of partition approval without regard to whether development is proposed at the time of partition approval. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. As part of the textual analysis under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), Oregon courts apply a grammatical rule or presumption that modifying words or phrases refer only to the "last antecedent," the last preceding word, phrase or clause, and not earlier words or phrases in the sentence, where no contrary intent appears. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The purpose statement to a land use regulation is both context for interpreting that regulation as well as an explicit statement of its purpose. LUBA will reverse a governing body's interpretation of the regulation to allow residential uses that are prohibited by and therefore inconsistent with the purpose statement. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the purpose of an overlay zone is to allow non-recreational uses only when they are related to or support recreational uses, under ORS 197.829(1)(b) LUBA will reverse a governing body's interpretation that the zone allows unrestricted non-recreational uses regardless of whether those uses are related to or support recreational uses. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A hearings officer does not err in determining that specific provisions governing property line adjustments of undersize lots in agricultural zones apply to an agriculturally zoned portion of a split-zoned parcel, rather than general provisions governing property line adjustments requiring that adjusted lots satisfy the minimum parcel size. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A code standard prohibiting a property line adjustment on agricultural land where the adjustment is used to qualify a lot or parcel for the siting of a dwelling does not preclude an adjustment that would effectively separate a split-zoned parcel to allow residential development on the non-agriculturally zoned portion of the parcel, where the adjustment will not qualify the agricultural portion of the parcel for a dwelling. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Some caution is warranted in determining the intended scope of a term based on dictionary definitions, given the descriptive and all-inclusive nature of modern reference dictionaries. In many cases, the text and context of the code term may indicate that the governing body did not intend the term to encompass all possible dictionary meanings. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A local government misconstrues its local code when it interprets the word "ownerships" to have different meanings in different parts of the code. *Brown v. Lane County*, 51 Or LUBA 689 (2006).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the text of an ordinance clearly demonstrates an intent not to rezone a particular area, but an attached map shows the area as rezoned, the text controls over the map. *Flying J. Inc. v. Marion County*, 49 Or LUBA 28 (2005).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a city's Master Plan Development District simply allows the uses that are permitted in certain other districts, the city erroneously interprets its code to allow those uses without the minimum lot size, minimum lot width, limit on building coverage, front or rear setback requirements or building

height or any other standards or regulations that are applied to those uses in the other zoning districts. Those limitations from the other zoning districts apply unless the city applies the Master Plan Development District provision that allows the city to apply alternative standards in certain circumstances. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Because ORS 215.130(11) does not unambiguously prohibit a county from requiring proof that a use was a lawful use when it came into existence more than 20 years ago or that it existed when the land use laws changed to prohibit the use, it is appropriate to consider legislative history of that statute. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The legislative history of ORS 215.130(11) makes clear that the statute operates to apply a 20-year proof limitation to any requirement of proof of existence as an element of continuity but it does not apply the 20-year limitation to any requirement of proof of existence, as an element of lawfulness at the time the use became nonconforming. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the text of a particular zoning district that allows permitted uses to be reviewed as conditional uses seems to call for a focus on the characteristics of the use itself, but the conditional use chapter of the zoning ordinance expressly provides that conditional uses may require special consideration due to unique site characteristics, the city does not err in interpreting the zoning district text to allow it to consider whether unique site characteristics justify treating the permitted use as a conditional use. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a local government approves a convention center, which is not listed as a permitted use in the applicable zone, but the use is expressly listed in another zone, the local government must address that "context" and explain how that context supports its conclusion that convention centers are allowed in the zone where they are not specifically listed. *O'Shea v. City of Bend*, 49 Or LUBA 498 (2005).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a regulation specifically authorizes a use in one zone and does not authorize that specific use in a second zone, a more general authorization of uses in the second zone should not be interpreted to include the more specifically authorized use in the first zone. However, that principle would not apply to bar finding a particular feedlot qualifies as a "farm use" rather than a "commercial activity * * * in conjunction with farm use," where the legislature's authorization of "commercial activities that are in conjunction with farm use" is no more specific than its authorization of "farm uses." *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107 (2004).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA will exercise its discretion under ORS 197.829(2) to interpret a comprehensive plan policy governing commercial zones to be inapplicable to a zone change to an industrial zone, notwithstanding that the proposed use is a commercial use, where the local government interpreted several similar plan policies to be inapplicable, and the context of the plan policy indicates that commercial uses in industrial zones are governed by industrial, not commercial, plan policies. *Staus v. City of*

Corvallis, 48 Or LUBA 254 (2004).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A county interpretation of its zoning ordinance to allow an existing manufactured dwelling to remain connected to the septic system that serves that existing dwelling, rather than to require the manufactured dwelling to be moved and connected to the septic system for the other dwelling on the property where the medical hardship is located is not inconsistent with the underlying purpose for medical hardship dwellings. In either case a second dwelling remains on the property for a specified period of time. *Burton v. Polk County*, 48 Or LUBA 440 (2005).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. In construing an initiative, a court attempts to discern the intent of the voters, based foremost on text and context of the initiative itself. While the chief petitioners may have intended that an initiative that preserves the city waterfront for a public park function as a mere straw poll on the future of the waterfront, the text and context of the initiative indicate that the voters intended to establish a binding policy effectively rezoning the city waterfront as a public park. The initiative is therefore a final, non-advisory decision for purposes of LUBA's jurisdiction. *Port of Hood River v. City of Hood River*, 47 Or LUBA 62 (2004).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. When viewed alone, the word "within" in a code provision that requires that dwellings must be within a template area to be counted is ambiguous, because it could mean the dwelling must be at least partially within or it could mean the dwelling must be entirely within. However, where a related provision specifies that "all or part of" a parcel must be within the template, the failure to include the "all or part of" modifier provides contextual support for interpreting the provision without the modifier as requiring that the entire dwelling must be within the template area. *Worman v. Multnomah County*, 47 Or LUBA 410 (2004).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA's assumption that an ambiguous code provision should be interpreted in one way in a prior LUBA appeal where the correctness of that interpretation was not at issue is of extremely limited precedential value in a subsequent appeal where the correctness of that interpretation is at issue. *Worman v. Multnomah County*, 47 Or LUBA 410 (2004).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the local code provides a list of factors to be considered in order to demonstrate compliance with a mandatory approval criterion, preceded by the phrase, "evaluation factors include," the local government must consider the listed factors, or explain why particular factors need not be considered. *Bauer v. City of Portland*, 47 Or LUBA 459 (2004).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. When a comprehensive plan has overlapping or conflicting policies, it is permissible for a local government to interpret them and apply them in a manner that balances those policies. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Arbitrary and

inconsistent interpretation of approval criteria in deciding applications for land use permits can provide a basis for reversal or remand; however where a city applies a plan policy to one kind of decision and does not apply it to another kind of decision, the differences in the two decisions can explain the different applications of the plan policy. *Citizens for Env. Resp. Dev. v. City of Beaverton*, 45 Or LUBA 378 (2003).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a city's interpretation that a broadcast radio tower may be allowed in a residential zoning district as a "private utility" and a "utility substation and related facilities" includes a number of erroneous interpretations of the city's zoning ordinance, but LUBA identifies a potentially sustainable interpretation of relevant zoning ordinance terms that would appear to permit approval of the radio tower, remand is nevertheless required where there are reasons why the city might not agree with LUBA's interpretation. *Citizens for Env. Resp. Dev. v. City of Beaverton*, 45 Or LUBA 378 (2003).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Generally, where a civil statute of limitation is changed to shorten the limitation period, the change is applied prospectively only. But where the statute is changed to lengthen the limitation period, the change applies both prospectively and retroactively. Applying that principle to ORS 215.417, forest template dwelling permits with a two-year duration that were issued before ORS 215.417 took effect, but which had not yet expired on the date ORS 215.417 took effect, must be honored for four years. *Butori v. Clatsop County*, 45 Or LUBA 553 (2003).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Although ORS 197.829(2) authorizes LUBA to interpret city zoning ordinances, where the city fails to do so and both petitioner and respondent present possible interpretations in their briefs that are plausible but both interpretations have problems, LUBA will remand the decision to the city so that it may address the interpretive issue in the first instance. *Renaissance Development v. City of Lake Oswego*, 45 Or LUBA 312 (2003).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. In considering whether a local government interpretation of a local provision is consistent with the express language of the provision under ORS 197.829(1), LUBA may consider the context of the provision. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A city's interpretation of comprehensive plan policies that apply to "residential development" as not applying to a proposed radio tower is not inconsistent with the language or apparent purpose of the policies and is therefore not reversible under ORS 197.829(1). *Citizens for Env. Resp. Dev. v. City of Beaverton*, 45 Or LUBA 378 (2003).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A prerequisite for application of the deferential standard of review under ORS 197.829(1) is, at a minimum, a written decision or document adopted by the governing body that contains an express or implicit interpretation of a local provision that is adequate for review. A city attorney's interpretation of a local provision is not entitled to deference under that standard, even assuming that the city council informally directed the city attorney to apply that interpretation in denying the challenged building

permits. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A zoning map that has a scale of one inch equals 800 feet is not of so gross a scale that it cannot be relied upon to locate a zoning boundary line on a 26-acre parcel. *DLCD v. City of Gold Beach*, 43 Or LUBA 319 (2002).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a local governing body interprets comprehensive plan provisions not to impose relevant approval criteria for a particular rezoning request it is entitled to great deference on review. However, where a local governing body simply declares that the provisions are not approval criteria without any explanation, the declaration expresses no reviewable interpretation and the declaration is not entitled to deference. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Rural fire service facilities in EFU zones under ORS 215.283(1)(w) need not be separately approved as utility facilities necessary for public service under 215.283(1)(d) or meet the "necessity test" that is applied to such utility facilities. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Nothing in the context of the term "kennel" as used in ORS 215.283(2)(m) demonstrates that the intended meaning of that term is narrower than the plain dictionary definition, which refers to establishments for the breeding and boarding of dogs. A proposal to breed and propagate dogs for sale is thus a "kennel" subject to county regulation and not a "farm use" allowed outright in an EFU zone. *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195 (1999).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where Metro has separate sources of statutory authority to adopt certain plans and to require that certain local planning actions be taken to conform to those plans, and a plan that was originally adopted pursuant to the broader statutory authority is amended in a way that makes it subject to the more limited statutory authority, the more limiting statute applies. That one statute may limit what would otherwise be permissible in that circumstance does not result in a statutory conflict. *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A statute requiring that certain actions required under implementing ordinances adopted "pursuant to a regional framework plan" be delayed until the regional framework plan is acknowledged by LCDC does not apply where the implementing ordinance is not adopted pursuant to a regional framework plan. *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Once Metro incorporates a functional plan into its regional framework plan, any subsequent amendments to the incorporated functional plan are subject to the limits imposed by ORS 268.390(5) on implementing ordinances adopted "[p]ursuant to a regional framework plan." *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA will reject a local government interpretation of a statute that would leave the universe of ordinances nominally regulated by the statute vacant. Such a construction fails to give effect to all subsections of the statute, contrary to ORS 174.010. *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. When a local zoning ordinance defines "Recreational Vehicle Camping Facilities" and explicitly permits such facilities in nine zones, but does not allow such facilities in a forest zone, such a facility is not properly allowed in the forest zones as a "campground." *Cotter v. Clackamas County*, 36 Or LUBA 172 (1999).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The rule of statutory construction favoring a particular provision over an inconsistent general provision is of limited help where the statutes governing street vacation decisions and land use decisions can both be viewed as defining particular kinds of city decisions. *Root v. City of Medford*, 35 Or LUBA 814 (1998).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. When viewed in context, ORS 271.134(4) and ORS 53.20 do not unambiguously grant the circuit court jurisdiction to review all city street vacation decisions. The context for ORS 271.134(4) and ORS 53.20 includes other statutes concerning appellate review of city decisions, such as ORS 197.825(1) and ORS 197.015(10)(a), which govern appellate review of land use decisions. *Root v. City of Medford*, 35 Or LUBA 814 (1998).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The appropriate way to give effect to statutes governing judicial review of city street vacation decisions and LUBA review of city land use decisions is to require that city street vacation decisions that are also land use decisions be reviewed by LUBA as land use decisions while requiring that city street vacation decisions that are not land use decisions be reviewed by circuit court. *Root v. City of Medford*, 35 Or LUBA 814 (1998).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a city code provision grants a city authority to prescribe the "manner" of submitting the "application and related information" but the city has not adopted substantive requirements to implement that authority, the city may not interpret the code provision to deny an application simply because it was signed by the applicant rather than the record title holder. *Doumani v. City of Eugene*, 35 Or LUBA 388 (1999).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Legislative history makes it clear that "needed housing" is not to be subjected to standards, conditions or procedures that involve subjective, value-laden analyses designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A code

requirement that a street connection need not be required if certain circumstances exist does not obligate the local government to expressly find that such circumstances do not exist before requiring the street connection. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998) (1998).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a local provision sets forth criteria in the disjunctive, but the sense and context of the provision compel application of each criterion, LUBA will affirm as reasonable and correct an interpretation by the local planning commission that the criteria must be satisfied *seriatim* rather than alternatively. *Recovery House VI v. City of Eugene*, 34 Or LUBA 486 (1998).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The statutory definition of "public road" at ORS 368.001(5) is not applicable to approval of a forest template dwelling required by ORS 215.750(5) to be located on a tract that abuts a "road." Interpretation of a local code requirement that such dwellings be located on a "public road" is controlled by local legislative intent rather than by statute. *Petersen v. Yamhill County*, 33 Or LUBA 584 (1997).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA uses the same analytical framework to interpret an agency rule that it uses to interpret a statute, first examining the text and context of the rule to discern the intent of the rule makers, turning to contextual history only if that intent is unclear. *DLCD v. Jackson County*, 33 Or LUBA 302 (1997).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA cannot employ the rules of statutory construction to interpret plan and code provisions even when it does so only as a means to establish a baseline from which to determine whether a local government interpretation is "clearly wrong" or "beyond a colorable defense." *Downtown Community Assoc. v. City of Portland*, 33 Or LUBA 140 (1997).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Provisions of a zoning ordinance should be interpreted in a manner which gives meaning to all parts of the ordinance. *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Under ORS 174.010, LUBA must give effect, if possible, to all provisions or particulars of a statute. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The inclusion of specific uses in an administrative rule tends to imply an intent to exclude related uses not mentioned. *J.C. Reeves Corp. v. Washington County*, 31 Or LUBA 115 (1996).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. After *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), the general rules of statutory construction are not dispositive in LUBA review of local government interpretations of their own comprehensive plans and land use regulations. Nevertheless, the rules are helpful in supporting a determination that a local government's interpretation is not clearly wrong. *Huntzicker v. Washington County*, 30 Or LUBA 397 (1996).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Labels "substantive," "procedural" and "remedial," used in characterizing amendments to statutes, are not an adequate substitute for an analysis of how a new statute should apply to existing rights. *Ramsay v. Linn County*, 30 Or LUBA 283 (1996).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Absent some clear indication to the contrary, legislative acts are not to be applied retroactively. *Ramsay v. Linn County*, 30 Or LUBA 283 (1996).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. When prospective application of a statute is required, the statute must be applied in a manner that does not affect legal rights and obligations arising out of past actions or occurrences. *Ramsay v. Linn County*, 30 Or LUBA 283 (1996).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where two separate ordinance provisions arguably establish two different deadlines for the filing of a local appeal, the more general ordinance provision is controlled by the more specific provision. *Sparks v. City of Bandon*, 30 Or LUBA 69 (1995).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. In the absence of some specific indication of a contrary intent, terms should be read consistently throughout a local government's plan and implementing development code. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46 (1995).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. ORS 215.236(2) requires that farm assessment disqualifications be filed within 120 days of approval of a nonfarm dwelling permit only when the subject property is assessed for farm use at the time of approval. A county's decision to modify a condition of approval requiring disqualification from farm assessment within 120 days after approval does not violate ORS 215.236(2) when the subject property was not assessed for farm use at the time of approval. *Wakeman v. Jackson County*, 29 Or LUBA 521 (1995).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the city's zoning code allows private households in the commercial-service/professional zone so long as the private households meet the development standards of a multi-family zone, LUBA will affirm the city's interpretation that private households includes a multiplex dwelling. *Stevens v. City of Medford*, 29 Or LUBA 422 (1995).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the city's zoning code provides that some permitted uses are subject to special use restrictions, LUBA will affirm the city's interpretation that the existence of special use restrictions does not convert a permitted use into an unpermitted use. *Stevens v. City of Medford*, 29 Or LUBA 422 (1995).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. When the language of a state regulation is clear, neither LUBA nor a local government may alter its meaning through interpretation. *Testa v. Clackamas County*, 29 Or LUBA 383 (1995).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA may not, through interpretation, alter the express meaning of a state regulation, even when the regulation has unanticipated consequences when applied locally in conjunction with an acknowledged zoning ordinance. *Testa v. Clackamas County*, 29 Or LUBA 383 (1995).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. For ORS 197.829(4) to apply to LUBA's review of a governing body's interpretation of its own code, the connection between the local code provision and the statewide planning goal it is arguably designed to implement must be a close one. ORS 197.829(4) was not adopted to allow LUBA to reconsider the propriety of the original acknowledgment of comprehensive plans and land use regulations. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where an EFU zone includes two provisions allowing churches and schools, and one of those provisions includes the OAR 660-33-130(3) restriction against approving churches and schools within 3 miles of an urban growth boundary but the other provision does not, LUBA will not assume the county will apply the provision that lacks the 3-mile limitation as though it includes the 3-mile limitation. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. If a county implements ORS 215.418(1) by providing in its code that it will notify DSL of "developments" in wetlands identified on the State-wide Wetlands Inventory, it must interpret "developments" consistently with the types of development applications and approvals for which such notice is required by ORS 215.418(1)(a) to (e). *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Neither ORS 222.173 nor ORS 222.115 purports to preempt local government use of consents to annexation in circumstances other than those identified in ORS 222.173(1). Statements by individual legislators during legislative proceedings leading to adoption of ORS 222.115 expressing general hostility towards involuntary annexation do not establish a legislative intent to preclude city or county legislation concerning consents to annexation. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. After *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), it is not clear whether general rules of statutory construction are relevant in LUBA review of local government interpretations of their own comprehensive plans and land use regulations. Even if they are, general rules of statutory construction are not absolute. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. That a proposed paintball game park could be allowed as a "private recreation use" in a commercial zone does not mean it cannot be allowed as a "park" in an EFU zone. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A local government's interpretation of "park," as used in a provision of its zoning ordinance, need not be consistent with a definition of "park areas" in a separate ordinance establishing administrative regulations for the use of parks owned or controlled by the local government. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. That a local government may have, in the past, erroneously interpreted its ordinances as not requiring a public hearing, does not require that the local government perpetuate that error. *McInnis v. City of Portland*, 25 Or LUBA 376 (1993).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a "generally unsuitable" approval standard for nonforest dwellings established by an LCDC enforcement order provides that land with certain soil types is presumed *not* to be "generally unsuitable," unless findings explain why "other factors" make the land generally unsuitable, it is reasonable to interpret such "other factors" to be limited to the physical characteristics listed in the first part of the approval standard. *DLCD v. Klamath County*, 25 Or LUBA 355 (1993).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. All provisions of the act that created ORS 215.301 must be related to uses allowed in EFU zones. Therefore, ORS 215.301 applies only to asphalt plants sited in EFU zones, not to an application to site an asphalt plant in an industrial zone. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The rules applicable to the severability of statutes are also applicable to local enactments. Thus, an unconstitutional ordinance provision will be severed from the remainder unless it is apparent that the local legislative body would not have enacted the regulation without the disputed provision, or the remaining parts of the regulation would be incomplete and incapable of being executed in accordance with the legislative intent. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Local ordinances governing when a local decision becomes final are effective only to the extent they do not conflict with state statutes. *A Storage Place v. City of Tualatin*, 24 Or LUBA 637 (1993).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a code provision is capable of more than one rational interpretation, and the code provision was adopted to implement an LCDC administrative rule, consideration of the context and purpose of the administrative rule is relevant in determining the meaning of the code provision. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where there is no definition of the term "golf course" in the local code, the plain and ordinary meaning of that term as it is defined in the dictionary applies, and a driving range is not the equivalent of a golf course. *DLCD v. Columbia County*, 24 Or LUBA 338 (1992).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a local code identifies RV camping facilities as one type of service recreational facility, and certain zones specifically list RV camping facilities as a conditional use, whereas other zones list only service recreational facilities in general, the other zones simply allow a broader range of service recreational facilities, including RV camping facilities. *Tylka v. Clackamas County*, 24 Or LUBA 296 (1992).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a term used in a local enactment is not defined in that or other local enactments, the term must be construed in accordance with its plain and ordinary meaning, absent some evidence of a contrary local legislative intent. *Thatcher v. Clackamas County*, 24 Or LUBA 207 (1992).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA will refer to legislative history only where the terms of a disputed statute are ambiguous. *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The existence of overlapping prohibitions in a local code does not provide a sufficient basis for creating an exception to one of the overlapping prohibitions that has no basis in the language of the code. *Goose Hollow Foothills League v. City of Portland*, 24 Or LUBA 69 (1992).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. A county comprehensive plan map with a scale of 1 inch to 9 miles is ambiguous and, therefore, the county must interpret and apply its plan map to specific properties in the first instance. *Larson v. Wallowa County*, 23 Or LUBA 527 (1992).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where there is neither a local code nor a statutory definition of the term "perennial," the commonly understood meaning of that term is applied. Under the commonly understood meaning of "perennial," a Christmas tree is a perennial under ORS 215.213(2)(b)(A). *Harwood v. Lane County*, 23 Or LUBA 191 (1992).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the local code employs the terms "necessary for and accessory to," as a standard for farm dwellings in a mixed farm/forest zone, and where that standard appears to have been adopted to comply with Goal 4, it is appropriate to interpret the ordinance standard in a manner consistent with the interpretation of those terms in the context of Goal 4. *Tipperman v. Union County*, 22 Or LUBA 775 (1992).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a code separately lists "boarding of horses for profit" and "commercial activities in conjunction with farm use" as distinct conditional uses in certain exclusive farm use zones that another zone lists "commercial activities in conjunction with farm use" but does not list "boarding of horses for profit" as a conditional use, it is reasonable to infer that the latter use was not intended to be allowed in the other zone. *Moody v. Deschutes County*, 22 Or LUBA 567 (1992).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. In the absence of a local or other regulation making provisions of ORS chapter 468, pertaining to pollution control, applicable to an application for a wrecking certificate as independent approval standards, that statute does not govern local approval of a wrecking certificate. *Bradbury v. City of Independence*, 22 Or LUBA 398 (1991).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The correct way to resolve a conflict between code provisions that (1) specifically allow approval of golf courses in an EFU zone as a conditional use, but (2) establish approval standards for golf courses which make it impossible to ever approve a golf course in the exclusive farm use zone, is to conclude that the approval standards making approval an impossibility were not intended to govern approval of golf courses. *Waker Associates, Inc. v. Clackamas County*, 22 Or LUBA 233 (1991).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where there appear to be conflicting code provisions such that a code approval criterion has the effect of nullifying another code provision which specifically allows a use subject to that approval criterion, the local government should first consider whether the code standard is sufficiently ambiguous that it can be interpreted in a manner that avoids the conflict. If the code can be interpreted to avoid the conflict, that interpretation should be adopted. *Waker Associates, Inc. v. Clackamas County*, 22 Or LUBA 233 (1991).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where language used in a local ordinance corresponds to language used in a state statute or statewide planning goal, it is appropriate to interpret those ordinance provisions consistently with available authority for interpreting the relevant statute or goals. *Tice v. Josephine County*, 21 Or LUBA 371 (1991).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Absent some expression of legislative intent to the contrary, the legislature is presumed to have intended that the same term used in different sections of the exclusive farm use statute have the same meaning in both sections. *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the legislature intended to allow facilities for intensive training of dogs in the exclusive farm use zone, it specifically used the term "training" in addition to the term "kennel." ORS 215.213(1)(L). *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Because the statute allowing dog kennels in exclusive farm use zones do not define the term "dog kennel," that term must be given its plain and ordinary meaning, which includes boarding and breeding facilities but does not include training facilities. *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Provisions of a local zoning ordinance should be interpreted in a manner which gives meaning to all parts of the zoning ordinance. *19th Street Project v. City of the Dalles*, 20 Or LUBA 440 (1991).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a zoning

ordinance specifically lists a use as allowed in one zoning district and fails to specifically list that use in a second zoning district, but includes in the list of permitted uses in the second zoning district a more open ended category of uses, there is an "inference" that the use specifically allowed in the first zoning district is not also allowed in the second zoning district under the open ended use category. *Sarti v. City of Lake Oswego*, 20 Or LUBA 387 (1991).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA is required to determine whether a local government's interpretation of its code is correct and, in doing so, construes the provisions of the code as a whole, giving meaning to each part. *Kittleson v. Lane County*, 20 Or LUBA 286 (1990).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Because ORS 197.015(10)(b)(B) is a subsection of the statute which creates exceptions to LUBA's jurisdiction, LUBA will assume the legislature intended ORS 197.015(10)(b)(B) to be a workable exception, and will not interpret ORS 197.015(10)(b)(B) to require that LUBA conduct a substantive review of urban partition and subdivision decisions to determine whether LUBA has jurisdiction to conduct such a review in the first place. *Southwood Homeowners Assoc. v. City of Philomath*, 20 Or LUBA 279 (1990).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. In so far as possible, LUBA construes relevant local government comprehensive plan and code provisions together, to give meaning to both. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the language employed in the purpose statement of a code PUD chapter evidences only what the local government intends the consequences of application of the specific provisions of that PUD chapter to be, the purpose applications. *White v. City of Oregon City*, 20 Or LUBA 470 (1990).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a comprehensive plan provides that plan "goals, policies, strategies and standards" are "legally binding to land use decisions" when expressed in mandatory language, relevant plan agricultural goals, policies, strategies and standards which are expressed in mandatory language are applicable to a request for conditional use approval for a golf course in the county's exclusive farm use zone. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. After-the-fact statements by county commissioners and the planning director concerning the intended applicability of plan provisions are not competent legislative history. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a code provision is specifically amended to provide that the amended code provision does not apply to "minor land divisions," LUBA will not apply that code provision to "minor land divisions" even though such divisions may also satisfy the unamended definitions of subdivision or partition, to which the amended code provision continues to apply. *Nicolai v. City of Portland*, 19 Or LUBA 142 (1990).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Absent a clear expression of intent to the contrary, when a local government adopts a requirement in terms substantially identical to a statutory or Statewide Planning Goal provision, the local code provision must be interpreted as the mimicked statute or goal is interpreted. *O'Brien v. City of West Linn*, 18 Or LUBA 665 (1990).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where an alleged ambiguity in an ordinance definition is not apparent, and the parties do not demonstrate the existence of an ambiguity, LUBA will conclude the ordinance definition is not ambiguous. *Wagner v. City of Yachats*, 17 Or LUBA 1322 (1989).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the local code draws a distinction between private schools in general and narrowly defines "commercial schools," the term "commercial schools" does not apply to schools offering the broader range of courses typically offered at a community college. *Highway 213 Coalition v. Clackamas County*, 17 Or LUBA 1284 (1989).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where the local code allows public and private schools as a conditional use, and the code envisions both private schools that are similar to public schools and private schools that are not similar to public schools, the term "schools" is not limited to those with strictly traditional curricula. *Highway 213 Coalition v. Clackamas County*, 17 Or LUBA 1284 (1989).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The rules that govern statutory construction also apply to the construction of local government ordinances. *Mental Health Division v. Lake County*, 17 Or LUBA 1165 (1989).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where a county code lists "other uses as authorized by ORS 215.213" as conditional uses in an EFU zone, but does not express an intent to adopt future amendments to ORS 215.213, LUBA will interpret the code to authorize as conditional uses only those uses listed in ORS 215.213 on the date that provision of the county code was adopted. *Mental Health Division v. Lake County*, 17 Or LUBA 1165 (1989).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. LUBA will interpret ordinance provisions together to give meaning to each part, and will not construe and ordinance provision in a manner which would render another provision meaningless. *League of Women Voters v. Metro Service Dist.*, 17 Or LUBA 949 (1989).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. The use of the words "may" and "shall" in ORS chapter 215 indicate that the legislature did not intend to require that counties adopting EFU zones incorporate ORS 215.213(1) and (2) verbatim. *Kola Tepee, Inc. v. Marion County*, 17 Or LUBA 910 (1989).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Statements made

20 years after a statute was enacted are of no value in determining the original legislative intent. *Kola Tepee, Inc. v. Marion County*, 17 Or LUBA 910 (1989).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Provisions of local government codes should be interpreted together, in a manner which gives meaning to all parts. *Kenton Neighborhood Assoc. v. City of Portland*, 17 Or LUBA 784 (1989).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Post adoption interpretation of a code provision is not competent legislative history of the original intent in adopting the code provision. *Hay v. City of Cannon Beach*, 17 Or LUBA 322 (1988).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Rules of statutory construction apply to construction of municipal ordinances. *Hay v. City of Cannon Beach*, 17 Or LUBA 322 (1988).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where code language is not ambiguous, it is necessary to resort to legislative history to determine legislative intent. *Hay v. City of Cannon Beach*, 17 Or LUBA 322 (1988).

1.1.2 Administrative Law – Interpretation of Law – Rules of Construction. Where two county ordinance provisions control conditional uses and neither indicates that it is not applicable in a particular zone or is the *only* provision applicable to conditional uses in a particular zone, LUBA will conclude that both conditional use approval sections are applicable in that zone. *Rodgers v. Douglas County*, 17 Or LUBA 122 (1988).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. To the extent that LUBA's holding in *Perry v. Yamhill County*, 26 Or LUBA 73, 80, *aff'd*, 125 Or App 588, 865 P2d 1344 (1993), that the reasoning in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), extends to a local government's interpretation of a prior land use decision, was correct, it was superseded by ORS 197.829(1), which requires LUBA to affirm "a local government's interpretation of its comprehensive plan and land use regulations" but does not require LUBA to affirm a local government's interpretation of a prior land use decision, findings adopted in support thereof, or conditions of approval attached thereto, which LUBA reviews under ORS 197.835(9)(a)(D) to determine whether the local government "[i]mproperly construed the applicable law." *M & T Partners, Inc. v. City of Salem*, 80 Or LUBA 221 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a design guideline for a historic district in a city requires that exterior alterations and additions to historic resources "be designed to be compatible primarily with the original resource, secondarily with adjacent properties, and finally * * * with the rest of the District," where the city council interprets the term "compatible" as not requiring uniformity, and where the petitioner has not demonstrated that that interpretation is inconsistent with the express language, purpose, or underlying policy that provides the basis for that design guideline, LUBA will uphold the city council's conclusion that two proposed new buildings meet the design guideline because they are similar to a historic resource on the same property, to adjacent properties, and to the historic district with respect to some design elements, even where they are dissimilar to adjacent properties with respect to other design elements. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county code provision allows "[p]arks, playgrounds, [and] community centers" in the Rural Residential (RR) zone, where the county code does not include a definition of "park," and where the board of county commissioners county relies upon the dictionary definition of "park" and the types of park uses recognized nationally and found in a nearby city park and in other county parks to conclude that the provision allows (1) year-round use of a portion of RR-zoned property for day camps, retreats, and environmental education programming for a maximum of 100 persons and a weeklong overnight camp serving youth, and (2) the use of another portion of the property "for small social gatherings of its members and guests of up to 500 persons in size for picnics, weddings, and memorials during the months of April through October weather permitting," LUBA will affirm the board of county commissioners' interpretation of the provision, even if a different interpretation might be better. *Klein v. Lane County*, 80 Or LUBA 287 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county code provision allows "campgrounds" in the Rural Residential (RR) zone but not "youth camps," and where the board of county commissioners relies on the definition of "youth camp" elsewhere in the code to conclude that a "youth camp" must be a permanent use, LUBA will affirm the board of county commissioners' interpretation of the provision to allow a weeklong youth overnight camp in the RR zone where the petitioners do not identify any provision of any statute or administrative rule with which the county's interpretation is inconsistent or establish that the county's interpretation is inconsistent with the express language of the county code or the underlying purpose of the RR zone. *Klein v. Lane County*, 80 Or LUBA

287 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the circumstances under which a local code provision applies are not clearly articulated in that provision or specified in any other local code provision, LUBA cannot say that an argument that the governing body misinterpreted that provision is one that "no reasonable lawyer would conclude * * * possessed legal merit" for purposes of awarding attorney fees under ORS 197.830(15)(b), even where the governing body's interpretation was required to be affirmed under ORS 197.829(1). *Vannatta v. City of St. Helens*, 80 Or LUBA 1018 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A petitioner is not required to anticipate erroneous findings or interpretations in a final decision in order to challenge them at LUBA. Where petitioner raised an issue before the city council regarding fees and argued that the local appeal was invalid because of an allegedly invalid fee waiver decision, petitioner could not have anticipated the city's decision along with its attendant findings and interpretations, until the city issued its final decision. Accordingly, petitioner did not have the opportunity to raise specific challenges to the city's decision regarding the fee waiver during the local proceeding and therefore may raise them for the first time on appeal to LUBA. *Riverview Abbey Mausoleum Company v. City of Portland*, 79 Or LUBA 38 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city's interpretation of its former version of a city code requirement that required that an appeal request include either the appeal fee or a fee waiver that had been approved by the planning director prior to the appeal deadline, and LUBA affirmed the city's interpretation, but the city code has since been amended and the city's code no longer requires a fee waiver be approved prior to the appeal deadline, and instead allows a local appellant to submit a fee waiver request and appeal request together, the city is not bound by its prior code, nor its interpretation of its prior code, and prior LUBA case law applying prior city code is no longer controlling. *Riverview Abbey Mausoleum Company v. City of Portland*, 79 Or LUBA 38 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Whether emergency access to the subject property is within the scope of an easement requires interpretation of the easement and is a matter of real estate law involving, among other things, a determination of the intent of the parties to the easement. Land use review bodies such as the city council are not particularly competent bodies to render interpretations of ambiguous terms in easements or deeds. Generally, a final and authoritative determination regarding the intent and scope of deeds, easements and similar real estate documents can be obtained only in circuit court, based on application of real estate law. *McNichols v. City of Canby*, 79 Or LUBA 139 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where an issue arises regarding compliance with an approval criterion that can be resolved only by interpretation of the ambiguous terms of an easement, the most problematic option for a local land use review body is to rely, without more, on its own interpretation of the ambiguous terms of an easement to determine compliance with the approval criterion. A less problematic option would be to impose conditions, at least as an alternative, intended to ensure

that the legal uncertainty is resolved prior to final development approvals. The least problematic option is for the local government to interpret the terms of its approval criterion, if it can, to the effect that compliance can be determined regardless of how the ambiguous terms of the easement are interpreted or whether the dispute over the terms of the easement is resolved. *McNichols v. City of Canby,* 79 Or LUBA 139 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city's minimum lot size requirements are based, in part, upon a code provision which requires a measurement of a lot's "slope," and the city interprets the term "slope" to be determined using post-development grades, rather than pre-development grades, LUBA will uphold the city's interpretation as "plausible" subject to *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), where the city found that "slope" is an ambiguous term, and the city interprets the term in a manner consistent with its interpretation of the text and in context of historical application of the code provision. An ambiguous code provision term is one with more than one possible construction of the term, and the local government interprets such a term in a "plausible" manner when read consistently with the express language of the code, as read in context. *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a code provision states that the "provisions of this code shall be interpreted as minimum requirements. When this code imposes a greater restriction than is required by other provisions of law * * * the provisions of this code shall control," and petitioners argue that the city erred in applying the least restrictive, rather than the most restrictive interpretation of the city's code requirement that minimum lot size be determined by "slope," by allowing project applicants to measure slope after grading, rather than before grading, to maximize their potential minimum developable lot size, but petitioners do not identify what other provision of law imposes a lesser restriction as regards to minimum lot size that the city should have applied, petitioners have not provided a basis for reversal or remand. *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Even if a local government's interpretation of its code were less plausible than petitioners' preferred interpretation, the "existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible' under the *Siporen*[*v. City of Medford*, 349 Or 247, 243 P3d 776 (2010),] standard." *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012). *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the city code defines "net density" to mean "the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development," and excludes public and private streets, the city did not err in including in the net density acreage calculation parking drives designed primarily to provide vehicular circulation to parking spaces in the apartment complex for resident and visitor parking and a leasing office and maintenance building. *Hulme v. City of Eugene,* 79 Or LUBA 218 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. Where a cross-petitioner seeks a remedy not available to it by statute, it is an obstacle to LUBA's review of the cross-assignment of error. LUBA lacks authority to affirm in part, and reverse in part a local government's approval of cross-petitioner's project application. ORS 197.835(1). Even assuming that the city erred by applying Willamette Greenway standards to cross-petitioner's housing project application, because they are not "clear and objective," the city's decision approving the development could not be reversed because it is not "prohibited as a matter of law." If LUBA agreed with cross-petitioners, the correct disposition would be remand, except that remand was not requested and would have no effect on the city's decision approving the application. In such a situation, LUBA will consider the request a contingent cross-assignment of error. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Goal 15 guidelines and county code requirements that require to "the greatest possible degree, necessary and adequate public access will be provided along the Willamette River by appropriate legal means," can be met where the city finds that current public access along the river provided by a public riverfront path is adequate, and the city does not err in construing the provision as requiring access only "along" the river instead of "to" the river. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code provision prohibits the local government from approving an application for development if the property is "in violation of applicable land use regulations," a local governing body's interpretation that a decision that (1) determines only that existing development requires land use approvals, or (2) denies an application to approve existing development does not constitute a determination of a "violation" is not inconsistent with the express language, purpose, or policy of the code provision and is therefore entitled to deference under ORS 197.829(1)(a) to (c). *Bishop v. Deschutes County*, 79 Or LUBA 380 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code provision prohibits a "[p]layground, recreation facility or community center owned and operated by a government agency or nonprofit community organization," a local governing body does not misconstrue the provision by interpreting the phrase "owned and operated by a government agency or nonprofit community organization" as applying to each antecedent rather than just to the last antecedent, community centers, and therefore as permitting a private recreation facility in the zone, where (1) the provision's language implements state law, which is concerned only with public facilities, (2) the code sets out a separate use category for "recreation-oriented facility," and (3) the local government has historically viewed the provision to encompass only public facilities. *Bishop v. Deschutes County*, 79 Or LUBA 380 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the county approves an amendment to a planned development approval for a resort, golf course and aerial challenge course, and petitioner argues the county improperly construed the applicable provisions of the county's code, but petitioner has not ultimately challenged the board of county commissioners' interpretation, or otherwise explained why LUBA is not required to affirm that interpretation under ORS 197.829(1), petitioner has provided no basis

for reversal or remand. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where petitioner argues the county committed a procedural error that prejudiced his substantial rights when the board of county commissioners failed to consider a written statement that petitioner submitted to the board of commissioners at the hearing, but petitioner does not establish that the board of county commissioners actually failed to consider petitioner's written statement, and petitioner failed to object to the alleged procedural error below, petitioner has not established that the county committed a procedural error or violated an applicable legal standard. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the county approved a proposed variance to the 20-acre minimum lot size for two one-acre parcels, pursuant to a county code provision that provides that the county planning director may approve a variance for a proposed project if the city does not object to the variance, LUBA will reverse the county's decision as "prohibited as a matter of law" pursuant to OAR 661-010-0071(c) where the county approved the variance as "consistent with the * * * city's comprehensive plan," but the city objected to the proposed variance because of the proposal's inconsistency with the city's comprehensive plan. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will reject a county's interpretation of its code—that a code provision which sets forth approval criteria regarding an application for a variance to the minimum lot size requirements within the county's urban growth area may not apply to the county's decision because it only applies to decisions made by the county's planning director but not to decisions made by the planning commission or board of county commissioners—that was made for the first time in its response brief, because that interpretation is not reflected in the decision and is therefore not an interpretation by the local government. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer does not misconstrue a development code requirement that a project applicant must demonstrate that environmental impacts have been "minimized to the extent practicable," in finding that the project applicant is not required to propose a smaller sized dwelling. *McAndrew v. Washington County*, 78 Or LUBA 21 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When the county is entitled to deference under ORS 197.829(1), the decision can be reversed only if the interpretation is inconsistent with the express language, purpose or policy underlying the relevant code language. Under a non-deferential standard of review petitioner must demonstrate that the commissioners' interpretation is reversible. *Oregon Coast Alliance v. Curry County*, 78 Or LUBA 81 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Petitioners did not demonstrate that the county hearings officer erred where local

county standards apply to development in "areas designated as floodways [as found on Federal Emergency Management Agency (FEMA) maps] or by methods described" elsewhere in the code, and the county hearings officer determined that because the development was not located within the "floodway," those standards did not apply. This is so, even where petitioners argue the FEMA maps are inaccurate and another section of code authorizes the county floodplain administrator to determine where the floodway is currently located based on "actual field conditions," but the county administrator has chosen not to exercise the authority granted in that section. *Meyer v. Jackson County*, 78 Or LUBA 150 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the county hearings officer agreed that the proposed project involved "the alteration of a watercourse" and that therefore standards applied which required the project applicant to show that the development "will not diminish the carrying capacity of a watercourse" by submitting "certification by an Oregon registered professional engineer," that in the engineer's opinion the watercourse "will not be diminished," the applicant has met those requirements by submitting the certification by a licensed engineer, even though another section of the county's code requires the applicant to "submit technical data" and a "Conditional Letter of Map Revision" from FEMA "when an alteration of a watercourse results in the expansion, relocation or elimination of the special flood hazard area [SFHA]" because the engineer certified that the project has not resulted in the expansion, relocation or elimination of the SFHA. *Meyer v. Jackson County*, 78 Or LUBA 150 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When comprehensive plan policies are not mandatory approval standards for a land use application, but the application must be evaluated for consistency with applicable plan policies, the evaluation may require some weighing and balancing of competing policy directions embodied in the applicable plan provisions. The local government's evaluation, weighing and balancing of competing interests as well as ambiguous comprehensive plan provisions are entitled to a deferential standard of review under ORS 197.829(1)(a)–(c) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 245 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Although the county concedes it erred in denying a plan amendment and zone change application based on the belief that the subject property was, at the time the county made its decision, within a designated urban reserve area, when the LCDC's urban reserve designation regarding the subject property had not actually become final at the time in question, LUBA will not remand the decision if the county's decision identifies at least one valid basis for denial that is affirmed on appeal. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county's comprehensive plan policy provides that "areas" may be designated rural commercial when the areas (1) have a "historical commitment" to commercial uses, or (2) the "areas" are "located within an Unincorporated Community" and have "direct access to a road of at least collector classification," petitioner has not demonstrated that the county commissioners' findings regarding the meaning of "area" are inadequate or that the county's

reliance on a previous interpretation as authority for interpreting the term "areas" as used in rezoning criteria to refer only to the property being considered for rezoning, and not also to include the surrounding area, was in error where petitioner cites to no contextual differences suggesting that the term "areas" should be interpreted differently than the same term used in similar rezoning standards, or authority suggesting the county has an obligation to adopt specific findings regarding the parties' alternative interpretations. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will uphold a county's interpretation of its own comprehensive plan policy regarding when a property may be designated rural commercial where the county evaluated the historic uses of the subject property and concluded that those uses did not demonstrate a "historical commitment to commercial uses," after concluding that (1) temporary commercial uses, (2) incidental or accessory commercial uses to permitted residential or farm uses on the property, and (3) the current unlawful commercial uses on the property were not sufficient to demonstrate "historical commitment" of the property to commercial use, where the county chose to focus on "commitment" which the county understood to require an inquiry into the nature of the historic uses on the property and a determination of whether commercial uses have constrained the scope of the uses on the property such that going forward only commercial uses are feasible, rather than defining commitment in terms of years of commercial use. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where petitioner argues that the city erred by failing to apply a national historic trail master plan and national historic trail district guidelines to applicant's proposed project, presenting evidence that the city "effectively" adopted the master plan by "endorsing" it during planning commission meetings over the years, the city's "endorsement" does not amount to "adoption" of the plan and guidelines, nor does "incorporation by reference" transform an "ancillary" document into mandatory approval criteria. *Nicita v. City of Oregon City*, 78 Or LUBA 463 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's code interpretation of a county zoning ordinance that provides that a permit extension may be granted if the "approval criteria for the original decision found in a state goal, policy, statute or administrative rule, the Comprehensive Plan or this Ordinance have not changed," and the county board of commissioners interprets "have not changed" to mean an administrative or legislative amendment to the administratively enacted or codified law described in the same provision, and not include decisional law not that is not administratively enacted or codified, as long as such interpretation is "plausible." *Hood River Valley Residents Comm. v. Hood River County*, 78 Or LUBA 478 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a LUBA decision merely "ascertain[ed] and declare[d]" what the laws at issue provided from the time of their enactment pursuant to ORS 174.010, such interpretative exercise cannot constitute a "change in the law." *Hood River Valley Residents Comm. v. Hood River County*, 78 Or LUBA 478 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer's interpretation is inadequate for review before LUBA where the hearings officer finds that that a proposed bed and breakfast inn designed for occupancy by an employee caretaker and up to eight non-resident guests qualifies as a "bed and breakfast inn," without explaining how a caretaker occupancy is consistent with the county code which defines a bed and breakfast inn as an "owner-occupied" "single-family dwelling unit." *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city governing body's code interpretation where a prohibition on adjustment "[t]o allow an increase in density in the [low density residential] RL zone" does not specify what denominator should be used to determine whether a proposed adjustment increases the density in the RL zone, or explain how "density in the RL zone" is measured, and the city used as the denominator the gross acreage of a subdivision as a whole, rather than the acreage of individual properties. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The city's comprehensive plan housing goal, Goal 10, and its policies and implementing measures, provide further contextual support for the city's interpretation of its code regarding a prohibition on lot size adjustment "[t]o allow an increase in density in the [low density residential] RL zone" by using as the denominator the gross acreage of a subdivision as a whole, rather than the acreage of individual properties. One of the Goal 10 housing goals is to "[p]romote the efficient use of vacant land by encouraging infill development which is sensitive to existing neighborhoods, and by encouraging new development which achieves the density allowed by the comprehensive plan." The city's interpretation is consistent with Goal 10 and the policies and implementing measures because it interprets "density" and "acre" to allow new infill development of vacant land to achieve a density that is allowed by the comprehensive plan. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where petitioner argues the city governing body's finding regarding the applicability of a zoning ordinance was erroneous, and the city concedes the finding is erroneous, but when the error is not critical to the city council's interpretation or ultimate conclusions, the error does not provide a basis for reversal or remand. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council's interpretation of a comprehensive plan policy requiring that city parks be protected against incompatible uses, to mean that city parks will be protected against approval of incompatible uses on adjoining lands, not that the city is also precluded from rezoning city parks to allow non-park uses of park lands, where the city council's narrower interpretation is not inconsistent with the express language, purpose and policy underlying the plan policy. *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. That county staff have in the past approved recreational vehicles as permanent residential dwellings does not provide a basis to interpret the county code to allow recreational vehicles to be used as permanent residential dwellings, where the county code definition of "recreational vehicle" prohibits their use as permanent residential dwellings. *Oregon Coast Alliance v. Tillamook County*, 77 Or LUBA 192 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The question under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010), is not whether petitioner's interpretation that a "street alignment and connections standard" and a "street connectivity standard" can be met by street extensions that terminate in a cul-de-sac is plausible. The question under *Siporen* is whether the city council's contrary interpretation that the standards require street extensions that connect with other streets on both ends is plausible, and the city council's interpretation is certainly plausible. *Martin v. City of Tigard*, 77 Or LUBA 288 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A decision that adopts a different position regarding *how* a street connectivity standard applies in a decision following a LUBA remand from the position adopted in the initial decision is not inconsistent with the holding in *Holland v. Cannon Beach*, 154 Or App 450, 962 P2d 701, *rev den*, 328 Or 115 (1998). In *Holland*, the Court of Appeals held a city erred by concluding in its initial decision that a slope and density standard had been repealed and therefore did not apply to a land division, and when its decision to deny the land division was remanded by LUBA, took the opposite position and applied the slope and density standard to deny the land division following remand. The change of position in *Holland* was a change of position in *whether* the standard applied, which is different from a change of position in *how* a standard applied. *Martin v. City of Tigard*, 77 Or LUBA 288 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city commission's interpretation of its code to permit the city to exercise its property rights under ORS 197.772(1) to refuse to consent to historic landmark designation separately from the city's grant of authority to the historic review board to consider and approve applications for historic landmark designations is plausible, and therefore must be affirmed under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010). Therefore, the historic review board must terminate consideration of a neighborhood association's application to designate city-owned property as a historic landmark when the city manager refuses to consent to the proposed historic landmark designation. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city commission's interpretation of a city manager's general authority to exercise "supervision over all city property" to be broad enough to include authority for the city manager to refuse to consent to a proposed historic landmark designation for city-owned property is not reversible under ORS 197.835(9)(a)(D) ("[i]mproperly construed the applicable law"). *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. The ORS 197.772(2) right to refuse to consent to historic designation of property, which is given to "property owners," is not limited to owners of private property. A city may refuse to consent to historic designation of city-owned property, where a neighborhood organization files an application to designate that city-owned property as an historic landmark. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local governing body commits no error in requesting that a prevailing party prepare written findings for it to adopt. And the governing body commits no error in adopting written findings that deviate from statements made at the final evidentiary hearing, and it is those written findings and not the oral statements that are subject to LUBA review on the merits. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Findings of fact and law are the decision; they are not evidence. A local governing body commits no error in adopting new findings following a LUBA remand for inadequate findings, without reopening the evidentiary record. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government does not misinterpret the term "substation" by interpreting it to be an example of the use category "utilities" that is broad enough to include a wireless transmission tower. And it does not matter that the wireless transmission tower is a cell tower and that there were no cell towers in 1984 when the legislation defining substation and utilities was adopted. There were radio transmission and communication towers in 1984, which are similar to cell towers, and it is not unusual for new uses to come into existence and fall into existing broad use categories. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local governing body's conclusion—that the general category of utility "[d]istribution plants and substations" adopted in 1984 is broad enough to include a wireless transmission tower—is not inconsistent with contemporary and other dictionary definitions of "distribution," "plant" and "substation." *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local governing body does not err by refusing to view the term "distribution plants and substations" as a technical term or term of art. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When a local government adopts a new rule of interpretation it is not limited to applying that new rule of interpretation to subsequently enacted legislation. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where petitioners take the position that historic review and site plan review

approval standards are so incompatible that site plan review entirely displaces historic review, but the city council's interpretation of its code that both reviews are possible and that historic review may be completed before site plan review is plausible, LUBA must defer to the city council's interpretation. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will reverse a governing body's interpretation that a large office complex providing offices for a number of local, regional, state and federal agencies is "accessory" to a small local fire station with a staff of four firefighters, where no reasonable person could conclude that the office complex is incidental and subordinate to the fire station, or subordinate in extent, area or purpose. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will reverse a governing body's interpretation that a 100-seat educational facility is "accessory" to a small local fire station with a staff of four firefighters, where even if it is presumed that the four firefighters sometimes take classes at the facility, no reasonable person could conclude that a 100-seat educational facility is incidental and subordinate to the fire station, or subordinate in extent, area or purpose. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of the code term "processing" (converting a natural mineral into a useful product) to include a facility that transforms natural gas into a liquefied form to more conveniently transport the gas to overseas markets aboard tanker ships, notwithstanding that after the liquefied natural gas reaches its destination it is returned to gaseous form, because in its intermediate liquid state the gas is a "useful product." *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A finding that the mixed-use development that might be developed under a new plan map designation will be "near" a transit corridor is sufficient to demonstrate compliance with a plan policy to focus mixed-use development "along" transit corridors, where the city's plan and land use regulations do not define either term and the term "along" is sufficiently subjective that the city's implicit interpretation and application of the policy is not implausible under *Siporen v. City of Medford*, 349 Or 247, 249, 243 P3d 776 (2010). *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where both the hearings officer and planning commission declined to address an argument regarding the standards and criteria that might apply to a hypothetical future building permit application for approved housing, and where petitioner points to nothing in the local government's code that requires the hearings officer or planning commission to address petitioner's argument, LUBA will decline to issue what is in essence an advisory opinion regarding that argument. *Wiper v. City of Eugene*, 75 Or LUBA 109 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. A County Court's interpretation of a comprehensive plan residential density standard that limits residential density in deer winter range to one dwelling unit per 160 acres to only consider nonfarm dwellings when computing density is not affirmable under ORS 197.829(1)(a) and *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010), where there is no textual support in the wildlife density standard itself for only counting nonfarm dwellings in computing density and the comprehensive plan policies the density limit was adopted to implement also do not support distinguishing between farm and nonfarm dwellings in computing density. *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 186 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Deference under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), and ORS 197.829(1) is only appropriate for interpretations that are adopted by the local governing body. Those interpretations include interpretations that are adopted initially by other bodies, so long as the local governing body adopts those interpretations of other bodies. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local governing body adopts a planning commission decision on appeal, interpretations adopted directly by the planning commission or adopted by incorporation by the planning commission are entitled to deference under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), and ORS 197.829(1). *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a zoning ordinance lists general use categories for a particular zoning district, followed by a listing of particular uses under those general use categories, a local governing body's interpretation that adopts a broad dictionary definition of the use category "Utilities" and finds that a cell tower is a permitted use under that definition, when cell towers are not one of the two particular uses listed under the general category of Utilities, is not an interpretation that must be affirmed under ORS 197.829(1) and is not entitled to deference under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a zoning ordinance separation standard applies to "buildings," defined in the zoning ordinance as "[a] structure built for support, shelter, or enclosure of persons, animals, chattels, or property of any kind," a local government is within its interpretive discretion to interpret the separation standard not to apply to cell towers. Although cell towers are "structures," they are not "built for support, shelter, or enclosure of persons, animals, chattels, or property of any kind." *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. An interpretation of local law that is offered in a brief at LUBA, but was not adopted by the local government, is not entitled to deference under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), and ORS 197.829(1). *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of its lot of record provisions, to the effect that consolidation of discrete parcels can be accomplished only by means of a county process resulting in county land use approval, and not by simply recording a deed, where that interpretation is not inconsistent with the express language, purpose or policy underlying the lot of record provision. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 328 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of its lot of record provisions, to the effect that "partitioning" (one of the ways in which a parcel can be created to qualify as a lot of record) includes units of land created as undescribed remainders of a parent parcel divided by deed, at a time when county approval was not required to create a parcel by deed, where that interpretation is plausible and not inconsistent with the text and context of the lot of record provision. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 328 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of the phrase "designated common area" as used in a plan policy governing a resort community zone to mean something different than a definition of "common area" in an unrelated section of the comprehensive plan that cross-references the definition of "common property" as used in the Oregon Planned Communities Act at ORS 94.550(7), where the latter definition was adopted at a different time and to serve a different purpose than the plan policy governing the resort community zone. *Kine v. Deschutes County*, 75 Or LUBA 407 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of a comprehensive plan policy concerning sites "developed as a golf course" to apply to sites adjoining a fairway that were landscaped and used as a playable area in 2001 when the policy was adopted, because the interpretation is not inconsistent with the text of the policy. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a comprehensive plan's text limits application of a Rural Industrial plan map designation to three exception areas that were built or committed to rural industrial use before the county enacted planning and zoning, the county must first amend the comprehensive plan text to expand the eligible areas for the Rural Industrial plan map designation before applying that designation to properties that are not within the three exception areas. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 441 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is not required to affirm a county's interpretation of an exception to Goal 4 that is part of the county's comprehensive plan, where that interpretation is contrary to the exception statutes at ORS 197.732, Goal 2, and the rule that implements Goal 2 at OAR 660-004-0018. ORS 197.829(1)(d). *Hood River Valley Residents v. Hood River County*, 75 Or LUBA 452 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county's interpretation of an irrevocably committed exception as allowing all uses on the exception site that are allowed in the zone that was applied to the site when the exception was approved is inconsistent with the ORS 197.732(1)(b) description of an exception as "a comprehensive plan provision that * * * is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability." *Hood River Valley Residents v. Hood River County*, 75 Or LUBA 452 (2017).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation of a code provision that implements the Transportation Planning Rule at OAR 660-012-0060 as applying only to an application for a comprehensive plan map amendment, and not applying to an application for planned unit development approval, even if the application for a comprehensive plan amendment is consolidated for review purposes with the PUD application, where that interpretation is not inconsistent with the express language of the provision. *Talbott v. City of Happy Valley*, 74 Or LUBA 143 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A comprehensive plan goal of "protecting and maintaining neighborhoods" is not necessarily violated by a development that will displace five existing houses. A city commission interpretation that the proposal complies with the goal, notwithstanding the loss of the five houses, so long as the proposal will otherwise protect and maintain the nearby neighborhood, is not reversible under ORS 197.829(1). *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the zoning code does not define "hospital structures" but does separately list "Hospitals" and "Medical and dental clinics, outpatient; [and] infirmary services" as permitted uses, a city does not misconstrue the zoning code by concluding that a "medical office building "does not qualify as a "hospital" and therefore need not have a backup source of electricity, which hospitals are required to have under the zoning code. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a comprehensive plan policy calls on the city to "[m]aintain the existing residential housing stock in established older neighborhoods by maintaining existing Comprehensive Plan and zoning designations <u>where appropriate</u>," and the city commission adopts a number of reasons why it believes maintaining existing planning and zoning designations is "not appropriate," a petitioner must do more than set out reasons why he thinks maintaining the existing planning and zoning is appropriate without directly challenging the city commission's reasoning. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a comprehensive plan policy requires that a city "ensure that potential loss of affordable housing is replaced" when changing comprehensive plan and zoning map designations, city findings that city-wide efforts to encourage affordable housing will be sufficient to make up for the loss of five dwellings through construction of a medical center made possible

under new comprehensive plan and zoning map designations are sufficient to demonstrate the policy will not be violated. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA owes no deference to a governing body's interpretation of a condition of approval imposed by a hearings officer in a prior decision, although deference may be required for any code interpretations the governing body adopts in the course of interpreting the condition of approval. *Kuhn v. Deschutes County*, 74 Or LUBA 190 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm an interpretation of a condition of approval requiring an "agreement" to maintain a common tract, such that the required agreement is not limited to Covenants, Conditions and Restrictions (CC&Rs), where the condition does not expressly limit the agreement to CC&Rs. *Kuhn v. Deschutes County*, 74 Or LUBA 190 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation of a code provision that requires a final plan that is submitted after approval of a concept plan for a planned unit development (PUD) to be "sufficiently detailed to indicate fully the ultimate operation and appearance of the development" to be satisfied by a submittal of plans providing detailed information about the location and size of building envelopes, dwelling heights, and the location of trees, utilities, the driveway, and the retaining wall, without requiring submission of plans and drawing regarding the appearance of the homes to be built on the PUD lots. *Harrison v. City of Cannon Beach*, 74 Or LUBA 202 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council's implied interpretation of the phrase "in all major respects" as excluding changes that do not qualify as major changes, such as changes in setbacks. *Harrison v. City of Cannon Beach*, 74 Or LUBA 202 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation of a local code provision that provides for "final concept approval by the planning commission" to be sent to the city council as requiring that the city council make the final decision on the application whether the planning commission recommends approval or denial of the application, where the text of the provision and context provided by other provisions render the city council's interpretation plausible. *Harrison v. City of Cannon Beach*, 74 Or LUBA 202 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation of a code provision as not requiring a stage development schedule where a planned unit development is not proposed to be completed in stages and where the text of the provision and context provided by other provisions render the city council's interpretation plausible. *Harrison v. City of Cannon Beach*, 74 Or LUBA 202 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation that the use category of mass shelter is limited to

shelters located in a "building" is inconsistent with the express language of the applicable code provisions, where the code defines "mass shelter" in part as a "structure" containing sleeping areas, and as the code defines "structures," they are not limited to structures that are "buildings." *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation that a mass shelter's sleeping areas must be located in permanent structures with foundations, and therefore a proposed tent camp that provides sleeping areas within large 10-person tents is not a mass shelter, is inconsistent with the code definition of mass shelter, which does not require that a mass shelter's sleeping areas be located in permanent structures with foundations. *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation that a proposed tent camp is not a "mass shelter" because the campers, rather than the tent camp operators, will provide sleeping pads is not consistent with the applicable text and definitions, which do not turn on who provides sleeping pads that shelter residents will sleep on. *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. It is inconsistent with the purpose of a code prohibition on mass shelters in an industrial zone to approve, as an outright permitted "Community Service" use, a tent camp that is functionally identical to a mass shelter. *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the city code excludes from the use category of "Community Service" any uses where tenancy is arranged on a month-to-month basis or longer period, a city errs in concluding that a proposed tent camp, which allows indefinite and potentially permanent tenancy by campers and staff, is a Community Service use allowed outright in an industrial zone. *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is required to affirm a city council's interpretation of a code provision that requires adequate street size and capacity as allowing a short-term temporal separation between the opening of a proposed store and completion of mitigation measures that will address all deficiencies in an impacted off-site facility, where petitioners do not develop any argument that the interpretation is inconsistent with the express language of the regulation. *Martin v. City of Central Point*, 74 Or LUBA 312 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The larger size of a 5,000-square-foot structure in a forest zone is not determinative of whether it can be correctly viewed as "accessory" to a 3,600-square-foot residence. *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Whether a proposed use is properly viewed as "accessory" to an existing residential use in a forest zone calls for a subjective judgment. Where a use began as an unauthorized use with a commercial component, and the commercial component is relocated to another site, a hearings official determines a number of limits imposed on the use are sufficient to ensure it is "accessory," and the board of commissioners adopts the hearings official's interpretation as its own, LUBA will defer to that interpretation under ORS 197.829(1). *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will reject a petitioner's challenge that a city's findings fail to demonstrate that allowing higher density residential development in an existing area of low density residential development, instead of in areas already planned for dense development, is consistent with a comprehensive plan policy encouraging compact development, where the petitioner fails to challenge the city council's interpretation of the policy as encouraging compact development in all areas of the city, not just in areas most suitable for high density development. *Kine v. City of Bend*, 74 Or LUBA 403 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's findings that a site has "good access" to an arterial, because it is within a one-third-mile drive from an arterial and has direct pedestrian and bicycle access to the arterial, are sufficient to establish consistency with a comprehensive plan policy requiring "good access to an arterial," particularly given the subjective nature of the policy. *Kine v. City of Bend*, 74 Or LUBA 403 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation of a comprehensive plan policy requiring that medium density residential development be located "near commercial services and employment" as being satisfied by a location near some commercial services and employment, but not necessarily a comprehensive range of commercial services and employment, is plausible and not reversible under ORS 197.829(1). *Kine v. City of Bend*, 74 Or LUBA 403 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. That a county commissioners' interpretation of a code variance standard is arguably inconsistent with language found on the county's variance application form does not demonstrate that the commissioners' interpretation is inconsistent with the express language, purpose or policy underlying the standard, under ORS 197.829(1). *Neil v. Columbia County*, 74 Or LUBA 442 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county is not bound to interpret its local variance standards in the same manner as traditional variance standards, and can plausibly interpret its "extraordinary hardship" standard to include considerations beyond the physical characteristics of the subject property. *Neil v. Columbia County*, 74 Or LUBA 442 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. How to determine whether a proposed zoning diagram is consistent with the comprehensive plan, based on trying to match surveyed lines to features depicted on the plan map, is a mixed question of law and fact, involving interpretation of the comprehensive plan map. LUBA owes no deference to a hearings officer's interpretation of the comprehensive plan map, or the interpretative exercise of selecting which plan map features to match with surveyed lines. *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city governing body's code interpretation to the effect that a vested right to complete what will be a nonconforming use is lost through discontinuance, if the applicant makes no effort toward completion of the use during a 12-month period, where that interpretation is consistent with the express language, purpose and policy underlying the code provision. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council's interpretation of provisions of the city code's planned development chapter to apply to a lot with portions that contain steep slopes that, under the city's subdivision ordinance, make the lot developable at a lesser density than the zoning allows, where the city council's interpretation of the planned development chapter is not inconsistent with one of the purposes of the planned development chapter to provide the city with flexibility to consider proposals that "cannot be obtained through traditional lot-by-lot subdivision," and is not inconsistent with the express language of the planned development chapter. *Harrison v. City of Cannon Beach*, 72 Or LUBA 182 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council does not misconstrue a development code limitation that a temporary use permit may not "be issued for a period exceeding 180 days in any 365 day period" to require a single period of 180 days and not allow the holder of the permit to operate for up to 180 nonconsecutive days in any 365-day period. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation of a development code limitation that a temporary use permit may not "be issued for a period exceeding 180 days in any 365 day period" to require that the 180-day period begin on the date the permit is issued has the effect of omitting the "in any 365 day period" language and reading in a requirement that the start date for the 180 days must be the date the permit is issued. That interpretation is therefore inconsistent with the express language of the 180-day limit. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a county governing body's interpretation of two provisions of the county's zoning code that describe certain uses in similar, but not identical, terms as describing different uses, where the interpretation is not inconsistent with the express language of the two provisions. *Devin Oil Co., Inc. v. Morrow County*, 72 Or LUBA 240 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the county establishes that an applicable county code provision does not implement the Airport Planning Rule at OAR 660-013-0080, LUBA will affirm a county governing body's interpretation of an undefined phrase "meeting place" in the applicable provision, where the interpretation is consistent with the plain ordinary meaning of the phrase and is not inconsistent with any of the express language of the county's code. *Devin Oil Co., Inc. v. Morrow County*, 72 Or LUBA 240 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the relevant planning documents submitted to comply with the Goal 5 administrative rule requirement for an inventory of significant mineral and aggregate resource sites are all ambiguous, and none of those documents clearly states that they are an inventory of significant mineral and aggregate resource sites, a board of county commissioners' interpretation that an inventory that was submitted for acknowledgment by LCDC showed both "significant" mineral and aggregate sites and mineral and aggregate sites for which there was not enough information to complete Goal 5 planning is not "inconsistent with the express language of the comprehensive plan," and therefore is not reversible under ORS 197.829(1)(a). Where the other bases that would also authorize LUBA to reverse the interpretation set out in ORS 197.829(1)(b), (c), and (d) also do not apply, LUBA must affirm the interpretation. *Delta Property Company, LLC v. Lane County*, 72 Or LUBA 250 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where LUBA sustains three assignments of error, but denies a fourth assignment of error, rejecting petitioner's challenge to a county commissioners' interpretation that a permit expiration standard that requires a finding that the applicant is not at fault for failing to complete the use authorized by the permit is met because the county's multi-stage destination resort process is so complicated, and LUBA's decision is reversed on appeal, with the Court of Appeals concluding that making the complexity of the multi-stage resort process the *only* consideration in applying the standard is an implausible interpretation of the standard, LUBA will sustain the fourth assignment of error as well. *Gould v. Deschutes County*, 72 Or LUBA 258 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a standard that permits the base zoning building height maximum to be increased if the "increased height is consistent with the purposes" of the applicable plan district's height limits, but does not expressly require that the proposed height increase must be consistent with all of the purposes or that each of the purposes operates as an approval criterion, a city council interpretation that the proposed height increase does not have to be consistent with all the purposes and that the individual purposes do not apply separately as approval criteria does not insert or omit text from the zoning code, in contravention of ORS 174.010. *Preserve the Pearl, LLC v. City of Portland*, 72 Or LUBA 261 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city council explains that interpreting a standard that requires that a proposal to increase building height to be consistent with a list of purposes requires consistency with *all* of those purposes is not possible, which would render the plan designation that makes an area of the city eligible for such building height increases a nullity, that explanation provides

contextual support for the city council's interpretation that the proposed building height increase need only be consistent with the purposes on balance. *Preserve the Pearl, LLC v. City of Portland*, 72 Or LUBA 261 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where contextual requirements are written in terms of standards or criteria, all of which must be met, but the disputed standard merely requires that a proposed height increase be consistent with the purposes set out in the applicable height limit section of the code, that context supports the city's interpretation that the proposed height increase need not be consistent with all of the purposes and that the purposes do not operate as individual approval criteria. *Preserve the Pearl, LLC v. City of Portland*, 72 Or LUBA 261 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation of the code-defined term "structure" as including a parking lot is not inconsistent with the definition of "structure" or the express language of the city's land use regulations or comprehensive plan provisions. The use of the same word in the city's buildings and construction code that is not a part of the city's acknowledged land use regulations is not relevant context for determining whether the city improperly construed the word structure to include a parking lot. *Knapp v. City of Jacksonville*, 72 Or LUBA 299 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of a code provision requiring notice to all parties to a land use proceeding that the members of the governing body intend to conduct a site visit "with any party or his representative," as requiring notice only when the members of the governing body expect to conduct the site visit with a party, and not to require notice where a safety escort is unexpectedly provided during the site visit. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a potentially dispositive issue under a zoning code requirement that development be served by public facilities is whether a private septic system qualifies as "public facilities," LUBA will reject arguments in respondent's brief that the city council relied on a comprehensive plan definition of "public facilities" that might be broad enough to include private septic systems as public facilities, where nothing in the city council's decision suggests the city council relied on the comprehensive plan definition. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. For an implied interpretation of a local standard to be adequate for review, the findings embodying the interpretation must carry one possible meaning of the ambiguous language in the standard, and an easily inferred explanation of that meaning. A finding that proposed rezoning to higher density residential use is consistent with a plan policy that requires "good access" to an arterial because the property is located near a minor arterial does not embody an implied interpretation adequate for review to the effect that "good access" is satisfied by physical proximity of the property to the arterial, regardless of the quality of access to that arterial. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA's review of planning commission interpretations is governed by ORS 197.835(9)(a)(D), rather than by ORS 197.829(1). And under ORS 197.835(9)(a)(D), LUBA must determine whether the planning commission "[i]mproperly construed the applicable law," "without according the deference required by *Clark*[*v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992)]." *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under the law of the case principle articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), the parties in a LUBA appeal of a decision following LUBA's remand of an earlier decision may not revisit legal issues that were resolved by LUBA in the prior appeal. Where the board of county commissioners could have reviewed the first decision and resolved interpretive issues differently than the hearings officer did in the first decision, but did not do so prior to the first LUBA appeal, the board of commissioners may not revisit resolved interpretive issues in the decision following remand and is not entitled to the deferential standard of review required by ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) in the second appeal. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. As a general proposition, a board of commissioners is free to interpret its land use regulations. But a hearings officer would not be free to interpret county land use regulations differently than LUBA did following a LUBA remand of the hearings officer's initial decision, and the board of commissioners is also not free to do so in a local appeal of the hearings officer's decision following LUBA's remand. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a board of commissioners' interpretation of its comprehensive plan that an Airport Master Plan adopted as part of the comprehensive plan is not a source of approval criteria for proposed airport development, where that interpretation is not inconsistent with the express language of the provisions of the county's development code that implement the Airport Master Plan or the county's transportation system plan that describes the Airport Master Plan. *The Flight Shop, Inc. v. Deschutes County*, 71 Or LUBA 141 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a board of commissioners' interpretation of the purpose statement for the county's Airport Development Zone that refers to "consisten[cy] with" the airport master plan as merely reciting a conclusion that the zone is consistent with the airport master plan, and not requiring independent review of development in the zone for consistency with the airport master plan. *The Flight Shop, Inc. v. Deschutes County*, 71 Or LUBA 141 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation that a code "Definition of Village Character" is not a mandatory permit approval standard, and that village character is achieved through compliance with substantive code standards that follow the definition, is consistent with the text and context

of the code, where the code standards that follow the definition all state "village character" will be created or enhanced "by" or "through" "compliance with the following" "requirements," "criteria" or "design standards." *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A petitioner's argument that a city's code requires that proposed development be compared with the width and length of buildings on adjoining lots, in addition to height, to ensure the proposed development is "small scale" will be rejected where petitioner cites no code language that requires that the proposed development must be directly compared with adjoining development, petitioner cites nothing to support its contention that width and length must invariably be considered in addition to height, and the code is reasonably interpreted to achieve "village character" through standards set out in the code, rather than through a direct comparison of the proposed development with surrounding development. *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city interpretation of the phrase "seasonal resident seeking shelter" used in its comprehensive plan as including part-time, seasonal residents who are owners of single-family second homes, and not tourists seeking short-term vacation rental dwellings, where that interpretation is not inconsistent with the express language of the comprehensive plan, or the purpose or underlying policy of the provision. *Oregonians in Action v. City of Lincoln City*, 71 Or LUBA 234 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In applying a conditional use "compatibility" standard that requires consideration of the "operating characteristics of the use," a local government does not err in considering the safety of the use. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where county zoning ordinance language replicates and was adopted to implement Goal 4 and LCDC's Goal 4 administrative rule, the board of county commissioner's interpretation of that zoning ordinance language is not entitled to deferential review under ORS 197.829(1) and is instead reviewed under ORS 197.835(9)(a)(D) to determine if the board of commissioners "improperly construed the applicable law." *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A board of county commissioners' interpretation of a zoning standard that requires that a proposed natural gas pipeline must "not limit the potential for more intensive use of the area" as being violated by the proposal unless the pipeline results in "no restrictions" on more intensive uses is neither inconsistent with the text of the zoning standard nor implausible and therefore is not reversible under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 260-61, 243 P3d 776 (2010). *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A board of commissioners correctly interprets a zoning standard that requires that

a "project's" public benefits outweigh expected adverse impacts to (1) limit consideration to the pipeline for which county permit approval is sought and (2) exclude any public benefits that may be generated by the LNG terminal that would be located in, and require the separate approval of, a city located in the county. The permit applicant's position that the county should consider the benefits of the LNG terminal but not the LNG terminal's expected adverse impacts is incorrect, because "project" cannot mean one thing when considering benefits and something else when considering expected adverse impacts. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A code provision requiring that a home occupation shall not utilize over 600 square feet of floor area cannot plausibly be interpreted to limit only the square feet physically occupied by a truck or trailer as part of a home occupation to perform maintenance work on trucks and trailers. Because the home occupation activity is the maintenance and not the storage of trucks and trailers, any interpretation that ignores the square footage necessary for employees to perform maintenance tasks is not consistent with the text of the code provision. *Stevens v. City of Island City*, 71 Or LUBA 275 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm as plausible a governing body's interpretation of a code provision requiring a geologic assessment where development cannot be accomplished without measures to "mitigate or control" the risk of geologic hazard, to trigger the need for a geologic assessment only if the development activity itself causes the risk of geologic hazard to increase above its pre-development state, and to not require geologic assessment simply because the applicant proposes measures, such as planting vegetation, intended to reduce existing landslide risk below the pre-development state. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation of a code provision specifying the requirements for design and construction of transportation facilities as allowing the city to approve the creation of a public right-of-way by deed where the city council's interpretation is not inconsistent with the text of the provision and relevant context provided by other provisions, and is plausible. *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation of the undefined term "project" as being limited to property that an applicant controls, notwithstanding evidence in the record demonstrating plans to develop more properties, where the city council's interpretation is not inconsistent with the text of the provision, relevant context provided by other provisions, or the purpose statement for the provision, and is plausible. *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation of a code provision regulating when master planned development approval is required as not applying where no land division is

proposed, and the interpretation is not inconsistent with the text of the provision. *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a local government's conclusion that an application to modify a condition of approval imposed in a prior decision does not propose dredging or filling, where no ground disturbing activity of any kind is proposed that differs from the ground disturbing activity approved in the prior decision. *McCaffree v. Coos County*, 70 Or LUBA 15 (2014).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council's code interpretation to the effect that minimum frontage and floor-area-ratio standards apply to the collective structures of a proposed fueling station as a whole, including the canopy, paved area, and an exterior trellis wall, even though the standards do not easily apply to those structures viewed individually, where the petitioner fails to demonstrate that the city council's interpretation is inconsistent with the express language, purpose or underlying policy of the code. *Save Downtown Canby v. City of Canby*, 70 Or LUBA 68 (2014).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county governing body's unexplained decision to rely on the on-line Merriam-Webster Dictionary definition of the term "penstock" does not constitute an interpretation that is adequate for review, where the governing body's decision does not show it was a considered choice between possible definitions. *Pacificorp v. Deschutes County*, 70 Or LUBA 89 (2014).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government approves an asphalt parking lot under a historic site review standard requiring that proposed development conform with the "character" of the historic district, LUBA will affirm the local government's interpretation that an asphalt parking lot conforms to the character of the district, because asphalt is a common building material in the district, even if asphalt paving is not itself a described feature of the historic district. *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a local governing body's interpretation of its comprehensive plan as not requiring consistency review for individual quasi-judicial land use applications where the interpretation is not inconsistent with the express language of the comprehensive plan policy or any other provision of the comprehensive plan, or with any purpose or policy underlying the policy. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm under ORS 197.829(1) a local governing body's interpretation of the term "areas" as synonymous with the property that is the subject of the rezoning application, where the interpretation is not inconsistent with any express language of the county's comprehensive plan or land use regulations. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government correctly construes its local code as not requiring an applicant

for a plan amendment and zone change that would have the effect of legalizing some uses of the property to demonstrate compliance with code provisions governing nonconforming uses. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council's determination that a good faith effort to lease an historic building is sufficient to satisfy a historic resource demolition permit standard requiring the applicant to demonstrate a good faith effort to "sell" the resource, where the city's findings explain that only the structure, and not the underlying land, is a designated historic resource, the city lacks authority to require the owner to sell the land, and the structure cannot be relocated intact. *Rushing v. City of Salem*, 70 Or LUBA 448 (2014).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city code limits the maximum number of parking spaces, and requires that parking must be provided on the same lot as the building served, or on an off-site lot within 500 feet of the building, a hearings officer misconstrues the code to allow parking spaces that are intended to serve hospital campus buildings that are located more than 500 feet away, under the theory that the various lots that make up the hospital campus constitute a single "lot" and the various buildings of the hospital campus a single development, where nothing in the code provides that the hospital campus is a single lot or constitutes a single development for off-street parking purposes. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer does not misconstrue a site plan review standard requiring a finding that "negative impacts to the transportation system are mitigated adequately" as not requiring the applicant to construct bike lanes that are shown in the Bicycle System Element of the city's Transportation System Plan (TSP), where the code standard does not refer to the TSP or indicate that site plan review is the vehicle to provide for construction of bike lanes depicted in the TSP. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A comprehensive plan provision is ambiguous if it can be interpreted in more than one way. *Northgreen Property LLC v. City of Eugene*, 68 Or LUBA 76 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A comprehensive plan policy that requires the city to extend "key urban services and facilities in an orderly and efficient manner" is relevant context for interpreting a comprehensive plan provision that requires the local government to design and locate public and private facilities such as cellular communications towers in a manner that "preserves and enhances desirable features of local and neighborhood areas" and "promotes their sense of identity," where the two policies deal with the same subject matter. *Northgreen Property LLC v. City of Eugene*, 68 Or LUBA 76 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a staff code interpretation to the effect that a district-specific density transfer provision governing single-family development in single-family zones does not

supersede or conflict with a general city-wide density transfer provision applicable to multi-family development in multi-family zones, where the two density transfer provisions would never apply to the same development, and therefore would not create incompatibility or conflict, such that the specific would control the general. *Sellwood-Moreland Improvement League v. City of Portland*, 68 Or LUBA 213 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a local government's interpretation of the provisions of its comprehensive plan that implement Goal 17 to be as protective as, but not more protective than, Goal 17, where the text of the comprehensive plan provisions make clear that the local government did not intend to regulate coastal shorelands more protectively than Goal 17. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is required under ORS 197.829(1) to affirm a local government's interpretation of a provision of its comprehensive plan that identifies the location of the coastal shorelands boundary as "the top of the seacliff along the seacliff shoreline" as a "general guide as to the location of the [boundary]" rather than a specific minimum elevation, where the interpretation is not inconsistent with the express language of the provision or the comprehensive plan map, and is plausible. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Goal 17 provides in part that coastal shorelands must include "adjacent areas of geologic instability where the geologic instability is related to or will impact a coastal water body[.]" In order to be consistent with Goal 17, a cliff erosion geologic hazard analysis that is relied on to determine the location of the coastal shorelands boundary must consider geologic instability from all causes of cliff erosion where the cliff erosion could impact the ocean. A geologic hazard analysis that does not analyze "adjacent areas of geologic instability" from causes of erosion other than waves hitting the shore cannot be relied on to locate the boundary consistent with Goal 17. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Goal 17 requires in part that coastal shorelands must include "lands within 100 feet of the ocean shore[.]" A county decision that locates the coastal shorelands boundary at the top of the beach and at the bottom or mid-point of shorefront cliffs is inconsistent with Goal 17, because such locations are arguably where the "ocean shore," as defined in ORS 390.605(2), ends and that interpretation gives little or no depth to the coastal shorelands boundary beyond the "ocean shore" in some places. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government interprets a land use regulation requirement for a geologic permit not to apply to an application for approval of a transportation impact analysis that does not propose any development, and that interpretation is consistent with the text of the land use regulation, LUBA is required to affirm the interpretation. *Oregon Coast Alliance v. City of Newport*, 68 Or LUBA 318 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation of a code standard requiring that a proposed facility is "consistent with the overall needs of the community" to also include consideration of impacts/benefits on citizens of adjoining cities, where that broad understanding of "community" is not inconsistent with the text, context, purpose or policy underlying the standard. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. An argument that a city council misconstrued a "mitigate permanent disturbances" standard to apply only to disturbances to the surface of wetlands does not provide a basis for remand, where fairly read the city council findings apply the standard to evaluate disturbances to the soils and water column that constitute a wetland, and conclude that placing a pipe underground in the bedrock 34 to 60 feet below the wetland would not cause permanent disturbance to the wetland. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation of a code standard requiring mitigation of "permanent disturbances" to water resource areas, to require no mitigation when a proposed pipeline is laid across a culvert within the paved area of a street, and thus would result in no additional impacts on the water resource, where the interpretation is consistent with the text and apparent purpose of the standard to minimize impacts on water resource areas. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. ORS 197.829(1)(d) effectively obligates a local government to interpret an ambiguous code provision if possible in a manner not contrary to the applicable statewide planning goals and administrative rules, not only where the code provision directly implements a goal or rule protecting resource lands, but also where the code provision is a general provision applicable to all zones, including resource zones, and is not intended to implement any particular goal or rule. *White v. Lane County*, 68 Or LUBA 423 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In approving a wedding venue and event business in a forest zone under a code provision that allows, on a "temporary" basis, uses otherwise not allowable in the applicable zone, a county must consider whether the proposed use is properly characterized as a "home occupation," which is an allowed conditional use in the forest zone, subject to restrictions. If the proposed is properly characterized as a home occupation allowable in the forest zone, then the code does not allow the county to issue a temporary use permit for that use. *White v. Lane County*, 68 Or LUBA 423 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county errs in approving a five-year renewable permit for an existing wedding venue and event business as a "temporary" use, without considering whether the use is "temporary" as defined under the county code, *i.e.*, something that exists only for a limited, transitory interval, and whether conditions are necessary to limit the duration of the use to ensure that it is in fact a "temporary" use. *White v. Lane County*, 68 Or LUBA 423 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county errs in interpreting a code provision to allow temporary use of an "existing structure" even if the structure was recently and illegally built for a use prohibited in the zone, where the text and context of the temporary use provisions suggest that temporary use of an "existing structure" is intended for a lawful structure, and the county's broader interpretation brings the code into conflict with nonconforming use statutes. *White v. Lane County*, 68 Or LUBA 423 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A decision that determines that ORS 215.301 does not prohibit batching operations at an existing mining site because a 1981 permit authorized batching operations on the subject property is not dicta, and a petitioner may challenge the conclusion in an appeal of the decision, where the decision purports to foreclose future challenges to a batching operation under the statute. *Poto v. Linn County*, 67 Or LUBA 162 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county has specific procedures for identifying and resolving development code violations and appeals from those procedures are to circuit court, LUBA will sustain a county's interpretation that it is not obligated to review a decision by a county enforcement officer that a property is not in violation of the development code as part of a permit application for a home occupation on the property that was the subject of the enforcement officer's decision. *Green v. Douglas County*, 67 Or LUBA 234 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When the governing body declines review of a planning commission decision, the planning commission's interpretations can be imputed to the governing body only if the governing body affirmed, adopted or incorporated the planning commission's decision as its own. *CRAW v. City of Warrenton*, 67 Or LUBA 263 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The intent to affirm, adopt or incorporate a planning commission's decision as the governing body's own decision must be expressly stated in the decision. Oral statements by individual members of the governing body indicating general approval of the planning commission decision are not a sufficient basis to input the interpretations of the planning commission to the governing body. *CRAW v. City of Warrenton*, 67 Or LUBA 263 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city staff interpretation that a site design review permit is not a "development permit" subject to certain submittal requirements because site design review does not directly authorize any alteration of land is inconsistent with the applicable text and context, where under that interpretation none of the city's discretionary or nondiscretionary permits qualify as development permits, leaving the category of development permits an empty set. *CRAW v. City of Warrenton*, 67 Or LUBA 263 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. A code provision prohibiting the location of loading docks on a building side that faces the highway is not concerned with the orientation of the loading docks, but the orientation of the building side. The code provision is not met by a loading dock located against an L-shaped façade with the long axis facing the highway. *CRAW v. City of Warrenton*, 67 Or LUBA 263 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a county governing body's interpretation of standards governing placement of fill and levees in different areas of the flood plain as allowing fills and levees in the "flood fringe" area as long as the fill or levee does not increase the base flood level by one foot and does not extend from the "flood fringe" into the "floodway," which regulates fill and levees more stringently. *Protect Grand Island Farms v. Yamhill County*, 67 Or LUBA 278 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a rezoning standard originated in a city/county agreement but was later adopted as part of the city's comprehensive plan and land use regulations, the city's interpretation of that rezoning standard is entitled to deference under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Mintz v. City of Beaverton*, 67 Or LUBA 374 (2013).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council's interpretation of local code provisions governing when a traffic impact analysis (TIA) is required for a land use application that concludes that a TIA is not required where ODOT is the road authority with jurisdiction over the affected roads, and petitioners merely disagree with the city's interpretation but do not explain why the interpretation is not plausible. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). *Neighbors for Dallas v. City of Dallas*, 66 Or LUBA 36 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Despite a reasonably strong textual and contextual argument in support of a different interpretation, a city's interpretation of the phrase "facilities operating at 1,000 watts [Effective Radiated Power] ERP or less" that ERP should be calculated by channel and not by antenna is not inconsistent with the express language of the city's regulation or with the purpose of the regulation, and is required to be affirmed, where the meaning of the key term used in the provision at issue, "facility," is not clear, is not defined in the code, and the dictionary definition of the word is not particularly helpful in discerning the intent of the city in enacting the provision. ORS 197.829(1)(a). *Hill v. City of Portland*, 66 Or LUBA 250 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of comprehensive plan policies that "encourage" alternative energy sources, to allow the county to adopt restrictions on development of wind energy facilities to protect other uses, as long as such restrictions do not preclude the siting of wind energy facilities, because the interpretation is consistent with the text of the comprehensive plan policies. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. LUBA will affirm a city council's interpretation of a standard requiring that the proposed road vacation be in the public interest, to the effect that "public interest" can include benefits flowing from development facilitated by the road vacation, not limited to the road vacation itself, where nothing in the text suggests limits on what considerations inform whether the vacation is in the public interest. *Conte v. City of Eugene,* 66 Or LUBA 334 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a planning director's interpretation that site design review standards do not apply to a proposed landfill expansion because the expansion was authorized in a 1980 decision that pre-dated the site design review standards, where nothing in the code compels application of the site design review standards to an already authorized landfill expansion. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city planning commission interpretation that a comprehensive plan policy does not apply to a planned unit development application for a cell tower is correct where the text of the policy directs the city to implement one of several means of protecting open space, including adopting planned unit development ordinances, and does not contain any language that suggests that it is intended to apply on a case-by-case basis to individual applications for planned unit development approval that are processed under the city's adopted planned unit development ordinances. *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city planning commission interpretation that a comprehensive plan policy does not apply to a planned unit development application to site a cell tower is not correct, where (1) the text of the policy provides specific and mandatory direction that public facilities "be designed and located" to "preserve[] and enhance" desirable features of the area, (2) the preamble to the applicable comprehensive plan policy refers to "daily decisions" being guided by "site planning," and (3) there is no similar provision in the city's development code that requires the city to consider whether the design and location of a public facility "preserve[s] and enhance[s] desirable features of the area." *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city planning commission's interpretation of a code provision that requires "adequate screening" as requiring screening of a 75-foot-tall cell tower to a reasonable extent and its conclusion that screening the bottom two thirds of a 75-foot-tall tower is sufficient to provide "adequate screening" are correct, given the inherently subjective nature of a criterion that requires "adequate screening." *Northgreen Property LLC v. City of Eugene,* 65 Or LUBA 83 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a proposed cell tower meets the objective standards set out in the city's code for telecommunications towers and where the tower will be screened from view while still allowing the tower to function as intended, LUBA will uphold a city's conclusion that the proposed cell tower is "reasonably compatible and harmonious" with the neighborhood, particularly given the inherently subjective nature of the criterion. *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. That the county initially adopted a problematic interpretation of the criteria for applying a limited use overlay zone to limit uses allowed on land for which a reasons exception is taken does not provide a basis for reversal or remand, where the county adopted an alternative interpretation that is consistent with the text of the zone change criteria. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of a code standard allowing imposition of a limited use overlay zone if "it is required to limit the uses permitted in the proposed zone" by the reasons exception rule at OAR chapter 660, division 4, to employ the overlay zone to limit uses to ensure consistency with Statewide Planning Goal 12 (Transportation), and the need to take an exception to Goal 12, even though the county took reasons exceptions only to other statewide planning goals, where the county's interpretation is not inconsistent with the express language, purpose or underlying policy of the code standard. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of a local code provision to require only consideration of current adequacy of transportation facilities, notwithstanding local traffic analysis guidelines that require analysis of impacts from future planned uses, where the county interprets the guidelines to be non-mandatory, and that interpretation is not inconsistent with the express language, purpose or policy of the relevant local provisions. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Although city governing body interpretations are entitled to considerable deference under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010), where there is no reviewable express or implied interpretation, LUBA has nothing to defer to. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a zoning ordinance allows "Government Services" uses if they are not "specifically listed" uses in other zoning districts, a city council is within its interpretive discretion under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010), when it concludes that a VA outpatient clinic is allowable as a Government Services use, notwithstanding that "Medical Health Facilities" are allowed in some city zones. Because the VA outpatient clinic would offer a variety of services some of which are not offered by the typical private and public clinics that would be allowed as "Medical Health Facilities," the VA outpatient clinic is not a "specifically listed" use in any zoning district. *Randazzo v. City of Eugene*, 65 Or LUBA 272 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation of a code provision allowing rezoning when "zoning previously adopted for the area was in error" to focus on the parcel to be rezoned rather than the surrounding area is consistent with the text of the provision, and will be affirmed. *O'Brien*

v. Lincoln County, 65 Or LUBA 286 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. That a sub-area comprehensive plan map designates an area as "Medium and High Density" does not imply an intent to limit density below the maximum density otherwise allowed under the area's general comprehensive plan map designation and zoning. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Sub-area plan language describing as a "buffer" the neighborhood that includes property proposed for rezoning from a high density residential to a higher density residential zone need not be interpreted to limit density to no more than the median density between the two zones. A planning commission does not err in concluding that the proposed rezone is consistent with the "buffer" description based on other density, height and design restrictions. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will not defer to an interpretation of a zoning ordinance that appears only in a city's reply brief and is inconsistent with an implied interpretation that is included in the city council's decision on appeal. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the city council interprets a local code provision that requires the city to determine that the "[p]ublic benefits of the use outweigh any impacts that cannot be mitigated" as not requiring the city to determine whether there is a public need for the use, the city council's interpretation is not inconsistent with the express language of the provision, and LUBA will affirm that interpretation. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Cottonwood Capital Property Mgmt. LLC v. City of Portland*, 65 Or LUBA 370 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation that granting an adjustment to a requirement that vehicle access to mining and waste related uses be from Major City Traffic Streets to allow access from a Truck Access Street, because the adjustment "will equally or better meet the purpose of the regulation to be modified" is not reversible under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), where it is clear that the proposed access street has ample access to carrying the expected traffic and that therefore the adjustment meets the purposes of the regulation, to reduce impacts and nuisances and transportation impacts from mining and waste related uses. *Cottonwood Capital Property Mgmt. LLC v. City of Portland*, 65 Or LUBA 370 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Because the legislature in adopting ORS 197.829(1) both codified and modified the holding in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), the legislature may have intended ORS 197.829(1) to be a comprehensive statement of the circumstances under which the *Clark* deferential standard of review is applied to a governing body's local code interpretations,

and did not intend LUBA to extend the reasoning in *Clark* to circumstances not covered by the statute, such as a governing body's interpretation of the text of a prior land use decision adopted by the planning commission. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will sustain a city council interpretation of a 1991 planning commission site plan decision to approve both a 70,000-square-foot retail store and a 30,000-square-foot "future expansion" area, notwithstanding a condition that refers only to approval of the retail store, where the site plan depicts both improvements, the 1991 decision approves the "site plan" without restriction, and the record indicates that the planning commission intended to approve both improvements. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will sustain a city council interpretation of a site plan condition of approval to impose no limits on the type merchandise sold at a retail store that is allowed outright in the applicable zone, where the condition authorizes sale of "general merchandise, to include" listed examples, and the fairest reading of the condition is that the list of examples is illustrative, not exclusive. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a communication tower arguably qualifies as either a heavily regulated wireless communication facility or a lightly regulated utility, a local government interpretation that the tower qualifies as a utility is not inconsistent with the underlying policy of the land use regulation, where the land use regulation has two underlying policies—one that favors heavily regulating private wireless communication facilities and one that emphasizes health, safety and emergency functions of publicly owned utilities. *Thielemann v. City of Medford*, 64 Or LUBA 8 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a land use regulation provides that a Wireless Communication Support Structure is operated by a Wireless Communication Provider and defines a Wireless Communication Provider as "a person or company in the business of designing, installing, marketing and maintaining wireless communication systems and services," a city correctly concludes that a police department communication tower is not a Wireless Communication Support Structure, because the police department uses the wireless communication system for its own purposes and does not provide wireless services. *Thielemann v. City of Medford*, 64 Or LUBA 8 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a zoning ordinance expressly excludes communication towers from zoning height limits but does not expressly exclude communication towers from zoning setback requirements, a city errs by interpreting the zoning ordinance to exclude communication towers from zoning setback requirements simply because the setback requirement is calculated based on

the tower's height. *Thielemann v. City of Medford*, 64 Or LUBA 8 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The underlying purpose of a setback requirement that increases by one-half foot for every foot a structure's height exceeds 15 feet is to ensure that taller structures are set back farther than shorter structures. Interpreting an express zoning ordinance exemption for communication towers from building height limits to include an unexpressed exemption from the setback requirement is inconsistent with that underlying purpose. *Thielemann v. City of Medford*, 64 Or LUBA 8 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer incorrectly interprets a code standard that requires a proposed modification to an approved tentative planned unit development (PUD) to be "consistent with the conditions of the original approval" by determining that the proposed modification is consistent with modified versions of the original conditions of approval that were imposed in connection with a concurrent application for final PUD approval. *Willamette Oaks LLC v. City of Eugene*, 64 Or LUBA 24 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer incorrectly interprets a code standard that requires a proposal to modify an approved planned unit development (PUD) to demonstrate that the modification proposal is "consistent with the conditions of the original approval," where nothing in the language of the code section allows the hearings officer to overlook inconsistency with the original approved PUD conditions simply because the modification proposes to eliminate the portion of the development that led to the conditions. *Willamette Oaks LLC v. City of Eugene*, 64 Or LUBA 24 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A code standard for final planned unit development (PUD) approval that allows the city to "approve [a final PUD] with conditions" does not allow the city to overlook nonconformance with conditions of the Tentative PUD approval and approve a Final PUD that does not comply with the original Tentative PUD conditions of approval by conditioning that Final PUD approval on future satisfaction of those Tentative PUD conditions. *Willamette Oaks LLC v. City of Eugene*, 64 Or LUBA 24 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation of a planned unit development approval standard requiring that mixed-use development be "constructed before or concurrently with" commercial development, to the effect that the concurrency standard is satisfied by conditions that allow the commercial development to be completed and become operational regardless of whether the mixed-use development is ever constructed, is inconsistent with the express language of the planned unit development standard. *Keep Keizer Livable v. City of Keizer*, 64 Or LUBA 53 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the plain purpose of a code standard requiring that mixed-use development be "constructed before or concurrently with" commercial development is to prevent circumstances

where the constructed commercial development is in place without the required mixed-use development, a governing body's interpretation that allows the commercial development to be constructed and operational without ensuring that the mixed-use development is ever constructed is inconsistent with the purpose of the code provision, and therefore that interpretation is reversible under ORS 197.829(1)(b), even if the interpretation is not inconsistent with the code standard's express language. *Keep Keizer Livable v. City of Keizer*, 64 Or LUBA 53 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In analyzing a proposal for "compliance" or "consistency" with applicable criteria, ultimately the city must determine whether the proposal "satisfies" the applicable review criteria. *Boucot v. City of Corvallis*, 64 Or LUBA 131 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation of local variance standards is subject to deferential review under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), and the governing body is not bound to follow judicial precedent interpreting traditional variance standards, even if the local variance standards are similar or identical to traditional variance standards. *JCK Enterprises LLC v. City of Cottage Grove*, 64 Or LUBA 142 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of a code variance standard providing that application of the standard to be varied "would result in practical difficulty * * * inconsistent with the objectives of this Code," to the effect that the practical difficulty standard is met even if application of the standard to be varied would be inconsistent with only one relevant code objective, where nothing in the express language of the variance standard requires a determination of inconsistency with all or any particular number of code objectives. *JCK Enterprises LLC v. City of Cottage Grove*, 64 Or LUBA 142 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation of a code variance standard providing that application of the standard to be varied "would result in practical difficulty," to the effect that the variance standard is satisfied if circumstances affecting the subject property make it extremely difficult to develop the property with the proposed use otherwise allowed in the zone, even if the property could be developed with other uses allowed in the zone without a variance, is consistent with the text and context of the variance standard and will be affirmed. *JCK Enterprises LLC v. City of Cottage Grove*, 64 Or LUBA 142 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a zoning ordinance requires that a notice of local appeal "include" "a clear and distinct identification of the specific grounds" for appeal and that compliance with that requirement is "jurisdictional," a local government may insist on strict compliance with the zoning ordinance requirements of a local notice of appeal. It is not inconsistent with the text of the zoning ordinance to conclude that a local appeal should be dismissed where the notice of intent to appeal includes no grounds for appeal and instead attempts to incorporate by reference legal issues stated in a different document that was created for a different reason, without attaching a copy of that

document. *Lang v. City of Ashland*, 64 Or LUBA 250 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. For purposes of ORS 197.829, LUBA must recognize as adequate for review a governing body's implicit interpretation of a local approval standard, where the findings and decision carry with it only one possible meaning for the standard and an easily inferred explanation of that meaning. *Green v. Douglas County*, 245 Or App 430, 263 P3d 355 (2011). *Foland v. Jackson County*, 64 Or LUBA 265 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A finding that "public facilities exist that are adequate to serve" proposed development is not sufficient to embody a reviewable interpretation of a plan map amendment standard requiring that "adequate public facilities can be provided to the property," where the findings fail to clarify whether the governing body understands the standard to be concerned only with the existence of public facilities in the area with adequate capacity, or whether the standard is also concerned with whether the public facility provider is willing and able to provide services to the property. *Foland v. Jackson County*, 64 Or LUBA 265 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under ORS 197.829(2), where the local government fails to interpret a local standard or adopt a reviewable interpretation, LUBA may interpret the standard in the first instance or remand the decision for the local government for an interpretation. Where the meaning of the local standard is "far from obvious" and the local government is in a better position than LUBA to clarify the meaning through interpretation of context and legislative history, LUBA should exercise its discretion to remand for an interpretation. *Green v. Douglas County*, 245 Or App 430, 263 P3d 355 (2011). *Foland v. Jackson County*, 64 Or LUBA 265 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer incorrectly interprets a code requirement that allows a "satellite building or station" to be sited in a residential district only if the satellite building or station will generate "no more trips than a residential use in the same district" to mean that the satellite building or station is allowed if it generates no more trips than the trips generated by the maximum number of detached residences possible under the property's R-6 zoning. *Sarathy v. Washington County*, 64 Or LUBA 279 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer's interpretation of the phrase "Willamette River" found in the portion of the city's code that implements Statewide Planning Goal 15 (Willamette River Greenway) as meaning only the main channel of the Willamette River is inconsistent with the definition of "Willamette River" set out at ORS 390.310(3), which is referenced in Goal 15 and which defines Willamette River to include all "channels" of the river. *Willamette Oaks LLC v. Lane County*, 64 Or LUBA 328 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation of its code to allow the setback distance from a wetland to be measured from the city's Goal 5 maps is correct where the applicable language

allows the setback to be measured from either the Goal 5 map or a wetland delineation that is provided by the property owner, where a wetland delineation is submitted by an applicant who is not a property owner and is later withdrawn. *Willamette Oaks LLC v. Lane County*, 64 Or LUBA 328 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council's determination that second floor "apartments" above a ground floor commercial use in a commercial zone do not constitute "multi-family housing development," even though the proposed apartments fit within the code definition of "multi-family housing development," where other code definitions and provisions indicate that a second floor apartment/ground floor commercial use is treated as a distinct category of mixed-use development rather than multi-family housing development. *Poe v. City of Warrenton*, 64 Or LUBA 377 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council's determination that a ground floor commercial mini-storage use is the "primary use" of a mixed-use structure, notwithstanding that second floor apartments and accessory ground floor garages constitute 75 percent of the building's total floor area, where the code definition of "primary use" includes consideration of the "most substantial" or "important" element, and the city council adopts unchallenged findings that the commercial mini-storage use dominates the ground floor and the approach to the development. *Poe v. City of Warrenton*, 64 Or LUBA 377 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government decision maker considering an application to extend the term of a permit fails to apply local standards that apply to modifications of conditions of approval, based on findings that those standards only apply to modifications of conditions of approval, but the term of the permit is in part imposed by a condition of approval and the decision maker fails to address that fact, LUBA will remand. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a permit extension may be granted based on a finding that the failure to complete the proposal within the original term of the permit was "for reasons which the applicant was not responsible," a board of county commissioners is within its discretion to interpret that standard to be met if a prudent developer would have delayed construction based on a funding shortfall. The county is also within its interpretive discretion not to require that the applicant explain why it could not have altered its decision to fund the project with donations or why it could not have reallocated other resources to construct the proposal. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation of its code is incomplete and inadequate for review where the decision does not address or interpret key provisions of the code, including code definitions of key terms. *Poe v. City of Warrenton*, 63 Or LUBA 20 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of a "public need and public

benefit" standard not to require a weighing of the positive against the negative impacts of proposed mining, and instead to require only that there is a public need for and benefit from the additional supply of aggregate, where that interpretation is consistent with the express language of the code provision. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city's interpretation of a local code provision governing appeals that determines that the consequence for underpayment of an appeal fee is not to dismiss the local appeal but rather to notify the appellant of the underpayment and request prompt payment of the remaining amount due is correct, where nothing in the applicable code section specifies that the consequence for an underpayment of an appeal fee based on misinformation from planning staff is dismissal of a local appeal. *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation that a code phrase "passive use recreational facilities," part of a wetland protection zone that generally prohibits development in wetland setback areas, includes trails and similar recreational facilities, and does not include developed recreational facilities such as an in-ground concrete swimming pool, is consistent with the text and context of the code provision. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body does not err in concluding that an in-ground concrete swimming pool is a "structure" as that term is defined in the city code, because it has a "fixed connection" to the ground. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code provision requires a proposed fueling center to be compatible with the "surrounding area," but the phrase "surrounding area" is not defined in the local code, a local government's interpretation of the phrase "surrounding area" as not requiring consideration of compatibility with a residential area located some distance away from the proposed fueling center must be affirmed under ORS 197.829(1)(a). *Leathers Oil Company v. City of Newberg*, 63 Or LUBA 176 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a proposed fueling center does not have a "primary pedestrian entrance" or any "large building surfaces," a local government's interpretation of its code provisions that regulate the design of the building features as in applicable to the proposed fueling center is required to be affirmed under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 258, 243 P2d 776 (2010). *Leathers Oil Company v. City of Newberg*, 63 Or LUBA 176 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer errs in determining that a local code provision that requires that each parcel created by a partition is "suitable for the use intended considering access" is satisfied by a demonstration of satisfaction with a separate code provision that requires each parcel to have "legal access" to a public road, where the two criteria pose different questions. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 288 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city setback reduction criterion requires the city to find that views of the ocean across a currently vacant lot will not be any more "obstructed" with a proposed front yard setback reduction than they would be without that setback reduction. Where it is the construction of the portion of the house that meets all setback requirements that almost entirely obstructs the view of the ocean, a city interpretation that any *de minimis* impact the proposed front yard setback might have on impaired view of the ocean that will remain through the small side yard does not amount to an "obstruction" is within the city's interpretive discretion under ORS 197.829(1). *Burton v. City of Cannon Beach*, 63 Or LUBA 300 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a breeding kennel arguably qualifies as animal husbandry, and animal husbandry is a farm use, a local government interpretation that the breeding kennel qualifies as a farm use is not inconsistent with the express language, purpose and policy of the land use regulation. *Siegert v. Crook County*, 63 Or LUBA 379 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation of a local code provision that allows a multi-use path to be constructed in a riparian corridor area if it is "necessary to maintain a functional trail system" is not inconsistent with the express language of any relevant plan or local code provision where a comprehensive plan map depicts a multi-use path within the riparian corridor area, even though the map labels the trail as "conceptual." *League of Women Voters v. City of Corvallis*, 63 Or LUBA 432 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government errs in denying an application for a use expressly allowed as a conditional use in the applicable zone on the grounds that the proposed conditional use is inconsistent with the purpose of the zone, where no code provision makes the zone purpose statement an applicable approval criterion, and the zone purpose statement includes no language suggesting that the purpose statement functions as a mandatory approval criterion for conditional uses allowed in the zone. *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will reject a city council's interpretation of a code provision allowing a property owner to site a recreational vehicle (RV) on the property for "temporary living purposes" to require that the RV be accessory to or in conjunction with a permanent dwelling on the property, where nothing in the applicable code provision expressly or impliedly requires a dwelling, and the city has expressly required, in other inapplicable code provisions, that an RV be an accessory use to or be in conjunction with a dwelling. *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. While a local government has latitude to identify applicable standards and criteria in its comprehensive plan and land use regulations, under ORS 227.173(1) the "standards and criteria" must already exist in the plan and ordinance, and the local government cannot manufacture standards and criteria to apply to approve or deny a permit application. *Buel-McIntire*

v. City of Yachats, 63 Or LUBA 452 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer does not err in interpreting a code standard requiring historic design review for alterations to a building having exterior materials "specifically listed" in the city's historic resource inventory not to require that contributing exterior materials be specifically described as contributing. If fairly read the text and context of the building description in the inventory indicates that a particular exterior material contributes to the building's significance, then historic design review is required to alter that exterior material. *Carlton Development LLC v. City of Portland*, 62 Or LUBA 157 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. That a city's historic resource inventory lists a building's "wood sash windows" in the "Description" paragraph rather than in the "Significance" paragraph does not mean that the windows are not contributing features, where in context it is clear that the inventory uses the description paragraph to list all contributing and noncontributing building features, and the significance paragraph is simply a summary conclusion based on the features listed in the description paragraph. *Carlton Development LLC v. City of Portland*, 62 Or LUBA 157 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer does not err in concluding that "wood sash windows" are specifically listed features contributing to a building's historic significance, such that a historic design review permit is required to replace the windows with vinyl windows, where the city's inventory concludes that the building is a "contributing" resource based on the features listed in the building description, including the original wood sash windows. *Carlton Development LLC v. City of Portland*, 62 Or LUBA 157 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of the use category "retail and wholesale trade facilities" to include a travel plaza that sells fuel, convenience items and food to travelers, where the proposed use fits within the plain and ordinary meaning of the use category's broad terms, and nothing in the text or context narrows the scope of the use category. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. An allegedly erroneous and overbroad code interpretation that all commercial uses allowed in any commercial zone are allowed under the use category "retail and wholesale trade facilities" in an airport overlay zone does not warrant reversal or remand, where the interpretative error, if any, does not undermine the governing body's principal interpretation that the proposed travel plaza is a "retail and wholesale trade facility." *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will reverse under ORS 197.829(1) a governing body's interpretation that a Limited Use overlay zone is applied to limit uses in exception areas only when the applicant requests it, and that instead conditions of approval can be applied to limit uses, when (1) the

Limited Use overlay zone is expressly intended for that purpose, (2) nothing in the code suggests an alternative mechanism to limit uses or authorizes attaching conditions of approval to limit uses in exception areas, and (3) under the county's interpretation and the criteria that govern designation of the overlay zone there are no circumstances under which the overlay zone could be applied. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local governing body interprets its zoning ordinance to conclude that either one of two provisions could apply to an application for a dwelling in a forest zone and that the applicant for the dwelling may choose to have the application evaluated under one or the other provision, LUBA will affirm that interpretation where that interpretation is not inconsistent with the text, context or purpose of the underlying provisions. *Bardolf v. Yamhill County*, 62 Or LUBA 321 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a county governing body's interpretation that an application to change the comprehensive plan map designation for property to Rural Use is not by itself a request for a right to develop more than one residence on the property and therefore need not be concurrently accompanied by a RU zone change application, when that interpretation is consistent with the express language of the provision. *City of Jacksonville v. Jackson County*, 62 Or LUBA 439 (2011).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The requirement that a dwelling sought to be replaced be a "building * * * which is occupied in whole or in part" does not include a requirement for continuous occupancy. *Dalton v. Polk County*, 61 Or LUBA 27 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When a replacement dwelling approval standard requires that the dwelling sought to be replaced have been "lawfully constructed," if there is a final unappealed decision that removed a use restriction from a lawfully established dwelling, the fact that that decision may have been incorrect does not change the fact that dwelling was legally established and may be replaced. *Dalton v. Polk County*, 61 Or LUBA 27 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a proposed replacement dwelling is in a forest zone rather than an EFU-zone, case law regarding the interpretation of "intact" for purposes of establishing that a dwelling sought to be replaced has "intact exterior walls" is not binding on the local government. *Dalton v. Polk County*, 61 Or LUBA 27 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council's implicit interpretation of a comprehensive plan requirement that amendments affecting less than five "separately owned tax lots" be processed as a minor plan amendment to mean lots or parcels owned by different persons, and reject petitioner's contrary interpretation that "separately owned" means lots or parcels potentially conveyable to different persons, where petitioner does not challenge the city council's interpretation or explain

why it is reversible under ORS 197.829(1). *Smith v. City of Salem*, 61 Or LUBA 87 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When deciding whether development is "small to moderate in scale" under one element of a comprehensive plan, a local government may consider language from another comprehensive plan element as context in determining that development of less than 100 acres is "small to moderate in scale." *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 96 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When determining what constitutes "development activity" in a subarea identified in the comprehensive plan, where the subarea provides for water dependent development, and the local government included inwater structures in its calculation of development acreage, dredging within those waters must be considered "development activity" in the subarea. *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 96 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When a local comprehensive plan provision that implements Goal 16 requires the local government to "protect" a resource, any development allowed is not consistent with the Goal 16 definition of "protect" unless there is at most a *de minimis* or insignificant impact on the resource that the provision requires to be protected. *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 96 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A comprehensive plan provision that implements Goal 16 and requires the local government to "protect" wildlife habitat within an estuary may be satisfied through off-site mitigation within the Goal 16 definition of "protect" if such mitigation results in no net loss to the protected habitat within the estuary, even if there is an impact at the development site. *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 96 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When building height requirements are measured from the "ground surface" within five feet of an exterior wall, a local government does not misconstrue the applicable law by interpreting "ground surface" to include the finished ground surface that is altered and raised during construction. *Concordia Neighborhood Association v. City of Portland*, 61 Or LUBA 143 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A requirement that mining "not be allowed closer than one-quarter mile from any noise or dust sensitive use" is properly interpreted to impose a minimum setback, leaving the applicant to select the mining site so long as the site selected is at least one-quarter mile from any noise or dust sensitive use. Any attempt by the local government to interpret the standard to allow it unbridled discretion to enlarge the one-quarter-mile setback would likely run afoul of the ORS 215.416(8)(a) requirement that permit applications be approved or denied based on "standards." *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. Where a zoning ordinance requires a mining permit applicant to demonstrate that a proposed mining operation can meet certain state standards and a state standard prohibits mining "without taking reasonable precautions to prevent particulate matter from becoming airborne," and a local government interprets that state standard to require that the applicant successfully prevent all particulate matter from becoming airborne, the local government erroneously interprets the state standard. The state standard only requires that the applicant take reasonable precautions; it does not require the elimination of all airborne particulate matter. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The hearings officer correctly interprets a code standard allowing modifications to a conditional use permit that result in "insignificant changes" in the physical appearance of development, use of the site, or impact on surrounding properties to be concerned with modifications that change the proposed development, not a modification to a deadline to complete the development as originally approved. *Connecting Eugene v. City of Eugene,* 61 Or LUBA 439 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The more deferential standard of review set out at ORS 197.829(1) applies to interpretations by local government governing bodies. The deferential standard of review set out at ORS 197.829(1) does not apply to interpretations by other local decision makers, such as hearings officers, and LUBA reviews such interpretations under ORS 197.835(9)(a)(D) to determine whether the hearings officer "[i]mproperly construed the applicable law." *Waverly Landing Condo. Owners' Assoc. v. City of Portland*, 61 Or LUBA 448 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Although a local code provision that requires an application to be reviewed for "consistency" with a variety of code requirements may not involve the same analysis that would be necessary if the code provision required the application to "comply" with explicit and easily measurable setback or height requirements, a local government misconstrues the applicable law in finding that it may ignore the "consistency" review unless an application also seeks a variation. *Hoskinson v. City of Corvallis*, 60 Or LUBA 93 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city's interpretation that a "common green" is a "full street" under a code provision that allows a reduction in density requirements where a "full street" is created is correct, where the code defines "common green" as a type of street, and does not include a definition for "full street." *Meade v. City of Portland*, 60 Or LUBA 265 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the local government did not adopt a reviewable interpretation of its erosion control ordinance to explain why the local government believes the erosion control ordinance applies to applications for preliminary subdivision approval, and it appears that the text of the erosion control ordinance could plausibly be interpreted to apply or not to apply to such decisions, remand is appropriate for the local government to interpret the erosion control ordinance in the first instance. *Montgomery v. City of Dunes City*, 60 Or LUBA 274 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When the local code requires a finding that a new parcel be suited for the "intended or offered" use, and the code requires a partition applicant to identify the intended use, a local government's interpretation that a finding of suitability is required only when the partition applicant files a concurrent permit application seeking approval of a specific use is not consistent with the text and context of the partition code. *Devin Oil Co., Inc. v. Morrow County*, 60 Or LUBA 336 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When a local code provision requires that a partition application demonstrate that "all required public service and facilities are available and adequate," the local government does not misinterpret that provision to apply only to services and facilities provided by third parties that serve more than one property, and not to apply to facilities provided on-site by the landowners to serve only the subject property. *Devin Oil Co., Inc. v. Morrow County*, 60 Or LUBA 336 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation of its ordinance is not "inconsistent" with the language of the ordinance, within the meaning of ORS 197.829(1)(a), if the interpretation is plausible, given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In determining whether a local government's interpretation of local land use law is inconsistent with the "express language" of the local land use law, LUBA and the appellate courts apply the statutory construction principles in ORS 174.010, which preclude interpretations that insert or delete words. *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation of its own land use laws to allow the planning commission complete discretion to grant an unlimited number of one-year permit approval extensions will not be affirmed under ORS 197.829(1), where the local government's interpretation adds language that is not present in the local land use law, and the interpretation defeats the purpose of the local land use law, which is to limit the life of a permit decision that is not acted on. *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Context includes previous versions of an ordinance. Where the previous comprehensive plan expressly permitted nonresource land to be designated Rural Residential, but subsequent plan amendments (1) eliminated that language and replaced it with language restricting the Rural Residential designation to lands subject to an exception to Goals 3 or 4, and (2) adopted a Rural Use designation limited to nonresource lands that do not require an exception, that context suggests that the county intended to restrict the Rural Residential designation to resource lands which require a goal exception, and exclusively employ the Rural Use designation for nonresource lands that do not require a goal exception. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392

(2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county's Rural Residential plan designation implements OAR 660-004-0040, which applies exclusively to rural residential areas that are subject to Goal 3 or 4 exceptions, and expressly does not apply to nonresource lands not subject to those goals, it is reasonable to presume that the Rural Residential designation also applies exclusively to resource lands for which a Goal 3 or 4 exception is taken, and is not intended to apply to nonresource lands. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. As part of a text and context analysis, LUBA may consider any local legislative history in the record for purposes of understanding the intent in adopting the text and context being considered. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will reverse a governing body's interpretation of an ambiguous plan provision, the text of which can be read to allow nonresource lands to be redesignated Rural Residential, where that interpretation is inconsistent with the text, context, purpose and underlying policy of the plan provision, and contrary to an administrative rule that the plan provision implements. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Because a comprehensive plan is made up of both text and maps, LUBA's deferential standard of review set out at ORS 197.829(1) applies to local government interpretations of plan maps as well as local government interpretations of plan text. *Oregon Shores Cons. Coalition v. Curry County*, 60 Or LUBA 415 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a composite map that is produced by enlarging a small scale comprehensive plan estuary map and applying it to a larger scale tax lot specific map has a fairly significant margin of error, it is plausible to interpret the small scale comprehensive plan estuary map to (1) include an entire small tax lot in a natural management unit, (2) exclude the entire small tax lot in a natural management unit or (3) place the small tax lot partially in a natural management unit and partially in a conservation management unit. In that circumstance, no further explanation is required for the local government's choice among the three plausible interpretations. *Oregon Shores Cons. Coalition v. Curry County*, 60 Or LUBA 415 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a comprehensive plan generally describes the resources that were to be protected by designating a natural estuary management unit on a small scale comprehensive plan map in 1981, a petitioner fails to show the local government's failure to interpret the comprehensive plan to include a small tax lot in the natural management unit is inconsistent with the "purpose" or "underlying" policy of the plan, within the meaning of ORS 197.829(1)(b) and (c), where, under the local government's interpretation, the natural estuary management unit still includes all of the resources that the comprehensive plan identified as justifying the natural estuary

management unit in 1981. *Oregon Shores Cons. Coalition v. Curry County*, 60 Or LUBA 415 (2010).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where petitioners assign error to a local government construction of applicable local land use law, the question for LUBA is whether the local government's interpretation must be sustained under ORS 197.829(1), not whether petitioners' interpretation is sustainable or a better interpretation than the local government's interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will not affirm a local governing body's interpretation of a code provision prohibiting development from disturbing more than 5,000 square feet to exempt areas temporarily disturbed during construction where that interpretation is inconsistent with the text of the code provision and context provided by the defined term "development," and policies and purposes of the development code. *Horsey v. City of West Linn*, 59 Or LUBA 185 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where no new roads or intersections are proposed as part of a partition, a hearings officer errs in interpreting a comprehensive plan policy that requires development to be served by adequate roadway facilities to require a showing of compliance with local ordinance criteria and road design standards that apply only to new roads and intersections. *Pelz v. Clackamas County*, 59 Or LUBA 219 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a local governing body's interpretation of a code provision that a modification of a detailed development plan necessarily extends the effective period of an approval of that detailed development plan, where that interpretation is consistent with the text and purpose of the provision. *Knapp v. City of Corvallis*, 59 Or LUBA 285 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will reverse a county governing body's code interpretation that a conditional use allowed in an Acreage Residential zone that generates any amount of dust leaving the property must be denied because it is not in harmony with the purpose of the zone to buffer urban uses from farm uses, where the zone allows a number of dust-generating uses as permitted and conditional uses in the zone, including farm use, and under the county's interpretation few if any of those uses could ever be approved in the zone. *Davis v. Polk County*, 58 Or LUBA 1 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city errs by approving a variance to subdivision standards under its general zoning variance criteria, where a separate city ordinance provides variance standards for subdivisions, and the city's decision offers no reviewable interpretation or explanation why the subdivision variance standards do not apply. *Holbrook v. City of Rockaway Beach*, 58 Or LUBA 179 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. When the local code defines "building" as a "structure built for the support, shelter, or enclosure of persons, animals, chattel, or property of any kind," the local government does not exceed its discretion under ORS 197.829(1) in finding that utility power poles are not buildings and thus not subject to building height restrictions. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When a local code establishes a hierarchical framework for terms that are not defined by the code, the local government must adhere to that framework, and not skip to the last source in the framework when a definition is provided by an earlier listed source. Using a lower hierarchy dictionary definition of "protect" that means to *attempt* to preserve a resource instead of a hierarchically superior OAR definition of "protect" that means to *actually* preserve a resource misinterprets the applicable law. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government misinterprets the applicable law by finding that a liquefied natural gas facility is "small or moderate" in scale just because it encompasses less than 100 acres and needs less than 20 acres of fill. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of a code provision that authorizes uses in a zone that are similar to listed uses, to allow a proposed use that is similar to a listed use, even if the proposed use is specifically listed in another zone, where the governing body's interpretation gives independent effect to that code provision and is consistent with its text and context. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county's code includes not one but two separate provisions authorizing uses that are not listed as permitted uses in that zone, or listed anywhere as a permitted use in any zone, if the use is "similar to" uses permitted in the zone, it is clear that the county is not concerned with maintaining bright lines between use categories, and the county does not err in approving a "truck stop" as a similar use to an "automobile service station," even though the applicable zone does not list truck stops as a permitted use while other zones in the county do. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city governing body does not err in interpreting comprehensive plan policies that govern "development" to be inapplicable to a proposal to annex and extend sewer service to fully developed property. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a local governing body's interpretation of a code provision allowing development approval to be extended for two years if "conditions have not changed" to require denial of the requested extension only if the changed conditions would have resulted in

denial of the original application, and that interpretation is consistent with the text and purpose of the code provision. *Oregon Shores Cons. Coalition v. City of Brookings*, 58 Or LUBA 421 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county does not err in interpreting a comprehensive plan policy requiring that airports be compatible with surrounding uses to be satisfied by incorporated findings addressing conditional use permit standards that, the county found, ensure that the airport is compatible with surrounding uses. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of a comprehensive plan policy that requires that development shall comply with "applicable" Department of Environmental Quality (DEQ) standards to not require that the applicant demonstrate that a proposed personal use airport will comply with a DEQ noise program that DEQ has suspended. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county does not err in concluding that the county's noise ordinance is not a conditional use approval standard for a personal use airport, where the noise ordinance is not part of the county's zoning regulations, the noise ordinance functions as a performance standard rather than an approval standard, and the noise ordinance includes an exclusion for noises generated by approved conditional uses. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation of conditional use criteria in its code as containing a categorical exemption for certain public utility facilities is not inconsistent with other applicable conditional use criteria or the provisions of the relevant zoning overlay district and is not reversible under ORS 197.829(1). *Paddock v. City of Lafayette*, 58 Or LUBA 498 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Absent code language to the contrary, a county does not err in finding that regulations governing a particular zoning district apply only to land located within that district, and not to uses proposed on land adjacent to the district. *Crockett v. Curry County*, 58 Or LUBA 520 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of a code provision requiring that a proposed use that is "inconsistent" with the transportation plan must be processed as a plan amendment, to require only that the county determine whether the proposed use is in conflict with any transportation plan policy, and not to require that the county find that the proposed use is specifically authorized by the transportation plan. *Crockett v. Curry County*, 58 Or LUBA 520 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When an approval criterion requires a partition map to show "other features affecting development," a local government does not misinterpret the applicable law by requiring

an applicant to show areas designated as less and least suitable by the comprehensive plan. "Other features affecting development" can encompass physical features themselves as well as comprehensive plan designations based on those features. *Sperber v. Coos County*, 58 Or LUBA 570 (2009).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of a code provision allowing second-floor residential use of a commercial building if "accessory to an active commercial use," to permit residential use by persons who are not owners or employees of the commercial use, where the code defines an accessory use as one that is "incidental and subordinate," rather than related to or associated with. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the relevant code provisions impose smaller building size limits on outright permitted commercial uses than conditionally permitted commercial uses, LUBA will affirm a governing body's interpretation that a 4,353-square-foot structure housing both outright permitted and conditionally permitted commercial uses is not subject to the 4,000-square-foot limit on outright permitted commercial uses. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county does not err in interpreting a planned development standard requiring that at least 50 percent of the development be open space "retained for common use by owners and residents of the development" to refer to both commonly owned open space and privately owned open space. *Saddle Butte Residents' Association v. Douglas County*, 56 Or LUBA 269 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government interpretation that construes a local code requirement for open space that requires either "open space" or "outdoor recreation area" in a manner that requires both open space and outdoor recreation area is not entitled to deference under ORS 197.829(1). *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city is not required to interpret traditional variance language ("practical difficulty or unnecessary hardship") in accordance with the traditional strict meaning of that language, particularly when that language is not used as part of the city's variance code but instead was borrowed from the variance context to be used as a test for expanding nonconforming uses. *Azore Enterprises, LLC v. City of Hillsboro*, 56 Or LUBA 422 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation that a code provision requiring that private wells be shown to meet certain bacteriological quality standards does not also require a showing of sufficient quantity, where the code provision does not mention water quantity and other code standards appear to govern water quantity. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When a local code allows exceptions when there is a "demonstrable difficulty" in meeting the applicable approval standard, a finding that meeting the approval standard would produce little benefit, even if true, does not establish that there is a "demonstrable difficulty" in meeting the standard. *Bullock v. City of Ashland*, 56 Or LUBA 677 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation of the meaning of various street classifications that are defined in its comprehensive plan is not inconsistent with the express language of the plan provision. *Lufkin v. City of Salem*, 56 Or LUBA 719 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The county's interpretation of a provision of its local code that allows the county to waive appeal fees for certain neighborhood groups is not inconsistent with the express provisions of its local code or other applicable ordinances under ORS 197.829(1). *Ratzlaff v. Polk County*, 56 Or LUBA 740 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation that allowing family and social guests to stay in two recreational vehicles parked on a lot adjoining the property owner's dwelling does not constitute a "recreational vehicle park" as that term is defined in the code, because it is not open to the "general public." *Fessler v. City of Fossil*, 55 Or LUBA 1 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council's interpretation of a planned unit development standard authorizing septic tanks for individual lots where it is "impractical" to connect the development to the city sewer system, to govern only circumstances requiring permanent septic tank installations, not temporary septic tanks to be used until the city system is upgraded, followed by mandatory connection to the city system. *Coquille Citizens for Resp. Growth v. City of Coquille*, 55 Or LUBA 155 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council interpretation of the code term "access" to include a driveway is not inconsistent with the text, context, purpose or policy of that term. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation of a code provision providing minimum performance standards for "streets" to include unsignalized intersections. *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Petitioner fails to demonstrate that the city erred in evaluating the performance of an intersection by measuring delays associated with each directional approach rather than the entire intersection, particularly when petitioner's own expert used the same method to evaluate intersection performance. *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Absent a local regulation that requires otherwise, it is permissible to locate an accessory parking lot on land that is zoned differently than the land on which the primary use the parking lot serves is located. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government misconstrues its code when it finds that an ambiguity in the exhibits to an ordinance creates an inconsistency between the ordinance and the official zoning map. *Brown v. Lane County*, 54 Or LUBA 281 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer's interpretation of the phrase "mechanical means" as applying to technology using light emitting diodes in electronic signs is correct. *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA's standard of review of county counsel's interpretation of a local zoning code provision is whether that interpretation is correct. *Love v. Klamath County*, 54 Or LUBA 410 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation that the use category of "truck sales, service, storage and maintenance" includes dispensing of fuel to trucks, notwithstanding that the code includes a different use category of "truck stop" that expressly permits dispensing fuel, where other context indicates that the county intended truck "service" to include dispensing fuel. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code includes specific conditional use standards for a particular use category that is a permitted use in some zones and a conditional use in other zones, LUBA will affirm the local government's interpretation that the conditional use standards do not apply to that use if it is proposed in a zone where it is a permitted use. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will reject a local government's interpretation of an ordinance recital stating that "[a]t such time as a development agreement is executed" the comprehensive plan "will be amended" to provide an exception to access spacing standards described in the ordinance to mean that the access spacing exception applies to proposed development notwithstanding the absence of an executed development agreement. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government is not bound by ORS 215.427 to interpret a local code provision in the manner that it has been interpreted in prior quasi-judicial proceedings on a

different application. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will not defer to a local government's interpretation of the phrase "necessary for and accessory to" forest management as meaning "convenient and efficient" to forest management, where such an interpretation is contrary to the plain meaning of the word "necessary," the express language of the provision at issue, and other language in the provision. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Interpretations of a local code provision offered for the first time in a response brief at LUBA are not interpretations made by the local government. *Munkhoff v. City of Cascade Locks*, 54 Or LUBA 660 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation of a code provision defining the study area for an aggregate mine, to exclude haul roads used to transport finished aggregate material off-site, is consistent with the text of the code provision and is not reversible under ORS 197.829(1). *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation that the pre-existing use or structure on a property does not have to be currently lawful for redevelopment of the property to qualify as remodeling or a change of use, rather than new development, is not reversible under the deferential standard of review under *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), and ORS 197.829(1). *Oregon Transfer Company v. City of Milwaukie*, 53 Or LUBA 119 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In determining whether a proposed park and ride lot will result in an increase in parking demand, a local government does not err in comparing the parking demand created by the prior theatre use of the property, which was discontinued six years earlier and the proposed demand will be created by the proposed park and ride lot. In many cases involving remodeling of existing development or a change in use there will be intervals of days, months, or years between uses where no use or associated parking is occurring on the property. *Oregon Transfer Company v. City of Milwaukie*, 53 Or LUBA 119 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city's interpretation that its community service overlay (CSO) zoning designation functions as a conditional use rather than a traditional overlay zone is sustainable under *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), and ORS 197.829(1). Therefore, because the CSO zone overlay can only be applied to approve a specific use, and unlike other city overlay zones, the CSO zone does not require a zoning map amendment, the CSO designation does not trigger the obligation to address the transportation planning rule. *Oregon Transfer Company v. City of Milwaukie*, 53 Or LUBA 119 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. Even though the text and context of an ordinance give little indication of the city council's intent in adopting the ordinance, when there is an undisputed claim that the ordinance was adopted to clarify that the proposed development qualifies as an "assisted residential facility," the city council does not misconstrue the law in concluding that the proposed development qualifies as an "assisted residential facility." *Toler v. City of Cave Junction*, 53 Or LUBA 158 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation of code variance and off-street parking standards, to the effect that a potential off-street parking site that would otherwise satisfy the code off-street parking standard need not be considered, because it would require patrons of a proposed restaurant to cross a four-lane highway with no crosswalks or pedestrian facilities. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a city council interpretation that a "self-created hardship" exists for purpose of obtaining a variance to a street access standard, where the applicant has taken actions in the past that are inconsistent with the expectation of obtaining future access, by consolidating the subject property with an adjoining lot that already has access. *Krishchenko v. City of Canby*, 53 Or LUBA 232 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer had authority to modify a prior permit's condition of approval requiring a perimeter fence, notwithstanding a code provision that prohibits a modification that is a "substitute for an appeal," where the requested modification is to approve a different fence location following a court order two years after the permit decision, and thus the modification could not have been the subject of an appeal. *Chackel Family Trust v. City of Bend*, 53 Or LUBA 385 (2007).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer's interpretation of a code standard requiring that proposed grading not cause erosion to any greater extent than would occur in the "absence of development" to mean in the "absence of *proposed* development," not prior development activities that predated the grading permit application, is reasonable and will be affirmed. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a hearings officer's interpretation of a code provision requiring that the applicant submit a letter from the service provider, to require only that the letter be submitted, not that it be free of error, where nothing in the text or context suggests that the county is supposed to second-guess the service provider's assessment. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a zoning ordinance limits residential development on "weak foundation soils," but does not define that term, the city's interpretation of that term to include soils that the

National Resource Conservation Service rates as having "severe" limitations but not to include soils rated as having "moderate" or "slight" limitations is not reversible under ORS 197.829(1). *Jebousek v. City of Newport*, 52 Or LUBA 435 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation of a plan provision allowing plan amendments when "necessary to correct an identified error in application of the plan," to include not only instances where the plan was erroneous when first implemented, but also instances where circumstances have changed over time. *Oregon Shores Cons. Coalition v. Lane County*, 52 Or LUBA 471 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a local government's interpretation of a planned unit development (PUD) standard prohibiting "clear-cutting" of trees, that trees that must be removed for siting individual dwellings will be evaluated at the time of building permit application, not as part of the PUD approval, where the standard does not explicitly require evaluation of trees removed for dwellings, and it is impossible to determine at the time of PUD approval which trees must be removed for dwellings. *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's authority to interpret the scope and meaning of land use regulations adopted to implement statewide planning goals and administrative rules is constrained by ORS 197.829(1)(d), which requires LUBA to reverse an interpretation of a local regulation contrary to the goal, statute or rule it implements, notwithstanding the acknowledged status of that regulation. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 250 (1996), LUBA may apply ORS 197.829(1)(d) to review a local government's interpretation of an acknowledged code provision that implements a statewide planning goal, statute or rule only if the code provision is ambiguous. If the code provision is subject to more than one reasonable interpretation, one of which is consistent with the goal, statute or rule implemented, the local government cannot choose an interpretation that is inconsistent with the goal, statute or rule implemented. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county's zoning code, like the Goal 4 rule, categorizes certain less intensive uses as outright permitted uses and similar but more intensive or permanent uses as conditional uses allowable on forest lands, an interpretation that the more intensive use is allowed outright as an accessory use to forest operations free of restrictions imposed on the less-intensive use is inconsistent with the structure of the code. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Determining whether a "permanent logging equipment repair and storage" structure that is a listed conditional use under the Goal 4 rule but is not provided for at all under

the county's forest zone is allowed as an outright permitted "accessory" use to forest operations requires interpretation of the text and context of the zoning code. Accordingly, LUBA's review of that interpretation is governed by ORS 197.829(1)(d) rather than the principle described in *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 250 (1996). *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. That a base commercial zone does not provide for residential uses does not mean that an overlay zone that allows residential uses is necessarily inconsistent with the base zone. Absent some textual or contextual basis to conclude otherwise, LUBA will affirm a governing body's interpretation that the overlay zone may authorize additional uses not authorized in the base zone. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The purpose statement to a land use regulation is both context for interpreting that regulation as well as an explicit statement of its purpose. LUBA will reverse a governing body's interpretation of the regulation to allow residential uses that are prohibited by and therefore inconsistent with the purpose statement. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the purpose of an overlay zone is to allow non-recreational uses only when they are related to or support recreational uses, under ORS 197.829(1)(b) LUBA will reverse a governing body's interpretation that the zone allows unrestricted non-recreational uses regardless of whether those uses are related to or support recreational uses. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's code interpretation that harmonizes and gives effect to two conflicting provisions, where the only other interpretation proffered would nullify an entire code chapter. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer does not err in interpreting a code provision that allows the "preparation of land for cultivation" that is a "customarily accepted agricultural activity" without a permit in agricultural zones to require the landowner to demonstrate that a proposal to cover an existing landfill with 100,000 cubic yards of soil not only involves "preparation of land for cultivation" but is also a "customarily accepted agricultural activity." *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a refinement plan specifies that applicable plan policies are "guidance for decision-making," as long as the decision maker actually considers applicable plan policies and explains the basis for its choice to give one policy greater weight than another, where different policies compete or point to different results, LUBA will not disturb that choice on review.

Bothman v. City of Eugene, Or LUBA 701 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a city council interpretation of a code provision allowing flag lots where a "public street cannot be provided" to allow flag lots where *code-compliant* public streets cannot be provided. Because a non-compliant public street would almost always be theoretically possible, any other interpretation would essentially prohibit flag lots. *Cutsforth v. City of Albany*, 51 OR LUBA 56 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city does not err in interpreting a code provision requiring that a subdivision plat provide access "that will allow its development in accordance" with the code to not require that the applicant provide additional access to a parcel that is already developed consistent with applicable zoning. The code does not require the applicant to provide access to allow for potential redevelopment of developed parcels. *Cutsforth v. City of Albany*, 51 OR LUBA 56 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city annexation ordinance must be reviewed by Metro under its code to determine if the annexation is consistent "with other applicable criteria * * * under state and local law," Metro does not exceed its interpretive discretion by interpreting that requirement to allow it to determine if the city's annexation ordinance is inconsistent with two Oregon Supreme Court decisions concerning annexation. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the code defines "amphitheater" to include "fixed, permanent or temporary seating," a phrase that clearly refers to physical objects such as chairs or benches, a hearings officer errs in interpreting "temporary seating" to include bare ground on which people may sit or spread a blanket. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a hearings officer's interpretation that tents are temporary "structures" for purposes of applying fire safety siting standards to a campground, where the code defines "structure" broadly in a manner that is not limited to permanent structures, and the code clearly subjects campgrounds to fire safety siting standards. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a hearings officer's interpretation of a code provision requiring calculation of groundwater availability based on a study area including the "average size of lots and parcels within one-quarter mile" of the subject property to include the entirety of all lots or parcels that are at least partially within one-quarter mile of the property. A hearing officer's refusal to interpret the code to require that the study area be limited to just those portions of lots or parcels within a one-quarter-mile radius is not erroneous, where the county staff manual for more detailed groundwater studies requires consideration of the entirety of lots or parcels that are bisected by a one-quarter-mile radius, and it is reasonably clear that both types of studies consider the same area. *Upright v. Marion County*, 51 Or LUBA 415 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the purpose of a groundwater study area is to accurately assess the risk to groundwater from residential development, an interpretation that more accurately represents the existing and potential residential development conditions in the area is more consistent with the purpose and underlying policy of the study than a contrary but textually plausible interpretation that considers undevelopable portions of lots as being developable and hence overstates potential development pressures. *Upright v. Marion County*, 51 Or LUBA 415 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A standard requiring a finding that the uses allowed by the proposed zoning "can be served through the orderly extension of key urban facilities and services" does not require evaluation of all theoretically possible uses allowed in the new zone. A city does not err in interpreting such a standard as being satisfied by evidence that uses likely to be developed under the new zone, given the property's size and other constraints, can be served by key urban facilities and services. *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city does not err in assuming that two developed lots that are part of a five-lot tract will not be redeveloped when rezoned, for purposes of a rezoning standard requiring that uses allowed in the proposed zoning can be served by urban services, including transportation facilities, where the applicant does not propose redevelopment and the code requires a similar evaluation when property is redeveloped. *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government has adopted a generally applicable procedure under which it corrects violations of a variety of local laws by filing actions in circuit court, a local government decision that an existing use of property does not constitute a violation of its zoning ordinance that would justify filing a circuit court action under that procedure is not a land use decision. *Wells v. Yamhill County*, 51 Or LUBA 659 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government correctly interprets its zoning code only to allow local appeals of decisions that will constitute land use decisions when they become final. *Wells v. Yamhill County*, 51 Or LUBA 659 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government misconstrues its local code when it interprets the word "ownerships" to have different meanings in different parts of the code. *Brown v. Lane County*, 51 Or LUBA 689 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where it is possible to interpret a development code provision to require consideration of more facilities and services than a similar comprehensive plan policy and to require that those facilities and services be already available at the time of annexation, but a local government implicitly interprets the development code policy simply to implement the

comprehensive plan policy and to be coextensive with the plan policy, LUBA will defer to that interpretation where there are other development code provisions that support that limited interpretation. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A code standard allowing an increased or reduced setback for cellular towers based on considerations such as topography, etc., that increase or reduce off-site impacts need not be interpreted to include an implicit "no net increase" in off-site impacts standard. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer errs in interpreting a code standard that allows a reduced setback for cellular towers based on listed considerations that increase or reduce off-site impacts, to allow a reduced setback as long as the applicant has minimized off-site impacts "to the extent possible" given the dimensional constraints of the property, where considerations such as the shape of the property and whether the applicant has minimized off-site impacts to the extent possible are not among the permissible considerations. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation that retaining walls that prevent erosion of a bluff on a public park are accessory to park uses, notwithstanding that the walls also serve to protect adjoining private property. *Moreland v. City of Depoe Bay*, 50 Or LUBA 44 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a code provision prohibiting removal of "riparian vegetation" plausibly could be interpreted either to apply throughout the zone or only within a defined "zone of riparian vegetation," LUBA will affirm a governing body's interpretation that the code provision applies only within the zone of riparian vegetation. *Moreland v. City of Depoe Bay*, 50 Or LUBA 44 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county inventoried big game habitat, identified conflicting uses, analyzed the ESEE consequences, and identified the subject property as a 3B site (allow the uses which conflict with the resource site fully), the county governing body's interpretation that its code exempts 3B sites from further ESEE analysis is entitled to deference. *Kemp v. Union County*, 50 Or LUBA 61 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. County's interpretation that use of the past tense in plan language that development in a particular residential area "*was* limited to the creation of long, narrow lots adjacent to the roads" indicates that the plan provision does not constitute a mandatory approval criterion for the challenged partition is entitled to deference. *Kemp v. Union County*, 50 Or LUBA 61 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. A local ordinance that prevents reconsideration within a year of a denied application "following the close of the public hearing" does not prevent reconsideration of a resubmitted site plan application that was part of a prior application that was denied following a public hearing, when the public hearing only considered a plan and zone change combined with the site plan application rather than the site plan application itself. *Wal-Mart Stores, Inc. v. City of Oregon City*, 50 Or LUBA 87 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A new application that eliminates a previously proposed plan and zone change on adjacent parcels but retains essentially the same site plan application is not the "same or substantially similar" as the prior application for purposes of a local ordinance that precludes reconsideration of such applications within a year after denial of the first application. *Wal-Mart Stores, Inc. v. City of Oregon City*, 50 Or LUBA 87 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When an ordinance requires "windows or transparencies" and the local government denies an application for providing windows that are not transparent, the local government's interpretation is inconsistent with the express language of the ordinance. *Wal-Mart Stores, Inc. v. City of Oregon City*, 50 Or LUBA 87 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. County interpretation that ordinance requiring a 25-foot access easement cannot be satisfied by two physically separated 20-foot easements is not inconsistent with the language, purpose, or policy of the ordinance, even if petitioner's suggested interpretation might also be consistent with the ordinance. *Blossom Properties, LLC v. Marion County*, 50 Or LUBA 269 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a local government interpretation that an elevated walkway that extends over an estuary zoned Water is not located in the Water zone, where the walkway is attached to a dock that is in a Marine Commercial zone. *Crowley v. City of Bandon*, 50 Or LUBA 389 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. That a code provision prohibiting application of urban residential zones outside urban growth boundaries is outdated may be a compelling argument for amending the code provision, but it is not a sufficient reason for the local government to ignore it. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a governing body's interpretation allowing residential units within a "recreational planned unit development," notwithstanding that "residential uses" are prohibited in the underlying zone, where the zone nonetheless allows a recreational planned unit development, and the code definition of that term includes residential units as a core component. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A code standard requiring that the local government apply the more restrictive standard when two or more conflicting standards apply does not govern circumstances where it is unclear which of two standards applies. In such circumstances, the local government must interpret its code to determine which of the standards governs the proposed use. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where both possible interpretations of a code density standard equally conflict with other code provisions, the choice of which interpretation to adopt is up to the local government. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. An interpretation made by county counsel in a stipulated dismissal in a circuit court mandamus proceeding is not entitled to deference under ORS 197.829(1). *Flying J. Inc. v. Marion County*, 49 Or LUBA 28 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the text of an ordinance clearly demonstrates an intent not to rezone a particular area, but an attached map shows the area as rezoned, the text controls over the map. *Flying J. Inc. v. Marion County*, 49 Or LUBA 28 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code requires that the zoning map be amended to an "appropriate designation" of the city when an area is annexed, and the city adopts county zoning for the annexed area but does not explain how county zoning satisfies the code requirement, remand is appropriate for the city to adopt findings or an interpretation demonstrating that the county zoning is consistent with the code requirement. *Hammons v. City of Happy Valley*, 49 Or LUBA 38 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government is within its discretion under ORS 197.829(1) to interpret a planned unit development regulation requiring protection of "public safety" on sites with natural hazards "through clustering of development" on that portion of the site suitable for development as not requiring consideration of off-site impacts of proposed development. *Dinges v. City of Oregon City*, 49 Or LUBA 376 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county errs in interpreting a rezoning code provision requiring that "[o]ther lands in the county" are unavailable or not as well-suited as the subject property to limit the inquiry to lands outside UGBs, where nothing in the text or context so limits the inquiry, and context directs the county to locate uses allowed under the proposed zone within UGBs. *Friends of Yamhill County v. Yamhill County*, 49 Or LUBA 529 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code criterion requires that a nonfarm dwelling be situated on a portion of a lot or parcel that is "generally unsuitable for the production of farm crops and livestock

or merchantable tree species," and the code then spells out the considerations for determining whether a portion of a lot or parcel is "unsuitable for farm use," the term "farm use" is not properly read to require evaluation of the suitability for farm uses other than the production of farm crops and livestock or merchantable tree species. *Griffin v. Jackson County*, 48 Or LUBA 1 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where code language limiting "gross square footage" is ambiguous and, based on text and context, could plausibly limit either "footprint" or "gross floor area," a governing body's choice between two equally plausible meanings is within its discretion under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003). *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city correctly construes a policy that conditions connection to or extension of city water and sewer service upon annexation or consent to annexation not to prohibit the city from requiring consents to annexation in other circumstances. *Roads End Sanitary District v. City of Lincoln City*, 48 Or LUBA 126 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will decline to interpret a local provision in the first instance under ORS 197.829(2), where the provision is subject to several potential interpretations, some of which, if adopted, would require reversing the decision. In such circumstances, remand is appropriate to allow the governing body to interpret the provision in the first instance. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where it is not clear from the comprehensive plan map whether the plan designation governing the subject property is a base or an overlay plan designation, LUBA will affirm a governing body's interpretation that the plan designation is an overlay designation, where the comprehensive plan text does not list or describe the designation as a base plan designation. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city's interpretation of its own legislation that the ocean front setback line be measured from the edge of adjacent "enclosed living areas" rather than attached decks and patios is inconsistent with the express language of the local ordinance, where that ordinance measures the setback from the edge of adjacent "structures" and "structures" is defined to include decks and patios. *Tonges v. City of Manzanita*, 48 Or LUBA 296 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Because OAR 660-006-0025(4)(t) does not require that "existing buildings" that are to be used for hardship dwelling must be connected to the same septic system that serves the existing dwelling, it would not be inconsistent with OAR 660-006-0025(4)(t) to interpret an ambiguous zoning ordinance provision for hardship dwellings in exclusive farm use zones not to impose that requirement either. *Burton v. Polk County*, 48 Or LUBA 440 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Given the significant regulatory distinctions between "single family dwellings" and "tourist rental cabins" allowed in a rural zone, a county may approve proposed cabins that will be owner-occupied part of the year under the densities allowed for "tourist rental cabins" only if their use for something other than "tourist rental cabins" is *de minimis*. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Owner-occupancy for 120 days per year is not a *de minimis* use of a dwelling, consistent with the status of dwellings as "tourist rental cabins." *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will reject an argument that a code limitation on "buildable area" regulates only the interior, habitable space of a dwelling, where the local government has previously interpreted the code provision to regulate uninhabited structures such as garages or sheds, and the context and legislative history of the provision indicates that it is intended to limit the area of a lot or parcel covered by structures, not the area of interior or habitable space. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. An interpretation that some decks but not others are regulated under a code provision limiting the "building area" of a lot or parcel is inconsistent with the text and purpose of the provision, where the relevant terms do not distinguish between types of decks and the apparent purpose of the provision is to limit the area of a lot or parcel covered by structures. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation that it has authority to modify a condition of preliminary subdivision plat approval under a code standard allowing "minor changes" to an unrecorded subdivision plat is not reversible under ORS 197.829(1). *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city's alleged misinterpretation of a code provision does not provide a basis for reversal or remand, where the only significance petitioner attaches to the misinterpretation relates to an issue that was not raised below and is therefore beyond LUBA's review. *Comrie v. City of Pendleton*, 47 Or LUBA 38 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretations that (1) the transportation system plan (TSP) is part of the city's comprehensive plan, (2) projects described in the TSP supersede transportation projects described in the comprehensive plan, and (3) extension of a different street than contemplated in the TSP is consistent with TSP language intended to allow the city flexibility in choosing which street to extend, are not reversible under ORS 197.829(1). *Comrie v. City of Pendleton*, 47 Or LUBA 38 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a finding is ambiguous and could be read to misinterpret a code provision, but read in context it is reasonably clear that the local government did not intend the erroneous interpretation petitioner ascribes to it, and in fact intended an interpretation consistent with the code provision, petitioner's arguments based on that ambiguous finding do not provide a basis for reversal or remand. *Wynn v. Polk County*, 47 Or LUBA 73 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer errs in determining that an internal logging road is not a "road" because of its poor condition and infrequent use, where the code definition of "road" does not assign significance to the road's condition or frequency of use. *McAlister v. Jackson County*, 47 Or LUBA 125 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a hearings officer misinterprets the code term "road," but does not address either the applicant's proposed interpretation that a logging track can be a "road" or a contrary planning staff interpretation that only platted rights-of-way or legally described easements are "roads," LUBA will remand the decision to the hearings officer to reconsider what constitutes a "road." *McAlister v. Jackson County*, 47 Or LUBA 125 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government may not interpret a local code provision that requires connection to "an existing city standard paved street" to be satisfied by a security deposit in lieu of an improved street. *Doob v. City of Grants Pass*, 47 Or LUBA 152 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government has the discretion to interpret a local code provision requiring private streets to provide for pedestrian needs in a "safe and functional manner" to not require sidewalks on private streets serving four or fewer units, in context with another code provision that requires sidewalks on private streets only if the streets serve more than four units. *Doob v. City of Grants Pass*, 47 Or LUBA 152 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a conditional use approval criterion requires a finding that the proposed conditional use will have minimal adverse impacts "compared to the impact of development that is permitted outright," a county decision that interprets that criterion to be met by a proposed commercial recreational park, because an otherwise identical publicly owned recreational park could be approved as a use permitted outright, is not reversible under ORS 197.829(1). *Gumtow-Farrior v. Crook County*, 47 Or LUBA 186 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Findings that rely on code drainage requirements to avoid impacts on adjacent farming are adequate to demonstrate compliance with a code standard requiring no significant impact on farming, where the only issue raised regarding impacts on adjacent farming involved drainage. *Nelson v. Curry County*, 47 Or LUBA 196 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation of a design review criterion requiring that the "bulk and scale" of a proposed retail supercenter be "compatible" with surrounding buildings as necessitating a comparison of the size of the proposed buildings and surrounding buildings—and not just visual compatibility—is consistent with the text of the criterion and not reversible under ORS 197.829(1)(a). *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. There is no intrinsic reason why a regulatory concern to ensure compatibility of size between proposed and existing development must be expressed as zoning standards rather than as site design review standards. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city's interpretation that a code definition of "Construction Sales and Services," allowing retail sale of "materials used in construction, maintenance and repair/remodel of buildings," does not limit the materials sold to any particular subset of "repair/remodel" materials is not inconsistent with the express language, purpose or underlying policy of the code definition. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the city's new acknowledged comprehensive plan includes a provision stating that existing development zones continue to apply until the new code is acknowledged, it is within the city's discretion under ORS 197.829(1) to interpret that plan provision to resolve any conflicts between the old zoning code and new comprehensive plan designations. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. It is within a city's interpretive discretion under ORS 197.829(1) to interpret comprehensive plan language setting out considerations for locating commercial development in the city as being planning directives to the city to be used in determining the appropriate plan designation or zone, and not as approval standards that an applicant for commercial development permitted outright in a particular zone must satisfy. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local code provision that requires legislative amendments to be consistent with the comprehensive plan and land use ordinances is not properly interpreted to require repeal and re-adoption of the entire comprehensive plan in order to amend a portion of the plan. The local government's interpretation that amendments must be consistent with *unamended* provisions of the plan and land use ordinances does not misconstrue the applicable law. *Stevens v. Jackson County*, 47 Or LUBA 381 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city does not exceed its discretion under ORS 197.829(1) in interpreting a code

provision requiring that development not be contrary to applicable comprehensive plan policies to allow a balancing of competing comprehensive plan policies. *Chin v. City of Corvallis*, 46 Or LUBA 1 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. That a city sign code adopts the Oregon Motorist Information Act (OMIA) by reference may indicate that the city intends to allow at least some OMIA-permitted signs within the city, but does not necessarily indicate that all OMIA-permitted signs are allowed in the city, much less that OMIA-permitted signs are allowed outright without further city regulation. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a sign code provision stating that state sign permit holders need not seek separate city approval can be read either to (1) allow such signs outright within the city, or (2) allow such signs only if otherwise permitted by the sign code, and either interpretation is consistent with the text and context of the provision, the city's choice between interpretations is not reversible under ORS 197.829(1)(a). *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the purpose of a sign code includes preventing sign clutter and minimizing distractions for motorists, a sign code interpretation that results in smaller and lower signs along public highways than would result under other interpretations is consistent with the code's purpose and underlying policy, for purposes of ORS 197.829(1)(b) and (c). *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A broad and poorly defined sign code prohibition on "billboards" does not necessarily require inquiry into the content of signs or allow content-based distinctions where, as interpreted by the city, the code allows or prohibits all signs, including "billboards," based on specific standards that do not require inquiry into the content of proposed signs. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A poorly defined code prohibition on "billboards" is not unconstitutionally overbroad when, read in context, it is subject to a narrowing construction that clarifies the meaning of "billboard" and the precise scope of the prohibition. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A poorly defined code prohibition on "billboards" is not unconstitutionally vague where, as interpreted and read in context, the sign code provides definite and objective standards governing all signs, including billboards, and does not grant the city "unbridled discretion" to approve or deny proposed signs. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The governing body is within its discretion under ORS 197.829(1) in interpreting

a standard to be a post-approval performance standard on industrial uses rather than an approval criterion, where the standard is within a section entitled "performance standards" and prescribes impermissible levels of pollution rather than approval criteria. *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city is entitled to appropriate deference to its interpretations of regional land use legislation under ORS 197.829(1), notwithstanding that the city is one of several enacting bodies that adopted the regional land use legislation. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A planning commission incorrectly interprets a code standard prohibiting "construction" on slopes greater than 30 percent to limit only construction of a building within a building envelope, and not to include a steep driveway and retaining walls, where the plain meaning of "construction" is not limited to buildings, the text and context do not suggest that the governing body intended to limit its regulatory effect to building envelopes, and the proposed driveway and retaining walls implicate the same regulatory concerns regarding erosion and visual scarring underlying the code standard as would construction of a building. *McCulloh v. City of Jacksonville*, 46 Or LUBA 267 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county's interpretation that cabins used more than half the year for residential use by owner-occupants and less than half the year for rental to tourists qualify as "tourist rental cabins" is inconsistent with the code definition of that term, where rental to tourists is the key definitional element, the code applies important regulatory distinctions to tourist uses and residential uses, and nothing in the text or context of the code suggests that more than *de minimis* residential use of the cabins is compatible with their status as tourist rental cabins. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a code definition of "tourist rental cabins" can plausibly be read to allow separate ownership of buildings and land on property, and legislative history in the record supports that interpretation, a county's interpretation that the cabins and underlying land need not be in common ownership is consistent with that definition and not reversible under ORS 197.829(1). *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where two interpretations of a local code are both less than compelling and neither interpretation is inconsistent with the apparent purpose or policy of the code, LUBA will defer to the interpretation adopted by the local government. *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. City interpretation that hospitals can be auxiliary uses in residential zones is not inconsistent with the express language of the comprehensive plan when hospitals are already

allowed as auxiliary uses in some residential zones under acknowledged local code. *Friends of Eugene v. City of Eugene*, 46 Or LUBA 721 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. City interpretation that hospitals can be permitted in industrial zones is not inconsistent with the express language of the comprehensive plan when the comprehensive plan does not preclude non-industrial uses that are compatible with industrial uses. *Friends of Eugene v. City of Eugene*, 46 Or LUBA 721 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government could permissibly interpret local code to allow variance to minimum lot size standard where general variance standards were met. *Walker v. Josephine County*, 46 Or LUBA 777 (2004).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the text of a local code standard does not require that an applicant establish that a proposed subdivision will not adversely affect nearby wells and does not require a finding that the applicant will be able to secure state agency approvals for its water supply, the local government is within its interpretative discretion under OAR 197.829(1) in interpreting that standard not to impose those obligations. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government does not misconstrue a local ordinance requiring permanent legal access to a parcel by relying on easements entered into by prior landowners with government agencies providing reciprocal rights for access. *Sisters Forest Planning Comm. v. Deschutes County*, 45 Or LUBA 145 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council interpretation of a comprehensive plan policy that prohibits "highway commercial development" south of a particular intersection as prohibiting "any commercial development" south of the intersection rather than "Highway Commercial" zoning or commercial development with direct access to the highway is not reversibly wrong. *Barton v. City of Lebanon*, 45 Or LUBA 214 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a city council interpretation of its zoning ordinance as not requiring a separate zoning amendment application where city zoning is applied to property inside the city's urban growth boundary as part of the annexation process. *Barton v. City of Lebanon*, 45 Or LUBA 214 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In considering whether a local government interpretation of a local provision is consistent with the express language of the provision under ORS 197.829(1), LUBA may consider the context of the provision. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. An interpretation of a local code provision to allow an offsite parking lot in conjunction with a commercial use in a residential zone where such commercial uses are prohibited is not reversible under ORS 197.829(1), where the context of the code provision includes regulations governing the residential zone that expressly allow a public parking area for use by persons patronizing a particular building or establishment. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer does not err in evaluating the adequacy of the "approach" to an intersection, rather than individual turning movements in the intersection, where the applicable code provisions do not specify a particular method for evaluating intersection adequacy, and that method is consistent with the highway capacity manual and county highways standards cited by the code provisions. *Noble v. Clackamas County*, 45 Or LUBA 366 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government interpretation of its own code that allows home occupations to exhibit some characteristics of a business does not violate ORS 197.829(1) when the local government code expressly allows for up to five employees, on-premises signage, and on-premises parking. *Stewart v. Coos County*, 45 Or LUBA 525 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city does not err in concluding that a parking lot on a portion of the Oregon State University Campus that is three quarters of a mile from proposed development is in "close proximity" to proposed development and on the same or abutting "site," where the city finds the campus to be a single integrated "site" and three quarters of a mile a reasonable distance for college students to walk, given adequate pedestrian facilities and shuttle services. *Bagnell v. City of Corvallis*, 44 Or LUBA 284 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Given the similarity between a code provision requiring preservation of "existing landscape features and amenities" "to the greatest extent possible," and another code provision requiring preservation of "significant trees and vegetation" "to the maximum extent practicable," a city does not err in interpreting one provision to be satisfied by findings addressing the other. *Bagnell v. City of Corvallis*, 44 Or LUBA 284 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. No reasonable person could interpret a plan policy stating that the county plans to participate with other counties in a regional aggregate needs analysis as imposing a requirement that an applicant seeking to amend the county's aggregate inventory must establish a "public need" for aggregate. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Although LUBA might be required to defer to a city interpretation of a subdivision criterion that requires that a proposed subdivision provide access to adjoining property as not applying where an adjoining property currently has access that it may lose in the future through condemnation, LUBA will not assume the criterion does not apply where the challenged decision

does not adopt that interpretation. *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Although a code provision that prohibits approval of a conditional use permit in circumstances where there are existing violations of county ordinances does not dictate that a condition of approval be included with a conditional use permit that the conditional use permit may be revoked if those violations recur in the future, it is within the county's discretion to interpret that code provision to permit it to impose such a condition. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Although a city might reasonably interpret a rezoning criterion that requires application of the "best suited" zone to require that an applicant demonstrate a need for the uses that would be allowed under the requested zoning, a city might also reasonably reject that interpretation and find that current land use needs are not relevant to its decision regarding which zoning district is "best suited." *Dimone v. City of Hillsboro*, 44 Or LUBA 698 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county errs in interpreting a one dwelling per 40 acres density standard intended to protect Goal 5 wildlife habitat to be satisfied if the average dwelling density over a 1.2-million-acre area of the county does not exceed the standard, where the county's interpretation gives the standard no regulatory effect until over 28,000 dwellings are built in the area, and is inconsistent with the purpose of the standard to protect wildlife habitat. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local standard imposing a one-dwelling-per-40-acres density limitation on Goal 5-protected wildlife habitat must be construed in a way that is consistent with its purpose and context to allow no more than one dwelling per 40 acres on the subject property. As applied to a destination resort, such a standard may effectively prohibit a resort that proposes 200 single-family residential lots in a 500-acre area. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county is within its discretion under ORS 197.829(1) in interpreting a code provision requiring a showing of "public need" for "rezonings," to apply only to map amendments to a base zone, and not to map amendments to an overlay zone. *Doty v. Jackson County*, 43 Or LUBA 34 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A code provision that allows certain uses in a zone "provided that the use promotes the purpose of the zone" is, on its face, a mandatory approval criterion. A city interpretation that fails to give any meaning to that language, and effectively reads it out of the code, is inconsistent with the express language of the code and is not entitled to deference under ORS 197.829(1). *Crowley v. City of Bandon*, 43 Or LUBA 79 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. A local government is within its discretion under ORS 197.829(1) to interpret a standard requiring that "other lands in the county" be unavailable for the uses allowed under proposed rezoning to be satisfied by examining lands in the vicinity of the subject property, and not to require consideration of all lands throughout the entire county. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 97 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city is within its discretion under ORS 197.829(1) in interpreting the term "bankful stage" to be equivalent to "top of the bank," where the pertinent code language was modeled on a Metro ordinance that expressly equates the two terms. Such an interpretation is not rendered erroneous simply because the unusual topographic facts of a case may make locating the "bankful stage" at the "top of the bank" mean that a portion of the subject property is undevelopable. *Starks Landing, Inc. v. City of Rivergrove*, 43 Or LUBA 237 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation of a code provision that fails to provide any independent meaning to a key term and that effectively eliminates that term from any function in the code is not entitled to deference under ORS 197.829(1). *Church v. Grant County*, 43 Or LUBA 291 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. ORS 197.175 requires that land use decisions comply with the applicable comprehensive plan. However, whether a particular plan provision is an approval criterion for a particular quasi-judicial land division application depends on the language of the comprehensive plan and its implementing regulations, with appropriate deference to any explicit or implicit interpretations of the comprehensive plan and implementing regulations by the local government. *Donivan v. City of La Grande*, 43 Or LUBA 477 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's decision to affirm a lower body's decision is sufficient to impute any local code interpretation of the lower body to the governing body, with or without a hearing before the governing body, unless the governing body expressly rejects or changes that interpretation. *Baker v. Lane County*, 43 Or LUBA 493 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A reasonable person could interpret the term "lodge" in the phrase "lodges and grange halls" to refer to more than a fraternal meeting place, and to include a commercial lodging facility like an inn or resort hotel, where both senses are within the dictionary definition of the term, and other code provisions the county separately provide for a "fraternal meeting place" and a "hotel, motel or lodge." *Baker v. Lane County*, 43 Or LUBA 493 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local variance provision imposes on the applicant the burden of establishing the nonexistence of alternatives to the variance, the local government errs in interpreting its code to impose on opponents the burden of establishing the existence, costs and consequences of alternatives. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where LUBA cannot tell if the local government simply weighed conflicting evidence, or instead impermissibly rejected the opponent's evidence for failure to satisfy a nonexistent burden of proof, the local government's error in explicitly shifting the burden of proof to the opponents is not harmless. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A code interpretation to the effect that the county need not consider lesser height variances if the proposed additional height poses no conflicts with views is inconsistent with code language that (1) requires consideration of lesser or no variances, and (2) contains no exception for variances that do not pose conflicts with views. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A code interpretation that limits the scope of alternative height variances that must be considered to those that provide the applicant with the same 35-foot height limitation allowed in a different regulatory zone is an impermissible amendment in the guise of interpretation, where the interpretation changes a rigorous alternatives analysis into a pro forma exercise and eliminates a regulatory distinction between zoning districts. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city's plan and zoning ordinance provisions provide that development within 500 feet of transit stops "should" be pedestrian-oriented and encourage "pedestrian and transit-friendly development criteria," the city's interpretation that those provisions do not require that only pedestrian-oriented uses may be permitted within 500 feet of a transit stop or promoted within the applicable zoning district is entitled to deference. *Barman v. City of Cornelius*, 42 Or LUBA 548 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city is within its discretion to interpret a zoning ordinance that encourages uses that complement and support existing uses and discourages "auto dependent commercial uses" as not constituting an outright prohibition of auto-dependent uses such as an automobile service station, as long as the automobile service station will be clustered near existing complementary uses such as a shopping center and a fast-food restaurant. *Barman v. City of Cornelius*, 42 Or LUBA 548 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city is within its discretion to interpret a comprehensive plan provision requiring establishment of a master plan prior to allowing development within a commercial district as being satisfied by the design review process where the city code defines "master plan" as a plan created through the land use review process governing design review and conditional use review, and the city does not have an independent process for establishing a master plan. *Barman v. City of Cornelius*, 42 Or LUBA 548 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county considers dust impacts from mining that may have an impact on neighboring residential uses, those dust impacts may form a basis for denial only if the impacts violate applicable Department of Environmental Quality air quality standards. *Morse Bros., Inc. v. Linn County*, 42 Or LUBA 484 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a regional transportation plan (RTP) specifies that a proposed interchange will include "five lane overpasses," and the record includes a planning program manager's interpretation that a short sixth exit lane does not make the interchange inconsistent with the RTP, it is not error for the decision maker to rely on that interpretation and reasoning in determining that the interchange is consistent with the five-lane overpass described in the RTP. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city's interpretation of a "public interest" standard for street vacations, that the standard is met when the record shows that potential future development in the area will not require the retention of the street, is not reversible under ORS 197.829(1). *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The deferential standard of appellate review of interpretations of local land use laws that is required under ORS 197.829(1) does not apply where the decision maker is not the local legislative body and does not apply to local government interpretations of state land use law. *Jordan v. Columbia County*, 42 Or LUBA 341 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A code provision limiting dwelling density to "one dwelling per 38 acres" in a big game overlay zone is meaningless unless given a frame of reference. An interpretation that the required frame of reference is the entire 640-acre section in which the proposed dwelling is located, rather than the area of the section subject to the overlay zone, is not reversible under ORS 197.829(1)(a) to (c), where related code provisions refer to the dwelling density in relation to the "section," and the county's interpretation is not inconsistent with the purpose of and policy underlying the overlay zone. *Matiaco v. Columbia County*, 42 Or LUBA 277 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A code provision limiting the planning director's interpretative powers, and prohibiting interpretations of the zoning ordinance that find a use not listed in the zone is "substantially similar" to a listed use, does not necessarily limit the board of commissioners' interpretative powers. To the extent it may, the commissioners' interpretation that the proposed use *is* a listed use is consistent with the code prohibition. *Yeager v. Benton County*, 42 Or LUBA 72 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation that a commercial horse facility that teaches children how to ride and care for horses is a "recreational facility" allowed as a conditional use in

a rural residential zone is within its interpretative discretion under ORS 197.829(1). That portions of the proposed use can also be described as a commercial "riding arena," which is expressly allowed in a different zone, does not mean that the proposed use cannot be a "recreational facility," or that the county adopted a de facto code amendment altering the uses allowed in the rural residential zone. *Yeager v. Benton County*, 42 Or LUBA 72 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A board of county commissioners does not exceed its interpretive discretion under ORS 197.829(1) when it interprets a comprehensive plan policy to "[e]nsure that traffic attracted to commercial development will not adversely affect neighborhoods" as being limited to examining traffic impacts on "residential" neighborhoods and to the "local" streets that serve such residential neighborhoods. *Swyter v. Clackamas County*, 42 Or LUBA 30 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A board of county commissioners acts within its interpretive discretion under ORS 197.829(1) where it interprets a comprehensive plan policy to "[e]nhance energy conservation and transportation system efficiency by locating opportunities for housing near work and shopping areas" to be met in the "obverse" situation where a proposal would "locate work and shopping areas near housing." *Swyter v. Clackamas County*, 42 Or LUBA 30 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city is within its discretion under ORS 197.829(1) in interpreting code language providing for "certain limited commercial" uses within a Residential Transitional zone as not limiting commercial uses to those listed in the Limited Commercial zone. *Chilla v. City of North Bend*, 41 Or LUBA 539 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city does not exceed its discretion under ORS 197.829(1) in interpreting code language providing for "rezoning" of property for limited commercial purposes "on a conditional use basis" to allow limited commercial uses on the property pursuant to a conditional use permit, without amending the zoning map to apply a commercial zone to the property. *Chilla v. City of North Bend*, 41 Or LUBA 539 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A proposed communication tower may be subject to code provisions governing "transmission and receiving towers," even though it is county-owned and thus also arguably falls within a broad category of "municipal uses" allowed in the zone. Where a regulatory scheme lists as permitted uses in a zone both a general category of uses and a specific category of uses, with different sets of requirements, and the proposed use fits within the specific category, the specific category and its requirements apply exclusively. *Luedtke v. Clackamas County*, 41 Or LUBA 493 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where county road standards that apply when new lots are created by major partition or subdivision do not by their terms apply where lot lines are adjusted, the board of county commissioners is nevertheless within its interpretive discretion under ORS 197.829(1) and *Clark*

v. Jackson County, 313 Or 508, 836 P2d 710 (1992), where it interprets separate code requirements for lot line adjustments as requiring that those county road standards be applied when providing access to lots for which lot lines have been adjusted. *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 476 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. It is within a city governing body's discretion under ORS 197.829(1) to interpret a code provision requiring that the transportation system be capable of safely supporting the proposed use, considering eight factors including "level of service," as not requiring that affected intersections maintain an acceptable level of service at all times. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A comprehensive plan provision that directs that a city should work with a county to ensure that certain lands are planned for residential development does not require the city to zone those lands exclusively for residential development. *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Plan policies that were clearly adopted to implement Goal 17 are not rendered inapplicable to a decision to approve fill in a coastal shoreland simply because the city codified those policies under the part of the comprehensive plan that is nominally devoted to Goal 16. *Willhoft v. City of Gold Beach*, 41 Or LUBA 130 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where petitioners' interpretational challenge of a city's finding that proposed development complies with code provisions implementing Goal 5 is, in essence, an argument that the city's code provisions are insufficient to implement Goal 5, LUBA will reject the challenge as an impermissible collateral attack on the city's acknowledged Goal 5 regulations. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The terms and not the title of a code provision setting forth certain exceptions to prohibited activities in riparian areas control the scope of the exceptions in that provision. LUBA will affirm a hearings officer's interpretation to that effect where the text and context of the provision indicate that the provision applies more broadly than its title suggests. *Tylka v. Clackamas County*, 41 Or LUBA 53 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm as reasonable and correct a hearings officer's interpretation of code provisions requiring that a proposed recycling facility be served by an adequate transportation system, to allow the facility notwithstanding some impacts on nearby failing intersections, so long as imposed conditions are sufficient to ensure that those impacts are *de minimis*. *K.B. Recycling, Inc. v. Clackamas County*, 41 Or LUBA 29 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. A governing body's interpretation of two provisions granting broad rights to use and develop lawfully created substandard lots is not sustainable under ORS 197.829(1), where the governing body draws an implication from the second provision and uses that implication to prohibit what the first code provision expressly allows, in a manner that effectively eliminates the first provision. *Church v. Grant County*, 40 Or LUBA 522 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city code provision requires that a "proposal" to adjust development standards be reviewed for compliance with specific criteria, it is reasonable for the city to determine that the scope of the "proposal" is the adjustment proposed by the applicant and therefore that an application for a setback adjustment for a building facade does not require review of the building design as a whole. *Lee v. City of Portland*, 40 Or LUBA 498 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city code requirement that multiple requests for adjustments must cumulatively comply with the overall purpose of the zone does not require the city to consider potential future adjustment requests that are not before it. The city's interpretation that limiting its consideration and approval to the adjustment request before it does not preclude the possibility of future adjustments is reasonable and correct. *Lee v. City of Portland*, 40 Or LUBA 498 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city's interpretation that a state highway is not subject to city road design standards for streets providing access to a proposed subdivision is not clearly wrong, and is entitled to deference under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Costanzo v. City of Grants Pass*, 40 Or LUBA 471 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city does not err in determining that a code provision requiring that roads providing access to a proposed subdivision be paved to city standards is satisfied by a state highway that is paved to state standards. *Costanzo v. City of Grants Pass*, 40 Or LUBA 471 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. It is within a city council's discretion under ORS 197.829(1) to interpret its code to limit design review of historic landmarks to historic design review criteria, where the code's design review provisions state that historic landmarks are exempt from design review and are instead subject to historic design review. *Pearl District Neigh. Assoc. v. City of Portland*, 40 Or LUBA 436 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. An apparent conflict between a city's current code, as interpreted, and a set of uncodified ordinances and guidelines that reflect superseded code language provides no basis to reverse the city's code interpretation. *Pearl District Neigh. Assoc. v. City of Portland*, 40 Or LUBA 436 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. It is within a city council's discretion under ORS 197.829(1) to interpret a code

provision that requires the "transportation structure" to be "adequate," as not requiring separate quantified empirical analysis with respect to separate components of the transportation system, such as parking. Under that interpretation, it is permissible for the city to rely on the ready availability of transit, bicycle and pedestrian transportation, and evidence that development allowed under rezoning can satisfy previously established off-street parking requirements, to conclude that the transportation structure is adequate with respect to parking. *Wakelin v. City of Portland*, 40 Or LUBA 401 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation of a local provision is adequate for review where its findings articulate or demonstrate the governing body's understanding of the provision to a degree sufficient to resolve the issues raised in the petition for review. *Huff v. Clackamas County*, 40 Or LUBA 264 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. It is within a governing body's discretion under ORS 197.829(1) to interpret a comprehensive plan provision that allows commercial rezoning of "areas" having "an historical commitment to commercial uses," neither to require a demonstration of exclusive commercial use, nor to require that the "area" under consideration include an entire parcel. *Huff v. Clackamas County*, 40 Or LUBA 264 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Statutory nonconforming use provisions at ORS 215.130 do not prohibit rezoning land to allow uses that would not be allowed to continue as nonconforming uses. Nor is the statute violated or undermined by the county's consideration of a history of illegal commercial uses, in applying a plan provision that allows land that has an "historical commitment" to commercial uses to be rezoned for commercial use. *Huff v. Clackamas County*, 40 Or LUBA 264 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a zone change criterion requires that an area have a "historical commitment to commercial uses" and the county governing body finds that criterion is met by a property that has been vacant for 11 years but was used for commercial purposes for the prior 65 years, LUBA will defer to that interpretation under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city governing body expressly interprets a traditional "extraordinary circumstances" variance criterion as being met in a circumstance where it traditionally would not be satisfied, that interpretation must nevertheless be affirmed under ORS 197.829(1) if the city governing body's interpretation is not inconsistent with the "express language" or the "purpose" of the variance criterion. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a variance criterion provides that a variance is not available where the applicant's circumstances "merely constitute a monetary hardship or inconvenience," the applicant's inability to create a second lot out of an existing lot without the variance would appear

to "merely constitute a monetary hardship or inconvenience," absent a contrary interpretation of that criterion by the local governing body. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Although a city's interpretation that it may balance applicable comprehensive plan provisions is entitled to deference, remand is necessary when the city fails to consider and balance against other plan provisions applicable provisions in the city's transportation system plan. *ODOT v. City of Klamath Falls*, 39 Or LUBA 641 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When petitioner disagrees with a local government's interpretation of its own ordinance but fails to acknowledge or challenge that interpretation, petitioner establishes no basis for determining that the interpretation is clearly wrong. *McNern v. City of Corvallis*, 39 Or LUBA 591 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city code requires that a lot line adjustment may be approved only if adequate public facilities are available to serve the resulting parcels and the proposal is compatible with the comprehensive plan, the city errs in interpreting the code to limit its consideration to the lot line adjustment itself and not the uses proposed on the adjusted lots. *Mountain West Investment v. City of Silverton*, 39 Or LUBA 507 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. It is within a city council's discretion to interpret its zoning ordinance to allow commercial-sized greenhouses as outright permitted uses in a residential zone and to allow a related home occupation florist business as a conditional use without considering the impacts that may be associated with the greenhouses. *Latta v. City of Joseph*, 39 Or LUBA 318 (2001).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA owes no deference to a city's decision *requiring* replat of a previously approved subdivision to modify private easements where it is clear that the city's decision was based solely on the provisions of ORS chapter 92, notwithstanding that the city subsequently applied local code provisions to determine the relevant approval criteria for the replat and how those approval criteria should be applied. *Haber v. City of Gates*, 39 Or LUBA 137 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. ORS 92.185 provides a specific requirement that *public* easements within a recorded plat must be reconfigured by replatting. However, the express reference in that statute to "public easements" and the absence of an express reference to "private easements" make it clear that reconfiguration of *private* easements within an existing subdivision plat does not require a replat under ORS 92.185. *Haber v. City of Gates*, 39 Or LUBA 137 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where an approval criterion contains two subsections with similar or overlapping requirements, but the local government's findings do not address one of the subsections or interpret the criterion to the effect that findings of compliance with both subsections are unnecessary,

remand is appropriate to address the omitted subsection or adopt an interpretation justifying the omission. *Chilla v. City of North Bend*, 39 Or LUBA 121 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government fails to interpret a local provision, and the purpose of the provision is unclear and subject to numerous interpretations, LUBA will decline to interpret the provision in the first instance and remand the decision to the local government. *OTCNA v. City of Cornelius*, 39 Or LUBA 62 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a city council interpretation of a comprehensive plan annexation policy that requires the city to "insure that there is a five year supply of vacant land within the city," as imposing a general anti-sprawl requirement rather than an absolute requirement that the city include no more than a five-year supply of vacant land. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city council interprets that a zone change criterion requiring a public need for the use proposed is met where there is a statistical probability that the segment of the population the proposed facility will serve will need the facility, LUBA will defer to that interpretation. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The existence of vacant land that is planned and zoned for multi-family residential use does not mean there can be no need for additional multi-family residential designated land, where there is a specific multi-family residential need identified and none of the land that is already designated for multi-family residential use is suitable for that specific need. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city may demonstrate compliance with a zoning change criterion that requires that the identified public need will be best served by rezoning the proposed site by showing that other sites, individually or as a group, are inferior to the proposed site. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When a local ordinance creates an exemption from additional approval criteria for uses permitted in the underlying zone, and the ordinance distinguishes between permitted uses and uses subject to administrative review, it is incorrect to determine that wineries, which are uses subject to administrative review, are permitted uses in the exclusive farm use zone, and thus not subject to the additional approval criteria. *Roth v. Jackson County*, 38 Or LUBA 894 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation that "commercial timberland properties" only refers to properties "operated by or for the benefit of commercial timber operations," and does not include property operated by individuals, is clearly wrong. *Fessler v. Yamhill County*, 38 Or LUBA

844 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the purpose and underlying policy of a local ordinance is, in part, to require consideration of the traffic impacts on transportation facilities caused by rezoning property in order to ensure that any impacts are consistent with the minimum level of service for such facilities, the city's interpretation that a street accommodating up to 250 average daily trips from adjacent property does not "serve" that property is contrary to the purpose and underlying policy of the ordinance and is clearly wrong. *Anderson v. City of Medford*, 38 Or LUBA 792 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Even if the decision makers were persuaded to reverse their initial decision by a change in city policy that occurred after the subject application was filed, a local government may reinterpret the meaning of indisputably applicable approval standards. *Anderson v. City of Medford*, 38 Or LUBA 792 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a variance criterion provides that the use of a structure may not change as a result of a variance, an interpretation that a variance may nevertheless be granted to convert a storage shed to a medical hardship dwelling is clearly wrong. *Puma v. Linn County*, 38 Or LUBA 762 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A finding that one alternative for providing sewer service to a proposed medical hardship dwelling has been approved by county health officials is inadequate to demonstrate compliance with an approval standard that requires that another alternative be used unless that alternative "is not feasible." *Puma v. Linn County*, 38 Or LUBA 762 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city code provision allows conditional use approval of a building that exceeds a mandatory height limit provided the increased building height "does not adversely affect the ocean * * * views" of neighboring structures, the city's interpretation of that provision to mean that the part of the building exceeding the height limit may not block any part of a neighboring property's view of ocean water from any perspective within the neighboring property is not clearly wrong. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation of code "compatibility" and "livability" standards as requiring that it consider whether a permit proposal for a 24-hour adult video business would result in increased potential for criminal activity and in increased vacancies in nearby offices is not impermissibly vague and is within the city's interpretive discretion under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Even under the deferential standard of review required by *Clark v. Jackson*

County, 313 Or 508, 836 P2d 710 (1992), city interpretation of a variance criterion that requires that a variance be "necessary to prevent a hardship to the applicant" as being met because without the variance the applicant will be unable to construct as much storage as he would like to have on the property at his preferred location on the lot is erroneous. *Roberts v. City of Gearhart*, 38 Or LUBA 407 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county code provision specifically requires findings documenting whether there is a need for additional land for a particular purpose and whether the timing is appropriate to rezone land for that purpose, but the county interprets the code provision to not require documentation of the need and timing elements in a particular instance, that interpretation is inconsistent with the express language of the provision and "clearly wrong." *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The "exceptional or extraordinary circumstances" standard is a demanding traditional variance standard. Under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), a city may be able to interpret that standard in a more lenient manner than the courts and LUBA have, but the city must articulate that interpretation in its decision. *Bates v. City of Cascade Locks*, 38 Or LUBA 349 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county is within its discretion under ORS 197.829(1) to interpret a code requirement regulating "new residential dwelling units" to apply to a proposal to convert an existing house no longer lawfully used as a dwelling into a watchman/caretaker dwelling. *Bogan v. Coos County*, 38 Or LUBA 166 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county's interpretation that certain comprehensive plan policies are inapplicable to a land use approval because those policies have been implemented by the county code is inadequate for review, where the county fails to identify any code provision that implements those policies or explain why those policies are among the plan policies implemented by the code rather than those that apply to specific land use approvals. *Spiro v. Yamhill County*, 38 Or LUBA 133 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Plan policies requiring that all proposed rural area development "shall be furnished" with an adequate water supply are stated in mandatory terms. A county's interpretation that such policies are aspirational is inconsistent with the terms of those policies and clearly wrong. *Spiro v. Yamhill County*, 38 Or LUBA 133 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county urbanization policy that was adopted to implement Goal 14 must be interpreted consistently with Goal 14's prohibition against approval of urban uses on rural land. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will reject a hearings officer's interpretation that a code standard imposing a riparian buffer zone within a "setback area" does not apply unless a structure is proposed, where a broader interpretation to apply the buffer zone in other circumstances is equally plausible and more consistent with the identified purpose of the code standard. *Tylka v. Clackamas County*, 37 Or LUBA 922 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A conditional use permit standard for aggregate extraction requiring that the applicant submit "sufficient information to allow the county to set standards" regarding the location, quality and quantity of resource available allows but does not obligate the county to set such standards in approving the permit. A local government's interpretation to that effect is consistent with the express language of the standard and is not reversible under ORS 197.829(1) or *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The standard of review LUBA must apply to a governing body's interpretation of its own land use regulations is not affected by whether the decision in which the interpretation appears is quasi-judicial or legislative. The deferential standard of review required by *Clark v. Jackson County*, 313 Or 508, 836 P2d 719 (1992), is based on the governing body's presumed better understanding of the intended meaning of its legislation and the governing body's political accountability for that legislation. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm as reasonable and correct a determination of a city historic review commission that historic review development standards directed at modifications or impacts on historic property do not apply to new development on vacant lots within an historic district. *Goose Hollow Foothills League v. City of Portland*, 37 Or LUBA 631 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. An historic review development standard requiring that development in an historic district be compatible with adjacent historic structures and the rest of the historic district does not require findings of compatibility with specific nonadjacent historic structures or require that the decision maker ensure compatibility with structures in the immediate neighborhood as distinct from the district as a whole. *Goose Hollow Foothills League v. City of Portland*, 37 Or LUBA 631 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. To the extent an historic review development standard requiring that the "historic character" of a property be "retained" applies to new development on a vacant lot within an historic district, a historic review commission does not err in failing to require that new development emulate the design, height, scale and features of the historic structure that previously existed on the lot. *Goose Hollow Foothills League v. City of Portland*, 37 Or LUBA 631 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation that a comprehensive plan policy that requires that scenic views be "promoted and protected" is met where a zoning ordinance amendment will not significantly affect scenic views is not "clearly wrong," and must be affirmed by LUBA under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the county's legislation is ambiguous with respect to whether the county "recognizes" a neighborhood association for purposes of statutory notice and local appeal requirements, LUBA will remand to the county for interpretation in the first instance. *McKy v. Josephine County*, 37 Or LUBA 554 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government finds noncompliance with an approval criterion because an intersection outside the traffic study area is inadequate to serve the subject property, but it is not clear why the local government believes the intersection "serves" the property, LUBA will remand to allow the local government to provide a more adequate interpretation of the criterion. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472 (2000).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county exceeds its interpretational discretion under ORS 197.829 and *Clark v. Jackson County* where it interprets an ordinance prohibiting home occupations that require alteration of a structure in a manner that changes the character of the structure under the Uniform Building Code, to allow such home occupations as long as the structure is altered to conform to the Uniform Building Code. *Greer v. Josephine County*, 37 Or LUBA 261 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. ORS 227.178(3) constrains a city's ability to change existing interpretations regarding the *applicability* of approval criteria during the course of proceedings on an application, but does not constrain a city's ability to reinterpret the *meaning* of indisputably applicable standards. *Greer v. Josephine County*, 37 Or LUBA 261 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county governing body's interpretation that a zoning ordinance requirement that "activities" specified in a farm management plan be implemented did not require that each and every task for which a cost estimate was provided in the farm management plan for each year be implemented is not "clearly wrong," and, therefore, is not reversible under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Rochlin v. Multnomah County*, 37 Or LUBA 237 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the issue of when local governments may be required to conform their plans and land use decision making to an amended regional framework plan is a question of statutory construction, Metro's possible reliance on an interpretation of its own legislation in establishing a compliance schedule under the statutes is entitled to no deference. *Commercial Real*

Estate Economic Coalition v. Metro, 37 Or LUBA 171 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm a local governing body's interpretation of its land use regulation where petitioners express disagreement with the interpretation but do not explain why the interpretation is inconsistent with the text of the regulation or otherwise legally incorrect. *Freedom v. City of Ashland*, 37 Or LUBA 123 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The scope of additional conflicts that may be considered under OAR 660-023-0180(4)(b)(F), is a question of state law and a county's interpretation of OAR 660-023-0180(4)(b)(F) is not entitled to the deferential standard of review required by ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county governing body does not exceed its interpretive discretion in interpreting a zoning ordinance provision that allows development of lots of record notwithstanding the lot's failure to meet lot area, width and depth requirements as not also excusing the zoning requirement that lots that are less than five acres in size be served by a public or community water system. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county governing body does not exceed its interpretive discretion in interpreting a zoning ordinance provision that delegates responsibility to the planning director to interpret the zoning ordinance as not preventing the governing body from interpreting the comprehensive plan in the first instance following an appeal of a planning director decision to the planning commission and the county governing body. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a Goal 4 committed exception imposes a zoning district with a five-acre minimum lot size and a lot of record provision that allows development of lots smaller than five acres but does not impose a specific residential density limit, the county governing body exceeds its interpretive discretion in interpreting the exception as imposing a 2.3-acre minimum residential density. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In the absence of a city's determination whether a comprehensive plan policy is a mandatory approval criterion, LUBA will exercise its interpretative discretion under ORS 197.829(2) to determine that the plan policy is a mandatory approval criterion, where the terms of the plan policy require the city to determine that essential public services "can be provided to a site" before granting development approval. That the plan policy specifies an exception to its requirements reinforces the conclusion that it is mandatory. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A comprehensive plan policy requiring that "[e]xcavations and fills shall be limited to those minimal areas where alteration is necessary to accommodate allowed development" is couched in terms imposing certain requirements in development approvals, and is thus a mandatory approval criterion. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county acts within the discretion afforded by ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992), where the zoning ordinance requires a finding that utilities and services likely to be needed by the "anticipated uses" are available, the county limits allowed uses on the property to the applicant's proposed use, and the county interprets the term "anticipated uses" to consist solely of the proposed use. A reasonable person could construe the term "anticipated uses" to denote something less than the range of uses allowed in the zone. *City of Newberg v. Yamhill County*, 36 Or LUBA 473 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city's implicit interpretation that an adjoining public roadway provides access to a manufactured home park for purposes of the city code's minimum access roadway improvement standard, and that internal proposed roadways are not access roadways, is not clearly wrong. *Wiley Mtn., Inc. v. City of Albany*, 36 Or LUBA 449 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city commission is within its interpretative discretion under ORS 197.829 to determine that a requirement that planned unit development within a natural hazards zone be consistent with applicable comprehensive plan policies is satisfied by a demonstration of compliance with ordinance standards implementing those comprehensive plan policies. *Salo v. City of Oregon City*, 36 Or LUBA 415 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a plan policy, implementing the Transportation Planning Rule, requires that the parking spaces per capita ratio must be reduced by 10 percent but does not specify how the starting point for computing the reduction must be computed, a city council interpretation that the starting point computation may include approved but not yet constructed parking spaces is within the city's interpretive discretion under ORS 197.829. *Baughman v. City of Portland*, 36 Or LUBA 353 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where an intergovernmental agreement governs until certain recommendations have been implemented, and also requires that those recommendations be implemented within a reasonable time, it is inconsistent with the terms of the agreement for a local government to unilaterally declare that the agreement no longer governs after four years, whether or not the recommendations have been implemented. *City of Salem/Marion County v. City of Keizer*, 36 Or LUBA 262 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county may adopt its own interpretation of "public need" as that term is used in

its comprehensive plan, and that interpretation is not constrained by judicial interpretation of similar, but unrelated, statutory standards. *Turrell v. Harney County*, 36 Or LUBA 244 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm as not clearly wrong an interpretation that commercial uses not otherwise listed as allowed uses in a university district are allowed when they are uses "customarily associated" with universities and thus fall within the definition of a use expressly allowed in the district. *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. It is within a city council's interpretive discretion under ORS 197.829 to interpret local design guidelines granting the city authority to impose conditions or require changes to construction proposals to meet those design guidelines to also permit the city to deny an application that does not meet those guidelines. *Barnard Perkins Corp. v. City of Rivergrove*, 36 Or LUBA 218 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code does not dictate how rear and front lot lines are to be identified, a city council is within its interpretive discretion under ORS 197.829 in requiring that building orientation be considered. *Barnard Perkins Corp. v. City of Rivergrove*, 36 Or LUBA 218 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. An argument that an uninterpreted clause of a local land use regulation conflicts with the city's express interpretation of another clause of that regulation is more appropriately framed as an argument that the city's interpretation is inconsistent with the terms of the regulation, not that the city's interpretation is inadequate for review. *McElroy v. City of Corvallis*, 36 Or LUBA 185 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local provision allows the planning commission to "consider the redesign" of a development plan "in whole or in part" when the applicant petitions for modification of the development plan, a city council interpretation of that provision to allow the planning commission to address modifications beyond those requested by the applicant is not clearly wrong. *McElroy v. City of Corvallis*, 36 Or LUBA 185 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county's implicit interpretation of a local provision is inadequate for review where the county's unambiguous understanding of the meaning of the provision is not discernible in the manner in which it applies that provision. LUBA cannot review a putative interpretation of a local provision where, because of the brevity of the county's findings and the nonspecific terms of the local provision, it cannot determine which of several plausible interpretations the governing body might have intended. *Eddings v. Columbia County*, 36 Or LUBA 159 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city comprehensive plan provision requires a site-specific investigation of natural hazards "prior to development," the city is within the discretion afforded it by ORS

197.829(1) and *Clark v. Jackson County*, 313 Or 504, 836 P2d 710 (1992), in interpreting that provision to apply at the stage where the city is evaluating a specific proposal for development such as a building permit. *Jebousek v. City of Newport*, 36 Or LUBA 124 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Exercise of LUBA's authority under ORS 197.829(2) to interpret local land use law in the first instance is not appropriate where the relevant code provision prohibiting reduction of acreage available for farm use could refer to reduction (1) of acreage on adjacent lands or (2) of acreage on the subject property that is available for use in conjunction with farm uses on adjacent lands. Where both interpretations are plausible and it is disputed factually whether the relevant lands could be used in conjunction with adjacent lands, a remand to the county to render its interpretation in the first instance is appropriate. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city council interprets a code standard that excuses a permit applicant from providing required parking where "special circumstances exist constituting a hardship" as being satisfied where the cost of providing the one additional parking site that is possible on the property will constitute an "economic hardship out of proportion to the gain of parking spaces," and petitioner does not specifically challenge the city council's findings, LUBA will affirm that interpretation unless it exceeds the city's interpretive discretion under ORS 197.829(1). *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county code "stability" standard that does not implement the statutory nonfarm use "stability" standard is not subject to case law interpreting the statutory "stability" standard, but such a code "stability" standard necessarily connotes a temporal period and a scope of causative impact for analysis. However, a county's interpretation of the local "stability" standard as focusing on short-term effects and direct impacts rather than long-term and cumulative impacts is not clearly wrong and therefore must be affirmed by LUBA. *Ray v. Douglas County*, 36 Or LUBA 45 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A planning director's letter that does no more than repeat the planning commission's condition of approval and speculate as to how that condition might be applied is not, under local zoning code, an "action or ruling" that may be appealed to the planning commission. *Schultz v. City of Forest Grove*, 35 Or LUBA 712 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where provisions allowing enforcement of the city's ordinance only specifically authorize judicial remedies, the city's interpretation of the enforcement provisions as allowing the city to conduct quasi-judicial proceedings to determine nonconforming use status is inconsistent with the terms of that provision and not entitled to deference under *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992), or ORS 197.829(1). *Dept. of Transportation v. City of Mosier*, 35 Or LUBA 701 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA owes no deference to a county's interpretation of ORS 215.130, governing

nonconforming uses, or ordinance provisions that implement the statute. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A governing body's interpretation of a local provision is within the discretion afforded by ORS 197.829(1) and Clark v. Jackson County, where the local ordinance requires that development allowed under a conditional use permit be commenced within six months in order to become effective, and the governing body interprets the ordinance to mean that development has commenced when the applicant has complied with all conditions precedent and obtained all required permits. *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the zoning ordinance allows a variance from its standards when those standards create a hardship due to one or more defined conditions, a hearing officer errs in requiring the applicant to demonstrate hardship in addition to those stated in the defined conditions. *Kelley v. Clackamas County*, 35 Or LUBA 215 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation of the terms "top of the nearest clearly defined bank" to mean the point where the angle of slope decreases rather than the top of the nearest ridge is within the range of plausible meanings denoted by the terms of that provision, and thus is not clearly wrong. *Dodds v. City of West Linn*, 35 Or LUBA 101 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation of its zoning ordinance as requiring conditional use approval for a towing yard as an "other industrial use" will be sustained where towing yards are not listed as an outright permitted use and the zoning code does not allow uses that are similar to outright permitted uses as permitted uses. *Williamson v. City of Arlington*, 35 Or LUBA 90 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council interpretation of the term "flood" as being limited to the "base flood" or 100-year flood must be sustained by LUBA where the stated objectives and introductory language of the zoning code are consistent with the narrow interpretation. *Visher v. City of Cannon Beach*, 35 Or LUBA 74 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation of a comprehensive plan requirement for "small lot" to be met by a lot size of 10,000 square feet is within the city council's interpretive discretion. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county interpretation of a code provision that allows smaller lot sizes provided certain road improvements are in place as also allowing smaller lot sizes so long as the number of residences is restricted until road improvements are made is clearly wrong. *DLCD v. Tillamook County*, 34 Or LUBA 586 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government does not expressly interpret a code provision, but adopts findings that are sufficiently detailed to demonstrate that it interprets the provision to require evaluation of the subject property rather than surrounding properties, LUBA will defer to that interpretation. *Rouse v. Tillamook County*, 34 Or LUBA 530 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a local government's broad interpretation of the term "transportation terminal" as including "airports" and "airport related uses" where the interpretation is not inconsistent with the text, purpose or policy of the zoning ordinance. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local provision sets forth criteria in the disjunctive, but the sense and context of the provision compel application of each criterion, LUBA will affirm as reasonable and correct an interpretation by the local planning commission that the criteria must be satisfied *seriatim* rather than alternatively. *Recovery House VI v. City of Eugene*, 34 Or LUBA 486 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA cannot determine whether inadequate findings are "clearly supported" by the record under ORS 197.835(11)(b) where the local provision to which the findings are directed is subject to numerous interpretations and the decision does not contain an adequate interpretation of that local provision. LUBA will not both fashion an interpretation of a local provision and then review the record for evidence clearly supporting findings of compliance with that provision, as interpreted. *Doob v. City of Grants Pass*, 34 Or LUBA 480 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a necessary interpretation of a local ordinance is absent or inadequate, LUBA will decline to interpret the local provision in the first instance, pursuant to ORS 197.829(2), when multiple interpretations are possible, and neither the county nor the applicant files a response brief. *Wodarczak v. Yamhill County*, 34 Or LUBA 453 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a petitioner at LUBA challenges an interpretation that first appeared in the challenged decision, petitioner need not have raised an issue concerning that interpretation during the local proceedings. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Because a county's interpretation of its code to allow deferral of compliance with an approval criterion to a later stage with no opportunity for public hearing is contrary to ORS 197.763(2) and 215.416, LUBA owes that interpretation no deference under ORS 197.829(1). *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A code provision that imposes different standards depending on how many "functions" the street supports is ambiguous. A county interpretation that equates "function" with

the number of units that use the street for "access" rather than the number of units that "border" the street is a plausible interpretation. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county adopts the comprehensive plan of a city pursuant to an intergovernmental agreement, LUBA will not defer to the county's interpretation of the city's plan. *Trademark Construction, Inc. v. Marion County*, 34 Or LUBA 202 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is not required to defer to an interpretation by a hearings officer. Thus, the proper standard of review is not whether the hearings officer's interpretation is contrary to the ordinance's express terms or policy, but rather whether that interpretation is reasonable and correct. *Tylka v. Clackamas County*, 34 Or LUBA 14 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government fails to adopt a needed interpretation of a land use ordinance, LUBA may interpret the ordinance on appeal. LUBA will do so where the facts are undisputed, a pure question of law is presented and the parties adequately address the interpretive issue in their briefs. *Tylka v. Clackamas County*, 34 Or LUBA 14 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government may change a prior interpretation that a plan provision is not an approval criterion and apply that plan provision as an approval criterion to a request for permit approval. *Holland v. City of Cannon Beach*, 34 Or LUBA 1 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. ORS 227.178(3) does not prevent a city from adopting an interpretation of a comprehensive plan that is different than the interpretation that was in effect on the date the permit application was submitted, and applying that new interpretation to the permit application. *Holland v. City of Cannon Beach*, 34 Or LUBA 1 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When a local government interprets its ordinance so that it effectively interprets the meaning of the terms "standards and criteria" in ORS 227.178(3), LUBA is not required to give that interpretation any deference. The appropriate standard of review in that instance is whether the local government's interpretation is reasonable and correct insofar as it interprets or applies ORS 227.178(3). *Holland v. City of Cannon Beach*, 34 Or LUBA 1 (1998).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is required to defer to a local governing body's implied interpretation of a local ordinance as long as the implied interpretation is adequate for review under ORS 197.829(2). *Bradbury v. City of Bandon*, 33 Or LUBA 664 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the purpose of a local provision is unclear and subject to numerous

interpretations, LUBA will decline to interpret the provision in the first instance. *Bradbury v. City of Bandon,* 33 Or LUBA 664 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where local code includes two different definitions of "campgrounds," a county decision approving a campground must address both definitions and determine whether one or both definitions apply and whether the proposed use complies with whatever definition applies. *Donnelly v. Curry County,* 33 Or LUBA 624 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A finding need not include an express interpretive statement about the meaning of a code standard as long as the local government's interpretation of the standard can be discerned from the way the standard is applied. *Port Dock Four, Inc. v. City of Newport,* 33 Or LUBA 613 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county may regulate or define uses allowed under ORS 215.283(2) as long as it does not define those uses more expansively than permitted by state law. *R/C Pilots Association v. Marion County,* 33 Or LUBA 532 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county may interpret its local codification of nonfarm uses allowed in EFU zones more restrictively than state law requires. Such a more restrictive interpretation is not contrary to ORS 215.283(2)(d) and will be affirmed by LUBA where it is not so inconsistent with the zoning ordinance as to be clearly wrong. *R/C Pilots Association v. Marion County,* 33 Or LUBA 532 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. That a parcel may be separately transferable under ORS 92.017 does not determine whether the parcel may be separately developed. *Eagle Point Development v. City of Shady Cove,* 33 Or LUBA 509 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a city's resolution of a conflict between the city's comprehensive plan text and its comprehensive plan map in favor of the plan text where that interpretation fulfills a plan policy and is as consistent with the language and intent of the plan as the alternative interpretation. *Hough v. City of Redmond,* 33 Or LUBA 483 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local ordinance allows a community center in an open space zone as a conditional use, the city's interpretation that a community center is a compatible use in that zone is not clearly wrong. *Risher v. City of Portland,* 33 Or LUBA 479 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where approval criteria include conformance with a transportation element of a local comprehensive plan that has both mandatory and aspirational standards, the local

government's interpretation that the aspirational standards are not specific approval criteria is not clearly wrong. *Risher v. City of Portland*, 33 Or LUBA 479 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will not defer to city's interpretation that a city code requirement for "usable outdoor recreation space * * * for the shared or common use of all the residents" is satisfied by balconies or by private patios and decks, where the code requires that such balconies, patios and decks be "designed to provide privacy." *Dodds v. City of West Linn*, 33 Or LUBA 470 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA defers to a county's interpretation of "flag lot" as used in local code, even if that interpretation can only be inferred from its actions, where the county's implicit interpretation is not clearly wrong. *Central Bethany Dev. Co. v. Washington County*, 33 Or LUBA 463 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city interprets its code erosion control standards as imposing construction guidelines, not approval standards requiring feasibility findings, LUBA must defer to that interpretation unless it is clearly wrong. *Arnett v. City of Lake Oswego*, 33 Or LUBA 384 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A code interpretation by a hearings officer is instructive and may be considered in determining if the county's interpretation is reasonable and correct. *Central Oregon Cellular, Inc. v. Deschutes County*, 33 Or LUBA 345 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The word "shall," used in a regulation, expresses what is mandatory. A local government interpretation to the contrary is indefensible and will not be affirmed by LUBA. *DLCD v. Tillamook County*, 33 Or LUBA 163 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Mandatory code requirements cannot be subverted by a local government interpretation. *DLCD v. Tillamook County*, 33 Or LUBA 163 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA cannot employ the rules of statutory construction to interpret plan and code provisions even when it does so only as a means to establish a baseline from which to determine whether a local government interpretation is "clearly wrong" or "beyond a colorable defense." *Downtown Community Assoc. v. City of Portland*, 33 Or LUBA 140 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a city's interpretation of a variance criterion is not inconsistent with the purpose and policy of the applicable chapter of the local code, as stated in that chapter's intent and purpose statement, the city's interpretation is not indefensible. *Shaffer v. City of Salem*, 33 Or LUBA 57 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In the context of a land use application, the county's interpretation of the code term "owner" to mean "authorized agent" is not indefensible, and LUBA will defer to it under ORS 197.829(1). *Nash v. Crook County*, 33 Or LUBA 51 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will not defer under ORS 197.829(1) to implicit interpretations of the local zoning ordinance. *Nash v. Crook County*, 33 Or LUBA 51 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the county determines that an apparent conflict exists between state statute and county code regarding whether livestock sales and shows are permitted on EFU land, LUBA will defer to the county's decision to clarify the nature of the use through a quasi-judicial use classification hearing. *Collins v. Klamath County*, 32 Or LUBA 338 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the county interprets "high value farm land" for purposes of its ordinance to mean "predominantly high value farm land," and concludes that because the subject property consists of predominantly non-high value farmland, a golf course is permitted as a conditional use, LUBA will defer to the county's interpretation of its own code. *Just v. Linn County*, 32 Or LUBA 325 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In the absence of a reviewable interpretation concerning the applicability of a possibly relevant zoning code provision, LUBA will remand for an interpretation. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The county is not bound by a hearings officer's previous legal interpretation of a local ordinance where the county determines that the earlier interpretation is incorrect. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA owes no deference to the county's "implicit" interpretation of a local ordinance. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In reviewing a hearings officer's decision, where LUBA is unable to fathom the meaning of a local ordinance and no interpretation is provided by the hearings officer, LUBA will give the county the opportunity to interpret the code in the first instance. *Jackson County Citizens League v. Jackson County*, 32 Or LUBA 212 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Since the rule of deference to a local government's interpretation of its plan and land use regulations, which is codified in ORS 197.829(1), does not apply to our review of local government decisions not made by the governing body, the exceptions to the rule, set forth in ORS

197.829(1)(a) to (d), also do not apply. *ODOT v. Clackamas County*, 32 Or LUBA 118 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will affirm the city planning bureau's determination that a proposed probation/parole office is an office use, permitted of right in a General Commercial zone, where that determination is reasonable and correct. *North Portland Citizens v. City of Portland*, 32 Or LUBA 70 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to the county governing body's interpretation of a plan policy as being applicable when development approval is sought rather than when the plan map is amended. *Helvetia Community Assoc. v. Washington County*, 31 Or LUBA 446 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local ordinance states that grading operations will not be permitted in open drainageways unless the building official finds that such an operation "will not adversely affect the existing and ultimate developments or land adjacent to a drainageway," the city's interpretation of that language to require consideration of "existing and ultimate developments *on* land adjacent to a drainageway" is not so wrong as to be beyond a colorable defense. *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When a city's final decision does not contain an interpretation of a comprehensive plan provision, LUBA need not remand for an interpretation, but may itself determine whether the city's decision is correct. *Stewart v. City of Brookings*, 31 Or LUBA 325 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Given the express language in Goal 3 that future availability of water for irrigation must be considered in evaluating suitability of soils for agricultural uses, the county's interpretation that it need not consider potential availability of irrigation in determining soil suitability is incorrect, and LUBA will not defer to that interpretation. *Doob v. Josephine County*, 31 Or LUBA 275 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local comprehensive plan provision is designed to implement, and in fact essentially mirrors, the requirements for compliance with Goal 3, LUBA owes deference to the local government's interpretation only to the extent that interpretation is consistent with Goal 3. *Doob v. Josephine County*, 31 Or LUBA 275 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under ORS 197.829(2), in the absence of local findings, LUBA may interpret the applicability of the city's comprehensive plan provisions in the first instance. *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under ORS 197.829(2), enacted in 1995, LUBA is not required to remand

decisions for local government interpretations of local provisions when LUBA is able to make the necessary interpretations. *Friends of Metolius v. Jefferson County*, 31 Or LUBA 160 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and ORS 197.829(1), LUBA must defer to local government interpretations of traditional variance standards, including those made without reference to traditional strict interpretations. *DeBardelaben v. Tillamook County*, 31 Or LUBA 131 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The informal adoption by a statement in a quasi-judicial decision of a definition of the term "firearms training facility," which term is found in both a state administrative rule and the county's zoning ordinance, does not constitute the amendment of an acknowledged land use regulation. *J.C. Reeves Corp. v. Washington County*, 31 Or LUBA 115 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's conclusion that one term in its code can be used to define a somewhat different term is within its interpretive discretion, and is not so wrong as to be beyond a colorable defense. *Winkler v. City of Cottage Grove*, 30 Or LUBA 351 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA cannot defer to a local government's interpretation of its own ordinance when it cannot discern what the interpretation is, and will not exercise its discretion under ORS 197.829(2) to interpret a county provision in the first instance where the purpose of the provision is unclear and subject to numerous interpretations. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Because relevant state statutes remain applicable to local land use decisions after acknowledgment of local regulations, a local government "legislative interpretation" of a statute does not supersede the statute itself. *Ramsay v. Linn County*, 30 Or LUBA 283 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. If the local government's interpretation of its own code regarding the scope of a proposed partition contravenes the express language of the code, LUBA will not defer to that interpretation. *Tognoli v. Crook County*, 30 Or LUBA 272 (1996).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Even if an interpretation of a local ordinance is colorable on its face, it may be inconsistent with the express language, purpose and policy underlying the ordinance and expressed in a comprehensive plan. In such cases, LUBA cannot affirm the local government's interpretation under ORS 197.829(1)(a) to (c). *DLCD v. Tillamook County*, 30 Or LUBA 221 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. City's interpretation of local wetland mitigation policy to "preserve wetland habitat" as allowing replacement of .05 acres of existing wetland with a larger wetland area is not

clearly wrong and must be affirmed. *Noble v. City of Fairview*, 30 Or LUBA 180 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. It is within the county's interpretive discretion to find that a code provision protecting agricultural land for farm use conflicts with a plan policy that certain land is not suitable for agricultural production and is committed to residential development. *Reeves v. Yamhill County*, 30 Or LUBA 135 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under ORS 197.829(2), in the absence of a local interpretation, LUBA may interpret an ordinance to determine whether a local government decision is correct. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The city was clearly correct in classifying a proposed recycling processing center as a "waste and/or recycling transfer operation" which is an allowed conditional use under local ordinance. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. While ORS 197.829(2) allows LUBA to interpret local land use regulations in the absence of interpretations by the local government, LUBA need not search the record, or make interpretations or draw conclusions that are not clearly evident. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), LUBA will defer to a city's interpretation that a comprehensive plan provision setting residential densities establishes a maximum density for specific zones which can be reduced in particular circumstances. *Holland v. City of Cannon Beach*, 30 Or LUBA 85 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A comprehensive plan policy limiting the clearing of vegetation on Neabeack Hill to that which is "necessary for housing, roads, and utilities" does not require that the city reduce the permitted density of a proposed planned unit development to preserve more natural vegetation than necessary for development consistent with the applicable zoning. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the city's application of a comprehensive plan policy intended to preserve vegetation to a proposed planned unit development actually ensures more preservation of vegetation than required by the express language of the policy, the city's interpretation of the policy is not clearly wrong. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. To challenge successfully the city's interpretation of a comprehensive plan format and provisions and the city's conclusion that two plan provisions are not land use regulations, a

petitioner must establish that the city's interpretation of the contested plan provisions is clearly wrong. *Fraser v. City of Joseph*, 30 Or LUBA 13 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where petitioners contend the governing body failed to follow procedures arguably required by the local code for making the challenged legislative land use decision, LUBA must defer to the governing body's interpretation of the code and cannot interpret the code provisions in the first instance. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 429 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the city's zoning code allows private households in the commercial-service/professional zone so long as the private households meet the development standards of a multi-family zone, LUBA will affirm the city's interpretation that private households includes a multiplex dwelling. *Stevens v. City of Medford*, 29 Or LUBA 422 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the city's zoning code provides that some permitted uses are subject to special use restrictions, LUBA will affirm the city's interpretation that the existence of special use restrictions does not convert a permitted use into an unpermitted use. *Stevens v. City of Medford*, 29 Or LUBA 422 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will not defer to a local government's interpretation of a state regulation. *Testa v. Clackamas County*, 29 Or LUBA 383 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a local governing body's interpretation of Standard Industrial Code Manual provisions incorporated into the local government's own zoning ordinance, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. *Pend-Air Citizen's Comm. v. City of Pendleton*, 29 Or LUBA 362 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Although LUBA owes no deference to a hearings officer's interpretation of a local enactment, LUBA may remand a challenged decision in cases where the interpretation at issue is not explained in the findings or differs from an earlier interpretation, in order to give the hearings officer an opportunity to interpret the local enactment in the first instance. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. If the local governing body's interpretation of its comprehensive plan as not already designating the subject property as a 1B aggregate resources site, or providing a method of doing so without amending the acknowledged plan, is not clearly wrong, LUBA will defer to the governing body's interpretation. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the local code specifically requires the application of a historic landmark designation to be consistent with comprehensive plan historic preservation policies, but does not indicate any plan policies are applicable to decisions on permits for demolition of property subject to the historic landmark designation, the local governing body is not clearly wrong in interpreting the plan and code to provide that no plan policies are applicable to its review of such a demolition permit application. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where an ordinance changing the plan and zone designations of the subject property provides the property will revert to its former designations if a final order denying a conditional use permit (CUP) for a mobile home park is issued, the local governing body acts within its interpretive discretion in deciding the contingency is not met when LUBA remands a local government decision approving a CUP for a mobile home park and the local government does not take further action on that application. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local governing body acts within its interpretive discretion in interpreting a code conditional use permit standard regarding feasibility of meeting "projected increased demand" for school facilities to refer to current demand, plus demand from other developments that have received final approval and the demand created by the proposed development, and not to include demand from future permitted development of residentially zoned land. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where determining whether a notice of intent to appeal was timely filed under ORS 197.830(3) depends on determining which code notice of hearing provision applied to the local proceeding, and LUBA can infer from the challenged decision which notice provision the local governing body believes governs the local proceeding and agrees with that interpretation, even without the deference required by *Clark*, LUBA is not required to remand the decision for the governing body to make its interpretation explicit. *Orenco Neighborhood v. City of Hillsboro*, 29 Or LUBA 186 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a code contains both a provision governing the expiration of quasi-judicial land use approvals generally and a provision specifically governing the expiration of planned development approvals, the local governing body is within its discretion under ORS 197.829 and *Clark* in interpreting the code to mean the expiration of planned development approvals is governed *only* by the specific code provision. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the code provides "if no extensions are granted, the authorization shall expire," the local governing body is within its discretion under ORS 197.829 and *Clark* in interpreting this provision to mean that if an extension is requested prior to the expiration of the

approval period, the approval does not expire while local government review of the extension request is pending. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. If a code includes provisions for extending planned development approvals and for requesting changes in approved final development plans, the local governing body is within its discretion under ORS 197.829 and *Clark* in interpreting these provisions together to mean if a change in an approved final development plan is requested before the original approval expires, the approval does not expire while the modification application is being processed, and a separate extension application is not necessary. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA owes no deference to a hearings officer's interpretation of a local code. *Walker v. Clackamas County*, 29 Or LUBA 22 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Even under the highly deferential review standard imposed by ORS 197.829 and *Clark v. Jackson County*, 313 Or 508, 514-15, 836 P2d 710 (1992), a local governing body cannot interpret an "exceptional or extraordinary circumstances * * * which do not apply generally to other properties in the same vicinity" variance standard to include any circumstance that does not apply uniformly to all, or nearly all, properties in the vicinity. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is required to defer to a local governing body's interpretation of any enactment which the governing body of that jurisdiction adopted, regardless of whether the governing body of another jurisdiction also adopted the same enactment. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA's review of a hearings officer's interpretation of a local code provision is to determine whether the interpretation is reasonable and correct. *Huiras v. Clackamas County*, 28 Or LUBA 667 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In reviewing a decision adopted by a local governing body, LUBA must review the governing body's interpretation of local code provisions and may not interpret the local code in the first instance, unless there is "no possible rational dispute" regarding the correct interpretation. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where individual guidelines made applicable by an overlay zone are expressed in nonmandatory terms, a governing body is well within its interpretive discretion in determining compliance with such guidelines is not required, even where the code provides that overlay zone provisions supersede provisions of the base zone. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a governing body's interpretation of a traditional local code "unnecessary hardship" variance standard, where the governing body determines that so long as some beneficial use of the subject property could be established, the unnecessary hardship standard is not satisfied. *Duck Delivery Produce v. Deschutes County*, 28 Or LUBA 614 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A city council's interpretation of a city code "unreasonable hardships or practical difficulties" variance standard, as requiring that it be "extremely difficult" to use the subject property for a proposed concrete operation without the requested variance, is not clearly wrong and, therefore, must be affirmed. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the challenged decision is adopted by the governing body, LUBA must grant considerable deference to the governing body's interpretations of the local code and cannot interpret the local code in the first instance. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is not required to defer to a hearing's officer's interpretation of the local code under ORS 197.829 or *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992). Rather, LUBA's review of a hearings officer's interpretation is to determine whether the interpretation is reasonable and correct. *Ellison v. Clackamas County*, 28 Or LUBA 521 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government acts within its interpretational discretion in construing local code provisions that treat "contiguous" parcels in "common ownership" as a single unit of land as not including parcels in common ownership which meet only at a common corner and share no common sides. *Tognoli v. Crook County*, 28 Or LUBA 527 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government acts within its interpretive discretion in interpreting comprehensive plan policies requiring "protection and preservation" of certain natural resources together with other plan policies calling for construction of a particular roadway to allow construction of the roadway, provided impacts on the natural resources are limited. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the local government determined comprehensive plan objectives are mandatory approval standards in a recently appealed local decision, it may not later determine that plan objectives are mere guidelines and not mandatory approval standards in a different decision appealed to LUBA, in the absence of some explanation for the disparity. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. Where the code does not specifically require that the county hearings officer make the initial interpretation concerning whether a nonconforming use exists and the nature and extent of that nonconforming use at the time restrictive zoning was applied, the board of commissioners is not clearly wrong in interpreting the code to grant the planning director authority to make such initial determinations. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA owes no deference to a local government's interpretation of an administrative rule promulgated by a state agency. *Sensible Transportation v. Washington County*, 28 Or LUBA 375 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a local government's interpretation that the term "development" used in the local code does not include zone changes. *Neuman v. City of Albany*, 28 Or LUBA 337 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When reviewing an interpretation of a local enactment by a local decision maker other than the local governing body, LUBA's acceptance or rejection of the interpretation is determined solely by whether the interpretation is right or wrong. *Gage v. City of Portland*, 28 Or LUBA 307 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under ORS 197.829, LUBA is required to afford deference to local interpretations of local comprehensive plans and land use regulations only when those interpretations are made by the local governing body. *Gage v. City of Portland*, 28 Or LUBA 307 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Code provisions that provide interim resource protection to property not on a local government's acknowledged Goal 5 resource inventories, until the Goal 5 planning process can be carried out, do not implement Goal 5. Therefore, local interpretations of such code provisions are not subject to reversal by LUBA under ORS 197.829(4). *Gage v. City of Portland*, 28 Or LUBA 307 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The scope and proper construction of the term "commercial activities that are in conjunction with farm use," used in ORS 215.213(2)(c) and 215.283(2)(a), is a question of state law. LUBA is not required to defer to a local government hearings officer's understanding of the scope of that term. *City of Sandy v. Clackamas County*, 28 Or LUBA 316 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. That LUBA may consider a statewide planning goal that is implemented by a particular plan or code provision, in determining whether the local government's interpretation of the plan or code provision should be affirmed under ORS 197.829(4), does not make that goal an approval standard for decisions made under an acknowledged plan and land use regulations. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is not required to give a planning director's interpretation of local regulations the deference LUBA must afford to a governing body's interpretation of local regulations. Rather, LUBA reviews a planning director's interpretation to determine whether that interpretation is reasonable and correct. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local governing body is not entitled to interpretive deference under ORS 197.829 and *Clark v. Jackson County* when interpreting statutory requirements for home occupations. *Holsheimer v. Clackamas County*, 28 Or LUBA 279 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the local code creates a process for the submittal and review of an applicant's "development impact statement" (DIS) as part of preliminary subdivision plat approval, the local governing body has considerable discretion in interpreting the role of the DIS process and must determine, in the first instance, whether the DIS content requirements are mere requests for information or impose substantive approval standards. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a challenged city council decision approving the provision of city sewer and water services outside city limits does not interpret arguably relevant comprehensive plan provisions with regard to whether they are approval criteria for the challenged decision, LUBA must remand the decision to the city to adopt such interpretations, before LUBA can determine whether the challenged decision is a land use decision subject to LUBA review. *Fraser v. City of Joseph*, 28 Or LUBA 217 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA owes no deference to interpretations of local code provisions adopted by local decision makers other than the governing body. *Derry v. Douglas County*, 28 Or LUBA 212 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A hearings officer's interpretation of a conditional use permit for a "tourist park" as not allowing placement of mobile homes within the approved "tourist park," as that term is defined by the local code, is reasonable and correct. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation of a code "compatibility" standard as not requiring consideration of "view impacts" is not "clearly wrong" and will be sustained by LUBA. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. Where a county adopts an urban growth management agreement requiring incorporation of city zoning ordinance and comprehensive plan provisions into the county's zoning ordinance and comprehensive plan, with regard to unincorporated land within the city's UGB, LUBA will extend the deference required by ORS 197.829 and *Clark v. Jackson County* to the county governing body's interpretation of city plan and zoning ordinance provisions when the county makes a land use decision concerning property within the UGB. *Mazeski v. Wasco County*, 28 Or LUBA 178 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county governing body's interpretation of the term "severe geologic hazard," as used in its comprehensive plan, is not so wrong as to be beyond colorable defense, LUBA will defer to it. *Mazeski v. Wasco County*, 28 Or LUBA 178 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where local conditional use approval standards do not specifically refer to impacts on property values, but rather to compatibility with "uses" and "land use patterns" and changes in "accepted farm or forest practices" or their cost, a local governing body is within its discretion under ORS 197.829 in interpreting such standards not to require consideration of a proposed conditional use's impact on property values. *Tucker v. Douglas County*, 28 Or LUBA 134 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county governing body's interpretation that an otherwise applicable code permit standard requiring "Class I-IV soils [to] be preserved and maintained for farm use" is not applicable to land for which an exception to Statewide Planning Goal 3 (Agricultural Lands) has been adopted as part of the acknowledged county comprehensive plan, is not "clearly wrong," and is within the governing body's discretion under ORS 197.829. *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In reviewing a local government hearings officer's interpretation of a land use regulation, LUBA determines whether the interpretation is reasonable and correct. The deference to a local governing body interpretation required by ORS 197.829 does not apply to interpretations by hearings officers. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a challenged decision was not adopted by the governing body of the local government, LUBA owes no deference to the interpretations of local enactments expressed in that decision. *Pickrell v. City of Portland*, 28 Or LUBA 103 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a particular activity is allowed as a conditional use, and is subject to criteria specifically and solely applicable to such activity, the governing body acts within its interpretive discretion under ORS 197.829 in determining such activity is not also subject to criteria generally applicable to conditional uses in the zone. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. A city council acts within its interpretive authority under ORS 197.829 in applying a code provision as a mandatory approval standard, notwithstanding its use of the word "should." So long as the city makes it clear that it does interpret the code provision as a mandatory approval standard, it need not explain why in its decision. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under ORS 197.829, LUBA is required to defer to a local governing body's interpretation of its own enactment, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. If a local government is presented with a plan or land use regulation provision that must be interpreted, and there is a reasonable interpretation that is *consistent* with the "state statute, land use goal or rule the comprehensive plan provision or land use regulation implements," that interpretation may not be rejected by the local government in favor of an interpretation that is *inconsistent* with those statutes, goals or rules. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. ORS 197.829(4) was not adopted to allow LUBA to reconsider the propriety of the original acknowledgment of comprehensive plans and land use regulations. Identification of an allegedly incorrect *interpretation* of such acknowledged comprehensive plan or land use regulation provisions is a condition precedent for invoking review under ORS 197.829(4). *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where nothing in its comprehensive plan or code requires that a particular level of service be maintained at affected street intersections at all times, the local government's interpretation of its plan and code as allowing short traffic system failures for infrequent, large, special events is not clearly wrong, and LUBA will defer to it. *Heine v. City of Portland*, 27 Or LUBA 571 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a document was originally drafted by state agency staff, but was never adopted by that agency as an administrative rule, and is applicable to a challenged local government decision only because it is incorporated by reference into the local code, under ORS 197.829 LUBA is neither required nor allowed to give deference to an interpretation of that document by an agency staff member. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code provides that a planning commission decision becomes final 10 days after "submittal" of the written decision to the clerk of the governing body, the local government is not clearly wrong in interpreting "submittal" to the clerk to mean "receipt" by the clerk, and its interpretation will be sustained. *McKenzie v. Multnomah County*, 27 Or LUBA 523

(1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government acts within its interpretive discretion in interpreting a plan policy that "residential development should only be encouraged" in certain areas not to be an approval standard for individual development applications. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. When LUBA reviews land use decisions for compliance with relevant approval standards, it does not matter whether the challenged decision is consistent with prior decisions, so long as the decision correctly interprets and applies the applicable standard. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government's interpretation of the term "motel," as defined by local ordinance, to include a particular development is not contrary to the express words, policy or purpose of that ordinance, LUBA will defer to the local government's interpretation. *Kaady v. City of Cannon Beach*, 27 Or LUBA 464 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the applicability of local comprehensive plan or land use regulation provisions is ambiguous, the local government is entitled to considerable deference in determining their applicability. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code provision does not explicitly state the requirements listed thereunder for a complete development application are "jurisdictional," the local government's interpretation of the code provision as imposing procedural rather than jurisdictional requirements is not inconsistent with the express words, purpose or policy of the code and, therefore, must be affirmed. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government acts within the interpretive discretion afforded by ORS 197.829 in finding a code requirement for a statement of the nature of the applicant's interest in the subject property is satisfied where the application states the applicant is the "future property owner" and there is evidence in the record that the applicant has acquired or will acquire the property. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government is within its interpretive discretion in counting an access driveway separated by a median into two one-way driveways as two access points, for purposes of satisfying the number of access points required by the local code. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government

Interpretation. That other inapplicable sections of the local code permit one-way driveways with a minimum 15-foot pavement width provides no basis for allowing 15-foot-wide paved driveways where the applicable code section unambiguously requires a 24-foot pavement width. Such an interpretation is clearly wrong, and exceeds the local government's interpretive discretion. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under ORS 197.829, LUBA is required to defer to a local government's interpretation of its own enactments, unless the local interpretation is contrary to the express words, purpose or policy of the enactment, or is inconsistent with a statute, goal or rule that the enactment implements. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the local code explicitly establishes a right to a local appeal only for decisions made pursuant to certain procedures set out in the code, a the local government's interpretation that no local appeal is available if the decision sought to be appealed was not made through those procedures is not clearly wrong, and LUBA will defer to it. *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The meaning of the term "standards and criteria" in ORS 227.178(3) is a question of state law, and a city's interpretation and application of this term does not bind LUBA. The role of the term "standards and criteria" in ORS 227.178(3) is to assure both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on a decision permitting or denying an application will remain constant throughout the proceedings. *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under ORS 197.829(4), if a comprehensive plan provision or land use regulation is clearly designed to implement a statewide planning goal or goals, a local government may not interpret such a plan provision or land use regulation in a manner inconsistent with the goals it implements. *DLCD v. City of Donald*, 27 Or LUBA 208 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a Transitional Timber zone provides that uses of land "not specifically mentioned" in that zone are prohibited, and the principal uses permitted outright in the zone are resource and resource-related uses, not commercial uses, LUBA will defer to the local government's interpretation that the zone does not allow parking, storage and maintenance of a commercial truck. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A comprehensive plan policy that "urban services shall only be established within recognized urban growth boundaries" implements Goals 11 and 14. Because Goals 11 and 14 prohibit the extension of urban level services outside of urban growth boundaries, LUBA will not defer to a local government interpretation of that plan policy as allowing extension of service from an urban sewage treatment plant to a rural area. ORS 197.829(4). *DLCD v. Fargo Interchange*

Service District, 27 Or LUBA 150 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code contains a variety of arguably relevant provisions that equally support different interpretations, the selection of an interpretation is for the local government to make. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the local code provides that nonconforming use rights are lost if the site of a nonconforming use is "vacant" for two continuous years, and also provides that words used in the code have their normal dictionary meaning, the local government may interpret "vacant" to mean "free from activity" consistent with the nonconforming use rights, but cannot embellish that definition by adding a requirement for the absence of "a bona fide effort to provide goods and services for profit." *Rhine v. City of Portland*, 27 Or LUBA 86 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to local government decisions giving different interpretations to the same language appearing in different sections of its code, where there are related code provisions that provide some justification for the different construction of such identical code language. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government operates within its interpretive discretion under ORS 197.829 when it interprets a code requirement that a proposed conditional use "fully accords with all applicable standards of the County and State Laws or regulations" to be satisfied, where the applicant demonstrates during the local proceedings that there are "no unusual circumstances or conditions which would prevent [subsequent] issuance of required regulatory approvals." *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government interpretation of its sign ordinance that regardless of whether a sign is an awning, fascia or other sign type, it is subject to certain measurement requirements, is not contrary to the express words, policy or context of the ordinance, and LUBA will defer to it. *Heath Northwest, Inc. v. City of Portland*, 26 Or LUBA 535 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under ORS 197.829, it is unclear whether LUBA is to defer to a local government interpretation of a prior local government decision or whether LUBA is required to determine whether the local government interpretation is reasonable and correct. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The noninterference standard of ORS 215.283(3)(b) applies directly to land in a county EFU zone, and EFU zone provisions implementing ORS 215.283(3)(b) may not be interpreted inconsistently with the statute. *DLCD v. Crook County*, 26 Or LUBA 478 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA may not interpret a local government's enactments, in the first instance, to determine what constitutes the local approval standards for, and how those standards apply to, a challenged decision. Rather, LUBA is required to review the local government's interpretation of its own enactments. *Rea v. City of Seaside*, 26 Or LUBA 444 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where petitioners do not argue that a local code provision governing local appeal procedures implements some requirement imposed on the local government by a state statute, statewide planning goal or administrative rule, LUBA will defer to the local government's interpretation of its code provision, unless that interpretation is clearly wrong. *Bjerk v. Deschutes County*, 26 Or LUBA 439 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government interpretation of a plan policy as governing how it inventories, plans and zones its forestland, and as not applying to a decision approving a non-forestland division and dwelling, will be sustained where the interpretation is consistent with the words and apparent purpose of the policy. *Draganowski v. Curry County*, 26 Or LUBA 420 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. 1993 Oregon Laws, chapter 792, section 43, codifies *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), with the exception that LUBA is not required to defer to a local government's interpretation of its regulations if that interpretation is contrary to a state statute, statewide planning goal or administrative rule which the regulations implement. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation of its code provisions on farm dwellings is within the interpretive discretion afforded local governments by *Clark v. Jackson County* and 1993 Oregon Laws, chapter 792, section 43, so long as its interpretation does not provide less protection to EFU-zoned land than what ORS 215.283(1)(f) and OAR 660-05-030(4) provide. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under Oregon Laws 1993, chapter 792, section 43(4), LUBA is not required to affirm a local government's interpretation of its own code provision if that interpretation is "contrary to a state statute, land use goal or [administrative] rule that the [code provision] implements." *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is required to defer to a local government's interpretation of its own ordinances, unless the interpretation is clearly contrary to the express words, policy or context of the enactment. *Lane v. City of Klamath Falls*, 26 Or LUBA 295 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. ORS 215.283(3)(d) must be independently applied to an application for division

of EFU-zoned land and requires that the entire EFU-zoned parcel be found to be generally unsuitable for farm use, regardless of whether local regulations impose a more relaxed standard on homestead lot divisions. *Geiselman v. Clackamas County*, 26 Or LUBA 260 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government interprets a "situated upon generally unsuitable land" approval standard for nonforest dwellings and land divisions in a forest zone to require that the entire subject parcel be generally unsuitable for the production of farm or forest products, and that interpretation is not contrary to the express words, policy or context of that standard, LUBA will defer to the local government's interpretation. *Alexanderson v. Clackamas County*, 26 Or LUBA 209 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), there can easily be more than one affirmable local government interpretation of a particular code provision. Nevertheless, *Clark* does not allow a local government arbitrarily to vary its interpretation of an approval standard when acting on permit applications. *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA cannot interpret a local government's ordinances in the first instance, but rather must review the local government's interpretation of its ordinances. Consequently, the failure of the local government to make the initial interpretation of local ordinance provisions is a basis for remand. *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the local code defines an accessory use or structure as one which is subordinate to and serves a principal structure or principal use, a local government is within its interpretive discretion under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), to require that the principal use or structure exist before an accessory structure or use may be approved. *McPeek v. Coos County*, 26 Or LUBA 165 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government's interpretation of its code that a retaining wall is not within the local code's definition of "building" is not clearly wrong, LUBA will defer to that interpretation. *Wood v. City of Lake Oswego*, 26 Or LUBA 121 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a question of proper interpretation of a comprehensive plan provision is raised during local proceedings, the interpretation required for LUBA review of the decision on appeal must be provided in the decision. The local government may not supply the interpretation in its brief on appeal. *Eskandarian v. City of Portland*, 26 Or LUBA 98 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the challenged decision interprets a local code standard for nonforest dwellings to require that an entire parcel be generally unsuitable for farm or forest uses, and that

interpretation is not clearly contrary to the words, policy or context of the code, LUBA will defer to it. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under ORS 197.835(7)(a)(D) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), LUBA must defer to a local government's interpretation of "applicable law" adopted by the local government, regardless of whether that applicable law is a zoning ordinance or conditions of approval imposed by a prior quasi-judicial order. *Perry v. Yamhill County*, 26 Or LUBA 73 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government's interpretation of its own comprehensive plan that the introductory sections in the land use chapter are not independent approval standards is not clearly wrong, LUBA must defer to that interpretation. *Moore v. Clackamas County*, 26 Or LUBA 40 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a local government's interpretation of a code requirement, that a PUD tentative plan covering a portion of property under single ownership be accompanied by a statement proving the entire property can be developed and used in accord with code standards, as requiring that the PUD not render the remainder of the property undevelopable. *McGowan v. City of Eugene*, 26 Or LUBA 9 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A county may interpret a comprehensive plan provision prohibiting plan map amendments designating "forest lands" for rural development as referring to the definition of "forest lands" contained in Goal 4 when the comprehensive plan provision was adopted. Such an interpretation would not allow development that would otherwise be prohibited by the current version of Goal 4 and, therefore, is not inconsistent with the current version of Goal 4. *Westfair Associates Partnership v. Lane County*, 25 Or LUBA 729 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government's interpretation of a particular code provision is expressed in a motion to dismiss an appeal before LUBA, rather than in the challenged decision itself, LUBA is not required to defer to the local government's interpretation. *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. The proper interpretation of state statutes is a question of law for LUBA to decide, and is not subject to the limitations that *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), places on LUBA's review of interpretations of local enactments. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Notwithstanding that LUBA may prefer a different interpretation of local code provisions, where the local decision maker's interpretation of the local code is not internally

inconsistent and not clearly wrong, LUBA will defer to it. *DLCD v. Crook County*, 25 Or LUBA 625 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the challenged decision contains an interpretation of the local code that a particular standard is inapplicable to the proposed development, and that interpretation is not clearly contrary to the express words, policy or context of the local code, LUBA will defer to that interpretation. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government's interpretation of its own code, that a county department manager may initiate an application for development approval on behalf of the local government, is not clearly contrary to the express words, policy or context of the local code, LUBA will defer to it. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA owes local governments no deference in interpreting state law. However, where a number of the issues raised in the petition for review do not turn on interpretation of state law, the presence of questions of state law does not, alone, make a voluntary remand inappropriate. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a challenged decision simply expresses a conclusion that the county court has discretion to act on a subdivision application without that application having first been acted on by the county planning commission, but does not identify the source of that discretion or interpret apparently relevant code provisions, the basis for the challenged decision is not sufficiently articulated for review, and the challenged decision must be remanded. *Larson v. Wallowa County*, 25 Or LUBA 537 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the challenged decision includes contradictory findings regarding compliance with an applicable local code approval standard, LUBA cannot interpret the standard itself, but rather must remand the decision to the local government to interpret the standard in the first instance. *Larson v. Wallowa County*, 25 Or LUBA 537 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the local code states that "failure to comply with this subsection shall be a jurisdictional defect," and a local appellant fails to establish compliance with that subsection, the local government is free to interpret its code to require dismissal of the local appeal, and LUBA will defer to that interpretation. *DLCD v. Wasco County*, 25 Or LUBA 529 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a farm dwelling approval standard in a local code requires a county to consider the median size of commercial farms in a specific area, as reported by certain government agencies or "other similar source," it is within the county's discretion to interpret the "other similar source" provision to allow it to consider relevant evidence from the county planning department,

county assessor's office or other reliable sources. *Giesy v. Benton County*, 25 Or LUBA 493 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government determination that occasionally staying on the subject property in a travel trailer is not residential use of the property for purposes of determining whether a nonconforming residential use has been "discontinued," is not a clearly wrong interpretation of the code, and LUBA will defer to it. *Cemper v. Clackamas County*, 25 Or LUBA 486 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government interpretation of a code "lot of record" provision as allowing legally created but now substandard lots to be separately developed if adjoining lots are held in separate ownership or if the lots were shown on a plat of record prior to the date the relevant zoning requirements took effect is reasonable, and LUBA will defer to that interpretation. *Campbell v. Multnomah County*, 25 Or LUBA 479 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. So long as the local decision maker (whether the governing body, planning commission, hearings officer or some other body) has authority to interpret local enactments, its interpretation is the interpretation of the local government, to which LUBA is required to defer under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code requires that home occupations occupy no more than 1000 square feet of an accessory building, an interpretation of that provision as excluding portions of the accessory building used to access the part of the accessory building used for the home occupation makes full use of the local government's interpretative discretion. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a county interprets a forest zone requirement that nonforest uses be located on generally unsuitable land for production of farm or forest products as requiring consideration of the suitability of the entire parcel, the county exercises its interpretive discretion to the fullest in interpreting a home occupation approval standard that incorporates the nonforest use standard by reference, as requiring consideration of only the land under the existing building where the home occupation will be located. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is required to defer to a local government's interpretation of its own ordinances, so long as the proffered interpretation is not clearly wrong. *Oregon Raptor Center v. City of Salem*, 25 Or LUBA 401 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the local code expresses an intent not to duplicate state mobile home park approval standards, LUBA will defer to the local government's interpretation that the state

approval standard in ORS 446.100(1)(a) is not part of the "applicable Oregon Law," which the code requires to be considered in making permit decisions. *Frankton Neigh. Assoc. v. Hood River County,* 25 Or LUBA 386 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA may not interpret a local government's comprehensive plan in the first instance, rather the local government must interpret its own plan, and LUBA may review that interpretation. *Citizens for Resp. Growth v. City of Seaside,* 25 Or LUBA 367 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA must defer to a local government's interpretation of its own land use regulations unless the interpretation is clearly wrong. A county interpretation that a facility for an annual equestrian event qualifies as a "rodeo" or a "livestock arena" is not clearly wrong. *Cooley v. Deschutes County,* 25 Or LUBA 350 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a code provision governing notice of decisions on a certain type of land use action does not expressly provide it applies only to a decision by the planning director, LUBA will defer to a local government's interpretation that the code provision also applies to a decision by the hearings officer on appeal from a decision by the planning director. *Reusser v. Washington County*, 25 Or LUBA 252 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where one code provision requires a local government's notice of decision to identify the local appeal fee, and another provision states that failure to pay the proper local appeal fee prior to expiration of the period for filing an appeal constitutes a "jurisdictional" defect, the local government may interpret the two code provisions together to mean that the period for filing an appeal does not begin to run until the required notice of decision, identifying the proper appeal fee, is provided to the appealing party. *Reusser v. Washington County,* 25 Or LUBA 252 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government's subdivision approval standards limit the length of cul-de-sac streets, as measured from through-traffic streets, and it is reasonable to interpret the limitation as being measured from either existing through-traffic streets or both existing and proposed through-traffic streets, LUBA will defer to the local government's selection of the latter interpretation. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is limited to considering the interpretations of ambiguous code language that are adopted by the decision-making body and may not consider interpretations that are not adopted by the decision maker, even if the offered interpretation is reasonable. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under a local code standard requiring that arterial streets not "penetrate identifiable neighborhoods," LUBA will defer to the local government's determination of what

constitutes an identifiable neighborhood, unless the local government's determination is clearly wrong. *Mannenbach v. City of Dallas*, 25 Or LUBA 136 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government determines a use does not fit neatly into any of the available definitional categories in its code, but provides a reasonable explanation for categorizing the use according to its primary use, LUBA will defer to that interpretation. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the local code includes an exception to the term "wetland" for wetlands created by "human activity as part of an approved development project," and there is no dispute that the subject wetland was created with the knowledge and consent of the local government, it is clearly wrong for the local government to fail to consider whether the wetland is within the local code exception. *Annett v. Clackamas County*, 25 Or LUBA 111 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Local government interpretations that particular PUD approval standards apply only at one stage of a multi-stage approval process will be sustained where the relevant code language supports that construction. However, LUBA will reject arguments that a local code should be interpreted in that manner, where the challenged decision does not interpret and apply the local code in that way and the local government's interpretation and application of its code is not clearly wrong. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government's interpretation that a local code standard requiring a determination concerning the adequacy of schools "existing or planned for the area" is satisfied by findings that there is unspent money in a school district's budget, is an interpretation of the local code that is "clearly wrong." *Burghardt v. City of Molalla*, 25 Or LUBA 43 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is required to defer to a local government's interpretation of its own ordinances, unless that interpretation is contrary to the express words, policy or context of the local enactment. LUBA may not interpret a local government's ordinances in the first instance, but rather must review the local government's interpretation of its ordinances. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government determines that a recreational cattle roping use was lawfully established on the date restrictive zoning was applied, because it constituted a farm use allowed outright by the subject zone, LUBA will defer to that interpretation so long as it is not clearly contrary to the express words, policy or context of the ordinance. *Smith v. Lane County*, 25 Or LUBA 1 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the term "vacant" in a local government's code is undefined, but the code

states that undefined terms have their "normal dictionary meaning," the local government may adopt one of the available ordinary dictionary definitions of the term "vacant," and LUBA will defer to that definition of the term so long as it is not clearly contrary to the context of the code provision in which the term "vacant" is found. *Rhine v. City of Portland*, 24 Or LUBA 557 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. A local government is within its interpretive discretion in interpreting the term "development" as including farming, where the code defines the term broadly and includes a nonexclusive list of examples of development that includes "site alteration such as * * * grading * * * or clearing." *Trumper v. Washington County*, 24 Or LUBA 552 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government interprets its own enactments in a way that is inconsistent with the express terms of a local provision, and there is at least one plausible interpretation of the disputed provision that is consistent with its express terms, LUBA will not defer to the local government's interpretation. *McGowan v. City of Eugene*, 24 Or LUBA 540 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a local government's determination that provisions in a comprehensive plan requiring the local government to "encourage" particular kinds of activities are not mandatory approval standards. *McGowan v. City of Eugene*, 24 Or LUBA 540 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA may not interpret a local government's ordinances in the first instance, but rather must review a local government's interpretation of its ordinances, and the local government interpretation must be adequate for LUBA's review. *Leabo v. Marion County*, 24 Or LUBA 495 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. If a local government has interpreted the local code in the challenged decision, LUBA must defer to that interpretation unless it is clearly contrary to the enacted language or the apparent purpose or policy of the provision. *Leabo v. Marion County*, 24 Or LUBA 495 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where LUBA must determine whether an ambiguous code provision (*i.e.*, one that is capable of more than one sustainable interpretation) is applicable to a challenged decision, and the challenged decision does not contain a reviewable interpretation of that provision, LUBA must remand the decision for the local government to interpret the provision in the first instance. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where petitioners contend a local government erred in failing to apply a code provision to the challenged decision, and the decision contains no interpretation of that code provision, but the code language unambiguously establishes that the provision in question is not applicable to the challenged decision, LUBA is not required to remand the decision so the local

government can interpret its code in the first instance. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In reviewing a local government's interpretation of its own ordinance, the question LUBA must resolve is not whether the local government interpretation is "right," but rather whether it is "clearly wrong." *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where under certain provisions of a local enactment, consideration of the geologic stability of the subject site would be relevant to the conditional use permit approval process, but other code provisions create a separate geologic hazard review process that may be initiated at any time prior to or in conjunction with filing an application for *any* required local permit, LUBA will defer to the local government's interpretation that it is not required to address geologic stability as part of the conditional use permit process. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government determines an application for a home occupation on a parcel adjoining another parcel on which an earlier application for the same home occupation was denied, is an application for a "substantially similar" use, LUBA will defer to that interpretation of the local code requirement that an application may not be "substantially similar" to a previously denied application. *Roozenboom v. Clackamas County*, 24 Or LUBA 433 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), the question for LUBA to resolve is not whether a local government interpretation of its own code is "right," but rather whether it is "clearly wrong." *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA may not interpret a local code in the first instance, but rather must review a local government's interpretation of its code. However, a local government interpretation of its code must be adequate for LUBA's review and may not consist of a mere conclusory statement. *DLCD v. Crook County*, 24 Or LUBA 393 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the decision whether to designate property as Agriculture or Forest on comprehensive plan maps is governed by specific plan policies, a county acts within its discretion in determining that it is not required to apply and balance other generally applicable Agricultural and Forest plan policies. *Marson Trucking, Inc. v. Clackamas County*, 24 Or LUBA 386 (1993).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. In the absence of a statutory policy pertaining to forestlands that, like the statutory policy concerning EFU land, requires the preservation of forestland in large blocks, LUBA cannot require that a local government interpret and apply its nonforest use "generally unsuitable" land approval standard in the same manner as the similarly worded statutory standard pertaining to

nonfarm uses on EFU land. *DLCD v. Coos County*, 24 Or LUBA 349 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code requires a proposed nonforest dwelling site to be on land generally unsuitable for forest uses, that standard can be interpreted to mean either that the proposed nonforest dwelling site itself, or that the entire forest parcel, must be generally unsuitable for forest uses. LUBA will defer to the local government's choice between those permissible interpretations. *DLCD v. Coos County*, 24 Or LUBA 349 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is required to defer to a local government's interpretation of its zoning ordinance, so long as the proffered interpretation is not "clearly contrary to the enacted language," or "inconsistent with express language of the ordinance or its apparent purpose or policy." *Tylka v. Clackamas County*, 24 Or LUBA 296 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a local government's interpretation of its own ordinance, that expansion of a nonconforming use onto property not currently utilized by the nonconforming use is not authorized, where that interpretation is not contrary to the express words or policy of the ordinance. *Leopold v. City of Milwaukie*, 24 Or LUBA 246 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code provision states that tree protection is a proper Justification for approval of a proposed setback reduction, the local government's interpretation that the provision allows it to approve a setback reduction to protect a particular tree, even though the setback reduction will result in the destruction of another tree, is not clearly contrary to the express terms of the code and LUBA will defer to the interpretation. *Barker v. City of Cannon Beach*, 24 Or LUBA 221 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a comprehensive plan policy provides that a change from a 10-acre minimum zone to a 5-acre minimum zone requires that "parcels are generally five acres," a county's interpretation of this policy to require consideration of the entire 10-acre minimum zoned area that includes the subject property is not "clearly contrary" to the terms of, or "inconsistent with the express language" or "apparent purpose and policy" of, the plan policy and must be upheld. *Thatcher v. Clackamas County*, 24 Or LUBA 207 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA will defer to a local government's interpretation of its code so long as the proffered interpretation is not "clearly contrary to the enacted language," or "inconsistent with express language of the ordinance or its apparent purpose or policy." An interpretation of a local code provision to require that in order to be recognized as separately developable, a parcel must have been in separate ownership on a particular date, is not "clearly contrary" to the terms of, or "inconsistent with the express language" or "apparent purpose or policy" of, the code provision. *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government interprets a code requirement that all functions associated with a proposed use take place "within the building" proposed to house the use to be satisfied, where a covered play area will be part of the total "floor area" of such building, its interpretation of the code is not inconsistent with the code's express language, purpose or policy and, therefore, must be affirmed. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local code allows recycling and other incidental uses, LUBA will defer to a local government interpretation of the code as allowing a recycling facility that accepts waste material including both solid waste and recyclable material, where approximately 70 percent of the material accepted will be recycled and approximately 30 percent will be disposed of at a landfill. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. LUBA is not required to defer to a local government's interpretation of its own code, where that interpretation is inconsistent with the express language of the code. *Goose Hollow Foothills League v. City of Portland*, 24 Or LUBA 69 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where there is a conflict between (1) plan text describing the geographic location of a Goal 5 forest resource site, and (2) other plan text giving its acreage, resolving that conflict in favor of the geographic location is at least as reasonable as resolving the conflict in favor of the acreage figure, LUBA will defer to the local government's interpretation of its plan. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where a local government's interpretation of its comprehensive plan Goal 5 inventory is consistent with the plan language and appears to be consistent with the purpose and policy of the plan, LUBA may not reject that interpretation. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

1.1.3 Administrative Law – Interpretation of Law – Effect of Local Government Interpretation. Where the purposes of a county's commercial zones are to provide for retail-oriented needs in areas characterized by good transportation services, and such needs and services are not identified with a particular proposed golf course, the county's interpretation of its own ordinance that the golf course is not a commercial use is not inconsistent with express language of the local ordinance or the ordinance's apparent purpose or policy and will be affirmed. *West v. Clackamas County*, 23 Or LUBA 558 (1992).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Approving a boundary line adjustment to a parcel under applicable standards does not "collaterally attack" a previous land partition decision that originally created the subject parcel under different standards, even assuming the adjusted parcel after the boundary line adjustment would not comply with the partition standards that were applied earlier when the parcel was created. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. When the county is entitled to deference under ORS 197.829(1), the decision can be reversed only if the interpretation is inconsistent with the express language, purpose or policy underlying the relevant code language. Under a non-deferential standard of review petitioner must demonstrate that the commissioners' interpretation is reversible. *Oregon Coast Alliance v. Curry County*, 78 Or LUBA 81 (2018).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. When a code provision requires geotechnical analysis, the feasibility of the planned development must be shown at the preliminary plan stage; however, technical matters that require expert evaluation may be deferred to administrative review and final plan approval even when final plan approval does not require a public hearing. *Lundeen v. City of Waldport*, 78 Or LUBA 95 (2018).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. When a county opts to approve a permit without a public hearing, any person who is adversely affected or aggrieved, or who is entitled to notice of the decision may appeal a decision made without a hearing. The county cannot require participation prior to a decision, either by attending a conference (that may or may not have occurred), or providing written comments, or in any other manner. Additionally, the county may not enact additional restrictions to prevent a person who is entitled to file an appeal under the ORS 215.416(11)(a)(A) right to file a local appeal. *Hood River Valley Residents Comm. v. Hood River County*, 78 Or LUBA 282 (2018).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. When a party raises an issue for the first time at oral argument LUBA will ignore all statements made at oral argument, by any party, that go beyond the issues framed in the briefs and the evidence cited in the record, and will confine its review to the issues framed in the briefs, the evidence cited in the record, and the portions of the oral argument that discuss those issues and evidence. *See* OAR 661-010-0040(1) and ORS 197.835(2)(a). *Conte v. City of Eugene*, 78 Or LUBA 289 (2018).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Pursuant to *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), where a planning commission initially finds a proposal complies with a planned unit development (PUD) approval standard without requiring transportation improvements, but on remand based on a different evidentiary record finds that some improvements are necessary to ensure compliance with the PUD approval standard, drawing a different conclusion based on a different evidentiary record does not mean that the planning commission changed its interpretation of the PUD approval standard. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Remand for

new proceedings to allow the petitioner to present new evidence to respond to an allegedly new, unanticipated interpretation of an approval standard is not warranted under *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), where the allegedly new interpretation is consistent with the position for which the petitioner argued and presented supporting evidence during the initial proceedings below. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where LUBA remands a county's decision adopting an ordinance so that the county can provide the published notice of the board of county commissioners' hearing that ORS 215.060 requires, considering petitioners' arguments directed at the ordinance would be inconsistent with sound principles of judicial review when a different ordinance may be adopted as a result of LUBA's remand. *Oregon Coast Alliance v. Clatsop County*, 75 Or LUBA 277 (2017).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a petitioner did not raise the issue in its filed statement of appeal before the hearings officer that street tree planting is required only when a new street is created, a planning commission exceeds its authority by considering the issue under the local code provisions governing the scope of appeals to the planning commission. *Rockbridge Capital v. City of Eugene*, 75 Or LUBA 364 (2017).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a county's land development ordinance provides petitioner with the right to appeal its staff decision to a hearings officer, whether the county's provisions for appealing a planning director decision are permissive or mandatory, they are "remedies" that are "available by right" to petitioner, within the meaning of the ORS 197.825(2)(a) requirement that a petitioner exhaust available local remedies, and therefore LUBA lacks jurisdiction if petitioner did not avail herself of the county's procedures for local appeal. *Levy v. Jackson County*, 75 Or LUBA 401 (2017).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where LUBA remands a decision for the county to interpret an approval standard in the first instance, the county need not adopt additional findings applying the standard to the application under the new interpretation, where the interpretation adopted on remand is consistent with the county's original findings of compliance, which the county re-adopted on remand. *Foland v. Jackson County*, 69 Or LUBA 49 (2014).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. LUBA will strike documents attached to the petition for review that are offered as "context" for interpreting an administrative rule adopted in 1990, where the documents are not subject to official notice, long post-date the 1990 administrative rule, and could not provide "context" for interpreting the rule. *Fritch v. Clackamas County*, 68 Or LUBA 184 (2013).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. A city's final decision includes adequate findings and a code interpretation adequate for review, where the final decision adopts a planning staff decision as its own, and the planning staff decision embodies a code interpretation that is adequate for review. *Sellwood-Moreland Improvement League v. City of Portland*, 68 Or LUBA 213 (2013).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a zoning ordinance requires that a notice of local appeal "include" "a clear and distinct identification of the specific grounds" for appeal and that compliance with that requirement is "jurisdictional," a local government may insist on strict compliance with the zoning ordinance requirements of a local notice of appeal. It is not inconsistent with the text of the zoning ordinance to conclude that a local appeal should be dismissed where the notice of intent to appeal includes no grounds for appeal and instead attempts to incorporate by reference legal issues stated in a different document that was created for a different reason, without attaching a copy of that document. *Lang v. City of Ashland*, 64 Or LUBA 250 (2011).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. For purposes of ORS 197.829, LUBA must recognize as adequate for review a governing body's implicit interpretation of a local approval standard, where the findings and decision carry with it only one possible meaning for the standard and an easily inferred explanation of that meaning. *Green v. Douglas County*, 245 Or App 430, 263 P3d 355 (2011). *Foland v. Jackson County*, 64 Or LUBA 265 (2011).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. A finding that "public facilities exist that are adequate to serve" proposed development is not sufficient to embody a reviewable interpretation of a plan map amendment standard requiring that "adequate public facilities can be provided to the property," where the findings fail to clarify whether the governing body understands the standard to be concerned only with the existence of public facilities in the area with adequate capacity, or whether the standard is also concerned with whether the public facility provider is willing and able to provide services to the property. *Foland v. Jackson County*, 64 Or LUBA 265 (2011).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Under ORS 197.829(2), where the local government fails to interpret a local standard or adopt a reviewable interpretation, LUBA may interpret the standard in the first instance or remand the decision for the local government for an interpretation. Where the meaning of the local standard is "far from obvious" and the local government is in a better position than LUBA to clarify the meaning through interpretation of context and legislative history, LUBA should exercise its discretion to remand for an interpretation. *Green v. Douglas County*, 245 Or App 430, 263 P3d 355 (2011). *Foland v. Jackson County*, 64 Or LUBA 265 (2011).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Dismissal of a local appeal for failure to comply with an informational requirement like specifying the date of the appealed decision in the local notice of appeal is a sufficiently harsh sanction that a local government may only dismiss the appeal if its code expressly provides that dismissal is the sanction for not complying with the informational requirement. *Golden v. City of Silverton*, 58 Or LUBA 399 (2009).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. A local government is not bound by ORS 215.427 to interpret a local code provision in the manner that it has been interpreted in prior quasi-judicial proceedings on a different application. *Greenhalgh v.*

Columbia County, 54 Or LUBA 626 (2007).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a local appeal deadline is a mandatory standard, and planning staff provides erroneous information to petitioner regarding the local appeal deadline, petitioner's reliance on that information does not excuse petitioner's untimely filing of the local appeal. *Jacobsen v. City of Winston*, 51 Or LUBA 602 (2006).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. A local government does not lose its inherent authority to interpret or reinterpret an ambiguous code provision in a quasi-judicial context when it decides to initiate a legislative code amendment process to resolve the code ambiguity. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where the applicable area plan specifically allows submittal of a master plan application without the signatures of all owners of the property subject to the application, petitioners cannot collaterally attack that provision when a master plan application is filed, and city's interpretation that the provision in area plan controls over a more general code provision requiring the consent of all owners is supportable under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Lowery v. City of Keizer*, 48 Or LUBA 568 (2005).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. When a petitioner raises an issue concerning a specific comprehensive plan provision, a local government is obligated to explain the extent to which, if any, the provision applies to the decision. *Doob v. Josephine County*, 47 Or LUBA 147 (2004).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. A prerequisite for application of the deferential standard of review under ORS 197.829(1) is, at a minimum, a written decision or document adopted by the governing body that contains an express or implicit interpretation of a local provision that is adequate for review. A city attorney's interpretation of a local provision is not entitled to deference under that standard, even assuming that the city council informally directed the city attorney to apply that interpretation in denying the challenged building permits. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. A code provision stating that the planning director "may" issue a clarification of ambiguous code language through a process requiring a hearing is permissive and does not require the director to provide a hearing in evaluating a particular development proposal that happens to involve ambiguous code language. *Holtz v. City of Portland*, 44 Or LUBA 595 (2003).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. A code provision limiting the planning director's interpretative powers, and prohibiting interpretations of the zoning ordinance that find a use not listed in the zone is "substantially similar" to a listed use, does not necessarily limit the board of commissioners' interpretative powers. To the extent it may, the commissioners' interpretation that the proposed use *is* a listed use is consistent with the code prohibition. *Yeager v. Benton County*, 42 Or LUBA 72 (2002).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. LUBA will decline to interpret a local provision in the first instance, to determine whether a proposed radio communication tower is a "radio and television transmission and receiving" tower and therefore subject to a special setback, where viewed in context the meaning and apparent purpose of the provision is subject to considerable doubt. *Luedtke v. Clackamas County*, 41 Or LUBA 493 (2002).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. LUBA will remand for the county to determine to what extent a code standard imposing a riparian buffer prohibits the removal of native vegetation and whether a proposal for a recreational vehicle camp site within the buffer violates that standard because maintenance of the site requires removal of certain small trees and some native vegetation. *Tylka v. Clackamas County*, 37 Or LUBA 922 (2000).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. The term "farm use" as defined in ORS 215.203(2)(a) is not a "delegative term," and a county commits no error by failing to adopt county legislation to clarify the meaning in advance of making a decision about whether a particular use qualifies as a "farm use." *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. In determining whether a particular use qualifies as an "other agricultural or horticultural use," as that phrase is used in ORS 215.203(2)(a), there is no requirement that a county hearings officer develop a list of salient characteristics of such uses. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a city code provision grants a city authority to prescribe the "manner" of submitting the "application and related information" but the city has not adopted substantive requirements to implement that authority, the city may not interpret the code provision to deny an application simply because it was signed by the applicant rather than the record title holder. *Doumani v. City of Eugene*, 35 Or LUBA 388 (1999).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where petitioner alleges a decision violates an ambiguous land use regulation provision, LUBA must first determine whether the decision includes a reviewable interpretation that is entitled to deference under ORS 197.829(1). *Botham v. Union County*, 34 Or LUBA 648 (1998).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. LUBA is only required to defer to a local government's express or implied interpretation where the interpretation is adequate for review. *Botham v. Union County*, 34 Or LUBA 648 (1998)

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where an interpretation cannot be implied by the way the code was applied and cannot be implied to resolve an irreconcilable conflict between code provisions, the decision lacks an implied interpretation. *Botham v. Union County*, 34 Or LUBA 648 (1998).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where there is no express or implied interpretation of an ambiguous local code provision, LUBA may interpret the code in the first instance. *Botham v. Union County*, 34 Or LUBA 648 (1998).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where the purpose of an ambiguous code provision is not clear and the provision is subject to more than one sustainable interpretation, it is appropriate for LUBA to remand the decision to the local government to interpret its land use regulation in the first instance. *Botham v. Union County*, 34 Or LUBA 648 (1998).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. The local government may be required to reopen the evidentiary hearing where the local government (1) changes to a significant degree an established interpretation of an approval standard; (2) the change makes relevant a different type of evidence that was irrelevant under the old interpretation; and (3) the party seeking to submit evidence responsive to the new interpretation identifies what evidence not already in the record it seeks to submit. *Gutoski v. Lane County*, 34 Or LUBA 219 (1998).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where the inapplicability of a local code provision is clear on its face, or petitioner's challenge to its applicability is so untenable as to obviate the need for the local government's authoritative interpretation, a remand for such purpose is unnecessary. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1996).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a local regulation allows certain development applicants to apply for a waiver of their application fees, no interpretation of that regulation would allow a development opponent to qualify for a waiver of appeal fees, and to remand for such findings would be devoid of substantive purpose. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1996).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. A local government's interpretation of its zoning ordinance must be provided in the challenged decision or supporting findings, not in the local government's brief. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. ORS 197.829(2) permits LUBA to determine whether a local government decision is correct, even when local government fails to interpret adequately a provision of its comprehensive plan or land use regulations. *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. There is no statutory or administrative law requirement that *all* legislative land use decisions be supported by findings. However, where a challenged legislative land use decision was made by the local governing body and the apparently applicable legal standards at issue on appeal are local comprehensive plan provisions, the interpretation of those provisions must initially be made by the governing body in its decision. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA

429 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. A city's hearing notice is not defective for failure to list certain comprehensive plan provisions when the city makes specific findings that those provisions are not approval criteria. *Stevens v. City of Medford*, 29 Or LUBA 422 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Although LUBA owes no deference to a hearings officer's interpretation of a local enactment, LUBA may remand a challenged decision in cases where the interpretation at issue is not explained in the findings or differs from an earlier interpretation, in order to give the hearings officer an opportunity to interpret the local enactment in the first instance. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Whether certain persons are "applicants" for destination resort preliminary development plan approval, as defined in the local code, requires an interpretation by the local governing body in the first instance. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where determining whether a notice of intent to appeal was timely filed under ORS 197.830(3) depends on determining which code notice of hearing provision applied to the local proceeding, and LUBA can infer from the challenged decision which notice provision the local governing body believes governs the local proceeding and agrees with that interpretation, even without the deference required by *Clark*, LUBA is not required to remand the decision for the governing body to make its interpretation explicit. *Orenco Neighborhood v. City of Hillsboro*, 29 Or LUBA 186 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. When reviewing a local governing body's decision, LUBA cannot interpret local enactments in the first instance. Where petitioners challenge a local governing body's decision on the basis of failure to comply with certain arguably applicable comprehensive plan and code provisions, and the challenged decision contains neither an interpretation of the applicability of the plan and code provisions, nor a determination of whether they are satisfied, the challenged decision must be remanded. *McCrary v. City of Talent*, 29 Or LUBA 110 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Without a demonstration that the interpretation of a local code provision in the challenged decision is significantly different from a previously established local government interpretation of that provision, petitioners fail to establish the local government erred by announcing the disputed interpretation for the first time in its final decision. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where the challenged decision was adopted by a decision maker other than the local governing body, and the decision fails to contain an interpretation of relevant code provisions, LUBA may interpret the local code. *Beveled Edge Machines, Inc. v. City of Dallas*, 28 Or LUBA 790 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. In reviewing a decision adopted by a local governing body, LUBA must review the governing body's interpretation of local code provisions and may not interpret the local code in the first instance, unless there is "no possible rational dispute" regarding the correct interpretation. *Champion v. City of Portland,* 28 Or LUBA 618 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. In reviewing a decision adopted by the local governing body, LUBA must review the governing body's interpretation of local code provisions and may not interpret the local code in the first instance, unless there is "no possible rational dispute" regarding the correct interpretation of the local code. *Foster v. Coos County*, 28 Or LUBA 609 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where the challenged decision is adopted by the governing body, LUBA must grant considerable deference to the governing body's interpretations of the local code and cannot interpret the local code in the first instance. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. The question of whether the governing body erroneously accepted a local appeal turns on the interpretation of relevant provisions of the city's code. Because LUBA may not interpret the local code in the first instance when reviewing a decision by a governing body, the decision must be remanded for such an interpretation. *Shapiro v. City of Talent,* 28 Or LUBA 542 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. To determine whether a use is a motel under the local code, a local government does not err in examining the original prospectus for the use. *Kaady v. City of Cannon Beach*, 28 Or LUBA 509 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where the challenged decision is made by a governing body and does not explain whether or to what extent apparently applicable comprehensive plan standards apply to the proposal, the challenged decision must be remanded for such an explanation. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where the challenged decision is adopted by the governing body, LUBA may not interpret the applicability of arguably applicable comprehensive plan policies. Rather, the governing body must interpret the applicability of such plan policies in the first instance. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a comprehensive plan provision potentially applies to a proposal, and a governing body's decision is silent concerning the applicability of such a plan provision, the challenged decision must be remanded for the governing body to interpret the plan provision. *Neuman v. City of Albany,* 28 Or LUBA 337 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where the

local code provides for discretionary review of certain development applications by the planning director, and also provides a process for the planning director to refer questions concerning code interpretation to the governing body, the code does not divest the planning director of authority to interpret the code in carrying out his duties. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. LUBA is not required to remand a decision for a local government to interpret its comprehensive plan in the first instance unless petitioners offer some explanation for why they believe the plan provision the local government failed to address in its decision applies in the circumstances presented in the appeal. *Holsheimer v. Clackamas County*, 28 Or LUBA 279 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a local governing body's findings are unclear with regard to whether the local government interprets the provisions of the local code's unstable slopes overlay district as applicable to approval of a subdivision preliminary plat, the challenged decision does not contain an interpretation adequate for review and must be remanded. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a challenged city council decision approving the provision of city sewer and water services outside city limits does not interpret arguably relevant comprehensive plan provisions with regard to whether they are approval criteria for the challenged decision, LUBA must remand the decision to the city to adopt such interpretations, before LUBA can determine whether the challenged decision is a land use decision subject to LUBA review. *Fraser v. City of Joseph*, 28 Or LUBA 217 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. If a city council decision approving a subdivision does not explain how the city interprets relevant comprehensive plan and code provisions to allow a 40-foot street right-of-way, the decision must be remanded for the city council to interpret the local provisions in the first instance. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. A hearings officer's reliance on a dictionary definition of "in conjunction with" without providing the dictionary definition relied upon is harmless error, where it is apparent from the decision that the hearings officer interpreted the code term to require establishment of a customer/seller or seller/customer relationship between the proposed commercial use and timber and farm uses in the community. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where one of the local government's critical findings depends on the scope of the term "houseboat," and the term is not defined in the local code or in the challenged decision, the decision must be remanded for the local government to supply the needed explanation of the scope of the term. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Even if a local code provision requiring that six percent of the gross area of a proposed subdivision be dedicated

for open space is properly interpreted as a minimum rather than a maximum requirement, a decision requiring dedication of much more than six percent of the gross area of a proposed subdivision must be remanded so that the local government may adopt findings explaining that interpretation and showing the "rough proportionality" requirement of *Dolan v. City of Tigard* is satisfied. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a challenged decision determines certain comprehensive plan policies are mandatory approval standards applicable to the proposed action, but LUBA cannot determine from the decision what the local government believes those policies require, the decision must be remanded for the local government to interpret the policies. *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a challenged decision adopts a new plan policy stating the city will allow a particular commercial-designated area to be developed "to serve both neighborhood commercial needs and as a community commercial center," but declines to change a plan policy that commercial development of the area should be at an intensity consistent with General Office or Neighborhood Commercial zoning, LUBA will remand the decision for the city to interpret the relevant plan and code provisions in the first instance. *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where petitioners contend legislative land use regulation amendments are inconsistent with certain arguably relevant comprehensive plan provisions, and those plan provisions are not interpreted in the challenged decision, LUBA must remand the challenged decision for the local government to adopt the necessary plan interpretations as part of its decision. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. If the local government interpretation of an applicable comprehensive plan provision expressed in a challenged decision is unclear, such that LUBA cannot determine whether the findings supporting the decision are adequate to demonstrate compliance with that plan provision, LUBA will remand the decision to the local government to clarify its interpretation. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where petitioner contends the challenged decision fails to address a comprehensive plan provision that appears to contain a standard applicable to the proposal, the local government must explain in its decision why the plan provision either is inapplicable to the proposal or is satisfied by the proposal. LUBA may not make such determinations in the first instance. *Laine v. City of Rockaway Beach*, 27 Or LUBA 493 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a challenged decision incorrectly concludes arguments based on an arguably applicable comprehensive plan provision are precluded by the acknowledgment of an earlier decision, and does not interpret that plan provision, LUBA must remand the decision for the local government

to interpret the plan provision in the first instance. *Rea v. City of Seaside*, 27 Or LUBA 443 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. LUBA lacks authority to interpret local comprehensive plan provisions in the first instance. Where certain comprehensive plan policies are arguably applicable to a development application and the challenged decision approving or denying that application does not include an interpretation of those policies, LUBA must remand the decision so the local government can interpret and apply its plan policies. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a local government relies on conditions to ensure that use of an approved parking structure is limited to "short term parking," as required by its code, any interpretations of code provisions necessary to support its determination that the code limitation to "short term parking" is satisfied must be set out in the challenged decision or supporting findings, not in the local government's brief. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. If petitioners contend the challenged decision fails to demonstrate compliance with certain local comprehensive plan and code provisions that are not addressed in the challenged decision, and those provisions are capable of being interpreted as approval standards under the permissive scope of review standard of ORS 197.829, LUBA must remand the decision to the local government to interpret and apply the plan and code provisions in the first instance. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where an exclusive farm use zone does not allow asphalt batch plants or their accessory uses, and petitioner contends the county erred by permitting a private access road across exclusive farm used zoned property to serve an asphalt batch plant, the county must respond in its decision to that interpretive question. Where the county fails to do so and simply concludes such roads are allowable, the decision must be remanded so that the county can adopt an interpretive response adequate for LUBA review. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. LUBA is not required to remand a decision for a local government interpretation of its code, where the interpretive issue raised by petitioner is so untenable that LUBA can reject it without an authoritative determination by the local decision maker. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where "private school" is listed as a conditional use in a particular zone, but the challenged decision does not interpret the code definitions of "private school" and "commercial school," or explain why application of those definitions to the facts leads to the conclusion that the proposed school is a "private school," LUBA must remand the challenged decision to the county to adopt the required interpretation in the first instance. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a local

code provision implementing ORS 215.283(1)(a) lists schools "including all buildings essential to the operation of a school" as a conditional use in an EFU zone, and the local government fails to interpret and apply the quoted provision in approving a conditional use permit for a school, LUBA must remand the decision for the local government to interpret its code provision in the first instance. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where petitioners contend the challenged decision does not demonstrate compliance with an applicable approval standard, and the decision does not interpret the standard sufficiently for LUBA to review that interpretation and consider petitioners' arguments, LUBA will remand the decision to the local government. *Bottum v. Union County*, 26 Or LUBA 407 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Even though LUBA might agree with a county's argument in its brief that the purpose section of its EFU zoning district is not an approval standard for a farm dwelling permit application, if the challenged decision itself does not interpret the code provision, LUBA must remand the decision for the county to interpret the provision in the first instance. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where property is annexed and it is not clear whether a plan policy and implementing measure governing annexations applies in the particular circumstances, a remand is required so that the local government may either apply the plan policy and implementing measure or explain why it does not apply. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where the challenged decision fails to explain whether an arguably relevant comprehensive plan provision imposes limitations on the kinds of uses allowed in the applicable zone, LUBA must remand the decision for such an interpretation. *Murphy Citizens Advisory Comm. v. Josephine County*, 26 Or LUBA 181 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where petitioners raised an issue below concerning whether a particular code provision is an applicable approval standard, and the challenged decision contains no interpretation explaining that code provision is either inapplicable or satisfied, LUBA must remand the challenged decision. *Hixson v. Josephine County*, 26 Or LUBA 159 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a question of proper interpretation of a comprehensive plan provision is raised during local proceedings, the interpretation required for LUBA review of the decision on appeal must be provided in the decision. The local government may not supply the interpretation in its brief on appeal. *Eskandarian v. City of Portland*, 26 Or LUBA 98 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. A local government decision that makes a binding interpretation of its regulations, without amending or adopting regulation provisions or granting or denying a development application, is a "final"

decision, even if other actions are required to give that decision practical effect. *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. The fact that a challenged local government decision does not include an interpretation of a particular local code provision, alleged to be applicable by petitioners, does not provide a basis for reversal or remand if the code provision in question is *not* ambiguous or susceptible to different sustainable interpretations. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. LUBA is limited to considering the interpretations of ambiguous code language that are adopted by the decision-making body and may not consider interpretations that are not adopted by the decision maker, even if the offered interpretation is reasonable. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. LUBA is required to defer to a local government's interpretation of its own ordinances, unless that interpretation is contrary to the express words, policy or context of the local enactment. LUBA may not interpret a local government's ordinances in the first instance, but rather must review the local government's interpretation of its ordinances. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a relevant ordinance provision is capable of more than one meaning, the challenged decision does not expressly interpret the ordinance provision, and LUBA cannot infer the local government's interpretation from the decision, LUBA must remand the decision for the local government to interpret the provision in the first instance. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where LUBA must determine whether an ambiguous code provision (*i.e.*, one that is capable of more than one sustainable interpretation) is applicable to a challenged decision, and the challenged decision does not contain a reviewable interpretation of that provision, LUBA must remand the decision for the local government to interpret the provision in the first instance. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where petitioners contend a local government erred in failing to apply a code provision to the challenged decision, and the decision contains no interpretation of that code provision, but the code language unambiguously establishes that the provision in question is not applicable to the challenged decision, LUBA is not required to remand the decision so the local government can interpret its code in the first instance. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. That a local governing body ultimately adopts an interpretation of an applicable code standard that is different from that adopted by the hearings officer, and declines to reopen the evidentiary record, does not provide a basis for reversal or remand where (1) there was no "established" local interpretation of

the code standard, (2) the governing body's interpretation does not make relevant any new type of evidence, and (3) petitioner does not identify any evidence it wishes to submit if the evidentiary hearing is reopened. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. Where a county plan policy provides that a particular zone change requires that "parcels are generally five acres," and the county's decision simply states that a total of 58.8 percent of the parcels in the relevant area being five acres or less does *not* satisfy this plan policy, the decision does not interpret what the policy requires, and LUBA will remand the decision so the county can interpret its plan in the first instance. *Thatcher v. Clackamas County*, 24 Or LUBA 207 (1992).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. It is a local government's responsibility to interpret the terms of its own enactments in the first instance. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

1.1.4 Administrative Law – Interpretation of Law – Procedural Requirements. It is the local government which, in the first instance, should interpret its own enactments. Where a local government has not interpreted and applied applicable provisions of its code, and it is not clear how those code provisions apply to the subject application, LUBA will remand the challenged decision so that the local government may do so. *Gage v. City of Portland*, 24 Or LUBA 47 (1992).

1.2.1 Administrative Law – Denials – Generally. Local governments are not required to condition approvals rather than deny noncompliant applications. *H2D2 Properties, LLC v. Deschutes County*, 80 Or LUBA 528 (2019).

1.2.1 Administrative Law – Denials – Generally. When the county is entitled to deference under ORS 197.829(1), the decision can be reversed only if the interpretation is inconsistent with the express language, purpose or policy underlying the relevant code language. Under a non-deferential standard of review petitioner must demonstrate that the commissioners' interpretation is reversible. *Oregon Coast Alliance v. Curry County*, 78 Or LUBA 81 (2018).

1.2.1 Administrative Law – Denials – Generally. When LUBA has affirmed at least one valid basis for denial the Board typically does not address challenges directed at other, alternate, bases for denial. Such an action would result in rendering what are essentially advisory adjudications, which is not consistent with the statutory mandate that LUBA's review should be conducted pursuant to sound principles of judicial review. ORS 197.805. *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 245 (2018).

1.2.1 Administrative Law – Denials – Generally. A local government in denying an application for permit approval is not obligated to give the applicant a detailed roadmap that guarantees permit approval. However, under *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978), a local government must give the permit applicant some minimal idea of changes that might lead to permit approval. *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016).

1.2.1 Administrative Law – Denials – Generally. Where the evidence is extremely one-sided in favor of a permit applicant challenging a county decision denying its application for permit approval for a natural gas pipeline on the basis that other uses allowed in the zone would be limited, it is possible to conclude that the permit applicant challenging the denial on evidentiary grounds carried its burden as a matter of law, as it must when challenging a permit denial on evidentiary grounds. But where that evidence is somewhat equivocal about whether some uses would be limited and does not address whether other uses would be limited, the evidentiary record is insufficient to demonstrate that the permit applicant carried its burden as a matter of law. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

1.2.1 Administrative Law – Denials – Generally. LUBA typically affirms a decision denying an application for land use approval as long as there is one valid basis for denial, notwithstanding other invalid bases for denial. However, LUBA will remand a county governing body's decision that reverses a planning commission approval of a conditional use, where the only valid basis for denial is a correctable findings and evidentiary deficiency, and the governing body's choice to reverse the planning commission decision rather than remand was based on the governing body's erroneous conclusion that the proposed conditional use is prohibited as a matter of law. In that circumstance, LUBA will remand the decision for the governing body to consider whether the planning commission decision should be remanded rather than reversed. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

1.2.1 Administrative Law – Denials – Generally. Where the local government denies an

application based on its conclusion that an applicant did not provide sufficient information, and the applicant submitted detailed information and studies regarding impacts to water quality, water flow, land stability and erosion, the findings are inadequate where they do not explain why the information that was submitted was not "sufficient." *Tidewater Contractors v. Curry County*, 65 Or LUBA 424 (2012).

1.2.1 Administrative Law – Denials – Generally. In considering an application for a three-parcel partition, the failure of an existing intersection that is not adjacent to the property to satisfy local zoning ordinance standards that apply to the design and construction of a new road or intersection does not provide a basis for the county to deny an application for a partition, where no new roads or intersections are proposed as part of the partition. *Pelz v. Clackamas County*, 59 Or LUBA 219 (2009).

1.2.1 Administrative Law – Denials – Generally. Where a local government denies an application based on one approval criterion, and LUBA remands the decision in part for the local government to consider whether additional approval standards apply, it is possible that in determining that additional approval standards apply the local government could identify additional bases for denial under the additional criteria, even if such additional bases for denial were not cited in the original decision. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

1.2.1 Administrative Law – Denials – Generally. Remand is necessary where a hearings officer misunderstood the applicant's argument regarding a critical piece of evidence, that misunderstanding played a significant role in denying the application, and LUBA cannot determine if the hearings officer's misunderstanding was harmless error. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

1.2.1 Administrative Law – Denials – Generally. A hearings officer does not err in concluding that even though a 1975 partition created a unit of land, that unit of land is not a "legal lot" as that term is defined in the county's code, where that unit of land did not conform to the applicable lot dimension standards when it was created. *Hogrefe v. Lane County*, 54 Or LUBA 514 (2007).

1.2.1 Administrative Law – Denials – Generally. Absent local code provisions that prohibit re-submittal of denied land use applications, nothing prohibits an applicant from re-submitting, or the local government from accepting, a previously denied application supported by the same or additional evidence. *Gordon v. Polk County*, 50 Or LUBA 502 (2005).

1.2.1 Administrative Law – Denials – Generally. Assuming, without deciding, that an applicant's misrepresentation of a material fact in a discretionary permit proceeding would allow a local government to deny subsequent administrative permits necessary to carry out the earlier permit approval, the record supporting denial must establish that the applicant indeed misrepresented a material fact. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004).

1.2.1 Administrative Law – Denials – Generally. Where a city attorney denies four applications for "billboards" on the grounds that "billboards" are not among the types of signs allowed under the city's sign ordinance, it is reasonably clear that the basis for denial is the fact that the applicant proposed a type of sign not allowed by the city's code. The city's *post-hoc* explanation that the

basis for denial was actually the size of the proposed signs is not credible, where the challenged decision contains no hint that size was a consideration. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

1.2.1 Administrative Law – Denials – Generally. LUBA will remand a city decision denying a partition application where it is not clear what documents make up the local decision and the documents that are identified as containing the final land use decision do not set out the city's rationale for denying the application. *Martin v. City of Dunes City*, 43 Or LUBA 354 (2002).

1.2.1 Administrative Law – Denials – Generally. A city's decision violates ORS 227.173(1) where the city relies on "factors" or "considerations" that are unconnected to approval standards established in its land use regulations to deny a permit application. *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000).

1.2.1 Administrative Law – Denials – Generally. Evidence that industrial uses are occurring on industrially zoned property within two miles of the subject property is insufficient to demonstrate, as a matter of law, that a proposed excavation business located in a rural residential zone complies with a requirement that the use "will not interfere with existing uses on nearby land or with other used permitted in the zone in which the property is located." *Munn v. Clackamas County*, 37 Or LUBA 621 (2000).

1.2.1 Administrative Law – Denials – Generally. In determining whether a denial is supported by substantial evidence, LUBA considers all relevant evidence, including that which supports and that which detracts from the county's decision. *Evenson v. Jackson County*, 36 Or LUBA 251 (1999).

1.2.1 Administrative Law – Denials – Generally. To successfully challenge the evidentiary basis for denial, it is not sufficient for petitioner to show there is evidence in the record to support his position; petitioner must show the evidence is such that a reasonable trier of fact could only decide in his favor. Where the record contains credible, conflicting evidence, petitioner has not sustained his burden to show, as a matter of law, that the trier of fact should only have believed petitioner's evidence. *Evenson v. Jackson County*, 36 Or LUBA 251 (1999).

1.2.1 Administrative Law – Denials – Generally. Typically only one adequate basis for denial of a land use permit is required to sustain the decision on appeal to LUBA. However, where the approval criteria provide that a setback exception can be granted if any one of several alternative criteria are met and LUBA rejects the hearings officer's findings of noncompliance with two of those alternative criteria, a remand is appropriate. *Parsley v. Jackson County*, 34 Or LUBA 540 (1998).

1.2.1 Administrative Law – Denials – Generally. While it is the applicants' burden to demonstrate compliance with relevant approval criteria, if a local government determines an approval criterion is not satisfied, it must adopt findings explaining why it believes the applicants failed to meet this burden. *Neuman v. Benton County*, 29 Or LUBA 172 (1995).

1.2.1 Administrative Law – Denials – Generally. Local government denial of proposed partitions

because the ability of the school district to provide the level of school services required by certain plan policies has not been established does not constitute the imposition of a development moratorium prohibited by ORS 195.110(8). *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

1.2.2 Administrative Law – Denials – Requirements for. When LUBA has affirmed at least one valid basis for denial the Board typically does not address challenges directed at other, alternate, bases for denial. Such an action would result in rendering what are essentially advisory adjudications, which is not consistent with the statutory mandate that LUBA's review should be conducted pursuant to sound principles of judicial review. ORS 197.805. *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 245 (2018).

1.2.2 Administrative Law – Denials – Requirements for. To succeed in a motion to take evidence outside the record and pursuant to OAR 661-010-0045(1), and (2)(a) and (c), regarding an alleged violation of petitioners' rights under the privileges and immunities clause of the Oregon Constitution, and the equal protection clause of the 14th Amendment to the United States Constitution, the movant must develop a legal theory and a set of factual assertions sufficient to allow LUBA to determine how consideration of the proffered evidence would "affect the outcome of the review proceeding." *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

1.2.2 Administrative Law – Denials – Requirements for. In a motion to take evidence outside the record pursuant to OAR 661-010-0045(1), and (2)(a) and (c), petitioners' argument—that two city employees violated petitioners' rights under the privileges and immunities clause of the Oregon Constitution, and the equal protection clause of the 14th Amendment to the United States Constitution because the employees engaged in the "unequal" application of the applicable standards in processing two similarly situated planned unit development (PUD) projects—fails to demonstrate that the proffered evidence would concern "procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision" because petitioners do not allege that the final decision maker violated petitioners' constitutional rights. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

1.2.2 Administrative Law – Denials – Requirements for. Where intervenor applied for, and received, two consecutive land use compatibility statements (LUCS), and argues it has now abandoned any reliance on the first LUCS decision, and instead has chosen to proceed with development pursuant to the second LUCS decision, the intervenor's current intent does not necessarily render the first LUCS decision ineffective. Unless and until the local government takes action to withdraw, revoke, or supersede the first LUCS decision, it remains as a potential basis for intervenor to proceed with development based on the LUCS as a final and binding county decision, and is therefore not moot. *Bishop v. Deschutes County*, 76 Or LUBA 515 (2017).

1.2.2 Administrative Law – Denials – Requirements for. A decision by the city that it will not approve any road that is located in the conceptual location approved in a previously approved conceptual development plan, and that is also shown in the city's adopted transportation systems plan and the adopted area refinement plan for the city, would not be a land use decision that is "in compliance with the acknowledged plan and land use regulations." ORS 197.175(2)(d). *GPA 1 LLC v. City of Corvallis*, 74 Or LUBA 527 (2016).

1.2.2 Administrative Law – Denials – Requirements for. Where a road is proposed in the conceptual location approved in a previously approved conceptual development plan, and is also shown in the city's adopted transportation systems plan and the adopted area refinement plan for the city, the city has a heightened obligation under *Commonwealth Properties v. Washington*

County, 35 Or App 387, 400, 582 P2d 1384 (1978), to either (1) approve the proposed alignment that is consistent with the planned and approved location, or (2) make it very clear which of five other alternative proposed alignments the city will accept. *GPA 1 LLC v. City of Corvallis*, 74 Or LUBA 527 (2016).

1.2.2 Administrative Law – Denials – Requirements for. If a local government interprets its code to the effect that federal particulate matter standards supply the relevant test for compliance with local approval standards, articulates that interpretation for the first time in its final decision, and denies the application for failure to present evidence of compliance with the federal standards, remand would likely be necessary to give the applicant an opportunity to present evidence addressing the federal standards. However, remand is not warranted where the decision merely discusses federal standards, but ultimately concludes that those standards do not govern. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

1.2.2 Administrative Law – Denials – Requirements for. Findings to explain the basis for denial of a permit are inadequate where the findings do not explain which criteria the application fails to meet or otherwise inform the applicant what steps are necessary to obtain approval under the relevant criteria. *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387 (2008).

1.2.2 Administrative Law – Denials – Requirements for. Under a variance standard requiring that the "hardship" not be "self-created," a finding that the "applicant's desire to partition his property" created the "hardship" is an insufficient basis to deny the variance request, where the hardship is the lack of alternative access to the proposed parcel and there is no explanation in the findings how petitioner's desire to partition his property created the lack of alternative access to the proposed parcel. *Krishchenko v. City of Canby*, 52 Or LUBA 290 (2006).

1.2.2 Administrative Law – Denials – Requirements for. The conclusory nature of a finding that faults the applicant for failing to present any evidence or evaluation of adverse impacts does not provide a basis for remand, where the hearings officer interpreted the code to require at least some evidence or evaluation of adverse impacts, and the applicant provided none. *Wiper v. City of Eugene*, 47 Or LUBA 21 (2004).

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

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

1.2.2 Administrative Law – Denials – Requirements for. Where a city attorney denies four applications for "billboards" on the grounds that "billboards" are not among the types of signs allowed under the city's sign ordinance, it is reasonably clear that the basis for denial is the fact that the applicant proposed a type of sign not allowed by the city's code. The city's *post-hoc* explanation that the basis for denial was actually the size of the proposed signs is not credible, where the challenged decision contains no hint that size was a consideration. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

1.2.2 Administrative Law – Denials – Requirements for. When an applicant asserts below that it is entitled to a well under the statutory exemption to obtaining a water use permit pursuant to ORS 537.545 and the findings supporting denial on the basis of lack of a water source do not address or respond to that assertion, the findings are inadequate. *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251 (2002).

1.2.2 Administrative Law – Denials – Requirements for. When the applicant and the local government address approval criteria using different approaches, findings denying the application must provide an explanation for why the applicant's approach is inadequate and explain, in at least a general way, how the applicant must address the criteria under the local government's approach. *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251 (2002).

1.2.2 Administrative Law – Denials – Requirements for. LUBA will remand a decision denying an application to place and remove fill in a riparian zone, where the findings do not independently address the relevant standards and it is not clear what evidence the hearings officer relied on to apply the standards. *Griffin v. Jackson County*, 41 Or LUBA 159 (2001).

1.2.2 Administrative Law – Denials – Requirements for. Where the applicant presents argument and evidence that property designated and zoned for forest use is not in fact forest land protected by Goal 4, making an exception to that goal unnecessary to rezone the property for residential use, the county errs in denying the rezoning application without addressing the issue or explaining why it believes the subject property is protected by Goal 4. *Potts v. Clackamas County*, 40 Or LUBA 371 (2001).

1.2.2 Administrative Law – Denials – Requirements for. In denying an application for land use approval based on a finding that the application does not comply with applicable criteria, a local government must explain in its findings why it believes the applicable criteria are not satisfied. Further, the local government's findings must be sufficient to inform petitioner either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266 (2000).

1.2.2 Administrative Law – Denials – Requirements for. Where a local government finds noncompliance with an approval criterion because an intersection outside the traffic study area is inadequate to serve the subject property, but it is not clear why the local government believes the intersection "serves" the property, LUBA will remand to allow the local government to provide a more adequate interpretation of the criterion. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472 (2000).

1.2.2 Administrative Law – Denials – Requirements for. A county's finding that a proposed nonforest dwelling is inconsistent with forest uses is inadequate where the finding is so conclusory that it fails to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application can be approved. *Eddings v. Columbia County*, 36 Or LUBA 159 (1999).

1.2.2 Administrative Law – Denials – Requirements for. Even though a city's denial of a land use application need only include findings adequate to demonstrate that one applicable criterion is not satisfied, before the city can reach such a conclusion it must first explain the applicable criteria, state the facts the city relied upon in reaching the decision and justify the decision based upon the criteria and facts. *Boehm v. City of Shady Cove*, 31 Or LUBA 85 (1996).

1.2.2 Administrative Law – Denials – Requirements for. While findings of noncompliance with applicable criteria need not be exhaustive, they must at least either inform the applicant of the standards the application does not meet or of the steps necessary to satisfy the standards. *Boehm v. City of Shady Cove*, 31 Or LUBA 85 (1996).

1.2.2 Administrative Law – Denials – Requirements for. ORS 227.173(2) does not require a local government to make findings regarding criteria which could support approval of an application, or to make findings regarding criteria upon which it did not rely in reaching its decision to deny an application. *Holland v. City of Cannon Beach*, 30 Or LUBA 85 (1995).

1.2.2 Administrative Law – Denials – Requirements for. When a challenged decision denies development approval, the county need only adopt findings, supported by substantial evidence, demonstrating that one approval standard is not met. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

1.2.2 Administrative Law – Denials – Requirements for. To support denial of a land use permit, a local government need only establish the existence of one adequate basis for denial. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632 (1995).

1.2.2 Administrative Law – Denials – Requirements for. Where the challenged decision is one to deny a development proposal, a local government need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. *Duck Delivery Produce v. Deschutes County*, 28 Or LUBA 614 (1995).

1.2.2 Administrative Law – Denials – Requirements for. Where the challenged decision denying development approval fails to inform the applicant of the steps it must take to gain approval of its application or, alternatively, of the standards the application does not meet, the decision must be remanded. *Ellis v. City of Bend*, 28 Or LUBA 332 (1994).

1.2.2 Administrative Law – Denials – Requirements for. Where the challenged decision is one to deny proposed development, LUBA must sustain the decision if there are adequate findings, supported by substantial evidence in the record, determining that one applicable standard is not met. *Newsome v. Clackamas County*, 27 Or LUBA 578 (1994).

1.2.2 Administrative Law – Denials – Requirements for. Where an approval standard for partitioning timber zoned property into nonresource parcels requires that the subject property be "generally unsuitable land for the production of farm or forest products," and petitioner does not challenge a county determination that the subject property is generally suitable for *farm use*, that determination provides an independent basis for affirming the county's decision to deny the partition. *Newsome v. Clackamas County*, 27 Or LUBA 578 (1994).

1.2.2 Administrative Law – Denials – Requirements for. Only one sustainable basis for a decision to deny a conditional use permit is required. Where such a sustainable basis for denial exists, LUBA does not consider challenges to other unrelated aspects of the decision. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

1.2.2 Administrative Law – Denials – Requirements for. Only one sustainable basis for a decision to deny a request for land use approval is required. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

1.2.2 Administrative Law – Denials – Requirements for. While it may be that findings of noncompliance with a relevant approval standard need not be as exhaustive or detailed as those necessary to establish compliance with that approval standard, a local government is obligated to provide an explanation for its conclusion that the standard is not met. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

1.2.2 Administrative Law – Denials – Requirements for. Where a code approval standard *prohibits* the proposed use *unless* an exception is justified under a second code standard that requires the local government to have a "short term parking strategy," if the local government has not adopted a "short term parking strategy," it cannot make use of the exception provided by the second standard and must deny the application. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

1.2.2 Administrative Law – Denials – Requirements for. Although a local government may impose conditions and rely on such conditions to determine a development application meets applicable approval standards, there is no general requirement that a local government *must* apply conditions to modify a proposal so that applicable standards are met, rather than deny the application. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

1.2.2 Administrative Law – Denials – Requirements for. Where a local government denies a request to remove a condition placed on a previous land use approval, based on its determination that *neither* of two sets of circumstances giving rise to the condition has changed, and petitioner challenges the local government's determination concerning only one set of circumstances, LUBA will affirm the local government's decision. *Livingston v. Jackson County*, 26 Or LUBA 395 (1994).

1.2.2 Administrative Law – Denials – Requirements for. To support a denial, a local government need only establish the existence of one adequate basis for denial. *Kangas v. City of Oregon City*, 26 Or LUBA 177 (1993).

1.2.2 Administrative Law – Denials – Requirements for. Because an applicant for development approval bears the burden of proof in a local government proceeding, if the challenged local government's decision denies petitioner's request for zoning clearance, only one sustainable basis for the decision is required. *McPeek v. Coos County*, 26 Or LUBA 165 (1993).

1.2.2 Administrative Law – Denials – Requirements for. To support denial of a development application, a local government need only establish the existence of one adequate basis for denial. *Hahn v. Marion County*, 26 Or LUBA 18 (1993).

1.2.2 Administrative Law – Denials – Requirements for. Because a permit applicant has the burden of demonstrating compliance with each approval criterion, a single supported finding of noncompliance with an approval criterion is sufficient to support a decision denying the permit. *Ball and Associates v. Josephine County*, 25 Or LUBA 525 (1993).

1.2.2 Administrative Law – Denials – Requirements for. For LUBA to sustain a challenged decision to deny proposed development, the local government need only adopt findings supported by substantial evidence that the proposal fails to meet one applicable standard. *Oregon Raptor Center v. City of Salem*, 25 Or LUBA 401 (1993).

1.2.2 Administrative Law – Denials – Requirements for. While a local government is free to impose conditions to enable it to approve a development application, it is not required to do so and may instead choose to deny development that, as proposed, does not satisfy relevant standards. *Decuman v. Clackamas County*, 25 Or LUBA 152 (1993).

1.2.2 Administrative Law – Denials – Requirements for. For LUBA to sustain a local government's denial decision, LUBA must find that the local government adopted findings supported by substantial evidence, demonstrating that one or more applicable standards are not met. *Decuman v. Clackamas County*, 25 Or LUBA 152 (1993).

1.2.2 Administrative Law – Denials – Requirements for. To support a denial decision, a local government need only establish the existence of one adequate basis for denial. *Roozenboom v. Clackamas County*, 24 Or LUBA 433 (1993).

1.2.2 Administrative Law – Denials – Requirements for. Where the challenged decision is one to deny proposed development, the local government need only adopt findings, supported by substantial evidence, demonstrating that at least one standard is not satisfied. *Stockwell v. Clackamas County*, 24 Or LUBA 358 (1992).

1.2.2 Administrative Law – Denials – Requirements for. Where the challenged decision denies a proposed development, the local government need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. Further, in challenging a denial decision on evidentiary grounds, petitioners have the burden of establishing compliance with each and every criterion as a matter of law. *Woosley v. Marion County*, 24 Or LUBA 231 (1992).

1.2.2 Administrative Law – Denials – Requirements for. To support a decision denying proposed development, local government need only adopt findings, supported by substantial

evidence, demonstrating that one or more standards are not met. *Leopold v. City of Milwaukie*, 24 Or LUBA 246 (1992).

1.2.2 Administrative Law – Denials – Requirements for. Inadequate findings concerning one of the bases for denying a permit application provide no basis for reversal or remand where there are other adequate findings of noncompliance with applicable approval standards. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where a local code provision allows a reduced setback where "the required setback would prohibit the placement of the residential structure on the parcel due to topography," and where the decision-maker denied a reduced setback in part because they concluded that there was a buildable area within the setback envelope that did not contain steep slopes, even if LUBA agrees with the petitioners that credible evidence weighs overwhelmingly in favor of a finding that the entire setback envelope contains steep slopes, LUBA must affirm the denial where the petitioners fail to challenge the decision-maker's further conclusion that steep slopes do not prohibit development but, instead, require further assessment, and where the petitioners did not provide any expert assessment that the entire setback envelope was unbuildable due to steep slopes. *Velasquez v. Jackson County*, 80 Or LUBA 1 (2019).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where a local government adopts independent findings and applies a different substantive analysis for two separate approval criteria, but relies on the same evidence in concluding that those criteria are not met, a petitioner does not effectively challenge the findings for one of those criteria by challenging the findings for the other so as to defeat an argument that it has failed to challenge all valid, alternative, and independent bases for denial. *Himmelberger v. City of Portland*, 79 Or LUBA 367 (2019).

1.2.3 Administrative Law – Denials – Burden to Challenge. OAR 660-012-0035(4) requires local governments to design their transportation system plans to achieve adopted standards for reducing reliance on cars. Although a city errs in finding that OAR 660-012-0035(4) does not apply to specific projects or to targeted amendments to a transportation system plan (TSP), where the findings also (1) identify adopted standards within the city's TSP, the city's comprehensive plan, and revised code that include measures to reduce reliance on cars, and (2) additionally conclude that the amendments comply with OAR 660-012-0035(4), and petitioner neither challenges those findings nor identifies any adopted standards in the TSP, comprehensive plan or revised code that the TSP amendments fail to satisfy, petitioners' arguments provide no basis for reversal or remand. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where petitioners argue that the city's calculation of future travel demand that relies on projections in the adopted and acknowledged regional transportation analysis prepared by state, regional and local governments is not supported by substantial evidence and petitioners fail to point to any evidence that contradicts or undercuts the city's traffic models based on the regional transportation analysis, petitioners have failed to set forth a basis for remand or reversal. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

1.2.3 Administrative Law – Denials – Burden to Challenge. A hearings officer's decision relying upon intervenor's traffic study is supported by substantial evidence where the hearings officer addressed petitioner's challenges to the credibility of the traffic study by citing to testimony of the intervenor's traffic engineer responding to each of petitioner's challenges. *Willis v. Clackamas County*, 76 Or LUBA 244 (2017).

1.2.3 Administrative Law – Denials – Burden to Challenge. In applying a development code standard that authorizes a local government to approve exceptions to lot size standards for planned

developments if the development's "design and amenities" warrant the exceptions, the fact that preservation of open space is encouraged by the comprehensive plan does not mean the exceptions must be approved simply because the proposal would preserve open space. That the proposed open space is consistent with the comprehensive plan does not require approval of the requested exceptions. *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016).

1.2.3 Administrative Law – Denials – Burden to Challenge. When a local ordinance requires that no additional vehicle trips enter an intersection during peak hours, an applicant cannot overcome a denial by merely encouraging visitors to use other routes to the site. Without an enforcement mechanism or evidence that such encouragement would be completely effective without an enforcement mechanism, the applicant has not demonstrated as a matter of law that no additional vehicle trips would enter the intersection during peak hours. *Vista Construction, LLC v. City of Grants Pass*, 59 Or LUBA 195 (2009).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where a hearings officer's evaluation of the evidence is based in part on a considered assessment that one set of witnesses is more credible or reliable than others with respect to a disputed factual issue, it will be a rare circumstance where LUBA has a basis to overturn that credibility judgment. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

1.2.3 Administrative Law – Denials – Burden to Challenge. The burden of overturning a permit denial on evidentiary grounds is even more difficult when the applicable approval criteria are highly subjective in nature, such as standards requiring "adequate" transportation improvements to "promote safety" and "reduce congestion." *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

1.2.3 Administrative Law – Denials – Burden to Challenge. Given the subjectivity of criteria requiring that (1) the subject property be of adequate size to allow for "aesthetic design treatment," (2) the proposed building be "compatible" in scale and mass with adjoining structures, and (3) the site plan provide for "adequate" buffers, the testimony of residential neighbors that a proposed church on a 3.85-acre parcel fails to comply with these criteria is adequate to support the city's finding of noncompliance. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

1.2.3 Administrative Law – Denials – Burden to Challenge. Conclusory testimony by an acoustic engineer that a proposed church will not violate "maximum allowable noise levels" is insufficient to show compliance as a matter of law with code standards that require a demonstration that proposed uses will not exceed specific decibel levels within a specified distance from adjoining residential uses. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

1.2.3 Administrative Law – Denials – Burden to Challenge. Petitioner fails to overcome the county's determination that property is forest land under Goal 4, and fails to demonstrate as a matter of law that land is not "suitable for commercial forest uses," where petitioner's own expert testifies that notwithstanding limitations on productivity the subject property is in a "medium productivity range" and would yield $81,300 worth of commercial timber at 50 years, after an investment of $7,450. *Potts v. Clackamas County*, 42 Or LUBA 1 (2002).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where there is evidence in the record to show that limited farm and forest activities may be conducted on the subject property, petitioner has not met his burden in challenging a denial on evidentiary grounds to show that, as a matter of law, only his evidence regarding the practicability of farm and forest use may be believed. *Dhillon v. Clackamas County*, 40 Or LUBA 397 (2001).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where there is conflicting substantial evidence regarding the location of a property line, and the local government determines, as a result, that the applicants failed to show by substantial evidence that all applicable criteria had been met, LUBA will affirm the local government's denial. *Gambee v. Yamhill County*, 38 Or LUBA 343 (2000).

1.2.3 Administrative Law – Denials – Burden to Challenge. LUBA will not conclude that the statutory definition of high-value soils excludes soil complexes in which listed soils form the predominant part, where petitioner fails to establish a sufficient basis to form that conclusion. *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195 (1999).

1.2.3 Administrative Law – Denials – Burden to Challenge. LUBA must affirm a decision denying a permit to site a dog kennel prohibited on high-value farmland, where petitioner fails to challenge the county's alternative finding that the subject property is high-value farmland because it is predominantly composed of a combination of two high-value soils. *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195 (1999).

1.2.3 Administrative Law – Denials – Burden to Challenge. A petitioner challenging a city's denial of its land use application on evidentiary grounds bears the burden of demonstrating that only evidence supporting the application can be believed and that, as a matter of law, such evidence establishes compliance with each of the applicable criteria. *Wiley Mtn., Inc. v. City of Albany*, 36 Or LUBA 449 (1999).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where a hearings officer gives several reasons why she was not persuaded by affidavit testimony submitted by a permit applicant, petitioner does not establish that the applicant carried his burden of proof as a matter of law. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

1.2.3 Administrative Law – Denials – Burden to Challenge. A local government need only adopt one sustainable basis to deny a request for permit approval. Where petitioner fails to challenge all of the city's bases for denial, the decision must be affirmed. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

1.2.3 Administrative Law – Denials – Burden to Challenge. Petitioner's disagreement with the reasons specified by a local government for rejecting the evidence he submitted in support of a land use application provides no basis for reversal or remand. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where a local government denies

a permit application following remand from the Court of Appeals and specifies more than one basis for the denial, in reviewing a subsequent appeal of the denial on remand LUBA need only review and sustain one of the bases for denial. *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

1.2.3 Administrative Law – Denials – Burden to Challenge. Typically only one adequate basis for denial of a land use permit is required to sustain the decision on appeal to LUBA. However, where the approval criteria provide that a setback exception can be granted if any one of several alternative criteria are met and LUBA rejects the hearings officer's findings of noncompliance with two of those alternative criteria, a remand is appropriate. *Parsley v. Jackson County*, 34 Or LUBA 540 (1998).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where petitioner cites no evidence that partition plat contains words of road dedication and there is unrebutted testimony that a partition plat lacks terms of dedication, the local decision maker's finding that petitioner failed to prove road dedication on the basis of the partition plat is supported by substantial evidence. *Petersen v. Yamhill County*, 33 Or LUBA 584 (1997).

1.2.3 Administrative Law – Denials – Burden to Challenge. To obtain reversal at LUBA of a city's variance denial, a petitioner must show that it proved its compliance with the criteria as a matter of law and that only its evidence should be believed. *Main Auto Body v. City of Salem*, 30 Or LUBA 194 (1995).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where the challenged decision denies an application, the local government need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. To challenge a denial on evidentiary grounds, petitioner must demonstrate compliance with all applicable criteria as a matter of law. *Gionet v. City of Tualatin*, 30 Or LUBA 96 (1995).

1.2.3 Administrative Law – Denials – Burden to Challenge. In challenging a local government's determination of noncompliance with an applicable approval standard on evidentiary grounds, petitioners must demonstrate they sustained their burden of proof of compliance with the applicable standard as a matter of law. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632 (1995).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where a local government denies development approval based on noncompliance with a relevant approval standard, a petitioner's evidentiary challenge to that determination must cite evidence in the record demonstrating the standard is satisfied as a matter of law. *Lyon v. Linn County*, 28 Or LUBA 402 (1994).

1.2.3 Administrative Law – Denials – Burden to Challenge. A Public Works Department memorandum showing traffic counts, setting out accident history and making a conditional recommendation that a traffic study may be deferred is not sufficient to show the applicant carried its burden as a matter of law with regard to compliance with a code minimal adverse impact standard. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where a local government denies an application based on noncompliance with certain comprehensive plan housing policies, petitioners' argument that other plan housing policies should also be applied provides no basis for reversal or remand, where petitioners fail to establish how the local government's failure to apply the other policies undermines its decision to deny the application based on the policies it did apply. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where petitioners were the applicants below, and challenge on evidentiary grounds a local government determination that an applicable approval standard is not met, petitioners must demonstrate, as a matter of law, that they sustained their burden of proof of compliance with the standard. *Kangas v. City of Oregon City*, 26 Or LUBA 177 (1993).

1.2.3 Administrative Law – Denials – Burden to Challenge. To overturn a denial decision on evidentiary grounds, an applicant must establish that the proposal satisfies each applicable approval standard as a matter of law. *Decuman v. Clackamas County*, 25 Or LUBA 152 (1993).

1.2.3 Administrative Law – Denials – Burden to Challenge. In order to overturn, on evidentiary grounds, a local government determination that an applicable approval criterion is not met, it is not sufficient for petitioners to show there is substantial evidence in the record to support their position. Rather, petitioners must demonstrate they sustained their burden of proof of compliance with applicable criteria, as a matter of law. *Thomas v. City of Rockaway Beach*, 24 Or LUBA 532 (1993).

1.2.3 Administrative Law – Denials – Burden to Challenge. To overturn on evidentiary grounds a local government's determination that an applicable approval standard is not met, a petitioner may not simply show that there is substantial evidence in the record to support his position. Rather, petitioner must demonstrate that he sustained his burden of proof of compliance with all applicable standards, as a matter of law. *Baker v. Marion County*, 24 Or LUBA 519 (1993).

1.2.3 Administrative Law – Denials – Burden to Challenge. In order to overturn on evidentiary grounds a local government's determination that an applicable approval criterion is not met, it is not sufficient for petitioner to show there is substantial evidence in the record to support its position. Rather, the evidence must be such that a reasonable trier of fact could only say petitioner's evidence should be believed. *Roozenboom v. Clackamas County*, 24 Or LUBA 433 (1993).

1.2.3 Administrative Law – Denials – Burden to Challenge. To overturn on evidentiary grounds a local government's determination that an applicable approval criterion is not met, petitioners must demonstrate they sustained their burden of proof of compliance with applicable criteria, as a matter of law. *Stockwell v. Clackamas County*, 24 Or LUBA 358 (1992).

1.2.3 Administrative Law – Denials – Burden to Challenge. Where the challenged decision denies a proposed development, the local government need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. Further, in challenging a denial decision on evidentiary grounds, petitioners have the burden of establishing compliance with each and every criterion as a matter of law. *Woosley v. Marion County*, 24 Or LUBA 231

(1992).

1.2.3 Administrative Law – Denials – Burden to Challenge. To overturn a local government determination that an applicable approval criterion is not met, on evidentiary grounds, petitioners must demonstrate that they sustained their burden to establish compliance with the applicable criterion as a matter of law. *Chauncey v. Multnomah County*, 23 Or LUBA 599 (1992).

1.2.3 Administrative Law – Denials – Burden to Challenge. In the absence of evidence in the record establishing the quantity of products delivered or dollar amount of sales by petitioners' business to farm uses within the local agricultural community, petitioners cannot demonstrate as a matter of law that their proposed use is a commercial activity in conjunction with farm use. *Chauncey v. Multnomah County*, 23 Or LUBA 599 (1992).

1.2.3 Administrative Law – Denials – Burden to Challenge. An evidentiary challenge to a local government finding that the applicant failed to carry his burden of proof below requires that a petitioner at LUBA demonstrate the applicant carried that burden as a matter of law. *Nelson v. Benton County*, 23 Or LUBA 392 (1992).

1.2.3 Administrative Law – Denials – Burden to Challenge. It is the applicant's burden to establish compliance with each relevant approval standard. Consequently, where the applicant fails to establish compliance with a single approval standard, a decision denying an application must be affirmed. *West v. Clackamas County*, 23 Or LUBA 558 (1992).

1.2.3 Administrative Law – Denials – Burden to Challenge. It is the applicant's burden to establish compliance with each applicable approval standard, and a local government may not approve a proposal unless each approval standard is met. LUBA will sustain a decision denying land use approval, if such a decision demonstrates that one or more approval standards are not met. *Seger v. City of Portland*, 23 Or LUBA 334 (1992).

1.2.3 Administrative Law – Denials – Burden to Challenge. For LUBA to overturn a local government's denial decision, petitioners must establish that the proposed development meets all applicable standards as a matter of law. *Rath v. Hood River County*, 23 Or LUBA 200 (1992).

1.2.3 Administrative Law – Denials – Burden to Challenge. In order to overturn, on evidentiary grounds, a local government determination that an approval standard is not met, petitioners must establish that the approval standard is satisfied as a matter of law. *Schoppert v. Clackamas County*, 23 Or LUBA 138 (1992).

1.2.3 Administrative Law – Denials – Burden to Challenge. In order to overturn, on evidentiary grounds, a local government's determination that an applicable approval standard is not met, the evidence must be such that a reasonable trier of fact could only say petitioners' evidence should be believed. *Goffic v. Jackson County*, 23 Or LUBA 1 (1992).

1.2.3 Administrative Law – Denials – Burden to Challenge. A local government's denial of a development application will be sustained if the local government's determination that any one approval standard is not satisfied is sustained. *Goffic v. Jackson County*, 23 Or LUBA 1 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the evidence is extremely one-sided in favor of a permit applicant challenging a county decision denying its application for permit approval for a natural gas pipeline on the basis that other uses allowed in the zone would be limited, it is possible to conclude that the permit applicant challenging the denial on evidentiary grounds carried its burden as a matter of law, as it must when challenging a permit denial on evidentiary grounds. But where that evidence is somewhat equivocal about whether some uses would be limited and does not address whether other uses would be limited, the evidentiary record is insufficient to demonstrate that the permit applicant carried its burden as a matter of law. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

1.2.4 Administrative Law – Denials – Evidence to Support. A high pressure natural gas pipeline applicant challenging a board of commissioners' denial of its request for permit approval on evidentiary grounds does not carry its burden as a matter of law, as it must when challenging a permit denial on evidentiary grounds, where the applicant's own evidence show there is some danger of habitat damage from hydraulic fracturing and other evidence from permit opponents that hydraulic fracturing has caused habitat damage in other pipeline projects. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

1.2.4 Administrative Law – Denials – Evidence to Support. ORS 215.296(1) requires some description of farm practices on surrounding farm lands, in order to evaluate whether the proposed conditional use will significantly change or increase the costs of such practices. Where the record and planning commission decision includes no such description, on local appeal the governing body could conclude that the planning commission decision approving the conditional use is not supported by substantial evidence. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

1.2.4 Administrative Law – Denials – Evidence to Support. When a local ordinance requires that no additional vehicle trips enter an intersection during peak hours, an applicant cannot overcome a denial by merely encouraging visitors to use other routes to the site. Without an enforcement mechanism or evidence that such encouragement would be completely effective without an enforcement mechanism, the applicant has not demonstrated as a matter of law that no additional vehicle trips would enter the intersection during peak hours. *Vista Construction, LLC v. City of Grants Pass*, 59 Or LUBA 195 (2009).

1.2.4 Administrative Law – Denials – Evidence to Support. A reasonable decision maker could conclude that the applicant for a proposed motorcycle race track failed to demonstrate compliance with an approval standard requiring that the property act as a buffer between urban and agricultural uses, which the county interpreted to require evidence that the race track, as mitigated, would externalize less dust than would agricultural use of the property, where the applicant failed to present any evidence quantifying dust impacts, comparing dust impacts of farm uses and the race track, or estimating the effectiveness of mitigation. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

1.2.4 Administrative Law – Denials – Evidence to Support. Where a hearings officer's evaluation of the evidence is based in part on a considered assessment that one set of witnesses is more credible or reliable than others with respect to a disputed factual issue, it will be a rare

circumstance where LUBA has a basis to overturn that credibility judgment. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

1.2.4 Administrative Law – Denials – Evidence to Support. In an evidentiary challenge to a hearings officer's denial of proposed development, the applicant can prevail only if the applicant demonstrates that no reasonable person could reach the conclusion the hearings officer did, considering the evidence in the whole record. *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

1.2.4 Administrative Law – Denials – Evidence to Support. A fire district letter opining that conducting large concert events of up to 5,500 people on a forest-zoned parcel would not significantly increase the risk of wildfires is not substantial evidence to support a finding to that effect, where the letter is expressly contingent on the applicant maintaining a prohibition on burning of any kind, and the evidence regarding the effectiveness of banning burning of any kind during large concert events is extremely limited and conclusory. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

1.2.4 Administrative Law – Denials – Evidence to Support. Assuming, without deciding, that an applicant's misrepresentation of a material fact in a discretionary permit proceeding would allow a local government to deny subsequent administrative permits necessary to carry out the earlier permit approval, the record supporting denial must establish that the applicant indeed misrepresented a material fact. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004).

1.2.4 Administrative Law – Denials – Evidence to Support. The burden of overturning a permit denial on evidentiary grounds is even more difficult when the applicable approval criteria are highly subjective in nature, such as standards requiring "adequate" transportation improvements to "promote safety" and "reduce congestion." *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

1.2.4 Administrative Law – Denials – Evidence to Support. A traffic engineer's critique of the applicant's traffic study that questions the accuracy and sufficiency of the study's calculation of traffic impacts and facility capacity is sufficient to support denial of proposed development under standards requiring the applicant to demonstrate that nearby transportation facilities can accommodate traffic impacts of the development. *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

1.2.4 Administrative Law – Denials – Evidence to Support. Denial of a proposed school bus storage yard is supported by evidence that access to the yard relies on a private fire lane that the applicant cannot improve and that limits bus movement, under design standards requiring a "safe and efficient" circulation pattern. *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

1.2.4 Administrative Law – Denials – Evidence to Support. Given the subjectivity of criteria requiring that (1) the subject property be of adequate size to allow for "aesthetic design treatment," (2) the proposed building be "compatible" in scale and mass with adjoining structures, and (3) the site plan provide for "adequate" buffers, the testimony of residential neighbors that a proposed church on a 3.85-acre parcel fails to comply with these criteria is adequate to support the city's finding of noncompliance. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77

(2003).

1.2.4 Administrative Law – Denials – Evidence to Support. Conclusory testimony by an acoustic engineer that a proposed church will not violate "maximum allowable noise levels" is insufficient to show compliance as a matter of law with code standards that require a demonstration that proposed uses will not exceed specific decibel levels within a specified distance from adjoining residential uses. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

1.2.4 Administrative Law – Denials – Evidence to Support. A city is entitled to rely on expert testimony that a specific model of the flood depth and velocity over the subject property is necessary to demonstrate compliance with a standard requiring no significant hazard to life or property, and the city may decline to extrapolate that information from other expert testimony that models an adjacent area. *Starks Landing, Inc. v. City of Rivergrove*, 43 Or LUBA 237 (2002).

1.2.4 Administrative Law – Denials – Evidence to Support. LUBA will remand a decision denying an application to place and remove fill in a riparian zone, where the findings do not independently address the relevant standards and it is not clear what evidence the hearings officer relied on to apply the standards. *Griffin v. Jackson County*, 41 Or LUBA 159 (2001).

1.2.4 Administrative Law – Denials – Evidence to Support. A city's denial of a permit to construct a house proposed to be cantilevered out over the face of a sand bluff is supported by substantial evidence, where there is conflicting expert testimony regarding adverse impacts from structural supports sunk into the face of the bluff, and the city reasonably chose to believe an expert opinion that under no circumstances should the face of the bluff be compromised. *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999).

1.2.4 Administrative Law – Denials – Evidence to Support. Neighbors' testimony regarding adverse impacts of vibration from construction on the integrity of a sand bluff underlying adjacent properties is substantial evidence supporting the city's denial of a house proposed to be built on the bluff, notwithstanding a contrary conclusion inferred from geotechnical reports supporting the application. *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999).

1.2.4 Administrative Law – Denials – Evidence to Support. In determining whether a denial is supported by substantial evidence, LUBA considers all relevant evidence, including that which supports and that which detracts from the county's decision. *Evenson v. Jackson County*, 36 Or LUBA 251 (1999).

1.2.4 Administrative Law – Denials – Evidence to Support. To successfully challenge the evidentiary basis for denial, it is not sufficient for petitioner to show there is evidence in the record to support his position; petitioner must show the evidence is such that a reasonable trier of fact could only decide in his favor. Where the record contains credible, conflicting evidence, petitioner has not sustained his burden to show, as a matter of law, that the trier of fact should only have believed petitioner's evidence. *Evenson v. Jackson County*, 36 Or LUBA 251 (1999).

1.2.4 Administrative Law – Denials – Evidence to Support. In challenging a decision denying

a permit on evidentiary grounds, it is not sufficient to show the evidence would also have supported approval of the permit. The evidence must show that petitioner sustained his burden of proof as a matter of law. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the evidence is such that a reasonable person could conclude that a permit applicant failed to carry his burden of proof, the hearings officer's decision denying the permit is supported by substantial evidence. A hearings officer is not obligated to defer to an unopposed affidavit submitted by a permit applicant as establishing the facts alleged in the affidavit. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

1.2.4 Administrative Law – Denials – Evidence to Support. An applicant does not carry his burden to demonstrate compliance with transportation-related criteria, where the findings supporting denial identify a flaw in the applicant's evidence resulting from conducting a traffic study in the summer when school trips would not be reflected in the study. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

1.2.4 Administrative Law – Denials – Evidence to Support. Where petitioner cites no evidence that partition plat contains words of road dedication and there is unrebutted testimony that a partition plat lacks terms of dedication, the local decision maker's finding that petitioner failed to prove road dedication on the basis of the partition plat is supported by substantial evidence. *Petersen v. Yamhill County*, 33 Or LUBA 584 (1997).

1.2.4 Administrative Law – Denials – Evidence to Support. Where an applicable criterion requires that a dwelling have the "least impact" on adjoining lands and the applicant does not show the dwelling could not be located on alternative sites on the property that would have fewer impacts, the applicant fails to demonstrate compliance with the criterion as a matter of law. *Evans v. Multnomah County*, 33 Or LUBA 555 (1997).

1.2.4 Administrative Law – Denials – Evidence to Support. A decision denying a requested nonconforming use determination is supported by substantial evidence, where the applicant's evidence had gaps and inconsistencies and the opponent's evidence was uniform. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

1.2.4 Administrative Law – Denials – Evidence to Support. To obtain reversal at LUBA of a city's variance denial, a petitioner must show that it proved its compliance with the criteria as a matter of law and that only its evidence should be believed. *Main Auto Body v. City of Salem*, 30 Or LUBA 194 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the challenged decision denies an application, the local government need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. To challenge a denial on evidentiary grounds, petitioner must demonstrate compliance with all applicable criteria as a matter of law. *Gionet v. City of Tualatin*, 30 Or LUBA 96 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. LUBA does not substitute its

judgment regarding conflicting evidence in the record for that of the local government. If a reasonable person could reach the decision made by the local government, LUBA will defer to the local government's choice between conflicting evidence. *Gionet v. City of Tualatin*, 30 Or LUBA 96 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. In order to justify reversal or remand of a city's denial of a discretionary application, petitioner must establish, as a matter of law, that all approval criteria are satisfied. Where there is substantial evidence in the record, upon which the city relied, to determine that the application fails to comply with several comprehensive plan provisions, petitioner fails to sustain his burden of proof regardless of whether the application could satisfy some, or even all, of the applicable subdivision approval criteria. *Holland v. City of Cannon Beach*, 30 Or LUBA 85 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. To overturn the county's determination that an applicable approval criterion is not met on evidentiary grounds, it is not sufficient for petitioners to show there is substantial evidence in the record to support their position. Rather, the evidence must show that only petitioners' evidence should be believed. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. In challenging a local government's determination of noncompliance with an applicable approval standard on evidentiary grounds, petitioners must demonstrate they sustained their burden of proof of compliance with the applicable standard as a matter of law. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632 (1995).

1.2.4 Administrative Law – Denials – Evidence to Support. Applicants for approval to divide a 110-acre EFU-zoned parcel into 50- and 60-acre farm parcels fail to carry their burden of proof regarding a code standard requiring that the newly created parcels be of sufficient size to continue existing commercial agricultural enterprises in the area, where the applicants submit evidence concerning agricultural activity only on the property proposed to be divided. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

1.2.4 Administrative Law – Denials – Evidence to Support. Where petitioners were the applicants below, and challenge on evidentiary grounds a local government determination that an applicable approval standard is not met, petitioners must demonstrate, as a matter of law, that they sustained their burden of proof of compliance with the standard. *Kangas v. City of Oregon City*, 26 Or LUBA 177 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. To overturn a denial decision on evidentiary grounds, an applicant must establish that the proposal satisfies each applicable approval standard as a matter of law. *Decuman v. Clackamas County*, 25 Or LUBA 152 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the local code includes a broad definition of the term "wetland," and the local government denies a permit application because it determines evidence in the record establishes that petitioner's grading activities on the subject property created a "wetland" within the meaning of the local code, LUBA cannot say that

the local government's determination is wrong as a matter of law. *Annett v. Clackamas County*, 25 Or LUBA 111 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. In order to overturn, on evidentiary grounds, a local government determination that an applicable approval criterion is not met, it is not sufficient for petitioners to show there is substantial evidence in the record to support their position. Rather, petitioners must demonstrate they sustained their burden of proof of compliance with applicable criteria, as a matter of law. *Thomas v. City of Rockaway Beach*, 24 Or LUBA 532 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. Where a local government denies a setback variance to allow a deck on the side of a dwelling, and petitioners cite no evidence in the record establishing that having such a deck on the dwelling is more than a personal preference or amenity, petitioners fail to show the evidence in the record establishes, as a matter of law, that enforcement of the setback requirement will cause "practical difficulty or unnecessary hardship." *Thomas v. City of Rockaway Beach*, 24 Or LUBA 532 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. To overturn on evidentiary grounds a local government's determination that an applicable approval standard is not met, a petitioner may not simply show that there is substantial evidence in the record to support his position. Rather, petitioner must demonstrate that he sustained his burden of proof of compliance with all applicable standards, as a matter of law. *Baker v. Marion County*, 24 Or LUBA 519 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the local government relies upon evidence that there are several hundred acres within an urban growth boundary (UGB) available for residential development to support its determination that the applicant failed to establish a need for more residential land under Goal 14, factor 1, evidence that some of those acres of land may be unavailable for residential development does not establish the existence of a need for residential land within the existing UGB as a matter of law. *Baker v. Marion County*, 24 Or LUBA 519 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. In order to overturn on evidentiary grounds a local government's determination that an applicable approval criterion is not met, it is not sufficient for petitioner to show there is substantial evidence in the record to support its position. Rather, the evidence must be such that a reasonable trier of fact could only say petitioner's evidence should be believed. *Roozenboom v. Clackamas County*, 24 Or LUBA 433 (1993).

1.2.4 Administrative Law – Denials – Evidence to Support. There is substantial evidence to support a local government determination that a code standard requiring a proposed use not to be detrimental to the area or to adjacent properties is not satisfied where the record includes evidence that the subject business operation is noisy, operates on evenings and weekends, and generates a significant amount of sawdust. *Stockwell v. Clackamas County*, 24 Or LUBA 358 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the challenged decision denies a proposed development, the local government need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. Further, in challenging

a denial decision on evidentiary grounds, petitioners have the burden of establishing compliance with each and every criterion as a matter of law. *Woosley v. Marion County*, 24 Or LUBA 231 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. In the absence of evidence in the record establishing the quantity of products delivered or dollar amount of sales by petitioners' business to farm uses within the local agricultural community, petitioners cannot demonstrate as a matter of law that their proposed use is a commercial activity in conjunction with farm use. *Chauncey v. Multnomah County*, 23 Or LUBA 599 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. In order to overturn, on evidentiary grounds, a local government determination that an approval standard is not met, petitioners must establish that the approval standard is satisfied as a matter of law. *Schoppert v. Clackamas County*, 23 Or LUBA 138 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. Where there is conflicting believable evidence in the record, LUBA cannot say a reasonable decision maker could only believe the evidence relied upon by petitioner, and will reject a challenge to the evidentiary support for a decision denying development approval. *Joyce v. Multnomah County*, 23 Or LUBA 116 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. To overturn on evidentiary grounds a local government's determination that an applicable approval criterion is not met, it is not sufficient for petitioners to show that there is substantial evidence in the record to support their position. Rather, the "evidence must be such that a reasonable trier of fact could only say petitioners' evidence should be believed." *Barber v. Marion County*, 23 Or LUBA 71 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. Where evidence in the record establishes that with adequate drainage a parcel could be put to farm use, petitioner has not established as a matter of law that the proposed nonfarm use is located on land "generally unsuitable" for farm use. *Barber v. Marion County*, 23 Or LUBA 71 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. In order to overturn, on evidentiary grounds, a local government's determination that an applicable approval standard is not met, the evidence must be such that a reasonable trier of fact could only say petitioners' evidence should be believed. *Goffic v. Jackson County*, 23 Or LUBA 1 (1992).

1.2.4 Administrative Law – Denials – Evidence to Support. Where the local code requires that additional dwellings in a forest zone "will not interfere with forest management or harvesting practices," and the parties cite no evidence in the record concerning the impacts of such additional dwellings on the use of the access road for forest management and harvesting, petitioners fail to demonstrate compliance with the approval standard as a matter of law. *Goffic v. Jackson County*, 23 Or LUBA 1 (1992).

1.3.1 Administrative Law – Findings Generally – What Constitutes. References to a staff report during oral deliberations and a city councilor's motion "to accept staff's recommendation" are insufficient to incorporate the staff report into the final decision where the city council does not orally approve or adopt the staff report and where the final decision does not mention the staff report, and the city may therefore not rely on the staff report in order to satisfy the requirement that its decision contain adequate findings. *Niederer v. City of Albany*, 79 Or LUBA 305 (2019).

1.3.1 Administrative Law – Findings Generally – What Constitutes. A city council decision that states "[t]he findings of fact in this matter are located in the staff report, incorporated herein as Exhibit A" is sufficient to satisfy the *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992), requirement to indicate an intent to incorporate another document as findings. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

1.3.1 Administrative Law – Findings Generally – What Constitutes. Where a city council decision adopts "a staff report, incorporated herein as Exhibit A," as findings, but there is no staff report labeled Exhibit A and there are two staff reports the city council could have been referring to, the decision is not sufficient to satisfy the *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992), requirement to identify the document that is incorporated as findings. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

1.3.1 Administrative Law – Findings Generally – What Constitutes. A finding that the decision maker "reviewed" a number of documents is not sufficient to adopt or incorporate those documents as findings to support a decision. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

1.3.1 Administrative Law – Findings Generally – What Constitutes. Where additional explanations and legal theories in a decision for why an approval criterion is met are not alternative sets of independently dispositive findings, a petitioner's failure to challenge those additional explanations and legal theories does not require that LUBA deny an assignment of error that challenges the findings that an approval criterion is met. *Siegert v. Crook County*, 63 Or LUBA 379 (2011).

1.3.1 Administrative Law – Findings Generally – What Constitutes. LUBA will assume that a city council adopted a staff report as findings in its entirety, notwithstanding language purporting to incorporate only findings "that support approving the application," where all the findings in the staff report support approving the application. *Soares v. City of Corvallis*, 56 Or LUBA 551 (2008).

1.3.1 Administrative Law – Findings Generally – What Constitutes. A purported incorporation of "those portions" of the minutes of hearings that support approval of the application is ineffective, as it fails to adequately identify what testimony or portions of the minutes the governing body intends to incorporate as findings. *Soares v. City of Corvallis*, 56 Or LUBA 551 (2008).

1.3.1 Administrative Law – Findings Generally – What Constitutes. Where it is possible to read a city council's findings as incorporating only the conditions of approval proposed in an attached staff report but it is also possible to read the city council's findings as incorporating the entire staff report as part of the city council's decision, but it is clear the city intended the latter,

LUBA will reject petitioner's contention that the more limited reading of the city council's decision is required. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

1.3.1 Administrative Law – Findings Generally – What Constitutes. A local government's failure to adequately identify documents it intends to incorporate by reference as findings, and its adoption of testimony as findings, are not by themselves a basis for reversal or remand. Instead, the attempted incorporation fails and the city may not rely on such documents or testimony to provide "findings" in support of the decision. If the city has adopted other findings that adequately support the decision, the failed incorporation and improper attempt to adopt testimony as findings are harmless error. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

1.3.1 Administrative Law – Findings Generally – What Constitutes. An attempt to incorporate documents in the record as findings of compliance with the Transportation Planning Rule fails, where the decision purports to incorporate hundreds of pages of minutes and written testimony without adequately identifying those documents, and the incorporation is qualified in a manner that makes it difficult or impossible to understand the facts relied upon and the justification for the decision. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

1.3.1 Administrative Law – Findings Generally – What Constitutes. A decision maker may rely on environmental assessments and technical reports prepared and used by the decision maker in making its decision to demonstrate compliance with findings requirements, notwithstanding that the documents were not formally adopted as findings, where a reasonable person would understand that the decision maker intended to rely on the documents to support its decision. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

1.3.1 Administrative Law – Findings Generally – What Constitutes. Where petitioner challenges the adequacy of a local government's findings, and the challenged decision neither contains findings nor incorporates other documents into the decision as findings, LUBA will remand the decision for adoption or incorporation of necessary findings. *Allen v. Grant County*, 39 Or LUBA 232 (2000).

1.3.1 Administrative Law – Findings Generally – What Constitutes. Oral discussion by the local decision makers reflected in the tape of the hearing does not constitute findings demonstrating compliance with applicable land use standards. *Allen v. Grant County*, 39 Or LUBA 232 (2000).

1.3.1 Administrative Law – Findings Generally – What Constitutes. Oral comments by individual city council members are not findings and cannot constitute a reviewable interpretation of local code provisions. *Breen v. City of Salem*, 37 Or LUBA 961 (2000).

1.3.1 Administrative Law – Findings Generally – What Constitutes. A statement adopted by a planning commission but not incorporated into the city council's final decision does not constitute a reviewable finding. *Hood River Valley Res. Comm. v. City of Hood River*, 33 Or LUBA 233 (1997).

1.3.1 Administrative Law – Findings Generally – What Constitutes. Where findings adopted by the initial local decision maker interpreted a local ordinance provision, but those findings were *replaced* by findings adopted by the local governing body which do not include an interpretation of the ordinance provision, LUBA must remand the decision to the local government to interpret the provision in the first instance. *Friends of Bryant Woods Park v. Lake Oswego,* 26 Or LUBA 185 (1993).

1.3.1 Administrative Law – Findings Generally – What Constitutes. The findings supporting a challenged decision may consist of several different documents, so long as the local government adequately identifies and specifically adopts those documents as findings. *Neuharth v. City of Salem,* 25 Or LUBA 267 (1993).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. References to a staff report during oral deliberations and a city councilor's motion "to accept staff's recommendation" are insufficient to incorporate the staff report into the final decision where the city council does not orally approve or adopt the staff report and where the final decision does not mention the staff report, and the city may therefore not rely on the staff report in order to satisfy the requirement that its decision contain adequate findings. *Niederer v. City of Albany*, 79 Or LUBA 305 (2019).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. When an applicant chooses to use reclaimed wastewater on farmland, a written explanation of alternatives to water uses is a very limited obligation imposed by ORS 215.246(3). The county's role, indeed LUBA's review itself, is confined to ensuring that the applicant (1) considered in writing any sufficiently identified alternatives, and (2) explained in writing the reasons for not using them. *Oregon Coast Alliance v. Curry County*, 78 Or LUBA 81 (2018).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. OAR 660-004-0022(6), which provides the standards for approving an exception to Goal 15, allows adverse effect on habitat as long as the adverse effect is not "significant." An argument that challenges a local government's findings that with mitigation, impacts to riparian habitat from a proposed new bridge project will not be significant because the need for mitigation at all demonstrates that the bridge will have a "significant adverse effect" on riparian values provides no basis for reversal or remand. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. To address a historic design standard requiring that new construction be "compatible with the appearance and character of the historic district," adequate findings must, at a minimum, describe the appearance and character of the historic district, as relevant, (2) describe the appearance and character of the proposed structure, and (3) explain why the proposed structure is or is not compatible with the appearance and character of the historic district. *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. The failure of a decision maker to list all of the evidence relied upon in making a decision is not necessarily fatal as long as the response brief directs LUBA to evidence in the record that supports the critical findings in the decision. *Lawrence v. Clackamas County*, 46 Or LUBA 101 (2003).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. When a local decision maker denies a person standing to participate in the local proceeding, the local decision maker must explain why that person was denied standing. *Swanson v. Jackson County*, 46 Or LUBA 629 (2004).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. The primary purpose of OAR 660-021-0030(5) is to develop findings that can form the basis of comprehensive plan language to guide future urbanization decisions. Thus, OAR 660-021-0030(5) requires that the local government adopt findings describing the results of its consideration of the suitability criteria in OAR 660-010-0030(2) for all lands included in urban reserves. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. Where a local government includes lands in urban reserves under one or more of the exceptions provided in OAR 660-021-0030(4), it must adopt findings as required by OAR 660-021-0030(5) that are sufficient to ensure that those lands are developed in accordance with the justification for including them in urban reserves. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. A county impermissibly defers a finding of compliance with a standard requiring that the lot be capable of being served with a domestic water supply, where there is no evidence or finding that an adequate domestic water supply is feasible, and the county's finding of compliance relies exclusively on a condition requiring that the applicant establish a domestic water supply. *Thomas v. Wasco County*, 35 Or LUBA 173 (1998).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. Findings are inadequate where a local government's decision makes conclusory statements of compliance with the applicable approval criteria without giving any factual or legal analysis to support the conclusion that the application complies with each of the criteria. *Larvik v. City of La Grande*, 34 Or LUBA 467 (1998).

Administrative Law – Findings Generally – Necessary Elements. Findings that the applicant has testified that applicable criteria will be met are conclusory and inadequate because they fail to identify the review standards, set out the facts relied upon or explain how those facts led to the decision. *Turrell v. Harney County*, 34 Or LUBA 423 (1998).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. Findings are adequate and supported by substantial evidence when the decision maker assembles evidence, identifies the relevant code standard, sets out the evidence found to be persuasive and explains how that evidence led to the decision. *Mountain Gate Homeowners v. Washington County*, 34 Or LUBA 169 (1998).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. When a challenged decision fails to incorporate a staff report or council minutes as findings, LUBA's review of the challenged decision for adequate findings is limited to the decision itself. *Hackler v. City of Hermiston*, 33 Or LUBA 755 (1997).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. Local findings addressing an approval criterion may be viewed together with findings in other documents that are incorporated into the decision as findings, in order to comply with the requirements that findings identify the applicable criteria, adequately demonstrate the facts relied upon and adequately explain how those facts show compliance with the applicable criteria. *Winkler v. City of Cottage Grove*, 33 Or LUBA 543 (1997).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. Local government findings of compliance with an applicable approval standard must state the facts the local government relies on and explain why those facts lead to the conclusion that the standard is satisfied. *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. Findings must identify relevant approval standards, identify the facts relied upon, and explain why those facts support a conclusion that the standard is met. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. A local government decision approving a permit will be remanded to the local government if the decision fails to (1) identify the relevant approval standards, (2) set out the facts believed and relied upon by the local decision maker, and (3) explain how those facts lead to a decision that the proposal complies with the approval standards. *Lathrop v. Wallowa County*, 25 Or LUBA 693 (1993).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. A local government decision approving a quasi-judicial zone change must be supported by written findings identifying the applicable criteria, setting out the facts relied on and explaining the reasons why the facts establish compliance with the applicable standards. *Strecker v. City of Spray*, 25 Or LUBA 264 (1993).

1.3.2 Administrative Law – Findings Generally – Necessary Elements. Findings must identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. *Heiller v. Josephine County*, 23 Or LUBA 551 (1992).

1.3.3 Administrative Law – Findings Generally – Form of. A city council decision that states "[t]he findings of fact in this matter are located in the staff report, incorporated herein as Exhibit A" is sufficient to satisfy the *Gonzalez v. Lane County*, 24 or LUBA 251, 259 (1992), requirement to indicate an intent to incorporate another document as findings. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

1.3.3 Administrative Law – Findings Generally – Form of. Where a city council decision adopts "a staff report, incorporated herein as Exhibit A," as findings, but there is no staff report labeled Exhibit A and there are two staff reports the city council could have been referring to, the decision is not sufficient to satisfy the *Gonzalez v. Lane County*, 24 or LUBA 251, 259 (1992), requirement to identify the document that is incorporated as findings. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

1.3.3 Administrative Law – Findings Generally – Form of. LUBA will not assume the planning commission intended to adopt a subdivision opponent's letter opposing the application as findings in support of the planning commission's decision to approve the subdivision application, simply because that letter was included as an attachment to the planning staff report that was adopted as findings. *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006).

1.3.3 Administrative Law – Findings Generally – Form of. Where it is possible to read a city council's findings as incorporating only the conditions of approval proposed in an attached staff report but it is also possible to read the city council's findings as incorporating the entire staff report as part of the city council's decision, but it is clear the city intended the latter, LUBA will reject petitioner's contention that the more limited reading of the city council's decision is required. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

1.3.3 Administrative Law – Findings Generally – Form of. A local government's failure to adequately identify documents it intends to incorporate by reference as findings, and its adoption of testimony as findings, are not by themselves a basis for reversal or remand. Instead, the attempted incorporation fails and the city may not rely on such documents or testimony to provide "findings" in support of the decision. If the city has adopted other findings that adequately support the decision, the failed incorporation and improper attempt to adopt testimony as findings are harmless error. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

1.3.3 Administrative Law – Findings Generally – Form of. An attempt to incorporate documents in the record as findings of compliance with the Transportation Planning Rule fails, where the decision purports to incorporate hundreds of pages of minutes and written testimony without adequately identifying those documents, and the incorporation is qualified in a manner that makes it difficult or impossible to understand the facts relied upon and the justification for the decision. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

1.3.3 Administrative Law – Findings Generally – Form of. A decision maker may rely on environmental assessments and technical reports prepared and used by the decision maker in making its decision to demonstrate compliance with findings requirements, notwithstanding that the documents were not formally adopted as findings, where a reasonable person would understand

that the decision maker intended to rely on the documents to support its decision. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

1.3.3 Administrative Law – Findings Generally – Form of. That the local government's Goal 14 findings incorporate other findings by reference does not demonstrate inadequacy in the county's Goal 14 findings, absent a showing that the county's findings as a whole, including the incorporated findings, are inadequate. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

1.3.3 Administrative Law – Findings Generally – Form of. LUBA will deny an assignment of error that challenges a decision for failing to make findings regarding applicable criteria when the decision properly incorporates additional findings that do address the applicable approval criteria, and the incorporated findings are not inadequate on their face. *McNern v. City of Corvallis*, 39 Or LUBA 591 (2001).

1.3.3 Administrative Law – Findings Generally – Form of. A statement by a governing body in its decision that it is incorporating as findings a separate document that it has specifically identified in its findings is effective in doing so, even if the title of the separate document is misstated in the decision. *Winkler v. City of Cottage Grove*, 33 Or LUBA 543 (1997).

1.3.3 Administrative Law – Findings Generally – Form of. Where a decision expressly incorporates an entire document by reference into its findings and quotes specific findings from the incorporated document, the scope of the incorporation is not limited to the quoted findings. *Winkler v. City of Cottage Grove*, 33 Or LUBA 543 (1997).

1.3.3 Administrative Law – Findings Generally – Form of. Final decisions may incorporate findings in other documents prepared by staff or an applicant, but may not do so in a way that leaves the parties and LUBA guessing which documents are made part of the decision or where the necessary findings may be located in the record. *DLCD v. Tillamook County*, 33 Or LUBA 323 (1997).

1.3.3 Administrative Law – Findings Generally – Form of. Where the county commissioners' final decision purports to adopt unspecified portions of the planning director's and hearings officer's decisions, but LUBA cannot determine from the final decision which portions of the lower decisions the commissioners intended to adopt, LUBA will rely solely on the commissioners' decision and those portions of the lower decisions that are specifically identified in the final decision. *Spencer Creek Neighbors v. Lane County*, 32 Or LUBA 349 (1997).

1.3.3 Administrative Law – Findings Generally – Form of. Where the county's findings regarding parcel size and ownership patterns on lands adjacent to a proposed exception area contain no reference to the analysis required by OAR 660-04-028(6)(c)(A), and do not suggest that the county is relying upon separate incorporated documents to provide that analysis, the county's incorporation of the entire application does not provide a sufficient reference to the specific documents relied upon by the county to satisfy the applicable criteria. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

1.3.3 Administrative Law – Findings Generally – Form of. If a local government wishes to incorporate all or portions of another document by reference into its findings, it must (1) clearly indicate its intent to do so; and (2) clearly identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

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

1.3.3 Administrative Law – Findings Generally – Form of. Where LUBA cannot determine which portions of a lower level local decision maker's decision are incorporated into the challenged governing body decision, the governing body's decision must be remanded. *Ellis v. City of Bend*, 28 Or LUBA 332 (1994).

1.3.3 Administrative Law – Findings Generally – Form of. A local government decision maker may adopt staff-prepared findings as its own. That the planner who prepared the findings later advised the decision maker the findings are erroneous does not establish that the findings in fact are erroneous. *Gettman v. City of Bay City*, 28 Or LUBA 116 (1994).

1.3.3 Administrative Law – Findings Generally – Form of. Where the challenged decision states the decision maker "adopts" a certain document and "makes it part of" the findings, that document is incorporated by reference into the findings and, under OAR 661-10-025(1)(a), is part of the local record, as findings. *Bates v. Josephine County*, 27 Or LUBA 673 (1994).

1.3.3 Administrative Law – Findings Generally – Form of. A statement in a local government's findings that it "accepts and relies on" the contents of a specific exhibit in the record "to establish" certain facts required by an applicable approval standard, indicates the local government's intent to adopt the contents of that exhibit as a statement of what the local government believes to be the relevant facts and, therefore, is adequate to incorporate the exhibit into the findings. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

1.3.3 Administrative Law – Findings Generally – Form of. Where the challenged decision refers to a staff report and the applicant's proposed findings and explicitly incorporates those documents by reference, and those documents are attached as exhibits to the decision, the decision adequately adopts those documents as findings in support of the decision. *Lucier v. City of Medford*, 26 Or LUBA 213 (1994).

1.3.3 Administrative Law – Findings Generally – Form of. Where a governing body's decision includes a statement that the governing body affirms the planning commission decision expressed in specific findings, such statement indicates the governing body either adopted the planning commission findings and determinations by reference or let the planning commission's decision

become final and subject to review as part of the governing body's decision. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

1.3.3 Administrative Law – Findings Generally – Form of. The findings supporting a challenged decision may consist of several different documents, so long as the local government adequately identifies and specifically adopts those documents as findings. *Neuharth v. City of Salem*, 25 Or LUBA 267 (1993).

1.3.3 Administrative Law – Findings Generally – Form of. A party's submission of proposed findings to a local decision maker does not constitute an *ex parte* contact warranting reversal or remand. In the absence of a local code provision to the contrary, there is no error in a local government's utilization of such a process. *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

1.3.3 Administrative Law – Findings Generally – Form of. A statements in a local government's findings that "substantial evidence in the record shows * * *" is not a recitation of evidence, but rather an expression of what the decision maker believes the evidence in the record demonstrates; and is, therefore, proper as a finding of fact. *DLCD v. Coos County*, 25 Or LUBA 158 (1993).

1.3.3 Administrative Law – Findings Generally – Form of. Where a challenged decision incorporates other documents by reference as findings, the decision must clearly indicate its intent to incorporate the documents, and (2) identify the documents or portions of them. *DLCD v. Crook County*, 24 Or LUBA 393 (1993).

1.3.3 Administrative Law – Findings Generally – Form of. If a local government decision maker incorporates all or portions of a separate document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. *Gonzalez v. Lane County*, 24 Or LUBA 251 (1992).

1.3.3 Administrative Law – Findings Generally – Form of. Where a decision maker does not clearly identify in its decision the portions of a document that it adopts by reference as findings, it runs a risk that LUBA will not be able to identify and review any portion of such document as findings of the decision maker. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

1.3.3 Administrative Law – Findings Generally – Form of. In the absence of a specific provision in the local code to the contrary, there is no general requirement that a party have an opportunity to object to proposed findings submitted to the local decision maker by the prevailing party in a local land use proceeding. *Adler v. City of Portland*, 24 Or LUBA 1 (1992).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a local government legislatively decreases the height limit in one part of a historic district and increases the height limit in another part of the historic district, findings that focus on the importance of creating incentives for development of vacant parcels in the historic district, determine that the new height limits are lower than those outside the historic district, and conclude that "the issue of consistency [is] best left to the Landmarks Commission who remain charged with reviewing future development proposals" are not adequate to explain how the new height limits comply with a comprehensive plan policy that requires the local government to "preserv[e] and complement[] historic resources." *Restore Oregon v. City of Portland*, 80 Or LUBA 158 (2019).

1.4.1 Administrative Law – Adequacy of Findings – Generally. While applying pesticides and herbicides in a manner that causes overspray or drift onto adjoining properties is not an accepted farm practice for purposes of the farm impacts test at ORS 215.296(1), where the labels for some pesticides and herbicides effectively require a setback from certain sensitive uses regardless of whether drift or overspray occurs, a county will likely have to make specific factual findings about the specific setbacks required by particular chemicals on particular farming operations on surrounding farmlands, based on application methods, and whether the operation of each setback would force a significant change in farm practices. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A condition of approval requiring that an applicant construct a proposed fence between a proposed trail and adjoining farms; specifying only that the proposed fence must be "capable of preventing dogs and people from entering adjacent farm fields"; punting all determinations regarding fence design, materials, construction, etc. to a subsequent master planning process that offers no opportunity for a public hearing or other public input; and allowing adjacent landowners to opt out of installing a fence on their property line is inadequate where the county relies on the proposed fence to address a wide variety of different potential impacts, which might require different fence designs, materials, construction techniques, and maintenance routines in order to ensure that the trail will not cause significant impacts on farm practices for purposes of the farm impacts test at ORS 215.296(1). Such a condition is also not clear and objective for purposes of ORS 215.296(2). *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a local code provision requires a finding that "[t]he proposed use is appropriate, considering the adequacy of public facilities and services existing or planned for the area affected by the use," and where the record includes undisputed expert testimony that fire and emergency access are inadequate unless a proposed trail and its bridges are built to certain standards, it is insufficient for the local government to state, without any supporting evidence, that it is "feasible" to design the trail and bridges to provide adequate fire and emergency access and then punt all determinations regarding trail and bridge design to a subsequent master planning process. *Van Dyke v. Yamhill County,* 80 Or LUBA 348 (2019).

1.4.1 Administrative Law – Adequacy of Findings – Generally. References to a staff report during oral deliberations and a city councilor's motion "to accept staff's recommendation" are insufficient to incorporate the staff report into the final decision where the city council does not

orally approve or adopt the staff report and where the final decision does not mention the staff report, and the city may therefore not rely on the staff report in order to satisfy the requirement that its decision contain adequate findings. *Niederer v. City of Albany,* 79 Or LUBA 305 (2019).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a county determines that a property qualifies for a forest template dwelling under ORS 215.750 because at least three dwellings existed on surrounding lots or parcels on January 1, 1993, based on a statement of the applicant, a recollection of the prior owner of one of the surrounding dwellings, an email from a contractor who worked on one of the surrounding dwellings, and a statement by the tax assessor that its records showed a dwelling in place on January 1, 1993, but where LUBA concludes that the county erred in accepting the email, where LUBA cannot determine whether the county would have reached the same conclusion without the email, and where the county's findings failed to address evidence that the tax rolls indicate existence of the dwelling as of July 1993 rather than January 1993, LUBA will remand for the county to adopt adequate findings. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Absent a legal definition for how the center point of a property must be established for purposes of determining whether it qualifies for a forest template dwelling under ORS 215.750, a county errs by not explaining the basis for its conclusion that its chosen method is the most appropriate and by not addressing opponents' arguments challenging that method. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

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1.4.1 Administrative Law – Adequacy of Findings – Generally. When a county has evaluated facts, evidence, and argument in the record in reaching its decision and adopted findings in support of its decision, it is not necessary for the county to incorporate specific documents as findings. *Wachal v. Linn County*, 78 Or LUBA 227 (2018).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A single set of findings may be relied on to address more than one similar comprehensive plan goal or policy, so long as the findings are adequate to show the proposal complies with both standards. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

1.4.1 Administrative Law – Adequacy of Findings – Generally. There is no general requirement that a city council discuss the evidence it chooses not to rely on and a city council's failure to discuss opposing evidence does not necessarily mean the city council did not consider that opposing evidence. *Evans v. City of Bandon*, 74 Or LUBA 418 (2016).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A local government's decision that identifies by subject the portion of a staff report that is incorporated as findings in the final decision is adequate to incorporate the findings section of the staff report as findings. *Altamont Homeowners' Assoc., Inc. v. City of Happy Valley*, 73 Or LUBA 126 (2016).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A finding that the decision maker "reviewed" a number of documents is not sufficient to adopt or incorporate those documents as findings to support a decision. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Absent LCDC rule-making, whether proposed industrial use of rural land is rural or urban in nature requires consideration of the factors described in case law. Where a county takes a reason exception to allow a wide range of unspecified industrial uses without considering the factors described in case law, the county's bare finding that the proposed amendments do not authorize urban use of rural land is inadequate and conclusory. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

1.4.1 Administrative Law – Adequacy of Findings – Generally. If a local government's decision fails to adequately identify the documents incorporated as findings, or attempts to incorporate documents that do not include findings, the purported incorporation of those other documents and materials fails, and the city may not rely on those documents to defend against a specific inadequate findings challenge. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

1.4.1 Administrative Law – Adequacy of Findings – Generally. If a local government attempts to incorporate as findings documents that are not fairly described as findings, those documents may not be relied upon as findings to support the decision. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A local government's incorporation of "any attachments or exhibits" to other incorporated documents that does not adequately describe those attachments or exhibits, and essentially attempts to sweep into the decision a number of documents that do not function as findings, is overbroad and fails. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A local government's incorporation of documents that are not adequately described by date, title, or subject in either the description included in the decision, or in the record itself, fails and the documents will not be

considered in resolving an inadequate findings challenge. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Findings are inadequate to explain why fire protection standards are met where the findings do not address whether the standards are met or why the evidence in the record supports a conclusion that it is feasible to meet the standards, particularly where the only evidence in the record is that the fire district is concerned about wildfires and will perform the required inspections. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Findings are inadequate to explain why the hearings officer concluded that a proposed aggregate operation will not force a significant change in or significantly increase the cost of accepted farming practices where the decision fails to consider whether the standard is met but rather relies on a determination that a haul road that opponents argue will force a significant change in farming practices was authorized in previous decisions. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Remand is necessary where a city deletes two refinement plan policies requiring protection of existing manufactured dwelling parks, and zones the parks to make them non-conforming uses, but the findings do not explain how the amendments are consistent with a comprehensive plan policy requiring conservation of existing affordable housing. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Findings that satisfaction of DEQ noise standards is feasible based on measures identified in a noise study as a combination of noise control measures that might not utilize a noise attenuation berm are adequate and are supported by substantial evidence in the record, where a noise berm is not categorically precluded or required as a mitigation measure and the noise study specifically left open the possibility that other measures without a noise berm could satisfy the standard. *Protect Grand Island Farms v. Yamhill County*, 67 Or LUBA 278 (2013).

1.4.1 Administrative Law – Adequacy of Findings – Generally. In approving a final planned unit development (PUD), where the hearings officer defers for a second time a determination that a tentative PUD complies with geotechnical requirements to subsequent building and site development permit stages, such a deferral runs afoul of *Gould v. Deschutes County*, 216 Or App 150, 162, 171 P3d 1017 (2007), because those development stages are not infused with the same participatory rights as the Tentative PUD approval phase or the Final PUD approval phase. *Willamette Oaks LLC v. City of Eugene*, 64 Or LUBA 24 (2011).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A petitioner at LUBA who alleges a land use decision should be remanded because a local government failed to address a relevant issue must (1) identify the issue raised, (2) demonstrate the issue was adequately raised, and (3) establish the issue is relevant to applicable approval criteria in some way. A petitioner who simply refers to 86 pages of single spaced written argument below fails to carry that burden. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

1.4.1 Administrative Law – Adequacy of Findings – Generally. General findings that address some of the impacts of a proposal on the surrounding neighborhood are inadequate to explain how the proposal satisfies specific conditional use criteria that apply to the proposal. *Poe v. City of Warrenton*, 63 Or LUBA 20 (2011).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A local government does not impermissibly defer making a determination of compliance with an applicable approval criterion to a future proceeding when it imposes a condition of approval that requires a 12-foot-wide multi-use path to be constructed in a location within a 45-foot easement area to be determined in the future by the applicant, but rather allows an applicant the flexibility to construct the path in the location within that easement area that minimizes adverse impacts to a protected riparian area. *League of Women Voters v. City of Corvallis*, 63 Or LUBA 432 (2011).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A zoning ordinance PUD Master Plan modification criterion that requires that the modification not have significant additional impacts on surrounding properties applies at the time the PUD Master Plan is modified, and the required finding that the modification will not have such impacts must be made at the time the PUD is modified and that finding cannot be deferred to a later date even though the precise nature of development may be better known at that later date. *Athletic Club of Bend v. City of Bend*, 63 Or LUBA 467 (2011).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A petitioner's argument that the city failed to comply with a transportation system plan policy that requires that the city hold a public meeting with affected property owners before selecting a roadway alignment provides no basis for reversal or remand, where the city adopted findings that the cited policy does not apply to the kind of decision on appeal and was satisfied even if it did apply, and petitioner fails to assign error to or otherwise challenge those findings. *Reeves v. City of Wilsonville*, 62 Or LUBA 142 (2010).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a petitioner does not challenge a hearings officer's finding that petitioner's use of his property for a wedding event required review and county approval under one code provision, and petitioner does not allege his wedding event received county review and approval, petitioner's arguments that the use could have been approved under a different code provision provide no basis for reversal or remand. *Reed v. Jackson County*, 61 Or LUBA 253 (2010).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where there is (1) a lack of evidence that the additional parking spaces that would be required under a legislative land use regulation amendment will materially increase the total number of vehicle trips, (2) some evidence that the legislative amendment will not cause trips to increase materially, and (3) petitioner does not identify which transportation facilities it believes will be significantly affected by the amendment, a local government's brief finding that the legislative amendment will not significantly affect transportation facilities is adequate. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A local government's legislative land use regulation amendment that increases the required number of off-street parking spaces for multiple family dwellings could impact the local government's plan to comply with OAR 660-012-0045(5)(c)(A), which requires that the local government have a parking plan which "[a]chieves a 10% reduction in the number of parking spaces per capita in the MPO." Where such a legislative land use decision is not supported by findings that address OAR 660-012-0045(5)(c)(A), the decision must be remanded. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A mitigation plan that is submitted to comply with a destination resort approval standard that requires that destination resorts employ mitigation measures to ensure "no net loss of wildlife" is inadequate where that mitigation plan proposes off-site mitigation and the location of the 4,501 acres that provide the needed mitigation, the nature of the habitat on those 4,501 acres, and the particular mix of mitigation measures that will be employed on those 4,501 acres are all unknown. Those details must be supplied at a stage where opponents still have a meaningful opportunity to challenge the adequacy of the proposed mitigation plan. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A finding that a proposed stormwater drainage facility complies with applicable criteria in the city's Stormwater Master Plan is inadequate, where the findings do not identify the "criteria" in the Master Plan or explain why they are satisfied. *Soares v. City of Corvallis*, 56 Or LUBA 551 (2008).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a petitioner does not explain why challenged findings are inadequate, but rather disagrees with the conclusion reached in those findings, petitioner's challenge to the findings will not be sustained. *Knapp v. City of Corvallis*, 55 Or LUBA 376 (2007).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Petitioner's argument that a finding is not supported by substantial evidence provides no basis for reversal or remand, where petitioner does not establish that the finding is required to address a relevant legal standard. *Meadow Neighborhood Assoc. v. Washington County*, 54 Or LUBA 124 (2007).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Demonstrating that a land use proposal satisfies relevant approval criteria, because there are "feasible solutions to identified problems" regarding those approval criteria, requires *some* explanation of what those feasible solutions are. If that explanation that explanation of feasible solutions is provided, it is an adequate substitute for a more direct or precise finding that the approval criterion is satisfied, and the choice among those feasible solutions can occur in a technical or administrative review process, without additional public hearings. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where an approval criterion requires a finding that the proposed land use "will be compatible with existing or anticipated uses in terms of size, building scale and style, intensity, setbacks, and landscaping," the local government must identify "existing or anticipated uses," describe those uses in the terms specified, describe the proposed land use in the terms specified, and then perform the required comparison

to determine if the proposed land use and existing or anticipated uses will be compatible. Where a city's decision does none of those things, the decision will be remanded. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a local code allows a non-farm dwelling only on land that is not predominantly composed of Class I through Class VI soils, and the property is composed predominantly of Class VI soils, a local government errs in finding that an application complies with that code provision. *Ott v. Lake County*, 54 Or LUBA 502 (2007).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A local government's conclusory finding that a sign plan complies with applicable criteria is not a basis for remand where the signage standards are clear and objective, and petitioners do not identify anything about the sign plan or the applicable standards that require more detailed discussion or findings. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a city council adopts a staff report as supporting findings and the staff report quotes the applicant's proposed findings verbatim, but inserts the words "applicant states" at the beginning of each finding, LUBA will reject a challenge that the findings are inadequate to express what the city council found where: (1) the findings are worded as findings, (2) the findings immediately follow the criteria the findings address, and (3) it is sufficiently clear from the decision that the city council intended to adopt the applicant's findings as its own. *Ettro v. City of Warrenton*, 53 Or LUBA 485 (2007).

1.4.1 Administrative Law – Adequacy of Findings – Generally. LUBA frequently analyzes findings challenges and evidentiary challenges separately and generally analyzes findings challenges first, because LUBA's resolution of the findings challenge frequently affects its resolution of the evidentiary challenge or makes it unnecessary to decide the evidentiary challenge. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where petitioners allege that certain findings supporting a land use decision are not supported by substantial evidence, but there are other unchallenged findings addressing the same criterion and it does not appear that the challenged findings are critical to the local government's decision, petitioners' challenge provides no basis for reversal or remand. *Neighbors 4 Responsible Growth v. City of Veneta*, 52 Or LUBA 325 (2006).

1.4.1 Administrative Law – Adequacy of Findings – Generally. City findings that there has been increased commercial development in the neighborhood and that traffic has increased on a nearby state highway and resulted in increased noise are sufficient to demonstrate compliance with a subjective "changed neighborhood conditions" rezoning criterion. *Jaffer v. City of Monmouth*, 51 Or LUBA 633 (2006).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where planning staff recommended findings and a planning commission recommendation appear in the record immediately behind a transcript of a city council motion to adopt an ordinance and the transcript

shows that the city council's decision was based on the planning commission recommendation and the staff's proposed findings, the city council's motion is sufficient to adopt the planning commission recommendation and staff proposed findings as findings in support of its decision. *Rhodes v. City of Talent*, 50 Or LUBA 415 (2005).

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

1.4.1 Administrative Law – Adequacy of Findings – Generally. Findings that conclude access is available to an adjoining road, but do not explain how the road may be accessed, are not supported by substantial evidence where all of the evidence cited to LUBA indicates that access is not possible. *Seaton v. Josephine County*, 47 Or LUBA 178 (2004).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Failure to adopt findings addressing a comprehensive plan policy requiring provision of preferential carpool and vanpool parking for new commercial uses is not a basis for remand, where the code leaves details of parking lot construction and striping to the city engineer at building permit review, the challenged decision requires the applicant to comply with all code parking requirements, and the petitioner offers no reason that the city engineer cannot require the applicant to provide carpool and vanpool parking as part of building permit review. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a non-duplicative plat name is a criterion for preliminary plat approval, a city does not err by granting preliminary plat approval without a plat name and imposing a condition of approval that the applicant submit a non-duplicative plat name prior to final plat approval. For such an approval criterion, it is at most harmless error that the city failed to find that it is feasible for the applicant to submit the required non-duplicative plat name. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Whether property with predominantly nonfarm soils should nevertheless be viewed as "other lands suitable for farm use" under a county code standard that replicates the Goal 3 definition of agricultural land, is governed by specific considerations. That a property may have been briefly used as an elk and deer holding facility is not one of the specified considerations. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

1.4.1 Administrative Law – Adequacy of Findings – Generally. There is no generally applicable rule that in approving a land use proposal a local government must find that the proposal complies with state permitting requirements or that it is feasible for the proposal to comply with state permitting requirements. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Findings that explain that a property's locational characteristics are ideal to support airport-related light industrial uses and that other properties located within city limits are not as well suited for those uses are adequate to

explain why an annexation is consistent with city annexation policies that require a demonstration that the annexation is "needed." *Just v. City of Lebanon*, 45 Or LUBA 162 (2003).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A hearings officer may rely on a staff memorandum to conclude an approval criterion is met, provided (1) the decision clearly identifies the staff memorandum relied upon; and (2) the memorandum adequately sets out the relevant approval criterion and explain the facts relied upon to reach the ultimate conclusion that the standard is satisfied. *Frazee v. Jackson County*, 45 Or LUBA 263 (2003).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Findings that do not address arguments made at the local level that the chosen study area is not reflective of the actual land use pattern of the area are not adequate to satisfy the stability standard set out in OAR 660-033-0130(4)(a)(D). *Frazee v. Jackson County*, 45 Or LUBA 263 (2003).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Testimony from fruit growers that a fruit processing facility provides a market for their fruit and, as a result, provides incentive to those growers to continue their agricultural operations and a condition of approval that requires the operator of the fruit processing facility to grow fruit on its property that will be processed at the facility is sufficient to establish that the proposed fruit processing facility will enhance the farming enterprises of the local agricultural community. *Hiebenthal v. Polk County*, 45 Or LUBA 297 (2003).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Remand to adopt specific findings addressing a local criterion requiring that comprehensive plan amendments be "in the public interest and will be of general public benefit" is not warranted where the findings and narrative text of the amendments make it abundantly clear that the local government believes that the amendments are in the public interest and will benefit the public. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A hearings officer's erroneous finding that land is currently employed for nursery stock production is harmless error, where petitioners do not establish that nursery stock production must precede issuance of a permit that is necessary to construct an accessory greenhouse. *Lorenz v. Deschutes County*, 45 Or LUBA 635 (2003).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A city's error in failing to applying an applicable criterion in the manner contemplated by an appellate decision is harmless if the city's alternative findings addressing the applicable criterion are consistent with the appellate decision and are adequate. *Robinson v. City of Silverton*, 44 Or LUBA 308 (2003).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A city's finding that none of the proposed units in a proposed 62-unit assisted living facility will have kitchen facilities and therefore each unit should not be considered an individual "housing unit" for the purposes of a housing density standard is inadequate, where there is evidence that administrative rules governing assisted living facilities require kitchen facilities in every unit, and the city's findings do not address those administrative rules. *Robinson v. City of Silverton*, 44 Or LUBA 308 (2003).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where the meaning of an approval standard is ambiguous and disputed during local proceedings, an unexplained conclusion that the standard is met is inadequate to supply the findings required by ORS 215.416(9). *Underhill v. Wasco County*, 43 Or LUBA 277 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A finding that a proposed Head Start program is not a school is inadequate, where it does not answer the relevant the question under the code, which is whether the proposed use is a "public building." *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a local approval criterion requires a finding that a proposed use will have a minimal adverse impact on surrounding uses compared to the impact of development permitted outright, a city may not limit its impact analysis to only one permitted use, where other permitted uses in the zone may have impacts similar to those of the proposed use. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a local approval criterion requires a finding that a proposed use will "preserve assets of particular interest in the community," a city council's finding that the proposed use does not satisfy the criterion is inadequate where the finding merely sets out a series of concerns about the proposed use without explaining why those concerns are "assets of particular interest" that the proposed use will not preserve. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A standard that imposes both an analytical requirement and an ultimate legal standard that public services be adequate to accommodate a proposed zone change is not satisfied by a conclusion that the ultimate legal standard is met, if the required analysis has not been conducted. *Fay v. City of Portland*, 43 Or LUBA 390 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A county's findings regarding the infeasibility of locating a radio transmission tower on either of two city-owned lots are adequate where the findings parallel an earlier memorandum in the record regarding one of the tax lots, and that earlier memorandum addresses the infeasibility of the other tax lot, notwithstanding the county's failure to recite specific aspects of the memorandum addressing the second tax lot. *Van Nalts v. Benton County*, 42 Or LUBA 497 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Read together with OAR 731-015-0075(7)'s express requirement for findings adequate to establish that a proposal complies with an affected local government's comprehensive plan, the OAR 731-015-0075(2) requirement for more extensive findings if the proposal requires comprehensive plan amendments cannot be interpreted to mean that only cursory findings are needed where no comprehensive plan amendments are required. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Findings that merely assert that a property is better suited for rural residential use than for farm use are inadequate to support a reasons exception under OAR 660-004-0020 and 660-004-0022. *DLCD v. Yamhill County*, 42 Or LUBA 126 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where it is unclear who would own a proposed "personal use airport" in an EFU zone, and whether the uses that the owner plans to make of the airport would be consistent with the uses allowed under ORS 215.283(2)(h), the owner must be identified and the county's findings must explain why it concludes that the proposed uses fall within the uses allowed with a personal use airport. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A city council finding that corrects a local appellant's citation to a city code provision provides no basis for reversal or remand where the correction has no effect on the city council's disposition of the merits of the local appellant's challenge. *Sattler v. City of Beaverton*, 41 Or LUBA 295 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A petitioner's challenge to a finding because it is more responsive to one code criterion than to another provides no basis for reversal or remand where the city's findings as a whole show that both criteria have been met. *Sattler v. City of Beaverton*, 41 Or LUBA 295 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a hearings official adopts detailed findings concerning the nature of the "surroundings" in applying a local approval criterion that requires that a proposed use be compatible with its surroundings, geographic ambiguity about the outer reach of the "surroundings" that were considered by the hearings official will provide no basis for remand, where petitioners identify no uses that they believe fall within the relevant "surroundings" and were not considered by the hearings official. *Knight v. City of Eugene*, 41 Or LUBA 279 (2002).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where petitioner raises issues regarding whether a proposed site design complies with potentially applicable approval criteria, the local government's decision must respond by either (1) determining that the cited provisions are not applicable approval criteria or (2) demonstrating that the proposal complies with such provisions. *Elliott v. City of Redmond*, 40 Or LUBA 242 (2001).

1.4.1 Administrative Law – Adequacy of Findings – Generally. In addressing an "adequate public facilities" zone change criterion, a county is not required to adopt findings specifically addressing every use allowed in the proposed commercial zone; more general findings may suffice. Where no party raises any issue concerning potential uses that may place more stringent demands on public facilities than the proposed use, the county may limit its consideration to the proposed use. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a finding incorporates findings from elsewhere in the decision to address an approval criterion, but refers to a paragraph number that is not included in the decision, that error provides no basis for reversal or remand

where it is obvious which findings the reference intended to incorporate. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A city's finding that the portion of a dwelling exceeding a code-mandated height limit adversely affects the ocean view of a neighboring property is supported by substantial evidence where the record includes photographs, a videotape and drawings that show the subject dwelling blocking the view of ocean water from the neighboring property, notwithstanding that the photographs, videotape and drawings show that the subject dwelling blocks only a tiny sliver of ocean water view. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A local code criterion that requires a county to consider comments and recommendations of adjacent and vicinity property owners does not require that the county adopt findings that address every comment or recommendation. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

1.4.1 Administrative Law – Adequacy of Findings – Generally. In reviewing findings adopted to support the imposition of exactions, LUBA first determines if any identified impacts or benefits are not relevant for the purposes of the rough proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). LUBA then looks at whether the remaining findings adequately quantify the benefits to the development or the impacts of the development on public facilities, and whether those findings suffice to demonstrate that the city's exactions are "roughly proportional" to those benefits and impacts. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

1.4.1 Administrative Law – Adequacy of Findings – Generally. In some cases, the impacts resulting from the development may be so great, and the exactions imposed so small, that it is readily apparent without additional explanation that the exactions are roughly proportional to the expected impact. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

1.4.1 Administrative Law – Adequacy of Findings – Generally. The impacts resulting from the approval of two residential parcels are not so great as to make it self-evident that the imposition of a 20-foot dedication of right-of-way requirement is roughly proportional to the impacts of the proposed development. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Unless a local government makes some effort to quantify the benefits accruing to a particular development, those benefits will be of limited assistance in applying the rough proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a zoning ordinance standard requires that the transportation system be capable of serving the proposed and existing uses and the findings addressing that standard focus exclusively on the relatively small traffic generating impact of the proposal without ever addressing the adequacy of the transportation

system, the findings are inadequate to demonstrate compliance with the standard. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Findings that express confidence that particular existing zoning districts could be applied to implement a conditional plan map amendment are legally irrelevant, where the decision to amend the zoning map to implement the new plan map designation is deferred to a later date. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a party argues that the decision is supported by substantial evidence, but fails to identify where in the record that evidence is located, LUBA will not search the record for such evidence. *DLCD v. Wallowa County*, 37 Or LUBA 105 (1999).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where the local government's findings are based entirely on a faulty analysis of the evidence, LUBA will remand the decision to permit the local government to reweigh and review the evidence and adopt findings consistent with a correct analysis. *Johnson v. Clackamas County*, 37 Or LUBA 73 (1999).

1.4.1 Administrative Law – Adequacy of Findings – Generally. In considering challenges to committed exception findings the question of whether the local government adopted the required findings addressing the characteristics of adjacent lands and the relationship between the exception area and adjacent lands is distinct from the question of whether the adopted findings demonstrate that uses allowed by Goal 3 are impracticable on the subject property. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Under OAR 660-004-0028(6)(c)(A), conflicts with rural residential development in exception areas created pursuant to applicable goals cannot be used to justify a committed exception on the subject property. A finding that a majority of nearby parcels were created before the statewide planning goals is insufficient to demonstrate compliance with this requirement. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

1.4.1 Administrative Law – Adequacy of Findings – Generally. The requirement in OAR 660-004-0028(6)(c)(B) that "several contiguous undeveloped parcels" under one ownership shall be considered as one farm or forest operation does not require that a contiguous developed parcel be considered as part of contiguous farm operation. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

1.4.1 Administrative Law – Adequacy of Findings – Generally. OAR 660-004-0028 does not require a finding that the characteristics of the proposed exception area are sufficient in and of themselves to commit the property to nonresource use. All factors in the rule must be considered, including the characteristics of the adjacent lands. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999). (1999)

1.4.1 Administrative Law – Adequacy of Findings – Generally. A county's conclusory finding that goals protecting housing are not violated by rezoning rural residential property for industrial use because proximity of the property to commercial and industrial uses and an interstate highway

makes use of the property for rural residential uses impracticable is inadequate, where the record includes no evidence of conflicts with those uses that might make rural residential uses impracticable. *James v. Josephine County*, 35 Or LUBA 493 (1999).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a county's land use decision approving a forest template dwelling consists of a single-page form that contains blanks for the subject property's legal description, zoning, size and the names and addresses of the applicant and any representatives plus signature lines, the decision is not supported by adequate findings. *Krieger v. Wallowa County*, 35 Or LUBA 305 (1998).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A city's failure to adopt findings specifically addressing a plan criterion is not error where the substance of the plan policy is addressed in the city's findings. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998) (1998).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Findings concerning the size and density of a proposal which simply cite to assessor's records as the basis for the findings are not supported by substantial evidence, where the record does not include the assessor's records or any other evidence that supports the findings. *Johnston v. City of Albany*, 34 Or LUBA 32 (1998).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A finding need not include an express interpretive statement about the meaning of a code standard as long as the local government's interpretation of the standard can be discerned from the way the standard is applied. *Port Dock Four, Inc. v. City of Newport*, 33 Or LUBA 613 (1997).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where visual impact, noise and safety issues are relevant to compliance with applicable standards and are raised by petitioner below, the local government must adequately address those issues, and conclusory findings unsupported by substantial evidence are inadequate. *Port Dock Four, Inc. v. City of Newport*, 613 (1997).

1.4.1 Administrative Law – Adequacy of Findings – Generally. ORS 197.835(11)(b) allows LUBA to overlook minor defects in local government findings when substantiating evidence makes the local government's decision obvious or inevitable; it does not authorize LUBA to disregard the local government's actual findings or to read into those findings language that is not stated. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Under ORS 197.835(11)(b), LUBA is authorized to review the findings and conclusions made by the governing body and correct minor oversights or omissions; however, the county's unexplained and unsupported determination of compliance with applicable criteria is not a minor oversight, and LUBA will not analyze the record and substantiate the county's conclusions. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Contrary to the contention that limited land use decisions require only cursory findings, ORS 227.173(2), which states the requirement for findings in support of a city permit approval, makes no distinction between land

use decision findings and limited land use decision findings. *Design Home Construction v. City of Silverton*, 32 Or LUBA 452 (1997).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where evidence identified in the city's brief clearly supports a finding that a proposed development will not significantly affect a transportation facility, LUBA will affirm that part of the city's decision under ORS 197.835(9), notwithstanding the city's failure to make the required finding. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where the local code requires that certain "factors" be considered, a finding that the subject property is located in a school district is not responsive to the factor "school district service capability," because the finding says nothing about the capability of the school district to serve the proposed development. *McNamara v. Union County*, 28 Or LUBA 396 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. In addressing a code requirement concerning visual impacts, a local government is not required to establish that every condition imposed will mitigate all visual impacts. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a local government adopts a number of different findings addressing a code standard requiring protection of the visual character of the area, and petitioners challenge some but not all of those findings, but make no attempt to explain why the findings taken as a whole are inadequate, petitioners provide no basis for reversal or remand. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where petitioners challenge planning commission findings addressing a standard requiring that the proposed use not force a significant change in farm or forest practices on adjoining lands, but do not challenge findings adopted by the county court which go beyond the planning commission findings, petitioners fail to provide a basis for reversal or remand. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A local government decision maker may adopt staff-prepared findings as its own. That the planner who prepared the findings later advised the decision maker the findings are erroneous does not establish that the findings in fact are erroneous. *Gettman v. City of Bay City*, 28 Or LUBA 116 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A planning director's decision that a development has satisfied the requirements of local ordinances is inadequate for review if it does not identify which provisions of the ordinances it addresses, does not set out the facts relied on, and does not relate the facts to the ordinance provisions addressed. *Hart v. Jefferson County*, 27 Or LUBA 612 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A finding that simply states the farm management plan submitted by an applicant for farm dwelling approval meets the local

code's definition of "commercial farm" is impermissibly conclusory. *Kunze v. Clackamas County*, 27 Or LUBA 130 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where petitioners contend the challenged decision does not demonstrate compliance with an applicable comprehensive plan policy, but fail to explain how the findings adopted by the local government addressing that policy are inadequate, LUBA will reject their contention. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Findings which simply discuss public facilities and how they will be provided are inadequate to demonstrate compliance with a code requirement that a proposed planned unit development have "no greater demand on public facilities and services than other authorized uses for the land." *DLCD v. Crook County*, 26 Or LUBA 478 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where findings do not directly address the question of the level of public facilities necessary to serve a proposed 120-lot planned unit development on EFU-zoned land, those findings are inadequate to demonstrate compliance with plan policies implementing Goals 11 and 14, which require that public facilities be provided on such rural land "at levels appropriate for rural use only and should not support urban uses." *DLCD v. Crook County*, 26 Or LUBA 478 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where petitioners contend the challenged decision does not demonstrate compliance with an applicable approval standard, and the decision does not interpret the standard sufficiently for LUBA to review that interpretation and consider petitioners' arguments, LUBA will remand the decision to the local government. *Bottum v. Union County*, 26 Or LUBA 407 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a local government fails to adopt findings identifying and applying applicable criteria, it is not possible for LUBA to perform its review function. *Laine v. City of Rockaway Beach*, 26 Or LUBA 417 (1994).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where petitioners contend the local government failed to adopt findings addressing standards that appear to be relevant to the challenged decision, and the challenged decision includes only a conclusory statement that applicants have adequately demonstrated compliance with such standards, LUBA will remand the decision for lack of adequate findings. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a comprehensive plan provides that a four minute response time is critical for certain types of emergencies, a conclusion that a three to five minute response time for emergency vehicles is adequate to comply with the plan is inadequate to establish compliance with the plan. *Langford v. City of Eugene*, 26 Or LUBA 60 (1993).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Findings supporting approval of a PUD that determine there are solutions available to various landslide, drainage and related

problems affecting the subject property, and that those solutions are possible, likely and reasonably certain to succeed, are adequate to establish that the local government did not improperly defer compliance with relevant PUD standards. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

1.4.1 Administrative Law – Adequacy of Findings – Generally. An expression of belief that a local code standard imposing a specific decibel limitation will not be violated is not an adequate finding of compliance with that standard. Expressions by the applicant's attorney that noise generated by the proposed use will not be excessive or violate the standard are not substantial evidence that the standard will be met. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Local code requirements that floodplain alterations for a driveway be in the public interest and meet some public need or public convenience are satisfied by determinations that (1) there is a public need for, and public interest in, the provision of housing; (2) the subject property is zoned for residential use; and (3) there is a need for, and a public interest in, the provision of access to the property to enable residential use. *Clarke v. City of Hillsboro*, 25 Or LUBA 195 (1993).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Allegations that amount to no more than a disagreement with the ultimate conclusion reached by the local government in its findings, provide no basis for reversal or remand of the challenged decision. *McGowan v. City of Eugene*, 24 Or LUBA 540 (1993).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Adequate findings enable participants in local government land use proceedings to understand the basis for the local government's decision and to determine whether an appeal is warranted. *Gonzalez v. Lane County*, 24 Or LUBA 251 (1992).

1.4.1 Administrative Law – Adequacy of Findings – Generally. Where a local government adopts findings specifically addressing an approval standard, petitioners may not fail to challenge the adequacy of the local government's findings, or their evidentiary support, and simply allege reasons why they believe the standard might be violated. *Mercer v. Josephine County*, 23 Or LUBA 608 (1992).

1.4.1 Administrative Law – Adequacy of Findings – Generally. A local code requirement for findings of preliminary PUD or subdivision plan feasibility does not require the kind of certainty or supporting evidence that may ultimately be required for approval of final construction plans. *Bartels v. City of Portland*, 23 Or LUBA 182 (1992).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. According to the "law of the case" pursuant to *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), matters conclusively resolved before LUBA cannot be relitigated in subsequent appeals of subsequent decisions on the same matter. However, that principle is not violated where (1) LUBA remands to the county to adopt new findings, based on substantial evidence, and (2) on remand, the county accepts new evidence and adopts new findings, as LUBA directed. Where LUBA's original decision discussed certain requirements to provide guidance and framework on remand, and some of the county's findings are still insufficient on remand does not mean that the county violated the "law of the case." *Richards v. Jefferson County*, 79 Or 171 (2019).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. On remand, where LUBA instructed the county to resolve whether the project applicant's farm operation qualifies as a "commercial farming operation" for purposes of applying for an accessory farm dwelling for a relative, LUBA established that certain findings and evidence are necessary to establish compliance with OAR 660-033-0130(9). The county's findings fall short of establishing that the applicant's farm operation qualifies as a "commercial farming operation," because it is an undefined term, and it is the county's obligation to attempt to articulate the thresholds that separate a "commercial" from a non-commercial farming operation, and to determine those thresholds in the first instance. Although the county has some discretion to determine the thresholds, that determination will necessarily constitute a mixed question of fact and law, subject to LUBA's review for legal error and evidentiary sufficiency. *Richards v. Jefferson County*, 79 Or 171 (2019).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. The focus of OAR 660-033-0130(9) and county code that implements it regarding whether the "farm operator * * * continue[s] to play the predominant role in the management and farm use of the farm," is on the farm operator's involvement in farm operations *on the subject property*, not on off-farm businesses that may relate to the farm operation. The commercial farm operator's involvement in off-farm businesses do not help establish any element of OAR 660-033-0130(9). The commercial farm operator's involvement in off-farm businesses are relevant to establishing the elements of OAR 660-033-0130(9) only in so much as the time spent on those businesses and away from the farm operation might undermine the claim that the farm operator will continue to play the "predominant role" in the farm operation and requires assistance in running the farm operation. *Richards v. Jefferson County*, 79 Or 171 (2019).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where a local government adopts independent findings and applies a different substantive analysis for two separate approval criteria, but relies on the same evidence in concluding that those criteria are not met, a petitioner does not effectively challenge the findings for one of those criteria by challenging the findings for the other so as to defeat an argument that it has failed to challenge all valid, alternative, and independent bases for denial. *Himmelberger v. City of Portland*, 79 Or LUBA 367 (2019).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. When and if a board of county commissioners adopts a revised staff report as its findings, it must identify the applicable standards, the facts used to meet those standards and explain how those facts led to the conclusion that the applicable criteria has been met. Simply adopting the report or incorporating

the applicant's burden of proof statement is not sufficient to serve as support for adequate findings. *VanSickle v. Klamath County*, 78 Or LUBA 56 (2018).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. When a county has evaluated facts, evidence, and argument in the record in reaching its decision and adopted findings in support of its decision, it is not necessary for the county to incorporate specific documents as findings. *Wachal v. Linn County*, 78 Or LUBA 227 (2018).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A city council's findings that a master plan design guideline to "[d]evelop buildings that are appropriately scaled to the neighborhood," is met by a proposal to build a seven-story apartment building with a five-story wing rather than a four-story wing, representing a proposal to increase the building height by 10 feet, where surrounding buildings range in height from three to seven stories, is not in error. Such a finding is sufficient to satisfy city's local ordinance which requires a finding that under a proposed modification "[t]he resulting development will better meet the applicable design guidelines," and that "[o]n balance the proposal will be consistent with the purpose of the standard modified" where the 10-foot modification represents a trade-off for a clipped corner which allows for increased pedestrian access and sunlight into a proposed public square. *Michaelson v. City of Portland*, 77 Or LUBA 504 (2018).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A city council's comparative approach of evaluating all design changes related to a proposed development modification at once to determine whether the resulting development better meets applicable guidelines, is not error. The nature of design review often involves tradeoffs and balancing between design features to achieve a more optimal overall design under the applicable guidelines. *Michaelson v. City of Portland*, 77 Or LUBA 504 (2018).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. LUBA will deny an assignment of error that argues that an application fails to comply with provisions of a neighboring city's municipal code where the provisions of the neighboring city's code do not apply to the application. *Martin v. City of Central Point*, 74 Or LUBA 312 (2016).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. To address a historic design standard requiring that new construction be "compatible with the appearance and character of the historic district," the decision-maker is not required to reference the description of the appearance and character of a historic district included in the nomination to the federal historic register, but that description is a relevant and convenient source. Because the decision-maker must base the compatibility analysis on something, unless the decision-maker duplicates some of the descriptive work in the federal register nomination, there may be no practical substitute for considering the federal register nomination. *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A finding that development will have no "significant" adverse impacts on estuarine resources does not indicate that the decision maker misunderstood the applicable test under Goal 16, Implementation Requirement 1, which is focused on evaluation of "potential" adverse impacts, where other

findings address the potential for adverse impacts. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Findings are inadequate to explain why fire protection standards are met where the findings do not address whether the standards are met or why the evidence in the record supports a conclusion that it is feasible to meet the standards, particularly where the only evidence in the record is that the fire district is concerned about wildfires and will perform the required inspections. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Findings are inadequate to explain why the hearings officer concluded that a proposed aggregate operation will not force a significant change in or significantly increase the cost of accepted farming practices where the decision fails to consider whether the standard is met but rather relies on a determination that a haul road that opponents argue will force a significant change in farming practices was authorized in previous decisions. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. In approving a final planned unit development (PUD), where the hearings officer defers for a second time a determination that a tentative PUD complies with geotechnical requirements to subsequent building and site development permit stages, such a deferral runs afoul of *Gould v. Deschutes County*, 216 Or App 150, 162, 171 P3d 1017 (2007), because those development stages are not infused with the same participatory rights as the Tentative PUD approval phase or the Final PUD approval phase. *Willamette Oaks LLC v. City of Eugene*, 64 Or LUBA 24 (2011).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A finding that a proposed stormwater drainage facility complies with applicable criteria in the city's Stormwater Master Plan is inadequate, where the findings do not identify the "criteria" in the Master Plan or explain why they are satisfied. *Soares v. City of Corvallis*, 56 Or LUBA 551 (2008).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Demonstrating that a land use proposal satisfies relevant approval criteria, because there are "feasible solutions to identified problems" regarding those approval criteria, requires *some* explanation of what those feasible solutions are. If that explanation that explanation of feasible solutions is provided, it is an adequate substitute for a more direct or precise finding that the approval criterion is satisfied, and the choice among those feasible solutions can occur in a technical or administrative review process, without additional public hearings. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. When a code provision regarding riparian corridors could plausibly be required to be satisfied at the stage of the challenged decision or at a later stage, the issue was raised below, and the decision does not address the issue, the decision must be remanded for the local government to address the issue. *Coquille Citizens for Resp. Growth v. City of Coquille*, 53 Or LUBA 186 (2006).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A county's interpretation that a comprehensive plan policy, which implements Statewide Planning Goal 7 (Natural Disasters and Hazards), requires regulation of development in known areas potentially subject to natural disasters and is aimed at reducing risks to life and property that are *caused by natural hazards*, is not applicable in the context of a determination whether development is appropriate in a beaches and dunes area, pursuant to a comprehensive plan policy that implements Statewide Planning Goal 18 (Beaches and Dunes), which is aimed at reducing impacts that may be *caused by the proposed development*. *Borton v. Coos County*, 52 Or LUBA 46 (2006).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Findings supporting a variance approval are not inadequate merely because they do not quote *verbatim* the applicable approval criteria; petitioners must explain how the "summary" of the applicable provision makes the findings inadequate or how the city misapplied the criteria. *Spooner v. City of Salem*, 51 Or LUBA 237 (2006).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A finding that land is not subject to Goal 3 is inadequate, where it does not address the definition of "agricultural land" at OAR 660-033-0020(1) or explain why land with Class III agricultural soils is not "agricultural land" under that definition. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Findings supporting a zone change are inadequate where they fail to address portions of the applicable approval criterion because the findings misquote the applicable zone change approval criterion, omitting language that refers to needed housing and requires that added emphasis be given to the comprehensive plan's housing policies. *Premier Development v. City of McMinnville*, 50 Or LUBA 666 (2005).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where the relevant legal standards mandate a regimented step-by-step analysis, and the findings adopted in support of a decision to deny a permit under those legal standards are brief and do not come close to providing the level of detail that is required to address the legal standards, remand is required. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where notice of the hearing on an application for a variance from required setback lists as an approval criterion the code provision from which applicants seek the variance, the code provision does not thereby become an applicable approval criterion, and the county's failure to adopt findings addressing it is not a basis for reversal or remand. *Papadopoulos v. Benton County*, 48 Or LUBA 600 (2005).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where a planning department finds that a proposed home occupation would violate two of twelve home occupation standards and following a local appeal a hearings official finds the proposed home occupation would not violate those two standards, assignments of error in a LUBA appeal of the hearings official decision that allege the home occupation would violate other standards that neither the planning department nor the hearings official considered provide no basis for reversal or remand,

where the petitioners cite no legal authority that would compel the hearings official to render a complete adjudication concerning all home occupation standards. *Revoal v. City of Eugene*, 47 Or LUBA 136 (2004).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A blanket finding that "many" of the plan policies cited by opponents are not applicable mandatory approval criteria is inadequate to provide a reviewable interpretation or determination that a particular plan policy is inapplicable, especially when the decision imposes conditions that appear to be directed at the policy's requirements. *Chin v. City of Corvallis*, 46 Or LUBA 1 (2003).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A city's findings are adequate where they address each of the applicable criteria in its tree removal ordinance and explain why the certified arborist's report submitted by the subdivision applicant satisfies each of those criteria. *Miller v. City of Tigard*, 46 Or LUBA 536 (2004).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where a city interprets a site design approval criterion as not requiring a demonstration that adequate facilities are available to serve the proposed development, the city does not err in failing to adopt findings to address arguments presented by opponents that facilities are not adequate. *Durham v. City of Philomath*, 45 Or LUBA 648 (2003).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Given the similarity between a code provision requiring preservation of "existing landscape features and amenities" "to the greatest extent possible," and another code provision requiring preservation of "significant trees and vegetation" " to the maximum extent practicable," a city does not err in interpreting one provision to be satisfied by findings addressing the other. *Bagnell v. City of Corvallis*, 44 Or LUBA 284 (2003).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A proposal to swap plan designations for two portions of a single parcel does not require separate findings addressing each portion, where the applicable plan amendment criteria do not necessarily require separate findings, and petitioner does not identify any meaningful difference between the two areas that would require separate consideration. *Excelsior Investment Co. v. City of Medford*, 44 Or LUBA 553 (2003).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where a county considers dust impacts from mining that may have an impact on neighboring residential uses, those dust impacts may form a basis for denial only if the impacts violate applicable Department of Environmental Quality air quality standards. *Morse Bros., Inc. v. Linn County*, 42 Or LUBA 484 (2002).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A finding that recreational zoning may be applied to land that is subject to a physically developed exception for industrial uses because some of the uses allowed in an industrial zone may also be allowed in a recreation zone is not responsive to OAR 660-004-0018(2)(a), which requires that the zoning

designation must "limit uses, density and public facilities and services to those which are the same as the *existing* land uses on the exception site." *Doty v. Coos County*, 42 Or LUBA 103 (2002).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Findings that conclude that a proposed recreational zoning designation will not permit urban uses on rural land because (1) the anticipated use of the property is allowed in the county's recreation zone, which is acknowledged as a rural zone, and (2) density is limited to the land's "carrying capacity," are inadequate to demonstrate compliance with OAR 660-004-0018(2)(b)(A) because acknowledgement of a zone as being generally in compliance with Goal 14 does not mean that all uses that may be approved under that zone are necessarily rural in nature. *Doty v. Coos County*, 42 Or LUBA 103 (2002).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Findings that assume that a proposed recreation use will be less intensive than the former industrial uses but do not address the diverse impacts that could result from recreational use of the property are inadequate to satisfy OAR 660-004-0018(2)(b)(B) and (C) because the uses are dissimilar and result in different impacts on adjacent and nearby resource land. *Doty v. Coos County*, 42 Or LUBA 103 (2002).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where a county considers the impacts that a proposed rezoning would have on inventoried Goal 5 resources, and concludes that the existing Goal 5 protection program continues to be adequate to protect those resources, the county's conclusion satisfies Goal 5. *Doty v. Coos County*, 42 Or LUBA 103 (2002).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Findings that address certain rural residential locational criteria in the county's comprehensive plan are inadequate to address the specific requirements of OAR 660-004-0028(6), where the locational criteria do not implement the rule and bear no obvious relationship to the rule's requirements. *Friends of Linn County v. Linn County*, 41 Or LUBA 358 (2002).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. LUBA will remand a decision denying an application to place and remove fill in a riparian zone, where the findings do not independently address the relevant standards and it is not clear what evidence the hearings officer relied on to apply the standards. *Griffin v. Jackson County*, 41 Or LUBA 159 (2001).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Petitioners' argument that a particular standard is not applicable to their application provides no basis for reversal or remand where it is obvious from the decision that the decision maker did not consider or apply that standard. *Griffin v. Jackson County*, 41 Or LUBA 159 (2001).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A city's interpretation that a state highway is not subject to city road design standards for streets providing access to a proposed subdivision is not clearly wrong, and is entitled to deference under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Costanzo v. City of Grants Pass*, 40 Or LUBA 471 (2001).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A city does not err in determining that a code provision requiring that roads providing access to a proposed subdivision be paved to city standards is satisfied by a state highway that is paved to state standards. *Costanzo v. City of Grants Pass*, 40 Or LUBA 471 (2001).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where a city code requires that alternative local access designs be examined and that the design chosen "best balances needs for economy, safety, efficiency and environmental compatibility," and the city's decision includes findings addressing specific environmental, traffic and safety impacts of the alternative access designs and explains why the chosen design avoids those impacts, the findings are adequate to address the criterion. *Costanzo v. City of Grants Pass*, 40 Or LUBA 471 (2001).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where a variance criterion requires that a variance conform to the comprehensive plan, a city's finding that a variance will promote in-fill and higher residential density is insufficient to demonstrate that the variance, allowing a lot to be divided into two lots, satisfies that criterion where the findings identify no comprehensive plan provisions encouraging in-fill and higher residential density. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where a county code provision specifically requires findings documenting whether there is a need for additional land for a particular purpose and whether the timing is appropriate to rezone land for that purpose, but the county interprets the code provision to not require documentation of the need and timing elements in a particular instance, that interpretation is inconsistent with the express language of the provision and "clearly wrong." *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A local code criterion that requires a county to consider comments and recommendations of adjacent and vicinity property owners does not require that the county adopt findings that address every comment or recommendation. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where the county approves a golf course expansion without adopting findings addressing a comprehensive plan provision that prohibits approval of urban uses outside urban growth boundaries, LUBA will remand the decision so that the county can adopt findings addressing whether the subject golf course is "urban" and whether the proposed expansion of the golf course is consistent with the comprehensive plan provision. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A specific finding of feasibility regarding an approval criterion is not satisfied by a general finding of overall feasibility, where a number of problems and conflicts were identified during the local proceedings concerning the particular approval criterion. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A local government has not deferred compliance with mandatory approval criteria where it grants tentative subdivision approval with the condition that development plans be reviewed by a geotechnical engineer prior to the issuance of construction permits. Once a local government has determined that compliance with a mandatory criterion is feasible, it may impose conditions of approval to ensure compliance with that criterion. No hearing on the geotechnical report is required. *Property Rights and Owners, Ltd. v. City of Salem*, 34 Or LUBA 258 (1998).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. The county's finding that the same level of public facilities and services that will be available to the subject property is presently available to all the surrounding land is not helpful to a determination of compliance with Goals 11 and 14 where the finding does not explain whether or how the goals were applied to the surrounding properties. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. The county's findings of compliance with applicable criteria are inadequate where they do not identify the relevant approval standards, set out the facts relied upon, or explain how the facts lead to the conclusion that applicable standards are satisfied. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where, on remand, an applicant modifies a site plan for a gas station and car wash so that only the location of the gas pumps is carried forward from the original site plan to the modified site plan, a reasonable person could not conclude that the two plans are substantially similar. A finding that the plans are substantially similar does not adequately address the code requirements that apply to a site plan. *Sullivan v. City of Woodburn*, 33 Or LUBA 356 (1997).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. The county's findings classifying livestock sales and shows as a "farm use" rather than as "stockyard and animal sales" are inadequate when the challenged decision does not relate the general findings to the property at issue, and therefore does not establish that the proposed use complies with the approval standards. *Collins v. Klamath County*, 32 Or LUBA 338 (1997).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. The county fails to establish that, under local code, a second dwelling is authorized as a conditional use in an EFU zone where the findings do not explain why the proposed dwelling is authorized and do not explain when the primary dwelling was established or whether its use is resource-related. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Findings are inadequate to establish that a proposed use does or can satisfy the definition of "light industrial business" when there are no factual findings regarding the number of employees necessary for the proposed use. *Miller v. City of Joseph,* 31 Or LUBA 472 (1996).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where the city's zoning code requires a structure or use be lawfully existing at the time the ordinance making it

nonconforming was adopted, the city may not find an existing use to be nonconforming until it determines, based on substantial evidence, that the use was lawfully existing at the time the ordinance making it nonconforming was adopted. *Smith v. City of Phoenix*, 31 Or LUBA 358 (1996).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. An operation that requires land for grazing horses employs that land for the production of livestock within the meaning of ORS 215.284(2)(b); therefore, a county errs when it concludes that consideration of the potential use of a parcel for grazing horses is not required in determining whether the parcel is generally unsuitable for farm use. *Moore v. Coos County*, 31 Or LUBA 347 (1996).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where LUBA remanded a previous appeal because the county did not apply relevant agricultural goal and implementation policies of its comprehensive plan, the county's conclusion on remand that its previous findings were sufficient is not adequate. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A local decision is subject to reversal, rather than remand, when the local government cannot demonstrate compliance with an applicable approval criterion. When a significant factual issue remains, the resolution of which could determine whether compliance is possible, the decision must be remanded. *DLCD v. Clatsop County*, 31 Or LUBA 90 (1996).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A finding that the county cooperated with certain state agencies by providing them with notice and an invitation to participate in local proceedings satisfies a plan requirement of cooperation with the agencies "to obtain more information." *Furler v. Curry County*, 31 Or LUBA 1 (1996).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A local government's design review approval for a proposed apartment complex must be remanded where it does not contain findings that address relevant approval standards relating to open space and recreation, and does not address issues raised in the proceedings below that are relevant to compliance with those standards. *Winkler v. City of Cottage Grove*, 30 Or LUBA 351 (1996).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. When a challenged decision does not contain findings related to specific approval criteria, LUBA cannot perform its review function. *Le Roux v. Malheur County*, 30 Or LUBA 268 (1995).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A local government is not required to make findings to address criteria that it has found to be inapplicable. *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147 (1995).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. ORS 227.173(2) does not require a local government to make findings regarding criteria which could support approval of an application, or to make findings regarding criteria upon which it did not rely in reaching its decision to deny an application. *Holland v. City of Cannon Beach*, 30 Or LUBA 85 (1995).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. That a subdivision may have detrimental effects on adjacent property does not compel a finding that the variance which makes the subdivision possible will itself have such detrimental effects. *Williams v. City of Philomath*, 30 Or LUBA 5 (1995).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A petitioner's statement that certain road improvement conditions, which are imposed prior to subdivision and variance approvals, are "inherently unfair and biased" provides no basis for reversal or remand if the petitioner states no legal standards that such conditions violate. *Williams v. City of Philomath*, 30 Or LUBA 5 (1995).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Findings supporting a local government determination that an existing use is lawful are inadequate if they do not interpret or apply relevant provisions of the local code and do not state the facts relied on by the local government. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where a local governing body's findings are unclear with regard to whether the local government interprets the provisions of the local code's unstable slopes overlay district as applicable to approval of a subdivision preliminary plat, the challenged decision does not contain an interpretation adequate for review and must be remanded. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where a local government decision identifies a number of comprehensive plan provisions as approval standards for a request to cut trees, it may not approve the request without adopting findings demonstrating that the application complies with the identified plan policies. *Gettman v. City of Bay City*, 28 Or LUBA 116 (1994).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A hearings officer's reliance on a dictionary definition of "in conjunction with" without providing the dictionary definition relied upon is harmless error, where it is apparent from the decision that the hearings officer interpreted the code term to require establishment of a customer/seller or seller/customer relationship between the proposed commercial use and timber and farm uses in the community. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Findings which do not identify the provisions of the statewide planning goals, comprehensive plan or local code that govern a challenged code amendment are inadequate to satisfy a local code requirement that *all* code amendments be supported by findings explaining why the amendment complies with any relevant plan, code and statewide planning goal requirements. *Andrews v. City of Brookings*, 27 Or LUBA 39 (1994).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where a state agency expresses concerns about the impacts of a proposed development on unstable sands and

flora, the Goal 2 coordination obligation requires that a county address those concerns in its findings. *Waugh v. Coos County*, 26 Or LUBA 300 (1993).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. The determination of whether a nonforest dwelling will materially alter the stability of the overall land use pattern of the area requires a county to (1) select an area for consideration, (2) determine the resource uses in the selected area, and (3) determine the proposed nonresource dwelling will not materially alter the stability of the existing resource in the selected area. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. Where the challenged decision applies some design review standards to an application for conditional use permit approval, but fails to explain why other apparently applicable design review standards are inapplicable to the conditional use permit stage, the challenged decision must be remanded for the local government to adopt findings addressing the applicability of these other design review standards. *Moore v. Clackamas County*, 26 Or LUBA 40 (1993).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. A local government decision approving a permit will be remanded to the local government if the decision fails to (1) identify the relevant approval standards, (2) set out the facts believed and relied upon by the local decision maker, and (3) explain how those facts lead to a decision that the proposal complies with the approval standards. *Lathrop v. Wallowa County*, 25 Or LUBA 693 (1993).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. While ORS 215.416(9) does not require that findings include citations to, or verbatim quotes of, applicable approval standards, it does require that a reasonable person be able to determine from the local government's decision what it considered to be the relevant criteria and standards. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

1.4.2 Administrative Law – Adequacy of Findings – Applicable Standards. It is error for a local government to fail to identify the standards relevant to a development application in the challenged decision and to fail to justify its decision on the basis of compliance with those standards. *Ruff v. Harney County*, 23 Or LUBA 521 (1992).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. While applying pesticides and herbicides in a manner that causes overspray or drift onto adjoining properties is not an accepted farm practice for purposes of the farm impacts test at ORS 215.296(1), where the labels for some pesticides and herbicides effectively require a setback from certain sensitive uses regardless of whether drift or overspray occurs, a county will likely have to make specific factual findings about the specific setbacks required by particular chemicals on particular farming operations on surrounding farmlands, based on application methods, and whether the operation of each setback would force a significant change in farm practices. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where an applicant proposes a planned development, and where a local code provision requires the local government to "seek to determine that the development * * * will not create a drainage or pollution problem outside the planned area," the local government errs by not adopting findings determining whether the construction of a road extension that is proposed as part of and that would provide access to the planned development will create a drainage or pollution problem outside the planned area. *Lundeen v. City of Waldport*, 80 Or LUBA 450 (2019).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. According to the "law of the case" pursuant to *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), matters conclusively resolved before LUBA cannot be relitigated in subsequent appeals of subsequent decisions on the same matter. However, that principle is not violated where (1) LUBA remands to the county to adopt new findings, based on substantial evidence, and (2) on remand, the county accepts new evidence and adopts new findings, as LUBA directed. Where LUBA's original decision discussed certain requirements to provide guidance and framework on remand, and some of the county's findings are still insufficient on remand does not mean that the county violated the "law of the case." *Richards v. Jefferson County*, 79 Or 171 (2019).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. On remand, where LUBA instructed the county to resolve whether the project applicant's farm operation qualifies as a "commercial farming operation" for purposes of applying for an accessory farm dwelling for a relative, LUBA established that certain findings and evidence are necessary to establish compliance with OAR 660-033-0130(9). The county's findings fall short of establishing that the applicant's farm operation qualifies as a "commercial farming operation," because it is an undefined term, and it is the county's obligation to attempt to articulate the thresholds that separate a "commercial" from a non-commercial farming operation, and to determine those thresholds in the first instance. Although the county has some discretion to determine the thresholds, that determination will necessarily constitute a mixed question of fact and law, subject to LUBA's review for legal error and evidentiary sufficiency. *Richards v. Jefferson County*, 79 Or 171 (2019).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. The focus of OAR 660-033-0130(9) and county code that implements it regarding whether the "farm operator * * * continue[s] to play the predominant role in the management and farm use of the farm," is on the farm operator's involvement in farm operations *on the subject property*, not on off-farm businesses that may relate to the farm operation. The commercial farm operator's involvement in off-farm businesses do not help establish any element of OAR 660-033-0130(9). The commercial farm operator's involvement in off-farm businesses are relevant to establishing the elements of OAR

660-033-0130(9) only in so much as the time spent on those businesses and away from the farm operation might undermine the claim that the farm operator will continue to play the "predominant role" in the farm operation and requires assistance in running the farm operation. *Richards v. Jefferson County*, 79 Or 171 (2019).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where a local government adopts independent findings and applies a different substantive analysis for two separate approval criteria, but relies on the same evidence in concluding that those criteria are not met, a petitioner does not effectively challenge the findings for one of those criteria by challenging the findings for the other so as to defeat an argument that it has failed to challenge all valid, alternative, and independent bases for denial. *Himmelberger v. City of Portland*, 79 Or LUBA 367 (2019).

1.4.3 Administrative Law – Adequacy of Findings – Applicable Standards. When and if a board of county commissioners adopts a revised staff report as its findings, it must identify the applicable standards, the facts used to meet those standards and explain how those facts led to the conclusion that the applicable criteria has been met. Simply adopting the report or incorporating the applicant's burden of proof statement is not sufficient to serve as support for adequate findings. *VanSickle v. Klamath County*, 78 Or LUBA 56 (2018).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. In considering whether property is generally unsuitable for farm use, it is not appropriate to disregard adjoining parcels as "nonfarm" parcels, simply because there is a nonfarm dwelling on the properties, where there is evidence those adjoining parcels have been planted in winter wheat. Without some findings addressing that evidence of farm use, findings that the property is generally unsuitable for farm use are not supported by substantial evidence. *Central Oregon Landwatch v. Crook County*, 77 Or LUBA 202 (2018).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings regarding the adequacy of urban services to serve annexed property are inadequate, where the findings cite only hearsay statements from providers, and fail to address issues raised below regarding delayed response times to service the subject property and an engineer's testimony that the electrical system cannot serve the property without impacting other portions of the city. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied Upon. A county's finding that a site adjoining a golf fairway was "developed as a golf course" in 2001 is supported by substantial evidence, where the record includes evidence that the site was landscaped in a mix of rough and smooth terrain, and was considered a playable area, notwithstanding that the golf course later designated the site as outside the playable area. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. There is no general requirement that a city council discuss the evidence it chooses not to rely on and a city council's failure to discuss opposing evidence does not necessarily mean the city council did not consider that opposing evidence. *Evans v. City of Bandon*, 74 Or LUBA 418 (2016).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Imprecision in a hearings officer's findings regarding the distance between a proposed asphalt batch plant and a greenway and trail and neighboring mobile home park provides no basis for reversal or remand, where there is evidence in the record showing those proximities and the imprecision in the findings do not establish that the hearings officer was under any misapprehension about how close the asphalt batch plant would be to the mobile home park or greenway and trail. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A finding that efforts over the last 100 years to address landslide danger to water reservoirs have been "Herculean," is an expression of opinion, rather than a necessary finding of fact, and need not be supported by substantial evidence. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where findings identify an applicable conditional use standard that requires that conditional uses must not impair permitted uses on surrounding property, but the decision includes no findings of fact or findings explaining why the decision maker believed proposed wind turbines satisfied that standard, remand is required for adequate findings. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. It will rarely be the case that an approval standard and the facts are such that it will suffice to quote the standard and conclude that the standard is met, without any further explanation. Where a use that is not listed as a permitted or conditional use in a zone may be approved if it is of the same character or has similar impacts as uses that are listed as permitted or conditional uses in the zone, and a proposed wind turbine has external moving parts that the listed uses do not, findings that simply quote the "same character or similar impacts" standard and conclude without any explanation that the standard is met, are inadequate. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Remand for more adequate findings is required where a historic design standard requires a finding that the relationship of new construction to the street and open space between buildings is compatible with the adjacent historic buildings and the historic character of the surrounding area, but the findings address only compliance with code setback requirements, and fail to identify or address compatibility with adjacent historic buildings and the historic character of the surrounding area. *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A finding that the height of new construction is "similar" to dwellings within a historic district is insufficient to establish compliance with a standard requiring that new construction not exceed the height of historic buildings in the surrounding area, where the surrounding area includes both historic and non-historic buildings, and the findings do not identify what buildings the height is compared to, or find that the height of new construction does not exceed the height of the tallest historic building in the surrounding area. *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A finding of compliance with a zone change standard requiring consistency with a comprehensive plan policy requiring that higher density residential uses be sited "near employment" is inadequate, where the finding does

not address proximity to employment at all, other than state that the property is adjacent to a small convenience commercial node. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A finding of consistency with a comprehensive plan policy requiring that higher density residential use be sited in locations with "good access" to arterials is inadequate, where the finding states only that the site is located near an arterial, but without attempting to evaluate whether the site has or will in fact have good access to the arterial. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A finding that a proposed truck maintenance home occupation will comply with a 600-square-foot floor area limitation is inadequate and not supported by substantial evidence, where the findings do not address how much floor area employees will use in performing maintenance tasks, and there is no evidence in the record supporting a finding that the physical area occupied by trucks, tools, storage, and the area needed to perform maintenance tasks will occupy no more than 600 square feet. *Stevens v. City of Island City*, 71 Or LUBA 275 (2015).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A hearings official's failure to specifically refer in his findings to a letter submitted in support of an application during a prior phase of the local proceedings does not mean the hearings official's decision is not supported by substantial evidence. *Teen Challenge v. Lane County*, 67 Or LUBA 300 (2013).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. In denying a permit application, a hearings official need not specifically refer to a letter that was submitted in support of an application, where that letter was submitted after the evidentiary record closed and was specifically rejected by the hearings official because it was submitted late. *Teen Challenge v. Lane County*, 67 Or LUBA 300 (2013).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A hearings officer's finding that a proposed kennel operation is compatible with surrounding uses is inadequate and is not based on substantial evidence in the record, where the findings do not explain the basis for assuming that impacts from the noise and traffic associated with the kennel operation will be limited to the kennel's historic operating levels, and no condition of approval limits the operation to its historic levels. *Butcher v. Washington County*, 65 Or LUBA 263 (2012).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where the local government denies an application based on its conclusion that an applicant did not provide sufficient information, and the applicant submitted detailed information and studies regarding impacts to water quality, water flow, land stability and erosion, the findings are inadequate where they do not explain why the information that was submitted was not "sufficient." *Tidewater Contractors v. Curry County*, 65 Or LUBA 424 (2012).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Under a code variance standard that requires identification of exceptional or extraordinary circumstances applicable to the subject property that do not generally apply to other properties in the same zone, the decision-maker must conduct some fact-finding regarding circumstances on other properties in the same

zone and compare those circumstances to those affecting the subject property. *JCK Enterprises LLC v. City of Cottage Grove*, 64 Or LUBA 142 (2011).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings that the "location, size, design and operating characteristics" of a mixed-use development in a commercial zone will be compatible with surrounding properties are inadequate, where the findings do not describe any of the "operating characteristics" of the mixed-use development or evaluate whether those operating characteristics will be compatible with surrounding properties. *Poe v. City of Warrenton*, 64 Or LUBA 377 (2011).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A finding that public facilities are adequate to accommodate the proposed conditional use, based on review of statements from the public works department and fire chief, is not supported by substantial evidence, where the record includes no statements from the public works department, and the fire chief's letter states that it is unknown whether the city water supply can accommodate the proposed use. *Poe v. City of Warrenton*, 64 Or LUBA 377 (2011).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings are inadequate to explain how a proposed waste water treatment facility on EFU land would either "force a significant change in" the adjacent farming practices or "significantly increase the cost of" an adjacent organic farming operation under ORS 215.296(1) where the findings do not explain what the "significant impacts" to the organic farming operation would be or explain how the potential for spray drift from the proposed facility would either "force a significant change in" the organic farm practices or "significantly increase the cost of" the operation. *Falcon Heights WSD v. Klamath County*, 64 Or LUBA 390 (2011).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where the evidence the county appears to rely on appears to show that state noise standards are violated by a wind energy facility at four residences, but the county only finds that the noise standards are violated at one residence, the decision must be remanded for additional findings. *Mingo v. Morrow County*, 63 Or LUBA 357 (2011).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. LUBA will remand for more adequate findings regarding a code requirement for "guaranteed access," where the local government relies upon a roadway easement on adjoining land that is not in the record and that arguably does not serve the subject property. *Devin Oil Co., Inc. v. Morrow County*, 60 Or LUBA 336 (2010).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where a county hearings officer's findings show she was persuaded that additional mitigation measures were necessary to address thermal impacts of destination resort groundwater use on a nearby cool water creek, the hearings officer's decision to accept the applicant's proposal to provide additional mitigation by reducing surface withdrawal from that cool water creek is inadequate where there was opposition testimony that the proposed mitigation would not mitigate the thermal impact. While there may be a simple answer to the opposition testimony, where that answer is missing in the record and the hearings officer's decision does not address that opposition testimony, the decision must be remanded. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A county's findings that rely on a single statement of a legislator that is a generalized statement about a large land use bill and not a statement directed at the meaning of the particular statute at issue is unpersuasive. *Friends of Yamhill County v. Yamhill County*, 58 Or LUBA 315 (2009).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings that describe the only forest practice that adjoining timber operators identified as impacted by proposed mining on forest land are adequate for purposes of a code significant change/increase standard, where the code standard does not implement the statutory significant change/increase standard, and the petitioners do not explain why the code standard requires an exhaustive description of all forest practices on nearby lands. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. While a county's failure to describe accepted farming practices on nearby lands would likely require remand under the ORS 215.296(1) significant change/increase standard or a code provision implementing that standard, such a failure is not necessarily reversible error under a similar code significant change/increase standard that does not implement the statute. Any failure to describe accepted farming practices under the code standard is harmless, where the county adopted unchallenged findings, supported by substantial evidence, that the proposed mining will not significantly affect any farm or forest practices. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A finding that simply states that an approval standard is satisfied "as shown in" the application and oral testimony, without any attempt to state the facts relied upon or explain why the facts demonstrate compliance with the standard, is inadequate. *O'Rourke v. Union County*, 54 Or LUBA 614 (2007).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Because ORS 215.422(1)(c) explicitly limits the appeal fee that counties can charge for certain land use appeals, evidence that total annual revenues produced by over 200 county fees fall short of total planning department annual expenses is not sufficient to demonstrate that the fees collected for three types of appeals comply with ORS 215.422(1)(c). A more particularized evidentiary effort to focus on the costs and expenses associated with the three types of appeals subject to ORS 215.422(1)(c) is required. *Landwatch Lane County v. Lane County*, 52 Or LUBA 140 (2006).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where a county interprets its code to require submittal of expert studies to more precisely establish the boundary of a significant natural resource area, a hearings officer may consider expert studies from the applicant and opponents, accept and reject parts of both studies, and require protection of a natural resource area that is smaller than proposed by opponents and larger than proposed by the applicant. *Kyle v. Washington County*, 52 Or LUBA 399 (2006).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. The fact that a local government could have reached the decision it did without considering and relying on improperly received evidence does not make that error harmless. When a local government relies on evidence not properly before it to render a decision, it violates the parties' substantial rights. *Wal-Mart Stores, Inc. v. City of Oregon City*, 50 Or LUBA 87 (2005).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where the relevant legal standards mandate a regimented step-by-step analysis, and the findings adopted in support of a decision to deny a permit under those legal standards are brief and do not come close to providing the level of detail that is required to address the legal standards, remand is required. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A finding that lands within a UGB are "unavailable" for a proposed public storage facility is inadequate, where the county fails to address evidence that there is a large surplus of vacant industrial and commercial lands within the UGB that allow public storage facilities, and there is no basis to conclude that such lands are not "available." *Friends of Yamhill County v. Yamhill County*, 49 Or LUBA 529 (2005).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings are inadequate where they simply disagree with a hearings officer's interpretation of what an approval standard requires, without explaining what the decision maker believes the standard to require or why the evidence satisfies the standard. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings that briefly describe existing parks within the city are inadequate to demonstrate that a proposed new park complies with a standard requiring that other properly zoned land is not available in sufficient quantity to meet current and projected needs. *Nielson v. City of Stayton*, 47 Or LUBA 52 (2004).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings that proposed residential development is consistent with permitted uses in the zone are inadequate to demonstrate that the proposed development is compatible with the "existing land use pattern in the area." *Doob v. Josephine County*, 47 Or LUBA 147 (2004).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Conclusory findings that proposed development is consistent with the current development pattern in the area are inadequate to demonstrate that the proposed development is "consistent with the character of the surrounding area," particularly when the local code calls for a "detailed review." *Seaton v. Josephine County*, 47 Or LUBA 178 (2004).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. That lot-of-record dwellings are allowed in the EFU zone is an insufficient basis to demonstrate compliance with a code standard requiring that a proposed lot-of-record dwelling will not materially alter the stability of the land use pattern in the area. *Tallman v. Clatsop County*, 47 Or LUBA 240 (2004).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. That lot-of-record dwellings are allowed in the EFU zone is an insufficient basis to demonstrate compliance with a code standard requiring a finding that the proposed dwelling will not create conditions or circumstances "contrary to the purposes or intent" of the county comprehensive plan and code. *Tallman v. Clatsop County*, 47 Or LUBA 240 (2004).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings that recite lengthy efforts by the city historic preservation board to encourage an applicant to preserve an historic building are adequate to show that the city met its obligations under a plan policy requiring the city to "encourage" preservation of historic structures. *Chin v. City of Corvallis*, 46 Or LUBA 1 (2003).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where a parking standard requires that parking "supply, operations and demand" be managed "to encourage economic vitality, traffic safety and livability of residential neighborhoods," a finding that additional parking that will be generated by a proposed rezoning is "negligible" is inadequate, where the finding does not explain what the local government means by the word "negligible" or why that increase will encourage economic vitality, traffic safety and livability, in the face of testimony that those attributes will be negatively affected by the proposal. *Fay v. City of Portland*, 46 Or LUBA 39 (2003).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. The failure of a decision maker to list all of the evidence relied upon in making a decision is not necessarily fatal as long as the response brief directs LUBA to evidence in the record that supports the critical findings in the decision. *Lawrence v. Clackamas County*, 46 Or LUBA 101 (2003).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A city's findings are adequate where they address each of the applicable criteria in its tree removal ordinance and explain why the certified arborist's report submitted by the subdivision applicant satisfies each of those criteria. *Miller v. City of Tigard*, 46 Or LUBA 536 (2004).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where an approval standard requires a finding that a proposed use will have a "minimal adverse impact on property values," a finding that relies on a letter stating that the impact of a proposed use cannot be evaluated until the use has been established is not adequate to demonstrate that the standard is met. *Gumtow-Farrior v. Crook County*, 45 Or LUBA 612 (2003).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where an applicable approval criterion requires that a proposed use be considered to determine whether adequate public facilities are available to serve a property, a city's conclusion that the criterion is met is not adequate, where that conclusion is based on (1) prior less intensive use of the two parcels; and (2) system-wide capacity of the city's sewer and water facilities. *Robinson v. City of Silverton*, 44 Or LUBA 308 (2003).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. LUBA will remand a decision where petitioner identifies a discrepancy between the county zoning map and the map the county relied upon to approve a rezoning application, where the discrepancy may affect the county's determination that coastal shorelands are not affected by the rezoning, and the county's findings do not explain why the county did not rely on the county zoning map to establish the zoning boundary. *Doty v. Coos County*, 44 Or LUBA 448 (2003).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A finding that a proposed destination resort is located in a setting with "high natural amenities" as required by ORS 197.445

is inadequate and not supported by substantial evidence, where neither the county's decision nor the record identifies or describes any high natural amenities near the proposed resort. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A city's finding that a proposed use will place an "excessive burden on traffic" based on a conclusion that the applicant failed to provide a traffic study that estimated the number of vehicles that would use local streets is inadequate, where there is a trip generation study in the record that provides the evidence the finding states is missing. *Oregon Child Devel. Coalition v. City of Madras,* 43 Or LUBA 184 (2002).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A county's findings regarding the infeasibility of locating a radio transmission tower on either of two city-owned lots are adequate where the findings parallel an earlier memorandum in the record regarding one of the tax lots, and that earlier memorandum addresses the infeasibility of the other tax lot, notwithstanding the county's failure to recite specific aspects of the memorandum addressing the second tax lot. *Van Nalts v. Benton County*, 42 Or LUBA 497 (2002).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings that a proposed underground shooting range cannot be detected by sight, smell or sound from adjacent residential property are adequate to explain why the proposed shooting range is compatible with adjacent property. *Chilla v. City of North Bend,* 41 Or LUBA 539 (2002).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where a petitioner does not explain why approval criteria for fill in a floodplain and coastal shoreland necessitated precise delineation of the floodplain boundaries and precise knowledge about the location, amount and nature of the fill, the local government's failure to precisely delineate and describe the floodplain and fill provides no basis for remand. *Willhoft v. City of Gold Beach,* 41 Or LUBA 130 (2001).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where a city code requires that alternative local access designs be examined and that the design chosen "best balances needs for economy, safety, efficiency and environmental compatibility," and the city's decision includes findings addressing specific environmental, traffic and safety impacts of the alternative access designs and explains why the chosen design avoids those impacts, the findings are adequate to address the criterion. *Costanzo v. City of Grants Pass,* 40 Or LUBA 471 (2001).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Failure to specifically describe the grazing practices on surrounding properties does not render a finding of compliance with the noninterference standard inadequate where the proposed nonfarm dwelling is one-half mile from the nearest grazing operation and buffered by a number of vacant lots, and no conceivable interference is identified. *Wolverton v. Crook County*, 39 Or LUBA 256 (2000).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. The mere presence of residential uses on EFU-zoned properties adjacent to a proposed exception area does not demonstrate that the subject property is irrevocably committed to nonfarm uses. In considering residential uses on adjacent properties, the county must identify in its findings the conflicts or other impacts between the residential uses and the subject property that make farm use of the subject

property impracticable. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A local government's findings that a proposed development is of a greater size, scale and intensity of development than was envisioned by the developer and nearby residents are inadequate to support denial of an application where those considerations are not based on any code standards or criteria. *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Although a decision maker is required to adopt findings that respond to relevant issues that are raised in quasi-judicial land use hearings, the decision maker is not necessarily required to adopt findings addressing particular items of evidence, provided LUBA is able to conclude that a reasonable decision maker could reach the disputed decision based on all the evidence. *Schwerdt v. City of Corvallis*, 38 Or LUBA 174 (2000).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings are inadequate, where they simply acknowledge statements that are made in a permit application and do not explain what the decision maker believes to be the relevant facts or explain why those facts lead to a conclusion that approval criteria are met. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where the local government's findings are based entirely on a faulty analysis of the evidence, LUBA will remand the decision to permit the local government to reweigh and review the evidence and adopt findings consistent with a correct analysis. *Johnson v. Clackamas County*, 37 Or LUBA 73 (1999).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A city's findings of compliance with conditional use criteria requiring that a "proposed use is consistent with the overall development character of the neighborhood with regard to building size, height, color, material and form" are conclusory and inadequate, where the city's findings do not describe either the boundaries or characteristics of the relevant neighborhood, but instead compare the proposed use to development in geographically distant parts of the city without explaining why those areas are part of the relevant neighborhood. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A hearings officer's findings which rely on the absence of business records and the testimony of a neighbor to conclude that a nonconforming use was discontinued are supported by substantial evidence, where the findings address the conflicting evidence submitted by the applicant and explain why that evidence did not establish the continued existence of the nonconforming use. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. The record in one proceeding does not include the record and hearing officer's decision of a previous conditional use application for a separate but similar use at a different location when the two determinations stem from independent requests, different parties and the decision maker did not rely on that previous

decision in approving the current application. *Buckman Community Assoc. v. City of Portland*, 35 Or LUBA 800 (1998).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. The failure of findings to identify the evidence that supports the findings is not necessarily fatal, so long as the response brief or the briefs filed by other parties direct LUBA's attention to evidence in the record that supports those findings. *Johns v. City of Lincoln City*, 35 Or LUBA 421 (1999).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A county's finding of compliance with a standard requiring that a nonforest dwelling not interfere with forest practices is inadequate, where the county merely finds that the proposed dwelling presents no greater risk of fire than posed by existing residential development, and fails to address evidence that the cumulative risk of fire from the proposed dwelling and existing development will require the owner of an adjacent forestry operation to change forestry practices and incur additional costs. *Thomas v. Wasco County*, 35 Or LUBA 173 (1998).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Adequate findings of compliance with a local standard requiring that proposed nonresource uses not significantly increase the cost of accepted farm and forest practices must identify the farm and forest practices in the area, even if the local standard does not implement and thus need not be consistent with the similar statutory standard. *Thomas v. Wasco County*, 35 Or LUBA 173 (1998).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. An applicant does not carry his burden to demonstrate compliance with transportation-related criteria, where the findings supporting denial identify a flaw in the applicant's evidence resulting from conducting a traffic study in the summer when school trips would not be reflected in the study. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Petitioner's disagreement with the reasons specified by a local government for rejecting the evidence he submitted in support of a land use application provides no basis for reversal or remand. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings that the applicant has testified that applicable criteria will be met are conclusory and inadequate because they fail to identify the review standards, set out the facts relied upon or explain how those facts led to the decision. *Turrell v. Harney County*, 34 Or LUBA 423 (1998).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. For a local government to properly evaluate the quality and quantity of aggregate resources on a parcel, test holes or borings must be "representative." To be representative, a reasonable person must conclude that the local government's findings as to the quantity and quality of the resource *throughout* the subject property are supported by substantial evidence. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. County and ODOT traffic engineers' testimony and commentary is not less credible simply because it is based on the

applicant's data rather than the traffic engineers' own study. *ODOT v. City of Oregon City*, 34 Or LUBA 57 (1998).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. When a challenged decision fails to incorporate a staff report or council minutes as findings, LUBA's review of the challenged decision for adequate findings is limited to the decision itself. *Hackler v. City of Hermiston*, 33 Or LUBA 755 (1997).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. The county's findings of compliance with applicable criteria are inadequate where they do not identify the relevant approval standards, set out the facts relied upon, or explain how the facts lead to the conclusion that applicable standards are satisfied. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. There is no legal requirement that a local government address in its findings conflicting evidence upon which it chooses not to rely. Where a petitioner presents conflicting evidence to the city during a local appeal, but does not raise new issues, the city may rely on findings prepared prior to the local appeal. *Tandem Development Corp. v. City of Hillsboro*, 33 Or LUBA 335 (1997).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A finding that an unlawful partition occurred prior to the date the variance applicant took title to the property is not adequate to demonstrate that the hardship is not "self-created," where the county provides no interpretation of the term "self-created hardship" and the variance applicant knew the property had been unlawfully partitioned. *Elder v. Douglas County*, 33 Or LUBA 276 (1997).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A hearings officer's finding that other residentially zoned property "may not be developable" does not factually justify the conclusion that "there are no non-agricultural lands" with priority for development. *Alliance for Responsible Land Use v. Deschutes County*, 33 Or LUBA 12 (1997).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where petitioners challenge the county's reliance on a traffic impact study that is three years old, but petitioners do not point to evidence in the record that undermines the conclusions of that study, petitioners fail to establish that the county's decision is not based on substantial evidence. *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76 (1996).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. The county's reliance on the existence of adjacent non-resource parcels in justifying a committed exception is impermissible under OAR 660-04-028(6)(c)(A) where the findings do not adequately establish how or when the adjacent parcels were created. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings are inadequate when they rely on a consultant's summary conclusions which are not based on evidence in the record. *Friends of Metolius v. Jefferson County*, 31 Or LUBA 160 (1996).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. County findings are inadequate when they fail to interpret an applicable local regulation, and fail to identify facts upon

which the county relied in reaching its conclusions. LUBA will not overlook such inadequacies in the findings when no party cites evidence in the record that compels the interpretation and conclusion made by the county. *DLCD v. Clatsop County*, 31 Or LUBA 90 (1996).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A finding that water for a proposed dwelling will come from a neighbor's property is not supported by substantial evidence when it has not been shown that the water can be legally provided through the appropriate grant of water rights. *Furler v. Curry County*, 31 Or LUBA 1 (1996).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. OAR 660-33-030(6) requires that the "more detailed data" upon which the county may rely in determining soil capability for forest uses be related to the SCS soils classification system and, therefore, before the county can rely on more detailed data, the county must establish that the source of the data has the requisite knowledge of the classification system, including the qualifications and expertise to classify soils under the system. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. When the county relies on a 1979 conditional use permit to find that a proposed partition satisfies the county's approval criteria, the county must make affirmative findings that the conditional use permit is valid. *Tognoli v. Crook County*, 30 Or LUBA 272 (1996).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A 1B designation on the county's Goal 5 inventory means that inadequate information exists on the site to determine its nature and, therefore, a county cannot rely on a site being listed as a 1B site to conclude that aggregate uses are allowed outright. *Tognoli v. Crook County*, 30 Or LUBA 272 (1996).

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

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. So long as the local government relies on evidence in the record in making its findings, the evidence upon which it relies can be either oral or written. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46 (1995).

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

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where the county identifies Big Game Habitat Range as a Goal 5 resource that conflicts with a proposed aggregate operation, it must identify the evidence upon which it relies to support its finding that the proposed quarry will have insignificant impacts on big game more than one-quarter mile away. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. The county's finding, made as part of its Goal 5 ESEE analysis, that an aggregate site located within a Big Game Habitat Range is not uniquely suited to wildlife must be supported by substantial evidence, not just a statement that the wildlife can "freely relocate" to other parts of the Big Game Habitat Range. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. While a local government is required to identify in its findings the facts it relies upon in reaching its decision, it is not required to explain why it chose to balance conflicting evidence in a particular way, or to identify evidence it chose not to rely on. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A local government's conclusion that required netting will have limited visual impacts on adjacent properties is unacceptably conclusory when unsupported by findings concerning how much netting is required or how high the netting must be. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. When the evidence in the record is conflicting, and the local government's findings fail to explain the basis for its conclusion or state which evidence it finds persuasive, LUBA must remand the decision for additional findings. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings supporting a local government determination that an existing use is lawful are inadequate if they do not interpret or apply relevant provisions of the local code and do not state the facts relied on by the local government. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings which do not identify the ways a destination resort preliminary development plan is different from the previously approved conceptual site plan, the magnitude of such differences or why the local government believes the differences are minor, are not adequate to establish compliance with a code standard requiring the preliminary development plan to conform to the conceptual site plan and alterations, if any, to be minor in nature. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Where the local code requires the proposal have only minimal impacts on adjacent properties, considering the operating characteristics of the proposed use, the decision must identify what the operating characteristics of the proposed use are. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Local government findings of compliance with an applicable approval standard must state the facts the local government relies on and explain why those facts lead to the conclusion that the standard is satisfied. *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. While a local government is required to identify in its findings the facts it relied upon in reaching its decision, it is not required

to explain why it chose to balance conflicting evidence in a particular way, or to identify evidence it chose not to rely on. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A local government decision granting design review plan approval must identify the design review plan approved. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings which identify a lack of evidence concerning road capacity and evidence concerning traffic congestion during weekend events at existing uses and a proposed agricultural/horticultural school complex are adequate to explain why a decision maker concluded the applicant failed to carry its burden concerning a code "minimal adverse impact" standard. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A local government is under no obligation to specifically discuss in a challenged decision all of the evidence in the record or to explain its reasons for choosing to rely upon particular evidence over other evidence. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. It is erroneous for a county to determine a farm and forest zoned area has a residential character based on the existence of former homesites in the area. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. The alleged failure of the minutes of a local government's proceedings to specifically identify documents the local government relied upon provides no basis for striking those documents from the record. The function of findings of fact is to identify the evidence relied upon, there is no legal requirement that the minutes perform that function. *McPeek v. Coos County*, 25 Or LUBA 805 (1993).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. A local government decision approving a permit will be remanded to the local government if the decision fails to (1) identify the relevant approval standards, (2) set out the facts believed and relied upon by the local decision maker, and (3) explain how those facts lead to a decision that the proposal complies with the approval standards. *Lathrop v. Wallowa County*, 25 Or LUBA 693 (1993).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Although a local government is not required to discuss in its findings the evidence it does *not* rely on to support its decision, doing so may improve its chances of success on appeal to LUBA. LUBA will not read such findings as improperly shifting the burden of proof, where the findings read as a whole show the local government was only trying to demonstrate that it considered all relevant evidence. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238 (1993).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Findings explaining how the existing limited rural industrial uses near a proposed aggregate processing facility have not affected the historical stability of an EFU-zoned area, and that the existing and proposed industrial uses may discourage intrusion of rural residential development, are adequate to demonstrate

compliance with an EFU zone "stability" standard. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238 (1993).

1.4.3 Administrative Law – Adequacy of Findings – Facts Relied on. Statements which merely summarize the evidence in the record, and do not state what the decision maker believes to be true, are not adequate findings of fact. *Heiller v. Josephine County*, 23 Or LUBA 551 (1992).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. While applying pesticides and herbicides in a manner that causes overspray or drift onto adjoining properties is not an accepted farm practice for purposes of the farm impacts test at ORS 215.296(1), where the labels for some pesticides and herbicides effectively require a setback from certain sensitive uses regardless of whether drift or overspray occurs, a county will likely have to make specific factual findings about the specific setbacks required by particular chemicals on particular farming operations on surrounding farmlands, based on application methods, and whether the operation of each setback would force a significant change in farm practices. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where an applicant proposes a planned development, and where a local code provision requires the local government to "seek to determine that the development * * * will not create a drainage or pollution problem outside the planned area," the local government errs by not adopting findings determining whether the construction of a road extension that is proposed as part of and that would provide access to the planned development will create a drainage or pollution problem outside the planned area. *Lundeen v. City of Waldport*, 80 Or LUBA 450 (2019).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a post-acknowledgement plan amendment would increase the amount of impervious surfaces permitted on the subject property, resulting in increased runoff volume, and the city's stormwater manual states that stormwater treatment facilities are designed to capture and treat only 80 percent of runoff volume, a conclusory finding that "the City standards will adequately collect and treat stormwater runoff" is inadequate to demonstrate, for purposes of OAR 660-023-0250(3)(b), that the city standards will eliminate the possibility of conflicts with a nearby creek which is a Goal 5 resource. *Nicita v. City of Oregon City*, 79 Or LUBA 22 (2019).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. On remand, where LUBA instructed the county to resolve whether the project applicant's farm operation qualifies as a "commercial farming operation" for purposes of applying for an accessory farm dwelling for a relative, LUBA established that certain findings and evidence are necessary to establish compliance with OAR 660-033-0130(9). The county's findings fall short of establishing that the applicant's farm operation qualifies as a "commercial farming operation," because it is an undefined term, and it is the county's obligation to attempt to articulate the thresholds that separate a "commercial" from a non-commercial farming operation, and to determine those thresholds in the first instance. Although the county has some discretion to determine the thresholds, that determination will necessarily constitute a mixed question of fact and law, subject to LUBA's review for legal error and evidentiary sufficiency. *Richards v. Jefferson County*, 79 Or 171 (2019).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. The focus of OAR 660-033-0130(9) and county code that implements it regarding whether the "farm operator * * * continue[s] to play the predominant role in the management and farm use of the farm," is on the farm operator's involvement in farm operations *on the subject property*, not on off-farm businesses that may relate to the farm operation. The commercial farm operator's involvement in off-farm businesses do not help establish any element of OAR 660-033-0130(9). The commercial farm operator's involvement in off-farm businesses is relevant to establishing the elements of OAR

660-033-0130(9) only in so much as the time spent on those businesses and away from the farm operation might undermine the claim that the farm operator will continue to play the "predominant role" in the farm operation and requires assistance in running the farm operation. *Richards v. Jefferson County*, 79 Or 171 (2019).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings are inadequate to explain how a proposed adjustment to the minimum lot size to allow a duplex on a corner lot will not "allow an increase in density in the [applicable] zone" under a local code provision where the findings merely conclude that the adjustment "does not result in an increase in density associated with the proposed use of the development site." *Hunt v. City of the Dalles*, 79 Or LUBA 265 (2019).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a county determines that a property qualifies for a forest template dwelling under ORS 215.750 because at least three dwellings existed on surrounding lots or parcels on January 1, 1993, based on a statement of the applicant, a recollection of the prior owner of one of the surrounding dwellings, an email from a contractor who worked on one of the surrounding dwellings, and a statement by the tax assessor that its records showed a dwelling in place on January 1, 1993, but where LUBA concludes that the county erred in accepting the email, where LUBA cannot determine whether the county would have reached the same conclusion without the email, and where the county's findings failed to address evidence that the tax rolls indicate existence of the dwelling as of July 1993 rather than January 1993, LUBA will remand for the county to adopt adequate findings. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Absent a legal definition for how the center point of a property must be established for purposes of determining whether it qualifies for a forest template dwelling under ORS 215.750, a county errs by not explaining the basis for its conclusion that its chosen method is the most appropriate and by not addressing opponents' arguments challenging that method. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

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explaining the basis for its conclusion that its chosen method is the most appropriate and by not addressing opponents' arguments challenging that method. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. When and if a board of county commissioners adopts a revised staff report as its findings, it must identify the applicable standards, the facts used to meet those standards and explain how those facts led to the conclusion that the applicable criteria has been met. Simply adopting the report or incorporating the applicant's burden of proof statement is not sufficient to serve as support for adequate findings. *VanSickle v. Klamath County*, 78 Or LUBA 56 (2018).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. In applying a vacation rental dwelling (VRD) standard that prohibits a VRD that would alter the character of the surrounding area so as to substantially limit permitted uses in the zoning district, the size of the residence, in and of itself, is largely irrelevant where a house of any size is permitted outright in the zone so long as it is occupied by the owner or leased on a long-term basis. Remand is required where the findings denying the VRD focus almost exclusively on the size of the dwelling rather than the proposed VRD use. *Gu v. City of Bandon*, 77 Or LUBA 535 (2018).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. LUBA will remand a legislative text amendment prohibiting new fossil fuel export terminals when nothing in the city's decision or the record explains how the amendment is consistent with the city's comprehensive plan policy requiring the city to "support multimodal freight transportation improvements to provide competitive regional access to global markets." *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a city adopts a legislative text amendment prohibiting expansion of existing fossil fuel terminals without considering consistency with a subarea plan policy objective to "foster a business and policy environment that promotes continued private and public sector investments in infrastructure, facilities, equipment and jobs," LUBA will remand the decision to the city to consider whether prohibiting expansion of fossil fuel terminals is consistent with the objective. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where state agencies took the position before the county that two different county EFU zones were equally valuable for big game habitat, and without explanation the county amended its comprehensive plan Goal 5 protection program to allow significantly increased residential densities in one of those zones, remand is required for an explanation of the county's rationale. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a county's ESEE analysis relies on an inflated estimate of the number of acres of big game habitat added to its Goal 5 inventory and greater existing residential densities in an area to justify allowing significantly increased residential densities on big game habitat in that area, remand is required for

a better explanation of the county's rationale for increasing those residential densities. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the hearings officer adopts a board of commissioners' interpretation of a comprehensive plan policy that was articulated in a different decision, and that interpretation is not challenged on appeal, LUBA will reject a challenge to the adequacy of the hearings officer's findings, arguing that the findings fail to resolve all potential inconsistencies or ambiguities in applying the commissioners' interpretation to the proposed rezoning at issue, where the findings adequately explain the hearings officer's understanding of the plan policy, as interpreted by the commissioners, and adequately explain how the policy is applied to the rezoning application before the hearings officer. *Landwatch Lane County v. Lane County*, 75 Or LUBA 302 (2017).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a petitioner challenges the adequacy of a county's findings that a small wind turbine is of the same general character as "communication towers, utility substations and transmission lines," arguing that the findings do not address the wind turbines' moving propellers, which the other uses do not have, but the findings in fact do address the moving propellers and provide a reason why the county did not believe that difference makes the wind turbines of a different "general character," LUBA will reject petitioner's findings challenge. *Burgermeister v. Tillamook County*, 75 Or LUBA 350 (2017).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city council's findings that identify the adverse impacts of a significant increase in the use of residences as vacation rental dwellings adequately identifies a "public need" in order to justify amendments to the city's zoning ordinances which prohibit and severely restrict vacation rental dwelling use. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A local government could reasonably conclude that speculative concerns regarding the possibility of transmitting avian flu to nearby chicken farms via dead birds buried at a proposed landfill are adequately addressed by statutory and regulatory requirements intended to protect against that possibility. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. LUBA will remand a decision concluding that a unit of land is a legal lot of record based on a county building permit for a dwelling on an adjoining unit of land, where the findings fail to explain or establish how a building permit approval can create a discrete unit of land, much less a legal lot of record. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A local government in denying an application for permit approval is not obligated to give the applicant a detailed roadmap that guarantees permit approval. However, under *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978), a local government must give the permit applicant some minimal idea of changes that might lead to permit approval. *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where findings identify an applicable conditional use standard that requires that conditional uses must not impair permitted uses on surrounding property, but the decision includes no findings of fact or findings explaining why the decision maker believed proposed wind turbines satisfied that standard, remand is required for adequate findings. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. It will rarely be the case that an approval standard and the facts are such that it will suffice to quote the standard and conclude that the standard is met, without any further explanation. Where a use that is not listed as a permitted or conditional use in a zone may be approved if it is of the same character or has similar impacts as uses that are listed as permitted or conditional uses in the zone, and a proposed wind turbine has external moving parts that the listed uses do not, findings that simply quote the "same character or similar impacts" standard and conclude without any explanation that the standard is met, are inadequate. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the city previously approved a conceptual development plan showing an arterial road in a particular location, the city's findings denying a subsequent application for detailed development plan approval are inadequate, where the findings do not give the applicant a better idea of how the city council would go about approving a road in the location shown in the conceptual development plan. *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339 (2016).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a local code provision provides that minimum lot width may be reduced if "[o]n balance, the proposed lots will have dimensions that are consistent with the purpose of this section," it is remandable error where the local code provides for nine purposes to be considered, but the decision maker considers only some of the nine purposes, and concludes without explanation, that "on balance, the applicant has not demonstrated that the proposal is consistent with the purpose of the lot dimension regulations." In this context, such findings are inadequate because an "on balance" determination requires the city to adopt findings explaining how it balances the different purposes. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a local code provision requires a determination that "[o]n balance, the proposed lots will have dimensions that are consistent with the purpose of this section," and the section provides for nine purposes to be considered, a city may be able to assign greater or lesser significance to a particular purpose based on direction from the city's code, comprehensive plan or other land use document. But a city errs to the extent that it interprets the "on balance" determination to allow denial based solely on a finding of inconsistency with one or two of the nine purposes, without considering consistency with all of the purposes. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a local code provision regulating minimum lot size requires a determination of whether a proposal is consistent with purposes of the code section, and an applicable code section is intended to ensure that "[e]ach lot has enough room for a reasonably-sized attached or detached house[,]" a finding

that the applicants have not demonstrated that "each parcel has enough room for a reasonably sized detached house[,]" is conclusory, because it fails to explain what constitutes a "reasonably-sized" house. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. LUBA will remand for more adequate findings where a city finds that a stormwater conveyance system constructed to city standards will minimize potential adverse impacts of stormwater pollutants on estuarine fish resources, where the finding does not describe potential adverse impacts, address expert testimony regarding those impacts, or explain why compliance with city stormwater construction standards is sufficient to minimize potential adverse impacts. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A finding of consistency with a comprehensive plan policy requiring that residential densities maintain a proper relationship between public facilities and services and population distribution is inadequate, where the finding merely recites that proposed higher density residential development will comply with the density requirements in the code, but without explaining how density will maintain the proper relationship between public facilities and population distribution. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A finding of consistency with a comprehensive plan provision requiring that future development shall respect the character of the existing area is inadequate, where the finding simply states that the general character of the area is "residential," without evaluating whether placing higher density residential development in the middle of an area zoned and developed with low density residential development is consistent with respecting the character of the existing area. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a zone change standard requires a finding that adequate transportation networks to support the use are presently provided or planned to be provided concurrently with development of the property, a finding that this standard is met because future development will be subject to subdivision and site design review is inadequate to establish that the subject site has required secondary access or that such access is planned to be provided concurrently with development of the property. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Plan goals requiring that development be "compatible" and seek to "protect" nearby neighborhoods are somewhat subjective. Where a local government recognizes that greater proposed building height and mass could result in incompatibility and (1) reduces the proposed building height, (2) requires that increased building heights be stepped down next to adjoining residential neighborhoods, (3) requires enhanced design review, and (4) imposes additional minimum setbacks, LUBA will not second guess the city regarding the adequacy of those measure to protect nearby neighborhoods so as to achieve compatibility. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. LUBA will reject petitioner's challenge to a plan map amendment for a proposal that would result in taller building heights, based on a plan compatibility policy, where the proposal is subject to conflicting plan policies, only one of which supports petitioner's position opposing the increased building height on compatibility grounds, and petitioner fails to challenge the local governments findings balancing those polities to find that the increase building heights equally or betters supports the policies viewed as a whole. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings are inadequate to explain why a tentative planned unit development (PUD) and subdivision will not be a significant risk to public health and safety, where evidence in the record demonstrates that the portions of the property that will be developed with roads, parking lots, and sewer, water and electrical lines contain loose soils. In that circumstance, where the findings do not conclude that the public health and safety standard does not apply to roads, parking lots, and sewer, electrical and water lines, and there is no finding that these aspects of the proposed PUD and subdivision can be constructed on those loose soils without causing unreasonable or significant public health and safety concerns, the findings are inadequate. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 33 (2013).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. The findings denying an application for a quasi-judicial zoning and comprehensive plan map amendment are adequate, where they explain that the two commissioners who participated in the decision could not agree whether the application satisfied two approval criteria and that by operation of law that failure to achieve a majority vote in favor of the application results in denial. The county was not required to adopt findings that are adequate to deny the application on the merits, where the decision does not deny the application on the merits. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the city takes the position during the initial proceedings below that an adopted plan is an applicable approval criterion, but reverses that position during the multi-hearing proceedings before the city council and takes the position that the adopted plan is not an applicable approval criterion because it is not yet effective, a city does not commit error in failing to adopt findings that confirm that the plan is not a source of approval criteria. *Vest v. City of Molalla*, 66 Or LUBA 155 (2012).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A hearings officer's finding that a code requirement that a proposed kennel be compatible with surrounding uses is met where the kennel is required to satisfy applicable DEQ noise standards is inadequate, where the findings do not explain why the hearings officer concluded that compliance with the applicable DEQ noise standards necessarily means that the proposed use is compatible with surrounding residential uses. *Butcher v. Washington County*, 65 Or LUBA 263 (2012).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the local government denies an application based on its conclusion that an applicant did not provide sufficient information, and the applicant submitted detailed information and studies regarding impacts to water quality, water flow, land stability and erosion, the findings are inadequate where

they do not explain why the information that was submitted was not "sufficient." *Tidewater Contractors v. Curry County*, 65 Or LUBA 424 (2012).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings addressing a code variance standard that provides that application of the standard to be varied "would result in practical difficulty * * * inconsistent with the objectives of this Code" are inadequate, where the findings address whether the *variance* would be consistent with identified code objectives, not whether application of the *standard to be varied* would cause practical difficulties inconsistent with code objectives. *JCK Enterprises LLC v. City of Cottage Grove*, 64 Or LUBA 142 (2011).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. LUBA will affirm a finding that the combination of a corner lot and shared access requirements between two adjoining lots proposed for two commercial drive-through establishments are sufficient to constitute a "hardship" that is not "self-imposed," for purposes of granting a variance to allow one commercial use to place its drive-through within a street setback, where the applicant is not responsible for the lot configuration and access restrictions. The fact that the applicant could construct a different combined commercial use on the two lots without a variance to the setback does not necessarily mean that no hardship exists or that the hardship is self-imposed. *JCK Enterprises LLC v. City of Cottage Grove*, 64 Or LUBA 142 (2011).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a hearings official's decision to approve a group care home with an on-site sewerage disposal system that is only approved for use with residential strength effluent demonstrates that the hearings official was unaware of and did not consider evidence that a similar group care home generated stronger than residential strength effluent, remand is required to consider that evidence. *Freedman v. Lane County*, 64 Or LUBA 309 (2011).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a petitioner assigns error on the basis that a hearings official failed to explain how he applied an Oregon Department of Environmental Quality Table in approving a septic system, but the hearings official in fact adopted such findings and those findings are neither acknowledged nor challenged by petitioner, the assignment of error will be denied. *Freedman v. Lane County*, 64 Or LUBA 309 (2011).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the record includes an Oregon Department of Human Services, Oregon Health Division report that concludes that the aquifer serving the well would be "highly susceptible to contamination" from a septic drainage field that is sited within 500 feet of the existing well, and the hearings official's decision approving the septic drainage field neither acknowledges nor addresses that report, remand is required for an explanation for why that potential for contamination does not implicate a local "carrying capacity" standard. *Freedman v. Lane County*, 64 Or LUBA 309 (2011).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that the "location, size, design and operating characteristics" of a mixed-use development in a commercial zone will be compatible with surrounding properties are inadequate, where the

findings do not describe any of the "operating characteristics" of the mixed-use development or evaluate whether those operating characteristics will be compatible with surrounding properties. *Poe v. City of Warrenton*, 64 Or LUBA 377 (2011).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings are inadequate to explain how a proposed waste water treatment facility on EFU land would either "force a significant change in" the adjacent farming practices or "significantly increase the cost of" an adjacent organic farming operation under ORS 215.296(1) where the findings do not explain what the "significant impacts" to the organic farming operation would be or explain how the potential for spray drift from the proposed facility would either "force a significant change in" the organic farm practices or "significantly increase the cost of" the operation. *Falcon Heights WSD v. Klamath County*, 64 Or LUBA 390 (2011).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the evidence the county appears to rely on appears to show that state noise standards are violated by a wind energy facility at four residences, but the county only finds that the noise standards are violated at one residence, the decision must be remanded for additional findings. *Mingo v. Morrow County*, 63 Or LUBA 357 (2011).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A permit decision consisting of a checklist with marginal notations that approval criteria are "Satisfied" or "Conditionally Satisfied" falls short of providing the findings and explanation why the evidence shows that the criteria are satisfied that is required by ORS 215.416(9). *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A local government's findings that an application for subdivision approval should be denied for failure to include a traffic study are inadequate, where there is no evidence that any of the circumstances that might require a traffic study under the local code were present and there was no suggestion during the local proceedings that planning staff believed a traffic study was necessary. *Montgomery v. City of Dunes City*, 60 Or LUBA 274 (2010).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Although a local government's findings may be brief, findings must be more than a bare conclusion that applicable approval criteria are satisfied. In addressing an approval criterion that the proposed use will have "minimal adverse impact upon adjoining properties," the findings must identify the alleged impacts and explain why they will be minimal. *Scott v. City of Jacksonville*, 60 Or LUBA 307 (2010).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. LUBA will remand for more adequate findings regarding a code requirement for "guaranteed access," where the local government relies upon a roadway easement on adjoining land that is not in the record and that arguably does not serve the subject property. *Devin Oil Co., Inc. v. Morrow County*, 60 Or LUBA 336 (2010).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings to explain the basis for denial of a permit are inadequate where the findings do not explain which criteria the application fails to meet or otherwise inform the applicant what steps are necessary to obtain approval under the relevant criteria. *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387 (2008).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. In addressing a requirement that a proposed use on forestland not interfere with nearby farming practices, a county must address the impacts on an adjacent parcel when the petitioner alleges that there will be adverse impacts on the adjacent parcel. *Tennant v. Polk County*, 56 Or LUBA 455 (2008).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a comprehensive plan categorizes lands within the urban growth boundary according to suitability for development, a county errs by denying a request for rezoning on the basis that the requested rezoning is inconsistent with the comprehensive plan, where the findings identify nothing in the comprehensive plan that supports a conclusion that the property's low suitability rating precludes the requested rezoning. *Sperber v. Coos County*, 56 Or LUBA 763 (2008).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a rezoning standard requires a finding that the rezoning "will not seriously interfere with permitted uses on other nearby parcels," a county's findings that the standard is not met due to "access and fire safety concerns" are inadequate, where those findings address concerns with development on the rezoned property and have no obvious bearing on interference with development on nearby parcels. *Sperber v. Coos County*, 56 Or LUBA 763 (2008).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the dispute during local proceedings on remand regarding a visual impact approval criterion centered on whether photographic evidence submitted by broadcast tower opponents simulated six-foot diameter microwave antennas or much larger antennas, the hearings officer's unexplained decision to allow microwave antennas to be sited on the towers without additional review so long as they did not exceed eight feet in diameter requires remand so that the hearings officer can explain her selection of the eight-foot parameter. *Save Our Skyline v. City of Bend*, 55 Or LUBA 12 (2007).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A hearings officer's decision to incorporate a "safe harbor" in her approval of broadcast towers that would allow additional microwave antennas to be sited on the towers in the future without additional review against visual impact approval criteria so long as they were not sited higher than 150 feet is erroneous, where the decision included no explanation for why the 150-foot parameter was selected. *Save Our Skyline v. City of Bend*, 55 Or LUBA 12 (2007).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A hearings officer's findings that a proposed cellular tower complies with a siting standard that requires the tower to minimize its effect on scenic values are adequate, where the findings note the developed nature of the butte where the cellular tower would be located and demonstrate that the hearings officer was persuaded that the standard was met by the applicant's proposal to shorten the tower

from 100 feet to 70 feet and to offer alternative designs that would make the tower look more like its surroundings. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city's findings in support of its decision to deny permit approval must adequately interpret and apply the criteria the city relies on to deny the application in a way that is consistent with the language of the criteria and must provide a coherent explanation for why the city believes the proposal does not comply with the criteria. A city decision will be remanded where its findings do not comply with these minimum requirements for adequate findings. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A local government's conclusory finding that a sign plan complies with applicable criteria is not a basis for remand where the signage standards are clear and objective, and petitioners do not identify anything about the sign plan or the applicable standards that require more detailed discussion or findings. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A finding that simply states that an approval standard is satisfied "as shown in" the application and oral testimony, without any attempt to state the facts relied upon or explain why the facts demonstrate compliance with the standard, is inadequate. *O'Rourke v. Union County*, 54 Or LUBA 614 (2007).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A conclusion that no potential off-street parking site is available within 500 feet of the subject property is not supported by adequate findings or evidence where the decision simply rejects alternative sites for unexplained "topographic" reasons. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Under a variance standard requiring that the "hardship" not be "self-created," a finding that the "applicant's desire to partition his property" created the "hardship" is an insufficient basis to deny the variance request, where the hardship is the lack of alternative access to the proposed parcel and there is no explanation in the findings how petitioner's desire to partition his property created the lack of alternative access to the proposed parcel. *Krishchenko v. City of Canby*, 52 Or LUBA 290 (2006).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A hearings officer's findings are sufficient to explain why a proposed subdivision complies with criteria that require preserving existing natural drainage channels where those findings explain that drainage within the historic drainage area has largely been diverted and there is no evidence that more than a *de minimis* flow of drainage will cross a shallow swale on the property to be subdivided. *Kyle v. Washington County*, 52 Or LUBA 399 (2006).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that an intervening road will buffer commercial and residential uses, and that rely on site design review standards to minimize adverse impacts of future commercial uses, are sufficient to explain why a zone change from office to commercial uses is consistent with a refinement plan policy that

encourages location of office uses as a transition between commercial and residential uses. *Bothman v. City of Eugene*, Or LUBA 701 (2006).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a variance criterion requires the city to find that "public need" outweighs "adverse impacts" of developing wetlands and a party argues there is no market demand for the commercial development that the variance would allow, the city must address in its findings the role, if any, that market demand plays under the variance criterion and explain why the public need, as the city interprets those words, outweighs the identified potential adverse impacts. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where intervenors provide in their response brief an alternative theory for affirming the challenged decision in the event necessary findings are found not to be supported by substantial evidence, and that alternative theory does not appear in the challenged findings, LUBA will decline to affirm on that basis, and will remand to allow the local government to consider that alternative theory in the first instance. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. While a code standard that allows a reduced setback for cellular towers based on listed considerations that increase or reduce off-site impacts does not require that the hearings officer assign equal weight to each of the listed considerations, it also does not allow the hearings officer to assign conclusive weight to one consideration while ignoring others. Where some considerations point toward increasing the setback, and others point to reduction, the hearings officer must adopt findings addressing all relevant considerations and explaining what weight is given to each and why weighing of all the circumstances supports the ultimate conclusion. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A challenge to the adequacy of findings will be sustained where the decision maker fails to explain why a code provision that prohibits development unless a developer makes transportation improvements necessary to maintain a particular level of service applies only at the time of a zone change and not to a site plan and architectural review application. *Wal-Mart Stores, Inc. v. City of Medford*, 49 Or LUBA 52 (2005).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A conclusory finding that a traffic study is sufficient to determine access requirements is inadequate where the finding fails to set out the applicable criteria or explain what those access requirements are. *Wal-Mart Stores, Inc. v. City of Medford*, 49 Or LUBA 52 (2005).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the decision approves a cul-de-sac that may be longer than 600 feet, depending on how the "block" is measured, remand is necessary to explain how the blocks created by the cul-de-sac comply with a subdivision approval standard prohibiting blocks longer than 600 feet as measured between the centerline of "through cross streets." *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the relevant legal standards mandate a regimented step-by-step analysis, and the findings adopted in support of a decision to deny a permit under those legal standards are brief and do not come close to providing the level of detail that is required to address the legal standards, remand is required. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that an annexation area is adjacent to a long-developed urban neighborhood with full public services that can be readily extended to the annexed territory area are sufficient to demonstrate compliance with a code criterion requiring that "an adequate level of urban services and infrastructure is available or will be made available in a timely manner." *Cutsforth v. City of Albany*, 49 Or LUBA 559 (2005).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings are inadequate where they simply disagree with a hearings officer's interpretation of what an approval standard requires, without explaining what the decision maker believes the standard to require or why the evidence satisfies the standard. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Evidence that a planning commissioner or member of the board of commissioners may have misunderstood the applicable standard does not provide a basis for reversal or remand where the challenged decision correctly identifies the applicable standards and correctly applies the law. *Potts v. Clackamas County*, 48 Or LUBA 521 (2005).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. An approval standard that requires that the local government identify the alternative that "most effectively carries out comprehensive plan goals and policies" necessarily requires balancing when the plan includes many overlapping policies that can work at cross-purposes. Findings that explain how the city chose to balance those plan goals and policies and which goals and policies the city emphasized are adequate, even if petitioners would have emphasized other goals and policies. *Doob v. City of Grants Pass*, 48 Or LUBA 587 (2005).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a development code includes a requirement that its standards for subdivision approval must "provide safe * * * traffic conditions," findings that explain how an amended development code subdivision approval standard will make the transportation system safer are adequate to demonstrate compliance with that development code requirement notwithstanding that alternative subdivision approval standards might result in safer traffic conditions or achieve those safer traffic conditions more quickly. *Doob v. City of Grants Pass*, 48 Or LUBA 587 (2005).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that briefly describe existing parks within the city are inadequate to demonstrate that a proposed new park complies with a standard requiring that other properly zoned land is not available in sufficient quantity to meet current and projected needs. *Nielson v. City of Stayton*, 47 Or LUBA 52 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A decision to deny a dwelling based on an applicant's failure to demonstrate that the dwelling has only "minimum impact" on wildlife habitat is inadequate, where the hearings officer also found that the dwelling complies with big game habitat criteria and that such compliance establishes a presumption that the dwelling has only minimum impact on habitat, and the hearings officer does not explain those apparently inconsistent findings. *McAlister v. Jackson County*, 47 Or LUBA 125 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that proposed residential development is consistent with permitted uses in the zone are inadequate to demonstrate that the proposed development is compatible with the "existing land use pattern in the area." *Doob v. Josephine County*, 47 Or LUBA 147 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a decision's findings rely on the supply of light industrial lands outside the UGB, but fail to consider the supply of light industrial and commercial lands within the UGB zoned to allow a proposed storage facility on rural land that serves residents within the UGB, those findings are inadequate to demonstrate compliance with rezoning criteria requiring a "need" to rezone land. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 160 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Conclusory findings that proposed development is consistent with the current development pattern in the area are inadequate to demonstrate that the proposed development is "consistent with the character of the surrounding area," particularly when the local code calls for a "detailed review." *Seaton v. Josephine County*, 47 Or LUBA 178 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where LUBA is able to determine that a reasonable decision maker could rely on the evidence the decision maker chose to rely on, findings specifically addressing conflicting evidence are unnecessary. *Tallman v. Clatsop County*, 47 Or LUBA 240 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. That lot-of-record dwellings are allowed in the EFU zone is an insufficient basis to demonstrate compliance with a code standard requiring that a proposed lot-of-record dwelling will not materially alter the stability of the land use pattern in the area. *Tallman v. Clatsop County*, 47 Or LUBA 240 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. That lot-of-record dwellings are allowed in the EFU zone is an insufficient basis to demonstrate compliance with a code standard requiring a finding that the proposed dwelling will not create conditions or circumstances "contrary to the purposes or intent" of the county comprehensive plan and code. *Tallman v. Clatsop County*, 47 Or LUBA 240 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Whether property with predominantly nonfarm soils should nevertheless be viewed as "other lands suitable for farm use" under a county code standard that replicates the Goal 3 definition of agricultural land, is governed by specific considerations. That a property may have been briefly used as an elk

and deer holding facility is not one of the specified considerations. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that recite lengthy efforts by the city historic preservation board to encourage an applicant to preserve an historic building are adequate to show that the city met its obligations under a plan policy requiring the city to "encourage" preservation of historic structures. *Chin v. City of Corvallis*, 46 Or LUBA 1 (2003).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A finding that a proposed dead-end street can exceed the code maximum grade because there are no turning movements on the street is inadequate, where the finding fails to take into account turning movements at the intersection of the local street and the nearest public road, where the grade also exceeds the maximum. *McCulloh v. City of Jacksonville*, 46 Or LUBA 267 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that address a city requirement that a proposed annexation must be a "natural extension" of city limits are adequate, where the findings explain that the area to be annexed will provide contiguity between existing city boundaries and commercially zoned property located outside city limits that will require annexation and the extension of urban services when they are developed. *West Side Rural F.P.D v. City of Hood River*, 46 Or LUBA 451 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. When a local decision maker denies a person standing to participate in the local proceeding, the local decision maker must explain why that person was denied standing. *Swanson v. Jackson County*, 46 Or LUBA 629 (2004).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. The proponent of "more stringent requirements" under ORS 836.623(1) has some burden to identify what additional requirements may be necessary to ensure public safety. Where the proponent merely argues that proposed development near an airport runway should be denied because existing standards cannot ensure ground safety against airplane crashes, local government findings rejecting the need for more stringent requirements may be equally conclusory. *Graham Oil Co. v. City of North Bend*, 44 Or LUBA 18 (2003).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. City findings that conclude that proposed park facility development within a floodway complies with a comprehensive plan policy regarding community parks are inadequate where those findings interpret the community park policy as being both aspirational *and* mandatory and the city's findings provide no explanation for that apparent discrepancy. *Monogios v. City of Pendleton*, 44 Or LUBA 576 (2003).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city's findings that a proposed tram system that will pass through open space zoned land is consistent with the purpose of the open space zone because the tram system will provide linkages between the hiking trails located at one end of the tramway and recreational amenities such as walkways,

bikeways and parks located at the other end of the tramway adequately explains why the proposed tram system is consistent with that purpose statement. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A finding that a proposed destination resort is located in a setting with "high natural amenities" as required by ORS 197.445 is inadequate and not supported by substantial evidence, where neither the county's decision nor the record identifies or describes any high natural amenities near the proposed resort. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A finding that a 1973 deed satisfied then existing subdivision regulations so as to legalize a parcel that was described in the 1973 deed is inadequate, where the finding does not address the terms of the subdivision ordinance nor explain why property described in a deed constitutes a "replat" or "resubdivision," as those terms are used in the subdivision ordinance. *Palaske v. Clackamas County*, 43 Or LUBA 202 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a local zoning ordinance adopts a definition of "lot of record" for purposes of identifying certain nonconforming lots and parcels that may be developed notwithstanding their inconsistency with the zoning ordinance requirements, a finding that concludes that a tract of land is a parcel and therefore is developable, but does not address the lot of record definition, is inadequate. *Palaske v. Clackamas County*, 43 Or LUBA 202 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city's finding that a county zoning boundary line is coterminous with the city's coastal shorelands boundary is inadequate where the decision does not explain why the zoning boundary is related to the shorelands boundary or, assuming that is the case, why a subsequent city amendment relocating the coastal shorelands boundary effected a corresponding relocation of the zoning boundary. *DLCD v. City of Gold Beach*, 43 Or LUBA 319 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city's finding that its coastal shorelands boundary is the landward "line of active and conditionally stable foredunes" is inadequate where the city's comprehensive plan identifies the coastal shorelands boundary as the area on the property that is subject to ocean flooding and includes a map depicting the area subject to ocean flooding, and the city's decision does not explain why the "line of active and conditionally stable foredunes" is the same as the area subject to ocean flooding. *DLCD v. City of Gold Beach*, 43 Or LUBA 319 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. LUBA will remand a city decision denying a partition application where it is not clear what documents make up the local decision and the documents that are identified as containing the final land use decision do not set out the city's rationale for denying the application. *Martin v. City of Dunes City*, 43 Or LUBA 354 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. LUBA will remand a county decision that alternatives to siting a radio transmission tower on EFU-zoned land are infeasible where the county did not adopt findings explaining why six of the identified sites are infeasible and the parties do not cite to evidence in the record that "clearly supports" the county's decision that the six sites are infeasible. *Van Nalts v. Benton County*, 42 Or LUBA 497 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a county considers dust impacts from mining that may have an impact on neighboring residential uses, those dust impacts may form a basis for denial only if the impacts violate applicable Department of Environmental Quality air quality standards. *Morse Bros., Inc. v. Linn County*, 42 Or LUBA 484 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city decision concluding that applying local sign ordinance criteria to deny a sign permit would violate Article I, section 8, of the Oregon Constitution is inadequate, where the findings do not identify what aspects of the local sign ordinance the city believes would be found to be unconstitutional or explain why the city believes it would be unconstitutional to apply the sign ordinance. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where an application for city approval of a sign that is larger than allowed by city sign standards does not meet the city's criteria for approval of such larger signs, a city may not cite constitutional concerns and approve the request for a larger sign without (1) adopting a reviewable decision that explains what constitutional provisions the city believes would be violated and why, and (2) explaining why the appropriate remedy in that circumstance would not be to deny the request until constitutional provisions for allowing such larger signs are adopted. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where it is not apparent that a local road improvement standard is satisfied by improving one road access or whether all accesses to a property must be improved to city standards prior to approval of a conditional use permit, city findings that establish that one access to the property is improved to city standards are inadequate to demonstrate that the local road improvement standard is met. *Monogios and Co. v. City of Pendleton*, 42 Or LUBA 291 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. It is inconsistent with a county's findings obligation under ORS 215.416(9) for the county to simply declare, without explanation, that it prefers the staff count of existing dwellings in the area and is not persuaded by petitioners' evidence of fewer dwellings, where petitioners provided specific, direct evidence supporting their dwelling count, and the staff figure is conclusory and based on evidence not in the record. *Matiaco v. Columbia County*, 42 Or LUBA 277 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. When an applicant asserts below that it is entitled to a well under the statutory exemption to obtaining a water use permit pursuant to ORS 537.545 and the findings supporting denial on the basis of lack

of a water source do not address or respond to that assertion, the findings are inadequate. *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. When the applicant and the local government address approval criteria using different approaches, findings denying the application must provide an explanation for why the applicant's approach is inadequate and explain, in at least a general way, how the applicant must address the criteria under the local government's approach. *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that a proposed underground shooting range cannot be detected by sight, smell or sound from adjacent residential property are adequate to explain why the proposed shooting range is compatible with adjacent property. *Chilla v. City of North Bend*, 41 Or LUBA 539 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A finding that existing improvements and the presence of seasonal drainage areas limit farm use of agricultural land is inadequate to demonstrate that the land is irrevocably committed to nonfarm uses, where the finding fails to describe the limitations, or explain why such longstanding limitations now render farm use of the subject property impracticable, given the history of farm use on the property. *Friends of Linn County v. Linn County*, 41 Or LUBA 358 (2002).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the county's code requires that streets providing access to a proposed land division be improved to a specified width and composition if the streets (1) will serve four or more lots or parcels and (2) are likely to serve additional lots or parcels in the future, LUBA will remand a decision when the county appears to answer those questions in the affirmative by requiring compliance with the width standard, but does not require compliance with the composition standard, and does not explain the reason for the apparent inconsistency. *Dudek v. Umatilla County*, 40 Or LUBA 416 (2001).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A finding that a proposed church expansion doubling the capacity of the church will not have greater adverse traffic impacts is inadequate, where the finding relies solely on the church's current plan to consolidate multiple daily services into a single service, and fails to explain why concentrating traffic from multiple services will not result in greater impacts or to address the possibility that future growth in church membership associated with the expansion may require additional services. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a variance criterion requires that a variance conform to the comprehensive plan, a city's finding that a variance will promote in-fill and higher residential density is insufficient to demonstrate that the variance, allowing a lot to be divided into two lots, satisfies that criterion where the findings identify no comprehensive plan provisions encouraging in-fill and higher residential density. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a county adopts unchallenged findings that siting a cellular phone tower next to a power line right-of-way does not create a hazardous condition, because the tower is designed to collapse in on itself in high winds rather than fall to the side, and those findings are supported by testimony from an engineer with the company that will construct the tower, the county's findings are adequate and supported by substantial evidence. *Pereira v. Columbia County,* 39 Or LUBA 575 (2001).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A decision that an existing road need not be considered as an alternative under OAR 660-012-0065(5)(a) is not supported by substantial evidence where there is no attempt to identify how costly it would be to address safety problems and bring the road up to applicable standards so that it could be approved by a registered engineer. *Friends of Yamhill County v. Yamhill County,* 39 Or LUBA 478 (2001).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a proposed aggregate extraction site must demonstrate compliance with a public need criterion and a criterion that requires consideration of alternative sites, but identified alternative sites are rejected without explanation and the only cited evidence regarding public need is testimony from the public works director that he would support a site anywhere in the county, the decision is not supported by adequate findings or substantial evidence. *Donnell v. Union County,* 39 Or LUBA 419 (2001).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city's finding that a proposed memorial is compatible with the applicable park master plan is inadequate, where the city's findings do not explain why the proposal to use a nearby street for vehicular access and parking for the memorial is compatible with the plan's recommendation to close that street to vehicles. *Carlsen v. City of Portland,* 39 Or LUBA 93 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Remand is necessary for a city to address a criterion requiring the existence of a "specific geographic justification" to site a memorial within a public park, where the city's findings do not identify a geographic justification or explain why no such justification is needed. *Carlsen v. City of Portland,* 39 Or LUBA 93 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a city's findings explain both a short term and long term solution for storm water that will be generated by a proposal and how they will be paid for and explain how storm water will be detained onsite, those findings are adequate to demonstrate compliance with a site design review criterion that requires that the proposed drainage facilities minimize the impact on public agencies' drainage facilities. *Hubenthal v. City of Woodburn,* 39 Or LUBA 20 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A finding that one alternative for providing sewer service to a proposed medical hardship dwelling has been approved by county health officials is inadequate to demonstrate compliance with an approval standard that requires that another alternative be used unless that alternative "is not feasible." *Puma v. Linn County,* 38 Or LUBA 762 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a neighboring farmer identifies significant changes and significant cost increases to his ranching operation from a proposed motocross race track and off-road vehicle park, the county must find that the proposed park, as conditioned, will not cause those impacts. Such findings are inadequate where the county does not address those identified impacts or explain why the proposed park, as conditioned, will not cause those impacts. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that characteristics of adjoining uses support an irrevocably committed exception to Goal 3 are inadequate where the findings do not explain (1) how many of the adjoining lots are developed, (2) what activities on those lots have impacts on the proposed exception area, (3) why services provided to those lots impact the proposed exception area, or (4) why adjoining recreational and open space uses make farm use of the proposed exception area impracticable. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. In denying an application for land use approval based on a finding that the application does not comply with applicable criteria, a local government must explain in its findings why it believes the applicable criteria are not satisfied. Further, the local government's findings must be sufficient to inform petitioner either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings are inadequate, where they simply acknowledge statements that are made in a permit application and do not explain what the decision maker believes to be the relevant facts or explain why those facts lead to a conclusion that approval criteria are met. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city adopts inadequate findings of compliance with a standard requiring park facilities or fees in lieu thereof adequate to serve proposed development, where the findings fail to address whether an identified park site is adequate to serve the development, and fail to explain why system development charges (SDCs) collected at the time building permits are issued will suffice to pay for parks adequate to serve the development. *Breen v. City of Salem*, 37 Or LUBA 961 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Remand is appropriate where the county's decision rezones 10 acres of a 121-acre farm/forest parcel to allow the landowner to site a nonresource dwelling, without explaining why the rezone is consistent with a code provision prohibiting rezoning that affords "special privileges to an individual property owner not available to the general public." *McLane v. Klamath County*, 37 Or LUBA 888 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that rely on factors such as soil acidity, poor drainage, traffic conflicts, and the availability of irrigation that are conditions common to the area are inadequate to explain why farming cannot practicably be managed on a parcel due to "extraordinary circumstances" that do not generally apply to other

lands in the vicinity, as required by ORS 215.705(2). *Friends of Linn County v. Linn County*, 37 Or LUBA 844 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A county's findings of compliance with the stability standard are inadequate, where the county fails to explain or justify a study area that places the subject property at the margin of the identified study area, and excludes from the study large EFU-zoned parcels adjacent to the subject property. *Friends of Linn County v. Linn County*, 37 Or LUBA 844 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A county's findings under the stability standard are inadequate, where the county fails to identify any uses on most of the EFU-zoned parcels within the study area, but merely assumes that the dominant land use in the area is residential because of the small size of most parcels and the fact that most dwellings in the area predated zoning restrictions. *Friends of Linn County v. Linn County*, 37 Or LUBA 844 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A county's finding that a proposed lot of record dwelling on high-value soils will not materially alter the stability of the overall land use pattern is inadequate, where the county considers only the stability of the *nonfarm* land uses in the area, and fails to consider whether the proposed dwelling will encourage additional nonfarm development in a manner that destabilizes remaining farm uses. *Friends of Linn County v. Linn County*, 37 Or LUBA 844 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a zoning ordinance standard requires consideration of residential appearance and function of an "area" in approving a bed and breakfast facility, and a hearings officer's findings use different areas in applying that criterion so that the analysis is internally inconsistent, the findings are inadequate to demonstrate compliance with the standard. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Required findings that a variance is "necessary" due to "special conditions or circumstances peculiar to the property" are inadequate, where the findings are equivocal about whether the problems identified are present and fail to explain why the cited problems could not be eliminated by redesigning the proposed subdivision or by eliminating one or more lots. *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city's findings of compliance with a variance criterion that requires that the variance be "necessary for the proper development of the subdivision and the preservation of property rights and values," are inadequate where the findings do not identify any "property rights" or "property values" that would be threatened by the required 60-foot right-of-way or why the proposed subdivision could not be designed to accommodate the required 60-foot right-of-way. *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that dwellings can be built consistent with building setbacks are not responsive to a criterion that

requires that the site be "suitable for the proposed use considering size, shape, location, topography and location of improvements and natural features." *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city's finding of noncompliance with an approval criterion must suffice to explain to the applicant what steps need be taken to demonstrate compliance, or why the application cannot gain approval under that criterion. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472 (2000).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that state there is "sufficient evidence in the form of oral testimony and documentation to support the application," and also state that existing adjacent parcels are "clustered around" two roads are insufficient to adequately describe the characteristics of adjacent lands and the uses located on them as required by OAR 660-004-0028(2)(b) and (6)(a). *DLCD v. Wallowa County*, 37 Or LUBA 105 (1999).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. City findings are inadequate to demonstrate compliance with flood hazard and storm water runoff requirements if they merely require the applicant to provide further studies to show that the runoff from the proposed development can be mitigated. *Highland Condominium Assoc. v. City of Eugene*, 37 Or LUBA 13 (1999).

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

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city's findings of compliance with conditional use criteria requiring that a "proposed use is consistent with the overall development character of the neighborhood with regard to building size, height, color, material and form" are conclusory and inadequate, where the city's findings do not describe either the boundaries or characteristics of the relevant neighborhood, but instead compare the proposed use to development in geographically distant parts of the city without explaining why those areas are part of the relevant neighborhood. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A finding that the soils on the subject property are unsuitable for farm use is an inadequate, unexplained conclusion where the subject property is predominantly Class VI soils and the comprehensive plan provides that such soils have significant importance for grazing. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Committed exception findings must explain what it is about existing parcel size and ownership patterns that irrevocably commit resource land to nonresource use, specify the location of parcels created prior

to application of the Goals, and distinguish those parcels created pursuant to the Goals. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Adequate findings regarding adjacent uses must specifically identify adjacent uses and explain what it is about the adjacent uses that make the farm use of the subject property impracticable. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Assuming that the existence of water and sewer lines on adjacent lands may be relevant to whether a property is irrevocably committed to nonresource use, findings must explain what that relevance is. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings addressing lands available for rural residential development need not consider residential land within urban growth boundaries. Land within urban growth boundaries is not rural land. *Turrell v. Harney County*, 36 Or LUBA 244 (1999).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A county's finding that a proposed nonforest dwelling is inconsistent with forest uses is inadequate where the finding is so conclusory that it fails to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application can be approved. *Eddings v. Columbia County*, 36 Or LUBA 159 (1999).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A decision that offers only conclusory statements of compliance with an applicable zoning ordinance does not provide an adequate explanation of the basis for the local government's determination of compliance. *Wood v. Crook County*, 36 Or LUBA 143 (1999).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a city council interprets a code standard that excuses a permit applicant from providing required parking where "special circumstances exist constituting a hardship" as being satisfied where the cost of providing the one additional parking site that is possible on the property will constitute an "economic hardship out of proportion to the gain of parking spaces," and petitioner does not specifically challenge the city council's findings, LUBA will affirm that interpretation unless it exceeds the city's interpretive discretion under ORS 197.829(1). *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68 (1999).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. An assignment of error challenging the adequacy of findings that an approval criterion is met must be denied, where the decision maker also adopts alternative findings that the approval criterion does not apply to the challenged permit application and those alternative findings are not challenged. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68 (1999).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings are inadequate where a local government's decision makes conclusory statements of compliance with

the applicable approval criteria without giving any factual or legal analysis to support the conclusion that the application complies with each of the criteria. *Larvik v. City of La Grande*, 34 Or LUBA 467 (1998).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. In applying a local provision based on the no significant change/increased cost standard, the local government is not required to perform the impossible task of proving a negative or to quantify how much imposed conditions will reduce conflicts with farm uses below a certain threshold. It need only affirmatively consider the impacts of a proposed use on farm or forest practices, and in so doing, consider whether the use will force a significant change or significantly increase the cost of those practices. *Gutoski v. Lane County*, 34 Or LUBA 219 (1998).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a local government's findings are supported in the record by substantial evidence, the findings will be considered sufficient even though there may also be evidence supporting the contrary position. *Risher v. City of Portland*, 33 Or LUBA 479 (1997).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. The county's findings do not demonstrate that the subject property is irrevocably committed to non-resource uses where the findings describe the characteristics of the subject property, but do not explain what impact those characteristics have on the practicability of uses on the property. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that address neighborhood and regional characteristics under OAR 660-04-028(6)(d) by concluding that there will continue to be an increasing demand for additional rural residential homesites in the future are irrelevant to a conclusion that a committed exception is justified. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where, on remand, an applicant modifies a site plan for a gas station and car wash so that only the location of the gas pumps is carried forward from the original site plan to the modified site plan, a reasonable person could not conclude that the two plans are substantially similar. A finding that the plans are substantially similar does not adequately address the code requirements that apply to a site plan. *Sullivan v. City of Woodburn*, 33 Or LUBA 356 (1997).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A finding that an "exceptional circumstances" variance criterion is met because an existing substandard road cannot be improved to comply with the road standard without expanding the right-of-way is conclusory and inadequate. *Elder v. Douglas County*, 33 Or LUBA 276 (1997).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings of compliance with a variance criterion requiring that the variance be consistent with "the purposes" of the zoning ordinance, are inadequate where the findings fail to identify or discuss any of the three potentially applicable purpose sections in the zoning ordinance. *Elder v. Douglas County*, 33 Or LUBA 276 (1997).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a challenged decision does not discuss why granting a variance is the most effective method to relieve the special conditions of parcel size and shape, the findings do not establish that the variance meets local code requirements that special conditions apply to the subject property that "can be most effectively relieved by a variance." *Shaffer v. City of Salem*, 33 Or LUBA 57 (1997).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. In applying a code approval standard that requires the identification of an area whose stability might be affected by a proposed development, the county's findings may not rely on inconsistent definitions of the area. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A code approval standard that requires "a clear picture of the existing land use pattern" in a specified area is not satisfied by general findings about zoning and details about some of the properties in the area. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

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

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. In order to demonstrate compliance with ORS 215.296(1), county findings must: (1) describe the farm and forest practices on surrounding lands devoted to farm or forest use; explain why the proposed use will not force a significant change in those practices; and (3) explain why the proposed use will not significantly increase the cost of those practices. *Brown v. Union County*, 32 Or LUBA 168 (1996).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a hearings officer's interpretation of an applicable code provision is inadequate for review because it omits necessary analytical steps, this Board may make the determination of whether the county's decision is correct. *Miller v. Clackamas County*, 31 Or LUBA 104 (1996).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. County findings are inadequate when they fail to interpret an applicable local regulation, and fail to identify facts upon which the county relied in reaching its conclusions. LUBA will not overlook such inadequacies in the findings when no party cites evidence in the record that compels the interpretation and conclusion made by the county. *DLCD v. Clatsop County*, 31 Or LUBA 90 (1996).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a standard requires a comparison of the traffic or parking generated by a proposed use to the traffic or parking that normally occurs in the district, and the findings contain no such comparison or other factual support to establish the basis upon which the county reached its conclusion that the

standard is satisfied, the findings are inadequate and not supported by substantial evidence. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1996).

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

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

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

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a local criterion requires that the county find a proposed use will not significantly reduce or impair significant wildlife, a finding that compliance with fencing specifications will "help the request comply" does not factually address or establish compliance with the criterion. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. To justify an irrevocably committed exception on forestland, the county must explain in findings why the facts upon which it relies lead to a conclusion that uses allowed by Goal 4 are impracticable. *DLCD v. Coos County*, 30 Or LUBA 229 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. The county must itself analyze and evaluate relevant facts in its findings to show how it reached its decision; it cannot do that analysis for the first time in its brief to LUBA. *DLCD v. Coos County*, 30 Or LUBA 229 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Both Goal 4 and Goal 2 require the county to evaluate the practicability of all forest uses on the subject property before determining that such uses are impracticable and taking a committed exception. *DLCD v. Coos County*, 30 Or LUBA 229 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Because OAR 660-09-025(1) allows a fair degree of imprecision in both the number and acreage of sites needed to accommodate industrial and commercial uses, as well as broad site categories, it is not necessary in cases involving very minor changes in acreages to support Goal 9 findings with extensive analysis. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a local government makes multiple findings, each showing compliance with a code criterion, the possibility that one such finding may be wrong is not critical to the final decision. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A city may not justify noncompliance with provisions of Goal 14 and policies in the city's own comprehensive plan on the ground that noncompliance is necessary to accommodate a particular development proposal. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a county code provision requires that a temporary mobile home be connected to an existing septic system "if feasible" and the county acknowledges the applicants have not applied for the authorization necessary to determine such feasibility, the county's findings are inadequate to establish compliance with the applicable code provision. *Collier v. Marion County*, 29 Or LUBA 462 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. The county's finding, made as part of its Goal 5 ESEE analysis, that an aggregate site located within a Big Game Habitat Range is not uniquely suited to wildlife must be supported by substantial evidence, not just a statement that the wildlife can "freely relocate" to other parts of the Big Game Habitat Range. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. While a local government is required to identify in its findings the facts it relies upon in reaching its decision, it is not required to explain why it chose to balance conflicting evidence in a particular way, or to identify evidence it chose not to rely on. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. When the evidence in the record is conflicting, and the local government's findings fail to explain the basis for its conclusion or state which evidence it finds persuasive, LUBA must remand the decision for additional findings. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that state aggregate sites already on the comprehensive plan inventory are being depleted faster than expected, conclude there is a need to preserve additional aggregate sites to provide for long-term supply at multiple sites to protect the competitive nature of the aggregate market and explain why it is in the public interest that a competitive aggregate market be maintained, are sufficient to satisfy a code requirement that there be a "public need" to add the subject site to the plan inventory. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where, during a local government proceeding regarding the existence of a nonconforming use, specific issues were raised concerning whether a complete or partial interruption or abandonment of any nonconforming use of the subject property had occurred, findings that simply state use of the

property has not been interrupted or abandoned are impermissibly conclusory. *Suydam v. Deschutes County*, 29 Or LUBA 273 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a local government relies on particular features to assure compliance of a proposed use with approval standards, it must assure there is an adequate reason to assume such features actually will be part of the use. More than testimony by the applicant expressing willingness to provide such features is required. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings which do not identify the ways a destination resort preliminary development plan is different from the previously approved conceptual site plan, the magnitude of such differences or why the local government believes the differences are minor, are not adequate to establish compliance with a code standard requiring the preliminary development plan to conform to the conceptual site plan and alterations, if any, to be minor in nature. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings supporting a local government decision that a proposed comprehensive plan amendment is a "major" plan amendment under the local code must explain the rationale for that conclusion. Quoting the code definition of "major" plan amendment and referring to unspecified principles or policies is not sufficient. *Cone v. City of Eugene*, 29 Or LUBA 133 (1995).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Identifying the area to be considered and the overall land use pattern of that area are prerequisites to determining whether a proposed partition satisfies a code requirement that it "not materially alter the stability of the land use pattern of the area." *McNamara v. Union County*, 28 Or LUBA 396 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. In addressing the ORS 215.448(1)(c) requirement that a proposed home occupation "will not interfere with existing uses on nearby land or with other uses permitted in the zone in which the property is located," the local government must identify the uses permitted in the applicable zone. *Holsheimer v. Clackamas County*, 28 Or LUBA 279 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings need not be perfect, and conditions may be imposed to assure compliance with approval standards. However, LUBA must be able to determine from the findings, conditions and evidence in the record that the relevant approval standards are met. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a code standard requires that conditional uses "preserve assets of particular interest to the community," local government findings supporting approval of a proposed conditional use must explain whether a natural feature that will be affected by the conditional use is such an asset and, if so, why the standard is satisfied. *Mazeski v. Wasco County*, 28 Or LUBA 178 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Local government findings of compliance with an applicable approval standard must state the facts the local government relies on and explain why those facts lead to the conclusion that the standard is satisfied. *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. While a local government is required to identify in its findings the facts it relied upon in reaching its decision, it is not required to explain why it chose to balance conflicting evidence in a particular way, or to identify evidence it chose not to rely on. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Arguments that approval of a fill permit violates local code provisions on fill in drainageways provide no basis for reversal or remand where (1) the local government adopted findings that the disputed fill was not placed in a drainageway, (2) those findings are supported by substantial evidence, and (3) petitioner does not specifically challenge the findings. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings which identify a lack of evidence concerning road capacity and evidence concerning traffic congestion during weekend events at existing uses and a proposed agricultural/horticultural school complex are adequate to explain why a decision maker concluded the applicant failed to carry its burden concerning a code "minimal adverse impact" standard. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. While it may be that findings of noncompliance with a relevant approval standard need not be as exhaustive or detailed as those necessary to establish compliance with that approval standard, a local government is obligated to provide an explanation for its conclusion that the standard is not met. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. In addressing a code requirement that a proposed conditional use satisfy state regulatory requirements, a local government determination that an exemption from certain state regulations applies must be reasonable. However, the local government need not establish that such a determination is correct. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings which identify some physical features and characteristics of an area, discuss planned improvements, and identify farm and nonfarm uses in the area do not establish the stability of the existing land use pattern of the area or explain why introducing a 120 lot residential planned unit development into the area will not materially alter that stability, as required by ORS 215.283(3)(c). *DLCD v. Crook County*, 26 Or LUBA 478 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings which identify facts relied on but fail to supply a rationale explaining why those facts led the local government to conclude a proposed livestock sale operation will not have significant adverse

impacts on abutting properties are inadequate. *Collins v. Klamath County*, 26 Or LUBA 434 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a local government relies on particular features of a proposed use to assure compliance with approval standards, it must assure there is an adequate reason to assume such features actually will be part of the proposal. *Collins v. Klamath County*, 26 Or LUBA 434 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Petitioner's argument that the county failed to address evidence that escaped dogs can cause great damage in rural areas provides no basis for reversal or remand, where the county found the proposed kennel will comply with a code standard requiring no significant increase in the cost of accepted farm and forest practices because the design of the kennel will result in no dogs escaping from the facility. *Larry Kelly Farms, Inc. v. Marion County*, 26 Or LUBA 401 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a comprehensive plan contains no existing inventory of significant aggregate resource sites and imposes different standards for plan amendments, depending on whether the amendment is a plan text or a plan map amendment, the local government must explain in its decision its rationale in processing and approving a request to amend the plan to designate a site as a significant aggregate resource site as a plan text amendment. *Nathan v. City of Turner*, 26 Or LUBA 382 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A local government is under no obligation to specifically discuss in a challenged decision all of the evidence in the record or to explain its reasons for choosing to rely upon particular evidence over other evidence. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Although the small size of a property may limit the size and impacts of a proposed development, and therefore provide a basis for explanatory findings demonstrating compliance with approval standards limiting development impacts, the decision approving such development may not simply cite the small size of the property and conclude the standards are met. *Lucier v. City of Medford*, 26 Or LUBA 213 (1994).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the challenged decision does not identify the characteristics of a proposed "soil remediation" use, or compare those characteristics with those of the listed, permitted uses in the applicable zone, the findings are inadequate to demonstrate the proposed "soil remediation" use is similar to the listed, permitted uses in the applicable zone. *Murphy Citizens Advisory Comm. v. Josephine County*, 26 Or LUBA 181 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A local government decision that a shopping center may be allowed in a particular zone under code "similar use" provisions must (1) express an interpretation of the "similar use" provisions that is adequate for LUBA review, (2) actually apply the interpretation adopted, and (3) explain how the

decision is consistent with that interpretation. *Loud v. City of Cottage Grove*, 26 Or LUBA 152 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings determining compatibility between a proposed nonforest dwelling and forest uses are inadequate where the findings simply conclude no conflicts have occurred between existing dwellings and forest uses, but fail to establish the proximity between those existing dwellings and forest uses, and fail to establish whether the existing dwellings have buffering or other characteristics similar to those of the subject parcel. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the local code requires that a proposed driving range not alter the character of the surrounding area "in a manner which substantially limits, impairs or precludes the use of surrounding properties" for listed permitted uses, and findings acknowledge safety as a relevant consideration but simply rely upon the striking areas being more than 300 yards from adjacent properties to satisfy that safety consideration, the findings are inadequate to explain how the code standard is satisfied. *Moore v. Clackamas County*, 26 Or LUBA 40 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Although a county had in the past applied a predominance test so that a property was not designated forest where less than one half of the property qualified as forestlands, such a test is not required by Goal 4. Findings that explain such a test may result in large parcels containing significant acreage of forestland not being designated for forest use under Goal 4 are adequate to support a decision not to apply the predominance test. *Westfair Associates Partnership v. Lane County*, 25 Or LUBA 729 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A local government decision approving a permit will be remanded to the local government if the decision fails to (1) identify the relevant approval standards, (2) set out the facts believed and relied upon by the local decision maker, and (3) explain how those facts lead to a decision that the proposal complies with the approval standards. *Lathrop v. Wallowa County*, 25 Or LUBA 693 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. A variance criterion requiring that there be no reasonably practical alternatives to granting the variance is met where the local government finds the subdivision roadway necessitating the variance is needed for compliance with the comprehensive plan, and petitioners do not challenge that finding. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where a county code provision requires that there be no other "feasible location" for a proposed use, county findings that do not explain *why* identified alternative sites are not "feasible locations" for the proposed use are impermissibly conclusory, and LUBA will remand the challenged decision unless "the parties identify relevant evidence in the record which clearly supports" the county's decision in this regard. *Simmons v. Marion County*, 25 Or LUBA 647 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. In denying a request for permit approval, ORS 215.416(9) requires that a county provide an explanation of why the county believes the request fails to satisfy applicable standards. Where the required explanation is missing, LUBA will remand the decision. *Ball and Associates v. Josephine County*, 25 Or LUBA 525 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where an applicable standard requires a determination that a proposed plan amendment complies with the plan, findings which state only that the proposal "appears" to satisfy the plan are inadequate to demonstrate compliance with that standard. *Makepeace v. Josephine County*, 25 Or LUBA 370 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings explaining how the existing limited rural industrial uses near a proposed aggregate processing facility have not affected the historical stability of an EFU-zoned area, and that the existing and proposed industrial uses may discourage intrusion of rural residential development, are adequate to demonstrate compliance with an EFU zone "stability" standard. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Where the challenged decision includes only a conclusory statement that detailed code criteria for PUD development plans are satisfied, and neither the decision itself nor the respondents' briefs explain how other findings addressing other code standards are adequate to demonstrate compliance with the PUD development plan criteria, LUBA cannot conclude the PUD development plan criteria are either satisfied or inapplicable to the subject proposal. *Davenport v. City of Tigard*, 25 Or LUBA 67 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. Findings that a proposed comprehensive plan map designation will offer more protection for resources identified in certain comprehensive plan policies than the existing plan map designation are adequate to support the change in plan designation, absent some explanation of why those findings are inadequate. *Reeves v. Washington County*, 24 Or LUBA 483 (1993).

1.4.4 Administrative Law – Adequacy of Findings – Explanation of Rationale. The requirement of OAR 660-16-005 for identification of conflicting uses is not satisfied by a local government finding that simply concludes, without explanation, that there are no potential conflicts between a Goal 5 resource site and existing uses. *Gonzalez v. Lane County*, 24 Or LUBA 251 (1992).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. Where a local government adopts independent findings and applies a different substantive analysis for two separate approval criteria, but relies on the same evidence in concluding that those criteria are not met, a petitioner does not effectively challenge the findings for one of those criteria by challenging the findings for the other so as to defeat an argument that it has failed to challenge all valid, alternative, and independent bases for denial. *Himmelberger v. City of Portland*, 79 Or LUBA 367 (2019).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. LUBA will deny an assignment of error that alleges that the city's findings are inadequate to explain why a proposed PUD is "reasonably compatible and harmonious with adjacent nearby land uses" where the assignment of error fails to challenge all of the city's findings and instead selectively quotes and challenges only portions of the findings. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. The local governing body is entitled to some latitude in reconciling competing plan policies that address different but related needs regarding residential land use and housing, and findings are not inconsistent merely because they recognize some tension between the policies. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. A challenge to a single sentence that expresses a very broad view of the words "public need" in a comprehensive plan policy does not alone provide a basis for reversal or remand where the local government's decision is supported by almost three single-spaced pages of findings that explain the local government's reasoning. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. An assignment of error that a decision maker erroneously characterized a nonconforming use application as an application to "change" rather than "expand" the nonconforming use does not provide a basis for reversal or remand, where the local approval criteria for both changes and expansions require a finding of no greater adverse impacts, and petitioner does not challenge findings that the proposed change/expansion results in greater adverse impacts. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. Where a local government adopts findings regarding a code provision that contains language that is almost identical to the challenged code provision and that requires the same analysis as the challenged code provision, those findings may be relied on to demonstrate compliance with both code provisions. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. Findings demonstrating compliance with an approval criterion that requires that a proposed RV park be compatible with surrounding residential areas based, in part, on vegetative screening are not sufficient to demonstrate compliance with a comprehensive plan policy requiring buffer zones between residential areas and conflicting land uses. *Jacobsen v. City of Winston*, 51 Or LUBA 602 (2006).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. Finding compliance with an approval standard by incorporating findings that address other standards may be insufficient where the standards are not identical and the findings do not address the differences. *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. While it might be error for a local government to rely on findings demonstrating compliance with a less rigorous "balancing" standard to demonstrate compliance with a more rigorous "no adverse impact" standard, the reverse is not necessarily true: the local government may be able to rely on findings of compliance with the more rigorous standard to demonstrate compliance with a less rigorous standard. *Cadwell v. Union County*, 48 Or LUBA 500 (2005).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. A local government may adopt a single set of findings addressing two code compatibility standards, as long as the findings are adequate to demonstrate that both standards are met. *Nelson v. Curry County*, 47 Or LUBA 196 (2004).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. A proposal to swap plan designations for two portions of a single parcel does not require separate findings addressing each portion, where the applicable plan amendment criteria do not necessarily require separate findings, and petitioner does not identify any meaningful difference between the two areas that would require separate consideration. *Excelsior Investment Co. v. City of Medford*, 44 Or LUBA 553 (2003).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. A standard requiring that a proposed use be compatible with the surrounding area is not the same as a standard requiring that a proposed use be compatible with farm and forest uses in the area and not interfere with farm or forest practices. A county cannot rely on findings of compliance with one standard to also find compliance with the other, without addressing the differences between the two standards or explaining why compliance with one also demonstrates compliance with the other. *Thomas v. Wasco County*, 35 Or LUBA 173 (1998).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. A finding that the subject property contains no identified Goal 5 resources is not adequate to address the Goal 4 requirement that "other forested lands" be designated as forest lands if such lands are needed to maintain soil, water, air, fish and wildlife resources. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. That the findings supporting the challenged decision are similar or identical to those adopted in a previous local government decision based on a different site plan does not, of itself, provide a basis for reversal or remand. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632 (1995).

1.4.5 Administrative Law – Adequacy of Findings – Related Findings. Where the challenged decision includes only a conclusory statement that detailed code criteria for PUD development

plans are satisfied, and neither the decision itself nor the respondents' briefs explain how other findings addressing other code standards are adequate to demonstrate compliance with the PUD development plan criteria, LUBA cannot conclude the PUD development plan criteria are either satisfied or inapplicable to the subject proposal. *Davenport v. City of Tigard*, 25 Or LUBA 67 (1993).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A local government's erroneous statement in the findings that it was not required to consider the petitioner's testimony does not establish that the local government committed procedural error where other findings establish that the local government did consider that testimony. *ODOT v. Grant County*, 80 Or LUBA 192 (2019).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a local government adopts independent findings and applies a different substantive analysis for two separate approval criteria, but relies on the same evidence in concluding that those criteria are not met, a petitioner does not effectively challenge the findings for one of those criteria by challenging the findings for the other so as to defeat an argument that it has failed to challenge all valid, alternative, and independent bases for denial. *Himmelberger v. City of Portland*, 79 Or LUBA 367 (2019).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Approving a boundary line adjustment to a parcel under applicable standards does not "collaterally attack" a previous land partition decision that originally created the subject parcel under different standards, even assuming the adjusted parcel after the boundary line adjustment would not comply with the partition standards that were applied earlier when the parcel was created. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. When LUBA has affirmed at least one valid basis for denial the Board typically does not address challenges directed at other, alternate, bases for denial. Such an action would result in rendering what are essentially advisory adjudications, which is not consistent with the statutory mandate that LUBA's review should be conducted pursuant to sound principles of judicial review. ORS 197.805. *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 245 (2018).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. When local code sets out independent grounds for granting a variance, and when only one of three rezoning criteria must be met in order to grant a rezoning, and the city adequately demonstrated that one criterion was satisfied, LUBA need not consider arguments relating to the other two criteria. *American Tower Corp v. City of Tualatin*, 78 Or LUBA 350 (2018).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A finding that the applicant qualifies as a "farm operator" as defined at OAR 660-033-0130(9)(a) is inadequate, where the finding merely assumes the applicant is the farm operator, and does not address issues raised below that the applicant leases the land to a third person who is the actual farm operator. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A hearings officer's failure to expressly interpret ambiguous code language is not, by itself, a basis for remand, where the hearings officer's decision primarily addressed a different issue raised by petitioner and LUBA agrees with the interpretation of that code language that is included in the county's response brief. *Brannon v. Multnomah County*, 77 Or LUBA 275 (2018).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A city's conclusion that zoning ordinance text amendments are consistent with the city's comprehensive plan policy which requires city to "maximize * * * intermodal transportation linkages" because the amendments will not affect the city's supply of land zoned for economic or industrial use is not responsive to the language of the comprehensive plan policy objective. On its face, a city's zoning ordinance which prohibits new and expanded intermodal fossil fuel transportation facilities appears to be inconsistent with the comprehensive plan policy objective language, and this apparent inconsistency requires some analysis and a direct explanation. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. In granting design review approval, whether the use for which design review approval is a permitted use in the applicable zoning district is a relevant issue, and when that issue is raised and the city fails to address that issue in its findings, remand is required for the city to adopt findings addressing the issue. *Glenwood 2006, LLC v. City of Beaverton*, 76 Or LUBA 162 (2017).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where parties raise legitimate questions about how a study area will be used to calculate residential density and the local government fails to address those questions when it adopts the amendments governing use of the study area, the study area does not comply with the OAR 660-023-0050(1) requirement for "specific standards," or the OAR 660-023-0050(2) requirement for "clear and objective" standards. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings regarding the adequacy of urban services to serve annexed property are inadequate, where the findings cite only hearsay statements from providers, and fail to address issues raised below regarding delayed response times to service the subject property and an engineer's testimony that the electrical system cannot serve the property without impacting other portions of the city. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Under an annexation requirement that the city must find that "sufficient planning and engineering data is available" and "all necessary studies and reviews have been completed such that there are no unresolved issues," a city's conclusory finding of compliance is inadequate in the face of detailed and unrebutted testimony that studies are required regarding impacts of proposed development on traffic, pedestrian and bicycle facilities, storm water drainage, flooding, electrical infrastructure, and emergency access. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a petitioner challenges the adequacy of a county's findings that a small wind turbine is of the same general character as "communication towers, utility substations and transmission lines," arguing that the findings do not address the wind turbines' moving propellers, which the other uses do not have, but the findings in fact do address the moving propellers and provide a reason why the county did not believe that difference makes the wind turbines of a different "general character," LUBA will reject petitioner's findings challenge. *Burgermeister v. Tillamook County*, 75 Or LUBA 350 (2017).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Adequate findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the conclusion that the approval standards are met; but adequate findings need not necessarily address evidence that conflicts with the evidence the local government chooses to rely upon, or explain why the decision-maker chose not to rely upon evidence that conflicts with the evidence it did choose to rely upon. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a governing body disagrees with a hearings officer regarding the applicability of a master plan to proposed development, the governing body is not obligated to adopt findings addressing the hearings officer's reasoning on that point. The findings are adequate as long as they explain the governing body's reasoning for reaching the opposite conclusion. *Kine v. Deschutes County,* 75 Or LUBA 419 (2017).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a hearings officer's finding takes inconsistent positions regarding the nature of the legal issue to be resolved in proceedings following a LUBA remand of a permit approval for a destination resort, a second remand is required. *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326 (2016).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a relevant issue is adequately raised in a land use proceeding, the findings supporting the final decision must address the issue and where the findings do not do so, remand is required. *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92 (2015).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a local code provision requires a determination that "[o]n balance, the proposed lots will have dimensions that are consistent with the purpose of this section," and the section provides for nine purposes to be considered, a city may be able to assign greater or lesser significance to a particular purpose based on direction from the city's code, comprehensive plan or other land use document. But a city errs to the extent that it interprets the "on balance" determination to allow denial based solely on a finding of inconsistency with one or two of the nine purposes, without considering consistency with all of the purposes. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. LUBA will remand for more adequate findings where a city finds that a stormwater conveyance system constructed to city standards will minimize potential adverse impacts of stormwater pollutants on estuarine fish resources, where the finding does not describe potential adverse impacts, address expert testimony regarding those impacts, or explain why compliance with city stormwater construction standards is sufficient to minimize potential adverse impacts. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Remand is required where a city's only finding responding to testimony that pesticides and herbicides runoff from residential development will harm fish in the adjacent estuary is that pesticides and herbicides will not be applied within a riparian buffer, but the finding does not address runoff from the residential

development itself, and no condition is imposed that prohibits application of pesticides or herbicides within the riparian buffer. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Absent a land use regulation or other applicable law that requires a county to address compliance with state or federal archeological and cultural preservation laws in approving an application for a mining use, or to impose conditions requiring compliance with such laws if archeological or cultural sites are discovered during mining, the county does not err in failing to adopt such findings or impose such a condition. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A finding that mining will not conflict with deer and elk winter range on the subject property, because resident deer and elk will adjust to noise from mining and truck traffic on the property, is insufficient to address issues raised regarding impacts of truck traffic on deer and elk migration routes off the property, including the increased potential for collisions between trucks and deer and elk migrating across the county road. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Remand is necessary where a county fails to address whether a comprehensive plan policy requiring the county to ensure that incompatible uses are not established "adjacent" to historic sites is violated by a proposal to run heavy trucks close to, but not across, a historic bridge, based on testimony that the truck traffic would make it unsafe for tourists and school groups to park and visit the bridge. Because there is no local interpretation of what "adjacent" means, and remand is required for other reasons, LUBA will remand the decision for the county to interpret the plan policy in the first instance, rather than interpret the plan policy on its own. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A board of county commissioners does not err in failing to address a petitioner's argument that is inconsistent with a thirteen-year-old board of commissioners' interpretation of a different LC provision. *Head v. Lane County*, 72 Or LUBA 411 (2015).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Remand is necessary where the findings conclude that the water supply is "adequate" to support proposed residential development because a main water line is located adjacent to the property, but do not address the code requirement to address the availability of water "relative to capacity," and the findings and record do not address capacity or issues raised about the capacity to serve new development while meeting existing obligations. *Oregon Coast Alliance v. City of Brookings*, 71 Or LUBA 14 (2015).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings are inadequate to establish that rezoning land adjacent to an estuary to allow for urban residential development is consistent with Goal 16, where federal agencies testified that development allowed under the rezone would adversely affect estuarine resources, but the findings do not address that testimony, or evaluate impacts of development on the estuary as Goal 16, Implementation Requirement 1 requires. *Oregon Coast Alliance v. City of Brookings*, 71 Or LUBA 14 (2015).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a county's decision modifies the alignment of a portion of a transmission pipeline that was approved in 2009, the county's findings need not address challenges raised by a landowner regarding impacts of a different portion of the pipeline, the alignment of which is not modified. Because the modification decision approves no modification of that portion of the pipeline, such challenges are collateral attacks on the 2009 decision. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where, based on Natural Resources Conservation Service data, opponents take the position that the water table lies two feet below the surface of a proposed topsoil mining operation, but the local government accepts the applicant's position that the water table lies 125 feet below the surface, but no party identifies the evidence the applicant and local government relied on for the 125-foot estimate, LUBA will remand the decision so that the county can adopt findings explaining the large discrepancy in the two estimates and why it accepted the 125-foot estimate. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Remand is necessary where a conditional use permit approval standard requires a comparison of the adverse impacts of the proposed mining use on abutting properties with the impacts of development permitted outright on the abutting properties, but the local government findings compare only the impacts of proposed and existing mining and do not consider the impacts of uses permitted outright. *Dion v. Baker County*, 70 Or LUBA 438 (2014).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Remand is required where the findings fail to address issues raised by an economist's report that economic impacts of construction on businesses are inadequately mitigated, where the report is the only evidence in the record that attempts to quantify economic impacts, and the findings do not address the report or the issue raised, or explain why that issue need not be considered under the approval criteria. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. The findings denying an application for a quasi-judicial zoning and comprehensive plan map amendment are adequate, where they explain that the two commissioners who participated in the decision could not agree whether the application satisfied two approval criteria and that by operation of law that failure to achieve a majority vote in favor of the application results in denial. The county was not required to adopt findings that are adequate to deny the application on the merits, where the decision does not deny the application on the merits. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings that batching operations on property zoned exclusive farm use that would be prohibited under ORS 215.301(2) are authorized under ORS 215.301(2) and a 1981 permit are inadequate where the findings do not respond to arguments that a 1997 permit modified the 1981 permit to disallow batching operations. *Poto v. Linn County*, 67 Or LUBA 162 (2013).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a variance standard requires that the applicant demonstrate that the "hardship was not created by the person requesting the variance," and an issue is raised below that no "hardship" exists in reducing the

number of required bicycle parking spaces, the decision maker must adopt findings identifying the hardship to the extent necessary to apply the variance criteria. *CRAW v. City of Warrenton*, 67 Or LUBA 263 (2013).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a zoning amendment standard requires that the city shall consider the comprehensive plan, and the city's transportation system plan proposes a pedestrian crossing near the rezoned property that the applicant's traffic engineer testified may require changes to the proposed development, but the findings do not address the issue, remand is necessary for the city to consider the issue or explain why no such consideration is warranted under the zoning amendment standard. *Save Downtown Canby v. City of Canby*, 67 Or LUBA 385 (2013).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings supporting a legislative decision that amends the Oregon Highway Plan to provide a process for modifying mobility standards need not address issues raised below regarding whether future decisions approving higher mobility standards will cause increased congestion of specific transportation facilities and increase pollution contrary to Goal 6, where Goal 6 will apply directly to any future decisions approving higher mobility standards for specific transportation facilities, and such issues cannot be meaningfully addressed in a legislative decision adopting general amendments to the Oregon Highway Plan. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Goal 9 requires local governments to provide adequate opportunities for a variety of economic activities, but does not require local governments to protect one type of economic activity against impacts created by other economic and non-economic uses. Goal 9 does not require that ODOT, in adopting higher mobility standards for state highways, address in its findings whether increased congestion from development allowed under the higher mobility standards will adversely affect existing economic activity. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. The Goal 11 requirement to provide "timely, orderly and efficient arrangement of public facilities and services" is not particularly concerned with the performance standards governing state highways, a concern that is more specifically addressed under Goal 12 and the Transportation Planning Rule. Goal 11 does not add anything new or different to the specific Goal 12 requirements with respect to the performance of state highways, and findings addressing Goal 11 are not inadequate simply because they fail to consider whether modified highway performance standards are consistent with Goal 11. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Although evidence in the record might provide a basis for a hearings officer to adopt findings that respond to an issue raised about the potential impact of a proposed aggregate mine on an existing wildlife corridor, where the decision on appeal does not include findings addressing that issue, the decision must be remanded for the hearings officer to adopt responsive findings. *Tonquin Holdings LLC v. Clackamas County*, 64 Or LUBA 68 (2011).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where an applicant's engineering report and environmental consultant identified technical and engineering challenges

and public health and safety issues associated with several alternatives to replacing a currently failing waste water treatment system that are independent of the costs of replacing that system, the county's findings are inadequate to explain its conclusion that an applicant considered only the cost of replacing the existing waste water treatment system in eliminating other alternative facility options. *Falcon Heights WSD v. Klamath County*, 64 Or LUBA 390 (2011).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A petitioner at LUBA who alleges a land use decision should be remanded because a local government failed to address a relevant issue must (1) identify the issue raised, (2) demonstrate the issue was adequately raised, and (3) establish the issue is relevant to applicable approval criteria in some way. A petitioner who simply refers to 86 pages of single spaced written argument below fails to carry that burden. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A criterion that requires a local government to find that a proposed dwelling will not force a significant change in accepted farm practices on surrounding lands does not require the local government to address the indirect and speculative possibility that the owner of the land on which the proposed dwelling will be located may decide in the future not to lease any portions of the subject property that may have been available for leasing for grazing in the past. *Womelsdorf v. Jackson County*, 62 Or LUBA 34 (2010).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. OAR 660-033-0030(2) and (3) require consideration of adjoining and nearby lands, in determining whether property is suitable for grazing and hence qualifies as agricultural land OAR 660-033-0020(1)(a)(B). Remand is necessary, where the record indicates that adjoining properties support seasonal grazing operations and have similar soils and conditions to the subject property, but the county does not adopt findings considering those adjoining properties or explain why the subject property cannot reasonably be used for seasonal grazing. *Wetherell v. Douglas County*, 62 Or LUBA 80 (2010).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a county hearings officer's findings show she was persuaded that additional mitigation measures were necessary to address thermal impacts of destination resort groundwater use on a nearby cool water creek, the hearings officer's decision to accept the applicant's proposal to provide additional mitigation by reducing surface withdrawal from that cool water creek is inadequate where there was opposition testimony that the proposed mitigation would not mitigate the thermal impact. While there may be a simple answer to the opposition testimony, where that answer is missing in the record and the hearings officer's decision does not address that opposition testimony, the decision must be remanded. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Remand is necessary to address testimony from a neighboring rancher that noise from blasting rock at a proposed quarry will force a significant change in or significantly increase the cost of ranching practices, where the findings do not address that testimony or noise impacts in general, but instead rely on fencing and a 200-foot buffer area to conclude that mining would not impact nearby grazing operations. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. LUBA will affirm a county's finding that fire protection measures that typically apply to logging operations are sufficient to ensure that a proposed mining operation in a forest zone will not significantly increase fire hazards, notwithstanding that a permanent mining operation will have greater duration and intensity than a seasonal logging operation, where the petitioners cite to no evidence substantiating their assertion that the nature and intensity of the mining operation require more stringent fire protection measures than logging operations. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where the Goal 5 program requires that the riparian setback be determined from the "top of high bank," as characterized by "an abrupt or noticeable change from a steeper grade to a less steep grade," a hearings officer errs in locating the top of high bank without addressing whether the location is characterized by an abrupt or noticeable change in grade. *The Piculell Group v. City of Eugene*, 56 Or LUBA 298 (2008).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Remand is necessary where one element of the test for determining the location of top of high bank is contingent on a finding that "natural conditions prevail," but the hearings officer locates the top of high bank under that element without finding or explaining why "natural conditions prevail." *The Piculell Group v. City of Eugene*, 56 Or LUBA 298 (2008).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Remand is necessary where the city attorney concludes in an enforcement action that intervenor's use of land is unlawful on two separate grounds, and the city council reverses the city attorney's decision on one ground and approves the use of land, but does not address the second ground for concluding that the use of land is unlawful. *Fessler v. City of Fossil*, 55 Or LUBA 1 (2007).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where the Oregon Department of Fish and Wildlife (ODFW) testifies that that county's Goal 5 program to protect Other Winter Range relies upon resource zoning to limit residential density, and the findings do not address that testimony or explain why the county believes it can rezone Other Winter Range land to nonresource use without amending the county's Goal 5 program, LUBA will remand the decision to address the issue. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where the county criteria that govern division of EFU-zoned land require that parcels be 160 acres or larger and require that divisions of EFU-zoned land comply with applicable comprehensive plan policies, and partition opponents argue that dividing an EFU-zoned parcel into parcels that are smaller than 160 acres violates those criteria and plan policies, the county's decision will be remanded where the county fails to address those arguments. *Friends of Umatilla County v. Umatilla County*, 55 Or LUBA 330 (2007).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A city's failure to find that it is feasible to construct a driveway without encroaching on adjacent property is not a basis for remand, where the applicable criteria require no finding of feasibility, and the petitioner identifies no physical or other impediment to constructing the driveway without encroachment. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. An equipment shed may or may not be allowed as part of a utility, where the zoning ordinance defines a "building," in part, as a "structure" and allows utilities in all zones but prohibits such utilities from including a "building." Because the zoning ordinance distinguishes between "structures" and "accessory structures," the issue becomes whether the equipment shed qualifies as an "accessory structure" and whether the prohibition is limited to "structures" and does not extend to "accessory structures." *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Remand is necessary where the local government's approval of an asphalt batch plant fails to address issues raised regarding the impact of emissions on especially sensitive crops grown nearby. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings concluding that a total variance from a code requirement to provide 10 off-street parking spaces is the "minimum necessary to alleviate the hardship" are inadequate, where the findings fail to address whether an adjacent site could provide at least some of the required 10 parking spaces. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. When a local government imposes a condition of approval based on a code provision regarding excessive demand created by a proposed development, but the local government does not find that the proposed development will cause excessive demand, ignores the developer's proposed interpretation of excessive demand, and does not provide its own interpretation, the decision must be remanded. *PacWest II, Inc. v. City of Madras*, 53 Or LUBA 241 (2007).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. In applying a compatibility standard a county does not err by failing to consider whether subdivision covenants, conditions and restrictions prohibit cell towers, where (1) it is not possible to determine if the covenants, conditions and restrictions were adopted to achieve compatibility, (2) there is a dispute about whether the covenants, conditions and restrictions apply, and (3) the county is not the body with jurisdiction to determine whether the covenants, conditions and restrictions apply. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. In applying a compatibility standard, a county does not err in failing to consider evidence about the impact the proposed use may have on property values, where the evidence is conflicting and the development code does not list impact on property values as a mandatory consideration in applying the compatibility standard. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a rezoning opponent specifically cites and quotes comprehensive plan policies and argues the proposed rezoning is inconsistent with those policies, it is generally risky for a local government to approve the rezoning without specially addressing the cited comprehensive plan policies. However, where the petitioner makes no attempt to tie his substantive arguments to the cited plan policies and the city's responsive findings adequately address petitioner's substantive arguments, the city's failure

to tie its responsive findings to the cited plan policies is not important. *Ettro v. City of Warrenton*, 53 Or LUBA 485 (2007).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where planned unit development subdivision opponents argued before the city that the proposal was inconsistent with a number of comprehensive plan provisions, and it is not clear why at least some of those comprehensive plan requirements are not relevant approval requirements, the city erred by not addressing those comprehensive plan provisions in its findings and explaining why they do not apply as approval requirements or why the proposal is consistent with those requirements if they do apply. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a city adjustment committee lacks authority to consider a legal issue, the adjustment committee does not err by failing to address that legal issue in its findings, even though petitioners raised the legal issue below. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. While it may be error to adopt findings of compliance with Goal 16 that consider only the positive economic benefits of the plan amendment without considering countervailing evidence of negative impacts, petitioners demonstrate no such error where the local government in fact considered the countervailing evidence and rejected it as unpersuasive and speculative. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where specific criticisms of a transportation impact analysis are made, silence or continued support of the transportation impact analysis by the city engineer and Oregon Department of Transportation engineers is not sufficient to refute those issues. Ignoring issues is not the same thing as implicitly refuting those issues. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a county interprets its code to require submittal of expert studies to more precisely establish the boundary of a significant natural resource area, a hearings officer may consider expert studies from the applicant and opponents, accept and reject parts of both studies, and require protection of a natural resource area that is smaller than proposed by opponents and larger than proposed by the applicant. *Kyle v. Washington County*, 52 Or LUBA 399 (2006).

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

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where on remand from LUBA the applicant withdraws a proposal for owner-occupancy that prompted the remand, that withdrawal moots that issue, and a finding to that effect is adequate to dispose of the issue on remand. *Friends of the Metolius v. Jefferson County*, 51 Or LUBA 188 (2006).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings supporting a variance approval are not inadequate merely because they do not quote *verbatim* the applicable approval criteria; petitioners must explain how the "summary" of the applicable provision makes the findings inadequate or how the city misapplied the criteria. *Spooner v. City of Salem*, 51 Or LUBA 237 (2006).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a variance criterion requires the city to find that "public need" outweighs "adverse impacts" of developing wetlands and a party argues there is no market demand for the commercial development that the variance would allow, the city must address in its findings the role, if any, that market demand plays under the variance criterion and explain why the public need, as the city interprets those words, outweighs the identified potential adverse impacts. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a variance criterion requires the city to find that "public need" outweighs "adverse impacts" of developing wetlands and a party identifies many potential adverse impacts of such development, a city's findings must do more than explain how the potential adverse impacts will be mitigated; the findings must explain why the public need outweighs the potential adverse impacts, as they may be mitigated. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a city council adopts as findings the application for approval of an RV park on a 3.5-acre parcel in a zone with a 10-acre minimum lot size, and those findings do not address petitioner's assertion at the local hearing that applicant must obtain a variance to the minimum lot size requirement, remand is appropriate for the city council to adopt findings addressing that issue. *Jacobsen v. City of Winston*, 51 Or LUBA 602 (2006).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings supporting a zone change are inadequate where they fail to address portions of the applicable approval criterion because the findings misquote the applicable zone change approval criterion, omitting language that refers to needed housing and requires that added emphasis be given to the comprehensive plan's housing policies. *Premier Development v. City of McMinnville*, 50 Or LUBA 666 (2005).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a petitioner argues at the local level that the Transportation Planning Rule (TPR) applies to the challenged decision because a condition of approval of a previous zone change arguably requires application of the TPR, the decision maker is required to at least address the issue in its decision and explain why the TPR does not apply. *Wal-Mart Stores, Inc. v. City of Medford*, 49 Or LUBA 52 (2005).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings that a text amendment adding a new use to a park zone are inadequate to address protection of historic sites under Goal 5, where the findings address only one of several parks with historic sites, and fail to explain why allowing a new potentially conflicting use on or near historic sites is consistent with Goal 5. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A hearings officer errs in approving a cul-de-sac under subdivision criteria that allow a cul-de-sac only where existing development on adjacent property prevents a street connection and a connected street pattern is not possible, where (1) the "existing development" is on the same property being subdivided, (2) there is evidence that a street connection is possible, and (3) there are no findings explaining why a street connection is not possible. *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where the approved tentative plat does not propose curbs on a private street, but the hearings officer's findings suggest that curbs will be provided to direct storm water to catch basins and there is expert testimony that curbs are necessary to direct storm water to catch basins, remand is necessary to address whether the decision requires curbs and, if not, how storm water will be directed to catch basins. *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where the decision approves a cul-de-sac that may be longer than 600 feet, depending on how the "block" is measured, remand is necessary to explain how the blocks created by the cul-de-sac comply with a subdivision approval standard prohibiting blocks longer than 600 feet as measured between the centerline of "through cross streets." *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A finding that lands within a UGB are "unavailable" for a proposed public storage facility is inadequate, where the county fails to address evidence that there is a large surplus of vacant industrial and commercial lands within the UGB that allow public storage facilities, and there is no basis to conclude that such lands are not "available." *Friends of Yamhill County v. Yamhill County*, 49 Or LUBA 529 (2005).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Remand is necessary where, on remand from LUBA, the local government approves unspecified modifications to an approved site plan without addressing issues raised on remand regarding whether those modifications are consistent with applicable criteria. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A local government's failure to address issues raised regarding whether an enhanced wetland project is consistent with the purpose of the EFU zone is at most harmless error, where petitioners do not explain why the purpose statement is an approval criterion. *Cadwell v. Union County*, 48 Or LUBA 500 (2005).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a planning department finds that a proposed home occupation would violate two of twelve home occupation standards and following a local appeal a hearings official finds the proposed home occupation would not violate those two standards, assignments of error in a LUBA appeal of the hearings official decision that allege the home occupation would violate other standards that neither the planning department nor the hearings official considered provide no basis for reversal or remand, where the petitioners cite no legal authority that would compel the hearings official to render a complete adjudication concerning all home occupation standards. *Revoal v. City of Eugene*, 47 Or LUBA 136 (2004).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. When a petitioner raises an issue concerning a specific comprehensive plan provision, a local government is obligated to explain the extent to which, if any, the provision applies to the decision. *Doob v. Josephine County*, 47 Or LUBA 147 (2004).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a city transportation plan assigns responsibility to the city engineer to determine the scope of a traffic study necessary to assess development impacts on "nearby key intersections," the city engineer's decision to limit the traffic study to intersections adjacent to the subject property and not to require study of intersections five blocks away is not a basis for reversal or remand, absent an explanation from petitioners as to why those intersections are both "nearby" and "key." *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where approval of an adjustment to create an oversize tract of land must not significantly detract from the livability or appearance of the residential area, a city commits no error in limiting its analysis to the oversize tract and declining to consider the possible impacts of developing another proposed tract that does not require a maximum lot size adjustment. *South v. City of Portland*, 46 Or LUBA 558 (2004).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. While a county need not address every possible farm use defined under ORS 215.203(2)(a) in adopting a committed exception to Goal 3, when a party below identifies a particular farm use that may be practicable, the county must address the practicability of that farm use. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. There is no generally applicable rule that in approving a land use proposal a local government must find that the proposal complies with state permitting requirements or that it is feasible for the proposal to comply with state permitting requirements. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A local government's failure to adopt findings addressing the potential impacts a subdivision will have on nearby wells and whether the applicant will be able to secure required state permits for its water supply could only provide a basis for remand by LUBA if there is some legal requirement that the local government adopt such findings. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a site design review purpose statement includes a requirement that decision makers "consider" certain impacts caused by a proposed site design, including impacts on neighboring land values, the decision must address issues that parties raise about those impacts, notwithstanding the fact that none of the approval criteria specifically require that impacts on neighboring land values be addressed. *Freeland v. City of Bend*, 45 Or LUBA 125 (2003).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A city's findings that a proposed annexation is consistent with applicable annexation policies that require a showing that (1) adequate public facilities are available to serve the property; (2) the proposed annexation is

needed; and (3) the annexation will result in a compact growth pattern, are not adequate when they fail to address petitioner's arguments that (1) not all of the needed public facilities have been determined to be available; (2) that the annexation is not needed because there is an abundance of available land within city limits; and (3) the annexation will not result in a compact growth pattern because it will result in a bulge in city limits that is almost entirely surrounded by unincorporated territory. *Friends of Linn County v. City of Lebanon*, 45 Or LUBA 204 (2003).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A county does not commit reversible error by failing to expressly reject a party's interpretative argument, where it is clear that the county implicitly rejected that interpretive argument. *Underhill v. Wasco County*, 45 Or LUBA 566 (2003).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a code provision appears to require analysis of cumulative impacts of development proposals, but the city's decision does not address cumulative impacts and the city's response brief fails to explain why no cumulative impact analysis is required or why the existing findings adequately address such impacts, LUBA will remand for the city to provide that explanation. *Bauer v. City of Portland*, 44 Or LUBA 210 (2003).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A city council decision approving a subdivision with modifications for required road access must be remanded where it is unclear which documents if any the city council adopted as part of its decision, and the city council decision includes no findings explaining the modification, or reducing the required road access to a condition of approval. Petitioner's appeal is sufficient to allege prejudice to petitioner's substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. City findings that specifically respond to a petitioner's interpretational challenge and address the only comprehensive plan goal that petitioner cites in support of that interpretational challenge are adequate to overcome petitioner's challenge that the city's findings are inadequate. *Dimone v. City of Hillsboro*, 44 Or LUBA 698 (2003).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A county's findings regarding the infeasibility of locating a radio transmission tower on either of two city-owned lots are adequate where the findings parallel an earlier memorandum in the record regarding one of the tax lots, and that earlier memorandum addresses the infeasibility of the other tax lot, notwithstanding the county's failure to recite specific aspects of the memorandum addressing the second tax lot. *Van Nalts v. Benton County*, 42 Or LUBA 497 (2002).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A city decision concluding that applying local sign ordinance criteria to deny a sign permit would violate Article I, section 8, of the Oregon Constitution is inadequate, where the findings do not identify what aspects of the local sign ordinance the city believes would be found to be unconstitutional or explain why the city believes it would be unconstitutional to apply the sign ordinance. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where an application for city approval of a sign that is larger than allowed by city sign standards does not meet the city's criteria for approval of such larger signs, a city may not cite constitutional concerns and approve the request for a larger sign without (1) adopting a reviewable decision that explains what constitutional provisions the city believes would be violated and why, and (2) explaining why the appropriate remedy in that circumstance would not be to deny the request until constitutional provisions for allowing such larger signs are adopted. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a city zoning ordinance permits consideration of consolidated applications and it is not apparent that an independent process is available to consider related permits, and petitioners raised the issue of compliance with standards required for the related permits during the pendency of a conditional use application, the city erred by failing to address petitioners' argument that the related permit standards must be satisfied before the conditional use permit could be approved. *Monogios and Co. v. City of Pendleton*, 42 Or LUBA 291 (2002).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a permit approval criterion requires that certain driveway improvements be made to ensure emergency vehicle access, it is error to simply approve the permit conditioned on future construction of the required driveway improvements, where there is focused testimony during the permit evidentiary hearing that the easement the permit applicant intended to rely on would not permit the required improvements. The permit findings must address the testimony and explain why it is reasonable to assume the required improvements can be made. *Harshman v. Jackson County*, 41 Or LUBA 330 (2002).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Although local governments are required to address legitimate issues that are raised in a quasi-judicial land use proceeding concerning relevant approval criteria, local governments are not required to address in their findings every conflict in the evidence or every criticism that is made of particular evidence. *Knight v. City of Eugene*, 41 Or LUBA 279 (2002).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where detailed arguments are presented in the petition for review questioning the need for an additional parking lot to supply adequate parking and the challenged decision treats the need for the additional parking as a relevant issue, but the respondent's brief does not respond to that issue, a remand is required. *Boly v. City of Portland*, 40 Or LUBA 537 (2001).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where comprehensive plan policies require efforts to reduce automobile use and encourage mass transit use, and arguments are presented that approving an additional parking lot adjacent to a light rail station is inconsistent with those policies, the city's unexplained dismissal of the issue requires remand. *Boly v. City of Portland*, 40 Or LUBA 537 (2001).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings that other resource lands that are potential candidates for inclusion in the UGB are better or more productive resource lands than the subject property, and therefore the environmental, social, energy, and

economic (ESEE) consequences of urbanizing other resource lands would be more adverse than urbanizing the subject property, are adequate for purposes of OAR 660-004-0010(1)(c)(B)(iii). Such findings need not specifically identify and discuss each ESEE consequence with respect to each alternative site, absent issues raised below that would require more detailed discussion. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. In evaluating reasonable alternatives to siting a utility facility necessary for public service in an EFU zone, a county must consider alternative sites identified by opponents that appear to satisfy an applicant's siting requirements and are not located on EFU-zoned land. *Jordan v. Douglas County*, 40 Or LUBA 192 (2001).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Reasonable alternatives to siting a utility facility necessary for public service in an EFU zone do not include non-EFU sites that the owner will not sell or lease to the utility provider. *Jordan v. Douglas County*, 40 Or LUBA 192 (2001).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. In addressing an "adequate public facilities" zone change criterion, a county is not required to adopt findings specifically addressing every use allowed in the proposed commercial zone; more general findings may suffice. Where no party raises any issue concerning potential uses that may place more stringent demands on public facilities than the proposed use, the county may limit its consideration to the proposed use. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A city's failure to respond to issues raised below regarding whether the "street frontage" of a flag lot is the same as its "front building line" provides no basis for remand, where it is clear under the city's land division ordinance that "street frontage" and "front building line" are not the same. *Webb v. City of Bandon*, 39 Or LUBA 584 (2001).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a city adopts findings addressing issues raised by petitioner during local proceedings, petitioner presents no basis for reversal or remand by repeating those issues at LUBA without challenging the findings the city adopted to address those issues. *Adams v. City of Medford*, 39 Or LUBA 464 (2001).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a county's findings simply state that conditions are being imposed to address identified environmental impacts from a proposed aggregate extraction site that must be addressed under local approval criteria, but the conditions that are imposed have nothing to do with the cited environmental concerns, the decision must be remanded to the county. *Donnell v. Union County*, 39 Or LUBA 419 (2001).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Remand is necessary for a city to address a criterion requiring the existence of a "specific geographic justification" to site a memorial within a public park, where the city's findings do not identify a geographic justification or explain why no such justification is needed. *Carlsen v. City of Portland*, 39 Or LUBA 93 (2000).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Conditions imposed on a proposed motocross race track and off-road vehicle park that noise from the park must comply with DEQ standards and not exceed 99 decibels are inadequate to support a finding of compliance with the noninterference standard, where the county does not determine whether compliance with DEQ standards will prevent identified impacts on surrounding farm and forest practices, and the only mechanism for achieving compliance is to limit the noise from individual vehicles to 99 decibels. Without addressing the cumulative noise impacts of multiple vehicles, the county is no position to conclude that identified impacts will not occur. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a petitioner challenges a variance decision and asserts that he raised relevant issues below, the challenged decision does not include findings addressing those issues and no party appears to dispute that petitioner raised the issues, LUBA will remand the challenged decision. *Bates v. City of Cascade Locks*, 38 Or LUBA 349 (2000).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Although a decision maker is required to adopt findings that respond to relevant issues that are raised in quasi-judicial land use hearings, the decision maker is not necessarily required to adopt findings addressing particular items of evidence, provided LUBA is able to conclude that a reasonable decision maker could reach the disputed decision based on all the evidence. *Schwerdt v. City of Corvallis*, 38 Or LUBA 174 (2000).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A local code criterion that requires a county to consider comments and recommendations of adjacent and vicinity property owners does not require that the county adopt findings that address every comment or recommendation. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where an issue was raised below concerning whether a proposed bed and breakfast facility violated a plan policy regulating commercial development and is not addressed in a hearings officer's decision and the policy itself and related plan and land use regulation provisions are unclear whether the policy applies, LUBA will remand the decision. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where no issue is raised during local proceedings concerning whether a need to save significant trees on a site would reduce the number of houses that can be constructed on a site, the city was not required to adopt findings addressing that question. Absent some reason to suspect the trees presented a development constraint, the city's decision to rely on assumptions concerning development potential of the site that do not take the trees into account is supported by substantial evidence. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings that rely on the testimony of a wildlife biologist to determine that proposed mitigation measures result in a development that will not seriously interfere with fish and wildlife habitat are adequate to address

petitioners' concern about the impact of the proposed development on wildlife habitat. *Plotkin v. Washington County*, 36 Or LUBA 378 (1999).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A decision that is not responsive to the inquiry required by applicable zoning ordinances, and does not respond to relevant issues raised during local proceedings pursuant to such ordinances, fails to provide adequate findings. *Wood v. Crook County*, 36 Or LUBA 143 (1999).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where the applicant for a planned unit development proposes to use an area to satisfy both open space and water quality facility requirements, and petitioner and a staff report raise concerns below that the proposed open space fails to comply with approval standards because it is unusable for any purpose other than for drainage, the county must adopt findings addressing that issue. *Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106 (1999).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where subdivision approval criteria do not require that the city determine whether a particular access route would be the "primary" access route, the city's failure to adopt such a finding and a lack of substantial evidence that the particular access route would be the primary access route provides no basis for reversal or remand. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A county's finding of compliance with a standard requiring that a nonforest dwelling not interfere with forest practices is inadequate, where the county merely finds that the proposed dwelling presents no greater risk of fire than posed by existing residential development, and fails to address evidence that the cumulative risk of fire from the proposed dwelling and existing development will require the owner of an adjacent forestry operation to change forestry practices and incur additional costs. *Thomas v. Wasco County*, 35 Or LUBA 173 (1998).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where specific issues are raised concerning compliance with an approval criterion, the findings supporting the decision must respond to those issues. *Rouse v. Tillamook County*, 34 Or LUBA 530 (1998).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A decision amending a comprehensive plan must specifically identify the applicable statewide planning goals and include findings that substantively address how the proposed comprehensive plan amendment assures compliance with those goals. It is insufficient to make passing reference to the general subject matter of the goals in addressing other approval criteria. *Larvik v. City of La Grande*, 34 Or LUBA 467 (1998).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where there is no requirement to determine whether property is surplus for purposes of rezoning, a local government does not violate any procedural rights by not considering the surplus status of the property in its decision to rezone the property. *St. Johns Neighborhood v. City of Portland*, 34 Or LUBA 46 (1998).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where an issue is raised below whether a condition imposed in a prior land use decision supplies an applicable approval standard in subsequent land use decisions, the local government must determine whether the condition is an applicable criterion for approval and, if so, whether it is satisfied. *Bradbury v. City of Bandon*, 33 Or LUBA 664 (1997).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where visual impact, noise and safety issues are relevant to compliance with applicable standards and are raised by petitioner below, the local government must adequately address those issues, and conclusory findings unsupported by substantial evidence are inadequate. *Port Dock Four, Inc. v. City of Newport*, 33 Or LUBA 613 (1997).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. There is no legal requirement that a local government address in its findings conflicting evidence upon which it chooses not to rely. Where a petitioner presents conflicting evidence to the city during a local appeal, but does not raise new issues, the city may rely on findings prepared prior to the local appeal. *Tandem Development Corp. v. City of Hillsboro*, 33 Or LUBA 335 (1997).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where the city makes a determination that it is feasible to comply with a local code standard requiring that each lot in a proposed subdivision be buildable, it may defer addressing engineering details to a later date. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. ORS 215.416(9) does not require the county's findings to respond to each of the arguments raised by petitioners or to discuss each of the facts that petitioners would choose the decision to rely on. *Mission Bottom Assoc. v. Marion County*, 32 Or LUBA 56 (1996).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. In approving a conditional use permit for a nonfarm dwelling, the county must make findings required by ORS 215.284(2)(c) or 215.284(3)(c) regarding the legal creation of the subject property as a separate parcel. *O'Brien v. Lincoln County*, 31 Or LUBA 262 (1996).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Law of the case only applies where an issue has been resolved in an earlier appeal. The county cannot rely on petitioners' failure to assign error under Goal 3 in a previous appeal to conclude that LUBA has made a de facto determination that the county's findings establish compliance with its own agricultural lands goal. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. In the absence of adequate findings, LUBA may affirm a local government's conclusion that a particular criterion is satisfied when facts in the record clearly support the conclusion. However, when there are no findings of compliance with a particular criterion, which was identified as applicable by the local staff and raised as an issue during the local proceedings, LUBA will not consider whether disputed facts could support findings of compliance. *DLCD v. Clatsop County*, 31 Or LUBA 90 (1996).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. The county's failure to address in findings the issues raised by a state agency not only shows a failure to cooperate as required by the county's plan, but also violates the general rule that when a relevant issue is raised in the local proceedings, it must be addressed in findings. *Furler v. Curry County*, 31 Or LUBA 1 (1996).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. LUBA need not determine whether each one of the county's findings independently could satisfy the rough proportionality test established in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). Rather, LUBA need only determine whether cumulatively the county's findings establish that there is a sufficient connection between the impacts of the proposed development and the dedication and frontage road improvements the county is requiring. *Art Piculell Group v. Clackamas County*, 30 Or LUBA 381 (1996).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A local government's design review approval for a proposed apartment complex must be remanded where it does not contain findings that address relevant approval standards relating to open space and recreation, and does not address issues raised in the proceedings below that are relevant to compliance with those standards. *Winkler v. City of Cottage Grove*, 30 Or LUBA 351 (1996).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. The county is not required to address all conflicting evidence in its findings, but the findings must address and respond to specific issues raised in the local proceedings that are relevant to compliance with approval standards. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a local decision approving a replacement dwelling does not make specific findings regarding the applicability of a local ordinance establishing a legal access requirement, and does not indicate whether legal access is a mandatory approval standard, the decision must be remanded for appropriate findings. *Drake v. Polk County*, 30 Or LUBA 199 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. When LUBA's remand order requires the county to address one code provision, the fact that certain issues raised under that code provision are also addressed by another code provision does not broaden the scope of the remand order to include the latter. *Reeves v. Yamhill County*, 30 Or LUBA 135 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where the city's findings of compliance with an ambiguous provision are inadequate and unresponsive to the issues raised by petitioners, on remand the city must specifically respond to those issues and explain its conclusions. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A local government is not required to make findings to address criteria that it has found to be inapplicable. *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. When a local ordinance requires a determination that its specific requirements can be satisfied by the imposition of

conditions, the city must make findings, supported by substantial evidence, with respect to feasibility. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. When specific issues relevant to compliance with applicable approval standards are raised in the proceedings before the county, the county's findings must address and respond specifically to those issues. *Collier v. Marion County*, 29 Or LUBA 462 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. The county's denial of a developed exception will be upheld when the county finds that the physical characteristics of the property do not render it irrevocably committed to nonresource uses; there is continuing resource use of properties to the north, east and west; and the existence of public facilities and services installed to serve the residence on the site do not irrevocably commit the remainder of the site to nonresource uses. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A local government decision granting site plan approval for off-street parking use of property containing an existing dwelling must address issues raised by petitioners concerning whether the approved site plan results in violations of code yard and setback requirements for the existing dwelling. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Failure of local government findings to address a specific issue raised by a party below, which is relevant to compliance with applicable approval standards, is a basis for remand. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where, during a local government proceeding regarding the existence of a nonconforming use, specific issues were raised concerning whether a complete or partial interruption or abandonment of any nonconforming use of the subject property had occurred, findings that simply state use of the property has not been interrupted or abandoned are impermissibly conclusory. *Suydam v. Deschutes County*, 29 Or LUBA 273 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. If relevant issues concerning compliance with applicable permit standards were specifically raised in the local government proceedings, they must be addressed in the local government's findings. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where petitioner seeks remand because the challenged decision fails to include findings on specific relevant issues raised in testimony below, petitioner must explain why the cited testimony is relevant to an applicable approval standard. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where the local code requires a determination that the proposal be in harmony with the natural environment in the area, and there is no dispute that native plant communities are a relevant characteristic of the natural environment, the decision must include findings determining the proposal is in harmony with the

native plant communities in the natural environment. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where the local code requires a determination that the proposal have minimal adverse impacts on the surrounding area, and the subject property is located within a wild and scenic river corridor, the decision must include findings evaluating the proposal's impacts on the wild and scenic river corridor. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Past use of property adjacent to the subject property as part of a nonconforming use would not establish a right to continue, on the subject property, the part of the nonconforming use that was located on other property. Where such issue is raised during local proceedings to determine the nature and extent of the nonconforming use of the subject property, it must be addressed in the local government's findings. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where a local government is required under its code to determine whether 10 percent of the "total project value" has been expended for construction, and parties raise relevant issues before the local government concerning what should be included in determining "total project value," the local government must address those issues in its findings. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A local government's findings supporting its decision on a conditional use application must address specific issues that were raised during the local proceedings and are relevant to compliance with applicable approval standards. *Bottum v. Union County*, 26 Or LUBA 407 (1994).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Failure to determine the cumulative impacts of a proposal provides no basis for reversal or remand of a decision unless petitioner establishes that some legal standard requires a determination of cumulative impacts. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. In the absence of a legal requirement that a local government determine an applicant's intent with regard to a development proposal, a local government has no obligation to determine such intent or to examine an applicant's prior history of compliance with land use or other regulations. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A local government's findings on the reasons justifying a goal exception under ORS 197.732(1)(c)(A) and OAR 660-04-022(1)(a) must respond to issues specifically raised by petitioners below concerning possible

means of lessening or eliminating the need for the proposed use. *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where petitioners raised an issue below concerning whether a particular code provision is an applicable approval standard, and the challenged decision contains no interpretation explaining that code provision is either inapplicable or satisfied, LUBA must remand the challenged decision. *Hixson v. Josephine County*, 26 Or LUBA 159 (1993).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where petitioners fail to identify any applicable standard arguably limiting the validity of a local government's initial PUD development plan approval to a particular period of time, the local government's failure to address the issue of whether the PUD development plan expired does not provide a basis for reversal or remand. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where the challenged decision acknowledges arguments below that emergency vehicles may have difficulty accessing a site proposed for urban level residential development, the challenged decision must explain how the proposal complies with Goal 11 in view of that acknowledged difficulty. *Neuharth v. City of Salem*, 25 Or LUBA 267 (1993).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. When a party raises a relevant issue below concerning whether a perceived surplus of classroom seats is in fact not a surplus due to the effects of already approved development, the local government must address that issue in its findings. *Burghardt v. City of Molalla*, 25 Or LUBA 43 (1993).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Where an applicable code criterion requires that an existing structure have been issued all necessary permits in the past and a party raises a substantial issue concerning whether such is the case, the local government is required to adopt findings explaining why the code criterion is met and those findings must be supported by substantial evidence. *Mercer v. Josephine County*, 23 Or LUBA 608 (1992).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. A general plan policy concerning transportation safety does not require that findings supporting a legislative comprehensive plan transportation map amendment negate every potential safety problem that might result from future implementation of the improvements authorized by the plan amendment. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

1.4.6 Administrative Law – Adequacy of Findings – Issues Addressed. Findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below. *Heiller v. Josephine County*, 23 Or LUBA 551 (1992).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Where an applicant proposes a planned development, and where a local code provision requires the local government to "seek to determine that the development * * * will not create a drainage or pollution problem outside the planned area," the local government errs by not adopting findings determining whether the construction of a road extension that is proposed as part of and that would provide access to the planned development will create a drainage or pollution problem outside the planned area. *Lundeen v. City of Waldport*, 80 Or LUBA 450 (2019).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Relying upon a local government staff report's citation to local code provisions is insufficient to "raise" an "issue" for purposes of bringing an appeal before LUBA under those code provisions pursuant to ORS 197.763(1) and 197.835(3) because no party to the proceedings below would understand from the staff report that an "issue" had been "raise[d]" regarding compliance with those code provisions. *McAndrew v. Washington County*, 78 Or LUBA 21 (2018).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Where a local code provision requires that a proposed development project not "seriously interfere" with the preservation of "fish and wildlife areas and habitat" as identified under the county's comprehensive plan, a hearings officer does not err in applying the code provision only to that portion of the property that is designated as "fish and wildlife areas and habitat." *McAndrew v. Washington County*, 78 Or LUBA 21 (2018).

1.4.7 Administrative Law – Adequacy of Findings – Scope. There is no general requirement that a city council discuss the evidence it chooses not to rely on and a city council's failure to discuss opposing evidence does not necessarily mean the city council did not consider that opposing evidence. *Evans v. City of Bandon*, 74 Or LUBA 418 (2016).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Goal 16, Implementation Requirement 1 requires evaluation of the impacts of development allowed under proposed zoning, but does not require the local government to evaluate potential adverse impacts of alterations approved in earlier land use decisions. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Where a local code provides that "Significant Natural Areas" are a subset of "Significant Natural Resources," a hearings officer does not err in failing to find that a proposed subdivision complies with a local code section that only applies to "Significant Natural Areas," absent a demonstration that the area in question is not only a "Significant Natural Resource," but also a "Significant Natural Area." *Carver v. Washington County*, 70 Or LUBA 23 (2014).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Findings supporting a legislative decision that amends the Oregon Highway Plan to provide a process for modifying mobility standards need not address issues raised below regarding whether future decisions approving higher mobility standards will cause increased congestion of specific transportation facilities and increase pollution contrary to Goal 6, where Goal 6 will apply directly to any future decisions approving higher mobility standards for specific transportation facilities, and such issues cannot

be meaningfully addressed in a legislative decision adopting general amendments to the Oregon Highway Plan. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

1.4.7 Administrative Law – Adequacy of Findings – Scope. When an approval criterion requires that the property for which a variance is sought must have circumstances that do not apply to "other properties in the same vicinity or land use district," the findings must address whether the circumstances which allegedly support a variance exist on other properties in the same vicinity or land use district. *Butte Conservancy v. City of Gresham*, 51 Or LUBA 194 (2006).

1.4.7 Administrative Law – Adequacy of Findings – Scope. In granting design approval for a highway interchange improvement project originally proposed as part of a larger project, a decision maker is not required to study and address interim impacts to existing facilities covered by the larger project other than the interchange, and the decision maker's failure to do so does not leave the evidence supporting approval of the interchange project something other than substantial evidence. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Findings adequate to demonstrate that an urban renewal plan "conforms to the comprehensive plan as a whole" pursuant to ORS 457.095(3) must at least (1) set forth the applicable comprehensive plan provisions and (2) express the local government's judgment as to the relationship between the renewal plan and the pertinent plan provisions. While the phrase "as a whole" in ORS 457.095(3) may allow the local government to balance competing plan policies, it does not allow the local government to address only some policies it identifies as being applicable and, without explanation, fail to address others also identified as applicable. *Zimmerman v. Columbia County*, 40 Or LUBA 483 (2001).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Until the county has adopted findings that determine precisely what inventoried Goal 5 resource areas are located on the subject property, it is not possible to identify which county Goal 5 resource protection programs affect all or parts of the subject property, and the county is in no position to adopt findings explaining whether a committed-exception zone-change is consistent with the county's existing Goal 5 resource protection provisions. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Findings addressing lands available for rural residential development need not consider residential land within urban growth boundaries. Land within urban growth boundaries is not rural land. *Turrell v. Harney County*, 36 Or LUBA 244 (1999).

1.4.7 Administrative Law – Adequacy of Findings – Scope. An assignment of error challenging the adequacy of findings that an approval criterion is met must be denied, where the decision maker also adopts alternative findings that the approval criterion does not apply to the challenged permit application and those alternative findings are not challenged. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68 (1999).

1.4.7 Administrative Law – Adequacy of Findings – Scope. OAR 660-004-0028 does not require a finding that the characteristics of the proposed exception area are sufficient in and of

themselves to commit the property to nonresource use. All factors in the rule must be considered, including the characteristics of the adjacent lands. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

1.4.7 Administrative Law – Adequacy of Findings – Scope. In considering challenges to committed exception findings the question of whether the local government adopted the required findings addressing the characteristics of adjacent lands and the relationship between the exception area and adjacent lands is distinct from the question of whether the adopted findings demonstrate that uses allowed by Goal 3 are impracticable on the subject property. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Under OAR 660-004-0028(6)(c)(A), conflicts with rural residential development in exception areas created pursuant to applicable goals cannot be used to justify a committed exception on the subject property. A finding that a majority of nearby parcels were created before the statewide planning goals is insufficient to demonstrate compliance with this requirement. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

1.4.7 Administrative Law – Adequacy of Findings – Scope. The requirement in OAR 660-004-0028(6)(c)(B) that "several contiguous undeveloped parcels" under one ownership shall be considered as one farm or forest operation does not require that a contiguous developed parcel be considered as part of contiguous farm operation. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

1.4.7 Administrative Law – Adequacy of Findings – Scope. A local provision requiring compatibility between a proposed use and development of abutting properties by outright permitted uses does not require an exhaustive listing and discussion of every subcategory of use permitted in the area. A county's general description of permitted uses and explanation why the proposed use is compatible with types of permitted uses is adequate. *Thomas v. Wasco County*, 35 Or LUBA 173 (1998).

1.4.7 Administrative Law – Adequacy of Findings – Scope. A specific finding of feasibility regarding an approval criterion is not satisfied by a general finding of overall feasibility, where a number of problems and conflicts were identified during the local proceedings concerning the particular approval criterion. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Where a decision does not describe land uses on any of the tax lots in the study area, how many lots are used for farm, forest or other uses, what those uses are, or how extensive those uses are, the decision does not supply enough information to draw a "clear picture" of the land use pattern in the area. *Hearne v. Baker County*, 34 Or LUBA 176 (1998).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Lot and parcel sizes are not dispositive of, or even particularly relevant to, determining the land use pattern. Even less relevant are tax lot sizes, which are less likely than lots and parcels to correspond to land ownership and land uses. *Hearne v. Baker County*, 34 Or LUBA 176 (1998).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Plan map and zoning amendments that significantly affect a transportation facility must be consistent with the Transportation Planning Rule (TPR). Therefore findings must address Goal 12 and the TPR as they apply to all access to the subject property unless the local government restricts access by imposing conditions of approval. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

1.4.7 Administrative Law – Adequacy of Findings – Scope. Where the only use approved by the challenged decision is mineral and aggregate extraction on a 186-acre site, and no uses on the remainder of intervenor's 490-acre parcel are subject to review under ORS 215.296, the county's findings correctly limit the evaluation of compliance with ORS 215.296 to the 186-acre area of mineral and aggregate extraction. *Mission Bottom Assoc. v. Marion County*, 32 Or LUBA 56 (1996).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where on remand a city accepts new evidence and adopts new findings regarding a planned unit development (PUD) approval standard, the issue of whether the new findings conflict with re-adopted but unchanged findings addressing other standards was not, and could not have been, resolved in the appeal of the city's initial PUD approval, and thus the "law of the case" principle under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), does not preclude a petitioner from raising that issue on appeal of the remand decision. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Findings that a 20-foot paved width is necessary to provide a "safe and adequate" transportation system for purposes of one planned unit development (PUD) standard do not conflict with findings addressing a differently worded standard that a 14-foot paved width is sufficient to ensure that the PUD is not an "impediment to emergency response." *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. In applying a vacation rental dwelling (VRD) standard that prohibits a VRD that would alter the character of the surrounding area so as to substantially limit permitted uses in the zoning district, the size of the residence, in and of itself, is largely irrelevant where a house of any size is permitted outright in the zone so long as it is occupied by the owner or leased on a long-term basis. Remand is required where the findings denying the VRD focus almost exclusively on the size of the dwelling rather than the proposed VRD use. *Gu v. City of Bandon*, 77 Or LUBA 535 (2018).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where the hearings officer adopts a board of commissioners' interpretation of a comprehensive plan policy that was articulated in a different decision, and that interpretation is not challenged on appeal, LUBA will reject a challenge to the adequacy of the hearings officer's findings, arguing that the findings fail to resolve all potential inconsistencies or ambiguities in applying the commissioners' interpretation to the proposed rezoning at issue, where the findings adequately explain the hearings officer's understanding of the plan policy, as interpreted by the commissioners, and adequately explain how the policy is applied to the rezoning application before the hearings officer. *Landwatch Lane County v. Lane County*, 75 Or LUBA 302 (2017).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where a hearings officer's finding takes inconsistent positions regarding the nature of the legal issue to be resolved in proceedings following a LUBA remand of a permit approval for a destination resort, a second remand is required. *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326 (2016).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where a decision includes potentially conflicting findings that (1) all of a geologist's recommendations must be implemented or (2) only those recommendations identified by staff must be implemented, but the first finding can be harmonized with the second because the first finding does not expressly require that all of the geologist's recommendations must be implemented, it is appropriate to interpret the first finding to only require implementation of the staff identified recommendations. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where a local government adopts alternative findings to address disjunctive statutory requirements for annexation, any inconsistency between the alternative findings is not a basis for remand. *Oregon Coast Alliance v. City of Brookings*, 71 Or LUBA 14 (2015).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. A city's findings in support of its decision to deny permit approval must adequately interpret and apply the criteria the city relies on to deny the application in a way that is consistent with the language of the criteria and must provide a coherent explanation for why the city believes the proposal does not comply with the criteria. A city decision will be remanded where its findings do not comply with these minimum requirements for adequate findings. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where an approval criterion requires a finding that the proposed land use "will be compatible with existing or anticipated uses in terms of size, building scale and style, intensity, setbacks, and landscaping," the local government must identify "existing or anticipated uses," describe those uses in the terms specified, describe the proposed land use in the terms specified, and then perform the required comparison to determine if the proposed land use and existing or anticipated uses will be compatible. Where a city's decision does none of those things, the decision will be remanded. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. An inconsistency regarding operating hours between the governing body's decision and a finding in the planning commission decision incorporated by reference into the governing body's decision does not warrant remand, where it is reasonably clear that the governing body intended to reverse the planning commission decision with respect to operating hours and inadvertently incorporated the planning commission finding. *O'Rourke v. Union County*, 54 Or LUBA 614 (2007).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where planning staff prepare a final written decision based on an oral decision by the governing body, the far better practice is to have the governing body review and approve the final written decision prior to its issuance, rather than have staff sign and issue the written decision, to avoid potential inconsistencies between the oral decision and the final written decision. *O'Rourke v. Union County*, 54 Or LUBA 614 (2007).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where the record reflects that 10 acres of irrigation rights were removed from two 20-acre parcels because (1) irrigating with that water was extremely inefficient, (2) the nonfarm parcels consist of 85 percent bare ground, and (3) moving the irrigation rights back would provide no benefit, county's findings that returning irrigation rights to the property would not render the nonfarm parcels generally suitable for the production of farm crops or livestock is supported by substantial evidence. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. That findings a local government adopts in support of its decision may conflict with some findings in a planning staff report that the city council adopts by reference provides no basis for remand where petitioner

identifies no conflicting findings that warrant remand. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where the approved tentative plat does not propose curbs on a private street, but the hearings officer's findings suggest that curbs will be provided to direct storm water to catch basins and there is expert testimony that curbs are necessary to direct storm water to catch basins, remand is necessary to address whether the decision requires curbs and, if not, how storm water will be directed to catch basins. *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Even if intersection improvements that are required in approving a destination resort will maintain acceptable levels of service on nearby roads and key intersections, it does not necessarily follow that there will not be conflicts between the increased levels of traffic the proposed destination resort will generate on these roads and agricultural traffic (including livestock and large slow-moving agricultural vehicles) seeking to negotiate these same roads. However, where the relevant approval standard only requires "reasonable compatibility," and the testimony on both sides of the seriousness of the conflicts from such traffic is speculative, LUBA cannot say the county was unreasonable in finding the destination resort will be "reasonably compatible" with nearby farm use and farm traffic. *Burke v. Crook County*, 48 Or LUBA 23 (2004).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. A local government could reasonably extrapolate from the fact that migratory birds using an existing wetland are not bothered by an adjoining aggregate mine operation to find that additional migratory birds attracted to the wetland, when enhanced, also would not be bothered by the mine operation. *Cadwell v. Union County*, 48 Or LUBA 500 (2005).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. A decision to deny a dwelling based on an applicant's failure to demonstrate that the dwelling has only "minimum impact" on wildlife habitat is inadequate, where the hearings officer also found that the dwelling complies with big game habitat criteria and that such compliance establishes a presumption that the dwelling has only minimum impact on habitat, and the hearings officer does not explain those apparently inconsistent findings. *McAlister v. Jackson County*, 47 Or LUBA 125 (2004).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. A county's finding that proposed mining activities are not minimized sufficiently to avoid conflicts with identified riparian resources is not adequate, where the riparian area is located near water courses that will receive water diverted from mining cells and the county adopted other findings that mining will not affect identified wetlands that are located between the riparian area and presumably would be more susceptible to fluctuations in water levels than the riparian areas. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. There is no inconsistency in a city council subdivision approval decision that (1) refuses to delay approval or require setbacks for a possible future freeway, (2) requires elimination of a proposed subdivision

access to the existing roadway that might be displaced by the possible future freeway, and (3) eliminates a planning commission requirement for pedestrian access to the roadway that might be displaced by the possible future freeway where (a) the possible future freeway is not yet included in the city's comprehensive plan, (b) the decision to eliminate the proposed roadway connection is based on an Oregon Department of Transportation policy that would preclude approval of the roadway connection, and (c) a code provision excuses pedestrian connections where they are found to be "infeasible or inappropriate" and the city council adopts an unchallenged finding that the pedestrian connection is "not necessary." *Baida v. City of Medford*, 44 Or LUBA 473 (2003).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. City findings that conclude that proposed park facility development within a floodway complies with a comprehensive plan policy regarding community parks are inadequate where those findings interpret the community park policy as being both aspirational *and* mandatory and the city's findings provide no explanation for that apparent discrepancy. *Monogios v. City of Pendleton*, 44 Or LUBA 576 (2003).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where the staff report that the county governing body adopts as findings recommends a 300-yard buffer to ensure a hunting preserve will be compatible with adjoining properties and the county governing body approves the hunting preserve without a buffer, but adopts no additional findings explaining why no buffer is needed to ensure compatibility, the county governing body's decision must be remanded. *Underhill v. Wasco County*, 43 Or LUBA 277 (2002).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. LUBA will remand a city decision denying a zone change where the city adopts as findings both a staff report that recommends and provides the rationale for *denying* the zone change, and an earlier staff report that recommends and provides the rationale for *approving* the zone change. *Larmer Warehouse v. City of Salem*, 43 Or LUBA 53 (2002).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. A finding that a proposed parking layout may be relocated to expand the septic drainfield does not conflict with a condition requiring that parking shall be provided as shown in the site plan, where it is clear that the purpose of the condition is to satisfy a standard addressing the number of parking spaces, and not the location of the parking lot. *Baker v. Lane County*, 43 Or LUBA 493 (2003).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Absent a criterion requiring that the city consider the height of an existing church in approving the height of a proposed addition to that church, the height of the existing structure has no bearing on the city's decision. That the city calculated the height of the proposed addition based in part on the grade elevation of the existing structure does not compel the city to consider the height of the existing structure in approving the proposed addition. *Sattler v. City of Beaverton*, 41 Or LUBA 106 (2001).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where the county's code requires that streets providing access to a proposed land division be improved to a specified width and composition if the streets (1) will serve four or more lots or parcels and (2) are likely to serve additional lots or parcels in the future, LUBA will remand a decision when the

county appears to answer those questions in the affirmative by requiring compliance with the width standard, but does not require compliance with the composition standard, and does not explain the reason for the apparent inconsistency. *Dudek v. Umatilla County*, 40 Or LUBA 416 (2001).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. It is not inconsistent for findings to reject alternative sites under OAR 660-004-0010(1)(c)(B)(ii) because proposed industrial uses would conflict with surrounding high-density residential uses, while concluding under OAR 660-004-0010(1)(c)(B)(iv) that, as limited by conditions of approval, industrial use of the subject property is compatible with rural residential uses that border the subject property on one side. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. The practice of incorporating other decisions or documents into the challenged decision as findings increases the risk of adopting inconsistent findings. However, such inconsistent findings do not provide a basis for remand when the local government explains and resolves the discrepancy between any conflicting decisions or documents it incorporates in its findings. *Spiro v. Yamhill County*, 38 Or LUBA 133 (2000).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where a zoning ordinance standard requires consideration of residential appearance and function of an "area" in approving a bed and breakfast facility, and a hearings officer's findings use different areas in applying that criterion so that the analysis is internally inconsistent, the findings are inadequate to demonstrate compliance with the standard. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where a zoning ordinance standard requires that the transportation system be capable of serving the proposed and existing uses and the findings addressing that standard focus exclusively on the relatively small traffic generating impact of the proposal without ever addressing the adequacy of the transportation system, the findings are inadequate to demonstrate compliance with the standard. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Findings that dwellings can be built consistent with building setbacks are not responsive to a criterion that requires that the site be "suitable for the proposed use considering size, shape, location, topography and location of improvements and natural features." *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where a hearings officer's findings incorporate staff report findings that are inconsistent concerning one issue, LUBA will not remand the hearings officer's decision where it is clear that the hearings officer's findings superseded the staff report on that issue. *Central Bethany Dev. Co. v. Washington County*, 33 Or LUBA 463 (1997).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. In determining whether a UGB amendment is justified on the basis of housing need, a local government cannot

focus its needs analysis on the needs of the existing population if the proposed development is intended for a different population. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. If a city seeking to expand its UGB wishes to recognize a housing need for a population other than the existing population, it must amend its population projections to recognize both the natural growth of the existing population and the addition of a new population group, and must describe the proposed development with enough specificity that it is reasonably clear the UGB amendment will accomplish the desired objective. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. If local government findings addressing different approval standards conflict with each other, and this conflict is not reconciled in the challenged decision, the conflict may undermine the findings sufficiently to render them inadequate to support the local government's determinations of compliance. *Doob v. Josephine County*, 27 Or LUBA 293 (1994).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. Where a challenged decision states certain findings supersede other inconsistent findings, a general challenge that findings adopted to support the decision are internally inconsistent provides no basis for reversal or remand, where petitioner fails to explain why the findings are inadequate to establish consistency with particular approval criteria or explain why alleged inconsistencies are not resolved by the designated superseding findings. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

1.4.8 Administrative Law – Adequacy of Findings – Logic and Consistency. An erroneous finding that the local government cannot impose a condition of subdivision approval requiring measures to mitigate off-site traffic impacts, provides no basis for reversal or remand, where the local government adopts superseding findings explaining why it believes such measures are not warranted and the local government's authority to require such measures is permissive rather than mandatory. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

1.5.1 Administrative Law – Requirements for Findings – Generally. Where a local government adopts a post-acknowledgment plan amendment creating a new zone that allows 20-acre lots, an argument that DEQ rules indicate that properties of 10 or more acres in size are generally able to support on-site wastewater systems is not sufficient to establish compliance with Goal 11 with respect to wastewater where those rules appear for the first time in the response brief, where there are no findings or evidence in the record addressing wastewater, and where there is no evidence in the record that the rule is accurate within the portion of the local government's jurisdiction at issue. Similarly, references to the proximity of the majority of candidate lands to fire districts, to evidence that more demand for funds would not be created in one of the districts, to 10 years of data indicating that less than two percent of fires resulted from residential structures, and to local fire protection standards with which future development would be required to comply are not sufficient to establish compliance with Goal 11 with respect to fire protection where there is no analysis of the likelihood of increased fire as more residences are potentially introduced into the area or discussion of the capacity of the existing fire service organizations to provide more service. *DLCD v. Douglas County*, 80 Or LUBA 98 (2019).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where the county approves an amendment to a planned development approval for a resort, golf course and aerial challenge course, and petitioner argues the county improperly construed the applicable provisions of the county's code, but petitioner has not ultimately challenged the board of county commissioners' interpretation, or otherwise explained why LUBA is not required to affirm that interpretation under ORS 197.829(1), petitioner has provided no basis for reversal or remand. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where petitioner argues the county committed a procedural error that prejudiced his substantial rights when the board of county commissioners failed to consider a written statement that petitioner submitted to the board of commissioners at the hearing, but petitioner does not establish that the board of county commissioners actually failed to consider petitioner's written statement, and petitioner failed to object to the alleged procedural error below, petitioner has not established that the county committed a procedural error or violated an applicable legal standard. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where a hearings officer's interpretive findings in support of his conclusion that a front setback and height standard qualify as "site-related development standards" are inadequate, LUBA will nevertheless affirm the hearings officer's decision where the hearings officer's decision is (1) consistent with prior hearings officer decisions, (2) consistent with prior city council decision, (3) consistent with relevant purpose statements, and (4) consistent with the relevant legislative history. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

1.5.1 Administrative Law – Requirement for Findings – Generally. A local governing body commits no error in requesting that a prevailing party prepare written findings for it to adopt. And the governing body commits no error in adopting written findings that deviate from statements made at the final evidentiary hearing, and it is those written findings and not the oral statements

that are subject to LUBA review on the merits. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.5.1 Administrative Law – Requirement for Findings – Generally. Findings of fact and law are the decision; they are not evidence. A local governing body commits no error in adopting new findings following a LUBA remand for inadequate findings, without reopening the evidentiary record. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where an applicant for a historic landmark designation advances three arguments why a property owner may not refuse to consent under ORS 197.722(1) and thereby terminate consideration of the application, the historic review board errs by terminating consideration of the application without adopting findings that respond to those arguments. *McLoughlin Neighborhood Assoc. v. City of Oregon City*, 76 Or LUBA 180 (2017).

1.5.1 Administrative Law – Requirement for Findings – Generally. Under OAR 661-010-0025(1)(a) a local government may clarify its understanding of all the documents a final decision maker adopted as supporting findings, by collecting all those adopted findings together at the beginning of the record. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

1.5.1 Administrative Law – Requirement for Findings – Generally. In amending a transportation systems plan (TSP) to locate a bypass through an industrial area, a local government is not obligated to adopt findings regarding the post-amendment adequacy of its inventory of commercial and industrial lands, where the acknowledged zoning district that applies to those lands already anticipates that at least some of those lands may be used for transportation facilities. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where a governing body adopts findings that were prepared by others, those findings become the findings of the governing body, and it does not matter who prepared or previously adopted the findings. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

1.5.1 Administrative Law – Requirement for Findings – Generally. Even if there is no statutory or other legal requirement that a building permit must in all cases be supported by findings, the record must be sufficient for LUBA or Court of Appeals review if the building permit qualifies as a land use decision. But the initial burden in an appeal to LUBA of such a building permit is to establish an arguable legal error. Once that is done, if the record is not sufficient to establish that the local government correctly applied the law, remand may be required. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

1.5.1 Administrative Law – Requirement for Findings – Generally. The absence of findings addressing whether an ordinance adopted on remand is consistent with applicable comprehensive plan policies is not a basis for reversal or remand, where the ordinance merely deletes text from the original ordinance subject to remand, on remand the county adopted findings concluding that the original ordinance is consistent with the plan policies, and the petitioner identifies nothing in the deletions accomplished by the remand ordinance that might cause the county to reach a

different conclusion with respect to the remand ordinance. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

1.5.1 Administrative Law – Requirement for Findings – Generally. Even if there is no state or local standard that requires that legislative land use decisions be supported by findings, a legislative land use decision must be supported by findings or accessible material in the record that is sufficient to show that applicable criteria were applied and any required considerations were considered. An unexplained finding that the comprehensive plan does not require that multifamily housing be located in the city's commercial zone is not sufficient to demonstrate that a zoning ordinance amendment to delete multi-family housing as a permitted use in the city's commercial zone is consistent with the city's comprehensive plan. *Cassidy v. City of Glendale*, 66 Or LUBA 314 (2012).

1.5.1 Administrative Law – Requirement for Findings – Generally. Comprehensive plan policies may be mandatory considerations, such that the local government is obligated to adopt findings addressing those considerations, even if individual policies are not mandatory approval criteria that must be independently satisfied or complied with. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

1.5.1 Administrative Law – Requirement for Findings – Generally. A finding that the public interest will not be prejudiced if a right-of-way is vacated is not adequate to address a comprehensive plan policy that asks whether the proposed right-of-way vacation "satisfies a compelling public need," because the finding answers a different question than the question asked by the comprehensive plan policy. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

1.5.1 Administrative Law – Requirement for Findings – Generally. A finding that a proposed right-of-way vacation "will not degrade * * * accessibility in the surrounding neighborhoods" is not sufficient to address a comprehensive plan policy that "[a] proposed vacation should not limit, nor make more difficult, safe and convenient pedestrian and bicycle access," where the barrier that two cemeteries currently pose for pedestrian, bicycle and vehicular traffic was the topic of considerable testimony and the vacation would eliminate the only existing publicly owned property to provide pedestrian and bicycle access through the cemeteries. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

1.5.1 Administrative Law – Requirement for Findings – Generally. Although there is no general legal requirement that all legislative land use decisions must be supported by findings, where the scope and meaning of at least some applicable comprehensive plan policies are unclear, it is highly unlikely that a decision to replace an existing mandatory, regulatory program to improve septic system maintenance with a voluntary, educational program to achieve the same goal will be defensible on appeal without adequate findings. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

1.5.1 Administrative Law – Requirement for Findings – Generally. If a local government in granting planned development approval wishes to defer a finding that is required at the time of planned development approval to a subsequent, future proceeding, it must ensure that the public

will be provided the same participatory rights at the future proceeding that they have at the time of planned development approval. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

1.5.1 Administrative Law – Requirement for Findings – Generally. ORS 215.416(9) requires that permits and expedited land divisions be supported by adequate findings. However, other kinds of county quasi-judicial land use decisions must also be supported by adequate findings, even if ORS 215.416(9) does not apply. *Mingo v. Morrow County*, 63 Or LUBA 357 (2011).

1.5.1 Administrative Law – Requirement for Findings – Generally. A finding that a proposed solid waste disposal operation will have "no significant effect" on farm or forest uses is not sufficient to also demonstrate that the operation will have "no adverse effect." While the two standards are similar, they are not the same, and separate findings are required. *Crocker v. Jefferson County*, 60 Or LUBA 317 (2010).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where there is (1) a lack of evidence that the additional parking spaces that would be required under a legislative land use regulation amendment will materially increase the total number of vehicle trips, (2) some evidence that the legislative amendment will not cause trips to increase materially, and (3) petitioner does not identify which transportation facilities it believes will be significantly affected by the amendment, a local government's brief finding that the legislative amendment will not significantly affect transportation facilities is adequate. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

1.5.1 Administrative Law – Requirement for Findings – Generally. A local government's legislative land use regulation amendment that increases the required number of off-street parking spaces for multiple family dwellings could impact the local government's plan to comply with OAR 660-012-0045(5)(c)(A), which requires that the local government have a parking plan which "[a]chieves a 10% reduction in the number of parking spaces per capita in the MPO." Where such a legislative land use decision is not supported by findings that address OAR 660-012-0045(5)(c)(A), the decision must be remanded. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

1.5.1 Administrative Law – Requirement for Findings – Generally. Absent a local or specific statutory requirement that legislative land use decisions be supported by findings, such decisions need not be supported by findings as long as LUBA and the appellate courts with the aid of the parties and the record can perform their review function. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

1.5.1 Administrative Law – Requirement for Findings – Generally. With the caveat that a legislative land use decision that is not supported by findings may have to be remanded if LUBA or the appellate courts are unable to perform their review function, there is no statute, statewide planning goal or administrative rule that generally requires that legislative land use decisions be supported by findings. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

1.5.1 Administrative Law – Requirement for Findings – Generally. While respondents may supply argument and record citations in support of a local governments' legislative decision to

supplement any adopted findings, respondents cannot recharacterize or change a legislative decision's stated decision-making rationale to be something that is at odds with the decision-making rationale that is expressed in the legislative decision itself. *Friends of French Prairie v. Marion County*, 58 Or LUBA 387 (2009).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where a county engineer testifies that the applicant may need to acquire "vision easements" if necessary and the county imposes a condition of approval to that effect, the county is not required to adopt a finding that it is "feasible" for the applicant to obtain such easements from neighbors, absent some indication that there is a legal or practical impediment to obtaining the easements. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where the petitioner raises a number of issues, some directed at a remanded decision that is not before the city, and others at the application that is before the city, and the city prudently adopts findings addressing all issues raised, the findings that address issues regarding an application that is not before the city are surplusage and not binding on the city or parties, and LUBA will not address challenges to those findings. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

1.5.1 Administrative Law – Requirement for Findings – Generally. Provided local law does not dictate a different result, local governments generally may approve a proposed development of land after providing any required notice and hearings−without finding that the proposal complies with all relevant approval criteria−so long as the local government defers the required findings to a later stage and ensures that a second opportunity for any required notice and public hearing is provided before the required findings are adopted at that later stage. *Meadow Neighborhood Assoc. v. Washington County*, 55 Or LUBA 472 (2007).

1.5.1 Administrative Law – Requirement for Findings – Generally. It may not be appropriate to grant conditional approval while deferring required findings to a subsequent approval stage, even where there will be a full public right to participate in the subsequent approval stage, where the initial decision has the effect of rendering the subsequent review moot or prevents meaningful review. However, where the initial decision has no legal or preclusive effect on the subsequent review, such conditional approval provides no basis for reversal or remand. *Meadow Neighborhood Assoc. v. Washington County*, 55 Or LUBA 472 (2007).

1.5.1 Administrative Law – Requirement for Findings – Generally. A county may not rely on a written statement that was prepared by one of the county commission decision makers as findings where the written statement was not adopted by the board of county commissioners as findings. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

1.5.1 Administrative Law – Requirement for Findings – Generally. Although all legislative decisions need not be supported by findings when the local government can supply argument and citation to the record in its brief to demonstrate compliance with the applicable criteria, such arguments must be based on evidence contained in the record rather than created out of whole cloth. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304 (2004).

1.5.1 Administrative Law – Requirement for Findings – Generally. A local government quasi-judicial land use decision maker is not legally required to verbally explain how all legal and evidentiary issues are resolved. It is the written decision that the decision maker ultimately adopts that is subject to LUBA's review on appeal. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

1.5.1 Administrative Law – Requirement for Findings – Generally. Even absent a specific legal requirement that a legislative decision be supported by findings, remand may be necessary if LUBA and the appellate courts cannot perform their review function without the missing findings to determine whether applicable decision making criteria are satisfied. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

1.5.1 Administrative Law – Requirement for Findings – Generally. A decision maker may rely on environmental assessments and technical reports prepared and used by the decision maker in making its decision to demonstrate compliance with findings requirements, notwithstanding that the documents were not formally adopted as findings, where a reasonable person would understand that the decision maker intended to rely on the documents to support its decision. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

1.5.1 Administrative Law – Requirement for Findings – Generally. A city council's decision to allow the prevailing party to draft proposed findings in support of a decision to rezone property provides no basis for reversal or remand. *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where a city council interprets that a zone change criterion requiring a public need for the use proposed is met where there is a statistical probability that the segment of the population the proposed facility will serve will need the facility, LUBA will defer to that interpretation. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

1.5.1 Administrative Law – Requirement for Findings – Generally. The Portland City Code does not require that the city adopt findings of fact to support its legislative decisions. Therefore, on appeal to LUBA, the city may rely upon citations to the comprehensive plan, code, the record and arguments in its brief to demonstrate that the legislative decision is consistent with applicable plan and code provisions. *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 870 (2000).

1.5.1 Administrative Law – Requirement for Findings – Generally. A city does not err by failing to address a comprehensive plan policy that requires an impact assessment for in-water structures, where the decision does not approve any in-water structures. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

1.5.1 Administrative Law – Requirement for Findings – Generally. The duty to coordinate under Goal 2 and ORS 197.015(5) does not mandate success in accommodating the needs or legitimate interests of all affected governmental agencies, but it does mandate a reasonable effort to accommodate those needs and legitimate interests "as much as possible." For LUBA to be able to determine that this coordination obligation has been satisfied, a local government must respond in its findings to "legitimate concerns" that are expressed by affected governmental agencies. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

1.5.1 Administrative Law – Requirement for Findings – Generally. Although there is no statutory requirement that legislative land use decisions be supported by findings, such findings may be required by local ordinance. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where a local government decision appears to authorize a nonconforming use and additional dwelling without notice or findings to support those approvals, LUBA will remand the decision. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

1.5.1 Administrative Law – Requirement for Findings – Generally. A local government's findings cannot defer a determination on discretionary approval criteria to a later stage without providing the same notice and comment period provided in the initial proceeding. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

1.5.1 Administrative Law – Requirement for Findings – Generally. A local government cannot defer its obligation to make findings of compliance with applicable approval criteria to a state agency. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

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

1.5.1 Administrative Law – Requirement for Findings – Generally. Where a zoning ordinance provision is an aspirational standard, a county need not make findings pertaining to the aspirational standard. *Sparks v. Tillamook County*, 30 Or LUBA 325 (1996).

1.5.1 Administrative Law – Requirement for Findings – Generally. The county must itself analyze and evaluate relevant facts in its findings to show how it reached its decision; it cannot do that analysis for the first time in its brief to LUBA. *DLCD v. Coos County*, 30 Or LUBA 229 (1995).

1.5.1 Administrative Law – Requirement for Findings – Generally. A local government is not required to make findings to address criteria that it has found to be inapplicable. *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147 (1995).

1.5.1 Administrative Law – Requirement for Findings – Generally. While ORS 197.835(9) requires LUBA to affirm a local government decision in the absence of adequate findings if the parties identify evidence that "clearly supports" the decision, "clearly supports" will be interpreted narrowly to mean "makes obvious" or "makes inevitable." *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

1.5.1 Administrative Law – Requirement for Findings – Generally. ORS 197.835(9)(b) and 197.829(2) authorize LUBA to remedy minor oversights and imperfections in local government

land use decisions, but do not permit or require LUBA to assume the responsibilities assigned to local governments, such as the weighing of evidence, the preparation of adequate findings and the interpretation of comprehensive plans and local land use regulations. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

1.5.1 Administrative Law – Requirement for Findings – Generally. There is no statutory or administrative law requirement that *all* legislative land use decisions be supported by findings. However, where a challenged legislative land use decision was made by the local governing body and the apparently applicable legal standards at issue on appeal are local comprehensive plan provisions, the interpretation of those provisions must initially be made by the governing body in its decision. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 429 (1995).

1.5.1 Administrative Law – Requirement for Findings – Generally. When determining whether a nonconforming use exists, a local government's findings must determine whether the use of the subject property existing when restrictive regulations were applied was lawfully established, and the nature and extent of such use. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

1.5.1 Administrative Law – Requirement for Findings – Generally. A local government may properly grant permit approval based on either (1) a finding that an applicable approval standard is satisfied, or (2) a finding that it is feasible to satisfy an applicable approval standard and the imposition of conditions necessary to ensure that the standard will be satisfied. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

1.5.1 Administrative Law – Requirement for Findings – Generally. While it is the applicants' burden to demonstrate compliance with relevant approval criteria, if a local government determines an approval criterion is not satisfied, it must adopt findings explaining why it believes the applicants failed to meet this burden. *Neuman v. Benton County*, 29 Or LUBA 172 (1995).

1.5.1 Administrative Law – Requirement for Findings – Generally. There is no statutory or administrative law requirement that *all* legislative decisions be supported by findings. However, where there is a local code provision requiring that findings be adopted in support of legislative decisions, the absence of such findings, or the adoption of purely conclusory findings, can provide a basis for reversal or remand. *Foster v. Coos County*, 28 Or LUBA 609 (1995).

1.5.1 Administrative Law – Requirement for Findings – Generally. There is no generally applicable legal standard requiring a local government to have a "substantial or reasonable basis" for declining to impose a condition proposed by a party to a local government land use proceeding. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where the challenged decision does not determine the proposal complies with mandatory approval standards applicable to the proposal or that compliance with such standards is feasible, the local government may not defer a determination of compliance with such standards to the city engineer, to be made in a process not involving notice or hearing. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

1.5.1 Administrative Law – Requirement for Findings – Generally. In order to defer determinations of compliance with mandatory approval standards to a later stage where no public hearing is contemplated, the local government must first determine that compliance with those standards is possible. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where a challenged permit decision is not supported by any findings, the decision must be remanded. *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994).

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

1.5.1 Administrative Law – Requirement for Findings – Generally. That a legislative land use decision is not supported by findings is not, in itself, a basis for reversal or remand, because no applicable legal standard requires that *all* legislative land use decisions be supported by findings. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

1.5.1 Administrative Law – Requirement for Findings – Generally. There is no legal requirement that a local government adopt findings to support a legislative land use decision. However, where the local government does not adopt findings explaining why a challenged legislative decision complies with applicable approval criteria, LUBA relies upon the responding parties to provide argument and citations to the record to assist the resolution of petitioners' allegations. *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150 (1994).

1.5.1 Administrative Law – Requirement for Findings – Generally. There is no legal requirement that local governments adopt findings in support of legislative land use decisions. Where a local government does not adopt findings explaining why a challenged legislative land use decision complies with applicable approval criteria, LUBA relies on the responding parties to provide argument and citations to the record to assist in the resolution of petitioners' allegations. *Andrews v. City of Brookings*, 27 Or LUBA 39 (1994).

1.5.1 Administrative Law – Requirement for Findings – Generally. For LUBA review of a legislative land use decision, either the legislative land use decision must be accompanied by findings addressing relevant legal standards or the local government must explain in its brief how the challenged legislative decision complies with applicable legal standards. *McInnis v. City of Portland*, 27 Or LUBA 1 (1994).

1.5.1 Administrative Law – Requirement for Findings – Generally. There is no requirement that a legislative land use decision redesignating numerous properties include findings specifically setting out the justification for the change in designation made for each affected property. *McInnis v. City of Portland*, 27 Or LUBA 1 (1994).

1.5.1 Administrative Law – Requirement for Findings – Generally. Although nothing requires that all legislative land use decisions be supported by findings, in order for LUBA to perform its review function, it is necessary either that legislative land use decisions be accompanied by findings demonstrating compliance with relevant legal standards or that respondent explain in its brief how the challenged legislative decision complies with applicable legal standards. *Rea v. City of Seaside*, 26 Or LUBA 444 (1994).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where a local government fails to adopt findings identifying and applying applicable criteria, it is not possible for LUBA to perform its review function. *Laine v. City of Rockaway Beach*, 26 Or LUBA 417 (1994).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where an approval standard requires that a proposed nonforest dwelling "not interfere seriously with the accepted forestry practices on adjacent lands," a local government must first determine what those accepted forestry practices are. Statements that "logging practices" which have occurred on adjacent properties are "logging" or "salvage logging" are not adequate descriptions of accepted forestry practices. *DLCD v. Klamath County*, 25 Or LUBA 355 (1993).

1.5.1 Administrative Law – Requirement for Findings – Generally. Even where a governing body's review of the decision of a lower level decision maker is limited to the evidentiary record below, the governing body must either make its own decision and findings regarding compliance with applicable approval standards, adopt by reference the decision and findings of the lower level decision maker, or in some other way take action such that a decision regarding compliance with applicable approval standards becomes final and subject to appeal to LUBA as part of the governing body's decision. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

1.5.1 Administrative Law – Requirement for Findings – Generally. A local government decision approving a quasi-judicial zone change must be supported by written findings identifying the applicable criteria, setting out the facts relied on and explaining the reasons why the facts establish compliance with the applicable standards. *Strecker v. City of Spray*, 25 Or LUBA 264 (1993).

1.5.1 Administrative Law – Requirement for Findings – Generally. While nothing requires that all legislative land use decisions be supported by findings, in order for LUBA to perform its review function, it is necessary either that legislative land use decisions be accompanied by findings of compliance with relevant legal standards or that respondents explain in their briefs how the legislative decision complies with applicable legal standards. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

1.5.1 Administrative Law – Requirement for Findings – Generally. Where a petitioner alleges a zoning map amendment violates plan policies and an LCDC administrative rule, a local government is obligated to adopt findings explaining either why the plan policies and rule do not apply to the disputed zone change or why the zone change is consistent with the plan policies and rule. *Recht v. City of Depoe Bay*, 24 Or LUBA 129 (1992).

1.5.1 Administrative Law – Requirement for Findings – Generally. A local government commits no error by failing to adopt findings addressing the impacts of a comprehensive plan transportation map amendment on an inventoried Goal 5 resource site, where the record shows the resource site is located outside the area affected by the challenged plan transportation map amendment. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

1.5.1 Administrative Law – Requirement for Findings – Generally. A challenged land use decision must contain findings addressing the applicable approval standards. *Veach v. Wasco County*, 23 Or LUBA 515 (1992).

1.5.1 Administrative Law – Requirement for Findings – Generally. There is no prohibition against a local government making a tentative oral decision on a permit application, followed by adoption of a final written decision containing its supporting findings. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992).

1.5.2 Administrative Law – Requirement for Findings – Statutes. When a county is evaluating an application for housing, including needed housing, ORS 197.307(4) (2017) prohibits the county from applying any standards, conditions and procedures that are not clear and objective to the application to develop a residential project, without regard to whether applicant's property is "buildable land" within the meaning of ORS 197.295(1). *Warren v. Washington County*, 78 Or LUBA 374 (2018).

1.5.2 Administrative Law – Requirement for Findings – Statutes. Absent a local or specific statutory requirement that legislative land use decisions be supported by findings, such decisions need not be supported by findings as long as LUBA and the appellate courts with the aid of the parties and the record can perform their review function. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

1.5.2 Administrative Law – Requirement for Findings – Statutes. ORS 836.623(1) requires explanatory findings addressing evidence that public safety requires a higher level of protection than the minimum set forth under the Airport Transportation Planning rule, even if the local government rejects that evidence and concludes that existing standards are sufficient to protect public safety. *Graham Oil Co. v. City of North Bend*, 44 Or LUBA 18 (2003).

1.5.2 Administrative Law – Requirement for Findings – Statutes. The statement in OAR 660-016-0005(a) that a local government is not required to "justify in its comprehensive plan a decision not to include a particular site" in its Goal 5 inventory simply means that the local government need not amend its comprehensive plan to justify a decision not to include a site on its Goal 5 inventory. The rule does not relieve local governments of the obligation to adopt adequate findings justifying a quasi-judicial decision to deny an application to include a site on the Goal 5 inventory. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

1.5.2 Administrative Law – Requirement for Findings – Statutes. Findings adequate to demonstrate that an urban renewal plan "conforms to the comprehensive plan as a whole" pursuant to ORS 457.095(3) must at least (1) set forth the applicable comprehensive plan provisions and (2) express the local government's judgment as to the relationship between the renewal plan and the pertinent plan provisions. While the phrase "as a whole" in ORS 457.095(3) may allow the local government to balance competing plan policies, it does not allow the local government to address only some policies it identifies as being applicable and, without explanation, fail to address others also identified as applicable. *Zimmerman v. Columbia County*, 40 Or LUBA 483 (2001).

1.5.2 Administrative Law – Requirement for Findings – Statutes. ORS 197.625(3)(b) requires that approval of a land use subject to an unacknowledged land use standard include findings of compliance with applicable goals. Until the land use standard is acknowledged to comply with applicable goals, the local government cannot rely solely upon the regulatory scope of that standard to avoid addressing compliance with potentially applicable goals. *Tylka v. Clackamas County*, 37 Or LUBA 922 (2000).

1.5.2 Administrative Law – Requirement for Findings – Statutes. Contrary to the contention that limited land use decisions require only cursory findings, ORS 227.173(2), which states the requirement for findings in support of a city permit approval, makes no distinction between land

use decision findings and limited land use decision findings. *Design Home Construction v. City of Silverton*, 32 Or LUBA 452 (1997).

1.5.2 Administrative Law – Requirement for Findings – Statutes. In order to demonstrate compliance with ORS 215.296(1), county findings must: (1) describe the farm and forest practices on surrounding lands devoted to farm or forest use; (2) explain why the proposed use will not force a significant change in those practices; and (3) explain why the proposed use will not significantly increase the cost of those practices. *Brown v. Union County*, 32 Or LUBA 168 (1996).

1.5.2 Administrative Law – Requirement for Findings – Statutes. The requirements of ORS 215.296 apply directly to uses allowed in EFU zones under ORS 215.283(2). In order to establish a proposed use satisfies the requirements of ORS 215.296, the local government must adopt findings establishing the proposal complies with that statute. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

1.5.2 Administrative Law – Requirement for Findings – Statutes. Where the aerial spray applicator formerly used by an orchard will not spray orchards surrounded by a golf course and the only sprayer who will charges 2000 dollars more to do so, the county's findings must explain why this cost increase, viewed cumulatively with any other cost increases attributable to the golf course, is not significant. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

1.5.2 Administrative Law – Requirement for Findings – Statutes. In denying a request for permit approval, ORS 215.416(9) requires that a county provide an explanation of why the county believes the request fails to satisfy applicable standards. Where the required explanation is missing, LUBA will remand the decision. *Ball and Associates v. Josephine County*, 25 Or LUBA 525 (1993).

1.5.2 Administrative Law – Requirement for Findings – Statutes. While ORS 215.416(9) does not require that findings include citations to, or verbatim quotes of, applicable approval standards, it does require that a reasonable person be able to determine from the local government's decision what it considered to be the relevant criteria and standards. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. In amending a transportation systems plan (TSP) to locate a bypass through an industrial area, a local government is not obligated to adopt findings regarding the post-amendment adequacy of its inventory of commercial and industrial lands, where the acknowledged zoning district that applies to those lands already anticipates that at least some of those lands may be used for transportation facilities. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. In amending an acknowledged zoning ordinance to reduce maximum building heights, a city is not required to demonstrate that the amendment complies with the statewide planning goals where the acknowledged comprehensive plan contains "specific policies or other provisions which provide the basis for the regulation." ORS 197.835(7)(b). However, where the comprehensive plan includes only general policies that make no reference to maximum building heights, the city must demonstrate that the amendment complies with the statewide planning goals. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. A decision amending a comprehensive plan must specifically identify the applicable statewide planning goals and include findings that substantively address how the proposed comprehensive plan amendment assures compliance with those goals. It is insufficient to make passing reference to the general subject matter of the goals in addressing other approval criteria. *Larvik v. City of La Grande*, 34 Or LUBA 467 (1998).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. A finding that the subject property contains no identified Goal 5 resources is not adequate to address the Goal 4 requirement that "other forested lands" be designated as forest lands if such lands are needed to maintain soil, water, air, fish and wildlife resources. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. In reviewing a county's legislative comprehensive plan amendment, LUBA does not require detailed findings, but Goal 2 requires a local government to explain why the amendment complies with applicable Statewide Planning Goals. The required explanation can appear in findings, in the record or in the brief the local government files with LUBA. *Valerio v. Union County*, 33 Or LUBA 604 (1997).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. The Goal 2 coordination requirement must be met by adopted findings that respond to state agency concerns. A statement in the record that county staff rejected state agency concerns does not satisfy the coordination requirement. *DLCD v. Douglas County*, 33 Or LUBA 216 (1997).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. If it is obvious from the record that a particular goal does not apply to a proposed comprehensive plan amendment, it is not a basis for remand that the local government has not actually stated in its written decision that the goal does not apply. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. All comprehensive plan amendments must comply with the Statewide Planning Goals. When adopting a comprehensive plan amendment, it is the local government's obligation to explain in its findings why the plan amendment complies with the goals or why arguably applicable goal standards need not be addressed and satisfied. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. The coordination obligation imposed by Statewide Planning Goal 2 (Land Use Planning), and similarly worded local government comprehensive plan provisions, does not require that a local government accede to every concern expressed by a state agency, but does require that a local government adopt findings responding to legitimate concerns expressed by a state agency. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. When a property's plan and zone designations are changed to allow a particular use, Goal 6 requires the local government to adopt findings explaining why it is reasonable to expect that applicable state and federal environmental quality standards can be met by the proposed use. Goal 6 does not require the local government to demonstrate its decision will not cause any adverse environmental impact on individual properties. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. Comprehensive plan amendments must comply with the Statewide Planning Goals. ORS 197.175(2)(a). Where a challenged comprehensive plan amendment does not address Goal 9 (Economic Development), and Goal 9 appears to be relevant to the challenged decision, LUBA will remand the decision. *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583 (1994).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. Where amendments to an exclusive farm use (EFU) zoning district do not change the maximum allowable density of nonfarm dwellings in PUDs, but may have the effect of increasing the numbers of, and circumstances in which, residential PUDs may be approved on EFU-zoned land, the county must consider these potential secondary effects of the amendments in determining whether the EFU zone, as amended, complies with Goals 11 and 14. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. No statute or appellate court case requires that all legislative land use decisions be supported by findings. Absent allegations by petitioner that a legislative decision violates particular legal standards, a local government's failure to adopt findings in support of that legislative decision addressing the statewide planning goals and local comprehensive plan is not, of itself, a basis for reversal or remand of the decision. *Oregon City Leasing, Inc. v. Columbia County*, 25 Or LUBA 129 (1993).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. Where Statewide Planning Goals are apparently applicable to a comprehensive plan amendment, a local government must either explain in its decision why the amendment complies with such apparently applicable goals, explain why those goals do not apply to the proposed plan amendment or explain why an exception to those goals is justified. *ODOT v. City of Newport*, 23 Or LUBA 408 (1992).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. To adopt a quasi-judicial plan amendment, a local government must make findings establishing the proposed amendment is in compliance with the Statewide Planning Goals. *ODOT v. Clackamas County*, 23 Or LUBA 370 (1992).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. In amending its comprehensive plan, it is error for a local government to neither explain in its decision why apparently applicable Statewide Planning Goals do not apply, adopt findings demonstrating compliance with such goals, nor take an exception to such goals. *ODOT v. Clackamas County*, 23 Or LUBA 370 (1992).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. To adopt a quasi-judicial comprehensive plan amendment, a local government must adopt findings establishing the proposed amendment is in compliance with the Statewide Planning Goals. *Klein v. City of Hubbard*, 23 Or LUBA 367 (1992).

1.5.3 Administrative Law – Requirement for Findings – Statewide Goals. In amending its comprehensive plan, it is a local government's obligation to explain in its findings why apparently applicable Statewide Planning Goal standards need not be addressed and satisfied. It is error for a local government to neither identify any goals applicable to a proposed plan amendment nor explain why apparently applicable goals are satisfied. *Klein v. City of Hubbard*, 23 Or LUBA 367 (1992).

1.5.4 Administrative Law – Requirement for Findings – Administrative Rules. Where audio recording of the hearing at which a motion to adopt a proposed plan was passed discloses that the motion also was sufficient to adopt a separate supporting findings document, the fact that the motion described in the minutes of that hearing makes no mention of the separate findings document provides no basis for remand. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

1.5.4 Administrative Law – Requirement for Findings – Administrative Rules. Even where no authority requires findings in support of a legislative decision, there must be enough in the way of findings or accessible material in the record to show that applicable criteria were applied and required considerations considered. Where the record of the legislative rezoning decision includes no findings or accessible material supporting the local government's view that the Transportation Planning Rule (TPR) does not apply to the decision, the local government can avoid remand only if it demonstrates in its response brief, as a matter of law, that the TPR does not apply to the rezoning decision and is not a required consideration. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

1.5.4 Administrative Law – Requirement for Findings – Administrative Rules. The statement in OAR 660-016-0005(a) that a local government is not required to "justify in its comprehensive plan a decision not to include a particular site" in its Goal 5 inventory simply means that the local government need not amend its comprehensive plan to justify a decision not to include a site on its Goal 5 inventory. The rule does not relieve local governments of the obligation to adopt adequate findings justifying a quasi-judicial decision to deny an application to include a site on the Goal 5 inventory. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

1.5.4 Administrative Law – Requirement for Findings – Administrative Rules. Read together with OAR 731-015-0075(7)'s express requirement for findings adequate to establish that a proposal complies with an affected local government's comprehensive plan, the OAR 731-015-0075(2) requirement for more extensive findings if the proposal requires comprehensive plan amendments cannot be interpreted to mean that only cursory findings are needed where no comprehensive plan amendments are required. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

1.5.4 Administrative Law – Requirement for Findings – Administrative Rules. Committed exception findings must explain what it is about existing parcel size and ownership patterns that irrevocably commit resource land to nonresource use, specify the location of parcels created prior to application of the Goals, and distinguish those parcels created pursuant to the Goals. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

1.5.4 Administrative Law – Requirement for Findings – Administrative Rules. Assuming that the existence of water and sewer lines on adjacent lands may be relevant to whether a property is irrevocably committed to nonresource use, findings must explain what that relevance is. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

1.5.4 Administrative Law – Requirement for Findings – Administrative Rules. The primary purpose of OAR 660-021-0030(5) is to develop findings that can form the basis of comprehensive

plan language to guide future urbanization decisions. Thus, OAR 660-021-0030(5) requires that the local government adopt findings describing the results of its consideration of the suitability criteria in OAR 660-010-0030(2) for all lands included in urban reserves. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

1.5.4 Administrative Law – Requirement for Findings – Administrative Rules. OAR 660-33-030(6) requires that the "more detailed data" upon which the county may rely in determining soil capability for forest uses be related to the SCS soils classification system and, therefore, before the county can rely on more detailed data, the county must establish that the source of the data has the requisite knowledge of the classification system, including the qualifications and expertise to classify soils under the system. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

1.5.4 Administrative Law – Requirement for Findings – Administrative Rules. A finding that soils could be reclassified to Class VII does not establish that the soils are Class VII or that even if they are Class VII, the classification renders the site unsuitable for forest use without evaluation of other relevant factors. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

1.5.4 Administrative Law – Requirement for Findings – Administrative Rules. Where a legislative comprehensive plan amendment adopts policies arguably relevant to OAR 660-12-060, either the decision must be supported by findings addressing OAR 660-12-060 or respondents must demonstrate, through arguments in their briefs and citation to provisions of the local government's plan and regulations or the record that the challenged policies comply with OAR 660-12-060. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. When a code provision requires geotechnical analysis, the feasibility of the planned development must be shown at the preliminary plan stage; however, technical matters that require expert evaluation may be deferred to administrative review and final plan approval even when final plan approval does not require a public hearing. *Lundeen v. City of Waldport*, 78 Or LUBA 95 (2018).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. When local code sets out independent grounds for granting a variance, and when only one of three rezoning criteria must be met in order to grant a rezoning, and the city adequately demonstrated that one criterion was satisfied, LUBA need not consider arguments relating to the other two criteria. *American Tower Corp v. City of Tualatin*, 78 Or LUBA 350 (2018).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a hearings officer's interpretive findings in support of his conclusion that a front setback and height standard qualify as "site-related development standards" are inadequate, LUBA will nevertheless affirm the hearings officer's decision where the hearings officer's decision is (1) consistent with prior hearings officer decisions, (2) consistent with prior city council decision, (3) consistent with relevant purpose statements, and (4) consistent with the relevant legislative history. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A city council's findings that a master plan design guideline to "[d]evelop buildings that are appropriately scaled to the neighborhood," is met by a proposal to build a seven-story apartment building with a five-story wing rather than a four-story wing, representing a proposal to increase the building height by 10 feet, where surrounding buildings range in height from three to seven stories, is not in error. Such a finding is sufficient to satisfy city's local ordinance which requires a finding that under a proposed modification "[t]he resulting development will better meet the applicable design guidelines," and that "[o]n balance the proposal will be consistent with the purpose of the standard modified" where the 10-foot modification represents a trade-off for a clipped corner which allows for increased pedestrian access and sunlight into a proposed public square. *Michaelson v. City of Portland*, 77 Or LUBA 504 (2018).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A city council's comparative approach of evaluating all design changes related to a proposed development modification at once to determine whether the resulting development better meets applicable guidelines, is not error. The nature of design review often involves tradeoffs and balancing between design features to achieve a more optimal overall design under the applicable guidelines. *Michaelson v. City of Portland*, 77 Or LUBA 504 (2018).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Even if there is no state or local standard that requires that legislative land use decisions be supported by findings, a legislative land use decision must be supported by findings or accessible material in the record that is sufficient to show that applicable criteria were applied and any required considerations were considered. An unexplained finding that the comprehensive plan does not require that multifamily housing be located in the city's commercial zone is not sufficient to demonstrate that a zoning ordinance amendment to delete multi-family housing as a permitted use in the city's commercial

zone is consistent with the city's comprehensive plan. *Cassidy v. City of Glendale*, 66 Or LUBA 314 (2012).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A local government decision that determines that an entire property is located on a foredune and denies an application for a dwelling based on that determination will be remanded where the findings do not explain why the local government reached the conclusion it reached and the conclusion is not supported by any evidence in the record identified by the local government. *Rudell v. City of Bandon*, 62 Or LUBA 279 (2010).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where an applicable comprehensive plan policy and intergovernmental agreement provision require a city to determine that adequate public services are available to a property that is proposed to be annexed, a city errs in failing to adopt findings regarding the availability of police protection. *Bowler v. City of Cave Junction*, 56 Or LUBA 152 (2008).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. LUBA will reject an argument that a legislative decision must be remanded to adopt findings addressing whether a proposed land use regulation is consistent with applicable comprehensive plan policies, where the petitioner identifies no local obligation to adopt findings, and the local government cites to a staff report that concludes the regulation is consistent with applicable plan policies. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a non-duplicative plat name is a criterion for preliminary plat approval, a city does not err by granting preliminary plat approval without a plat name and imposing a condition of approval that the applicant submit a non-duplicative plat name prior to final plat approval. For such an approval criterion, it is at most harmless error that the city failed to find that it is feasible for the applicant to submit the required non-duplicative plat name. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Findings challenges are necessarily derivative of the underlying criteria the findings address. Where the county code requires adoption of findings supporting legislative decisions, whether jurisdiction to review an adequate findings challenge in a legislative decision adopted to fulfill a periodic review work task lies with LUBA or LCDC depends on whether the findings address goal or rule compliance issues subject to LCDC's exclusive jurisdiction. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A local code requirement for findings demonstrating that legislative decisions are "in the public interest and will be of general public benefit" does not implicate any Goal or rule requirements, and thus a challenge that the local government failed to adopt adequate findings addressing that criterion in adopting a decision to fulfill a periodic review work task is subject to LUBA's exclusive jurisdiction. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A county commits no error in applying a zoning code requirement that a conditional use be found to be in harmony with the purpose and intent of the zone as a mandatory approval criterion where the provision expressly requires that determination. The county's identification in its notice of hearing of the chapter in which that zoning code requirement appears is sufficient to give the applicant notice of that approval criterion where the chapter is short and code requirement for a finding concerning that criterion is clear. *Hick v. Marion County*, 43 Or LUBA 483 (2003).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A local planned unit development (PUD) requirement that development preserve "significant on-site resources" and "worthwhile natural features" does not impose an absolute requirement that significant vegetation and other natural resources must be preserved in all cases. A local government does not commit error by balancing such preservation requirements with other code requirements and explaining why in some cases the preservation requirement is sacrificed to achieve other code requirements. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a county code provision specifically requires findings documenting whether there is a need for additional land for a particular purpose and whether the timing is appropriate to rezone land for that purpose, but the county interprets the code provision to not require documentation of the need and timing elements in a particular instance, that interpretation is inconsistent with the express language of the provision and "clearly wrong." *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A local standard requiring adequate access to the subject property is not inapplicable merely because the road in issue is private rather than public. *Highland Condominium Assoc. v. City of Eugene*, 37 Or LUBA 13 (1999).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Although there is no statutory requirement that legislative land use decisions be supported by findings, such findings may be required by local ordinance. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A local government cannot defer its obligation to make findings of compliance with applicable approval criteria to a state agency. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a city interprets its code erosion control standards as imposing construction guidelines, not approval standards requiring feasibility findings, LUBA must defer to that interpretation unless it is clearly wrong. *Arnett v. City of Lake Oswego*, 33 Or LUBA 384 (1997).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. In applying a code approval standard that requires the identification of an area whose stability might be affected by a

proposed development, the county's findings may not rely on inconsistent definitions of the area. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A code approval standard that requires "a clear picture of the existing land use pattern" in a specified area is not satisfied by general findings about zoning and details about some of the properties in the area. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A local government decision granting site plan approval for off-street parking use of property containing an existing dwelling must address issues raised by petitioners concerning whether the approved site plan results in violations of code yard and setback requirements for the existing dwelling. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Findings supporting a local government decision that a proposed comprehensive plan amendment is a "major" plan amendment under the local code must explain the rationale for that conclusion. Quoting the code definition of "major" plan amendment and referring to unspecified principles or policies is not sufficient. *Cone v. City of Eugene*, 29 Or LUBA 133 (1995).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. The coordination obligation imposed by Statewide Planning Goal 2 (Land Use Planning), and similarly worded local government comprehensive plan provisions, does not require that a local government accede to every concern expressed by a state agency, but does require that a local government adopt findings responding to legitimate concerns expressed by a state agency. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where the local code requires a determination that the proposal be in harmony with the natural environment in the area, and there is no dispute that native plant communities are a relevant characteristic of the natural environment, the decision must include findings determining the proposal is in harmony with the native plant communities in the natural environment. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where the local code requires a determination that the proposal have minimal adverse impacts on the surrounding area, and the subject property is located within a wild and scenic river corridor, the decision must include findings evaluating the proposal's impacts on the wild and scenic river corridor. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where the local code requires the proposal have only minimal impacts on adjacent properties, considering the operating characteristics of the proposed use, the decision must identify what the operating characteristics of the proposed use are. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a local government finds that a proposed road alignment is consistent with plan policies calling for a balanced transportation system designed to minimize energy impacts because it will shorten travel distance to a light rail station, that the facility will also shorten travel distance to a major arterial does not, of itself, mean the plan policies are violated. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where the challenged decision is made by a governing body and does not explain whether or to what extent apparently applicable comprehensive plan standards apply to the proposal, the challenged decision must be remanded for such an explanation. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where the local code requires that certain "factors" be considered, a finding that the subject property is located in a school district is not responsive to the factor "school district service capability," because the finding says nothing about the capability of the school district to serve the proposed development. *McNamara v. Union County*, 28 Or LUBA 396 (1994).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where the comprehensive plan requires a zone change application to demonstrate the chosen site is superior or equal to alternative sites, findings that simply state no one identified alternative sites during the local proceedings are inadequate to establish compliance with the plan standard. *Neuman v. City of Albany*, 28 Or LUBA 337 (1994).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a local government interprets a comprehensive plan provision using the word "should" as imposing a nonmandatory consideration, findings demonstrating compliance with the plan provision are not required. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a code standard requires that conditional uses "preserve assets of particular interest to the community," local government findings supporting approval of a proposed conditional use must explain whether a natural feature that will be affected by the conditional use is such an asset and, if so, why the standard is satisfied. *Mazeski v. Wasco County*, 28 Or LUBA 178 (1994).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a local government decision identifies a number of comprehensive plan provisions as approval standards for a request to cut trees, it may not approve the request without adopting findings demonstrating that the application complies with the identified plan policies. *Gettman v. City of Bay City*, 28 Or LUBA 116 (1994).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where an applicable comprehensive plan policy requires that residential uses adjacent to forestlands have adequate setbacks and fire prevention measures, a local government decision approving a forest dwelling must be supported by findings establishing what setbacks and fire prevention measures are required and why they are adequate. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where petitioner contends the challenged decision fails to address a comprehensive plan provision that appears to contain a standard applicable to the proposal, the local government must explain in its decision why the plan provision either is inapplicable to the proposal or is satisfied by the proposal. LUBA may not make such determinations in the first instance. *Laine v. City of Rockaway Beach*, 27 Or LUBA 493 (1994).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where the local code's definition of "northern lot line" is ambiguous and recognizes there can be more than one northern lot line on any given piece of property, and the challenged decision determining compliance with solar access setback requirements simply contains a conclusory statement that a flag lot has only one northern lot line, LUBA will remand the decision for adoption of interpretive findings. *Sullivan v. City of Ashland*, 27 Or LUBA 411 (1994).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a county proposes to change the zoning of agricultural land designated Farm/Forest on its comprehensive plan map, a standard that "the purpose of the Comprehensive Plan and Zoning Ordinance will be carried out by approving the proposal" requires the county to explain how the proposed zone change carries out the purpose of the Farm/Forest plan designation and the plan agricultural goals. *DLCD v. Polk County*, 27 Or LUBA 345 (1994).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Findings which do not identify the provisions of the statewide planning goals, comprehensive plan or local code that govern a challenged code amendment are inadequate to satisfy a local code requirement that *all* code amendments be supported by findings explaining why the amendment complies with any relevant plan, code and statewide planning goal requirements. *Andrews v. City of Brookings*, 27 Or LUBA 39 (1994).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. In addressing a code requirement that a proposed conditional use satisfy state regulatory requirements, a local government determination that an exemption from certain state regulations applies must be reasonable. However, the local government need not establish that such a determination is correct. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a petitioner lists a number of apparently relevant comprehensive plan policies and argues the local government erred by not addressing the policies in its decision, petitioner's argument is sufficiently developed for LUBA review, and the decision must be remanded so that the local government can address those policies in its findings. *Waugh v. Coos County*, 26 Or LUBA 300 (1993).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A local government decision that a shopping center may be allowed in a particular zone under code "similar use" provisions must (1) express an interpretation of the "similar use" provisions that is adequate for LUBA review, (2) actually apply the interpretation adopted, and (3) explain how the decision is consistent with that interpretation. *Loud v. City of Cottage Grove*, 26 Or LUBA 152 (1993).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. To find compliance with a local code requirement that schools be adequate to meet anticipated demand, a local government must find that existing school facilities are adequate to serve the proposed project or that they can be made adequate by employing available techniques to maximize school facility capacity. *Langford v. City of Eugene,* 26 Or LUBA 60 (1993).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. In order to determine compliance with a code permit approval standard requiring that "the proposed use will not alter the character of the surrounding area" in a particular manner, the local government must first identify the "surrounding area" to be considered. *Spiering v. Yamhill County,* 25 Or LUBA 695 (1993).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a subdivision approval standard simply requires connection with a storm drainage system, and there is no allegation that the subdivision cannot be connected to a storm drainage system, allegations that the challenged decision fails to find the storm drainage system will be adequate to handle storm water provide no basis for reversal or remand of the decision. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A determination that an onsite dwelling is essential to carrying out the proposed forest management operation, supported by adequate findings and substantial evidence, demonstrates compliance with a local standard requiring that a forest management dwelling be "necessary for * * * a permitted forest use." *DLCD v. Coos County*, 25 Or LUBA 158 (1993).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. No statute or appellate court case requires that all legislative land use decisions be supported by findings. Absent allegations by petitioner that a legislative decision violates particular legal standards, a local government's failure to adopt findings in support of that legislative decision addressing the statewide planning goals and local comprehensive plan is not, of itself, a basis for reversal or remand of the decision. *Oregon City Leasing, Inc. v. Columbia County,* 25 Or LUBA 129 (1993).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a county approves a 120 unit PUD on rural land, but fails to address plan policies limiting the provision of urban public services on rural land, a remand is required so that the county may adopt findings explaining why these standards are not violated by the proposed PUD. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. To demonstrate compliance with a local code approval standard requiring that a proposed use be compatible with "existing adjacent permitted uses," a local government must identify the existing adjacent permitted uses. A necessary step in identifying such uses is identifying what constitutes the "adjacent" area to be considered. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a local code standard requires that creation of new nonfarm and nonforest parcels be consistent with comprehensive plan forest and agriculture policies, the local government's findings must demonstrate compliance with all such plan policies or explain why they do not apply. *DLCD v. Curry County*, 24 Or LUBA 200 (1992).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where the code requires that a proposed development be compatible with "adjacent residential developments," based on certain characteristics, the local government must (1) identify "adjacent residential developments," and (2) explain why the proposed development will be compatible, considering the specified characteristics. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Where a code provides that changes having significant impacts are major PUD amendments, and lists categories of changes that *might* result in significant impacts, whether a proposed amendment falls within a category on the list is not in itself determinative of whether the amendment is major. Because the categories are not independent bases for identifying a major amendment, a determination that a proposed PUD amendment is not major need not be supported by findings addressing each category. *Gage v. City of Portland*, 24 Or LUBA 47 (1992).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A general plan policy concerning transportation safety does not require that findings supporting a legislative comprehensive plan transportation map amendment negate every potential safety problem that might result from future implementation of the improvements authorized by the plan amendment. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. A local government must determine compliance with a code standard requiring that a proposed golf course will have no significant adverse impact on wildlife. The local government may not leave a determination of compliance with a code approval standard to a state agency. *Kaye v. Marion County*, 23 Or LUBA 452 (1992).

1.5.5 Administrative Law – Requirement for Findings – Local Standards. Findings which state that the additional traffic generated by a proposed use would have "an insignificant additional impact" on the affected roads and would not result in "an unreasonable increase" in dust, are sufficient to demonstrate compliance with a code requirement that the proposed use "will have minimal adverse impact on the livability, value or appropriate development of abutting properties or the surrounding area," with regard to adverse impacts from traffic and dust. *Avgeris v. Jackson County*, 23 Or LUBA 124 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a decision-maker relies on 40-foot contour maps in the record, sourced from county data, to determine the slopes on the subject property, an argument that the decision-maker erred by disregarding finer-scale, two-foot contour maps that petitioners submitted provides no basis for reversal or remand where the decision-maker reasoned that petitioners' contour maps were "not reliable, accurate or trustworthy evidence" because they were not signed by a registered professional surveyor and because they contained an incorrect scale, and where the petitioners have not otherwise established that credible evidence weighs overwhelmingly in favor of their description of the slopes on the subject property or that the evidence upon which the decision-maker did rely was not substantial evidence. *Velasquez v. Jackson County*, 80 Or LUBA 1 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a local government adopts a post-acknowledgment plan amendment creating a new zone that allows 20-acre lots, an argument that DEQ rules indicate that properties of 10 or more acres in size are generally able to support on-site wastewater systems is not sufficient to establish compliance with Goal 11 with respect to wastewater where those rules appear for the first time in the response brief, where there are no findings or evidence in the record addressing wastewater, and where there is no evidence in the record that the rule is accurate within the portion of the local government's jurisdiction at issue. Similarly, references to the proximity of the majority of candidate lands to fire districts, to evidence that more demand for funds would not be created in one of the districts, to 10 years of data indicating that less than two percent of fires resulted from residential structures, and to local fire protection standards with which future development would be required to comply are not sufficient to establish compliance with Goal 11 with respect to fire protection where there is no analysis of the likelihood of increased fire as more residences are potentially introduced into the area or discussion of the capacity of the existing fire service organizations to provide more service. *DLCD v. Douglas County*, 80 Or LUBA 98 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a neighbor describes observing, from their living room view, minimal orchard, meadow, and garden-related activity on the property and, other than horses belonging to some of the owners of the property, never seeing any livestock or other animals on the property between 1970 and 2004, and where the neighbor subsequently reiterates that there was no farm use, such as cattle or crops, between 1978 and 1983 and that, during the 1980s, owners of the property kept their show horses on the property, a local government may reasonably conclude that the property was "not managed for three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced $20,000 or more in annual gross income" for purposes of *former* ORS 197.247(1)(a) (1991), even where the record includes (1) aerial photos from 1979 and 1982, (2) a 1979 permit for a new barn, (3) a 1987 farm dwelling approval, and (4) testimony from other area residents contradicting the neighbor's testimony, where the record does not disclose the proximity of the other area residents' properties to the subject property or whether those area residents had made firsthand observations of the subject property during the relevant statutory period. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. For purposes of designating marginal lands under *former* ORS 197.247 (1991), it is not enough for an applicant to provide a list of the allegedly qualifying lots or parcels; the applicant must provide foundational evidence

that the lots or parcels are lawful and that lots or parcels that were in common ownership on July 1, 1983, are not overcounted. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. An attorney-land-use-consultant-prepared ESEE analysis including numerous plans, reports, and other documents supporting the redesignation and rezoning of protected habitat from forest land to marginal land under *former* ORS 197.247 (1991) is not sufficient to rebut expert testimony including (1) a letter authored by an ODFW biologist that generally discusses the cumulative impact of development on habitat and (2) general ODFW guidance related to levels of residential density in areas of peripheral big game habitat absent evidence of the attorney land use consultant's expertise. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. In the context of an application to remove property from a county's Goal 5 inventory of significant aggregate resources, where the county has previously determined, in two separate final, acknowledged decisions—one based on area-specific soils mapping and the other based on periodic review which resulted in an updated inventory—that the property should not be included on the county's Goal 3 inventory of agricultural lands; where the county zoned the property for surface mining, a zone that does not implement Goal 3, after one of those previous determinations; and where the ESEE analysis for the property does not specify a post-mining zoning designation or use, a conclusion that the property is not agricultural land is supported by substantial evidence. The county, having previously determined that the property is not agricultural land, is not required to revisit whether the property is agricultural land. *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 252 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. In the context of an application to change the comprehensive plan designation of property to Rural Residential Exception Area, where a comprehensive plan provision provides that "any new Rural Residential Exception Areas need to be justified through initiating a non-resource plan amendment and zone change by demonstrating that the property does not meet the definition of agricultural * * * land," a county correctly determines that an applicant satisfies that provision by producing copies of the county's adopted and acknowledged agricultural lands inventories, which do not include the property. Even where an opponent submits an NRCS soils map into the record, which the opponent argues shows the property's soils constitute agricultural lands, where the NRCS website that the opponent used to prepare the soils map includes a disclaimer regarding the large scale of mapping, stating that "[e]nlargement of maps beyond the scale of mapping can cause misunderstanding of the detail of mapping and accuracy of soil line placement," a reasonable decision-maker would rely on the inventories to conclude that the property is not agricultural land, and a reasonable decision-maker could determine that the NRCS soils map is less credible than the inventories. *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 252 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a city bureau manages the city's transportation system, including private uses in the city right-of-way, and where bureau staff have special expertise in the safe and efficient use of the right-of-way and various demands on streets, including traffic, parking, and loading, statements from the bureau (1) that studio apartments have lower turnover rates, less need for unloading large furniture, and, thus, less need for a loading space, and (2) that signed, infrequent on-street loading will not have a negative effect

on the traffic safety or other transportation functions of the abutting right-of-way are evidence that would permit a reasonable person to find that an on-street loading space is adequate for a proposed studio apartment building's loading needs such that the development continues to meet the intended purpose of, and, therefore, qualifies for an adjustment to, an off-street loading space requirement, even where there is testimony in the record from an opponent of the development regarding anticipated negative congestion and safety impacts of off-street loading. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a city within Metro's jurisdiction adopts its portion of an intergovernmental concept plan into its comprehensive plan and applies an industrial zoning designation to a portion of the planning area with slopes greater than 10 percent, that Metro's previous decision to include the planning area in its UGB stated that land needed for industrial uses should generally have slopes of less than 10 percent and that a previous Metro housing need projection anticipated almost 600 more housing units than the industrial zoning designation would allow provide no basis for reversal or remand where Metro's previous UGB decision is not evidence, an applicable approval criterion, or a relevant consideration for the city in determining the correct zoning designation for the property and where Metro's previous housing need projection has been superseded by a later decision to remove the property from its inventory of buildable residential lands. *Watts v. City of Tualatin*, 80 Or LUBA 339 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where an approved site plan indicates that a replacement dwelling will be sited on an *adjacent* property, but where the building permit for the replacement dwelling allows a replacement dwelling "in the same footprint as the original home," and where an ArcGIS map marked with distances and existing development indicate that the footprint of the original dwelling was located on the *subject* property, a conclusion that the subject property does not "include[] a dwelling" for purposes of forest template dwelling approval under ORS 215.750(4)(d) is not supported by substantial evidence. *Bielefeld v. Lane County*, 80 Or LUBA 480 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where an applicant proposes to occupy one guest apartment within an 18,000-square-foot dwelling while allowing the remainder of the dwelling and all of its amenities to be used by bed and breakfast guests, a county's conclusion that the bed and breakfast is not a "subordinate use" of the dwelling, and therefore not a home occupation, and that the applicant is not a "resident of the dwelling" is consistent with the plain meaning of the code language and is supported by substantial evidence in the record where there is evidence that the applicant "spends a couple of days a week" at a different home, and that the subject dwelling does not appear to be occupied when viewed from the road or neighboring properties, even though the applicant provides a copy of her driver's license that lists the subject dwelling. *Lee v. Marion County*, 79 Or LUBA 199 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a local code provision provides that issuance of a conditional use permit (CUP) requires a determination that "[t]he proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone," a local government decision granting a CUP is not supported by substantial evidence where it does not identify and describe all of the existing and permitted

uses on adjacent properties and where it fails to analyze or measure the extent of the potential impacts of the proposed use and instead proceeds straight to mitigation measures. *Currie v. Douglas*, 79 Or LUBA 585 (2019).

1.6.1 Administrative Law – Substantial Evidence – Generally. If an exhibit is attached to the petition for review before LUBA, but that exhibit was not a part of the record made available to the local decision maker, LUBA may not consider it in resolving petitioner's assignment of error. ORS 197.835(2)(a). When the petitioner's argument relies on exhibits not in the record, it provides no basis for reversal or remand of the decision. *Newbrook v. City of Portland*, 78 Or LUBA 73 (2018).

1.6.1 Administrative Law – Substantial Evidence – Generally. Substantial evidence is a somewhat deferential test LUBA applies in its review of a local government fact-finder's evidentiary judgments. When a hearings officer incorrectly applies the substantial evidence standards of review, ORS 197.835(11)(b) does not authorize LUBA to affirm a decision by reweighing the evidence under the correct standard of evidentiary review. On remand, the hearings officer must reapply the evidence using the correct standard of review—the preponderance of the evidence. *Morgan v. Jackson County*, 78 Or LUBA 188 (2018).

1.6.1 Administrative Law – Substantial Evidence – Generally. When an opponent provides evidence sufficient to rebut the presumption under ORS 215.130(10)(a) regarding the existence, continuity, nature and extent of the proposed nonconforming use, the applicant has the burden of demonstrating that the use proposed for verification has existed and continued in its current nature and extent from the date the use became nonconforming, or 20 years prior to the date of application, whichever date is applicable. *Morgan v. Jackson County*, 78 Or LUBA 188 (2018).

1.6.1 Administrative Law – Substantial Evidence – Generally. ORS 215.130(11) prohibits a challenge to the lawful establishment element of a nonconforming use which would compel the applicant to submit evidence regarding the nature and extent of the use during periods that are more than 20 years prior to the date of application. A hearings officer cannot adopt findings based on impermissible evidence. *Morgan v. Jackson County*, 78 Or LUBA 188 (2018).

1.6.1 Administrative Law – Substantial Evidence – Generally. Petitioner's argument that a proposed detached accessory structure for an "art studio" is not a permissible "accessory" structure allowed in the Impacted Forest Lands (F-2) zone provides no basis for reversal or remand where petitioner cites to no local code, state statute or administrative rule governing forest lands, suggesting limitations on accessory structures to a primary dwelling that is otherwise allowed on forest lands under state law. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

1.6.1 Administrative Law – Substantial Evidence – Generally. A hearings officer's finding that land in the forest zone upon which development is proposed is "flat" is not supported by substantial evidence where the finding is supported only by the applicant's assertion that the relevant slope is "less than 3" percent, but the record includes two topographic maps that appear to show that the slope exceeds 10 percent, which if so triggers additional fire safety requirements. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the city's code provides that development application materials "shall reflect that consideration has been given to [tree] preservation," the city does not err in finding that the code requirement is met when the applicant's submissions demonstrate that consideration was given to tree preservation through a tree survey and site design that preserves trees within a stand on slopes greater than 25 percent, contains yard sizes that decrease critical root zone impacts, and preserves trees between and around homes. Those application materials reflect that consideration was given to tree preservation even though some high and moderate priority trees must be removed to develop streets, utilities and building pads, and preservation of trees on residential lots would be left to the discretion of future lot owners. The code does not require the actual preservation of trees; instead, the code requires a project applicant to consider tree preservation and submit evidence to demonstrate that such consideration occurred. *Fairmount Neighborhood Assoc. v. City of Eugene*, 78 Or LUBA 418 (2018).

1.6.1 Administrative Law – Substantial Evidence – Generally. Extension and improvement of a residential access road over an existing public right-of-way is not subject to a city code section that requires streets that are "dedicated to the public by the applicant * * * conform" with adopted street right-of-way maps. A proposed improvement of a type of street that is not depicted on the city's adopted street right-of-way map does not fail to "conform" with that map. *Fairmount Neighborhood Assoc. v. City of Eugene*, 78 Or LUBA 418 (2018).

1.6.1 Administrative Law – Substantial Evidence – Generally. In considering whether property is generally unsuitable for farm use, it is not appropriate to disregard adjoining parcels as "nonfarm" parcels, simply because there is a nonfarm dwelling on the properties, where there is evidence those adjoining parcels have been planted in winter wheat. Without some findings addressing that evidence of farm use, findings that the property is generally unsuitable for farm use are not supported by substantial evidence. *Central Oregon Landwatch v. Crook County*, 77 Or LUBA 202 (2018).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local governing body commits no error in requesting that a prevailing party prepare written findings for it to adopt. And the governing body commits no error in adopting written findings that deviate from statements made at the final evidentiary hearing, and it is those written findings and not the oral statements that are subject to LUBA review on the merits. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.6.1 Administrative Law – Substantial Evidence – Generally. Findings of fact and law are the decision; they are not evidence. A local governing body commits no error in adopting new findings following a LUBA remand for inadequate findings, without reopening the evidentiary record. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

1.6.1 Administrative Law – Substantial Evidence – Generally. A reasonable decision maker could conclude that a 3,050-square-foot Event Center that is marketed to both hotel patrons and to the general public would generate larger events, with far more event attendees, and more traffic and parking demand from off-site than an Event Center that is conditioned to limit the Event Center use to hotel patrons and their guests only. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

1.6.1 Administrative Law – Substantial Evidence – Generally. A hearings officer's decision relying upon intervenor's traffic study is supported by substantial evidence where the hearings officer addressed petitioner's challenges to the credibility of the traffic study by citing to testimony of the intervenor's traffic engineer responding to each of petitioner's challenges. *Willis v. Clackamas County*, 76 Or LUBA 244 (2017).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a city ballot measure that approved the sale or transfer of park land to a school district included a statement that the former park land would "maximize recreational opportunities while preserving significant trees," and the school district's plans preserve 1.28 or 1.6 acres of former park land in its natural forested condition, the development uses only .32 acres of park land for school facilities, preserves many significant trees on the site, expands the school's playground located adjacent to the former park land, and preserves some acreage in a natural park like setting, a reasonable decision maker could find that school district has maximized recreational opportunities. *Dodds v. City of West Linn*, 75 Or LUBA 24 (2017).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding that city streets have adequate capacity to accommodate traffic generated on annexed land is not supported by substantial evidence, where the finding cites and relies only upon extra-record street capacity data found in the transportation system plans of three nearby cities, rather than any evidence in the record. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding that the noise created by wind turbines site on top of a building located next to a bay will be mitigated by ocean noise and noise generated by nearby sewage pumps is not supported by substantial evidence, where the record includes no evidence concerning how loud the ocean and sewage pumps are at the site of the building. *Burgermeister v. Tillamook County*, 75 Or LUBA 350 (2017).

1.6.1 Administrative Law – Substantial Evidence – Generally. Remand is required where the county standards provide that a parcel created by land sale contract is a legal lot of record only if the contract is (1) dated and signed by the parties, (2) includes a separate legal description, and (3) does not include more than one legal description, but the county concluded that a parcel is as a legal lot of record based on an incomplete copy of a land sale contract without signatures that did not provide a separate legal description for the subject parcel. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

1.6.1 Administrative Law – Substantial Evidence – Generally. An applicant's letter detailing the nature and location of a concrete batch plant's fuel tanks, stockpiles and buildings is not sufficient to establish their location as a matter of law or to establish that a hearings officer erred by failing to rely on that letter, where the hearings officer pointed out discrepancies between that letter and other letters submitted by the applicant. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where there is conflicting believable evidence regarding whether a proposal to replace a concrete batch plant with an asphalt batch plant would present a greater risk of explosions and damage to surrounding properties, a

hearings officer's conclusion that the asphalt batch plant poses a greater risk of explosions and damage is supported by substantial evidence. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

1.6.1 Administrative Law – Substantial Evidence – Generally. The standard of review that LUBA applies in reviewing substantial evidence challenges to critical findings of fact is not particularly demanding. City findings that a landslide poses a danger to water reservoirs, which are supported by the testimony of two engineers, one of them a geotechnical engineer, are supported by substantial evidence where the contrary evidence is not sufficient to call the testimony of the engineers into question. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

1.6.1 Administrative Law – Substantial Evidence – Generally. A memorandum from the city engineer that upsizing sewer pipes, rehabilitating and replacing sewer facilities and adding an infiltration and inflow abatement programs will result in an adequate sewer system is substantial evidence that with those improvements "adequate sewer facilities and services are presently or can be made available with development." *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

1.6.1 Administrative Law – Substantial Evidence – Generally. A board of commissioners could reasonably conclude that a double-wide mobile home was located on property in 1987, the year in which the county approved placement of a temporary medical hardship dwelling, where the record includes the 1987 permit approving placement of the temporary medical hardship dwelling, and that permit included a condition that required connection to the existing septic system. The existence of a septic system already on the property is some evidence of the contemporary existence of the temporary medical hardship dwelling and the double-wide mobile home on the property. *Treadway v. Jefferson County*, 72 Or LUBA 122 (2015).

1.6.1 Administrative Law – Substantial Evidence – Generally. For purposes of determining, under OAR 660-033-0130(8)(a)(C)(ii), whether a dwelling was "improperly removed" from the tax roll and whether the dwelling has "taxable value in its present state," a board of commissioners' decision that a dwelling was "improperly removed" from the tax roll is supported by substantial evidence in the record, where the record includes the two most recent years of tax assessor's reports for a single-wide mobile home that describe the mobile home as having two bedrooms and one bathroom and show an assessed value of approximately $1,000. *Treadway v. Jefferson County*, 72 Or LUBA 122 (2015).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government reasonably relies on testimony from a civil engineer that a retaining wall provides support for a parking lot and transmits its imposed load to the earth, notwithstanding that the civil engineer is a member of the board of directors of the non-profit organization applicant, because the engineer's participation on the board of directors does not, in itself, call her professional credibility into question. *Knapp v. City of Jacksonville*, 72 Or LUBA 299 (2015).

1.6.1 Administrative Law – Substantial Evidence – Generally. Remand is necessary where the findings conclude that the water supply is "adequate" to support proposed residential development because a main water line is located adjacent to the property, but do not address the code requirement to address the availability of water "relative to capacity," and the findings and record

do not address capacity or issues raised about the capacity to serve new development while meeting existing obligations. *Oregon Coast Alliance v. City of Brookings*, 71 Or LUBA 14 (2015).

1.6.1 Administrative Law – Substantial Evidence – Generally. A reasonable decision maker could rely on planning staff testimony that with zoning ordinance provisions allowing transfer of density, it is not necessary to remove 500,000 cubic yards of rock from a five-acre site to permit the site to be developed residentially. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding that a proposed truck maintenance home occupation will comply with a 600-square-foot floor area limitation is inadequate and not supported by substantial evidence, where the findings do not address how much floor area employees will use in performing maintenance tasks, and there is no evidence in the record supporting a finding that the physical area occupied by trucks, tools, storage, and the area needed to perform maintenance tasks will occupy no more than 600 square feet. *Stevens v. City of Island City*, 71 Or LUBA 275 (2015).

1.6.1 Administrative Law – Substantial Evidence – Generally. Notwithstanding that the record includes no evidence quantifying how much water would be transferred between a ranch and a proposed golf course, a county's finding that the water transfer will not significantly change or increase the cost of farming practices on the ranch is supported by substantial evidence, where the ranch manager testifies that in exchange for transferring water, the applicant will improve the ranch's irrigation system, and the ranch anticipates no change in the amount of irrigation water available or irrigation practices. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

1.6.1 Administrative Law – Substantial Evidence – Generally. A reasonable person could find based on the evidence in the record that where only a modest increase in vehicle trips is created by a PUD, the PUD is "reasonably compatible with adjacent and nearby land uses," particularly given the inherently subjective nature of the criterion. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

1.6.1 Administrative Law – Substantial Evidence – Generally. Based on evidence in the record that (1) no level of service deficiencies would occur based on new trips added to the area and (2) the PUD will not generate additional traffic above the threshold required for a TIA, A reasonable person could find, that a PUD will have minimal impact on traffic off-site, particularly given the inherently subjective nature of the criterion. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

1.6.1 Administrative Law – Substantial Evidence – Generally. Land use proceedings are not governed by rules of evidence, and a local government may rely in part on a planner's testimony regarding a phone conversation with the fire district chief, among other evidence, to conclude that the water supply is sufficient for fire suppression, notwithstanding that the fire district chief did not submit direct testimony. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

1.6.1 Administrative Law – Substantial Evidence – Generally. Remand is necessary where the decision (1) approves a two-year intensification of a mining operation and (2) modifies extraction

limits to extend the life of the mining operation beyond the initial two-year period, but the only evidence regarding compliance with an approval standard requiring that the existing county road system be "adequate to accommodate the proposed use" addresses only the initial two-year period, not long-term impacts on the adequacy of the county road system. *Dion v. Baker County*, 70 Or LUBA 438 (2014).

1.6.1 Administrative Law – Substantial Evidence – Generally. Substantial evidence supports a finding that the value of proposed development outweighs the value of retaining rather than demolishing an historic structure, notwithstanding opponents' arguments that the city did not give weight to the architectural value of the structure, where the record indicates that the structure was designated only for its cultural, not architectural, significance. *Rushing v. City of Salem*, 70 Or LUBA 448 (2014).

1.6.1 Administrative Law – Substantial Evidence – Generally. Under a historic demolition permit standard requiring a finding that the value of proposed development outweighs the value of retaining the historic resource, evidence that there are better sites in the city for the proposed development, a playground, is irrelevant to the question posed by the standard, which requires a comparison of the value of constructing the playground on the site against the value of retaining the historic resource. *Rushing v. City of Salem*, 70 Or LUBA 448 (2014).

1.6.1 Administrative Law – Substantial Evidence – Generally. The city has discretion to rely on the evidence it chooses in making its decision, and the city's decision not to rely on evidence provided by an applicant that calculates slopes on a property using a method that differs from the method requested by the city is not a basis to reverse or remand the decision. *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51 (2013).

1.6.1 Administrative Law – Substantial Evidence – Generally. A petitioner's mere disagreement with a city's conclusion that, as conditioned, a commercial truck repair home occupation located in an accessory structure is secondary to residential use of the property does not establish that the city's conclusion is not supported by substantial evidence. *Stevens v. City of Island City*, 68 Or LUBA 112 (2013).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where there is no dispute that the applicant's traffic impact study was prepared by a licensed traffic engineer or that two existing intersections will need to be signalized to avoid having a proposed development significantly affect those intersections, the fact that the traffic impact study in the record is a draft of the final traffic impact study, which lacks the stamp of the engineer and the warrants that justified the two traffic signals, does not mean the draft traffic impact study is not substantial evidence. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

1.6.1 Administrative Law – Substantial Evidence – Generally. The technical support for level of service figures in a traffic impact study (TIS) is a critical part of the TIC and the fact that the draft TIS does not include that technical support in the TIS appendix might require remand so that the final TIS with the technical support appendix could be added to the record. However, where no issue was raised before the local government concerning the missing technical support appendix, the issue is waived. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

1.6.1 Administrative Law – Substantial Evidence – Generally. A hearings official's expressions of misgivings about the quality of evidence submitted by an applicant do not mean the hearings officer required the applicant to meet an impermissible "absolute certainty" burden of proof. *Teen Challenge v. Lane County*, 67 Or LUBA 300 (2013).

1.6.1 Administrative Law – Substantial Evidence – Generally. A governing body errs in relying upon the personal knowledge of its members who are farmers to resolve a disputed issue regarding whether proposed disturbances to topsoil would render the subject property unfit for future agricultural use. The effect of topsoil disturbance on agricultural productivity is an arcane subject, and even if the farmer/commissioners have expert personal knowledge of that subject, it is inappropriate to approve or deny an application based on the decision-makers' personal knowledge of disputed facts rather than on the evidence submitted during the evidentiary proceeding. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city's decision that it has the required majority of consents to annex an area is supported by substantial evidence, where the contract consents have been executed and recorded and there is nothing on the face of the documents that calls their validity into question. Not-yet-litigated contentions of the consenting landowners that the contract consents are invalid because they were obtained through coercion or that the contract consents have been revoked do not so undermine the contract consents that they can no longer be viewed as substantial evidence. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

1.6.1 Administrative Law – Substantial Evidence – Generally. LUBA will affirm a city decision that an applicant's methodology for estimating trip generation from a proposed discount superstore is consistent with the guidelines set out in an applicable traffic generation manual, where nothing in the manual requires that another method be used where no similarly situated store is located in the city, or calls into question the extrapolation method that the traffic engineer used. *Neighbors for Dallas v. City of Dallas*, 66 Or LUBA 36 (2012).

1.6.1 Administrative Law – Substantial Evidence – Generally. Given the subjectivity of a criterion requiring that the proposed comprehensive plan map amendment be "in the public interest with regard to neighborhood or community concerns," a reasonable person could rely on the testimony of industrial businesses adjacent to the property that a proposed mixed-use apartment building located along a heavily used truck route could create conflicts between the residents and truck traffic to support a finding of that the proposed change is not in the public interest. *Vest v. City of Molalla*, 66 Or LUBA 155 (2012).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city decision maker may reasonably dismiss as not believable petitioner's non-expert testimony that proposed residential development could have a variety of negative environmental effects. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

1.6.1 Administrative Law – Substantial Evidence – Generally. Substantial evidence in the record supports a city's finding that a proposed cell tower location is the only feasible location

where the evidence demonstrates that (1) alternative sites are located outside of the search area identified by applicant for meeting its coverage objectives, (2) the tower cannot reasonably be located within a right-of-way because there is not sufficient area within the right-of-way to locate all of the necessary equipment, (3) co-location is not feasible because the heights of existing towers are inadequate, and (4) co-location on an existing rooftop facility is not feasible due to inadequate structural integrity of the rooftop. *Hill v. City of Portland*, 66 Or LUBA 250 (2012).

1.6.1 Administrative Law – Substantial Evidence – Generally. Uncontradicted evidence that a legislative text amendment allowing for the expansion of existing landfills would not affect the county's transportation facilities, because traffic generated by landfill expansion is not a net increase but simply replaces traffic generated by portions of the existing landfill that are at capacity and will be closed, is sufficient to demonstrate that the text amendment does not "significantly affect" any transportation facility within the meaning of the Transportation Planning Rule at OAR 660-012-0060(1). *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

1.6.1 Administrative Law – Substantial Evidence – Generally. A reasonable person could conclude, based on evidence that commercial farms near existing landfills are viable agricultural operations, that a text amendment allowing existing landfills to expand their geographic scope will not have additional impacts on nearby farm uses, and is consistent with a comprehensive plan policy providing that proposed rural development shall not substantially conflict with farm and forest uses. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

1.6.1 Administrative Law – Substantial Evidence – Generally. A hearings officer's decision that it is feasible for a proposed kennel operation to comply with DEQ's applicable noise standard is not supported by substantial evidence in the record, where an engineer's report concludes that noise from dogs barking in the outdoor kennel play area could exceed the DEQ hourly noise level limits on the property directly to the east and there is nothing in the record that rebuts that conclusion. *Butcher v. Washington County*, 65 Or LUBA 263 (2012).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding that an 8.5-acre parcel with Class VI agricultural soils is not "suitable for grazing," and not "other lands" suitable for farm use, and hence not "agricultural land" as defined in OAR 660-033-0020, is supported by substantial evidence, where the undisputed evidence is that the parcel can accommodate only two animal units per month, equivalent to a lease value of $30 per month, yielding less revenue than the annual property taxes. *O'Brien v. Lincoln County*, 65 Or LUBA 286 (2012).

1.6.1 Administrative Law – Substantial Evidence – Generally. Arguments that a proposed system for controlling odor and leachate will not in fact control odor and leachate generated by the proposed use are insufficient to demonstrate that the decision is not supported by substantial evidence where nothing in the record calls into question the efficacy of the proposed odor and leachate system. *Cottonwood Capital Property Mgmt. LLC v. City of Portland*, 65 Or LUBA 370 (2012).

1.6.1 Administrative Law – Substantial Evidence – Generally. Geotechnical reports, a storm water design report and a staff report amount to substantial evidence in the record to support the city's conclusion that a proposed stormwater drainage plan "fit[s] the topography, soil, geology,

and hydrology of hillsides and * * * ensure[s] hillside stability both during and after development. *Boucot v. City of Corvallis*, 64 Or LUBA 131 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. Maps based on a city's GIS database that do not differ in any material respect from the city's Goal 5 map and are not a smaller scale than the city's adopted Goal 5 map provide substantial evidence regarding the location of wetland boundaries. *Willamette Oaks LLC v. Lane County*, 64 Or LUBA 328 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where an authorization to an applicant to apply on a city's and county's behalf for land use approval to construct improvements on city and county owned property includes a statement at the beginning that the person or persons executing it has the authority to do so, a reasonable decision maker could conclude that the persons signing the authorization had the authority to provide the authorizations, where there is no evidence in the record indicating that the persons who issued the authorizations did not have that authority. *Willamette Oaks LLC v. Lane County*, 64 Or LUBA 328 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city does not err in relying upon an authoritative trip generation manual to estimate the number of new trips generated by a proposed use, instead of conducting actual traffic counts, where the petitioner cites no authority requiring the city to conduct actual traffic counts, nor suggests any way for the city to do so with respect to new development. *Kane v. City of Beaverton*, 64 Or LUBA 351 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding that the record reflects that the proposed development will generate 18 trips per day is not supported by substantial evidence, where nothing in the record indicates that the development will generate 18 trips per day except the finding itself and earlier proposed versions of that finding in a staff report. A finding or proposed finding is not evidence. *Poe v. City of Warrenton*, 64 Or LUBA 377 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding that public facilities are adequate to accommodate the proposed conditional use, based on review of statements from the public works department and fire chief, is not supported by substantial evidence, where the record includes no statements from the public works department, and the fire chief's letter states that it is unknown whether the city water supply can accommodate the proposed use. *Poe v. City of Warrenton*, 64 Or LUBA 377 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a permit extension criterion requires a local government to find that the permit applicant was not responsible for its failure to complete the development authorized by the permit within the term of the permit, a local government errs in finding that its determination concerning whether the applicant was responsible for that failure need not be supported substantial evidence. And while an applicant's claim that it could not have completed development within the term of the term of the original permit due to a historic downturn in the economy might be substantial evidence if that is the only evidence in the record, that unsubstantiated claim is not substantial evidence if there is other evidence that the applicant was seeking an alternate development proposal during the term of the original permit. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the county's initial 2006 decision relies upon a traffic study to demonstrate compliance with the Transportation Planning Rule (TPR) at OAR 660-012-0060(1)(c), and the decision is remanded but the county takes no action on remand until 2010, the county need not require that the traffic study be updated to reflect current 2010 traffic conditions. The focus of OAR 660-012-0060(1)(c) is on the end of the planning period, based on projected traffic growth from a base condition, and for purposes of the rule it does not matter whether growth is projected from 2006 or 2010. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a decision maker is required to conduct a *de novo* review of the evidence in the record, but the decision maker erroneously believes that under the appropriate standard of review the decision maker is obligated to resolve all evidentiary conflicts in the applicant's favor absent overwhelming conflicting evidence, a decision based on that erroneous understanding would likely not constitute *de novo* review. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding expressing an erroneous understanding of the local decision-maker's standard of evidentiary review is harmless error at best, where no party identifies any findings addressing the approval criteria or evidence in which the decision-maker applied that erroneous standard of review. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. Well reports generated when wells were dug decades ago are substantial evidence that a reasonable decision maker could rely upon to conclude that the wells can supply sufficient water for a proposed destination resort, where there is no countervailing evidence in the record, and the county addresses the possibility that the well reports are no longer accurate by imposing a condition requiring prior to final master plan approval that the applicant conduct pump tests and, if necessary, dig new wells, to ensure sufficient water. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. Opinions given by members of a local decision-making body during deliberations do not constitute new evidence that the public has a right to respond to. *Siegert v. Crook County*, 63 Or LUBA 379 (2011).

1.6.1 Administrative Law – Substantial Evidence – Generally. A reasonable person could conclude from the plat of a neighboring subdivision showing a spur road ending in turnaround bordering the common property line with the proposed subdivision, and a notation that the roads are intended to "benefit this plat," that the spur road is not intended to be a connecting road between the two subdivisions. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government decision that determines that an entire property is located on a foredune and denies an application for a dwelling based on that determination will be remanded where the findings do not explain why the local government reached the conclusion it reached and the conclusion is not supported by any evidence in the record identified by the local government. *Rudell v. City of Bandon*, 62 Or LUBA 279 (2010).

1.6.1 Administrative Law – Substantial Evidence – Generally. DLCD's Goal 14 rule was amended in 2007 to require that the coordinated population projections required by ORS 195.025 and 195.036 must be "developed using commonly accepted practices and standards for population forecasting" and "based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic Analysis (OEA). OAR 660-024-0030. A county may not simply rely on county population projections that were found to be valid when they were adopted in 1998 to adopt updated population projections in 2009. While the county is not required to use the OEA long range forecast, it must conduct a review of its 1998 assumptions to determine whether they remain reliable in light of actual population growth and the OEA forecast. *Meyer v. Douglas County*, 61 Or LUBA 412 (2010).

1.6.1 Administrative Law – Substantial Evidence – Generally. DLCD's Goal 14 rule was amended in 2007 to require that the coordinated population projections required by ORS 195.025 and 195.036 must be "developed using commonly accepted practices and standards for population forecasting" and "based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic Analysis (OEA)." OAR 660-024-0030. If in adopting a coordinated population projection under ORS 195.025 and 195.036 a county relies on a city's undocumented preference for a particular growth rate, the county forecast is not supported by an adequate factual base. *Meyer v. Douglas County*, 61 Or LUBA 412 (2010).

1.6.1 Administrative Law – Substantial Evidence – Generally. DLCD's Goal 14 rule was amended in 2007 to require that the coordinated population projections required by ORS 195.025 and 195.036 must be "developed using commonly accepted practices and standards for population forecasting" and "based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic Analysis (OEA)." OAR 660-024-0030. A county decision to apply its assumed population growth rate for unincorporated areas of the county to the unincorporated areas of the county located inside urban growth boundaries is not supported by an adequate factual base where there is no explanation for why that assumption is reasonable for urban areas around cities that project a much lower population growth rate. *Meyer v. Douglas County*, 61 Or LUBA 412 (2010).

1.6.1 Administrative Law – Substantial Evidence – Generally. Even though the county relied on an erroneous calculation of potential mortgage carrying costs associated with attempting to farm the property, because even without the losses from mortgage costs, evidence in the record indicates that the property could not be profitably farmed, the county did not err in finding that the property could not be profitably farmed. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city's decision that a partition complies with common green recommended "width" standards is supported by substantial evidence when the width of the common green, as located and measured by the city, is within the recommended width. *Meade v. City of Portland*, 60 Or LUBA 265 (2009).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government's findings that an application for subdivision approval should be denied for failure to include a traffic study are inadequate, where there is no evidence that any of the circumstances that might require a traffic study under the local code were present and there was no suggestion during the local proceedings that planning staff believed a traffic study was necessary. *Montgomery v. City of Dunes City*, 60 Or LUBA 274 (2010).

1.6.1 Administrative Law – Substantial Evidence – Generally. When an approval criterion requires that there be adequate water to serve the proposed use, it is not enough to demonstrate that there are sources of water available to the property. The amount of water needed to serve the proposed use must also be estimated. *Crocker v. Jefferson County*, 60 Or LUBA 317 (2010).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a small scale estuarine management unit map is ambiguous, even if the evidence in the record established that a tax lot was being mined in 1981 when estuary management unit designations were applied to the property, that would not conclusively establish an intent to place the tax lot in an estuary management unit that allows mining, as opposed to a management unit that does not allow mining, when the small scale map was adopted in 1981. However, such evidence would likely constitute substantial evidence of an intent to place the tax lot into an estuary management unit that allows mining, when the map was adopted in 1981. *Oregon Shores Cons. Coalition v. Curry County*, 60 Or LUBA 415 (2010).

1.6.1 Administrative Law – Substantial Evidence – Generally. Comprehensive plan maps that are not tax lot specific and post-1981 aerial photographs are not substantial evidence that a small tax lot was being mined in 1981 when the comprehensive plan was first adopted. *Oregon Shores Cons. Coalition v. Curry County*, 60 Or LUBA 415 (2010).

1.6.1 Administrative Law – Substantial Evidence – Generally. An applicant for approval of a cell tower may rely on letters from a school district director of communications and facilities and a special district property manager to establish that school district and special district property is not available as a site for a proposed cell tower. The applicant need not inquire beyond the districts' professional staff or contact the governing boards of the school district and special district. *McLaughlin v. City of Springfield*, 59 Or LUBA 275 (2009).

1.6.1 Administrative Law – Substantial Evidence – Generally. Post-enactment statements by the Metro Council President and a Metro planner that when 308 acres were added to the urban growth boundary and designated for Industrial use Metro only expected that 120 of those acres would actually be put to industrial use are not substantial evidence of that expectation, where neither the Metro Council President nor the planner make any reference to the ordinances that added the property to the urban growth boundary or any attempt to explain how the 120-acre figure was computed. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where Metro has designated 308 acres next to a city for industrial development, a market analysis is not substantial evidence that those 308 acres are not needed to meet the 20-year regional need for industrial land, where that market analysis concludes that under the right economic conditions only 150 acres of 308

acres will be developed but also concludes that there is a current shortage of industrial land to meet the region's 20-year need for industrial land. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

1.6.1 Administrative Law – Substantial Evidence – Generally. In applying a destination resort approval standard that requires that destination resorts employ mitigation measures to ensure "no net loss of wildlife," a county may allow an applicant to utilize data developed in approval of a nearby destination resort that utilized seven indicator species to estimate the nature and extent of the damage that must be fully mitigated. A reasonable person would rely on such data unless opposing data is submitted to show the analysis that relies on indicator species missed or inadequately addressed some aspect of the wildlife resource. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

1.6.1 Administrative Law – Substantial Evidence – Generally. Arguments that a basis of value report that was prepared to support an application to vacate right-of-way does not constitute substantial evidence—because the basis of value report is not an appraisal and was not prepared by a person who is licensed to prepare commercial real estate appraisals—are not sufficient to show the challenged decision is not supported by substantial evidence, where the city standard that requires a determination of the special benefit that will result from the requested vacation does not require an appraisal or require that the person who supplies that estimate be a licensed commercial real estate appraiser. *Bowers v. City of Eugene*, 58 Or LUBA 51 (2008).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county does not err in relying on a 2007 soil study to conclude that a parcel is not agricultural land under Goal 3, notwithstanding the absence in the record of a 2001 soil study that the applicant's consultant cites, where the 2007 study is intended to stand on its own and petitioners do not identify any critical information missing from the 2007 study that might be found in the 2001 study. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

1.6.1 Administrative Law – Substantial Evidence – Generally. Substantial evidence does not support a city's finding that constructing a new elementary school on a parcel 10 miles from the original urban renewal area will benefit or serve that original urban renewal area, where there is no evidence that the school would serve any current or displaced residents of the renewal area. *Friends of Urban Renewal v. City of Portland*, 58 Or LUBA 148 (2009).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county does not err in concluding that, as conditioned, a personal use airport will not "significantly" impact a neighboring equine facility, where the only adverse impact identified by the facility owner is that guests are advised to delay mounting or dismounting horses until after planes land or take-off, and conditions of approval limit operations to 20 flights per month. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

1.6.1 Administrative Law – Substantial Evidence – Generally. A reasonable person could infer from photographs that show the front and two sides of a dwelling that the pictured dwelling has "intact exterior walls and roof structure," as required by ORS 215.283(1)(s)(A) for approval of a

replacement dwelling in an exclusive farm use zone. *Hegele v. Crook County*, 56 Or LUBA 156 (2008).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the evidence shows that a house had a kitchen sink, toilet and bathing facilities that were connected to a pipe that exited the house and traveled underground to a holding and disposal tank of some sort, that evidence is sufficient to establish that the dwelling had indoor plumbing that was connected to "a sanitary waste disposal system," as required by ORS 215.283(1)(s)(B) for approval of a replacement dwelling in an exclusive farm use zone. ORS 215.283(1)(s)(B) does not require that the applicant establish that the required "sanitary waste disposal system" qualifies as a "subsurface sewage disposal system," as defined by ORS 454.605(13). *Hegele v. Crook County*, 56 Or LUBA 156 (2008).

1.6.1 Administrative Law – Substantial Evidence – Generally. LUBA will affirm a county's finding that fire protection measures that typically apply to logging operations are sufficient to ensure that a proposed mining operation in a forest zone will not significantly increase fire hazards, notwithstanding that a permanent mining operation will have greater duration and intensity than a seasonal logging operation, where the petitioners cite to no evidence substantiating their assertion that the nature and intensity of the mining operation require more stringent fire protection measures than logging operations. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

1.6.1 Administrative Law – Substantial Evidence – Generally. A conclusion that the 374-foot elevation corresponds to the top of high bank, characterized by "an abrupt or noticeable change from a steeper grade to a less steep grade," is not supported by substantial evidence, where evidence in the record indicates that the 374-foot elevation is one point on a barely perceptible slope with no perceptible change in grade. *The Piculell Group v. City of Eugene*, 56 Or LUBA 298 (2008).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where an applicant seeking to establish that a proposed mining site qualifies as a significant aggregate resource site does not argue to the county that opponents' data from off-site wells is consistent with data from the applicant's on-site wells or that the data from the off-site wells is unreliable because it was not collected under the supervision of a geologist, it is not unreasonable for the county to rely on the opponents' evidence to conclude that the two on-site borings were not sufficient to establish that a 117-acre mining site qualifies as a significant aggregate resource site. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where two 25-foot test pits show an aggregate layer that is at least 20 feet deep and shows no sign of diminishing and the decision maker does not seem to have appreciated that the test pits were consistent with the first 25 feet of two deep borings located elsewhere on the site that showed an aggregate layer of far more than the 25-foot width required to qualify as a significant aggregate resource site under OAR 660-023-0180(3)(d)(B)(ii), remand is required so that the county can make it clearer that it understood the significance of the two 25-foot test pits. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding that rural residential development will have "minimal impact" on wildlife habitat is not supported by substantial evidence, where the only evidence relied upon is a study that addressed a different proposal under which one-fifth of the property would have been placed in a conservation easement, and the county fails to impose or require such a condition or easement, or explain why the proposed development satisfies the minimal impact standard without such a condition. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city finding that the "top of the bank" is located entirely within 50 horizontal feet of the high water line is not supported by substantial evidence, where the applicant submitted a survey showing that at two points the top of the bank is further than 50 horizontal feet, and the city cites no specific evidence to the contrary. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

1.6.1 Administrative Law – Substantial Evidence – Generally. A planning staff report that takes the position that a proposed development is not in a fire hazard area can constitute substantial evidence that the development is not located in a fire hazard area, where the position in the planning staff report is unchallenged. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

1.6.1 Administrative Law – Substantial Evidence – Generally. A hearings officer's conclusion that a fence between a public park and grazing land is sufficient to ensure compliance with ORS 215.296(1) is supported by substantial evidence, notwithstanding the possibility that dogs may exit the park through an unfenced boundary and travel across intervening parcels to harass cattle, where there are no reported incidents of trespass across the unfenced boundaries and only speculation to support the possibility. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

1.6.1 Administrative Law – Substantial Evidence – Generally. Remand is necessary where the city concludes based on petitioner's traffic impact analysis that proposed development will cause intersection performance to fall below the minimum standard, but the city misconstrues the analysis, which indicates that the proposed development will not cause the intersection to fall below the minimum performance standard. *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

1.6.1 Administrative Law – Substantial Evidence – Generally. An applicant's experience as a geologist does not necessarily qualify her to testify as an expert on the feasibility of constructing driveway access that complies with maximum finished grade requirements. *Lenox v. Jackson County*, 54 Or LUBA 272 (2007).

1.6.1 Administrative Law – Substantial Evidence – Generally. That a conditional use permit application is deemed complete under ORS 227.178 does not necessarily mean that the application is supported by substantial evidence that demonstrates compliance with all applicable approval criteria. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

1.6.1 Administrative Law – Substantial Evidence – Generally. A two-year old traffic study determining that the local transportation system will continue to operate within acceptable limits

after full build-out of property in the area is substantial evidence that a particular proposed commercial use will not impose an undue burden on the transportation system, where there is evidence that the assumptions that the study was based upon are still valid. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county's finding that land is not suitable for grazing is not supported by substantial evidence, where the land has a history of grazing, and is bordered by similarly sized parcels currently used for grazing that have the same soils and conditions. *Wetherell v. Douglas County*, 54 Or LUBA 678 (2007).

1.6.1 Administrative Law – Substantial Evidence – Generally. An adjoining farmer's testimony that a parcel need not remain in farm zoning to allow their farm operations to continue, combined with the absence of any history of combined farm use, is substantial evidence supporting a county's finding that the parcel is not "agricultural land" under the OAR 660-033-0020(1)(a)(C) definition. *Wetherell v. Douglas County*, 54 Or LUBA 678 (2007).

1.6.1 Administrative Law – Substantial Evidence – Generally. A reasonable person could rely on evidence that there are 25 on-street parking spaces in the area that are only partially occupied during peak hours, to conclude that parking in the area is adequate, and thus that a variance to off-street parking requirements will not be "materially detrimental" to the purpose of the off-street parking requirement. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

1.6.1 Administrative Law – Substantial Evidence – Generally. A substantial evidence challenge may not be based on evidence that is not in the local record and was not before the final decision maker. *Lissner v. Washington County*, 53 Or LUBA 357 (2007).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county's conclusion that the property is not suitable for commercial forest uses is supported by substantial evidence where the property owner prepared a study of the forestland productivity of the subject property, which was reviewed by a forester from the Department of Forestry (DOF), that indicated that the property is capable of producing only 1.8 cubic feet per acre per year of wood fiber, and the record includes letters from the DOF stating that any attempts to produce commercial stands on the property would be futile. *Hecker v. Lane County*, 52 Or LUBA 91 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. Because ORS 215.422(1)(c) explicitly limits the appeal fee that counties can charge for certain land use appeals, evidence that total annual revenues produced by over 200 county fees fall short of total planning department annual expenses is not sufficient to demonstrate that the fees collected for three types of appeals comply with ORS 215.422(1)(c). A more particularized evidentiary effort to focus on the costs and expenses associated with the three types of appeals subject to ORS 215.422(1)(c) is required. *Landwatch Lane County v. Lane County*, 52 Or LUBA 140 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the record reflects that 10 acres of irrigation rights were removed from two 20-acre parcels because irrigating with that water was extremely inefficient, (2) the nonfarm parcels consist of 85 percent bare ground, and (3) moving the irrigation rights back would provide no benefit, county's findings that returning

irrigation rights to the property would not render the nonfarm parcels generally suitable for the production of farm crops or livestock is supported by substantial evidence. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. Under substantial evidence review, petitioners must do more than identify conflicting evidence the local government could have relied upon; they must explain why it was unreasonable for the local government to make the challenged the decision. *Burlison v. Marion County*, 52 Or LUBA 216 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. Under *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 752 P2d 312 (1988), the substantial evidence standard is not satisfied when "the credible evidence apparently weighs overwhelmingly in favor of one finding and the [decision maker] finds the other without giving a persuasive explanation." *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. The party who puts forth the larger effort to produce evidence regarding a land use application is not necessarily entitled to prevail under a substantial evidence review solely by virtue of that larger effort. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. The critical issue for the local decision maker will generally be whether any expert or lay testimony offered by permit opponents raises questions or issues that undermine or call into question the conclusions or supporting documentation that are presented by the applicant's experts and, if so, whether any such questions or issues are adequately rebutted by the applicant's experts. LUBA's role on review is to determine if a reasonable person would have answered those questions as the local decision maker did, in view of all of the evidence in the record. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local decision maker may assign some additional significance to the testimony of the city engineer or Oregon Department of Transportation engineers regarding transportation system impacts based on their neutrality regarding the merits of the development proposal itself. But that process of assigning any extra weight necessarily calls for a case by case determination by the local decision maker, with LUBA deferring to any such assignments of extra weight that are reasonable, based on the evidence in the whole record. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. LUBA frequently analyzes findings challenges and evidentiary challenges separately and generally analyzes findings challenges first, because LUBA's resolution of the findings challenge frequently affects its resolution of the evidentiary challenge or makes it unnecessary to decide the evidentiary challenge. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. LUBA will affirm a hearings officer's finding that it is feasible to expand an existing stormwater facility without infringing on the neighboring petitioner's rights to the existing capacity of that facility, where there is no

evidence that the expansion will affect the capacity of the existing pond, and the hearings officer imposed conditions sufficient to ensure that the expansion will not infringe on the existing capacity. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government could reasonably accept as true an expert's testimony about the findings in a biological assessment, even though the biological assessment itself is not in the record. *Neighbors 4 Responsible Growth v. City of Veneta*, 52 Or LUBA 325 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government's decision is supported by substantial evidence despite the fact that a wetlands delineation report and a biological assessment that were discussed during the local proceedings are not included in the record, where parts of the wetlands delineation report are quoted in the application and there is a great deal of other evidence in the record that the local government relied on. *Neighbors 4 Responsible Growth v. City of Veneta*, 52 Or LUBA 325 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county hearings officer's identification of the "ordinary high water" line for purposes of determining a riparian setback area is supported by substantial evidence even though specific elevations were not identified on the property and then transferred to a map, where the planning staff and hearings officer conducted site visits to confirm the accuracy of the applicant's map indicating the location of the high water mark. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. A hearings officer's determination that it is feasible for a proposed home occupation to comply with local code criteria prohibiting the creation of vibration, glare, fumes or odors detectable to normal sensory perception off the subject property with a condition relocating the parking area for diesel vehicles away from abutting properties and limiting idling time of diesel vehicles to 10 minutes is not supported by substantial evidence, where the evidence relied upon is a conclusory statement in a planning staff memorandum that fumes and odors could be eliminated by limiting idling time and providing a sufficient buffer. *Watts v. Clackamas County*, 51 Or LUBA 166 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government reasonably viewed an engineer as a qualified expert, where the person had a degree in agricultural engineering and several engineering certifications, participated actively in the local proceedings regarding a mineral and aggregate overlay and presented models to predict performance of mining plans, and challenged assumptions of the applicant's experts. *Westside Rock v. Clackamas County*, 51 Or LUBA 264 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. LUBA will affirm a hearings officer's conclusion that a standard requiring that development not "seriously interfere" with sensitive riparian habitat is not met, notwithstanding that the only evidence on that point is the testimony of the applicant's consultant, where that testimony is based on an assertion that the proposed campground and parking areas "stay well clear" of sensitive riparian habitat, but the site plan clearly shows that the proposed campground and parking area are located adjacent to the riparian habitat. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. An acoustic engineer's statement that the procedures followed in conducting a noise study for an aggregate mine were "generally consistent" with procedures required by state administrative rule is sufficient to demonstrate compliance with the rule, particularly where the petitioners do not identify any material difference between the procedures followed and those required the rule. *Ray v. Josephine County*, 51 Or LUBA 443 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county's findings that chemicals are required in the future in order to make forest practices on a property practicable are not supported by substantial evidence where the record does not indicate whether chemicals were already applied to the property or that whatever applications might be necessary have not already occurred. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county's finding that aerial spraying of chemicals is necessary in order to make forest practices on a 20-acre property practicable is not supported by substantial evidence where the evidence in the record supports a conclusion that manual application is the preferred method of application for properties 40 acres or smaller and the findings do not provide other reasons that manual spraying is not practicable. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. In order to prevail on a substantial evidence challenge, a petitioner must identify the challenged findings and explain why a reasonable person could not reach the same conclusion based on all the evidence in the record. *Stoloff v. City of Portland*, 51 Or LUBA 560 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a development code requires that a city find that transportation facilities will be available prior to or at the time of development of annexed property, testimony by an applicant's traffic engineer and the city engineer that traffic facilities needed to serve annexed property will be available prior to or at the time of development is substantial evidence supporting a city's finding that the development code requirement is satisfied. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city finding that an existing residential zone may be amended in ways that will reduce the development potential of that zone because development in that zone has historically been at the high end of 5 to 10 units per acre density allowed in the zone is not supported by substantial evidence, where the only relevant evidence in the record shows that development has averaged 5.6 units per acre in that zone. *4-J Land Co., LLC v. City of Sandy*, 50 Or LUBA 525 (2005).

1.6.1 Administrative Law – Substantial Evidence – Generally. A hearings officer errs in approving a cul-de-sac under subdivision criteria that allow a cul-de-sac only where existing development on adjacent property prevents a street connection and a connected street pattern is not possible, where (1) the "existing development" is on the same property being subdivided, (2) there is evidence that a street connection is possible, and there are no findings explaining why a street connection is not possible. *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county's conclusion that a proposed nonfarm dwellings will not alter the stability of the land use pattern in the area is not supported by substantial evidence where that conclusion is based on an estimate that 4 or 5 additional nonfarm dwellings could be approved, and that estimate is not supported by any evidence in the record. *Peterson v. Crook County*, 49 Or LUBA 223 (2005).

1.6.1 Administrative Law – Substantial Evidence – Generally. Absent any contravening evidence or need for more detailed analysis, staff testimony that proposed application fee increases accurately reflect increased costs and are less than the maximum amount that cities may charge under ORS 227.175(1) is substantial evidence supporting a finding of compliance with the statute. *Doty v. City of Bandon*, 49 Or LUBA 411 (2005).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the decision maker adopts application fee increases but fails to recognize that doing so inadvertently increases local appeal fees, remand is necessary for the local government to take evidence and adopt findings demonstrating that the increased appeal fees are consistent with ORS 227.180(1). *Doty v. City of Bandon*, 49 Or LUBA 411 (2005).

1.6.1 Administrative Law – Substantial Evidence – Generally. When the local record clearly shows and adequately describes the location of a proposed road project, a decision approving that project is supported by substantial evidence regarding the location of the proposed road even if the specific name for the project in the decision was not used in the local record. *1000 Friends of Oregon v. City of Dayton*, 49 Or LUBA 622 (2005).

1.6.1 Administrative Law – Substantial Evidence – Generally. That cattle grazing occurs at some level on large tracts of BLM land with the same Class VII soils and vegetative characteristics as the subject property is some evidence that the much smaller subject property could also support some level of grazing. However, that indirect evidence does not compel a conclusion that the property is suitable for grazing, given countervailing evidence that the property is not suitable for farm use under the factors considered in OAR 660-033-0020(1)(a)(B). *Wood v. Crook County*, 49 Or LUBA 682 (2005).

1.6.1 Administrative Law – Substantial Evidence – Generally. A hearings official decision that a proposed chiropractic home occupation that would generate eight client trips per day does not constitute "excessive traffic" on a short, dead-end unimproved residential street that serves a relatively small number of existing residences is supported by substantial evidence. *Revoal v. City of Eugene*, 47 Or LUBA 136 (2004).

1.6.1 Administrative Law – Substantial Evidence – Generally. Findings that conclude access is available to an adjoining road, but do not explain how the road may be accessed, are not supported by substantial evidence where all of the evidence cited to LUBA indicates that access is not possible. *Seaton v. Josephine County*, 47 Or LUBA 178 (2004).

1.6.1 Administrative Law – Substantial Evidence – Generally. A code standard that requires preliminary staff approval of the location, design and capacity of a proposed subdivision sewage

disposal system does not require independent determination of adequacy of the city's sewer facilities. *Bauer v. City of Portland*, 47 Or LUBA 459 (2004).

1.6.1 Administrative Law – Substantial Evidence – Generally. Testimony from a person who is unwilling to identify himself is suspect and absent any corroboration is not evidence a reasonable person would rely upon. *Lawrence v. Clackamas County*, 46 Or LUBA 101 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. LUBA will reject a challenge to the evidentiary support for a finding that mining traffic will significantly conflict with agricultural practices, within the meaning of OAR 660-023-0180(4)(b)(E), where there is evidence that (1) truck traffic from the mine will cause the level of service for vehicles entering and exiting a nearby farm stand to be reduced from LOS C to LOS D, (2) truck traffic will interfere with the use of the road for the transport of agricultural equipment, and the applicant has not demonstrated that those conflicts will be minimized. *Eugene Sand and Gravel, Inc. v. Lane County*, 46 Or LUBA 254 (2004).

1.6.1 Administrative Law – Substantial Evidence – Generally. A hearings officer's finding that aerial photographs neither established the existence nor non-existence of a road in 1992 is supported by substantial evidence where the road was primitive and only used intermittently over the years. *Bonnett v. Deschutes County*, 46 Or LUBA 318 (2004).

1.6.1 Administrative Law – Substantial Evidence – Generally. A hearings officer's decision that a road existed in 1992 is supported by substantial evidence where the record includes conflicting expert and lay testimony regarding the existence of the road in 1992 and the road need not have been improved to any particular standard and was the kind of primitive road that a reasonable person might or might not have recognized as a road. *Bonnett v. Deschutes County*, 46 Or LUBA 318 (2004).

1.6.1 Administrative Law – Substantial Evidence – Generally. An arborist's and professional engineer's testimony is not substantial evidence that it is impracticable to save two groves of mature trees in constructing a discount superstore and parking, where the arborist and professional engineer do not consider the practicability of reducing the building footprint or the area of the site that will be developed with parking. *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680 (2004).

1.6.1 Administrative Law – Substantial Evidence – Generally. Expert testimony that is not in the record and that appears only as reported by the applicant to staff is not sufficient to establish the capacity of the subject property for farm and forest uses. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government does not misconstrue a local ordinance requiring permanent legal access to a parcel by relying on easements entered into by prior landowners with government agencies providing reciprocal rights for access. *Sisters Forest Planning Comm. v. Deschutes County*, 45 Or LUBA 145 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where there is evidence that the subject property was separated from a larger parcel by virtue of a 1976 conveyance of an intervening parcel, a county's conclusion that the subject property was also created in 1976 is supported by substantial evidence. *Frazee v. Jackson County*, 45 Or LUBA 263 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. Testimony by the city administrator that anticipated local appeal costs are likely to be similar to the cost of appeals from the city to LUBA is substantial evidence supporting imposition of a $500 local appeal fee, for purposes of establishing that the fee is not more than the average or actual cost of such appeals under ORS 227.180(1)(c), in the absence of contradictory evidence. *Friends of Linn County*, 45 Or LUBA 408 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where county code requires that "all owners" sign a subdivision application, a conclusion that that standard is met is supported by substantial evidence where the record includes a certificate signed by the applicant certifying that the applicant owns the property and other documents in the record name the applicant as the grantee or as a representative of the owner. *Neketin v. Washington County*, 45 Or LUBA 495 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. A decision verifying the scope and intensity of a nonconforming racetrack operation is not supported by substantial evidence, where no party identifies supporting evidence in the record, and the decision's recitation of facts indicates that the use as verified exceeds the scope and intensity of the racetrack on the date it became nonconforming in at least some particulars. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. LUBA will not remand a county decision for failing to include a sample of light-green visqueen to support a finding that the material is nonreflective, where the challenged decision is not based on such a finding. *Lorenz v. Deschutes County*, 45 Or LUBA 635 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. The lack of specific evidence on whether aggregate samples tested by a laboratory were "representative," as required by OAR 660-023-0180(3)(a), does not provide a basis for reversal or remand, where the samples came from an existing quarry and there is no suggestion in the record that the sample was not representative or that the quality of rock in the existing quarry was not uniform. *Bryant v. Umatilla County*, 45 Or LUBA 653 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the evidence concerning whether a dwelling had been abandoned or interrupted before 1995 is conflicting and the hearings officer relies heavily on photographs of the dwelling that he mistakenly believed were taken in 1995 rather than years later to conclude that use of the dwelling use was abandoned or interrupted for more than one-year before 1995, the hearings officer's decision is not supported by substantial evidence and must be remanded so that the hearings officer can render a decision with a correct understanding of the date the photographs were taken. *Bradley v. Washington County*, 44 Or LUBA 36 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city's finding that buried concrete reservoirs will not cause "significant detrimental impact" to the environment is supported by substantial evidence, where the city's code defines that term to mean development that disrupts or destroys ecological systems, and evidence in the record shows that the surface over the buried reservoirs will be restored and replanted and the reservoirs will not significantly affect underground hydrology. *Bauer v. City of Portland*, 44 Or LUBA 210 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. Petitioner's evidentiary challenge to a city's conclusion that an applicable criterion is satisfied provides no basis for reversal or remand, where the challenge is based on petitioner's interpretation of what the criterion requires, and that interpretation was not presented during the local proceedings. *Slepack v. City of Manzanita*, 44 Or LUBA 301 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a decision approving a subdivision that finds it is infeasible to extend a road from the proposed subdivision to an adjoining property and a petitioner at LUBA argues that the finding is not supported by substantial evidence, LUBA will remand where the respondent cites no evidence that supports the finding. *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding that an EFU parcel would contribute no productive farm acreage to any neighboring farm, and thus is generally unsuitable for farm use even if used in conjunction with neighboring dairy farms, is not supported by substantial evidence, where two neighboring dairy farmers offered to buy the parcel to use in conjunction with their farms. A property's usefulness as farmland, considered on its own, is not necessarily indicative of its usefulness when combined with an existing farm or ranch. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county decision establishing a one-half-mile radius impact area around proposed dwellings within a Goal 5 wildlife habitat area is supported by substantial evidence, where the county relies on studies that human impacts extend one-half mile from dwellings and elk prefer to be at least one-half mile from humans. *Doty v. Jackson County*, 43 Or LUBA 34 (2002).

1.6.1 Administrative Law – Substantial Evidence – Generally. Evidence that a livestock operation is conducted on a parcel for part of the year is sufficient to establish that the property contains an "existing" livestock operation, for purposes of the requirements for siting a guest ranch on EFU-zoned land, where the record shows that rotation of cattle from the property during the wet months, to allow pasture to rest, is a matter of good animal husbandry. *Durdan v. Deschutes County*, 43 Or LUBA 248 (2002).

1.6.1 Administrative Law – Substantial Evidence – Generally. In determining that an applicant failed to carry his burden to demonstrate that a proposed home occupation would be carried out inside a building and in a manner that would not unreasonably interfere with other uses, the county did not err by considering existing and past conditions on the property. *Hick v. Marion County*, 43 Or LUBA 483 (2003).

1.6.1 Administrative Law – Substantial Evidence – Generally. A memorandum explaining why one tax lot is not a feasible alternative to siting a radio transmission tower on EFU-zoned land and also addressing criticisms of an earlier memorandum explaining why another tax lot is infeasible is evidence a reasonable person could rely on to conclude that the second tax lot is not a feasible alternative. *Van Nalts v. Benton County*, 42 Or LUBA 497 (2002).

1.6.1 Administrative Law – Substantial Evidence – Generally. In granting design approval for a highway interchange improvement project originally proposed as part of a larger project, a decision maker is not required to study and address interim impacts to existing facilities covered by the larger project other than the interchange, and the decision maker's failure to do so does not leave the evidence supporting approval of the interchange project something other than substantial evidence. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

1.6.1 Administrative Law – Substantial Evidence – Generally. A decision that analyzes numerous aspects of a proposed alteration of a nonconforming use compared to the historic use of the property is sufficient to establish the scope and nature of the nonconforming use where the petitioner does not challenge that analysis. *Ankarberg v. Clackamas County*, 41 Or LUBA 504 (2002).

1.6.1 Administrative Law – Substantial Evidence – Generally. A prior local government decision that a nonconforming use had not been discontinued may constitute substantial evidence in support of a subsequent land use decision that, as of the date of the prior decision, the nonconforming use had not been discontinued. *Ankarberg v. Clackamas County*, 41 Or LUBA 504 (2002).

1.6.1 Administrative Law – Substantial Evidence – Generally. Draft transportation and parking demand plans for a proposed school are substantial evidence supporting a finding of compliance with a "safe streets" approval standard, notwithstanding that the conditions of approval require that the school submit and city staff approve *final* plans in which the city might impose additional or different terms. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

1.6.1 Administrative Law – Substantial Evidence – Generally. A planning staff report that advises the city council that a riparian vegetation plan had been reviewed and found to be adequate by the Oregon Department of Fish and Wildlife is substantial evidence in support of a finding that a proposal will not result in "adverse impact to the fish and wildlife resources in the area." *Willhoft v. City of Gold Beach*, 41 Or LUBA 130 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the city's comprehensive plan locates the boundary of a Goal 17 overlay zone at the "top edge" of the bluff overlooking the ocean, but nothing in the record supports the city's conclusion that proposed expansion of a dwelling built into the bluff will occur outside the overlay zone, remand is necessary for the city to identify the "top edge" of the bluff and the existing dwelling's location in relation to the zoning boundary. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. Conditions imposed to ensure that only *de minimis* traffic volumes from a proposed recycling facility impact nearby failing intersections during certain times are insufficient and unenforceable, where the county's decision fails to (1) define what *de minimis* traffic volumes are, (2) specify the times when the conditions apply, and (3) impose conditions or identify solutions that a reasonable person would find adequate to ensure that traffic associated with the facility uses a longer alternate route rather than the short direct route through failing intersections. *K.B. Recycling, Inc. v. Clackamas County*, 41 Or LUBA 29 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. The assumptions underlying the county's revenue projections and its conclusion that an urban renewal plan is "feasible" under ORS 457.095(6) and 457.085(3)(g) must be supported by substantial evidence, *i.e.*, evidence a reasonable person would rely upon. The local government need not demonstrate that projected new development is presently committed and certain to occur. *Zimmerman v. Columbia County*, 40 Or LUBA 483 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where nearly all the evidence in the record concerning potential groundwater pollution associated with a proposed aggregate mine is speculative and would support opposite conclusions concerning that potential, the local government's selection of which evidence to believe is reasonable. *Donnell v. Union County*, 40 Or LUBA 455 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. An unsupported assurance by the applicant's attorney that the entire septic system necessary to support a proposed church expansion can be located on a church-owned parcel is not substantial evidence supporting a finding to that effect, where all the other evidence in the record regarding the feasibility of the septic system assumes that part of it will be located on an adjoining parcel. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding that property that is to be rezoned from residential to commercial can be adequately served by sewer and fire districts is supported by substantial evidence, where the record shows that nine months earlier the districts indicated in a prior proceeding concerning the property that such services could be provided. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. Findings that a proposed road width variance will not be materially detrimental to other property owners in the area are not supported by substantial evidence when they are based on a comparison to other substandard roads rather than the effect of the proposed variance itself. *Georgeff v. Curry County*, 40 Or LUBA 101 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. Even though substantial evidence did not exist in a prior application to support a finding of need for additional seasonal farmworkers, additional evidence may be presented during a subsequent application to support a finding of need. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city governing body is not required to apply the Oregon Rules of Evidence in its land use proceedings and may rely on hearsay evidence in a planning staff report to reach a conclusion regarding representations that were made to a permit applicant. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city's finding that a proposal will have no adverse effect on abutting property is not supported by substantial evidence when the decision does not address how all abutting property owners are affected. *ODOT v. City of Klamath Falls*, 39 Or LUBA 641 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a proposed aggregate extraction site must demonstrate compliance with a public need criterion and a criterion that requires consideration of alternative sites, but identified alternative sites are rejected without explanation and the only cited evidence regarding public need is testimony from the public works director that he would support a site anywhere in the county, the decision is not supported by adequate findings or substantial evidence. *Donnell v. Union County*, 39 Or LUBA 419 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government's determination that there is sufficient land designated multi-family residential to satisfy Goal 10 is supported by substantial evidence when the acknowledged Goal 10 housing inventory establishes that the city has a 238-acre surplus of land designated for multi-family development, and the proposal is to rezone only eight acres from multi-family residential to commercial. *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384 (2001).

1.6.1 Administrative Law – Substantial Evidence – Generally. A planning staff report may constitute substantial evidence upon which a local government may rely, and a planning staff report may summarize applicable portions of professional manuals, such as the Institute of Transportation Engineers Trip Generation Guide. *Chilla v. City of North Bend*, 39 Or LUBA 121 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. A planning administrator's "unique knowledge" of additional information that is not contained in the record is not substantial evidence upon which a local government may rely in reaching its decision. *Hausam v. City of Salem*, 39 Or LUBA 51 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. Although items of evidence, when viewed individually, might be sufficiently questionable that they would not be relied upon by a reasonable decision maker, when viewed together those same items of evidence might become evidence a reasonable person could accept in support of a challenged finding. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city's finding that the portion of a dwelling exceeding a code-mandated height limit adversely affects the ocean view of a neighboring property is supported by substantial evidence where the record includes photographs, a videotape and drawings that show the subject dwelling blocking the view of ocean water from the neighboring property, notwithstanding that the photographs, videotape and drawings show that

the subject dwelling blocks only a tiny sliver of ocean water view. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. A reasonable person with an understanding of the assumptions and limitations that underlie USDA soils data would not rely on those data to conclude that sites rated to have severe soils limitations for small commercial uses for that reason alone cannot accommodate any commercial use. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where an existing adult video store seeks a conditional use permit to remain open past the normal 10 p.m. closing time required in the zoning district, evidence that a police prostitution sting operation at a nearby 24-hour adult video store resulted in numerous arrests after 10 p.m. and testimony by a business neighbor of vandalism and criminal activity outside another 24-hour adult video store operated by the permit applicant is substantial evidence that granting the requested conditional use permit would result in an increase of criminal activity and thereby violate a conditional use "compatibility" and "livability" standard. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. Absent a condition requiring a holding tank of sufficient size, a reasonable decision maker could not conclude that a well producing 1,200 to 2,400 gallons per day is adequate to serve a rural use without adversely affecting neighboring wells, when there is undisputed evidence that the peak demands of the proposed use exceed the estimated well capacity. *Spiro v. Yamhill County*, 38 Or LUBA 133 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government's findings determining that traffic generated by a proposed development will be mitigated by certain conditions of approval is not supported by substantial evidence, where the government's decision does not limit the maximum developable area to that established as the basis for the traffic impact analysis. *DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where petitioner challenges the adequacy and evidentiary basis for a local government's decision determining that a proposed development "is or will be compatible" with the land use development pattern in the vicinity of the request, LUBA will analyze the findings to determine (1) whether the findings are adequate; (2) whether there is substantial evidence in the record to support a finding that, absent some conditions of approval, the compatibility standard is met; and (3) if conditions of approval are necessary to establish compatibility, whether the local government adopted such conditions. *DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county may reasonably rely on a report based on consideration of a broad sample of native tree species to determine whether the predominant soils on the property are capable of producing more than 49 cubic feet per acre per year of wood fiber of any kind where there is not reasonable basis presented for believing that planting one or more nonnative tree species on the predominate soils would produce more than 49 cubic feet per acre per year of wood fiber. *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a county prohibits the refiling of a new or substantially similar application until two years after a final decision denying an application; the decision maker determines that a second application, filed less than a year after the first, was "substantially similar" because it involved the same use on the same property and the changes in the facts supporting the application were otherwise insufficient to demonstrate that the application is different; and the decision maker points to evidence in the record to support his conclusions, that decision is supported by substantial evidence. *Munn v. Clackamas County*, 37 Or LUBA 621 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. Evidence that industrial uses are occurring on industrially zoned property within two miles of the subject property is insufficient to demonstrate, as a matter of law, that a proposed excavation business located in a rural residential zone complies with a requirement that the use "will not interfere with existing uses on nearby land or with other used permitted in the zone in which the property is located." *Munn v. Clackamas County*, 37 Or LUBA 621 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the city council's review of a planning commission decision is limited to whether the lower decision is supported by substantial evidence, and petitioner argues that the city council exceeded its review authority by reweighing the evidence, LUBA will deny the assignment of error where it concludes that the city council understood and applied the substantial evidence standard correctly. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a hearings officer rejects a proposed stormwater control method as inadequate to ensure compliance with an approval criterion that requires reduction of flood flows below erosive capacity, but nonetheless finds compliance with the standard based on the hearings officer's unsupported opinion that more adequate methods are available, the finding of compliance is not supported by substantial evidence. *Mitchell v. Washington County*, 37 Or LUBA 452 (2000).

1.6.1 Administrative Law – Substantial Evidence – Generally. When a city's decision to annex territory is also a land use decision, the city must be able to demonstrate that the annexation decision complies with the statutory annexation requirements and is supported by substantial evidence in the record. A failure to demonstrate such compliance requires a remand. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. A bill to the property owner for spraying and planting of trees is substantial evidence that the required spraying was done on the property, notwithstanding that the bill refers to a different property, where the property owner explains during the local hearing that the reference to a different property is an error and LUBA concludes a reasonable person could have accepted that explanation. *Rochlin v. Multnomah County*, 37 Or LUBA 237 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. A property owner's explanation that required plowing and cultivation occurred at the time Christmas trees were planted is

substantial evidence that required plowing and cultivation occurred, where the only contrary evidence is opponents' unsupported expressions of doubt that the required plowing and cultivation occurred. *Rochlin v. Multnomah County*, 37 Or LUBA 237 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local ordinance requiring feasible or adequate bicycle or pedestrian connections to adjacent and nearby planned unit developments is not met when the evidence fails to show where the bicycle and pedestrian connections are to be located, and the decision does not require the connections to be located in any particular place. *Highland Condominium Assoc. v. City of Eugene*, 37 Or LUBA 13 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city's finding that it is feasible to comply with an approval standard requiring that public facilities can accommodate the proposed use is supported by substantial evidence, where the city conditions approval on the applicant making improvements to an intersection, including improvements that ODOT had imposed on a previous application for a more traffic-intensive use on the subject property. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. Substantial evidence supports a city's rezoning of land from multi-family to single-family residential uses, where the city's inventory indicates a need for 1,081 multi-family dwellings, and a reasonable person could conclude that the number of existing and approved multi-family dwellings exceeds 1,081 units, notwithstanding flaws in the city's analysis that render the exact number of those dwellings uncertain. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city's finding that a proposed college pedestrian/bicycle path meets applicable safety standards is supported by substantial evidence notwithstanding concerns raised about the efficacy of proposed safety measures, where there is evidence the college has not historically experienced the kinds of criminal activity opponents speculate may occur as a result of construction of the path. *Baughman v. City of Portland*, 36 Or LUBA 353 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city's ultimate finding that constructing a parking lot that will add pedestrians to a pedestrian/bicycle path complies with bicycle safety criteria is supported by substantial evidence, notwithstanding the lack of evidence in the record concerning how the relative mix of pedestrians and bicyclists will be affected by the parking lot, where petitioners fail to challenge the city's separate finding that co-existence of bicycles and pedestrians is "expected" on pedestrian/bicycle paths. *Baughman v. City of Portland*, 36 Or LUBA 353 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. A city's decision to rely on estimates of traffic impacts based solely on student enrollment is supported by substantial evidence, notwithstanding the failure to separately account for traffic impacts that might be associated with a 90,000-square-foot expansion of school facilities, where the facility expansion will not increase student enrollment and the city explained that the traffic impact projections based on student enrollment were very conservative and overstated the likely actual traffic impacts. *Baughman v. City of Portland*, 36 Or LUBA 353 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a city interprets its zoning ordinance as requiring that a "recycling center" have the "primary purpose" of extracting recyclables from a waste stream, but not requiring that any particular percentage of the waste stream will be recycled, the city's conclusion that a proposed facility is a "recycling center" is supported by substantial evidence, notwithstanding the absence of evidence quantifying the percentage of recyclables in the waste stream. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. A hearings officer's findings which rely on the absence of business records and the testimony of a neighbor to conclude that a nonconforming use was discontinued are supported by substantial evidence, where the findings address the conflicting evidence submitted by the applicant and explain why that evidence did not establish the continued existence of the nonconforming use. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the applicant bears the burden of demonstrating under a local provision that there is no reason to believe a potential hazard exists on the subject property, the absence of evidence regarding potential hazards on the property does not constitute substantial evidence of compliance with that provision. *Jebousek v. City of Newport*, 36 Or LUBA 124 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. Substantial evidence supports a city's denial of a subdivision application based on a standard prohibiting cul-de-sacs longer than 400 feet, when the preliminary plat shows a cul-de-sac 427 feet in length. The city is not obligated to approve an application that does not comply with approval standards even if the approval could be conditioned on submitting a final plat that shows compliance with the applicable criteria. *Holland v. City of Cannon Beach*, 35 Or LUBA 482 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. That findings of noncompliance with an approval criterion are not supported by substantial evidence is not a basis for reversal or remand, where petitioner fails to challenge other findings of noncompliance with that criterion that are an independent basis for denial. *Holland v. City of Cannon Beach*, 35 Or LUBA 482 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where subdivision approval criteria do not require that the city determine whether a particular access route would be the "primary" access route, the city's failure to adopt such a finding and a lack of substantial evidence that the particular access route would be the primary access route provides no basis for reversal or remand. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding that a proposed subdivision will be connected to the city's storm drainage system is not supported by substantial evidence, where the proposed drainage system stops short of the city's storm drainage system and a condition of approval requiring paved access to the subdivision is not adequate to ensure that the storm drainage connection will be constructed along with that paved access. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. The evidence supporting a decision denying a permit need not match the evidence supporting the permit application in a qualitative and quantitative sense. *Johns v. City of Lincoln City*, 35 Or LUBA 421 (1999).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county's improper reliance on poor past management practices in concluding a property is not suitable for commercial forest use provides no basis for reversal or remand, where there is other evidence in the record that a reasonable person could rely on to reach that conclusion. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a site plan depicting setbacks was before the county decision maker, and was inadvertently not submitted to LUBA, testimony discussing the measurements and setbacks depicted on the site plan is evidence that may support the county's s findings regarding setbacks, notwithstanding that the site plan is itself absent from the record. *Thomas v. Wasco County*, 35 Or LUBA 173 (1998).

1.6.1 Administrative Law – Substantial Evidence – Generally. A staff report constitutes substantial evidence, where petitioner does not challenge the explanation and calculations contained in the report. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

1.6.1 Administrative Law – Substantial Evidence – Generally. A condition requiring a drainage plan for a towing facility is supported by substantial evidence notwithstanding the owner's claim that towed vehicles would be drained of fluids, where the record showed the city council questioned the owner's claim and it was not clear where the drained fluids would be stored. *Williamson v. City of Arlington*, 35 Or LUBA 90 (1998).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a local government fails to find a proposal complies with a code requirement for two parking spaces per unit, the applicant's testimony that two parking spaces will be provided per unit is not evidence that clearly supports a finding of compliance with the parking requirement under ORS 197.835(11)(b). *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998).

1.6.1 Administrative Law – Substantial Evidence – Generally. A decision maker may review certain types of land use permit applications more stringently than others, provided the higher burden of proof is not attributable to bias or some other legally impermissible reason. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

1.6.1 Administrative Law – Substantial Evidence – Generally. Petitioner's disagreement with the reasons specified by a local government for rejecting the evidence he submitted in support of a land use application provides no basis for reversal or remand. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where there is no evidence that a property only functions as winter range between December 1 and March 31, the selection of that

time period for a condition of approval is not supported by substantial evidence. It is not within generally accepted knowledge that property only functions as winter range between December 1 and March 31. *Botham v. Union County*, 34 Or LUBA 648 (1998).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government's unsupported inference that ranching operations are 2-3 miles distant from the proposed nonfarm dwelling, and its reliance on the absence of evidence on which the applicant bears the burden of proof, do not constitute substantial evidence supporting a finding that the nonfarm dwelling is compatible with farm uses. *Wolverton v. Crook County*, 34 Or LUBA 515 (1998).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a county finds that the subject property's soils constitute "high-value farmland" as that concept is defined by statute, but there is no evidence in the record that supports that ultimate conclusion, the decision must be remanded. *Corp. of Presiding Bishop v. Klamath County*, 34 Or LUBA 131 (1998).

1.6.1 Administrative Law – Substantial Evidence – Generally. A planning "staff report" may provide an "adequate factual base" to support a legislative land use decision. *Buhler Ranch v. Wallowa County*, 33 Or LUBA 594 (1997).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where an applicable criterion requires that a dwelling have the "least impact" on adjoining lands and the applicant does not show the dwelling could not be located on alternative sites on the property that would have fewer impacts, the applicant fails to demonstrate compliance with the criterion as a matter of law. *Evans v. Multnomah County*, 33 Or LUBA 555 (1997).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where, on remand, an applicant modifies a site plan for a gas station and car wash so that only the location of the gas pumps is carried forward from the original site plan to the modified site plan, a reasonable person could not conclude that the two plans are substantially similar. A finding that the plans are substantially similar does not adequately address the code requirements that apply to a site plan. *Sullivan v. City of Woodburn*, 33 Or LUBA 356 (1997).

1.6.1 Administrative Law – Substantial Evidence – Generally. Unsupported statements and assurances that a proposed dwelling will comply with local roof height and pitch standards do not constitute substantial evidence. *Pekarek v. Wallowa County*, 33 Or LUBA 225 (1997).

1.6.1 Administrative Law – Substantial Evidence – Generally. Petitioner cannot challenge a moratorium extension by asserting that the city lacked substantial evidence to justify the initial moratorium; the relevant question is whether the record includes substantial evidence to support the moratorium extension. *Manning v. City of St. Paul*, 33 Or LUBA 193 (1997).

1.6.1 Administrative Law – Substantial Evidence – Generally. In reviewing evidence, LUBA may not substitute its judgment for that of the local decision maker, but must consider and weigh all evidence in the record to determine if the local decision maker's conclusion is supported by substantial evidence. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

1.6.1 Administrative Law – Substantial Evidence – Generally. To demonstrate a nonconforming use was not interrupted under ORS 215.130, the evidence must establish that the business was operational on an ongoing basis. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

1.6.1 Administrative Law – Substantial Evidence – Generally. Petitioners fail to establish that a reasonable person could not reach the county's conclusion, based upon the facts before it, where petitioners disagree with the county's evaluation of the evidence, and present arguments as to how the facts could support a contrary conclusion. *Alliance for Responsible Land Use v. Deschutes County*, 33 Or LUBA 12 (1997).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where petitioners challenge the county's reliance on a traffic impact study that is three years old, but petitioners do not point to evidence in the record that undermines the conclusions of that study, petitioners fail to establish that the county's decision is not based on substantial evidence. *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76 (1996).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a petitioner challenges percentages relied upon by the county in support of a finding, the petitioner must provide citations to the record where the data upon which it relies to calculate its own percentages can be found. *Helvetia Community Assoc. v. Washington County*, 31 Or LUBA 446 (1996).

1.6.1 Administrative Law – Substantial Evidence – Generally. There is no general requirement that survey evidence supporting a consultant's calculation of area be included in the record; instead, LUBA must determine whether, considering all relevant evidence in the record, a reasonable person could rely on the consultant's calculations. *Squires v. City of Portland*, 31 Or LUBA 335 (1996).

1.6.1 Administrative Law – Substantial Evidence – Generally. In considering the substantiality of evidence supporting a Goal 3 reasons exception for realignment of a highway, LUBA must look at the evidence supporting the challenged decision for the entire four-mile stretch of highway and all the impacted properties, not just the evidence of effects on one of the properties. *Schrock Farms, Inc. v. Linn County*, 31 Or LUBA 57 (1996).

1.6.1 Administrative Law – Substantial Evidence – Generally. Petitioners' challenge of the reliability of an environmental impact statement (EIS) that was relied upon by the county in its decision is insufficient where the challenge is based solely on the age of the EIS, without identification of other evidence in the record which undermines the EIS.
Schrock Farms, Inc. v. Linn County, 31 Or LUBA 57 (1996).

1.6.1 Administrative Law – Substantial Evidence – Generally. A finding that water for a proposed dwelling will come from a neighbor's property is not supported by substantial evidence when it has not been shown that the water can be legally provided through the appropriate grant of water rights. *Furler v. Curry County*, 31 Or LUBA 1 (1996).

1.6.1 Administrative Law – Substantial Evidence – Generally. A county's denial of petitioners' application for a temporary special care permit is supported by substantial evidence in the record where the hearings officer finds that alternative housing exists close enough to petitioners' residence to provide necessary special assistance, and petitioners presented no evidence indicating that alternative housing is not available. *Lundy v. Clackamas County*, 30 Or LUBA 377 (1996).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a local criterion requires that the county find a proposed use will not significantly reduce or impair significant wildlife, a finding that compliance with fencing specifications will "help the request comply" does not factually address or establish compliance with the criterion. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

1.6.1 Administrative Law – Substantial Evidence – Generally. Evidence of resource preservation gathered on one property can be substantial evidence to support findings of resource preservation on adjacent properties. *Reeves v. Yamhill County*, 30 Or LUBA 135 (1995).

1.6.1 Administrative Law – Substantial Evidence – Generally. In performing an alternative sites analysis under Goal 14 and its own zoning ordinance, a city may not assume that the cost of a previously developed site within the city limits is excessive or that forecasted redevelopment expenses will be prohibitive. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

1.6.1 Administrative Law – Substantial Evidence – Generally. An unsupported statement in an application is not evidence, and an estimate of a geologist as to resource quantity, made without reference to evidence of any kind, is not substantial evidence. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

1.6.1 Administrative Law – Substantial Evidence – Generally. A reasonable person would not conclude that a code conditional use permit standard requiring a proposed development to be timely considering the adequacy of storm drainage systems is satisfied, where there is no evidence in the record concerning the existence or adequacy of storm drainage facilities to handle anticipated runoff from the proposed development. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

1.6.1 Administrative Law – Substantial Evidence – Generally. The mere existence of a survey or computer listing of a city's available industrial land, absent argument by petitioner that particular listed sites represent available, industrially designated sites in the vicinity of a proposed plan map amendment, does not refute other evidence relied on by the city to determine there are no suitable alternative sites within a reasonable area of a proposed plan map amendment. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

1.6.1 Administrative Law – Substantial Evidence – Generally. Findings that the impacts of a proposed livestock sales facility will be reduced because the livestock to be sold will be purebred, as opposed to animals of mixed ancestry, lack evidentiary support where there is no evidence distinguishing the impacts of these types of livestock. *Collins v. Klamath County*, 28 Or LUBA 553 (1995).

1.6.1 Administrative Law – Substantial Evidence – Generally. Findings that an orchard's accepted farming practices have not been significantly affected by trespassing golf balls are supported by substantial evidence where the evidence shows no orchard employees have been hit by golf balls, tree buffers are effective in deflecting golf balls and petitioner's testimony was discredited by video tape of petitioner collecting golf balls on the golf course property. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a finding that the gravel extraction rate at a proposed site will not change from historic rates is not supported by substantial evidence, and the finding appears to play a significant role in the local government's finding of compliance with a code "compatibility" requirement, the challenged decision approving a conditional use permit for a gravel operation is not supported by substantial evidence. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

1.6.1 Administrative Law – Substantial Evidence – Generally. A lack of response from the county Road Master is not substantial evidence that a code provision requiring no undue impairment of traffic flow is met. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

1.6.1 Administrative Law – Substantial Evidence – Generally. A reasonable person could not conclude that a proposed forest dwelling satisfies a "necessary for forest use" standard because the subject property is "quite remote," where the evidence in the record shows only that the subject property is five miles from an urban growth boundary and a 35 minute drive from a city. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

1.6.1 Administrative Law – Substantial Evidence – Generally. Statewide Planning Goal 2 requires that planning decisions and actions have an adequate factual base, regardless of the legislative or quasi-judicial nature of the decision. The Goal 2 requirement for an adequate factual base is equivalent to the requirement for substantial evidence in the whole record. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

1.6.1 Administrative Law – Substantial Evidence – Generally. A determination that a nonconforming quarry occupied five acres at the time it became nonconforming is not supported by substantial evidence in the whole record where the only evidence cited by the parties as establishing the size of the quarry operation at the relevant time is an undated aerial photograph. *Mazeski v. City of Mosier*, 27 Or LUBA 100 (1994).

1.6.1 Administrative Law – Substantial Evidence – Generally. Testimony from an Oregon Department of Forestry (DOF) representative which suggests a proposed dwelling could be compatible with forest uses, but was clarified by the DOF representative to eliminate any suggestion of compatibility, is not evidence a reasonable decision maker would rely upon to establish a proposed nonforest dwelling is compatible with forest uses. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the record establishes only that a small portion of the subject parcel is unsuitable for forest uses, a reasonable person

could not conclude the entire parcel is generally unsuitable for farm or forest uses. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. Under ORS 197.830(13)(a), LUBA's review is limited to the record of the proceedings below. Statements in a local government comprehensive plan background and inventory document, that are not included in the record, cannot constitute substantial evidence in support of a challenged decision. *Fleck v. Marion County*, 25 Or LUBA 745 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where a reasonable decision maker could rely on information contained in a geotechnical report to determine there are engineering solutions available to solve identified landslide, drainage and other hazards associated with the subject property, the geotechnical report is substantial evidence to support the local government's determination that the proposal complies with relevant local code standards. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the governing body ratifies an act of another local government official in the challenged decision, that aspect of the challenged decision is itself substantial evidence that the local official possessed authority to accomplish the disputed act. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. An expression of belief that a local code standard imposing a specific decibel limitation will not be violated is not an adequate finding of compliance with that standard. Expressions by the applicant's attorney that noise generated by the proposed use will not be excessive or violate the standard are not substantial evidence that the standard will be met. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. A staff report can contain evidence to support a decision challenged at LUBA. *Oregon Raptor Center v. City of Salem*, 25 Or LUBA 401 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government is free to disregard or give little weight to a party's allegations concerning the substance of a telephone conversation between that party and another person not present at the local hearing. *Decuman v. Clackamas County*, 25 Or LUBA 152 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. Evidence in the local record that there are currently a certain number of approved mobile home subdivision lots within a local jurisdiction, is not undermined by a statement in the comprehensive plan that several years earlier, a different number of mobile home subdivision lots were approved, but had not been "finalized." *Mannenbach v. City of Dallas*, 25 Or LUBA 136 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the local decision maker determines the existence of a nonconforming personal use airport, but the evidence concerning the scope of that nonconforming use is nonspecific, LUBA will affirm the local decision maker's determination that the scope of the nonconforming use amounts to no more than one four-hour flight per year from such airport. *Warner v. Clackamas County*, 25 Or LUBA 82 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. In determining compliance with a local code standard that a proposed farm dwelling be on a parcel as large as the median commercial farm unit in the area, a local government may rely on evidence that farm operations on three adjoining parcels constitute one commercial farm operation for purposes of calculating the size of the median commercial farm unit in that area. *Walker v. Clackamas County*, 25 Or LUBA 6 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. There is substantial evidence to support a local government's determination that a parcel is in farm use, where the parcel is a pasture for livestock and poison oak is burned on the property to retain that pasture. *Leabo v. Marion County*, 24 Or LUBA 495 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. Substantial evidence is evidence a reasonable person would accept as adequate to support a conclusion. Absent some indication that the information provided by a traffic count at a single location is an unreliable indicator of the daily traffic on a road, the traffic count is substantial evidence of the daily traffic on that road. *Reeves v. Washington County*, 24 Or LUBA 483 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. There is no statutory requirement that legislative decisions be supported by substantial evidence. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government determination that a proposed nonresource dwelling "does not materially alter the stability of the overall land use pattern of the area" is not supported by substantial evidence, where the parties cite

no evidence in the record establishing the relevant area, the overall land use pattern of such area or the effect of the proposed dwelling on the stability of such land use pattern. *Todd v. Columbia County,* 24 Or LUBA 289 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where there is evidence in the local government record that the number of golf balls claimed to have landed in adjoining orchards is exaggerated, a decision approving a golf course and imposing a condition requiring the planting of trees to contain golf balls on-site and installation of a fence and screen to prevent golfers and golf balls from entering adjoining orchard property, is supported by substantial evidence. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the aerial application of chemicals on an orchard adjoining a proposed golf course will be rendered more difficult, although possible, in that at least one aerial sprayer indicates he would be willing to spray the affected orchard, and the decision approving the golf course requires the operator to close the golf course to facilitate such spraying, there is substantial evidence in the record that the golf course will not force a significant change in or significantly increase the cost of aerial spraying of the adjoining orchard. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. A decision that a golf course will not significantly change or increase the cost of ground spraying of an adjoining orchard is supported by substantial evidence, where there is conflicting evidence concerning the magnitude of ground spraying drift expected to travel onto adjoining properties, and the decision imposes a condition requiring that the golf course operator provide monitors to prevent golfers from coming into contact with ground spray drift. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where different reasonable conclusions could be drawn from the evidence in the record, the choice between the different reasonable conclusions belongs to the local government. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. A local government determination that a proposed development can be built without placing new construction within 25 feet of the centerline of a designated water feature is supported by substantial evidence where site plans in the record indicate the centerline of the water feature and display an acceptable design for the development that does not impinge on the 25-foot boundary. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where there is uncontradicted evidence that up to 70 percent of the waste material to be accepted at a proposed recycling facility will be recycled, and that some recycling facilities accept material that includes both solid waste that cannot be recycled as well as recyclable material, a local government's finding that the solid waste transfer component of the proposed facility is "customarily incidental" to the recycling component of the facility is supported by substantial evidence in the record. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. A reasonable person could conclude that adequate water service can be provided to a proposed development, where the record contains evidence demonstrating that under a worst case scenario of high water demand and limited availability of water from existing water rights, sufficient water can be provided if a certain additional quantity of water is stored in impoundments on the subject property, and that impounding such quantity of water on the subject property is feasible. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where an applicable code criterion requires that an existing structure have been issued all necessary permits in the past and a party raises a substantial issue concerning whether such is the case, the local government is required to adopt findings explaining why the code criterion is met and those findings must be supported by substantial evidence. *Mercer v. Josephine County*, 23 Or LUBA 608 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the evidence indicates that there are two rock cairns on the subject property which may be Native American burial cairns eligible for listing on the National Register of Historic Places, and the function of the cairns cannot be determined without further archaeological evaluation, there is not substantial evidence in the record to support a determination that there are no significant archaeological sites on the property. *Larson v. Wallowa County*, 23 Or LUBA 527 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where there is expert evidence in the record that traffic systems in the area are inadequate to serve a proposed golf course, and only conclusory evidence to the contrary, a local government's finding of compliance with a code standard requiring adequate rural facilities to serve the proposed use is not supported by substantial evidence in the record. *Kaye v. Marion County*, 23 Or LUBA 452 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the only evidence supporting a finding that a site contains 1.5 million cubic yards of aggregate material is a page from a reclamation application with that figure filled in, with no supporting documentation, the finding is not supported by substantial evidence in the record and is inadequate to comply with the Goal 5 inventory requirements of OAR 660-16-000. *Calhoun v. Jefferson County*, 23 Or LUBA 436 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Comments made by individual local government decision makers during deliberation on an application cannot constitute *evidence* in support of, or in opposition to, a challenged decision approving or denying such application. *Forster v. Polk County*, 23 Or LUBA 420 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Where the only evidence cited in the record strongly suggests that sewer service is unavailable to the subject property, and the availability of water service and storm drainage systems to serve the subject property is uncertain, a determination that a UGB amendment complies with Goal 14 factor 3, requiring "[o]rderly and economic provisions for public facilities and services," is not supported by substantial evidence. *ODOT v. City of Newport*, 23 Or LUBA 408 (1992).

1.6.1 Administrative Law – Substantial Evidence – Generally. Even if the subject property is properly described as marginal farmland with poor drainage, where there is undisputed evidence in the record of the property's historic and current use for agricultural production and that the property has Class II and IV agricultural soils, a finding that the property "is not likely to be used for agricultural production" is not supported by substantial evidence. *Brandt v. Marion County*, 23 Or LUBA 316 (1992).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Where a county code provision requires a finding that development of a proposed solar facility will "not result in unnecessary soil erosion or loss," and includes a provision that this finding "*may* be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual," and "[t]he approved plan *shall* be attached to the decision *as a condition of approval*," that provision allows an applicant and the county the *option* of relying on a qualified soil and erosion control plan to satisfy the provision and, if that option is followed, by imposing a condition of approval that requires compliance with the approved plan. The phrase "attached to the decision as a condition of approval" is a term of art that does not mean that the plan must be physically attached to the decision. *Harris v. Marion County*, 78 Or LUBA 209 (2018).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Where a county code provision requires that a proposed solar facility may not "create unnecessary negative impacts on agricultural operations," including dividing a field or multiple fields "in such a way that creates small or isolated pieces of property that are more difficult to farm," and placing solar facility components on lands in a manner that "could disrupt common and accepted farming practices," a hearings officer's decision errs in concluding that a 12-acre solar facility located on a 14.15-acre lot will not create an isolated strip of cultivated land because as s a matter of simple arithmetic, some portion of the 14.15-acre lot will remain outside the 12-acre solar facility. *Harris v. Marion County*, 78 Or LUBA 209 (2018).

1.6.2 Administrative Law – Substantial Evidence – Definition of. ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d) require a finding that the proposed uses authorized by the proposed exception are "compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." To establish compliance with OAR 660-004-0020(2)(d), the county's finding that the likely adverse impacts of the proposed uses allowed under the proposed exception are similar to the impacts of the existing uses must be supported by substantial evidence. The absence of evidence that the impacts would be different is not a basis to conclude that the impacts would be similar. Where this unsupported presumption that the impacts would be similar is the foundation of the much of the county's subsequent analysis, the presumption is not supported by substantial evidence, and remand is necessary for the county to adopt more adequate findings regarding compatibility, supported by substantial evidence. *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

1.6.2 Administrative Law – Substantial Evidence – Definition of. ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d) require a finding that the proposed uses authorized by the proposed exception are "compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." The potential adverse impacts of different types of liquid bulk terminals affiliated with a deepwater port, such as an oil terminal versus a fertilizer export operation, could be different enough to require a separate analysis. Adequate findings regarding compatibility would start by identifying the likely adverse impacts of typical uses authorized under approved use categories, evaluating each use category separately, and if necessary specific types of uses within each category. The findings should also address the characteristics of uses on adjoining areas, and assess vulnerability to potential externalities from industrial uses in the exception area. Informed by those analyses, the county can then reach sustainable conclusions regarding whether the proposed uses are compatible with adjoining uses, or can be rendered

compatible via identified measures. *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

1.6.2 Administrative Law – Substantial Evidence – Definition of. A city council errs in concluding that a city council-devised future modification to a submitted but unsatisfactory drainage and grading plan that will be reviewed in a future non-public proceeding can satisfy a requirement that the storm drainage plan "maintain[s] pre-existing levels and meet[s] planning and engineering requirements." Pursuant to *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007), the city council must determine whether the submitted drainage and grading plan complies with the approval criteria or must consider the modifications to the drainage plan identified by the city council in a proceeding that allows public participation. *Dodds v. City of West Linn*, 75 Or LUBA 24 (2017).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Under *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 752 P2d 312 (1988), the substantial evidence standard is not satisfied when "the credible evidence apparently weighs overwhelmingly in favor of one finding and the [decision maker] finds the other without giving a persuasive explanation." *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Although items of evidence, when viewed individually, might be sufficiently questionable that they would not be relied upon by a reasonable decision maker, when viewed together those same items of evidence might become evidence a reasonable person could accept in support of a challenged finding. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

1.6.2 Administrative Law – Substantial Evidence – Definition of. A reasonable person with an understanding of the assumptions and limitations that underlie USDA soils data would not rely on those data to conclude that sites rated to have severe soils limitations for small commercial uses for that reason alone cannot accommodate any commercial use. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Where no issue is raised during local proceedings concerning whether a need to save significant trees on a site would reduce the number of houses that can be constructed on a site, the city was not required to adopt findings addressing that question. Absent some reason to suspect the trees presented a development constraint, the city's decision to rely on assumptions concerning development potential of the site that do not take the trees into account is supported by substantial evidence. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

1. 6.2 Administrative Law – Substantial Evidence – Definition of. Where the evidence is such that a reasonable person could conclude that a permit applicant failed to carry his burden of proof, the hearings officer's decision denying the permit is supported by substantial evidence. A hearings officer is not obligated to defer to an unopposed affidavit submitted by a permit applicant as establishing the facts alleged in the affidavit. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

1.6.2 Administrative Law – Substantial Evidence – Definition of. A permit applicant with the burden of demonstrating compliance with an off-site odor standard may not rely on the lack of odor-based complaints in an earlier code enforcement proceeding to establish compliance with the odor standard, where the record includes testimony about possible off-site odor problems. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Where the city's decision is based on a well-reasoned analysis that reaches the conclusion that a state road crossing a lot is located on an easement rather than on land owned in fee by the state, the city's determination that the lot may include the area occupied by the state road in determining whether the lot meets minimum lot size requirements is supported by substantial evidence. *Marshall v. City of Yachats*, 35 Or LUBA 82 (1998).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Where LUBA concludes the evidence in the record is such that a reasonable person would rely on the evidence, the decision is supported by substantial evidence, notwithstanding that a reasonable person could also draw different conclusions. *Rouse v. Tillamook County*, 34 Or LUBA 530 (1998).

1.6.2 Administrative Law – Substantial Evidence – Definition of. In deciding whether a challenged decision is supported by substantial evidence in the whole record, LUBA is required to consider whether supporting evidence is refuted or undermined by other evidence in the record, but cannot reweigh the evidence. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Where LUBA concludes a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, LUBA will defer to the local government's choice between conflicting evidence. *Bottum v. Union County*, 26 Or LUBA 407 (1994).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Substantial evidence is evidence a reasonable person would rely upon to reach a conclusion, notwithstanding that different reasonable people could draw different conclusions from the evidence. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

1.6.2 Administrative Law – Substantial Evidence – Definition of. The choice between conflicting believable evidence belongs to the local government, and so long as the evidence relied upon by the local government is such that a reasonable person could reach the conclusion that the local government reaches, the decision is supported by substantial evidence in the whole record. *McInnis v. City of Portland*, 25 Or LUBA 376 (1993).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Substantial evidence is evidence a reasonable person would accept as adequate to support a conclusion. Absent some indication that the information provided by a traffic count at a single location is an unreliable indicator of the daily traffic on a road, the traffic count is substantial evidence of the daily traffic on that road. *Reeves v. Washington County*, 24 Or LUBA 483 (1993).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Where a golf course adjoining an orchard will force alterations in accepted farming practices and increase the costs associated with such practices, the relevant question under ORS 215.296(1) is whether such alterations and increased costs will be *significant*. Where there is evidence in the whole record that would allow a local government decision maker to answer that question either way, LUBA is required by ORS 197.835(7)(a)(C) to defer to the local government's judgment. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Where a reasonable person would not conclude, based on the evidence cited in the record, that the proposed use will comply with an applicable approval standard, the local government's determination of compliance with that approval standard is not supported by substantial evidence. *Reynolds v. Clackamas County*, 24 Or LUBA 14 (1992).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Where the relevant facts are not in dispute, the choice between different reasonable conclusions based on the undisputed evidence in the record belongs to the local government. *Dority v. Clackamas County*, 23 Or LUBA 384 (1992).

1.6.2 Administrative Law – Substantial Evidence – Definition of. Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *Brandt v. Marion County*, 23 Or LUBA 316 (1992).

1.6.2 Administrative Law – Substantial Evidence – Definition of. The "evidence * * * which clearly supports the decision" standard of ORS 197.835(9)(b) imposes a higher evidentiary standard than the "substantial evidence" standard of ORS 197.835(7)(a)(C). *Friedman v. Yamhill County*, 23 Or LUBA 306 (1992).

1.6.3 Administrative Law – Substantial Evidence – Official Notice. Aerial photographs and modified printouts of zoning maps generated from an electronic database, submitted in order to support a disputed question of fact, are not official enactments of a city or a source of law that is subject to official notice under ORS 40.090(7). *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

1.6.3 Administrative Law – Substantial Evidence – Official Notice. LUBA will not take official notice of a memorandum from the assistant director of the Oregon Department of Energy (DOE) to a staff person at the Oregon Department of Land Conservation and Development (DLCD) explaining the current opinion of the DOE, because such memorandum is not an "official act" of a state executive department pursuant to ORS 40.090(2). *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 488 (2017).

1.6.3 Administrative Law – Substantial Evidence – Official Notice. A circuit court opinion letter is "decisional law" for purposes of Oregon Evidence Code 202, notwithstanding that the writ of review process that yielded the opinion letter has not yet concluded in a final judgment. *J4J Miscellaneous PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

1.6.3 Administrative Law – Substantial Evidence – Official Notice. A local government commits remandable procedural error by taking official notice of natural resource base maps where the record does not establish that the maps are part of the comprehensive plan or land use regulations and does not establish that the maps were adopted by ordinance. *Oregon Pipeline Company LLC v. Clatsop County*, 69 Or LUBA 403 (2014).

1.6.3 Administrative Law – Substantial Evidence – Official Notice. LUBA will strike documents attached to the petition for review that are offered as "context" for interpreting an administrative rule adopted in 1990, where the documents are not subject to official notice, long post-date the 1990 administrative rule, and could not provide "context" for interpreting the rule. *Fritch v. Clackamas County*, 68 Or LUBA 184 (2013).

1.6.3 Administrative Law – Substantial Evidence – Official Notice. Notwithstanding OAR 661-010-0025(1), which requires that all "documents or other written materials" that are placed before the decision maker must be included in the record, a local government's consideration of a land use regulation in adopting a land use decision does not, by itself, require that the land use regulation be included as part of the record that must be submitted in a LUBA appeal, unless there is some reason to believe the local government intended to make a copy of the land use regulation part of the record of the local government's proceedings. However, LUBA routinely takes official notice of comprehensive plans and land use regulations under ORS 40.090(7) and OEC 202(7). *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 452 (2012).

1.6.3 Administrative Law – Substantial Evidence – Official Notice. A letter ruling from an Oregon circuit court judge constitutes decisional law and is therefore subject to official notice by LUBA. *ODOT v. City of Mosier*, 41 Or LUBA 73 (2001).

1.6.3 Administrative Law – Substantial Evidence – Official Notice. LUBA will take official notice of zoning ordinances and judicially cognizable law, including decisional law. *North Park Annex Bus. Trust v. City of Independence*, 35 Or LUBA 827 (1998).

1.6.3 Administrative Law – Substantial Evidence – Official Notice. LUBA cannot take official notice of a city's notice of adoption of ordinance pursuant to OEC 202(2) because the city's notice was not an "official act[] of the * * * executive department * * * of this state." *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

1.6.3 Administrative Law – Substantial Evidence – Official Notice. With certain, limited exceptions, LUBA will not take official notice of historical facts contained in newspaper clippings that are not included in the record. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. An attorney-land-use-consultant-prepared ESEE analysis including numerous plans, reports, and other documents supporting the redesignation and rezoning of protected habitat from forest land to marginal land under *former* ORS 197.247 (1991) is not sufficient to rebut expert testimony including (1) a letter authored by an ODFW biologist that generally discusses the cumulative impact of development on habitat and (2) general ODFW guidance related to levels of residential density in areas of peripheral big game habitat absent evidence of the attorney land use consultant's expertise. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where a city bureau manages the city's transportation system, including private uses in the city right-of-way, and where bureau staff have special expertise in the safe and efficient use of the right-of-way and various demands on streets, including traffic, parking, and loading, statements from the bureau (1) that studio apartments have lower turnover rates, less need for unloading large furniture, and, thus, less need for a loading space, and (2) that signed, infrequent on-street loading will not have a negative effect on the traffic safety or other transportation functions of the abutting right-of-way are evidence that would permit a reasonable person to find that an on-street loading space is adequate for a proposed studio apartment building's loading needs such that the development continues to meet the intended purpose of, and, therefore, qualifies for an adjustment to, an off-street loading space requirement, even where there is testimony in the record from an opponent of the development regarding anticipated negative congestion and safety impacts of off-street loading. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. When a hearings officer weighs the testimony of several experts and articulates how and why he came to his decision based on the experience and findings of the experts, petitioner needs to provide adequate reason before LUBA will second-guess the hearings officer's decision. Without reason to review the hearings officer's decision LUBA will conclude that the findings are adequate and supported by substantial evidence. *Gould v. Deschutes County*, 78 Or LUBA 118 (2018).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A reasonable person could conclude, based on expert testimony, that the 14-foot paved width of the only access street is sufficient to ensure compliance with a planned unit development (PUD) approval standard requiring that the PUD is not an "impediment to emergency response," where there is evidence that with adjoining paved or graveled parking areas to allow opposing traffic to pull over, the access street could allow emergency vehicle access in the same manner as a "queuing street," notwithstanding that the access street does not possess all the characteristics of a queuing street. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Expert testimony that parking along a narrow access road is only "intermittent" is substantial evidence supporting a finding that the narrow road does not represent an "impediment to emergency response," given the absence of any countervailing evidence that parking along both sides is so continuous that there is no room for opposing traffic to pull over to allow emergency vehicles to pass. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where county code requires a building in which marijuana is grown to be "equipped with an effective odor control system" which must "prevent unreasonable interference of neighbors' use and enjoyment of their property," and the odor control system is deemed permitted only after the applicant submits "a report by a [licensed] mechanical engineer * * * demonstrating that the system will control odor so as not to unreasonably interfere with neighbors' use and enjoyment of their property," a board of county commissioners' conclusion that the application satisfies these requirements is supported by substantial evidence where it relies upon an engineers' report which demonstrates that the applicant's proposed odor control system "will control" odor as designed. The odor control system need not be actually built prior to the project receiving approval. *King v. Deschutes County*, 77 Or LUBA 339 (2018).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. LUBA will deny a petitioner's challenges to a county board of commissioners' conclusion that a project application satisfies the county code requirement that "[s]ustained noise" generated from a building in which marijuana is grown "shall not exceed 30 dB(A)," based upon statements made in the applicant's engineers' report where petitioner argues the engineer reports failed to adequately describe the system as built, did not consider site-specific characteristics or address allegations that the odor control systems will generate noise in excess of 30 dB(A), but petitioner failed to point to any evidence in the record that calls into question the engineer's statements that the operation will not produce "sustained" noise that exceeds permissible levels. *King v. Deschutes County*, 77 Or LUBA 339 (2018).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A hearings officer's decision relying upon intervenor's traffic study is supported by substantial evidence where the hearings officer addressed petitioner's challenges to the credibility of the traffic study by citing to testimony of the intervenor's traffic engineer responding to each of petitioner's challenges. *Willis v. Clackamas County*, 76 Or LUBA 244 (2017).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. LUBA will affirm a finding that a proposed gas processing facility will not cause emissions of steam that could obscure visibility within an airport approach surface, where the finding is supported by substantial expert testimony that the facility will not generate visible steam and in any case is proposed to be located outside the airport approach surface. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Remand is necessary where a county finds that exclusion zones around liquefied natural gas tankers in a narrow estuary will not interfere with public trusts right to use the estuary based on the county's understanding that the Coast Guard will allow "known" boats to traverse the exclusion zone without delay, but the expert evidence in the record does not support that finding. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A local government's decision that traffic impacts from a proposed PUD can be mitigated is supported by substantial evidence in the record where a Traffic Impact Analysis prepared by a transportation engineer

assumes a growth rate of two percent and there is no evidence in the record to call that assumed growth rate into question. *Talbott v. City of Happy Valley*, 74 Or LUBA 143 (2016).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A local government's decision that materials submitted with an application for final plan approval of a planned unit development that provide detailed information about the location and size of building envelopes, dwelling heights, and the location of trees, utilities, the driveway, and the retaining wall are "sufficiently detailed to indicate fully the ultimate operation and appearance of the development" is supported by substantial evidence in the record, and evidence that a reasonable person would rely on in making the decision. *Harrison v. City of Cannon Beach*, 74 Or LUBA 202 (2016).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where OAR 660-023-0180 sets a default maximum mining impact area of 1500 feet, and the county employed an impact area of one-half mile and relied on testimony from the operator of a nearby cattle operation and a second person with experience with mining impacts on cattle in other locations to conclude that the one-half-mile impact area did not need to be extended based on potential mining noise impacts on cattle, the county's decision that the one-half-mile impact area need not be extended is supported by substantial evidence. *Central Oregon Landwatch v. Deschutes County*, 72 Or LUBA 45 (2015).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. While the evaluation of impacts on estuarine resources required by Goal 16, Implementation Requirement 1 need not be prepared by an expert, the nature of some types of potential adverse impacts caused by development on estuarine resources may be such that some technical expertise is necessary to provide substantial evidence to support conclusions based on the evaluation. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where the record includes expert testimony that residential development may adversely impact endangered salmon species in an adjacent estuary through pollution from stormwater runoff, some level of scientific or professional expertise is necessary to rebut that testimony in order to provide supporting evidence for a contrary conclusion. A letter from the applicant's attorney opining that stormwater runoff will not adversely impact salmon is not substantial evidence to support that conclusion. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Land use proceedings are not governed by rules of evidence, and a local government may rely in part on a planner's testimony regarding a phone conversation with the fire district chief, among other evidence, to conclude that the water supply is sufficient for fire suppression, notwithstanding that the fire district chief did not submit direct testimony. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A city's finding that a historic resource is not capable of generating a reasonable economic return is supported by substantial evidence, where the applicant submitted detailed studies showing that the cost of rehabilitating the structure to meet current building codes would far exceed the reasonable rental value, notwithstanding conflicting testimony by opponents that rehabilitation costs could be lower,

and rental returns higher, than the applicant's experts estimated. *Rushing v. City of Salem*, 70 Or LUBA 448 (2014).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where a hearings official is faced with testimony from one expert that a proposal's sewage effluent would be residential strength and from another expert that the proposal's effluent would be greater than residential strength, and both experts' testimony is believable, the choice of which expert to believe lies with the hearings official. *Teen Challenge v. Lane County*, 67 Or LUBA 300 (2013).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A governing body errs in relying upon the personal knowledge of its members who are farmers to resolve a disputed issue regarding whether proposed disturbances to topsoil would render the subject property unfit for future agricultural use. The effect of topsoil disturbance on agricultural productivity is an arcane subject, and even if the farmer/commissioners have expert personal knowledge of that subject, it is inappropriate to approve or deny an application based on the decision-makers' personal knowledge of disputed facts rather than on the evidence submitted during the evidentiary proceeding. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. LUBA will not second guess a land use decision maker's choice between conflicting expert testimony, so long as it appears to LUBA that a reasonable person could decide as the decision maker did based on all of the evidence in the record. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351 (2013).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Despite some equivocal statements in a soil scientist's report regarding whether soil represents a variant of an existing soil type or a new unknown soil type, the county's conclusion that the soil represents a variant is supported by substantial evidence, where the only evidence on this point is the soil scientist's, and it is reasonably clear that he ultimately concluded that the soil is a variant. *Rogue Advocates v. Josephine County*, 66 Or LUBA 45 (2012).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where none of the applicable approval criteria require that evidence must be provided by an engineer licensed in Oregon or require the city's decision to be based solely on the testimony of a licensed engineer, the fact that the engineer is not licensed in Oregon, by itself, is not a basis to reverse or remand the decision. *Hill v. City of Portland*, 66 Or LUBA 250 (2012).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A petitioner's unsupported opinion that locating a proposed cell tower in a residential zone with a 75-foot height limit is a reasonable alternative to locating the proposed 150-foot tall tower in a farm zone, because there is no significant difference in coverage between 75-foot and 150-foot tall towers, does not undermine the expert evidence the county relied upon to conclude that a 75-foot tall tower would not meet the cell provider's coverage objectives. *Oberdorfer v. Harney County*, 64 Or LUBA 47 (2011).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A petitioner's argument that a cell-phone provider could meet its coverage objectives by co-locating its antennas on

existing cell-phone towers does not provide a basis for remand, where the record includes expert testimony that co-location would not meet the provider's coverage objectives and petitioner cites no evidence in the record to the contrary. *Oberdorfer v. Harney County*, 64 Or LUBA 47 (2011).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where a hearings officer specifically recognizes that there is conflicting expert testimony and the expert testimony he finds more persuasive is believable, his decision is supported by substantial evidence. *Tonquin Holdings LLC v. Clackamas County*, 64 Or LUBA 68 (2011).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. In order to add a site to a local government's inventory of significant aggregate sites, an applicant must demonstrate that threshold amounts of aggregate are present on the site based on a "representative set of samples of aggregate material in the deposit on the site" under OAR 660-023-0180(3)(a). Where nothing in the Goal 5 rule specifies any particular standards that govern the methodology used to collect "a representative set of samples," a county does not err in accepting and relying on samples collected using methods that a reasonable professional geologist would employ to determine the quantity of aggregate present on the site. *Protect Grand Island Farms v. Yamhill County*, 64 Or LUBA 179 (2011).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where the local government recognizes that there is conflicting expert testimony and the expert testimony the local government finds more persuasive is believable, the decision is supported by substantial evidence. *Protect Grand Island Farms v. Yamhill County*, 64 Or LUBA 179 (2011).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where a local code provision requires that an applicant for a partition demonstrate that the parcels created be "suitable for residential use considering * * * fire hazards," the local government errs in failing to consider expert evidence regarding the proposed parcels' unsuitability for residential use considering fire hazards because the local government mistakenly concludes that such considerations will be considered at dwelling approval stage. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 288 (2011).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A forestry consultant's conclusion that land is not forest land subject to Goal 4 is not supported by the record, where it is based on an erroneous assumption that the county's comprehensive plan provides a productivity threshold of 80 cubic feet per acre of per year for lands suitable for commercial forestry. *Wetherell v. Douglas County*, 62 Or LUBA 80 (2010).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Although a hearing official is entitled to rely on the expert opinion of a county sanitarian that a required septic drain-field expansion is feasible, where opponents offer a detailed explanation for why the subject property may not be able to accommodate the required expansion and replacement drain-field, the county sanitarian must supply more than an unexplained expression of belief that the needed expansion is feasible. *Phillips v. Lane County*, 62 Or LUBA 92 (2010).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A condition of zone change approval limiting use of the property to a proposed travel plaza is insufficient to ensure consistency with the Transportation Planning Rule at OAR 660-012-0060, where the record indicates that even limited to the travel plaza the zone change will significantly affect nearby transportation facilities, and the county failed to require other mitigation or improvements necessary to ensure that allowed uses are consistent with the capacity and performance measures of affected intersections. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where the opponents' traffic engineer testifies based on data in the record that a left turn lane is required to ensure that the proposed use complies with a local transportation standard, and the applicant's traffic engineer disagrees, but without citing any evidence or explaining the basis for the contrary opinion, the applicant's engineer's unsupported opinion is not substantial evidence demonstrating compliance with the standard. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Remand is necessary where the applicant's traffic engineer declines to consider the impact of large spectator events at an already approved speedway near the proposed travel plaza, because the speedway events would "overwhelm" the local transportation system, without explaining why those impacts can be ignored in evaluating whether the local transportation system has the "carrying capacity" to handle traffic from the proposed travel plaza. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Absent countervailing evidence, a letter from an applicant's engineer relating the site visit and verbal agreement of representatives from the Department of State Lands (DSL) and Department of Geology and Mineral Industries (DOGAMI) that DOGAMI and not DSL has jurisdiction over a proposed riparian mining operation is substantial evidence a decision maker could rely upon to conclude that DOGAMI has jurisdiction over the operation. *Oregon Shores Cons. Coalition v. Curry County*, 61 Or LUBA 8 (2010).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. When nearby ranchers submit evidence that conflicts with the applicant's expert testimony regarding whether the property could be used in conjunction with other land for farm use, even though that evidence could constitute substantial evidence, the county was entitled to rely on the conflicting evidence submitted by the applicant's expert. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A local partition criterion that a new parcel be suited for the intended use does not necessarily require submission of engineering studies or design plans for water, septic, or storm water facilities. In the absence of parcel size, topographic or other constraints on facility adequacy, a reasonable person could rely on expert testimony that the parcel can accommodate required facilities for the intended use, even if that testimony is unsupported by engineering studies or facility design plans. *Devin Oil Co., Inc. v. Morrow County*, 60 Or LUBA 336 (2010).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Testimony from a land surveyor and project manager at an engineering consulting firm that the firm's engineers have

conducted preliminary investigations and consulted with appropriate state agencies and concluded based on those investigations and consultations that a proposed parcel is suited for the intended use, considering water supply, septic and storm water disposal, is expert testimony that a decision maker could reasonably rely upon to find that the parcel is suited for the intended use. *Devin Oil Co., Inc. v. Morrow County*, 60 Or LUBA 336 (2010).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where the record includes conflicting believable evidence about whether an applicant's assumption that 90 percent of the groundwater withdrawn for use by a destination resort will be returned to the subsurface hydrologic system and the county hearings officer findings recognize the conflicting evidence but choose to rely on the applicant's expert's position, which had been accepted by the Oregon Water Resources Department, the hearings officer's findings on that question are supported by substantial evidence. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A county reasonably concludes that the record does not include "factual information indicating significant potential conflicts" with respect to whether a proposed quarry will disrupt sage grouse flights to and from a protected breeding site, where the only evidence suggesting that grouse flights come near the quarry site is a map the significance of which is subject to conflicting expert testimony. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A county does not err in relying on a 2007 soil study to conclude that a parcel is not agricultural land under Goal 3, notwithstanding the absence in the record of a 2001 soil study that the applicant's consultant cites, where the 2007 study is intended to stand on its own and petitioners do not identify any critical information missing from the 2007 study that might be found in the 2001 study. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A finding that a proposed truck stop will not create a traffic hazard is not supported by substantial evidence, where the traffic impact analysis finds that the nearest intersection presents only a "marginal safety concern" but fails to take into account the 1,000 daily truck and vehicle trips the proposed truck stop will send through the intersection, and there is no evidence that the additional traffic will not significantly decrease the intersection's safety or significantly increase the crash rate. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Reports and approvals from the Federal Aviation Administration and Oregon Department of Aviation that a proposed personal use airport complies with federal and state safety requirements is substantial evidence that a county could rely upon, among other evidence, to conclude that the airport is consistent with a comprehensive plan policy requiring that airports be located in areas that are safe for air operations. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Substantial evidence supports a county's finding that a 160-acre parcel is not suitable for an independent grazing operation, where the property has never supported an independent grazing operation, and an

agricultural consultant's study details significant capital inputs needed to establish a new, independent grazing operation that could not be recovered from income reasonably expected from such a grazing operation. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A county could reasonably choose to rely on a consultant's economic analysis to conclude that a 160-acre parcel is not "other suitable land" under OAR 660-033-0020(1)(a)(B) because it cannot be profitably combined with nearby grazing operations, notwithstanding that nearby ranchers testified that they had successfully used the property in conjunction with their grazing operation in the past and believe they can do so again, where the economic analysis sets out a detailed, if hypothetical, budget demonstrating that such combined use could not be conducted with the primary purpose of obtaining a profit in money, and the nearby ranchers do not provide any similar budget or explanation for why they believe a combined operation would be financially beneficial to them. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A county errs in relying on testimony of a general well constructor to conclude that digging 32 new wells would not adversely affect the underlying aquifer, where (1) the constructor's testimony is based on the current functioning of three wells in the area and does not address the impacts of 32 new wells, (20 the constructor provided no water budget for the aquifer or similar data, and (3) the opponents submitted a detailed study and water budget from an acknowledged aquifer expert who testified that 32 new wells would adversely impact the aquifer. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A hearings officer may rely on undisputed expert testimony that compliance with federal radio frequency exposure limits depends on whether non-employees at the site are aware of occupational exposure levels and have the ability to remove themselves from the site, combined with the fact that the site is fenced and signed to warn of occupational exposure levels, to conclude that a proposed broadcast tower complies with federal exposure limits. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. While an astronomer's testimony regarding the impact of dust on an observatory's telescopes is substantial evidence from which a reasonable decision maker could conclude that dust from an open-pit mining operation would significantly conflict with the observatory, the county could nonetheless rely on the distance between the site and the observatory and proposed measures to control dust to conclude that the mine would not significantly conflict with the observatory. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Expert testimony that an existing firearms training facility in a forest zone is a fire hazard and increases costs and risks of fire suppression is not sufficient to undermine a finding to the contrary, where the testimony is based on the operation of the facility as a whole, and not on the post-1995 improvements that are the subject of the application. *Citizens for Responsibility v. Lane County*, 54 Or LUBA 1 (2007).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. LUBA will affirm the hearings officer's choice to rely on a traffic model that has not been "calibrated" against real-world data, where the applicable guidelines stress the importance of calibration but do not state that calibration is the only way to ensure that the model is accurate, and the applicant's expert testifies that the model is reliable notwithstanding the absence of calibration. *Wal-Mart Stores, Inc. v. City of Gresham,* 54 Or LUBA 16 (2007).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A finding that it is feasible to construct a driveway that complies with maximum finished grade standards is not supported by substantial evidence, where the proposed driveway alignment clearly does not comply, the applicant's engineer stated generally that an alternate alignment is likely to meet grade standards but submitted no plans or drawings demonstrating the location or feasibility of that alignment, and the opponents' engineer submitted detailed testimony supported by drawings showing that the suggested alternate alignment will not comply. *Lenox v. Jackson County,* 54 Or LUBA 272 (2007).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A county reasonably relies on a forester's opinion that Ponderosa pine is a more valuable species to grow on certain soils than Douglas fir, over conflicting opinions by persons who are not soil or forestry experts. *Anderson v. Lane County*, 54 Or LUBA 669 (2007).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A hearings officer errs in concluding, based on expert testimony that isolated dwellings force firefighters to choose either to abandon such homes or to devote insufficient resources to defend them, that the proposed isolated dwelling will not significantly increase fire suppression costs or risks to fire suppression personnel because firefighters would simply abandon the dwelling. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Remand is necessary where the applicant's forest consultant recommends vegetation removal as necessary to ensure compliance with approval criteria for a large tract forest dwelling, but the hearings officer does not adopt a condition of approval to that effect or explain why such measures are not necessary to ensure compliance with approval criteria. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Under a code standard requiring that a forest dwelling be located at a site that minimizes the risks associated with wildfire, remand is necessary where the opponents' expert testified that the preferred site is isolated and will incur significantly more risk and cost to firefighters over alternative sites, there is no rebuttal of that testimony, and the findings do not state a sufficient basis to reject that testimony. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Expert testimony is not required in order to satisfy the requirement that a demonstration of forest productivity of a property be shown by empirical evidence; a study, prepared by an applicant seeking to redesignate the subject property as nonresource, which is subsequently reviewed by a Department of Forestry

forester, is evidence upon which a reasonable person would rely. *Hecker v. Lane County*, 52 Or LUBA 91 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Absent countervailing evidence, expert testimony expressing doubt that Ponderosa pine can be established on a parcel even under intensive management techniques is substantial evidence supporting the local government's conclusion that the property cannot produce Ponderosa pine. *Just v. Linn County*, 52 Or LUBA 145 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. In determining whether a property is generally unsuitable for the production of farm crops and livestock or merchantable tree species, a county's conclusion that any historic agricultural use on the property before that time does not provide a substantial hurdle is supported by substantial evidence where the county chooses to rely on an expert's opinion that proposed nonfarm parcels have not been used for agricultural operation in the past 20 years. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Under *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 752 P2d 312 (1988), the substantial evidence standard is not satisfied when "the credible evidence apparently weighs overwhelmingly in favor of one finding and the [decision maker] finds the other without giving a persuasive explanation." *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. It is not unreasonable for a local decision maker to cite issues raised regarding the evidence submitted by an applicant's engineers that were not responded to, and to rely on opponents' experts' testimony to find that the applicant failed to carry its burden of proof. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A local government could reasonably accept as true an expert's testimony about the findings in a biological assessment, even though the biological assessment itself is not in the record. *Neighbors 4 Responsible Growth v. City of Veneta*, 52 Or LUBA 325 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. The testimony of experts in assessing the risk of turbid water discharges from proposed aggregate mining in a river's floodplain and the risk of avulsion is likely to be critical. Experts must collect and analyze the data and draw scientific conclusions to assess that risk and ultimately the issue will likely be which experts the decision maker finds more believable. *Westside Rock v. Clackamas County*, 51 Or LUBA 264 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where there is conflicting expert testimony regarding the location of a river channel migration zone and the probability that the river channel might migrate to capture a proposed floodplain mining site causing river turbidity, the county's decision to believe the larger channel migration zone should apply is supported by substantial evidence. *Westside Rock v. Clackamas County*, 51 Or LUBA 264 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A fire district letter opining that conducting large concert events of up to 5,500 people on a forest-zoned parcel would not significantly increase the risk of wildfires is not substantial evidence to support a finding to that effect, where the letter is expressly contingent on the applicant maintaining a prohibition on burning of any kind, and the evidence regarding the effectiveness of banning burning of any kind during large concert events is extremely limited and conclusory. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. LUBA will affirm a hearings officer's conclusion that a standard requiring that development not "seriously interfere" with sensitive riparian habitat is not met, notwithstanding that the only evidence on that point is the testimony of the applicant's consultant, where that testimony is based on an assertion that the proposed campground and parking areas "stay well clear" of sensitive riparian habitat, but the site plan clearly shows that the proposed campground and parking area are located adjacent to the riparian habitat. *Horning v. Washington County,* 51 Or LUBA 303 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. An acoustic engineer's statement that the procedures followed in conducting a noise study for an aggregate mine were "generally consistent" with procedures required by state administrative rule is sufficient to demonstrate compliance with the rule, particularly where the petitioners do not identify any material difference between the procedures followed and those required the rule. *Ray v. Josephine County*, 51 Or LUBA 443 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Largely unchallenged testimony of a county engineer who is a professional engineer, but not a traffic engineer, may constitute substantial evidence concerning the safety of a proposed intersection. *Ghena v. Josephine County,* 51 Or LUBA 681 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where a development code requires that a city find that transportation facilities will be available prior to or at the time of development of annexed property, testimony by an applicant's traffic engineer and the city engineer that traffic facilities needed to serve annexed property will be available prior to or at the time of development is substantial evidence supporting a city's finding that the development code requirement is satisfied. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A county's decision to amend its deer winter range map redesignating property from "critical" deer habitat to "impacted deer winter range" is supported by substantial evidence where the county makes a reasonable choice to rely on the applicant's expert, who conducted only one site visit and reviewed data that had previously been prepared by the Oregon Department of Fish and Wildlife, and concluded that the proposal would not significantly impact deer winter range. *Anthony v. Josephine County*, 50 Or LUBA 573 (2005).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A herbaceous forage survey is not substantial evidence upon which a county may rely in determining that a property is

"generally unsuitable" for the production of farm crops and livestock or merchantable tree species pursuant to ORS 215.263(5), where it impossible to ascertain what area the surveys studied and where the survey does not consider potential herbaceous forage capacity if the properties were irrigated. *Peterson v. Crook County*, 49 Or LUBA 223 (2005).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. An expert study concluding that a clay layer prevents rainwater from permeating down to the aquifer and that proposed storm water facilities will ensure that post-development hydrology differs little from pre-development hydrology is substantial evidence a reasonable person could rely upon to conclude that proposed development will not adversely affect the aquifer or wells that rely on it. *Dinges v. City of Oregon City*, 49 Or LUBA 376 (2005).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A local government may rely on portions of two conflicting expert studies of soil classifications, although explanatory findings may be necessary to identify what portions are relied upon, and to resolve any differences or contradictions between the studies relied upon, so that LUBA may perform its review function. *Doob v. Josephine County*, 48 Or LUBA 227 (2004).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Expert evidence that an enhanced wetland is very unlikely to attract species that would conflict with operation of an adjoining aggregate mine is substantial evidence to support a finding that the enhanced wetlands will not "adversely impact" the mine, notwithstanding conflicting evidence on that point and the fact that the applicant's expert could not guarantee no adverse impacts. *Cadwell v. Union County*, 48 Or LUBA 500 (2005).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A code standard requiring that a proposed use will not interfere with or cause an adverse impact on a mining operation does not require evidence that adverse impacts are impossible; rather, it requires the decision maker to evaluate probabilities. Expert evidence that it is "highly unlikely" that wetland enhancements will attract species that might lead to restrictions on a mining operation is evidence a reasonable person could rely on to find compliance with the adverse impacts standard, notwithstanding conflicting expert evidence on that point. *Cadwell v. Union County*, 48 Or LUBA 500 (2005).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Expert testimony that is not in the record and that appears only as reported by the applicant to staff is not sufficient to establish the capacity of the subject property for farm and forest uses. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Substantial evidence supports a hearings officer's conclusion that only five percent of traffic generated by a proposed church would turn south at an affected intersection, and that traffic counts performed in February are indicative of summer peak traffic loads, where it is undisputed that few if any church members reside south of the intersection, and the applicant's traffic engineer testified that the affected intersection is not subject to seasonal fluctuations in traffic levels. *Noble v. Clackamas County*, 45 Or LUBA 366 (2003).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A traffic study concluding that there is adequate vehicular access to a shopping mall is substantial evidence supporting a finding of "adequate access and traffic control," notwithstanding that the study did not consider or quantify internal store-to-store vehicular traffic, where there is no evidence that such internal traffic is significant. *Graham Oil Co. v. City of North Bend*, 44 Or LUBA 18 (2003).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where petitioners present evidence and testimony that a property is not predominately composed of Class IV through Class VIII soils because an access easement that covers over 25 percent of the property is not wholly comprised of Class VI soils, and the testimony of the applicant's soil scientist does not explain why the entire easement is comprised of Class VI soils, the county's determination that the property is predominately composed of Class IV through VIII soils is not supported by substantial evidence. *Friends of Yamhill County v. Yamhill County*, 44 Or LUBA 777 (2003).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A city is entitled to rely on expert testimony that a specific model of the flood depth and velocity over the subject property is necessary to demonstrate compliance with a standard requiring no significant hazard to life or property, and the city may decline to extrapolate that information from other expert testimony that models an adjacent area. *Starks Landing, Inc. v. City of Rivergrove*, 43 Or LUBA 237 (2002).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. ORS 672.025(3), pertaining to the duties of engineers, permits an engineer to survey property to "determine area and topography" and to "establish lines, grades and elevations," so long as the engineer's survey is not used to convey property. *Mertz v. Clackamas County*, 43 Or LUBA 313 (2002).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where a regional transportation plan (RTP) specifies that a proposed interchange will include "five lane overpasses," and the record includes a planning program manager's interpretation that a short sixth exit lane does not make the interchange inconsistent with the RTP, it is not error for the decision maker to rely on that interpretation and reasoning in determining that the interchange is consistent with the five-lane overpass described in the RTP. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. In determining whether conflicting uses can be minimized pursuant to OAR 660-023-0180(4), a local government may draw reasonable inferences from expert testimony to determine that a numerical standard for minimization, such as for turbidity, cannot be satisfied. *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251 (2002).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where a finding concerning traffic safety is not supported by substantial evidence in the record, but it is clear that traffic safety was at most a peripheral concern and other findings addressing a general "adversely affects neighborhoods" standard make it clear that the county's focus was on roadway and intersection capacity rather than traffic safety per se, the lack of evidence supporting the disputed

traffic safety finding provides no basis for reversal or remand. *Swyter v. Clackamas County*, 42 Or LUBA 30 (2002).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Petitioner fails to overcome the county's determination that property is forest land under Goal 4, and fails to demonstrate as a matter of law that land is not "suitable for commercial forest uses," where petitioner's own expert testifies that notwithstanding limitations on productivity the subject property is in a "medium productivity range" and would yield $81,300 worth of commercial timber at 50 years, after an investment of $7,450. *Potts v. Clackamas County*, 42 Or LUBA 1 (2002).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where expert testimony that grazing use of property would require .45 inches of irrigation water per day during peak irrigation times is not challenged below, the county could reasonably rely on that testimony. *Doob v. Josephine County*, 41 Or LUBA 303 (2002).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Substantial evidence supports a finding that a proposed high school will not increase traffic through an affected intersection during the peak morning hour, notwithstanding failure of the traffic study to take certain trips into account, where the decision imposes conditions that effectively eliminate the possibility of those trips impacting the intersection. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. An architect's unsupported statement that a proposed structure is 14,719 square feet in size and thus complies with a local standard limiting permissible size to 14,723 square feet is not substantial evidence supporting a finding of compliance with the standard, where the opponents offered detailed evidence showing that the structure exceeds the maximum size and the applicant failed to either explain the architect's supporting calculations or refute the opposing evidence. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Expert testimony that existing riprap will prevent dune retreat if repaired when damaged is substantial evidence supporting the county's finding under Goal 18 that the dune upon which development is proposed is stabilized and not subject to wave overtopping or ocean undercutting, notwithstanding conflicting expert evidence that the riprap may be insufficient or may fail. *Save Oregon's Cape Kiwanda v. Tillamook County*, 40 Or LUBA 143 (2001).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Although continued location of wells on a single aquifer may eventually have an adverse impact on other properties that use the aquifer, a decision based on expert testimony that the application at issue will not have an adverse impact on other properties is supported by substantial evidence. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where a county adopts unchallenged findings that siting a cellular phone tower next to a power line right-of-way does not create a hazardous condition, because the tower is designed to collapse in on itself in high winds

rather than fall to the side, and those findings are supported by testimony from an engineer with the company that will construct the tower, the county's findings are adequate and supported by substantial evidence. *Pereira v. Columbia County*, 39 Or LUBA 575 (2001).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A local government may not explicitly rely on a traffic study to demonstrate compliance with Goal 12 and then ignore a portion of the traffic study that describes anticipated deterioration in level of service. *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A local government could reasonably rely upon evidence given by a photogrammetrist with 21 years of experience who had provided services for local governments in the past and provided a detailed analysis of his findings in a written report, where no challenge to the photogrammetrist's credentials was made to the local decision maker. *Crook v. Curry County*, 38 Or LUBA 677 (2000).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. LUBA will affirm a hearings officer's choice between conflicting expert testimony where a reasonable person could conclude, based on the testimony of applicant's expert, that a proposed intersection provides a sight distance exceeding that required by the code, notwithstanding the contrary testimony of opponents' engineer. *Mitchell v. Washington County*, 37 Or LUBA 452 (2000).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where a hearings officer rejects a proposed stormwater control method as inadequate to ensure compliance with an approval criterion that requires reduction of flood flows below erosive capacity, but nonetheless finds compliance with the standard based on the hearings officer's unsupported opinion that more adequate methods are available, the finding of compliance is not supported by substantial evidence. *Mitchell v. Washington County*, 37 Or LUBA 452 (2000).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A city's denial of a permit to construct a house proposed to be cantilevered out over the face of a sand bluff is supported by substantial evidence, where there is conflicting expert testimony regarding adverse impacts from structural supports sunk into the face of the bluff, and the city reasonably chose to believe an expert opinion that under no circumstances should the face of the bluff be compromised. *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Neighbors' testimony regarding adverse impacts of vibration from construction on the integrity of a sand bluff underlying adjacent properties is substantial evidence supporting the city's denial of a house proposed to be built on the bluff, notwithstanding a contrary conclusion inferred from geotechnical reports supporting the application. *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Whether composting qualifies as a farm use under ORS 215.203(2)(a) is a question of statutory interpretation, not a question of whether agricultural experts believe composting, in the abstract, falls within a scientific definition of farm use. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. The evidence supporting a decision denying a permit need not match the evidence supporting the permit application in a qualitative and quantitative sense. *Johns v. City of Lincoln City*, 35 Or LUBA 421 (1999).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where there is no evidence that a property only functions as winter range between December 1 and March 31, the selection of that time period for a condition of approval is not supported by substantial evidence. It is not within generally accepted knowledge that property only functions as winter range between December 1 and March 31. *Botham v. Union County*, 34 Or LUBA 648 (1998).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Selected portions of an engineer's letter, cited to support a finding that water supply is adequate, do not constitute substantial evidence where that finding is undermined by the engineer's letter taken as a whole and by other conflicting evidence. *Pekarek v. Wallowa County*, 33 Or LUBA 225 (1997).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Population projections of a witness who is not shown to be qualified by education or experience to evaluate evidence and draw conclusions concerning a highly technical and complex subject raise substantial evidence concerns, particularly when they are contradicted by the official population estimates prepared by the Center for Population Research and Census (CPRC) and letters from CPRC experts. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where the resume of a soil scientist does not establish his credentials to determine forest productivity and the only scientific data in the record are the results of soil tests, the soil scientist's conclusions with respect to forest productivity are not substantial evidence. *DLCD v. Curry County*, 31 Or LUBA 503 (1996).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Findings are inadequate when they rely on a consultant's summary conclusions which are not based on evidence in the record. *Friends of Metolius v. Jefferson County*, 31 Or LUBA 160 (1996).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. An unsupported statement in an application is not evidence, and an estimate of a geologist as to resource quantity, made without reference to evidence of any kind, is not substantial evidence. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A lack of response from the county Road Master is not substantial evidence that a code provision requiring no undue impairment of traffic flow is met. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. With regard to reliance on the testimony of an expert, the substantial evidence standard of ORS 197.835(7)(a)(C) requires only that, considering all the relevant evidence in the record, a reasonable person could have chosen to rely on the expert's conclusions. *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. There is no requirement that an expert witness explain the basis for all assumptions underlying the expert's evidence, or that evidence supporting the expert's assumptions be included in the record. Under ORS 197.835(7)(a)(C), where petitioners argue an assumption underlying an expert's conclusions is undermined by other evidence, LUBA must determine whether, considering all relevant evidence in the record, a reasonable person could rely on the expert's conclusions. *ODOT v. Clackamas County*, 27 Or LUBA 141 (1994).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A state agency report, based on a recent inspection of the subject property, concluding that a limited exemption "remains valid for the majority of [the] site" is substantial evidence that a limited exemption from the agency's regulatory requirements has been granted. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. It is reasonable for a local government decision maker to rely upon statements made by representatives of the Oregon Department of Transportation (ODOT) stating that ODOT's requirements are met, even though the evidence underlying the ODOT representatives' statements is not included in the local record. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A reasonable decision maker could rely upon testimony by a consultant that RV parks in a selected area are unable to accommodate RV travelers' needs, to support a decision granting a reasons exception to Goal 3 based on a demonstrated need for more RV parks in the area. *1000 Friends of Oregon v. Marion County*, 26 Or LUBA 448 (1994).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A local government's decision that a proposed plan map amendment would negatively impact groundwater quantity and violate an applicable plan criterion is supported by substantial evidence where there is conflicting lay and expert testimony, and the expert testimony concedes the uncertainty of the proposal's impacts. *Ericsson v. Washington County*, 26 Or LUBA 169 (1993).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Testimony from an Oregon Department of Forestry (DOF) representative which suggests a proposed dwelling could be compatible with forest uses, but was clarified by the DOF representative to eliminate any suggestion of compatibility, is not evidence a reasonable decision maker would rely upon to establish a proposed nonforest dwelling is compatible with forest uses. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. An expression of belief that a local code standard imposing a specific decibel limitation will not be violated is not an adequate finding of compliance with that standard. Expressions by the applicant's attorney that noise generated by the proposed use will not be excessive or violate the standard are not substantial evidence that the standard will be met. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. A county does not improperly rely on unadopted, unofficial criteria where its findings make it sufficiently clear that the county is simply relying on material submitted by the Oregon Department of Forestry as expert testimony in determining whether a code "necessary for and accessory to" standard for approval of forest management dwellings is met. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

1.6.4 Administrative Law – Substantial Evidence – Expert Testimony. Where a local decision maker relies on prior nonspecific and equivocal testimony concerning the location and presence of wetlands, in place of a well documented specific expert study, and adopts no findings explaining that choice, the challenged decision is not supported by substantial evidence. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where a decision-maker relies on 40-foot contour maps in the record, sourced from county data, to determine the slopes on the subject property, an argument that the decision-maker erred by disregarding finer-scale, two-foot contour maps that petitioners submitted provides no basis for reversal or remand where the decision-maker reasoned that petitioners' contour maps were "not reliable, accurate or trustworthy evidence" because they were not signed by a registered professional surveyor and because they contained an incorrect scale, and where the petitioners have not otherwise established that credible evidence weighs overwhelmingly in favor of their description of the slopes on the subject property or that the evidence upon which the decision-maker did rely was not substantial evidence. *Velasquez v. Jackson County*, 80 Or LUBA 1 (2019).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where a neighbor describes observing, from their living room view, minimal orchard, meadow, and garden-related activity on the property and, other than horses belonging to some of the owners of the property, never seeing any livestock or other animals on the property between 1970 and 2004, and where the neighbor subsequently reiterates that there was no farm use, such as cattle or crops, between 1978 and 1983 and that, during the 1980s, owners of the property kept their show horses on the property, a local government may reasonably conclude that the property was "not managed for three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced $20,000 or more in annual gross income" for purposes of *former* ORS 197.247(1)(a) (1991), even where the record includes (1) aerial photos from 1979 and 1982, (2) a 1979 permit for a new barn, (3) a 1987 farm dwelling approval, and (4) testimony from other area residents contradicting the neighbor's testimony, where the record does not disclose the proximity of the other area residents' properties to the subject property or whether those area residents had made firsthand observations of the subject property during the relevant statutory period. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

1**.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence.** An attorney-land-use-consultant-prepared ESEE analysis including numerous plans, reports, and other documents supporting the redesignation and rezoning of protected habitat from forest land to marginal land under *former* ORS 197.247 (1991) is not sufficient to rebut expert testimony including (1) a letter authored by an ODFW biologist that generally discusses the cumulative impact of development on habitat and (2) general ODFW guidance related to levels of residential density in areas of peripheral big game habitat absent evidence of the attorney land use consultant's expertise. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. In the context of an application to change the comprehensive plan designation of property to Rural Residential Exception Area, where a comprehensive plan provision provides that "any new Rural Residential Exception Areas need to be justified through initiating a non-resource plan amendment and zone change by demonstrating that the property does not meet the definition of agricultural * * * land," a county correctly determines that an applicant satisfies that provision by producing copies of the county's adopted and acknowledged agricultural lands inventories, which do not include the property. Even where an opponent submits an NRCS soils map into the record, which the opponent argues shows the property's soils constitute agricultural lands, where the NRCS website that the opponent used to prepare the soils map includes a disclaimer regarding the large scale of mapping,

stating that "[e]nlargement of maps beyond the scale of mapping can cause misunderstanding of the detail of mapping and accuracy of soil line placement," a reasonable decision-maker would rely on the inventories to conclude that the property is not agricultural land, and a reasonable decision-maker could determine that the NRCS soils map is less credible than the inventories. *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 252 (2019).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where a city bureau manages the city's transportation system, including private uses in the city right-of-way, and where bureau staff have special expertise in the safe and efficient use of the right-of-way and various demands on streets, including traffic, parking, and loading, statements from the bureau (1) that studio apartments have lower turnover rates, less need for unloading large furniture, and, thus, less need for a loading space, and (2) that signed, infrequent on-street loading will not have a negative effect on the traffic safety or other transportation functions of the abutting right-of-way are evidence that would permit a reasonable person to find that an on-street loading space is adequate for a proposed studio apartment building's loading needs such that the development continues to meet the intended purpose of, and, therefore, qualifies for an adjustment to, an off-street loading space requirement, even where there is testimony in the record from an opponent of the development regarding anticipated negative congestion and safety impacts of off-street loading. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where an approved site plan indicates that a replacement dwelling will be sited on an *adjacent* property, but where the building permit for the replacement dwelling allows a replacement dwelling "in the same footprint as the original home," and where an ArcGIS map marked with distances and existing development indicate that the footprint of the original dwelling was located on the *subject* property, a conclusion that the subject property does not "include[] a dwelling" for purposes of forest template dwelling approval under ORS 215.750(4)(d) is not supported by substantial evidence. *Bielefeld v. Lane County*, 80 Or LUBA 480 (2019).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. LUBA will not second-guess a decision-maker's choice between conflicting evidence, including expert testimony, so long as a reasonable person could decide as the decision-maker did. *Fairmount Neighborhood Assoc. v. City of Eugene*, 80 Or LUBA 551 (2019).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where an applicant proposes to occupy one guest apartment within an 18,000-square-foot dwelling while allowing the remainder of the dwelling and all of its amenities to be used by bed and breakfast guests, a county's conclusion that the bed and breakfast is not a "subordinate use" of the dwelling, and therefore not a home occupation, and that the applicant is not a "resident of the dwelling" is consistent with the plain meaning of the code language and is supported by substantial evidence in the record where there is evidence that the applicant "spends a couple of days a week" at a different home, and that the subject dwelling does not appear to be occupied when viewed from the road or neighboring properties, even though the applicant provides a copy of her driver's license that lists the subject dwelling. *Lee v. Marion County*, 79 Or LUBA 199 (2019).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A reasonable person could conclude, based on expert testimony, that the 14-foot paved width of the only access street is sufficient to ensure compliance with a planned unit development (PUD) approval standard requiring that the PUD is not an "impediment to emergency response," where there is evidence that with adjoining paved or graveled parking areas to allow opposing traffic to pull over, the access street could allow emergency vehicle access in the same manner as a "queuing street," notwithstanding that the access street does not possess all the characteristics of a queuing street. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Whether an individual "appeared" during the proceedings below and thus has standing to appeal or intervene before LUBA is a mixed question of law and fact that often requires extra-record evidence to evaluate, including the circumstances surrounding whatever action is the basis for the asserted appearance. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A hearings officer's conclusion that the subject property was "lawfully created" is supported by substantial evidence in the record that includes (1) a set of receipts for 1980 recording fees for the final partition plat for submittal of a survey, (2) a set of 1980 recorded deeds, and (3) the recorded final partition plat, despite the fact that the final partition plat was not recorded until 1996, where a reasonable person could rely on that evidence to conclude the subject property was created in conformance with all applicable ordinances. *Landwatch Lane County v. Lane County*, 75 Or LUBA 151 (2017).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Adequate findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the conclusion that the approval standards are met; but adequate findings need not necessarily address evidence that conflicts with the evidence the local government chooses to rely upon, or explain why the decision-maker chose not to rely upon evidence that conflicts with the evidence it did choose to rely upon. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where a hearings officer finds that the only evidence on a key legal issue regarding required mitigation for the impacts of a destination resort was presented by permit opponents, but the record makes it clear that the applicant also submitted conflicting evidence on that legal issue, remand is required. *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326 (2016).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. LUBA will affirm a county's finding that a high-voltage line that effectively divides a property into thirds is a condition "unique to the property" justifying a variance to a minimum parcel size, where there is no argument or evidence that nearby properties are similarly divided by the high-voltage line. *Neil v. Columbia County*, 74 Or LUBA 442 (2016).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. An applicant's letter detailing the nature and location of a concrete batch plant's fuel tanks, stockpiles and buildings is not sufficient to establish their location as a matter of law or to establish that a hearings officer

erred by failing to rely on that letter, where the hearings officer pointed out discrepancies between that letter and other letters submitted by the applicant. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where there is conflicting believable evidence regarding whether a proposal to replace a concrete batch plant with an asphalt batch plant would present a greater risk of explosions and damage to surrounding properties, a hearings officer's conclusion that the asphalt batch plant poses a greater risk of explosions and damage is supported by substantial evidence. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A reasonable decision-maker could infer from the lack of any mention of composting on the subject property in any contemporaneous documentation prior to the 1990s that composting did not occur on the property prior to the period, notwithstanding conflicting testimony from the applicant that composting occurred prior to 1962, the date a composting facility became nonconforming on the property. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A landscape architect's conclusory statement that a proposed buffer will "ensure compatibility" between urban and rural agricultural uses is not supported by an adequate factual base, where the record includes uncontroverted testimony that the buffer depends on vegetation growth that will take up to 15 years to effectively screen equestrian jumping events located only 50 feet away from urban residential development, and that horses participating in the events may be panicked by fireworks and other sudden visual and auditory impacts stemming from the unscreened residential uses. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. An exhibit prepared by the applicant's attorney showing that three equestrian centers are located within urban areas does not provide an adequate factual base to support a finding that a 50-foot-wide buffer is sufficient to ensure compatibility between urban residential uses and an adjacent equestrian center, where that testimony is undermined by testimony from the owners of the urban equestrian centers that their operations rely on buffers that are 160 to 300 feet wide, and that a buffer only 50 feet wide would compromise the safety of horse riders. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. The lack of evidentiary support for a finding that a vegetative buffer is superior to a distance buffer at reducing visual incompatibilities is not harmless error, where the only evidence on that point is to the contrary, and under the local government's interpretation of the compatibility standard whether one buffer method is better at reducing or minimizing adverse visual impacts than another method appears to be a legitimate consideration. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A reasonable decision-maker could rely upon a diesel fume test conducted by the applicant to determine whether

diesel fumes are detectable at the property line, combined with a condition of approval limiting idling and operation within 60 feet of the property line, to conclude that a "no fume detection" home occupation standard is met, notwithstanding conflicting anecdotal testimony from the neighbors across the road that they can sometimes detect diesel fumes. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where OAR 660-023-0180 sets a default maximum mining impact area of 1500 feet, and the county employed an impact area of one-half mile and relied on testimony from the operator of a nearby cattle operation and a second person with experience with mining impacts on cattle in other locations to conclude that the one-half-mile impact area did not need to be extended based on potential mining noise impacts on cattle, the county's decision that the one-half-mile impact area need not be extended is supported by substantial evidence. *Central Oregon Landwatch v. Deschutes County*, 72 Or LUBA 45 (2015).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the record includes only speculative testimony that mining would impact sage grouse causing them to relocate and conflict with grazing operations beyond the proposed one-half-mile mining impact area, thus justifying a larger impact area, a county finding that mining would neither impact sage grouse nor cause them to relocate nor result in conflicts with distant farming operations is supported by substantial evidence, where the record includes testimony from the manager of a nearby grazing operation that there were no nearby sage grouse and the proposed mine would not have any impacts on grazing. *Central Oregon Landwatch v. Deschutes County*, 72 Or LUBA 45 (2015).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. While the evaluation of impacts on estuarine resources required by Goal 16, Implementation Requirement 1 need not be prepared by an expert, the nature of some types of potential adverse impacts caused by development on estuarine resources may be such that some technical expertise is necessary to provide substantial evidence to support conclusions based on the evaluation. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the record includes expert testimony that residential development may adversely impact endangered salmon species in an adjacent estuary through pollution from stormwater runoff, some level of scientific or professional expertise is necessary to rebut that testimony in order to provide supporting evidence for a contrary conclusion. A letter from the applicant's attorney opining that stormwater runoff will not adversely impact salmon is not substantial evidence to support that conclusion. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A county errs in applying a rigorous "compelling evidence" standard to evaluate testimony from farmers located more than one mile from a proposed landfill, regarding impacts of the landfill operation on their farm costs and practices. Nothing in ORS 215.296(1) suggests that a county can apply different evidentiary standards on different parties based on the geographic distance to the proposed non-farm use. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. In comparing uses across different zoning districts for purposes of determining whether a rezone "significantly affects" a transportation facility under the Transportation Planning Rule (TPR), consistent assumptions must be used, with the only variables reflecting the different zoning standards. Where the opposition traffic expert used different assumptions about development under the original zone and the new zone that are not based on the differences between the two zones, that testimony does not undermine reliance on the applicant's expert's conclusion that the new zone does not allow more traffic-intensive uses than the old zone. *Save Downtown Canby v. City of Canby*, 70 Or LUBA 68 (2014).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where findings explain that a 1996 flood destroyed some county permit records, but staff testifies that the flood did not destroy older building permit records because the older records were stored above the flood damage area, substantial evidence exists to support the finding that the county permit records are complete through that period, as well as the inference that the absence of a building permit for a second dwelling means that the dwelling was constructed without a building permit approval, and therefore was not lawfully established. *Macfarlane v. Clackamas County*, 70 Or LUBA 126 (2014).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where, based on Natural Resources Conservation Service data, opponents take the position that the water table lies two feet below the surface of a proposed topsoil mining operation, but the local government accepts the applicant's position that the water table lies 125 feet below the surface, but no party identifies the evidence the applicant and local government relied on for the 125-foot estimate, LUBA will remand the decision so that the county can adopt findings explaining the large discrepancy in the two estimates and why it accepted the 125-foot estimate. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A city's finding that a historic resource is not capable of generating a reasonable economic return is supported by substantial evidence, where the applicant submitted detailed studies showing that the cost of rehabilitating the structure to meet current building codes would far exceed the reasonable rental value, notwithstanding conflicting testimony by opponents that rehabilitation costs could be lower, and rental returns higher, than the applicant's experts estimated. *Rushing v. City of Salem*, 70 Or LUBA 448 (2014).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. The city has discretion to rely on the evidence it chooses in making its decision, and the city's decision not to rely on evidence provided by an applicant that calculates slopes on a property using a method that differs from the method requested by the city is not a basis to reverse or remand the decision. *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51 (2013).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where a hearings official is faced with testimony from one expert that a proposal's sewage effluent would be residential strength and from another expert that the proposal's effluent would be greater than

residential strength, and both experts' testimony is believable, the choice of which expert to believe lies with the hearings official. *Teen Challenge v. Lane County*, 67 Or LUBA 300 (2013).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. LUBA will not second guess a land use decision maker's choice between conflicting expert testimony, so long as it appears to LUBA that a reasonable person could decide as the decision maker did based on all of the evidence in the record. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351 (2013).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where a hearings officer specifically recognizes that there is conflicting expert testimony and the expert testimony he finds more persuasive is believable, his decision is supported by substantial evidence. *Tonquin Holdings LLC v. Clackamas County*, 64 Or LUBA 68 (2011).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the local government recognizes that there is conflicting expert testimony and the expert testimony the local government finds more persuasive is believable, the decision is supported by substantial evidence. *Protect Grand Island Farms v. Yamhill County*, 64 Or LUBA 179 (2011).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where DEQ rules require that septic drain fields must be set back at least 100 yards from wells and there is conflicting substantial evidence regarding the existence of an old well in an area proposed for a septic drain field, LUBA will defer to a hearings official's decision that has the effect of allowing the drain field to be used as proposed. *Freedman v. Lane County*, 64 Or LUBA 309 (2011).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where a decision maker is required to conduct a *de novo* review of the evidence in the record, but the decision maker erroneously believes that under the appropriate standard of review the decision maker is obligated to resolve all evidentiary conflicts in the applicant's favor absent overwhelming conflicting evidence, a decision based on that erroneous understanding would likely not constitute *de novo* review. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A finding expressing an erroneous understanding of the local decision-maker's standard of evidentiary review is harmless error at best, where no party identifies any findings addressing the approval criteria or evidence in which the decision-maker applied that erroneous standard of review. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the critical finding in a hearings officer's decision in a code enforcement proceeding is that petitioner had a longstanding regular practice of mowing grass and blackberry bushes in the riparian zone on his property, the only evidence that supports that finding is the testimony of the code enforcement officer based on field notes regarding conversations he had with petitioner that are not part of the record, petitioner testifies in the hearings before the hearings officer that he mowed in the riparian area on only one occasion, and it is not clear that the hearings officer even recognized that the testimony of petitioner and the code enforcement officer conflicted on the critical issue, remand is required. The hearings officer may be able to explain why he believed the code enforcement officer

over petitioner, but without any explanation his decision is not supported by substantial evidence. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Substantial evidence supports a county's finding that alternative sites not requiring an exception cannot accommodate a proposed travel plaza, where the record indicates that limited access to the alternative sites precludes use by large trucks. A county does not err in determining reasonable access by large trucks to be a essential or necessary characteristic of a proposed travel plaza. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the opponents' traffic engineer testifies based on data in the record that a left turn lane is required to ensure that the proposed use complies with a local transportation standard, and the applicant's traffic engineer disagrees, but without citing any evidence or explaining the basis for the contrary opinion, the applicant's engineer's unsupported opinion is not substantial evidence demonstrating compliance with the standard. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Remand is necessary where the applicant's traffic engineer declines to consider the impact of large spectator events at an already approved speedway near the proposed travel plaza, because the speedway events would "overwhelm" the local transportation system, without explaining why those impacts can be ignored in evaluating whether the local transportation system has the "carrying capacity" to handle traffic from the proposed travel plaza. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. That there is conflicting evidence in the record regarding whether an existing cell tower has capacity for co-locating the applicant's cellular antennas is not a basis for reversal or remand, where the decision maker could reasonably conclude based on substantial evidence in the record that the existing tower does not have capacity. *Oberdorfer v. Deschutes County*, 62 Or LUBA 296 (2010).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. When a traffic impact analysis (TIA) states that it was based on ODOT recommended guidelines but fails to follow those ODOT guidelines, and the final decision relies on that TIA and does not respond to opponents' challenges to the failure to comply with the ODOT guidelines, the decision to rely on a TIA is not reasonable and the decision is not supported by substantial evidence. *Citizens for Responsible Development v. City of The Dalles*, 60 Or LUBA 12 (2009).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the petitioner fails to challenge findings that explain why the county chose to rely on a consultant's report that estimates the costs of putting land to farm use based on certain assumptions, the petitioner's evidentiary arguments that the county should have used other assumptions fails to establish that the report is flawed or that the county erred in relying on the report. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. When nearby ranchers submit evidence that conflicts with the applicant's expert testimony regarding whether

the property could be used in conjunction with other land for farm use, even though that evidence could constitute substantial evidence, the county was entitled to rely on the conflicting evidence submitted by the applicant's expert. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A hearings officer does not err in rejecting as not credible testimony that a 19-acre farm produced over $80,000 in revenue from hay grown on the property, where the applicant provided no evidence of how much hay was grown on the property, or documentation distinguishing revenue from the sale of hay grown on the property from revenue derived from the resale of $83,000 in hay that the applicant purchased that year, and substantial evidence in the record indicated that to derive $80,000 in revenue solely from hay grown on the property would mean the applicant achieved yields and prices several times higher than average for the county. *Chapman v. Marion County*, 60 Or LUBA 377 (2010).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. When determining what comprehensive plan designation is more appropriate, a local government may consider evidence regarding wildlife habitat protection, recreation, need for parkland, water quality preservation, noise and air pollution, and tree preservation with respect to the entire property at issue in deciding that open space is the proper designation. The consideration is not limited to inventoried habitat and riparian areas. *Haertl Development Company v. City of Portland*, 59 Or LUBA 69 (2009).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where Metro has designated 308 acres next to a city for industrial development, a market analysis is not substantial evidence that those 308 acres are not needed to meet the 20-year regional need for industrial land, where that market analysis concludes that under the right economic conditions only 150 acres of 308 acres will be developed but also concludes that there is a current shortage of industrial land to meet the region's 20-year need for industrial land. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Although a local government land use decision maker is entitled to choose between conflicting believable expert testimony, where the decision maker does not demonstrate that it recognized the conflicting expert testimony and chose to believe one expert's testimony rather than the other expert's testimony, remand is required. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the record includes conflicting believable evidence about whether an applicant's assumption that 90 percent of the groundwater withdrawn for use by a destination resort will be returned to the subsurface hydrologic system and the county hearings officer findings recognize the conflicting evidence but choose to rely on the applicant's expert's position, which had been accepted by the Oregon Water Resources Department, the hearings officer's findings on that question are supported by substantial evidence. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A county reasonably concludes that the record does not include "factual information indicating significant potential

conflicts" with respect to whether a proposed quarry will disrupt sage grouse flights to and from a protected breeding site, where the only evidence suggesting that grouse flights come near the quarry site is a map the significance of which is subject to conflicting expert testimony. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Arguments that merely cite to opposing testimony and contend that that testimony should be believed over the evidence the local government chose to rely upon are insufficient to demonstrate that the decision is not supported by substantial evidence. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A county errs in relying on testimony of a general well constructor to conclude that digging 32 new wells would not adversely affect the underlying aquifer, where (1) the constructor's testimony is based on the current functioning of three wells in the area and does not address the impacts of 32 new wells, (20 the constructor provided no water budget for the aquifer or similar data, and (3) the opponents submitted a detailed study and water budget from an acknowledged aquifer expert who testified that 32 new wells would adversely impact the aquifer. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. The existence of conflicting evidence in the record regarding whether an existing structure within a setback is 7.5 feet or one foot from the property boundary is not a basis for remand, as long as the city's choice between the conflicting evidence is one a reasonable person could make. *McConnell v. City of Grants Pass*, 55 Or LUBA 280 (2007).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. While an astronomer's testimony regarding the impact of dust on an observatory's telescopes is substantial evidence from which a reasonable decision maker could conclude that dust from an open-pit mining operation would significantly conflict with the observatory, the county could nonetheless rely on the distance between the site and the observatory and proposed measures to control dust to conclude that the mine would not significantly conflict with the observatory. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Expert testimony that an existing firearms training facility in a forest zone is a fire hazard and increases costs and risks of fire suppression is not sufficient to undermine a finding to the contrary, where the testimony is based on the operation of the facility as a whole, and not on the post-1995 improvements that are the subject of the application. *Citizens for Responsibility v. Lane County*, 54 Or LUBA 1 (2007).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. LUBA will affirm the hearings officer's choice to rely on a traffic model that has not been "calibrated" against real-world data, where the applicable guidelines stress the importance of calibration but do not state that calibration is the only way to ensure that the model is accurate, and the applicant's expert testifies that the model is reliable notwithstanding the absence of calibration. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. To obtain remand of development approval based on evidentiary grounds, it is insufficient to simply cite the evidence that the hearings officer rejected and argue that the evidence undermines the hearings officer's ultimate evidentiary choice. The petitioner must also challenge and establish error in the findings in which the hearings officer explained why he found petitioner's evidence unreliable. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A finding that it is feasible to construct a driveway that complies with maximum finished grade standards is not supported by substantial evidence, where the proposed driveway alignment clearly does not comply, the applicant's engineer stated generally that an alternate alignment is likely to meet grade standards but submitted no plans or drawings demonstrating the location or feasibility of that alignment, and the opponents' engineer submitted detailed testimony supported by drawings showing that the suggested alternate alignment will not comply. *Lenox v. Jackson County*, 54 Or LUBA 272 (2007).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where an approval criterion for an adjustment to the size of required loading spaces requires that the adjustment not negatively affect traffic safety or other transportation features, the mere fact that there might be some moving or delivery vehicles that will not fit into the adjusted spaces that could have fit into the unadjusted spaces does not compel the conclusion that the approval criterion is not satisfied. *Yun v. City of Portland*, 54 Or LUBA 564 (2007).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A county reasonably relies on a forester's opinion that Ponderosa pine is a more valuable species to grow on certain soils than Douglas fir, over conflicting opinions by persons who are not soil or forestry experts. *Anderson v. Lane County*, 54 Or LUBA 669 (2007).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. In determining whether a property is generally unsuitable for the production of farm crops and livestock or merchantable tree species, a county's conclusion that any historic agricultural use on the property before that time does not provide a substantial hurdle is supported by substantial evidence where the county chooses to rely on an expert's opinion that proposed nonfarm parcels have not been used for agricultural operation in the past 20 years. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. It is not unreasonable for a local decision maker to cite issues raised regarding the evidence submitted by an applicant's engineers that were not responded to, and to rely on opponents' experts' testimony to find that the applicant failed to carry its burden of proof. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A local government may rely on evidence that clam beds that partially justified a previous natural management unit designation have been smothered by erosion, and the reduced habitat value warrants redesignation

of the area to a conservation management unit, notwithstanding conflicting evidence over the remaining habitat value. *Oregon Shores Cons. Coalition v. Lane County*, 52 Or LUBA 471 (2006).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where an applicant's expert and the United States Fish and Wildlife Service disagree about the adequacy of the expert's survey of endangered western lilies on the site of a proposed development, LUBA will defer to the city's choice to believe the applicant's expert. While the United States Fish and Wildlife Service may ultimately prevail in future federal permitting proceedings, a city's choice between conflicting testimony at the city's master plan of development approval stage presents no basis for reversal or remand. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. An expert study concluding that a clay layer prevents rainwater from permeating down to the aquifer and that proposed storm water facilities will ensure that post-development hydrology differs little from pre-development hydrology is substantial evidence a reasonable person could rely upon to conclude that proposed development will not adversely affect the aquifer or wells that rely on it. *Dinges v. City of Oregon City*, 49 Or LUBA 376 (2005).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Even if intersection improvements that are required in approving a destination resort will maintain acceptable levels of service on nearby roads and key intersections, it does not necessarily follow that there will not be conflicts between the increased levels of traffic the proposed destination resort will generate on these roads and agricultural traffic (including livestock and large slow-moving agricultural vehicles) seeking to negotiate these same roads. However, where the relevant approval standard only requires "reasonable compatibility," and the testimony on both sides of the seriousness of the conflicts from such traffic is speculative, LUBA cannot say the county was unreasonable in finding the destination resort will be "reasonably compatible" with nearby farm use and farm traffic. *Burke v. Crook County*, 48 Or LUBA 23 (2004).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A local government may rely on portions of two conflicting expert studies of soil classifications, although explanatory findings may be necessary to identify what portions are relied upon, and to resolve any differences or contradictions between the studies relied upon, so that LUBA may perform its review function. *Doob v. Josephine County*, 48 Or LUBA 227 (2004).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Expert evidence that an enhanced wetland is very unlikely to attract species that would conflict with operation of an adjoining aggregate mine is substantial evidence to support a finding that the enhanced wetlands will not "adversely impact" the mine, notwithstanding conflicting evidence on that point and the fact that the applicant's expert could not guarantee no adverse impacts. *Cadwell v. Union County*, 48 Or LUBA 500 (2005).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A code standard requiring that a proposed use will not interfere with or cause an adverse impact on a mining operation does not require evidence that adverse impacts are impossible; rather, it requires the

decision maker to evaluate probabilities. Expert evidence that it is "highly unlikely" that wetland enhancements will attract species that might lead to restrictions on a mining operation is evidence a reasonable person could rely on to find compliance with the adverse impacts standard, notwithstanding conflicting expert evidence on that point. *Cadwell v. Union County*, 48 Or LUBA 500 (2005).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where LUBA concludes that the evidence in the local government record regarding whether use of a nonconforming dwelling was abandoned for more than one year was "hardly overwhelming" but was nevertheless such that a reasonable decision maker could either find that the use was discontinued or find that the use was not discontinued, the hearings officer's finding that the nonconforming use was discontinued is supported by substantial evidence. *Bradley v. Washington County*, 47 Or LUBA 11 (2004).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where LUBA is able to determine that a reasonable decision maker could rely on the evidence the decision maker chose to rely on, findings specifically addressing conflicting evidence are unnecessary. *Tallman v. Clatsop County*, 47 Or LUBA 240 (2004).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A surveyor's map that shows elevation differences at certain points on the subject property, but does not provide a basis to estimate whether the slope of the property is predominantly more or less than seven percent, does not so undermine a small-scale county soil survey map indicating that the soil slope on the subject property is predominantly greater than seven percent, as to render the county soil survey nonsubstantial evidence. *Tallman v. Clatsop County*, 47 Or LUBA 240 (2004).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A finding that sales of non-construction related materials at a home improvement store, such as house plants, barbeques, etc., are incidental and subordinate to the primary use of "Construction Sales and Services" is supported by substantial evidence, where the testimony cited by petitioners takes a broader view of what constitutes non-construction related material that the local decision maker and in any case fails to establish that the sales of such non-construction related materials is so predominant as to make such sales the principal use. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where two traffic studies indicate that post-acknowledgment plan amendments may cause a transportation facility to fall below the minimum acceptable performance standard, and the respondent cites no evidence to the contrary that a reasonable person would rely upon, remand is necessary for the city to address whether the plan amendment will "significantly affect" that transportation facility within the meaning of OAR 660-012-0060(2)(d). *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where there is conflicting believable expert testimony regarding the efficacy of a subdivision applicant's proposed measures to ensure that construction of a road near large trees with intertwined roots can

be accomplished without so damaging the roots that the trees will die, LUBA will defer to the city's choice of which expert to believe. *Miller v. City of Tigard*, 46 Or LUBA 536 (2004).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Substantial evidence supports a hearings officer's conclusion that only five percent of traffic generated by a proposed church would turn south at an affected intersection, and that traffic counts performed in February are indicative of summer peak traffic loads, where it is undisputed that few if any church members reside south of the intersection, and the applicant's traffic engineer testified that the affected intersection is not subject to seasonal fluctuations in traffic levels. *Noble v. Clackamas County*, 45 Or LUBA 366 (2003).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A reasonable decision maker may rely upon existing state and federal safety standards, and evidence of safety features designed to prevent fire or explosion in the event an airplane crashes into a proposed fuel station located near a runway, to conclude that no additional safety standards are necessary, notwithstanding testimony from the airport manager and aviation officials that the location of the proposed station is unsafe. *Graham Oil Co. v. City of North Bend*, 44 Or LUBA 18 (2003).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where petitioners present evidence and testimony that a property is not predominately composed of Class IV through Class VIII soils because an access easement that covers over 25 percent of the property is not wholly comprised of Class VI soils, and the testimony of the applicant's soil scientist does not explain why the entire easement is comprised of Class VI soils, the county's determination that the property is predominately composed of Class IV through VIII soils is not supported by substantial evidence. *Friends of Yamhill County v. Yamhill County*, 44 Or LUBA 777 (2003).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A city is entitled to rely on expert testimony that a specific model of the flood depth and velocity over the subject property is necessary to demonstrate compliance with a standard requiring no significant hazard to life or property, and the city may decline to extrapolate that information from other expert testimony that models an adjacent area. *Starks Landing, Inc. v. City of Rivergrove*, 43 Or LUBA 237 (2002).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A county decision the relies on an engineer's report to identify the location of a floodway boundary is supported by substantial evidence, where the county does not require that a land surveyor locate the floodway boundary and the conflicting evidence that supports a different location for the boundary is not so compelling as to cause a reasonable person to doubt the credibility of the engineer's report. *Mertz v. Clackamas County*, 43 Or LUBA 313 (2002).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. In determining whether conflicting uses can be minimized pursuant to OAR 660-023-0180(4), a local government may draw reasonable inferences from expert testimony to determine that a numerical standard for minimization, such as for turbidity, cannot be satisfied. *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251 (2002).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Petitioner fails to overcome the county's determination that property is forest land under Goal 4, and fails to demonstrate as a matter of law that land is not "suitable for commercial forest uses," where petitioner's own expert testifies that notwithstanding limitations on productivity the subject property is in a "medium productivity range" and would yield $81,300 worth of commercial timber at 50 years, after an investment of $7,450. *Potts v. Clackamas County*, 42 Or LUBA 1 (2002).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Although local governments are required to address legitimate issues that are raised in a quasi-judicial land use proceeding concerning relevant approval criteria, local governments are not required to address in their findings every conflict in the evidence or every criticism that is made of particular evidence. *Knight v. City of Eugene*, 41 Or LUBA 279 (2002).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Substantial evidence supports a finding that a proposed high school will not increase traffic through an affected intersection during the peak morning hour, notwithstanding failure of the traffic study to take certain trips into account, where the decision imposes conditions that effectively eliminate the possibility of those trips impacting the intersection. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A reasonable person could conclude that revenue projections for an urban renewal plan are feasible for purposes of ORS 457.095(6) and 457.085(3)(g), where expert evidence in the record shows that the total debt can be retired if four new industrial developments locate in the industrial park improved under the renewal plan, that three new industrial developments have advanced plans to locate in the park, and that the park, once improved, is likely to attract at least one other new industrial development over the relevant time period. *Zimmerman v. Columbia County*, 40 Or LUBA 483 (2001).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where nearly all the evidence in the record concerning potential groundwater pollution associated with a proposed aggregate mine is speculative and would support opposite conclusions concerning that potential, the local government's selection of which evidence to believe is reasonable. *Donnell v. Union County*, 40 Or LUBA 455 (2001).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. An architect's unsupported statement that a proposed structure is 14,719 square feet in size and thus complies with a local standard limiting permissible size to 14,723 square feet is not substantial evidence supporting a finding of compliance with the standard, where the opponents offered detailed evidence showing that the structure exceeds the maximum size and the applicant failed to either explain the architect's supporting calculations or refute the opposing evidence. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Expert testimony that existing riprap will prevent dune retreat if repaired when damaged is substantial evidence supporting the county's finding under Goal 18 that the dune upon which development is proposed is stabilized and not subject to wave overtopping or ocean undercutting, notwithstanding

conflicting expert evidence that the riprap may be insufficient or may fail. *Save Oregon's Cape Kiwanda v. Tillamook County*, 40 Or LUBA 143 (2001).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A determination by a hearings officer that, based on conflicting testimony and evidence, the impacts from a proposed alteration to a nonconforming use would be greater than the allowed nonconforming use does not allow opponents to "effectively veto" the alteration, where the decision identifies the evidence considered by the hearings officer and articulates the reasons why the hearings officer found certain testimony more credible than other testimony. *Hal's Construction, Inc. v. Clackamas County*, 39 Or LUBA 616 (2001).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A city's finding that all fill that had been placed in an estuary had been removed is supported by substantial evidence where the city relied on testimony by the applicant's engineer, a letter from the Corps of Engineers and other evidence of delivery and removal of fill, notwithstanding certain weaknesses in that evidence and the existence of other conflicting evidence. *Willhoft v. City of Gold Beach*, 39 Or LUBA 353 (2001).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. The burden of proof to show the legitimacy of a nonconforming use rests with the party asserting the existence of the use. LUBA will not substitute its judgment for that of the local decision maker where a reasonable person could find a beach house is not a valid nonconforming use. *Crook v. Curry County*, 38 Or LUBA 677 (2000).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Evidence that alternatives to the preferred option require a sewer connection to a different drainage basin, a pump station contrary to applicable regulations and the removal of mature trees, and that they are significantly more expensive to install, demonstrates that the alternatives are impracticable. *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Neighboring farmer's testimony regarding potential for goose depredation of crops is substantial evidence that impacts from mining will not substantially increase the cost of or force a significant change in agricultural practices, notwithstanding contrary general statements from a government wildlife biologist. *Stockwell v. Benton County*, 38 Or LUBA 621 (2000).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A title insurance company letter indicating that a property has legal access is substantial evidence that such access exists, notwithstanding contrary evidence in the record. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A city's conclusion that additional parking is needed is supported by substantial evidence notwithstanding contrary evidence contained within a parking study, where the city found the parking study is limited in scope and does not account for certain variables, and there is also evidence that parking is

unavailable during peak times and that persons avoid a particular store because of a perceived lack of parking. *Douglas v. City of Lake Oswego*, 37 Or LUBA 826 (2000).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. LUBA will affirm a hearings officer's choice between conflicting expert testimony where a reasonable person could conclude, based on the testimony of applicant's expert, that a proposed intersection provides a sight distance exceeding that required by the code, notwithstanding the contrary testimony of opponents' engineer. *Mitchell v. Washington County*, 37 Or LUBA 452 (2000).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where an applicant submits evidence that an intersection will operate at level of service C but later submits evidence showing the intersection will operate at level of service E, a finding that the intersection will operate at level of service C is not supported by substantial evidence. Where the finding concerning the intersection is a necessary part of the decision, the decision must be remanded. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A property owner's explanation that required plowing and cultivation occurred at the time Christmas trees were planted is substantial evidence that required plowing and cultivation occurred, where the only contrary evidence is opponents' unsupported expressions of doubt that the required plowing and cultivation occurred. *Rochlin v. Multnomah County*, 37 Or LUBA 237 (1999).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A city's denial of a permit to construct a house proposed to be cantilevered out over the face of a sand bluff is supported by substantial evidence, where there is conflicting expert testimony regarding adverse impacts from structural supports sunk into the face of the bluff, and the city reasonably chose to believe an expert opinion that under no circumstances should the face of the bluff be compromised. *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Neighbors' testimony regarding adverse impacts of vibration from construction on the integrity of a sand bluff underlying adjacent properties is substantial evidence supporting the city's denial of a house proposed to be built on the bluff, notwithstanding a contrary conclusion inferred from geotechnical reports supporting the application. *Johns v. City of Lincoln City*, 37 Or LUBA 1 (1999).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where all the testimony regarding whether students would or would not continue current parking behavior in the future is based on unsupported speculation about what might happen in the future, a reasonable decision maker could choose either the proponent's or the opponent's testimony. *Baughman v. City of Portland*, 36 Or LUBA 353 (1999).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Substantial evidence supports a city's finding that the primary purpose of a proposed facility is to recover recyclables from a waste stream, where there is evidence that the most significant function and justification of the proposed facility is to recover recyclables, notwithstanding that the proposed facility might

also serve or facilitate other economic purposes. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A hearings officer's findings which rely on the absence of business records and the testimony of a neighbor to conclude that a nonconforming use was discontinued are supported by substantial evidence, where the findings address the conflicting evidence submitted by the applicant and explain why that evidence did not establish the continued existence of the nonconforming use. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. An assignment of error criticizing a city council for not discussing conflicting evidence will be rejected, because it is the written decision rather than oral deliberations where the decision maker is required to explain its choice between conflicting evidence. Moreover, where LUBA can determine that a reasonable decision maker would rely on the evidence the decision maker relied on, findings specifically addressing the conflicting evidence are not necessary. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68 (1999).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. LUBA does not independently analyze the evidence, but reviews evidence in the record solely to determine whether it was reasonable for the decision maker to rely on that evidence in making a decision. Where the written evidence is conflicting and a video tape makes it clear that only small remnants of past farming or Christmas tree growing efforts on the subject property remain among the piles of debris that have been scattered over the subject property, it is reasonable for a hearings officer to conclude there is no current farm use of the property. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. LUBA does not duplicate the role of a local hearings officer. Where the evidence is conflicting such that a reasonable decision maker could reach different conclusions based on that evidence, the choice of which evidence to believe and which conclusion to reach is for the hearings officer. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A local government's decision regarding the scope of an alleged nonconforming use is supported by substantial evidence, where the evidence the local government relies on is credible, and the opposing evidence does not so undermine the evidence relied upon as to render the local government's reliance on supporting evidence unreasonable. *Aman v. City of Tigard*, 35 Or LUBA 353 (1998).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where findings identify substantial evidence to support a local government's position, the government is not required to explain why it chose to balance conflicting evidence in a particular way or to identify evidence it chose not to rely upon. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where there is a dispute between expert opinions, a local government is entitled to choose between conflicting evidence, provided that opposing testimony and other evidence in the record do not undermine the government's evidence to the extent that no reasonable person would rely on it. *ODOT v. City of Oregon City*, 34 Or LUBA 57 (1998).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Selected portions of an engineer's letter, cited to support a finding that water supply is adequate, do not constitute substantial evidence where that finding is undermined by the engineer's letter taken as a whole and by other conflicting evidence. *Pekarek v. Wallowa County*, 33 Or LUBA 225 (1997).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. LUBA will defer to a local government's choice between conflicting evidence if it concludes a reasonable person would have reached the decision the local government made in view of all of the evidence in the record. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Population projections of a witness who is not shown to be qualified by education or experience to evaluate evidence and draw conclusions concerning a highly technical and complex subject raise substantial evidence concerns, particularly when they are contradicted by the official population estimates prepared by the Center for Population Research and Census (CPRC) and letters from CPRC experts. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Although the choice between conflicting testimony belongs to the county, where the evidence provided by petitioners reveals factual inconsistencies in intervenors' evidence, the county must at least explain a reasonable basis for its choice between the conflicting evidence. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the county's factual findings determine that the subject parcel contains soils that are presumptively suitable for farm use, but then conclude that the proposed dwelling is situated on land that is unsuitable for farm use, the county's conclusion is not supported by substantial evidence in the record. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the county's conclusion that two parcels are not contiguous for purposes of OAR 660-04-028(6)(c)(B) is not factually established in the record and is inconsistent with evidence relied upon by the county regarding nonresource use on adjacent parcels, the county's finding is not supported by substantial evidence in the record. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. LUBA will not substitute its judgment for that of the local decision maker. Without references to conflicting evidence in the record that so undermines the evidence upon which the county based its conclusion as to compel a conclusion that a reasonable person could not have reached the county's conclusion,

LUBA will not find the county's findings lack substantial evidence. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1996).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. The county is not required to address all conflicting evidence in its findings, but the findings must address and respond to specific issues raised in the local proceedings that are relevant to compliance with approval standards. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the evidence is conflicting, if a reasonable person could reach the decision made by the local government in view of all the evidence in the record, LUBA will defer to the local government's choice between the conflicting evidence, notwithstanding that reasonable people could draw different conclusions from the evidence. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. LUBA does not substitute its judgment regarding conflicting evidence in the record for that of the local government. If a reasonable person could reach the decision made by the local government, LUBA will defer to the local government's choice between conflicting evidence. *Gionet v. City of Tualatin*, 30 Or LUBA 96 (1995).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where evidence in the record supports the city's finding that a development site is not capable of supporting an 11-lot subdivision, LUBA will defer to the city's evaluation of the evidence, notwithstanding petitioner's citation to contrary evidence in the record that the site could accommodate 11 units. *Holland v. City of Cannon Beach*, 30 Or LUBA 85 (1995).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Petitioners' disagreement with a local government's evaluation of conflicting evidence is not a basis for remand; where different reasonable conclusions can be drawn from evidence in the record, the local government may choose the evidence upon which it will rely. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46 (1995).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Petitioners' disagreement with the county's evaluation of the evidence and its conclusions is not a basis for remand or reversal if the county's evaluation and conclusions are reasonable in light of all the evidence in the record. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where LUBA concludes a reasonable person could reach the decision made by a local government, in view of all the evidence cited in the record, LUBA will defer to the local government's choice between conflicting evidence. *Carter v. Umatilla County*, 29 Or LUBA 181 (1995).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. The mere existence of a survey or computer listing of a city's available industrial land, absent argument by petitioner that particular listed sites represent available, industrially designated sites in the vicinity of a proposed plan map amendment, does not refute other evidence relied on by the city to determine

there are no suitable alternative sites within a reasonable area of a proposed plan map amendment. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where there is conflicting evidence concerning the effectiveness of a condition requiring golf course closures during spraying operations to avoid significant effects on or cost increases in such spraying, a finding that the condition has been effective is supported by substantial evidence. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the evidence in the record cited by the parties can be characterized as conflicting, but does not so undermine the local government's conclusion as to make the conclusions unreasonable, the record contains substantial evidence supporting the local government's conclusion. *Mazeski v. Wasco County*, 28 Or LUBA 178 (1994).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the evidentiary support for a local government's determination of compliance with a relevant code standard is a 1990 traffic study, that evidentiary support is not undermined by a 1992 traffic study in the record which is based on data collected over a shorter period of time and from fewer intersections, further from the affected area. *Heine v. City of Portland*, 27 Or LUBA 571 (1994).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the evidence in the record concerning likely impacts associated with a vacation rental dwelling is largely conflicting opinion testimony, and could reasonably lead to a conclusion that relevant approval criteria either are or are not met, the choice of which evidence to believe belongs to the local government. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where LUBA concludes a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, LUBA will defer to the local government's choice between conflicting evidence. *Bottum v. Union County*, 26 Or LUBA 407 (1994).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A local government's decision that a proposed plan map amendment would negatively impact groundwater quantity and violate an applicable plan criterion is supported by substantial evidence where there is conflicting lay and expert testimony, and the expert testimony concedes the uncertainty of the proposal's impacts. *Ericsson v. Washington County*, 26 Or LUBA 169 (1993).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Testimony from an Oregon Department of Forestry (DOF) representative which suggests a proposed dwelling could be compatible with forest uses, but was clarified by the DOF representative to eliminate any suggestion of compatibility, is not evidence a reasonable decision maker would rely upon to establish a proposed nonforest dwelling is compatible with forest uses. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Determining compatibility is inherently subjective. Where there is conflicting believable evidence concerning a proposed PUD's compatibility with the surrounding neighborhood, LUBA will not disturb the local government's determination that the height of the proposed buildings is compatible with the surrounding neighborhood. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. LUBA will defer to a local government's choice between conflicting believable evidence. *Cemper v. Clackamas County*, 25 Or LUBA 486 (1993).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. The choice between conflicting believable evidence belongs to the local government, and so long as the evidence relied upon by the local government is such that a reasonable person could reach the conclusion that the local government reaches, the decision is supported by substantial evidence in the whole record. *McInnis v. City of Portland*, 25 Or LUBA 376 (1993).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. The choice between conflicting believable evidence belongs to the local government decision maker. *Neuharth v. City of Salem*, 25 Or LUBA 267 (1993).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. The choice between conflicting believable evidence belongs to the local government. *Clarke v. City of Hillsboro*, 25 Or LUBA 195 (1993).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A school district letter rating schools as adequate to serve a proposed subdivision is adequate to demonstrate compliance with a code requirement for documentation of school facility adequacy, notwithstanding a subsequent letter from the school district raising questions about the earlier rating, where the executive director of school district facilities expressly reaffirms the earlier rating of the schools as adequate. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Evidence in the local record that there are currently a certain number of approved mobile home subdivision lots within a local jurisdiction, is not undermined by a statement in the comprehensive plan that several years earlier, a different number of mobile home subdivision lots were approved, but had not been "finalized." *Mannenbach v. City of Dallas*, 25 Or LUBA 136 (1993).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where the evidence in the record cited by petitioner does not so undermine the evidence in the record relied upon by the local government that it is unreasonable for the local government to have relied on it, LUBA will defer to the local government's choice between conflicting evidence. *Smith v. Lane County*, 25 Or LUBA 1 (1993).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where LUBA concludes a reasonable person could reach the decision made by the local government, in view of

all the evidence in the record, it defers to the local government's choices between conflicting evidence and of reasonable conclusions to be drawn from the evidence. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where there is conflicting believable evidence, the choice of which evidence to believe belongs to the local government. *Giesy v. Benton County*, 24 Or LUBA 328 (1992).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where a local decision maker relies on prior nonspecific and equivocal testimony concerning the location and presence of wetlands, in place of a well documented specific expert study, and adopts no findings explaining that choice, the challenged decision is not supported by substantial evidence. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. A county determination that particular land is "agricultural land" is supported by substantial evidence in the record where the comprehensive plan defines agricultural land to include land consisting of predominantly Class I-IV soils as determined by SCS soil maps, and there is no dispute that the subject land consists of predominantly Class I-IV soils based on such SCS maps. Expert testimony that the subject land is not agricultural land, based on a different definition, does not undermine the county's determination. *Wells v. Clackamas County*, 23 Or LUBA 402 (1992).

1.6.5 Administrative Law – Substantial Evidence – Conflicting Evidence. Where conflicting evidence does not so undermine the evidence relied upon by the local decision maker that it is unreasonable for the decision maker to rely upon it, the choice between such conflicting believable evidence belongs to the local government decision maker and LUBA will not disturb that choice. *Harwood v. Lane County*, 23 Or LUBA 191 (1992).

1.7 Administrative Law – Evidence Which Clearly Supports. The "clearly supports" standard at ORS 197.835(11)(b) does not authorize LUBA to affirm a decision notwithstanding inadequate findings, where the lack of adequate findings concern a subjective approval standard under Goal 16 requiring that the local government, in approving development in an estuary, identify the "public need [for] and gain" from the project warrant any modification or loss to estuarine values that would result from the development, and evaluate and minimize the adverse impacts of development. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

1.7 Administrative Law – Evidence Which Clearly Supports. ORS 197.835(11)(b) is a limited vehicle that does not allow LUBA to affirm a decision based on an alternative legal theory not considered below, if that alternative theory requires significant, discretionary legal and evidentiary determinations regarding which instrument created a disputed parcel, and whether the resulting parcel is a legal lot of record. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

1.7 Administrative Law – Evidence Which Clearly Supports. A finding that is ambiguous regarding whether a restaurant and meeting area in a destination resort each provide 100 seats, as required by local code, is not a basis for reversal or remand, where all the evidence in the record indicates that the two facilities each provide 100 seats, and the petitioner cites no contrary evidence. Under these circumstances, LUBA will affirm that portion of the decision notwithstanding inadequate findings, because the evidence in the record "clearly supports" a finding that the 100-seat requirement is met. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

1.7 Administrative Law – Evidence Which Clearly Supports. Where there is conflicting evidence regarding a subjective code standard requiring a finding that a destination resort expansion is "integral" to the remainder of the resort, LUBA will decline to use its authority under ORS 197.835(11)(b) to affirm a decision notwithstanding inadequate findings, based on evidence that "clearly supports" the decision. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

1.7 Administrative Law – Evidence Which Clearly Supports. Although ORS 197.835(11)(b) authorizes LUBA to overlook defective findings where evidence in the record "clearly supports the decision," ORS 197.835(11)(b) does not authorize a local government's total failure to identify any supporting findings in a case that is factually and legally complex. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

1.7 Administrative Law – Evidence Which Clearly Supports. Under ORS 197.835(11)(b), LUBA may overlook inadequate findings where the evidence makes a finding of compliance with the criteria obvious or inevitable. But ORS 197.835(11)(b) generally will not apply where the criteria are subjective and does not apply in a case where an applicant for approval of wind turbines relies on one kind of evidence, opponents rely heavily on a different kind of evidence, and the decision makes no attempt to identify which evidence the decision maker found persuasive or why. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

1.7 Administrative Law – Evidence Which Clearly Supports. ORS 197.835(11)(b) authorizes LUBA to overlook "defective" findings regarding a relevant legal standard, if a party can identify

evidence that "clearly supports" a decision that the standard is met. But where the legal standard requires completion of a condition within a "reasonable time," there are no findings addressing the "reasonable time" standard, and the evidence falls far short of clearly supporting a decision that a 10-year delay in completing the condition was a "reasonable time," ORS 197.835(11)(b) does not apply. *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92 (2015).

1.7 Administrative Law – Evidence Which Clearly Supports. The ORS 197.835(11)(b) "clearly supports" standard is considerably more demanding than the substantial evidence standard, and is generally only appropriately applied to approval standards that are objective or do not require interpretation or much discretionary judgment. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

1.7 Administrative Law – Evidence Which Clearly Supports. The ORS 197.835(11)(b) "clearly supports" standard is not met where LUBA must weigh conflicting evidence or resolve disputes over the credibility of experts. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

1.7 Administrative Law – Evidence Which Clearly Supports. Notwithstanding that a city erroneously determined that a particular section of the development code exempted a permit applicant from development code buffer requirements, where another section of the development code cited by the petitioner clearly does exempt the permit applicant from the buffer requirements, LUBA will affirm the city's decision. ORS 197.835(11)(b). *Nielsen v. City of Gresham*, 66 Or LUBA 24 (2012).

1.7 Administrative Law – Evidence Which Clearly Supports. Under ORS 215.283(2)(k), buildings "necessary" for the operation of a waste disposal facility are permitted. Where the findings are insufficient, but the record includes evidence which clearly establishes that proposed buildings are "necessary," and no contrary evidence in the record is cited, LUBA will affirm the conclusion that the proposed buildings are "necessary." *Crocker v. Jefferson County*, 60 Or LUBA 317 (2010).

1.7 Administrative Law – Evidence Which Clearly Supports. LUBA will decline to address arguments under ORS 197.835(11)(b) that the record "clearly supports" a finding that use of land for two recreational vehicle pads is "accessory" to a dwelling on an adjacent lot, where the critical unresolved issue is not evidentiary but rather interpretative. *Fessler v. City of Fossil*, 55 Or LUBA 1 (2007).

1.7 Administrative Law – Evidence Which Clearly Supports. LUBA will not affirm a decision under the harmless error doctrine or ORS 197.835(11)(b) notwithstanding failure to adopt findings applicable to conditional uses allowed in the zone, based on findings adopted to address similar site review standards, where it is not clear that the zoning district provides for the proposed use at all. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

1.7 Administrative Law – Evidence Which Clearly Supports. Where the record clearly reflects that a local government adopted a condition of approval that limited full development until completion of a direct connection from the proposed development to a nearby street because it was

not convinced that other alternatives proposed by the applicant would solve the anticipated traffic congestion problem, any failure to adopt findings explaining the city's rejection of the applicant's alternatives does not provide a basis for reversal or remand. *Premier Development v. City of McMinnville*, 50 Or LUBA 666 (2005).

1.7 Administrative Law – Evidence Which Clearly Supports. Where a county concludes that conflicts with adjoining rural residential development commit a property to nonresource uses, the county's findings addressing OAR 660-004-0018(2)(b)(B) must explain why residential development of the subject property will not present the same risk of committing other adjacent resource lands to nonresource uses. Given the complex nature of that explanation, evidence of conflicts with rural residential uses do not "clearly support" a finding that residential zoning of the subject property will not commit adjacent resource lands, for purposes of ORS 197.835(11)(b). *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

1.7 Administrative Law – Evidence Which Clearly Supports. The record does not "clearly support" a finding that petitioner's property is undevelopable, relieving a subdivision applicant of the obligation to provide access to petitioner's property, where the record includes conflicting expert testimony on that point, and the city's decision can be read to agree with petitioner's evidence that his property is developable petitioner's appeal is sufficient to allege prejudice to petitioner's substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

1.7 Administrative Law – Evidence Which Clearly Supports. LUBA will remand a county decision that alternatives to siting a radio transmission tower on EFU-zoned land are infeasible where the county did not adopt findings explaining why six of the identified sites are infeasible and the parties do not cite to evidence in the record that "clearly supports" the county's decision that the six sites are infeasible. *Van Nalts v. Benton County*, 42 Or LUBA 497 (2002).

1.7 Administrative Law – Evidence Which Clearly Supports. Evidence that a proposed cellular communications tower on EFU land is within an optimal area for telecommunication coverage is insufficient to allow LUBA to conclude, under ORS 197.835(11)(b), that the record "clearly supports" a finding of compliance with ORS 215.275, which requires that the local government consider reasonable alternatives to siting the tower on EFU-zoned land. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001).

1.7 Administrative Law – Evidence Which Clearly Supports. Although LUBA may overlook a city's failure to adopt findings addressing an approval criterion for signs under ORS 197.835(11)(b) where the record clearly supports the decision, where the record provides only an idea of what the signs will look like and the criterion requires a highly subjective judgment, application of ORS 197.835(11)(b) is not appropriate. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

1.7 Administrative Law – Evidence Which Clearly Supports. Evidence that certain potential sites for a water reservoir inside the urban growth boundary are too small or would be technically difficult and costly to develop and that locating water treatment facilities on rural EFU-zoned land next to wells would have cost advantages and certain technical advantages is not sufficient to "clearly support" a decision that it is not feasible to locate the reservoir and treatment facilities on

urban land rather than on rural EFU-zoned land. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

1.7 Administrative Law – Evidence Which Clearly Supports. LUBA will not affirm a decision notwithstanding inadequate findings of compliance with approval criteria pursuant to ORS 197.835(11)(b), where the criterion at issue requires a subjective judgment regarding the consistency of the proposed use with the development character of the neighborhood, and the parties fail to identify evidence in the record demonstrating that compliance with the criterion is "obvious" or "inevitable." *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

1.7 Administrative Law – Evidence Which Clearly Supports. Evidence that a proposed asphalt plant will comply with DEQ requirements and that its emissions do not pose human health risks does not "clearly support" a finding of compliance with a plan provision requiring that the local government consider the proximity of proposed industrial uses "likely to pose a threat to air quality" with residential uses, particularly where it is not clear that the provision is limited to emissions regulated by DEQ and those that pose human health risks. *City of Newberg v. Yamhill County*, 36 Or LUBA 473 (1999).

1.7 Administrative Law – Evidence Which Clearly Supports. LUBA will not exercise its authority under ORS 197.835(11)(b) to affirm a decision notwithstanding inadequate findings, where the local government fails to adopt findings of compliance with a criterion requiring that planned unit development be designed to minimize the number and size of cuts and fills, and it is not obvious from evidence in the record that the PUD design minimizes cuts and fills. *Salo v. City of Oregon City*, 36 Or LUBA 415 (1999).

1.7 Administrative Law – Evidence Which Clearly Supports. A city cannot find it is feasible to comply with all approval criteria based on a site plan for only four of the total 15 lots and defer submission of a complete site plan, and the record does not clearly support a determination of compliance with the approval criteria where the complete site plan is not included in the record. *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998).

1.7 Administrative Law – Evidence Which Clearly Supports. LUBA cannot determine whether inadequate findings are "clearly supported" by the record under ORS 197.835(11)(b) where the local provision to which the findings are directed is subject to numerous interpretations and the decision does not contain an adequate interpretation of that local provision. LUBA will not both fashion an interpretation of a local provision and then review the record for evidence clearly supporting findings of compliance with that provision, as interpreted. *Doob v. City of Grants Pass*, 34 Or LUBA 480 (1998).

1.7 Administrative Law – Evidence Which Clearly Supports. Evidence in the record that may support an intended future conditional use application, but does not address the approval criteria of the present decision, changing the designation and zoning of property, does not clearly support a conclusion that a decision approving the designation and zone change complies with applicable criteria. *Larvik v. City of La Grande*, 34 Or LUBA 467 (1998).

1.7 Administrative Law – Evidence Which Clearly Supports. Where local standards require that there be a "demonstrated public need" for a proposed subdivision of five-acre lots, letters from real estate agents describing the lack of listings for five-acre parcels do not "clearly support" a finding of demonstrated public need for the subdivision absent evidence relating the lack of listings to an identified need. *Turrell v. Harney County*, 34 Or LUBA 423 (1998).

1.7 Administrative Law – Evidence Which Clearly Supports. A city's error in not including findings addressing certain conditions of preliminary subdivision and PUD plan approval provides no basis for reversal or remand where the parties identify evidence in the record that clearly shows compliance with the conditions. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

1.7 Administrative Law – Evidence Which Clearly Supports. Where the evidence supporting an alternative plan amendment that was not selected also supports the alternative plan amendment that was selected in a legislative future streets plan amendment, the decision is supported by an adequate factual base. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

1.7 Administrative Law – Evidence Which Clearly Supports. ORS 197.835(11)(b) allows LUBA to overlook minor defects in local government findings when substantiating evidence makes the local government's decision obvious or inevitable; it does not authorize LUBA to disregard the local government's actual findings or to read into those findings language that is not stated. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

1.7 Administrative Law – Evidence Which Clearly Supports. Under ORS 197.835(11)(b), LUBA is authorized to review the findings and conclusions made by the governing body and correct minor oversights or omissions; however, the county's unexplained and unsupported determination of compliance with applicable criteria is not a minor oversight, and LUBA will not analyze the record and substantiate the county's conclusions. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

1.7 Administrative Law – Evidence Which Clearly Supports. Where there is conflicting evidence in the record regarding whether intervenor's application proposes development within a flood plain, LUBA cannot affirm the city's decision under ORS 197.835(11)(b) because the evidence does not "clearly support" a decision that the application does not propose development in the flood plain. *Venable v. City of Albany*, 33 Or LUBA 1 (1997).

1.7 Administrative Law – Evidence Which Clearly Supports. County findings are inadequate when they fail to interpret an applicable local regulation, and fail to identify facts upon which the county relied in reaching its conclusions. LUBA will not overlook such inadequacies in the findings when no party cites evidence in the record that compels the interpretation and conclusion made by the county. *DLCD v. Clatsop County*, 31 Or LUBA 90 (1996).

1.7 Administrative Law – Evidence Which Clearly Supports. While ORS 197.835(9) requires LUBA to affirm a local government decision in the absence of adequate findings if the parties identify evidence that "clearly supports" the decision, "clearly supports" will be interpreted narrowly to mean "makes obvious" or "makes inevitable." *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

1.7 Administrative Law – Evidence Which Clearly Supports. ORS 197.835(9)(b) and 197.829(2) authorize LUBA to remedy minor oversights and imperfections in local government land use decisions, but do not permit or require LUBA to assume the responsibilities assigned to local governments, such as the weighing of evidence, the preparation of adequate findings and the interpretation of comprehensive plans and local land use regulations. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

1.7 Administrative Law – Evidence Which Clearly Supports. Evidence which establishes there are markets for farm products from the subject property, but does not address whether products of the proposed farm will "contribute substantially" to those markets, agricultural processors and the local agricultural economy does not "clearly support" a determination that the proposed farm use satisfies a code standard requiring that "products from the farm unit contribute substantially to the agricultural economy, to agricultural processors and [to] farm markets." *Kunze v. Clackamas County*, 27 Or LUBA 130 (1994).

1.7 Administrative Law – Evidence Which Clearly Supports. Where there is conflicting expert testimony in the record, such evidence does not "clearly support" the challenged decision pursuant to ORS 197.835(9)(b). *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

1.7 Administrative Law – Evidence Which Clearly Supports. Where evidence in the record is conflicting, or provides a reasonable basis for different conclusions, such evidence does not "clearly support" the challenged decision under ORS 197.835(9)(b). *Waugh v. Coos County*, 26 Or LUBA 300 (1993).

1.7 Administrative Law – Evidence Which Clearly Supports. Where the relevant approval standards are subjective, it is less likely evidence will "clearly support" a decision that the approval standards are met under ORS 197.835(9)(b). *Waugh v. Coos County*, 26 Or LUBA 300 (1993).

1.7 Administrative Law – Evidence Which Clearly Supports. Where a county code provision requires that there be no other "feasible location" for a proposed use, county findings that do not explain *why* identified alternative sites are not "feasible locations" for the proposed use are impermissibly conclusory, and LUBA will remand the challenged decision unless "the parties identify relevant evidence in the record which clearly supports" the county's decision in this regard. *Simmons v. Marion County*, 25 Or LUBA 647 (1993).

1.7 Administrative Law – Evidence Which Clearly Supports. Where the challenged decision lacks adequate findings of compliance with a relevant approval standard, LUBA will not reverse or remand if the parties cite evidence in the record that "clearly supports" a determination of compliance with the standard. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

1.7 Administrative Law – Evidence Which Clearly Supports. Where the challenged decision does not include interpretations of relevant approval standards, and the provisions in question are ambiguous and capable of more than one sustainable interpretation, it is not possible for LUBA to determine, pursuant to ORS 197.830(9)(b), whether the evidence in the record "clearly supports"

the challenged decision. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

1.7 Administrative Law – Evidence Which Clearly Supports. The evidence cited by the parties does not "clearly support" a challenged local government decision where it is not clear what the relevant standards are or whether the proposed use is one allowed in the underlying zoning district. *Ruff v. Harney County*, 23 Or LUBA 521 (1992).

1.7 Administrative Law – Evidence Which Clearly Supports. Evidence that (1) people had expressed support for the proposed business, (2) there is no similar use in the particular community, and (3) some people want to utilize the services of the proposed use, does not "clearly support" a determination that there is a "public need" for the proposed use. *Ruff v. Harney County*, 23 Or LUBA 521 (1992).

1.7 Administrative Law – Evidence Which Clearly Supports. Evidence that soils on a particular parcel are not particularly good for farming does not clearly support a determination that a proposed nonresource dwelling will not materially alter the stability of the land use pattern of the area, or be incompatible or interfere with adjacent farm or forest uses. *Veach v. Wasco County*, 23 Or LUBA 492 (1992).

1.7 Administrative Law – Evidence Which Clearly Supports. The "evidence * * * which clearly supports the decision" standard of ORS 197.835(9)(b) imposes a higher evidentiary standard than the "substantial evidence" standard of ORS 197.835(7)(a)(C). *Friedman v. Yamhill County*, 23 Or LUBA 306 (1992).

1.7 Administrative Law – Evidence Which Clearly Supports. Testimony concerning a lack of land zoned for rural residential development does not "clearly support" a decision that there is a demonstrable need or market demand for land zoned for rural residential development, where the findings do not explain or justify the nature of the need to be served by the rezoning or the area used in analyzing need and market demand, and the record includes evidence of a significant amount of vacant land in the general area of the property to be rezoned that is already zoned for rural residential development. *Friedman v. Yamhill County*, 23 Or LUBA 306 (1992).

1.8 Administrative Law – Burden of Proof. For purposes of designating marginal lands under *former* ORS 197.247 (1991), it is not enough for an applicant to provide a list of the allegedly qualifying lots or parcels; the applicant must provide foundational evidence that the lots or parcels are lawful and that lots or parcels that were in common ownership on July 1, 1983, are not overcounted. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

1.8 Administrative Law – Burden of Proof. Where a local code provision requires that a requested zone change be justified by proof that "[t]he potential impact upon the area resulting from the change has been considered," a finding that "[n]o significant evidence was presented by the Applicant regarding the impact upon the area, and certainly nothing indicating that the impact would be minimal or positive," does not *impermissibly* shift the burden of persuasion to the applicant because the applicant has the ultimate burden of establishing that their application complies with applicable criteria. *Carroll v. City of Malin*, 80 Or LUBA 298 (2019).

1.8 Administrative Law – Burden of Proof. Where an environmental review framework includes an implicit assumption that development meeting certain disturbance thresholds will result in significant detrimental impacts to identified resources, it is the applicant's burden to establish that the development will *not* result in significant detrimental impacts, and arguments that the local government failed to find that the development would result in *significant* detrimental impacts provide no basis for reversal or remand. *Himmelberger v. City of Portland*, 79 Or LUBA 367 (2019).

1.8 Administrative Law – Burden of Proof. When petitioner disputes the findings of a hearings officer, the burden of providing sufficient evidence and showing the law was improperly applied lies with the petitioner. If the petitioner does not show the hearings officer erred, the decision will be affirmed. *Johnson v. City of Portland*, 78 Or LUBA 158 (2018).

1.8 Administrative Law – Burden of Proof. When an opponent provides evidence sufficient to rebut the presumption under ORS 215.130(10)(a) regarding the existence, continuity, nature and extent of the proposed nonconforming use, the applicant has the burden of demonstrating that the use proposed for verification has existed and continued in its current nature and extent from the date the use became nonconforming, or 20 years prior to the date of application, whichever date is applicable. *Morgan v. Jackson County*, 78 Or LUBA 188 (2018).

1.8 Administrative Law – Burden of Proof. LUBA will deny a petitioner's challenges to a county board of commissioners' conclusion that a project application satisfies the county code requirement that "[s]ustained noise" generated from a building in which marijuana is grown "shall not exceed 30 dB(A)," based upon statements made in the applicant's engineers' report where petitioner argues the engineer reports failed to adequately describe the system as built, did not consider site-specific characteristics or address allegations that the odor control systems will generate noise in excess of 30 dB(A), but petitioner failed to point to any evidence in the record that calls into question the engineer's statements that the operation will not produce "sustained" noise that exceeds permissible levels. *King v. Deschutes County*, 77 Or LUBA 339 (2018).

1.8 Administrative Law – Burden of Proof. A hearings officer improperly shifts the burden of proof to opponents of a mine to prove that the source of dust that is alleged to have a "significant

impact" on adjacent farms emanates from a haul road that provides access to the mine, where the findings do not explain why the evidence that was submitted by the mine operator demonstrates that the source of the dust is not the haul road. *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301 (2016).

1.8 Administrative Law – Burden of Proof. A hearings officer improperly shifts the burden of proof to opponents of a mine to show that source of dust depicted in photographs of the mining area is from mining activities. It is the applicant's burden of proof to show that either the source of the dust depicted in the photographs is not from the mining activities, or that it can minimize or has minimized the dust from those activities so that the hearings officer can conclude that the mining activities do not significantly contribute to the cumulative dust problem in the protected viewshed. *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301 (2016).

1.8 Administrative Law – Burden of Proof. A county errs in discounting the testimony of farmer/opponents that a landfill operation causes significant changes or significant costs to their farm practices, for failure to quantify or specify the degree of impacts. While the county is free to give more weight to testimony that is quantified or more detailed over less quantified or detailed testimony, requiring opponents to quantify or specify the degree of impacts, while not requiring similar quantification or specification from the applicant, who has the burden of proof, effectively shifts the burden of proof to the opponents. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

1.8 Administrative Law – Burden of Proof. A land use regulation that assigns the burden of proof to the permit "applicant" does not require that "only the applicant" carry the burden of proof. Assigning the burden of proof to the applicant does not preclude other parties from presenting evidence and legal positions or preclude the decision maker from relying on such evidence. *Pacificorp v. Deschutes County*, 70 Or LUBA 89 (2014).

1.8 Administrative Law – Burden of Proof. A hearings official's expressions of misgivings about the quality of evidence submitted by an applicant do not mean the hearings officer required the applicant to meet an impermissible "absolute certainty" burden of proof. *Teen Challenge v. Lane County*, 67 Or LUBA 300 (2013).

1.8 Administrative Law – Burden of Proof. It is the local government that determines—either explicitly or implicitly—whether the party with the burden of proof has carried his or her burden of proof. A local government decision must conclude that the governing criteria are satisfied—presumably because the party with the burden of proof carried his or her burden. Once that decision is made, it is subject to LUBA review to determine whether the local government's decision is supported by substantial evidence. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

1.8 Administrative Law – Burden of Proof. A local code provision that provides that where a proposal will have significant impacts on an area, the proponent of the proposal may be required to submit more detailed and reliable evidence that the proposal will comply with applicable approval criteria than would otherwise be required in order for the county to approve an application with fewer impacts is consistent with *Fasano v. Washington Co. Comm.*, 264 Or 574, 586, 507

P2d 23 (1973), regarding the burden of proof in a quasi-judicial application for rezoning. *Tidewater Contractors v. Curry County*, 65 Or LUBA 424 (2012).

1.8 Administrative Law – Burden of Proof. An applicant bears the burden of proof to demonstrate that an application complies with applicable approval standards, and a local government is not required to approve a noncomplying development proposal, even if conditions of approval might be imposed that would render the proposal consistent with the applicable criteria. *Wilson v. Washington County*, 63 Or LUBA 314 (2011).

1.8 Administrative Law – Burden of Proof. It is generally the applicant's responsibility to anticipate a range of reasonable interpretations or approaches to demonstrating compliance with an approval standard, even if the approval standard is nonspecific and subjective, and to shape the evidence accordingly. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

1.8 Administrative Law – Burden of Proof. Where a local government finds that there is a lack of evidence that vacant buildable lands inside an urban growth boundary are available for development, the local government impermissibly avoids the burden placed on it by Goal 14 and the applicable administrative rules to demonstrate that additional land is needed inside the urban growth boundary for urban development. *Hildenbrand v. City of Adair Village*, 54 Or LUBA 734 (2007).

1.8 Administrative Law – Burden of Proof. The property owner has the burden of proof to establish that it qualifies for the statutory prohibition against nonconsensual annexation provided by Oregon Laws 1987, chapter 737, section 3. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

1.8 Administrative Law – Burden of Proof. A statement by a county commissioner during deliberations that opponents of the application have not presented proof to substantiate their assertion that the applicant has not complied with a mediated settlement does not demonstrate that the commissioner shifted the burden of proof from the applicant to the opponents, where the context of the statement makes it clear that the commissioner was simply discussing conflicting evidence on the issue. *Ray v. Josephine County*, 51 Or LUBA 443 (2006).

1.8 Administrative Law – Burden of Proof. Expert evidence that an enhanced wetland is very unlikely to attract species that would conflict with operation of an adjoining aggregate mine is substantial evidence to support a finding that the enhanced wetlands will not "adversely impact" the mine, notwithstanding conflicting evidence on that point and the fact that the applicant's expert could not guarantee no adverse impacts. *Cadwell v. Union County*, 48 Or LUBA 500 (2005).

1.8 Administrative Law – Burden of Proof. When an opponent below initiates a revocation hearing regarding a previously issued permit, the local government may place the burden of proof on that opponent rather than the permitee. *Stewart v. Coos County*, 45 Or LUBA 525 (2003).

1.8 Administrative Law – Burden of Proof. OAR 660-023-0180(4) does not change an applicant's evidentiary burden to demonstrate that measures proposed to minimize of the impacts

of mining are reasonable, practical and achievable. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

1.8 Administrative Law – Burden of Proof. Where LUBA and the Court of Appeals have already decided that local ordinance provisions require that an applicant for a lot line adjustment demonstrate that the proposed use of the property after the lot line adjustment is served by adequate public facilities and is compatible with comprehensive plan policies, a city may not interpret those same provisions in such a way as to relieve an applicant of that burden. *Robinson v. City of Silverton*, 44 Or LUBA 308 (2003).

1.8 Administrative Law – Burden of Proof. Provided the record demonstrates that the county recognized that the burden of proof remained with the applicant throughout the local proceedings, and that the county was obliged to review all of the evidence in the record to determine whether the applicant carried that burden, findings that *may* be read to shift the burden of proof to opponents do not provide a basis for reversal or remand. *Friends of Yamhill County v. Yamhill County*, 44 Or LUBA 777 (2003).

1.8 Administrative Law – Burden of Proof. Where a local variance provision imposes on the applicant the burden of establishing the nonexistence of alternatives to the variance, the local government errs in interpreting its code to impose on opponents the burden of establishing the existence, costs and consequences of alternatives. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

1.8 Administrative Law – Burden of Proof. Where LUBA cannot tell if the local government simply weighed conflicting evidence, or instead impermissibly rejected the opponent's evidence for failure to satisfy a nonexistent burden of proof, the local government's error in explicitly shifting the burden of proof to the opponents is not harmless. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

1.8 Administrative Law – Burden of Proof. Isolated statements in a land use decision are not sufficient to demonstrate that the decision maker improperly shifted the burden of proof where, viewed in context, it is clear that the burden of proof was placed on the appropriate party. *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001).

1.8 Administrative Law – Burden of Proof. The rebuttable presumption provided by ORS 215.130(10)(a) does not shift the applicant's ultimate burden of proof to demonstrate compliance with all applicable approval criteria. Where a party produces sufficient evidence of the continued existence of a nonconforming use for the prior 10-year period, the statute then shifts the burden of going forward with countering evidence to the county or any party opposing the nonconforming use. When sufficient evidence is produced showing that the nonconforming use was interrupted during some period, the applicant may no longer rely on the presumption with regard to that period of interruption. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

1.8 Administrative Law – Burden of Proof. An interpretation of a zoning ordinance that shifts the burden of demonstrating compliance with minimum lot size approval standards to opponents of the application is erroneous. *Wood v. Crook County*, 36 Or LUBA 143 (1999).

1.8 Administrative Law – Burden of Proof. Where the applicant bears the burden of demonstrating under a local provision that there is no reason to believe a potential hazard exists on the subject property, the absence of evidence regarding potential hazards on the property does not constitute substantial evidence of compliance with that provision. *Jebousek v. City of Newport*, 36 Or LUBA 124 (1999).

1.8 Administrative Law – Burden of Proof. A permit applicant with the burden of demonstrating compliance with an off-site odor standard may not rely on the lack of odor-based complaints in an earlier code enforcement proceeding to establish compliance with the odor standard, where the record includes testimony about possible off-site odor problems. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

1.8 Administrative Law – Burden of Proof. The applicant retains the burden of proof throughout the local process to demonstrate compliance with all applicable approval criteria. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

1.8 Administrative Law – Burden of Proof. A finding that petitioner did not present evidence showing that an approval criterion was not met does not demonstrate an improper shifting of the burden of proof from the applicant to the petitioner, where the decision maker's findings addressing the criterion also explain why the evidence that was submitted demonstrates that the approval criterion is satisfied. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998) (1998).

1.8 Administrative Law – Burden of Proof. A decision maker may review certain types of land use permit applications more stringently than others, provided the higher burden of proof is not attributable to bias or some other legally impermissible reason. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

1.8 Administrative Law – Burden of Proof. Under ORS 215.296(1), the applicant bears the burden to demonstrate that the proposed use will force no significant change in accepted farming practices or their cost, and the local government's findings must affirmatively explain why it believes there are no such significant adverse impacts. *Just v. Linn County*, 32 Or LUBA 325 (1997).

1.8 Administrative Law – Burden of Proof. Under ORS 215.296(1), the county may not assume from an absence of information in the record that there are no adverse farm impacts. The burden is on the county to identify and explain why it believes there are no significant adverse impacts and why it believes the cost of accepted farm practices would not be increased. *Brown v. Union County*, 32 Or LUBA 168 (1996).

1.8 Administrative Law – Burden of Proof. The proponent of a nonconforming use carries the burden to demonstrate the use was lawfully established and continued without interruption. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996).

1.8 Administrative Law – Burden of Proof. While it is the applicants' burden to demonstrate compliance with relevant approval criteria, if a local government determines an approval criterion

is not satisfied, it must adopt findings explaining why it believes the applicants failed to meet this burden. *Neuman v. Benton County*, 29 Or LUBA 172 (1995).

1.8 Administrative Law – Burden of Proof. A local governing body in considering an appeal of a planning commission decision approving a subdivision may not shift the burden of proof from the applicant to the opponents of the subdivision. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

1.8 Administrative Law – Burden of Proof. The protected right to continue a nonconforming use is a right to continue the nature and extent of use that existed at the time the use became nonconforming. The proponents of a nonconforming use have the burden of producing evidence from which a local government can make an adequate determination of the nature and extent of the nonconforming use. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

1.8 Administrative Law – Burden of Proof. The burden of showing an alleged nonconforming use was lawfully established at the time it became nonconforming rests with the proponent. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

1.8 Administrative Law – Burden of Proof. Where the local code requires that a proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding land, the applicant has the burden of identifying the relevant accepted farm and forest practices and producing evidence showing those practices will not be significantly changed or their costs significantly increased. *Lyon v. Linn County*, 28 Or LUBA 402 (1994).

1.8 Administrative Law – Burden of Proof. During the local proceedings, the applicant for development approval bears the burden of proof to establish its application satisfies relevant approval standards. Where the local government shifted that burden to opponents of the development application, the challenged decision must be remanded. *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994).

1.8 Administrative Law – Burden of Proof. Where the local code explicitly provides that a tie vote of the decision making body means the appealed decision of a lower level decision maker stands, the general rule that a tie vote of a decision maker amounts to a failure of the applicant to carry the burden of proof does not apply. *Derry v. Douglas County*, 28 Or LUBA 212 (1994).

1.8 Administrative Law – Burden of Proof. A finding stating there is no evidence in the record that a proposed conditional use will cause pollution, which simply describes the contents of the record, does not indicate the local government improperly shifted the burden of proof from the applicant to opponents. *Tucker v. Douglas County*, 28 Or LUBA 134 (1994).

1.8 Administrative Law – Burden of Proof. Even after an initial local government decision is made approving a permit application, and a local appeal is filed, the applicant has the burden of establishing that the proposal satisfies relevant approval standards. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

1.8 Administrative Law – Burden of Proof. A Public Works Department memorandum showing traffic counts, setting out accident history and making a conditional recommendation that a traffic study may be deferred is not sufficient to show the applicant carried its burden as a matter of law with regard to compliance with a code minimal adverse impact standard. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

1.8 Administrative Law – Burden of Proof. LUBA will not conclude a local government improperly shifted the burden of proof to those opposing a permit application, based on isolated statements in the challenged decision, where placing those isolated statements in context shows the burden of proof was not improperly shifted to opponents. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

1.8 Administrative Law – Burden of Proof. Applicants for approval to divide a 110-acre EFU-zoned parcel into 50- and 60-acre farm parcels fail to carry their burden of proof regarding a code standard requiring that the newly created parcels be of sufficient size to continue existing commercial agricultural enterprises in the area, where the applicants submit evidence concerning agricultural activity only on the property proposed to be divided. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

1.8 Administrative Law – Burden of Proof. More than the mere possibility of compliance with applicable standards is required to grant land use approval. However, it does not follow that the possibility that the additional development allowable under a requested comprehensive plan map amendment will violate an applicable standard is insufficient to provide a basis for denial of the request. It is the applicant's burden to establish compliance with all approval standards. *Ericsson v. Washington County*, 26 Or LUBA 169 (1993).

1.8 Administrative Law – Burden of Proof. Because an applicant for development approval bears the burden of proof in a local government proceeding, if the challenged local government's decision denies petitioner's request for zoning clearance, only one sustainable basis for the decision is required. *McPeek v. Coos County*, 26 Or LUBA 165 (1993).

1.8 Administrative Law – Burden of Proof. Where the challenged local government decision determines the applicant had no burden of proof in the local proceedings, the decision demonstrates the decision maker improperly shifted the burden of proof to the local appellants. *Derry v. Douglas County*, 26 Or LUBA 25 (1993).

1.8 Administrative Law – Burden of Proof. Although a local appellant may have the burden under local code provisions of demonstrating error in a lower local decision maker's decision, the *applicant* for permit approval retains the burden of proof concerning compliance with all applicable approval criteria throughout the local appeals process. *Mohler v. Josephine County*, 26 Or LUBA 1 (1993).

1.8 Administrative Law – Burden of Proof. To establish actual bias or prejudgment on the part of a local decision maker, the petitioner has the burden of showing the decision maker was biased or prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

1.8 Administrative Law – Burden of Proof. It is the applicant's burden to establish compliance with each relevant approval standard. Consequently, where the applicant fails to establish compliance with a single approval standard, a decision denying an application will be affirmed. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

1.8 Administrative Law – Burden of Proof. A local government finding that "there was no reliable evidence of" noncompliance with approval standards, read in context, is an evaluation of the state of the evidentiary record, and not an indication that the local government improperly shifted the burden of proof from the applicant for land use approval to opponents. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

1.8 Administrative Law – Burden of Proof. Although a local government is not required to discuss in its findings the evidence it does *not* rely on to support its decision, doing so may improve its chances of success on appeal to LUBA. LUBA will not read such findings as improperly shifting the burden of proof, where the findings read as a whole show the local government was only trying to demonstrate that it considered all relevant evidence. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238 (1993).

1.8 Administrative Law – Burden of Proof. Where applicants wish to establish the scope of a nonconforming use, they have the burden of producing evidence from which the local decision maker can determine the scope of the nonconforming use. If applicants present nonspecific information, they run the risk that reasonable people, including the local decision maker, will disagree with them concerning the scope of the nonconforming use. *Warner v. Clackamas County*, 25 Or LUBA 82 (1993).

1.8 Administrative Law – Burden of Proof. An allegation that the county planning commission referred to petitioner during the local appeal proceedings as the "applicant," rather than the appellant, does not establish that the local government impermissibly shifted the burden of proof from the applicant to petitioner. *Columbia River Television v. Multnomah County*, 24 Or LUBA 82 (1992).

1.8 Administrative Law – Burden of Proof. Findings which indicate the local1 government believed the applicants submitted sufficient evidence to support a conclusion that the relevant approval standards were met, and that petitioners did not present evidence adequate to undermine that conclusion, reflect a correct understanding of the applicants' burden of proof. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

1.8 Administrative Law – Burden of Proof. Petitioner does not have a burden to establish that the proposed UGB amendment will conflict with the adjoining inventoried Goal 5 resource, rather it is the applicant's burden to establish no conflicts will result from the proposed UGB amendment. *ODOT v. City of Newport*, 23 Or LUBA 408 (1992).

1.8 Administrative Law – Burden of Proof. The applicant for comprehensive plan and zone map amendments has the burden of establishing compliance of the proposed amendments with the applicable approval standards. *Hess v. City of Portland*, 23 Or LUBA 343 (1992).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. ORS 197.835(2)(b) and OAR 661-01-0045(1) authorize LUBA to consider evidence outside the record where the proponent demonstrates that there are disputed allegations in the parties' briefs regarding the "unconstitutionality of the decision." However, where petitioners do not intend to argue that a city's decision is unconstitutional, but rather that the city erred in failing to comply with its city charter requirement for a vote, based on the city's reliance on a statute that petitioners believe unconstitutionally infringes on the city's charter authority, LUBA will deny petitioners' motion to take evidence because evidence on the constitutionality of a statute is not one of the bases for taking evidence outside the record under ORS 197.835(2)(b) and OAR 661-010-0045(1). *Renken v. City of Oregon City*, 78 Or LUBA 1070 (2018).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. In a motion to take evidence outside the record pursuant to OAR 661-010-0045(1), and (2)(a) and (c), petitioners' argument—that two city employees violated petitioners' rights under the privileges and immunities clause of the Oregon Constitution, and the equal protection clause of the 14th Amendment to the United States Constitution because the employees engaged in the "unequal" application of the applicable standards in processing two similarly situated planned unit development (PUD) projects—fails to demonstrate that the proffered evidence would concern "procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision" because petitioners do not allege that the final decision maker violated petitioners' constitutional rights. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. To succeed in a motion to take evidence outside the record and pursuant to OAR 661-010-0045(1), and (2)(a) and (c), regarding an alleged violation of petitioners' rights under the privileges and immunities clause of the Oregon Constitution, and the equal protection clause of the 14th Amendment to the United States Constitution, the movant must develop a legal theory and a set of factual assertions sufficient to allow LUBA to determine how consideration of the proffered evidence would "affect the outcome of the review proceeding." *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. It would be inconsistent with sound principles of judicial review, ORS 197.805, for LUBA to resolve a constitutional challenge to the procedure a city uses to approve an annexation, in a direct appeal of the city decision approving the annexation, when the same issue is pending before a circuit court in a writ of mandamus proceeding between the same parties, seeking to compel the city to approve the annexation under a different procedure. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. A petitioner's constitutional challenge to a city's denial of a business license fee exemption, in its appeal of a land use permit decision, is premature for two reasons. First, the challenged decision only requires business licenses, without specifying whether exemptions to the business license fee might apply. Second, because the city took the position at LUBA that it intended to deny the business license exemption, and the decision failed to include finding on that issue, the decision must be remanded for response findings. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. *Fasano v. Washington County*, 264 Or 574, 507 P2d 23 (1973), does not give a party an independent constitutional right to notice of a hearing in addition to a statutory or local code right to notice of a hearing. *Plaid Pantries, Inc. v. City of Tigard*, 60 Or LUBA 441 (2010).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Code procedures that distinguish between "Type II" permit decisions that can be made without an initial hearing, with an opportunity for affected persons to appeal to a *de novo* hearing, and "Type III" permit decisions that require an initial hearing, do not violate the privileges and immunities clause by granting "privileges" to participants of Type III proceedings that are denied Type II participants. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. A challenge to a city decision denying building permits under the city's sign ordinance is necessarily viewed as an "as-applied" challenge rather than a facial challenge, because the challenged decision is not the enactment of an ordinance by lawmakers, but rather the enforcement of the ordinance by executive officials. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Even in the context of an "as-applied" constitutional challenge, LUBA's scope of review is not limited to the code provisions directly applied to the petitioner. Depending on the type of constitutional challenge, petitioner may cite to portions of legislation not directly applied to petitioner and argue that the government's action is unconstitutional, because the legislative scheme under which the government acted includes impermissible distinctions. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Incremental impacts on a transportation facility attributable to a proposed development may support an exaction. *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. LUBA will uphold an exaction requiring the dedication of right-of-way where the city's findings demonstrate that the exaction is roughly proportional to the impacts caused by the development, including any benefits the development receives by virtue of the exaction. *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Where a city fails to establish a relationship between vehicular and nonvehicular impacts of a proposed development and a required dedication for sidewalks, the exaction is not supportable under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. A waiver of remonstrance to the formation of a local improvement district is not subject to the analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), because it, by

itself, does not result in the loss of property. *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. A city does not violate an applicant's right to due process by denying its request to cross-examine witnesses, where the local code provides no right of cross-examination and the applicant fails to explain why an alternative process offered by the city in place of cross-examination would be insufficient to protect the applicant's right to due process. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Where a city allows one party more time to present oral testimony during a land use hearing than is allowed another party, the unequal allocation of time will not constitute error so long as the city's decision explains the reason for the differentiation, there is an unlimited opportunity to submit written testimony, and the unequal allocation of time does not cause substantial prejudice. *Kane v. City of Beaverton*, 38 Or LUBA 183 (2000).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. An enumeration of alleged procedural irregularities, without analysis, does not amount to a reviewable claim of a constitutional violation. *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Where petitioner makes no distinction in his brief between state and federal constitutional issues, LUBA cannot consider his constitutional arguments. *Fence v. Jackson County*, 30 Or LUBA 265 (1995).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. Under Article IV, section 20, of the Oregon Constitution, a legislative act is limited to one subject, and that subject must be expressed in the act's title. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. There is nothing unconstitutional about providing only published notice of legislative rezoning. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

2.1.1 Constitutional Law – Oregon Constitution – Procedural Issues. It is reasonable for a county to adopt special procedures for application of new criteria to amended permit applications already reviewed by a county decision maker, in order to avoid undue delay in processing the amended applications while providing notice and a *de novo* hearing on the new criteria. Because such procedures have a rational basis, they do not violate Article I, section 20, of the Oregon Constitution (Equal Privileges and Immunities). *Eckis v. Linn County*, 19 Or LUBA 15 (1990).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Petitioner fails to establish a basis for reversal or remand under Article I, section 20, of the Oregon Constitution where there is no evidence that other city-approved applications for a zone change to residential are factually identical to his application. *Carroll v. City of Malin*, 80 Or LUBA 298 (2019).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A city council decision approving a subdivision that was not an amendment of the city's development code, was not adopted by ordinance, and was the result of a quasi-judicial, rather than legislative process, does not violate the prohibition in Article I, section 21, of the Oregon Constitution against laws that delegate the power to amend those laws to another entity. *Harra v. City of West Linn*, 77 Or LUBA 136 (2018).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. *Brown v. City of Medford*, 251 Or App 42, 47, 283 P3d 367 (2012), sets forth the two-part test that is applied to determine the constitutionality of an "exaction" under the Fifth Amendment of the U.S. Constitution. First, under *Nollan v. California Coastal Comm'n*, 483 US 825, 831-32, 107 S Ct 3141, 97 L Ed 677 (1987), the exaction must "substantially advance the same government interest that would furnish a valid ground for denial of the development permit." Second, under *Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309, 129 L Ed 2d 304 (1994), "the nature and extent of the exaction must be 'roughly proportional' to the effect of the proposed development." *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. To determine whether a local government's conditions of approval satisfy the *Nollan v. California Coastal Comm'n*, 483 US 825, 831-32, 107 S Ct 3141, 97 L Ed 677 (1987), "essential nexus" prong of the two-part test for assessing the constitutionality of a government exaction, the local government must show "(1) what interests would allow the [local government] to deny [the applicant's proposed land] partition, and (2) how the exaction would serve those interests." *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where a city has two separate criteria—a transportation impacts criterion, and a services and utilities criterion—both of which are generally concerned with achieving and maintaining an adequate and safe transportation system, and both criteria must be satisfied, a finding that one of those criteria is satisfied does not necessarily mean the other criterion is satisfied. In such a situation, simply because the city found no "traffic impacts" requiring mitigation under the traffic impacts criterion does not mean the city imposed an unconstitutional exaction when it required right-of-way dedication and street improvements as conditions of approval to satisfy the services and utilities criterion. It simply means the city applies the rights-of-way requirements through the services and utilities criterion, rather than the transportation impacts criterion. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. To determine whether "the nature and extent of the exaction is 'roughly proportional' to the effect of the proposed development" under *Dolan v. City of Tigard*, 512 US 374, 384, 391, 114 S Ct 2309, 129 L Ed 2d 304 (1994), "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and

extent to the impact of the proposed development." *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. As part of the "rough[] proportional[ity]" test under *Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309, 129 L Ed 2d 304 (1994), a hearings officer commits no error when he or she identifies and relies upon potential "sub-impacts" of a proposed development, including street infrastructure wear and tear, pollution and safety, which may not be readily quantifiable, in conjunction with a quantifiable motor vehicle trip generation analysis to determine whether the impacts of the proposed development are "roughly proportional" to the required right-of-way dedication. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. As part of the "rough[] proportional[ity]" test under *Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309, 129 L Ed 2d 304 (1994), although a local government's decision to compare the percentage of total trips in the area that can be attributed to the development proposal and the exaction's percentage of the total area of the subject property can be accused of comparing apples and oranges, that argument does not provide a basis for remand or reversal, because that criticism is possible in most cases where a *Dolan* "rough[] proportional[ity] analysis is required. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A waiver of remonstrance to the formation of a local improvement district (LID) is not subject to the constitutional exaction analysis because it, by itself, does not result in a loss of petitioner's property. Conditions of approval, such as a waiver of remonstrance, may be applied by a local government to ensure that a development proposal conforms to the applicable approval criteria or to ensure the enforcement of other local government regulations. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A code provision that requires the applicant for a wind energy facility to obtain the signature of residential landowners consenting to reducing a two-mile setback between the facility and residences violates the Delegation Clause, Article I, section 21, of the Oregon Constitution, because the signature requirement effectively allows neighbors to "veto" the application, for any or no reason, and without appeal or review. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. State constitutional provisions may be more protective than similarly worded federal constitutional provisions, and therefore that federal courts have interpreted the analogous federal constitutional provision more narrowly than state courts have interpreted the state constitutional provision has no bearing on the meaning of the state constitutional provision. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where a state constitutional provision resolves the controversy and provides the petitioner with a complete

remedy, LUBA should decline to reach issues under an analogous federal constitutional provision. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A county ordinance that allows a private residential landowner or a city council to unilaterally "waive" a two-mile setback from wind towers to a lesser distance, potentially to a zero setback, violates the Article I, section 21, delegation clause of the Oregon Constitution, because it authorizes an entity other than the county to determine whether there is a setback at all and if so the extent of that setback. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. In determining whether and how to sever a sign regulation that includes an unconstitutional content-based exemption, it is the court's understanding of legislative intent that guides that severance decision. Legislative intent may or may not have anything to do with the impact that severance might have or how many signs would be affected by competing severance options. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A court may consider post-enactment actions by the enacting body to try to determine how that enacting body would go about severing an unconstitutional sign regulation. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where a board of county commissioners adopted an ordinance repealing a content-based exemption to its sign regulations, rather than repealing the sign regulation altogether, a hearings officer considering local appeals of sign permit decisions governed by the old, unconstitutional version of the sign regulations properly considered the ordinance that amended the sign regulations in determining how to go about severing the unconstitutional sign regulations and applying them to the permit applications. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where free-standing signs are expressly prohibited by the applicable underlying zoning district, an unconstitutional content-based exemption in the sign regulations that would otherwise apply to allow free-standing signs in that zoning district provides no basis for allowing free-standing signs in that zoning district. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where sign regulations partially exempt regulated signs from underlying zoning requirements, including setback requirements, but the sign regulations are unconstitutional in their entirety due to a separate content-based exemption in the sign regulations, proposed signs must be denied if they violate setback requirements in the underlying zone because the exemption from those setback requirements is ineffective if the sign regulations are unconstitutional in their entirety. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Without a protected property interest to continued use of a particular access to an arterial, a property owner has no

takings claim under the Article I, section 18, of the Oregon Constitution or the Fifth Amendment to the United States Constitution when the Oregon Department of Transportation adopts a plan to close that access and require the property owner to use an alternative route to access to that arterial. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where the Goal 4 rule incorporates a definition in the Oregon Structural Specialty Code, the version of the Code in effect when the Goal 4 rule was adopted controls, not the Code as subsequently amended, to avoid running afoul of constitutional prohibitions on delegating legislative authority. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 443 (2011).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. To advance a facial challenge under the Takings Clause of the Oregon Constitution to an ordinance that allegedly requires an uncompensated physical invasion of private property and acquisition of a property easement, a petitioner need not demonstrate that the mere enactment of the ordinance effects a physical invasion or acquisition of property. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. An ordinance requiring that developers of residential property near an airport grant the airport an uncompensated "avigation easement" that allows the airport to subject the property to noise, vibrations, fumes, dust and fuel particle emissions is facially inconsistent with the federal and state Takings Clauses, because the easement does not advance the governmental interest in reducing land use conflicts between the airport and surrounding residential uses. Under the easement, the conflicts will exist to the same degree; the only arguable effect is to make it more difficult for the property owner to advance a successful inverse condemnation or other legal action against the airport. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. LUBA will not consider a petitioner's assignment of error that the county's more favorable treatment of other applicants for partition approval violates his right to equal privileges and immunities under Article I, section 20, of the Oregon Constitution, where LUBA is sustaining another assignment of error that does not raise a constitutional issue and would require remand for approval without the disputed conditions of approval in any event. *Sperber v. Coos County*, 60 Or LUBA 44 (2009).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The single-subject requirement of Article IV, section 20, of the Oregon Constitution limits every legislative act to one subject and renders the act void with respect to any subject embraced in the legislation that is not expressed in the title. ORS 197.522, which was adopted as part of an act the subject of which is "moratorium on land development," runs afoul of the single-subject requirement to the extent it is interpreted to apply to development permits outside the context of a declared or de facto moratorium. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. That ORS 197.522 was not intended to apply to development permits outside the context of a declared or de facto moratorium is supported by the legislative history of the bill that enacted it, which indicates that the legislative discussion was focused exclusively on amending the moratoria statutes and included

no suggestion that the legislature contemplated that the section codified at ORS 197.522 should be applied outside the context of a moratorium. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The arbitrary application of facially neutral laws could constitute a violation of Article I, section 20, of the Oregon Constitution, but showing that a local government has treated different applications differently falls far short of demonstrating such a violation, particularly when there are factual differences in the applications that could easily explain the different treatment. *Sperber v. Coos County*, 58 Or LUBA 570 (2009).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where a local ordinance that restricts the size of all electronic signs except those operated by government agencies as public signs is not concerned with the content of the messages being displayed on the electronic signs, under Article I, section 8, of the Oregon Constitution, the ordinance is a content neutral restriction on speech that is a reasonable time, place and manner restriction. *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295 (2007).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. In the absence of evidence in the record indicating that a local government is allowing certain private parties to use government signs to display private commercial messages and that use results in discrimination against particular speakers, no violation of Article I, section 20, of the Oregon Constitution has occurred. *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295 (2007).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where a local government's only claimed basis for imposing an exaction that requires off-site road improvements is that a subdivision would otherwise violate a code standard regarding street system impacts, and LUBA finds that the local government has not established that the subdivision would violate the code standard, there is also no basis to impose the exaction. *PacWest II, Inc. v. City of Madras*, 53 Or LUBA 241 (2007).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where statutes grant a triple majority of property owners in an area to be annexed the unilateral right to consent to the proposed annexation, and thereby make an election in the area to be annexed unnecessary, but do not grant a similar unilateral right to resident electors who do not own property, the resident electors constitute a true class for purposes of considering whether those statutes violate Article I, section 20. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. For purposes of an Article I, section 20, challenge to statutes that grant privileges to some classes and not to others, suspect classifications are not necessarily limited to classifications based on immutable characteristics, but the class of voters who do not own property is not a suspect classification. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Because the triple majority method of annexation does not discriminate based on a suspect classification, it need only

bear a rational relationship to a legitimate state purpose. The classification involved in the triple majority method of annexation is rationally related to a legitimate state purpose. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. There is no right under either the federal or Oregon constitution to vote on questions of incorporation or annexation. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where a right to vote in a general election is extended by statute, any classification restricting that franchise on grounds other than residence, age, and citizenship must be shown to serve a compelling state interest. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. In analyzing annexation statutes, if those statutes are viewed as restricting a statutory right to vote, strict scrutiny is generally applied under the Equal Protection Clause; but if those statutes are viewed as merely presenting alternative annexation methods, where some provide for elections and some do not, rational basis scrutiny is generally applied under the Equal Protection Clause. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The more clearly and cleanly statutes that authorize different annexation methods segregate the annexation methods that do not require elections from those that do, the more likely the statutes will not be subject to strict scrutiny as statutes that restrict voting rights. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. When statutes do not make it clear at the time an annexation is initiated whether the annexation will ultimately be subject to an election before the annexation can take effect, or the statutes appear to grant a right to vote on an annexation but also allow the election to be foreclosed at some later point in the annexation process, those statutes are likely to be subject to strict scrutiny under the Equal Protection Clause as statutes that restrict voting rights. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The right to an election that ORS 222.111(5) grants is not an absolute right. There is no right to vote in health hazard, double majority, island or triple majority annexations. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Unlike annexation statutes that have been subject to strict scrutiny and found to violate the Equal Protection Clause as an improper restriction on voting rights, the triple majority method of annexation authorized by ORS 222.170(1) does not have the have the legal effect of "nullifying a vote," "preventing an election" or "halting an election." ORS 222.170(1) simply makes an election unnecessary; it does not foreclose an election or prohibit the city from submitting the proposed annexation to the voters in the territory to be annexed, notwithstanding that a triple majority of the property owners in the

territory to be annexed consent to the annexation. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. ORS 222.750, which allows a city to annex an "island" of territory without consent or a vote of the residents or landowners within the island, does not distinguish between classes of persons based on a "suspect" classification, for purposes of Article I, section 20 (Privileges and Immunities), of the Oregon Constitution. Therefore, the statute must be upheld if the differential treatment between persons residing or owning property within such islands and those residing or owning property in other types of unincorporated territory has a "rational basis," *i.e.*, bears some relationship to a legitimate end. *Kane v. City of Beaverton*, 49 Or LUBA 512 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Reducing jurisdictional confusion and administrative and service inefficiencies created by "islands" of unincorporated territory surrounded by a city are legitimate legislative ends. A statute that makes it easier to incorporate such islands by eliminating the requirement to obtain the consent or electoral majority of residents or landowners within such islands furthers those legislative ends, and therefore the statute survives rational basis scrutiny under Article I, section 20 (Privileges and Immunities), of the Oregon Constitution. *Kane v. City of Beaverton*, 49 Or LUBA 512 (2005).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The initiative powers reserved to the people under Oregon Constitution Article IV, section 1(5), are limited to "legislative" matters, and do not include "administrative" matters. An initiative that is directed at or has the effect of overturning a previous administrative or adjudicative decision is itself administrative in nature and thus beyond the electorate's Article IV, section 1(5), powers. *Port of Hood River v. City of Hood River*, 47 Or LUBA 62 (2004).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. An initiative that effectively rezones a single property in unified ownership involves an "administrative" matter rather than "municipal legislation" and is therefore beyond the electorate's Article IV, section 1(5), powers. *Port of Hood River v. City of Hood River*, 47 Or LUBA 62 (2004).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A broad and poorly defined sign code prohibition on "billboards" does not necessarily require inquiry into the content of signs or allow content-based distinctions where, as interpreted by the city, the code allows or prohibits all signs, including "billboards," based on specific standards that do not require inquiry into the content of proposed signs. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A poorly defined code prohibition on "billboards" is not unconstitutionally overbroad when, read in context, it is subject to a narrowing construction that clarifies the meaning of "billboard" and the precise scope of the prohibition. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. An argument that a sign code definition of "image" impermissibly distinguishes between content because it regulates representational images but not abstract images does not provide a basis for reversal or remand,

where nothing in the sign code narrows the scope of the term "image" to exclude abstract or non-representational images. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. In the absence of a content-neutral way of distinguishing wall murals from other types of signs, a city's regulatory choice lies between deregulating signs altogether or regulating murals along with signs. A city's choice to regulate murals along with signs does not violate Article I, section 8, of the Oregon Constitution, where graphic expression by muralists is burdened only to the same extent as other types of constitutionally protected expression. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A city's failure to address subjective language in a sign code criterion does not provide a basis for reversal or remand, where the petitioner also argues that applying that code language to approve or deny a sign application would be inconsistent with Article I, section 8, of the Oregon Constitution. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. That the record does not contain evidence of the specific content of proposed billboards does not indicate that a city's denial of the billboards was not content-based, where the city's sign ordinance defines permitted signs by content, the city denied the proposed signs because they were not among the types of signs allowed by the ordinance, and the city's denial reflects a belief or assumption about the types of speech the proposed billboards would not include. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A sign ordinance that defines and regulates six permitted types of signs, and implicitly prohibits all others, necessarily requires inquiry into the content of the proposed sign in order to determine which if any of the six permitted categories and six different sets of standards apply. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. While distinction between "off-premises" and "on-premises" signs is not necessarily a content-based distinction in violation of Article I, section 8, of the Oregon Constitution, a sign ordinance that allows some types of off-premises speech and prohibits others necessarily distinguishes between speech based on content, and is therefore inconsistent with Article I, section 8. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A sign ordinance that impermissibly allows certain types of speech while prohibiting other types of speech based on content in violation of Article I, section 8, of the Oregon Constitution may also, for the same reason, violate the equal privileges and immunities clause under Article I, section 20. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. An evidentiary proceeding before LUBA is not warranted to consider evidence that the petitioner has installed "light emitting diodes" on an existing sign in order to engage in constitutionally protected speech,

where the question of whether petitioner's installation is constitutionally protected speech is a legal conclusion, not an assertion of fact. *Meredith v. Lincoln County*, 44 Or LUBA 821 (2003).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A petitioner's claim that a variance applicant received favorable treatment by the city provides no basis for concluding that the local government thereby improperly extended a "privilege or immunity" to the applicant under Article I, section 20, of the Oregon Constitution, where petitioner does not allege that she or any other variance applicant were denied similarly favorable treatment. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The fact that a city approved billboards 20 years ago under a very different regulatory scheme than the current one has little bearing on whether the city violated petitioner's state and federal constitutional rights in denying its application for a billboard under current regulations. Absent a showing of similarity between the old and new regulatory schemes, evidence of prior approvals does not demonstrate that a city acted arbitrarily or extended privileges to others that were denied to petitioners, and consideration of extra-record evidence under OAR 661-010-0045 is not warranted. *West Coast Media v. City of Gladstone*, 43 Or LUBA 659 (2003).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A city decision concluding that applying local sign ordinance criteria to deny a sign permit would violate Article I, section 8, of the Oregon Constitution is inadequate, where the findings do not identify what aspects of the local sign ordinance the city believes would be found to be unconstitutional or explain why the city believes it would be unconstitutional to apply the sign ordinance. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where an application for city approval of a sign that is larger than allowed by city sign standards does not meet the city's criteria for approval of such larger signs, a city may not cite constitutional concerns and approve the request for a larger sign without (1) adopting a reviewable decision that explains what constitutional provisions the city believes would be violated and why, and (2) explaining why the appropriate remedy in that circumstance would not be to deny the request until constitutional provisions for allowing such larger signs are adopted. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Although the basic thrust of Article I, section 18, of the Oregon Constitution is the same as the federal Takings Clause, the two provisions are not necessarily identical. Absent particular arguments based on Article I, section 18, LUBA will not consider claims under the state constitution that are based solely on federal takings jurisprudence. *Carver v. City of Salem*, 42 Or LUBA 305 (2002).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Eliminating a quasi-judicial UGB amendment process for housing, while providing such a process for nonhousing needs, does not violate petitioner's rights under either the Equal Protection Clause of the US Constitution or the Privileges and Immunities clause of the Oregon Constitution, where petitioner's housing developer members are not a suspect class, and the local government's distinction between

housing and nonhousing UGB amendments is rationally related to a legitimate government purpose. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Comments by one local government decision maker expressing frustration at the perceived burdens created by a statute promoted by petitioner is insufficient to establish that the local government, in adopting a legislative amendment to the local government's plan and code that is adverse to petitioner's interests, impermissibly retaliated against petitioner for exercising its free speech and other constitutional rights. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Determining whether a statute violates the Contracts Clause, Article I, section 21, of the Oregon Constitution, requires two steps: (1) determining whether a contract exists to which the party asserting impairment is a party; and (2) determining whether the statute impairs the obligations under that contract. In making the required determinations under the Contracts Clause, LUBA applies standard principles of contract law. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Because a letter from city planning director and county memorandum setting out circumstances surrounding a compromise is not sufficient to establish an agreement between the parties establishing rights and obligations, the Contracts Clause, Article I, section 21, of the Oregon Constitution, is not applicable. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The remedies clause, Article I, section 10, of the Oregon Constitution, allows the state to alter or abolish a cause of action, so long as an injured party is not left entirely without a remedy. The remedy need not be of precisely the same type, as long as the remedy is a substantial one. *Hale v. Port of Portland*, 308 Or 508, 523, 783 P2d 506 (1989). *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Even if immunity provisions of ORS 467.131 and 467.133 violate the remedies clause, Article I, section 10, of the Oregon Constitution, that infirmity does not implicate the limited preemption provisions of ORS 467.136 or the total preemption provisions of ORS 166.170 through 166.176. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A land use regulation that makes no reference to protected speech is analyzed under the third of the categories set out in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), to determine whether, as applied, the regulation impermissibly burdens the applicant's right of free speech under Article I, section 8, of the Oregon Constitution. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. If the real reason a city council denied an adult video store owner's request for a conditional permit for extended

operating hours was the city council's opposition to the nature of the business, rather than its finding that the request did not satisfy relevant approval criteria, it would necessarily follow that the city's decision violates Article I, section 8, of the Oregon Constitution. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A city's denial of an existing adult video store's application for a conditional use permit for extended operating hours to allow 24-hour operation does not violate Article I, section 8, of the Oregon Constitution, where (1) the conditional use approval criteria are not directed at protected speech, (2) the city's decision is supported by adjudicative findings that the effects that are proscribed by the conditional use criterion would result if the permit were granted, and (3) the city's decision is supported by substantial evidence. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A city council decision that has the effect of requiring petitioner to produce a traffic study with larger geographic scope than that required by city staff does not violate the privileges and immunities clause of the Oregon Constitution, absent a further showing that the city council has in fact imposed the traffic study requirement in a manner that discriminates against petitioner and in favor of others. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472 (2000).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. OAR 660-012-0060 does not require that a local government impose exactions to ensure that impacts from a plan amendment do not violate Transportation Planning Rule Level of Service requirements. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Compliance with OAR 660-012-0060 does not deprive a property of all beneficial use, where the current comprehensive plan and zoning designations allow a range of uses that may generate any amount of traffic and are not subject to the rule. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A zoning ordinance that lacks provisions governing signs and that is nevertheless applied to evaluate whether a proposed billboard is an accessory use to industrial and commercial uses allowed in the relevant zone is not subject to facial challenge under Article I, section 8, as an ordinance directed at the content of speech or as a content-neutral ordinance that expressly prohibits speech. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A zoning ordinance that is not directed at the content of speech and does not expressly prohibit speech may be challenged under Article I, section 8, only on an as-applied basis. To prevail, an as-applied challenge to a decision denying a proposed billboard because it is not an accessory use to uses allowed in an industrial and commercial zone must demonstrate that the decision burdens the applicant's rights of free expression without a rational basis for doing so. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A local government may constitutionally distinguish between signs related to on-premises uses, and signs related only to off-premises uses or services, and deny a proposed billboard because it is unrelated to the primary use of the property, where the city's evaluation of the relationship between the sign and the premise does not entail a content-based distinction, and the on-premises/off-premises distinction is a rational means to preserve the zone for allowed uses. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A local government does not impermissibly favor commercial speech over noncommercial speech because it allows signs related to on-premises uses in an industrial and commercial zone and prohibits all others. That signs related to on-premises commercial uses are allowed while unrelated commercial and noncommercial signs are prohibited is an incidental consequence of the permissible distinction drawn between signs related to on- and off-premises uses. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A facial "takings" challenge of a mandatory public acquisition ordinance, while not subject to the "ripeness" requirement, must nevertheless demonstrate that the ordinance would "take" petitioner's property and that the taking would be uncompensated. *Nike, Inc. v. City of Beaverton*, 35 Or LUBA 57 (1998).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The key to determining whether an approval standard is unconstitutionally vague is whether a reasonable applicant could understand what must be done to comply with the standard. *Holland v. City of Cannon Beach*, 34 Or LUBA 1 (1998).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where the accumulation of sand on petitioner's beachfront property is caused by time and nature, and not city's sand removal regulations, denial of petitioner's permit request to remove the sand does not fall within the "physical invasion" category of takings cases. *Beta Trust v. City of Cannon Beach*, 33 Or LUBA 576 (1997).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Article I, section 20, of the Oregon Constitution does not prohibit a county from limiting park ownership in EFU zones to fee owners because such a classification is not closed to petitioner nor is it based on antecedent personal or social status or characteristics. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. There is no violation of the right to equal privileges and immunities under Article I, section 20, of the Oregon Constitution or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution in applying a code provision to deny an absentee landowner permission to remove a tree, where the code does not create a separate classification for absentee landowners and the record does not show that any of the applications previously denied by the city were submitted by absentee landowners. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. In order to claim inequality of treatment as a class, petitioner must be a member of a true class whose disparate treatment is by virtue of characteristics they have apart from the law in question. A local code provision establishing criteria that must be met in specified circumstances to approve removal of a tree does not create such a true class. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The city's denial of a tree cutting permit does not result in an unconstitutional "taking" of the portion of petitioner's property defined by the "circumference and diameter of the foliage and surface of roots of the tree," where petitioner retains "some beneficial use" of the property and is left with "an economically viable use" of the property. The "rough proportionality" test of *Dolan v. City of Tigard*, 512 US 374 (1994), does not apply to land use decisions that merely limit the available uses of property. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. In adopting land use regulations, including emergency and temporary land use regulations, a city is bound by the substantive and procedural requirements established by ORS 197.610 and Statewide Planning Goals 1 and 2. These statutory and Goal requirements must be followed notwithstanding contrary city charter provisions. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. LUBA will reject petitioners' claims that amendments to the city zoning ordinance are "class legislation" that violates certain property owners' right to equal privileges and immunities under Article I, section 20, of the Oregon Constitution where any property owner may bring itself, on equal terms, within the "favored class." *Downtown Community Assoc. v. City of Portland*, 32 Or LUBA 1 (1996).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. To establish a privileges and immunities violation under Article I, section 20, of the Oregon Constitution, a petitioner must prove: (1) denial of a privilege granted to others; (2) membership in a true class, and (3) the legislative classification has no rational basis. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A condition requiring an applicant for site plan approval for a fast food restaurant to design street improvements for hundreds of feet beyond the subject property boundaries does not meet the "rough proportionality" test established in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994). *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994), and *J.C. Reeves Corp. v. Clackamas County*, 131 Or App 615, 887 P2d 360 (1994), findings in support of a condition requiring an applicant for site plan approval for a fast food restaurant to construct certain street and frontage improvements must compare traffic and other effects of development to required improvements. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. That a local code's definition of the term "taking" neither accurately nor completely reflects the opinions of appellate courts and LUBA regarding what constitutes a "taking" of private property for public use under the Fifth Amendment to the U.S. Constitution or Article I, section 18, of the Oregon Constitution provides no basis for reversal or remand, where the term "taking" is not used elsewhere in the code. *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. That a local government determined a particular development is a "motel" and, therefore, is not subject to the restrictions on transient occupancy of dwelling units otherwise applicable under local ordinance, does not confer on that development any privilege not generally available to other similarly situated establishments, in violation of Article I, section 20, of the Oregon Constitution. *Kaady v. City of Cannon Beach*, 27 Or LUBA 464 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. City and county ordinances requiring that owners of certain unincorporated property either annex or sign a consent to annexation before receiving sewer connection permits do not improperly infringe on such property owners' statutory right to vote on annexations. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Ordinances requiring consents to annexation as a condition of receiving sewer service do not improperly coerce property owners to give up their right to vote on annexations simply because an objecting property owner may be forced to pay a LID benefit assessment for the cost of extending sewer service which the objecting property owner does not wish to receive. Any such benefit assessments may be challenged on that basis in a proper forum and will either be invalidated or sustained. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A condition of approval requiring elimination of a one-foot "spite strip" separating a new street serving a subdivision from the adjoining property is reasonably related to the impacts of the proposed subdivision and, therefore, does not effect an unconstitutional "taking" under either the United States or Oregon Constitution. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where the local code prohibits residential, but not commercial or industrial, development in certain wetlands, and includes density transfer provisions for residential developments limited by wetlands, but not for commercial or industrial developments, there is a rational basis to justify the disparate code treatment of residential versus commercial or industrial developments. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where a proposed subdivision will add traffic to an abutting arterial street, although direct access to the subdivision will be provided by local streets, a local government approval condition requiring that the developer construct sidewalks, storm sewers and other frontage improvements along the portion

of the arterial abutting the subdivision is reasonably related to the impacts of the proposed subdivision and is not an unconstitutional taking. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Vague approval standards in a local code will not be found to violate the Oregon Constitution's guarantee of equal privileges and immunities unless a petitioner demonstrates that such approval standards have in fact led to a policy unlawfully discriminating in favor of some persons against others. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where the challenged decision concerns the application of zoning regulations that limit the permissible uses of the subject property, rather than zoning decisions made in contemplation of eventual acquisition of the subject property for public use, there is no unconstitutional taking if the decision allows petitioner "some beneficial use" of the property. *Stern v. City of Portland*, 26 Or LUBA 544 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The legal analyses applied to vagueness and overbreadth challenges under both the United States and Oregon Constitutions are essentially the same. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. That a condition of approval contains an ambiguous term does not, of itself, establish the condition is unconstitutionally vague. Rather, some ambiguity is tolerated where the ambiguous language of a condition is circumscribed by reference to specific, non-vague regulations. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The issue in determining whether a condition of approval is unconstitutionally vague is whether a reasonable applicant could understand what must be done to comply with the condition. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Unconstitutional overbreadth refers to legislative action having a sweep so broad that it unreasonably limits constitutionally protected activity. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where petitioners do not challenge findings that a condition of approval is reasonably related to mitigation of impacts associated with the particular development proposal, petitioners fail to establish the challenged action is overbroad. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Article I, section 8, of the Oregon Constitution forbids the passage of any law absolutely and directly restraining free expression. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A condition of permit approval that prohibits remonstrance against the formation of an LID, but does not proscribe other kinds of objections to an LID, only limits the manner in which expression may be exercised and does not directly and absolutely restrain the exercise of free expression in violation of Article I, section 8, of the Oregon Constitution. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. In Oregon, waiver of a constitutional right is uniformly held to be the voluntary relinquishment of a known right. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Petitioner's claim that his business was treated differently from another business, in violation of Article I, section 20, of the Oregon Constitution, because the other business was granted an "exemption" from a restrictive ordinance requirement, provides no basis for reversal or remand of the challenged decision where the decision does not purport to grant an "exemption" to any business. *Kaady v. City of Cannon Beach*, 26 Or LUBA 424 (1994)

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A condition of partition approval requiring that three existing driveways presently serving property to be partitioned be consolidated into a single driveway does not "take" a cognizable property interest, within the meaning of the Fifth Amendment to the U.S. Constitution or Article I, section 18, of the Oregon Constitution. Such a condition simply requires that a property owner exercise the property right of access differently. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where there is a reasonable relationship between the development potential of a parcel to be divided and the impacts reasonably attributable to the divided parcel on the one hand, and the city's need to respond to legitimate traffic concerns on the other, and it would be more difficult to address such concerns when there are three parcels rather than a single parcel, notwithstanding the lack of current plans to develop the property further, a condition requiring consolidation of existing driveways is appropriate. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Because a constitutional taking claim is not dependent upon a local government's adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. While a local government is not obliged to respond to a taking claim raised during the local proceedings, the local government should, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should have the opportunity to adopt an interpretation that is constitutional. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The purpose of the requirement under applicable federal and state constitutions that a "taking" claim be ripe, is to allow the reviewing body to know the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. That petitioners believe a local government will deny proposed development because it does not meet various approval standards, does not excuse petitioners from giving the local government the opportunity to make that decision for itself. Petitioners must make a good faith application for at least some of the conditional uses allowed in the applicable zoning district before a taking claim is ripe for review. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where a petitioner has been denied permit approval, but has failed to seek approval of other allowable uses or seek a plan amendment or statewide planning goal exception, the petitioner's regulatory taking claims under the United States and Oregon Constitutions are not ripe for review. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Under Article I, section 18, of the Oregon Constitution, a land use regulation must allow a property owner some substantial beneficial use of his property, but there is no generally applicable right under that section to construct a dwelling on one's property. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Under Article I, section 18, of the Oregon Constitution and *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978), a landowner must be compensated where land use regulations which designate his property for public use or public acquisition "inflict virtually irreversible damage." However, the "inflict virtually irreversible damage" test does not apply to other types of land use regulations which do not designate property for public use or public acquisition. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A taking claim brought under the "inflict virtually irreversible damage" test articulated by the Oregon Supreme Court in *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978), is not excused from the ripeness requirement. *Young v. Clackamas County*, 24 Or LUBA 526 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. LUBA will not presume it would be futile for petitioners to apply for a comprehensive plan amendment and zone change to make their taking claim ripe for review. *Young v. Clackamas County*, 24 Or LUBA 526 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. In order for petitioners' claims under Article I, section 8, of the Oregon Constitution and the Fifth Amendment to the United States Constitution, that their property was taken by a local government without just

compensation, to be ripe for review, petitioners must show that listed permitted uses cannot be established on the subject property and that they were refused a plan and zone change and approval for other listed conditional uses. *Young v. Clackamas County*, 24 Or LUBA 526 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A local government's implementation of exclusive farm use zoning is not the equivalent of imposing a statutory conservation easement. *Young v. Clackamas County*, 24 Or LUBA 526 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Both the Oregon and U.S. Constitutions require that there be a "reasonable relationship" between a challenged condition of approval and the impacts of, or needs generated by, the proposed development. *Sherwood Baptist Church v. City of Sherwood*, 24 Or LUBA 502 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Because a constitutional taking claim is not dependent upon a local government's adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. While a local government is not *obliged* to respond to a taking claim raised during the local proceedings, the local government should, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should at least have the opportunity, if possible, to adopt an interpretation that is constitutional. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. The purpose of the requirement under applicable federal and state constitutions that a "taking" claim be ripe, is to allow the reviewing body to know the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. That petitioners believe a local government will deny proposed development because it might not meet various approval standards, does not excuse petitioners from giving the local government the opportunity to make that decision for itself. Accordingly, petitioners must make a good faith application for at least some of the conditional uses allowed in the underlying zoning district before a taking claim is ripe for review. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. An evidentiary hearing at LUBA will not be allowed to show that many, but not all, conditionally permitted uses listed in the applicable zoning district are economically infeasible, where petitioners do not argue that it would have been futile to apply for approval of the other conditionally permitted uses. Under these circumstances, the evidence petitioners seek to introduce would not establish an unconstitutional "taking." *Larson v. Multnomah County*, 24 Or LUBA 591 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where a petitioner alleges a land use decision results in a taking under Article I, section 18, of the Oregon Constitution, but relies entirely on arguments advanced in support of allegations that the decision constitutes a taking under the Fifth Amendment of the U.S. Constitution, LUBA will limit its review to petitioner's federal taking claim. *Nelson v. Benton County*, 23 Or LUBA 392 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where petitioner seeks to establish through an evidentiary hearing that all nonresidential uses allowed outright or conditionally under the existing zone are not economically feasible on the subject property, but has not sought approval of a plan and zone map amendment which would allow residential development of the subject property, petitioner's state constitution taking claim is not ripe for adjudication and petitioner's motion for evidentiary hearing will be denied. *Dority v. Clackamas County*, 23 Or LUBA 384 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Under both the Oregon and Federal constitutions, taking claims must be ripe for adjudication before LUBA may review their merits. Where petitioners did not seek any form of administrative relief from the applicable regulations, and did not seek either a variance or a plan and zone map change, petitioners' taking claims are not ripe. *Schoppert v. Clackamas County*, 23 Or LUBA 138 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Petitioner's unsupported assertions that the subject parcel is not suited for any use other than a nonresource dwelling are not a sufficient basis for excusing petitioner from the requirement that he seek approval for other uses potentially allowed under the applicable zone before pursuing a taking claim under the Oregon or United States Constitution. In any case, a petitioner is required to seek quasi-judicial plan and zone map amendments prior to pursuing a taking claim. *Joyce v. Multnomah County*, 23 Or LUBA 116 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A local code criterion requiring that a request for land use approval be in the "public interest" does not require that the local government determine whether denial of the request would constitute a taking of private property without just compensation in violation of Article I, section 18, of the Oregon Constitution or the Fifth Amendment to the U.S. Constitution. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Because a local government is not required to consider whether denying a request for land use approval would constitute an unconstitutional taking of private property without just compensation, a local government's findings on such constitutional issues provide no basis for reversal or remand. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Unlike a local government, LUBA is specifically required by statute to consider arguments that a local government decision is unconstitutional and to reverse or remand an unconstitutional decision. Therefore, procedural errors a local government may have committed in considering constitutional

issues during local proceedings are harmless errors. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Zoning regulations limiting the allowable forest and nonforest uses of property located within a forest zone do not constitute a nuisance or physical invasion of such private property. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Under Article I, section 18, of the Oregon Constitution, private property is not impermissibly taken for public use without just compensation, so long as the landowner is allowed "some substantial beneficial use" of the property. *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 609, 581 P2d 50 (1978). *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. In view of the Oregon Supreme Court's explicit reservation of judgment concerning whether it will look to U.S. Supreme Court Fifth Amendment "takings" jurisprudence to further develop the appropriate tests to be applied in considering Article I, section 18, takings claims under the Oregon Constitution, LUBA will not do so. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where there is expert testimony in the record that the subject property can produce a net profit if properly managed for forest use, and the conclusion of the owner's expert that there is limited existing and future value in forest use of the property is based as much on deficiencies in forest management practices as on inherent limitations of the property, the landowners have a substantial beneficial use of their property. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where property was not legally partitioned until after the applicable zoning district was amended to limit dwellings to those necessary for and accessory to forest uses, and the property owners' predecessors in interest received notice of the zoning ordinance amendment, the owners may not fail to consider the uncertainty of receiving approval for a dwelling in agreeing to a purchase price and thereafter use the price of the property as a basis for contending their property has been unconstitutionally taken without compensation. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Petitioners must seek relief from application of a velocity flooding overlay designation to the subject property through the variance process provided in the local government's flood damage prevention ordinance, before they may obtain LUBA review of any constitutional "taking" claims. *Alexiou v. Curry County*, 22 Or LUBA 639 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Article I, section 18, of the Oregon Constitution requires that there be a "reasonable relationship" between a condition of approval and the impacts of or needs generated by the proposed development. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where a proposed larger building and paved parking area will increase the amount of impervious surfaces on the subject property and, therefore, runoff into an adjacent creek, there is a "reasonable relationship" between the proposed development and a condition requiring land along the creek to be dedicated for a planned greenway for management of storm water runoff. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where a significantly larger retail sales building and parking lot will accommodate larger numbers of customers and employees and their vehicles, there is a reasonable relationship between alleviating these impacts of the development and a condition requiring dedication of land for a pedestrian/bicycle pathway as an alternative means of transportation. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Where the evidence cited by the parties supports only a conclusion that production of forest products, a permitted use in the subject zone, is a feasible economic use of the subject property, petitioners fail to demonstrate they are precluded from making any economic use of the subject property and their claim of violation of Article I, section 18, of the Oregon Constitution will be denied. *Wickwire v. Clackamas County*, 21 Or LUBA 278 (1991).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Legislation preempting certain city and county land use decision making and rights of appeal concerning a proposed mass transportation facility does not violate constitutional home rule provisions because such legislation is a "general law addressed primarily to substantive social, economic, or other regulatory objectives of the state," and is not "irreconcilable with the local community's freedom to choose its own political form." *La Grande/Astoria v. PERB*, 281 Or 137, 156, 576 P2d 1204 (1978). *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. A law adopted to facilitate decision making concerning a mass transit system which will be part of a regional transportation system serving a large number of cities and counties and a significant percentage of the state's population is a "general law addressed primarily to substantive social, economic, or other regulatory objectives of the state" even though only three cities and two counties are directly affected by the law. *La Grande/Astoria v. PERB*, 281 Or 137, 156, 576 P2d 1204 (1978). *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Constitutional home rule provisions do not prohibit the legislature from adopting substantive legislation in an area where local governments are also permitted to legislate. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Different treatment under the law does not necessarily amount to a violation of constitutional rights to equal protection under the Fourteenth Amendment to the U.S. Constitution or equal privileges and immunities under Article I, section 20, of the Oregon Constitution. Where petitioners fail to explain why the

different treatment amounts to a violation of those constitutional provisions, petitioners' constitutional challenges will be rejected. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Petitioners' challenge to a condition of development approval as a taking, contrary to the Oregon Constitution, cannot be upheld if a variance process in the local code is an available administrative means for petitioners to seek relief from the disputed condition. *Dolan v. City of Tigard*, 20 Or LUBA 411 (1991).

2.1.2 Constitutional Law – Oregon Constitution – Nonprocedural Issues. Neither the equal protection clause of the 14th Amendment to the U.S. Constitution nor the equal privileges and immunities provision of Article I, section 20, of the Oregon Constitution requires a local decision maker to adhere to a prior erroneous interpretation of a comprehensive plan policy. *Reeder v. Clackamas County*, 20 Or LUBA 238 (1990).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. In a motion to take evidence outside the record pursuant to OAR 661-010-0045(1), and (2)(a) and (c), petitioners' argument—that two city employees violated petitioners' rights under the privileges and immunities clause of the Oregon Constitution, and the equal protection clause of the 14th Amendment to the United States Constitution because the employees engaged in the "unequal" application of the applicable standards in processing two similarly situated planned unit development (PUD) projects—fails to demonstrate that the proffered evidence would concern "procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision" because petitioners do not allege that the final decision maker violated petitioners' constitutional rights. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. To succeed in a motion to take evidence outside the record and pursuant to OAR 661-010-0045(1), and (2)(a) and (c), regarding an alleged violation of petitioners' rights under the privileges and immunities clause of the Oregon Constitution, and the equal protection clause of the 14th Amendment to the United States Constitution, the movant must develop a legal theory and a set of factual assertions sufficient to allow LUBA to determine how consideration of the proffered evidence would "affect the outcome of the review proceeding." *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. A petitioner's constitutional challenge to a city's denial of a business license fee exemption, in its appeal of a land use permit decision, is premature for two reasons. First, the challenged decision only requires business licenses, without specifying whether exemptions to the business license fee might apply. Second, because the city took the position at LUBA that it intended to deny the business license exemption, and the decision failed to include finding on that issue, the decision must be remanded for response findings. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. There is no right under the Due Process clause of the Fourteenth Amendment to cross-examination in quasi-judicial land use hearings in Oregon. *Emmert v. Clackamas County*, 65 Or LUBA 1 (2012).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Absent citation to any convincing authority, LUBA will not find that the Due Process Clause of the Fourteenth Amendment requires the county to notify petitioner or any other party when an item is submitted into the record. *Emmert v. Clackamas County*, 65 Or LUBA 1 (2012).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Before considering a petitioner's constitutional arguments under an assignment of error, LUBA will first consider whether there is a subconstitutional basis for resolving the assignment of error that would make it unnecessary to resolve the constitutional argument. *Families for a Quarry Free Neighborhood v. Lane County*, 64 Or LUBA 297 (2011).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Even assuming that OAR 661-010-0075(11), which provides that LUBA shall dismiss an appeal of a decision that is not reviewable as a land use decision, unless a motion to transfer to circuit court is filed within 14 days of the date any party or LUBA raises the jurisdictional issue, is inconsistent with ORS 34.102(4)

or the federal due process clause, LUBA lacks authority to reconsider its final opinion to change the disposition of the appeal, in response to a motion to transfer filed after LUBA issued its final opinion dismissing the appeal. Any error that LUBA may commit in issuing the final opinion can only be corrected by appeal to the Court of Appeals. *Maguire v. Clackamas County*, 64 Or LUBA 478 (2011).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Code procedures that distinguish between "Type II" permit decisions that can be made without an initial hearing, with an opportunity for affected persons to appeal to a *de novo* hearing, and "Type III" permit decisions that require an initial hearing, do not violate the privileges and immunities clause by granting "privileges" to participants of Type III proceedings that are denied Type II participants. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Where the local code does not provide procedures or standards governing a specific decision, the local government may, consistent with the federal due process clause, borrow and apply procedures and standards applicable to other types of decisions. *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Where a local government has no procedures governing a particular type of decision, it is consistent with the federal due process clause to adopt a written set of procedures and standards that significantly cabin the local government's discretion and that offer all participants a reasonable opportunity to present evidence and argument. That such procedures are one-time and temporary in nature, rather than permanent code provisions does not offend the due process clause. *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. A city commits no error in proceeding with a decision on an application for a subdivision, and does not violate a subdivision opponent's due process rights, where a quiet title action is pending to resolve an ownership dispute between the opponent and the subdivision applicant, but the applicant is the record fee owner of the property. *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. A conditional use permit condition of approval that the applicants terminate a special events business that was operated as part of a permitted bed and breakfast inn does not unconstitutionally impose an overbroad or vague limit on the bed and breakfast owners' constitutionally protected religious activity and speech. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. That conditional use permit applicants for approval of a bed and breakfast home occupation may not have been aware that the conditional use permit would be conditioned on the applicants terminating a special events business that the county concluded was not allowed in the county's EFU zone does not violate the applicants' rights to due process where they were allowed: (1) to challenge the administrative decision in a quasi-judicial hearing before a hearings officer, (2) to appeal the hearings officer's decision to the board of county commissioners, (3) to appeal that decision to LUBA, and (4) would

be entitled to seek judicial review of LUBA's decision. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Absent a legal requirement that local governments provide a quasi-judicial UGB amendment process, petitioner fails to establish that it has a constitutionally protected due process interest to a quasi-judicial forum for invoking state and local UGB amendment standards. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Where a city allows one party more time to present oral testimony during a land use hearing than is allowed another party, the unequal allocation of time will not constitute error so long as the city's decision explains the reason for the differentiation, there is an unlimited opportunity to submit written testimony, and the unequal allocation of time does not cause substantial prejudice. *Kane v. City of Beaverton*, 38 Or LUBA 183 (2000).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. An assignment of error fails to raise a justiciable controversy where it merely asks the Board to declare that, in future hypothetical cases where the city applies an allegedly unconstitutional ordinance, LUBA will deny any motions to dismiss arguing that the appeal is not ripe or the petitioner has failed to exhaust administrative remedies. *Lincoln City Ch. of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. An enumeration of alleged procedural irregularities, without analysis, does not amount to a reviewable claim of a constitutional violation. *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Petitioners do not establish the county made a decision in violation of their federal due process right to be heard, on the basis that the county board of commissioners conducted a staff briefing at which it instructed its staff to inform petitioners that it intended to comply with its ordinance provision regarding the conduct of appeal hearings. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1998).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Where petitioner makes no distinction in his brief between state and federal constitutional issues, LUBA cannot consider his constitutional arguments. *Fence v. Jackson County*, 30 Or LUBA 265 (1995).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Due process does not require an extension of time to file a local appeal of a land use decision where procedural defects in the notice of decision were unrelated to petitioner's failure to mount a timely challenge to the decision. *Thomas v. Wasco County*, 30 Or LUBA 142 (1995).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Failure to waive a local appeal fee violates no federal constitutional rights of due process or access to the courts; ORS 215.422(1)(c) does not create a right to a free appeal. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Petitioner's arguments that the local government's refusal to allow him to cross-examine witnesses, refusal to allow him to present evidence during its final hearing, and failure to explain his procedural rights do not establish he was denied due process of law, where petitioner never requested a right to cross-examine witnesses, does not explain why the evidentiary hearings the local government provided were inadequate, and makes no attempt to identify the procedural rights he believes should have been explained. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. A local government may not delegate to any particular group of citizens standardless authority to veto a request for land use approval. Such consent ordinances deny the permit applicant due process and violate the Fourteenth Amendment to the United States Constitution. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. A local code provision that imposes different approval procedures for vacation rental dwellings if a specified number of affected property owners object does not constitute a consent ordinance and does not deny the permit applicant due process. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. A city's exercise of its zoning power to regulate vacation rental dwellings to ensure streets are adequate to handle the traffic that such dwellings will generate, and that impacts of such dwellings on the neighborhood will be minimal, is not arbitrary and does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Where a challenged ordinance requires discontinuation of a use after expiration of a five-year amortization period, but also allows a property owner to apply for hardship relief if such property owner can substantiate that an investment made exclusively in the nonconforming use cannot be adequately amortized within the five-year period specified by such ordinance, property owners have no basis to contend their property has been taken until they have applied for and been denied the hardship relief. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. There is nothing unconstitutional about providing only published notice of legislative rezoning. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Petitioner's claim that the city erroneously refused to provide a transcript of proceedings before a hearings officer for his appeal of the hearings officer's decision to the city council will be denied where petitioner (1) identifies no code section requiring the city to provide a transcript, and (2) fails to develop an argument in support of his contention that due process requires that a transcript be provided. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. Although petitioners have a right under the 14th Amendment to the U.S. Constitution to an unbiased decision maker, petitioners have the burden of establishing that the decision maker was incapable of making a decision on the basis of the evidence and argument before him. LUBA will not infer that a decision maker had actual bias solely because he and a party to the proceeding were business associates. *Torgeson v. City of Canby*, 19 Or LUBA 511 (1990).

2.2.1 Constitutional Law – U.S. Constitution – Procedural Issues. When alleging that their rights to due process under the 14th Amendment to the U.S. Constitution were violated because of bias by the local decision maker, petitioners must show that the local decision maker was incapable of making a decision on the basis of the evidence and argument before it. *Eckis v. Linn County*, 19 Or LUBA 15 (1990).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Because the law regarding the application of RLUIPA's Equal Terms provision to particular local zoning provisions is unsettled, and because conflicts exist between decisions from courts in the various federal circuits that have applied the Equal Terms provision to specific local zoning ordinances, it will be a rare occurrence where a party challenging a local government decision regarding RLUIPA will "present[] a position without probable cause to believe the position was well-founded in law" for purposes of awarding attorney fees under ORS 197.830(15)(b). *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 1026 (2019).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. When the Court of Appeals remands a LUBA decision that affirmed a local government decision requiring a condition of approval that petitioner argued constituted an unconstitutional exaction of property prohibited by the Fifth and Fourteenth Amendments to the U.S. Constitution, because the Court of Appeals agreed with petitioner that the dedication is unconstitutional unless the hearings officer finds that the impacts of the proposed development would substantially impede the governmental interest advanced by the city's standards which the conditions of approval were imposed to meet, LUBA will remand that portion of the decision to the hearings officer for reconsideration where the hearings officer adopted no findings on that point. *Hill v. City of Portland*, 78 Or LUBA 334 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a city code provides that a property owner must, as a condition of permit or partition approval, either provide the improvements or pay into an improvement fund if a street adjoining property without direct access to the street does not have standard full-width improvements, and petitioner argues that the code provision is not applicable to his proposed property partition, LUBA will sustain, in part, petitioner's challenge upon remand from the Court of Appeals, where the arguments on appeal have evolved and it is apparent that remand is necessary for the hearings officer to adopt findings regarding LUBA's underlying conclusion that the hearings officer was correct in concluding that the condition requiring a waiver of remonstrance against a street or stormwater facility improvement was justified under *Clark v. City of Albany*, 31 Or LUBA 375, 380, *aff'd*, 144 Or App 192, 924 P2d 877 (1966), and did not constitute a taking. *Hill v. City of Portland*, 78 Or LUBA 334 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. While the county presumably has a legitimate governmental interest in preserving wildlife migration corridors, under RLUIPA, 42 USC § 2000cc *et seq.*, the county cannot treat religious assemblies in the wildlife area (WA) Overlay zone on less favorable terms than non-religious assemblies with similar impacts on wildlife. Accordingly, the board of county commissioners correctly concluded that the express exclusion of churches in the county code from the WA overlay zone, while allowing nonreligious assemblies and institutions as conditional uses, violates the so-called Equal Terms provision of RLUIPA because churches are not treated equally. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 516 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where the county found that county code provisions, which expressly exclude churches in the wildlife area (WA) Overlay zone, while allowing nonreligious assemblies and institutions as conditional uses, violate the Equal

Terms provision of RLUIPA, 42 USC § 2000cc *et seq.*, under the Article VI of the United States Constitution, the Supremacy Clause, a county would almost certainly lack authority to deny applications for a proposed church located on property within the WA overlay zone, based on nonconformance with local or state regulations that the county had concluded cannot be applied to the proposed use consistently with RLUIPA. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 516 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where LUBA concludes a county provision violates the so-called Equal Terms provision of RLUIPA, 42 USC § 2000cc *et seq.*, which focuses on protecting religious assembly from unequal treatment, petitioner's argument that intervenors' religious use of their dwelling does not qualify as a "church," and therefore that ORS 215.441 does not apply to authorize activities customarily associated with the practice of the religious activity, does not provide a basis for us to remand the decision. Even if intervenors' religious use of their dwelling and property does not constitute a "church" for purposes of ORS 215.441 or ORS 215.283(1)(a), that has no bearing on whether the county is obligated, under the Equal Terms provision, to treat religious assemblies and institutions no less favorably than secular assemblies and institutions. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 516 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. *Brown v. City of Medford*, 251 Or App 42, 47, 283 P3d 367 (2012), sets forth the two-part test that is applied to determine the constitutionality of an "exaction" under the Fifth Amendment of the U.S. Constitution. First, under *Nollan v. California Coastal Comm'n*, 483 US 825, 831-32, 107 S Ct 3141, 97 L Ed 677 (1987), the exaction must "substantially advance the same government interest that would furnish a valid ground for denial of the development permit." Second, under *Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309, 129 L Ed 2d 304 (1994), "the nature and extent of the exaction must be 'roughly proportional' to the effect of the proposed development." *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. To determine whether a local government's conditions of approval satisfy the *Nollan v. California Coastal Comm'n*, 483 US 825, 831-32, 107 S Ct 3141, 97 L Ed 677 (1987), "essential nexus" prong of the two-part test for assessing the constitutionality of a government exaction, the local government must show "(1) what interests would allow the [local government] to deny [the applicant's proposed land] partition, and (2) how the exaction would serve those interests." *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a city has two separate criteria—a transportation impacts criterion, and a services and utilities criterion—both of which are generally concerned with achieving and maintaining an adequate and safe transportation system, and both criteria must be satisfied, a finding that one of those criteria is satisfied does not necessarily mean the other criterion is satisfied. In such a situation, simply because the city found no "traffic impacts" requiring mitigation under the traffic impacts criterion does not mean the city imposed an unconstitutional exaction when it required right-of-way dedication and street improvements as conditions of approval to satisfy the services and utilities criterion. It simply

means the city applies the rights-of-way requirements through the services and utilities criterion, rather than the transportation impacts criterion. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. To determine whether "the nature and extent of the exaction is 'roughly proportional' to the effect of the proposed development" under *Dolan v. City of Tigard*, 512 US 374, 384, 391, 114 S Ct 2309, 129 L Ed 2d 304 (1994), "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. As part of the "rough[] proportional[ity]" test under *Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309, 129 L Ed 2d 304 (1994), a hearings officer commits no error when he or she identifies and relies upon potential "sub-impacts" of a proposed development, including street infrastructure wear and tear, pollution and safety, which may not be readily quantifiable, in conjunction with a quantifiable motor vehicle trip generation analysis to determine whether the impacts of the proposed development are "roughly proportional" to the required right-of-way dedication. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. As part of the "rough[] proportional[ity]" test under *Dolan v. City of Tigard*, 512 US 374, 384, 114 S Ct 2309, 129 L Ed 2d 304 (1994), although a local government's decision to compare the percentage of total trips in the area that can be attributed to the development proposal and the exaction's percentage of the total area of the subject property can be accused of comparing apples and oranges, that argument does not provide a basis for remand or reversal, because that criticism is possible in most cases where a *Dolan* "rough[] proportional[ity] analysis is required. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A waiver of remonstrance to the formation of a local improvement district (LID) is not subject to the constitutional exaction analysis because it, by itself, does not result in a loss of petitioner's property. Conditions of approval, such as a waiver of remonstrance, may be applied by a local government to ensure that a development proposal conforms to the applicable approval criteria or to ensure the enforcement of other local government regulations. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The courts have generally adopted a two-tiered approach to so-called "dormant" Commerce Clause challenges under the U.S. Constitution: When a state or local law facially discriminates against interstate commerce, or when its purpose or practical effect is to favor in-state economic interests over out-of-state interests, courts have generally struck down the law without further inquiry, under an elevated level of scrutiny. Where the law is facially non-discriminatory, and does not discriminate against out-of-state economic interests in its purpose or practical effect, the courts engage in a balancing test, subject to a lesser level of scrutiny, that weighs the state's interests against the indirect burden on interstate commerce. Such a law will only be struck down when the burden on

interstate commerce is "clearly excessive" in relation to the putative local benefits. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where city ordinance text amendments effectively prohibit fossil fuel export terminals and limit existing terminals to serving local fossil fuel needs, the amendments discriminate against out-of-state interests in purpose and practical effect and violate the "dormant" Commerce Clause of the U.S. Constitution unless the city identifies a legitimate local interest and demonstrates that the local interest cannot be adequately served by reasonably nondiscriminatory alternatives. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where due to a city's geographic position astride a major trade route an ordinance prohibiting new or expanded fossil fuel terminals would have some impact on interstate and international commerce, and the local benefits served by the ordinance are attenuated at best, the ordinance violates the dormant Commerce Clause under the balancing test articulated in Pike v. Bruce Church, 397 US 137, 90 S Ct 844 (1970), which provides that nondiscriminatory regulations with incidental effects on interstate commerce are valid unless the burden imposed on interstate commerce is "clearly excessive" in relation to the putative local benefits. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. No unconstitutional exaction of private property occurs when a city requires an applicant to improve to the width, grade and materials standards designated by the city engineer a newly created pathway that was approved and required as part of a previously approved partition of the property. Such a requirement does not run afoul of *Koontz v. St. Johns Water Management District*, 570 US 595, 133 S Ct 2586, 186 L Ed 2d 697 (2013), because requiring the pathway to be improved makes it usable by the occupants of the dwellings on the newly created parcels and by the public. *Locke v. City of Portland*, 76 Or LUBA 423 (2017).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. LUBA will reject arguments that applying a county prohibition on churches in deer winter range would cause the county to violate the "equal terms" provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), because the county has allegedly allowed wedding event venues and similar uses on nearby properties, where the applicant does not argue or demonstrate that nearby properties are also subject to winter range restrictions or otherwise similarly zoned and situated as the subject property. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A development standard requiring a developer to dedicate and improve adjoining roads to city half-street standards "to the extent the city demonstrates consistency with constitutional requirements" merely acknowledges that the city's ability to require dedications and improvements may be limited by the Takings Clause of the U.S. Constitution, and is not properly understood to allow city staff to waive the code requirements on a case-by-case basis without any analysis or explanation. *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. State constitutional provisions may be more protective than similarly worded federal constitutional provisions, and therefore that federal courts have interpreted the analogous federal constitutional provision more narrowly than state courts have interpreted the state constitutional provision has no bearing on the meaning of the state constitutional provision. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a state constitutional provision resolves the controversy and provides the petitioner with a complete remedy, LUBA should decline to reach issues under an analogous federal constitutional provision. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. LUBA will deny a motion to take evidence of a city's post-adoption actions to enforce a sign ordinance on appeal, where the petitioner's challenge to the sign ordinance is necessarily a facial challenge, and the petitioner fails to demonstrate that evidence of the city's post-adoption enforcement actions would be relevant or determinative of any facial challenge. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. LUBA will deny a motion to take evidence that a city has applied its sign ordinance by its terms to require that temporary signs be constructed in a "colonial post style," where the petitioner advances a facial challenge to the ordinance itself, and evidence that the city has applied the ordinance by its terms could add nothing to any facial constitutional challenge to the ordinance. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. LUBA will deny a motion to take evidence that a city has applied its sign ordinance in an unequal or discriminatory fashion, where the petitioner fails to demonstrate that the city's actual post-hoc pattern of enforcement is probative to a facial challenge to the sign ordinance itself. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A county ordinance that allows a private residential landowner or a city council to "waive" a two-mile setback from wind towers and substitute a lesser or no setback violates the Due Process Clause of the U.S. Constitution, because it grants wind tower project neighbors the arbitrary and standardless power to determine whether and to what extent there is a setback for wind tower development. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where the conservation easement required as a condition of permit approval would essentially make the burdened property part of a public surface water management system and transfer several important sticks in the bundle of property rights formerly held by the fee owner, the easement is correctly viewed as an "exaction," subject to the rough proportionality requirement under *Dolan v. City of Tigard*, 512 US 374, 391, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *Tonquin Holdings LLC v. Clackamas County*, 64 Or LUBA 68 (2011).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. To raise an issue of constitutional violation with sufficient specificity for purposes of ORS 197.763(1), at a minimum the constitutional provision at issue must be cited or the substance of the constitutional provision argued to the decision maker. A claim for relief from setbacks required under a wetland protection zone is not sufficient to put the decision maker on notice that the petitioner believes that denial of relief would violate the federal Takings Clause. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A petitioner's allegations that the city mayor cut off his oral testimony to censor the content of petitioner's testimony is not supported by the record, where the mayor gave the petitioner the same amount of time to speak as other participants and there is no indication in the record that the mayor's attempt to hold petitioner to the announced three-minute time limit was based on the content of petitioner's testimony. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Without a protected property interest to continued use of a particular access to an arterial, a property owner has no takings claim under the Article I, section 18, of the Oregon Constitution or the Fifth Amendment to the United States Constitution when the Oregon Department of Transportation adopts a plan to close that access and require the property owner to use an alternative route to access to that arterial. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. An ordinance requiring that developers of residential property near an airport grant the airport an uncompensated "avigation easement" that allows the airport to subject the property to noise, vibrations, fumes, dust and fuel particle emissions is facially inconsistent with the federal and state Takings Clauses, because the easement does not advance the governmental interest in reducing land use conflicts between the airport and surrounding residential uses. Under the easement, the conflicts will exist to the same degree; the only arguable effect is to make it more difficult for the property owner to advance a successful inverse condemnation or other legal action against the airport. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A city ordinance that explicitly and unequivocally requires that land use applicants comply with all environmental laws "as they may be amended from time to time" is inconsistent with the Oregon Constitution Article I, section 21, prohibition on delegation of the power to amend legislation. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A city ordinance requiring that land use applicants comply with "currently applicable" standards of a port district does not violate the Oregon Constitution Article I, section 21, prohibition on delegation of the power to amend legislation, because it can be construed to refer to port standards as they exist on the date the ordinance was adopted. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A city airport zone that authorizes air passenger and freight services at a regional airport consistent with the levels identified in the airport's master plan, which does not currently authorize such services, violates the Oregon Constitution Article I, section 21, delegation clause, because it effectively delegates to the airport the authority to determine what uses are allowed in the airport zone. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. For purposes of the equal terms provision of the Religious Land Use and Institutionalized Persons Act, an "assembly" is a place where groups or individuals dedicated to similar social, educational or recreational purposes meet to pursue those interests, and includes golf courses, and private or public parks. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The legal question under the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) is whether the applicable zoning scheme allows religious assemblies on less equal terms than non-religious assemblies, with respect to the regulatory objective. That question is primarily resolved by examining the text of the applicable zoning scheme, and a claimant under RLUIPA is not generally required to produce traffic studies or other evidence comparing the adverse impacts of religious and non-religious assemblies. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. While the state may have a compelling interest in preserving agricultural land and the integrity of urban growth boundaries, that interest does not justify an administrative rule that prohibits churches on agricultural land within three miles of an urban growth boundary while allowing golf courses and similar non-religious assemblies that appear to impact the state interest to the same degree. Therefore, the rule prohibition on churches on agricultural land within three miles of an urban growth boundary is inconsistent with the equal terms provision of the Religious Land Use and Institutionalized Persons Act. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where the "rough proportionality" test in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d (1994), applies, it can function as a kind of variance, providing a basis under which a local government may choose not to exact property as a condition of development approval that it would otherwise be entitled to exact under its land use regulations, as an alternative to compensating the landowner for the taking. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Even if the *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d (1994), "rough proportionality" test does not apply to exactions not requiring the dedication of a property interest, where a county road standard includes a provision prohibiting the county from requiring road improvements that are not "roughly proportional" to the impact of the proposed development on public facilities and services, the county may apply its local rough proportionality test in determining whether to grant requested variances from county road standards. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A county does not err in concluding that requiring a development applicant to improve a substandard local street to full collector street standards is not roughly proportional to the impacts of a proposed Liquified Natural Gas terminal and therefore granting variances to some collector street standards, where in operation the terminal would produce only 150 daily trips, which combined with the existing 50 daily trips would fall below the threshold traffic range for a collector street. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Under *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 862 P2d 1293 (1993), a prior decision involving an issue may preclude relitigation of the issue if, among other things, the issue was actually litigated and essential to a final decision on the merits. Where in a prior land use decision the hearings officer concluded that a city code provision is facially unconstitutional, but the hearings officer denied the petitioner's application on different grounds, the hearings officer's view regarding facial unconstitutionality is *dicta* and not "essential" to a final decision on the merits, and therefore does not preclude the hearings officer from reconsidering that view in a decision on petitioner's subsequent land use application. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A code provision requiring dedication of a greenway is not facially unconstitutional simply because it does not explicitly require the city to conduct the proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). The city must conduct that analysis, where required by the United States Constitution, even if the local code does not require it. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Even if an overbreadth challenge can be advanced under the Takings Clause or under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), a code provision requiring dedication of a greenway is not unconstitutionally overbroad where the provision does not prohibit the city from conducting a *Dolan* analysis prior to imposing the dedication. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Even if a decision can be understood to grant an adjoining landowner the exclusive right to use a portion of a public right-of-way that the petitioner's predecessor-in-interest had dedicated to the city for public use, petitioner no longer has any property interest in the right-of-way and therefore the decision cannot possibly take petitioner's property. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a local government's only claimed basis for imposing an exaction that requires off-site road improvements is that a subdivision would otherwise violate a code standard regarding street system impacts, and LUBA finds that the local government has not established that the subdivision would violate the code standard, there is also no basis to impose the exaction. *PacWest II, Inc. v. City of Madras*, 53 Or LUBA 241 (2007).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Federal law preempts a local determination that a proposed cellular communications facility is unsafe where the Federal Aviation Administration (FAA) has issued a "Determination of No Hazard" under FAA rules. *U.S. Cellular v. Klamath County*, 53 Or LUBA 442 (2007).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Evidence of the availability of alternative properties zoned to allow a proposed religious use may be critical to any demonstration that denial of a proposed religious use substantially burdens religious exercise under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). Such evidence may not be necessary or relevant where the record establishes that the subject property has a particular religious significance. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a zone prohibits a particular use, the "substantial burden" under RLUIPA is the burden of acquiring suitable property located within zones where the proposed use is allowed. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Denial of a proposed religious school is not a substantial burden under RLUIPA, where the record indicates that the petitioner could acquire property zoned to allow the proposed school, and thus denial of the school on property owned by petitioner does not pressure or force the petitioner to choose between following a religious precept and forfeiting approval of the school, or force petitioner to abandon a religious precept in order to obtain approval. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. To demonstrate that denial of a proposed religious school substantially burdens religious exercise, it is insufficient to show that no alternative properties zoned to allow a school are currently for sale. The burden of seeking out suitable properties and contacting owners of land not for sale, as other land developers frequently must do, is not a substantial burden. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A church's particular financial circumstances and its ability or inability to afford land that is otherwise suitable and available on which to construct a religious school is not a basis to conclude that denial of the proposed school on property not zoned for that use substantially burdens the church's free exercise rights. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Given specific testimony that a church's religious mission requires operating a religious school on the same site as the church, the fact that the church currently operates a school on a separate site may not be a sufficient basis to reject the church's claim that denial of the school on the same site as the church is a substantial burden under RLUIPA. *Timberline Baptist Church v. Washington County*, 52 Or LUBA 374 (2006).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. There is no right under either the federal or Oregon constitution to vote on questions of incorporation or annexation. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a right to vote in a general election is extended by statute, any classification restricting that franchise on grounds other than residence, age, and citizenship must be shown to serve a compelling state interest. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. In analyzing annexation statutes, if those statutes are viewed as restricting a statutory right to vote, strict scrutiny is generally applied under the Equal Protection Clause; but if those statutes are viewed as merely presenting alternative annexation methods, where some provide for elections and some do not, rational basis scrutiny is generally applied under the Equal Protection Clause. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The more clearly and cleanly statutes that authorize different annexation methods segregate the annexation methods that do not require elections from those that do, the more likely the statutes will not be subject to strict scrutiny as statutes that restrict voting rights. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. When statutes do not make it clear at the time an annexation is initiated whether the annexation will ultimately be subject to an election before the annexation can take effect, or the statutes appear to grant a right to vote on an annexation but also allow the election to be foreclosed at some later point in the annexation process, those statutes are likely to be subject to strict scrutiny under the Equal Protection Clause as statutes that restrict voting rights. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The right to an election that ORS 222.111(5) grants is not an absolute right. There is no right to vote in health hazard, double majority, island or triple majority annexations. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Unlike annexation statutes that have been subject to strict scrutiny and found to violate the Equal Protection Clause as an improper restriction on voting rights, the triple majority method of annexation authorized by ORS 222.170(1) does not have the have the legal effect of "nullifying a vote," "preventing an election" or "halting an election." ORS 222.170(1) simply makes an election unnecessary; it does not foreclose an election or prohibit the city from submitting the proposed annexation to the voters in the territory to be annexed, notwithstanding that a triple majority of the property owners in the territory to be annexed consent to the annexation. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A county does not violate the Religious Land Use and Institutionalized Persons Act (RLUIPA) by requiring that an applicant for a church on exclusive farm use land within three miles of an urban growth boundary

apply for a statewide planning goal exception as required by OAR 660-033-0130. The exceptions process does not in itself impose a substantial burden on a person's religious exercise and does not constitute unfair delay. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The term "existing facilities" in OAR 660-033-0130 is limited to a facility that will continue in the same use. The rule does not allow an existing residence to be converted to a church merely because it is an existing facility. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a city does not seek appellate court review of LUBA's initial decision that the city's actions to secure consents to annexation are subject to heightened scrutiny, it may not argue in a subsequent appeal of its decision on remand that its actions to secure consents to annexation are subject only to a requirement that there be a rational basis for the city's actions. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A poorly defined code prohibition on "billboards" is not unconstitutionally vague where, as interpreted and read in context, the sign code provides definite and objective standards governing all signs, including billboards, and does not grant the city "unbridled discretion" to approve or deny proposed signs. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Even assuming that an administrative rule prohibition on churches on high-value farmland violates the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), nothing in RLUIPA requires that the local government must go further and relieve the applicant from the obligation to comply with other land use standards that apply to uses allowed in the zone and that do not impose a "substantial burden" on religious exercise. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Because Congress intended the Religious Land Use and Institutionalized Persons Act (RLUIPA) to subject land use regulations to at least the same level of scrutiny as would apply under the Free Exercise Clause of the U.S. Constitution, analysis of whether an administrative rule prohibition on churches on high-value farmland violates RLUIPA is also dispositive of the same claim under the Free Exercise Clause. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Prohibiting uses that are inconsistent with agriculture on high-value farmland, such as churches, while allowing agricultural-supportive structures and uses on high-value farmland, such as barns, wineries and farm stands, is rationally related to the policy of preserving high-value farmland for agricultural use, and neither treats religious assemblies on unequal terms with nonreligious assemblies nor discriminates against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Prohibiting establishment of new uses on high-value farmland, such as churches or golf courses, while allowing expansion of existing churches or golf courses on high-value farmland does not treat religious assemblies on unequal terms with nonreligious assemblies or discriminate against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. An administrative rule that prohibits new churches and schools on land within three miles of an urban growth boundary (UGB), while allowing community centers "operated primarily by and for residents of the local rural community" within three miles of a UGB, does not violate the "equal terms" and nondiscrimination clauses of the Religious Land Use and Institutionalized Persons Act (RLUIPA), where the membership of the proposed church is primarily composed of people who reside within the UGB. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The Religious Land Use and Institutionalized Persons Act (RLUIPA) does not require local governments to provide for churches in all zones within its jurisdiction, or prohibit local governments from excluding churches from some zoning districts. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Whether a zoning prohibition on churches imposes a "substantial burden" on religious exercise under the Religious Land Use and Institutionalized Persons Act (RLUIPA) depends on whether the jurisdiction's zoning scheme as a whole fails to provide adequate opportunity to site a church within the jurisdiction. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The actual financial circumstances of a religious assembly, its financial ability to acquire land zoned for a church, and the existence of market-based constraints that apply equally to religious and non-religious land users, have no bearing on whether exclusion of churches in some zones within a jurisdiction imposes a "substantial burden" on religious exercise under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Evidence that a church is unable to acquire land with desired characteristics at a desirable price within an urban growth boundary is insufficient as a matter of law to demonstrate that an administrative rule prohibiting churches on high-value farmland owned by the church imposes a "substantial burden" on the church's free exercise rights, under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Subjective, discretionary conditional use and design review criteria are precisely the type of land use regulations that Congress intended to regulate, as applied to religious practices and institutions, in enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA). Although such standards may

be "generally applicable" in the sense that they apply broadly to a number of secular and non-secular uses, their application to approve or deny a proposed church requires an "individualized assessment" and thus is subject to RLUIPA. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Application of discretionary design review criteria to proposed religious buildings involves the "proposed use" of land within the meaning of, and is thus subject to, the Religious Land Use and Institutionalized Persons Act (RLUIPA), where the local government may deny a proposed church if the applicant fails to demonstrate compliance with such design review criteria. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A city's denial of a proposed church based on highly discretionary conditional use and design review standards constitutes imposition of a "substantial burden" on religious exercise within the meaning of the Religious Land Use and Institutionalized Persons Act (RLUIPA), at least where the city's land use scheme does not include zones where a church is allowed outright without an "individualized assessment," or where the record fails to show that there are more suitable sites in the city where the proposed church would likely be approved. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The regulatory effect of the Religious Land Use and Institutionalized Persons Act (RLUIPA) is not limited to prohibiting discrimination against religious institutions. Rather, Congress intended RLUIPA to require local governments to treat development proposals for buildings intended for religious exercise more favorably, if necessary, than other development proposals. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where the petitioner demonstrates that denial of a proposed church imposes a "substantial burden" on religious exercise under Religious Land Use and Institutionalized Persons Act (RLUIPA), the burden of persuasion shifts to the local government to show that denial is the least restrictive means of furthering a compelling governmental interest. That showing is not made where the record indicates that the proposed church might satisfy local regulations with imposition of reasonable conditions of approval. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The Religious Land Use and Institutionalized Persons Act (RLUIPA) does not overrule or limit the U.S. Supreme Court's free exercise jurisprudence, and thus does not exceed Congress' authority under the enforcement clause of the U.S. Constitution. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The Religious Land Use and Institutionalized Persons Act (RLUIPA) is not an impermissible advancement of religion in violation of the establishment clause of the U.S. Constitution, as long as the purpose and primary effect of RLUIPA is to alleviate significant governmental interference with religious exercise.

Where RLUIPA is narrowly interpreted so that its primary effect is to constrain an area of extremely discretionary land use decision-making that historically allowed local governments to discriminate against controversial land use proposals, such as religious structures in residential settings, RLUIPA is a permissible accommodation of religion rather than an impermissible advancement of religion. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. An evidentiary proceeding before LUBA is not warranted to consider evidence that the petitioner has installed "light emitting diodes" on an existing sign in order to engage in constitutionally protected speech, where the question of whether petitioner's installation is constitutionally protected speech is a legal conclusion, not an assertion of fact. *Meredith v. Lincoln County*, 44 Or LUBA 821 (2003).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. An agreement by a property owner to establish a walkway from a vacated street west of the property to an existing street east of the property, in order to provide pedestrian access to a building on the property, does not necessarily constitute a voluntary agreement to deed a public easement for a sidewalk connecting the vacated street with the existing street. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a city requires that a property owner grant an easement across its property to provide pedestrian access between a vacated street and an existing street as a condition of development approval, and determines that the easement will satisfy city requirements for connectivity, the city has established a nexus between the exaction and the city's legitimate governmental interest in ensuring adequate transportation connectivity. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. In requiring an easement for a pedestrian walkway as a condition of development approval, a city may consider the impacts that reasonably flow from the approval granted, including the possible use of the walkway by employees of the development to access adjoining streets and by residents of neighboring properties to access the development on foot or by bicycle. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A city adequately quantifies the impact of a proposed development on the area's bicycle and pedestrian transportation system and establishes that an exaction for a pedestrian walkway across the subject property is roughly proportional to the impact of the development where the city: (1) considers the types of uses in the vicinity and concludes that the walkway is necessary to allow access to a transit stop and other neighborhood amenities; (2) explains that persons working at or patronizing the development would be impeded from accessing a neighborhood attraction to the west of the subject property without the walkway; and (3) explains that the subject property could be developed as six individual lots, with sidewalks required for each, and the decision to combine the lots into one development has impacts on the city's transportation system that the required easement ameliorates. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Allegations that conditions of approval are unconstitutional exactions are not sufficiently developed for review where the allegations neither explain why the conditions of approval constitute exactions nor explain why the conditions of approval, if they are exactions, violate petitioners' Fifth Amendment rights. *Botham v. Union County*, 43 Or LUBA 263 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The fact that a city approved billboards 20 years ago under a very different regulatory scheme than the current one has little bearing on whether the city violated petitioner's state and federal constitutional rights in denying its application for a billboard under current regulations. Absent a showing of similarity between the old and new regulatory schemes, evidence of prior approvals does not demonstrate that a city acted arbitrarily or extended privileges to others that were denied to petitioners, and consideration of extra-record evidence under OAR 661-010-0045 is not warranted. *West Coast Media v. City of Gladstone*, 43 Or LUBA 659 (2003).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A local ordinance that requires an applicant for a partition to improve the entire 3,500-foot length of a private road providing access to the property, including widening existing easements across private property and improving the road to full county road standards, is a possessory exaction requiring off-site improvements and is therefore subject to the "rough proportionality" requirement of *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *Dudek v. Umatilla County*, 42 Or LUBA 427 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Even assuming that a landowner's actions can constitute a voluntary waiver of claims under the federal Takings Clause, the act of filing an application to develop land in an area where the city has prohibited development in the absence of essential public facilities is not, in itself, a voluntary waiver of a landowner's rights under *Dolan v. City of Tigard*, 512 US 734, 114 S Ct 2309, 120 L Ed 2d 304 (1994). *Carver v. City of Salem*, 42 Or LUBA 305 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A landowner's choice to seek development in an area with inadequate public facilities, rather than wait an indefinite period of time until the city or another developer provides the missing facilities, does not constitute a voluntary waiver of the landowner's rights under the Takings Clause, or otherwise allow the city to impose an exaction of land to provide the missing facilities, without satisfying the rough proportionality test of *Dolan v. City of Tigard*, 512 US 734, 114 S Ct 2309, 120 L Ed 2d 304 (1994). *Carver v. City of Salem*, 42 Or LUBA 305 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The relative importance of the public purpose underlying an exaction of land imposed as a condition of development approval does not justify an exaction that is disproportionate to the impacts of development. *Carver v. City of Salem*, 42 Or LUBA 305 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. To the extent a city relies on a process for compensating the landowner for a required dedication of land as a means of avoiding the requirements of *Dolan v. City of Tigard*, 512 US 734, 114 S Ct 2309, 120 L Ed 2d

304 (1994), that process must ensure that the landowner receives "just compensation." A process for reimbursing the landowner with credits against system development charges is not "just compensation," where the amount of compensation is not related to the fair market value of land, does not include severance damages to the remainder parcel, and does not ensure that the landowner will, in fact, receive any compensation. *Carver v. City of Salem*, 42 Or LUBA 305 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Eliminating a quasi-judicial UGB amendment process for housing, while providing such a process for nonhousing needs, does not violate petitioner's rights under either the Equal Protection Clause of the US Constitution or the Privileges and Immunities clause of the Oregon Constitution, where petitioner's housing developer members are not a suspect class, and the local government's distinction between housing and nonhousing UGB amendments is rationally related to a legitimate government purpose. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Comments by one local government decision maker expressing frustration at the perceived burdens created by a statute promoted by petitioner is insufficient to establish that the local government, in adopting a legislative amendment to the local government's plan and code that is adverse to petitioner's interests, impermissibly retaliated against petitioner for exercising its free speech and other constitutional rights. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A code criterion requiring that a proposal be shown to be compatible with the surrounding area and to not have more than a minimal impact on the livability and appropriate development of the surrounding area is not unconstitutionally vague and does not violate the ORS 227.173(1) requirement that permit approval criteria be included in the city's land use regulations. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Only those impacts that reasonably flow from the approval granted may be considered when imposing exactions to ameliorate those impacts. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. During its review of a proposed partition, a city may consider the impact that future dwellings may have on public infrastructure, where the partition approval is the last land use decision necessary to establish dwellings on the resulting parcels. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. It is appropriate to include some consideration of the benefits to the parcels created by a partition, as well as the impacts from the new parcels, in the rough proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. In reviewing findings adopted to support the imposition of exactions, LUBA first determines if any identified impacts or

benefits are not relevant for the purposes of the rough proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). LUBA then looks at whether the remaining findings adequately quantify the benefits to the development or the impacts of the development on public facilities, and whether those findings suffice to demonstrate that the city's exactions are "roughly proportional" to those benefits and impacts. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The fact that an exaction is required by city ordinance is irrelevant to whether an exaction imposed pursuant to that ordinance is in fact roughly proportional to the impacts of development. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The fact that a portion of the property subject to dedication for transportation improvements will be used for transportation access whether it is privately or publicly owned is not relevant under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), because that consideration is neither a benefit to the property owner nor an impact of development on the public infrastructure. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Benefits to the larger community resulting from the imposition of exactions, as opposed to specific benefits to the subject property, are not appropriate considerations under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. In some cases, the impacts resulting from the development may be so great, and the exactions imposed so small, that it is readily apparent without additional explanation that the exactions are roughly proportional to the expected impact. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The impacts resulting from the approval of two residential parcels are not so great as to make it self-evident that the imposition of a 20-foot dedication of right-of-way requirement is roughly proportional to the impacts of the proposed development. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Unless a local government makes some effort to quantify the benefits accruing to a particular development, those benefits will be of limited assistance in applying the rough proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. If the extent of safety impacts caused by a proposed partition justify some or all of the city's exactions, the local government may impose those additional conditions that are roughly proportional to the safety impacts caused by the approval. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A land use regulation may effect a taking under the Fifth Amendment of the United States Constitution if it does not substantially advance a legitimate state interest. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Under the Fifth Amendment takings clause, zoning to achieve aesthetic concerns is within the city's police power and is a legitimate state interest. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Under the Fifth Amendment takings clause, public safety and alternative transportation goals constitute legitimate state interests. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A city is not required, under the first prong of the two-part test in *Agins v. Tiburon*, 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980), to establish in advance that a land use regulation prohibiting certain housing designs will in fact result in more livable or aesthetically pleasing residential neighborhoods. Where a city regulation directly regulates the design features that the city has identified as negatively affecting aesthetic and livability concerns, the regulation "substantially advances legitimate state interests," within the meaning of the first part of the *Agins* test. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a petitioner's disagreement with the city over whether a land use regulation will actually further identified public safety concerns is based on the kind of arguments over which reasonable persons may disagree, LUBA will conclude that the land use regulation satisfies the requirement under *Agins v. Tiburon*, 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980), that the regulation substantially advances a legitimate state interest. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Consents to annexation obtained pursuant to ORS 222.115, where the consent is given in exchange for the city's provision of extra-territorial services, are constitutional. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The exactions analysis set forth in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), is not applicable to petitioner's claim that the city effected a regulatory taking in rezoning his property from multi-family to single-family residential uses. Even if the rezoning reduced the value of the property, that is insufficient to establish that the rezoning is a regulatory taking that deprives the property of all economically beneficial use. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. To the extent *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), is applicable to a facial takings challenge to legislative adoption of a local ordinance, petitioner must establish from the

face of the challenged ordinance that no set of circumstances exist under which the ordinance can be applied in a constitutional manner. *Lincoln City Ch. of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The requirement in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), that the local government establish "rough proportionality" between a proposed exaction and the impacts of development does not mean that the local government must assume the burden of producing the evidence on which the rough proportionality determination is based. *Lincoln City Ch. of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Depending on the facts of the case, a local government's demonstration of rough proportionality required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), may require up to three distinct sets of analyses: (1) the extent to which the proposed exaction will benefit the development; (2) the extent to which the proposed exaction will mitigate the development's impacts on the public infrastructure; and (3) whether the benefits and impacts analyzed in (1) and (2), considered together, demonstrate that the proposed exaction is roughly proportional to the impacts of development. *Lincoln City Ch. of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Even assuming *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), addresses whether the local government must originate the analysis used to demonstrate rough proportionality between a proposed exaction and the impacts of development, an ordinance requiring that an applicant submit a "rough proportionality report" is not facially unconstitutional, where nothing on the face of the ordinance requires the local government to adopt or use in whole or part the conclusions contained therein. *Lincoln City Ch. of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A county provision requiring that schools outside urban growth boundaries be "scaled to serve the rural population" is not unconstitutionally vague where a reasonable applicant would understand that to comply with that provision, the applicant must submit evidence that the school is no larger than needed to serve the anticipated number of rural students. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A county provision requiring that schools outside urban growth boundaries be "scaled to serve the rural population" does not infringe directly on religious practices, and thus is not subject to strict scrutiny, absent a showing that the proposed parochial school must exist on the same rural property as its supporting church for members to exercise their rights to free exercise of religion and their right to direct their children's education. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The appropriate standard for reviewing challenges to zoning laws under the Free Exercise Clause involves balancing (1) the impact of the zoning law on the exercise of religious belief; (2) the existence of a compelling state interest justifying the burden on the exercise of religious belief; and (3) the extent to which an

exemption from the law would impede the objectives sought to be advanced by the law. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The Free Exercise Clause does not require an exemption from a county zoning ordinance that prohibits urban-sized schools on rural land, where the county has a strong interest in maintaining the boundaries between rural and urban uses, and the ordinance imposes only the minimal burden on religious practice of requiring the applicant to build a smaller parochial school than desired or locate the school on property within the nearby urban growth boundary. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. OAR 660-012-0060 does not require that a local government impose exactions to ensure that impacts from a plan amendment do not violate Transportation Planning Rule Level of Service requirements. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Compliance with OAR 660-012-0060 does not deprive a property of all beneficial use, where the current comprehensive plan and zoning designations allow a range of uses that may generate any amount of traffic and are not subject to the rule. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A local government may constitutionally distinguish between signs related to on-premises uses, and signs related only to off-premises uses or services, and deny a proposed billboard because it is unrelated to the primary use of the property, where the city's evaluation of the relationship between the sign and the premise does not entail a content-based distinction, and the on-premises/off-premises distinction is a rational means to preserve the zone for allowed uses. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A local government does not impermissibly favor commercial speech over noncommercial speech because it allows signs related to on-premises uses in an industrial and commercial zone and prohibits all others. That signs related to on-premises commercial uses are allowed while unrelated commercial and noncommercial signs are prohibited is an incidental consequence of the permissible distinction drawn between signs related to on- and off-premises uses. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A city's determination that a proposed billboard is not an accessory use "incidental, appropriate and subordinate" to the primary use on the property is subject to an inquiry so factually and legally circumscribed that it does not render constitutionally protected rights of free expression contingent upon the unbridled discretion of a government official. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A facial "takings" challenge of a mandatory public acquisition ordinance, while not subject to the "ripeness" requirement, must nevertheless demonstrate that the ordinance would "take" petitioner's property

and that the taking would be uncompensated. *Nike, Inc. v. City of Beaverton*, 35 Or LUBA 57 (1998).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where almost all loss of viable economic use of a property is the result of the landowner's choice to restrict use of the property rather than the city's action in revoking a conditional use permit, the city's action cannot be combined with the landowner's actions to constitute a complete loss of viable economic use of the property and hence a taking of property without just compensation in violation of the Fifth Amendment of the U.S. Constitution. *Cope v. City of Cannon Beach*, 34 Or LUBA 441 (1998).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The key to determining whether an approval standard is unconstitutionally vague is whether a reasonable applicant could understand what must be done to comply with the standard. *Holland v. City of Cannon Beach*, 34 Or LUBA 1 (1998).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where the accumulation of sand on petitioner's beachfront property is caused by time and nature, and not city's sand removal regulations, denial of petitioner's permit request to remove the sand does not fall within the "physical invasion" category of takings cases. *Beta Trust v. City of Cannon Beach*, 33 Or LUBA 576 (1997).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues A federal takings claim challenging city's denial of remedial sand removal is not ripe for review where petitioner has not requested a grading permit limited to the amount of grading necessary to preserve alleged protected property rights. The city is not obligated to approve something different than what was requested. *Beta Trust v. City of Cannon Beach*, 33 Or LUBA 576 (1997).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a county identifies a rational basis for distinguishing between leaseholders and fee owners for purposes of allowing conditional uses on EFU lands, the county does not violate the Equal Protection Clause. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. There is no violation of the right to equal privileges and immunities under Article I, section 20, of the Oregon Constitution or the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution in applying a code provision to deny an absentee landowner permission to remove a tree, where the code does not create a separate classification for absentee landowners and the record does not show that any of the applications previously denied by the city were submitted by absentee landowners. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The city's denial of a tree cutting permit does not result in an unconstitutional "taking" of the portion of petitioner's property defined by the "circumference and diameter of the foliage and surface of roots of the tree," where petitioner retains "some beneficial use" of the property and is left with "an economically viable use" of the property. The "rough proportionality" test of *Dolan v. City of*

Tigard, 512 US 374 (1994), does not apply to land use decisions that merely limit the available uses of property. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. LUBA will not find that the application of a broad design review standard violates the Fourteenth Amendment to the U.S. Constitution unless petitioner shows that a policy unlawfully discriminating in favor of some persons against others either has been adopted or has been followed in practice. *Johns v. City of Lincoln City*, 32 Or LUBA 195 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The difference between modes of transportation on different streets justifies separate classifications for transit mall streets and light rail transit streets. Since the different classifications bear a rational relationship to an end of government (*i.e.*, appropriate forms of development), they are not prohibited by the Fourteenth Amendment to the United States Constitution. *Downtown Community Assoc. v. City of Portland*, 32 Or LUBA 1 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where the different modes of transportation found on light rail transit streets and transmit mall streets justifies the distinctions made in permitting development on the two types of streets, there has been no violation of the right to substantive due process under the Fourteenth Amendment to the United States Constitution. *Downtown Community Assoc. v. City of Portland*, 32 Or LUBA 1 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Until LUBA can ascertain whether and to what extent proposed conditions will be imposed on petitioner's property, there is no way of determining whether the conditions bear an "essential nexus" to the impacts of the development and whether any exactions are roughly proportional to the impacts of petitioner's proposed development. *Reeves v. City of Tualatin*, 31 Or LUBA 11 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A federal taking claim challenging a condition of development approval is not ripe for review where petitioner has not pursued a variance procedure that is available under the local code. Until a variance is denied, LUBA has no way of knowing whether petitioner can be relieved of the contested conditions. *Reeves v. City of Tualatin*, 31 Or LUBA 11 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A city cannot be required to contribute to the cost of the improvements directly proportional to petitioner's proposed development simply because the city owns undeveloped property adjoining petitioner's parcel, where the city has not proposed to develop that property; *Dolan v. City of Tigard* does not require improvements or contribution from an adjacent property owner simply because that owner may develop the adjacent property in the future. *Clark v. City of Albany*, 31 Or LUBA 375 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A city satisfies the "rough proportionality" test of *Dolan v. City of Tigard* where it determines that petitioner's development will receive the sole or principal benefit of the improvements that he is required to make, and that the requirements are directly responsive to the impacts that the development will have. *Clark v. City of Albany*, 31 Or LUBA 375 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Under the rough proportionality test established in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994), the local government must consider both the nature of the exaction, *i.e.*, whether there is an adequate nexus between the legitimate state interest and the exaction, and the extent of the impact, *i.e.*, whether there is a close enough connection or fit between the exaction and the anticipated impact of the development. *Art Piculell Group v. Clackamas County*, 30 Or LUBA 381 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The rough proportionality analysis established by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994), and *J.C. Reeves Corp. v. Clackamas County*, 131 Or App 615, 887 P2d 360 (1994) requires more than a simple mathematical equation as to the number of cars generated by a subdivision development; rather, the analysis allows the county to consider the subdivision's real traffic impacts to the adjoining road. *Art Piculell Group v. Clackamas County*, 30 Or LUBA 381 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994), and *J.C. Reeves Corp. v. Clackamas County*, 131 Or App 615, 887 P2d 360 (1994), a subdivision developer's fair share of the total cost of road improvements rightfully includes traffic-related impacts by subdivision residents beyond the portion of an adjoining road which actually fronts the subdivision. Consideration of those impacts requires more than a mathematical calculation of the number of cars driving on an isolated segment of the adjoining road. *Art Piculell Group v. Clackamas County*, 30 Or LUBA 381 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Consideration of both the benefits and the burdens of an exaction is relevant and appropriate in articulating whether there is a sufficient connection between the proposed development and the required improvements to justify the exaction. *Art Piculell Group v. Clackamas County*, 30 Or LUBA 381 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. LUBA need not determine whether each one of the county's findings independently could satisfy the rough proportionality test established in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994). Rather, LUBA need only determine whether cumulatively the county's findings establish that there is a sufficient connection between the impacts of the proposed development and the dedication and frontage road improvements the county is requiring. *Art Piculell Group v. Clackamas County*, 30 Or LUBA 381 (1996).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution, legislative classifications must bear a rational relationship to a legitimate state interest. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994), and *J.C. Reeves Corp. v. Clackamas County*, 131 Or App 615, 887 P2d 360 (1994), findings in support of a condition requiring an

applicant for site plan approval for a fast-food restaurant to construct certain street and frontage improvements must compare traffic and other effects of development to required improvements. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A condition requiring an applicant for site plan approval for a fast-food restaurant to design street improvements for hundreds of feet beyond the subject property boundaries does not meet the "rough proportionality" test established in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994). *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994), and *J.C. Reeves Corp. v. Clackamas County*, 131 Or App 615, 887 P2d 360 (1994), the city must show a right-of-way dedication is roughly proportional to the impact of a proposed development. To require the dedication when the city finds there will be no impact is unconstitutional. *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. If a local government approves a proposed partition with conditions requiring exactions, the local government must ensure that the requirement of *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 2319-20, 129 L Ed2d 304 (1994) for "individualized determination[s] that the required dedication is related both in nature and extent to the impact of the proposed development" is satisfied. *Neuman v. Benton County*, 29 Or LUBA 172 (1995).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A local government does not violate petitioner's right to equal protection under the law by directing its enforcement order exclusively at petitioner, and excluding the property owner, where the property owner attempted to have petitioner remove the use that was the subject of the enforcement order and ultimately advised petitioner he would have to vacate the property. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. That a local code's definition of the term "taking" neither accurately nor completely reflects the opinions of appellate courts and LUBA regarding what constitutes a "taking" of private property for public use under the Fifth Amendment to the U.S. Constitution or Article I, section 18, of the Oregon Constitution provides no basis for reversal or remand, where the term "taking" is not used elsewhere in the code. *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Conditions of land use approval requiring uncompensated dedication of land constitute "exactions." Where a condition of land use approval imposes an exaction, the local government must make an individualized determination that the exaction is roughly proportional in nature and extent to the impact of the proposed development. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Aside from the requirement under *Dolan v. City of Tigard* for an "individualized determination" justifying a

condition of approval imposing an exaction, there is no generally applicable requirement that conditions of land use approval be supported by findings that justify imposing the condition. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A condition of approval requiring elimination of a one-foot "spite strip" separating a new street serving a subdivision from the adjoining property is reasonably related to the impacts of the proposed subdivision and, therefore, does not effect an unconstitutional "taking" under either the United States or Oregon Constitution. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where the local code prohibits residential, but not commercial or industrial, development in certain wetlands, and includes density transfer provisions for residential developments limited by wetlands, but not for commercial or industrial developments, there is a rational basis to justify the disparate code treatment of residential versus commercial or industrial developments. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a proposed subdivision will add traffic to an abutting arterial street, although direct access to the subdivision will be provided by local streets, a local government approval condition requiring that the developer construct sidewalks, storm sewers and other frontage improvements along the portion of the arterial abutting the subdivision is reasonably related to the impacts of the proposed subdivision and is not an unconstitutional taking. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Vacation renters and owners of vacation rental dwellings are not suspect or quasi-suspect classifications which require that a local government have a "compelling governmental interest" to justify regulation of vacation rental dwellings differently than other types of dwellings. A rational basis is sufficient to justify regulation of vacation rental dwellings. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A local code provision which regulates vacation rental dwellings to limit their impacts on adjoining neighborhoods and streets has a rational basis and does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The legal analyses applied to vagueness and overbreadth challenges under both the United States and Oregon Constitutions are essentially the same. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. That a condition of approval contains an ambiguous term does not, of itself, establish the condition is unconstitutionally vague. Rather, some ambiguity is tolerated where the ambiguous language of a condition is circumscribed by reference to specific, non-vague regulations. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The issue in determining whether a condition of approval is unconstitutionally vague is whether a reasonable applicant could understand what must be done to comply with the condition. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Unconstitutional overbreadth refers to legislative action having a sweep so broad that it unreasonably limits constitutionally protected activity. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where petitioners do not challenge findings that a condition of approval is reasonably related to mitigation of impacts associated with the particular development proposal, petitioners fail to establish the challenged action is overbroad. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A condition of approval limiting petitioners' rights to remonstrate against LIDs does not impermissibly infringe on petitioners' First Amendment rights to freedom of expression where the condition does not require the local decision maker to disregard petitioners' political views about LIDs and leaves petitioners free to object to the formation of a proposed LID in a variety of ways other than by remonstrance. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The protections afforded by the First Amendment to the U.S. Constitution may be waived so long as the waiver is voluntary and knowing. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A requirement for an uncompensated dedication or conveyance is constitutional under the Fifth and Fourteenth Amendments to the U.S. Constitution where the required dedication or conveyance is reasonably related to the needs created by the use for which approval is sought. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A county may not condition approval of a farm dwelling on dedication of over two miles of right-of-way, where the required dedication has no reasonable relationship to needs or impacts associated with the farm dwelling. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A condition of partition approval requiring that three existing driveways presently serving property to be partitioned be consolidated into a single driveway does not "take" a cognizable property interest, within the meaning of the Fifth Amendment to the U.S. Constitution or Article I, section 18, of the Oregon Constitution. Such a condition simply requires that a property owner exercise the property right of access differently. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where there is a reasonable relationship between the development potential of a parcel to be divided and the

impacts reasonably attributable to the divided parcel on the one hand, and the city's need to respond to legitimate traffic concerns on the other, and it would be more difficult to address such concerns when there are three parcels rather than a single parcel, notwithstanding the lack of current plans to develop the property further, a condition requiring consolidation of existing driveways is appropriate. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Federal preemption of local authority to regulate is not presumed. Rather it is necessary to determine whether preemption was the "clear and manifest purpose of Congress." *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Nothing in the federal regulatory scheme relating to the regulation of parachute jumping purports to foreclose state and local land use regulation of the ground based impacts of parachuting. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Because a constitutional taking claim is not dependent upon a local government's adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. While a local government is not obliged to respond to a taking claim raised during the local proceedings, the local government should, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should have the opportunity to adopt an interpretation that is constitutional. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The purpose of the requirement under applicable federal and state constitutions that a "taking" claim be ripe, is to allow the reviewing body to know the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. That petitioners believe a local government will deny proposed development because it does not meet various approval standards, does not excuse petitioners from giving the local government the opportunity to make that decision for itself. Petitioners must make a good faith application for at least some of the conditional uses allowed in the applicable zoning district before a taking claim is ripe for review. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a petitioner has been denied permit approval, but has failed to seek approval of other allowable uses or seek a plan amendment or statewide planning goal exception, the petitioner's regulatory taking claims under

the United States and Oregon Constitutions are not ripe for review. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. LUBA will not presume it would be futile for petitioners to apply for a comprehensive plan amendment and zone change to make their taking claim ripe for review. *Young v. Clackamas County*, 24 Or LUBA 526 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. In order for petitioners' claims under Article I, section 8, of the Oregon Constitution and the Fifth Amendment to the United States Constitution, that their property was taken by a local government without just compensation, to be ripe for review, petitioners must show that listed permitted uses cannot be established on the subject property and that they were refused a plan and zone change and approval for other listed conditional uses. *Young v. Clackamas County*, 24 Or LUBA 526 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Both the Oregon and U.S. Constitutions require that there be a "reasonable relationship" between a challenged condition of approval and the impacts of, or needs generated by, the proposed development. *Sherwood Baptist Church v. City of Sherwood*, 24 Or LUBA 502 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The U.S. Constitution imposes a requirement that there be an "essential nexus" between the legitimate public purpose for which a development application could be denied, and the condition imposed. *Sherwood Baptist Church v. City of Sherwood*, 24 Or LUBA 502 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. In the absence of some reason apart from its origin to treat out-of-state waste differently than in-state waste, local laws that discriminate against out-of-state waste violate the Commerce Clause. Further, the local government bears the burden of establishing that there are no non-discriminatory alternatives available to protect a legitimate local interest that is served by the local law. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where no nondiscriminatory reason is offered to justify a local regulation treating out-of-state waste differently than in-state waste, and where no party argues non-discriminatory alternatives are not available to protect a legitimate local interest served by the regulation, the regulation violates the Commerce Clause. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The rules applicable to the severability of statutes are also applicable to local enactments. Thus, an unconstitutional ordinance provision will be severed from the remainder unless it is apparent that the local legislative body would not have enacted the regulation without the disputed provision, or the remaining parts of the regulation would be incomplete and incapable of being executed in accordance with the legislative intent. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Because a constitutional taking claim is not dependent upon a local government's adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. While a local government is not *obliged* to respond to a taking claim raised during the local proceedings, the local government should, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should at least have the opportunity, if possible, to adopt an interpretation that is constitutional. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. The purpose of the requirement under applicable federal and state constitutions that a "taking" claim be ripe, is to allow the reviewing body to know the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. That petitioners believe a local government will deny proposed development because it might not meet various approval standards, does not excuse petitioners from giving the local government the opportunity to make that decision for itself. Accordingly, petitioners must make a good faith application for at least some of the conditional uses allowed in the underlying zoning district before a taking claim is ripe for review. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. An evidentiary hearing at LUBA will not be allowed to show that many, but not all, conditionally permitted uses listed in the applicable zoning district are economically infeasible, where petitioners do not argue that it would have been futile to apply for approval of the other conditionally permitted uses. Under these circumstances, the evidence petitioners seek to introduce would not establish an unconstitutional "taking." *Larson v. Multnomah County*, 24 Or LUBA 591 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A land use restriction results in a taking under the Fifth Amendment of the U.S. Constitution if the restriction (1) does not substantially advance a legitimate state interest, or (2) denies the owner economically viable use of his land. *Nelson v. Benton County*, 23 Or LUBA 392 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Under *Rutherford v. Armstrong*, 31 Or App 1319, 572 P2d 1331 (1977), parcels that would be suitable for farm use, except for their small size, nevertheless are considered suitable for farm use unless it is shown they cannot be leased or by some other arrangement be put to farm use in conjunction with other farm parcels. The *Rutherford* requirement substantially advances the state's legitimate public interest in preserving "the maximum amount of the limited supply of agricultural land," and thus does not violate the takings clause of the Fifth Amendment, provided it does not leave the property without viable economic use. *Nelson v. Benton County*, 23 Or LUBA 392 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a challenged ordinance requires discontinuation of a use after expiration of a five-year amortization period, but also allows a property owner to apply for hardship relief if such property owner can substantiate that an investment made exclusively in the nonconforming use cannot be adequately amortized within the five-year period specified by such ordinance, property owners have no basis to contend their property has been taken until they have applied for and been denied the hardship relief. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where the maximum penalty for each separate violation of an ordinance is 500 dollars, and there is no possibility of imprisonment for violating the ordinance, the penalties provided by the ordinance are civil, not criminal, in nature. Therefore, a vagueness challenge based solely on the constitutional vagueness analysis applied where criminal sanctions are possible, provides no basis for reversal or remand of such ordinance *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Under both the Oregon and Federal constitutions, taking claims must be ripe for adjudication before LUBA may review their merits. Where petitioners did not seek any form of administrative relief from the applicable regulations, and did not seek either a variance or a plan and zone map change, petitioners' taking claims are not ripe. *Schoppert v. Clackamas County*, 23 Or LUBA 138 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Petitioner's unsupported assertions that the subject parcel is not suited for any use other than a nonresource dwelling are not a sufficient basis for excusing petitioner from the requirement that he seek approval for other uses potentially allowed under the applicable zone before pursuing a taking claim under the Oregon or United States Constitution. In any case, a petitioner is required to seek quasi-judicial plan and zone map amendments prior to pursuing a taking claim. *Joyce v. Multnomah County*, 23 Or LUBA 116 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A local code criterion requiring that a request for land use approval be in the "public interest" does not require that the local government determine whether denial of the request would constitute a taking of private property without just compensation in violation of Article I, section 18, of the Oregon Constitution or the Fifth Amendment to the U.S. Constitution. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Because a local government is not required to consider whether denying a request for land use approval would constitute an unconstitutional taking of private property without just compensation, a local government's findings on such constitutional issues provide no basis for reversal or remand. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Unlike a local government, LUBA is specifically required by statute to consider arguments that a local government decision is unconstitutional and to reverse or remand an unconstitutional decision.

Therefore, procedural errors a local government may have committed in considering constitutional issues during local proceedings are harmless errors. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Petitioners must seek relief from application of a velocity flooding overlay designation to the subject property through the variance process provided in the local government's flood damage prevention ordinance, before they may obtain LUBA review of any constitutional "taking" claims. *Alexiou v. Curry County*, 22 Or LUBA 639 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A condition requiring dedication of portions of the applicants' property is not an unconstitutional taking under the Fifth Amendment of the U.S. Constitution, if it has a "reasonable relationship" to the impacts of the proposed development. *Nollan v. California Coastal Com'n*, 483 US 825, 107 S Ct 3141, 97 L Ed2d 677 (1987), does not establish a new, stricter standard for the relationship required between the impacts of a proposed development and exactions imposed as conditions of approval. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a proposed larger building and paved parking area will increase the amount of impervious surfaces on the subject property and, therefore, runoff into an adjacent creek, there is a "reasonable relationship" between the proposed development and a condition requiring land along the creek to be dedicated for a planned greenway for management of storm water runoff. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where a significantly larger retail sales building and parking lot will accommodate larger numbers of customers and employees and their vehicles, there is a reasonable relationship between alleviating these impacts of the development and a condition requiring dedication of land for a pedestrian/bicycle pathway as an alternative means of transportation. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Different treatment under the law does not necessarily amount to a violation of constitutional rights to equal protection under the Fourteenth Amendment to the U.S. Constitution or equal privileges and immunities under Article I, section 20, of the Oregon Constitution. Where petitioners fail to explain why the different treatment amounts to a violation of those constitutional provisions, petitioners' constitutional challenges will be rejected. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Although a county's denial of permission to locate a dwelling on a 50-acre forest parcel may make forest operations more expensive and difficult, where the record does not show the decision denies petitioner economically viable use of the forest parcel, the county's decision does not contravene the Fifth and Fourteenth Amendments to the United States Constitution. *Lardy v. Washington County*, 20 Or LUBA 450 (1991).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. A federal taking claim challenging a condition of development approval is not ripe for review if a variance process in the local code is an available administrative means for petitioners to seek relief from the disputed condition. *Dolan v. City of Tigard*, 20 Or LUBA 411 (1991).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Neither the equal protection clause of the 14th Amendment to the U.S. Constitution nor the equal privileges and immunities provision of Article I, section 20, of the Oregon Constitution requires a local decision maker to adhere to a prior erroneous interpretation of a comprehensive plan policy. *Reeder v. Clackamas County*, 20 Or LUBA 238 (1990).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Unequal administration of the law does not in every case constitute a violation of Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution. Petitioner must show the local government's decision to deny his application was based on race, religion, the exercise of constitutional rights or some other arbitrary classification. *McCarty v. City of Portland*, 20 Or LUBA 86 (1990).

2.2.2 Constitutional Law – U.S. Constitution – Nonprocedural Issues. Where several different uses are permitted, or permitted subject to review, in the county's General Timber District zone, and petitioners have been denied one type of use, a nonforest dwelling, but have not shown that the other authorized uses could not be established on the subject property, petitioners have not established their property has been "taken" without due process, under the Fifth and Fourteenth Amendments of the United States Constitution. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

2.3 Constitutional Law – Nonspecific Constitutional Claims. Where petitioners argue that the statutory definition of "farm use" is void for vagueness but make no attempt to develop that argument, LUBA will reject the argument. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

2.3. Constitutional Law – Nonspecific Constitutional Claims. Where petitioner only provides a bare reference to "equal protection" as a constitutional claim, that is not sufficient to afford the local government and the opposing parties an adequate opportunity to respond to the issue pursuant to ORS 197.763(1). *Yontz v. Multnomah County*, 34 Or LUBA 367 (1998).

2.3 Constitutional Law – Nonspecific Constitutional Claims. LUBA will not consider claims of a constitutional violation when the petitioner raising the claim does not make a legal argument sufficient for review of the claim. *Sparks v. Tillamook County*, 30 Or LUBA 325 (1996).

2.3 Constitutional Law – Nonspecific Constitutional Claims. Even if petitioner has constitutional defenses against an action by a local government to enforce its code fence height limitation, that does not provide an independent basis upon which to compel the local government to grant a variance to its code fence height limitation. *Stern v. City of Portland*, 26 Or LUBA 544 (1994).

2.3 Constitutional Law – Nonspecific Constitutional Claims. LUBA will not consider claims of constitutional violations that are not supported by legal argument. *Poddar v. City of Cannon Beach*, 26 Or LUBA 429 (1994).

2.3 Constitutional Law – Nonspecific Constitutional Claims. Allegations that denial of a requested plan map amendment based on a plan groundwater protection policy is unconstitutional, because it is economically infeasible to conduct the studies necessary to demonstrate compliance with the policy, are insufficient to establish the policy is unconstitutional. *Ericsson v. Washington County*, 26 Or LUBA 169 (1993).

2.3 Constitutional Law – Nonspecific Constitutional Claims. LUBA will not consider claims of constitutional violations where the parties raising such claims do not supply legal argument in support of those claims. *Perry v. Yamhill County*, 26 Or LUBA 73 (1993).

2.3 Constitutional Law – Nonspecific Constitutional Claims. LUBA will not consider claims of constitutional violations where the parties raising such claims do not supply legal argument in support of the claims. *Joyce v. Multnomah County*, 23 Or LUBA 116 (1992).

2.3 Constitutional Law – Nonspecific Constitutional Claims. Undeveloped claims of unconstitutionality provide an insufficient basis for LUBA to reverse or remand a challenged decision. *Cummins v. Washington County*, 22 Or LUBA 129 (1991).

2.3 Constitutional Law – Nonspecific Constitutional Claims. LUBA will not consider claims of constitutional violations which are unsupported by legal argument. *Dolan v. City of Tigard*, 20 Or LUBA 411 (1991).

2.3 Constitutional Law – Nonspecific Constitutional Claims. LUBA will not consider claims of constitutional violation where the parties raising such claims do not supply legal argument in support of their claims. *Torgeson v. City of Canby*, 19 Or LUBA 511 (1990).

3.1 EFU Statute/Ordinances – Generally. Establishing that proposed "agri-tourism or other commercial events or activities" are "necessary to support the commercial farm uses or the commercial agricultural enterprises in the area" for purposes of ORS 215.283(4)(d)(A) is a relatively high hurdle: the county must find that the events are essential in order to maintain the existence of either the commercial farm uses on the subject property or the commercial agricultural enterprises in the area. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

3.1 EFU Statute/Ordinances – Generally. A demonstration that proposed "agri-tourism or other commercial events or activities" are "necessary to support" an approved commercial activity in conjunction with farm use under ORS 215.283(2)(a), such as a brewery, is not sufficient to demonstrate that the events are "necessary to support" an "existing commercial farm use of the tract," such as the growing of filberts, for purposes of ORS 215.283(4)(d)(A), even where revenue from the brewery "supplements" revenue from the growing of filberts. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

3.1 EFU Statute/Ordinances – Generally. ORS 215.441 does not provide an independent basis to approve a dwelling within a church on property zoned EFU, and, where a local code provision provides that "[e]xisting churches may be maintained, enhanced or expanded on the same tract," a construction of that provision to independently allow a residential use of a church as an enhancement to the church impermissibly conflicts with ORS 215.203, ORS 215.283, and ORS 215.441. *Wetherell v. Douglas County*, 80 Or LUBA 183 (2019).

3.1 EFU Statute/Ordinances – Generally. While a local government's authority to regulate land use and development is generally broad under Oregon law, a local government's authority to regulate land use on exclusive farm use (EFU)-zoned land is governed by state law. Land that is planned and zoned for exclusive farm use must be used exclusively for defined farm uses or limited listed exceptions provided by state law. Production of marijuana is an outright permitted farm use on land zoned EFU. While state law controls permitted uses on farmland and the regulation of marijuana production, local governments may adopt reasonable "time, place, and manner" regulations for marijuana production. *MJAI Oregon 5, LLC v. Linn County*, 78 Or LUBA 366 (2018).

3.1 EFU Statute/Ordinances – Generally. A county's decision is "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances," pursuant to ORS 197.835(10)(a)(A), where petitioner's application for marijuana production meets a county's clear and objective standards for marijuana production on EFU-zoned land, no evidence was submitted that contradicted petitioner's assertion that it could and would meet the county's marijuana production standards, and the county relied upon factors and considerations in denying petitioner's application that are not contained in the applicable approval criteria. Accordingly, the proper disposition of the county's denial is reversal with an order instructing the county to grant approval of the application. *MJAI Oregon 5, LLC v. Linn County*, 78 Or LUBA 366 (2018).

3.1 EFU Statute/Ordinances – Generally. OAR 660-024-0050(6) requires that when land is added to an urban growth boundary (UGB), the local government "must assign appropriate urban plan designations to the added land, consistent with the need determination and the requirements of section (7) of this rule, if applicable." OAR 660-024-0050(7) provides lands included with a

UGB for a public facility "must be planned and zoned for the intended use and must remain planned and zoned for that use unless the city removes the land from the UGB." A city decision to retain the land's existing Exclusive Farm Use zoning until the land is annexed into the city is inconsistent with the OAR 660-024-0050(7) requirement to adopt concurrent plan and zone re-designation "for [that] intended use." *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

3.1 EFU Statute/Ordinances – Generally. ORS 215.448(1)(a) to (d) provide standards that apply to a proposed home occupation in "an exclusive farm use zone, forest zone or a mixed farm and forest zone that allows residential uses," and do not apply to an application for a proposed home occupation on property located in a rural residential zone. *Willis v. Clackamas County*, 76 Or LUBA 244 (2017)

3.1 EFU Statute/Ordinances – Generally. The uses authorized in EFU zones in counties that have designated marginal lands are generally set out in subsections of ORS 215.213, whereas the uses authorized in EFU zones in non-marginal lands counties are generally set out in ORS 215.283. The regulation of dwellings under ORS 215.213 was originally intended to be slightly more restrictive than under ORS 215.283, as the quid pro quo for more liberal allowance of dwellings on designated marginal lands under ORS 215.317. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.1 EFU Statute/Ordinances – Generally. The nonfarm dwelling standards codified at ORS 215.284 were enacted by the legislature as amendments to ORS 215.283(3) and new subsections of ORS 215.283. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.1 EFU Statute/Ordinances – Generally. Legislative Counsel's decision to renumber as ORS 215.284(1) to (6) what the legislature enacted as ORS 215.283(3) to (8) does not change the fact that what is now codified at ORS 215.284(1) to (6) was enacted by the legislature as part of ORS 215.283 and 215.283. ORS 215.283 is the statutory regime that applies to non-marginal lands counties rather than marginal lands counties. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.1 EFU Statute/Ordinances – Generally. As a marginal lands county, Lane County is expressly authorized to apply ORS 215.213(3) in approving a nonfarm dwelling on non-high value farmland in the Willamette Valley. Because Lane County is a marginal lands county, it is not required to apply ORS 215.284(1) in addition to ORS 215.213(3), simply because ORS 215.284(1) expressly applies to lands in the Willamette Valley. ORS 215.284(1) applies to non-marginal lands counties. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.1 EFU Statute/Ordinances – Generally. Where a planning commission almost entirely relied on the EFU zoning statutes to find that a permit applicant inadequately considered alternatives to a proposed EFU-zoned site for a transmission line, and only belatedly and obscurely relied on a comprehensive plan policy to impose a similar alternatives analysis, the permit applicant's general challenge to the planning commission's legal analysis on cited pages of the planning commission's decision where the comprehensive plan policy was mentioned is sufficient to preserve the permit applicant's right to challenge the planning commission's reliance on the plan policy in its appeal to the board of commissioners. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

3.1 EFU Statute/Ordinances – Generally. ORS 215.275(5) requires a county to consider whether the imposition of clear and objective conditions on a proposed utility facility would prevent a significant change in accepted farm practices or prevent a significant increase in the cost of farm practices, and to approve the proposed facility with those clear and objective conditions if the conditions would minimize or mitigate the impacts. *Falcon Heights WSD v. Klamath County*, 64 Or LUBA 390 (2011).

3.1 EFU Statute/Ordinances – Generally. Goal 3 (Agricultural Lands), LCDC administrative rules concerning Goal 3 and the statutory EFU zone contain a level of detail that frequently requires that counties replicate the statutory and rule language in their EFU zones. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

3.1 EFU Statute/Ordinances – Generally. Roadways that cross exclusive farm use zoned land to connect two villages in a destination resort are properly viewed as "[a]ccessory transportation improvements for a use that is allowed" in the exclusive farm use zone, within the meaning of OAR 660-012-0065(3)(a). *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

3.1 EFU Statute/Ordinances – Generally. A local government errs in geographically limiting its inquiry regarding what constitutes a "farm operation" for purposes of ORS 197.247(1)(a) to only lands "adjacent to" or "contiguous with" the property that is the subject of the marginal lands application. *Walker v. Lane County*, 53 Or LUBA 374 (2007).

3.1 EFU Statute/Ordinances – Generally. ORS 197.247(1)(a)(1991), which allows counties to designate as marginal land property that was not managed during three of the five years preceding January 1, 1983 as part of a forest operation producing an average of $10,000 in annual gross income, implicitly requires that counties use 1983 timber prices in estimating the annual timber revenue derived from the property. *Just v. Lane County*, 49 Or LUBA 456 (2005).

3.1 EFU Statute/Ordinances – Generally. ORS 197.247(1)(b)(C) requires that counties use the agricultural classification system in use by the Soil Conservation Service on October 15, 1983, in determining whether proposed marginal lands are predominantly composed of Class VI soils. A county is entitled to rely upon a 1987 Soil Conservation Service soil survey that is a product of the classification system in use on October 15, 1983. *Just v. Lane County*, 49 Or LUBA 456 (2005).

3.1 EFU Statute/Ordinances – Generally. A county EFU zone limit on farm recreational uses that requires that such uses "be subordinate to the commercial agricultural operation in scope, scale and impact, and shall contribute 'added value' to the commercial agricultural farm operation" does not necessarily prohibit a farm recreational use that generates more income than the commercial agricultural operation on the property. *Underhill v. Wasco County*, 43 Or LUBA 277 (2002).

3.1 EFU Statute/Ordinances – Generally. Counties may not impose additional local barriers to uses allowed outright in EFU zones under ORS 215.283(1) and also may not allow additional uses in the EFU zone that are not allowed by statute. *Bechtold v. Jackson County*, 42 Or LUBA 204 (2002).

3.1 EFU Statute/Ordinances – Generally. ORS 215.283(1)(b) separately authorizes churches and cemeteries in conjunction with churches, but does not separately authorize other uses that commonly are constructed in conjunction with churches. That provides at least some indication that such other uses in conjunction with churches are not authorized by ORS 215.283(1)(b). *Bechtold v. Jackson County*, 42 Or LUBA 204 (2002).

3.1 EFU Statute/Ordinances – Generally. ORS 215.283(1)(a) authorizes "[p]ublic or private schools, including all buildings essential to the operation of a school." This language potentially allows a variety of accessory, school-related buildings, and the legislature's failure to include similar language in ORS 215.283(1)(b) where the legislature authorized churches is some indication that the legislature did not intend to authorize a broad range of church-related accessory uses. *Bechtold v. Jackson County*, 42 Or LUBA 204 (2002).

3.1 EFU Statute/Ordinances – Generally. ORS 215.441, which limits local zoning authority over churches, but refers to churches and other places of worship as "nonresidential place[s] of worship," provides context for ORS 215.283(1)(b) and suggests that the word "church" in ORS 215.283(1)(b) is not properly interpreted to authorize rectories, convents, or office/dormitories which are used in large part for residential purposes. *Bechtold v. Jackson County*, 42 Or LUBA 204 (2002).

3.1 EFU Statute/Ordinances – Generally. Absent textual or contextual support for interpreting the word "church" in ORS 215.283(1)(b) as including rectories, convents and offices/dormitories, the general rule that EFU zoning statutes should be interpreted narrowly to limit approval of nonfarm uses applies and the term should be interpreted narrowly to exclude those uses. *Bechtold v. Jackson County*, 42 Or LUBA 204 (2002).

3.1 EFU Statute/Ordinances – Generally. Uses within a mixed farm/forest zone must comply with the restrictions placed on exclusive farm use zones by ORS chapter 215 and the regulations that implement it. *City of Albany v. Linn County*, 40 Or LUBA 38 (2001).

3.1 EFU Statute/Ordinances – Generally. ORS 197.685 imposes a legislative duty to consider non-EFU-zoned lands to provide areas that would supplement seasonal farmworker housing allowed outright on EFU-zoned land. ORS 197.685 does not require that an applicant for quasi-judicial approval for seasonal farmworker housing in EFU zones demonstrate that non-EFU-zoned lands are unavailable to provide such housing. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

3.1 EFU Statute/Ordinances – Generally. Where the ORS 215.283(1)(w) authorization for rural fire service facilities in EFU zones had taken effect, but a county had not yet amended its zoning ordinance to reflect the statutory change, ORS 215.283(1)(w) applies directly, and the county does not violate the zoning ordinance by approving a rural fire service facility in its EFU zone. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

3.1 EFU Statute/Ordinances – Generally. Rural fire service facilities in EFU zones under ORS 215.283(1)(w) need not be separately approved as utility facilities necessary for public service

under 215.283(1)(d) or meet the "necessity test" that is applied to such utility facilities. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

3.1 EFU Statute/Ordinances – Generally. In approving applications for permits for uses that are specifically allowed in rural EFU zones by ORS 215.213 and 215.283, counties are not required to apply the case-by-case urban/rural analysis that is required under Goal 14 and *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986), on non-EFU-zoned rural lands. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

3.1 EFU Statute/Ordinances – Generally. A water utility's proposal to solve a water shortage by drilling wells and constructing related facilities on EFU-zoned land need not demonstrate that it is not feasible to solve the water shortage in some other way than drilling wells. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

3.1 EFU Statute/Ordinances – Generally. Once a water utility decides to solve a water shortage by drilling wells and constructing related facilities, the wells and related facilities must be located on non-EFU-zoned land, unless it is not feasible to do so. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

3.1 EFU Statute/Ordinances – Generally. A utility facility may be located on EFU-zoned land if it is not feasible to locate the utility facility on non-EFU-zoned land and, in that circumstance, ORS 215.213(1)(d) and 215.283(1)(d) do not require that the utility facility be located on the "least suitable" EFU-zoned land. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

3.1 EFU Statute/Ordinances – Generally. In reviewing alternatives to locating a proposed utility facility on a proposed EFU-zoned site, a county is not required to examine alternatives that would also involve using EFU-zoned lands. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

3.1 EFU Statute/Ordinances – Generally. Under *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), a county may not apply local land use legislation to deny or condition uses that are authorized by ORS 215.213(1) or 215.283(1), unless the county is required by statewide planning goals or LCDC rules to apply the local land use legislation to such uses. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

3.1 EFU Statute/Ordinances – Generally. That a type of nonfarm use is listed in ORS 215.283(2) authorizes a county to allow such uses in an EFU zone, but carries no implication that a particular use is consistent with the purpose of the EFU zone as a matter of law. ORS 215.283(2) does not prohibit the county from applying a local criterion that requires a proposal to mine high-value agricultural topsoil in an EFU zone not seriously interfere with the purpose of that zone. *MacHugh v. Benton County*, 37 Or LUBA 65 (1999).

3.1 EFU Statute/Ordinances – Generally. Even assuming that a county cannot categorically prohibit all mining operations in the EFU zone, the county can apply a local standard requiring that conditional uses not seriously interfere with the purpose of the zone to deny a proposal to mine

high-value agricultural topsoil, where the county's application of its standard is limited to mining operations that permanently remove agricultural topsoil. *MacHugh v. Benton County*, 37 Or LUBA 65 (1999).

3.1 EFU Statute/Ordinances – Generally. *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), circumscribes a local government's authority under ORS 215.283(1) with respect to substantive standards, but it does not prescribe the procedure the county must use when considering whether a proposed use is permitted. *Corp. of Presiding Bishop v. Klamath County*, 34 Or LUBA 131 (1998).

3.1 EFU Statute/Ordinances – Generally OAR 660-33-120 and 660-33-130, which prohibit churches on high-value EFU land, are valid because the uses allowed under the rules are not less restrictive than the uses that would otherwise be allowed under ORS 215.283. *DLCD v. Clackamas County*, 33 Or LUBA 675 (1997).

3.1 EFU Statute/Ordinances – Generally. *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), does not prohibit local regulations that implement uses permitted under ORS 215.283(1), and does not restrict LCDC's authority to adopt or apply rules that implement statutory language. *DLCD v. Polk County*, 32 Or LUBA 16 (1996).

3.1 EFU Statute/Ordinances – Generally. In *Lane County v. LCDC*, 138 Or App 635, 910 P2d 414, *modified on recons*, 140 Or App 368 (1996), OAR 660-33-135(7) was invalidated as exceeding the scope of LCDC's rulemaking authority only as the rule applies to the approval of dwellings on high-value farmland in marginal lands counties under ORS 215.213(2)(b); the *Lane County* decision did not invalidate OAR 660-33-135(7) as it applies to ORS 215.283(1). *DLCD v. Polk County*, 32 Or LUBA 16 (1996).

3.1 EFU Statute/Ordinances – Generally. Although a county may regulate or define "commercial activities that are in conjunction with farm use" more restrictively than required by state law, the county's EFU zones may not allow uses that are not authorized by statutory exclusive farm use zoning provisions. *City of Sandy v. Clackamas County*, 28 Or LUBA 316 (1994).

3.1 EFU Statute/Ordinances – Generally. Although nothing in ORS 215.213(1) and (2) and 215.283(1) and (2) prevents a county from adopting an EFU zone that allows uses identified in ORS 215.213(1) or 215.283(1) as outright permitted uses, those statutes do not *require* that it do so. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

3.1 EFU Statute/Ordinances – Generally. ORS 215.316(1) (1993) expresses a legislative intent to retroactively prohibit counties from designating resource lands as marginal lands, and from adopting plan and code provisions allowing additional nonresource uses on such marginal lands, after January 1, 1993. ORS 215.316(1) (1993) does not express an intent to retroactively prohibit counties that have *not* designated marginal lands from applying either ORS 215.283 (1991) or the supposedly stricter provisions of 215.213(1) to (3) (1991) to their exclusive farm use zones. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

3.1 EFU Statute/Ordinances – Generally. County comprehensive plan and ordinance amendments affecting a county's exclusive farm use zone(s), adopted after August 7, 1993, are required to implement the requirements of OAR chapter 660, division 33, for important farmland. OAR 660-33-150(3) (1993). *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

3.1 EFU Statute/Ordinances – Generally. A local government's implementation of exclusive farm use zoning is not the equivalent of imposing a statutory conservation easement. *Young v. Clackamas County*, 24 Or LUBA 526 (1993).

3.1 EFU Statute/Ordinances – Generally. Counties may adopt EFU zones that are more restrictive than statutory EFU zoning requirements, but may not adopt EFU zones that are less restrictive than the statutory requirements. *Harris v. Polk County*, 23 Or LUBA 152 (1992).

3.1 EFU Statute/Ordinances – Generally. Acknowledgment under ORS 197.251 certifies that a comprehensive plan and land use regulations comply with the statewide planning goals, but does not establish that a plan and land use regulations comply with applicable statutes. *Harris v. Polk County*, 23 Or LUBA 152 (1992).

3.1 EFU Statute/Ordinances – Generally. While counties may not adopt exclusive farm use zones that are less protective of agricultural lands than required by statute, they may regulate agricultural lands more stringently. *Avgeris v. Jackson County*, 23 Or LUBA 124 (1992).

3.1 EFU Statute/Ordinances – Generally. Although counties may regulate uses within their exclusive farm use zones more stringently than required by statute, the uses that may be allowed within such zones are limited to those specified in ORS 215.313 and 215.283. *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

3.1 EFU Statute/Ordinances – Generally. Absent some expression of legislative intent to the contrary, the legislature is presumed to have intended that the same term used in different sections of the exclusive farm use statute have the same meaning in both sections. *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

3.1 EFU Statute/Ordinances – Generally. Where language in the EFU statues is not precise, and therefore susceptible of more than one interpretation, the interpretation favoring farm use and discouraging non farm use should be adopted. *Smith v. Clackamas County*, 19 Or LUBA 171 (1990).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Establishing that proposed "agri-tourism or other commercial events or activities" are "necessary to support the commercial farm uses or the commercial agricultural enterprises in the area" for purposes of ORS 215.283(4)(d)(A) is a relatively high hurdle: the county must find that the events are essential in order to maintain the existence of either the commercial farm uses on the subject property or the commercial agricultural enterprises in the area. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A demonstration that proposed "agri-tourism or other commercial events or activities" are "necessary to support" an approved commercial activity in conjunction with farm use under ORS 215.283(2)(a), such as a brewery, is not sufficient to demonstrate that the events are "necessary to support" an "existing commercial farm use of the tract," such as the growing of filberts, for purposes of ORS 215.283(4)(d)(A), even where revenue from the brewery "supplements" revenue from the growing of filberts. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A petitioner may not also operate an exotic animal rescue facility, which is undisputedly not a "farm use," on EFU land where the petitioner uses his or her EFU-zoned property for certain "farm uses," under ORS 215.203. The existing "farm use[s]" do not "legitimize" the concurrent unpermitted uses, nor do they shield the unpermitted uses from county code enforcement action. *A Walk on the Wild Side v. Washington County,* 78 Or LUBA 356 (2018).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. While a local government's authority to regulate land use and development is generally broad under Oregon law, a local government's authority to regulate land use on exclusive farm use (EFU)-zoned land is governed by state law. Land that is planned and zoned for exclusive farm use must be used exclusively for defined farm uses or limited listed exceptions provided by state law. Production of marijuana is an outright permitted farm use on land zoned EFU. While state law controls permitted uses on farm land and the regulation of marijuana production, local governments may adopt reasonable "time, place, and manner" regulations for marijuana production. *MJAI Oregon 5, LLC v. Linn County*, 78 Or LUBA 366 (2018).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A county's decision is "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances," pursuant to ORS 197.835(10)(a)(A), where petitioner's application for marijuana production meets a county's clear and objective standards for marijuana production on EFU-zoned land, no evidence was submitted that contradicted petitioner's assertion that it could and would meet the county's marijuana production standards, and the county relied upon factors and considerations in denying petitioner's application that are not contained in the applicable approval criteria. Accordingly, the proper disposition of the county's denial is reversal with an order instructing the county to grant approval of the application. *MJAI Oregon 5, LLC v. Linn County*, 78 Or LUBA 366 (2018).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A building accessory to farm use that is allowed under ORS 215.213(1)(e) as a building "customarily provided in conjunction with farm use" is not itself a farm use. *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Determining whether a proposed building is allowed in the EFU zone under ORS 215.213(1)(e) or 215.283(1)(e) as a building "customarily provided in conjunction with farm use" requires the local government to determine whether the land is currently employed for farm use and whether the proposed building is of the type that is customarily combined with the farm use in question. Because those determinations are not clear and objective, a building permit to approve such a building is not subject to the ORS 197.015(10)(b)(B) exception for "building permits issued under clear and objective standards." *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Where a property is to be developed with a commercial or industrial use, the internal driveway on that property that connects the commercial or industrial buildings to the nearest public right-of-way is properly viewed as part of the commercial or industrial use, whether that driveway is labeled as "accessory" to the business or an integral part of the use itself. *Wilson v. Washington County*, 63 Or LUBA 314 (2011).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. The Supreme Court's decision in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), that uses listed in ORS 215.203(1) may not be subject to local criteria more restrictive than the statute, did not automatically invalidate all final, unappealed land use decisions or conditions attached to those decisions that were issued and final prior to 1995, even if those decisions were inconsistent with the holding in *Brentmar*. *Just v. Linn County*, 59 Or LUBA 233 (2009).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Whether the county tax assessor in 1971 applied preferential tax assessment to properties that were zoned to allow for agricultural use has little bearing on whether that zone was an "exclusive farm use" zone subject to the limitations of ORS 215.203(1971). Rather, the text and context of the county's zoning ordinance in 1971 is the best evidence. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. LUBA will affirm a county's determination that the Agriculture-A zone adopted in 1971 was not an "exclusive farm use" zone subject to the limitations of ORS 215.203 (1971), for purposes of determining whether proposed dwellings under a Ballot Measure 37 waiver must be "in conjunction with farm use," where the 1971 ordinance included a separate "exclusive farm use" zone that permitted only the uses allowed under ORS 215.203 (1971), the Agriculture-A zone in contrast permitted a large number of nonfarm uses that bore no relationship to the uses allowed in the statute, and the obvious inference is that the county did not intend the Agriculture-A zone to implement ORS 215.203 (1971). *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Pursuant to *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007), a local government may consider "profitability" in determining whether land is "suitable for farm use" under OAR 660-033-0020(1)(a)(B). *Wetherell v. Douglas County*, 54 Or LUBA 646 (2007).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. That a farm use is not commercial-scale in size, intensity or profitability is not a sufficient basis to conclude that land is not suitable for farm use under OAR 660-033-0020(1)(a)(B). *Wetherell v. Douglas County*, 54 Or LUBA 646 (2007).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Under OAR 660-033-0030(3), a local government must consider whether land may be used in conjunction with nearby or adjacent farm lands. *Wetherell v. Douglas County*, 54 Or LUBA 646 (2007).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. OAR 660-033-0030(5) prohibits consideration of "profitability or gross farm income" in determining whether land is agricultural land. That prohibition de-emphasizes if not eliminates the role that the "primary purpose of obtaining a profit in money" language in ORS 215.203(2)(a) definition of farm use might otherwise play in determining whether land is agricultural land. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. "Employment of land for the primary purpose of obtaining a profit in money," within the meaning of ORS 215.203(2)(a), includes a proposal for a feedlot where: (1) calves that are bred off-site are brought to the property, (2) they are fed with feed produced both on-site and off-site, (3) the calves are cared for on-site, and (4) waste is collected and used in conjunction with on-site hay production. *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107 (2004).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. *Moore v. Coos County*, 144 Or App 195, 925 P2d 927 (1996), lends indirect support for the principle that feeding of livestock in pens does not constitute "the produce of livestock," within the meaning of ORS 215.203(2)(a), where there are "no other indices of production." *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107 (2004).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. ORS 215.203(2)(a) provides that "feeding, breeding, management and sale of livestock" is a farm use. A proposed use that will carry out fewer than all four of those activities may still qualify as a farm use, if it nevertheless constitutes "the produce of * * * livestock," which is also listed as a farm use under ORS 215.203(2)(a). *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107 (2004).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Where a regulation specifically authorizes a use in one zone and does not authorize that specific use in a second zone, a more general authorization of uses in the second zone should not be interpreted to include the more specifically authorized use in the first zone. However, that principle would not apply to bar finding a particular feedlot qualifies as a "farm use" rather than a "commercial activity * * * in conjunction with farm use," where the legislature's authorization of "commercial activities that are in conjunction with farm use" is no more specific than its authorization of "farm uses." *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107 (2004).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A county's error in finding that ORS 215.253 imposes an absolute bar on adopting and applying local land use regulations to farm uses provides no basis for remand of land use decision approving a feedlot, where petitioners identify no existing, applicable local land use regulations that apply to county approval of a feedlot. *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107 (2004).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A hearings officer's interpretation of a local code to conclude that a "wholesale nursery" is properly viewed as an "agricultural use" is consistent with the text of the code's definition of "agricultural use," where the term is expressly defined to include "horticultural use." *Lorenz v. Deschutes County*, 45 Or LUBA 635 (2003).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Absent some argument or evidence that calls into question a hearings officer's conclusion that growing plants in a greenhouse is an "accepted agricultural practice," LUBA will reject petitioners' contention that the hearings officer's decision must be remanded for a more detailed explanation of that conclusion. *Lorenz v. Deschutes County*, 45 Or LUBA 635 (2003).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. As long as the primary purpose of grazing livestock is to obtain a profit from money, that activity is a farm use as defined at ORS 215.203(2), even if the profit obtained is not directly from grazing or selling livestock, but instead from using the livestock as part of a nonfarm business on the property. *Oregon Natural Desert Assoc. v. Harney County*, 42 Or LUBA 149 (2002).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A 1995 amendment to the ORS 215.203(2)(a) definition of "farm use" clarified that "riding lessons, training clinics and schooling shows" are activities commonly associated with facilities for "stabling or training equines." However, the legislature did not intend that such activities be properly viewed as "farm uses" in themselves, in isolation from "stabling or training equines." *Oregon Natural Desert Assoc. v. Harney County*, 42 Or LUBA 149 (2002).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A facility where fruit process water is trucked to a lagoon, stored and aerated to prevent odors and later used to irrigate a hay crop is properly viewed as a "farm use," within the meaning of ORS 215.203(2). *Farrell v. Jackson County*, 41 Or LUBA 1 (2001).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. The requirement in ORS 215.203(2) that land must be employed "for the primary purpose of obtaining a profit in money" by one of the uses specified in the statute in order to be considered in "farm use" is an objective test that focuses on the activities that are occurring on the land rather than on the actual motivation of the owner or operator. *Cox v. Polk County*, 39 Or LUBA 1 (2000).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A proposed use of land may be both a "farm use" and a "utility facility," and where it qualifies as both, the proposed use must meet the approval criteria for both farm uses and utility facilities. *Cox v. Polk County*, 39 Or LUBA 1 (2000).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. When a local ordinance creates an exemption from additional approval criteria for uses permitted in the underlying zone, and the ordinance distinguishes between permitted uses and uses subject to administrative review, it is incorrect to determine that wineries, which are uses subject to administrative review, are permitted uses in the exclusive farm use zone, and thus not subject to the additional approval criteria. *Roth v. Jackson County*, 38 Or LUBA 894 (2000).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. An access road to a winery is an accessory use to the winery. When the zoning for the location of the proposed access road does not allow wineries, the access road cannot be established as an accessory use on that part of the property. *Roth v. Jackson County*, 38 Or LUBA 894 (2000).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Under ORS 215.705(4), an application for a dwelling in a mixed farm/forest zone must comply with the siting standards appropriate for the predominant use of the tract on January 1, 1993. A showing that no farm use of the property, as that term is defined in ORS 215.203(2), was occurring on the tract as of January 1, 1993, does not mean that, by default, the property was predominantly in forest use on that date. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. ORS 215.705(4) requires that a county must determine whether farm or forest uses predominated on a "tract" on January 1, 1993. However, the configuration of the tract is considered as it exists as of the time an application for a dwelling is submitted. Once the scope of the tract is identified, the inquiry turns to whether farm or forest uses predominated on that tract on January 1, 1993. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. In considering which of two uses, farm or forest, predominate on a tract as of January 1, 1993, a county may consider more than the number of acres devoted to farm or forest use to determine predominant use. However, those considerations must flow from the use that was made of the tract on January 1, 1993. Thus, income from farm and forest uses and the amount of activity directed at those uses may be considered, but historic uses and soil capability may not. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Portions of a tract that are used for nonfarm or nonforest activities have no relevance to the inquiry under ORS 215.705(4), which requires a county to determine whether farm or forest uses predominated on a tract as of January 1, 1993. If only a small portion of the property can reasonably be considered to be in farm or forest use, the county need only consider that portion in its determination of predominant use. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A county must consider all farm uses in the area, including "hobby farm" uses located on adjacent properties, in determining whether property can practicably be managed for farm use, as required by ORS 215.705(2)(a)(C)(i). *Friends of Linn County v. Linn County*, 37 Or LUBA 297 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. County findings that a parcel has been managed for "private use" rather than for "profit" fail to demonstrate that a parcel "cannot be practicably managed for farm use." Although the statutory definition of "farm use" requires that property be used "for the purpose of obtaining a profit in money," the term "profit" in this context does not mean profit in the ordinary sense, but rather refers to gross income. *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Pasturing livestock is a "farm use" as that term is defined in ORS 215.203(2), even though the owner's primary purpose in pasturing cattle on the property is to reduce fire potential by reducing ground cover. *DLCD v. Wallowa County*, 37 Or LUBA 105 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. The statutory definition of "farm use" which requires in part that the land be used "for the primary purpose of obtain a profit in money" by farming, does not require an inquiry into the primary actual motivation of particular landowners. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. ORS 215.203(2)(a) expressly defines "farm use" to permit "on-site * * * equipment and facilities" used for "farm use," even if it is possible to locate such equipment and facilities on land outside the EFU zone. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. An irrigation reservoir may be considered a farm use, notwithstanding that the reservoir is sized to accommodate the needs of the supplier rather than the farm user. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. The grazing of livestock on property in conjunction with a larger livestock operation on other lands constitutes the current employment of land for the produce of livestock under ORS 215.203. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A property need not be capable of supporting a commercial farm by itself to be capable of being put to "farm use" as that term is defined in ORS 215.203. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. LUBA does not independently analyze the evidence, but reviews evidence in the record solely to determine whether it was reasonable for the decision maker to rely on that evidence in making a decision. Where the written evidence is conflicting and a video tape makes it clear that only small remnants of past farming or Christmas tree growing efforts on the subject property remain among the piles of debris that have been scattered over the subject property, it is reasonable for a hearings officer to conclude there is no current farm use of the property. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Whether composting qualifies as a farm use under ORS 215.203(2)(a) is a question of statutory interpretation, not a question of whether agricultural experts believe composting, in the abstract, falls within a scientific definition of farm use. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A composting operation where all the compost inputs are produced off-site and all of the compost produced is sold for use off-site does not involve "current employment of the land" and for that reason is not a "farm use" as defined by ORS 215.203(2)(a). *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Where petitioners argue that the statutory definition of "farm use" is void for vagueness but make no attempt to develop that argument, LUBA will reject the argument. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. The suitability standard requires that the local government consider whether the subject parcel or portion thereof can reasonably be put to farm use in conjunction with adjacent or nearby lands, including land under the same ownership. The local government must consider not only the property's suitability for producing crops but also its suitability for producing livestock, both alone and in conjunction with adjoining and nearby properties. *DLCD v. Crook County*, 34 Or LUBA 243 (1998).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. There is no indication in the language of ORS 215.203(2)(a) that "other agricultural use" includes uses other than those relating to plants or animals. *DLCD v. Curry County*, 32 Or LUBA 358 (1997).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. An operation that requires land for grazing horses employs that land for the production of livestock within the meaning of ORS 215.284(2)(b); therefore, a county errs when it concludes that consideration of the potential use of a parcel for grazing horses is not required in determining whether the parcel is generally unsuitable for farm use. *Moore v. Coos County*, 31 Or LUBA 347 (1996).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. The prohibitions against unreasonable restriction or regulation of farm uses stated in ORS 215.253(1) are not limited to local government legislative enactments, but may apply as well to local government quasi-judicial land use decisions. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. ORS 215.253 must be read in context with ORS 215.203(1) and ORS 215.283(2)(b), which specifically permit mineral and aggregate operations on EFU-zoned land. Mineral and aggregate operations do not per se unreasonably restrict or regulate farm structures or practices. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A condition imposed on a mineral and aggregate operation does not violate ORS 215.253(1) simply because it has the potential of impacting some farm uses. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A potential, temporary impact on farm structures or practices on the subject property, caused by an aggregate operation allowed in the EFU zone, is not an unreasonable restriction or regulation under ORS 215.253**.** *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Where the term "farm use" is defined in a rural residential zone to include noncommercial farms, and it appears from the challenged decision that the hearings officer may not have considered noncommercial farms in determining whether a landscaping business qualifies as a commercial or processing activity "in conjunction with timber and farm uses," the decision will be remanded. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Even if a local government may establish the level of profitability necessary to qualify as a "farm use," as that term is defined by ORS 215.203, such level may not be set at the same level that would qualify a farm use as a commercial agricultural enterprise. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Evidence which establishes there are markets for farm products from the subject property, but does not address whether products of the proposed farm will "contribute substantially" to those markets, agricultural processors and the local agricultural economy does not "clearly support" a determination that the proposed farm use satisfies a code standard requiring that "products from the farm unit contribute substantially to the agricultural economy, to agricultural processors and [to] farm markets." *Kunze v. Clackamas County*, 27 Or LUBA 130 (1994).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A local government decision maker exercises both policy and legal judgment in determining whether the raising of large numbers of pigs in a confined area is a use "similar" to farm uses permitted in an EFU zone. Therefore, such a decision is a land use decision subject to LUBA's jurisdiction. *Derry v. Douglas County*, 26 Or LUBA 25 (1993).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. There is substantial evidence to support a local government's determination that a parcel is in farm use, where the parcel is a pasture for livestock and poison oak is burned on the property to retain that pasture. *Leabo v. Marion County*, 24 Or LUBA 495 (1993).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. The definition of "accepted farming practices" in ORS 215.203(2)(c) is relevant to whether land under certain buildings is "currently employed for farm use." ORS 215.203(2)(b)(F). This definition has no relevance to whether an undeveloped parcel is currently in "farm use," as defined by ORS 215.203(2)(a). *Forster v. Polk County*, 22 Or LUBA 380 (1991).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. A finding that "the use of the parcel is farm related" does not satisfy a local standard requiring that the parcel is "currently employed

for farm use where the day-to-day activities are principally directed to the farm use of the land." *Forster v. Polk County*, 22 Or LUBA 380 (1991).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Both the first sentence of the definition of farm use in ORS 215.203(2)(a) and the county code identify as farm use only the *production* of farm products for sale or otherwise obtaining a monetary profit. *J and D Fertilizers v. Clackamas County*, 20 Or LUBA 44 (1990).

3.2.1 EFU Statute/Ordinances – Farm Uses – Generally. Under ORS 215.203(2)(a) and the county code, "the preparation and storage of [farm] products raised on such land for man's use * * * and disposal by marketing or otherwise," i.e. "farm use," does not require that *all* agricultural products involved in such an operation be produced on the land where the preparation and storage takes place. However, an operation for the preparation or storage of agricultural products where *none* of the products are produced on the land where the preparation or storage takes place does not constitute farm use. *J and D Fertilizers v. Clackamas County*, 20 Or LUBA 44 (1990).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. On remand, where LUBA instructed the county to resolve whether the project applicant's farm operation qualifies as a "commercial farming operation" for purposes of applying for an accessory farm dwelling for a relative, LUBA established that certain findings and evidence are necessary to establish compliance with OAR 660-033-0130(9). The county's findings fall short of establishing that the applicant's farm operation qualifies as a "commercial farming operation," because it is an undefined term, and it is the county's obligation to attempt to articulate the thresholds that separate a "commercial" from a non-commercial farming operation, and to determine those thresholds in the first instance. Although the county has some discretion to determine the thresholds, that determination will necessarily constitute a mixed question of fact and law, subject to LUBA's review for legal error and evidentiary sufficiency. *Richards v. Jefferson County*, 79 Or 171 (2019).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. The focus of OAR 660-033-0130(9) and county code that implements it regarding whether the "farm operator * * * continue[s] to play the predominant role in the management and farm use of the farm," is on the farm operator's involvement in farm operations *on the subject property*, not on off-farm businesses that may relate to the farm operation. The commercial farm operator's involvement in off-farm businesses do not help establish any element of OAR 660-033-0130(9). The commercial farm operator's involvement in off-farm businesses are relevant to establishing the elements of OAR 660-033-0130(9) only in so much as the time spent on those businesses and away from the farm operation might undermine the claim that the farm operator will continue to play the "predominant role" in the farm operation and requires assistance in running the farm operation. *Richards v. Jefferson County*, 79 Or 171 (2019).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A finding that the applicant qualifies as a "farm operator" as defined at OAR 660-033-0130(9)(a) is inadequate, where the finding merely assumes the applicant is the farm operator, and does not address issues raised below that the applicant leases the land to a third person who is the actual farm operator. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. To qualify as a "farm operator" as defined at OAR 660-033-0130(9)(a), in order to gain approval of a farm relative dwelling, the applicant must establish that he or she will "continue to play the predominant role" in farm use of the property. That qualification may not be met if the reason the applicant requires the assistance of a relative is because the applicant is substantially employed off the farm and does not have enough time to conduct farm operations. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. To gain approval of a farm relative dwelling, the applicant must qualify as the "farm operator" and demonstrate, among other things, that he or she would "continue to play the predominate role" in farm operations. That demonstration requires some evidence regarding the proportionate contributions of the farm operator and the relative to the farm operation. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where the record includes no evidence or findings regarding whether a 119-acre parcel with a hay-growing operation constitutes

a "commercial farm operation," for purposes of approving a farm relative dwelling under OAR 660-033-00130(9), remand is necessary to address that issue. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. An occupant of a proposed accessory farm dwelling who is employed full-time as a long-haul trucker is not "principally engaged" in farm use of the property, and therefore cannot be used to qualify the dwelling as an accessory farm dwelling. *Aplin v. Deschutes County*, 69 Or LUBA 174 (2014).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Determining whether a person is "principally engaged" in farm use of the property for purposes of qualifying an accessory farm dwelling requires the applicant to submit, and the county to evaluate, evidence that, to the extent necessary, describes or quantifies the amount of time that the occupant will be engaged in farm use of the property, and compare it to the average amount of time typically required for a full time employee of the relevant farm use. *Aplin v. Deschutes County*, 69 Or LUBA 174 (2014).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Activities that a county may consider in determining whether a person is "principally engaged" in farm use must be activities related to "farm use" as that term is defined at ORS 215.203(2)(a). Activities that are inseparable from general rural residential living do not constitute activities that may be considered in determining whether a proposed farm dwelling will be occupied by a person who is "principally engaged" in farm use, even if such residential activities arguably benefit the farm operation in some way. *Aplin v. Deschutes County*, 69 Or LUBA 174 (2014).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. LUBA will affirm a county finding that an elderly couple qualifies as the occupants of a "relative" farm dwelling because they provide "assistance" to the farm operation, where there is substantial evidence in the record that advancing age and health issues do not prevent the couple from assisting in the management of the farm. *Aplin v. Deschutes County*, 69 Or LUBA 174 (2014).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. In approving a property line adjustment between two EFU-zoned parcels to facilitate a proposed farm dwelling, under a standard that requires that the adjusted parcel "qualifies for a homesite," a county may rely on a concurrent county decision approving a farm dwelling on the adjusted parcel to conclude that the "qualifies for a homesite" standard is met, and need not require farm income evidence or adopt findings as part of the adjustment decision that again demonstrate that the adjusted parcel qualifies for a farm dwelling. *Louks v. Jackson County*, 65 Or LUBA 58 (2012).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A lot of record dwelling approval under ORS 215.705(1) does not have the automatic effect of consolidating parcels within the tract in which the dwelling is approved; such consolidation must occur via a formal process that has the legal effect of vacating the interior property lines. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. OAR 660-033-0135(1) authorizes a farm dwelling on a "parcel," which obligates the local government to confirm that the

subject property is a unit of land created in one of the ways described in ORS 92 and ORS 215.010, but it does not obligate the local government to determine whether the land use decision or process that created the property was legally correct in the sense that all applicable standards were properly applied and satisfied. Any legal errors in such decisions cannot be challenged in the appeal of a subsequent decision approving a dwelling on the parcel. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. The OAR 660-033-0135(1)(d) requirement allowing a farm dwelling on a parcel only if "there is no other dwelling on the subject tract" focuses on the "subject tract" as it exists when the local government approves the farm dwelling; that the parcel was once part of a different tract that included a dwelling does not prohibit approval of the farm dwelling, if the tract the parcel is currently a part of has no dwelling. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. OAR 660-033-0135(1)(c) allows a farm dwelling upon a finding that the dwelling will be occupied by persons principally engaged in farm use of the land at a commercial scale. Although the rule is ambiguous regarding whether the "land" means the parcel on which the dwelling would be located or the tract that includes the parcel, based on context it is reasonably clear that the unit of analysis for the "commercial scale" inquiry is the tract. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A county errs in finding that a farm dwelling will be occupied by persons principally engaged in farm use of the land at a "commercial scale" for purposes of OAR 660-033-0135(1)(c) based on evidence of ranching activities on a 17,000-acre ranch that the subject tract is associated with, instead of the tract on which the proposed dwelling will be located. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A county is not required to impose a condition prohibiting use of a farm dwelling if the tract on which it is located is no longer used for farm use at a commercial scale. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Seasonal occupation of a farm dwelling is not necessarily inconsistent with a finding that the dwelling will be occupied by persons "principally engaged" in farm use of the property, where the property is located in a high elevation area where pasture and farm use is possible only six months of the year. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where the local notice of appeal fails to identify any issue regarding whether a proposed farm relative dwelling is "necessary," that issue cannot be raised on appeal to LUBA, pursuant to ORS 197.825(2)(a) and *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A farm dwelling is permitted under OAR 660-033-0135(7)(a) only if the property is "currently employed for the farm use * * * that produced" the requisite $80,000 income in farm products. As worded, the rule does not permit a farm dwelling if the current farm use of the property is significantly different from the farm use that produced the requisite income. *Chapman v. Marion County*, 60 Or LUBA 377 (2010).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A hearings officer does not err in rejecting as not credible testimony that a 19-acre farm produced over $80,000 in revenue from hay grown on the property, where the applicant provided no evidence of how much hay was grown on the property, or documentation distinguishing revenue from the sale of hay grown on the property from revenue derived from the resale of $83,000 in hay that the applicant purchased that year, and substantial evidence in the record indicated that to derive $80,000 in revenue solely from hay grown on the property would mean the applicant achieved yields and prices several times higher than average for the county. *Chapman v. Marion County*, 60 Or LUBA 377 (2010).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A decision maker is not required to exercise policy or legal judgment in determining whether a replacement dwelling replaces a dwelling that is "lawfully established" under ORS 215.283(1)(s), where a valid building permit was issued for the dwelling sought to be replaced. *Biggerstaff v. Yamhill County*, 58 Or LUBA 476 (2009).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A local code provision that was adopted to implement the OAR 660-033-0130(9) authorization for family farm help dwellings does not require that an applicant establish that the relative's assistance is required year-round or full-time. Where an applicant identifies varied tasks that the relative will perform and takes the position that the relative's assistance will be particularly needed during times when the only farm operator cannot be present, the applicant adequately establishes that the relative's assistance is "required" under the code. *Harland v. Polk County*, 44 Or LUBA 420 (2003).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. The question of whether a particular farm parcel size supports a farm operation that contributes to and helps maintain the "commercial agricultural enterprise" in the area, within the meaning of OAR 660-033-0020(2) and 660-033-0100, is similar to the question of whether a particular farm operation is a "commercial farm operation" under OAR 660-033-0130(9). Therefore, a county could require that an applicant for a family farm help dwelling on a commercial farm operation must establish that the farm operation "(1) "[c]ontributes in a substantial way to the area's existing agricultural economy, and (2) "[h]elps maintain agricultural processors and established farm markets." *Harland v. Polk County*, 44 Or LUBA 420 (2003).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Because LCDC did not define the term "commercial farm operation" in OAR 660-033-0130(9) or draft the rule to expressly provide that only those farm operations that make up the county's "[c]ommercial [a]gricultural [e]nterprise" are eligible for a family farm help dwelling, it is not appropriate to assume that LCDC intended to *require* that county's derive a definition of "commercial farm operation" from OAR 660-033-0020(2). Rather, LCDC intended to allow the county some discretion in distinguishing

"hobby" or "recreational" farms from those farms that rise to the level of a commercial farm operation. *Harland v. Polk County*, 44 Or LUBA 420 (2003).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A cattle operation with from 26 to 70 head of purebred and crossbred cattle is not a large cattle operation, but a county does not err in concluding that such a cattle operation is a "commercial farm operation," within the meaning of OAR 660-033-0130(9) and implementing local code provisions, where the cattle operation provides the sole source of taxable income for the farm operator. *Harland v. Polk County*, 44 Or LUBA 420 (2003).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A code provision that allows a farm dwelling on a 160-acre rangeland parcel, rather than the minimum 320 acres specified in OAR 660-033-0135(1)(a), may be inconsistent with the rule. However, the county may rely on its code, acknowledged in 2001 to comply with Goal 3 and the Goal 3 rule, notwithstanding any inconsistency with the rule. *Oregon Natural Desert Assoc. v. Harney County*, 42 Or LUBA 149 (2002).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. OAR 660-033-0135(1)(c) allows a farm dwelling only if the occupant(s) will be "principally engaged" in farm use, as opposed to principally engaged in nonfarm uses. Consequently, in allowing a farm dwelling under OAR 660-033-0135(1)(c), it is not sufficient for the county to determine that the occupants, as opposed to someone else, will be the primary actors in farm use of the property, where the record shows that the occupants' primary economic livelihood is a nonfarm use. *Oregon Natural Desert Assoc. v. Harney County*, 42 Or LUBA 149 (2002).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. OAR 660-033-0135(1) provides that a dwelling may be considered customarily provided in conjunction with farm use if it satisfies four standards set forth in the rule. Nothing in the rule requires the county to make a separate determination, in addition to applying the four standards, that the predicate farm use is of the type that is customarily associated with a dwelling. *Oregon Natural Desert Assoc. v. Harney County*, 42 Or LUBA 149 (2002).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Income and activities pursuant to a nonfarm business that is authorized by a conditional use permit on land zoned EFU may not be considered, for purposes of determining whether the farm uses proposed to support a farm dwelling are "at a commercial scale." *Oregon Natural Desert Assoc. v. Harney County*, 42 Or LUBA 149 (2002).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. In considering whether a farm management plan has been substantially complied with, a county is not required to consider issues that could have been presented in a prior, unappealed decision that authorized a property line adjustment for the two parcels that were the subject of the farm management plan. *Rochlin v. Multnomah County*, 37 Or LUBA 237 (1999).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A bill to the property owner for spraying and planting of trees is substantial evidence that the required spraying was done on the

property, notwithstanding that the bill refers to a different property, where the property owner explains during the local hearing that the reference to a different property is an error and LUBA concludes a reasonable person could have accepted that explanation. *Rochlin v. Multnomah County*, 37 Or LUBA 237 (1999).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A property owner's explanation that required plowing and cultivation occurred at the time Christmas trees were planted is substantial evidence that required plowing and cultivation occurred, where the only contrary evidence is opponents' unsupported expressions of doubt that the required plowing and cultivation occurred. *Rochlin v. Multnomah County*, 37 Or LUBA 237 (1999).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A county governing body's interpretation that a zoning ordinance requirement that "activities" specified in a farm management plan be implemented did not require that each and every task for which a cost estimate was provided in the farm management plan for each year be implemented is not "clearly wrong," and, therefore, is not reversible under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Rochlin v. Multnomah County*, 37 Or LUBA 237 (1999).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. The OAR 660-033-0140 provisions imposing time limits on and providing standards for extension of certain EFU zone permits, including farm dwelling permits, expressly apply only to permits approved after August 7, 1993. OAR 660-033-0140 does not prohibit extension of farm dwelling permits that were approved prior to August 7, 1993 and does not require that the standards adopted by that rule be applied to any extensions of such previously approved farm dwelling permits. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. OAR 660-033-0135 and 660-033-0140 have no legal effect on the continued validity of farm dwelling permits approved prior to the adoption of those rules or the county's authority to impose time limits on those previously approved permits or to adopt standards for extending those new time limits. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Under ORS 215.428(3), OAR 660-033-0140 may not be applied to applications for farm dwelling permits that were filed prior to the effective date of the rule and were pending on the date the rule became effective. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. The 80,000 dollars gross annual income requirement stated in OAR 660-33-135(7) for farm dwellings on high-value farmland is not inconsistent with ORS 215.283(1)(f), although it conflicts with ORS 215.213(2)(b) under *Lane County v. LCDC*, 138 Or App 635, 910 P2d 414, *modified on recons*, 140 Or App 368, 914 P2d 1114, *rev allowed*, 324 Or 305 (1996). *Nichols v. Clackamas County*, 32 Or LUBA 113 (1996).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. The county's findings are inadequate to establish compliance with OAR 660-05-030(4) where they do not show that once the proposed level of farm activity is established on the subject property, the property will be

"currently employed for the primary purpose of obtaining a profit in money" as required by ORS 215.203. *Still v. Marion County*, 32 Or LUBA 40 (1996).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. In *Lane County v. LCDC*, 138 Or App 635, 910 P2d 414, *modified on recons*, 140 Or App 368 (1996), OAR 660-33-135(7) was invalidated as exceeding the scope of LCDC's rulemaking authority only as the rule applies to the approval of dwellings on high-value farmland in marginal lands counties under ORS 215.213(2)(b); the *Lane County* decision did not invalidate OAR 660-33-135(7) as it applies to ORS 215.283(1). *DLCD v. Polk County*, 32 Or LUBA 16 (1996).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Findings with respect to an applicant's need for a farm dwelling do not necessarily satisfy the requirement in ORS 215.283(1)(f) that a dwelling be "customarily required in conjunction with farm use." *Ramsay v. Linn County*, 30 Or LUBA 283 (1996).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A finding under ORS 215.283(1)(f) that a proposed farm dwelling is "customarily required in conjunction with farm use" must be based on substantial evidence that goes beyond the facts of the applicants' own farm. *Ramsay v. Linn County*, 30 Or LUBA 283 (1996).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where a local code requires that a second farm dwelling be shown "conclusively" to be "necessary for the operation of the commercial farm," but does not define the term necessary, it is appropriate to use the dictionary definition of the term "necessary." *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where a local code requires that a second farm dwelling be shown to be "necessary," absent a definition to the contrary or contrary legislative history, the term "necessary" has the same meaning in the Goal 3 context that it has in the Goal 4 context. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. While adding dwellings to the existing dwellings on one parcel of a multi-parcel commercial orchard may provide additional deterrence to trespass, vandalism and theft on that parcel, those dwellings will not provide deterrence on the other parcels and are not "necessary" for continuation of the commercial farm. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Although a code definition of "high-value farmland," unlike the definition in OAR 660-33-020(8), is prefaced by the phrase "for the purpose of locating a limited lot of record dwelling on farmland," that the code definition is specifically incorporated into the approval standards for other types of dwellings on high-value farmland, as required by LCDC rule, is sufficient to establish that the definition must be applied in these other circumstances as well. *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Following 1993 legislative amendments, small scale farm or forest dwellings are not allowable under Goals 3 and 4, and ORS 215.304(1) prohibits LCDC from adopting or implementing any rule which would permit counties

to allow such small scale farm or forest dwellings. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A finding that simply states the farm management plan submitted by an applicant for farm dwelling approval meets the local code's definition of "commercial farm" is impermissibly conclusory. *Kunze v. Clackamas County*, 27 Or LUBA 130 (1994).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where the local code allows a farm dwelling on EFU-zoned property that "is currently used for a commercial farm use," the local government may interpret its code to allow it to issue a building permit for a farm dwelling when a commercial farm management plan is substantially implemented, including a situation where perennial crops capable of producing the level of income required for commercial farm use have been planted on the property. *Kunze v. Clackamas County*, 27 Or LUBA 130 (1994).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. The provisions of ORS 215.213 and 215.283 establishing the uses allowable on exclusive farm use zoned land apply directly to a local government decision approving a farm dwelling on such land. *Fleck v. Marion County*, 25 Or LUBA 745 (1993).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A local government decision that approves a farm dwelling, but does not require that the farm use justifying the dwelling be established on the subject property prior to issuance of a building permit for the proposed farm dwelling, violates ORS 215.283(1)(f) and OAR 660-05-030(4). *Fleck v. Marion County*, 25 Or LUBA 745 (1993).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A county may reasonably interpret the term "existing commercial farm enterprises" in a code provision establishing a minimum lot size standard for farm dwellings, as not including property that is not presently operated as part of a commercial farm operation. *Giesy v. Benton County*, 25 Or LUBA 493 (1993).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where the county code requires the "farm unit" on which a farm dwelling is proposed to be located to be consistent with the size of existing commercial farm enterprises in the area, and also recognizes that commercial farms may be composed of several separate management units, it is reasonable for the county to interpret "farm unit" to include all land that is part of a farm operation, including land in different locations. *Giesy v. Benton County*, 25 Or LUBA 493 (1993).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where a farm dwelling approval standard in a local code requires a county to consider the median size of commercial farms in a specific area, as reported by certain government agencies or "other similar source," it is within the county's discretion to interpret the "other similar source" provision to allow it to consider relevant evidence from the county planning department, county assessor's office or other reliable sources. *Giesy v. Benton County*, 25 Or LUBA 493 (1993).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. In determining compliance with a local code standard that a proposed farm dwelling be on a parcel as large as the median commercial farm unit in the area, a local government may rely on evidence that farm operations on three adjoining parcels constitute one commercial farm operation for purposes of calculating the size of the median commercial farm unit in that area. *Walker v. Clackamas County*, 25 Or LUBA 6 (1993).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Under OAR 660-05-030(4), a dwelling customarily provided in conjunction with farm use may not be approved until the farm use which justifies the dwelling exists on the subject property. *Forster v. Polk County*, 24 Or LUBA 476 (1993).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. It is clearly contrary to the express terms of a local ordinance standard requiring a determination that "the type of farm products produced on the applicant's farm" be unrepresented within a particular area, to determine the standard is satisfied by a showing that there are no similar farm management methodologies employed on farms in the designated area. *Giesy v. Benton County*, 24 Or LUBA 328 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. That area farms produce either purebred cattle or sheep, rather than a combination of purebred cattle and sheep, is not a basis for determining there are no similar farm products produced in the designated area. *Giesy v. Benton County*, 24 Or LUBA 328 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. The grown on "land used exclusively" requirement of ORS 215.203(2)(a) and (3)(a) and the "evidence of periodic maintenance practices" requirement of ORS 215.203(3)(d) are qualifications for particular tax treatment, and are *not* standards applicable to the approval of dwellings "customarily provided in conjunction with farm use" under ORS 215.283(1)(f). *Forster v. Polk County*, 23 Or LUBA 420 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A county can approve a dwelling customarily provided in conjunction with farm use, where all or part of the proposed farm use does not yet exist on the subject property, only if it (1) determines the farm operation proposed in a farm management plan satisfies the applicable approval standards, and (2) ensures through conditions that the farm dwelling may not be built until after the county determines the farm management plan has been carried out. *Forster v. Polk County*, 23 Or LUBA 420 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. In approving a dwelling customarily provided in conjunction with farm use, what OAR 660-05-030(4) and equivalent local code provisions require is that the daily activities on the subject *property* be directed primarily towards farm use, rather than residential use, not that the daily activities of the *residents* be directed primarily toward farm use. *Forster v. Polk County*, 23 Or LUBA 420 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Parcels in Exclusive Farm Use zones that are of insufficient size to "continue the existing commercial enterprise in the area" may

be eligible for approval of a nonfarm dwelling, but are not eligible for approval of a farm dwelling. OAR 660-05-025; 660-05-030. *DLCD v. Yamhill County*, 23 Or LUBA 361 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A local government may not distinguish between commercial and noncommercial farms in an area, as required by OAR 660-05-015(6), based on gross farm income only. All of the factors specified in OAR 660-05-015(6)(b) must be considered. *DLCD v. Yamhill County*, 23 Or LUBA 361 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. ORS 215.283(1)(e) allows a dwelling for a relative whose assistance either is *or will be* required by the farm operator. Therefore, such a dwelling may be justified on the basis of *proposed* farm activities. Neither OAR 660-10-030(4) nor ORS 215.283(1)(f), relating to approvals of primary farm dwellings in EFU zones, are applicable to the approval of a dwelling for the relative of a farm operator under ORS 215.283(1)(e). *Kenagy v. Benton County*, 23 Or LUBA 328 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where the unchallenged facts reflected in an appealed decision are that the farm operator requires assistance to perform the tasks necessary to carry out a cattle operation on a portion of the farm parcel due to his physical condition, that the proposed assistance of the farm operator's relatives is "nominal" provides no basis for reversal or remand of the challenged decision. *Kenagy v. Benton County*, 23 Or LUBA 328 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where the local government findings are silent on the issue of whether the farm operator will continue to have significant involvement in the farm operations, but suggest that the relative will assume all of the farm operator's duties, the decision must be remanded to determine whether the farm operator will continue to have "significant involvement" in the farm operations on the farm parcel. *Kenagy v. Benton County*, 23 Or LUBA 328 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Even where a parcel is shown to be in commercial farm use, approval of a dwelling customarily provided in conjunction with farm use requires a demonstration that the proposed dwelling is customarily provided in conjunction with the particular commercial farm use. It may not be assumed that a dwelling is customarily provided in conjunction with all commercial farm uses. *Elliott v. Lane County*, 23 Or LUBA 257 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. In applying the "customarily provided in conjunction with farm use" standard of OAR 660-05-030(4), only existing farm uses of the property may be considered. *Elliott v. Lane County*, 23 Or LUBA 257 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. In determining whether a proposed dwelling meets the ORS 215.213(2) standards for dwellings in conjunction with a Christmas tree farm use, it is incorrect to apply the "used exclusively" and "evidence of periodic maintenance practices" standards contained in ORS 215.203(2)(a) and (3)(a) and (d). Those ORS 215.203 standards are designed to constitute qualifications for particular taxation treatment, and

are not land use standards applicable to approval of dwellings in conjunction with farm use. *Harwood v. Lane County*, 23 Or LUBA 191 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Nothing in ORS 215.213(2) requires a local government to find that a proposed dwelling in conjunction with farm use be "necessary" to the farm use of the property. *Harwood v. Lane County*, 23 Or LUBA 191 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. OAR 660-05-030(4) does not allow approval of a dwelling customarily provided in conjunction with farm use where the farm use that the dwelling would be customarily provided in conjunction with does not yet exist on the subject property. *Hayes v. Deschutes County*, 23 Or LUBA 91 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A code approval standard requiring that a farm dwelling be located on a parcel "planted in perennials capable of producing upon harvest, an average of at least 10,000 dollars in gross annual income" does not require that the *site* be capable of producing the required income, but rather that the *perennials planted* on the site be capable of producing, upon harvest, the required income. *McKay Creek Valley Assoc. v. Washington County*, 23 Or LUBA 85 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. In approving a request for a dwelling in conjunction with farm use, under applicable local code provisions which require that the proposed farm use constitute a commercial farm, a county is not required to find that the proposed commercial farm will not have adverse environmental impacts or that the commercial farm will be successful in the short or long term. *Richards v. Marion County*, 22 Or LUBA 608 (1992).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where a local code authorizes a second farm related dwelling for a relative of a "farm operator," whether the alleged "farm operator" owns the farm property is a relevant consideration in determining who is the "farm operator." *Kenagy v. Benton County*, 22 Or LUBA 356 (1991).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. To the extent it is relevant to determine whether an alleged farm operator has "significant involvement in farm operations," that the alleged farm operator is a property owner who retains the right to control when, whether and what crops are planted indicates "significant involvement in farm operations." *Kenagy v. Benton County*, 22 Or LUBA 356 (1991).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. OAR 660-05-030(4) is applicable only to determining whether dwellings are "customarily provided in conjunction with farm use" under ORS 215.213(1)(g) and 215.283(1)(f). *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 421 (1990).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. There is no requirement in ORS chapter 215 or Statewide Planning Goal 3 that farm dwellings authorized pursuant to ORS 215.213(2)(b) be on acreages sufficient to support residents whose principal occupation is farming. To the contrary, ORS 215.213(2)(b) specifically recognizes that a farm dwelling may be allowed

on a parcel capable of producing 10,000 dollars in annual gross farm income. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 421 (1990).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. A county may rely on statistical data in establishing crop acreage and density standards for meeting the ORS 215.213(2)(b) farm income standards for dwellings in conjunction with farm use. However, the adoption of such standards must be supported by substantial evidence in the whole record upon which a reasonable person may conclude that such acreages and densities of crops are capable of producing an average of at least 10,000 dollars in gross annual farm income. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 421 (1990).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where a parcel is "currently employed for farm use as defined in ORS 215.203," the requirement of OAR 660-05-030(4) that farm use of EFU-zoned property be established prior to approval of a farm dwelling is satisfied, even where the current farm use is not the farm use which the proposed dwelling is to be "customarily provided in conjunction with." *Rebmann v. Linn County*, 19 Or LUBA 307 (1990).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Where the local code requires that a farm dwelling be "customarily provided in conjunction with farm use, as determined by [listed] factors," the county must adopt findings addressing the factors listed in the code to determine whether it is customary to establish a dwelling for farm assistance for the proposed type of farming operation. *Rebmann v. Linn County*, 19 Or LUBA 307 (1990).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Findings that the applicants "have other plans for" their nearby rental dwelling, and that immediately available live-in farm help will make their farm more "productive," are inadequate to establish that farm help is *required* to reside on the subject farm. *Rebmann v. Linn County*, 19 Or LUBA 307 (1990).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. ORS 215.283(1)(f) does not require a county to permit *outright* all dwellings customarily provided in conjunction with farm use. *Zorn v. Marion County*, 19 Or LUBA 54 (1990).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. Ordinance provisions which effectively require conversion of nonfarm dwellings to farm dwellings before additional farm dwellings may be approved are not mandated by ORS 215.283(1)(f), but they do further the legislative policy contained in ORS 215.243, and are consistent with ORS 215.283(1)(f) and 215.283(3). *Zorn v. Marion County*, 19 Or LUBA 54 (1990).

3.2.2 EFU Statute/Ordinances – Farm Uses – Farm Dwellings. To satisfy ORS 215.283(1)(e), a county must adopt findings, supported by substantial evidence, determining both (1) the farm operator will maintain significant involvement in farm operations, and (2) the assistance of a relative is, or will be, required by the farm operator. *1000 Friends of Oregon v. Coos County*, 18 Or LUBA 852 (1990).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. Establishing that proposed "agri-tourism or other commercial events or activities" are "necessary to support the commercial farm uses or the commercial agricultural enterprises in the area" for purposes of ORS 215.283(4)(d)(A) is a relatively high hurdle: the county must find that the events are essential in order to maintain the existence of either the commercial farm uses on the subject property or the commercial agricultural enterprises in the area. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. A demonstration that proposed "agri-tourism or other commercial events or activities" are "necessary to support" an approved commercial activity in conjunction with farm use under ORS 215.283(2)(a), such as a brewery, is not sufficient to demonstrate that the events are "necessary to support" an "existing commercial farm use of the tract," such as the growing of filberts, for purposes of ORS 215.283(4)(d)(A), even where revenue from the brewery "supplements" revenue from the growing of filberts. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. When an applicant chooses to use reclaimed wastewater on farmland, a written explanation of alternatives to water uses is a very limited obligation imposed by ORS 215.246(3). The county's role, indeed LUBA's review itself, is confined to ensuring that the applicant (1) considered in writing any sufficiently identified alternatives, and (2) explained in writing the reasons for not using them. *Oregon Coast Alliance v. Curry County*, 78 Or LUBA 81 (2018).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. When ORS 215.283(1)(o) was enacted in 1993 to expressly authorize farm stands in EFU zones the statue authorized, among other things, "sale of retail incidental items," but limited such sales to "25 percent of the total sales of the farm stand." *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. Legislation enacted in 2001 amended ORS 215.283(1)(o) concerning farm stands to expressly authorize "fee-based activity to promote sale of farm crops and livestock sold at the farm stand," subject to the limitation that such sales and incidental retails could not exceed 25 percent of farm stand sales. Legislative history shows that the legislature intended to authorize farm product food contests and farm product food preparations, but did not intend to authorize banquets, restaurants, or cafes. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. The ORS 215.283(1)(o) authorization for farm stands authorizes structures that are designed and used for the sale of farm products and livestock, and also authorizes those structures to be used for "sale of retail incidental items and fee-based activity to promote sale of farm crops or livestock." The EFU statute is correctly interpreted also to authorize farm stand activities to be conducted outside the authorized structures. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. A farm stand permit that authorizes up to 22 al fresco dinners for up to 75 diners each year is inconsistent with the express prohibition in ORS 215.283(1)(o) and OAR 660-033-0130(23) against farm stand structures for banquets.

Although the statute and rule are expressly directed at "structures for banquets," the prohibition extends to such large and frequent al fresco dinners, which fall within the meaning of "banquets," as that term is used in the statute and rule, and the prohibition extends to outdoor banquets. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. ORS 215.283(1)(o) and OAR 660-033-0130(23) authorize the "sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock" inside structures that are "designed and used for sale of farm crops and livestock," but they do not authorize structures that are specifically designed and used for retail sales and fee-based promotional activity. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. A county's condition of approval that farm stand "wholesale sales" be separately accounted and not included in applying the ORS 215.283(1)(o) requirement that "sale of retail incidental items and fee-based activity to promote sale of farm crops or livestock" not exceed "25 percent of the total annual sales of the farm stand," while an imperfect way to ensure that farm stand sales are not inflated with nonfarm stand sales to inflate the permissible sales from retail and fee-based activity, is a permissible condition under the statute. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. A farm stand permit that (1) authorizes "small-scale gatherings such as birthdays, picnics, and similar activities" and requires that such gatherings "shall promote the farm stand and contemporaneous crops sold in the farm stand" does not exceed the ORS 215.283(1)(o) and OAR 660-033-0130(23) authority for farm stands. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. A farm stand permit that authorizes multiple food carts to sell a variety of prepared food at up to 24 events per year cannot be characterized as "incidental retail sales," and exceeds the authority granted by ORS 215.283(1)(o) and OAR 660-033-0130(23). *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. ORS 215.283(1)(o) and OAR 660-033-0130(23) do not categorically prohibit food carts in all circumstances. If a permit authorizing a farm stand appropriately limited food carts so that they could be characterized as "incidental retail sales," they could be authorized at a farm stand. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. ORS 215.283(1)(o) and OAR 660-033-0130(23) do not prohibit all concessions at farm stands. The statute and rule only prohibit "large concessions." *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. Where an applicant's engineering report and environmental consultant identified technical and engineering challenges and public health and safety issues associated with several alternatives to replacing a currently failing waste water treatment system that are independent of the costs of replacing that system, the county's findings are inadequate to explain its conclusion that an applicant considered only the cost of

replacing the existing waste water treatment system in eliminating other alternative facility options. *Falcon Heights WSD v. Klamath County*, 64 Or LUBA 390 (2011).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. ORS 215.275(5) requires a county to consider whether the imposition of clear and objective conditions on a proposed utility facility would prevent a significant change in accepted farm practices or prevent a significant increase in the cost of farm practices, and to approve the proposed facility with those clear and objective conditions if the conditions would minimize or mitigate the impacts. *Falcon Heights WSD v. Klamath County*, 64 Or LUBA 390 (2011).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. A hearings officer does not err in interpreting a code provision that allows the "preparation of land for cultivation" that is a "customarily accepted agricultural activity" without a permit in agricultural zones to require the landowner to demonstrate that a proposal to cover an existing landfill with 100,000 cubic yards of soil not only involves "preparation of land for cultivation" but is also a "customarily accepted agricultural activity." *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. Any inquiry into whether a proposal to place 100,000 cubic yards of soil on an existing landfill is a "customarily accepted agricultural activity" is necessarily a fact-specific inquiry. In answering that question, a hearings officer does not err in considering as relevant facts the absence of ongoing agricultural activity on the property and the lack of specificity in the landowner's plans for post-fill agricultural use. *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. Any inquiry into what is a customarily accepted agricultural activity necessarily requires whether other similar farms have engaged in the proposed activity. A hearings officer does not err in considering the absence of evidence that other farms have placed 100,000 cubic yards of fill in a 13-acre area to prepare the land for cultivation. *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. Given the history of the subject property as a landfill, a hearings officer does not err in considering the lack of evidence that it is customary for farmers to charge a fee to persons to deposit soil on farm land, in determining whether a proposal to place 100,000 cubic yards of fill on farm land is a "customarily accepted agricultural activity" allowed without a permit, or something else that requires a permit. *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. The only limitations placed on uses that may be permitted as "commercial uses in conjunction with farm use" within the meaning of ORS 215.283(2)(a) are that the proposed use must: (1) enhance the farming enterprises of the local agricultural community to which the EFU land hosting that commercial activity relates; and (2) satisfy ORS 215.296. *Hiebenthal v. Polk County*, 45 Or LUBA 297 (2003).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. Testimony from fruit growers that a fruit processing facility provides a market for their fruit and, as a result, provides incentive to those growers to continue their agricultural operations and a condition of approval that requires the

operator of the fruit processing facility to grow fruit on its property that will be processed at the facility is sufficient to establish that the proposed fruit processing facility will enhance the farming enterprises of the local agricultural community. *Hiebenthal v. Polk County*, 45 Or LUBA 297 (2003).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. The fact that wineries are a permitted use in EFU zones under ORS 215.213(1) and 215.283(1) does not mean that wineries are "agricultural uses" permitted in a rural residential zone, where the code definition of "agricultural uses" does not include wineries, and wineries are not among the uses allowed in the rural residential zone. *Roth v. Jackson County*, 40 Or LUBA 531 (2001).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. ORS 197.685 imposes a legislative duty to consider non-EFU-zoned lands to provide areas that would supplement seasonal farmworker housing allowed outright on EFU-zoned land. ORS 197.685 does not require that an applicant for quasi-judicial approval for seasonal farmworker housing in EFU zones demonstrate that non-EFU-zoned lands are unavailable to provide such housing. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. ORS 197.685(3) and (4) *allow* local governments to adopt clear and objective approval criteria for seasonal farmworker housing that do not have the result of discouraging needed seasonal farmworker housing, but do not *require* local governments to adopt additional approval criteria, and do not make unrelated approval criteria applicable in the absence of legislation incorporating those criteria. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. Nothing in the context of the term "kennel" as used in ORS 215.283(2)(m) demonstrates that the intended meaning of that term is narrower than the plain dictionary definition, which refers to establishments for the breeding and boarding of dogs. A proposal to breed and propagate dogs for sale is thus a "kennel" subject to county regulation and not a "farm use" allowed outright in an EFU zone. *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195 (1999).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. The definition of "farm use" in ORS 215.203(2)(a) does not include the extraction, processing and bottling of a mineral resource such as water. *DLCD v. Curry County*, 32 Or LUBA 358 (1997).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. The county's findings classifying livestock sales and shows as a "farm use" rather than as "stockyard and animal sales" are inadequate when the challenged decision does not relate the general findings to the property at issue, and therefore does not establish that the proposed use complies with the approval standards. *Collins v. Klamath County*, 32 Or LUBA 338 (1997).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. Where the county determines that an apparent conflict exists between state statute and county code regarding whether livestock sales and shows are permitted on EFU land, LUBA will defer to the county's decision to clarify the

nature of the use through a quasi-judicial use classification hearing. *Collins v. Klamath County*, 32 Or LUBA 338 (1997).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. The breeding and raising of one's own horses is a farm use. *Moody v. Deschutes County*, 22 Or LUBA 567 (1992).

3.2.3 EFU Statute/Ordinances – Farm Uses – Other Uses. Where a code separately lists "boarding of horses for profit" and "commercial activities in conjunction with farm use" as distinct conditional uses in certain exclusive farm use zones that another zone lists "commercial activities in conjunction with farm use" but does not list "boarding of horses for profit" as a conditional use, it is reasonable to infer that the latter use was not intended to be allowed in the other zone. *Moody v. Deschutes County*, 22 Or LUBA 567 (1992).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. "In-home commercial activities" are not authorized by right in resource zones, even where (1) such activities are accessory to residential uses and would have minimal to no impact on resource lands, (2) such an approach would streamline local permitting by avoiding the conditional use process required for home occupations, and (3) such activities are consistent with a model ordinance prepared by DLCD. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where certain activities are allowed as accessory to a home occupation use, they may not be allowed through a Type I process (i.e., ministerial review of an application based on clear and objective standards and criteria) that does not provide the review that is required by ORS 215.448(1) and (4). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where local code amendments allow accessory uses and structures in an EFU zone, arguments that (1) the amendments improperly exempt such structures from a local code requirement that steps be taken to minimize adverse impacts on farm and forest uses and (2) the provisions governing such uses are inconsistent with ORS 215.213(3)(b) provide no basis for reversal or remand where the amended code is comparable to the prior code and where the petitioner does not develop any argument explaining why the amendments are substantive instead of technical. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Establishing that proposed "agri-tourism or other commercial events or activities" are "necessary to support the commercial farm uses or the commercial agricultural enterprises in the area" for purposes of ORS 215.283(4)(d)(A) is a relatively high hurdle: the county must find that the events are essential in order to maintain the existence of either the commercial farm uses on the subject property or the commercial agricultural enterprises in the area. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A demonstration that proposed "agri-tourism or other commercial events or activities" are "necessary to support" an approved commercial activity in conjunction with farm use under ORS 215.283(2)(a), such as a brewery, is not sufficient to demonstrate that the events are "necessary to support" an "existing commercial farm use of the tract," such as the growing of filberts, for purposes of ORS 215.283(4)(d)(A), even where revenue from the brewery "supplements" revenue from the growing of filberts. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. ORS 215.441 does not provide an independent basis to approve a dwelling within a church on property zoned EFU, and, where a local code provision provides that "[e]xisting churches may be maintained, enhanced or expanded on the same tract," a construction of that provision to independently allow a residential use of a church as an enhancement to the church impermissibly conflicts with ORS 215.203, ORS 215.283, and ORS 215.441. *Wetherell v. Douglas County*, 80 Or LUBA 183 (2019).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. While applying pesticides and herbicides in a manner that causes overspray or drift onto adjoining properties is not an accepted farm practice for purposes of the farm impacts test at ORS 215.296(1), where the labels for some pesticides and herbicides effectively require a setback from certain sensitive uses regardless of whether drift or overspray occurs, a county will likely have to make specific factual findings about the specific setbacks required by particular chemicals on particular farming operations on surrounding farmlands, based on application methods, and whether the operation of each setback would force a significant change in farm practices. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Spraying adjoining property with herbicides without permission from the property owner or another legal right to do so is not an accepted farm practice for purposes of the farm impacts test at ORS 215.296(1), even where the farm operation grows grass seed which is certified to be free of contamination from weeds and where spraying the adjoining property allows multiple fields to be treated as a single continuous field for purposes of certification and prevents the farm operator from having to create "isolation strips" on either side of the adjoining property that would shrink the scope of the certified fields. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A condition of approval requiring that an applicant construct a proposed fence between a proposed trail and adjoining farms; specifying only that the proposed fence must be "capable of preventing dogs and people from entering adjacent farm fields"; punting all determinations regarding fence design, materials, construction, etc. to a subsequent master planning process that offers no opportunity for a public hearing or other public input; and allowing adjacent landowners to opt out of installing a fence on their property line is inadequate where the county relies on the proposed fence to address a wide variety of different potential impacts, which might require different fence designs, materials, construction techniques, and maintenance routines in order to ensure that the trail will not cause significant impacts on farm practices for purposes of the farm impacts test at ORS 215.296(1). Such a condition is also not clear and objective for purposes of ORS 215.296(2). *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where farmers have historically crossed a right-of-way to access fields they own on either side of the right-of-way, and where the right-of-way owner proposes to construct a fence along its property line, negotiate with farmers to provide licenses to cross the applicant's property, and install gates in the fence to allow farm equipment to pass through, any delay for farmers to open, pass through, and close the gates multiple times per day and perhaps multiple times per hour need not be evaluated as impacts on accepted farm practices for purposes of the farm impacts test at ORS 215.296(1) because using another's property to move farm equipment without a legal right or permission to do so is not an accepted farm practice. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Although the impacts of nonfarm uses on surrounding farmland must be evaluated on a farm-by-farm and practice-by-practice basis, an evaluation of the cumulative impacts on all farm practices on all impacted farms is not required. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. When an applicant chooses to use reclaimed wastewater on farmland, a written explanation of alternatives to water uses is a very limited obligation imposed by ORS 215.246(3). The county's role, indeed LUBA's review itself, is confined to ensuring that the applicant (1) considered in writing any sufficiently identified alternatives, and (2) explained in writing the reasons for not using them. *Oregon Coast Alliance v. Curry County*, 78 Or LUBA 81 (2018).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A petitioner may not also operate an exotic animal rescue facility, which is undisputedly not a "farm use," on EFU land where the petitioner uses his or her EFU-zoned property for certain "farm uses," under ORS 215.203. The existing "farm use[s]" do not "legitimize" the concurrent unpermitted uses, nor do they shield the unpermitted uses from county code enforcement action. *A Walk on the Wild Side v. Washington County,* 78 Or LUBA 356 (2018).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. With regard to school structures on non-high-value farmland that existed prior to adoption of LCDC's three-mile rule, OAR 660-033-0130(2)(c) provides that such schools may be "maintained, enhanced or expanded on the same tract subject to other requirements of law, but enclosed existing structures within a farm use zone within three miles of an urban growth boundary may not be expanded beyond the requirements of this rule." The "requirements of this rule" in OAR 660-033-0130(2)(c) is a reference to the OAR 660-033-0130(2)(a) requirement that the design capacity of enclosed structures be no "greater than 100 people," and the OAR 660-033-0130(2)(b) requirement that enclosed structures be spaced "no less than one-half mile" apart. *Landwatch Lane County v. Lane County,* 76 Or LUBA 227 (2017).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. HB 3099, now codified at ORS 215.135, was adopted in 2009 to address legislative concerns about the new HB 3099 requirement that schools on EFU-zoned land must be "primarily for residents of the rural area in which the school is located" and perhaps concerns about new local criteria that might be adopted and applied to such existing schools. But there is nothing in the legislative history of HB 3099 that suggests it was also concerned with LCDC's three-mile rule at OAR 660-033-0130(2), adopted in 1993. ORS 215.135 and its parallel administrative rule at OAR 660-033-0130(18)(b) to (c) were not adopted to excuse existing schools from complying with LCDC's three-mile rule. To the extent the text of OAR 660-033-0130(2)(c) is ambiguous, the legislative history confirms that LCDC intended the OAR 660-033-0130(2)(a) 100-person design limit and the OAR 660-033-0130(2)(b) "no less than one-half mile" spacing requirement to apply to expansion of such existing structures. *Landwatch Lane County v. Lane County*, 76 Or LUBA 227 (2017).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A "residential facility" as defined in ORS 197.660(1) is not a use that is authorized in the exclusive farm use zone under ORS 215.283(2)(o). *KanDu Ranch, LLC v. Jackson County,* 72 Or LUBA 401 (2015).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A Table in OAR 660-033-0120 is not inconsistent with ORS 215.283(2)(o) where the text of the Table, read in context with the definition of "residential home" at ORS 197.660 that it references, authorizes only a "residential home" in the exclusive farm use zone and does not purport to authorize a "residential facility" in

the EFU zone, which would be inconsistent with ORS 215.283(2)(o). *KanDu Ranch, LLC v. Jackson County*, 72 Or LUBA 401 (2015).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The uses authorized in EFU zones in counties that have designated marginal lands are generally set out in subsections of ORS 215.213, whereas the uses authorized in EFU zones in non-marginal lands counties are generally set out in ORS 215.283. The regulation of dwellings under ORS 215.213 was originally intended to be slightly more restrictive than under ORS 215.283, as the quid pro quo for more liberal allowance of dwellings on designated marginal lands under ORS 215.317. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The nonfarm dwelling standards codified at ORS 215.284 were enacted by the legislature as amendments to ORS 215.283(3) and new subsections of ORS 215.283. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. As a marginal lands county, Lane County is expressly authorized to apply ORS 215.213(3) in approving a nonfarm dwelling on non-high value farmland in the Willamette Valley. Because Lane County is a marginal lands county, it is not required to apply ORS 215.284(1) in addition to ORS 215.213(3), simply because ORS 215.284(1) expressly applies to lands in the Willamette Valley. ORS 215.284(1) applies to non-marginal lands counties. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. ORS 215.213(4) provides that a lot for a nonfarm dwelling must comply with any applicable Willamette River Greenway regulations and ORS 215.213(3) does not include a similar reference to Willamette River Greenway regulations. However, that difference in wording between ORS 215.213(3) and (4) alone does not support interpreting ORS 215.213(4) to apply, to the exclusion of ORS 215.213(3), throughout both the Willamette River Greenway and the much larger Willamette River Valley, when ORS 215.213(3) includes no language precluding its applicability within the Willamette River Valley. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A county errs in requiring an applicant to apply the ORS 215.296 "significant change/increase" standard to a study of the "surrounding area" that encompasses all agricultural land in the county, on the theory that a proposed conditional use will remove land from agricultural use and require county farmers to shoulder a greater burden of fixed costs in the county's agricultural economy. The focus of ORS 215.296 is on the impacts of the proposed conditional use on agricultural practices in the proximate surrounding area, not attenuated impacts to the larger economy caused by conversion of the subject property from agricultural use to a conditional non-farm use otherwise allowed under ORS chapter 215. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The scope of "surroundings lands" to which ORS 215.296 applies is not limited to lands adjacent to the subject property. However, failure to define the outer limits of the study area or to evaluate impacts on non-adjacent farm operations is not necessarily fatal to the application, if the surrounding agricultural area is

homogenous, and there is substantial evidence that the conditional use has no significant impacts on farm practices on adjacent farm parcels. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. ORS 215.296(1) does not require a demonstration that a proposed conditional use of an EFU-zoned parcel will not prevent future agricultural use of the soils occupied by the non-farm conditional use. Because ORS chapter 215 authorizes in EFU zones several uses such as mining or solid waste disposal facilities that involve removal or loss of agricultural soil, such a requirement would effectively prohibit uses allowed in EFU zones under ORS chapter 215. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Under ORS 215.283(1)(c), "[u]tility facilities necessary for public service" are permitted in EFU zones. ORS 215.283(1)(c) operates in conjunction with ORS 215.275(1), which provides that the utility facilities authorized by ORS 215.283(1)(c) are "necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service," and ORS 215.275(2), which sets out the alternatives analysis that must be used to demonstrate that a proposed utility facility is the type of utility facility authorized by ORS 215.283(1)(c) and 215.275(1). *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. An important difference between the uses that are allowed under subsection (1) of ORS 215.283 and the uses that are allowed under subsection (2) of 215.283 is that the uses allowed under subsection (1) are permitted outright and are only subject to statutory standards. Unlike Subsection (2) uses, which may be subject to locally adopted standards, Subsection (1) uses may not be subject to additional regulation under local law. *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995). *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Transmission towers over 200 feet in height are allowed under subsection (2) of ORS 215.283. ORS 215.283(2)(m). Transmission towers that are not taller than 200 feet are allowable as "utility facilities necessary for public service" under subsection (1) of ORS 215.283. ORS 215.283(1)(c); 215.275. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Under ORS 215.275, an applicant proposing to site a utility facility on EFU zoned land must consider alternatives that do not utilize EFU-zoned land. Such an applicant need not consider alternatives that do utilize EFU-zoned land and need not establish that there are not other EFU-zoned alternatives that would have fewer adverse impacts on the county's EFU zone. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The general legislative farmland preservation policies set out in the statutory EFU zone play no role in applying the alternatives analysis required for utility facilities necessary for public service under ORS 215.275. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. ORS 215.296(2), which provides that an applicant for a conditional use allowed under ORS 215.213(2) or 215.283(2) may demonstrate compliance with the ORS 215.296(1) no significant change/increase standard through imposition of clear and objective conditions, does not impliedly limit conditions to those intended to protect farm and forest uses. Neither does ORS 215.296(2) prohibit counties from adopting additional EFU zone approval standards to address the impacts of wind energy facilities on residential uses or Goal 5 resources. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A comprehensive plan policy implementing Statewide Planning Goal 3, which states that the county's policy is to "continue to preserve" for farm use lands with agricultural soils, does not impliedly preclude the county from adopting a text amendment that authorizes in the EFU zone one of the non-farm uses allowed on EFU land under ORS 215.283(2). Authorizing on EFU land non-farm uses listed in ORS 215.283(2) is consistent with Goal 3 as a matter of law. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. In approving a building permit for a building "customarily provided in conjunction with farm use" in the EFU zone under ORS 215.213(1)(e) or 215.283(1)(e), one factual variable a county should consider is whether the building is intended to be used as an accessory building to non-farm uses authorized on the property, such as a private use airport, instead of or in addition to an accessory to farm use of the property. *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. ORS 215.441 authorizes weddings on EFU-zoned land, only if the weddings are associated with "a church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship." *Reed v. Jackson County*, 61 Or LUBA 253 (2010).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where a county's EFU zone does not permit solid waste disposal sites, but the statutory EFU zone does allow solid waste disposal sites, under the holding in *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002), a county may not approve an exception to Goal 3 (Agricultural Lands) to allow a solid waste disposal site on EFU-zoned property. Rather, the county must amend its EFU zone to allow solid waste disposal sites if it wishes to authorize that use on its EFU-zoned land. *Waste Not of Yamhill County v. Yamhill County*, 61 Or LUBA 423 (2010).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Utility facilities that are necessary for public service are a permitted use on EFU-zoned land. However, reasonable non-EFU-zoned alternative sites must be considered, and only if one or more of the factors listed at ORS 215.275(2) make the non-EFU-zoned sites infeasible can the utility facility be developed on EFU-zoned land. *Getz v. Deschutes County*, 58 Or LUBA 559 (2009).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. To comply with ORS 215.275(2), before approval for a utility facility on EFU-zoned land may be granted, an applicant must (1) make a reasonable effort to identify reasonable non-EFU-zoned sites, consider any reasonable non-

EFU zoned sites that are identified by other parties and demonstrate that all identified non-EFU-zoned alternative sites are not feasible based on one or more of the factors set out in ORS 215.275(2). Where an applicant generally describes how alternative sites were selected, opponents may not fail to suggest any additional alternative non-EFU-zoned sites and on appeal of a decision approving the utility facility argue that the applicant's failure to provide a more detailed explanation for how the applicant selected alternative sites provides a basis for remand. *Getz v. Deschutes County*, 58 Or LUBA 559 (2009).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. It is not error for an applicant for approval of a utility facility on EFU-zoned land to change the focus of its analysis of whether alternative non-EFU-zoned sites are a feasible alternative, so long as the analysis that is ultimately accepted by the local government is legally defensible. *Getz v. Deschutes County*, 58 Or LUBA 559 (2009).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The term "dwelling," as used in ORS 215.284 regarding nonfarm dwellings on farmland, includes any essential or accessory improvements or structures such as a well and septic system, and therefore, like the dwelling itself, those essential or accessory improvements or structures are authorized only on portions of the farm parcel that are generally unsuitable for farm use. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Under ORS 215.284, unlike the nonfarm dwelling itself or essential or accessory improvements or structures, driveways or access roads serving the nonfarm dwelling do not have to be located on a portion of the parcel that is generally unsuitable for farm use. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A county EFU zone limit on farm recreational uses that requires that such uses "be subordinate to the commercial agricultural operation in scope, scale and impact, and shall contribute 'added value' to the commercial agricultural farm operation" does not necessarily prohibit a farm recreational use that generates more income than the commercial agricultural operation on the property. *Underhill v. Wasco County*, 43 Or LUBA 277 (2002).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A use permitted by statute on EFU land is not subject to the additional requirement that the use be rural or that an exception to Goal 14 be taken, even if the use is urban in nature. Where such a use is expressly permitted on EFU land, it is also implicitly permitted by statute on rural land zoned other than EFU. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Because a public park is permitted by statute on EFU land without requiring compliance with Goal 14 or an exception to that goal, it is also permitted on rural land zoned other than EFU without requiring compliance with Goal 14 or an exception, even if the park would primarily serve urban residents. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Assuming that a public park is a "public facility or service" governed by Goal 11, because a public park is permitted by statute on EFU land without taking an exception to Goal 11, a public park is also allowed on rural land zoned other than EFU without taking an exception to Goal 11, or requiring that the park serve only rural lands. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A public stormwater facility is or can be a "utility facility necessary for public service" allowed by statute in the EFU zone. Such a facility is also allowed on rural lands zoned other than EFU without taking an exception to Goal 11 or requiring that the stormwater facility serve only rural lands. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The rural fire service facilities authorized by ORS 215.283(1)(w) are not required to serve rural areas exclusively. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. In considering whether a rural fire service facility authorized by ORS 215.283(1)(w) primarily serves rural rather than urban areas, areas inside UGBs and any areas outside a UGB for which an exception to Goal 14 has been approved to allow urban-level development must be considered urban. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A fire station with only five percent of its service area inside a UGB and somewhere between 67 percent and 76 percent of its incident responses going to rural areas outside the UGB primarily serves rural areas. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The fire service facilities authorized by ORS 215.283(1)(w) may also provide emergency medical services and appropriately limited on-site training. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The requirement under OAR 660-012-0065(3)(o) that the travel capacity and level of service of transportation facilities sited on rural EFU-zoned land must "be limited to that necessary to support rural land uses identified in the acknowledged comprehensive plan" is satisfied where the proposed facility would serve seven lot of record dwellings, the comprehensive plan authorizes rural dwellings and the EFU zoning statutes specifically authorize lot of record dwellings in EFU zones. *Friends of Yamhill County v. Yamhill County*, 39 Or LUBA 478 (2001).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. An existing road cannot be rejected as an alternative under OAR 660-012-0065(5)(a) because it is (1) unsafe, (2) does not meet "applicable standards," or (3) has not previously been "approved by a registered professional engineer." Under the rule, the county must also establish that the existing road cannot be improved to be "safe," meet "applicable standards," and be "approved by a registered professional engineer" "at a reasonable cost, not considering raw land costs, with available technology." *Friends of Yamhill County v. Yamhill County*, 39 Or LUBA 478 (2001).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A decision that an existing road need not be considered as an alternative under OAR 660-012-0065(5)(a) is not supported by substantial evidence where there is no attempt to identify how costly it would be to address safety problems and bring the road up to applicable standards so that it could be approved by a registered engineer. *Friends of Yamhill County v. Yamhill County*, 39 Or LUBA 478 (2001).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. OAR 660-012-0065(5)(a) prohibits consideration of "land costs," in determining whether the cost of an alternative is reasonable. "Land costs" are not limited to purchase of the fee title and include purchase of an easement. *Friends of Yamhill County v. Yamhill County*, 39 Or LUBA 478 (2001).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Contextual statutory references to "public schools," "private schools" and "schools" indicate that the legislature intended the scope of "public or private schools" allowed in the EFU zone under ORS 215.283(1)(a) to include schools for elementary and secondary education, but not adult career schools. *Warburton v. Harney County*, 39 Or LUBA 398 (2001).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Nonfarm uses allowed by ORS 215.213 and 215.283 are exceptions to the agricultural purpose of the EFU zone and, where an interpretative choice is necessary, specific statutory uses should be interpreted not to include uses that would subvert the goal of preserving land in productive agriculture. *Warburton v. Harney County*, 39 Or LUBA 398 (2001).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where the scope of "public or private schools" allowed in the EFU zone under ORS 215.283(1)(a) could be plausibly construed to include only schools for elementary and secondary education, or more broadly to include any kind of use that has an educational component, the statute should be interpreted not to include uses that would subvert the goal of preserving land for agriculture. *Warburton v. Harney County*, 39 Or LUBA 398 (2001).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where petitioner does not establish that the city either applied or was required to apply land use standards when it made a final decision to condemn petitioner's EFU-zoned property for a utility facility, in advance of seeking county land use approval for that facility, the challenged decision is not a land use decision over which LUBA has jurisdiction. *E & R Farm Partnership v. City of Gervais*, 39 Or LUBA 251 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where industrial effluent is applied to poplar trees in an exclusive farm use zone so that heavy metals and nitrogen compounds in the effluent will bind to the soil and be taken up into the poplar trees, rather than being deposited into a creek, the proposed use is properly viewed as an extension of the city's sewerage treatment system and thus as a "utility facility," within the meaning of ORS 215.283(1)(d). *Cox v. Polk County*, 39 Or LUBA 1 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A proposed use of land may be both a "farm use" and a "utility facility," and where it qualifies as both, the proposed use must

meet the approval criteria for both farm uses and utility facilities. *Cox v. Polk County*, 39 Or LUBA 1 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The limitations on activities in public parks imposed by OAR 660-034-0035 do not apply to private parks allowed on agricultural and forest lands under ORS 215.283(2)(c), OAR 660-033-0120 and OAR 660-006-0025(4)(e). *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Unlike Goal 4 and the Goal 4 rule, which limit recreational activities on forest lands to those "appropriate for a forest environment," ORS 215.283(2)(c) and OAR 660-033-0120 contain no express language restricting the scope or intensity of activities allowed in "private parks" on agricultural land. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Transmission towers that are less than 200 feet in height may only be approved on EFU-zoned land, under ORS 215.283(1)(d), where it is established that it is not feasible to locate the tower on non-EFU-zoned lands. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Transmission towers that are more than 200 feet in height may be approved under ORS 215.283(2)(L) on EFU-zoned land, subject to the approval criteria set out at ORS 215.296 and any locally adopted approval criteria. It is not necessary to establish that it is not feasible to locate such transmission towers on non-EFU-zoned lands. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. In approving applications for permits for uses that are specifically allowed in rural EFU zones by ORS 215.213 and 215.283, counties are not required to apply the case-by-case urban/rural analysis that is required under Goal 14 and *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986), on non-EFU-zoned rural lands. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A water utility's proposal to solve a water shortage by drilling wells and constructing related facilities on EFU-zoned land need not demonstrate that it is not feasible to solve the water shortage in some other way than drilling wells. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Once a water utility decides to solve a water shortage by drilling wells and constructing related facilities, the wells and related facilities must be located on non-EFU-zoned land, unless it is not feasible to do so. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A utility facility may be located on EFU-zoned land if it is not feasible to locate the utility facility on non-EFU-zoned land and, in that circumstance, ORS 215.213(1)(d) and 215.283(1)(d) do not require that the utility facility be

located on the "least suitable" EFU-zoned land. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. In reviewing alternatives to locating a proposed utility facility on a proposed EFU-zoned site, a county is not required to examine alternatives that would also involve using EFU-zoned lands. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Under *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), a county may not apply local land use legislation to deny or condition uses that are authorized by ORS 215.213(1) or 215.283(1), unless the county is required by statewide planning goals or LCDC rules to apply the local land use legislation to such uses. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. "Community centers" that are operated by a "nonprofit commmunity organization" may be allowed in EFU zones. An argument that an approved facility is a "retreat center" rather than a "community center" provides no basis for remand, where petitioner fails to establish that the facility could not appropriately be considered both a "retreat center" and a "community center." *Lighthart v. Polk County*, 37 Or LUBA 787 (2000).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. An applicant for approval of a utility facility on EFU-zoned land must demonstrate that constructing the utility on non-EFU-zoned land is not a feasible alternative. *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The rule announced in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), that the category of uses listed at ORS 215.283(1) are uses of right to which a county cannot apply supplementary standards, does not preclude the possibility that specific uses listed at ORS 215.283(1) by their terms permit the county to apply supplemental standards. *Shadrin v. Clackamas County*, 34 Or LUBA 154 (1998).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Read in context, the statutory provision at ORS 215.283(1)(p) allowing "seasonal farmworker housing" as a permitted use in an EFU zone allows the local government to apply supplemental approval standards, as long as those standards are clear and objective and do not have the effect of discouraging needed housing through unreasonable cost or delay. *Shadrin v. Clackamas County*, 34 Or LUBA 154 (1998).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A local standard limiting seasonal farmworker housing to workers employed exclusively on the resident farm is inconsistent with the legislative intent behind the seasonal farmworker statutes, which do not contemplate such a restriction. *Shadrin v. Clackamas County*, 34 Or LUBA 154 (1998).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A county may regulate or define uses allowed under ORS 215.283(2) as long as it does not define those uses more expansively than permitted by state law. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A county may interpret its local codification of nonfarm uses allowed in EFU zones more restrictively than state law requires. Such a more restrictive interpretation is not contrary to ORS 215.283(2)(d) and will be affirmed by LUBA where it is not so inconsistent with the zoning ordinance as to be clearly wrong. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Expansion of a golf course is not permitted under OAR 660-33-130(18) exception unless the existing facilities are within the same zone as the proposed expansion. *DLCD v. Jackson County*, 33 Or LUBA 302 (1997).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Limitations in OAR 660-33-120 and 660-33-130 are consistent with ORS 215.283 provision allowing golf courses on exclusive farm use land. *DLCD v. Jackson County*, 33 Or LUBA 302 (1997).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Neither ORS 215.203(1) nor ORS 215.283 mandates the manner in which the local governing body may approve nonfarm uses allowed in EFU zones under ORS 215.283. Nor do these statutes require an additional permit for uses allowed under ORS 215.283, independent of the requirements of the local government's approval process. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The requirements of ORS 215.296 apply directly to uses allowed in EFU zones under ORS 215.283(2). In order to establish a proposed use satisfies the requirements of ORS 215.296, the local government must adopt findings establishing the proposal complies with that statute. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. A county must incorporate into its exclusive farm use zones, or otherwise implement, the restrictions on uses of high-value farmland required by OAR 660-33-020(8), 660-33-080, 660-33-090 and 660-33-120. *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Although nothing in ORS 215.213(1) and (2) and 215.283(1) and (2) prevents a county from adopting an EFU zone that allows uses identified in ORS 215.213(1) or 215.283(1) as outright permitted uses, those statutes do not *require* that it do so. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where LUBA determines a proposed use is allowable as a conditional use on EFU-zoned land under a provision of ORS 215.213 or 215.283, it need only consider whether the use is also allowable as a conditional use under the provisions of a county's EFU zone to the extent that the zone imposes more restrictive requirements than the statute. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. That a proposed paintball game park could be allowed as a "private recreation use" in a commercial zone does not mean it cannot be allowed as a "park" in an EFU zone. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where a local code requires certain nonresidential conditional uses in an EFU zone to be "a principal use of the property," it is within a local government's discretion to interpret this phrase to apply only to the portion of the property on which the conditional use will be located, and to require that the proposed use be more than a strictly personal use of the property owner. *Spiering v. Yamhill County,* 25 Or LUBA 695 (1993).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. ORS 215.283 establishes standards directly applicable to county land use decisions concerning nonfarm uses of EFU-zoned land. Regardless of whether a county adopts an exception to Goal 3 for EFU-zoned land, it cannot allow a nonfarm use not listed under ORS 215.283 on such land without changing the zone. *Schrock Farms, Inc. v. Linn County*, 25 Or LUBA 187 (1993).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where a local government adopts an adequate exception to Statewide Planning Goal 3 for a proposed highway realignment, failure to comply with ORS 215.283 or local EFU zoning requirements does not provide a basis for reversing or remanding the local government's decision. *Schrock Farms, Inc. v. Linn County*, 24 Or LUBA 58 (1992).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. While counties may not adopt exclusive farm use zones that are less protective of agricultural lands than required by statute, they may regulate agricultural lands more stringently. *Avgeris v. Jackson County*, 23 Or LUBA 124 (1992).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Under the EFU zoning statute, counties may allow churches as outright permitted uses. However, where a particular EFU zone requires case-by-case findings that proposed nonfarm uses, including churches, will be compatible with farm uses and consistent with state Agricultural Land Use Policies, such findings must be made. *Avgeris v. Jackson County*, 23 Or LUBA 124 (1992).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where a conditional use permit approval standard in an EFU zone requires that there be "no other feasible location for the proposed use," the term "feasible location" does not mean "ideal location," but rather a location which is capable of being used for the proposed use. *Simmons v. Marion County,* 22 Or LUBA 759 (1992).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where a conditional use permit approval standard in an EFU zone requires that there be "no other feasible location for the proposed use," the price of land at an alternative site is not justification for finding that site infeasible, in the absence of evidence that the price is unreasonable for a site for the proposed use. *Simmons v. Marion County,* 22 Or LUBA 759 (1992).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Although the EFU zoning statutes do not establish specific approval standards for golf courses in EFU zones, ORS 215.296(1) establishes standards applicable to nonfarm uses in EFU zones generally, and requires that approval of such uses not force a significant change in, or significantly increase the cost of,

accepted farm or forest practices on surrounding lands. *Von Lubken v. Hood River County*, 22 Or LUBA 307 (1991).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Comprehensive plan agriculture policies are criteria applicable to a request for conditional use approval for a nonfarm use in an exclusive farm use zone, where the zoning ordinance specifically provides that conditional uses must comply with plan goals and policies and there is nothing in the language of the plan agriculture policies which suggests they were not intended to apply as applicable approval standards. *Waker Assoc., Inc. v. Clackamas County*, 22 Or LUBA 233 (1991).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. The correct way to resolve a conflict between code provisions that (1) specifically allow approval of golf courses in an EFU zone as a conditional use, but (2) establish approval standards for golf courses which make it impossible to ever approve a golf course in the exclusive farm use zone, is to conclude that the approval standards making approval an impossibility were not intended to govern approval of golf courses. *Waker Assoc., Inc. v. Clackamas County*, 22 Or LUBA 233 (1991).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Because the statutes allowing dog kennels in exclusive farm use zones do not define the term "dog kennel," that term must be given its plain and ordinary meaning, which includes boarding and breeding facilities but does not include training facilities. *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Where the legislature intended to allow facilities for intensive training of dogs in the exclusive farm use zone, it specifically used the term "training" in addition to the term "kennel." ORS 215.213(1)(L). *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. Application of plan agricultural goals requiring preservation of agricultural lands to proposed nonfarm conditional uses in exclusive farm use zones does not effectively prohibit such nonfarm conditional uses, if the ordinance requirement to satisfy the purposes of the plan goals is interpreted and applied by balancing the degree to which a proposed nonfarm use furthers or conflicts with various plan goals and policies. *Rowan v. Clackamas County*, 19 Or LUBA 163 (1990).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. County interpretation of its plan agricultural land policy to allow it to balance the applicant's need for additional acreage for a golf course, against the county policy favoring retention of EFU-zoned land in large blocks for agricultural use, is a correct interpretation of the county policy. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

3.3.1 EFU Statute/Ordinances – Nonfarm Uses – Generally. County interpretation of a code "minimum" lot size standard requiring that the lot size be based on the needs of the use to impose a requirement that a golf course in an EFU zone include only the number of acres needed for the golf course is a correct interpretation of the code. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. ORS 215.301 prohibits approval of a batching operation on land zoned exclusive farm use within two miles of a planted vineyard, unless the batching operation is "under a local land use approval on October 3, 1989, or a subsequent renewal of an existing approval." *Poto v. Linn County*, 67 Or LUBA 162 (2013).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. In considering conflicts with agricultural practices under OAR 660-023-0180(5)(b), nothing in ORS 215.301 mandates that the outcome of a county's conflicts analysis must be that batching is a conflict that cannot be minimized. If the evidence showed absolutely no conflicts between a batching plant and a vineyard located closer than two miles from the property, under the Goal 5 rule the county could add the site to its inventory of Significant Resource Sites with All Conflicts Minimized, but would be prohibited from approving batching *under ORS 215.301* unless the exemption in ORS 215.301(2) applies. *Poto v. Linn County*, 67 Or LUBA 162 (2013).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. Read in context, the ORS 215.298 provision allowing a mining operation on EFU-zoned lands if the site is on an "inventory" in a comprehensive plan is a reference to a Goal 5 "inventory" of mineral sites. Because under the 1982 Goal 5 rule the term "inventory" referred to an inventory of *significant* mineral sites, ORS 215.298 allows mining in an EFU zone only if the site is on a comprehensive plan inventory of significant mineral sites, not if the site is on a separate list of nonsignificant sites. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. In ORS 215.298, the legislature apparently balanced the conflict between preservation of agricultural soils and extraction of important mineral resources, by allowing mining in the EFU zone only if the site is on a comprehensive plan inventory of significant Goal 5 mineral inventory. It is inconsistent with that legislative intent to read ORS 215.298 more broadly to allow in the EFU zone mining of mineral resources that are insignificant in quality or quantity. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. A conditional use permit standard for aggregate extraction requiring that the applicant submit "sufficient information to allow the county to set standards" regarding the location, quality and quantity of resource available allows but does not obligate the county to set such standards in approving the permit. A local government's interpretation to that effect is consistent with the express language of the standard and is not reversible under ORS 197.829(1) or *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. ORS 215.296 does not require a guarantee that aggregate mining on land zoned for exclusive farm use will cause no adverse impacts on the water table on surrounding lands. *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. That a type of nonfarm use is listed in ORS 215.283(2) authorizes a county to allow such uses in an EFU zone, but carries no implication that a particular use is consistent with the purpose of the EFU zone as a matter of

law. ORS 215.283(2) does not prohibit the county from applying a local criterion that requires a proposal to mine high-value agricultural topsoil in an EFU zone not seriously interfere with the purpose of that zone. *MacHugh v. Benton County*, 37 Or LUBA 65 (1999).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. Even assuming that a county cannot categorically prohibit all mining operations in the EFU zone, the county can apply a local standard requiring that conditional uses not seriously interfere with the purpose of the zone to deny a proposal to mine high-value agricultural topsoil, where the county's application of its standard is limited to mining operations that permanently remove agricultural topsoil. *MacHugh v. Benton County*, 37 Or LUBA 65 (1999).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. LUBA's review of a local government decision applying its code mineral and aggregate resources chapter for compliance with ORS 215.283 does not extend to a review of the code chapter for compliance with ORS 215.283 in respects unrelated to the challenged decision. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. ORS 215.253 must be read in context with ORS 215.203(1) and ORS 215.283(2)(b), which specifically permit mineral and aggregate operations on EFU-zoned land. Mineral and aggregate operations do not per se unreasonably restrict or regulate farm structures or practices. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. A condition imposed on a mineral and aggregate operation does not violate ORS 215.253(1) simply because it has the potential of impacting some farm uses. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. A potential, temporary impact on farm structures or practices on the subject property, caused by an aggregate operation allowed in the EFU zone, is not an unreasonable restriction or regulation under ORS 215.253. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. Where a county decision adds a mineral and aggregate overlay zone to the site of a pre-existing conditional use asphalt batch plant within two miles of a planted vineyard, but does not expand or alter either the operation of or area subject to the conditional use permit, and the batch plant could continue to operate regardless of the challenged decision, the continuation of the batch plant is not prohibited by ORS 215.301. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. Nothing in ORS chapter 215 requires a conditional use process before a county can impose on the application of a mineral and aggregate overlay zone conditions requiring minor road improvements of the type listed in ORS 215.283(1)(L), which "may be established" in any EFU-zoned area. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. The provisions of ORS 215.298, including its definition of "mining," do not apply to zoning districts that are not exclusive farm use zones. *Williams v. Clackamas County*, 27 Or LUBA 602 (1994).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. Exclusive farm use zoning statutory requirements apply directly to uses in exclusive farm use zones. ORS 215.283(2)(b)(B) and (C) allow mining of aggregate and processing into asphalt, subject to the standards imposed by ORS 215.296. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. Where a county failed to interpret ORS 215.213(2)(d)(C) as allowing an aggregate processing facility that conducts part of the processing on-site but completes the process of making aggregate into asphalt or Portland cement off-site, and the party wishing to assign the county's interpretive failure as error did not appeal the county's decision to LUBA or file a cross-petition for review, LUBA will not consider the interpretive question. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238 (1993).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. ORS 215.213(2)(d)(D) authorizes the processing of mineral resources *other than aggregate*. Therefore, that statute does not authorize an aggregate processing facility, notwithstanding that the final processing of aggregate into asphalt or Portland cement occurs off-site. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238 (1993).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. All provisions of the act that created ORS 215.301 must be related to uses allowed in EFU zones. Therefore, ORS 215.301 applies only to asphalt plants sited in EFU zones, not to an application to site an asphalt plant in an industrial zone. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

3.3.2 EFU Statute/Ordinances – Nonfarm Uses – Mineral Operations. The requirement of ORS 215.298(2) that permits for mining of aggregate on EFU-zoned land only be issued for sites included on an inventory in an acknowledged comprehensive plan became effective October 3, 1989, and does not apply to a pending application submitted prior to that date. *Clark v. Jackson County*, 19 Or LUBA 220 (1990).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A marginal lands county is not required to include in its code a requirement to consider the cumulative impacts from existing or potential lot-of-record dwellings in approving dwellings under OAR 660-033-0130(4)(a)(D)(ii) and (iii). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. ORS 215.441 does not provide an independent basis to approve a dwelling within a church on property zoned EFU, and, where a local code provision provides that "[e]xisting churches may be maintained, enhanced or expanded on the same tract," a construction of that provision to independently allow a residential use of a church as an enhancement to the church impermissibly conflicts with ORS 215.203, ORS 215.283, and ORS 215.441. *Wetherell v. Douglas County*, 80 Or LUBA 183 (2019).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A replacement dwelling allowed under ORS 215.213(1)(q) must be located on a lawful unit of land. *Landwatch Lane County v. Lane County*, 80 Or LUBA 415 (2019).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Although it is not clear a proposed "parsonage," which is a portion of a church to include a bedroom, kitchen and bathroom for use by the church's pastor, must be evaluated and approved or denied under the criteria that apply to a nonfarm dwelling under the county's land use ordinance implementing ORS 215.284, those land use standards require the exercise of discretion in approving the development of land. Further, it is possible, even probable, that any application for a proposed residential use associated with a church must be evaluated under the standards at ORS 215.441, and accordingly the county must process such an application according to its procedures that apply to permits. *Wetherell v. Douglas County*, 78 Or LUBA 33 (2018).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. When a hearings officer determines that a building envelope is generally unsuitable in part due to adverse soil conditions and in part due to size or location, the hearings officer is not required to consider the "used in conjunction with other lands" standard. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 136 (2018).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The dictionary definition of "conjunction" suggests a close spatial relationship between an existing dwelling on EFU-zoned property and a temporary hardship dwelling that is allowed "in conjunction" with that existing dwelling. *Holmberg v. Deschutes County*, 77 Or LUBA 109 (2018).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Interpreting ORS 215.283(2)(L), which authorizes a temporary hardship dwelling "in conjunction with" an existing dwelling, to require that the temporary hardship dwelling be sited in close proximity to the existing dwelling, so as to minimize the need for new supporting residential infrastructure, is consistent with the overriding legislative policy of preventing "agricultural land from being diverted to non-agricultural use." *Holmberg v. Deschutes County*, 77 Or LUBA 109 (2018).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. OAR 660-033-0130(10)'s requirement—that a temporary hardship dwelling developed "in conjunction with" an existing

dwelling on EFU-zoned land must use the existing dwelling's septic system unless it is inadequate for two dwellings—is some indication that the Land Conservation and Development Commission wants to discourage unnecessary, duplicative new supporting infrastructure. *Holmberg v. Deschutes County*, 77 Or LUBA 109 (2018).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Legislative history supports an interpretation of Oregon Laws 2013, chapter 462 (2013 Act), which amended ORS 215.213(2)(b)(A) and (B) (and its counterpart ORS 215.283(2)(b)(A) and (B)), that the default, and longest, assessment look-back period possible to allow a property owner to build a "replacement dwelling" on Exclusive Farm Use (EFU)-zoned land is five years. Section 2 of the 2013 Act provides that a dwelling may be replaced if the dwelling it replaces was assessed *ad valorem* taxes for the *lesser* of: (1) the previous five tax years, (2) the previous five tax years except those years where the dwelling had no value as a result of destruction or demolition of the dwelling, or (3) where the dwelling was constructed within the last five years, for the rest of that five-year period. The five-year look-back therefore may not be more than five years and applies to dwellings that were destroyed or demolished. *Landwatch Lane County v. Lane County*, 76 Or LUBA 250 (2017).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. OAR 660-033-0180(8), the Land Conservation and Development Commission (LCDC) rule that implements Oregon Laws 2013, chapter 462 (the 2013 Act), combines the first part of the 2013 Act's Section 2(2)(b)(A) and Section 2(2)(b)(B) into the rule's Section (B), and ties the first part of Section 2(2)(b)(B) to the five-year tax assessment look-back. Then, the rule's Section (C)(i) eliminates the duplication in the statute and achieves the same limitation the statute achieves, but the rule does not eliminate the statutory requirement to impose a look-back period of five years, essentially giving effect to the "lesser of" language that is not included in the rule. *Landwatch Lane County v. Lane County*, 76 Or LUBA 250 (2017).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Where four pre-1993 parcels are combined through property line adjustments to meet a local minimum parcel size standard, under OAR 660-033-0020(4) the date the property line adjustments created the new combined parcel is the new "date of creation." Where that new date of creation post-dates 1993, a county decision approving a nonfarm dwelling on the combined parcel does not comply with the ORS 215.284(2)(c) requirement that a nonfarm dwelling must "be sited on a lot or parcel created before January 1, 1993." *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 186 (2017).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A county's findings that a parcel proposed siting a nonfarm dwelling is generally unsuitable for farm use are inadequate, where the property is composed of predominantly Class I-VI soils and the findings do not address the OAR 660-033-0130(4)(c)(B)(ii) presumption that property composed of predominantly Class I-VI soils are suitable for farm use or the fact that livestock did graze on the property in the past. *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 186 (2017).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The uses authorized in EFU zones in counties that have designated marginal lands are generally set out in subsections of ORS 215.213, whereas the uses authorized in EFU zones in non-marginal lands counties are generally

set out in ORS 215.283. The regulation of dwellings under ORS 215.213 was originally intended to be slightly more restrictive than under ORS 215.283, as the quid pro quo for more liberal allowance of dwellings on designated marginal lands under ORS 215.317. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The nonfarm dwelling standards codified at ORS 215.284 were enacted by the legislature as amendments to ORS 215.283(3) and new subsections of ORS 215.283. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. As a marginal lands county, Lane County is expressly authorized to apply ORS 215.213(3) in approving a nonfarm dwelling on non-high value farmland in the Willamette Valley. Because Lane County is a marginal lands county, it is not required to apply ORS 215.284(1) in addition to ORS 215.213(3), simply because ORS 215.284(1) expressly applies to lands in the Willamette Valley. ORS 215.284(1) applies to non-marginal lands counties. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. ORS 215.284(1) to (4) distinguish between lands inside the Willamette Valley and lands outside the Willamette Valley, and apply the stability standard inside the Willamette Valley and apply the suitability standard outside the Willamette Valley. However, the fact that ORS 215.213(3) imposes a suitability standard does not provide a basis for importing the Willamette Valley regulatory distinction from ORS 215.284 into ORS 215.213 and it does not provide a basis for concluding that ORS 215.213(3) does not apply to lands in the Willamette Valley. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. ORS 215.213(4) provides that a lot for a nonfarm dwelling must comply with any applicable Willamette River Greenway regulations and ORS 215.213(3) does not include a similar reference to Willamette River Greenway regulations. However, that difference in wording between ORS 215.213(3) and (4) alone does not support interpreting ORS 215.213(4) to apply, to the exclusion of ORS 215.213(3), throughout both the Willamette River Greenway and the much larger Willamette River Valley, when ORS 215.213(3) includes no language precluding its applicability within the Willamette River Valley. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A reasonable person could infer from photographs that show the front and two sides of a dwelling that the pictured dwelling has "intact exterior walls and roof structure," as required by ORS 215.283(1)(s)(A) for approval of a replacement dwelling in an exclusive farm use zone. *Hegele v. Crook County*, 56 Or LUBA 156 (2008).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Where the evidence shows that a house had a kitchen sink, toilet and bathing facilities that were connected to a pipe that exited the house and traveled underground to a holding and disposal tank of some sort, that evidence is sufficient to establish that the dwelling had indoor plumbing that was connected to "a sanitary waste disposal system," as required by ORS 215.283(1)(s)(B) for approval of a replacement

dwelling in an exclusive farm use zone. ORS 215.283(1)(s)(B) does not require that the applicant establish that the required "sanitary waste disposal system" qualifies as a "subsurface sewage disposal system," as defined by ORS 454.605(13). *Hegele v. Crook County*, 56 Or LUBA 156 (2008).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Under ORS 215.283(1)(s)(A) and (B), a county may approve a replacement dwelling only if the dwelling that is to be replaced "[h]as intact walls and roof structure" and "[h]as indoor plumbing." Although ORS 215.283(1)(s)(A) and (B) can be interpreted to require that the dwelling that is to be replaced must remain intact until the county decision approving the replacement dwelling becomes final, the statute does not have to be interpreted in that way, since ORS 215.283(1)(s)(E)(i) requires that the dwelling to be replaced must ultimately be removed. *Hegele v. Crook County*, 56 Or LUBA 156 (2008).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A county does not commit error by allowing access to a nonfarm dwelling in an exclusive farm use zone to be provided across a right-of-way that crosses a zoning district that does not permit nonfarm dwellings. *Central Oregon Landwatch v. Deschutes County*, 56 Or LUBA 280 (2008).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. OAR 660-012-0065(3) sets out "transportation improvements [that] are consistent with Goals 3, 4, 11, and 14" and allows new access roads "where the function of the road is to reduce local access to or local traffic on a state highway." The rule does not require that the reduced access must in all cases be access that is currently constructed and providing access, but the rule also does not necessarily allow new access roads where the access that is to be eliminated is an unexercised legal right to construct access. *Central Oregon Landwatch v. Deschutes County*, 56 Or LUBA 280 (2008).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Relinquishing a reserved right of access does not result in a reduction of "local access to * * * a state highway," within the meaning of OAR 660-012-0065(3)(g), where the only evidence in the record suggests that ODOT would not allow access to be constructed under that reserved right of access. *Central Oregon Landwatch v. Deschutes County*, 56 Or LUBA 280 (2008).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. OAR 660-012-0035(10) does not *require* that projects approved under OAR 660-012-0065(3) must be included in the transportation system plan; it provides that they *may* be included in the transportation system plan, but only if they satisfy the other requirements set out in that section of the rule. *Central Oregon Landwatch v. Deschutes County*, 56 Or LUBA 280 (2008).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. While a parcel may not be considered generally unsuitable "based solely on size or location" without considering whether it can be used in conjunction with other lands, if size or location are not the sole basis for a finding of general unsuitability, then a local government is just required to determine whether the parcel can be used in conjunction with other lands. *Williams v. Jackson County*, 55 Or LUBA 223 (2007).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The proper inquiry under ORS 215.284(3)(b) is whether land is generally unsuitable "for the production of farm crops and

livestock or merchantable tree species," not whether the land is generally unsuitable for "farm use." *Williams v. Jackson County*, 55 Or LUBA 223 (2007).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A parcel can satisfy the generally unsuitable standard even if portions of the parcel contain areas that, if considered alone, do not satisfy the standard. *Williams v. Jackson County*, 55 Or LUBA 223 (2007).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. In *Smith v. Clackamas County*, 313 Or 519, 836 P2d 716 (1992), the court held that in applying local nonfarm dwelling standards that replicated existing statutory standards, the requirement that the dwelling be sited on "generally unsuitable land for the production of farm crops and livestock" requires that the entire farm parcel, rather than the portion of the parcel where the dwelling would be sited, must be "generally unsuitable land." ORS 215.284(3)(b) was adopted in 1993 in reaction to *Smith*, and makes the "generally unsuitable land" standard apply to "a lot, parcel or portion of a lot or parcel." *Wetherell v. Douglas County*, 50 Or LUBA 71 (2005).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. For jurisdictions outside the Willamette Valley, OAR 660-033-0130(4)(c) requires that an applicant for a nonfarm dwelling must demonstrate that the dwelling: (1) "will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use;" (2) will be "situated upon a lot or parcel, or a portion of a lot or parcel, that is generally unsuitable land for the production of farm crops and livestock or merchantable tree species;" and (3) "will not materially alter the stability of the overall land use pattern of the area." *Lichvar v. Jackson County*, 49 Or LUBA 68 (2005).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. OAR 660-033-0130(4)(c)(C) incorporates the worst-case scenario methodology for applying the stability standard that is set out at OAR 660-033-0130(4)(a)(D) and essentially requires that an applicant for a nonfarm dwelling: (1) project the worst-case scenario for development of dwellings on similarly situated parcels; and (2) determine whether the stability of the area for continued agriculture will be upset if that worst-case scenario comes true. If the worst-case scenario would upset the stability of the area for continued agriculture, the application for a nonfarm dwelling must be denied. *Lichvar v. Jackson County*, 49 Or LUBA 68 (2005).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. In most cases, the OAR 660-033-0130(4)(a)(D) stability standard cannot be applied until *after* the OAR 660-033-0130(4)(c)(B) generally unsuitable standard is applied because the county will need to know the salient characteristics of the subject property in order to determine whether other similarly situated parcels include generally unsuitable land that could potentially provide a site for a nonfarm dwelling under OAR 660-033-0130(4), when applying the stability standard's worst-case scenario test. If so, the potential for siting a nonfarm dwelling on that similarly situated parcel must be included in the analysis of the worst-case scenario. *Lichvar v. Jackson County*, 49 Or LUBA 68 (2005).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A county finding that a site where a nonfarm dwelling could be located under OAR 660-033-0130(4)(c)(B) is too small for a dwelling is an inadequate basis for denying the application where the other nonfarm dwelling criteria are

met and the county has no minimum size or dimensional requirement for nonfarm dwellings. *Lichvar v. Jackson County*, 49 Or LUBA 68 (2005).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Where an applicant takes the position that a farm driveway has compacted the underlying soils so that they are no longer suitable for the production of farm crops and livestock or trees so that the driveway is a potential site for a nonfarm dwelling under OAR 660-033-0130(4)(c)(B), and the county accepts that position, the applicant cannot fault the county for finding there are other nearby similarly situated parcels that have driveways that would also qualify for nonfarm dwellings and thereby destabilize the area for agriculture, in violation of OAR 660-033-0130(4)(a)(D). *Lichvar v. Jackson County*, 49 Or LUBA 68 (2005).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. OAR 660-006-0025(4)(t), which is part of the Land Conservation and Development Commission's rule governing medical hardship dwellings on land that is zoned for exclusive farm use, does not require that a "recreational vehicle" or "an existing building" be connected to the septic system that serves the existing residence. *Burton v. Polk County*, 48 Or LUBA 440 (2005).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Because OAR 660-006-0025(4)(t) does not require that "existing buildings" that are to be used for hardship dwelling must be connected to the same septic system that serves the existing dwelling, it would not be inconsistent with OAR 660-006-0025(4)(t) to interpret an ambiguous zoning ordinance provision for hardship dwellings in exclusive farm use zones not to impose that requirement either. *Burton v. Polk County*, 48 Or LUBA 440 (2005).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A county interpretation of its zoning ordinance to allow an existing manufactured dwelling to remain connected to the septic system that serves that existing dwelling, rather than to require the manufactured dwelling to be moved and connected to the septic system for the other dwelling on the property where the medical hardship is located is not inconsistent with the underlying purpose for medical hardship dwellings. In either case a second dwelling remains on the property for a specified period of time. *Burton v. Polk County*, 48 Or LUBA 440 (2005).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. When a proposed nonresource parcel is found to be unsuitable for farm or forest use based solely on terrain, adverse soils and land conditions, rather than size and location, a local government need not consider whether the parcel could be put to farm or forest use in conjunction with other land. *Epp v. Douglas County*, 46 Or LUBA 480 (2004).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. When an acknowledged local ordinance requires a justification of the study area for a stability analysis only when the study area is less than 2000 acres, and the study area used by the local government is over 2000 acres, no justification is required even though OAR 660-033-0130(4) would require such justification absent the acknowledged local ordinance. *Epp v. Douglas County*, 46 Or LUBA 480 (2004).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. ORS 215.213(1)(t) allows alteration, restoration or replacement of an existing dwelling in an EFU zone if certain requirements are met, including a requirement that the dwelling have "intact exterior walls and roof structure." This requirement is met even if the roof and wall have suffered from normal wear and tear or are damaged, so long as they continue to perform the function of separating an indoor living environment from the elements outside the dwelling. *Bradley v. Washington County*, 44 Or LUBA 36 (2003).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. ORS 215.213(1)(t) requires that "exterior walls" be "intact." Where an addition to a dwelling makes the original exterior wall an interior wall, it is the exterior wall of the addition that must be "intact" under ORS 215.213(1)(t). *Bradley v. Washington County*, 44 Or LUBA 36 (2003).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A county may not approve a nonfarm dwelling on a parcel created after January 1, 1993, under ORS 215.284(2)(c), which requires that the parcel on which a nonfarm dwelling is to be located be created prior to January 1, 1993, in order to remedy what it perceives to be an injustice. *Harris v. Jefferson County*, 44 Or LUBA 205 (2003).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A decision that approves a nonfarm dwelling on EFU land notwithstanding that the application does not comply with the applicable criteria set out at ORS 215.284(2)(c) will be reversed. *Harris v. Jefferson County*, 44 Or LUBA 205 (2003).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Because a study area of 276 acres is clearly insufficient to satisfy the 1,000-to-2,000-acre study area required by OAR 660-033-0130(4)(a)(D), for purposes of the stability standard, LUBA will not address arguments that the study area is sufficient to satisfy the case law on which the rule elaborates. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A local government must consider whether land can be used in conjunction with a commercial farm or ranch under OAR 660-033-0130(4)(c), unless it first finds that the subject property is generally unsuitable for farm use, regardless of size or location. Where the local government relies on a combination of factors, including size, to conclude that the subject property is generally unsuitable for farm use, it must consider whether the property can be used in conjunction with nearby commercial farms or ranches. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. If property has some value as farmland if used in conjunction with a neighboring commercial farm or ranch, and the owner of that farm or ranch offers to buy, lease, rent or otherwise manage the property for something approaching its actual market value as farmland, then OAR 660-033-0130(4)(c) prohibits a finding that the property is "generally unsuitable" for farm use. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A finding that an EFU parcel would contribute no productive farm acreage to any neighboring farm, and thus is generally unsuitable for farm use even if used in conjunction with neighboring dairy farms, is not supported by substantial evidence, where two neighboring dairy farmers offered to buy the parcel to use in conjunction with their farms. A property's usefulness as farmland, considered on its own, is not necessarily indicative of its usefulness when combined with an existing farm or ranch. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. OAR 660-033-0130(4)(c)(C) requires that a county consider the "cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated" by applying the standards of OAR 660-033-0130(4)(a)(D), in determining whether a proposed nonfarm dwelling would materially alter the stability of the overall land use pattern. That language requires that the county include in its stability analysis potential new nonfarm dwellings on existing lots or parcels. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. OAR 660-033-0130(4)(a)(D) requires that the county's stability analysis consider the potential for new nonfarm parcels in the area, whether or not the applicant proposes a new nonfarm parcel. OAR 660-033-0130(4)(c)(C) requires compliance with the standards of OAR 660-033-0130(4)(a)(D), and therefore also requires consideration of potential new nonfarm parcels, whether or not a new nonfarm parcel is proposed. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Remand is necessary where the hearings officer cites a nonexistent requirement for "substantial and compelling findings," and appears to apply that standard in determining that the applicant does not satisfy the stability standard. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. ORS 215.236(4) requires that the applicant for a nonfarm dwelling notify the tax assessor that the parcel is no longer being used as farmland, and appears to presume that nonfarm parcels are not in farm use. Given that statutory presumption, the hearings officer did not err in assuming that a parcel disqualified for farm tax deferral is no longer in farm use, and is not required to assume that farm use will continue on portions of larger nonfarm parcels. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. OAR 660-033-0130(4)(a)(D) requires the county to assume that any property in the study area that can be divided or developed for a nonfarm dwelling will be. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The stability standard at OAR 660-033-0130(4)(a)(D)(iii) is framed in the disjunctive, and the standard is not met if the cumulative impact of nonfarm dwellings will either (1) make it more difficult for farm use to continue due to diminished opportunities to expand, purchase or lease farmland; or (2) diminish the number of tracts or acreage in farm use in a manner that destabilizes the character of the study area. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. OAR 660-033-0130(4)(a)(D) and (c)(C) require consideration of the cumulative impact of a proposed nonfarm dwelling on lots or parcels that are "similarly situated." Because OAR 660-033-0130(4)(a)(D)(ii) expressly requires consideration of whether parcels larger than the minimum parcel size may be divided to allow nonfarm dwellings, the scope of "similarly situated" parcels is not limited to substandard parcels or parcels that are the same size as the subject property. *Elliott v. Jackson County,* 43 Or LUBA 426 (2003).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Any minimum gross farm income level that a county may establish in approving a lot of record dwelling on EFU-zoned high-value farmland must be consistent with the income generated by the county's noncommercial farms, which are protected under Goal 3 (Agricultural Lands) and the EFU zoning statutes. *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A county errs in relying on OAR 660-033-0135, which establishes standards to ensure that farms are large enough and generate sufficient income to warrant an assumption that a dwelling on the farm is properly viewed as "customarily provided in conjunction with farm use" within the meaning of ORS 215.283(1)(f), to also set a gross annual income threshold for determining whether farm use on high-value farmland is "impracticable" for purposes of siting a lot of record dwelling under ORS 215.705(2)(a)(C)(i). *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The minimum gross income levels the legislature established at ORS 308A.071(2)(a) for non-EFU-zoned parcels to qualify for special assessment are the best available indication of the level of gross income that the legislature believes demonstrates practicable farm use. *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. In applying ORS 215.705(2)(a)(C)(i) to determine whether farm use of an EFU-zoned parcel with high-value soils is "impracticable," evidence that the property and nearby properties have generated limited farm income in the past is relevant evidence, but it is not determinative. *Friends of Linn County v. Linn County,* 39 Or LUBA 627 (2001).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Under ORS 215.705(2)(a)(C)(i), a property's impracticability for farm use must be "due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity." A decision that does not demonstrate that cited factors are not shared by neighboring properties and does not explain why the cited factors make farm use impracticable must be remanded. *Friends of Linn County v. Linn County,* 39 Or LUBA 627 (2001).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Failure to specifically describe the grazing practices on surrounding properties does not render a finding of compliance with the noninterference standard inadequate where the proposed nonfarm dwelling is one-half mile from the nearest grazing operation and buffered by a number of vacant lots, and no conceivable interference is identified. *Wolverton v. Crook County,* 39 Or LUBA 256 (2000).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Vandalism and traffic impacts associated with a county road traversing petitioners' cattle ranch are insufficient to show that a proposed nonfarm dwelling will seriously interfere with grazing practices on petitioners' ranch, where the county finds that vandalism is not associated with nonfarm dwellings using the road and traffic from the proposed dwelling is not significantly greater than could occur under permitted uses. *Wolverton v. Crook County*, 39 Or LUBA 256 (2000).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Although past denial of nonfarm development in the area is not necessarily an indicator that similar applications will be denied in the future, the county does not err in relying upon recent denials and its understanding of the current law to conclude that potential new nonfarm development is so limited in the area that the cumulative effect of such development will not materially alter the stability of the land use pattern. *Wolverton v. Crook County*, 39 Or LUBA 256 (2000).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. As construed in *Dorvinen v. Crook County*, 153 Or App 391, 957 P2d 180 (1998), ORS 215.780(1) applies the statutory minimum lot or parcel size to all parcels resulting from a partition for nonfarm dwellings, including the parcel on which the nonfarm dwelling will be sited. *Friends of Douglas County v. Douglas County*, 39 Or LUBA 156 (2000).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. When a local code parallels and implements an administrative rule standard for reviewing an application for a nonfarm dwelling in an EFU zone, the local government's discretion to interpret its local criteria is constrained. Its interpretation and application of its code must be consistent with the rule it implements. *Dowrie v. Benton County*, 38 Or LUBA 93 (2000).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Two separate parcels do not form a "tract," as that term is defined by ORS 215.010(2), where a husband and a wife own one parcel jointly and the second parcel is owned by the husband only. *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. LUBA will remand rather than reverse a decision approving partitions in conjunction with a nonfarm dwelling, notwithstanding that the resulting partitions violate the minimum parcel size at ORS 215.780(1), where the decision expressly preserves an issue regarding whether the county's 20-acre minimum parcel size was adopted under one of the exceptions to ORS 215.780(1), and thus LUBA cannot determine whether the approval is prohibited as a matter of law. *Alliance for Responsible Land Use v. Deschutes Co.*, 37 Or LUBA 215 (1999).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The legal effect of a "partition," as defined at ORS 92.010, is to create new parcels as of the date the partition plat is approved. The parcels resulting from a partition are thus "created" as of the date the plat is approved, for purposes of the nonfarm dwelling provisions of OAR 660-033-0130 and ORS 215.284. *Hartmann v. Washington County*, 36 Or LUBA 442 (1999).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The definition of "Date of Creation" at OAR 660-033-0020(4) expands the circumstances in which parcels are "created" for purposes of siting a nonfarm dwelling to include lot line adjustments or similar reconfigurations that have the effect of qualifying the parcel for a dwelling. The definition does not impliedly narrow the set of circumstances that create a parcel to include only those events that have the effect of qualifying a parcel for a dwelling. *Hartmann v. Washington County*, 36 Or LUBA 442 (1999).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A partition, as defined by ORS 92.010, is not a "reconfiguration" of the boundaries of a parcel within the meaning of OAR 660-033-0020(4) because the legal effect of partition is to create new parcels. *Hartmann v. Washington County*, 36 Or LUBA 442 (1999).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Absent an identification of what specific farm and forest practices are involved on nearby lands, a local government cannot meaningfully determine whether a proposed nonfarm dwelling will cause a significant change in or increased cost to those practices. *Hearne v. Baker County*, 34 Or LUBA 176 (1998).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The only difference between ORS 215.284(2) and 215.284(3) is that ORS 215.284(2) permits a nonfarm dwelling on an existing parcel, while ORS 215.284(3) permits a nonfarm dwelling on a newly created parcel. *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A parcel that was illegally created in 1974 and then legalized by an "after-the-fact" decision in 1989 is not "lawfully created" under ORS 215.705(1), which requires that the parcel be "lawfully created * * * [p]rior to January 1, 1985." *Skrepetos v. Douglas County*, 33 Or LUBA 502 (1997).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The county fails to establish that, under local code, a second dwelling is authorized as a conditional use in an EFU zone where the findings do not explain why the proposed dwelling is authorized and do not explain when the primary dwelling was established or whether its use is resource-related. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. There is insufficient evidence in the county's findings to support a conclusion of compatibility with farm use where the findings do not include evidence regarding the surrounding farm uses in the area, and do not explain how the proposed nonfarm dwelling will be compatible with the identified farm uses. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The county's findings lack evidentiary support for the conclusion that a proposed dwelling will not materially alter the stability of the surrounding area where there is inadequate evidence regarding the surrounding area, inadequate evidence regarding the uses existing in the area, and no evidence regarding how the proposed dwelling will not alter the stability of those uses in the selected area. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. In approving a conditional use permit for a nonfarm dwelling, the county must make findings required by ORS 215.284(2)(c) or 215.284(3)(c) regarding the legal creation of the subject property as a separate parcel. *O'Brien v. Lincoln County*, 31 Or LUBA 262 (1996).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. How petitioners believe a property should have been assessed for property taxation before approval of a nonfarm dwelling permit is not relevant in a subsequent land use proceeding. *Wakeman v. Jackson County*, 29 Or LUBA 521 (1995).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. ORS 215.236(2) requires that farm assessment disqualifications be filed within 120 days of approval of a nonfarm dwelling permit only when the subject property is assessed for farm use at the time of approval. A county's decision to modify a condition of approval requiring disqualification from farm assessment within 120 days after approval does not violate ORS 215.236(2) when the subject property was not assessed for farm use at the time of approval. *Wakeman v. Jackson County*, 29 Or LUBA 521 (1995).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The "lot of record" dwelling provisions of ORS 215.705 provide an alternative to the nonfarm dwelling provisions of ORS 215.284, which do not allow dwellings on lots or parcels that are not composed of predominantly Class IV to VIII soils. *Blondeau v. Clackamas County*, 29 Or LUBA 115 (1995).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Where amendments to an exclusive farm use (EFU) zoning district do not change the maximum allowable density of nonfarm dwellings in PUDs, but may have the effect of increasing the numbers of, and circumstances in which, residential PUDs may be approved on EFU-zoned land, the county must consider these potential secondary effects of the amendments in determining whether the EFU zone, as amended, complies with Goals 11 and 14. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. ORS 215.283(1)(f) and OAR 660-05-030(4) are satisfied where the farm use in conjunction with which a dwelling is customarily provided will be established prior to placement of a dwelling on the subject property. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. A local government's interpretation of its code provisions on farm dwellings is within the interpretive discretion afforded local governments by *Clark v. Jackson County* and 1993 Oregon Laws, chapter 792, section 43, so long as its interpretation does not provide less protection to EFU-zoned land than what ORS 215.283(1)(f) and OAR 660-05-030(4) provide. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Even though LUBA might agree with a county's argument in its brief that the purpose section of its EFU zoning district is not an approval standard for a farm dwelling permit application, if the challenged decision itself does not

interpret the code provision, LUBA must remand the decision for the county to interpret the provision in the first instance. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Where a previous local government decision approved a nonfarm dwelling, the local government cannot require the proposed nonfarm dwelling to be re-reviewed against the same standards. *Rodriguez v. Marion County*, 26 Or LUBA 50 (1993).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. LUBA will defer to a county's interpretation of its EFU zone provisions as not allowing approval of a nonfarm dwelling on a parcel that already has a dwelling, or approval of a partition to allow a nonfarm dwelling, if the parent parcel already has a dwelling. *Hahn v. Marion County*, 26 Or LUBA 18 (1993).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. ORS 215.283(3) applies to the "establishment" of a nonfarm dwelling in an EFU zone. In this context, "establishment" refers to the legal establishment of a nonfarm residential use, not merely to the construction of a nonfarm dwelling. *DLCD v. Columbia County*, 24 Or LUBA 32 (1992).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Parcels in Exclusive Farm Use zones that are of insufficient size to "continue the existing commercial enterprise in the area" may be eligible for approval of a nonfarm dwelling, but are not eligible for approval of a farm dwelling. OAR 660-05-025; 660-05-030. *DLCD v. Yamhill County*, 23 Or LUBA 361 (1992).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Whether a proposed dwelling (1) is permitted outright in an EFU zone, (2) is "accessory" to an underlying nonconforming use, and (3) complies with ORS 215.296(1), are determinations which require "interpretation or the exercise of factual, policy or legal judgment" within the meaning of ORS 197.015(10)(b)(A) and (C). *Komning v. Grant County*, 20 Or LUBA 481 (1990).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. In denying an application for a nonfarm dwelling on land zoned for exclusive farm use, a county need only adopt findings demonstrating that one or more approval standards are not met. *McNulty v. Marion County*, 19 Or LUBA 367 (1990).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. In reviewing a combined request for approval of a nonfarm dwelling and a partition to create a nonfarm parcel, a county must first apply applicable approval standards, including the "general unsuitability" standard, to the request for approval of the nonfarm dwelling. Only after the nonfarm dwelling is approved may the county consider the request to create a new nonfarm parcel for the dwelling. *Smith v. Clackamas County*, 19 Or LUBA 171 (1990).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. The "general unsuitability" standard applies to the entire parent parcel, not just to the portion of the parent parcel or the new nonfarm parcel on which a nonfarm dwelling is to be located. *Smith v. Clackamas County*, 19 Or LUBA 171 (1990).

3.3.3 EFU Statute/Ordinances – Nonfarm Uses – Dwellings. Compliance with an ordinance provision requiring that proposed nonfarm dwellings be found consistent with the policies of ORS 215.243 requires the county to explain which of the policies of ORS 215.243 are relevant and to address those relevant policies. *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. A local government's unsupported inference that ranching operations are 2-3 miles distant from the proposed nonfarm dwelling, and its reliance on the absence of evidence on which the applicant bears the burden of proof, do not constitute substantial evidence supporting a finding that the nonfarm dwelling is compatible with farm uses. *Wolverton v. Crook County*, 34 Or LUBA 515 (1998).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. Under the compatibility standard, the local government must address conflicts between existing residential uses and nearby farm uses, where a proposed nonfarm dwelling will contribute to and thus aggravate those conflicts. *Wolverton v. Crook County*, 34 Or LUBA 515 (1998).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. Absent an identification of what specific farm and forest practices are involved on nearby lands, a local government cannot meaningfully determine whether a proposed nonfarm dwelling will cause a significant change in or increased cost to those practices. *Hearne v. Baker County*, 34 Or LUBA 176 (1998).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. Where a conditional use is proposed on EFU land, the compatibility of the proposed use with uses on adjacent properties is necessary to ensuring the stability of existing uses, but it does not alone ensure stability. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. There is insufficient evidence in the county's findings to support a conclusion of compatibility with farm use where the findings do not include evidence regarding the surrounding farm uses in the area, and do not explain how the proposed nonfarm dwelling will be compatible with the identified farm uses. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. Where a county acknowledges an incompatibility between a proposed nonfarm use and surrounding farm uses, it cannot determine that the proposed use satisfies the requirement that it be compatible through the imposition of a condition which will mitigate but not resolve the incompatibility. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. Findings determining compatibility between a proposed nonforest dwelling and forest uses are inadequate where the findings simply conclude no conflicts have occurred between existing dwellings and forest uses, but fail to establish the proximity between those existing dwellings and forest uses, and fail to establish whether the existing dwellings have buffering or other characteristics similar to those of the subject parcel. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. Even if a proposed use does not significantly interfere with accepted farming practices on adjacent agricultural lands or materially alter the stability of the overall land use pattern of the area, it may nevertheless be

incompatible with farm uses and inconsistent with the intent and purpose of ORS 215.243. *DLCD v. Crook County*, 26 Or LUBA 478 (1994).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. A local code requirement that a proposed farm dwelling be compatible with area farm operations does not require a determination of the compatibility of the proposed dwelling with domestic water users in the area. *Giesy v. Benton County*, 24 Or LUBA 328 (1992).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. A code requirement that a proposed nonresource dwelling not be incompatible or interfere with adjacent farm and forest uses requires findings (1) identifying an area zoned for farm and forest uses, (2) determining what farm and forest uses occur within that identified area, and (3) evaluating whether the proposed nonresource dwelling will be "incompatible" or will "interfere" with those practices. *Veach v. Wasco County*, 23 Or LUBA 492 (1992).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. In determining whether a proposed golf course on EFU-zoned land satisfies local standards requiring that the golf course be compatible with and not seriously interfere with farm uses, the local government must identify the farm uses in the area and explain how the proposal will be compatible, and not seriously interfere, with the identified farm uses. *Kaye v. Marion County*, 23 Or LUBA 452 (1992).

3.3.4 EFU Statute/Ordinances – Nonfarm Uses – Compatibility Standard. Without an explanation of the relationship between the location of the farm uses in the area and the subject parcel, a county's findings are inadequate to establish that a proposed nonfarm dwelling is compatible with the farm uses in the area. *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Where it is not apparent that a county adopted one or more conditions of approval to address the impacts described in ORS 215.296(1), petitioner's argument that the county's conditions of approval are not "clear and objective," as is required by ORS 215.296(2), provides no basis for reversal or remand. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Failure to specifically describe the grazing practices on surrounding properties does not render a finding of compliance with the noninterference standard inadequate where the proposed nonfarm dwelling is one-half mile from the nearest grazing operation and buffered by a number of vacant lots, and no conceivable interference is identified. *Wolverton v. Crook County*, 39 Or LUBA 256 (2000).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Vandalism and traffic impacts associated with a county road traversing petitioners' cattle ranch are insufficient to show that a proposed nonfarm dwelling will seriously interfere with grazing practices on petitioners' ranch, where the county finds that vandalism is not associated with nonfarm dwellings using the road and traffic from the proposed dwelling is not significantly greater than could occur under permitted uses. *Wolverton v. Crook County*, 39 Or LUBA 256 (2000).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Where a neighboring farmer identifies significant changes and significant cost increases to his ranching operation from a proposed motocross race track and off-road vehicle park, the county must find that the proposed park, as conditioned, will not cause those impacts. Such findings are inadequate where the county does not address those identified impacts or explain why the proposed park, as conditioned, will not cause those impacts. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Conditions imposed on a proposed motocross race track and off-road vehicle park that noise from the park must comply with DEQ standards and not exceed 99 decibels are inadequate to support a finding of compliance with the noninterference standard, where the county does not determine whether compliance with DEQ standards will prevent identified impacts on surrounding farm and forest practices, and the only mechanism for achieving compliance is to limit the noise from individual vehicles to 99 decibels. Without addressing the cumulative noise impacts of multiple vehicles, the county is no position to conclude that identified impacts will not occur. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Where a party during local proceedings advises the county that an existing or prior farm use on surrounding lands is in the process of being abandoned, and plans for the new farm use are sufficiently developed to allow the new farm use to be described in sufficient detail to allow the farm practices that will be associated with the new farm use to be identified, an applicant for a nonfarm use that is subject to ORS 215.296(1) must address the accepted farming practices that will be associated with that new farm use. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Organic farming is not properly viewed as either a "farm use" or an "accepted farm practice." However, organic

farmers may employ accepted farming practices that are not normally associated with other types of farming. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Impacts on "farm families, residents and workers" are not impacts on "accepted farm practices," that must be considered under ORS 215.296(1). *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Where a county's findings are adequate to identify accepted farming practices on lands surrounding a proposed aggregate mining operation but do not explain why they will not be significantly affected by the mining operation, the county's decision must be remanded. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. A county may distinguish between those properties "primarily devoted" to farm use versus properties "primarily devoted" to residential use in its analysis to determine whether a proposed dwelling will force a significant change in or increase the cost of farm practices on surrounding lands devoted to farm use, as required by ORS 215.705(2)(a)(C)(ii). *Friends of Linn County v. Linn County*, 37 Or LUBA 297 (1999).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. A county's findings concerning the noninterference standard are inadequate, where the findings simply identify nearby farm uses without identifying the accepted farming practices associated with those uses or explaining why the proposal will not force a significant change in or significantly increase the cost of those accepted farming practices. *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. A finding that there is no "commercially viable farm activity" on nearby parcels does not satisfy an approval standard that a proposed nonfarm dwelling will not interfere with nearby farm uses. *O'Brien v. Lincoln County*, 31 Or LUBA 262 (1996).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. The noninterference standard of ORS 215.283(3)(b) applies directly to land in a county EFU zone, and EFU zone provisions implementing ORS 215.283(3)(b) may not be interpreted inconsistently with the statute. *DLCD v. Crook County*, 26 Or LUBA 478 (1994).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Where only a portion of an EFU-zoned property is to be put to nonfarm use, the provision of ORS 215.283(3)(b) requiring noninterference with accepted farming practices applies both to farming practices that will continue on the subject property and to farming practices on parcels that adjoin the subject property. *DLCD v. Crook County*, 26 Or LUBA 478 (1994).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Where findings state facts relevant to whether a proposed nonfarm use will interfere with accepted farming practices, but do not identify the types of farming occurring in the area, and those findings are

challenged as inadequate and not supported by substantial evidence, LUBA will sustain the challenge in the absence of any attempt by respondents to defend the findings or identify evidence supporting the findings. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. A code requirement that a proposed nonresource dwelling not be incompatible or interfere with adjacent farm and forest uses requires findings (1) identifying an area zoned for farm and forest uses, (2) determining what farm and forest uses occur within that identified area, and (3) evaluating whether the proposed nonresource dwelling will be "incompatible" or will "interfere" with those practices. *Veach v. Wasco County*, 23 Or LUBA 492 (1992).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. In determining whether a proposed golf course on EFU-zoned land satisfies local standards requiring that the golf course be compatible with and not seriously interfere with farm uses, the local government must identify the farm uses in the area and explain how the proposal will be compatible, and not seriously interfere, with the identified farm uses. *Kaye v. Marion County*, 23 Or LUBA 452 (1992).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Where the evidence establishes a reasonable farmer would not significantly change the manner in which the farm is managed due to a proposed golf course, and the opponents' evidence shows only that there is a remote possibility that there could be some impacts from such proposed golf course, the county's determinations that the proposed golf course will not seriously interfere with, force a significant change in, or significantly increase the cost of accepting farming practices in the area, are supported by substantial evidence. *Washington Co. Farm Bureau v. Washington County*, 22 Or LUBA 540 (1992).

3.3.5 EFU Statute/Ordinances – Nonfarm Uses – Noninterference Standard. Findings of compliance with a standard that a proposed golf course will not "force a significant change in," or "significantly increase the cost of," accepted farm or forest practices on surrounding lands do not necessarily satisfy a standard that the proposed golf course will not "interfere seriously" with accepted farming practices. *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51 (1991).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. ORS 215.284(1) to (4) distinguish between lands inside the Willamette Valley and lands outside the Willamette Valley, and apply the stability standard inside the Willamette Valley and apply the suitability standard outside the Willamette Valley. However, the fact that ORS 215.213(3) imposes a suitability standard does not provide a basis for importing the Willamette Valley regulatory distinction from ORS 215.284 into ORS 215.213 and it does not provide a basis for concluding that ORS 215.213(3) does not apply to lands in the Willamette Valley. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. When a petitioner was required to raise local appeal issues below pursuant to *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), raising the issue that approval of a nonfarm dwelling would significantly increase the cost of farming practices is not sufficient to raise any issue concerning impacts on the stability of the overall land use pattern, and the petitioner may not raise the stability standard at LUBA. *Zeitoun v. Yamhill County*, 60 Or LUBA 111 (2009).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. The stability standard requires a county to project a full-development, worst-case scenario and determine whether under that scenario the agricultural land use pattern would be destabilized at some point in the future. If the answer is affirmative, the county must either (1) deny the application or (2) identify some reason or mechanism why that scenario is not likely to occur and nonfarm development will not reach levels that destabilize the agricultural land use pattern. *Young v. Crook County*, 56 Or LUBA 704 (2008).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Where a county's code and comprehensive plan are silent regarding how a one-dwelling-per-160-acres wildlife habitat standard is to be calculated, the county does not err in averaging residential density within the same 2000-acre study area that is used for the stability standard. *Young v. Crook County*, 56 Or LUBA 704 (2008).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Although a local land use regulation may not specifically require the justification of a 2,000-acre study area for purposes of determining whether a proposed nonfarm dwelling will "materially alter the stability of the overall land use pattern of the area," that regulation implements a statutory requirement, ORS 215.284(2)(d), which has been interpreted to require justification of the scope and contours of any study area used in applying the stability test. To the extent *Epp v. Douglas County*, 46 Or LUBA 480 (2004), concludes otherwise, it is overruled. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. For purposes of determining whether a proposed nonfarm dwelling will "materially alter the stability of the overall land use pattern of the area," OAR 660-033-0130(4)(a)(D)(ii) requires identification of the "number, location and type" of existing dwellings in an identified study area. Where a petitioner fails to explain why the county's alleged errors in identifying existing dwellings on nearby properties as nonfarm dwellings rather than farm dwellings would render its conclusion regarding

the resulting stability of the area inadequate, it fails to provide a basis for reversal or remand of the challenged decision. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A 2,000-acre study area that encompasses a diverse range of topography and land uses could take on many different configurations that are equally "representative of the land use pattern surrounding the subject parcel," for purposes of OAR 660-033-0140(4)(a). *Ploeg v. Tillamook County*, 50 Or LUBA 608 (2005).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Where a county considers whether the stability standard is met based on the number of vacant parcels in the study area that potentially qualify for a nonfarm dwelling under the general unsuitability standard, it is not enough to consider whether such vacant parcels are generally unsuitable as a whole. The county must also consider whether due to poor soils or other circumstances portions of such vacant parcels could qualify the parcels for nonfarm dwellings. *Ploeg v. Tillamook County*, 50 Or LUBA 608 (2005).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. That lot-of-record dwellings are allowed in the EFU zone is an insufficient basis to demonstrate compliance with a code standard requiring that a proposed lot-of-record dwelling will not materially alter the stability of the land use pattern in the area. *Tallman v. Clatsop County*, 47 Or LUBA 240 (2004).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. LUBA will not consider new evidence presented for the first time in an appendix to a petition for review that addresses the stability standard set out at OAR 660-033-0130(4), where the evidence is used to challenge the reasonableness of a county's evidentiary decision regarding the number of new dwellings that could be established within the study area and the new evidence is based on a methodology that was not presented to the county during the local evidentiary proceedings. *Knoche v. Crook County*, 46 Or LUBA 85 (2003).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. When an acknowledged local ordinance requires a justification of the study area for a stability analysis only when the study area is less than 2000 acres, and the study area used by the local government is over 2000 acres, no justification is required even though OAR 660-033-0130(4) would require such justification absent the acknowledged local ordinance. *Epp v. Douglas County*, 46 Or LUBA 480 (2004).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Findings that do not address arguments made at the local level that the chosen study area is not reflective of the actual land use pattern of the area are not adequate to satisfy the stability standard set out in OAR 660-033-0130(4)(a)(D). *Frazee v. Jackson County*, 45 Or LUBA 263 (2003).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Findings that fail to consider the cumulative impact of existing, proposed and potential future nonfarm dwellings are inadequate to demonstrate that proposed nonfarm dwellings will not materially alter the stability of the land use pattern. *Hanna v. Crook County*, 44 Or LUBA 386 (2003).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Because a study area of 276 acres is clearly insufficient to satisfy the 1,000-to-2,000-acre study area required by OAR 660-033-0130(4)(a)(D), for purposes of the stability standard, LUBA will not address arguments that the study area is sufficient to satisfy the case law on which the rule elaborates. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. OAR 660-033-0130(4)(c)(C) requires that a county consider the "cumulative impact of nonfarm dwellings on other lots or parcels in the area similarly situated" by applying the standards of OAR 660-033-0130(4)(a)(D), in determining whether a proposed nonfarm dwelling would materially alter the stability of the overall land use pattern. That language requires that the county include in its stability analysis potential new nonfarm dwellings on existing lots or parcels. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. OAR 660-033-0130(4)(a)(D) requires that the county's stability analysis consider the potential for new nonfarm parcels in the area, whether or not the applicant proposes a new nonfarm parcel. OAR 660-033-0130(4)(c)(C) requires compliance with the standards of OAR 660-033-0130(4)(a)(D), and therefore also requires consideration of potential new nonfarm parcels, whether or not a new nonfarm parcel is proposed. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Remand is necessary where the hearings officer cites a nonexistent requirement for "substantial and compelling findings," and appears to apply that standard in determining that the applicant does not satisfy the stability standard. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. ORS 215.236(4) requires that the applicant for a nonfarm dwelling notify the tax assessor that the parcel is no longer being used as farmland, and appears to presume that nonfarm parcels are not in farm use. Given that statutory presumption, the hearings officer did not err in assuming that a parcel disqualified for farm tax deferral is no longer in farm use, and is not required to assume that farm use will continue on portions of larger nonfarm parcels. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. OAR 660-033-0130(4)(a)(D) requires the county to assume that any property in the study area that can be divided or developed for a nonfarm dwelling will be. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. The stability standard at OAR 660-033-0130(4)(a)(D)(iii) is framed in the disjunctive, and the standard is not met if the cumulative impact of nonfarm dwellings will either (1) make it more difficult for farm use to continue due to diminished opportunities to expand, purchase or lease farmland; or (2) diminish the number of tracts or acreage in farm use in a manner that destabilizes the character of the study area. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. OAR 660-033-0130(4)(a)(D) and (c)(C) require consideration of the cumulative impact of a proposed nonfarm

dwelling on lots or parcels that are "similarly situated." Because OAR 660-033-0130(4)(a)(D)(ii) expressly requires consideration of whether parcels larger than the minimum parcel size may be divided to allow nonfarm dwellings, the scope of "similarly situated" parcels is not limited to substandard parcels or parcels that are the same size as the subject property. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. The analysis that is required to demonstrate compliance with the ORS 215.284 stability standard is not necessarily required for versions of the stability standard that are unrelated to the siting of nonfarm dwellings in EFU zones. However, approval standards that require an analysis of the impact of the proposed use on surrounding properties must identify those properties. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Although past denial of nonfarm development in the area is not necessarily an indicator that similar applications will be denied in the future, the county does not err in relying upon recent denials and its understanding of the current law to conclude that potential new nonfarm development is so limited in the area that the cumulative effect of such development will not materially alter the stability of the land use pattern. *Wolverton v. Crook County*, 39 Or LUBA 256 (2000).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. When a local government is required by an administrative rule to adequately describe and identify a study area for determining whether a proposed nonfarm use will materially alter the stability of the existing area, the local government's findings must justify the study area that is selected. *Dowrie v. Benton County*, 38 Or LUBA 93 (2000).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A local government cannot reach supportable conclusions as to the stability of the land use pattern required by OAR 660-033-0130(4)(a)(D) unless it adequately defines the study area and determines not only what the land use pattern is, but also whether the proposed use or land division will encourage similar uses or divisions on similarly situated parcels in the area. *Dowrie v. Benton County*, 38 Or LUBA 93 (2000).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A county's findings of compliance with the stability standard are inadequate, where the county fails to explain or justify a study area that places the subject property at the margin of the identified study area, and excludes from the study large EFU-zoned parcels adjacent to the subject property. *Friends of Linn County v. Linn County*, 37 Or LUBA 844 (2000).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A county's findings under the stability standard are inadequate, where the county fails to identify any uses on most of the EFU-zoned parcels within the study area, but merely assumes that the dominant land use in the area is residential because of the small size of most parcels and the fact that most dwellings in the area predated zoning restrictions. *Friends of Linn County v. Linn County*, 37 Or LUBA 844 (2000).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A county's finding that a proposed lot of record dwelling on high-value soils will not materially alter the stability of the overall land use pattern is inadequate, where the county considers only the stability of the *nonfarm* land uses in the area, and fails to consider whether the proposed dwelling will encourage additional nonfarm development in a manner that destabilizes remaining farm uses. *Friends of Linn County v. Linn County*, 37 Or LUBA 844 (2000).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Where a proposed lot of record dwelling will be sited on a parcel surrounded by 34 other small EFU parcels that already contain dwellings, a county could conclude that the proposed dwelling will not materially affect the stability of the land use pattern in the area. *Friends of Linn County v. Linn County*, 37 Or LUBA 297 (1999).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A challenge to a county's identification of a study area must demonstrate why the proposed study area does not provide a "clear picture" of the land use pattern in the area, as required by ORS 215.705(2)(a)(C)(iii). *Friends of Linn County v. Linn County*, 37 Or LUBA 297 (1999).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. In selecting a study area to determine whether a proposed dwelling would alter the overall stability of the area, the county's selection of a study area based on natural and constructed barriers is appropriate, where no party explains why defining the study area based on the selected barriers is inappropriate. *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A county's findings that a proposed lot-of-record dwelling would "not materially alter the overall stability of the land use pattern in the area" are inadequate, where the findings focus almost exclusively on non-EFU zoned property in the area and do not explain why approving the request would not lead to approval of additional dwellings on remaining farm parcels that are not already developed with dwellings. *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A county code "stability" standard that does not implement the statutory nonfarm use "stability" standard is not subject to case law interpreting the statutory "stability" standard, but such a code "stability" standard necessarily connotes a temporal period and a scope of causative impact for analysis. However, a county's interpretation of the local "stability" standard as focusing on short-term effects and direct impacts rather than long-term and cumulative impacts is not clearly wrong and therefore must be affirmed by LUBA. *Ray v. Douglas County*, 36 Or LUBA 45 (1999).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A county's findings addressing the requirement of ORS 215.705(a)(C)(iii) that a dwelling not "materially alter the stability of the overall land use pattern of the area" must limit the analysis to EFU-zoned lands. Where LUBA cannot determine whether the analysis was so limited, the decision will be remanded. *DLCD v. Umatilla County*, 34 Or LUBA 703 (1998).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Under the stability standard, the county must explain what justifies the scope and contours of a defined study area, and the county's failure to adopt a reasonably definite study area may so undermine its evaluation of the other elements of the analysis required by *Sweeten v. Clackamas County*, 17 Or LUBA 1234 (1989), as to render its findings on those elements unreviewable. *Wolverton v. Crook County*, 34 Or LUBA 515 (1998).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. In defining an area to study, the local government must explain what justifies the scope and contours of the study area. Bare references to "geographic and traffic patterns" are insufficient to explain the scope and contours of the study area. *DLCD v. Crook County*, 34 Or LUBA 243 (1998).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Characterizing the bulk of the study area solely on the basis of nonspecific information such as farm tax deferrals is insufficient to draw the requisite clear picture of the existing land use pattern. *DLCD v. Crook County*, 34 Or LUBA 243 (1998).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. The stability standard requires a prospective analysis, under which the county must determine not only what the land use pattern is, but also the development trends in the area and whether the proposed use or land division will encourage similar uses or divisions on similarly situated parcels in the area. *DLCD v. Crook County*, 34 Or LUBA 243 (1998).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. The basic purpose of evaluating the land use pattern and the development trends in an area is to determine how stable the current land use pattern is and hence what steps are necessary to protect its stability. *DLCD v. Crook County*, 34 Or LUBA 243 (1998).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. OAR 660-033-0130 and LUBA's decisions require the local government to determine that the proposed nonfarm dwellings and any chain of conversions that the dwellings will encourage on similarly situated properties susceptible to development shall not materially alter the stability of the current land use pattern. *DLCD v. Crook County*, 34 Or LUBA 243 (1998).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. The stability standard requires a local government to examine the history of nonfarm development in the area and to determine the extent to which that development and the current proposal encourage future nonfarm development. The stability standard is not met if the cumulative effect of historical, current and projected nonfarm development is to materially alter the stability of the land use pattern. *Hearne v. Baker County*, 34 Or LUBA 176 (1998).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. In applying a code approval standard that requires the identification of an area whose stability might be affected by a proposed development, the county's findings may not rely on inconsistent definitions of the area. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Where a conditional use is proposed on EFU land, the compatibility of the proposed use with uses on adjacent properties is necessary to ensuring the stability of existing uses, but it does not alone ensure stability. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A county must consider development trends in determining whether a proposed development will alter the stability of the overall land use pattern in an area. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Evidence of a history of similar development approvals or of similarly situated properties where comparable applications would be encouraged by approval of the subject application supports a conclusion that approval of the application could materially alter the stability of existing uses in a selected area. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. The county's findings lack evidentiary support for the conclusion that a proposed dwelling will not materially alter the stability of the surrounding area where there is inadequate evidence regarding the surrounding area, inadequate evidence regarding the uses existing in the area, and no evidence regarding how the proposed dwelling will not alter the stability of those uses in the selected area. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. The purpose of requiring a clear picture of the existing land use pattern as part of the *Sweeten* analysis is to evaluate what impacts a proposed development will have on the stability of that pattern. Information not pertinent to the evaluation need not be obtained, and whether the picture is sufficiently clear depends on the facts of a particular case. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Information as to the particular farm use on each parcel in the area selected as the first step of the stability analysis is pertinent because it may indicate the amount and nature of farm-related capital investment on that parcel, and that, in turn, may help to determine the degree of commitment to continued farm use, which itself bears on stability. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. "Similarly situated," as the term is used in OAR 660-33-130(4)(d) means "similarly circumstanced" in susceptibility to development of nonfarm dwellings. While the size of the parcels is one factor to consider in determining which parcels are situated similarly to a particular parcel, it is not the only factor. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A demonstration that a particular tax lot will be ineligible for a nonfarm dwelling for three years is not substantial evidence which supports a finding that the tax lot has no real potential for a nonfarm dwelling. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Without information concerning the nature and duration of the lease, the use of a particular tax lot as a leased tax-exempt watershed is not substantial evidence which supports a finding that the lot will remain ineligible for a nonfarm dwelling during a term that is reasonable for purposes of a stability analysis. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Findings regarding the stability of the overall land use pattern are inadequate where they do not describe the size of the area encompassing the adjoining parcels, do not examine all of the types of uses in the selected area, do not describe the development pattern and do not conclude that the proposed dwelling will not materially alter the stability of the existing uses. *O'Brien v. Lincoln County*, 31 Or LUBA 262 (1996).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. To establish that a nonfarm dwelling will not materially alter the stability of the land use pattern in the area, the county must (1) select an appropriate area for consideration; (2) examine the types of uses existing in the selected area; and (3) determine that the proposed nonfarm use will not materially alter the stability of the existing uses in the selected area. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Identifying the area to be considered and the overall land use pattern of that area are prerequisites to determining whether a proposed partition satisfies a code requirement that it "not materially alter the stability of the land use pattern of the area." *McNamara v. Union County*, 28 Or LUBA 396 (1994).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Findings which identify some physical features and characteristics of an area, discuss planned improvements, and identify farm and nonfarm uses in the area do not establish the stability of the existing land use pattern of the area or explain why introducing a 120 lot residential planned unit development into the area will not materially alter that stability, as required by ORS 215.283(3)(c). *DLCD v. Crook County*, 26 Or LUBA 478 (1994).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. The requirement of ORS 215.283(3)(c) that nonfarm dwellings "not materially alter the stability of the overall land use pattern in the area" may be violated by introducing residential development into a rural agricultural area where such residential uses do not already exist and may also be violated where there is existing residential development and introducing more such development makes it more difficult to continue existing agricultural uses. *DLCD v. Crook County*, 26 Or LUBA 478 (1994).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. It is erroneous for a county to determine a farm and forest zoned area has a residential character based on the existence of former homesites in the area. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Findings explaining how the existing limited rural industrial uses near a proposed aggregate processing facility have not affected the historical stability of an EFU-zoned area, and that the existing and proposed industrial uses may discourage intrusion of rural residential development, are adequate to demonstrate

compliance with an EFU zone "stability" standard. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238 (1993).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Where a decision recites facts that might provide a basis for explaining why a proposed nonfarm use will not materially alter the land use pattern of the area, but the findings do not identify the relevant area, examine uses existing in the area, or explain why the proposed use will not materially alter the stability of the land use pattern of the area, the findings are inadequate. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A local government determination that a proposed nonresource dwelling "does not materially alter the stability of the overall land use pattern of the area" is not supported by substantial evidence, where the parties cite no evidence in the record establishing the relevant area, the overall land use pattern of such area or the effect of the proposed dwelling on the stability of such land use pattern. *Todd v. Columbia County*, 24 Or LUBA 289 (1992).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. In applying a local code standard requiring that newly created nonfarm and nonforest parcels not materially alter the stability of the overall land use pattern of the area, a local government must define the relevant area and may not focus exclusively on a single rural residential area near the subject property and ignore the potential impacts on nearby forestlands. *DLCD v. Curry County*, 24 Or LUBA 200 (1992).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A code standard requiring that a proposed nonfarm/nonforest dwelling in a farm/forest zone not materially alter the stability of the land use pattern of the area, requires findings (1) identifying an area for consideration, (2) identifying the farm and forest practices occurring in the identified area, and (3) explaining how the proposal will affect those practices. *Veach v. Wasco County*, 23 Or LUBA 492 (1992).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Where the record shows that a proposed church will not require urban services and will be located within a designated rural service center, adjacent to existing commercial and public uses, and is otherwise surrounded by large parcels in commercial farm use, a determination that the proposed church will not materially alter the stability of the land use pattern in the area is supported by substantial evidence *Simmons v. Marion County*, 22 Or LUBA 759 (1992).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A finding that a proposed nonfarm partition would establish a precedent and encourage additional requests for nonfarm partitions of the subject property and an adjoining similarly situated property is sufficient to support a determination that a proposed nonfarm partition will materially alter the stability of the overall land use pattern of the area. *Jonas v. Clackamas County*, 22 Or LUBA 525 (1992).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. Under a code standard requiring that a proposed nonfarm dwelling will "not materially alter the stability of the overall land use pattern in the area," local government findings which indicate the decision maker (1)

excluded from the considered area those parcels zoned for rural residential use, (2) analyzed the types of uses occurring on the land in the area considered, and (3) concluded those uses were "generally" agricultural, are adequate to establish the overall land use pattern of the area. *Fiegi v. Clackamas County*, 22 Or LUBA 182 (1991).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. In order to deny a proposed nonfarm dwelling based on its precedential effect, a county must either determine there is a "history of progressive partitioning and homesite development in the area" or there are "other similarly situated properties in the area for which similar nonfarm dwelling applications would be encouraged." *Fiegi v. Clackamas County*, 22 Or LUBA 182 (1991).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. A code standard requiring that a nonfarm dwelling "not materially alter the stability of the overall land use pattern in the area" does not require a determination that proposed nonfarm dwelling would change the balance between resource and nonresource uses in the area considered. *Fiegi v. Clackamas County*, 22 Or LUBA 182 (1991).

3.3.6 EFU Statute/Ordinances – Nonfarm Uses – Stability Standard. To determine whether a nonfarm dwelling will materially alter the stability of the overall land use pattern of the area, it is necessary for a county to (1) select an area for consideration, (2) examine the types of uses existing in the selected area, and (3) determine the proposed nonfarm dwelling will not materially alter the stability of the existing uses in the selected area. *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where local code amendments allow accessory uses and structures in an EFU zone, arguments that (1) the amendments improperly exempt such structures from a local code requirement that steps be taken to minimize adverse impacts on farm and forest uses and (2) the provisions governing such uses are inconsistent with ORS 215.213(3)(b) provide no basis for reversal or remand where the amended code is comparable to the prior code and where the petitioner does not develop any argument explaining why the amendments are substantive instead of technical. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. While applying pesticides and herbicides in a manner that causes overspray or drift onto adjoining properties is not an accepted farm practice for purposes of the farm impacts test at ORS 215.296(1), where the labels for some pesticides and herbicides effectively require a setback from certain sensitive uses regardless of whether drift or overspray occurs, a county will likely have to make specific factual findings about the specific setbacks required by particular chemicals on particular farming operations on surrounding farmlands, based on application methods, and whether the operation of each setback would force a significant change in farm practices. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Spraying adjoining property with herbicides without permission from the property owner or another legal right to do so is not an accepted farm practice for purposes of the farm impacts test at ORS 215.296(1), even where the farm operation grows grass seed which is certified to be free of contamination from weeds and where spraying the adjoining property allows multiple fields to be treated as a single continuous field for purposes of certification and prevents the farm operator from having to create "isolation strips" on either side of the adjoining property that would shrink the scope of the certified fields. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A condition of approval requiring that an applicant construct a proposed fence between a proposed trail and adjoining farms; specifying only that the proposed fence must be "capable of preventing dogs and people from entering adjacent farm fields"; punting all determinations regarding fence design, materials, construction, etc. to a subsequent master planning process that offers no opportunity for a public hearing or other public input; and allowing adjacent landowners to opt out of installing a fence on their property line is inadequate where the county relies on the proposed fence to address a wide variety of different potential impacts, which might require different fence designs, materials, construction techniques, and maintenance routines in order to ensure that the trail will not cause significant impacts on farm practices for purposes of the farm impacts test at ORS 215.296(1). Such a condition is also not clear and objective for purposes of ORS 215.296(2). *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where farmers have historically crossed a right-of-way to access fields they own on either side of the right-of-way, and where the right-of-way owner proposes to construct a fence along its property line, negotiate with farmers to provide licenses to cross the applicant's property, and install gates in the fence to allow farm equipment to pass through, any delay for farmers to open, pass through,

and close the gates multiple times per day and perhaps multiple times per hour need not be evaluated as impacts on accepted farm practices for purposes of the farm impacts test at ORS 215.296(1) because using another's property to move farm equipment without a legal right or permission to do so is not an accepted farm practice. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Although the impacts of nonfarm uses on surrounding farmland must be evaluated on a farm-by-farm and practice-by-practice basis, an evaluation of the cumulative impacts on all farm practices on all impacted farms is not required. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. When a hearings officer determines that a building envelope is generally unsuitable in part due to adverse soil conditions and in part due to size or location, the hearings officer is not required to consider the "used in conjunction with other lands" standard. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 136 (2018).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. The answer to whether property in eastern Oregon is generally unsuitable for farm use begins with the OAR 660-033-0130(4)(c)(B)(ii) presumption that it is suitable for farm use if its soils are predominantly Class VI. It is inconsistent with OAR 660-033-0130(4)(c)(B)(ii) to dismiss the significance of the predominant soil class simply because only 50 to 60 percent of the soils are Class VI soils. Because Class VI soils predominate, under OAR 660-033-0130(4)(c)(B)(ii) the presumption of suitability for farm use applies. *Central Oregon Landwatch v. Crook County*, 77 Or LUBA 202 (2018).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. In considering whether property is generally unsuitable for farm use, it is not appropriate to disregard adjoining parcels as "nonfarm" parcels, simply because there is a nonfarm dwelling on the properties, where there is evidence those adjoining parcels have been planted in winter wheat. Without some findings addressing that evidence of farm use, findings that the property is generally unsuitable for farm use are not supported by substantial evidence. *Central Oregon Landwatch v. Crook County*, 77 Or LUBA 202 (2018).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. If a local government finds property is generally unsuitable for farm use without considering size or location, under ORS 215.284(2)(b) and OAR 660-033-0130(4)(c)(B)(i) the county need not consider whether the property can be used for farm use in conjunction with other lands. But if the property is not generally unsuitable for farm use based on factors other than size and location, size and location must be considered and therefore size and location are to be the determining factors in establishing that the subject property is generally unsuitable for farm use. Therefore, the county must then consider whether the subject property "can reasonably be put to farm * * * use in conjunction with other land[,]" as required by ORS 215.284(2)(b) and OAR 660-033-0130(4)(c)(B)(i). *Central Oregon Landwatch v. Crook County*, 77 Or LUBA 202 (2018).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Findings that property "is not necessary for the future continuation of any existing farm operation," and that

"[t]here is no evidence that the property can be put to farm use in conjunction with other land," are inadequate to establish that the property cannot "reasonably be put to farm * * * use in conjunction with other land," as required by ORS 215.284(2)(b) and OAR 660-033-0130(4)(c)(B)(i). It is entirely possible that the property could "reasonably be put to farm * * * use in conjunction with other land" even though nearby farms do not depend on such conjoined use to continue to operate. And a lack of evidence that property can be put to use in conjunction with other lands is not evidence that the subject cannot "reasonably be put to farm * * * use in conjunction with other land." *Central Oregon Landwatch v. Crook County*, 77 Or LUBA 202 (2018).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A county's findings that a parcel proposed siting a nonfarm dwelling is generally unsuitable for farm use are inadequate, where the property is composed of predominantly Class I-VI soils and the findings do not address the OAR 660-033-0130(4)(c)(B)(ii) presumption that property composed of predominantly Class I-VI soils are suitable for farm use or the fact that livestock did graze on the property in the past. *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 186 (2017).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. ORS 215.284(1) to (4) distinguish between lands inside the Willamette Valley and lands outside the Willamette Valley, and apply the stability standard inside the Willamette Valley and apply the suitability standard outside the Willamette Valley. However, the fact that ORS 215.213(3) imposes a suitability standard does not provide a basis for importing the Willamette Valley regulatory distinction from ORS 215.284 into ORS 215.213 and it does not provide a basis for concluding that ORS 215.213(3) does not apply to lands in the Willamette Valley. *Landwatch Lane County v. Lane County*, 70 Or LUBA 325 (2014).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A nonfarm dwelling must be sited on land that is "generally unsuitable for the production of farm crops and livestock." In determining whether that standard is met, a county does not err by failing to identify the precise level of beef production that would indicate suitability. *Central Oregon Landwatch v. Deschutes County*, 56 Or LUBA 280 (2008).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. While a parcel may not be considered generally unsuitable "based solely on size or location" without considering whether it can be used in conjunction with other lands, if size or location are not the sole basis for a finding of general unsuitability, then a local government is just required to determine whether the parcel can be used in conjunction with other lands. *Williams v. Jackson County*, 55 Or LUBA 223 (2007).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. The proper inquiry under ORS 215.284(3)(b) is whether land is generally unsuitable "for the production of farm crops and livestock or merchantable tree species," not whether the land is generally unsuitable for "farm use." *Williams v. Jackson County*, 55 Or LUBA 223 (2007).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A parcel can satisfy the generally unsuitable standard even if portions of the parcel contain areas that, if considered alone, do not satisfy the standard. *Williams v. Jackson County*, 55 Or LUBA 223 (2007).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where a portion of a lot or parcel is predominantly composed of Class I-IV soils, OAR 660-033-0130(4)(c)(B)(ii) provides that the portion is presumed generally suitable for the production of farm crops and livestock or merchantable tree species; where the portion is predominantly composed of soils that are not Class I-IV, but the entire subject property is predominantly composed of Class I-IV soils, the presumption provided for in OAR 660-033-0130(4)(c)(B)(ii) does not apply. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Even assuming a county correctly interprets local code provisions designed to implement OAR 660-033-0130(4)(c)(B) regarding the general suitability for the production of farm crops to refer to the grapes and not the vines, its determination that the portion of the property is generally unsuitable for growing grapes is not supported by substantial evidence where there is no evidence that the vines on that portion do not produce grapes. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where local land use regulation implements the statutory requirement in ORS 215.284(2)(b) that a portion of a lot or parcel on which a nonfarm dwelling will be located be generally unsuitable for the production of farm crops, the local regulation must be interpreted to be consistent with the statutory requirement it implements. An interpretation that improvements such as driveways, septic systems and wells may be located on the portion of the property that is suitable for production of farm crops is not consistent with the legislative intent of ORS 215.284(2)(b). *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. In *Smith v. Clackamas County*, 313 Or 519, 836 P2d 716 (1992), the court held that in applying local nonfarm dwelling standards that replicated existing statutory standards, the requirement that the dwelling be sited on "generally unsuitable land for the production of farm crops and livestock" requires that the entire farm parcel, rather than the portion of the parcel where the dwelling would be sited, must be "generally unsuitable land." ORS 215.284(3)(b) was adopted in 1993 in reaction to *Smith*, and makes the "generally unsuitable land" standard apply to "a lot, parcel or portion of a lot or parcel." *Wetherell v. Douglas County*, 50 Or LUBA 71 (2005).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Statements in a county soil survey that a general class of soils is limited by risk of erosion if the vegetative cover is not maintained is not substantial evidence that specific soils within that class on the subject property are generally unsuitable for grazing, where nothing in the soil survey suggests that grazing presents a risk of erosion and the survey's specific description of the soils on the property states that those soils are used mainly for grazing. *Ploeg v. Tillamook County*, 50 Or LUBA 608 (2005).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Evidence that an adjoining dairy farmer grazed 70 cows on a six-acre portion of a 25-acre parcel and exhausted the forage on that portion within six days does little to demonstrate that the parcel is generally unsuitable for farm uses, where the record provides no comparison or standard against which to measure the relative forage producing capacity of the grazed portion. *Ploeg v. Tillamook County*, 50 Or LUBA 608 (2005).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. The focus under the generally unsuitable standard is the land's capacity to produce crops or livestock under appropriate agricultural management. Evidence that land once maintained as pasture but neglected for 20 years currently does not produce much forage says little about its capacity for producing forage, particularly where there is evidence that forage production would dramatically improve if the land were appropriately managed. *Ploeg v. Tillamook County*, 50 Or LUBA 608 (2005).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A finding that the subject property cannot be used in conjunction with neighboring commercial farms is not supported by the record, where neighboring farmers submitted affidavits expressing interest in acquiring the subject property and describing how they could use the property in conjunction with their farm operation. Evidence of actual offers to buy or lease the property is not essential, particularly where the affidavits explain that the applicant for the nonfarm dwelling has no interest in selling or leasing the property for its value as farm land. *Ploeg v. Tillamook County*, 50 Or LUBA 608 (2005).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where the record indicates that the neighboring dairy farmers could expand their herds if a particular property were available for manure disposal under a confined animal feeding (CAFO) permit, and evidence indicates that the property is suited for that use, the county must consider whether the property can be used in conjunction with adjoining dairy farms for manure disposal under a CAFO permit. *Ploeg v. Tillamook County*, 50 Or LUBA 608 (2005).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where a local code criterion requires that a nonfarm dwelling be situated on a portion of a lot or parcel that is "generally unsuitable for the production of farm crops and livestock or merchantable tree species," and the code then spells out the considerations for determining whether a portion of a lot or parcel is "unsuitable for farm use," the term "farm use" is not properly read to require evaluation of the suitability for farm uses other than the production of farm crops and livestock or merchantable tree species. *Griffin v. Jackson County*, 48 Or LUBA 1 (2004).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. When a proposed nonresource parcel is found to be unsuitable for farm or forest use based solely on terrain, adverse soils and land conditions, rather than size and location, a local government need not consider whether the parcel could be put to farm or forest use in conjunction with other land. *Epp v. Douglas County*, 46 Or LUBA 480 (2004).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A county hearings officer does not misconstrue local code provisions designed to implement OAR 660-033-

0130(4)(c)(B) by interpreting those provisions not to require consideration of the suitability of the entire parcel that is the subject of a nonfarm dwelling application. *Frazee v. Jackson County*, 45 Or LUBA 263 (2003).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Whether an EFU-zoned parcel is capable of producing "herbaceous forage" is a relevant consideration under the "generally unsuitable" standard, which requires consideration of "vegetation" on the subject property. *Hanna v. Crook County*, 44 Or LUBA 386 (2003).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Because the legislature required compliance with both the "generally unsuitable" standard and the "adequate herbaceous forage" test in order to partition an EFU zoned parcel for nonfarm dwellings under ORS 215.263(5)(b), the legislature did not intend that compliance with one standard necessarily establishes compliance with the other. *Hanna v. Crook County*, 44 Or LUBA 386 (2003).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A county's erroneous application of an "adequate herbaceous forage" standard in approving a nonfarm partition is not harmless error, where the county focused preponderantly on that standard and failed to adopt findings addressing the required considerations under the correct standard. *Hanna v. Crook County*, 44 Or LUBA 386 (2003).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A local government must consider whether land can be used in conjunction with a commercial farm or ranch under OAR 660-033-0130(4)(c), unless it first finds that the subject property is generally unsuitable for farm use, regardless of size or location. Where the local government relies on a combination of factors, including size, to conclude that the subject property is generally unsuitable for farm use, it must consider whether the property can be used in conjunction with nearby commercial farms or ranches. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. If property has some value as farmland if used in conjunction with a neighboring commercial farm or ranch, and the owner of that farm or ranch offers to buy, lease, rent or otherwise manage the property for something approaching its actual market value as farmland, then OAR 660-033-0130(4)(c) prohibits a finding that the property is "generally unsuitable" for farm use. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A finding that an EFU parcel would contribute no productive farm acreage to any neighboring farm, and thus is generally unsuitable for farm use even if used in conjunction with neighboring dairy farms, is not supported by substantial evidence, where two neighboring dairy farmers offered to buy the parcel to use in conjunction with their farms. A property's usefulness as farmland, considered on its own, is not necessarily indicative of its usefulness when combined with an existing farm or ranch. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. The fact that a small portion of an EFU-zoned parcel can theoretically generate some farm income does not necessarily

compel a conclusion that the property as a whole is suitable for farm use. *King v. Washington County*, 42 Or LUBA 400 (2002).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A decision approving a nonfarm dwelling does not misconstrue applicable law where the hearings officer considers all of the relevant factors of ORS 215.213(3)(b) and concludes that a parcel is generally unsuitable for farm use based on (1) the steep topography of the site; the limited access to irrigation water; (3) the relatively small parcel size; (4) the size of the farmable area on the subject parcel; and (5) the inability to combine farm operations on the subject property with other farm operations. *King v. Washington County*, 42 Or LUBA 400 (2002).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Any minimum gross farm income level that a county may establish in approving a lot of record dwelling on EFU-zoned high-value farmland must be consistent with the income generated by the county's noncommercial farms, which are protected under Goal 3 (Agricultural Lands) and the EFU zoning statutes. *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A county errs in relying on OAR 660-033-0135, which establishes standards to ensure that farms are large enough and generate sufficient income to warrant an assumption that a dwelling on the farm is properly viewed as "customarily provided in conjunction with farm use" within the meaning of ORS 215.283(1)(f), to also set a gross annual income threshold for determining whether farm use on high-value farmland is "impracticable" for purposes of siting a lot of record dwelling under ORS 215.705(2)(a)(C)(i). *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. The minimum gross income levels the legislature established at ORS 308A.071(2)(a) for non-EFU-zoned parcels to qualify for special assessment are the best available indication of the level of gross income that the legislature believes demonstrates practicable farm use. *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. In applying ORS 215.705(2)(a)(C)(i) to determine whether farm use of an EFU-zoned parcel with high-value soils is "impracticable," evidence that the property and nearby properties have generated limited farm income in the past is relevant evidence, but it is not determinative. *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Under ORS 215.705(2)(a)(C)(i), a property's impracticability for farm use must be "due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity." A decision that does not demonstrate that cited factors are not shared by neighboring properties and does not explain why the cited factors make farm use impracticable must be remanded. *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. In adopting an irrevocably committed exception where the proposed exception area has a history of farm use and

is currently in farm use, it is not sufficient to rely solely upon long-standing site characteristics or the presence of long-standing adjacent conflicting uses. An adequate demonstration of impracticability must identify recent or imminent changes affecting the subject property that, by themselves or in combination with other factors, render continued farm use of the property impracticable. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. The mere presence of residential uses on EFU-zoned properties adjacent to a proposed exception area does not demonstrate that the subject property is irrevocably committed to nonfarm uses. In considering residential uses on adjacent properties, the county must identify in its findings the conflicts or other impacts between the residential uses and the subject property that make farm use of the subject property impracticable. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A county must consider all farm uses in the area, including "hobby farm" uses located on adjacent properties, in determining whether property can practicably be managed for farm use, as required by ORS 215.705(2)(a)(C)(i**)**. *Friends of Linn County v. Linn County*, 37 Or LUBA 297 (1999).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. County findings that a parcel has been managed for "private use" rather than for "profit" fail to demonstrate that a parcel "cannot be practicably managed for farm use." Although the statutory definition of "farm use" requires that property be used "for the purpose of obtaining a profit in money," the term "profit" in this context does not mean profit in the ordinary sense, but rather refers to gross income. *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A county's findings that a parcel "cannot be practicably managed for farm use" due to a ravine, road frontage, lack of irrigation and rocky soils are inadequate, where the parcel has been managed for pasture use in conjunction with a nearby 20-acre parcel in the past. That the cited factors may make the parcel unsuitable for intensive, cultivated agriculture does not establish that the parcel "cannot be practicably managed for farm use." *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Under the agricultural lands definition, in western Oregon, Class V soils, when intermingled with Class IV soils, are not presumed to be nonagricultural, nor is the presence of Class V soils determinative, in itself, as to whether land is generally unsuitable for farm use. *Evenson v. Jackson County*, 36 Or LUBA 251 (1999).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. In addressing a code criterion requiring a finding that a parcel "cannot practicably be managed for farm use," a hearings officer's occasional use of the word "unsuitable" does not mean the hearings officer applied the wrong standard. *Jorgensen v. Clackamas County*, 34 Or LUBA 710 (1998).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. The suitability standard requires that the local government consider whether the subject parcel or portion thereof can reasonably be put to farm use in conjunction with adjacent or nearby lands, including land under the same ownership. The local government must consider not only the property's suitability for producing crops but also its suitability for producing livestock, both alone and in conjunction with adjoining and nearby properties. *DLCD v. Crook County*, 34 Or LUBA 243 (1998).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. The proper inquiry in reference to the unsuitability standard is whether the subject property can reasonably be put to farm or forest use alone or in conjunction with other land. In this context, farm use need not rise to the scale of a commercial agricultural enterprise. *Hearne v. Baker County*, 34 Or LUBA 176 (1998).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Although the choice between conflicting testimony belongs to the county, where the evidence provided by petitioners reveals factual inconsistencies in intervenors' evidence, the county must at least explain a reasonable basis for its choice between the conflicting evidence. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where the county's factual findings determine that the subject parcel contains soils that are presumptively suitable for farm use, but then conclude that the proposed dwelling is situated on land that is unsuitable for farm use, the county's conclusion is not supported by substantial evidence in the record. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. An applicant carries the burden to demonstrate that a parcel is generally unsuitable for the production of farm crops and livestock. The question to be answered is whether the subject land, rather than a particular farmer, can produce crops or livestock. *Moore v. Coos County*, 31 Or LUBA 347 (1996).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. An operation that requires land for grazing horses employs that land for the production of livestock within the meaning of ORS 215.284(2)(b); therefore, a county errs when it concludes that consideration of the potential use of a parcel for grazing horses is not required in determining whether the parcel is generally unsuitable for farm use. *Moore v. Coos County*, 31 Or LUBA 347 (1996).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. In approving a nonfarm dwelling under OAR 660-33-130(4)(c), analysis is required regarding whether the parcel can be sold, leased or otherwise put to profitable agricultural use, unless the county first finds that a parcel is generally unsuitable for farm use, regardless of size. *Moore v. Coos County*, 31 Or LUBA 347 (1996).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Findings that state that "property above the county road" is "unsuitable for commercial agricultural use" are insufficient because they do not clearly relate to the subject property and do not justify a conclusion

that the subject property is unsuitable for the production of farm crops, livestock or merchantable tree species. *O'Brien v. Lincoln County*, 31 Or LUBA 262 (1996).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. ORS 215.284(2)(b) imposes a requirement that nonfarm dwellings be located on land that is generally unsuitable for the production of both (1) "farm crops and livestock," and (2) "merchantable tree species." *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. ORS 215.283(3)(d) must be independently applied to an application for division of EFU-zoned land and requires that the entire EFU-zoned parcel be found to be generally unsuitable for farm use, regardless of whether local regulations impose a more relaxed standard on homestead lot divisions. *Geiselman v. Clackamas County*, 26 Or LUBA 260 (1993).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Evidence that a parcel is suitable for grazing of livestock is evidence of suitability for the production of farm products. *Alexanderson v. Clackamas County*, 26 Or LUBA 209 (1993).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where the challenged decision interprets a local code standard for nonforest dwellings to require that an entire parcel be generally unsuitable for farm or forest uses, and that interpretation is not clearly contrary to the words, policy or context of the code, LUBA will defer to it. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where the record establishes only that a small portion of the subject parcel is unsuitable for forest uses, a reasonable person could not conclude the entire parcel is generally unsuitable for farm or forest uses. *DLCD v. Lincoln County*, 26 Or LUBA 89 (1993).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where a church is proposed to be located in an EFU zone, and a county code provision requires that there be "no other feasible location" for the proposed use that satisfies a code standard requiring that certain nonfarm uses in the EFU zone be located on land "generally unsuitable" for farm use, the county may interpret the code provision to require that there be no other feasible location for the propose church *in the EFU zone* that is generally unsuitable for agricultural production. *Simmons v. Marion County*, 25 Or LUBA 647 (1993).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where a code approval standard for home occupations in a resource zone requires that a home occupation be "situated upon generally unsuitable land for the production of farm and forest products," the local government may interpret the standard to require that the entire property on which the home occupation is proposed to be located be "generally unsuitable." *Smith v. Clackamas County*, 25 Or LUBA 568 (1993).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where a county interprets a forest zone requirement that nonforest uses be located on generally unsuitable land for

production of farm or forest products as requiring consideration of the suitability of the entire parcel, the county exercises its interpretive discretion to the fullest in interpreting a home occupation approval standard that incorporates the nonforest use standard by reference, as requiring consideration of only the land under the existing building where the home occupation will be located. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Findings that a parcel lacks water rights and does not produce sufficient forage for livestock without supplemental feed are inadequate to demonstrate the parcel is generally unsuitable land for agricultural production, where the parcel is large, has two active springs and is currently leased for grazing. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. In the absence of a statutory policy pertaining to forestlands that, like the statutory policy concerning EFU land, requires the preservation of forestland in large blocks, LUBA cannot require that a local government interpret and apply its nonforest use "generally unsuitable" land approval standard in the same manner as the similarly worded statutory standard pertaining to nonfarm uses on EFU land. *DLCD v. Coos County*, 24 Or LUBA 349 (1992).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where a zoning district adopted to implement both Goal 3 and Goal 4 includes the generally unsuitable land standard that is required under statutory exclusive farm use zoning provisions, the generally unsuitable standard must be applied to the entire parent parcel and may not be limited in its application to a proposed nonforest parcel. *DLCD v. Curry County*, 24 Or LUBA 200 (1992).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A proposed nonfarm dwelling will not be located on land generally unsuitable for farm use, as required by statute and local code provisions, where the evidence shows the property contains soils suitable for a variety of farm crops and, while the property is small, it can be farmed in conjunction with other nearby agricultural enterprises. *Reed v. Benton County*, 23 Or LUBA 486 (1992).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A finding that a parcel is generally suitable for farm use is supported by substantial evidence where the evidence shows that, while the parcel is of limited value for farm use because it is small, the parcel is otherwise suitable for a variety of farm uses and could be used in conjunction with adjoining and nearby farming operations. *Nelson v. Benton County*, 23 Or LUBA 392 (1992).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A parcel's small size cannot be relied upon, in whole or in part, to support a finding that the parcel is generally unsuitable for farm use, without also demonstrating the parcel cannot be leased or by some other arrangement be put to agricultural use in conjunction with adjoining or nearby farm uses. *Nelson v. Benton County*, 23 Or LUBA 392 (1992).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. In addressing the ORS 215.283(3)(d) "general unsuitability" standard for the approval of nonfarm dwellings in an EFU zone, or an equivalent standard in a local code, a local government must consider all relevant

factors listed in the standard, not just soil types. *Dority v. Clackamas County*, 23 Or LUBA 384 (1992).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A determination of noncompliance with the ORS 215.283(3)(d) "general unsuitability" standard for the approval of nonfarm dwellings in an EFU zone, or an equivalent standard in a local code, does not require a finding that a reasonable and prudent farmer can put the subject property to profitable agricultural use. *Dority v. Clackamas County*, 23 Or LUBA 384 (1992).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where a parcel has historically been used for livestock grazing in conjunction with other adjoining parcels, a county must consider the subject parcel's suitability for grazing in conjunction with adjoining and nearby properties in determining whether the parcel satisfies the "generally unsuitable" standard. *Avgeris v. Jackson County*, 23 Or LUBA 124 (1992).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where evidence in the record establishes that with adequate drainage a parcel could be put to farm use, petitioner has not established as a matter of law that the proposed nonfarm use is located on land "generally unsuitable" for farm use. *Barber v. Marion County*, 23 Or LUBA 71 (1992).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Local code term "generally unsuitable" is a term of art. Where a local code applies the "generally unsuitable" standard to the approval of nonforest dwellings in a forest zone, the legal interpretation of the term "generally unsuitable" developed in the context of nonfarm uses is applicable. *DLCD v. Coos County*, 23 Or LUBA 13 (1992).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where the evidence in the record establishes (1) the soils on the subject property are suitable for the production of forest and farm products, (2) the subject property has been logged, and other parcels in the area are suitable for the production of forest products or currently are used for the production of Christmas trees, there is substantial evidence that the subject property is not generally unsuitable for the production of farm and forest products. *Ralston v. Clackamas County*, 22 Or LUBA 573 (1992).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. In determining whether a nonforest dwelling proposed to be located on a small but otherwise suitable parcel may be approved under a "generally unsuitable for the production of farm or forest products" standard, it is proper for the local government to determine whether the subject parcel may be combined with other resource land and managed for farm or forest uses. *Samoilov v. Clackamas County*, 22 Or LUBA 446 (1991).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Whether adjacent parcels are currently used for the production of farm or forest products is only indirectly relevant in determining whether such properties are suitable for farm or forest use. *Samoilov v. Clackamas County*, 22 Or LUBA 446 (1991).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Evidence which establishes that a forest zoned parcel has been for sale for many years, but does not establish that the parcel was listed for sale at a price typical for farm of forest parcels, is not sufficient evidence to establish as a matter of law that the parcel cannot be combined with adjacent properties suitable for farm of forest uses. *Samoilov v. Clackamas County*, 22 Or LUBA 446 (1991).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Adequate findings that the subject property is generally unsuitable for the production of farm crops and livestock regardless of size, supported by substantial evidence in the whole record, make it irrelevant whether the subject parcel may be combined with other land, as it cannot be made suitable in any event. *Stefan v. Yamhill County*, 21 Or LUBA 18 (1991).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. An exclusive farm use zone provision which states that a "nonfarm dwelling * * * will be located on * * * predominantly soil capability classes IV through VIII" requires that the *entire parcel* on which the proposed nonfarm dwelling will be located consist of predominantly Class IV-VIII soils. A U.S. Soil Conservation Service map can be substantial evidence for a determination of compliance with such a standard. *Adams v. Jackson County*, 20 Or LUBA 398 (1991).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where property has been used for grazing and growing of hay in the past and there is no evidence that anything about the land has changed to make it generally unsuitable for those purposes, there is substantial evidence to support a finding that the property is not generally unsuitable for the production of livestock. *Adams v. Jackson County*, 20 Or LUBA 398 (1991).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Evidence that a parcel's soils are all Agricultural Class I-IV is relevant to whether the parcel is generally unsuitable for farm use. *McNulty v. Marion County*, 19 Or LUBA 367 (1990).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Undisputed evidence in the record that at least half of the soils on the subject property are Agriculture Class I and II, and that at least seven of the subject parcel's eight acres have been, and continue to be, used for farm uses, is evidence which "clearly supports" a finding that the parcel is not generally unsuitable for farm use. *McNulty v. Marion County*, 19 Or LUBA 367 (1990).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. A statement that property is not useful for agricultural purposes because it is "heavily impacted by wetland and a drainage way" is conclusory and inadequate to establish that the subject property is unsuitable for the production of farm crops and livestock. *Reed v. Lane County*, 19 Or LUBA 276 (1990).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Local code "unsuitability for the production of farm crops and livestock" standards similar to ORS 215.213(3)(b) and 215.283(3)(d) require an analysis of the physical attributes of the exclusive farm use zoned land which is the subject of a nonfarm dwelling application. Whether a particular farmer can make a profit, at a particular period in time, on a particular piece of farmland, is at best indirect

evidence of whether the land itself is suitable for the production of farm crops and livestock. *Reed v. Lane County*, 19 Or LUBA 276 (1990).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where 40 acres which produce only sparse forage of little value for grazing are generally unsuitable for grazing by themselves, but have historically been used for grazing in conjunction with the adjoining 400 acres, the adjoining 40 acres are not "generally unsuitable for farm use" within the meaning of ORS 215.213(3), 215.283(3) and county legislation implementing those statutes. *Clark v. Jackson County*, 19 Or LUBA 220 (1990).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. In reviewing a combined request for approval of a nonfarm dwelling and a partition to create a nonfarm parcel, a county must first apply applicable approval standards, including the "general unsuitability" standard, to the request for approval of the nonfarm dwelling. Only after the nonfarm dwelling is approved may the county consider the request to create a new nonfarm parcel for the dwelling. *Smith v. Clackamas County*, 19 Or LUBA 171 (1990).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. The "general unsuitability" standard applies to the entire parent parcel, not just to the portion of the parent parcel or the new nonfarm parcel on which a nonfarm dwelling is to be located. *Smith v. Clackamas County*, 19 Or LUBA 171 (1990).

3.3.7 EFU Statute/Ordinances – Nonfarm Uses – Unsuitability Standard. Where county findings determine property is suitable for the production of farm crops and livestock, but explain that the agricultural uses for which the parcel is suited are not "warranted" due to identified "substantially" limiting factors, including small parcel size, the county must determine whether the subject parcel may be put to agricultural use in combination with agricultural operations conducted in the area. *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. In determining that a landfill does not "[f]orce a significant change" in accepted farm practices on surrounding lands devoted to farm use under ORS 215.296(1)(a), a county errs in relying on a condition of approval requiring the landfill to install a second fence between the working face of the landfill and an adjacent farm to capture more trash that escapes the landfill before it enters onto the adjacent farm, where there is no quantification in the record of how effective the existing fence is at intercepting landfill trash. *Stop the Dump Coalition v. Yamhill County*, 79 Or LUBA 459 (2019).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A county fails to correctly apply the farm impacts test at ORS 215.296(1) where it concludes that there are only a few farm or forest uses in the area but does not identify and discuss each farm or forest use, where it does not describe the operations on each of the surrounding properties devoted to farm or forest use, where it does not identify evidence of the unmitigated impacts of the proposed nonfarm use, and where it concludes that such impacts will be reduced but does not identify evidence that significant impacts are avoided. *Currie v. Douglas County*, 79 Or LUBA 585 (2019).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Under ORS 215.296(2), a county may impose conditions of approval to ensure compliance with the ORS 215.296(1) "significant change/cost" standard, in which case the question on appeal to LUBA is not whether the decision establishes that the proposed use complies with ORS 215.296(1), but whether the decision establishes that the proposed use, as conditioned, complies with ORS 215.296(1). *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A local government could reasonably conclude that a landfill expansion complies with the ORS 215.296(1) "significant change/cost" standard, notwithstanding testimony from an adjacent hay farmer regarding the need for weekly litter patrols to prevent trash entering farm soils or destroying farm equipment, based in part on a condition of approval that requires a second litter fence between the working face of the landfill and adjacent hay fields, where there is no dispute that the existing litter fence is somewhat effective at reducing the volume of wind-blown trash that escapes the landfill, and the second litter fence will reduce that volume further. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A local government can impose conditions of approval to ensure compliance with the ORS 215.296(1) "significant change/cost" standard that require the applicant to assume the cost or burden of performing actions on nearby farms necessary to prevent a significant change in accepted farming practices on those farms or significant increase in costs on those farms. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A local government could reasonably conclude that a landfill expansion complies with the ORS 215.296(1) "significant change/cost" standard, notwithstanding testimony from an adjacent hay farmer regarding the need for weekly litter patrols year-round to prevent trash entering farm soils or destroying farm equipment, based in part on a condition of approval that requires the landfill

operator to provide, pay for, or reimburse the farmer for litter patrols prior to harvest, even if the condition does not entirely eliminate the need for litter patrols at non-harvest times. *Stop the Dump Coalition v. Yamhill County,* 74 Or LUBA 1 (2016).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A local government could reasonably conclude that a landfill expansion complies with the ORS 215.296(1) "significant change/cost" standard, notwithstanding testimony that the existing intermittent falconry program simply displaces nuisance birds onto nearby farms, based on conditions of approval that require a more intensive falconry program and implementation of integrated techniques recommended by a wildlife biologist to discourage nuisance birds from remaining in the area. *Stop the Dump Coalition v. Yamhill County,* 74 Or LUBA 1 (2016).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A condition requiring the landfill operator to buy at market prices the entire crop of berries and cherries produced by a nearby farmer concerned with nuisance bird impacts on her crop is sufficient to reduce to insignificance the alleged adverse impacts of the landfill on the farmer's farm practices. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A farmer's reasonable apprehension about losing direct sale customers due to odor impacts of a landfill could lead the farmer to make changes in accepted farming practices or significantly increase the cost of farming practices; however, customer perceptions are not farm practices, and the feared or actual loss of direct sales customers alone, without any associated change or increased costs, is not a sufficient basis to conclude that the ORS 215.296(1) "significant change/costs" standard is violated. *Stop the Dump Coalition v. Yamhill County,* 74 Or LUBA 1 (2016).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. To address cumulative impacts on farm practices under ORS 215.296(1), the question is whether multiple impacts on individual farms, which may individually be insignificant, cumulatively force significant changes in farm practices or significantly increase the cost of farm practices on each individual farm that experiences multiple impacts. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. The applicant has the burden to demonstrate that individual insignificant impacts under ORS 215.296(1) are not cumulatively significant, and a local government cannot shift that burden to farmer/opponents to a proposed landfill, by finding that the farmer/opponents failed to explain how multiple impacts are cumulatively significant. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A county errs in applying a rigorous "compelling evidence" standard to evaluate testimony from farmers located more than one mile from a proposed landfill, regarding impacts of the landfill operation on their farm costs and practices. Nothing in ORS 215.296(1) suggests that a county can apply different evidentiary standards on different parties based on the geographic distance to the proposed non-farm use. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A county errs in discounting the testimony of farmer/opponents that a landfill operation causes significant changes or significant costs to their farm practices, for failure to quantify or specify the degree of impacts. While the county is free to give more weight to testimony that is quantified or more detailed over less quantified or detailed testimony, requiring opponents to quantify or specify the degree of impacts, while not requiring similar quantification or specification from the applicant, who has the burden of proof, effectively shifts the burden of proof to the opponents. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A county errs in placing "great weight" on a longitudinal study offered by the applicant to demonstrate that the proposed expansion of a landfill will not cause significant change/increase costs to surrounding farm practices, by showing that farm uses on surrounding lands have remained stable and even expanded under the impacts of the existing landfill. Farm use may have remained stable despite significant changes or significant increases in costs to farm practices, or indeed because such changes have allowed farm operations to continue despite the impacts of the landfill. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A finding that the amount of trash that escapes a landfill onto adjoining farm land is not "significant" in volume is not sufficient to demonstrate that the changes the farmer made to avoid trash damaging equipment and crops does not reflect a significant change or increased cost for purposes of ORS 215.296(1). The question is whether the changes are significant, not whether the impacts or volume of trash is significant. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. The apparent success of a change in farming practices in mitigating or preventing lost revenue from impacts of landfill operations on surrounding farmland does not demonstrate that the change itself is not a significant change in farm practices, for purposes of ORS 215.296(1). *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. That a pheasant raising operation may be a recently established farm practice on farm land adjacent to a proposed landfill does not mean that the operation is a "hobby" or noncommercial farm use such that the county need not evaluate alleged impacts from the landfill operation on the pheasant raising operation. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. To establish compliance with ORS 215.296(1), the applicant may initially survey farm uses on surrounding lands, and identify in general terms accepted farming practices associated with those farm uses. Remand is necessary where the initial survey identifies a farm stand adjacent to a proposed landfill, but does not identify, even in general terms, any accepted practices associated with the farm stand. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where it is undisputed that direct sales of agricultural products is an accepted farm practice, a county must address allegations that odor and visual impacts from a proposed landfill adversely impact direct sales of agricultural products, for purposes of establishing compliance with ORS 215.296(1), even if the alleged adverse impacts are based on customers' perceptions regarding landfill impacts. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Notwithstanding that the record includes no evidence quantifying how much water would be transferred between a ranch and a proposed golf course, a county's finding that the water transfer will not significantly change or increase the cost of farming practices on the ranch is supported by substantial evidence, where the ranch manager testifies that in exchange for transferring water, the applicant will improve the ranch's irrigation system, and the ranch anticipates no change in the amount of irrigation water available or irrigation practices. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A county errs in requiring an applicant to apply the ORS 215.296 "significant change/increase" standard to a study of the "surrounding area" that encompasses all agricultural land in the county, on the theory that a proposed conditional use will remove land from agricultural use and require county farmers to shoulder a greater burden of fixed costs in the county's agricultural economy. The focus of ORS 215.296 is on the impacts of the proposed conditional use on agricultural practices in the proximate surrounding area, not attenuated impacts to the larger economy caused by conversion of the subject property from agricultural use to a conditional non-farm use otherwise allowed under ORS chapter 215. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. The scope of "surroundings lands" to which ORS 215.296 applies is not limited to lands adjacent to the subject property. However, failure to define the outer limits of the study area or to evaluate impacts on non-adjacent farm operations is not necessarily fatal to the application, if the surrounding agricultural area is homogenous, and there is substantial evidence that the conditional use has no significant impacts on farm practices on adjacent farm parcels. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. ORS 215.296(1) does not require a demonstration that a proposed conditional use of an EFU-zoned parcel will not prevent future agricultural use of the soils occupied by the non-farm conditional use. Because ORS chapter 215 authorizes in EFU zones several uses such as mining or solid waste disposal facilities that involve removal or loss of agricultural soil, such a requirement would effectively prohibit uses allowed in EFU zones under ORS chapter 215. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. ORS 215.296(1) requires some description of farm practices on surrounding farm lands, in order to evaluate whether the proposed conditional use will significantly change or increase the costs of

such practices. Where the record and planning commission decision includes no such description, on local appeal the governing body could conclude that the planning commission decision approving the conditional use is not supported by substantial evidence. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A winery that was initially approved as a permitted use under ORS 215.283(1)(n) and 215.452 was not required to consider its impact on farm and forest practices on nearby lands because ORS 215.296(1)(a) and (b) do not apply to such permitted use wineries. However, if that winery is to be expanded later in ways that are not allowed under ORS 215.452, as a "commercial activit[y] that [is] in conjunction with farm use" under ORS 215.283(2)(a), the expanded winery must comply with ORS 215.296(1)(a) and (b), which apply to "commercial activities that are in conjunction with farm use." In that circumstance ORS 215.296(1)(a) and (b) apply to the entire winery as expanded, not just the later approved expansion. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Petitioners' challenge to a winery expansion presents no basis for remand under the ORS 215.296(1)(a) and (b) significant change/increase standard, where the county's findings can be read to identify "spraying pesticides, burning fence lines and plowing fields" as accepted farming practices that might be impacted by an expanded winery operation, the county imposes a 200-foot buffer setback requirement on the winery and requires a recorded acknowledgement by the winery owner that nearby farms have a right to continue their accepted farming practices even if they impact the winery, and petitioners offer no direct challenge to the adequacy of those measure to avoid significant changes in or increases in the cost of accepted farming practices. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. ORS 215.296(2), which provides that an applicant for a conditional use allowed under ORS 215.213(2) or 215.283(2) may demonstrate compliance with the ORS 215.296(1) no significant change/increase standard through imposition of clear and objective conditions, does not impliedly limit conditions to those intended to protect farm and forest uses. Neither does ORS 215.296(2) prohibit counties from adopting additional EFU zone approval standards to address the impacts of wind energy facilities on residential uses or Goal 5 resources. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A hearings officer does not err in concluding that a county standard requiring a showing that the proposed "use" will not force a significant change in farm or forest practices or significantly increase costs of farm and forest practices does not apply to a property line adjustment, where the county standard applies to "uses" listed in the county's EFU zone, and property line adjustments are not listed as a use. *Louks v. Jackson County*, 65 Or LUBA 58 (2012).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Findings are inadequate to explain how a proposed waste water treatment facility on EFU land would either "force a significant change in" the adjacent farming practices or "significantly

increase the cost of" an adjacent organic farming operation under ORS 215.296(1) where the findings do not explain what the "significant impacts" to the organic farming operation would be or explain how the potential for spray drift from the proposed facility would either "force a significant change in" the organic farm practices or "significantly increase the cost of" the operation. *Falcon Heights WSD v. Klamath County*, 64 Or LUBA 390 (2011).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A criterion that requires a local government to find that a proposed dwelling will not force a significant change in accepted farm practices on surrounding lands does not require the local government to address the indirect and speculative possibility that the owner of the land on which the proposed dwelling will be located may decide in the future not to lease any portions of the subject property that may have been available for leasing for grazing in the past. *Womelsdorf v. Jackson County*, 62 Or LUBA 34 (2010).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A general statement of concern that a proposed campground would cause "interactions between livestock and people" is insufficient under ORS 197.763(1) to raise the issue of compliance with a local code analogue to the ORS 215.296(1) that requires a finding that the proposed use will not force a significant change in or significantly increase the cost of accepted farm practices on surrounding lands devoted to farm use. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where a petitioner fails to challenge all the reasons a hearings officer gives for finding that a proposed wind turbine facility will not force a significant change in or significantly increase the cost of accepted farm practices on nearby farms, petitioner's challenge to the adequacy of one of the reasons the hearings officer gave provides no basis for reversal or remand. *Falls v. Marion County*, 61 Or LUBA 39 (2010).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. When a petitioner was required to raise local appeal issues below pursuant to *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), raising the issue that approval of a nonfarm dwelling would significantly increase the cost of farming practices is not sufficient to raise any issue concerning impacts on the stability of the overall land use pattern, and the petitioner may not raise the stability standard at LUBA. *Zeitoun v. Yamhill County*, 60 Or LUBA 111 (2009).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A county does not err in concluding that, as conditioned, a personal use airport will not "significantly" impact a neighboring equine facility, where the only adverse impact identified by the facility owner is that guests are advised to delay mounting or dismounting horses until after planes land or take-off, and conditions of approval limit operations to 20 flights per month. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. In analyzing significant changes to or significant increases in cost of farming practices on nearby lands, where a county wishes to disqualify unspecified farm practices that the county believes are

not intended to generate a profit, it is incumbent on the county in its findings to identify which practices it has not analyzed for that reason. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A county's error in failing to identify which farm practices on nearby lands are excluded from the significant change/increase analysis because they are part of "hobby farms" and are not intended to generate a profit is harmless error, where the governing body adopted unchallenged planning commission findings that discuss impacts of the proposed mining on farm practices without distinguishing between "hobby farms" and other farms, and conclude that any impacts on farm practices will be insignificant. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A county does not err in failing to define a geographic area of analysis for the impacts of a non-forest use in a forest zone under a code "significant change/increase" standard that does not implement the similar significant change/increase standard applicable to EFU zones and that, unlike the statute, does not require analysis of impacts on "surrounding lands" or any other particular geographic area. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Findings that describe the only forest practice that adjoining timber operators identified as impacted by proposed mining on forest land are adequate for purposes of a code significant change/increase standard, where the code standard does not implement the statutory significant change/increase standard, and the petitioners do not explain why the code standard requires an exhaustive description of all forest practices on nearby lands. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. While a county's failure to describe accepted farming practices on nearby lands would likely require remand under the ORS 215.296(1) significant change/increase standard or a code provision implementing that standard, such a failure is not necessarily reversible error under a similar code significant change/increase standard that does not implement the statute. Any failure to describe accepted farming practices under the code standard is harmless, where the county adopted unchallenged findings, supported by substantial evidence, that the proposed mining will not significantly affect any farm or forest practices. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. ORS 215.296(1) does not require that a county prevent all impacts on farming practices, only that the proposed use, as conditioned, not force a significant change in accepted farm practices or significantly increase the cost of accepted farm practices. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A hearings officer's conclusion that a fence between a public park and grazing land is sufficient to ensure compliance with ORS 215.296(1) is supported by substantial evidence, notwithstanding the possibility that dogs may exit the park through an unfenced boundary and travel across intervening parcels to harass cattle, where there are no reported incidents of trespass across the unfenced

boundaries and only speculation to support the possibility. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Remand is necessary where the local government's approval of an asphalt batch plant fails to address issues raised regarding the impact of emissions on especially sensitive crops grown nearby. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. The scope of "accepted farming or forest practices" that must be evaluated under the no significant change/increase standard is a fact-specific inquiry. A hearings officer does not err in evaluating the scope and intensity of "accepted forest practices" on adjacent lands based on the forest uses currently or recently occurring in the area, and need not assume that forest practices on adjacent parcels will occur at the most intensive level possible. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. ORS 215.284(2)(a) requires a demonstration that a proposed nonfarm dwelling or "activities associated with the dwelling" will not force a significant change in or significantly increase the cost of accepted farming practices on nearby lands. Improvements such as driveways, wells and septic systems are not "activities associated with the dwelling." However, such improvements must be considered part of the proposed dwelling and thus must be considered when determining compliance with ORS 215.284(2)(a). *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. For purposes of determining whether a nonfarm dwelling proposed in the middle of an existing vineyard will force a significant change in or significantly increase the cost of accepted farming practices on "nearby lands," the county's determination of the dwelling's impact on nearby lands must include consideration of the impact of the dwelling on the existing vineyard on the subject property itself. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. An allegation that the county failed to consider the potential impact of a proposed nonfarm dwelling on wells located on nearby properties that serve *domestic* purposes does not provide a basis to reverse or remand the approval of a nonfarm dwelling, where the applicable approval criterion requires a demonstration of whether the proposal will force a significant change in or significantly increase the cost of accepted *farming practices*. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Under a code standard requiring that a proposed forest dwelling not significantly change or increase the cost of farm or forest practices on nearby resource lands, the hearings officer's failure to separately analyze more distant properties in the study area or identify its outer boundaries is not reversible error, where the hearings officer found no significant impacts on parcels adjacent to the subject property and, given the homogeneity of the surrounding area, significant impacts on non-adjoining parcels are unlikely. *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Testimony that approval of a non-farm dwelling will increase agricultural land costs because of the parcel's increased value as a building site is at best indirect evidence of an increase in the cost of "farm practices" within the meaning of ORS 215.296(1). *Frazee v. Jackson County*, 45 Or LUBA 263 (2003).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Findings concluding that adjacent farms do not use pesticides or aerial spraying and will not cause conflicts with proposed nonfarm dwellings are sufficient to show compliance with the no significant change/increase standard, where petitioners do not identify other farm practices or conflicts that the county's findings fail to address, and do not challenge the findings regarding pesticide use and aerial spraying. *Hanna v. Crook County*, 44 Or LUBA 386 (2003).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where a party during local proceedings advises the county that an existing or prior farm use on surrounding lands is in the process of being abandoned, and plans for the new farm use are sufficiently developed to allow the new farm use to be described in sufficient detail to allow the farm practices that will be associated with the new farm use to be identified, an applicant for a nonfarm use that is subject to ORS 215.296(1) must address the accepted farming practices that will be associated with that new farm use. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Organic farming is not properly viewed as either a "farm use" or an "accepted farm practice." However, organic farmers may employ accepted farming practices that are not normally associated with other types of farming. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Impacts on "farm families, residents and workers" are not impacts on "accepted farm practices," that must be considered under ORS 215.296(1). *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. ORS 215.286 does not require a guarantee that aggregate mining on land zoned for exclusive farm use will cause no adverse impacts on the water table on surrounding lands. *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Petitioners' argument that the county used a different definition of "accepted farming practices" than the definition provided in ORS 215.203(2)(c) does not provide a basis for reversal or remand, where petitioners do not demonstrate that the county's definition is inconsistent with the statutory definition, or that application of the county's definition supports a different result than would application of the statutory definition. *Wilbur Residents v. Douglas County*, 37 Or LUBA 156 (1999).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. It is inconsistent with ORS 215.296(1) to arbitrarily limit the scope of analysis to properties within 500 feet of the subject property, where doing so results in failure to consider substantial evidence in the record of significant impacts from the proposed use to accepted farming practices on lands beyond 500 feet. However, where petitioners fail to challenge a finding that there are no significant impacts within 500 feet, and an extrapolation of that finding to lands beyond 500 feet, the county's error does not provide a basis for reversal or remand. *Wilbur Residents v. Douglas County*, 37 Or LUBA 156 (1999).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Petitioners' argument at LUBA that using agricultural land for a golf course buffer violates the ORS 215.296(1) prohibition against forcing a significant change in farm practices on surrounding lands devoted to farm use was waived, where petitioners' arguments during the local proceedings concerning the proposed buffers were not sufficient for the decision maker to understand and respond to that issue. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A local provision requiring compatibility between a proposed use and development of abutting properties by outright permitted uses does not require an exhaustive listing and discussion of every subcategory of use permitted in the area. A county's general description of permitted uses and explanation why the proposed use is compatible with types of permitted uses is adequate. *Thomas v. Wasco County*, 35 Or LUBA 173 (1998).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Adequate findings of compliance with a local standard requiring that proposed nonresource uses not significantly increase the cost of accepted farm and forest practices must identify the farm and forest practices in the area, even if the local standard does not implement and thus need not be consistent with the similar statutory standard. *Thomas v. Wasco County*, 35 Or LUBA 173 (1998).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. In applying a local provision based on the no significant change/increased cost standard, the local government is not required to perform the impossible task of proving a negative or to quantify how much imposed conditions will reduce conflicts with farm uses below a certain threshold. It need only affirmatively consider the impacts of a proposed use on farm or forest practices, and in so doing, consider whether the use will force a significant change or significantly increase the cost of those practices. *Gutoski v. Lane County*, 34 Or LUBA 219 (1998).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Under ORS 215.296(1), the applicant bears the burden to demonstrate that the proposed use will force no significant change in accepted farming practices or their cost, and the local government's findings must affirmatively explain why it believes there are no such significant adverse impacts. *Just v. Linn County*, 32 Or LUBA 325 (1997).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. In order to demonstrate compliance with ORS 215.296(1), county findings must: (1) describe the farm and forest practices on surrounding lands devoted to farm or forest use; explain why the proposed use

will not force a significant change in those practices; and (3) explain why the proposed use will not significantly increase the cost of those practices. *Brown v. Union County*, 32 Or LUBA 168 (1996).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Under ORS 215.296(1), the county may not assume from an absence of information in the record that there are no adverse farm impacts. The burden is on the county to identify and explain why it believes there are no significant adverse impacts and why it believes the cost of accepted farm practices would not be increased. *Brown v. Union County*, 32 Or LUBA 168 (1996).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where the only use approved by the challenged decision is mineral and aggregate extraction on a 186-acre site, and no uses on the remainder of intervenor's 490-acre parcel are subject to review under ORS 215.296, the county's findings correctly limit the evaluation of compliance with ORS 215.296 to the 186-acre area of mineral and aggregate extraction. *Mission Bottom Assoc. v. Marion County*, 32 Or LUBA 56 (1996).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. ORS 215.296(1) does not require of the local government the impossible task of proving a negative; rather, the local government must affirmatively consider the impacts of a proposed use on farm or forest practices, and in consideration of those impacts, consider whether the use will force a significant change or significantly increase the cost of those practices. *Mission Bottom Assoc. v. Marion County*, 32 Or LUBA 56 (1996).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where the local code requires that a proposed use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding land, the applicant has the burden of identifying the relevant accepted farm and forest practices and producing evidence showing those practices will not be significantly changed or their costs significantly increased. *Lyon v. Linn County*, 28 Or LUBA 402 (1994).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Findings of fact stating that accepted farm practices which occurred on adjoining properties have continued after a golf course was constructed do not constitute an improper interpretation of ORS 215.296(1) as being met simply because those past accepted farm practices have continued. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Findings that it is possible to apply agricultural sprays with little or no drift if label restrictions are followed do not constitute findings that spray drift is not an accepted farm practice. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where impacts on an individual accepted farm practice are such that they almost force a significant change in that practice, additional impacts on other accepted farm practices may lead to a conclusion that

there is a cumulative significant change in accepted farm practices, but such is not necessarily the case. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. An applicant may not construct a golf course, prior to receipt of a decision approving such construction that is sustained on appeal, and thereafter rely on the fact that construction has already occurred to avoid showing that the impacts on accepted farm practices and the costs thereof during construction of the golf course are not significant. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Findings that an orchard's accepted farming practices have not been significantly affected by trespassing golf balls are supported by substantial evidence where the evidence shows no orchard employees have been hit by golf balls, tree buffers are effective in deflecting golf balls and petitioner's testimony was discredited by video tape of petitioner collecting golf balls on the golf course property. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where there is conflicting evidence concerning the effectiveness of a condition requiring golf course closures during spraying operations to avoid significant effects on or cost increases in such spraying, a finding that the condition has been effective is supported by substantial evidence. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where the aerial spray applicator formerly used by an orchard will not spray orchards surrounded by a golf course and the only sprayer who will charges 2000 dollars more to do so, the county's findings must explain why this cost increase, viewed cumulatively with any other cost increases attributable to the golf course, is not significant. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Petitioner's argument that the county failed to address evidence that escaped dogs can cause great damage in rural areas provides no basis for reversal or remand, where the county found the proposed kennel will comply with a code standard requiring no significant increase in the cost of accepted farm and forest practices because the design of the kennel will result in no dogs escaping from the facility. *Larry Kelly Farms, Inc. v. Marion County*, 26 Or LUBA 401 (1994).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where testimony below does not refer to ORS 215.296 by its statutory citation, title or any recognized abbreviation for either, and does not employ any of the operative terms of the statute, a reasonable local decision maker would not have understood that compliance with ORS 215.296 was raised below, and petitioner may not raise this issue before LUBA. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where a golf course adjoining an orchard will force alterations in accepted farming practices and increase the costs associated with such practices, the relevant question under ORS 215.296(1) is whether

such alterations and increased costs will be *significant*. Where there is evidence in the whole record that would allow a local government decision maker to answer that question either way, LUBA is required by ORS 197.835(7)(a)(C) to defer to the local government's judgment. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where there is evidence in the local government record that the number of golf balls claimed to have landed in adjoining orchards is exaggerated, a decision approving a golf course and imposing a condition requiring the planting of trees to contain golf balls on-site and installation of a fence and screen to prevent golfers and golf balls from entering adjoining orchard property, is supported by substantial evidence. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where the aerial application of chemicals on an orchard adjoining a proposed golf course will be rendered more difficult, although possible, in that at least one aerial sprayer indicates he would be willing to spray the affected orchard, and the decision approving the golf course requires the operator to close the golf course to facilitate such spraying, there is substantial evidence in the record that the golf course will not force a significant change in or significantly increase the cost of aerial spraying of the adjoining orchard. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A decision that a golf course will not significantly change or increase the cost of ground spraying of an adjoining orchard is supported by substantial evidence, where there is conflicting evidence concerning the magnitude of ground spraying drift expected to travel onto adjoining properties, and the decision imposes a condition requiring that the golf course operator provide monitors to prevent golfers from coming into contact with ground spray drift. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where petitioners do not specifically challenge county findings which (1) identify a specific area surrounding a proposed golf course as the "surrounding lands" to be considered in determining compliance with ORS 215.296(1) and identical local code provisions, and (2) explain how the area was chosen, but rather assert a larger area should have been chosen, LUBA will uphold the county's identification of "surrounding lands." *Schellenberg v. Polk County*, 22 Or LUBA 673 (1992).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. ORS 215.296(1), and identical local code provisions, require that a county consider the impacts of a proposed nonfarm use on *all* "surrounding lands devoted to farm or forest use," whether that use is commercial or noncommercial. *Schellenberg v. Polk County*, 22 Or LUBA 673 (1992).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. A county may properly base its identification of "accepted farm or forest practices," as those terms are used in ORS 215.296(1), on the definition of "accepted farming practice" in ORS 215.203(2)(c). *Schellenberg v. Polk County*, 22 Or LUBA 673 (1992).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Where the evidence establishes a reasonable farmer would not significantly change the manner in which the farm is managed due to a proposed golf course, and the opponents' evidence shows only that there is a remote possibility that there could be some impacts from such proposed golf course, the county's determinations that the proposed golf course will not seriously interfere with, force a significant change in, or significantly increase the cost of accepting farming practices in the area, are supported by substantial evidence. *Washington Co. Farm Bureau v. Washington County*, 22 Or LUBA 540 (1992).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Under ORS 215.296(1), the burden is on the applicant to show a proposed golf center will force no significant change in accepted farming practices or their cost, and on the county to so find. *Berg v. Linn County*, 22 Or LUBA 507 (1992).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Findings which fail to identify the farm practices employed on surrounding properties devoted to farm use cannot explain why the proposed use will not cause a significant change in or increase the cost of such practices, and are inadequate to comply with ORS 215.296(1). *Berg v. Linn County*, 22 Or LUBA 507 (1992).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Although the EFU zoning statutes do not establish specific approval standards for golf courses in EFU zones, ORS 215.296(1) establishes standards applicable to nonfarm uses in EFU zones generally, and requires that approval of such uses not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands. *Von Lubken v. Hood River County*, 22 Or LUBA 307 (1991).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Under ORS 215.296(1) and similar local code provisions, the burden is on the applicant to show the proposed use will force no significant change in accepted farming practices or their cost, and on the county to so find. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. ORS 215.296(1) and similar local code provisions require a county to consider all issues relevant to whether the proposed use will force a significant change in accepted farm or forest practices on surrounding lands or significantly increase the cost of such practices. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. In order to demonstrate compliance with ORS 215.296(1) and similar code standards, county findings must (1) describe the farm and forest practices on surrounding lands devoted to farm or forest use, (2) explain why the proposed use will not force a significant change in those practices, and (3) explain why the proposed use will not significantly increase the cost of those practices. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Without an adequate identification of the accepted farming practices on surrounding lands, the county's findings cannot explain why the proposed use will not cause a significant change in or increase the cost of such practices, as required by ORS 215.296(1) and the local code. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Findings of compliance with a standard that a proposed golf course will not "force a significant change in," or "significantly increase the cost of," accepted farm or forest practices on surrounding lands do not necessarily satisfy a standard that the proposed golf course will not "interfere seriously" with accepted farming practices. *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51 (1991).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. The requirement that conditions imposed to ensure that a proposed nonfarm use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands "be clear and objective," does not necessarily require a local government to adopt *findings* explaining why conditions imposed for this purpose are clear and objective. *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51 (1991).

3.3.8 EFU Statute/Ordinances – Nonfarm Uses – No Significant Change/Increase Std. Whether a proposed dwelling (1) is permitted outright in an EFU zone, (2) is "accessory" to an underlying nonconforming use, and (3) complies with ORS 215.296(1), are determinations which require "interpretation or the exercise of factual, policy or legal judgment" within the meaning of ORS 197.015(10)(b)(A) and (C). *Komning v. Grant County*, 20 Or LUBA 481 (1990).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. "In-home commercial activities" are not authorized by right in resource zones, even where (1) such activities are accessory to residential uses and would have minimal to no impact on resource lands, (2) such an approach would streamline local permitting by avoiding the conditional use process required for home occupations, and (3) such activities are consistent with a model ordinance prepared by DLCD. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where certain activities are allowed as accessory to a home occupation use, they may not be allowed through a Type I process (i.e., ministerial review of an application based on clear and objective standards and criteria) that does not provide the review that is required by ORS 215.448(1) and (4). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where local code amendments allow accessory uses and structures in an EFU zone, arguments that (1) the amendments improperly exempt such structures from a local code requirement that steps be taken to minimize adverse impacts on farm and forest uses and (2) the provisions governing such uses are inconsistent with ORS 215.213(3)(b) provide no basis for reversal or remand where the amended code is comparable to the prior code and where the petitioner does not develop any argument explaining why the amendments are substantive instead of technical. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Establishing that proposed "agri-tourism or other commercial events or activities" are "necessary to support the commercial farm uses or the commercial agricultural enterprises in the area" for purposes of ORS 215.283(4)(d)(A) is a relatively high hurdle: the county must find that the events are essential in order to maintain the existence of either the commercial farm uses on the subject property or the commercial agricultural enterprises in the area. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A demonstration that proposed "agri-tourism or other commercial events or activities" are "necessary to support" an approved commercial activity in conjunction with farm use under ORS 215.283(2)(a), such as a brewery, is not sufficient to demonstrate that the events are "necessary to support" an "existing commercial farm use of the tract," such as the growing of filberts, for purposes of ORS 215.283(4)(d)(A), even where revenue from the brewery "supplements" revenue from the growing of filberts. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. ORS 215.441, which provides that if county zoning allows a church or other nonresidential place of worship, the county shall also allow certain accessory uses, is not an independent authorization of churches in any county zone, and does not extend any protections to churches proposed for zones where churches are not allowed. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A hearings officer Misconstrues the text and context of the county Wildlife Area overlay zone, which allows uses that are

"permitted outright" and "permitted conditionally" in the underlying zone, by concluding that a church is a use "permitted outright" based solely on the fact that ORS 215.283(1) allows churches on lands zoned for exclusive farm use (EFU), when the question is whether churches are "permitted outright" in the *county* EFU zone, which does not list churches under the category of uses "permitted outright." *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Notwithstanding that uses listed in ORS 215.283(1), including churches, are generally allowed on lands zoned for exclusive farm use free of locally imposed restrictions, other state statutes and administrative rules can impose restrictions. Because ORS 215.441 and OAR 660-033-0130 impose restrictions on churches in EFU zones that require or authorize a county to undertake discretionary reviews of proposed churches, it is not accurate to characterize churches as uses "permitted outright" in a county EFU zone. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. The text and context of ORS 215.283(2)(c), which allows "private parks, playgrounds, hunting and fishing preserves and campgrounds" on EFU-zoned land, indicate that the qualifier "private" refers to private ownership, not private access. Accordingly, a "private park" for purposes of ORS 215.283(2)(c) is not limited to parks that exclude the public. *Central Oregon Landwatch v. Deschutes County*, 72 Or LUBA 61 (2015).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. The primary use of a "park" allowed under ORS 215.283(2)(c) on EFU-zoned land must be a recreational use of some kind. A proposed wedding event center is not a "park," because weddings and other focal events are not "recreational" uses, even if incidental activities associated with such events, such as dancing and lawn games, could be viewed as recreational activities. *Central Oregon Landwatch v. Deschutes County*, 72 Or LUBA 61 (2015).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. OAR 660-033-0130(18)(a) authorizes expansion of "[e]xisting facilities wholly within a farm use zone," but does not expressly require that the facility existed wholly within a farm use zone in 1996, on the date the rule language was adopted. As written, the rule includes no such temporal qualification, and would allow expansion of a facility that currently exists wholly within a farm use zone, but that did not in 1996. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. ORS 215.283(2)(k) allows a solid waste disposal facility on EFU-zoned land for which a DEQ permit has been granted. Where the record shows that a currently operating facility proposed for expansion had a DEQ permit that has been extended, but does not include a copy of the current DEQ permit, remand is not necessary to remedy that evidentiary defect where the petitioner offers no reason to believe that the landfill is operating without a current permit, and the county imposed a condition requiring the applicant to provide a copy of the current permit prior to undertaking any expansion. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Filming that is incidental to a primary use of a property zoned EFU cannot legitimize that primary use if it is not otherwise

allowed in the EFU zone, and such incidental filming cannot bring that primary use within the scope of "on-site filming," allowed in an EFU zone under ORS 215.306. *Smalley v. Benton County*, 71 Or LUBA 172 (2015).

3.3.9 EFU Statutes/Ordinances – Nonfarm Uses – Other Uses. An event that may or may not involve videotaping, subject to the event participants' discretion, does not constitute "on-site filming" allowed in an EFU zone under ORS 215.306 when the videotaping that occurs is not the primary use of EFU land, and is merely an incidental part of the event. Videotaping of weddings and other events does not qualify as "on-site filming" when it is the events themselves, and not the recording of them, that are the principal use of the EFU land. *Smalley v. Benton County*, 71 Or LUBA 172 (2015).

3.3.9 EFU Statutes/Ordinances – Nonfarm Uses – Other Uses. Under ORS 215.306(4)(b), "on-site filming," i.e., the production of "advertisements, documentaries, feature film, television services and other film productions," refers to production of films and television for broadcast or distribution to the public in some manner, and does not mean the production of private home videos that merely memorialize personal events of interest only to the participants. The videotaping of a wedding or similar private event does not constitute the production of a "documentary." *Smalley v. Benton County*, 71 Or LUBA 172 (2015).

3.3.9 EFU Statutes/Ordinances – Nonfarm Uses – Other Uses. Under ORS 215.306, "on-site filming" is intended to be a temporary or non-permanent use of EFU land. An event facility that operates in a continuous and apparently permanent manner over the course of 12 years, even though individual events may only last one day, does not qualify as "on-site filming" as that term is used in ORS 215.306. *Smalley v. Benton County*, 71 Or LUBA 172 (2015).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A utility facility authorized in an EFU zone under ORS 215.283(1)(c) is not limited to facilities that provide utility services to local or county residents, but includes a natural gas transmission line that connects an interstate natural gas pipeline to an export terminal. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. LUBA will reject an argument that a county erred in failing to deny a proposed natural gas transmission line allowed as a utility facility in an EFU zone under ORS 215.283(1)(c) based on comprehensive plan language that the petitioner argues limits utility facilities to those that serve county residents, because even if the county's comprehensive plan is interpreted to limit utility facilities, application of those limits to deny a use allowed outright under ORS 215.283(1) would exceed the county's authority, under the reasoning in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995). *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. When ORS 215.283(1)(o) was enacted in 1993 to expressly authorize farm stands in EFU zones the statue authorized, among other things, "sale of retail incidental items," but limited such sales to "25 percent of the total sales of the farm stand." *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Legislation enacted in 2001 amended ORS 215.283(1)(o) concerning farm stands to expressly authorize "fee-based activity to promote sale of farm crops and livestock sold at the farm stand," subject to the limitation that such sales and incidental retails could not exceed 25 percent of farm stand sales. Legislative history shows that the legislature intended to authorize farm product food contests and farm product food preparations, but did not intend to authorize banquets, restaurants, or cafes. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. The ORS 215.283(1)(o) authorization for farm stands authorizes structures that are designed and used for the sale of farm products and livestock, and also authorizes those structures to be used for "sale of retail incidental items and fee-based activity to promote sale of farm crops or livestock." The EFU statute is correctly interpreted also to authorize farm stand activities to be conducted outside the authorized structures. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A farm stand permit that authorizes up to 22 al fresco dinners for up to 75 diners each year is inconsistent with the express prohibition in ORS 215.283(1)(o) and OAR 660-033-0130(23) against farm stand structures for banquets. Although the statute and rule are expressly directed at "structures for banquets," the prohibition extends to such large and frequent al fresco dinners, which fall within the meaning of "banquets," as that term is used in the statute and rule, and the prohibition extends to outdoor banquets. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. ORS 215.283(1)(o) and OAR 660-033-0130(23) authorize the "sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock" inside structures that are "designed and used for sale of farm crops and livestock," but they do not authorize structures that are specifically designed and used for retail sales and fee-based promotional activity. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A county's condition of approval that farm stand "wholesale sales" be separately accounted and not included in applying the ORS 215.283(1)(o) requirement that "sale of retail incidental items and fee-based activity to promote sale of farm crops or livestock" not exceed "25 percent of the total annual sales of the farm stand," while an imperfect way to ensure that farm stand sales are not inflated with nonfarm stand sales to inflate the permissible sales from retail and fee-based activity, is a permissible condition under the statute. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A farm stand permit that authorizes "small-scale gatherings such as birthdays, picnics, and similar activities" and (2) requires that such gatherings "shall promote the farm stand and contemporaneous crops sold in the farm stand" does not exceed the ORS 215.283(1)(o) and OAR 660-033-0130(23) authority for farm stands. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A farm stand permit that authorizes multiple food carts to sell a variety of prepared food at up to 24 events per year cannot

be characterized as "incidental retail sales," and exceeds the authority granted by ORS 215.283(1)(o) and OAR 660-033-0130(23). *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. ORS 215.283(1)(o) and OAR 660-033-0130(23) do not categorically prohibit food carts in all circumstances. If a permit authorizing a farm stand appropriately limited food carts so that they could be characterized as "incidental retail sales," they could be authorized at a farm stand. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. ORS 215.283(1)(o) and OAR 660-033-0130(23) do not prohibit all concessions at farm stands. The statute and rule only prohibit "large concessions." *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Under 2010 legislation, wineries authorized by ORS 215.283(1)(n) and 215.452 may offer "[s]ervices directly related to the sale and promotion of wine," and host "private events." ORS 215.452 limits "gross income from the sale of incidental items and services" to "25 percent of the gross income from the retail sale on-site of wine produced in conjunction with the winery." *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. The legislature in 2010 enacted amendments to ORS 215.452, which governs wineries that are a permitted use under ORS 215.283(1)(n), and those amendments failed to adopt a proposal to expressly preserve statutory authority to approve wineries under ORS 215.283(2)(a) as "commercial activities that are in conjunction with farm use." However, LUBA will not infer from that failure a legislative intent to eliminate ORS 215.283(2)(a) as basis for winery approval on EFU-zoned land, where it was common practice before 2010 to approve wineries under ORS 215.283(2)(a) as "commercial activities that are in conjunction with farm use" and the 2010 legislative history suggests that the legislature did not intended to eliminate that common practice. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Approval of wineries under ORS 215.283(2)(a) as "commercial activities that are in conjunction with farm use" and approval of wineries under ORS 215.283(1)(n) and 215.452, which specifically authorize "wineries" on EFU-zoned land, are *alternative* ways to seek approval for a winery. Approval under ORS 215.283(2)(a) for expansions to an existing winery that was originally approved under ORS 215.283(1)(n) and 215.452 that are not permitted under ORS 215.452, has the legal effect of converting ORS 215.283(1)(n) and 215.452 winery into an ORS 215.283(2)(a) winery. Therefore the expanded winery as a whole must comply with the limits imposed on ORS 215.283(2)(a) wineries. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. ORS 215.283(1)(r) authorizes "processing of farm crops" as a permitted use in EFU zones. While a winery that only produces wine from wine grapes might qualify for approval under ORS 215.283(1)(r), a winery that includes a tasting room and hosts numerous events at the winery to promote sale of wine is more than

"processing of farm crops" and must be approved under ORS 215.283(1)(n), which authorizes wineries that are limited in accordance with ORS 215.452 and 215.453 or under ORS 215.283(2)(a), which authorizes "commercial activities that are in conjunction with farm use." *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A winery that is authorized to hold up to 44 public or private events annually to promote and sell wine produced at the winery and to prepare and serve meals at those events, but must limit sale of incidental items and services at the events and winery to no more than "25 percent of the gross income from the on-site sale of wine produced in conjunction with the winery," is permissible under the Supreme Court's and Court of Appeals' decisions in *Craven v. Jackson County*, because the events, food service and sale of incidental items and services are properly viewed as "incidental" and "secondary" to the winery. However, such a winery is approaching the point where the events, food service and sale of incidental items and services can no longer be said to be "incidental" and "secondary" to the winery. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. In approving a building permit for a building "customarily provided in conjunction with farm use" in the EFU zone under ORS 215.213(1)(e) or 215.283(1)(e), one factual variable a county should consider is whether the building is intended to be used as an accessory building to non-farm uses authorized on the property, such as a private use airport, instead of or in addition to an accessory to farm use of the property. *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. LUBA will reject an argument that the alternative site study for a transmission tower proposed in an EFU zone erred in rejecting an alternative site in a light industrial area, where the petitioner cites to no evidence that the industrial area has a vacant location of the size necessary to prevent damage to other structures if the tower collapsed. *Hamilton v. Jackson County*, 63 Or LUBA 156 (2011).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Under ORS 215.275, the alternative sites analysis for a utility facility proposed on EFU land evaluates alternative sites on land that is zoned other than EFU. The analysis is not required to evaluate alternative EFU-zoned sites. *Hamilton v. Jackson County*, 63 Or LUBA 156 (2011).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. In approving a public recreational vehicle (RV) campground under OAR 660-035-0035 and 0040, a local government need not limit infrastructure such as septic RV dumps, water and electric services to the most minimally intensive infrastructure that is possible, to avoid the necessity of taking an exception to Goal 3. *Linn County Farm Bureau v. Linn County*, 63 Or LUBA 347 (2011).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A county does not err in concluding that providing central septic dump sites for recreational vehicles (RVs) in a public RV campground does not require an exception to Statewide Planning Goal 3, where if the county did not provide central RV dump sites it would have to increase the size or number of communal restrooms to meet campers' needs, offsetting any reduction in septic infrastructure. *Linn County Farm Bureau v. Linn County*, 63 Or LUBA 347 (2011).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A county does not err in concluding that providing a water spigot and an electrical outlet in individual campsites in a public recreational vehicle campground does not require an exception to Goal 3, where providing necessary services to campers requires a dispersed water and electric grid in any event, and the additional infrastructure to supply water and electricity to individual sites is not significantly greater than that otherwise required to provide basic services. *Linn County Farm Bureau v. Linn County*, 63 Or LUBA 347 (2011).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Driveways serving nonfarm dwellings do not have to be located on a portion of the parcel that is generally unsuitable for farm use. *Womelsdorf v. Jackson County*, 62 Or LUBA 34 (2010).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A general statement of concern that a proposed campground would cause "interactions between livestock and people" is insufficient under ORS 197.763(1) to raise the issue of compliance with a local code analogue to the ORS 215.296(1) that requires a finding that the proposed use will not force a significant change in or significantly increase the cost of accepted farm practices on surrounding lands devoted to farm use. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. It is inappropriate to simply apply the restrictions that govern private park/campgrounds under OAR 660-033-0130(19) to public park/campgrounds governed by a different set of rules, because for whatever reason LCDC has chosen to treat public park/campgrounds more favorably than private park/campgrounds. Nonetheless, the rule governing private campgrounds is the only analogous area of law in which LCDC has attempted to delineate the type or intensity of uses allowed in a campground on EFU land as a conditional use without taking an exception to Goal 3, and is useful context in attempting to determine which local public park uses on EFU land require a Goal 3 exception in the absence of a local master park plan. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. ORS 215.283(2)(k) restricts a solid waste disposal facility from being "established" prior to Department of Environmental Quality (DEQ) permitting, but does not prohibit local government approval of a facility that is conditioned on receipt of the DEQ permit prior to establishment or building of the facility. *Crocker v. Jefferson County*, 60 Or LUBA 317 (2010).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where there is no evidence in the record that a proposed cell tower will have any impact on farm or forest practices, a county may simply find that, and need not conduct a *pro forma* analysis of impacts on farm and forest practices. *Seeberger v. Yamhill County*, 56 Or LUBA 656 (2008).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A county cannot apply local site design standards to deny a proposed cellular tower in an exclusive farm use zone, a permitted use under ORS 215.283(1), because as explained in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), state law generally prohibits local governments from imposing approval criteria on

ORS 215.283(1) uses other than those authorized by statute. *T-Mobile USA v. Yamhill County*, 55 Or LUBA 83 (2007).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A county errs in denying a proposed cellular tower under ORS 215.275 for failure to evaluate opponents' claims that the tower could be located on alternative sites on non-agricultural land, when none of the alternative sites were identified with sufficient specificity to allow evaluation. *T-Mobile USA v. Yamhill County*, 55 Or LUBA 83 (2007).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. ORS 215.283(1) and 215.275 do not permit a county to deny an application to site a proposed cellular tower in an exclusive farm use zone simply because there is already some existing cellular service in the area. A proposed cellular communication facility may be justified based on a need to improve existing service. *T-Mobile USA v. Yamhill County*, 55 Or LUBA 83 (2007).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A hearings officer does not err in interpreting a code provision that allows the "preparation of land for cultivation" that is a "customarily accepted agricultural activity" without a permit in agricultural zones to require the landowner to demonstrate that a proposal to cover an existing landfill with 100,000 cubic yards of soil not only involves "preparation of land for cultivation" but is also a "customarily accepted agricultural activity." *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Any inquiry into whether a proposal to place 100,000 cubic yards of soil on an existing landfill is a "customarily accepted agricultural activity" is necessarily a fact-specific inquiry. In answering that question, a hearings officer does not err in considering as relevant facts the absence of ongoing agricultural activity on the property and the lack of specificity in the landowner's plans for post-fill agricultural use. *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Any inquiry into what is a customarily accepted agricultural activity necessarily requires whether other similar farms have engaged in the proposed activity. A hearings officer does not err in considering the absence of evidence that other farms have placed 100,000 cubic yards of fill in a 13-acre area to prepare the land for cultivation. *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Given the history of the subject property as a landfill, a hearings officer does not err in considering the lack of evidence that it is customary for farmers to charge a fee to persons to deposit soil on farm land, in determining whether a proposal to place 100,000 cubic yards of fill on farm land is a "customarily accepted agricultural activity" allowed without a permit, or something else that requires a permit. *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where a regulation specifically authorizes a use in one zone and does not authorize that specific use in a second zone, a more general authorization of uses in the second zone should not be interpreted to include the more specifically authorized use in the first zone. However, that principle would not apply to bar finding

a particular feedlot qualifies as a "farm use" rather than a "commercial activity * * * in conjunction with farm use," where the legislature's authorization of "commercial activities that are in conjunction with farm use" is no more specific than its authorization of "farm uses." *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107 (2004).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Evidence that a livestock operation is conducted on a parcel for part of the year is sufficient to establish that the property contains an "existing" livestock operation, for purposes of the requirements for siting a guest ranch on EFU-zoned land, where the record shows that rotation of cattle from the property during the wet months, to allow pasture to rest, is a matter of good animal husbandry. *Durdan v. Deschutes County*, 43 Or LUBA 248 (2002).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. While the guest ranch statute requires an existing livestock operation on a parcel of at least 160 acres on which the proposed guest ranch and qualifying dwelling must be located, nothing in the statute requires that the livestock operation exist exclusively on that parcel, or prohibits the livestock operation from being part of a larger operation on non-contiguous properties. *Durdan v. Deschutes County*, 43 Or LUBA 248 (2002).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. The guest ranch statute requires that the subject parcel contain the dwelling of the livestock operator, but does not require that the dwelling exist on the date of application for approval of a guest ranch. A condition of approval requiring that the dwelling be completed prior to construction of the guest ranch is sufficient to satisfy the statute. *Durdan v. Deschutes County*, 43 Or LUBA 248 (2002).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. While the guest ranch statute allows provision of food services to "guests" that "visit or stay" at the ranch, and does not expressly prohibit providing food services to visitors who are not overnight guests, it is reasonably clear in context that "guests" are those persons who have paid a fee to stay at the lodge, bunkhouse or cottage authorized by the statute, and therefore the statute does not allow provision of food services to visitors who are not overnight guests. *Durdan v. Deschutes County*, 43 Or LUBA 248 (2002).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. In adopting ORS 215.275, the legislature struck a particular balance between the siting of utility facilities in EFU zones and the statutory policy to preserve farmland for farm uses. Once that balance is struck, however, the county's task is to apply the terms of the statute. Nothing in ORS 215.275 requires direct consideration of agricultural land preservation policies, external to the statute, in applying its terms, or "balancing" the technical difficulty of alternatives against farmland preservation. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Under ORS 215.275, a utility provider and the local government are not required to consider under ORS 215.275(2) any alternative that requires a different type of facility or that would not meet the essential features of the chosen facility, as defined by the utility provider. However, the utility provider and local government must consider under ORS 215.275(2) an alternative that appears to satisfy the applicant's defined objectives, even if the alternative is a facility in a non-EFU location that

requires a different component design than the preferred EFU location. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. In addressing consideration of land costs in comparing "utility facilities that are not substantially similar," ORS 215.275(3) implies that the scope of "reasonable alternatives" that must be considered under ORS 215.275(2) includes non-EFU-zoned sites with conditions that may require at least some design modifications to the facility. However, nothing in the statute requires that a utility provider consider alternatives that cannot satisfy the provider's defined objectives in providing the public service. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A utility provider need not consider and disqualify as "reasonable alternatives" under ORS 215.275(2) alternatives that require reassessment of its fundamental technology or its business plan, or that involve sites or facilities that would fail to provide public services to the desired coverage area. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where a telecommunications provider defines as one of its objectives building its own wireless tower in order to lease space to other providers, any alternative such as collocation on existing telephone poles will not satisfy at least one of the provider's defined objectives, and therefore need not be considered and disqualified as a "reasonable alternative" under ORS 215.275(2). *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. ORS 215.275 does not require a utility provider to consider and disqualify as "reasonable alternatives" non-EFU locations on which the proposed utility facility would require a variance from applicable zoning standards. Such lands are either not "reasonable alternatives" or simply not "available" under ORS 215.275(2)(c), as a matter of law. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where it is unclear who would own a proposed "personal use airport" in an EFU zone, and whether the uses that the owner plans to make of the airport would be consistent with the uses allowed under ORS 215.283(2)(h), the owner must be identified and the county's findings must explain why it concludes that the proposed uses fall within the uses allowed with a personal use airport. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. The fact that wineries are a permitted use in EFU zones under ORS 215.213(1) and 215.283(1) does not mean that wineries are "agricultural uses" permitted in a rural residential zone, where the code definition of "agricultural uses" does not include wineries, and wineries are not among the uses allowed in the rural residential zone. *Roth v. Jackson County*, 40 Or LUBA 531 (2001).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Absent text or contextual support in the statutes for a narrower interpretation of "community center," a mixed-use building that contains a public library, community meeting space, office space for a local nonprofit community

organization and public restrooms may be properly considered a "community center" as that term is used in ORS 215.283(2)(d). *Hendrix v. Benton County*, 40 Or LUBA 362 (2001).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Collocation of cellular telecommunication facilities is not a reasonable alternative to constructing a new telecommunications tower on EFU-zoned property, where the applicant's siting requirements include constructing a facility where space will be leased to other telecommunication providers and collocation with existing towers will not meet that requirement. *Jordan v. Douglas County*, 40 Or LUBA 192 (2001).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. In evaluating reasonable alternatives to siting a utility facility necessary for public service in an EFU zone, a county must consider alternative sites identified by opponents that appear to satisfy an applicant's siting requirements and are not located on EFU-zoned land. *Jordan v. Douglas County*, 40 Or LUBA 192 (2001).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Reasonable alternatives to siting a utility facility necessary for public service in an EFU zone do not include non-EFU sites that the owner will not sell or lease to the utility provider. *Jordan v. Douglas County*, 40 Or LUBA 192 (2001).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where a permit application identifies ORS 215.275 as a criterion applicable to the county's decision approving a cellular communications tower on EFU-zoned land and proposes findings of compliance with the statute, the issue of compliance with the statute was raised below and the county's failure to address the statute can be assigned as error, notwithstanding petitioners' failure to raise that issue below. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Evidence that a proposed cellular communications tower on EFU land is within an optimal area for telecommunication coverage is insufficient to allow LUBA to conclude, under ORS 197.835(11)(b), that the record "clearly supports" a finding of compliance with ORS 215.275, which requires that the local government consider reasonable alternatives to siting the tower on EFU-zoned land. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. The standard a county must apply under ORS 215.275 in considering siting of a public utility facility on EFU land is the same standard mandated by *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998): "whether the facility must be sited in an EFU zone in order to provide the service." The factors specified in ORS 215.275 may be used merely to demonstrate compliance with that ultimate standard. *City of Albany v. Linn County*, 40 Or LUBA 38 (2001).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. When considering approval of a public utility facility on EFU land, the factors listed in ORS 215.275(2) are intended to be applied not only to the proposed EFU site, but also to the non-EFU sites considered as potential alternatives. *City of Albany v. Linn County*, 40 Or LUBA 38 (2001).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Justification for siting one component of a utility facility in an EFU zone does not necessarily justify siting other components in that zone. *City of Albany v. Linn County*, 40 Or LUBA 38 (2001).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Under ORS 215.275, when a county considers siting of a certain type of public utility facility on EFU land, the county need not consider as a "reasonable alternative" a different type of utility facility designed to meet the same need as the proposed facility type. *City of Albany v. Linn County*, 40 Or LUBA 38 (2001).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. The limitations on activities in public parks imposed by OAR 660-034-0035 do not apply to private parks allowed on agricultural and forest lands under ORS 215.283(2)(c), OAR 660-033-0120 and OAR 660-006-0025(4)(e). *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Unlike Goal 4 and the Goal 4 rule, which limit recreational activities on forest lands to those "appropriate for a forest environment," ORS 215.283(2)(c) and OAR 660-033-0120 contain no express language restricting the scope or intensity of activities allowed in "private parks" on agricultural land. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Nothing in the context of the term "kennel" as used in ORS 215.283(2)(m) demonstrates that the intended meaning of that term is narrower than the plain dictionary definition, which refers to establishments for the breeding and boarding of dogs. A proposal to breed and propagate dogs for sale is thus a "kennel" subject to county regulation and not a "farm use" allowed outright in an EFU zone. *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195 (1999).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. The scope of the "solid waste disposal facility" subject to county regulation under ORS 215.283(2)(j) is coextensive with the scope of the facility for which DEQ grants a permit pursuant to ORS 459.245. Where the DEQ permit issued pursuant to ORS 459.245 governs only the septic treatment ponds on the subject property and does not govern the land application of treated wastes on adjacent parcels, the "solid waste disposal facility" subject to compliance with the county's conditional use criteria does not include those adjacent parcels. *Wilbur Residents v. Douglas County*, 37 Or LUBA 156 (1999).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. ORS 215.283(2)(j) authorizes a county to allow infrastructure such as equipment, facilities or buildings necessary for the operation of a solid waste disposal facility, but does not require a county to consider or approve off-site infrastructure that is not necessary for that facility. An adjacent farm parcel on which treated waste from the facility will be applied as fertilizer and for irrigation purposes is not "necessary" for the operation of the facility, and thus is not subject to the county's regulation under ORS 215.283(2)(j). *Wilbur Residents v. Douglas County*, 37 Or LUBA 156 (1999).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Petitioners' argument that the county used a different definition of "accepted farming practices" than the definition provided in

ORS 215.203(2)(c) does not provide a basis for reversal or remand, where petitioners do not demonstrate that the county's definition is inconsistent with the statutory definition, or that application of the county's definition supports a different result than would application of the statutory definition. *Wilbur Residents v. Douglas County*, 37 Or LUBA 156 (1999).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. It is inconsistent with ORS 215.296(1) to arbitrarily limit the scope of analysis to properties within 500 feet of the subject property, where doing so results in failure to consider substantial evidence in the record of significant impacts from the proposed use to accepted farming practices on lands beyond 500 feet. However, where petitioners fail to challenge a finding that there are no significant impacts within 500 feet, and an extrapolation of that finding to lands beyond 500 feet, the county's error does not provide a basis for reversal or remand. *Wilbur Residents v. Douglas County*, 37 Or LUBA 156 (1999).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A decision that disposal of sewage effluent by applying it to farm land constitutes a "utility facility necessary for public service" within the meaning of ORS 215.283(1)(d) requires the exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of land use decision provided by ORS 197.015(10)(b)(A) for certain ministerial decisions. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A decision that disposal of sewage effluent by applying it to farm land constitutes a "farm use" within the meaning of ORS 215.203 requires the exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of "land use decision" provided by ORS 197.015(10)(b)(A) for certain ministerial decisions. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A decision that a proposal to transport treated effluent to an EFU-zoned parcel and apply that effluent to poplar trees constitutes a "farm use" within the meaning of ORS 215.283(1)(d) requires the exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of land use decision provided by ORS 197.015(10)(b)(A) for certain ministerial decisions. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Under OAR 660-033-0130(16) a "utility facility necessary for public service" may only be located in an EFU zone if "it must be situated in the EFU zone in order for the service to be provided." *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. An applicant for approval of a utility facility on EFU-zoned land must demonstrate that constructing the utility on non-EFU-zoned land is not a feasible alternative. *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. It is reasonable and correct to interpret a code provision requiring that "vehicle to be repaired shall be located within an enclosed building" to require that repaired vehicles remain within an enclosed building until they are removed from the property. *Gibbons v. Clackamas County*, 35 Or LUBA 210 (1998).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. It is reasonable and correct to consider vehicles used to pick up and drop off customers who have vehicles waiting to be repaired as "vehicles associated with" an auto repair home occupation. *Gibbons v. Clackamas County*, 35 Or LUBA 210 (1998).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Because OAR 660-033-0120 and 660-33-0130 prohibit establishment of a church on high-value farmland, the only procedure available to site a church on high-value farmland is to apply for an exception to the applicable goals under Goal 2. *Corp. of Presiding Bishop v. Klamath County*, 34 Or LUBA 131 (1998).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Article I, section 20, of the Oregon Constitution does not prohibit a county from limiting park ownership in EFU zones to fee owners because such a classification is not closed to petitioner nor is it based on antecedent personal or social status or characteristics. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where the county's interpretation of a local ordinance allows dog kennels that were in existence in 1986 to be established as permitted uses without a showing of compliance with the ORS 215.296 farm impact standards, the county's interpretation violates ORS 215.283(2). *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Nothing in ORS chapter 215 requires a conditional use process before a county can impose on the application of a mineral and aggregate overlay zone conditions requiring minor road improvements of the type listed in ORS 215.283(1)(L), which "may be established" in any EFU-zoned area. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Although a county may regulate or define "commercial activities that are in conjunction with farm use" more restrictively than required by state law, the county's EFU zones may not allow uses that are not authorized by statutory exclusive farm use zoning provisions. *City of Sandy v. Clackamas County*, 28 Or LUBA 316 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. The scope and proper construction of the term "commercial activities that are in conjunction with farm use," used in ORS 215.213(2)(c) and 215.283(2)(a), is a question of state law. LUBA is not required to defer to a local government hearings officer's understanding of the scope of that term. *City of Sandy v. Clackamas County*, 28 Or LUBA 316 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Even if a commercial activity sells primarily to farm uses, it is not a "commercial activity * * * in conjunction with farm use" unless the products and services provided are "essential to the practice of agriculture." *City of Sandy v. Clackamas County*, 28 Or LUBA 316 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Products and services which could be used by farm uses and farm workers, but are also used by a variety of other nonfarm uses and users, lack a sufficient connection to the "essential practice of agriculture" to be considered "commercial activities * * * in conjunction with farm use." *City of Sandy v. Clackamas County*, 28 Or LUBA 316 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. OAR 660-33-130(3) precludes approval of churches or public or private schools on agricultural lands "within 3 miles of an urban growth boundary." *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where an EFU zone includes two provisions allowing churches and schools, and one of those provisions includes the OAR 660-33-130(3) restriction against approving churches and schools within three miles of an urban growth boundary but the other provision does not, LUBA will not assume the county will apply the provision that lacks the three-mile limitation as though it includes the three-mile limitation. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. OAR 660-06-025(4)(i) allows power generation facilities on forestlands without a Goal 4 exception, provided such facilities do not remove more than 10 acres of land from resource use. OAR 660-33-130(23) includes similar provisions for power generation facilities on agricultural lands without a Goal 3 exception, but requires that the power generation facilities not remove more than *20* acres of land from resource use. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where an EFU zone allows "golf courses" as a conditional use, it must incorporate the definition of "golf course" in OAR 660-33-130(20) or specify that the rule definition applies. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A county does not err by interpreting a local code provision allowing "commercial or processing activities that are in conjunction with timber and farm uses," in a rural residential zone, in the same way the Oregon Supreme Court has interpreted similar language in the exclusive farm use zoning statutes. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. The Oregon Supreme Court's decision in *Craven v. Jackson County*, 308 Or 281, 779 P2d 1011 (1989), requires that a winery, as a commercial activity in conjunction with farm use, be primarily a buyer and processor of grapes into wine, and only incidentally a retail seller of souvenirs. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where a local code provision implementing ORS 215.283(1)(a) lists schools "including all buildings essential to the operation of a school" as a conditional use in an EFU zone, and the local government fails to interpret and apply the quoted provision in approving a conditional use permit for a school, LUBA must remand the decision for the local government to interpret its code provision in the first instance. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where the relevant EFU code provisions permit boarding kennels but do not permit training kennels, a boarding kennel that includes up to three hours a day of on-site training may not be approved unless it is established that such on-site training is customary at boarding kennels. *Larry Kelly Farms, Inc. v. Marion County*, 26 Or LUBA 401 (1994).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. ORS 215.213(2)(q) through (s) all refer to *existing* roads. Consequently, a new bridge terminus and new road to connect that bridge to an existing road are not allowed on land designated and zoned for forest uses under OAR 660-06-025(4)(u) and ORS 215.213(2)(q) through (s). *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Construction of a new bridge terminus or a new road to connect that bridge to an existing road are not uses allowed on forest zoned land under OAR 660-04-025(3)(h) and ORS 215.213(1)(m) to (p). *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Median turn lanes are prohibited on rural lands under OAR 660-12-065(4), even on rural EFU-zoned lands where they might otherwise be permissible under ORS 215.213(1) or (2). *Bicycle Transportation Alliance v. Washington Co.*, 26 Or LUBA 265 (1993).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. A privately owned and managed paintball game park is potentially allowable in an EFU zone as a "park" under ORS 215.213(2)(e). *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Under ORS 215.283, construction of new roads and road improvements other than the types identified in ORS 215.283(1)(k) to (n) and (2)(p) to (r) is not allowed in EFU zones. *Schrock Farms, Inc. v. Linn County*, 25 Or LUBA 187 (1993).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. In the absence of evidence in the record establishing the quantity of products delivered or dollar amount of sales by petitioners' business to farm uses within the local agricultural community, petitioners cannot demonstrate as a matter of law that their proposed use is a commercial activity in conjunction with farm use. *Chauncey v. Multnomah County*, 23 Or LUBA 599 (1992).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Under ORS 215.283(1)(d) and 215.283(2)(L), transmission towers are allowable in EFU zones as "[u]tility facilities necessary

for public service." Such towers may be allowed outright under ORS 215.283(1)(d), if they do not exceed 200 feet in height. Such towers may be allowed under ORS 215.283(2)(L), subject to the standards set forth at ORS 215.296(1), if they are over 200 feet in height. *Harris v. Polk County*, 23 Or LUBA 152 (1992).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. Where a code standard requires a determination that there is a demonstrated need for a proposed golf course "which outweighs the need for, or benefits of, the existing or potential farm or forest use," the county correctly applied that standard by determining even though there is a need for more golf courses in the county, the value of the property for farmland outweighs that need. *Barber v. Marion County*, 23 Or LUBA 71 (1992).

3.3.9 EFU Statute/Ordinances – Nonfarm Uses – Other Uses. As a matter of law, a cellular communication facility is a "utility facility" which provides "public service." However, the requirement that a cellular communication facility proposed to be located in an exclusive farm use (EFU) zone be a "utility facility *necessary* for public service" is not satisfied unless the county finds that it is necessary to locate the proposed facility in the EFU zone in order to provide that service. *McCaw Communications, Inc. v. Polk County*, 20 Or LUBA 456 (1991).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally. A replacement dwelling allowed under ORS 215.213(1)(q) must be located on a lawful unit of land. *Landwatch Lane County v. Lane County*, 80 Or LUBA 415 (2019).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally. A hearings officer does not err in concluding that a county standard requiring a showing that the proposed "use" will not force a significant change in farm or forest practices or significantly increase costs of farm and forest practices does not apply to a property line adjustment, where the county standard applies to "uses" listed in the county's EFU zone, and property line adjustments are not listed as a use. *Louks v. Jackson County*, 65 Or LUBA 58 (2012).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally. Where the county criteria that govern division of EFU-zoned land require that parcels be 160 acres or larger and require that divisions of EFU-zoned land comply with applicable comprehensive plan policies, and partition opponents argue that dividing an EFU-zoned parcel into parcels that are smaller than 160 acres violates those criteria and plan policies, the county's decision will be remanded where the county fails to address those arguments. *Friends of Umatilla County v. Umatilla County*, 55 Or LUBA 330 (2007).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally. Where the county criteria that govern division of EFU-zoned land require that parcels be 160 acres or larger, and the county grants a variance to allow an EFU-zoned parcel to be divided into parcels that are smaller than 160 acres, where LUBA finds the county's justification for the variance is inadequate, the partition approval must be remanded. *Friends of Umatilla County v. Umatilla County*, 55 Or LUBA 330 (2007).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally. ORS 215.263(7), which provides for the division of land resulting from lien foreclosure, does not authorize a county to "legalize" an existing but illegally created parcel that happens to be subject to foreclosure after its illegal creation. *Perkins v. Umatilla County*, 45 Or LUBA 445 (2003).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally. Even assuming that a parcel formed without required local government approval has not been "created" in any meaningful sense, the legislature did not intend ORS 215.263(7), which provides for division of land resulting from lien foreclosure, to authorize counties to effectively legalize such parcels for development. *Perkins v. Umatilla County*, 45 Or LUBA 445 (2003).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally. Where a local land division ordinance mandates that the size of proposed parcels be greater than or equal to the size of the typical commercial agricultural enterprise in the area, a local government misconstrues that ordinance by requiring only that the size of the proposed parcel be similar to the size of other parcels in the area. *Wood v. Crook County*, 36 Or LUBA 143 (1999).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally The only difference between ORS 215.284(2) and 215.284(3) is that ORS 215.284(2) permits a nonfarm dwelling on an existing

parcel, while ORS 215.284(3) permits a nonfarm dwelling on a newly created parcel. *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally Under OAR 660-05-005 to 660-06-020 and *Still v. Marion County*, 22 Or LUBA 331 (1991), there are three steps that must be followed to determine if a proposed partition of EFU land is appropriate. First, an area large enough to accurately represent the existing commercial agricultural enterprise must be identified. Second, the existing *commercial* agricultural enterprises in the area must be identified. Third, it must be determined that the proposed division will result in parcels of sufficient size to "maintain" or "continue" the identified existing commercial agricultural enterprise in the area. *Still v. Marion County*, 32 Or LUBA 40 (1996).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally The county erred by applying a local ordinance to determine, without further explanation, that the relevant area to be considered for purposes of OAR 660-05-015(6)(c) was limited to the zone in which the subject parcel is located. *Still v. Marion County*, 32 Or LUBA 40 (1996).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally In determining compliance with a local code standard requiring that partitions of EFU-zoned property result in parcels which are "as large as the typical commercial farm unit in the area," it is appropriate for the local government to examine only EFU-zoned parcels in determining the "typical commercial farm unit in the area." *Walker v. Clackamas County*, 29 Or LUBA 22 (1995).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally Read together, ORS 215.263(7) and 215.284(2)(c) prohibit the further division of an EFU-zoned parcel created before January 1, 1993, on which a nonfarm dwelling has already been approved. Therefore, a county decision approving division of such a parcel is erroneous as a matter of law and must be reversed. *Harrell v. Baker County*, 28 Or LUBA 260 (1994).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally ORS 215.263 authorizes counties to approve *partitions* creating new parcels for farm uses and nonfarm uses in EFU zones. However, ORS 215.263 does not authorize *subdivision* of land zoned for exclusive farm use. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally To the extent a "woodlot parcel" is something other than a farm parcel, the creation of a "woodlot parcel" in an exclusive farm use zone is not authorized by ORS 215.263, Goal 3 or the Goal 3 rule. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally The definition of "farm use" in ORS 215.203 is not an independent approval criterion for a lot line adjustment in an exclusive farm use zone. *Wissusik v. Yamhill County*, 27 Or LUBA 94 (1994).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally ORS 215.283(3)(d) must be independently applied to an application for division of EFU-zoned land and requires that the entire EFU-zoned parcel be found to be generally unsuitable for farm use, regardless of whether local

regulations impose a more relaxed standard on homestead lot divisions. *Geiselman v. Clackamas County*, 26 Or LUBA 260 (1993).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally LUBA will defer to a county's interpretation of its EFU zone provisions as not allowing approval of a nonfarm dwelling on a parcel that already has a dwelling, or approval of a partition to allow a nonfarm dwelling, if the parent parcel already has a dwelling. *Hahn v. Marion County*, 26 Or LUBA 18 (1993).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally A county may reasonably interpret the term "existing commercial farm enterprises" in a code provision establishing a minimum lot size standard for farm dwellings, as not including property that is not presently operated as part of a commercial farm operation. *Giesy v. Benton County*, 25 Or LUBA 493 (1993).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally Where the county code requires the "farm unit" on which a farm dwelling is proposed to be located to be consistent with the size of existing commercial farm enterprises in the area, and also recognizes that commercial farms may be composed of several separate management units, it is reasonable for the county to interpret "farm unit" to include all land that is part of a farm operation, including land in different locations. *Giesy v. Benton County*, 25 Or LUBA 493 (1993).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally Where a zoning district adopted to implement both Goal 3 and Goal 4 includes the generally unsuitable land standard that is required under statutory exclusive farm use zoning provisions, the generally unsuitable standard must be applied to the entire parent parcel and may not be limited in its application to a proposed nonforest parcel. *DLCD v. Curry County*, 24 Or LUBA 200 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally In applying a local code standard requiring that newly created nonfarm and nonforest parcels not materially alter the stability of the overall land use pattern of the area, a local government must define the relevant area and may not focus exclusively on a single rural residential area near the subject property and ignore the potential impacts on nearby forestlands. *DLCD v. Curry County*, 24 Or LUBA 200 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally Where a local code standard requires that creation of new nonfarm and nonforest parcels be consistent with comprehensive plan forest and agriculture policies, the local government's findings must demonstrate compliance with all such plan policies or explain why they do not apply. *DLCD v. Curry County*, 24 Or LUBA 200 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally ORS 215.263(4) specifically governs the creation of new lots or parcels in an EFU zone for nonfarm dwellings, including the creation of a lot or parcel for a preexisting nonfarm dwelling. *DLCD v. Columbia County*, 24 Or LUBA 32 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally ORS 215.236 must be complied with before a land division for a nonfarm dwelling in an EFU zone may be approved, regardless of whether the dwelling already exists. *DLCD v. Columbia County*, 24 Or LUBA 32 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally In assuring that partitions creating new farm parcels within exclusive farm use zones comply with the requirements of OAR 660-05-015 and 660-05-020 that the parcels be of sufficient size "to maintain and continue the existing commercial agricultural enterprise in the area," counties may perform the required analysis legislatively or on a case-by-case basis. *DLCD v. Yamhill County*, 23 Or LUBA 351 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally A study which divides a county into four large subareas, and describes the "sizes and other characteristics" of commercial agricultural enterprises in the relevant areas, provides adequate justification for the area selected, under OAR 660-05-015(6)(c), to determine the parcel size sufficient to "continue the existing commercial agricultural enterprise in the area." *DLCD v. Yamhill County*, 23 Or LUBA 351 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally Where a county identifies subareas of the county for purposes of identifying and analyzing the existing commercial agricultural enterprise within those subareas, the county may limit the analyses required by OAR 660-05-015 and 660-05-020 to the identified subareas. *DLCD v. Yamhill County*, 23 Or LUBA 351 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally A local government may not distinguish between commercial and noncommercial farms in an area, as required by OAR 660-05-015(6), based on gross farm income only. All of the factors specified in OAR 660-05-015(6)(b) must be considered. *DLCD v. Yamhill County*, 23 Or LUBA 351 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally ORS 215.263(2) establishes minimum standards for approving divisions of land in EFU zones. ORS 215.263(2) does not require findings that the existing parcel is in farm use. Rather, ORS 215.263(2) requires that proposals to divide EFU-zoned land for farm use must establish that the resultant parcels either (1) will be appropriate for the continuation of the existing commercial agricultural enterprises in the area, or (2) will be no less than the acknowledged minimum lot size for the area. *Fennell v. Douglas County*, 23 Or LUBA 178 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally Where a local government changes the zoning of agricultural land from one acknowledged EFU zone to another, Goal 3 requires that it demonstrate that the minimum lot size imposed by the new EFU zone is appropriate for the continuation of the existing commercial agricultural enterprise in the area. *Dobson v. Polk County*, 22 Or LUBA 701 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally ORS 215.243(2), relating to the preservation of agricultural land in large blocks, does not prohibit all divisions of agricultural land. *Dobson v. Polk County*, 22 Or LUBA 701 (1992).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally The legislative policy of ORS 215.243(2) to preserve agricultural land in large blocks is not correctly interpreted to preclude *any* division of an existing farm parcel. *Still v. Marion County*, 22 Or LUBA 331 (1991).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally The division of existing farm parcels into two or more smaller parcels is only appropriate where the resulting parcels are appropriate for the continuation of the existing commercial agricultural enterprise in the area. *Still v. Marion County*, 22 Or LUBA 331 (1991).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally OAR 660-05-015 and 660-05-020 establish three steps that must be followed to divide an EFU-zoned farm parcel. First, an area large enough to accurately represent the existing commercial agricultural enterprise must be identified. Second, the existing *commercial* agricultural enterprises in the area must be identified. Third, it must be determined that the proposed division will result in parcels of sufficient size to "maintain" or "continue" the identified existing commercial agricultural enterprise in the area. *Still v. Marion County*, 22 Or LUBA 331 (1991).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally Where an EFU-zoned area includes different commercial agricultural enterprises, with differing land area requirements, a county may not automatically approve divisions of farm parcels in that area into parcels the size of the smallest existing commercial agricultural enterprise. The county may, however, adopt findings explaining why, in the particular circumstances presented, such a proposed division will result in parcels of sufficient size to "maintain" and "continue" the existing commercial agricultural enterprise in the area. *Still v. Marion County*, 22 Or LUBA 331 (1991).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally An acknowledged zoning ordinance provision concerning division of EFU-zoned farm parcels providing that "evaluation shall include the subject property and commercial agricultural enterprises located in the same zone within one-half mile of the subject property" is properly interpreted as identifying the *minimum* area to be evaluated, and areas beyond a one-half-mile radius may have to be evaluated to establish the nature of the existing commercial agricultural enterprise in the area. *Still v. Marion County*, 22 Or LUBA 331 (1991).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally Goal 3 requires that in EFU zones the minimum lot size "shall be appropriate for the continuation of the existing commercial agricultural enterprise in the area." Where a local government changes the zoning of agricultural land from one acknowledged EFU zone to another, it must demonstrate that the minimum lot size imposed by the new EFU zone is appropriate for the continuation of the existing commercial agricultural enterprise in the area. *DLCD v. Polk County*, 21 Or LUBA 463 (1991).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally In reviewing a combined request for approval of a nonfarm dwelling and a partition to create a nonfarm parcel, a county must first apply applicable approval standards, including the "general unsuitability" standard, to the request for approval of the nonfarm dwelling. Only after the nonfarm dwelling is approved may the county consider the request to create a new nonfarm parcel for the dwelling. *Smith v. Clackamas County*, 19 Or LUBA 171 (1990).

3.4.1 EFU Statute/Ordinances – Land Divisions – Generally The "general unsuitability" standard applies to the entire parent parcel, not just to the portion of the parent parcel or the new

nonfarm parcel on which a nonfarm dwelling is to be located. *Smith v. Clackamas County*, 19 Or LUBA 171 (1990).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. Although the county's approval of the boundary line adjustment for the siting of a nonfarm dwelling could effectively undercut the factual predicate for compliance with a statutory-based standard pursuant to ORS 215.263(4) designed to minimize loss of productive resource lands in exclusive farm use zones to non-resource uses, where petitioner has not cited anything in the county ordinance that constitutes an approval standard for a post-partition boundary line adjustment, even if the adjustment undercuts a factual predicate for the partition approval, this argument provides no basis for reversal or remand. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. Where the county found a boundary line adjustment application is in compliance with a county ordinance that requires that the "resulting parcel sizes do not change the existing land use" because before and after the boundary line adjustment there was one parcel conforming and one parcel non-conforming in size, LUBA will remand the decision. On remand, the county shall consider petitioners' argument and adopt any necessary findings regarding petitioners' argument that the ordinance could be interpreted to require the county to consider whether the "existing land use pattern" is changed when the subject parcel—that was previously deemed "generally unsuitable" for farm use due to its size and soil composition—qualifies for a nonfarm dwelling as a result of the boundary line adjustment because the parcel was expanded to include agricultural soils in a manner that possibly renders the resulting parcel suitable for farm use. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. Where four pre-1993 parcels are combined through property line adjustments to meet a local minimum parcel size standard, under OAR 660-033-0020(4) the date the property line adjustments created the new combined parcel is the new "date of creation." Where that new date of creation post-dates 1993, a county decision approving a nonfarm dwelling on the combined parcel does not comply with the ORS 215.284(2)(c) requirement that a nonfarm dwelling must "be sited on a lot or parcel created before January 1, 1993." *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 186 (2017).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. ORS 215.780(1)(a) expressly authorizes counties to adopt an 80-acre minimum parcel size in the EFU zone, and ORS 215.263(2)(b) expressly authorizes counties to approve partitions of EFU-zoned land if the resulting parcels "are not smaller than the minimum size established under ORS 215.780." Additional justification for adopting the statutorily authorized 80-acre minimum parcel size is not required by Goal 3, ORS 215.243 and 215.700. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. It is not error for a county to amend its code to recognize that under ORS 215.780(2)(a), a minimum parcel size of less than 80 acres may be authorized by LCDC in the future pursuant to OAR 660-033-0100(2) through (9), if the county is able to justify such smaller minimum parcel sizes in the future. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. ORS 215.263 expressly authorizes a number of different kinds of land divisions of EFU-zoned land for development of

non-farm uses on parcels that are smaller than the minimum parcel size for land divisions for new farm parcels. A county may include such authorization in its EFU zone and Goal 3, ORS 215.243 and 215.700 do not require that a county adopt findings to justify its decision to include such statutory authorizations. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. A county is not obligated to explain its choice to adopt current statutory standards for land divisions in its EFU zone in place of the previously adopted county standards for such land divisions. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. Where the county criteria that govern division of EFU-zoned land require that parcels be 160 acres or larger and require that divisions of EFU-zoned land comply with applicable comprehensive plan policies, and partition opponents argue that dividing an EFU-zoned parcel into parcels that are smaller than 160 acres violates those criteria and plan policies, the county's decision will be remanded where the county fails to address those arguments. *Friends of Umatilla County v. Umatilla County*, 55 Or LUBA 330 (2007).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. Where the county criteria that govern division of EFU-zoned land require that parcels be 160 acres or larger, and the county grants a variance to allow an EFU-zoned parcel to be divided into parcels that are smaller than 160 acres, where LUBA finds the county's justification for the variance is inadequate, the partition approval must be remanded. *Friends of Umatilla County v. Umatilla County*, 55 Or LUBA 330 (2007).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. ORS 215.780(2) authorizes counties to seek Land Conservation and Development Commission approval to impose a smaller minimum lot and parcel size in their exclusive farm use zone than would otherwise be required by ORS 215.780(1). *Thompson v. Umatilla County*, 54 Or LUBA 531 (2007).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. No statute or administrative rule sets out procedures for counties to seek approval from the Land Conservation and Development Commission to impose smaller minimum lot and parcel sizes than would otherwise be required by ORS 215.780(1). *Thompson v. Umatilla County*, 54 Or LUBA 531 (2007).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. As construed in *Dorvinen v. Crook County*, 153 Or App 391, 957 P2d 180 (1998), ORS 215.780(1) applies the statutory minimum lot or parcel size to all parcels resulting from a partition for nonfarm dwellings, including the parcel on which the nonfarm dwelling will be sited. *Friends of Douglas County v. Douglas County*, 39 Or LUBA 156 (2000).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. LUBA will remand rather than reverse a decision approving partitions in conjunction with a nonfarm dwelling, notwithstanding that the resulting partitions violate the minimum parcel size at ORS 215.780(1), where the decision expressly preserves an issue regarding whether the county's 20-acre minimum

parcel size was adopted under one of the exceptions to ORS 215.780(1), and thus LUBA cannot determine whether the approval is prohibited as a matter of law. *Alliance for Responsible Land Use v. Deschutes Co.*, 37 Or LUBA 215 (1999).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. Under ORS 215.284(3) a partition of EFU-zoned land must leave a remainder parcel that meets the applicable minimum parcel size. *Lyle v. Wheeler County*, 33 Or LUBA 746 (1997).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. A new nonfarm parcel is not subject to minimum parcel size under ORS 215.780 where the new nonfarm parcel is created from a parent parcel under ORS 215.263(4) and 215.283(3). *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. Taken together, ORS 215.263(2) and legislative history indicate that the legislature intended ORS 215.284(3) to at least mean that where a remaining parcel suitable for farm use is created from a partition under ORS 215.284(3), the remaining farm parcel must meet the minimum parcel size. *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. Consistent with the statutory scheme and policy of ORS 215.243, ORS 215.284(3) requires that a partition must leave a remainder parcel that meets the minimum parcel size, whether or not the remainder parcel is suitable for farm use. *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. Where the county zoning ordinance establishes an array of minimum lot or parcel sizes on EFU land, depending on the proposed commodity or on circumstances that can only be ascertained through a case-by-case review, the ordinance does not satisfy ORS 215.780(3); and the county must either adopt the minimum lot size stated in ORS 215.780(1)(a) or demonstrate satisfaction of the criteria stated in ORS 215.780(2). *DLCD v. Polk County*, 31 Or LUBA 69 (1996).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. Unless approval is given by LCDC under ORS 215.780(2) for a smaller minimum lot size or sizes, ORS 215.780(1) requires a county to apply minimum lot sizes of 80 acres (designated forestland and non-range farmland) or 160 acres (designated rangeland) in its farm and forest zones. *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. Where a county's EFU zone minimum lot size standard was subject to periodic review by LCDC under the old periodic review provisions of ORS 197.640 to 197.649 (1989), *not* under the new periodic review provisions of ORS 197.628 to 197.636, the county may not apply a minimum lot size less than that required by ORS 215.780(1) to EFU-zoned land without LCDC approval pursuant to ORS 215.780(2). *DLCD v. Wallowa County*, 28 Or LUBA 452 (1994).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. ORS 215.780, Goal 3 and OAR 660-33-100 require a county to adopt one or more minimum parcel sizes of specific

acreages for exclusive farm use zone(s), and do not allow determinations of minimum parcel sizes in EFU zones through the case-by-case application of performance standards. *DLCD v. Wallowa County*, 28 Or LUBA 452 (1994).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. The 1993 legislature adopted specific minimum lot and parcel sizes. For forestland and farmland that is not designated rangeland, the minimum lot or parcel size is 80 acres. ORS 215.780(1)(a) and (c). For land zoned for exclusive farm use and designated as rangeland, the minimum lot or parcel size is 160 acres. ORS 215.780(1)(b). *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

3.4.2 EFU Statute/Ordinances – Land Divisions – Minimum Lot Sizes. The ORS 215.780(2) provisions that allow counties to adopt a minimum lot size smaller than would otherwise be required for farmland and forestland by ORS 215.780(1), require that a county obtain LCDC approval for such smaller lot sizes *before* adopting such smaller lot sizes. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

3.5 EFU Statute/Ordinances – Statutory Policy. While a local government's authority to regulate land use and development is generally broad under Oregon law, a local government's authority to regulate land use on exclusive farm use (EFU)-zoned land is governed by state law. Land that is planned and zoned for exclusive farm use must be used exclusively for defined farm uses or limited listed exceptions provided by state law. Production of marijuana is an outright permitted farm use on land zoned EFU. While state law controls permitted uses on farm land and the regulation of marijuana production, local governments may adopt reasonable "time, place, and manner" regulations for marijuana production. *MJAI Oregon 5, LLC v. Linn County*, 78 Or LUBA 366 (2018).

3.5 EFU Statute/Ordinances – Statutory Policy. A county's decision is "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances," pursuant to ORS 197.835(10)(a)(A), where petitioner's application for marijuana production meets a county's clear and objective standards for marijuana production on EFU-zoned land, no evidence was submitted that contradicted petitioner's assertion that it could and would meet the county's marijuana production standards, and the county relied upon factors and considerations in denying petitioner's application that are not contained in the applicable approval criteria. Accordingly, the proper disposition of the county's denial is reversal with an order instructing the county to grant approval of the application. *MJAI Oregon 5, LLC v. Linn County*, 78 Or LUBA 366 (2018).

3.5 EFU Statute/Ordinances – Statutory Policy. Interpreting ORS 215.283(2)(L), which authorizes a temporary hardship dwelling "in conjunction with" an existing dwelling, to require that the temporary hardship dwelling be sited in close proximity to the existing dwelling, so as to minimize the need for new supporting residential infrastructure, is consistent with the overriding legislative policy of preventing "agricultural land from being diverted to non-agricultural use." *Holmberg v. Deschutes County*, 77 Or LUBA 109 (2018).

3.5 EFU Statute/Ordinances – Statutory Policy. In adopting ORS 215.275, the legislature struck a particular balance between the siting of utility facilities in EFU zones and the statutory policy to preserve farmland for farm uses. Once that balance is struck, however, the county's task is to apply the terms of the statute. Nothing in ORS 215.275 requires direct consideration of agricultural land preservation policies, external to the statute, in applying its terms, or "balancing" the technical difficulty of alternatives against farmland preservation. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

3.5 EFU Statute/Ordinances – Statutory Policy. The legislative intent of ORS 215.705 lot-of-record provisions is to allow property owners who acquired property prior to 1985 to subsequently transfer the lot to designated family members or entities without losing the right to build a dwelling on that property. *DLCD v. Yamhill County*, 33 Or LUBA 362 (1997).

3.5 EFU Statute/Ordinances – Statutory Policy. Even if a proposed use does not significantly interfere with accepted farming practices on adjacent agricultural lands or materially alter the stability of the overall land use pattern of the area, it may nevertheless be incompatible with farm uses and inconsistent with the intent and purpose of ORS 215.243. *DLCD v. Crook County*, 26 Or LUBA 478 (1994).

3.5 EFU Statute/Ordinances – Statutory Policy. ORS 215.243(2), relating to the preservation of agricultural land in large blocks, does not prohibit all divisions of agricultural land. *Dobson v. Polk County*, 22 Or LUBA 701 (1992).

3.5 EFU Statute/Ordinances – Statutory Policy. The legislative policy of ORS 215.243(2) to preserve agricultural land in large blocks is not correctly interpreted to preclude *any* division of an existing farm parcel. *Still v. Marion County*, 22 Or LUBA 331 (1991).

3.5 EFU Statute/Ordinances – Statutory Policy. County interpretation of its plan agricultural land policy to allow it to balance the applicant's need for additional acreage for a golf course, against the county policy favoring retention of EFU-zoned land in large blocks for agricultural use, is a correct interpretation of the county policy. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A marginal lands county is not required to include in its code a requirement to consider the cumulative impacts from existing or potential lot-of-record dwellings in approving dwellings under OAR 660-033-0130(4)(a)(D)(ii) and (iii). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A lot of record dwelling approval under ORS 215.705(1) does not have the automatic effect of consolidating parcels within the tract in which the dwelling is approved; such consolidation must occur via a formal process that has the legal effect of vacating the interior property lines. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Some of the ORS 215.705(1) standards to approve a lot of record dwelling, such as the requirement that the parcel be "lawfully created," that the dwelling comply with applicable comprehensive plan provisions, and that the dwelling be consistent with big-game habitat limitations on residential density, require the exercise of policy or legal judgment, and therefore a decision approving or denying a lot of record dwelling under such standards is a land use decision as defined at ORS 197.015(10)(a), and does not fall within the exception for ministerial decisions at ORS 197.015(10)(b)(A). *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Approval of a lot of record dwelling under the standards at ORS 215.705(1) constitutes the "discretionary approval of a proposed development of land" and is thus a "permit" decision subject to ORS 215.416, a conclusion made even clearer under ORS 215.417, which specifically describes dwellings provided under a number of statutes, including ORS 215.705(1), as permits approved under ORS 215.416. *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. ORS 215.705(7) provides that when a local government approves an application for a dwelling under ORS 215.705, including a lot of record dwelling by a qualifying owner under ORS 215.705(1)(a), the "application may be transferred" to any other person after the effective date of the land use decision." The legislature was presumably aware that such decisions could be appealed and potentially remanded following a transfer to a person who does not qualify for a lot of record dwelling. In such circumstances, the subsequent purchaser can pursue the application on remand as if the property were still owned by the qualifying owner for purposes of ORS 215.705(1)(a). *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A hearings officer correctly determines that adjoining parcels do not constitute a "tract" where the parcels are not in the same ownership, and the definition of "owner" found in ORS 215.705 is inapposite to that determination. *Craven v. Jackson County*, 135 Or App 250, 253-4, 898 P2d 809 (1995). *Lenox v. Jackson County*, 55 Or LUBA 538 (2008).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Under local legislation that was adopted to implement lot of record provisions at ORS 215.705, once a dwelling is authorized on one of two parcels that makes up a tract in single ownership, a second dwelling may not be

approved on the remaining parcel in the tract. *Randall v. Klamath County*, 48 Or LUBA 321 (2004).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. For land to constitute "high-value farmland" under OAR 660-033-0020(8)(d), the land must be (1) west of the Coast Range summit, (2) used in conjunction with a dairy operation on January 1, 1993, and (3) part of a "tract," one or more contiguous parcels in the same ownership, composed predominantly of listed soils. Separately owned parcels are not part of the same "tract" for purposes of OAR 660-033-0020(8)(d), even if those parcels were used together as part of a dairy operation on January 1, 1993. *Tallman v. Clatsop County*, 47 Or LUBA 240 (2004).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Any minimum gross farm income level that a county may establish in approving a lot of record dwelling on EFU-zoned high-value farmland must be consistent with the income generated by the county's noncommercial farms, which are protected under Goal 3 (Agricultural Lands) and the EFU zoning statutes. *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A county errs in relying on OAR 660-033-0135, which establishes standards to ensure that farms are large enough and generate sufficient income to warrant an assumption that a dwelling on the farm is properly viewed as "customarily provided in conjunction with farm use" within the meaning of ORS 215.283(1)(f), to also set a gross annual income threshold for determining whether farm use on high-value farmland is "impracticable" for purposes of siting a lot of record dwelling under ORS 215.705(2)(a)(C)(i). *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. The minimum gross income levels the legislature established at ORS 308A.071(2)(a) for non-EFU-zoned parcels to qualify for special assessment are the best available indication of the level of gross income that the legislature believes demonstrates practicable farm use. *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. In applying ORS 215.705(2)(a)(C)(i) to determine whether farm use of an EFU-zoned parcel with high-value soils is "impracticable," evidence that the property and nearby properties have generated limited farm income in the past is relevant evidence, but it is not determinative. *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Under ORS 215.705(2)(a)(C)(i), a property's impracticability for farm use must be "due to extraordinary circumstances inherent in the land or its physical setting that do not apply generally to other land in the vicinity." A decision that does not demonstrate that cited factors are not shared by neighboring properties and does not explain why the cited factors make farm use impracticable must be remanded. *Friends of Linn County v. Linn County*, 39 Or LUBA 627 (2001).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Seven lot of record dwellings on lots that range in size from as small as two acres to as large as eight acres are properly viewed as rural land uses. *Friends of Yamhill County v. Yamhill County*, 39 Or LUBA 478 (2001).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Findings that rely on factors such as soil acidity, poor drainage, traffic conflicts, and the availability of irrigation that are conditions common to the area are inadequate to explain why farming cannot practicably be managed on a parcel due to "extraordinary circumstances" that do not generally apply to other lands in the vicinity, as required by ORS 215.705(2). *Friends of Linn County v. Linn County*, 37 Or LUBA 844 (2000).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A county's findings of compliance with the stability standard are inadequate, where the county fails to explain or justify a study area that places the subject property at the margin of the identified study area, and excludes from the study large EFU-zoned parcels adjacent to the subject property. *Friends of Linn County v. Linn County*, 37 Or LUBA 844 (2000).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A county's findings under the stability standard are inadequate, where the county fails to identify any uses on most of the EFU-zoned parcels within the study area, but merely assumes that the dominant land use in the area is residential because of the small size of most parcels and the fact that most dwellings in the area predated zoning restrictions. *Friends of Linn County v. Linn County*, 37 Or LUBA 844 (2000).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A county's finding that a proposed lot of record dwelling on high-value soils will not materially alter the stability of the overall land use pattern is inadequate, where the county considers only the stability of the *nonfarm* land uses in the area, and fails to consider whether the proposed dwelling will encourage additional nonfarm development in a manner that destabilizes remaining farm uses. *Friends of Linn County v. Linn County*, 37 Or LUBA 844 (2000).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. LCDC has authority to adopt administrative rules that limit types of nonfarm uses otherwise allowed by statute. Therefore, OAR 660-033-0020(4), which establishes November 4, 1993, as the date a county must use for determining whether a dwelling exists on a tract for purposes of lot-of-record dwelling, is valid, notwithstanding that it prohibits some lot-of-record dwellings otherwise allowed by ORS 215.710. *Bruggere v. Clackamas County*, 37 Or LUBA 571 (2000).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Two separate parcels do not form a "tract," as that term is defined by ORS 215.010(2), where a husband and a wife own one parcel jointly and the second parcel is owned by the husband only. *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. In addressing a code criterion requiring a finding that a parcel "cannot practicably be managed for farm use," a hearings officer's occasional use of the word "unsuitable" does not mean the hearings officer applied the wrong standard. *Jorgensen v. Clackamas County*, 34 Or LUBA 710 (1998).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A parcel that qualifies as "high-value farmland" under the criteria established by statute is not disqualified as "high value farmland" because it is subject to "frost threat." *DLCD v. Umatilla County*, 34 Or LUBA 703 (1998).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Findings that a parcel "cannot practically be managed for farm use due to extraordinary circumstances" under ORS 215.705(a)(C)(i) are inadequate where the parcel has been used for an apple orchard for the past 18 years and the findings simply show that allowing a dwelling on the property would facilitate on-site management of the orchard. *DLCD v. Umatilla County*, 34 Or LUBA 703 (1998).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A county's findings addressing the requirement of ORS 215.705(a)(C)(iii) that a dwelling not "materially alter the stability of the overall land use pattern of the area" must limit the analysis to EFU-zoned lands. Where LUBA cannot determine whether the analysis was so limited, the decision will be remanded. *DLCD v. Umatilla County*, 34 Or LUBA 703 (1998).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A parcel that was illegally created in 1974 and then legalized by an "after-the-fact" decision in 1989 is not "lawfully created" under ORS 215.705(1), which requires that the parcel be "lawfully created * * * [p]rior to January 1, 1985." *Skrepetos v. Douglas County*, 33 Or LUBA 502 (1997).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. The legislative intent of ORS 215.705 lot-of-record provisions is to allow property owners who acquired property prior to 1985 to subsequently transfer the lot to designated family members or entities without losing the right to build a dwelling on that property. *DLCD v. Yamhill County*, 33 Or LUBA 362 (1997).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. An *inter vivos* transfer of a parcel from the present owner who held the property prior to January 1, 1985, to a family member as defined in ORS 215.705(6) will preserve the expectation of the right to site a lot of record dwelling on the parcel as provided under ORS 215.705(1)(a). *DLCD v. Yamhill County*, 33 Or LUBA 362 (1997).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. When a unit of land is divided between two zones, the local government must apply the lot-of-record standards appropriate to the predominant use of that unit. *Phillips v. Yamhill County*, 32 Or LUBA 308 (1997).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. The requirement stated in ORS 215.705(1)(b) that the tract on which a proposed lot-of-record dwelling is to be sited not include a dwelling, and the consolidation requirement in ORS 215.705(1)(g) operate to prohibit approval of a lot-of-record dwelling unless (1) the tract of which the lot is a part contains no dwellings; and (2) all lots within the tract are consolidated at the time of approval. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. ORS 215.705 precisely states comprehensive criteria that govern when a lot-of-record dwelling may be allowed. Under ORS

183.400 and ORS 215.304(3), OAR 660-33-020(4) cannot be interpreted to prohibit what the statute otherwise allows. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Because ORS 215.705 mentions only the date of creation or existence of a *lot or parcel*, the reconfiguration of a *tract* containing the lot or parcel has no significance in determining when, for purposes of qualifying for a lot-of-record dwelling, the lot or parcel was created. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. ORS 215.705 cannot be interpreted or supplemented by LCDC rule to provide that the reconfiguration of a tract through the sale of one or more lots extinguishes the right to build a dwelling on at least one of the lots of record within the original tract. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A county that wishes to limit lot-of-record dwellings to protect agricultural lands cannot rely on policies and regulations implementing ORS 215.283(3)(d), which protects agricultural land, but must legislatively adopt new policies and regulations pursuant to ORS 215.705(5). However, policies and regulations with an apparent purpose other than to protect agricultural land are not superseded by ORS 215.705. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A lot-of-record dwelling is not precluded by ORS 215.705 where an applicant voluntarily relinquishes irrigation rights to one acre of his property in order to remove it from the definition of "high-value farmland" under ORS 215.710(1). *Younger v. Jackson County*, 32 Or LUBA 177 (1996).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Lot-of-record provisions should be interpreted as limited in their application to property owners who had a reasonable expectation in 1985 of a right to build a home. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. The term "present owner," as it is used in ORS 215.705(1)(a), refers to a land sale contract vendee, not a land sale contract vendor. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. The word "owner," as it is used in ORS 215.705, is not defined, and when applied to land generally, has no fixed and inflexible meaning. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A county may rely on the current ownership of the subject and contiguous parcels in determining whether a proposed "lot of record" dwelling is located on a "tract" that does not include a dwelling, as required by ORS 215.705(1)(b). *Craven v. Jackson County*, 29 Or LUBA 125 (1995).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. The expansive definition of "owner" in ORS 215.705(6) explicitly applies only to ORS 215.705(1)(a), which refers to when the subject lot or parcel "was acquired by the present owner." The ORS 215.705(6) definition of "owner" does

not apply to the term "tract," as used in ORS 215.705(1)(b), or to the term "ownership," as used in the ORS 215.010(2) definition of "tract." *Craven v. Jackson County*, 29 Or LUBA 125 (1995).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Under ORS 197.746(3) and appellate court decisions, the provisions of ORS 215.705 are directly applicable to a county decision to approve a "lot of record" dwelling in an exclusive farm use zone, and the county cannot apply comprehensive plan or code criteria that are inconsistent with, or less restrictive than, the applicable statutory standards. *Blondeau v. Clackamas County*, 29 Or LUBA 115 (1995).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. The "lot of record" dwelling provisions of ORS 215.705 provide an alternative to the nonfarm dwelling provisions of ORS 215.284, which do not allow dwellings on lots or parcels that are not composed of predominantly Class IV to VIII soils. *Blondeau v. Clackamas County*, 29 Or LUBA 115 (1995).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. ORS 215.705(1)(c) does not allow a county to deny a "lot of record" dwelling because it fails to comply with code provisions previously adopted to implement ORS 215.283(3) (1991) or with comprehensive plan provisions generally requiring protection of agricultural land. *Blondeau v. Clackamas County*, 29 Or LUBA 115 (1995).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. A code provision allowing establishment of a dwelling on certain "lots of record," if the "lot or parcel" does not already have a dwelling, is impermissibly less strict than ORS 215.705(1)(b), which requires that the "tract" not have a dwelling. ORS 215.010(2) defines "tract" as "one or more contiguous lots or parcels under the same ownership." *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. With regard to siting a lot of record dwelling on high-value farmland, a county does not have authority to require that an Oregon Department of Agriculture hearings officer make determinations other than those specified in ORS 215.705(2)(c). *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. Although a code definition of "high-value farmland," unlike the definition in OAR 660-33-020(8), is prefaced by the phrase "for the purpose of locating a limited lot of record dwelling on farmland," that the code definition is specifically incorporated into the approval standards for other types of dwellings on high-value farmland, as required by LCDC rule, is sufficient to establish that the definition must be applied in these other circumstances as well. *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. ORS 215.705(1)(a) does not allow lot-of-record dwellings on EFU-zoned lots or parcels that were created after January 1, 1985, even if the parent lot or parcel was acquired prior to January 1, 1985. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

3.6 EFU Statute/Ordinances – Lot of Record Dwellings. ORS 215.705(1)(a) does not allow lot-of-record dwellings on EFU-zoned lots or parcels that were illegally created before January 1, 1985, even if action was taken after January 1, 1985 to legalize the illegally created lots or parcels. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Under ORS 197.175(2)(d), after acknowledgement, a local government reviews an application for planned unit development approval to determine whether the application complies with its land use regulations and comprehensive plan, and may not review the application for compliance with the statewide planning goals. *Talbott v. City of Happy Valley*, 74 Or LUBA 143 (2016).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where a local government adopts an ordinance that repeals and readopts, verbatim, 34 previously adopted and acknowledged land use ordinances, solely to correct a problem with the publication notice for the readopted ordinances, the repeal and readoption of the 34 ordinances does not accomplish any "change" or amendment to the acknowledged ordinances that would require that the re-adoption be processed as a post-acknowledgment plan amendment under ORS 197.610 *et seq.* Repeal and verbatim readoption of a previously acknowledged ordinance does not change the acknowledged status of the ordinance, such that pursuant to ORS 197.175(2)(e) the statewide planning goals then apply directly to decisions made under the readopted ordinance. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. The Oregon Supreme Court decision in *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447 (1986), did not obligate local governments to apply Goal 14 as interpreted directly to land use decisions made under acknowledged land use regulations, although *amendments* to those regulations must be consistent with Goal 14 as interpreted by *Curry County*. Where a county's regulations governing floating homes were adopted and acknowledged to comply with Goal 14 in 1982, and have not been amended since, those regulations remain acknowledged to comply with Goal 14, and thus Goal 14 would not apply directly to a decision to approve floating homes under that acknowledged ordinance. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where a county fails to implement a new administrative rule, pursuant to ORS 197.646(3) the rule applies directly to county land use decisions until the county amends its code to implement the rule. However, once the county implements the Goal 4 rule at OAR 660-006-0025 by adopting the substance of the rule into its land use code, ORS 197.646(3) does not operate to apply the rule directly to nonforest uses the county approves in a forest zone. *White v. Lane County*, 68 Or LUBA 423 (2013).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. To preserve the issue of whether the statewide planning goals apply to a rezoning decision and thus whether notice of hearing must be provided to DLCD under ORS 197.610, the issue must be raised during the proceedings below to avoid waiver under ORS 197.763(1) and, additionally, specified in the local notice of appeal to avoid waiver under the exhaustion/waiver principle in *Miles v. City of Florence*, 190 Or App 500 (2003). *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. ORS 197.610(2) provides that a local government need not provide notice of hearing to DLCD if the local government concludes that no statewide planning goals apply. However, the failure to adopt in the final decision *express* findings that no goals apply is not a basis for remand, where no statute requires express findings

that the goals do not apply and the petitioner fails to demonstrate that any goals in fact do apply. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. The statewide planning goals normally do not apply directly as approval criteria for permit applications governed by acknowledged comprehensive plans and land use regulations. *Gottman v. Clackamas County,* 64 Or LUBA 358 (2011).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. An argument that a decision approving a boundary line adjustment under an acknowledged comprehensive plan and land use regulations violates Goal 4 provides no basis for reversal, where petitioner offers no legal theory for why Goal 4 applies to such a decision. Generally, unless a land use decision adopts new or amended comprehensive plan or land use regulation provisions, a post-acknowledgement land use decision is governed by the acknowledged comprehensive plan and land use regulations and need not apply the statewide planning goals directly. *Lulay v. Linn County*, 60 Or LUBA 432 (2010).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Under OAR 660-031-0040 when renewing a state agency permit the agency is not required to make a determination of compliance with the statewide planning goals, unless the renewal involves a substantial modification or intensification of the permitted activity. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Under OAR 660-018-0050(2), the Department of Environmental Quality's state agency coordination rule, a land use compatibility statement (LUCS) is the primary vehicle to ensure that agency permits are consistent with the statewide planning goals. In circumstances where the state agency coordination rules exempt permit renewals from the requirement to obtain a LUCS, the rules also exempt the agency from the requirement to make a determination that the renewed permit complies with the applicable goals. *Tualatin Riverkeepers v. ODEQ,* 55 Or LUBA 569 (2008).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. In renewing a discharge permit under the Department of Environmental Quality's state agency coordination rules, nothing in those rules requires the agency to determine that the renewed permit complies with the statewide planning goals in circumstances where it is unclear that such determinations were made regarding the original permit. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. A state agency permit renewal decision that concludes, based on substantial evidence, that the renewed permit does not involve a substantial modification to or intensification of the permitted activity, and thus no land use compatibility statement is required from the affected local government, is not a land use decision subject to LUBA's jurisdiction under ORS 197.015(11)(a)(B), because it is not an agency decision with respect to which the agency is required to apply the goals. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. OAR 660-014-0060 requires that local governments apply acknowledged comprehensive plans and ordinances to annexation decisions in lieu of the statewide planning goals, unless the plan and ordinance do not "control the

annexation." A comprehensive plan policy need not be a mandatory approval criterion to "control the annexation" for purposes of OAR 660-014-0060; it is sufficient that the policy provides relevant guidance with respect to annexations. *Costco Wholesale Corporation v. City of Beaverton*, 50 Or LUBA 476 (2005).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Under OAR 660-014-0060, which requires that local governments apply acknowledged comprehensive plans and ordinances to annexation decisions in lieu of the statewide planning goals, unless the plan and ordinance do not "control the annexation," whether the plan and ordinances control the annexation depends on whether the plan and ordinances include substantive standards guiding a city's determination whether or not to annex land, not whether the plan and ordinances include procedures specific to annexations. *Patterson v. City of Independence*, 49 Or LUBA 589 (2005).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where a county approves formation of a special district and the county's comprehensive plan is acknowledged, the statewide planning goals do not apply, notwithstanding language in ORS 199.462(1) governing formation of special districts that requires consideration of the statewide planning goals. *Kneeland v. Douglas County*, 48 Or LUBA 347 (2005).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. As a general principle, goal compliance issues raised by a post-acknowledgment plan amendment must be addressed and resolved at the time the plan amendment is adopted. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 160 (2004).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. At least where the record includes sufficient information regarding proposed or contemplated uses to determine whether a post-acknowledgment plan amendment is consistent with applicable goals, the local government must address and resolve whether the amendment is consistent with those goals at the time the amendment is adopted, and cannot defer that consideration to a proceeding that is not a post-acknowledgment plan amendment proceeding. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 160 (2004).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Annexation decisions are governed by comprehensive plan annexation criteria or, if no such comprehensive plan criteria have been adopted, by the statewide planning goals. Where a city annexation decision is adopted without applying either its comprehensive plan or the statewide planning goals, the decision must be remanded. *Morsman v. City of Madras*, 45 Or LUBA 16 (2003).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. An application to amend the county comprehensive plan list of non-significant aggregate sites to include a proposed new mining site is subject to review for compliance with any potentially applicable statewide planning goals. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Absent a showing that amendments regulating natural resources not on the city's acknowledged Goal 5 inventory are intended to create or amend or have the effect of creating or amending a Goal inventory, such amendments need not

comply with Goal 5 or the Goal 5 rule. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. A UGB amendment adopted pursuant to acknowledged local code provisions that implement Goal 14 is nonetheless subject to direct review for compliance with Goal 14 unless such review would necessarily invalidate some provision of the acknowledged code. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. A county urbanization policy that was adopted to implement Goal 14 must be interpreted consistently with Goal 14's prohibition against approval of urban uses on rural land. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. In approving applications for permits for uses that are specifically allowed in rural EFU zones by ORS 215.213 and 215.283, counties are not required to apply the case-by-case urban/rural analysis that is required under Goal 14 and *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986), on non-EFU-zoned rural lands. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. That a challenged plan amendment is consistent with other provisions of an acknowledged comprehensive plan may have some bearing on whether the plan, as amended, continues to comply with all applicable statewide planning goals; however, such consistency does not obviate goal compliance review. *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. A comprehensive plan amendment that increases the required right-of-way for major arterials from 80 feet to 100 feet may reduce the supply of buildable land and commercial sites and thus requires findings that address Statewide Planning Goals 9 and 10. *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. OAR 660-023-0180, which governs comprehensive plan amendments for mineral and aggregate resources, establishes the procedures required to comply with Goal 5 but does not obviate the requirement to address other statewide planning goals. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where a county's comprehensive plan contains or is required to contain provisions that by their terms apply to a decision vacating a county road within city limits, the county must apply those provisions. If any such provisions apply, the county's road vacation decision is a land use decision subject to LUBA's jurisdiction. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where LCDC requires a county to adopt comprehensive plan amendments implementing a statewide planning goal by a certain date, and the county fails to implement the goal as of that date, the goal becomes directly applicable to

county decisions pursuant to ORS 197.646, even if the goal did not become "effective" as to that county when LCDC adopted the goal. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where a city approves a development plan for a university district as part of a quasi-judicial proceeding, but does not incorporate it into the city's comprehensive plan or land use regulations, the development plan is not a comprehensive plan or land use regulation, and thus amendments to that plan are not subject to review for compliance with statewide planning goals or the Transportation Planning Rule. *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Petitioners' argument that a proposed golf course expansion violates Goal 14 because it constitutes an expansion of an urban use onto rural EFU-zoned land provides no basis for reversal or remand, because Goal 14 does not apply to a permit to expand a use allowed in an EFU zone. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. LUBA will reject an assignment of error alleging that a post-acknowledgment plan amendment violates Goal 5, where petitioner does not demonstrate that the decision affects a Goal 5 resource in one of the ways specified in OAR 660-023-0250(3). *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where petitioner fails to assign error to detailed findings explaining why certain acknowledged comprehensive plan provisions constitute "specific policies" that, under ORS 197.835(7)(b), make it unnecessary for the city to demonstrate compliance with statewide planning goals when amending city land use regulations to implement those policies, LUBA will reject an assignment of error alleging the city erred by failing to demonstrate that the new and amended land use regulations comply with the statewide planning goals. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. A land development ordinance amendment adopting a half-acre minimum lot size for a flood hazard zone is not reviewable for compliance with Goal 5 where the acknowledged comprehensive plan calls for a half-acre minimum in the flood hazard zone. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. ORS 197.835 does not exempt amendments to land use regulations from compliance with applicable administrative rules that implement statutory provisions. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Goal 11 prohibits relying on "establishment or extension of a water system" as a basis for allowing higher residential density outside UGBs. Where a local government approves a rural subdivision with a higher density based

on provision of water service, it must explain why the apparently applicable Goal 11 prohibition does not apply. *DeShazer v. Columbia County*, 34 Or LUBA 416 (1998).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. A legislative comprehensive plan amendment must comply with the statewide planning goals, and that requirement is not met simply because subsequent development applications would be reviewed pursuant to acknowledged criteria. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. An amendment to an acknowledged comprehensive plan must be reviewed for compliance with the statewide planning goals, notwithstanding that the acknowledged plan has an acknowledged process for amending the plan, where the amendment can be reviewed for compliance with the statewide planning goals without necessarily challenging the acknowledged process itself. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where a local government's amendment of its comprehensive plan potentially affects the plan's compliance with a statewide planning goal, the local government is required to find and explain why (1) the proposed action does not implicate the goal, (2) the proposed action complies with the goal, or (3) the land subject to the proposed action meets the standards for a goal exception. *Doty v. Jackson County*, 34 Or LUBA 287 (1998).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. A plan amendment redesignating land as commercial on the basis of a nonconforming use is subject to review for compliance with applicable statewide planning goals, notwithstanding an acknowledged comprehensive plan policy that directs designation of such land as commercial rather than recognizing the nonconforming use, where a goals compliance challenge to the amendment is not an indirect compliance challenge to the comprehensive plan policy itself. *Geaney v. Coos County*, 34 Or LUBA 189 (1998).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Goal 14 is applicable to a plan amendment redesignating rural land as commercial, where the land is outside the UGB and the commercial designation would permit any commercial use of any size or intensity, including large commercial uses such as a Wal-Mart store that are urban in character and intensity. *Geaney v. Coos County*, 34 Or LUBA 189 (1998).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. In reviewing a county's legislative comprehensive plan amendment, LUBA does not require detailed findings, but Goal 2 requires a local government to explain why the amendment complies with applicable Statewide Planning Goals. The required explanation can appear in findings, in the record or in the brief the local government files with LUBA. *Valerio v. Union County*, 33 Or LUBA 604 (1997).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Under ORS 197.625, when a county code provision has not yet been acknowledged by LCDC, a land use application is subject to that provision, as well as to the applicable land use goal and its implementing rules. *Evans v. Multnomah County*, 33 Or LUBA 555 (1997).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where the county's decision to apply overlay zoning directly implements plan policies that were previously determined to comply with the statewide planning goals, and the policies are sufficiently specific to provide the basis for case-by-case evaluation of development applications, ORS 197.835(7)(b) does not require the local government to apply the goals independently to the decision. *Cuddeback v. City of Eugene*, 32 Or LUBA 418 (1997).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. The statewide goals apply independently to a county's zoning amendment where the comprehensive plan specifies that zone changes must comply with applicable statewide goals. *Doob v. Josephine County*, 32 Or LUBA 364 (1997).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. The Statewide Planning Goals do not apply directly to the approval of a permit under the county's acknowledged comprehensive plan and land use regulations. *McArthur v. Lane County*, 31 Or LUBA 309 (1996).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. After the December 5, 1994 effective date of amendments to Statewide Planning Goal 11, local governments may not rely on acknowledged comprehensive plan or ordinance provisions to establish goal compliance if those provisions violate the Goal 11 amendments. *DeShazer v. Columbia County*, 31 Or LUBA 300 (1996).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. When an earlier acknowledged comprehensive plan amendment imposes a condition that any proposed conditional use or use variance shall require a revised exception to the Statewide Planning Goals, a new plan amendment is required before additional conditional uses can be allowed, since taking an exception necessitates a plan amendment. *Leathers v. Marion County*, 31 Or LUBA 220 (1996).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Goal 4 does not apply to the adoption of a city tree-cutting regulation that has no application to acknowledged forestlands or lands suitable for commercial forest uses. *Ramsey v. City of Portland*, 30 Or LUBA 212 (1995).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Not every regulation that arguably furthers the objectives of Goal 5 applies Goal 5. *Ramsey v. City of Portland*, 30 Or LUBA 212 (1995).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. If it is obvious from the record that a particular goal does not apply to a proposed comprehensive plan amendment, it is not a basis for remand that the local government has not actually stated in its written decision that the goal does not apply. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Goal 6 is limited by its terms to discharges of pollutants from future development itself. It does not apply to all such discharges that may occur consequentially as a result of the development. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Once a local government's comprehensive plan and land use regulations are acknowledged under ORS 197.251, the Statewide Planning Goals no longer apply directly to its land use decisions, other than to those decisions which amend the acknowledged plan or regulations. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 429 (1995).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where a county zoning district was acknowledged by LCDC as a forest zone, not a farm/forest zone, a regulation subsequently adopted by LCDC to apply immediately to uses in forest zones applies to uses within that zoning district. *Testa v. Clackamas County*, 29 Or LUBA 383 (1995).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. All comprehensive plan amendments must comply with the Statewide Planning Goals. When adopting a comprehensive plan amendment, it is the local government's obligation to explain in its findings why the plan amendment complies with the goals or why arguably applicable goal standards need not be addressed and satisfied. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. If a local government's comprehensive plan and land use regulations are acknowledged as being in compliance with the statewide planning goals, and the challenged decision approving a residential subdivision does not amend the local government's plan or land use regulations, the statewide planning goals to do not apply to the challenged decision. *McCrary v. City of Talent*, 29 Or LUBA 110 (1995).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where a local government does not identify specific provisions in its comprehensive plan which it contends provide the basis for challenged land use regulation amendments, under ORS 197.835(5)(b), LUBA is required to reverse or remand the land use regulation amendments if they do not comply with applicable provisions of the Statewide Planning Goals. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where respondents do not identify specific provisions in the applicable comprehensive plan, which they contend provide the basis for challenged zone changes, under ORS 197.825(5)(b) LUBA is required to reverse or remand the zone changes if they do not comply with applicable provisions of the Statewide Planning Goals or their implementing rules. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. That LUBA may consider a statewide planning goal that is implemented by a particular plan or code provision, in determining whether the local government's interpretation of the plan or code provision should be affirmed under ORS 197.829(4), does not make that goal an approval standard for decisions made under an acknowledged plan and land use regulations. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. If a local government is presented with a plan or land use regulation provision that must be interpreted, and there is a reasonable interpretation that is *consistent* with the "state statute, land use goal or rule the comprehensive plan

provision or land use regulation implements," that interpretation may not be rejected by the local government in favor of an interpretation that is *inconsistent* with those statutes, goals or rules. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Comprehensive plan amendments must comply with the Statewide Planning Goals. ORS 197.175(2)(a). Where a challenged comprehensive plan amendment does not address Goal 9 (Economic Development), and Goal 9 appears to be relevant to the challenged decision, LUBA will remand the decision. *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583 (1994).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. The Statewide Planning Goals are not directly applicable to a local government decision that approves a subdivision without amending the local government's acknowledged comprehensive plan. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where petitioners contend a land use regulation amendment fails to comply with the statewide planning goals and implementing rules, and respondents fail to identify specific provisions in the local comprehensive plan that provide the basis for the challenged amendment, LUBA will assume no such provisions exist, and under ORS 197.835(5)(b) LUBA has authority to reverse or remand the land use regulation amendment if it does not comply with the statewide planning goals or implementing rules. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Where property is the subject of a concurrent comprehensive plan map amendment and zone change, the zone change is made under an unacknowledged plan amendment and must comply with those statewide planning goals applicable to the unacknowledged plan amendment. ORS 197.175(2)(e) and 197.625(3)(b). *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. Any amendment to an acknowledged land use regulation must comply with all applicable statewide planning goals, if the comprehensive plan "does not contain specific policies or other provisions which provide the basis for the regulation." ORS 197.835(5)(b). *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. A special district decision that finally determines policy questions concerning how the district will provide sewerage service to an area, where that service will occur, and the level of that service, is an exercise of the district's planning duties and responsibilities under ORS 195.020(1) that must comply with the Statewide Planning Goals and is a land use decision subject to LUBA review. *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150 (1994).

4.1 Statewide Planning Goals/ LCDC Rules – Applicability. If a county's comprehensive plan and land use regulations have been acknowledged by the Land Conservation and Development Commission pursuant to ORS 197.251, the statewide planning goals are *directly* applicable to a

challenged land use decision only if the decision amends the county plan. *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150 (1994).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. A local government complies with Goal 14 (effective 04/28/06), and OAR 661-024-0050(4) (effective 04/16/09), where it first demonstrates that the need cannot reasonably be accommodated on land already inside the UGB. Only if land within the UGB cannot reasonably accommodate the identified need would the local government proceed to consider sites outside the UGB to satisfy the identified need. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. When a county amends a zoning ordinance to require a particular study area when applying a maximum residential density standard within that zoning district, the county cannot rely on an earlier LUBA decision that allowed use of a similar study area in a quasi-judicial decision affecting a single property. Instead, the county must establish in amending the zoning ordinance that mandating the particular study area in all cases in that zone in the future is consistent with the maximum residential density standard and Goal 5, which the maximum residential density standard was adopted to implement. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. A county must justify its decision to replace an ambiguous existing maximum residential density standard with a similarly worded but much more methodologically precise maximum residential standard and may not simply rely on the similar wording to conclude that the new standard is consistent with the county's comprehensive plan and Goal 5. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. Where a city's acknowledged comprehensive plan and land use regulations have been acknowledged to comply with the statewide planning goals, an amendment of the city's land use regulations is only directly reviewable for compliance with the statewide planning goals where "[t]he comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation * * *." ORS 197.835(7)(b). *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. Goals 9 and 10 do not apply to a city decision on a conditional use application for a single family dwelling, and the city is not obligated to consider whether denying the conditional use application impacts the city's obligations under Goals 9 and 10 to maintain adequate inventories of commercially, industrially and residentially zoned lands. *Rudell v. City of Bandon*, 64 Or LUBA 201 (2011).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. A local government need not simply copy a general rule standard into its zoning ordinance. Local governments frequently adopt a variety of specific standards to comply with more general administrative rule standards, and they are free to do so if the more specific standards are sufficient to ensure compliance with the more general rule standards. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. The guidelines to the Statewide Planning Goals are not standards that must be satisfied to approve a post-acknowledgment plan amendment, and thus alleged inconsistency between a plan amendment and a guideline to Goal 9 is not a basis to reverse or remand the plan amendment. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. Nothing in the rules for conducting periodic review under OAR Chapter 660, Division 25 preempts local procedures or indicates that plan amendments adopted pursuant to those rules may not also be subject to local code requirements governing plan amendments. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. A county decision that approves the redesignation of property from a nonresource zone to rural residential zone does not implicate Goal 3, even though the county may have erred in its original decision to zone the property for nonresource use rather than agricultural use and LCDC may have erred in acknowledging the nonresource designation for the property. *Caldwell v. Klamath County*, 45 Or LUBA 548 (2003).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. A county does not err by refusing to apply Goal 3 or by failing to require an exception to Goal 3 to allow nonresource-zoned property to be rezoned for rural residential use, where the nonresource zoning designation for that property was acknowledged and the proposed rural residential zoning designation is consistent with that initial determination. *Caldwell v. Klamath County*, 45 Or LUBA 548 (2003).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. Under OAR 731-015-0075, an ODOT Class 3 project to improve a highway interchange must comply with any affected local government's comprehensive plan and, if the project does not comply, any comprehensive plan amendments that are necessary to bring the project into compliance must be adopted *before* ODOT issues its Revised Environmental Assessment for the interchange project. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. Where petitioners' interpretational challenge of a city's finding that proposed development complies with code provisions implementing Goal 5 is, in essence, an argument that the city's code provisions are insufficient to implement Goal 5, LUBA will reject the challenge as an impermissible collateral attack on the city's acknowledged Goal 5 regulations. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. Read in conjunction with the "safe harbor" provisions of OAR 660-013-0140, the requirement at OAR 660-013-0160(5) that a local government achieve full compliance with the Airport Planning Rule in amending its comprehensive plan and land use regulations applies only when the local government amends its plan or land use regulations to add different requirements than the plan or land use regulations previously imposed. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291 (2000).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. The "air, rail, water and pipeline transportation plan" required by OAR 660-012-0020(2)(e) to be included in a local government's Transportation System Plan need not include any information other than that specified in the rule, *i.e.*, the location and extent of existing or planned facilities. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291 (2000).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. That a challenged plan amendment is consistent with other provisions of an acknowledged comprehensive plan may have some bearing on whether the plan, as amended, continues to comply with all applicable statewide planning goals; however, such consistency does not obviate goal compliance review. *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. OAR 660-023-0180, which governs comprehensive plan amendments for mineral and aggregate resources, establishes the procedures required to comply with Goal 5 but does not obviate the requirement to address other statewide planning goals. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

4.2 Statewide Planning Goal/ LCDC Rules – Compliance With. A county's transportation plan is inconsistent with the Transportation Planning Rule where it fails to inventory existing and committed bicycle and pedestrian facilities in the county, assess the capability and condition of those facilities, develop a system of planned improvements to those facilities, and depict planned improvements on a map, as required by OAR 660-012-0020. *Dept. of Transportation v. Douglas County*, 36 Or LUBA 131 (1999).

4.2 Statewide Planning Goal/ LCDC Rules – Compliance With. A letter from an ODOT employee regarding negotiations between ODOT and the county does not constitute an affirmative waiver of issues related to minimum street width standards under OAR 660-012-0045(7), where it is unclear what was resolved between the parties and whether the county implemented the parties' resolution. Even if petitioner ODOT had waived that issue, such waiver would not apply to petitioner DLCD. *Dept. of Transportation v. Douglas County*, 36 Or LUBA 131 (1999).

4.2 Statewide Planning Goal/ LCDC Rules – Compliance With. The requirement at OAR 660-012-0045(7) that the county evaluate whether its street width standards are the minimum consistent with operational needs is not satisfied by a county procedure to consider, on a case-by-case basis, whether certain street widths should be reduced. *Dept. of Transportation v. Douglas County*, 36 Or LUBA 131 (1999).

4.2 Statewide Planning Goalss/ LCDC Rules – Compliance With. Application of criteria included in an acknowledged comprehensive plan governing redesignation of resource lands does not obviate the requirement that comprehensive plan and land use regulation amendments comply with the statewide planning goals. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. LUBA may review a local government decision under rules adopted after the date of a challenged decision if a remand would be based on a failure to comply with rules that have been superseded. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. In adopting land use regulations, including emergency and temporary land use regulations, a city is bound by the substantive and procedural requirements established by ORS 197.610 and Statewide Planning

Goals 1 and 2. These statutory and Goal requirements must be followed notwithstanding contrary city charter provisions. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. Goal 9 does not require that a city find that its "regulations will result in there being an adequate supply of sites for telecommunication facilities." *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. A land use regulation does not "prohibit new telecommunication" facilities where such facilities are allowed as a permitted or conditional use in all zones and variances are allowed for otherwise applicable height limits and setback requirements. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. While Goal 11 requires that a local government "plan and develop a timely, orderly and efficient arrangement of public facilities," a local government need not provide an expedited process for public facilities and retains its ability to ensure the appropriate juxtaposition of land uses. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. The decision to vacate 105 feet of a public road is not a "plan," as that term is used in ORS 197.250. The county's land use "plans, programs, rules or regulations affecting land use" are contained in its acknowledged comprehensive plan and implementing regulations. *Pacific Western Co. v. Lincoln County*, 32 Or LUBA 317 (1997).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. LUBA may review a local government decision under LCDC rules adopted after the date of the decision if a remand would be based on a failure to comply with rules since superseded. However, LUBA cannot apply rules before LCDC adopts them. *DLCD v. Yamhill County*, 31 Or LUBA 488 (1996).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. Under ORS 197.646(3), there is no grace period prior to required local government compliance with amendments to statutes, rules or Statewide Planning Goals. *DLCD v. Lincoln County*, 31 Or LUBA 240 (1996).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. Goal 6 requires a finding that a proposed use will be able to comply with applicable environmental standards, and is not satisfied by findings stating only that the proposed use will be required through conditions to comply with the standards. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. The Goal 9 rule applies only to plan and land use amendments adopted during periodic review, but it provides interpretive guidance in applying Goal 9 to quasi-judicial changes to acknowledged comprehensive plans or land use regulations that affect continued compliance with Goal 9. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. Statewide Planning Goal "guidelines" are simply suggested approaches that local governments may use in achieving compliance with the goals; they are not requirements with which local governments must comply. ORS 197.015(9); Goal 2, Part III. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. The Goal 2 requirement for "ultimate policy choices" does not mean local governments cannot adopt ambiguous or subjective development standards or complex development review processes. Where LCDC interprets a particular Statewide Planning Goal to require that certain uses be subject only to clear and objective standards, it says so in an implementing rule. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

4.2 Statewide Planning Goals/ LCDC Rules – Compliance With. LCDC does not require that local governments adopt comprehensive plans and land use regulations that restate, word for word, the statewide planning goals or the administrative rules which implement those goals. Comprehensive plans and land use regulations must "comply" with the goals and rules. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

4.3 Statewide Planning Goals / LCDC Rules – Definitions. The informal adoption by a statement in a quasi-judicial decision of a definition of the term "firearms training facility," which term is found in both a state administrative rule and the county's zoning ordinance, does not constitute the amendment of an acknowledged land use regulation. *J.C. Reeves Corp. v. Washington County*, 31 Or LUBA 115 (1996).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. A petitioner's challenge to a county's amendments to its comprehensive plan that expand the allowable locations in the county that could be the subject of an application to change the plan designation to rural commercial and rural industrial, that argue that the county's adopted and acknowledged rural commercial and rural industrial zones impermissibly allow urban uses in contravention of Goal 14 are an impermissible collateral attack on an acknowledged land use regulation where no provisions of the county's code were amended by the challenged decision. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where a local code provision, which is acknowledged to comply with Goal 5, allows the construction of a reservoir for surface mining in conjunction with an irrigation district, but requires that sites proposed for that use be added to the local government's inventory of non-significant mineral sites through a post-acknowledgment plan amendment (PAPA), such a PAPA does not allow "new uses that could be conflicting uses" with a Goal 5 resource, and therefore does not require further analysis under Goal 5, where the construction of a reservoir is otherwise allowed for a recreation-oriented facility without a PAPA. *Bishop v. Deschutes County,* 79 Or LUBA 380 (2019).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where a local government adopts an ordinance that repeals and readopts, verbatim, 34 previously adopted and acknowledged land use ordinances, solely to correct a problem with the publication notice for the readopted ordinances, the repeal and readoption of the 34 ordinances does not accomplish any "change" or amendment to the acknowledged ordinances that would require that the re-adoption be processed as a post-acknowledgment plan amendment under ORS 197.610 *et seq.* Repeal and verbatim readoption of a previously acknowledged ordinance does not change the acknowledged status of the ordinance, such that pursuant to ORS 197.175(2)(e) the statewide planning goals then apply directly to decisions made under the readopted ordinance. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. OAR 660-033-0140 provides that certain permits on agricultural and forest land are void after two years if the use is not initiated within that time period. Where the county development code includes language that is nearly identical to much of the language in OAR 660-033-0140, it is reasonable to conclude the code was adopted to implement OAR 660-033-0140. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where a county makes it sufficiently clear that it adopted its similarly worded version of OAR 660-033-0140 to apply in all county zones, including those that apply to agricultural and forest lands, the county code version of OAR 660-033-0140 applies in place of OAR 660-033-0140 on agricultural and forest lands after the county code version of OAR 660-033-0140 is acknowledged. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. The statewide planning goals normally do not apply directly as approval criteria for permit applications governed by acknowledged comprehensive plans and land use regulations. *Gottman v. Clackamas County*, 64 Or LUBA 358 (2011).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Under ORS 197.625(1) and (2), where an amendment to the text of a local government's land use ordinance is appealed to LUBA, the 21-day deadline for appealing LUBA's decision to the Court of Appeals would have to expire before the ordinance would be considered acknowledged under ORS 197.625(2). *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2011).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where a local government adopts a new zone in one legislative decision and then applies that new zone to property in a separate legislative decision, which is then appealed to LUBA, a challenge that the new zone is contrary to the statewide planning goals may be precluded by acknowledgment of the first decision. However, acknowledgment does not insulate the new zone from a facial challenge on statutory or constitutional grounds, advanced in the appeal of the second legislative decision that for the first time applies the new zone to specific properties. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. ORS 197.625(3) permits a post-acknowledgment land use regulation amendment to take effect as soon at it is adopted, and before the amendment is deemed acknowledged under ORS 197.625(1), if the amendment was "adopted in substantial conformance with ORS 197.610 and 197.615." Where a post-acknowledgment plan amendment to an erosion control ordinance is appealed to LUBA and is affirmed, LUBA's decision has the legal effect of establishing that the post-acknowledgment plan amendment was adopted in substantial compliance with ORS 197.610 and 197.615. Whether the post-acknowledgment plan amendment was adopted in substantial compliance with ORS 197.610 and 197.615 may not be raised in a subsequent LUBA appeal of a subdivision decision that applied the amended erosion control ordinance. *Montgomery v. City of Dunes City*, 60 Or LUBA 274 (2010).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. An argument that a decision approving a boundary line adjustment under an acknowledged comprehensive plan and land use regulations violates Goal 4 provides no basis for reversal, where petitioner offers no legal theory for why Goal 4 applies to such a decision. Generally, unless a land use decision adopts new or amended comprehensive plan or land use regulation provisions, a post-acknowledgement land use decision is governed by the acknowledged comprehensive plan and land use regulations and need not apply the statewide planning goals directly. *Lulay v. Linn County*, 60 Or LUBA 432 (2010).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. ORS 197.610(1) and OAR 660-018-0020(1)(c) and (2) require that a local government provide the Department of Land Conservation and Development with a copy of the proposed text of any post acknowledgment comprehensive plan or land use regulation amendment. Where a local government's notice of its post acknowledgment action does not include the proposed text, remand is required. *SEIU v. City of Happy Valley*, 58 Or LUBA 261 (2009).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Even if a local code provision is deemed by its acknowledgment to comply with any applicable statewide planning goals,

acknowledgment does not mean that the provision is deemed to comply with applicable state statutes. *Jouvenat v. Douglas County*, 58 Or LUBA 378 (2009).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. ORS 197.625(3) was adopted in response to the Court of Appeals' decision in *Von Lubken v. Hood River County*, 118 Or App 246, 249, 846 P2d 1178 (1993), so that post-acknowledgement plan and land use regulation amendments would take effect on adoption. Under *Von Lubken v. Hood River County*, post-acknowledgement plan and land use regulation amendments did not take effect until they were acknowledged. *NWDA v. City of Portland*, 58 Or LUBA 533 (2009).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. OAR 660-018-0020 does not require that the Department of Land Conservation and Development be provided a redlined version of a post-acknowledgment comprehensive plan amendment. In addition, OAR 660-018-0020 does not provide that any failure on a local government's part to adequately identify the text to be repealed or adopted by a post-acknowledgment comprehensive plan amendment has the legal consequence of requiring that the post-acknowledgment comprehensive plan amendment be viewed as an entirely new comprehensive plan such that unamended portions of the comprehensive plan must be shown to comply with the statewide planning goals. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. An argument that the Department of Land Conservation and Development erred in acknowledging the city's riparian protection ordinance is a collateral attack on the acknowledgment that cannot be advanced in an appeal of a permit decision applying the acknowledged ordinance. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where LCDC approves a periodic review work task and no appeal of that approval is filed with the Court of Appeals, the work task is deemed acknowledged under OAR 660-025-0160(7). Where the LCDC approval of the work task is appealed to the Court of Appeals and affirmed, the work task is acknowledged when the appellate judgment is issued. Where plan amendment that was adopted to respond to the periodic review work task is appealed to LUBA, LUBA has no jurisdiction to review the plan amendment for compliance with the statewide planning goals and therefore acknowledgement of that plan amendment is not delayed until the completion of LUBA's review under ORS 197.625. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Under *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 250 (1996), LUBA may apply ORS 197.829(1)(d) to review a local government's interpretation of an acknowledged code provision that implements a statewide planning goal, statute or rule only if the code provision is ambiguous. If the code provision is subject to more than one reasonable interpretation, one of which is consistent with the goal, statute or rule implemented, the local government cannot choose an interpretation that is inconsistent with the goal, statute or rule implemented. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. That LCDC acknowledged a 1999 decision including resource land within an urban unincorporated community (UUC) does not mean that LCDC concurred with the county's apparent intent to later plan and zone the land for non-resource uses. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. While the acknowledgment process shields local governments from collateral attacks on acknowledged plans and ordinances, any errors the local government may have made in that process do not obviate goal and rule requirements that govern subsequent plan and zoning amendments. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Lands that are planned and zoned for resource use under Goals 3 and 4 may be redesignated for nonresource use by applying an acknowledged comprehensive plan policy that establishes standards for such redesignations. Where such a specific policy and local standards have been acknowledged, they apply in place of more general statewide planning goals standards that would otherwise apply to such a redesignation. *Sommer v. Josephine County*, 49 Or LUBA 134 (2005).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Arguments that an acknowledged comprehensive plan policy that rates certain soils as unsuitable for commercial forestry is inconsistent with the county soil survey or uses inaccurate figures are impermissible collateral attacks on the policy. *Doob v. Josephine County*, 48 Or LUBA 227 (2004).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where it is undisputed that a city has adopted a Wetlands Resource Plan that has been acknowledged by LCDC, the acknowledged Wetlands Resource Plan and implementing regulations apply in reviewing an application for subdivision approval and neither Goal 5 nor its implementing regulations apply directly. *Doob v. City of Grants Pass*, 48 Or LUBA 245 (2004).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where a county approves formation of a special district and the county's comprehensive plan is acknowledged, the statewide planning goals do not apply, notwithstanding language in ORS 199.462(1) governing formation of special districts that requires consideration of the statewide planning goals. *Kneeland v. Douglas County*, 48 Or LUBA 347 (2005).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where the county's comprehensive plan makes it clear that it relied on a particular zoning district as its program to protect an existing mining operation from conflicting uses, and that zone allows mining and dwellings as conditional uses, the county does not err in requiring that a conditional use application to reopen that mine after it had been closed for over 10 years to demonstrate that the mine would be compatible with nearby dwellings. Any error that the county may have committed in subjecting an existing mine with no conflicts to conditional use review in the future if the mine closed was rendered irrelevant by LCDC's acknowledgment of the comprehensive plan. *Dundas v. Lincoln County*, 43 Or LUBA 407 (2002).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. A code provision that allows a farm dwelling on a 160-acre rangeland parcel, rather than the minimum 320 acres specified in OAR 660-033-0135(1)(a), may be inconsistent with the rule. However, the county may rely on its code, acknowledged in 2001 to comply with Goal 3 and the Goal 3 rule, notwithstanding any inconsistency with the rule. *Oregon Natural Desert Assoc. v. Harney County*, 42 Or LUBA 149 (2002).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. LCDC's 1985 acknowledgement of a county's rural residential zone has the legal effect of establishing that the rural residential zoning district *may* be applied consistent with Goal 14 to rural lands outside a UGB. However, the 1985 acknowledgment does not have the legal effect of establishing that *all* future applications of the zoning district to particular properties, no matter what the circumstances, will necessarily comply with Goal 14. *DLCD v. Klamath County*, 40 Or LUBA 221 (2001).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where a regional transportation plan that is submitted to LCDC for acknowledgment review under ORS 197.251 is also appealed to LUBA, and the issues raised in the petition for review arguably are within LCDC's jurisdiction under ORS 197.825(2)(c), it is appropriate to suspend the LUBA appeal for 120 days pursuant to ORS 197.840(1) and (4). *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 807 (2001).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Acknowledgement of a land use ordinance establishes only that it is in compliance with the statewide planning goals; it does not exempt a local government from complying with statutory requirements. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. A permit application may be approved based on adopted standards and criteria that are not yet acknowledged. However, under ORS 197.625(3), if the standards and criteria are not ultimately acknowledged, any improvements that have been made in reliance on a permit issued under the unacknowledged standards and criteria may have to be removed. *Western States v. Multnomah County*, 37 Or LUBA 835 (2000).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. New land use regulations can only become acknowledged under ORS 197.625(2) if the ordinance adopting those new land use regulations is "affirmed on appeal under ORS 197.830 to 197.855." Where LUBA remands the adopting ordinance because a portion of the new land use regulations is found to be defective, without specifically affirming the remaining portions of those regulations, no part of the ordinance is considered acknowledged under ORS 197.625. *Western States v. Multnomah County*, 37 Or LUBA 835 (2000).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Although a decision may qualify as a land use decision subject to LUBA review, ORS 197.825(2)(c) provides that LUBA lacks jurisdiction to consider statewide planning goal compliance issues in conducting that review, where the challenged decision is also subject to review by LCDC under ORS 197.251. *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. LUBA has no jurisdiction to review provisions of an acknowledged comprehensive plan for compliance with the Transportation Planning Rule, where those plan provisions are not amended by the challenged decision and are not affected by the challenged decision in a way that affects their compliance with the statewide planning goals. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where petitioners' arguments are directed at unamended provisions of an acknowledged comprehensive plan rather than the comprehensive plan amendments adopted by the challenged decision, petitioners present no basis for reversal or remand. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. ORS 197.835 does not exempt amendments to land use regulations from compliance with applicable administrative rules that implement statutory provisions. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Application of criteria included in an acknowledged comprehensive plan governing redesignation of resource lands does not obviate the requirement that comprehensive plan and land use regulation amendments comply with the statewide planning goals. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. The Statewide Planning Goals do not apply directly to the approval of a permit under the county's acknowledged comprehensive plan and land use regulations. *McArthur v. Lane County*, 31 Or LUBA 309 (1996).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Once a local government's comprehensive plan and land use regulations are acknowledged under ORS 197.251, the Statewide Planning Goals no longer apply directly to its land use decisions, other than to those decisions which amend the acknowledged plan or regulations. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 429 (1995).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where a county zoning district was acknowledged by LCDC as a forest zone, not a farm/forest zone, a regulation subsequently adopted by LCDC to apply immediately to uses in forest zones applies to uses within that zoning district. *Testa v. Clackamas County*, 29 Or LUBA 383 (1995).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. If a local government's comprehensive plan and land use regulations are acknowledged as being in compliance with the statewide planning goals, and the challenged decision approving a residential subdivision does not amend the local government's plan or land use regulations, the statewide planning goals to do not apply to the challenged decision. *McCrary v. City of Talent*, 29 Or LUBA 110 (1995).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where a local government's acknowledged comprehensive plan and land use regulations apply a freshwater wetland designation to certain property, the local government's application of regulations governing freshwater wetlands to development of the subject property is not error, even though

comprehensive plan inventory documents suggest the property is in fact a saltwater marsh. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. When adopting a comprehensive plan map amendment, a city can rely on its acknowledged plan and regulations as providing a sufficient number of large parcels of industrially designated land to comply with a plan policy requiring the designation of a sufficient number of such parcels, where the plan map amendment does not affect the inventory or use of such parcels. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. For ORS 197.829(4) to apply to LUBA's review of a governing body's interpretation of its own code, the connection between the local code provision and the statewide planning goal it is arguably designed to implement must be a close one. ORS 197.829(4) was not adopted to allow LUBA to reconsider the propriety of the original acknowledgment of comprehensive plans and land use regulations. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. After acknowledgment, a city is not required to apply the statewide planning goals to land use decisions that do not amend its acknowledged plan or land use regulations. Therefore, a city decision to provide city sewer and water service to development outside city limits does not concern the application of the statewide planning goals. *Fraser v. City of Joseph*, 28 Or LUBA 217 (1994).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. ORS 197.829(4) was not adopted to allow LUBA to reconsider the propriety of the original acknowledgment of comprehensive plans and land use regulations. Identification of an allegedly incorrect *interpretation* of such acknowledged comprehensive plan or land use regulation provisions is a condition precedent for invoking review under ORS 197.829(4). *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Post-acknowledgment local code amendments which are not adopted to satisfy periodic review requirements are deemed acknowledged under ORS 197.625, if such amendments are not appealed to LUBA. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. LUBA does not have jurisdiction to review LCDC acknowledgment orders. ORS 197.825(2)(c). Subject to review by the appellate courts, once an LCDC acknowledgment order is issued, it forecloses an appeal to LUBA on any issue that was raised or could have been raised in the LCDC acknowledgment proceedings concerning goal compliance. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. The Statewide Planning Goals are not directly applicable to a local government decision that approves a subdivision without amending the local government's acknowledged comprehensive plan. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. If a county's comprehensive plan and land use regulations have been acknowledged by the Land Conservation and Development Commission pursuant to ORS 197.251, the statewide planning goals are *directly* applicable to a challenged land use decision only if the decision amends the county plan. *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150 (1994).

4.4 Statewide Planning Goals/ LCDC Rules – Acknowledgment. Where the county plan and zone designations applied to certain rural property at the time of acknowledgment permit a level of activity that requires sewer service, a petitioner may not challenge proposed development allowed by the acknowledged plan and land use regulations on the basis that the allowed development violates Goals 11 and 14. *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150 (1994).

5. Goal 1 – Citizen Involvement. When a county acknowledges that no evidence in the record supports a determination that an adequate flow of water exists, and essentially follows the third *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), option, it must comply with all of the third *Rhyne* option and defer its decision making to a proceeding that provides the statutorily required notice and hearing. *Wachal v. Linn County*, 78 Or LUBA 227 (2018).

5. Goal 1 – Citizen Involvement. Where a local government has adopted and acknowledged a Citizen Involvement Program (CIP) that implements Goal 1, the only way a petitioner can demonstrate a violation of Goal 1 is by demonstrating that the local government failed to comply with the CIP. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

5. Goal 1 – Citizen Involvement. A county ordinance that adopts a text amendment to a comprehensive plan that discontinues a coastal advisory committee that is provided for in the comprehensive plan, and replaces it with a process for "appointing advisory committees to address specific land use issues" does not violate the requirements of Statewide Planning Goal 1 (Citizen Involvement) to provide for "clearly define[d] * * * procedures by which the general public will be involved in the on-going land-use planning process" and for the "continuity of citizen participation and of information that enables citizens to identify and comprehend issues." *Oregon Coast Alliance v. Clatsop County*, 75 Or LUBA 277 (2017).

5. Goal 1 – Citizen Involvement. Arguments that a concept plan fails to comply with Statewide Planning Goal 1 (Citizen Involvement) provide no basis for reversal or remand for lack of compliance with Goal 1 where the concept plan does not amend or affect the city's acknowledged Citizen Involvement Program. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

5. Goal 1 – Citizen Involvement. A county's use of a "redline" and "track changes" approach to show text that is being added and deleted, as well as marginal notes to further explain the amendments is sufficient to comply with the Goal 1 requirement that "information necessary to reach policy decisions" be in an "understandable form." *Stevens v. Clackamas County*, 68 Or LUBA 490 (2013).

5. Goal 1 – Citizen Involvement. While Goal 1 requires ODOT to make use of existing local citizen involvement programs in amending the Oregon Highway Plan, it does not require ODOT to create new local citizen involvement programs, or mandate that local governments create or invoke local citizen involvement programs in coordinating future OHP future amendments to the Oregon Highway Plan. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

5. Goal 1 – Citizen Involvement. A city's failures to follow comprehensive plan and land use regulation provisions that were adopted to implement Goal 1 may constitute substantive or procedural errors; however, without more, any such errors do not constitute a violation of the city's Goal 1 obligation to develop a citizen involvement program. *Jaffer v. City of Monmouth*, 51 Or LUBA 633 (2006).

5. Goal 1 – Citizen Involvement. Goal 10 (Housing) requires local governments to inventory available residential buildable lands, and Goal 2 (Land Use Planning) requires those inventories to be part of the comprehensive plan. Where the residential buildable lands inventory in the

comprehensive plan is not useable, and an applicant presents evidence regarding the current inventory of buildable lands, Goal 1 (Citizen Involvement), Goal 2 and Goal 10 require that the comprehensive plan be amended to incorporate that inventory. *Lengkeek v. City of Tangent*, 50 Or LUBA 367 (2005).

5. Goal 1 – Citizen Involvement. Goal 10 (Housing), Goal 2 (Land Use Planning) and Goal 1 (Citizen Involvement) require that a population projection that forms the basis of a city's residential lands needs analysis be incorporated into the comprehensive plan. *Lengkeek v. City of Tangent*, 50 Or LUBA 367 (2005).

5. Goal 1 – Citizen Involvement. A citizen participation requirement for appointment of a three-person citizens' advisory committee when considering major land use regulation amendments is a procedural requirement. A petitioner who wishes to assign error to the local government's failure to appoint such a committee must have objected to that failure during the proceedings below. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

5. Goal 1 – Citizen Involvement. Where a planning commission fails to formally appoint a three-person citizens' advisory committee from the community at large when considering major land use regulation amendment, as required by an applicable citizen involvement comprehensive plan requirement, that failure does not constitute reversible error where the planning commission in fact seeks the advice of four members of the city's design review committee who are citizens of the community. Where no party disputes that the design review committee members are members of the community at large, the planning commission's decision to seek input from the design review committee either constitutes de facto compliance with the citizen involvement requirement or renders any failure to formally appoint a citizens advisory committee a procedural error that resulted in no prejudice to the petitioner or other citizens of the community. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

5. Goal 1 – Citizen Involvement. The Land Conservation and Development Commission has exclusive jurisdiction to review allegations that a county's proceedings under periodic review failed to comply with Goal 1 and LCDC's rules for conducting periodic review. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

5. Goal 1 – Citizen Involvement. Amendments to Metro's Regional Framework Plan and the Metro Code that do not amend or affect Metro's citizen involvement program can violate Goal 1 only if the decision is inconsistent with Metro's citizen involvement program. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

5. Goal 1 – Citizen Involvement. Where amendments to a local government's comprehensive plan or land use regulations do not amend or affect the local government's acknowledged citizen involvement program, the only way a petitioner can demonstrate a violation of Goal 1 is by demonstrating a failure to comply with the acknowledged CIP. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

5. Goal 1 – Citizen Involvement. A city violates Goal 1 when it fails to follow its acknowledged citizen involvement program in adopting a temporary land use regulation. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

5. Goal 1 – Citizen Involvement. Where amendments to a local government's comprehensive plan or land use regulations do not amend or affect the local government's acknowledged Citizen Involvement Program (CIP), the only way a petitioner can demonstrate a violation of Goal 1 is by demonstrating a failure to comply with the acknowledged CIP. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

5. Goal 1 – Citizen Involvement. A local government does not violate Goal 1 or comprehensive plan policies implementing Goal 1 by adopting a decision six weeks after the final planning staff report is available, where a great deal of citizen involvement and participation preceded issuance of the final staff report. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

6.1 Goal 2 – Land Use Planning – Generally. The Goal 2 requirement that acknowledged comprehensive plans be the "basis" for land use decisions is not violated by citation to an adopted, but unacknowledged housing strategy document, where the cited portion of the document directly implements, in almost identical language, policy recommendations in the city's acknowledged housing needs analysis. *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

6.1 Goal 2 – Land Use Planning – Generally. Language in a city's acknowledged housing needs analysis finding an existing deficit of affordable housing in the city, and recommending that the city identify surplus city land for development with government-subsidized housing, provides a policy basis for the city to rezone public land from an open space zone to a residential zone that allows high density residential development. *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

6.1 Goal 2 – Land Use Planning – Generally. A city's process in adopting amendments to a subarea plan to approve a proposal to construct a new bridge does not violate Goal 2 where the city provided opportunities for review and comment on the proposed plan amendments by the public, and provided notice to neighborhood associations of the plan amendment proceedings, despite a very compressed period of time for public input regarding a fairly complex proposal. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

6.1 Goal 2 – Land Use Planning – Generally. A city errs in finding compliance with annexation standards based on a projection of housing need from a Portland State University study rather than on projections of housing need in the city's own acknowledged housing inventory. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

6.1 Goal 2 – Land Use Planning – Generally. LUBA is not required to affirm a county's interpretation of an exception to Goal 4 that is part of the county's comprehensive plan, where that interpretation is contrary to the exception statutes at ORS 197.732, Goal 2, and the rule that implements Goal 2 at OAR 660-004-0018. ORS 197.829(1)(d). *Hood River Valley Residents v. Hood River County*, 75 Or LUBA 452 (2017).

6.1 Goal 2 – Land Use Planning – Generally. A county's interpretation of an irrevocably committed exception as allowing all uses on the exception site that are allowed in the zone that was applied to the site when the exception was approved is inconsistent with the ORS 197.732(1)(b) description of an exception as "a comprehensive plan provision that * * * is applicable to specific properties or situations and does not establish a planning or zoning policy of general applicability." *Hood River Valley Residents v. Hood River County*, 75 Or LUBA 452 (2017).

6.1 Goal 2 – Land Use Planning – Generally. A decision by the city that it will not approve any road that is located in the conceptual location approved in a previously approved conceptual development plan, and that is also shown in the city's adopted transportation systems plan and the adopted area refinement plan for the city, would not be a land use decision that is "in compliance with the acknowledged plan and land use regulations." ORS 197.175(2)(d). *GPA 1 LLC v. City of Corvallis*, 74 Or LUBA 527 (2016).

6.1 Goal 2 – Land Use Planning – Generally. Where a road is proposed in the conceptual location approved in a previously approved conceptual development plan, and is also shown in the city's adopted transportation systems plan and the adopted area refinement plan for the city, the city has a heightened obligation under *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978), to either (1) approve the proposed alignment that is consistent with the planned and approved location, or (2) make it very clear which of five other alternative proposed alignments the city will accept. *GPA 1 LLC v. City of Corvallis*, 74 Or LUBA 527 (2016).

6.1 Goal 2 – Land Use Planning – Generally. A plan amendment that designates 33 acres for high-density residential development is not inconsistent with a plan policy requiring a minimum of 28 acres of high-density residential, including seven acres to provide public open space, notwithstanding the failure to specifically designate seven acres for open space, where the 33 designated acres can supply the required seven acres of open space. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

6.1 Goal 2 – Land Use Planning – Generally. In adopting zoning that makes existing manufactured dwelling parks non-conforming uses in a high-density residential zone, a city is not required to consider in isolation a comprehensive plan policy requiring conservation of existing affordable housing, but may consider and balance other plan policies that promote competing policy objectives. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

6.1 Goal 2 – Land Use Planning – Generally. Remand is necessary where a city deletes two refinement plan policies requiring protection of existing manufactured dwelling parks, and zones the parks to make them non-conforming uses, but the findings do not explain how the amendments are consistent with a comprehensive plan policy requiring conservation of existing affordable housing. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

6.1 Goal 2 – Land Use Planning – Generally. A decision that adopts a refinement plan that describes a 15-inch wastewater pipeline that is not included in the city's acknowledged public facilities plan does not present a Goal 2 consistency problem or violation of Goal 11, where under the acknowledged plan 15-inch pipelines need not be included in the plan and the petitioner's argument that the plan must include the proposed pipeline represents a collateral attack on the acknowledged public facilities plan. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

6.1 Goal 2 – Land Use Planning – Generally. Goal 2 is not violated by adopting a plan amendment that references unacknowledged land use regulations. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

6.1 Goal 2 – Land Use Planning – Generally. Neither a petitioner nor a city may rely on an adopted planning document that had not taken effect at the time of the city's decision to argue that the question of whether a proposed comprehensive plan map amendment is in the public interest has been conclusively answered by the adopted but ineffective planning document. *Vest v. City of Molalla*, 66 Or LUBA 155 (2012).

6.1 Goal 2 – Land Use Planning – Generally. Although previously adopted and acknowledged city public facilities plans identified as future public facilities projects the replacement of existing transmission lines and construction of a treatment plant, where a project that the city includes in a new public facilities plan proposes a larger diameter transmission pipe than any previous plan, more miles of pipeline than some previous plans, and relocation of the transmission pipe, the project that is included in the new public facilities plan has not previously been included in an adopted and acknowledged plan and the parties are not precluded from challenging the project. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 392 (2012).

6.1 Goal 2 – Land Use Planning – Generally. Where the text of an ordinance adopts and incorporates documents that are dated "September 2011" but the documents that are actually attached to the ordinance are dated "May 2012," and the ordinance and record viewed as whole make clear that the city council intended to adopt the more recent versions of the documents that were actually attached to the adopted ordinance, the mistaken reference in the text of the ordinance to the former versions of those documents is simply a typographical error that does not amount to a failure to comply with Goal 2's consistency requirements. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 392 (2012).

6.1 Goal 2 – Land Use Planning – Generally. Where a comprehensive plan amendment to the city's public facilities chapter includes a public facilities project as one of the improvements to be constructed within the twenty-year planning period, but a public facilities plan adopted concurrently with the comprehensive plan amendment and incorporated into the comprehensive plan fails to identify the project as a "short term" or "long term" project or to identify the project at all, the amendment means the comprehensive plan is internally inconsistent in violation of Goal 2. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 392 (2012).

6.1 Goal 2 – Land Use Planning – Generally. Nothing in Goal 2, Goal 11, or an urban growth management agreement between the city and the county for lands within the urban growth boundary requires the city to consider the impacts of a public facilities project on a county-identified Goal 5 resource, where the county was given an opportunity to and did not raise any concerns about the project's impact on a county-identified Goal 5 resource. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 392 (2012).

6.1 Goal 2 – Land Use Planning – Generally. A local government's reliance on a draft economic opportunities analysis that has not been adopted as a part of the local government's comprehensive plan to conclude that new regulations will not affect the city's supply of industrial land runs afoul of Statewide Planning Goal 2, even if the draft economic opportunities analysis is part of the record and could provide an adequate factual base to support the decision. *Gunderson, LLC v. City of Portland*, 62 Or LUBA 403 (2011).

6.1 Goal 2 – Land Use Planning – Generally. Based on the Court of Appeals' decisions in *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249 (2005) and *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000), it would be error for a local government to ignore available commercial and industrial land data in its acknowledged comprehensive plan and rely instead on different data that is not part of the acknowledged comprehensive plan to conclude that a land use regulation amendment will leave the local

government with an adequate supply of commercial and industrial land. However, if the local government also adopts adequate findings based on the commercial and industrial land data in its acknowledged comprehensive plan that the land use regulation amendment will not leave the local government with an inadequate supply of commercial and industrial land, the local government's additional findings that rely on data that is not included in the comprehensive plan provide no basis for reversal or remand. *McDougal Bros. Investments v. City of Veneta*, 59 Or LUBA 207 (2009).

6.1 Goal 2 – Land Use Planning – Generally. An argument that a county erred by changing a proposed zoning ordinance text amendment approximately a month before the change was adopted provides no basis for reversal or remand where a detailed explanation of the proposed change was provided shortly after the change was introduced, many written comments were received and one of the petitioners submitted detailed comments opposing the proposed change. *Carver v. Deschutes County*, 58 Or LUBA 323 (2009).

6.1 Goal 2 – Land Use Planning – Generally. Although Goal 2 requires that "ultimate policy choices" be included in the comprehensive plan, Goal 2 does not dictate the manner in which a local government must make its ultimate policy choices or the form in which the city must express ultimate policy choices. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006).

6.1 Goal 2 – Land Use Planning – Generally. Although the use of different planning periods in different regional planning documents might constitute an internal conflict that would violate the Goal 2 (Land Use Planning) internal plan consistency requirement, the statewide planning goals do not mandate identical planning periods in all planning documents in all circumstances and it is petitioners' obligation to demonstrate that the use of different planning periods in the particular planning documents constitutes a conflict that violates Goal 2. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 134 (2005).

6.1 Goal 2 – Land Use Planning – Generally. A city may rely on a recent buildable lands inventory (BLI) that is a completed final document in demonstrating that a proposed transportation project will not result in a deficiency of buildable land under Goal 10 (Housing), even if that BLI has not yet been incorporated into the comprehensive plan. *1000 Friends of Oregon v. City of Dundee*, 49 Or LUBA 601 (2005).

6.1 Goal 2 – Land Use Planning – Generally. When a city's population passes 2,500, more types of needed housing must be addressed, but the city does not have to amend its housing inventory before it can adopt any land use decision that will affect housing. *1000 Friends of Oregon v. City of Dundee*, 49 Or LUBA 601 (2005).

6.1 Goal 2 – Land Use Planning – Generally. A city's decision to rezone land to allow for future residential development notwithstanding the existence of an airport overlay zone on that property that currently prohibits residential uses does not violate Goal 2's requirement that land use regulations be consistent. *Holcombe v. City of Florence*, 45 Or LUBA 59 (2003).

6.1 Goal 2 – Land Use Planning – Generally. A city's finding that additional residential land is needed to accommodate anticipated population growth is not inconsistent with a 1997 buildable lands inventory that sufficient residential land is available, where (1) a 2000 comprehensive plan

indicates that during the late 1990s, there was a significant and unanticipated population increase that was not reflected in the 1997 buildable lands inventory, and (2) the 2000 comprehensive plan includes policies that allow for the designation of additional residential land to address housing needs resulting from that unanticipated growth. *Holcombe v. City of Florence*, 45 Or LUBA 59 (2003).

6.1 Goal 2 – Land Use Planning – Generally. Neither Goal 10 nor Goal 14 require a finding of "demonstrated need" for additional residential land within the meaning of Goal 2, Part II or Goal 14, factors 1 and 2 before the city may amend its comprehensive plan map to allow property to be zoned for residential rather than industrial uses. *Holcombe v. City of Florence*, 45 Or LUBA 59 (2003).

6.1 Goal 2 – Land Use Planning – Generally. LUBA does not have jurisdiction to review a regional transportation plan to determine whether it is consistent with a regional framework plan consistency requirement, where such consistency is also required by Goal 2 and LCDC has jurisdiction to review the regional framework plan and regional transportation plan for compliance with Goal 2. *Citizens Against Irresponsible Growth v. Metro*, 40 Or LUBA 426 (2001).

6.1 Goal 2 – Land Use Planning – Generally. A local government must rely on the housing inventory contained in its acknowledged comprehensive plan to determine whether rezoning property from multi-family residential to commercial use will cause the local government's housing inventory to violate Goal 10. *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384 (2001).

6.1 Goal 2 – Land Use Planning – Generally. Metro's Regional Framework Plan, a master plan that incorporates and coordinates Metro's various functional plans, is a planning document of the type contemplated by Goal 2 that Metro must rely upon in making its required need determination for expanding the urban growth boundary, even though the 1997 population and demand figures in the plan do not reflect subsequent updates. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

6.1 Goal 2 – Land Use Planning – Generally. A demonstration of need for a UGB amendment must be based upon and consistent with the local government's planning documents adopted pursuant to the Goal 2-mandated planning process. In order to amend the UGB based on different population and capacity projections than those in the local government's comprehensive plan, the local government must amend the plan to include those different projections. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

6.1 Goal 2 – Land Use Planning – Generally. Neither Goal 2 nor ORS 197.175(2) require that zoning ordinance amendments that are necessary to implement a comprehensive plan map amendment be adopted at the same time as the plan amendment. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

6.1 Goal 2 – Land Use Planning – Generally. Findings that express confidence that particular existing zoning districts could be applied to implement a conditional plan map amendment are legally irrelevant, where the decision to amend the zoning map to implement the new plan map

designation is deferred to a later date. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

6.1 Goal 2 – Land Use Planning – Generally. The lack of an available implementing zoning district at the time a conditional plan map amendment is adopted does not provide a basis for reversal or remand. In that event, at the time the city amends its zoning map to implement the conditional plan map amendment, it will be required to (1) adopt a new implementing zoning district or amend an existing zoning district so that it could be applied, or (2) adopt further plan map amendments that may be required to allow adoption of an implementing zoning district. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

6.1 Goal 2 – Land Use Planning – Generally. Goal 2 does not forbid a comprehensive plan map amendment that will revert in two years to the previously existing acknowledged plan map designations, under specified conditions. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

6.1 Goal 2 – Land Use Planning – Generally. Where a comprehensive plan map amendment adopts a plan map designation that authorizes several zoning districts, LUBA will assume the city will later apply the zoning districts that will comply with housing goals, rather than zoning districts that might violate those housing goals. If inappropriate zoning districts are applied later, the decisions adopting those zoning districts can be corrected through an appeal of those zoning map decisions. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

6.1 Goal 2 – Land Use Planning – Generally. A local government does not violate the Goal 2 consistency requirement by using updated population projections instead of population projections in its comprehensive plan to determine the size of the urban land need under the urban reserve rule, OAR 660-021-0030, where the two projections serve different purposes and use of the updated projections does not undermine or conflict with the comprehensive plan or implementing regulations. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

6.1 Goal 2 – Land Use Planning – Generally. In reviewing a county's legislative comprehensive plan amendment, LUBA does not require detailed findings, but Goal 2 requires a local government to explain why the amendment complies with applicable Statewide Planning Goals. The required explanation can appear in findings, in the record or in the brief the local government files with LUBA. *Valerio v. Union County*, 33 Or LUBA 604 (1997).

6.1 Goal 2 – Land Use Planning – Generally. A city violates Goal 2 when it adopts a temporary land use regulation without following the hearing and opportunity for review and comment requirements of Goal 2. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

6.1 Goal 2 – Land Use Planning – Generally. Statewide Planning Goal "guidelines" are simply suggested approaches that local governments may use in achieving compliance with the goals; they are not requirements with which local governments must comply. ORS 197.015(9); Goal 2, Part III. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

6.1 Goal 2 – Land Use Planning – Generally. The Goal 2 requirement for "ultimate policy choices" does not mean local governments cannot adopt ambiguous or subjective development standards or complex development review processes. Where LCDC interprets a particular Statewide Planning Goal to require that certain uses be subject only to clear and objective standards, it says so in an implementing rule. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

6.1 Goal 2 – Land Use Planning – Generally. Where the only inventory of historic structures maintained by a city has not been adopted as part of the city's acknowledged comprehensive plan, a post-acknowledgment decision not to designate an inventoried building as a historical landmark is not a de facto post-acknowledgment plan amendment, even though the decision may ultimately allow the building to be demolished. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. Where a city has made it clear in its comprehensive plan and in dealings over the years with a water district and a sanitary district that as a condition of the city providing city water and sewer services to water and sanitary district customers the properties receiving such services would have to annex to the city in the future, and the districts have no plans to provide water or sewer service to the disputed area, the city's decision to annex and withdraw that territory from the districts was adequately coordinated under Goal 2, although the city and the districts may dispute the desirability of that annexation. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

6.2 Goal 2 – Land Use Planning – Coordination. Where evidence in the record shows that in one year during a multi-year planning process the city and county met five times to coordinate on joint projects, including the water public facilities planning process, the city satisfied its Goal 2 obligation to coordinate with the county in adopting the city's public facilities plan. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 392 (2012).

6.2 Goal 2 – Land Use Planning – Coordination. Nothing in Goal 2, Goal 11, or an urban growth management agreement between the city and the county for lands within the urban growth boundary requires the city to consider the impacts of a public facilities project on a county-identified Goal 5 resource, where the county was given an opportunity to and did not raise any concerns about the project's impact on a county-identified Goal 5 resource. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 392 (2012).

6.2 Goal 2 – Land Use Planning – Coordination. Where an interchange area management planning effort was a joint Oregon Department of Transportation (ODOT)/city effort, in satisfying its OAR 734-051-0155(5)(c) obligation to coordinate with affected property owners ODOT is not required to repeat the public outreach effort that was made before the city adopted the interchange area management plan. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

6.2 Goal 2 – Land Use Planning – Coordination. Under Statewide Planning Goal 2, a local government is obligated to coordinate its plans with affected local governments and address the legitimate concerns of affected government units. However, a local government is not required to coordinate between the local government's proposed stormwater master plan and a plan that is adopted by the board of directors of a water control district in a non-public meeting and process that is merely a unilateral attempt by the water control district to dictate a particular outcome in an ongoing dispute between the local government and the water control district. *Santiam Water Control District v. City of Stayton*, 62 Or LUBA 149 (2010).

6.2 Goal 2 – Land Use Planning – Coordination. Under ORS 197.015(5), comprehensive plans are "coordinated" when the needs of all levels of government have been considered and accommodated as much as possible, and the local government has balanced the needs of all affected governmental units and selected a particular course of action from among the competing proposed courses of action. *Santiam Water Control District v. City of Stayton*, 62 Or LUBA 149 (2010).

6.2 Goal 2 – Land Use Planning – Coordination. A city satisfies its Goal 2 and Airport Planning Rule coordination responsibilities where the city considers an airport's and the Federal Aviation Administration's (FAA's) concerns about a zoning district that allows through the fence access for residential development next to a public airport and the city requires that any applicant for such residential development secure a through the fence agreement with the airport and a letter of support from the FAA. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

6.2 Goal 2 – Land Use Planning – Coordination. The Goal 2 coordination requirement requires that a local government's comprehensive plan be coordinated with the plans of affected governmental units. While a water district is an affected governmental unit, when the water district does not identify any plan that the local government must coordinate with, the local government does not violate the coordination requirement by failing to coordinate with the water district. *Santiam Water Control District v. City of Stayton*, 54 Or LUBA 553 (2007).

6.2 Goal 2 – Land Use Planning – Coordination. Where an urban growth management agreement between a county and city requires that each jurisdiction consider the comments of the other in certain specified proceedings, the local government need only consider those "legitimate concerns" that present issues that are relevant to the matter that is before it. *Borton v. Coos County*, 52 Or LUBA 46 (2006).

6.2 Goal 2 – Land Use Planning – Coordination. Where a city amends its transportation system plan to include an access management plan that was previously prepared by ODOT, it is the city's obligation to comply with the OAR 660-012-0015(5) requirement for coordination with affected private providers of transportation services. While the city may be able to rely on ODOT's coordination efforts at the time the access management plan was adopted, the city must establish that such coordination in fact occurred. *Rhodes v. City of Talent*, 50 Or LUBA 415 (2005).

6.2 Goal 2 – Land Use Planning – Coordination. The Goal 2 coordination requirement is satisfied where the hearings officer adopts lengthy findings addressing the city's concerns and explaining why the hearings officer believed he could not or should not accommodate the city's requests. The hearings officer is not required to accede to the city's requests. *City of Damascus v. Clackamas County*, 50 Or LUBA 514 (2005).

6.2 Goal 2 – Land Use Planning – Coordination. The Goal 2 coordination requirement applies when comprehensive plans and land use regulations are being adopted or amended, not when a local government applies the plan and land use regulations to grant tentative subdivision approval. *Ghena v. City of Grants Pass*, 50 Or LUBA 552 (2005).

6.2 Goal 2 – Land Use Planning – Coordination. The Goal 2 coordination requirement is not satisfied by a response to affected governmental bodies' concerns regarding a legislative text amendment that allows a dog control facility in county parks will be addressed when the facility is actually constructed, where the text amendment makes dog control facilities outright permitted uses, which can be constructed without notice or hearing at which such concerns can be raised and addressed. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

6.2 Goal 2 – Land Use Planning – Coordination. There is nothing in the language of ORS 197.025(1) and 268.385(1) that imposes a higher obligation on the Metropolitan Service District in performing its coordination obligation than is imposed under the Goal 2 coordination obligation. Therefore, in performing periodic review of a regional plan amendment, the Land Conservation and Development Commission will resolve the question of whether the Metropolitan Service District properly coordinated its decision, and LUBA does not have jurisdiction to consider that issue in a LUBA appeal of the same regional plan amendment. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

6.2 Goal 2 – Land Use Planning – Coordination. A city's failure to enter into an urban services agreement with a rural fire protection district prior to annexing property located within the fire district does not violate either Goal 2 or Goal 11. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 546 (2003).

6.2 Goal 2 – Land Use Planning – Coordination. When a city invites comments from and meets with affected agencies, and the city incorporates some of the agencies' concerns and requests into its final decision, the Goal 2 coordination requirement is met. *ODOT v. City of Klamath Falls*, 39 Or LUBA 641 (2001).

6.2 Goal 2 – Land Use Planning – Coordination. The coordination requirement at OAR 660-012-0015(5) provides that the adopting local government must provide notice and an opportunity to comment to affected local governments. However, the rule does not require that the adopting local government provide additional notice and opportunity to comment each time the proposal is modified. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291 (2000).

6.2 Goal 2 – Land Use Planning – Coordination. Allowing affected local governments only seven days to comment on a revised UGB amendment master plan is consistent with the Goal 2 coordination requirement, where the local governments had opportunity to comment on the original master plan, the revisions reflect and attempt to accommodate those comments, and the affected local governments failed to request any additional time to comment on the revisions. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

6.2 Goal 2 – Land Use Planning – Coordination. The duty to coordinate under Goal 2 and ORS 197.015(5) does not mandate success in accommodating the needs or legitimate interests of all affected governmental agencies, but it does mandate a reasonable effort to accommodate those needs and legitimate interests "as much as possible." For LUBA to be able to determine that this coordination obligation has been satisfied, a local government must respond in its findings to "legitimate concerns" that are expressed by affected governmental agencies. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

6.2 Goal 2 – Land Use Planning – Coordination. An affected local government raises a legitimate concern where the concern is explained in sufficient detail to (1) communicate the expectation of some sort of response from the local government and (2) provide the decision maker with a sufficient understanding of the concern that an appropriate response can be

included in the decision. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

6.2 Goal 2 – Land Use Planning – Coordination. The requirement at OAR 660-021-0020 that a local government coordinate with affected governmental units in including lands within urban reserves is coextensive with the Goal 2 coordination requirement. Under either requirement, the local government must consider and accommodate as much as possible the needs of affected jurisdictions, and must respond in its findings to the legitimate concerns raised by those jurisdictions. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

6.2 Goal 2 – Land Use Planning – Coordination. A local government fails to satisfy the requirement of the Transportation Planning Rule, OAR 660-012-0060, to coordinate with affected jurisdictions, where it amends its comprehensive plan to allow a shopping mall designed to be a regional destination point, but limits its coordination efforts to ODOT and the surrounding county. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

6.2 Goal 2 – Land Use Planning – Coordination. Where there is no particularized showing that a challenged decision will have any more effect on adjoining cities and counties than other jurisdictions in the metropolitan region, the Goal 2 coordination obligation is met by providing DLCD and the responsible regional agency notice and an opportunity to comment. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

6.2 Goal 2 – Land Use Planning – Coordination. The Goal 2 coordination requirement is fulfilled when written notice of a proposed land use plan amendment is provided to all potentially affected governmental units, and the notice explains the proposed action and invites written comment. Coordination does not require a local government to compel the governmental units to reply. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

6.2 Goal 2 – Land Use Planning – Coordination. A county fails to satisfy the Goal 2 coordination requirement of exchange of information when it rejects the state's request to postpone county population projections until the state completes its own projections, because the rejection eliminates any possibility of exchanging information or balancing the needs of other affected agencies. *DLCD v. Douglas County*, 33 Or LUBA 216 (1997).

6.2 Goal 2 – Land Use Planning – Coordination. The Goal 2 coordination requirement must be met by adopted findings that respond to state agency concerns. A statement in the record that county staff rejected state agency concerns does not satisfy the coordination requirement. *DLCD v. Douglas County*, 33 Or LUBA 216 (1997).

6.2 Goal 2 – Land Use Planning – Coordination. County findings which do not accede to every request made by the Oregon Parks and Recreation Department regarding the proposed development, but explain the concerns raised by that agency, comment specifically on those concerns, and add conditions which the county determined appropriate to address the concerns raised, are sufficient to establish compliance with the Goal 2 coordination requirement. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

6.2 Goal 2 – Land Use Planning – Coordination. When, prior to an appeal to LUBA, a city satisfies the coordination requirement of OAR 660-12-060(3) by consulting with the county, and the development proposal does not change between LUBA's remand order and a second appeal, the city is not required to consult with the county again during the proceedings on remand. *Melton v. City of Cottage Grove*, 30 Or LUBA 331 (1996).

6.2 Goal 2 – Land Use Planning – Coordination. The coordination obligation imposed by Statewide Planning Goal 2 (Land Use Planning), and similarly worded local government comprehensive plan provisions, does not require that a local government accede to every concern expressed by a state agency, but does require that a local government adopt findings responding to legitimate concerns expressed by a state agency. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

6.2 Goal 2 – Land Use Planning – Coordination. Letters from state and federal agency personnel that are not addressed to the local government, and the oral comments of an individual member of a regional government council, may raise substantive issues but do not trigger a coordination obligation under Goal 2. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

6.2 Goal 2 – Land Use Planning – Coordination. The coordination requirement of OAR 660-12-060(3) should be interpreted the same as the coordination provision in Goal 2, which requires the jurisdiction developing plan or land use regulation provisions (1) to exchange information with other affected governmental units; and (2) to consider and accommodate the needs of such governmental units as much as possible in formulating or revising the plan or regulations. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. If a city located outside the Metro UGB wishes to plan to capture growth currently anticipated to occur within the Metro UGB, it must specifically coordinate that desire with Metro and the affected units of government within the Metro UGB. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. The coordination required by Goal 2 is achieved by balancing the needs of all affected governmental units and selecting a particular course of action from among the competing proposed courses of action. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. Providing notice of a post-acknowledgment plan or land use regulation amendment to the Department of Land Conservation and Development under ORS 197.610(1) is inadequate to satisfy a local government's coordination obligations. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. A sanitary district's obligation to provide sewer service, and a person's right to receive such sewer service, are subject to county comprehensive plan and land use regulation limitations on the provision of such sewer service. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. A city and county may conclude the consequences of allowing sewer service to be provided without first securing consents to annexation outweigh any difficulties requiring such consents to annexation will pose for a sanitary district's use of local improvement districts to pay the cost of providing sewer service. Coordination under Goal 2 does not require that all affected governmental units agree on the proposal. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. A city's unilateral decision to amend its acknowledged comprehensive plan policies concerning provision of urban services within an unincorporated area, such that the amended city plan is inconsistent with the acknowledged comprehensive plans of a county and another city, violates Goal 2 and improperly exercises coordination authority assigned to the Metropolitan Service District under ORS 197.190(1) and 268.385(1). *Washington County v. City of Portland*, 27 Or LUBA 204 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. Although Goal 2 requires that special district plans and actions related to land use must be consistent with city and county comprehensive plans, the goal does not establish any hierarchy for consistency between city and county plans. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. The statutory and Goal 2 obligations to coordinate require an exchange of information between affected governmental units and the planning jurisdiction and a balancing of the needs of all governmental units and citizens of the state, to reach a course of action that is consistent with the comprehensive plans of affected governmental units. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. Because cities and counties generally do not directly assert planning interests outside their municipal boundaries, changes in the acknowledged comprehensive plans of nearby jurisdictions generally will have only indirect consequences on the city's or county's comprehensive plan and will not amount to a conflict or result in an inconsistency. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. A city comprehensive plan amendment that simply makes a planning recommendation for an unincorporated area outside the city is unlikely to be "inconsistent" with the county comprehensive plan for that unincorporated area. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. Where a proposed comprehensive plan amendment is opposed by one or more affected local governments, but will not actually conflict with the affected local government's plan, the entity proposing the comprehensive plan amendment satisfies its coordination obligation under Goal 2 by following the two steps set out in *Rajneesh v. Wasco County*, 13 Or LUBA 202 (1985). After having done so, the entity proposing the change may adopt the plan amendment. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. A local government that lacks ORS 197.190(1) coordination responsibility may not alter the acknowledged status quo by adopting or

amending a comprehensive plan provision that is inconsistent with the acknowledged comprehensive plan of an affected local government. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. Although Goal 2 requires all units of government to coordinate their land use planning, ORS 197.190(1) imposes an overriding coordination responsibility on counties and the Metropolitan Service District to ensure that the plans within their boundaries make up an integrated comprehensive plan for the entire area of the county or Metropolitan Service District. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. In the circumstance where affected jurisdictions (1) have acknowledged plans which directly assert overlapping planning interests, and (2) cannot agree on "coordinated, consistent" plan amendments, only the county or Metropolitan Service District with ORS 197.190(1) coordination authority may unilaterally direct a change in the acknowledged status quo. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. The Metropolitan Service District may, under ORS 197.190(1) and 268.385(1), determine that a proposed amendment to an acknowledged comprehensive plan in an area of overlapping planning interests is "coordinated" under ORS 197.015(5) and Goal 2, even though the amendment is inconsistent with the acknowledged plan of another jurisdiction. Pursuant to ORS 268.380(2), Metro may require any existing acknowledged comprehensive plans that are inconsistent with the newly amended comprehensive plan to be amended to maintain consistency, as required by Goal 2. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. ORS 197.190(1) and 268.385(1) and Goal 2 directly impose plan coordination and consistency obligations on the Metropolitan Service District. Metropolitan area goals and objectives and functional plans may supplement Metro's coordination authority and obligation, but they are not a necessary precondition to Metro's exercise of its coordination authority, where a city's or county's adoption of a particular plan amendment will necessitate changes in one or more acknowledged comprehensive plans to maintain plan consistency under Goal 2. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

6.2 Goal 2 – Land Use Planning – Coordination. ORS 197.190(1) and 268.285(1) both require that a Metropolitan Service District decision to coordinate be an action taken "through its governing body." Where the product of a Metro sponsored mediation is not formally adopted by the Metro governing body, it does not constitute an exercise of Metro's coordination obligation under those statutes. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d) require a finding that the proposed uses authorized by the proposed exception are "compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." To establish compliance with OAR 660-004-0020(2)(d), the county's finding that the likely adverse impacts of the proposed uses allowed under the proposed exception are similar to the impacts of the existing uses must be supported by substantial evidence. The absence of evidence that the impacts would be different is not a basis to conclude that the impacts would be similar. Where this unsupported presumption that the impacts would be similar is the foundation of the much of the county's subsequent analysis, the presumption is not supported by substantial evidence, and remand is necessary for the county to adopt more adequate findings regarding compatibility, supported by substantial evidence. *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d) require a finding that the proposed uses authorized by the proposed exception are "compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." The potential adverse impacts of different types of liquid bulk terminals affiliated with a deepwater port, such as an oil terminal versus a fertilizer export operation, could be different enough to require a separate analysis. Adequate findings regarding compatibility would start by identifying the likely adverse impacts of typical uses authorized under approved use categories, evaluating each use category separately, and if necessary specific types of uses within each category. The findings should also address the characteristics of uses on adjoining areas, and assess vulnerability to potential externalities from industrial uses in the exception area. Informed by those analyses, the county can then reach sustainable conclusions regarding whether the proposed uses are compatible with adjoining uses, or can be rendered compatible via identified measures. *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. OAR 660-004-0010(2) does not provide authority for the proposition that an exception to Statewide Planning Goal 4 is unnecessary to plan and zone an inventoried Statewide Planning Goal 5 aggregate site on forest land for mining rather than for forest uses. Rather, OAR 660-004-0010(2) simply makes it clear that a decision under Statewide Planning Goal 5 not to protect Goal 5 resource need not be supported by an exception to Goal 5. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Because of the way Statewide Planning Goal 5 is written, a decision to protect a significant aggregate resource site on forest land for mining, and to apply planning and zoning map designations to allow mining in a way that is not fully consistent with Statewide Planning Goal 4, does not require an exception to Statewide Planning Goal 4. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Pursuant to OAR 660-004-0018(4)(a), where a city finds that "[e]xisting plan and zoning designations" will be maintained for land subject to a Goal 15 exception, but does not explain why "existing plan and zoning designations" "limit the uses * * * public facilities and services, and activities" to only those that are justified in the exception, remand is required for the city to explain why the land

subject to an exception to Goal 15 satisfies the requirement in OAR 660-004-0018(4)(a) that the plan and zone designations "limit the uses * * * public facilities and services, and activities" to those justified in the exception, or apply plan and zone designations that limit the uses to the transportation facilities that are justified in the exception. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Where a petitioner argues a Geographic Information System map in the record suggests that a portion of the Willamette River Greenway included in a city's Goal 15 exception is located outside the city limits, but within county limits, and therefore the county is also required to join in or approve its own Goal 15 exception, petitioner fails to allege a basis for remand or reversal because as a matter of law the official Willamette River Greenway overlay zone boundary is the boundary mapped by the Oregon Department of Transportation, which confirms the greenway overlay zone is entirely within city limits. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Where LUBA remands a comprehensive plan amendment to adopt limited, technical changes to the analysis of economic, social, environmental and energy (ESEE) consequences that was adopted to support an exception to Goal 3, the county does not err in limiting the scope of remand to exclude new issues raised on remand regarding new conflicts with agricultural uses that the petitioner argues should be considered in a revised ESEE analysis, where the alleged new conflicts have nothing to do with the limited, technical changes to the ESEE required by LUBA's remand. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. An LCDC acknowledgement order that includes findings that characterize an industrial zone that the county applied to land subject to an exception to Goal 4 as "rural zoning," supports a conclusion that as a matter of law LCDC did not acknowledge the zone to comply with Goal 14. Rather, the uses authorized by the zone were intended to be limited to uses that are appropriate outside an urban growth boundary. *Hood River Valley Residents v. Hood River County*, 75 Or LUBA 452 (2017).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Nothing in OAR chapter 660, division 4, requires a county to identify one specific proposed use when adopting a reasons exception, or precludes a county from identifying a wide range of uses as the proposed "use." *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Adopting a reasons exception for an open-ended range of unspecified industrial uses, justified under three separate, partially overlapping "reasons," is a permissible approach, but compared to justifying a single proposed use under a single reason, the broader approach complicates an already difficult process, when the analysis moves to determining whether the proposal complies with the reasonable accommodation, ESEE and compatibility standards, and at the end of the process when the local government must apply zoning that limits uses to those allowed in the reasons exception. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. In taking a reasons exception, a local government must ensure that there is a close, direct relationship between the reason that is advanced to justify the exception, the proposed use or uses that fit within that reason and are analyzed under the exception standards, and the uses that are ultimately authorized by the zoning applied to the exception area. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. OAR 660-004-0018(4) provides that in taking a reasons exception a local government shall adopt zoning that limits the uses to those justified in the exception. Complying with OAR 660-004-0018(4) is difficult when the reasons exception is intended to authorize a broad array of unspecified rural industrial uses, under three separate reasons, because it may be unclear which specific industrial uses are allowed in the exception area and whether they have been justified in the exception. That difficulty might be overcome if the exceptions document that is incorporated into the comprehensive plan, the conditions imposed, and the approval standards and plan policies that will apply to any proposed industrial use are sufficient to ensure that only uses justified in the reasons exception are allowed. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. OAR 660-004-0020(2)(d) requires findings that the use proposed for an exception area will be rendered compatible with adjacent uses through measures designed to reduce adverse impacts. However, merely identifying a local process that in the future will identify the proposed use, identify the adverse impacts of that use and then identify and impose specific measures to reduce impacts is insufficient to comply with OAR 660-004-0020(2)(d), because it represents a deferral of compliance with the exception standard. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Even if there may be circumstances where it is permissible to defer to a later permit proceeding consideration of goal compliance issues that tangentially arise in processing a post-acknowledgment plan amendment that does not require a goal exception, it is clearly impermissible to approve a goal exception while deferring to a later permit proceeding a determination that a Goal 2 exception standard is or is not met. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. That the county initially adopted a problematic interpretation of the criteria for applying a limited use overlay zone to limit uses allowed on land for which a reasons exception is taken does not provide a basis for reversal or remand, where the county adopted an alternative interpretation that is consistent with the text of the zone change criteria. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Under a zone change criterion that requires a finding that the proposed base zone is "best suited" to accommodate the proposed use, in order to apply a limited use overlay zone to limit uses of the property to uses justified in a reasons exception, the fact that other base zones would also accommodate the proposed use does not undermine the county's finding that the proposed tourist commercial zone is best suited, where there is no evidence that the other zones are better suited

than the tourist commercial zone, and the reasons exception was expressly justified based on tourist commercial uses and application of the tourist commercial base zone. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. LUBA will affirm a governing body's interpretation of a code standard allowing imposition of a limited use overlay zone if "it is required to limit the uses permitted in the proposed zone" by the reasons exception rule at OAR chapter 660, division 4, to employ the overlay zone to limit uses to ensure consistency with Statewide Planning Goal 12 (Transportation), and the need to take an exception to Goal 12, even though the county took reasons exceptions only to other statewide planning goals, where the county's interpretation is not inconsistent with the express language, purpose or underlying policy of the code standard. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. While OAR 660-004-0018(4) requires that a reasons exception must limit uses authorized to those justified in the exception, the rule does not expressly require that the local government use the mechanism of an overlay zone to achieve that end, or preclude the use of appropriate conditions imposed under the plan or zoning amendments as part of the reasons exception. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. LUBA will reverse under ORS 197.829(1) a governing body's interpretation that a Limited Use overlay zone is applied to limit uses in exception areas only when the applicant requests it, and that instead conditions of approval can be applied to limit uses, when (1) the Limited Use overlay zone is expressly intended for that purpose, (2) nothing in the code suggests an alternative mechanism to limit uses or authorizes attaching conditions of approval to limit uses in exception areas, and (3) under the county's interpretation and the criteria that govern designation of the overlay zone there are no circumstances under which the overlay zone could be applied. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Where a county approves an exception for a transportation facility that will cross privately owned and federally owned EFU-zoned land, the county must approve the exception for both the privately and federally owned land. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. The statewide planning goal exception standards are set out at ORS 197.732 (statutory standard), Goal 2, Part II (goal standard); OAR chapter 660, division 4 (general administrative rule standard); OAR 660-012-0070) (transportation improvements on rural land); OAR chapter 660, division 14 (urban development of rural land). Those different exception standards vary somewhat in their wording and level of detail, and where a Goal 14 exception is required to allow residential development on rural land, OAR 660-014-040 is the more particular standard and the exception standard that applies to such Goal 14 exceptions. *VinCEP v. Yamhill County*, 215 Or App 414, 422-23, 171 P3d 368 (2007). *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 240 (2010).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. A net reduction in potential development density on rural land could be a sufficient reason under OAR 660-014-0040(2) to allow existing rural residential zoning to be relocated and reduced in size. *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 240 (2010).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Where a county's EFU zone does not permit solid waste disposal sites, but the statutory EFU zone does allow solid waste disposal sites, under the holding in *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002), a county may not approve an exception to Goal 3 (Agricultural Lands) to allow a solid waste disposal site on EFU-zoned property. Rather, the county must amend its EFU zone to allow solid waste disposal sites if it wishes to authorize that use on its EFU-zoned land. *Waste Not of Yamhill County v. Yamhill County*, 61 Or LUBA 423 (2010).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. When a goal exception is taken to facilitate proposed development, any comprehensive plan policies that implement the goal for which the exception is taken no longer govern that development. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Remand is necessary where the local government adopts exceptions to Statewide Planning Goals 11 and 14 to approve a destination resort, but fails to address comprehensive plan transportation policies that appear to implement Statewide Planning Goal 12 (Transportation), for which the local government did not adopt an exception, and the decision fails to explain why those policies are either satisfied or not applicable. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. In rezoning existing exception areas, OAR 660-004-0018(2)(b) does not require a county to evaluate all of the various uses potentially allowed in the new rural zone when (1) the rezone is from one nonresource zone to another nonresource zone, (2) the site is already developed with an existing use, and (3) the purpose of the rezone is to conform the zoning designation more closely to that existing use. *Landwatch Lane County v. Lane County*, 56 Or LUBA 408 (2008).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Where an existing exception area is rezoned to allow redevelopment of a developed site or development of a vacant site, OAR 660-004-0018(2)(b) may require the county to evaluate at least those uses in the new zone that are more intensive than uses allowed in the old zone and impose appropriate conditions if necessary to assure that the new zoning complies with the rule. *Landwatch Lane County v. Lane County*, 56 Or LUBA 408 (2008).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. LUBA will affirm findings that rezoning a vacant exception area from rural industrial to rural commercial is consistent with OAR 660-004-0018(2)(b), notwithstanding that the applicant does not propose a specific commercial use to evaluate, where the county concludes that any allowable use in the commercial zone would not commit nearby resource lands to nonresource use or be incompatible with such uses, given that the property is isolated and buffered from nearby resource uses by a

highway, a river, and residential development. *Landwatch Lane County v. Lane County*, 56 Or LUBA 408 (2008).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. A county does not err by failing to consider and approve an exception to Goals 3 and 4, where the application for a comprehensive plan and zoning map designation that would allow rural residential development is based on a code provision that allows rural nonagricultural and nonforest lands to be designated for rural residential use. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Under Goal 2, Part II(c)(4) an exception to allow a parkway on agricultural land requires that impacts on adjacent uses be reduced to a compatible level. Where a petitioner argues the challenged decision fails to do so and respondents identify no findings addressing this requirement, remand is required. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Petitioner's argument that land formerly within a city's urban growth boundary is necessarily subject to an exception to Goal 3 provides no basis for remand where it is not clear that the property was subject to a Goal 3 exception when included in the UGB and, even if it was, petitioner does not explain why removal of the property from the UGB would leave the property subject to a Goal 3 exception as a matter of law. *Manning v. Marion County*, 42 Or LUBA 56 (2002).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Rural nonresource property for which a Goal 2 exception has not been taken is not subject to the Goal 14 safe harbor provisions of OAR 660-004-0040. *DLCD v. Klamath County*, 40 Or LUBA 221 (2001).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. In adopting an exception to the statewide planning goals to allow rural residential use of forestland, a local government must comply with the requirements of OAR 660-004-0018(2)(b) regarding rural uses in exception areas. Rural residential zoning, in itself, does not demonstrate that the exception area will not commit nearby resource uses to nonresource uses and that the exception area is compatible with nearby resource uses, particularly when nearby rural residential uses are used to justify a conclusion that the exception area is committed to nonresource use. *DLCD v. Coos County*, 39 Or LUBA 432 (2001).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Before amending an urban growth boundary to add land with predominantly Class I soils to meet an identified need for commercial land, a county must determine whether alternatives to adding a site with predominantly Class I soils can reasonably accommodate the identified need. That alternatives analysis under OAR 660-004-0020(2)(b)(B) is a multi-factor analysis and rejecting alternative sites solely because they have soils that may increase development costs is error. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Land that is already included within a UGB is assumed to be available for urban development. That assumption

is not rendered invalid simply because sites that are planned and zoned for residential, industrial and commercial use have soil or other characteristics that make them less than ideal to develop. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Alternative sites to meet an identified need for commercially planned and zoned land may not be rejected solely because they have soils limitations that the USDA estimates may result in an average 39 percent development cost increase for some small commercial buildings. The estimated 39 percent cost increase is an average, so it may be lower in particular cases, and any added cost may be offset by other advantages the sites may possess. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Where petitioner argues that a Goal 3 exception to allow a subdivision of 10 five-acre lots on rural land also requires an exception to Goal 14, but petitioner fails to explain why such a subdivision constitutes an urban use and fails to challenge the county's findings that the proposal would be served by rural services, LUBA will reject the argument. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489 (2000).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. ORS 197.732(6), which applies to LUBA's and LCDC's review of goal exception decisions, does not require LUBA to perform a comprehensive and independent evaluation of a proposed goal exception, but is satisfied by a reasoned opinion. *Laurence v. Douglas County*, 33 Or LUBA 292 (1997).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. The county's failure to provide adequate notice of a proposed goal exception under ORS 197.732(5) is a procedural error that will not result in reversal or remand where the record demonstrates that petitioners' substantial rights were not prejudiced. *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. At a minimum, ORS 197.732(5) requires that the county's notice of a proposed goal exception must include a brief summary of the issues involved in the proposed exception, in addition to the list of applicable criteria required by ORS 197.763(3)(b). *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. ORS 215.431(1) and (2) allow delegation by a county governing body to the county planning commission or hearings officer of the authority to conduct hearings and make decisions on applications for plan amendments, subject to appeal to the county governing body. However, under ORS 215.413(5)(a), ORS 215.431(1) and (2) do not apply to any plan amendment for which an exception to any of the Statewide Planning Goals is required. *Young v. Douglas County*, 31 Or LUBA 545 (1996).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. Under OAR 660-04-020(2)(d), an exception to Goal 3 may be approved so long as compatibility with adjacent uses *will be* achieved through measures designed to reduce adverse impacts; compliance with the compatibility standard need not be actually achieved prior to approval of the exception. *Schrock Farms, Inc. v. Linn County*, 31 Or LUBA 57 (1996).

6.3.1 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Generally. A county governing body's interpretation that an otherwise applicable code permit standard requiring "Class I-IV soils [to] be preserved and maintained for farm use" is not applicable to land for which an exception to Statewide Planning Goal 3 (Agricultural Lands) has been adopted as part of the acknowledged county comprehensive plan, is not "clearly wrong," and is within the governing body's discretion under ORS 197.829. *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

6.3.2 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Developed. The county did not err in concluding that the "unique resource" at issue, a deepwater river port whose upland portions are located within the existing exception area, is still "located on agricultural or forest land" for purposes of OAR 660-004-0022(3)(a). Although "Agricultural Land" for purposes of Goal 3 and its implementing administrative rule does not include land areas subject to exceptions to Goal 3, it does not necessarily follow that agricultural land, as that term is used in OAR 660-004-0022 or other parts of the Goal 2 exception rule is subject to the same restriction. At least for the limited purpose of evaluating the need for and compliance with exception standards to allow new or changed uses contrary to the resource goals, land within an exception area potentially remains "agricultural land" subject to Goal 3, and where the original exception did not take an exception to Goal 4 the site potentially remains "forest land." *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

6.3.2 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Developed. An LCDC acknowledgement order that includes findings that characterize an industrial zone that the county applied to land subject to an exception to Goal 4 as "rural zoning," supports a conclusion that as a matter of law LCDC did not acknowledge the zone to comply with Goal 14. Rather, the uses authorized by the zone were intended to be limited to uses that are appropriate outside an urban growth boundary. *Hood River Valley Residents v. Hood River County*, 75 Or LUBA 452 (2017).

6.3.2 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Developed. Where a county adopts both irrevocably committed and physically developed exceptions to the statewide planning goals, but the only issues raised below were directed at the physically developed exceptions, ORS 197.763(1) precludes the petitioner from challenging the irrevocably committed exceptions for the first time at LUBA. *Landwatch Lane County v. Lane County*, 56 Or LUBA 408 (2008).

6.3.2 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Developed. Under OAR 660-004-0025(2), the "uses allowed by the applicable goal" that cannot be used to justify a physically developed exception are not limited to the uses set forth in OAR 660-004-0028(3)(b) and (c), which apply to irrevocably committed exceptions. *Cotter v. Clackamas County*, 53 Or LUBA 25 (2006).

6.3.2 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Developed. Under OAR 660-004-0025(2), the phrase "uses allowed by the applicable goal" does not exclude uses conditionally allowed in forest zones under OAR 660-006-0025 merely because such uses are subject to review to analyze impacts to adjacent forest lands. *Cotter v. Clackamas County*, 53 Or LUBA 25 (2006).

6.3.2 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Developed. A local government decision approving a physically developed exception under OAR 660-04-025 to Goals 3 and 4 will be remanded where the findings do not establish that the property is physically developed with non-resource uses. *DLCD v. Columbia County*, 32 Or LUBA 221 (1996).

6.3.2 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Developed. The county's denial of a developed exception will be upheld when the county finds that the physical characteristics of the property do not render it irrevocably committed to nonresource uses; there is

continuing resource use of properties to the north, east and west; and the existence of public facilities and services installed to serve the residence on the site do not irrevocably commit the remainder of the site to nonresource uses. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

6.3.2 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Developed. Even if petitioners' evidence supports a conclusion that a resource parcel is not adequate for commercial timber production, that conclusion does not justify an exception to Goals 3 and 4 since it does not establish that all uses allowed by the applicable goals are impracticable. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

6.3.2 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Developed. The standards for approving a physically developed exception to Statewide Planning Goals 3 and 4 are demanding. The county must find that the property has been physically developed to such an extent that all Goal 3 or 4 resource uses are precluded. Uses established in accordance with the goals cannot be used to justify such an exception. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

6.3.2 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Developed. The bias under Goals 3 and 4 in favor of commercial agricultural and forest enterprises does not mean a local government may assume that noncommercial farm and forest uses are not "uses allowed by the applicable goal" for which a proposed exception area's suitability must be considered in granting an exception. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

6.3.2 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Developed. A local government may not assume that the entire parcel or ownership occupied by an existing dwelling or road is physically developed so that it is not available for uses allowed under the goals. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The county did not err in concluding that the "unique resource" at issue, a deepwater river port whose upland portions are located within the existing exception area, is still "located on agricultural or forest land" for purposes of OAR 660-004-0022(3)(a). Although "Agricultural Land" for purposes of Goal 3 and its implementing administrative rule does not include land areas subject to exceptions to Goal 3, it does not necessarily follow that agricultural land, as that term is used in OAR 660-004-0022 or other parts of the Goal 2 exception rule is subject to the same restriction. At least for the limited purpose of evaluating the need for and compliance with exception standards to allow new or changed uses contrary to the resource goals, land within an exception area potentially remains "agricultural land" subject to Goal 3, and where the original exception did not take an exception to Goal 4 the site potentially remains "forest land." *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. An LCDC acknowledgement order that includes findings that characterize an industrial zone that the county applied to land subject to an exception to Goal 4 as "rural zoning," supports a conclusion that as a matter of law LCDC did not acknowledge the zone to comply with Goal 14. Rather, the uses authorized by the zone were intended to be limited to uses that are appropriate outside an urban growth boundary. *Hood River Valley Residents v. Hood River County*, 75 Or LUBA 452 (2017).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where a county adopts both irrevocably committed and physically developed exceptions to the statewide planning goals, but the only issues raised below were directed at the physically developed exceptions, ORS 197.763(1) precludes the petitioner from challenging the irrevocably committed exceptions for the first time at LUBA. *Landwatch Lane County v. Lane County*, 56 Or LUBA 408 (2008).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Because a committed exception under OAR 660-004-0028 is based primarily on the relationship between the exception area and adjacent lands, arguments that the land within a one-mile radius of the subject property is predominantly farmland does not demonstrate error in the county's findings that adjacent residential development commits the subject property to non-resource use. *Scott v. Crook County*, 56 Or LUBA 691 (2008).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Evidence that 73 percent of the parcels within a one-mile radius are less than five acres in size, including 18 lots in the immediate vicinity of the subject property that average 2.5 acres in size, is sufficient to support the county's finding under OAR 660-010-0028(6)(d) that the character of the neighborhood and region is predominantly residential rather than agricultural, notwithstanding that the county might reach a different conclusion if it evaluated a much larger area. *Scott v. Crook County*, 56 Or LUBA 691 (2008).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Under OAR 660-004-0028(6)(e), a county must evaluate whether natural or man-made features or impediments, such as roads, separate the exception area from adjacent resource lands. It is

immaterial under the rule whether the applicant owns the adjacent resource lands. *Scott v. Crook County*, 56 Or LUBA 691 (2008).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings supporting an irrevocably committed exception are inadequate, where the county fails to identify any conflicts between adjoining uses and resource use of the property or address whether adjoining parcels were created pursuant to the applicable statewide planning goals. That adjoining farm-zoned parcels have dwellings is an insufficient basis for concluding that a parcel is irrevocably committed to residential use. *Lancefield Farm Co. v. Yamhill County*, 56 Or LUBA 781 (2008).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where a county's findings note that property contains a spring and a road and that adjacent lands contain dwellings, but do not otherwise explain why the spring and the road and the adjacent dwellings make resource use of the property impracticable, the county's findings are inadequate to demonstrate compliance with OAR 660-004-0028(2). *Gordon v. Polk County*, 55 Or LUBA 57 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A county errs in concluding that residential uses of properties in the vicinity of the property have committed the subject property to non-resource use, without explaining why those same residential uses will not result in committing other resource lands in the area to non-resource use. *Gordon v. Polk County*, 55 Or LUBA 57 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Under OAR 660-004-0028(2)(c), findings must address "the relationship between the exception area and the lands adjacent to it." Findings that discuss lands located within a 2000-foot radius from the proposed exception area but do not discuss the lands adjacent to the exception area are inadequate. *Gordon v. Polk County*, 54 Or LUBA 351 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The mere presence of adjoining residential uses is not a sufficient basis for concluding that resource lands are irreversibly committed to non-resource uses. *Gordon v. Polk County*, 54 Or LUBA 351 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. OAR 660-004-0028(6) requires the county's findings to focus on existing adjacent uses and parcel size and ownership patterns on adjacent lands. Findings that analyze parcel sizes within a 2000-foot radius of the property and beyond, but do not discuss adjacent uses and ownership patterns, are inadequate. *Gordon v. Polk County*, 54 Or LUBA 351 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The focus of OAR 660-004-0028(6)(b) is to determine whether existing public facilities and services on or near the property commit the property to non-resource use. The focus is not on determining whether public facilities and services are available to serve proposed non-resource uses. *Gordon v. Polk County*, 54 Or LUBA 351 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Under OAR 660-004-0018(2), where the county concludes that residential uses have committed a property to non-resource use but also concludes that residential uses of the exception area will not further commit resource lands to non-resource use, the county must provide an explanation for why residential uses that commit one resource property to residential use will not result in that same residential use committing other resource lands in the area. *Gordon v. Polk County*, 54 Or LUBA 351 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. If an exception area does not include land on the county's acknowledged inventory of Goal 5 resources, the county need not adopt an exception to Goal 5. *Gordon v. Polk County*, 54 Or LUBA 351 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Absent evidence of conflicts or similar impediments to resource use, the fact that access to forest land is via a county road that passes through an area of rural residential homes is not a sufficient basis to conclude that the property is irrevocably committed to uses not allowed by Goal 4. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. That a paved county road may not be suitable to transport heavy equipment necessary for grass seed farming does not mean that the road is inadequate to provide access for other agricultural uses, and is not a sufficient basis to conclude that the property is irrevocably committed to non-agricultural uses. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. That some residential neighbors may find pasturing of animals objectionable is not a sufficient basis to conclude that property otherwise suitable for pasturing animals is irrevocably committed to non-farm uses. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. While OAR 660-004-0028(6) does not require detailed descriptions of adjacent existing uses, a finding that "some incidental farm use, limiting to pasturing of horses, occurs to the north" is an inadequate description of adjacent farm uses. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The purpose of the OAR 660-004-0028(6)(b) requirement to identify existing public facilities and services is to determine whether existing public facilities and services on or near the subject property contribute to irrevocably committing the property to non-resource use. The purpose is not to determine whether public facilities and services are available to serve proposed non-resource uses. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A finding that a Goal 14 exception has been taken for some properties in the area of the subject parcel is

inadequate to satisfy the OAR 660-004-0028(6)(c)(A) requirement that the findings analyze how the existing development pattern in the area came about and whether findings against the statewide planning goals were made at the time of partitioning or subdividing. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where a local government concludes that adjoining rural residential development commits resource land to uses not allowed by Goals 3 or 4, OAR 660-004-0018(2) requires the local government to explain why rural residential development of the subject property will not also result in committing other resource lands in the area. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where in adopting a committed exception under OAR 660-004-0028 the local government includes findings addressing some of the standards for adopting a reasons exception under OAR 660-004-0020(2), LUBA will remand to the local government to either delete those findings or explain what relevance they have to the committed exception. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A county's findings that chemicals are required in the future in order to make forest practices on a property practicable are not supported by substantial evidence where the record does not indicate whether chemicals were already applied to the property or that whatever applications might be necessary have not already occurred. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Contamination of drinking water through application of herbicides, pesticides and fertilizers on adjacent resource lands is not an occasional inconvenience accompanying rural life that rural residents must be willing to accept, and might provide the basis for a committed exception to Goal 4. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A county's finding that aerial spraying of chemicals is necessary in order to make forest practices on a 20-acre property practicable is not supported by substantial evidence where the evidence in the record supports a conclusion that manual application is the preferred method of application for properties 40 acres or smaller and the findings do not provide other reasons that manual spraying is not practicable. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where the county's conclusion that forest uses are impracticable because of liability risks associated with possible contamination of drinking water through application of chemicals hinges upon its finding that aerial spraying is necessary, and that findings is unsupported by substantial evidence, the challenged decision fails to demonstrate that uses allowed by Goal 4 are impracticable. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A risk of liability for negligent application of fertilizers on property that might result in contamination of drinking water serving adjacent lands does not provide a sufficient basis to conclude that farm use is impracticable on the subject property. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings supporting a conclusion that a property is irrevocably committed to nonresource use that rely on the property's similarity to other properties already zoned for nonresource use and the presence of residences on adjacent lands are not sufficient to explain why the relationship between the property and adjacent lands make the property impracticable for resource uses. *Wetherell v. Douglas County*, 51 Or LUBA 730 (2006).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where a proposed plan amendment, zone change and goal exception would result in a split-zoned parcel with the northern portion planned and zoned for residential use and the southern portion planned and zoned for resource use, and a policy in the county's comprehensive plan at least arguably permits land divisions along boundaries separating exception areas from resource lands, and such a division would result in lots smaller than the minimum lot size permitted by the county's acknowledged Goal 14 exception, the county must adopt Goal 14 findings or, if necessary, adopt a specific exception to Goal 14. *Wetherell v. Douglas County*, 51 Or LUBA 730 (2006).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A landowner is not legally obligated to withdraw land from forest operations in order to protect adjoining rural residential lands from the potential threat of windthrow, and the potential of such windthrow resulting from logging forest lands is not a basis to conclude that such lands are committed to non-resource uses. *Gordon v. Polk County*, 50 Or LUBA 647 (2005).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Riparian protection measures required under the Forest Practices Act are not "forest practices" for purposes of OAR 660-004-0028(3)(c), and a county may consider setbacks and other riparian protection measures in determining whether forest land is irrevocably committed to non-resource use. *Gordon v. Polk County*, 50 Or LUBA 647 (2005).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. That two-acres of a 41-acre parcel are subject to riparian setbacks and other limitations on logging does little to demonstrate that propagation and harvesting of forest products on the parcel is impracticable. *Gordon v. Polk County*, 50 Or LUBA 647 (2005).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Incidents of trespass and vandalism on forest lands are insufficient to demonstrate that such lands are irrevocably committed to non-resource use, where most of the cited incidents stem not from trespassers but from residential neighbors and their guests who enter the property as invitees. *Gordon v. Polk County*, 50 Or LUBA 647 (2005).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Some level of trespass and vandalism is an inevitable aspect of maintaining large tracts in forest use,

particularly near rural residential areas. Unless such incidents rise to such a level that they actually hinder or preclude forest operations on a significant part of the property, such incidents do not demonstrate that forest use of the property is impracticable. *Gordon v. Polk County*, 50 Or LUBA 647 (2005).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. In adopting a committed exception to Goal 14, a county does not err in assuming that residential properties less than 2 acres constitute "urban levels of development," to support its conclusion that all rural uses on the subject property are impractical. *Doob v. Josephine County*, 49 Or LUBA 113 (2005).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where a local comprehensive plan policy defines "Urban Exception Areas" as lands with acknowledged exceptions to Statewide Planning Goals 3, 4 and 11, the county need not require an exception to Goal 11 where it limits uses in approved exception area to those uses that do not require or impact urban public facilities. *Doob v. Josephine County*, 49 Or LUBA 113 (2005).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. While a county need not address every possible farm use defined under ORS 215.203(2)(a) in adopting a committed exception to Goal 3, when a party below identifies a particular farm use that may be practicable, the county must address the practicability of that farm use. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The focus of a committed exception under OAR 660-004-0028 is the relationship between the subject property and adjacent uses. Findings that describe and rely upon alleged impacts from rural residential uses up to one-half mile from the subject property, and that provide no description or analysis of adjacent uses, are insufficient to demonstrate that the subject property is committed to nonresource uses. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A county's reliance on reported incidents of vandalism and other crimes in a large rural residential area near a parcel are insufficient to demonstrate that the parcel is committed to nonresource uses, absent evidence that the cited criminal incidents interfere or are likely to interfere with farm or forest uses on the subject property. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Externalities from farm or forest operations such as dust, spray, smoke and noise are inherent aspects of rural life in agricultural or forest zones, and absent evidence that such externalities have or are likely to cause actual conflicts with resource operations, evidence of the possibility of such conflicts with rural residential uses is insufficient to demonstrate that resource uses are impracticable. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The focus of analysis under OAR 660-004-0028 is on *existing* circumstances that contribute to the

practicability of resource use in the exception area, not speculative future circumstances. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where a county concludes that conflicts with adjoining rural residential development commit a property to nonresource uses, the county's findings addressing OAR 660-004-0018(2)(b)(B) must explain why residential development of the subject property will not present the same risk of committing other adjacent resource lands to nonresource uses. Given the complex nature of that explanation, evidence of conflicts with rural residential uses do not "clearly support" a finding that residential zoning of the subject property will not commit adjacent resource lands, for purposes of ORS 197.835(11)(b). *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Concerns that topsoil might wash down on an adjoining residential area and that resource related truck traffic will have impacts on that residential area are the kinds of discomforts that are part and parcel of rural living and they do not provide a basis for an irrevocably committed exception. *Friends of Linn County v. Linn County*, 44 Or LUBA 349 (2003).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Concerns that a property owner's use of large quantities of well water on a resource parcel for farm or forest use might interfere with individual wells used by nearby rural residences does not support a conclusion that farm or forest use of the resource parcel impracticable. *Friends of Linn County v. Linn County*, 44 Or LUBA 349 (2003).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Although it may be appropriate to focus exclusively or preponderantly on the poor quality of soils for farm and forest use in deciding whether a particular tract qualifies as agricultural lands or forest lands, such an exclusive or preponderant focus on the tract itself is not appropriate in considering an irrevocably committed exception, where the focus is on the relationship of the adjoining properties to the tract. *Friends of Linn County v. Linn County*, 42 Or LUBA 235 (2002).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Speculative impacts on an adjoining rural subdivision from possible future aerial application of herbicides, pesticides and fertilizer and future movement of trucks to and from a 39-acre parcel for future farm and forest use are the occasional inconveniences that rural residents must be willing to accept and do not provide a basis for a committed exception to Goals 3 and 4. *Friends of Linn County v. Linn County*, 42 Or LUBA 235 (2002).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A reasons exception for rural housing is not "necessary" under the last sentence of OAR 660-004-0022(2), if the county fails to demonstrate that land inside nearby urban growth boundaries or on nearby exception lands could not accommodate any identified market demand for housing, as required by OAR 660-004-0020(2)(b). *Friends of Linn County v. Linn County*, 42 Or LUBA 235 (2002).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A county errs in concluding that agricultural land is committed to nonfarm uses under OAR 660-004-0028(6),

where its conclusion rests preponderantly on the characteristics of the subject property and fails to identify any conflicts or other aspects of the relationship between the subject property and adjoining residential uses that commit the property to nonfarm uses. *Friends of Linn County v. Linn County*, 41 Or LUBA 358 (2002).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A finding that existing improvements and the presence of seasonal drainage areas limit farm use of agricultural land is inadequate to demonstrate that the land is irrevocably committed to nonfarm uses, where the finding fails to describe the limitations, or explain why such longstanding limitations now render farm use of the subject property impracticable, given the history of farm use on the property. *Friends of Linn County v. Linn County*, 41 Or LUBA 358 (2002).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings that address certain rural residential locational criteria in the county's comprehensive plan are inadequate to address the specific requirements of OAR 660-004-0028(6), where the locational criteria do not implement the rule and bear no obvious relationship to the rule's requirements. *Friends of Linn County v. Linn County*, 41 Or LUBA 358 (2002).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Absent recent or imminent changes in adjacent rural residential uses, where a neighboring subdivision has been developed for many years and the subject property has been in resource use during much of that time, the existence of those adjacent rural residential uses is insufficient to demonstrate that the subject property is irrevocably committed to nonresource use. *DLCD v. Lane County*, 39 Or LUBA 445 (2001).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. When the local government does not demonstrate that the uses allowed by the goals are impracticable, there is no need to resolve relevancy and evidentiary challenges to the findings. *DLCD v. Coos County*, 39 Or LUBA 432 (2001).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings supporting an irrevocably committed exception must address adjacent lands that may tend to make resource use of the proposed exception area practicable as well as adjacent lands that may tend to make resource use impracticable. *DLCD v. Coos County*, 39 Or LUBA 432 (2001).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The mere existence of residential uses near a proposed exception area does not demonstrate that the proposed exception area is committed to nonresource use, especially when most of the nearby properties with residential uses also include resource uses. *DLCD v. Coos County*, 39 Or LUBA 432 (2001).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A county errs in relying exclusively on rural residential locational criteria in its comprehensive plan in taking a committed exception to Goal 3, instead of the criteria of OAR 660-004-0028, where nothing in the county comprehensive plan purports to waive or supplant any requirement of state law. *Friends of Linn County v. Linn County*, 39 Or LUBA 74 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where petitioner argues that a Goal 3 exception to allow a subdivision of 10 five-acre lots on rural land also requires an exception to Goal 14, but petitioner fails to explain why such a subdivision constitutes an urban use and fails to challenge the county's findings that the proposal would be served by rural services, LUBA will reject the argument. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings that characteristics of adjoining uses support an irrevocably committed exception to Goal 3 are inadequate where the findings do not explain (1) how many of the adjoining lots are developed, (2) what activities on those lots have impacts on the proposed exception area, (3) why services provided to those lots impact the proposed exception area, or (4) why adjoining recreational and open space uses make farm use of the proposed exception area impracticable. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. While the characteristics of a proposed exception area itself are relevant in addressing the requirements for an irrevocably committed exception, the focus must be on impacts from adjoining properties and it is error to give "exclusive or preponderant weight" to characteristics of the proposed exception area itself. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. In adopting an irrevocably committed exception where the proposed exception area has a history of farm use and is currently in farm use, it is not sufficient to rely solely upon long-standing site characteristics or the presence of long-standing adjacent conflicting uses. An adequate demonstration of impracticability must identify recent or imminent changes affecting the subject property that, by themselves or in combination with other factors, render continued farm use of the property impracticable. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The mere presence of residential uses on EFU-zoned properties adjacent to a proposed exception area does not demonstrate that the subject property is irrevocably committed to nonfarm uses. In considering residential uses on adjacent properties, the county must identify in its findings the conflicts or other impacts between the residential uses and the subject property that make farm use of the subject property impracticable. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. OAR 660-004-0028(6)(c)(B) does not require that the county consider as one farm or forest operation those contiguous, undeveloped parcels under common ownership not zoned for resource use. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. OAR 660-004-0028(6)(c) prohibits impacts from rural residential uses approved pursuant to the statewide

land use goals from being used to justify a committed exception for nearby property. Where a county decision relies in part on impacts from nearby residential uses to conclude that the resource lands are irrevocably committed to nonresource use, the findings must establish that those conflicts do not arise from residential areas that were approved pursuant to statewide planning goal exceptions. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A local government is not required to adopt findings addressing the farm tax deferral status of property when considering the "irrevocably committed" factors of OAR 660-004-0028. However, the fact that property is in farm tax deferral is relevant evidence in determining whether it is impracticable to put the property to farm use. *Friends of Yamhill County v. Yamhill County,* 38 Or LUBA 62 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Once a local government reaches a supportable conclusion that growing timber is impracticable on forest land, it does not need to address the practicability of other forest practices described in OAR 660-006-0025(2)(a). *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A conclusion that a property has a negative present net value if converted to forest uses, without explaining what relevance a forest operation's present value has on whether forest uses are impracticable, is inadequate to demonstrate that forest uses are in fact impracticable. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. In reviewing a county's decision that property is irrevocably committed to nonresource uses, LUBA is not required to give any deference to the county's explanation for why it believes the facts demonstrate compliance with the legal standards for a committed exception. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings that state there is "sufficient evidence in the form of oral testimony and documentation to support the application," and also state that existing adjacent parcels are "clustered around" two roads are insufficient to adequately describe the characteristics of adjacent lands and the uses located on them as required by OAR 660-004-0028(2)(b) and (6)(a). *DLCD v. Wallowa County*, 37 Or LUBA 105 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A determination that rural residential uses on EFU property would create a buffer between urban uses and nearby agricultural land is not a proper consideration in granting an exception under OAR 660-004-0028. *DLCD v. Wallowa County*, 37 Or LUBA 105 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where a Goal 4 committed exception imposes a zoning district with a five-acre minimum lot size and a lot of record provision that allows development of lots smaller than five acres but does not impose a specific residential density limit, the county governing body exceeds its interpretive discretion in

interpreting the exception as imposing a 2.3-acre minimum residential density. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A committed-exception zone-change decision that acknowledges the existence of Goal 5 resources on the subject property, but concludes that the county's existing Goal 5 plan provisions will address any conflicts, is not adequate to demonstrate compliance with Goal 5, where the findings do not state which of the county's existing Goal 5 plan provisions ensure continued compliance once the exception is taken, and the findings do not consider whether the zone change may introduce the possibility of new conflicting uses. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Until the county has adopted findings that determine precisely what inventoried Goal 5 resource areas are located on the subject property, it is not possible to identify which county Goal 5 resource protection programs affect all or parts of the subject property, and the county is in no position to adopt findings explaining whether a committed-exception zone-change is consistent with the county's existing Goal 5 resource protection provisions. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A finding that the soils on the subject property are unsuitable for farm use is an inadequate, unexplained conclusion where the subject property is predominantly Class VI soils and the comprehensive plan provides that such soils have significant importance for grazing. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Committed exception findings must explain what it is about existing parcel size and ownership patterns that irrevocably commit resource land to nonresource use, specify the location of parcels created prior to application of the Goals, and distinguish those parcels created pursuant to the Goals. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Adequate findings regarding adjacent uses must specifically identify adjacent uses and explain what it is about the adjacent uses that make the farm use of the subject property impracticable. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Assuming that the existence of water and sewer lines on adjacent lands may be relevant to whether a property is irrevocably committed to nonresource use, findings must explain what that relevance is. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A property need not be capable of supporting a commercial farm by itself to be capable of being put to "farm use" as that term is defined in ORS 215.203. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The ultimate issue in LUBA's review of a decision adopting a committed exception under OAR 660-004-0028 is whether the adopted findings that are relevant and supported by substantial evidence are sufficient to demonstrate compliance with the standard of ORS 197.732(1)(b) that uses allowed by the goal are impracticable. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. OAR 660-004-0028 does not require a finding that the characteristics of the proposed exception area are sufficient in and of themselves to commit the property to nonresource use. All factors in the rule must be considered, including the characteristics of the adjacent lands. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. In considering challenges to committed exception findings the question of whether the local government adopted the required findings addressing the characteristics of adjacent lands and the relationship between the exception area and adjacent lands is distinct from the question of whether the adopted findings demonstrate that uses allowed by Goal 3 are impracticable on the subject property. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Under OAR 660-004-0028(6)(c)(A), conflicts with rural residential development in exception areas created pursuant to applicable goals cannot be used to justify a committed exception on the subject property. A finding that a majority of nearby parcels were created before the statewide planning goals is insufficient to demonstrate compliance with this requirement. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The requirement in OAR 660-004-0028(6)(c)(B) that "several contiguous undeveloped parcels" under one ownership shall be considered as one farm or forest operation does not require that a contiguous developed parcel be considered as part of contiguous farm operation. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A Goal 3 committed exception cannot be justified based on a finding that "commercial farming" is impracticable on the subject property. Protection under Goal 3 is not limited to commercial farms. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A Goal 3 committed exception cannot be justified based on a finding that the property is not capable of supporting an economically self-sufficient agricultural operation, or property on which a reasonable farmer could make a living entirely from agricultural use of the land. Farm uses that do not meet that threshold are protected by Goal 3. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. In considering whether farm uses are impracticable, a county may not limit its consideration to

"traditional" agricultural uses, where the feasibility of "nontraditional" agricultural uses is raised as an issue before the county. However, where the county's findings nevertheless address the feasibility of "nontraditional" uses, the county's possible misunderstanding of the scope of the required analysis provides no basis for reversal or remand. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A county's findings and reasons do not demonstrate that the relationship between the subject property and adjacent lands has irrevocably committed the subject property to uses not allowed by Goal 3, or that uses allowed by the goal are impracticable where: (1) the property includes prime agricultural soils, (2) the property has a long history of and is currently used for sheep raising and other farm uses; (3) few conflicts between adjacent uses and farm uses on the subject property are identified and (4) the county applied an incorrect legal standard in assessing whether farm uses are impracticable on the subject property. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A finding that property is "not ideal" for rural residential use under current zoning is not sufficient to demonstrate that it is "impracticable" to use the property for such rural residential use, where a rural residence exists on the property and the decision does not explain why proximity to the interstate highway or other abutting uses make continued rural residential use impracticable. *James v. Josephine County*, 35 Or LUBA 493 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A committed exception to Goal 11 will be remanded, where the effect of taking the exception is to allow urban uses that would not be supported by levels of public facilities and services appropriate for a rural area and the county has not shown that it is impracticable to continue using the property for rural residential use. *James v. Josephine County*, 35 Or LUBA 493 (1999).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. In light of historical use of the property for grazing, its high-value soils and similarities between the property and adjacent resource lands, the county's unexplained reliance on a winter high-water table and slight to moderate slopes on the property are inadequate to demonstrate that farm use on the property is impracticable in order to justify a committed exception to Goal 3. *Wodarczak v. Yamhill County*, 34 Or LUBA 453 (1998).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A committed exception to Goal 3 is not justified by the mere presence of adjacent residential development, without evidence of conflicts or an explanation why the relationship between that development and the subject property renders farm use impracticable on the property. *Wodarczak v. Yamhill County*, 34 Or LUBA 453 (1998).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. In approving a committed exception to Goal 3, the county is required by OAR 660-004-0018(2) to limit use on the property within the exception area to ensure that the exception does not tend to commit

adjacent and nearby resource lands to nonresource uses. *Wodarczak v. Yamhill County*, 34 Or LUBA 543 (1998).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Committed exceptions must be based on facts illustrating how past development has cast a mold for future uses; taking a committed exception requires an analysis of how existing development on some parcels affects practicable uses of others. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The county's findings do not demonstrate that the subject property is irrevocably committed to non-resource uses where the findings describe the characteristics of the subject property, but do not explain what impact those characteristics have on the practicability of uses on the property. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings that address neighborhood and regional characteristics under OAR 660-04-028(6)(d) by concluding that there will continue to be an increasing demand for additional rural residential homesites in the future are irrelevant to a conclusion that a committed exception is justified. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Under OAR 660-04-028(3), the appropriate standard for determining whether farm use is impracticable on the subject property is whether the property is capable, now or in the future, of being employed for agricultural production for the purpose of obtaining a profit in money. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. All the factors listed in OAR 660-04-028(6), including "existing adjacent uses" and "other relevant factors," are applicable to an irrevocably committed exception. *DLCD v. Curry County*, 33 Or LUBA 313 (1997).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The purported unsuitability of a property for resource use is not an "other relevant factor" for purposes of approving an irrevocably committed exception for that property under OAR 660-04-028(6). *DLCD v. Curry County*, 33 Or LUBA 313 (1997).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. An irrevocably committed exception under Goal 2 concerns the relationship between the exception area and adjacent lands. Under OAR 660-04-028(6), a county decision granting an exception to Goals 3 and 4 based on a factor that has nothing to do with that relationship is in error. *DLCD v. Curry County*, 33 Or LUBA 313 (1997).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A local government decision approving an irrevocably committed exception under OAR 660-04-028 to Goals 3 and 4 will be remanded where it does not include findings supported by substantial

evidence establishing that uses allowed by Goals 3 and 4 are impracticable. *DLCD v. Columbia County*, 32 Or LUBA 221 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Conflicts between certain property and rural residential development in exception areas created pursuant to the applicable goals cannot be used to justify a committed exception on the property. *DLCD v. Yamhill County*, 31 Or LUBA 488 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. To approve an irrevocably committed exception, a county must find that all uses allowed by the goals are impracticable, but this does not mean the findings must anticipate every conceivable objection by specifically addressing each and every use potentially allowable under the applicable goals. *DLCD v. Yamhill County*, 31 Or LUBA 488 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where the county attempts to apply a rural residential zoning density in an irrevocably committed exception area, a conclusory finding that redesignation of the subject parcel will not cause adjacent resource lands to satisfy working paper guidelines for irrevocably committed exceptions does not substitute for the actual analysis required under OAR 660-04-018(2)(b)(B) regarding the potential commitment of adjacent resource lands to nonresource use. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings adopted by the county approving a committed exception to Goals 3 and 4 are inadequate where they contain no discussion or explanation of how the existing uses on adjacent parcels make resource use on the subject property impracticable. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where the county's conclusion that two parcels are not contiguous for purposes of OAR 660-04-028(6)(c)(B) is not factually established in the record and is inconsistent with evidence relied upon by the county regarding nonresource use on adjacent parcels, the county's finding is not supported by substantial evidence in the record. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The county's reliance on the existence of adjacent non-resource parcels in justifying a committed exception is impermissible under OAR 660-04-028(6)(c)(A) where the findings do not adequately establish how or when the adjacent parcels were created. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. OAR 660-04-028(6)(c)(A) does not categorically prohibit a local government from relying upon the existence of adjacent exception areas in granting a committed exception. Rather, the rule permits consideration of past land divisions that were made without application of the Statewide Planning Goals as one factor in the analysis of whether a committed exception should be allowed

if the manner of development on the resulting parcels or other factors makes resource use unsuitable on those parcels or on nearby lands. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Where the county's findings regarding parcel size and ownership patterns on lands adjacent to a proposed exception area contain no reference to the analysis required by OAR 660-04-028(6)(c)(A), and do not suggest that the county is relying upon separate incorporated documents to provide that analysis, the county's incorporation of the entire application does not provide a sufficient reference to the specific documents relied upon by the county to satisfy the applicable criteria. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. County findings that describe the physical characteristics and existing uses of adjacent lands in approving a committed exception to Goals 3 and 4 are adequate for purposes of OAR 660-04-028(2)(b) and (6)(a). Those rules do not require the county to make findings regarding the ownership of the adjacent parcels or the proximity of developed uses on adjacent lands. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The failure of adjacent property owners to manage their lands actively and successfully, the frustrated intentions of a developer in creating a large-capacity water system to serve the subject forest property, the earlier approval of a three-phase subdivision, the property's potential for non-resource use and similar considerations do not support a determination that the property is irrevocably committed to non-resource use. *1000 Friends of Oregon v. Columbia County*, 31 Or LUBA 47 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Capital expenditures for streets, water lines, electric power, design, engineering and surveying on an adjacent property are not relevant to finding a committed exception unless they detract from management of the subject property for forest uses. *1000 Friends of Oregon v. Columbia County*, 31 Or LUBA 47 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Under OAR 660-04-028(6)(c)(A), a county may not rely on the developed characteristics of adjacent non-resource parcels created pursuant to applicable goals to justify a committed exception on the subject property. *DLCD v. Curry County*, 30 Or LUBA 294 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. When property is located in a combined agricultural and forest zone, findings in support of an irrevocably committed exception must establish that all uses allowed by Goals 3 and 4 are impracticable. A finding that the property has never been in agricultural use is insufficient. *DLCD v. Curry County*, 30 Or LUBA 294 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. A finding that commercial forestry is impracticable on certain property does not justify an irrevocably

committed exception to Goal 4. The county must show the property is impracticable for all Goal 4 uses. *DLCD v. Curry County*, 30 Or LUBA 294 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Under OAR 660-04-028(6)(e), man-made features such as roads may constitute impediments to resource use and may justify an irrevocably committed exception for resource lands. However, the existence of a scenic buffer on the subject property adjacent to a road at the property's edge does not necessarily make resource use of the entire property impracticable. *DLCD v. Curry County*, 30 Or LUBA 294 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The fact that adjoining properties have different uses, topography or characteristics from the subject property has no bearing on whether it is irrevocably committed to non-resource uses, unless the different uses, topography or characteristics make resource use on the property impracticable. *DLCD v. Curry County*, 30 Or LUBA 294 (1996).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. In order to justify an irrevocably committed exception, the county must determine, based on an evaluation of the facts, that surrounding residential uses make resource use of the subject property impracticable. *DLCD v. Coos County*, 30 Or LUBA 229 (1995).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. To justify an irrevocably committed exception on forestland, the county must explain in findings why the facts upon which it relies lead to a conclusion that uses allowed by Goal 4 are impracticable. *DLCD v. Coos County*, 30 Or LUBA 229 (1995).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Both Goal 4 and Goal 2 require the county to evaluate the practicability of all forest uses on the subject property before determining that such uses are impracticable and taking a committed exception. *DLCD v. Coos County*, LUBA No. 30 Or LUBA 229 (1995).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. To approve an irrevocably committed exception to Goals 3 and 4, the county must find that all uses allowed by the goals are impracticable, primarily as a result of uses established on adjacent parcels. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings that address only the practicability of commercial forestry uses, rather than all commercial and noncommercial uses allowed by Goals 3 and 4 on agricultural and forestlands, do not justify an irrevocably committed exception to either Goal 3 or Goal 4. *DLCD v. Coos County*, 29 Or LUBA 415 (1995).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings must address the practicability of commercial forestry uses on adjacent lands as well as in a proposed exception area to satisfy the requirements for an irrevocably committed exception to either Goal 3 or Goal 4. *DLCD v. Coos County*, 29 Or LUBA 415 (1995).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Under OAR 660-04-028(6)(c), findings are necessary on when and how the existing development pattern of adjacent parcels occurred and whether past land divisions were made through application of the goals, in order for the county to determine if it can consider existing uses of any adjacent parcels in deciding whether those uses make resource uses in a proposed exception area impracticable. *DLCD v. Coos County*, 29 Or LUBA 415 (1995).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings to justify a committed exception to Goals 3 and 4 must address the factors of OAR 660-04-028(6) and must be supported by substantial evidence explaining how conflicts between existing uses and resource uses operate in a particular instance to render the subject property irrevocably committed. *DLCD v. Coos County*, 29 Or LUBA 415 (1995).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. In adopting a "committed" exception to Goals 3 and 4, a local government may consider the characteristics of the subject property as one of the "other relevant factors" to be addressed in the analysis required by OAR 660-04-028(1). *DLCD v. Curry County*, 28 Or LUBA 205 (1994).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The bias under Goals 3 and 4 in favor of commercial agricultural and forest enterprises does not mean a local government may assume that noncommercial farm and forest uses are not "uses allowed by the applicable goal" for which a proposed exception area's suitability must be considered in granting an exception. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. The impracticability standard for committed exceptions is a demanding standard, and findings must do more than recite facts addressing the relevant factors, they must also explain why those facts lead to a conclusion that uses allowed by Goals 3 and 4 are impracticable. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Even where a local government's findings supporting an "irrevocably committed" goal exception address all factors made relevant under OAR 660-04-028, and are supported by substantial evidence in the record, it is still LUBA's responsibility to determine whether the findings demonstrate compliance with the standard of ORS 197.732(1)(b) that "existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable." *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474 (1994).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. Findings that (1) an undisclosed portion of a 143-acre property is occupied by gravel roads, (2) an unspecified number of residences on adjacent properties create the possibility of trespass and complaints regarding forest operations, and (3) two powerline easements separate the property from other forestlands, are insufficient to explain why it is impracticable to use the subject property for uses allowed by Goal 4, as required by ORS 197.732(1)(b) for an irrevocably committed goal exception. *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474 (1994).

6.3.3 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Committed. OAR 660-12-060(4) prohibits using the existence of transportation facilities as a basis for approving (1) exceptions to the requirements of OAR 660-12-065, adopted under OAR 660-12-070; or (2) exceptions to statewide planning goals, adopted under OAR 660-04-022 (reasons exceptions) or OAR 660-04-028 (committed exceptions). OAR 660-12-060(4) does not apply to an exception for a change to an established UGB, adopted under OAR 660-04-010(1)(c)(B). *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. In determining whether to take a reasons exception under ORS 197.732(2)(c), where a local government finds that there is a public need to provide certain residents, many of whom are of limited financial means and mobility, with close access to the proposed uses, the local government does not err in concluding that "[a]reas that do not require a new exception cannot reasonably accommodate the use" under ORS 197.732(2)(c)(B) because the proposed location is the only location that is accessible to the residents. *VanSickle v. Klamath County*, 80 Or LUBA 241 (2019).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A locational attractor which may support a reasons exception under OAR 660-004-0022(3)(c) need not be located on rural land outside a UGB. *1000 Friends of Oregon v. Jackson County*, 80 Or LUBA 521 (2019).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. An approximately 80-acre photovoltaic solar power generation facility is not "industrial development" for purposes of OAR 660-004-0022(3)(c). *1000 Friends of Oregon v. Jackson County*, 80 Or LUBA 521 (2019).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Where the challenged decision is limited to a single site in a remote rural area, is based on a single unique resource, and limits its authorization to five categories of rural industrial uses that are significantly dependent on that resource, nothing in OAR 660-004-0020 or -0022 precludes a county from justifying an amount of land for a range of deepwater port-dependent rural industrial uses based on the best available evidence regarding the types and land needs of likely industrial uses, without knowing exactly which industrial uses will locate in the exception area or exactly how much acreage each use will require. Although the typical reasons exception involves only a single proposed use, the size of which is generally known, and in such cases it is relatively easy to determine "the amount of land for the use being planned" for purposes of OAR 660-004-0020(2)(a), a county may take a reasons exception to allow more than one use, or even a range of uses, the exact nature and size of which may not be known. *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Goal 3 does not generally allow industrial uses on agricultural land. Goal 2 defines an "exception" in part as a comprehensive plan amendment to allow a use that "[d]oes not comply with some or all goal requirements applicable to the subject property or situations[.]" Goal 2 does not allow establishment of a zoning policy of general applicability. Where a local government authorizes five broad categories of industrial and commercial uses distinguished by a general type of good or commodity (dry bulk, liquid bulk, breakbulk, etc.), and each use is limited by the requirement that the use be significantly dependent on a deepwater port, that does not mean that as a consequence the county has approved an exception that establishes a "zoning policy of general applicability," contrary to the Goal 2, ORS 197.732(1)(b)(A) and OAR 660-004-0005(1)(a) definition of "exception." *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. The county did not err in concluding that the "unique resource" at issue, a deepwater river port whose upland portions are located within the existing exception area, is still "located on agricultural or forest land" for

purposes of OAR 660-004-0022(3)(a). Although "Agricultural Land" for purposes of Goal 3 and its implementing administrative rule does not include land areas subject to exceptions to Goal 3, it does not necessarily follow that agricultural land, as that term is used in OAR 660-004-0022 or other parts of the Goal 2 exception rule is subject to the same restriction. At least for the limited purpose of evaluating the need for and compliance with exception standards to allow new or changed uses contrary to the resource goals, land within an exception area potentially remains "agricultural land" subject to Goal 3, and where the original exception did not take an exception to Goal 4 the site potentially remains "forest land." *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. The issue of whether a county erred in adopting a reasons exception to Statewide Planning Goal 3 under both the catch-all provision at OAR 660-004-0022(1) and the specific provisions for rural industrial use at OAR 660-004-0022(3) was adequately raised below for purposes of ORS 197.763(1), where a participant argued below that the county cannot adopt exceptions under both provisions but must choose one or the other. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Both the reasons set forth in the catch-all provision at OAR 660-004-0022(1) and the specific reasons set out in OAR 660-004-0022(3) provide non-exclusive lists of acceptable reasons to justify an exception to a statewide planning goal. A county could potentially seek to justify a reasons exception based on the standards set out in OAR 660-004-0022(1) even for a type of use that is subject to specific standards set out in OAR 660-004-0022(3), or vice versa. Consequently, nothing in the rule precludes a county from attempting to justify an exception alternatively under either OAR 660-004-0022(1) or (3). *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. The Goal 13 requirement for local governments to "maximize the conservation of all forms of energy" does not impose an affirmative obligation on local governments to promote the development of renewable energy, or provide a basis to conclude that there is a "demonstrated need" to meet a goal requirement, in order to satisfy the standards at OAR 660-004-0022(1)(a) for adopting a reasons exception in order to site a solar energy facility on agricultural land. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. An 80-acre utility-scale solar energy generating facility produces goods or services and thus qualifies as "industrial development" for purposes of OAR 660-004-0022(3), notwithstanding that the facility, once constructed, will require only a few permanent employees. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A county errs to the extent it justifies a reasons exception under OAR 660-044-0022(3)(a) to site an industrial use on agricultural land, based on proximity to and dependency on an electrical substation located within a nearby urban growth boundary, because OAR 660-004-0022(3)(a) applies only to industrial uses that are dependent on resources located on agricultural or forest land. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-004-0022(3)(c) provides a sufficient reason for siting industrial development on resource lands where the use "would have a significant comparative advantage due to its location." The text and context of OAR 660-004-0022(3)(c) indicate that the locational attractor that provides a significant comparative advantage justifying industrial development of resource land must also be located on resource land, and therefore an electrical substation located within an urban growth boundary cannot qualify as the locational attractor. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-004-0022(3)(c), which states that a significant comparative advantage due to "location" is a sufficient basis to adopt a reasons exception to site industrial development on resource lands, is not properly interpreted to allow industrial use of resource land to be justified based solely on proximity to resources located within a nearby urban growth boundary (UGB), because under such an interpretation the rule could potentially undermine the integrity of UGBs, and it is unlikely that in drafting the rule the Land Conservation and Development Commission intended that result. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-011-0060(9)(a) and (b) provide examples of "[a]ppropriate reasons and facts for an exception to Goal 11" that are context for determining the scope of the general term "appropriate reasons and facts," but they do not state the only "appropriate reasons and facts for an exception to Goal 11" to extend a sewer system into a rural area to solve a public health problem. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 455 (2016).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-011-0060(9) is not intended to describe the complete universe of situations that could justify a reasons exception to Goal 11. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 455 (2016).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A county decision that it "may be" necessary to allow sewers systems to serve up to 11,000 lots in a 180-square-mile area of the county to address a future potential health hazard if the county later determines that septic systems and other treatment systems are not the best solution does not state "appropriate reasons and facts" for justifying a Goal 11 exception. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 455 (2016).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. In approving an exception to Goal 11 to extend sewers onto rural land in the county, a county's failure to distinguish between 3,353 high groundwater lots that are either already developed with houses or that are vacant but could be developed with houses, and other areas that it is proposing to serve with sewers in order to more easily allow future houses on rural lands but that the record does not demonstrate are located in high groundwater areas, makes the county's ordinance adopting an exception to Goal 11 an ordinance that "establish[es] a planning or zoning policy of general applicability" in contravention of ORS 197.732(1)(b), rather than an ordinance that adopts an exception. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 455 (2016).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A finding that taking an exception to Goal 4 is warranted to allow adaptive reuse of Goal 5 historic structures located on forest lands because allowed uses under Goal 4 will not raise sufficient revenue to offset the cost of maintaining those structures, if supported by substantial evidence, is a sufficient reason why the policy embodied in Goal 4 should not apply to the exception area. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Goal 5 imposes obligations on local governments with respect to the preservation of historic resources and requires a local government to act in a way to help willing property owners achieve actual and not merely nominal preservation of historic resources. Such obligations can constitute a demonstrated need based on the requirements of Goal 5 as a basis for taking a reasons exception. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under OAR 660-004-0022, a county does not err in finding that a proposed adaptive reuse of a historic structure has special features or qualities that necessitate its location because the proposed use, adaptive reuse of a historic structure, must occur within the structure and cannot occur elsewhere. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under OAR 660-004-0020(2)(d), the relevant inquiry is whether the proposed use requiring an exception is compatible with adjacent uses, not whether the proposed use is more intensive than prior uses. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Nothing in OAR chapter 660, division 004, requires a county to identify one specific proposed use when adopting a reasons exception, or precludes a county from identifying a wide range of uses as the proposed "use." *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Adopting a reasons exception for an open-ended range of unspecified industrial uses, justified under three separate, partially overlapping "reasons," is a permissible approach, but compared to justifying a single proposed use under a single reason, the broader approach complicates an already difficult process, when the analysis moves to determining whether the proposal complies with the reasonable accommodation, ESEE and compatibility standards, and at the end of the process when the local government must apply zoning that limits uses to those allowed in the reasons exception. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. In taking a reasons exception, a local government must ensure that there is a close, direct relationship between the reason that is advanced to justify the exception, the proposed use or uses that fit within that reason and are analyzed under the exception standards, and the uses that are ultimately authorized by the zoning applied to the exception area. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-004-0018(4) provides that in taking a reasons exception a local government shall adopt zoning that limits the uses to those justified in the exception. Complying with OAR 660-004-0018(4) is difficult when the reasons exception is intended to authorize a broad array of unspecified rural industrial uses, under three separate reasons, because it may be unclear which specific industrial uses are allowed in the exception area and whether they have been justified in the exception. That difficulty might be overcome if the exceptions document that is incorporated into the comprehensive plan, the conditions imposed, and the approval standards and plan policies that will apply to any proposed industrial use are sufficient to ensure that only uses justified in the reasons exception are allowed. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-004-0022(3)(b) authorizes a reasons exception for rural industrial uses where "the use cannot be located inside an urban growth boundary due to impacts that are hazardous or incompatible with densely populated areas." However, findings that do not address proposed industrial uses or evaluate specific types of hazards or incompatibilities with densely populated areas are an insufficient basis to justify any industrial uses under OAR 660-004-0022(3)(b). *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-004-0022(3)(c) authorizes a reasons exception for rural industrial uses where the use would have a significant comparative advantage due to its location in proximity to certain facilities or resources, which would benefit the county economy. Detailed findings that identify a significant comparative advantage to locating rural industrial uses in proximity to an adjacent industrial site with deep-water port access, power generating facilities, and railroad connections are sufficient to justify a reasons exception for rural industrial uses that benefit from proximity to the identified facilities or resources. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. The "benefit the county economy" standard in OAR 660-004-0022(3)(c), which is applied in taking a reasons exception to allow rural industrial uses where there is a significant comparative advantage due to their location near certain resources, is a more generous standard than the "demonstrated need" standard that applies to reasons exceptions for non-industrial uses. To satisfy the "benefit the county economy" standard the county need not identify a demonstrated need for the industrial use based on the requirements of other statewide planning goals. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. The "minimal loss of productive resources" standard in OAR 660-004-0022(3)(c), which is applied in taking a reasons exception to allow rural industrial uses where there is a significant comparative advantage due to location near certain resources, is concerned with loss of productive resources in the proposed exception area, not resource uses on adjoining lands. Further, the minimal loss standard does not necessarily require evaluation of the actual revenues and employment generated by the current leasehold farmers of the exception area, since such data may not be easy to obtain and can

be manipulated. Evaluation of average and potential farm income based on published sources may suffice. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-004-0020(2)(b)(B) requires a finding that other areas that do not require a new exception cannot reasonably accommodate the proposed use. Where the proposed use is an expansion of an existing rural industrial park that has over 445 acres of vacant land that is available for development, the county cannot reject that vacant site under the reasonably accommodate standard simply because the vacant land is not controlled by the applicant. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. That an alternative 445-acre site within an existing industrial park has wetlands does not necessarily establish that the site is unbuildable or cannot "reasonably accommodate" proposed industrial use, absent evidence and findings that the cost of filling and mitigating for wetland areas would be so prohibitive that the cost alone or in combination with other factors renders the site unable to reasonably accommodate industrial use. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Rejecting alternative industrially zoned sites under the reasonable accommodation standard at OAR 660-004-0020(2)(b)(B) is highly problematic when the "proposed use" is an open-ended range of unspecified industrial uses, each with different characteristics and requirements, justified under three separate "reasons." Under that approach, a local government cannot reject an alternative site simply because it cannot reasonably accommodate some industrial uses, but can only reject the alternative site if it cannot reasonably accommodate all of the proposed uses justified under the three reasons. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Where a reasons exception for a 837-acre exception area is justified for proposed large-lot industrial uses of 50 to 300 acres, the county cannot reject alternative industrial sites that could accommodate some large-lot industrial uses simply because such sites are not equal in size to the exception area or cannot accommodate the same number of multiple large-lot industrial uses at a single location, absent findings establishing that multiple large-lot industrial uses must be located together at a single large site. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Findings that a 450-acre vacant site within an urban growth boundary zoned for heavy industrial use cannot reasonably accommodate proposed heavy industrial uses, because the site is more parcelized, is intended for labor intensive uses, and is close to populated areas, are insufficient bases to reject the alternative site, where the findings do not establish that the cost of assembling parcels is prohibitive, and that the proposed industrial uses exclude uses that are labor intensive or compatible with populated areas. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-004-0020(2)(c) requires a comparison of the adverse environmental, economic, social and energy

(ESEE) consequences of developing the proposed exception area, with the typical ESEE consequences of developing alternative resource lands. But OAR 660-004-0020(2)(c) does not require detailed evaluation of alternative sites unless such sites are specifically identified during the proceedings below. Where the petitioner did not specifically identify alternatives sites below, the failure of the county's findings to compare ESEE consequences of developing specific alternative sites is not a basis for remand. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. LUBA will reverse under ORS 197.829(1) a governing body's interpretation that a Limited Use overlay zone is applied to limit uses in exception areas only when the applicant requests it, and that instead conditions of approval can be applied to limit uses, when (1) the Limited Use overlay zone is expressly intended for that purpose, (2) nothing in the code suggests an alternative mechanism to limit uses or authorizes attaching conditions of approval to limit uses in exception areas, and (3) under the county's interpretation and the criteria that govern designation of the overlay zone there are no circumstances under which the overlay zone could be applied. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Substantial evidence supports a county's finding that alternative sites not requiring an exception cannot accommodate a proposed travel plaza, where the record indicates that limited access to the alternative sites precludes use by large trucks. A county does not err in determining reasonable access by large trucks to be an essential or necessary characteristic of a proposed travel plaza. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. After *1000 Friends of Oregon v. Yamhill County*, 203 Or App 323, 332-33, 126 P3d 684 (2005), was decided, LCDC amended OAR 660-012-0070 to make it clear that when approving an exception for a transportation facility on rural resource land, OAR 660-012-0070 sets out the exclusive criteria governing such exceptions. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. To approve an exception for a transportation facility on rural resource land, OAR 660-012-0070(4) requires that a county supply reasons why state policy in the applicable goals should not apply and also requires the county to demonstrate that there are transportation needs identified in the county's TSP that cannot reasonably be satisfied by one or more of the non-exception measures specified in the rule. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A county may not rely on transportation needs in a city's transportation system plan to justify an exception for a new rural arterial road through the county, where the county transportation system plan states there is no need for new transportation facilities in the area and does not identify those city transportation needs as county transportation needs. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-012-0070(4) requires that a county determine whether there are reasonable alternative measures to satisfy an identified transportation need that would not require a statewide planning goal exception. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-012-0070(5) imposes a requirement to consider whether a proposed transportation facility on rural resource land could reasonably be sited in alternative locations that would not require an exception. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-012-0070(6) sets out how a county must go about determining whether any identified alternative measures and alternative locations are reasonable under OAR 660-012-0070(4) and OAR 660-012-0070(5). OAR 660-012-0070(6) requires that certain specified factors and "other relevant factors" be considered and that "thresholds" be identified and applied in rejecting any alternatives as unreasonable. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. As OAR 660-012-0070(4) is currently written, it cannot be assumed that an identified transportation need is necessarily sufficient to provide a reason that justifies "why the state policy in the applicable goals should not apply." *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. For reasons exceptions that are required in order to site "transportation facilities and improvements" on rural lands, the exceptions standards set out at OAR 660-012-0070 apply, rather than the standards set out in OAR 660-004-0020. *Foland v. Jackson County*, 61 Or LUBA 264 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Reasons that justify a goal exception under OAR 660-012-0070 may be sufficient to justify a goal exception under Goal 11, OAR 660-011-0060(9) and OAR 660-004-0020 and 660-004-0022. Where a local government reasonably concludes under OAR 660-12-0070 that an on-site septic system would not be adequate to handle the volume of projected waste from a transportation facility, a local government may also be able to rely on the same evidence to conclude that an exception to Goal 11 is justified. *Foland v. Jackson County*, 61 Or LUBA 264 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Where a county's EFU zone does not permit solid waste disposal sites, but the statutory EFU zone does allow solid waste disposal sites, under the holding in *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002), a county may not approve an exception to Goal 3 (Agricultural Lands) to allow a solid waste disposal site on EFU-zoned property. Rather, the county must amend its EFU zone to allow solid waste disposal sites if it wishes to authorize that use on its EFU-zoned land. *Waste Not of Yamhill County v. Yamhill County*, 61 Or LUBA 423 (2010).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. There is no legal requirement that an airport owner must enter into a binding commitment to build a runway

extension before a county can grant a reasons exception to extend the runway onto land that is subject to Goal 4 (Forest Lands). *Brockman v. Columbia County*, 59 Or LUBA 302 (2009).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A desire to improve a city airport and encourage economic development in a city may be legitimate reasons for an exception, even though other cities in the county may also be economically depressed. *Brockman v. Columbia County*, 59 Or LUBA 302 (2009).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Although the statutes and rules that encourage continued operation and vitality of Oregon's airports do not necessarily trump the statewide planning goal exception criteria, it does not follow that a desire to encourage development of an existing airport cannot be a legitimate reason for an exception. *Brockman v. Columbia County*, 59 Or LUBA 302 (2009).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. That dwellings near an airport were constructed after the airport was built does not mean expansions of the airport onto land that requires a statewide planning goal exception need not satisfy the statewide planning goal exception standard that requires that the use allowed by the exception must be compatible with adjoining uses. *Brockman v. Columbia County*, 59 Or LUBA 302 (2009).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. In approving a reasons exception to allow extension of an airport runway and additional airport development, the applicant and the county have the burden of proof to establish that the additional air traffic that will be generated by the additional airport development will be compatible with adjoining uses. *Brockman v. Columbia County*, 59 Or LUBA 302 (2009).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under OAR 660-004-0010(3), an exception to one statewide planning goal does exempt the local government from the requirements of other goals for which an exception was not taken. However, OAR 660-004-0010(3) does not prohibit a local government from relying on the reasons that justify an exception to one goal to justify an exception to another goal. Depending on the goals and circumstances, the same set of reasons may constitute a partial or complete justification for two or more goal exceptions. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A county may rely on the reasons that justified a Goal 4 exception earlier approved by the county and Land Conservation and Development Commission (LCDC) for a proposed destination resort to justify reasons exceptions to Goals 11 and 14, where the record supports the county's finding that the Goal 4 reasons are still valid and the Goals 11 and 14 exceptions merely implement and complete the earlier county and LCDC approval. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Because Goal 11 and Goal 14 serve congruent policy objectives, the reasons sufficient to justify a Goal 14 exception for a destination resort may also be sufficient to justify an exception to Goal 11 to authorize a

community sewer system to serve the destination resort. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Compliance with OAR 660-004-0020(2)(a) is shown by demonstrating that a proposed reasons exception complies with OAR 660-004-0022(3), which specifies appropriate reasons for an exception to the statewide planning goals for "Rural Industrial Development." *Gordon v. Polk County*, 55 Or LUBA 67 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Where the proposed use of the property is for "Rural Industrial Development" on resource land outside an urban growth boundary, and that use is provided for in OAR 660-004-0022(3), a showing of compliance with OAR 660-004-0022(1) is not required. *Gordon v. Polk County*, 55 Or LUBA 67 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under OAR 660-004-0020(2)(c), a local government must determine that the long term environmental, economic, social, and energy consequences of a goal exception are not significantly more adverse than would result from the same proposed use being located on other lands that require a goal exception. Where the petitioner argues that the county did not adequately review other lands that also require a goal exception in determining whether to grant a reasons exception, but petitioner's argument focuses exclusively on lands that would not require a goal exception, petitioner provides no basis for reversal or remand. *Gordon v. Polk County*, 55 Or LUBA 67 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A finding that the economic success of a proposed wine country hotel would be enhanced by location in a "quiet rural atmosphere among vineyards and near wineries" is insufficient to demonstrate under OAR 660-004-0020(2) that the hotel "requires a location on resource land" as opposed to otherwise suitable non-resource land. *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. To establish a "demonstrated need" for a proposed hotel on agricultural land based on the requirements of Goal 9 under OAR 660-004-0022(1)(a) does not necessarily require demonstrating that the county is in violation of its Goal 9 obligations or that the county is faced with a circumstance in which it must choose between violating its Goal 9 or Goal 3 obligations. *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. To show a demonstrated need to locate a proposed hotel on resource land based on the general Goal 9 requirement to "provide adequate opportunities * * * for a variety of economic activities," the county must establish that the county has failed or is at risk of failing to provide adequate opportunities for a variety of economic activities, and that taking an exception to Goal 3 to provide for a hotel is a necessary step toward satisfying that goal requirement. *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A locally unsatisfied market demand for a particular sub-type of lodging accommodation targeted at a small demographic of users is insufficient to establish that there is a demonstrated need for a proposed hotel to satisfy the Goal 9 requirement that the county provide "adequate opportunities for a variety of economic activities." *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A comprehensive plan amendment that adopts a factual inventory of a county's rural residential lands and rural unincorporated communities does not establish standards for evaluating future reasons exceptions to add rural residential lands or expand unincorporated communities. *Wetherell v. Douglas County*, 54 Or LUBA 520 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Comprehensive plan policies suggesting that existing rural unincorporated communities and existing rural residential areas may be expanded a local shortage of vacant rural residential lands develops, without regard to whether that shortage is caused by a general "market demand" for rural residential lands, would be inconsistent with OAR 660-004-0022(2) and (4), if such policies could be applied as a sufficient reason to expand rural residential areas without also establishing that the expansion is necessary to satisfy a housing need that is "generated by existing industrial, commercial, or other economic activity in the surrounding area." *Wetherell v. Douglas County*, 54 Or LUBA 520 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A comprehensive plan policy that the county will "consider" and "support" adding new rural residential lands when certain vacant lands thresholds are met is not inconsistent with OAR 660-004-0022(2) and (4), where it is clear in context that the thresholds are not intended to provide a sufficient reason to approve an exception to designate new rural residential lands. *Wetherell v. Douglas County*, 54 Or LUBA 520 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under ORS 660-004-022, the permissible reasons that may be relied on to approve a reasons exception depend on the use or development that the reasons exception is being approved to allow. *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Where a county's findings of fact merely show that some constraints must be overcome to farm property, they do not establish sufficient reasons to support a reasons exception to Statewide Planning Goal 3 (Agricultural Lands). *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. The first sentence of OAR 660-004-0022(2) prohibits reliance on a continuation of past development patterns in approving a reasons exception to Statewide Planning Goal 3 to allow rural residential development *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A generalized market demand for smaller, less expensive farm parcels to allow part-time farming in conjunction

with rural residential use is not a permissible reason for adopting a Statewide Planning Goal 3 exception to divide a small farm parcel into smaller farm parcels. *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under OAR 660-004-0022(2) it is not enough to show that persons who might want to buy proposed rural residences might work at nearby rural businesses. Rather, the county must show that the property that the exception is proposed for is needed to meet the market demand for housing that is created by "rural industrial, commercial, or other economic activity in the area." *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. In approving a reasons exception for rural residential development, Goal 2, Part II(c)(2) requires a demonstration that sites that do not require an exception cannot reasonably accommodate the use. In making that demonstration, it is error to exclude alternative sites simply because they do not have particular characteristics of the exception site, where those characteristics are not common or necessary attributes of rural residential development. *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Where in adopting a committed exception under OAR 660-004-0028 the local government includes findings addressing some of the standards for adopting a reasons exception under OAR 660-004-0020(2), LUBA will remand to the local government to either delete those findings or explain what relevance they have to the committed exception. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Because the provisions OAR 660-004 govern the exception process as it applies to statewide planning goals "except as provided for" in OAR 660-014, it is reasonably clear that the Land Conservation and Development Commission intends that a reasons exception for proposed urban development be evaluated under OAR 660-014, not OAR 660-004. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Given the strong family resemblance between the various rules that interpret and apply Goal 2, Part
and ORS 197.732 in different contexts, any cases interpreting OAR 660-004-0022, the goal or the statute are at least potentially helpful in interpreting OAR 660-014-0040(2), or in evaluating a reasons exception under that rule. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Where a local government proceeds to justify an exception under reasons listed in OAR 660-014-0040(2) or OAR 660-004-0022, the decision must demonstrate that each of the elements set out in the listed reason is met. That the listed reasons are not exclusive does not mean that an exception is permissible in circumstances where only some of the elements for each listed reason are met. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Findings addressing the standards for a reasons exception for transportation improvements under OAR 660-012-0070 are also sufficient to satisfy the standards for a reasons exception under OAR 660-004-0020(2), where the findings in fact address the substantive differences between the two standards, and the petitioner does not explain why failure to directly address the OAR 660-004-0020(2) standards warrants reversal or remand. *1000 Friends of Oregon v. Yamhill County*, 52 Or LUBA 418 (2006).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. In justifying a reasons exception under OAR 660-004-0020(2) to allow nonresource uses on resource lands, a local government may choose the preferred alternative as long as the environmental, social, economic and energy consequences are not "significantly more adverse" than would typically result from using other resource lands for the proposed use. A local government is not required to choose the alternative that is "least disruptive to resource land." *1000 Friends of Oregon v. Yamhill County*, 52 Or LUBA 418 (2006).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. The environmental, economic, social and energy (ESEE) analysis does not elevate economic consequences above the other three types of consequences that must be analyzed. A local government could reach a sustainable conclusion that the long-term ESEE consequences of the preferred alternative "are not significantly more adverse than would typically result from the same proposal being located in other areas requiring a Goal exception," notwithstanding that analysis of economic consequences indicates that another alternative is superior in that respect. *1000 Friends of Oregon v. Yamhill County*, 52 Or LUBA 418 (2006).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Findings that all resource land displaced by a proposed bypass consist of high-value farmlands and are similar in agricultural productivity are sufficient to satisfy the OAR 660-004-0020(2) requirement to determine which resource land is least productive, absent some argument from the petitioner for why an explicit productivity ranking is required. *1000 Friends of Oregon v. Yamhill County*, 52 Or LUBA 418 (2006).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Because OAR 660-004-0020(2)(b)(B)(iv) requires a local government to determine whether the "proposed use" can be "reasonably accommodated without the provision of a proposed public facility or service," it is reasonably clear under the rule that the "proposed use" and the "public facility" are two different things. In the context of a Goal 11 exception to extend public facilities to serve proposed development on lands outside the urban growth boundary, the "proposed use" can only be the proposed development to be served by the facility extension, and not the extended public facility. *Todd v. City of Florence*, 52 Or LUBA 445 (2006).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. In granting a Goal 11 exception to extend a public sewer system outside the urban growth boundary, OAR 660-004-0020(2)(b) through (d) require a city to evaluate the "proposed use," the development served by that extended sewer facility, even if that development is not subject to the city's approval authority and does not require a goal exception. *Todd v. City of Florence*, 52 Or LUBA 445 (2006).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. The reasons set out in OAR 660-004-0022(1) are not the exclusive set of reasons that may justify an exception to applicable goals, and it is at least theoretically possible to identify a sufficient reason why the state policy embodied in the applicable goal should not apply that does not require evaluation of the ultimate use or proposed development of the exception area. *Todd v. City of Florence*, 52 Or LUBA 445 (2006).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. That it is economically advantageous to a developer to rely on public services extended from the urban growth boundary rather than develop such services on site is an insufficient "reason" why the state policy embodied in Goal 11 should not apply. *Todd v. City of Florence*, 52 Or LUBA 445 (2006).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Goal 11 requires an "orderly and efficient arrangement of public facilities and services." That requirement is little offended by allowing a single sewer system to serve two adjoining areas that each have the legal right and ability to develop urban uses and urban-level public facilities, notwithstanding that one area is within an urban growth boundary and the other outside. *Todd v. City of Florence*, 52 Or LUBA 445 (2006).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-011-0060(9) requires that a local government adopting an exception to Goal 11 to extend a sewer system outside the urban growth boundary also adopt land use regulations that prohibit the sewer system from serving uses other than those justified in the exception. A provision in an intergovernmental agreement (IGA) that limits sewer access to residential and commercial uses is insufficient to satisfy OAR 660-011-0060(9), because the provision does not limit uses served by the sewer to uses specifically justified in the exception. *Todd v. City of Florence*, 52 Or LUBA 445 (2006).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. While OAR 660-004-0018(4) requires that local governments adopt a new reasons exception when changing the types or intensities of uses within an area subject to a reasons exception, a decision that simply corrects the official zoning map to accurately reflect prior zoning amendments does not change the types or intensities of uses allowed on the property. *Sullivan v. Polk County*, 51 Or LUBA 107 (2006).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A local government does not err by interpreting a local "need" standard to impose a much less rigorous standard than the need standard that was included in prior version of Goal 2 for approval of a reasons exception. *Wetherell v. Douglas County*, 50 Or LUBA 275 (2005).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Identifying a transportation need under OAR 660-012-0070 is sufficient to justify an exception under ORS 197.732(1)(c)(A). The county need not separately demonstrate that the state policies embodied in the applicable goals should not apply. *1000 Friends of Oregon v. Yamhill County*, 49 Or LUBA 640 (2005).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under OAR 660-012-0070(6), the reasonableness of non-exception alternatives is determined by the thresholds established by the local government, which include consideration of "cost, operational feasibility, economic dislocation and other relevant factors." *1000 Friends of Oregon v. Yamhill County*, 49 Or LUBA 640 (2005).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. When taking an exception for a transportation facility on rural lands, the more specific provisions of OAR 660-012-0070 apply in place of the more general ESEE analysis requirements of Goal 2, Part II (c)(3), ORS 197.732(1)(c)(C), and OAR 660-004-0020(2)(c). *1000 Friends of Oregon v. Yamhill County*, 49 Or LUBA 640 (2005).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A county does not err in rejecting sites that are smaller than the 70 to 75 acres that an applicant demonstrates are necessary for a proposed agricultural processing facility under OAR 660-004-0020(2)(b), notwithstanding that ethanol facilities have been sited on much smaller sites, where the proposed agricultural processing facility will produce a number of other outputs in addition to ethanol and the additional acres are needed for those other aspects of the agricultural processing facility. *Concerned Citizens v. Malheur County*, 47 Or LUBA 208 (2004).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A county's findings that the complicated ownership of an alternative property and its lack of current rail access make it unsuitable as an alternative to an EFU-zoned parcel for development of an agricultural processing facility are adequate to explain why the property is not a reasonable alternative under OAR 660-004-0020(2)(b). *Concerned Citizens v. Malheur County*, 47 Or LUBA 208 (2004).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A county's finding that developing a proposed EFU-zoned site would not have significantly more adverse environmental, economic, social and energy consequences than developing a nearby site that would also require a statewide planning goal exception is adequate to address OAR 660-004-0020(2)(c), where the nearby site would use the same transportation system and have similar impacts on that transportation system. *Concerned Citizens v. Malheur County*, 47 Or LUBA 208 (2004).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A county's finding that a proposed agricultural processing facility will be compatible with adjacent uses under OAR 660-004-0020(2)(d) notwithstanding that it would produce some airborne particulates is adequate, where the findings establish that only 100 tons of particulates would be generated each year and that DEQ regulations require that the operator use the most advanced technology available to mitigate the impact of those particulates. *Concerned Citizens v. Malheur County*, 47 Or LUBA 208 (2004).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A county's findings that odors from a proposed agricultural processing facility will not make that facility incompatible with adjacent properties under OAR 660-004-0020(2)(d) are adequate, where the findings

establish that odors would not normally extend beyond the facility site and would not adversely affect the nearest rural residential area three quarters of a mile away. *Concerned Citizens v. Malheur County*, 47 Or LUBA 208 (2004).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Applicants for an exception to Goal 3 to rezone land to allow division into two parcels for eventual development of an additional nonfarm dwelling are not seeking approval for a "type of use" that could be approved as a nonfarm dwelling without an exception to Goal 3 and are not prohibited from taking an exception under the Court of Appeals' ruling in *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002). *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 508 (2004).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under OAR 660-004-0022(2), a reasons exception for rural residential development cannot be based on market demand for housing unless the housing demand is generated by existing or planned rural industrial, commercial or other economic activity in the area, and where the county makes a finding that the demand results from commercial and industrial development within the UGB, the county errs in concluding that OAR 660-004-0022(2) is satisfied. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 508 (2004).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A reasons exception for rural residential development requires demonstration that areas that don't require an exception cannot reasonably accommodate the proposed use. That standard is not met by applying a less stringent county standard that would allow granting an exception where other parcels already zoned for the proposed use are either unavailable or not as well suited to the proposed use. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 508 (2004).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Findings that establish that a proposed motor speedway must be centrally located in its market area, that it will provide significant local economic benefits, and that it has characteristics that make locating the speedway within nearby urban growth boundaries an unreasonable alternative are sufficient to provide reasons for an exception to Goals 11 and 14. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Findings that establish that a gasoline station is needed to avoid forcing some departing speedway attendees to travel out-of-direction to buy gasoline when such out-of-direction travel would thereby adversely affect transportation facilities, are sufficient to provide a reason justifying and exception to Goal 14 to site the gas station next to a speedway on rural land, where the challenged decision imposes conditions to prevent the gasoline station from becoming a standalone facility that competes with nearby gas stations in urban areas. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A challenged decision establishes sufficient reasons to allow a restaurant and bar next to a speedway on rural land to satisfy significant on-site demand for such facilities, where locational and signage conditions are imposed to limit the possibility that those facilities would compete with nearby

facilities inside urban areas for other customers not associated with the speedway. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Identified needs to (1) attract speedway fans early and keep them on site longer to spread traffic impacts, and (2) provide on-site activities for family members accompanying racing spectators may provide sufficient reasons to permit siting indoor and outdoor speedway related recreational facilities on rural land. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Findings that merely suggest that speedway-dependent and related industrial uses may require close proximity to the speedway and state that they may generate sufficient noise to make an urban location inappropriate provide weak reasons for approving a rural location for such industries. However, where petitioner does not challenge that rationale, those findings may provide sufficient reasons for a Goal 14 exception. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Where a county's findings addressing the comparative environmental, economic, social and energy consequences of siting a proposed speedway at the proposed rural location rather than other possible rural locations identify a number of unchallenged energy considerations that favor the proposed rural site, the county's failure to require that the applicant supply a fuel consumption analysis does not provide a basis for remand. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A county may not rely on a previously adopted Goal 3 exception for airport related industrial uses to justify approving a major automobile speedway and speedway related uses on rural agricultural land. Although the same factors that the county relied on to justify Goal 11 and Goal 14 exceptions for the speedway and related uses might justify a new Goal 3 exception, a new Goal 3 exception must be adopted to replace the one that was adopted for the airport related industrial uses. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Although a previously approved Goal 3 reasons exception for a nearby parkway corridor may not by itself provide sufficient reasons to justify a new Goal 3 exception for a new parkway corridor across more acres of agricultural land, it is not legal error for a county to rely on the prior exception as one of its bases for granting a new exception. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under Goal 2, Part II(c)(4) an exception to allow a parkway on agricultural land requires that impacts on adjacent uses be reduced to a compatible level. Where a petitioner argues the challenged decision fails to do so and respondents identify no findings addressing this requirement, remand is required. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-004-0022(2) establishes the reasons that may justify a statewide planning goal exception to allow rural

residential development on farm or forest land; OAR 660-004-0022(1) establishes reasons that may justify a statewide planning goal exception for uses that are not provided for in other subsections of OAR 660-004-0022. Historical residential use of a property without land use approvals is not a permissible reason for an exception under either OAR 660-004-0022(1) or (2). *Wetherell v. Douglas County*, 44 Or LUBA 567 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Reasons. In approving a reasons exception, ORS 197.732(1)(c) requires that an applicant establish that "[a]reas which do not require a new exception cannot reasonably accommodate the [proposed] use." Whether requiring a person who is living on rural resource land without required permit approvals to move to areas that do not require an exception would cause a personal or economic hardship on that person has no bearing on whether there are areas that do not require an exception that could reasonably accommodate a dwelling for that person. *Wetherell v. Douglas County*, 44 Or LUBA 567 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under ORS 197.732(1)(c)(C), a local government must compare the proposed exception area with other alternative areas that also would also require an exception and find that selecting the proposed exception area will not have significantly more adverse environmental, economic, social and energy consequences than selecting one of those alternative areas for an exception. A decision that merely speculates that development of alternative exception sites would have significantly more adverse consequences is insufficient where it is not clear that the local government considered any other potential exception areas. *Wetherell v. Douglas County*, 44 Or LUBA 567 (2003).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Findings that merely assert that a property is better suited for rural residential use than for farm use are inadequate to support a reasons exception under OAR 660-004-0020 and 660-004-0022. *DLCD v. Yamhill County*, 42 Or LUBA 126 (2002).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Because OAR 660-004-0022(3) governs reasons exceptions for rural industrial development, and the OAR 660-004-0022(1) provisions for all other uses do not apply, a local government errs in applying OAR 660-004-0022(1) to an application to amend the comprehensive plan map and zoning map to allow rural industrial development. *Morgan v. Douglas County*, 42 Or LUBA 46 (2002).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. The OAR 660-004-0022(1) requirement for a threshold finding that there is a demonstrated need for a proposed use or activity based on the requirements of Goals 3-19 is not met by a county simply finding that there is a market demand for the proposed use. The county must find that it is unable to satisfy its obligations under Goals 3-19 absent the proposed exception. *Morgan v. Douglas County*, 42 Or LUBA 46 (2002).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A county may not rely on a finding that an "established industrial use" on a proposed exception site demonstrates that the site has special features or qualities that necessitate the continued location of the use on the site to justify an exception under OAR 660-004-0022(1)(c), where the existing industrial

activity was developed in violation of a conditional use permit authorizing a much more limited home occupation and the county does not explain why the approved home occupation constitutes an "established industrial use." *Morgan v. Douglas County*, 42 Or LUBA 46 (2002).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Sustainable findings under the seven Goal 14 factors state a legally sufficient "reason" justifying why the state policy embodied in Goal 14 should not apply, for purposes of adopting the exception necessary to include resource land within a UGB under OAR 660-004-0010(1)(c)(B)(i). *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. When taking a reasons exception to allow nonresource uses on resource land, a local government must identify the character of the use for which the exception is proposed in order to determine which approval criteria apply. If the proposed reasons exception involves urban uses, then OAR 660-014-0040 applies. If the proposed reasons exception involves rural uses, then OAR 660-004-0022(1) through (10) provide the applicable approval criteria. *DLCD v. Umatilla County*, 39 Or LUBA 715 (2001).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A reasons exception allowing rural residential housing must meet the approval criteria of OAR 660-004-0022(2), but approving a community water and sewer system also requires an exception to Goal 11 because such systems are not generally necessary for rural residential housing and must be approved as separate uses. *DLCD v. Umatilla County*, 39 Or LUBA 715 (2001).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Goal 10 concerns needed housing, and nothing in the Goal 10 rules requires a local government to provide housing for a "recreational golf course lifestyle" absent support for such housing in the local comprehensive plan or Goal 10 inventory. *DLCD v. Umatilla County*, 39 Or LUBA 715 (2001).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-004-0018(4) requires a new reasons exception when an applicant changes the type or intensity of uses within an area for which a reasons exception was approved. Where a reasons exception to Goal 3 is based on the proposed expansion of an existing truck stop, the county cannot approve a more intensive independent truck stop without a revised exception. *Flying J., Inc. v. Marion County*, 38 Or LUBA 149 (2000).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. A reasons exception to Goals 3 and 4 must be based on the considerations set forth in Goal 2 and OAR 660-004-0020 and 660-004-0022. Under OAR 660-004-0022, the fact that farm and forest land is not prime timber or agricultural land is not a legally cognizable basis to adopt a reasons exception to Goals 3 and 4. *McLane v. Klamath County*, 37 Or LUBA 888 (2000).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under OAR 660-04-022(2), which addresses reasons exceptions for rural residential development, the reasons justifying an exception for rural residential development cannot be based on market demand for housing, except as provided in the rule. *DLCD v. Yamhill County*, 31 Or LUBA 488 (1996).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. If reasons stated in OAR 660-04-022(1)(a) and (b) or (c) are not the basis for a reasons exception, the county must make clear in its findings that it intends to justify a reasons exception on some other basis. *DLCD v. Yamhill County*, 31 Or LUBA 488 (1996).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. In the absence of a showing that the county has followed the process set forth in OAR Chapter 660, Division 16, to place a state viewpoint on its Goal 5 inventory, it may not rely on Goal 5 to protect the viewpoint from the impact of growing trees on the subject property. *DLCD v. Yamhill County*, 31 Or LUBA 488 (1996).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. In order to comply with OAR 660-04-020(2)(d), the county must identify all of the uses on property adjacent to a proposed exception area, not just the residential uses, and explain why the proposed use of the exception area is or will be rendered compatible with those uses. *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Under OAR 660-04-020(2)(c), the county is not required to evaluate the ESEE consequences of locating a proposed use at any of the alternative sites suggested by petitioners where petitioners do not assert that locating the proposed racetrack at any of the alternative sites would produce significantly fewer impacts. *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. The county's findings fail to demonstrate that the proposed use requires the use of resource land, as required by OAR 660-04-020(2)(a), where the findings only indicate that the proposed racetrack requires (1) low density, (2) varied topography with a dirt base, and (3) a 15-to-17-acre minimum size. *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Where the county's findings regarding the alternative sites analysis required by OAR 660-04-020(2)(b) offer little or no support for the conclusions drawn, LUBA will remand the county's decision on that basis alone, and need not reach the substantial evidence challenges. *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. An exception to Goal 4 is not justified under OAR 660-04-022(1)(a) where the county fails to establish that a "need" for the proposed use exists by demonstrating that absent the proposed exception, the county would be unable to satisfy its obligations under one or more of Goals 3-19. *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Where a county makes an unchallenged determination that the "reason" justifying an exception to Goal 3 under ORS 197.732(1)(c)(A) and OAR 660-04-020(2)(a) is the need for a church to serve a congregation located in and around the City of Amity, the county is not required to consider as alternative sites

land within the UGBs of other cities in the county. *Cox v. Yamhill County*, 29 Or LUBA 263 (1995).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. Where a county makes an unchallenged determination that a three-acre site is required for a "reasons" goal exception, a finding that a 4.75-acre site is too small for the proposed use, because only 45-50 percent of the site is buildable, is sufficient to explain why that site is not a reasonable alternative for the proposed use. *Cox v. Yamhill County*, 29 Or LUBA 263 (1995).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. That a site contains buildings that would have to be removed does not, of itself, mean the site cannot reasonably accommodate a proposed new use under ORS 197.732(1)(c)(B) and OAR 660-04-020(2)(b). *Cox v. Yamhill County*, 29 Or LUBA 263 (1995).

6.3.4 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Reasons. OAR 660-12-060(4) prohibits using the existence of transportation facilities as a basis for approving exceptions to the requirements of OAR 660-12-065, adopted under OAR 660-12-070; or (2) exceptions to statewide planning goals, adopted under OAR 660-04-022 (reasons exceptions) or OAR 660-04-028 (committed exceptions). OAR 660-12-060(4) does not apply to an exception for a change to an established UGB, adopted under OAR 660-04-010(1)(c)(B). *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Where a county approves a reasons exception to Goal 11 to allow extension of city water to serve a highway rest area, and imposes a condition of approval requiring city approval, but later modifies the condition to substitute rural irrigation water for city water to be used to irrigate landscaping, the modification does not necessarily change the "type" of public facilities and service and thus require a new reasons exception pursuant to OAR 660-004-0018(4)(b). Generally, a new reasons exception is required under OAR 660-004-0018(4)(b) only for changes that make the exception area less conforming to the goal. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Because Goal 11 defines "water system" as a system for the provision of piped water for human consumption, modifying a condition of approval so that city water is not used for irrigating landscaping, but used only for human consumption, does not constitute a change in the type or intensity of the "water system" for purposes of OAR 660-044-0018(2)(b) and thus modifying the condition does not require a new reasons exception. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. OAR 660-004-0018(2)(a) and (b) limit new uses on an exception site to "those * * * [t]hat are the same as the existing land uses on the exception site" and those that will maintain the land as "'[r]ural [l]and' as defined by the goals[.]" If the new uses are not the same as the existing land uses or will not maintain the land as rural land, then a reasons exception is required in order to use the site for a new use. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. The requirement in OAR 660-004-0018(2)(a) that the proposed uses be the "same as the existing land uses on the exception site" requires the county to consider the uses that were "recognized or justified" in the exception statement. It does not allow the county to consider current uses on the site that were not "recognized or justified" in the exception statement. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. OAR 660-004-0018 is clear that an exception to one or more goals does not insulate all future changes in the plan and zone designations of the property subject to the exception from needing an exception for uses not recognized or justified under the exception. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. A local government does not err in not applying OAR 660-012-0070(5) and (6), which govern the analysis for transportation improvements that do not require a new exception, to evaluate the petitioner's alternative site for a highway interchange, where the record does not support the petitioner's claim that the new interchange could be located without expanding an existing exception area that was approved for a two-lane rural overpass. In that circumstance, OAR 660-012-0070(7) applies to govern the alternatives analysis when a transportation improvement requires a new exception. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Where constructing a new highway interchange in an existing exception area would constitute a change in the type of use or change in the intensity of the use justifying an existing exception, OAR 660-012-0070(10) and OAR 660-004-0018(4)(b) require a new exception as a matter of law, even if the existing exception area could accommodate the proposed interchange as a matter of engineering. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. In approving an exception to allow construction of a temporary $25 million highway interchange, a local government is not required to include guarantees that the temporary interchange will not be converted to a permanent interchange or identify reasons to justify the interchange as permanent, where the exception decision approves only a temporary interchange, and any attempt to convert it into a permanent interchange will require a new goal exception. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. In approving a public recreational vehicle (RV) campground under OAR 660-035-0035 and 0040, a local government need not limit infrastructure such as septic RV dumps, water and electric services to the most minimally intensive infrastructure that is possible, to avoid the necessity of taking an exception to Goal 3. *Linn County Farm Bureau v. Linn County*, 63 Or LUBA 347 (2011).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. A county does not err in concluding that providing central septic dump sites for recreational vehicles (RVs) in a public RV campground does not require an exception to Statewide Planning Goal 3, where if the county did not provide central RV dump sites it would have to increase the size or number of communal restrooms to meet campers' needs, offsetting any reduction in septic infrastructure. *Linn County Farm Bureau v. Linn County*, 63 Or LUBA 347 (2011).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. A county does not err in concluding that providing a water spigot and an electrical outlet in individual campsites in a public recreational vehicle campground does not require an exception to Goal 3, where providing necessary services to campers requires a dispersed water and electric grid in any event, and the additional infrastructure to supply water and electricity to individual sites is not significantly greater than that otherwise required to provide basic services. *Linn County Farm Bureau v. Linn County*, 63 Or LUBA 347 (2011).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. OAR 660-034-0040(4), governing local park planning, clearly provides that "some" of the listed park uses permitted in a local park on EFU land require an exception to Goal 3, in the absence of a local master park plan. However, the rule is profoundly ambiguous regarding which of the listed park uses require an exception in the absence of a local master park plan. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. The context provided by Goal 3, the Goal 3 rule on private park/campgrounds, Goal 3 Guideline B.1, and the state agricultural land use policies at ORS 215.243, suggest that the public park uses and

facilities listed in OAR 660-034-0035(2)(a) through (g) that require a Goal 3 exception in the absence of a master park plan are those that involve higher-intensity development or infrastructure, where there exist less intensive alternatives that minimize permanent loss of agricultural land to non-agricultural use. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. The provision of full septic, water and electric hookups to individual campsites in a public RV park/campground constitutes higher-intensity development or infrastructure that, in the absence of a master park plan, requires an exception to Goal 3. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Because the public park rule at OAR 660-034-0035(2) allows a campground "group shelter" in a local public park, but effectively prohibits a "meeting hall" in a local public park, a county cannot approve a fully enclosed, 1,200-square-foot "clubhouse" intended for all-season group activities unless it demonstrates that the clubhouse is properly viewed as a "group shelter" rather than a "meeting hall." *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Because a commercial use such as a convenience store is not allowed in the EFU zone or on Goal 3 land without a Goal 3 exception, a "camp store" similar in function to a convenience store is not permitted in a local public park on EFU land, in the absence of an exception to Goal 3 or the adoption of a local master park plan. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Where a county's EFU zone does not permit solid waste disposal sites, but the statutory EFU zone does allow solid waste disposal sites, under the holding in *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002), a county may not approve an exception to Goal 3 (Agricultural Lands) to allow a solid waste disposal site on EFU-zoned property. Rather, the county must amend its EFU zone to allow solid waste disposal sites if it wishes to authorize that use on its EFU-zoned land. *Waste Not of Yamhill County v. Yamhill County*, 61 Or LUBA 423 (2010).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. A comprehensive plan provision prohibiting application of a Rural Residential plan designation to land that is currently designated farm or forest "unless an exception to the applicable Goal 3 or 4 is justified" could be interpreted such that the prohibition does not apply to nonresource land that is not subject to either goal. However, the stronger textual reading is that the qualifier "applicable" simply reflects that the subject property is currently designated under either Goal 3 or Goal 4, whichever is applicable, and an exception to the applicable goal is required in order to redesignate the property to Rural Residential. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. OAR 660-034-0035—and by cross-reference OAR 660-034-0040—provide a list of uses that are allowed in state and local parks, some of which are generally not allowed on resource lands without an

exception to the resource goals. However, no exception is required if the uses are authorized in a state or local park master plan. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. By implication, some of the park uses listed in OAR 660-034-0035(2) do not require a goal exception, even if there is no acknowledged park master plan. However, the rule does not specify which uses do or do not require a goal exception in the absence of a park master plan. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Park uses listed in OAR 660-034-0035(2) that are passive, low-intensity uses similar to those allowed in campgrounds in resource zones do not require a goal exception to be placed in state or local parks. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. A county cannot lawfully include resource lands within an urban unincorporated community unless that land remains planned and zoned for resource uses or the county takes an exception to Goals 3 and 4. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. A county does not violate the Religious Land Use and Institutionalized Persons Act (RLUIPA) by requiring that an applicant for a church on exclusive farm use land within three miles of an urban growth boundary apply for a statewide planning goal exception as required by OAR 660-033-0130. The exceptions process does not in itself impose a substantial burden on a person's religious exercise and does not constitute unfair delay. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Land that qualifies as "agricultural land" based on soil classification cannot be classified as something other than agricultural land based on existing land use patterns or other factors listed in the definition of "agricultural land" that serve to include lands within the definition of agricultural land that do not otherwise qualify based on the soils classifications. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 508 (2004).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. When a local government demonstrates that land may be included in an urban growth boundary under OAR 660-004-0010(1)(c)(B)(i) by demonstrating compliance with the seven factors of Goal 14, the local government need not take exceptions to other goals individually. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Although OAR 661-004-0010(1)(c)(B)(i) nominally requires a local government to apply all seven of the Goal 14 factors, when the local government is proceeding under the "unneeded but committed" exception, the two "need" factors of Goal 14 need not be addressed. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. When a local government amends its urban growth boundary under the "unneeded but committed" exception it demonstrates that the land is committed to urban uses under the five "locational factors" of Goal 14. The local government need not adopt an irrevocably committed exception under OAR 660-004-0028. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. To the extent amendments to physically developed or irrevocably committed exceptions are required to comply with OAR 660-004-0018, the standards applicable to such exception areas are those at OAR 660-004-0018(2). Unlike standards applicable to reasons exception areas, OAR 660-004-0018(2) does not require a new exception when allowing changes to uses, densities or services in physically developed or irrevocably committed exception areas. *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247 (2002).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Even when the Goal 14 rule on rural residential development at OAR 660-004-0040 does not apply to a proposed plan or zone change for residential development on rural land, a local government must still address whether the proposed residential development is consistent with Goal 14. *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247 (2002).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Where the applicant presents argument and evidence that property designated and zoned for forest use is not in fact forest land protected by Goal 4, making an exception to that goal unnecessary to rezone the property for residential use, the county errs in denying the rezoning application without addressing the issue or explaining why it believes the subject property is protected by Goal 4. *Potts v. Clackamas County*, 40 Or LUBA 371 (2001).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. A reasons exception allowing rural residential housing must meet the approval criteria of OAR 660-004-0022(2), but approving a community water and sewer system also requires an exception to Goal 11 because such systems are not generally necessary for rural residential housing and must be approved as separate uses. *DLCD v. Umatilla County*, 39 Or LUBA 715 (2001).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. OAR 660-004-0018(4) requires a new reasons exception when an applicant changes the type or intensity of uses within an area for which a reasons exception was approved. Where a reasons exception to Goal 3 is based on the proposed expansion of an existing truck stop, the county cannot approve a more intensive independent truck stop without a revised exception. *Flying J., Inc. v. Marion County*, 38 Or LUBA 149 (2000).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. Because OAR 660-033-0120 and 660-33-0130 prohibit establishment of a church on high-value farmland, the only procedure available to site a church on high-value farmland is to apply for an exception to the applicable goals under Goal 2. *Corp. of Presiding Bishop v. Klamath County*, 34 Or LUBA 131 (1998).

6.3.5 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – When Required. When an earlier acknowledged comprehensive plan amendment imposes a condition that any proposed conditional use or use variance shall require a revised exception to the Statewide Planning Goals, a new plan amendment is required before additional conditional uses can be allowed, since taking an exception necessitates a plan amendment. *Leathers v. Marion County*, 31 Or LUBA 220 (1996).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. A county's interpretation of an irrevocably committed exception as allowing all uses on the exception site that are allowed in the zone that was applied to the site when the exception was approved is inconsistent with OAR 660-004-0018(3), which requires a new reasons exception for a proposed use of land that is different from the use for which an exception was originally taken unless the proposed new use maintains the land as rural land. *Hood River Valley Residents v. Hood River County*, 75 Or LUBA 452 (2017).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. OAR 660-004-0018(3) applies directly to a proposed change in the use of an exception area, where (1) the proposed change in use is one that will arguably no longer maintain the land as rural land and (2) the zone applied to the exception area does not unambiguously allow urban uses of the exception area. *Hood River Valley Residents v. Hood River County*, 75 Or LUBA 452 (2017).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. Where a county approves a reasons exception to Goal 11 to allow extension of city water to serve a highway rest area, and imposes a condition of approval requiring city approval, but later modifies the condition to substitute rural irrigation water for city water to be used to irrigate landscaping, the modification does not necessarily change the "type" of public facilities and service and thus require a new reasons exception pursuant to OAR 660-004-0018(4)(b). Generally, a new reasons exception is required under OAR 660-004-0018(4)(b) only for changes that make the exception area less conforming to the goal. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. Because Goal 11 defines "water system" as a system for the provision of piped water for human consumption, modifying a condition of approval so that city water is not used for irrigating landscaping, but used only for human consumption, does not constitute a change in the type or intensity of the "water system" for purposes of OAR 660-044-0018(2)(b) and thus modifying the condition does not require a new reasons exception. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. OAR 660-004-0018(2)(a) and (b) limit new uses on an exception site to "those * * * [t]hat are the same as the existing land uses on the exception site" and those that will maintain the land as "'[r]ural [l]and' as defined by the goals[.]" If the new uses are not the same as the existing land uses or will not maintain the land as rural land, then a reasons exception is required in order to use the site for a new use. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. The requirement in OAR 660-004-0018(2)(a) that the proposed uses be the "same as the existing land uses on the exception site" requires the county to consider the uses that were "recognized or justified" in the exception statement. It does not allow the county to consider current uses on the site that were not "recognized or justified" in the exception statement. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. OAR 660-004-0018 is clear that an exception to one or more goals does not insulate all future changes in the plan

and zone designations of the property subject to the exception from needing an exception for uses not recognized or justified under the exception. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. A local government does not err in not applying OAR 660-012-0070(5) and (6), which govern the analysis for transportation improvements that do not require a new exception, to evaluate the petitioner's alternative site for a highway interchange, where the record does not support the petitioner's claim that the new interchange could be located without expanding an existing exception area that was approved for a two-lane rural overpass. In that circumstance, OAR 660-012-0070(7) applies to govern the alternatives analysis when a transportation improvement requires a new exception. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. Where constructing a new highway interchange in an existing exception area would constitute a change in the type of use or change in the intensity of the use justifying an existing exception, OAR 660-012-0070(10) and OAR 660-004-0018(4)(b) require a new exception as a matter of law, even if the existing exception area could accommodate the proposed interchange as a matter of engineering. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. While OAR 660-004-0018(4) requires that a reasons exception must limit uses authorized to those justified in the exception, the rule does not expressly require that the local government use the mechanism of an overlay zone to achieve that end, or preclude the use of appropriate conditions imposed under the plan or zoning amendments as part of the reasons exception. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. LUBA will reverse under ORS 197.829(1) a governing body's interpretation that a Limited Use overlay zone is applied to limit uses in exception areas only when the applicant requests it, and that instead conditions of approval can be applied to limit uses, when (1) the Limited Use overlay zone is expressly intended for that purpose, (2) nothing in the code suggests an alternative mechanism to limit uses or authorizes attaching conditions of approval to limit uses in exception areas, and (3) under the county's interpretation and the criteria that govern designation of the overlay zone there are no circumstances under which the overlay zone could be applied. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. While OAR 660-004-0018(4) requires that local governments adopt a new reasons exception when changing the types or intensities of uses within an area subject to a reasons exception, a decision that simply corrects the official zoning map to accurately reflect prior zoning amendments does not change the types or intensities of uses allowed on the property. *Sullivan v. Polk County*, 51 Or LUBA 107 (2006).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. Simply because OAR 660-004-0018(1) has clarified since 1986 that an exception to one goal does not relieve a

local government from other goal requirements does not mean that the converse was true prior to adoption of the rule. Rezoning property located in a Goal 3 exception area adjacent to a UGB requires consideration of Goal 14, even if OAR 660-004-0018(1) was not applicable at the time the Goal 3 exception was taken. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 160 (2004).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. A finding that recreational zoning may be applied to land that is subject to a physically developed exception for industrial uses because some of the uses allowed in an industrial zone may also be allowed in a recreation zone is not responsive to OAR 660-004-0018(2)(a), which requires that the zoning designation must "limit uses, density and public facilities and services to those which are the same as the *existing* land uses on the exception site." *Doty v. Coos County*, 42 Or LUBA 103 (2002).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. Findings that conclude that a proposed recreational zoning designation will not permit urban uses on rural land because (1) the anticipated use of the property is allowed in the county's recreation zone, which is acknowledged as a rural zone, and (2) density is limited to the land's "carrying capacity," are inadequate to demonstrate compliance with OAR 660-004-0018(2)(b)(A) because acknowledgement of a zone as being generally in compliance with Goal 14 does not mean that all uses that may be approved under that zone are necessarily rural in nature. *Doty v. Coos County*, 42 Or LUBA 103 (2002).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. Findings that assume that a proposed recreation use will be less intensive than the former industrial uses but do not address the diverse impacts that could result from recreational use of the property are inadequate to satisfy OAR 660-004-0018(2)(b)(B) and (C) because the uses are dissimilar and result in different impacts on adjacent and nearby resource land. *Doty v. Coos County*, 42 Or LUBA 103 (2002).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. Whether uses or zones are "identified and authorized by specific related policies" in the local government's plan within the meaning of OAR 660-004-0018, and thus whether a new exception is necessary to expand uses allowed in an exception zone, depends on whether the policy refers to specific uses or zones in relation to the subject property. *Geaney v. Coos County*, 34 Or LUBA 189 (1998).

6.3.6 Goal 2 – Land Use Planning – Exceptions/ Exception Rule – Changes to. When a change in the type or intensity of an existing use is proposed for an exception area, the county must (1) make findings showing either that Goal 14 does not apply or the proposal complies with an existing Goal 14 exception; or (2) take a new Goal 14 exception. *Leathers v. Marion County*, 31 Or LUBA 220 (1996).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. In evaluating whether a proposed solar energy generating facility can be reasonably accommodated on alternative sites that do not require an exception under OAR 660-004-0020(2)(b)(B), the applicant cannot limit the scope of the alternative sites analysis by considering only sites near a specific electrical substation owned by a company with which the applicant has entered into a contract to provide electricity. The alternative sites analysis must consider sites that are proximate to other substations or connection points that could reasonably accommodate the proposed use, regardless of whether the applicant has a contract to provide electricity to those substations or connection points. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. Under OAR 660-004-0020(2)(b), a county does not err in finding that an analysis of alternative non-resource sites for a proposed adaptive reuse of a Goal 5 historic structure is not required because reuse of a particular historical structure dictates that no alternative site not requiring an exception can reasonably accommodate the adaptive reuse. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. Under OAR 660-004-0020(2)(c), a county does not err when determining that permitting adaptive reuse of existing historic structures in the proposed exception area results in fewer adverse consequences, compared to locating the proposal on other resource lands that require an exception, which would require significant new construction of infrastructure and accordingly more adverse consequences. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. OAR 660-004-0020(2)(b)(B) requires a finding that other areas that do not require a new exception cannot reasonably accommodate the proposed use. Where the proposed use is an expansion of an existing rural industrial park that has over 445 acres of vacant land that is available for development, the county cannot reject that vacant site under the reasonably accommodate standard simply because the vacant land is not controlled by the applicant. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. That an alternative 445-acre site within an existing industrial park has wetlands does not necessarily establish that the site is unbuildable or cannot "reasonably accommodate" proposed industrial use, absent evidence and findings that the cost of filling and mitigating for wetland areas would be so prohibitive that the cost alone or in combination with other factors renders the site unable to reasonably accommodate industrial use. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. Rejecting alternative industrially zoned sites under the reasonable accommodation standard at OAR 660-004-0020(2)(b)(B) is highly problematic when the "proposed use" is an open-ended range of unspecified industrial uses, each with different characteristics and requirements, justified under three separate "reasons." Under that approach, a local government cannot reject an alternative site simply because it cannot reasonably accommodate some industrial uses, but can only reject the alternative site if it cannot reasonably accommodate all of the proposed uses justified under the three reasons. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. Where a reasons exception for a 837-acre exception area is justified for proposed large-lot industrial uses of 50 to 300 acres, the county cannot reject alternative industrial sites that could accommodate some large-lot industrial uses simply because such sites are not equal in size to the exception area or cannot accommodate the same number of multiple large-lot industrial uses at a single location, absent findings establishing that multiple large-lot industrial uses must be located together at a single large site. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. Findings that a 450-acre vacant site within an urban growth boundary zoned for heavy industrial use cannot reasonably accommodate proposed heavy industrial uses, because the site is more parcelized, is intended for labor intensive uses, and is close to populated areas, are insufficient bases to reject the alternative site, where the findings do not establish that the cost of assembling parcels is prohibitive, and that the proposed industrial uses exclude uses that are labor intensive or compatible with populated areas. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. OAR 660-004-0020(2)(c) requires a comparison of the adverse environmental, economic, social and energy (ESEE) consequences of developing the proposed exception area, with the typical ESEE consequences of developing alternative resource lands. But OAR 660-004-0020(2)(c) does not require detailed evaluation of alternative sites unless such sites are specifically identified during the proceedings below. Where the petitioner did not specifically identify alternatives sites below, the failure of the county's findings to compare ESEE consequences of developing specific alternative sites is not a basis for remand. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. A local government does not err in not applying OAR 660-012-0070(5) and (6), which govern the analysis for transportation improvements that do not require a new exception, to evaluate the petitioner's alternative site for a highway interchange, where the record does not support the petitioner's claim that the new interchange could be located without expanding an existing exception area that was approved for a two-lane rural overpass. In that circumstance, OAR 660-012-0070(7) applies to govern the alternatives analysis when a transportation improvement requires a new exception. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. A fairly detailed explanation for why the consequences of rural residential development of a proposed exception area would be minimal is not sufficient to comply with the OAR 660-014-0040(3)(b) requirement to demonstrate that the consequences of developing the proposed site would not be "significantly more adverse" than would be the case at other potential exception sites, where there is no attempt to compare those identified minimal consequences with the consequences of developing any other potential exception sites. *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 240 (2010).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. Where the county and the Land Conservation and Development Commission previously approved a Goal 4 exception for a destination resort under conditions requiring specified on-site accommodations and facilities, and

the county imposed an overlay zone to ensure that the resort includes those on-site accommodations and facilities, in later adopting a reasons exception to Goal 14 to complete the proposed resort the county can consider those required accommodations and facilities to be essential characteristics of the proposed use, for purposes of the alternative sites analysis required under OAR 660-014-0040(3)(a). In that circumstance, the county does not err in concluding that alternative sites within urban growth boundaries cannot reasonably accommodate the proposed use. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. A finding that the economic success of a proposed wine country hotel would be enhanced by location in a "quiet rural atmosphere among vineyards and near wineries" is insufficient to demonstrate under OAR 660-004-0020(2) that the hotel "requires a location on resource land" as opposed to otherwise suitable non-resource land. *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. Evidence that an alternative site zoned for residential use is needed to satisfy a shortfall in residential lands, and is adjacent to high-density residential development, is sufficient to demonstrate that the alternative site cannot "reasonably accommodate" a proposed need for industrial land, for purposes of OAR 660-004-0010(1)(c)(B)(ii). *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. Land owned by the federal government and not subject to local zoning and planning need not be considered as an alternative site to proposed industrial development on resource land, for purposes of OAR 660-004-0010(1)(c)(B)(ii). The rule does not require the local government to consider the speculative possibility that federal land might someday be exchanged or otherwise become subject to the local government's zoning and planning jurisdiction. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. Evidence that an alternative site (1) is needed to satisfy a city's identified need for future residential lands, (2) is surrounded by residential uses, (3) does not have adequate access for industrial uses, and (4) is located far from existing industrial uses, is sufficient to demonstrate that the alternative site cannot "reasonably accommodate" an identified need for industrial land, for purposes of OAR 660-004-0010(1)(c)(B)(ii). *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. Findings that other resource lands that are potential candidates for inclusion in the UGB are better or more productive resource lands than the subject property, and therefore the environmental, social, energy, and economic (ESEE) consequences of urbanizing other resource lands would be more adverse than urbanizing the subject property, are adequate for purposes of OAR 660-004-0010(1)(c)(B)(iii). Such findings need not specifically identify and discuss each ESEE consequence with respect to each alternative site, absent issues raised below that would require more detailed discussion. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. It is not inconsistent for findings to reject alternative sites under OAR 660-004-0010(1)(c)(B)(ii) because proposed

industrial uses would conflict with surrounding high-density residential uses, while concluding under OAR 660-004-0010(1)(c)(B)(iv) that, as limited by conditions of approval, industrial use of the subject property is compatible with rural residential uses that border the subject property on one side. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. The requirement that a proposed development of resource land be compatible with adjacent uses under OAR 660-004-0010(1)(c)(B)(iv) does not require that all conflicts or adverse impacts be eliminated. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. The impracticability standard of the Metro Code (MC) for locational amendments to the Urban Growth Boundary (UGB) performs a limited version of the functional role that Goal 14, factor 6, and Goal 2, Part II(c)(2), play in the context of more comprehensive UGB amendments: ensuring that agricultural land is included in the UGB only when nonagricultural lands cannot reasonably accommodate the proposed use. Because the MC must be consistent with Goals 2 and 14, the decision is not entitled to deference under ORS 197.829(1). *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. "Practicable" has two distinct connotations: (1) technical possibility; and (2) prudential balancing of costs and other relevant considerations. An alternative is impracticable where it is either technically infeasible or, based on all relevant considerations, including consideration of cost, it would not be a feasible alternative. *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. The present development intentions of current owners are not determinative as to whether undeveloped lands may require urban services in the near future. A local government may assume that continued resource use will render near term urbanization of property within the urban growth boundary impracticable, even if the current owners of urbanizable land testify that they do not intend to develop their property for urban uses anytime soon. *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. In conducting the alternative site analysis required to include lower priority resource lands in the UGB under Goal 2, Part II, and ORS 197.298(3)(a), the relevant question is whether higher priority exception lands can "reasonably accommodate" the identified need, not whether such exception lands can satisfy that need as well as or better than resource lands. Findings that, due to parcelization and existing development patterns, exception lands cannot accommodate as much or as dense residential development per acre as resource lands are not sufficient to establish that exception lands cannot "reasonably accommodate" that residential development. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

6.4 Goal 2 – Land Use Planning – Alternative Courses of Action. In determining whether land is suitable for inclusion in urban reserves, OAR 660-021-0030(2) requires that, prior to including any lower priority land in urban reserves pursuant to OAR 660-021-0030(4), the local government must conduct an alternative sites analysis sufficient to demonstrate that nonresource lands cannot

reasonably accommodate the need that justifies the inclusion of land under OAR 660-021-0030(4). *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. The inventory of existing bicycle facilities in a revised Transportation System Plan (TSP) does not violate the requirement, under OAR 660-012-0020(3)(a), that TSPs include "[a]n inventory and general assessment of existing and committed transportation facilities and services by function, type, capacity and condition" merely because the inventory includes narrow or substandard bike lanes. In addition, such an inventory does not violate the requirement, under Goal 2, that decisions be supported by an adequate factual base where the local government relies on a Level of Stress (LTS) analysis to reflect the capacity and condition of the facilities and where a petitioner fails to explain why LTS does not reflect capacity and condition. *Shaff v. City of Medford*, 79 Or LUBA 317 (2019).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A city's findings addressing future regional demand for fossil fuels, the key support for city's prohibition on any expansion of existing fossil fuel terminals, is not supported by an "adequate factual base," as required by Statewide Planning Goal 2, where city ignored uncontradicted projections of moderate growth in demand for fossil fuels, and instead relied on unsupported speculation that demand will actually plateau or decline. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. An ordinance that amends the width and features of a buffer area between urban and rural lands is properly viewed as a legislative rather than quasi-judicial decision, where the ordinance was adopted as part of a legislative process that was not bound to result in a decision, the modified buffer affects over 135 acres of land that stretch over one mile in length, and the amendments potentially affect hundreds of property owners. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A landscape architect's conclusory statement that a proposed buffer will "ensure compatibility" between urban and rural agricultural uses is not supported by an adequate factual base, where the record includes uncontroverted testimony that the buffer depends on vegetation growth that will take up to 15 years to effectively screen equestrian jumping events located only 50 feet away from urban residential development, and that horses participating in the events may be panicked by fireworks and other sudden visual and auditory impacts stemming from the unscreened residential uses. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. An exhibit prepared by the applicant's attorney showing that three equestrian centers are located within urban areas does not provide an adequate factual base to support a finding that a 50-foot-wide buffer is sufficient to ensure compatibility between urban residential uses and an adjacent equestrian center, where that testimony is undermined by testimony from the owners of the urban equestrian centers that their operations rely on buffers that are 160 to 300 feet wide, and that a buffer only 50 feet wide would compromise the safety of horse riders. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. The lack of evidentiary support for a finding that a vegetative buffer is superior to a distance buffer at reducing visual incompatibilities is not harmless error, where the only evidence on that point is to the contrary, and under the local government's interpretation of the compatibility standard whether one buffer method is better at

reducing or minimizing adverse visual impacts than another method appears to be a legitimate consideration. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Planning staff testimony that two five-foot-high fences on either side of a 50-foot-wide vegetated buffer would discourage human trespass from urban residential development onto adjoining agricultural land provides an adequate factual basis to conclude that the buffer "ensures compatibility" between urban and rural agricultural uses as regards impacts from trespass. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Under OAR 660-004-0020(2)(d), the relevant inquiry is whether the proposed use requiring an exception is compatible with adjacent uses, not whether the proposed use is more intensive than prior uses. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A city's conclusion that proposed high-density residential zoning complies with Goal 12 and the Transportation Planning Rule is not supported by an adequate factual base, where the city assumed full development under the old zoning but only partial development under the new zoning, for general economic reasons that apply equally to both development scenarios. Absent an explanation for using different background assumptions, a comparison of traffic-generative capacity allowed under new and old zoning under OAR 660-012-0060 must use consistent assumptions. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Where the evidence in the record demonstrates that an applicant for a destination resort map amendment's consultant compared the entirety of the applicant's ownership of land within the county, based on the county's ownership database, to the properties proposed for inclusion on the map of eligible lands, and disqualified several properties from inclusion on the map that included ineligible lands and did not comply with ORS 197.435(7) (the 30 percent rule), a reasonable person could rely on that evidence to conclude that the remaining properties included on the map comply with ORS 197.435(7) and that the proposed map amendment is supported by an adequate factual base. *Root v. Klamath County*, 68 Or LUBA 124 (2013).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Goal 9 requires local governments to provide adequate opportunities for a variety of economic activities, but does not require local governments to protect one type of economic activity against impacts created by other economic and non-economic uses. Goal 9 does not require that ODOT, in adopting higher mobility standards for state highways, address in its findings whether increased congestion from development allowed under the higher mobility standards will adversely affect existing economic activity. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. The city's reliance on information and studies prepared several years prior to the adoption of a public facilities plan does not, in itself, provide a basis for reversal or remand of the decision. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 392 (2012).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Goal 2 (Land Use Planning) generally requires that comprehensive plan amendments be based on the analyses that are included in the comprehensive plan, rather than analyses that are external to the comprehensive plan. *Hawksworth v. City of Roseburg*, 64 Or LUBA 171 (2011).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A map adopted by the county does not provide an adequate factual base under Goal 2 for a decision to amend the county's destination resort map where it is not possible to tell by looking at the map where the boundaries of the included properties are located, and the list of properties included in the record identifies properties as entire sections of land within townships and ranges, or numbered parcels within sections, ranges, and townships but the map does not include any section numbers or locations. *Root v. Klamath County*, 63 Or LUBA 230 (2011).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Based on the Court of Appeals' decisions in *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249 (2005), and *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000), it would be error for a local government to ignore available commercial and industrial land data in its acknowledged comprehensive plan and rely instead on different data that is not part of the acknowledged comprehensive plan to conclude that a land use regulation amendment will leave the local government with an adequate supply of commercial and industrial land. However, if the local government also adopts adequate findings based on the commercial and industrial land data in its acknowledged comprehensive plan that the land use regulation amendment will not leave the local government with an inadequate supply of commercial and industrial land, the local government's additional findings that rely on data that is not included in the comprehensive plan provide no basis for reversal or remand. *McDougal Bros. Investments v. City of Veneta*, 59 Or LUBA 207 (2009).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. It may be that a city's buildable lands inventory (BLI) can be written and structured so that it can be updated without incorporating the update into the city's comprehensive plan. However, where a city's BLI is not the type of BLI that might be updated and relied upon without incorporating the updated BLI into the comprehensive plan, a city decision relying on that BLI update to enlarge the city's urban growth boundary, without first adopting the updated BLI as part of the city's comprehensive plan, is error. *Lengkeek v. City of Tangent*, 54 Or LUBA 160 (2007).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Extrapolation of a local government's buildable lands inventory based on assumptions not contained in the comprehensive plan is not compatible with the Goal 2 requirement that decisions be based on the comprehensive plan. *Lengkeek v. City of Tangent*, 52 Or LUBA 509 (2006).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A local government may rely on population projections contained in the transportation system plan portion of the comprehensive plan in amending its urban growth boundary. *Lengkeek v. City of Tangent*, 52 Or LUBA 509 (2006).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. The city's conclusion that there is a demonstrated need to add 90 acres of residential land to the city's residential buildable lands inventory, based on information submitted by the applicant that uses a planning period to the year 2020, is not inconsistent for purposes of Goal 2 (Land Use Planning) with the buildable lands inventory in the acknowledged comprehensive plan that relies on a planning period that ends in 2004 or 2005. *Lengkeek v. City of Tangent*, 50 Or LUBA 367 (2005).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Goal 10 (Housing) requires local governments to inventory available residential buildable lands, and Goal 2 (Land Use Planning) requires those inventories to be part of the comprehensive plan. Where the residential buildable lands inventory in the comprehensive plan is not useable, and an applicant presents evidence regarding the current inventory of buildable lands, Goal 1 (Citizen Involvement), Goal 2 and Goal 10 require that the comprehensive plan be amended to incorporate that inventory. *Lengkeek v. City of Tangent*, 50 Or LUBA 367 (2005).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Goal 10 (Housing), Goal 2 (Land Use Planning) and Goal 1 (Citizen Involvement) require that a population projection that forms the basis of a city's residential lands needs analysis be incorporated into the comprehensive plan. *Lengkeek v. City of Tangent*, 50 Or LUBA 367 (2005).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A county's population projection is supported by an adequate factual base when it relies on a massive supply of groundwater in the regional aquifer and future acquisition of rights to the aquifer in order to meet future water needs for population growth. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100 (2005).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A local government may take past and future annexations into account in determining its future growth rate. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100 (2005).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. ORS 195.036 does not require a county to employ any particular methodology to project future population, and is silent with respect to whether different methodologies may be used for different areas of the county. As long as the county's choice of methodology is supported by an adequate factual base, the county may choose to use different methodologies in different areas of the county. *Tipperman v. Union County*, 44 Or LUBA 98 (2003).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A reasonable factfinder would not rely on 1990-2000 building permit data to project a higher than historic population increase through the year 2020, where the analysis of building permit data assumes without any basis that each building permit resulted in construction of a permanent non-seasonal dwelling, and fails to adequately take into account the number of abandoned, demolished, removed or replaced dwellings. *Tipperman v. Union County*, 44 Or LUBA 98 (2003).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A reasonable factfinder would not assume that every new job and student slot created in the county over the next 20 years will be

filled by a new immigrant to the county, for purposes of projecting county population increase, particularly given the relatively high rate of unemployment in the county, and the unlikelihood that all new jobs will be full-time or family-wage jobs likely to induce in-migration. *Tipperman v. Union County*, 44 Or LUBA 98 (2003).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A county's choice to allocate a higher than historic rate of growth to one city, in coordinating the county's 20-year population projection among cities and unincorporated areas, is supported by an adequate factual base, where the record includes evidence that the city was the fastest growing city in the county in the 1990s and is likely to annex rural residential land at a higher rate than other cities. *Tipperman v. Union County*, 44 Or LUBA 98 (2003).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. The Goal 2 requirement for an adequate factual base does not exist in a vacuum. In alleging a Goal 2 factual base inadequacy at LUBA, a petitioner must establish that some applicable statewide planning goal or other criterion imposes obligations that are of such a nature that a factual base is required to determine if the zoning ordinance amendment is consistent with the goal or other criterion. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Where petitioner alleges that a comprehensive plan amendment violates the Goal 2 requirement for an "adequate factual base," but petitioner makes no attempt to explain why the three-volume record supporting the challenged decision is inadequate to satisfy this general Goal 2 requirement, the assignment of error will be denied. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A UGB amendment based on a subregional need to provide affordable housing must ensure that the land included in the UGB will be used to satisfy that need. Adoption of a master plan that imposes zoning and other measures to allow for a significant number of high-density dwellings is sufficient to ensure that the land included in the UGB will be used to satisfy that need, given evidence that the lack of affordable housing in the subregion is the result of the relative absence of high-density dwellings and that such dwellings will be affordable to 83 percent of the employees in the subregion. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A county's 2020 population projection is supported by an adequate factual base, notwithstanding that it is based on 1991-1997 population figures that differ from official state estimates for those years, where a reasonable person could conclude that, when the two sets of figures are adjusted to cover the same period of time, the difference between the county and state figures falls within a statistically acceptable margin of error. *DLCD v. Douglas County*, 37 Or LUBA 129 (1999).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A county population projection is supported by an adequate factual base, notwithstanding that it is based on assumptions regarding economic growth that are inconsistent with the county's historic economic growth patterns, where a reasonable person could conclude that those historic economic growth patterns are not indicative

of the county's long-term economic prospects. *DLCD v. Douglas County*, 37 Or LUBA 129 (1999).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A county plan amendment imposing a "sequencing" requirement that proposed attached housing be built before completing proposed detached housing is supported by an adequate factual base, where a reasonable decision maker could conclude, based on testimony in the record, that the sequencing requirement is necessary to forestall attempts to underbuild attached housing, which may subvert the county's minimum density standard. *West Hills Development Co. v. Washington County*, 37 Or LUBA 46 (1999).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Petitioners fail to demonstrate that a county's plan amendment lacks an adequate factual base and is inconsistent with Goal 10 where petitioners merely speculate that the county's plan amendment, which requires that proposed attached housing be built at a site before completing proposed detached housing, will adversely affect the county's buildable lands inventory. *West Hills Development Co. v. Washington County*, 37 Or LUBA 46 (1999).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Petitioners fail to demonstrate that a county's minimum density standard lacks an adequate factual base or is inconsistent with Goal 10 where petitioners merely speculate that application of the standard will make it impossible to develop certain lands at lower densities. Even if petitioners' speculations are correct, the only probable result is that those lands will be developed at higher densities, which is not inconsistent with Goal 10. *West Hills Development Co. v. Washington County*, 37 Or LUBA 46 (1999).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. A local government errs in declaring that an intergovernmental agreement no longer controls where by the terms of that agreement it governs until specified recommendations are implemented, and the record shows that the recommendations have been only partially implemented. *City of Salem/Marion County v. City of Keizer*, 36 Or LUBA 262 (1999).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Petitioner's arguments that four studies supporting a comprehensive plan amendment are old, fail to address certain features, are preliminary, and call for more study do not demonstrate the challenged amendment lacks an adequate factual base, where the challenged decision's factual base is not limited to the four studies. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. With regard to providing an explanation of the basis for a challenged legislative decision, the Goal 2 "adequate factual base" requirement will be satisfied if the decision is supported by either (1) findings demonstrating compliance with applicable legal standards, or (2) argument and citations to facts in the record, in respondents' briefs, adequate to demonstrate compliance with applicable legal standards. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Statewide Planning Goal 2 requires that comprehensive plan and land use regulation amendments have an adequate factual base,

regardless of whether they are legislative or quasi-judicial in nature. *Rea v. City of Seaside*, 27 Or LUBA 443 (1994).

6.5 Goal 2 – Land Use Planning – Adequate Factual Base. Statewide Planning Goal 2 requires that planning decisions and actions have an adequate factual base, regardless of the legislative or quasi-judicial nature of the decision. The Goal 2 requirement for an adequate factual base is equivalent to the requirement for substantial evidence in the whole record. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. OAR 660-033-0140 provides that a decision extending the expiration period for an ORS 215.402 permit decision on farm or forest land is not a "land use decision," and therefore such an extension decision is not within LUBA's jurisdiction. *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. Farms are part of the "existing commercial agricultural enterprise" as that phrase is used in Goal 3 if they contribute to the overall agricultural economy in the area in a substantial way. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. Where a county's findings of fact merely show that some constraints must be overcome to farm property, they do not establish sufficient reasons to support a reasons exception to Statewide Planning Goal 3 (Agricultural Lands). *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. The first sentence of OAR 660-004-0022(2) prohibits reliance on a continuation of past development patterns in approving a reasons exception to Statewide Planning Goal 3 to allow rural residential development *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. A generalized market demand for smaller, less expensive farm parcels to allow part-time farming in conjunction with rural residential use is not a permissible reason for adopting a Statewide Planning Goal 3 exception to divide a small farm parcel into smaller farm parcels. *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. Under OAR 660-004-0022(2) it is not enough to show that persons who might want to buy proposed rural residences might work at nearby rural businesses. Rather, the county must show that the property that the exception is proposed for is needed to meet the market demand for housing that is created by "rural industrial, commercial, or other economic activity in the area." *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. In approving a reasons exception for rural residential development, Goal 2, Part II(c)(2) requires a demonstration that sites that do not require an exception cannot reasonably accommodate the use. In making that demonstration, it is error to exclude alternative sites simply because they do not have particular characteristics of the exception site, where those characteristics are not common or necessary attributes of rural residential development. *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. While population forecasts may eventually be used to provide a partial basis for a local government to take future actions that might have an effect upon farmland, the forecasts do not have an effect on farmland, and therefore do not implicate Goal 3. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100 (2005).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. A Statewide Planning Goal 3

guideline does not impose an approval standard for a permit for a use authorized under ORS 215.283(2) and local implementing regulations. *Hiebenthal v. Polk County*, 45 Or LUBA 297 (2003).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. A county decision that approves the redesignation of property from a nonresource zone to rural residential zone does not implicate Goal 3, even though the county may have erred in its original decision to zone the property for nonresource use rather than agricultural use and LCDC may have erred in acknowledging the nonresource designation for the property. *Caldwell v. Klamath County*, 45 Or LUBA 548 (2003).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. A county does not err by refusing to apply Goal 3 or by failing to require an exception to Goal 3 to allow nonresource-zoned property to be rezoned for rural residential use, where the nonresource zoning designation for that property was acknowledged and the proposed rural residential zoning designation is consistent with that initial determination. *Caldwell v. Klamath County*, 45 Or LUBA 548 (2003).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. Although it may be appropriate to focus exclusively or preponderantly on the poor quality of soils for farm and forest use in deciding whether a particular tract qualifies as agricultural lands or forest lands, such an exclusive or preponderant focus on the tract itself is not appropriate in considering an irrevocably committed exception, where the focus is on the relationship of the adjoining properties to the tract. *Friends of Linn County v. Linn County*, 42 Or LUBA 235 (2002).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. Speculative impacts on an adjoining rural subdivision from possible future aerial application of herbicides, pesticides and fertilizer and future movement of trucks to and from a 39-acre parcel for future farm and forest use are the occasional inconveniences that rural residents must be willing to accept and do not provide a basis for a committed exception to Goals 3 and 4. *Friends of Linn County v. Linn County*, 42 Or LUBA 235 (2002).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. A reasons exception for rural housing is not "necessary" under the last sentence of OAR 660-004-0022(2), if the county fails to demonstrate that land inside nearby urban growth boundaries or on nearby exception lands could not accommodate any identified market demand for housing, as required by OAR 660-004-0020(2)(b). *Friends of Linn County v. Linn County*, 42 Or LUBA 235 (2002).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. Where a county's legislative decision changes the comprehensive plan designation for a property from Industrial to Primary Agriculture, and the record does not reflect that the county considered other potentially suitable designations or explained why other potentially suitable designations should not be applied, the decision and record are insufficient to demonstrate that applicable criteria were considered. *Manning v. Marion County*, 42 Or LUBA 56 (2002).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. Where a local comprehensive plan provision is designed to implement, and in fact essentially mirrors, the requirements for compliance with Goal 3, LUBA owes deference to the local government's interpretation only to

the extent that interpretation is consistent with Goal 3. *Doob v. Josephine County*, 31 Or LUBA 275 (1996).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. County comprehensive plan and ordinance amendments affecting a county's exclusive farm use zone(s), adopted after August 7, 1993, are required to implement the requirements of OAR Chapter 660, Division 33 for important farmland. OAR 660-33-150(3) (1993). *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Generally. Where OAR 660-33-150(4)(a) (1993) requires a county to complete the process of implementing the requirements of the Goal 3 rule for high-value farmland by October 31, 1995, the county did not err by failing to bring its exclusive farm use zones into compliance with the requirements for high-value farmland in the 1993 version of the Goal 3 rule when it adopted amendments to its EFU zones in November 1993. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. In the context of an application to remove property from a county's Goal 5 inventory of significant aggregate resources, where the county has previously determined, in two separate final, acknowledged decisions—one based on area-specific soils mapping and the other based on periodic review which resulted in an updated inventory—that the property should not be included on the county's Goal 3 inventory of agricultural lands; where the county zoned the property for surface mining, a zone that does not implement Goal 3, after one of those previous determinations; and where the ESEE analysis for the property does not specify a post-mining zoning designation or use, a conclusion that the property is not agricultural land is supported by substantial evidence. The county, having previously determined that the property is not agricultural land, is not required to revisit whether the property is agricultural land. *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 252 (2019).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. In the context of an application to change the comprehensive plan designation of property to Rural Residential Exception Area, where a comprehensive plan provision provides that "any new Rural Residential Exception Areas need to be justified through initiating a non-resource plan amendment and zone change by demonstrating that the property does not meet the definition of agricultural * * * land," a county correctly determines that an applicant satisfies that provision by producing copies of the county's adopted and acknowledged agricultural lands inventories, which do not include the property. Even where an opponent submits an NRCS soils map into the record, which the opponent argues shows the property's soils constitute agricultural lands, where the NRCS website that the opponent used to prepare the soils map includes a disclaimer regarding the large scale of mapping, stating that "[e]nlargement of maps beyond the scale of mapping can cause misunderstanding of the detail of mapping and accuracy of soil line placement," a reasonable decision-maker would rely on the inventories to conclude that the property is not agricultural land, and a reasonable decision-maker could determine that the NRCS soils map is less credible than the inventories. *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 252 (2019).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. OAR 660-033-0030(5) permits use of "[m]ore detailed data on soil capability than is contained in the National Resource Conservation Service" soil maps and surveys to determine whether particular soils qualify as agricultural soils. A more detailed soils study of a 21.59-acre parcel that uses 43 soil data points, five transects and 276 site observations is substantial evidence that the parcel contains predominantly Class VII and VIII soils rather than predominantly Class VI soils as shown by the National Resource Conservation Service soil survey. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. As defined by OAR 660-033-020(8), "High Value Farmland" includes tracts with soils that are predominantly prime, unique, Class I and Class II farmland. The OAR 660-033-020(8) definition of High Value Farmland includes all subclassifications of Class II soils, and a tract that has predominantly Class II soils therefore is High Value Farmland. *Gottman v. Clackamas County*, 64 Or LUBA 358 (2011).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally.

Where the petitioner fails to challenge findings that explain why the county chose to rely on a consultant's report that estimates the costs of putting land to farm use based on certain assumptions, the petitioner's evidentiary arguments that the county should have used other assumptions fails to establish that the report is flawed or that the county erred in relying on the report. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. When considering the profitability of land for farm use, the fair market value of property zoned for agricultural use incorporates a host of nonfarm economic values in addition to the value of the property attributable to its suitability for farm use. Property owned in fee simple grants the owner a bundle of rights and investment potentials, only some of which are related to the economic use of the land in general, or for farm use in particular. The fair market value of any EFU-zoned parcel presumably reflects its potential for nonfarm uses as well. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. Even though the county relied on an erroneous calculation of potential mortgage carrying costs associated with attempting to farm the property, because even without the losses from mortgage costs, evidence in the record indicates that the property could not be profitably farmed, the county did not err in finding that the property could not be profitably farmed. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. Unlike OAR 660-033-0020(1)(a)(B), OAR 660-033-0120(1)(b) does not refer to profitability, so whether a "farm unit" has been or can be farmed "profitably" is not a consideration for purposes of the "farm unit" prong. The question under OAR 660-033-0120(1)(b) is whether the subject property is properly viewed as part of a "farm unit," despite the recent cessation of joint use. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. When there is no dispute that a former ranch was part of a farm unit with a long and recent history of farm use, it is difficult to adopt a sustainable conclusion that the property is no longer part of the farm unit absent a finding that something fundamental has changed that would preclude a resumption of a farm operation using the elements of the former ranch. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. Testimony that the applicant has not shown why a parcel formerly part of a larger ranch cannot be used in conjunction with adjacent and nearby farm properties is sufficient to raise the issue of compliance with OAR 660-033-0030(3), notwithstanding that the petitioner failed to cite the rule. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. LUBA will remand a decision determining that a parcel is not Goal 3 agricultural land for findings under OAR 660-033-0030(3), which requires that the county examine nearby or adjacent land, regardless of ownership, in determining whether a parcel is agricultural land, where the county

adopted no findings addressing the rule, and there is evidence in the record that the subject property was formerly used in conjunction with adjacent farm lands and can be so used again. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. In determining whether a property is generally unsuitable for the production of farm crops and livestock or merchantable tree species, a county's conclusion that any historic agricultural use on the property before that time does not provide a substantial hurdle is supported by substantial evidence where the county chooses to rely on an expert's opinion that proposed nonfarm parcels have not been used for agricultural operation in the past 20 years. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. Where the record reflects that 10 acres of irrigation rights were removed from two 20-acre parcels because (1) irrigating with that water was extremely inefficient, (2) the nonfarm parcels consist of 85 percent bare ground, and (3) moving the irrigation rights back would provide no benefit, county's findings that returning irrigation rights to the property would not render the nonfarm parcels generally suitable for the production of farm crops or livestock is supported by substantial evidence. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. Where the record reflects that at least 75 percent of the parcels proposed for nonfarm dwellings are incapable of supporting grazing, the county is not required to specifically consider whether neighboring ranchers could use the proposed nonfarm parcels in conjunction with other ranch land. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. A 160-acre parcel that was partitioned from and ceased concurrent farm operations with the parent parcel three years prior to being sold for non-farm purposes is not part of a "farm unit" with the parent parcel, and hence "agricultural land" under OAR 660-033-0020(1)(b), where different farming regimes operated on each parcel, there is a subsequent history of independent farm operations, and the county determined in allowing the partition that the 160-acre parcel either was the appropriate size for an agricultural operation or that it met the statutory minimum size for an agricultural operation. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. A finding that land is not subject to Goal 3 is inadequate, where it does not address the definition of "agricultural land" at OAR 660-033-0020(1) or explain why land with Class III agricultural soils is not "agricultural land" under that definition. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. Lands that are planned and zoned for resource use under Goals 3 and 4 may be redesignated for nonresource use by applying an acknowledged comprehensive plan policy that establishes standards for such redesignations. Where such a specific policy and local standards have been acknowledged, they apply in place of more general statewide planning goals standards that would

otherwise apply to such a redesignation. *Sommer v. Josephine County*, 49 Or LUBA 134 (2005).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. Property that is: (1) comprised of land in Natural Resources Conservation Service (NRCS) soils classes other than I-IV; (2) is farmed and intermingled with adjacent lands in capability classes I-IV; (3) contains a barn and farmhouse; and (4) satisfies the farm unit test, is agricultural land, and may not be redesignated as nonresource land. *Emmons v. Lane County*, 48 Or LUBA 457 (2005).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. Where the question of whether a property qualifies as agricultural land, so that it cannot be considered for a comprehensive plan Rural Use map designation, is governed by the same legal standard that governed a prior local government finding in an earlier decision on the same application that the subject property does not qualify as agricultural land subject to Goal 3, the same issue is presented. If that issue was conclusively resolved in the earlier decision, a different resolution of that issue in the later decision is barred by the *Beck v. City of Tillamook* waiver principle. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. An ambiguous county code provision that allows lands that were incorrectly identified as agricultural or forest land under Goals 3 and 4 to be rezoned for rural residential use is correctly interpreted to require that an applicant show that a particular property is neither agricultural land nor forest land because land will frequently qualify as both agricultural and forest land and the Land Conservation and Development Commission's rules allow such lands to be zoned for either for exclusive farm use or for forest use. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. Where county comprehensive plan standards for identifying agricultural land implement the Goal 3 definition of agricultural land, and an evidentiary challenge to a finding under the comprehensive plan standards that certain land is agricultural land is inseparable from the question of whether that land is agricultural land under Goal 3, LUBA lacks jurisdiction to address the challenge under the county's comprehensive plan standards. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. Any lands designated as "marginal lands" pursuant to ORS 197.247 retain that status, notwithstanding repeal of that statute. Where the local government is considering lands for inclusion in urban reserves that might include marginal lands, it must correctly identify those lands and assign them second priority status pursuant to OAR 660-021-0030(3)(b). Failure to do so is inconsistent with the urban reserve rule because it treats second priority marginal lands as fourth priority resource lands. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. A local government may include third priority "secondary lands" within urban reserves under OAR 660-021-0030(3)(c) only if such lands have been designated as secondary lands pursuant to a statutory or rule-based definition. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. In determining whether a parcel is agricultural land under Goal 3, a local government must: (1) evaluate the soils and suitability of the entire subject property under applicant's ownership, and (2) determine whether the entire subject property is necessary to permit farm practices on nearby lands under OAR 660-33-020(1)(a)(C). *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. County findings do not justify a conclusion that the subject property is part of a "farm unit" within the definition of agricultural land set forth in OAR 660-33-020(1)(b) where the findings do not address whether the subject property is intermingled with lands in capability classes I-IV, and do not explain the relationship between the subject property and the remainder of the parcel. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

7.2.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Generally. Where a local government properly determines certain land is not farm or forestland subject to Statewide Planning Goals 3 and 4, an exception to Goals 3 and 4 is *not* required to support comprehensive plan and zone map amendments designating such property for residential use. *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. Where the county found a boundary line adjustment application is in compliance with a county ordinance that requires that the "resulting parcel sizes do not change the existing land use" because before and after the boundary line adjustment there was one parcel conforming and one parcel non-conforming in size, LUBA will remand the decision. On remand, the county shall consider petitioners' argument and adopt any necessary findings regarding petitioners' argument that the ordinance could be interpreted to require the county to consider whether the "existing land use pattern" is changed when the subject parcel—that was previously deemed "generally unsuitable" for farm use due to its size and soil composition—qualifies for a nonfarm dwelling as a result of the boundary line adjustment because the parcel was expanded to include agricultural soils in a manner that possibly renders the resulting parcel suitable for farm use. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. Although the county's approval of the boundary line adjustment for the siting of a nonfarm dwelling could effectively undercut the factual predicate for compliance with a statutory-based standard pursuant to ORS 215.263(4) designed to minimize loss of productive resource lands in exclusive farm use zones to non-resource uses, where petitioner has not cited anything in the county ordinance that constitutes an approval standard for a post-partition boundary line adjustment, even if the adjustment undercuts a factual predicate for the partition approval, this argument provides no basis for reversal or remand. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. For purposes of determining whether land in soil capability classes other than Class I-IV soils according to the U.S. Natural Resources Conservation Service (NRCS), is "agricultural land" under OAR 660-033-0020(1)(a)(B), a factor that a local government may consider in addition to the seven factors listed in the rule is whether a reasonable farmer would be motivated to put the land to agricultural use, for the primary purpose of obtaining a profit in money. The suitability for farm use inquiry must also consider the potential for use in conjunction with adjacent or nearby land. OAR 660-033-0030(3). *Landwatch Lane County v. Lane County*, 77 Or LUBA 368 (2018).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. For purposes of determining whether land is agricultural land under OAR 660-033-0020(1)(a)(B), a county's findings are not deficient when they do not address whether marijuana production is a viable farm use or crop on the subject property. The analysis under OAR 660-033-0020, which gives effect to Statewide Planning Goal 3, focuses on the land and its suitability for farm use, not on whether a particular crop can be grown on the site regardless of the qualities of the land. Such an analysis would be entirely removed from an analysis of the agricultural qualities of the land, which is contrary to the plain text of the rule, and therefore a county's failure to adopt findings addressing that issue does not provide a basis for reversal or remand. *Landwatch Lane County v. Lane County*, 77 Or LUBA 368 (2018).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. OAR 660-033-0030(5) permits use of "[m]ore detailed data on soil capability than is contained in the National Resource Conservation Service" soil maps and surveys to determine whether

particular soils qualify as agricultural soils. A more detailed soils study of a 21.59-acre parcel that uses 43 soil data points, five transects and 276 site observations is substantial evidence that the parcel contains predominantly Class VII and VIII soils rather than predominantly Class VI soils as shown by the National Resource Conservation Service soil survey. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. Under OAR 660-033-0020(1)(a)(B), even if land does not qualify as agricultural land under OAR 660-033-0020(1)(a)(A), because it does not meet the predominantly Class I-VI test, land may qualify as agricultural land "taking into consideration" the factors set out at OAR 660-033-0020(1)(a)(B), which include "accepted farming practices." Additionally, under OAR 660-033-0020(1)(b), lands in other classification must be inventoried as agricultural land if they are "adjacent to or intermingled with land in capability classes * * * I-VI within a farm unit * * *." *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. A county does not err in relying on a 2007 soil study to conclude that a parcel is not agricultural land under Goal 3, notwithstanding the absence in the record of a 2001 soil study that the applicant's consultant cites, where the 2007 study is intended to stand on its own and petitioners do not identify any critical information missing from the 2007 study that might be found in the 2001 study. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. In determining whether a parcel remains "adjacent to or intermingled with" agricultural land within a "farm unit" under OAR 660-033-0020(1)(b) notwithstanding that the parcel was recently partitioned from a larger farm parcel and is no longer in common use, the most important consideration is whether there is some significant obstacle to resumed joint operation. Where a 260-acre parcel was recently divided from a 590-acre ranch and was long used in conjunction with other lands within the farm unit, and there appears no reason why the parcel cannot continue to be used in conjunction with the other parcels within the former farm unit, a county has not established that the parcel is not agricultural land under OAR 660-033-0020(1)(b). *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. *Flury v. Land Use Board*, 50 Or App 263, 623 P2d 671 (1981), cited and relied on *Meyer v. Lord*, 37 Or App 59, 586 P2d 367 (1978), in holding that the "predominant soils class" prong of the Goal 3 definition of agricultural lands may be applied to a portion of a parcel. *Wetherell v. Douglas County*, 50 Or LUBA 71 (2005).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. OAR 660-033-0030(2), which describes how the predominant soils class prong of the Goal 3 agricultural land definition is to be applied when inventorying agricultural land, assumes that the inventories will consider whole lots and parcels rather than portions of lots or parcels. *Wetherell v. Douglas County*, 50 Or LUBA 71 (2005).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes.

At the time LCDC adopted OAR 660-033-0030(2), which describes how the predominant soils class prong of the Goal 3 agricultural land definition is to be applied when inventorying agricultural land, it also adopted OAR 660-033-0030(4)(c)(B)(i) to expressly state that the "generally unsuitable lands" nonfarm dwelling standard may be applied to a "lot or parcel or portion of a lot or parcel." Because LCDC did not also make it clear that the inventory required by OAR 660-033-0030(2) could apply the predominant soils class prong of the Goal 3 agricultural land definition to portions of existing parcels, that prong must be applied to entire parcels and may not be applied to a portion of a parcel. *Wetherell v. Douglas County*, 50 Or LUBA 71 (2005).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. A local government may rely on portions of two conflicting expert studies of soil classifications, although explanatory findings may be necessary to identify what portions are relied upon, and to resolve any differences or contradictions between the studies relied upon, so that LUBA may perform its review function. *Doob v. Josephine County*, 48 Or LUBA 227 (2004).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. Land that qualifies as "agricultural land" based on soil classification cannot be classified as something other than agricultural land based on existing land use patterns or other factors listed in the definition of "agricultural land" that serve to include lands within the definition of agricultural land that do not otherwise qualify based on the soils classifications. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 508 (2004).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. Common ownership with adjacent agricultural lands is an indication that the parcel is part of a farm unit, as that term is used in OAR 660-033-0020(1); however, it is not determinative. *Riggs v. Douglas County*, 37 Or LUBA 432 (1999).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. LUBA will not conclude that the statutory definition of high-value soils excludes soil complexes in which listed soils form the predominant part, where petitioner fails to establish a sufficient basis to form that conclusion. *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195 (1999).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. LUBA must affirm a decision denying a permit to site a dog kennel prohibited on high-value farmland, where petitioner fails to challenge the county's alternative finding that the subject property is high-value farmland because it is predominantly composed of a combination of two high-value soils. *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195 (1999).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. Under the agricultural lands definition, in western Oregon, Class V soils, when intermingled with Class IV soils, are not presumed to be nonagricultural, nor is the presence of Class V soils determinative, in itself, as to whether land is generally unsuitable for farm use. *Evenson v. Jackson County*, 36 Or LUBA 251 (1999).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. Where a county finds that the subject property's soils constitute "high-value farmland" as that

concept is defined by statute, but there is no evidence in the record that supports that ultimate conclusion, the decision must be remanded. *Corp. of Presiding Bishop v. Klamath County*, 34 Or LUBA 131 (1998).

7.2.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Soil Classes. In determining whether land subject to a proposed comprehensive plan and zone map change is composed of predominantly Class I-IV soils, as required by OAR 660-33-020(1)(a)(A), it is permissible for a local government to examine only the acreage under consideration. *DLCD v. Curry County*, 28 Or LUBA 205 (1994).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. For purposes of determining whether land in soil capability classes other than Class I-IV soils according to the U.S. Natural Resources Conservation Service (NRCS), is "agricultural land" under OAR 660-033-0020(1)(a)(B), a factor that a local government may consider in addition to the seven factors listed in the rule is whether a reasonable farmer would be motivated to put the land to agricultural use, for the primary purpose of obtaining a profit in money. The suitability for farm use inquiry must also consider the potential for use in conjunction with adjacent or nearby land. OAR 660-033-0030(3). *Landwatch Lane County v. Lane County*, 77 Or LUBA 368 (2018).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. For purposes of determining whether land is agricultural land under OAR 660-033-0020(1)(a)(B), a county's findings are not deficient when they do not address whether marijuana production is a viable farm use or crop on the subject property. The analysis under OAR 660-033-0020, which gives effect to Statewide Planning Goal 3, focuses on the land and its suitability for farm use, not on whether a particular crop can be grown on the site regardless of the qualities of the land. Such an analysis would be entirely removed from an analysis of the agricultural qualities of the land, which is contrary to the plain text of the rule, and therefore a county's failure to adopt findings addressing that issue does not provide a basis for reversal or remand. *Landwatch Lane County v. Lane County*, 77 Or LUBA 368 (2018).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Under OAR 660-033-0020(1)(a)(B), even if land does not qualify as agricultural land under OAR 660-033-0020(1)(a)(A), because it does not meet the predominantly Class I-VI test, land may qualify as agricultural land "taking into consideration" the factors set out at OAR 660-033-0020(1)(a)(B), which include "accepted farming practices." Additionally, under OAR 660-033-0020(1)(b), lands in other classification must be inventoried as agricultural land if they are "adjacent to or intermingled with land in capability classes * * * I-VI within a farm unit * * *." *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. A 21.59-acre parcel need not be designated as agricultural under the OAR 660-033-0020(1)(b) "adjacent to or intermingled with [agricultural land] within a farm unit" requirement, where the property is comparatively small for eastern Oregon, and there is a major highway bisecting the parcel that makes it much more difficult to put to farm use, the property never contributed significantly to any of the larger farming operations it was a part of in the past and the property is not adjacent to or intermingled with any property that currently constitutes a farm unit. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. A finding that an 8.5-acre parcel with Class VI agricultural soils is not "suitable for grazing," and not "other lands" suitable for farm use, and hence not "agricultural land" as defined in OAR 660-033-0020, is supported by substantial evidence, where the undisputed evidence is that the parcel can accommodate only two animal units per month, equivalent to a lease value of $30 per month, yielding less revenue than the annual property taxes. *O'Brien v. Lincoln County*, 65 Or LUBA 286 (2012).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Where the record indicates that seasonal rather than year-round cattle grazing is a common pattern in an area, and the subject property is currently or was recently leased for seasonal grazing, evidence sufficient to establish that the property is not "suitable for grazing" and thus not agricultural land under OAR 660-033-0020(1)(a)(B) must include an evaluation of whether the property is suitable for seasonal grazing. *Wetherell v. Douglas County*, 62 Or LUBA 80 (2010).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. OAR 660-033-0030(2) and (3) require consideration of adjoining and nearby lands, in determining whether property is suitable for grazing and hence qualifies as agricultural land OAR 660-033-0020(1)(a)(B). Remand is necessary, where the record indicates that adjoining properties support seasonal grazing operations and have similar soils and conditions to the subject property, but the county does not adopt findings considering those adjoining properties or explain why the subject property cannot reasonably be used for seasonal grazing. *Wetherell v. Douglas County*, 62 Or LUBA 80 (2010).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Where an issue arises whether a petitioner waived his right to raise an issue at LUBA regarding whether a county erroneously found that land is not "other lands" that are suitable for farm use considering the factors set out at OAR 660-033-0020(1)(a)(B), a petitioner may not respond that the applicant raised that issue by addressing those factors below. The only issue raised by the applicant was whether the land *does not qualify* as such lands; the applicant did not raise the issue of whether the land *does qualify* as such other land. *Just v. Linn County*, 60 Or LUBA 74 (2009).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Where a local government's findings rely heavily on particular factors set out in OAR 660-033-0020(1)(a)(B) to conclude that land does not qualify as "other lands" that are suitable for farm use under OAR 660-033-0020(1)(a)(B), and petitioner waived his right to challenge the findings concerning those particular factors because petitioner raised no issue below concerning those particular factors, LUBA will deny an assignment of error that challenges the adequacy of the county's OAR 660-033-0020(1)(a)(B) findings. *Just v. Linn County*, 60 Or LUBA 74 (2009).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. When considering the profitability of land for farm use, the fair market value of property zoned for agricultural use incorporates a host of nonfarm economic values in addition to the value of the property attributable to its suitability for farm use. Property owned in fee simple grants the owner a bundle of rights and investment potentials, only some of which are related to the economic use of the land in general, or for farm use in particular. The fair market value of any EFU-zoned parcel presumably reflects its potential for nonfarm uses as well. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Even though a common practice of ranching may involve trucking cattle from one

grazing area to another, the focus of OAR 660-033-0030(3) is on conjoined use of farmland with "nearby or adjacent" properties. In this context, "nearby" means property within a relatively short geographic distance, and property that is almost or nearly adjacent. The county is not required to consider conjoined use with a property that is miles away from the subject property, or separated by a significant number of other parcels. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. In determining whether land is "other suitable land" under the Goal 3 definition of agricultural land and considering whether the land can be farmed with the primary purpose of obtaining a profit in money, the county errs in considering the applicant's annual debt-service payments on the $3,000,000 acquisition price that reflects the speculative value of the land for rural residential use rather than its actual value as farm land. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Determining whether land is agricultural land under OAR 660-033-0020(1)(a)(B) is based on the objective considerations set out in the rule. The particular motivations or financial circumstances of the landowner/applicant are irrelevant. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Testimony that the applicant has not shown why a parcel formerly part of a larger ranch cannot be used in conjunction with adjacent and nearby farm properties is sufficient to raise the issue of compliance with OAR 660-033-0030(3), notwithstanding that the petitioner failed to cite the rule. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. LUBA will remand a decision determining that a parcel is not Goal 3 agricultural land for findings under OAR 660-033-0030(3), which requires that the county examine nearby or adjacent land, regardless of ownership, in determining whether a parcel is agricultural land, where the county adopted no findings addressing the rule, and there is evidence in the record that the subject property was formerly used in conjunction with adjacent farm lands and can be so used again. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. In determining that the land is not "other suitable land" under OAR 660-033-0020(1)(a)(B), a county does not err in relying on uncertainty over whether irrigation necessary to establish a new vineyard is available, combined with high cost of establishing a new commercial vineyard and the higher risks of dry-land viniculture, to conclude that land is not suitable for growing wine grapes. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. In determining whether a parcel remains "adjacent to or intermingled with" agricultural land within a "farm unit" under OAR 660-033-0020(1)(b) notwithstanding that the parcel was recently partitioned from a larger farm parcel and is no longer in common use, the most important consideration is whether there is some significant obstacle to resumed joint operation.

Where a 260-acre parcel was recently divided from a 590-acre ranch and was long used in conjunction with other lands within the farm unit, and there appears no reason why the parcel cannot continue to be used in conjunction with the other parcels within the former farm unit, a county has not established that the parcel is not agricultural land under OAR 660-033-0020(1)(b). *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. The considerations listed in OAR 660-033-0020(1)(a)(B)—soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices—are the primary drivers of any determination under the rule whether land is "suitable for farm use" as defined in ORS 215.203(2)(a). *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. While profitability is a permissible consideration in determining whether land is agricultural land under OAR 660-033-0020(1)(a)(B), it is a relatively minor consideration, and one with a large potential for distracting the decision maker and the parties from the primary considerations listed in the rule—soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Substantial evidence supports a county's finding that a 160-acre parcel is not suitable for an independent grazing operation, where the property has never supported an independent grazing operation, and an agricultural consultant's study details significant capital inputs needed to establish a new, independent grazing operation that could not be recovered from income reasonably expected from such a grazing operation. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. In evaluating whether a 160-acre parcel that was grazed for 70 years in conjunction with nearby lands as part of a larger grazing operation is "other suitable land" under OAR 660-033-0020(1)(a)(B) because it can be put to farm use in conjunction with nearby agricultural lands, the testimony of nearby ranchers that they have successfully ranched the subject property as part of their grazing operation in the past, are willing to do so again, and believe they can do so profitably is generally more than sufficient to establish that the property can be used in conjunction with nearby farm lands. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Where no issue was raised during the initial proceedings or initial appeal to LUBA regarding whether a property could be used as a "woodlot" and thus be put to "farm use" for purposes of ORS 215.203(2), that issue cannot be raised for the first time on appeal of the decision on remand, pursuant to *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992). *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. A county could reasonably choose to rely on a consultant's economic analysis to conclude that a 160-acre parcel is not "other suitable land" under OAR 660-033-0020(1)(a)(B) because it cannot be profitably combined with nearby grazing operations, notwithstanding that nearby ranchers testified that they had successfully used the property in conjunction with their grazing operation in the past and believe they can do so again, where the economic analysis sets out a detailed, if hypothetical, budget demonstrating that such combined use could not be conducted with the primary purpose of obtaining a profit in money, and the nearby ranchers do not provide any similar budget or explanation for why they believe a combined operation would be financially beneficial to them. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. That land might qualify as "wasteland" for purposes of the ORS 215.203(2)(b)(E) definition of "current employment of land for farm use" does not mean that the land is therefore "suitable for farm use as defined by ORS 215.203(2)(a)," for purposes of determining whether the property is agricultural land subject to Goal 3. The ORS 215.203(2)(b)(E) definition of current employment of land for farm use serves different purposes than the definition of farm use at ORS 215.203(2)(a). *Doherty v. Wheeler County*, 56 Or LUBA 465 (2008).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. OAR 660-033-0020(1) comprehensively addresses the circumstances under which land qualifies as agricultural land subject to Goal 3. The fact that land might qualify as "wasteland" for purposes of the ORS 215.203(2)(b) definition of "current employment of land for farm use" does not establish as a matter of law that the land qualifies as "agricultural land" under OAR 660-033-0020(1). *Doherty v. Wheeler County*, 56 Or LUBA 465 (2008).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Undisputed evidence that (1) 41 percent of a property is inaccessible to livestock, (2) the portion that is accessible was severely overgrazed and has lost much of its topsoil, (3) the property can support only six cow-calf pairs for a three month grazing season, and (4) fencing the property for grazing would cost $5,000 but yield at most $400 per year in rent is substantial evidence that the property is not suitable for grazing, for purposes of OAR 660-033-0020(1)(a). *Doherty v. Wheeler County*, 56 Or LUBA 465 (2008).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. In determining whether land must be considered agricultural land under Goal 3 (Agricultural Lands) because the land is suitable for farm use, even though the land is not predominantly NRCS Class I-IV soils, where there is conflicting believable evidence regarding whether the property can be profitably farmed, LUBA will defer to the county's finding that the property is not suitable for farm use. *Wetherell v. Douglas County*, 54 Or LUBA 604 (2007).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Goal 3's protection is not limited to property that is suitable for large, highly profitable, "commercial" farms that would be sufficiently profitable to provide the sole or primary source of income for a property owner. Land that is suitable for noncommercial but profitable farm

use must be protected under Goal 3. *Wetherell v. Douglas County*, 54 Or LUBA 604 (2007).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. LUBA will not assume a county applied an improper "commercial" agricultural standard in determining that property need not be protected under Goal 3 for farm use, where it is reasonably clear the county used the term "commercial" to distinguish land that is suitable for a profitable vineyard from land that is not suitable for a profitable vineyard, in the sense that a vineyard on the property would not produce grapes of a quality and quantity that could be sold for a price that would exceed the cost of production. Such a distinction is permissible under *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007). *Wetherell v. Douglas County*, 54 Or LUBA 604 (2007).

7**.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land.** Pursuant to *Wetherell v. Douglas County*, 342 Or 666, 160 P3d 614 (2007), a local government may consider "profitability" in determining whether land is "suitable for farm use" under OAR 660-033-0020(1)(a)(B). *Wetherell v. Douglas County*, 54 Or LUBA 646 (2007).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. That a farm use is not commercial-scale in size, intensity or profitability is not a sufficient basis to conclude that land is not suitable for farm use under OAR 660-033-0020(1)(a)(B). *Wetherell v. Douglas County*, 54 Or LUBA 646 (2007).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Under OAR 660-033-0030(3), a local government must consider whether land may be used in conjunction with nearby or adjacent farm lands. *Wetherell v. Douglas County*, 54 Or LUBA 646 (2007).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. A county's finding that land is not suitable for grazing is not supported by substantial evidence, where the land has a history of grazing, and is bordered by similarly sized parcels currently used for grazing that have the same soils and conditions. *Wetherell v. Douglas County*, 54 Or LUBA 678 (2007).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. That land is suitable only for seasonal grazing as opposed to year-round grazing does not mean that the land is not "suitable for grazing" as that term is used in the OAR 660-033-0020(1)(a)(B) definition of agricultural land. *Wetherell v. Douglas County*, 54 Or LUBA 678 (2007).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Findings that do not address a petitioner's argument that property can be used for grazing like surrounding properties fail to demonstrate that the property is not suitable lands for farm use. *Wetherell v. Douglas County*, 52 Or LUBA 677 (2006).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. OAR 660-033-0030(5) prohibits consideration of "profitability or gross farm

income" in determining whether land is agricultural land. That prohibition de-emphasizes if not eliminates the role that the "primary purpose of obtaining a profit in money" language in ORS 215.203(2)(a) definition of farm use might otherwise play in determining whether land is agricultural land. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. While counties have some latitude to define a threshold of profitability in determining whether land is subject to a committed exception to Goal 3, counties have no such latitude in determining whether land is agricultural land under OAR 660-033-0030(5), which prohibits counties from considering "profitability or gross farm income" in determining whether land is agricultural land. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Goal 3 protects small-scale agricultural uses as well as large-scale uses. While land capable of grazing only a few animals might not constitute land "suitable for grazing" under OAR 660-033-0020(1)(a)(B), the fact that a 160-acre parcel can provide forage to support only 211 animal unit months on a seasonal basis, consistent with its historic use and other grazing operations in the area, is not a sufficient basis to conclude that the parcel is not "agricultural land" under the Goal 3 definition. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Where land was once maintained at a level of forage productivity that has suffered in recent years due to neglect, it is inappropriate to take such neglect into account in determining whether the land is "agricultural land" under OAR 660-033-0020(1)(a)(B). Instead, the county must examine the parcel's capability for grazing assuming appropriate management measures, such as maintaining fences and controlling brush and weeds. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. OAR 660-033-0030(3) requires counties to consider whether the subject parcel can be used in conjunction with nearby or adjacent land in other ownerships in determining whether the parcel is "suitable for farm use" under OAR 660-033-0020(1)(a)(B). Where the subject property has a 70-year history of conjoined use with an adjacent parcel, the fact that the owner of the other parcel is not currently interested in conjoined use is not a sufficient basis to conclude that the subject property is not suitable for farm use. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Where a parcel has soils, aspect and other features suitable for a commercial vineyard, the county must consider whether the parcel can support such a vineyard. The fact that any vineyard the property could support would be relatively small in scale and that the soils on the predominant portion of the parcel cannot support a commercial vineyard is not dispositive. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. When determining whether land qualifies as agricultural land that must be

protected under Goal 3, profitability and gross farm income are not to be considered in applying the considerations specified in OAR 660-033-0020(1)(a). *Wetherell v. Douglas County*, 50 Or LUBA 275 (2005).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. The structure of OAR 660-033-0020(1), which first applies an objective soil classification threshold to define agricultural land and then applies several other standards to require that land with poorer classification soils nevertheless be inventoried as agricultural land, demonstrates an intent to cast a relatively large net when inventorying agricultural land. At least some properties with soils that are not well suited for farm use are nevertheless to be inventoried as agricultural land. *Wetherell v. Douglas County*, 50 Or LUBA 275 (2005).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. If new farm uses are beginning to make use of poorer quality lands that historically were not put to farm use in a county, such poorer quality lands may now qualify as agricultural land under OAR 660-033-0020(1)(a)(B), despite their soil classifications. *Wetherell v. Douglas County*, 50 Or LUBA 275 (2005).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. That cattle grazing occurs at some level on large tracts of BLM land with the same Class VII soils and vegetative characteristics as the subject property is some evidence that the much smaller subject property could also support some level of grazing. However, that indirect evidence does not compel a conclusion that the property is suitable for grazing, given countervailing evidence that the property is not suitable for farm use under the factors considered in OAR 660-033-0020(1)(a)(B). *Wood v. Crook County*, 49 Or LUBA 682 (2005).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Whether property with predominantly nonfarm soils should nevertheless be viewed as "other lands suitable for farm use" under a county code standard that replicates the Goal 3 definition of agricultural land, is governed by specific considerations. That a property may have been briefly used as an elk and deer holding facility is not one of the specified considerations. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. The suitability standard requires that the local government consider whether the subject parcel or a portion thereof can reasonably be put to farm use in conjunction with adjacent or nearby lands. The county must not only consider the property's suitability for producing crops but also its suitability for producing livestock, in conjunction with adjoining and nearby properties. *Riggs v. Douglas County*, 37 Or LUBA 432 (1999).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. County findings which conclude that the subject parcel is not suitable for farming, but do not evaluate each of the factors identified in the applicable comprehensive plan policy implementing Goal 3, are inadequate to establish compliance with the plan. *Doob v. Josephine County*, 31 Or LUBA 275 (1996).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Where the subject parcel contains soils which are rated Class III when irrigated, the county must consider in its soil evaluation the feasibility of providing irrigation to the parcel. Without such an evaluation, the findings are inadequate to reach a conclusion regarding the suitability of the soil for farm use under the county's comprehensive plan. *Doob v. Josephine County,* 31 Or LUBA 275 (1996).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. Given the express language in Goal 3 that future availability of water for irrigation must be considered in evaluating suitability of soils for agricultural uses, the county's interpretation that it need not consider potential availability of irrigation in determining soil suitability is incorrect, and LUBA will not defer to that interpretation. *Doob v. Josephine County*, 31 Or LUBA 275 (1996).

7.2.3 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Suitable Land. In determining whether land subject to a proposed comprehensive plan and zone map change is (1) suitable for farm use, (2) necessary to permit farm use on other agricultural land, or (3) intermingled with lands of Class I-IV soils; as required by OAR 660-33-020(1)(a)(B) to (C) and (b); a local government's analysis must include all property in common ownership with the subject land. *DLCD v. Curry County*, 28 Or LUBA 205 (1994).

7.2.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Necessary Land. A PAPA that creates a new plan designation and zone and makes a parcel eligible for the new zone if it is at least 20 acres in size and if 60 percent of it is eligible for the new plan designation does not comply with the Goal 3 requirement to protect agricultural lands, even where the PAPA excludes lands zoned EFU from eligibility for the new plan designation, where it does not also exclude lands in other zones which may be necessary to permit farm practices to be undertaken on adjacent or nearby agricultural lands. *DLCD v. Douglas County*, 80 Or LUBA 98 (2019).

7.2.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Necessary Land. The possibility that certain potential uses might cause some conflicts with existing farm and forest practices does not demonstrate that land is necessary for continued farm and forest operations. The fact that existing farm or forest operators propose conditions of approval for the subject property suggests that the property is not necessary to continue those farm or forest operations. *Walker v. Josephine County*, 60 Or LUBA 186 (2009).

7.2.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Necessary Land. An adjoining farmer's testimony that a parcel need not remain in farm zoning to allow their farm operations to continue, combined with the absence of any history of combined farm use, is substantial evidence supporting a county's finding that the parcel is not "agricultural land" under the OAR 660-033-0020(1)(a)(C) definition. *Wetherell v. Douglas County*, 54 Or LUBA 678 (2007).

7.2.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Necessary Land. When the decision does not describe adjacent or nearby agricultural use, it fails to demonstrate that the property is not necessary to permit adjacent and nearby farm practices to continue. *Wetherell v. Douglas County*, 52 Or LUBA 677 (2006).

7.2.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Necessary Land. Under OAR 660-033-0020(1)(a)(C), which includes within the definition of "agricultural lands" land that is "necessary" to permit farm practices on adjacent or nearby agricultural lands, the county must consider whether there is some connection between the subject property and adjacent or nearby farm practices such that the subject property must remain as "agricultural land" in order to permit such practices on adjacent or nearby lands to be undertaken. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

7.2.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Necessary Land. In determining whether a parcel is agricultural land under Goal 3, a local government must: (1) evaluate the soils and suitability of the entire subject property under applicant's ownership, and (2) determine whether the entire subject property is necessary to permit farm practices on nearby lands under OAR 660-33-020(1)(a)(C). *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

7.2.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Agricultural Land Definition – Other Necessary Land. In determining whether land subject to a proposed comprehensive plan and zone map change is (1) suitable for farm use, (2) necessary to permit farm use on other agricultural land,

or (3) intermingled with lands of Class I-IV soils; as required by OAR 660-33-020(1)(a)(B)-(C) and (b); a local government's analysis must include all property in common ownership with the subject land. *DLCD v. Curry County*, 28 Or LUBA 205 (1994).

7.3.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Commercial Agricultural Enterprise. Goal 3 (Agricultural Lands), LCDC administrative rules concerning Goal 3 and the statutory EFU zone contain a level of detail that frequently requires that counties replicate the statutory and rule language in their EFU zones. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

7.3.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Commercial Agricultural Enterprise. ORS 215.780(1)(a) expressly authorizes counties to adopt an 80-acre minimum parcel size in the EFU zone, and ORS 215.263(2)(b) expressly authorizes counties to approve partitions of EFU-zoned land if the resulting parcels "are not smaller than the minimum size established under ORS 215.780." Additional justification for adopting the statutorily authorized 80-acre minimum parcel size is not required by Goal 3, ORS 215.243 and 215.700. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

7.3.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Commercial Agricultural Enterprise. It is not error for a county to amend its code to recognize that under ORS 215.780(2)(a), a minimum parcel size of less than 80 acres may be authorized by LCDC in the future pursuant to OAR 660-033-0100(2) through (9), if the county is able to justify such smaller minimum parcel sizes in the future. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

7.3.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Commercial Agricultural Enterprise. ORS 215.263 expressly authorizes a number of different kinds of land divisions of EFU-zoned land for development of non-farm uses on parcels that are smaller than the minimum parcel size for land divisions for new farm parcels. A county may include such authorization in its EFU zone and Goal 3, ORS 215.243 and 215.700 do not require that a county adopt findings to justify its decision to include such statutory authorizations. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

7.3.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Commercial Agricultural Enterprise. A county is not obligated to explain its choice to adopt current statutory standards for land divisions in its EFU zone in place of the previously adopted county standards for such land divisions. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

7.3.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Commercial Agricultural Enterprise. Farms are part of the "existing commercial agricultural enterprise" as that phrase is used in Goal 3 if they contribute to the overall agricultural economy in the area in a substantial way. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

7.3.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Commercial Agricultural Enterprise. In determining the "existing commercial agricultural enterprise," a county must take a broad-based view of the entire agricultural enterprise in a given area, not a limited inventory of one specific crop or farm use. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

7.3.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Commercial Agricultural Enterprise. A county errs when it defines "the area" to be inventoried under Goal 3 as the entire county but fails to inventory the existing commercial agricultural enterprise in the county, and determine the minimum parcel size necessary to continue that enterprise. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

7.3.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Commercial Agricultural Enterprise. Under OAR 660-05-005 to 660-06-020 and *Still v. Marion County*, 22 Or LUBA 331 (1991), there are three steps that must be followed to determine if a proposed partition of EFU land is appropriate. First, an area large enough to accurately represent the existing commercial agricultural enterprise must be identified. Second, the existing *commercial* agricultural enterprises in the area must be identified. Third, it must be determined that the proposed division will result in parcels of sufficient size to "maintain" or "continue" the identified existing commercial agricultural enterprise in the area. *Still v. Marion County*, 32 Or LUBA 40 (1996).

7.3.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Commercial Agricultural Enterprise. The county erred by applying a local ordinance to determine, without further explanation, that the relevant area to be considered for purposes of OAR 660-05-015(6)(c) was limited to the zone in which the subject parcel is located. *Still v. Marion County*, 32 Or LUBA 40 (1996).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. Goal 3 (Agricultural Lands), LCDC administrative rules concerning Goal 3 and the statutory EFU zone contain a level of detail that frequently requires that counties replicate the statutory and rule language in their EFU zones. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. ORS 215.780(1)(a) expressly authorizes counties to adopt an 80-acre minimum parcel size in the EFU zone, and ORS 215.263(2)(b) expressly authorizes counties to approve partitions of EFU-zoned land if the resulting parcels "are not smaller than the minimum size established under ORS 215.780." Additional justification for adopting the statutorily authorized 80-acre minimum parcel size is not required by Goal 3, ORS 215.243 and 215.700. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. It is not error for a county to amend its code to recognize that under ORS 215.780(2)(a), a minimum parcel size of less than 80 acres may be authorized by LCDC in the future pursuant to OAR 660-033-0100(2) through (9), if the county is able to justify such smaller minimum parcel sizes in the future. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. ORS 215.263 expressly authorizes a number of different kinds of land divisions of EFU-zoned land for development of non-farm uses on parcels that are smaller than the minimum parcel size for land divisions for new farm parcels. A county may include such authorization in its EFU zone and Goal 3, ORS 215.243 and 215.700 do not require that a county adopt findings to justify its decision to include such statutory authorizations. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. A county is not obligated to explain its choice to adopt current statutory standards for land divisions in its EFU zone in place of the previously adopted county standards for such land divisions. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. ORS 215.780(2), the "go below" statute, provides the authority for counties to adopt a minimum lot size for EFU parcels that is lower than the 80-acre minimum lot size prescribed by ORS 215.780(1). Where a local code provision is not adopted pursuant to the procedures set forth in ORS 215.780(2)(a) and (5), it is not a "go below" provision. *Jouvenat v. Douglas County*, 58 Or LUBA 378 (2009).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. Notwithstanding a local zoning ordinance provision that would allow a property line adjustment between an existing 115-acre parcel and an existing 40-acre parcel to reduce the 40-acre parcel to a 27-acre parcel and increase the 115-acre parcel to a 128-acre parcel, where those parcels are located in an exclusive farm use zone that is subject to an 80-acre minimum

parcel size under ORS 215.780(1)(a), the reduction in size of the already substandard 40-acre parcel violates ORS 215.780(1)(a). *Phillips v. Polk County*, 53 Or LUBA 194 (2007).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. The minimum lot or parcel size requirements of ORS 215.780(1) for resource lands do not apply to decisions that rezone a portion of a resource parcel to nonresource use but do not partition or subdivide the parcel. *DLCD v. Coos County*, 39 Or LUBA 432 (2001).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. Consistent with the statutory scheme and policy of ORS 215.243, ORS 215.284(3) requires that a partition must leave a remainder parcel that meets the minimum parcel size, whether or not the remainder parcel is suitable for farm use. *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. Unless approval is given by LCDC under ORS 215.780(2) for a smaller minimum lot size or sizes, ORS 215.780(1) requires a county to apply minimum lot sizes of 80 acres (designated forestland and non-range farmland) or 160 acres (designated rangeland) in its farm and forest zones. *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. Where a county's EFU zone minimum lot size standard was subject to periodic review by LCDC under the old periodic review provisions of ORS 197.640 to 197.649 (1989), *not* under the new periodic review provisions of ORS 197.628 to 197.636, the county may not apply a minimum lot size less than that required by ORS 215.780(1) to EFU-zoned land without LCDC approval pursuant to ORS 215.780(2). *DLCD v. Wallowa County*, 28 Or LUBA 452 (1994).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. ORS 215.780, Goal 3 and OAR 660-33-100 require a county to adopt one or more minimum parcel sizes of specific acreages for exclusive farm use zone(s), and do not allow determinations of minimum parcel sizes in EFU zones through the case-by-case application of performance standards. *DLCD v. Wallowa County*, 28 Or LUBA 452 (1994).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. The 1993 legislature adopted specific minimum lot and parcel sizes. For forestland and farmland that is not designated rangeland, the minimum lot or parcel size is 80 acres. ORS 215.780(1)(a) and (c). For land zoned for exclusive farm use and designated as rangeland, the minimum lot or parcel size is 160 acres. ORS 215.780(1)(b). *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

7.3.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Minimum Lot Size Standard – Operation and Effect of. The ORS 215.780(2) provisions that allow counties to adopt a minimum lot size smaller than would otherwise be required for farmland and forestland by ORS 215.780(1), require that a county obtain LCDC approval for such smaller lot sizes *before* adopting such smaller lot sizes. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. Remand is necessary where petitioners argue that a boundary line adjustment application is governed by a county ordinance addressing the "Sale or Transfer of Land to an Adjacent Owner * * *," under the section on nonconforming uses that apply to "Designated Resource Areas," where the subject parcels are designated for agricultural and forest uses and are zoned exclusive farm use – grazing (FG) and where respondents filed no response brief. Because there is no local interpretation of the applicability of the ordinance, LUBA will remand the decision for the county to interpret the ordinance in the first instance. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. Where the county found a boundary line adjustment application is in compliance with a county ordinance that requires that the "resulting parcel sizes do not change the existing land use" because before and after the boundary line adjustment there was one parcel conforming and one parcel non-conforming in size, LUBA will remand the decision. On remand, the county shall consider petitioners' argument and adopt any necessary findings regarding petitioners' argument that the ordinance could be interpreted to require the county to consider whether the "existing land use pattern" is changed when the subject parcel—that was previously deemed "generally unsuitable" for farm use due to its size and soil composition—qualifies for a nonfarm dwelling as a result of the boundary line adjustment because the parcel was expanded to include agricultural soils in a manner that possibly renders the resulting parcel suitable for farm use. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. Although the county's approval of the boundary line adjustment for the siting of a nonfarm dwelling could effectively undercut the factual predicate for compliance with a statutory-based standard pursuant to ORS 215.263(4) designed to minimize loss of productive resource lands in exclusive farm use zones to non-resource uses, where petitioner has not cited anything in the county ordinance that constitutes an approval standard for a post-partition boundary line adjustment, even if the adjustment undercuts a factual predicate for the partition approval, this argument provides no basis for reversal or remand. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. Approving a boundary line adjustment to a parcel under applicable standards does not "collaterally attack" a previous land partition decision that originally created the subject parcel under different standards, even assuming the adjusted parcel after the boundary line adjustment would not comply with the partition standards that were applied earlier when the parcel was created. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. A division of land that creates an EFU-zoned parcel that is smaller than the 80-acre minimum set forth in ORS 215.780(1) violates that statute, and the land division is prohibited as a matter of law. *Jouvenat v. Douglas County*, 58 Or LUBA 378 (2009).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. A county errs when it defines "the area" to be inventoried under Goal 3 as the entire county but fails to inventory the existing

commercial agricultural enterprise in the county, and determine the minimum parcel size necessary to continue that enterprise. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. Notwithstanding a local zoning ordinance provision that would allow a property line adjustment between an existing 115-acre parcel and an existing 40-acre parcel to reduce the 40-acre parcel to a 27-acre parcel and increase the 115-acre parcel to a 128-acre parcel, where those parcels are located in an exclusive farm use zone that is subject to an 80-acre minimum parcel size under ORS 215.780(1)(a), the reduction in size of the already substandard 40-acre parcel violates ORS 215.780(1)(a). *Phillips v. Polk County*, 53 Or LUBA 194 (2007).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. A code standard prohibiting a property line adjustment on agricultural land where the adjustment is used to qualify a lot or parcel for the siting of a dwelling does not preclude an adjustment that would effectively separate a split-zoned parcel to allow residential development on the non-agriculturally zoned portion of the parcel, where the adjustment will not qualify the agricultural portion of the parcel for a dwelling. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. A new nonfarm parcel is not subject to minimum parcel size under ORS 215.780 where the new nonfarm parcel is created from a parent parcel under ORS 215.263(4) and 215.283(3). *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. Taken together, ORS 215.263(2) and legislative history indicate that the legislature intended ORS 215.284(3) to at least mean that where a remaining parcel suitable for farm use is created from a partition under ORS 215.284(3), the remaining farm parcel must meet the minimum parcel size. *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. Consistent with the statutory scheme and policy of ORS 215.243, ORS 215.284(3) requires that a partition must leave a remainder parcel that meets the minimum parcel size, whether or not the remainder parcel is suitable for farm use. *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

7.4 Goal 3 – Agricultural Lands/ Goal 3 Rule – Land Divisions. To the extent a "woodlot parcel" is something other than a farm parcel, the creation of a "woodlot parcel" in an exclusive farm use zone is not authorized by ORS 215.263, Goal 3 or the Goal 3 rule. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

There are currently no headnotes under this topic.

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A petitioner may not also operate an exotic animal rescue facility, which is undisputedly not a "farm use," on EFU land where the petitioner uses his or her EFU-zoned property for certain "farm uses," under ORS 215.203. The existing "farm use[s]" do not "legitimize" the concurrent unpermitted uses, nor do they shield the unpermitted uses from county code enforcement action. *A Walk on the Wild Side v. Washington County,* 78 Or LUBA 356 (2018).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Where the challenged decision is limited to a single site in a remote rural area, is based on a single unique resource, and limits its authorization to five categories of rural industrial uses that are significantly dependent on that resource, nothing in OAR 660-004-0020 or -0022 precludes a county from justifying an amount of land for a range of deepwater port-dependent rural industrial uses based on the best available evidence regarding the types and land needs of likely industrial uses, without knowing exactly which industrial uses will locate in the exception area or exactly how much acreage each use will require. Although the typical reasons exception involves only a single proposed use, the size of which is generally known, and in such cases it is relatively easy to determine "the amount of land for the use being planned" for purposes of OAR 660-004-0020(2)(a), a county may take a reasons exception to allow more than one use, or even a range of uses, the exact nature and size of which may not be known. *Columbia Riverkeeper v. Columbia County,* 78 Or LUBA 547 (2018).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Goal 3 does not generally allow industrial uses on agricultural land. Goal 2 defines an "exception" in part as a comprehensive plan amendment to allow a use that "[d]oes not comply with some or all goal requirements applicable to the subject property or situations[.]" Goal 2 does not allow establishment of a zoning policy of general applicability. Where a local government authorizes five broad categories of industrial and commercial uses distinguished by a general type of good or commodity (dry bulk, liquid bulk, breakbulk, etc.), and each use is limited by the requirement that the use be significantly dependent on a deepwater port, that does not mean that as a consequence the county has approved an exception that establishes a "zoning policy of general applicability," contrary to the Goal 2, ORS 197.732(1)(b)(A) and OAR 660-004-0005(1)(a) definition of "exception." *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The county did not err in concluding that the "unique resource" at issue, a deepwater river port whose upland portions are located within the existing exception area, is still "located on agricultural or forest land" for purposes of OAR 660-004-0022(3)(a). Although "Agricultural Land" for purposes of Goal 3 and its implementing administrative rule does not include land areas subject to exceptions to Goal 3, it does not necessarily follow that agricultural land, as that term is used in OAR 660-004-0022 or other parts of the Goal 2 exception rule is subject to the same restriction. At least for the limited purpose of evaluating the need for and compliance with exception standards to allow new or changed uses contrary to the resource goals, land within an exception area potentially remains "agricultural land" subject to Goal 3, and where the original exception did not take an exception to Goal 4 the site potentially remains "forest land." *Columbia Riverkeeper v. Columbia County,* 78 Or LUBA 547 (2018).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d) require a finding that the proposed uses authorized by the proposed exception are "compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." To establish compliance with OAR 660-004-0020(2)(d), the county's finding that the likely adverse impacts of the proposed uses allowed under the proposed exception are similar to the impacts of the existing uses must be supported by substantial evidence. The absence of evidence that the impacts would be different is not a basis to conclude that the impacts would be similar. Where this unsupported presumption that the impacts would be similar is the foundation of the much of the county's subsequent analysis, the presumption is not supported by substantial evidence, and remand is necessary for the county to adopt more adequate findings regarding compatibility, supported by substantial evidence. *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d) require a finding that the proposed uses authorized by the proposed exception are "compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." The potential adverse impacts of different types of liquid bulk terminals affiliated with a deepwater port, such as an oil terminal versus a fertilizer export operation, could be different enough to require a separate analysis. Adequate findings regarding compatibility would start by identifying the likely adverse impacts of typical uses authorized under approved use categories, evaluating each use category separately, and if necessary specific types of uses within each category. The findings should also address the characteristics of uses on adjoining areas, and assess vulnerability to potential externalities from industrial uses in the exception area. Informed by those analyses, the county can then reach sustainable conclusions regarding whether the proposed uses are compatible with adjoining uses, or can be rendered compatible via identified measures. *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Only "transportation facilities and improvements" that meet the requirements of OAR 660-012-0065 are allowed on EFU-zoned "rural land" without an exception to Goals 3, 11 and 14. OAR 660-012-0070 provides that "transportation facilities" that do not meet the requirements of OAR 660-012-0065 cannot be constructed on "rural land" without an exception to the applicable goals. However, OAR 660-012-0070 does not require an exception to the applicable resource and urban goals where the city concurrently includes the land within its urban growth boundary, because the land is no longer "rural land" as defined in that rule. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. *VinCEP v. Yamhill County*, 215 Or App 414, 171 P3d 368 (2007), which involved a reasons exception to Goals 3, 4 and 14 to develop a hotel on land zoned exclusive farm use (EFU), and its holding which interprets the rules for reasons exceptions, is inapposite where no reasons exception is involved. Similarly, OAR 661-012-0070 and its requirements for exceptions for transportation improvements on rural land do not apply where no exception to a resource goal is sought. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. ORS 215.448(1)(a) to (d) provide standards that apply to a proposed home occupation in "an exclusive farm use zone, forest zone or

a mixed farm and forest zone that allows residential uses," and do not apply to an application for a proposed home occupation on property located in a rural residential zone. *Willis v. Clackamas County,* 76 Or LUBA 244 (2017).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The issue of whether a county erred in adopting a reasons exception to Statewide Planning Goal 3 under both the catch-all provision at OAR 660-004-0022(1) and the specific provisions for rural industrial use at OAR 660-004-0022(3) was adequately raised below for purposes of ORS 197.763(1), where a participant argued below that the county cannot adopt exceptions under both provisions but must choose one or the other. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The Goal 13 requirement for local governments to "maximize the conservation of all forms of energy" does not impose an affirmative obligation on local governments to promote the development of renewable energy, or provide a basis to conclude that there is a "demonstrated need" to meet a goal requirement, in order to satisfy the standards at OAR 660-004-0022(1)(a) for adopting a reasons exception in order to site a solar energy facility on agricultural land. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A county errs to the extent it justifies a reasons exception under OAR 660-044-0022(3)(a) to site an industrial use on agricultural land, based on proximity to and dependency on an electrical substation located within a nearby urban growth boundary, because OAR 660-004-0022(3)(a) applies only to industrial uses that are dependent on resources located on agricultural or forest land. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. OAR 660-004-0022(3)(c) provides a sufficient reason for siting industrial development on resource lands where the use "would have a significant comparative advantage due to its location." The text and context of OAR 660-004-0022(3)(c) indicate that the locational attractor that provides a significant comparative advantage justifying industrial development of resource land must also be located on resource land, and therefore an electrical substation located within an urban growth boundary cannot qualify as the locational attractor. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. OAR 660-004-0022(3)(c), which states that a significant comparative advantage due to "location" is a sufficient basis to adopt a reasons exception to site industrial development on resource lands, is not properly interpreted to allow industrial use of resource land to be justified based solely on proximity to resources located within a nearby urban growth boundary (UGB), because under such an interpretation the rule could potentially undermine the integrity of UGBs, and it is unlikely that in drafting the rule the Land Conservation and Development Commission intended that result. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. OAR 660-004-0022(3)(c), which states that a significant comparative advantage due to "location" is a sufficient basis to adopt a reasons exception to site industrial development on resource lands, is not properly interpreted to

allow industrial use of resource land to be justified based solely on proximity to resources located within a nearby urban growth boundary (UGB), because under such an interpretation the rule could potentially undermine the integrity of UGBs, and it is unlikely that in drafting the rule the Land Conservation and Development Commission intended that result. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Where LUBA remands a comprehensive plan amendment to adopt limited, technical changes to the analysis of economic, social, environmental and energy (ESEE) consequences that was adopted to support an exception to Goal 3, the county does not err in limiting the scope of remand to exclude new issues raised on remand regarding new conflicts with agricultural uses that the petitioner argues should be considered in a revised ESEE analysis, where the alleged new conflicts have nothing to do with the limited, technical changes to the ESEE required by LUBA's remand. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. For reasons exceptions that are required in order to site "transportation facilities and improvements" on rural lands, the exceptions standards set out at OAR 660-012-0070 apply, rather than the standards set out in OAR 660-004-0020. *Foland v. Jackson County*, 61 Or LUBA 264 (2010).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. OAR 660-034-0040(4), governing local park planning, clearly provides that "some" of the listed park uses permitted in a local park on EFU land require an exception to Goal 3, in the absence of a local master park plan. However, the rule is profoundly ambiguous regarding which of the listed park uses require an exception in the absence of a local master park plan. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The context provided by Goal 3, the Goal 3 rule on private park/campgrounds, Goal 3 Guideline B.1, and the state agricultural land use policies at ORS 215.243, suggest that the public park uses and facilities listed in OAR 660-034-0035(2)(a) through (g) that require a Goal 3 exception in the absence of a master park plan are those that involve higher-intensity development or infrastructure, where there exist less intensive alternatives that minimize permanent loss of agricultural land to non-agricultural use. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The provision of full septic, water and electric hookups to individual campsites in a public RV park/campground constitutes higher-intensity development or infrastructure that, in the absence of a master park plan, requires an exception to Goal 3. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Because the public park rule at OAR 660-034-0035(2) allows a campground "group shelter" in a local public park, but effectively prohibits a "meeting hall" in a local public park, a county cannot approve a fully enclosed, 1,200-square-foot "clubhouse" intended for all-season group activities unless it demonstrates that the clubhouse is properly viewed as a "group shelter" rather than a "meeting hall." *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Because a commercial use such as a convenience store is not allowed in the EFU zone or on Goal 3 land without a Goal 3 exception, a "camp store" similar in function to a convenience store is not permitted in a local public park on EFU land, in the absence of an exception to Goal 3 or the adoption of a local master park plan. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Where a county's EFU zone does not permit solid waste disposal sites, but the statutory EFU zone does allow solid waste disposal sites, under the holding in *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002), a county may not approve an exception to Goal 3 (Agricultural Lands) to allow a solid waste disposal site on EFU-zoned property. Rather, the county must amend its EFU zone to allow solid waste disposal sites if it wishes to authorize that use on its EFU-zoned land. *Waste Not of Yamhill County v. Yamhill County*, 61 Or LUBA 423 (2010).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A comprehensive plan provision prohibiting application of a Rural Residential plan designation to land that is currently designated farm or forest "unless an exception to the applicable Goal 3 or 4 is justified" could be interpreted such that the prohibition does not apply to nonresource land that is not subject to either goal. However, the stronger textual reading is that the qualifier "applicable" simply reflects that the subject property is currently designated under either Goal 3 or Goal 4, whichever is applicable, and an exception to the applicable goal is required in order to redesignate the property to Rural Residential. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Where a county's findings note that property contains a spring and a road and that adjacent lands contain dwellings, but do not otherwise explain why the spring and the road and the adjacent dwellings make resource use of the property impracticable, the county's findings are inadequate to demonstrate compliance with OAR 660-004-0028(2). *Gordon v. Polk County*, 55 Or LUBA 57 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A county errs in concluding that residential uses of properties in the vicinity of the property have committed the subject property to non-resource use, without explaining why those same residential uses will not result in committing other resource lands in the area to non-resource use. *Gordon v. Polk County*, 55 Or LUBA 57 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Compliance with OAR 660-004-0020(2)(a) is shown by demonstrating that a proposed reasons exception complies with OAR 660-004-0022(3), which specifies appropriate reasons for an exception to the statewide planning goals for "Rural Industrial Development." *Gordon v. Polk County*, 55 Or LUBA 67 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Where the proposed use of the property is for "Rural Industrial Development" on resource land outside an urban growth boundary, and that use is provided for in OAR 660-004-0022(3), a showing of compliance with OAR 660-004-0022(1) is not required. *Gordon v. Polk County*, 55 Or LUBA 67 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Under OAR 660-004-0020(2)(c), a local government must determine that the long term environmental, economic, social, and energy consequences of a goal exception are not significantly more adverse than would result from the same proposed use being located on other lands that require a goal exception. Where the petitioner argues that the county did not adequately review other lands that also require a goal exception in determining whether to grant a reasons exception, but petitioner's argument focuses exclusively on lands that would not require a goal exception, petitioner provides no basis for reversal or remand. *Gordon v. Polk County*, 55 Or LUBA 67 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. To establish a "demonstrated need" for a proposed hotel on agricultural land based on the requirements of Goal 9 under OAR 660-004-0022(1)(a) does not necessarily require demonstrating that the county is in violation of its Goal 9 obligations or that the county is faced with a circumstance in which it must choose between violating its Goal 9 or Goal 3 obligations. *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. To show a demonstrated need to locate a proposed hotel on resource land based on the general Goal 9 requirement to "provide adequate opportunities * * * for a variety of economic activities," the county must establish that the county has failed or is at risk of failing to provide adequate opportunities for a variety of economic activities, and that taking an exception to Goal 3 to provide for a hotel is a necessary step toward satisfying that goal requirement. *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A locally unsatisfied market demand for a particular sub-type of lodging accommodation targeted at a small demographic of users is insufficient to establish that there is a demonstrated need for a proposed hotel to satisfy the Goal 9 requirement that the county provide "adequate opportunities for a variety of economic activities." *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Under OAR 660-004-0028(2)(c), findings must address "the relationship between the exception area and the lands adjacent to it." Findings that discuss lands located within a 2000-foot radius from the proposed exception area but do not discuss the lands adjacent to the exception area are inadequate. *Gordon v. Polk County*, 54 Or LUBA 351 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The mere presence of adjoining residential uses is not a sufficient basis for concluding that resource lands are irreversibly committed to non-resource uses. *Gordon v. Polk County*, 54 Or LUBA 351 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. That a paved county road may not be suitable to transport heavy equipment necessary for grass seed farming does not mean that the road is inadequate to provide access for other agricultural uses, and is not a sufficient basis to conclude that the property is irrevocably committed to non-agricultural uses. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. That some residential neighbors may find pasturing of animals objectionable is not a sufficient basis to conclude that property otherwise suitable for pasturing animals is irrevocably committed to non-farm uses. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Where a local government concludes that adjoining rural residential development commits resource land to uses not allowed by Goals 3 or 4, OAR 660-004-0018(2) requires the local government to explain why rural residential development of the subject property will not also result in committing other resource lands in the area. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. In justifying a reasons exception under OAR 660-004-0020(2) to allow nonresource uses on resource lands, a local government may choose the preferred alternative as long as the environmental, social, economic and energy consequences are not "significantly more adverse" than would typically result from using other resource lands for the proposed use. A local government is not required to choose the alternative that is "least disruptive to resource land." *1000 Friends of Oregon v. Yamhill County*, 52 Or LUBA 418 (2006).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The environmental, economic, social and energy (ESEE) analysis does not elevate economic consequences above the other three types of consequences that must be analyzed. A local government could reach a sustainable conclusion that the long-term ESEE consequences of the preferred alternative "are not significantly more adverse than would typically result from the same proposal being located in other areas requiring a Goal exception," notwithstanding that analysis of economic consequences indicates that another alternative is superior in that respect. *1000 Friends of Oregon v. Yamhill County*, 52 Or LUBA 418 (2006).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Findings that all resource land displaced by a proposed bypass consist of high-value farmlands and are similar in agricultural productivity are sufficient to satisfy the OAR 660-004-0020(2) requirement to determine which resource land is least productive, absent some argument from the petitioner for why an explicit productivity ranking is required. *1000 Friends of Oregon v. Yamhill County*, 52 Or LUBA 418 (2006).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A risk of liability for negligent application of fertilizers on property that might result in contamination of drinking water serving adjacent lands does not provide a sufficient basis to conclude that farm use is impracticable on the subject property. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Findings supporting a conclusion that a property is irrevocably committed to nonresource use that rely on the property's similarity to other properties already zoned for nonresource use and the presence of residences on adjacent lands are not sufficient to explain why the relationship between the property and adjacent lands make the property impracticable for resource uses. *Wetherell v. Douglas County*, 51 Or LUBA 730 (2006).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Applicants for an exception to Goal 3 to rezone land to allow division into two parcels for eventual development of an additional nonfarm dwelling are not seeking approval for a "type of use" that could be approved as a nonfarm dwelling without an exception to Goal 3 and are not prohibited from taking an exception under the Court of Appeals' ruling in *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002). *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 508 (2004).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. While a county need not address every possible farm use defined under ORS 215.203(2)(a) in adopting a committed exception to Goal 3, when a party below identifies a particular farm use that may be practicable, the county must address the practicability of that farm use. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The focus of a committed exception under OAR 660-004-0028 is the relationship between the subject property and adjacent uses. Findings that describe and rely upon alleged impacts from rural residential uses up to one-half mile from the subject property, and that provide no description or analysis of adjacent uses, are insufficient to demonstrate that the subject property is committed to nonresource uses. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A county's reliance on reported incidents of vandalism and other crimes in a large rural residential area near a parcel are insufficient to demonstrate that the parcel is committed to nonresource uses, absent evidence that the cited criminal incidents interfere or are likely to interfere with farm or forest uses on the subject property. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Externalities from farm or forest operations such as dust, spray, smoke and noise are inherent aspects of rural life in agricultural or forest zones, and absent evidence that such externalities have or are likely to cause actual conflicts with resource operations, evidence of the possibility of such conflicts with rural residential uses is insufficient to demonstrate that resource uses are impracticable. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The focus of analysis under OAR 660-004-0028 is on *existing* circumstances that contribute to the practicability of resource use in the exception area, not speculative future circumstances. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Where a county concludes that conflicts with adjoining rural residential development commit a property to nonresource uses, the county's findings addressing OAR 660-004-0018(2)(b)(B) must explain why residential development of the subject property will not present the same risk of committing other adjacent resource lands to nonresource uses. Given the complex nature of that explanation, evidence of conflicts with rural residential uses do not "clearly support" a finding that residential zoning of the

subject property will not commit adjacent resource lands, for purposes of ORS 197.835(11)(b). *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A county may not rely on a previously adopted Goal 3 exception for airport related industrial uses to justify approving a major automobile speedway and speedway related uses on rural agricultural land. Although the same factors that the county relied on to justify Goal 11 and Goal 14 exceptions for the speedway and related uses might justify a new Goal 3 exception, a new Goal 3 exception must be adopted to replace the one that was adopted for the airport related industrial uses. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. OAR 660-004-0000(2) does not, as a matter of law, impose a requirement that an applicant for an exception to Goal 3 to permit a single-family dwelling on a 10-acre parcel first exhaust all other potential avenues to obtain approval for that single-family dwelling. *DLCD v. Yamhill County*, 42 Or LUBA 126 (2002).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Findings that merely assert that a property is better suited for rural residential use than for farm use are inadequate to support a reasons exception under OAR 660-004-0020 and 660-004-0022. *DLCD v. Yamhill County*, 42 Or LUBA 126 (2002).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Absent recent or imminent changes in adjacent rural residential uses, where a neighboring subdivision has been developed for many years and the subject property has been in resource use during much of that time, the existence of those adjacent rural residential uses is insufficient to demonstrate that the subject property is irrevocably committed to nonresource use. *DLCD v. Lane County*, 39 Or LUBA 445 (2001).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. When the local government does not demonstrate that the uses allowed by the goals are impracticable, there is no need to resolve relevancy and evidentiary challenges to the findings. *DLCD v. Coos County*, 39 Or LUBA 432 (2001).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A county errs in relying exclusively on rural residential locational criteria in its comprehensive plan in taking a committed exception to Goal 3, instead of the criteria of OAR 660-004-0028, where nothing in the county comprehensive plan purports to waive or supplant any requirement of state law. *Friends of Linn County v. Linn County*, 39 Or LUBA 74 (2000).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Before amending an urban growth boundary to add land with predominantly Class I soils to meet an identified need for commercial land, a county must determine whether alternatives to adding a site with predominantly Class I soils can reasonably accommodate the identified need. That alternatives analysis under OAR 660-004-0020(2)(b)(B) is a multi-factor analysis and rejecting alternative sites solely because they have soils that may increase development costs is error. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Land that is already included within a UGB is assumed to be available for urban development. That assumption is not rendered invalid simply because sites that are planned and zoned for residential, industrial and commercial use have soil or other characteristics that make them less than ideal to develop. *DLCD v. Douglas County,* 38 Or LUBA 542 (2000).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Alternative sites to meet an identified need for commercially planned and zoned land may not be rejected solely because they have soils limitations that the USDA estimates may result in an average 39 percent development cost increase for some small commercial buildings. The estimated 39 percent cost increase is an average, so it may be lower in particular cases, and any added cost may be offset by other advantages the sites may possess. *DLCD v. Douglas County,* 38 Or LUBA 542 (2000).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. In adopting an irrevocably committed exception where the proposed exception area has a history of farm use and is currently in farm use, it is not sufficient to rely solely upon long-standing site characteristics or the presence of long-standing adjacent conflicting uses. An adequate demonstration of impracticability must identify recent or imminent changes affecting the subject property that, by themselves or in combination with other factors, render continued farm use of the property impracticable. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The mere presence of residential uses on EFU-zoned properties adjacent to a proposed exception area does not demonstrate that the subject property is irrevocably committed to nonfarm uses. In considering residential uses on adjacent properties, the county must identify in its findings the conflicts or other impacts between the residential uses and the subject property that make farm use of the subject property impracticable. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 357 (2000).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. OAR 660-004-0028(6)(c)(B) does not require that the county consider as one farm or forest operation those contiguous, undeveloped parcels under common ownership not zoned for resource use. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. OAR 660-004-0028(6)(c) prohibits impacts from rural residential uses approved pursuant to the statewide land use goals from being used to justify a committed exception for nearby property. Where a county decision relies in part on impacts from nearby residential uses to conclude that the resource lands are irrevocably committed to nonresource use, the findings must establish that those conflicts do not arise from residential areas that were approved pursuant to statewide planning goal exceptions. *Friends of Yamhill County v. Yamhill County,* 38 Or LUBA 62 (2000).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A local government is not required to adopt findings addressing the farm tax deferral status of property when considering the "irrevocably committed" factors of OAR 660-004-0028. However, the fact that property is in farm

tax deferral is relevant evidence in determining whether it is impracticable to put the property to farm use. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A reasons exception to Goals 3 and 4 must be based on the considerations set forth in Goal 2 and OAR 660-004-0020 and 660-004-0022. Under OAR 660-004-0022, the fact that farm and forest land is not prime timber or agricultural land is not a legally cognizable basis to adopt a reasons exception to Goals 3 and 4. *McLane v. Klamath County*, 37 Or LUBA 888 (2000).

7. 6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Findings that state there is "sufficient evidence in the form of oral testimony and documentation to support the application," and also state that existing adjacent parcels are "clustered around" two roads are insufficient to adequately describe the characteristics of adjacent lands and the uses located on them as required by OAR 660-004-0028(2)(b) and (6)(a). *DLCD v. Wallowa County*, 37 Or LUBA 105 (1999).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A determination that rural residential uses on EFU property would create a buffer between urban uses and nearby agricultural land is not a proper consideration in granting an exception under OAR 660-004-0028. *DLCD v. Wallowa County*, 37 Or LUBA 105 (1999).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A generalized statement that livestock operations are incompatible with residential uses is insufficient to show that the particular livestock operations on the property for which an exception is proposed are incompatible with existing residential uses. *DLCD v. Wallowa County*, 37 Or LUBA 105 (1999).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Pasturing livestock is a "farm use" as that term is defined in ORS 215.203(2), even though the owner's primary purpose in pasturing cattle on the property is to reduce fire potential by reducing ground cover. *DLCD v. Wallowa County*, 37 Or LUBA 105 (1999).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A committed-exception zone-change decision that acknowledges the existence of Goal 5 resources on the subject property, but concludes that the county's existing Goal 5 plan provisions will address any conflicts, is not adequate to demonstrate compliance with Goal 5, where the findings do not state which of the county's existing Goal 5 plan provisions ensure continued compliance once the exception is taken, and the findings do not consider whether the zone change may introduce the possibility of new conflicting uses. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Until the county has adopted findings that determine precisely what inventoried Goal 5 resource areas are located on the subject property, it is not possible to identify which county Goal 5 resource protection programs affect all or parts of the subject property, and the county is in no position to adopt findings explaining whether a committed-exception zone-change is consistent with the county's existing Goal 5 resource protection provisions. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. In light of historical use of the property for grazing, its high-value soils and similarities between the property and adjacent resource lands, the county's unexplained reliance on a winter high-water table and slight to moderate slopes on the property are inadequate to demonstrate that farm use on the property is impracticable in order to justify a committed exception to Goal 3. *Wodarczak v. Yamhill County*, 34 Or LUBA 453 (1998).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A committed exception to Goal 3 is not justified by the mere presence of adjacent residential development, without evidence of conflicts or an explanation why the relationship between that development and the subject property renders farm use impracticable on the property. *Wodarczak v. Yamhill County*, 34 Or LUBA 453 (1998).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. In approving a committed exception to Goal 3, the county is required by OAR 660-004-0018(2) to limit use on the property within the exception area to ensure that the exception does not tend to commit adjacent and nearby resource lands to nonresource uses. *Wodarczak v. Yamhill County*, 34 Or LUBA 543 (1998).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A local government decision approving an irrevocably committed exception under OAR 660-04-028 to Goals 3 and 4 will be remanded where it does not include findings supported by substantial evidence establishing that uses allowed by Goals 3 and 4 are impracticable. *DLCD v. Columbia County*, 32 Or LUBA 221 (1996).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A local government decision approving a physically developed exception under OAR 660-04-025 to Goals 3 and 4 will be remanded where the findings do not establish that the property is physically developed with non-resource uses. *DLCD v. Columbia County*, 32 Or LUBA 221 (1996).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Findings adopted by the county approving a committed exception to Goals 3 and 4 are inadequate where they contain no discussion or explanation of how the existing uses on adjacent parcels make resource use on the subject property impracticable. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. County findings that describe the physical characteristics and existing uses of adjacent lands in approving a committed exception to Goals 3 and 4 are adequate for purposes of OAR 660-04-028(2)(b) and (6)(a). Those rules do not require the county to make findings regarding the ownership of the adjacent parcels or the proximity of developed uses on adjacent lands. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. In considering the substantiality of evidence supporting a Goal 3 reasons exception for realignment of a highway, LUBA must look at the evidence supporting the challenged decision for the entire four-mile stretch of highway and all the impacted properties, not just the evidence of effects on one of the properties. *Schrock Farms, Inc. v. Linn County*, 31 Or LUBA 57 (1996).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Under OAR 660-04-020(2)(d), an exception to Goal 3 may be approved so long as compatibility with adjacent uses *will be* achieved through measures designed to reduce adverse impacts; compliance with the compatibility standard need not be actually achieved prior to approval of the exception. *Schrock Farms, Inc. v. Linn County*, 31 Or LUBA 57 (1996).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. When property is located in a combined agricultural and forest zone, findings in support of an irrevocably committed exception must establish that all uses allowed by Goals 3 and 4 are impracticable. A finding that the property has never been in agricultural use is insufficient. *DLCD v. Curry County*, 30 Or LUBA 294 (1996).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The standards for approving a physically developed exception to Statewide Planning Goals 3 and 4 are demanding. The county must find that the property has been physically developed to such an extent that all Goal 3 or 4 resource uses are precluded. Uses established in accordance with the goals cannot be used to justify such an exception. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. To approve an irrevocably committed exception to Goals 3 and 4, the county must find that all uses allowed by the goals are impracticable, primarily as a result of uses established on adjacent parcels. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Even if petitioners' evidence supports a conclusion that a resource parcel is not adequate for commercial timber production, that conclusion does not justify an exception to Goals 3 and 4 since it does not establish that all uses allowed by the applicable goals are impracticable. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The county's denial of a developed exception will be upheld when the county finds that the physical characteristics of the property do not render it irrevocably committed to nonresource uses; there is continuing resource use of properties to the north, east and west; and the existence of public facilities and services installed to serve the residence on the site do not irrevocably commit the remainder of the site to nonresource uses. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Findings that address only the practicability of commercial forestry uses, rather than all commercial and non-commercial uses allowed by Goals 3 and 4 on agricultural and forestlands, do not justify an irrevocably committed exception to either Goal 3 or Goal 4. *DLCD v. Coos County*, 29 Or LUBA 415 (1995).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Findings must address the practicability of commercial forestry uses on adjacent lands as well as in a proposed exception area to satisfy the requirements for an irrevocably committed exception to either Goal 3 or Goal 4. *DLCD v. Coos County*, 29 Or LUBA 415 (1995).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Findings to justify a committed exception to Goals 3 and 4 must address the factors of OAR 660-04-028(6) and must be supported by substantial evidence explaining how conflicts between existing uses and resource uses operate in a particular instance to render the subject property irrevocably committed. *DLCD v. Coos County*, 29 Or LUBA 415 (1995).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Where a county makes an unchallenged determination that the "reason" justifying an exception to Goal 3 under ORS 197.732(1)(c)(A) and OAR 660-04-020(2)(a) is the need for a church to serve a congregation located in and around the City of Amity, the county is not required to consider as alternative sites land within the UGBs of other cities in the county. *Cox v. Yamhill County*, 29 Or LUBA 263 (1995).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. A county governing body's interpretation that an otherwise applicable code permit standard requiring "Class I-IV soils [to] be preserved and maintained for farm use" is not applicable to land for which an exception to Statewide Planning Goal 3 (Agricultural Lands) has been adopted as part of the acknowledged county comprehensive plan, is not "clearly wrong," and is within the governing body's discretion under ORS 197.829. *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Where a local government properly determines certain land is not farm or forestland subject to Statewide Planning Goals 3 and 4, an exception to Goals 3 and 4 is *not* required to support comprehensive plan and zone map amendments designating such property for residential use. *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The bias under Goals 3 and 4 in favor of commercial agricultural and forest enterprises does not mean a local government may assume that noncommercial farm and forest uses are not "uses allowed by the applicable goal" for which a proposed exception area's suitability must be considered in granting an exception. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. Even if a local government may establish the level of profitability necessary to qualify as a "farm use," as that term is defined by ORS 215.203, such level may not be set at the same level that would qualify a farm use as a commercial agricultural enterprise. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. The impracticability standard for committed exceptions is a demanding standard, and findings must do more than recite facts addressing the relevant factors, they must also explain why those facts lead to a conclusion that uses allowed by Goals 3 and 4 are impracticable. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

7.6 Goal 3 – Agricultural Lands/ Goal 3 Rule – Exceptions to. In adopting exceptions to Goals 3 and 4 as post-acknowledgment plan amendments, a local government must also address Goal 5

if the exceptions concern or affect lands included on the local government's acknowledged inventory of Goal 5 resources. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. When considering if a piece of property is "suitable for farm use" within the meaning of OAR 660-033-0020(1)(a)(B), the county must consider the parcel in full; it cannot exclude a portion of the property being constrained from farm use from consideration until it evaluates if a reasonable farmer would put the subject property to farm use and/or grazing using the applicable criteria. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 180 (2018).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. When deciding if a property is "suitable for farm use" the county must consider the adjacent or intermingled properties, and property lines or land ownership are not the sole deciding factors. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 180 (2018).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. While counties may use discretion to determine whether an operation is a "commercial farming operation," that does not mean that a county may equate an "existing commercial farming operation" with "farm use." *Wachal v. Linn County*, 78 Or LUBA 227 (2018).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. ORS 215.203(2)(a) provides that "farm use" includes the "preparation" of "products or by-products raised on * * * land for human or animal use[.]" A straw pressing operation that compresses straw that is initially baled in the field after it is cut such that the bales are easier to transport to their eventual end use as feed but that does not change the straw in any way or change the fact that it is ready for use as feed after it is baled and remains ready for use as feed after it is compressed is "preparation" of the straw within the meaning of ORS 215.203(2)(a). *Gilmour v. Linn County*, 73 Or LUBA 90 (2016).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. A building accessory to farm use that is allowed under ORS 215.213(1)(e) as a building "customarily provided in conjunction with farm use" is not itself a farm use. *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. Determining whether a proposed building is allowed in the EFU zone under ORS 215.213(1)(e) or 215.283(1)(e) as a building "customarily provided in conjunction with farm use" requires the local government to determine whether the land is currently employed for farm use and whether the proposed building is of the type that is customarily combined with the farm use in question. Because those determinations are not clear and objective, a building permit to approve such a building is not subject to the ORS 197.015(10)(b)(B) exception for "building permits issued under clear and objective standards." *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. The Supreme Court's decision in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), that uses listed in ORS 215.203(1) may not be subject to local criteria more restrictive than the statute, did not automatically invalidate all final, unappealed land use decisions or conditions attached to those decisions that were issued and final prior to 1995, even if those decisions were inconsistent with the holding in *Brentmar*. *Just v. Linn County*, 59 Or LUBA 233 (2009).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. The considerations listed in OAR 660-033-0020(1)(a)(B)—soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices—are the primary drivers of any determination under the rule whether land is "suitable for farm use" as defined in ORS 215.203(2)(a). *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. While profitability is a permissible consideration in determining whether land is agricultural land under OAR 660-033-0020(1)(a)(B), it is a relatively minor consideration, and one with a large potential for distracting the decision maker and the parties from the primary considerations listed in the rule—soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. Substantial evidence supports a county's finding that a 160-acre parcel is not suitable for an independent grazing operation, where the property has never supported an independent grazing operation, and an agricultural consultant's study details significant capital inputs needed to establish a new, independent grazing operation that could not be recovered from income reasonably expected from such a grazing operation. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. In evaluating whether a 160-acre parcel that was grazed for 70 years in conjunction with nearby lands as part of a larger grazing operation is "other suitable land" under OAR 660-033-0020(1)(a)(B) because it can be put to farm use in conjunction with nearby agricultural lands, the testimony of nearby ranchers that they have successfully ranched the subject property as part of their grazing operation in the past, are willing to do so again, and believe they can do so profitably is generally more than sufficient to establish that the property can be used in conjunction with nearby farm lands. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. A county could reasonably choose to rely on a consultant's economic analysis to conclude that a 160-acre parcel is not "other suitable land" under OAR 660-033-0020(1)(a)(B) because it cannot be profitably combined with nearby grazing operations, notwithstanding that nearby ranchers testified that they had successfully used the property in conjunction with their grazing operation in the past and believe they can do so again, where the economic analysis sets out a detailed, if hypothetical, budget demonstrating that such combined use could not be conducted with the primary purpose of obtaining a profit in money, and the nearby ranchers do not provide any similar budget or explanation for why they believe a combined operation would be financially beneficial to them. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. Where no issue was raised during the initial proceedings or initial appeal to LUBA regarding whether a property could be used as a "woodlot" and thus be put to "farm use" for purposes of ORS 215.203(2), that issue

cannot be raised for the first time on appeal of the decision on remand, pursuant to *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992). *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. A local government errs in concluding that the uses specified in OAR 660-004-0028(3) are impracticable because the property is not capable of supporting commercial levels of agriculture. The test under the rule is not whether the property is capable of supporting commercial levels of agriculture. *Gordon v. Polk County*, 55 Or LUBA 57 (2007).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. Pasturing livestock is a "farm use" as that term is defined in ORS 215.203(2), even though the owner's primary purpose in pasturing cattle on the property is to reduce fire potential by reducing ground cover. *DLCD v. Wallowa County*, 37 Or LUBA 105 (1999).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. LUBA does not independently analyze the evidence, but reviews evidence in the record solely to determine whether it was reasonable for the decision maker to rely on that evidence in making a decision. Where the written evidence is conflicting and a video tape makes it clear that only small remnants of past farming or Christmas tree growing efforts on the subject property remain among the piles of debris that have been scattered over the subject property, it is reasonable for a hearings officer to conclude there is no current farm use of the property. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. Whether composting qualifies as a farm use under ORS 215.203(2)(a) is a question of statutory interpretation, not a question of whether agricultural experts believe composting, in the abstract, falls within a scientific definition of farm use. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. A composting operation where all the compost inputs are produced off-site and all of the compost produced is sold for use off-site does not involve "current employment of the land" and for that reason is not a "farm use" as defined by ORS 215.203(2)(a). *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

7.7.1 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Generally. The 80,000 dollars gross annual income requirement stated in OAR 660-33-135(7) for farm dwellings on high-value farmland is not inconsistent with ORS 215.283(1)(f), although it conflicts with ORS 215.213(2)(b) under *Lane County v. LCDC*, 138 Or App 635, 910 P2d 414, *adh'd to as modified on recons*, 140 Or App 368, 914 P2d 1114 (1996), *rev'd*, 325 Or 569, 942 P2d 278 (1997). *Nichols v. Clackamas County*, 32 Or LUBA 113 (1996).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. While counties may use discretion to determine whether an operation is a "commercial farming operation," that does not mean that a county may equate an "existing commercial farming operation" with "farm use." *Wachal v. Linn County*, 78 Or LUBA 227 (2018).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. A finding that the applicant qualifies as a "farm operator" as defined at OAR 660-033-0130(9)(a) is inadequate, where the finding merely assumes the applicant is the farm operator, and does not address issues raised below that the applicant leases the land to a third person who is the actual farm operator. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. To qualify as a "farm operator" as defined at OAR 660-033-0130(9)(a), in order to gain approval of a farm relative dwelling, the applicant must establish that he or she will "continue to play the predominant role" in farm use of the property. That qualification may not be met if the reason the applicant requires the assistance of a relative is because the applicant is substantially employed off the farm and does not have enough time to conduct farm operations. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. To gain approval of a farm relative dwelling, the applicant must qualify as the "farm operator" and demonstrate, among other things, that he or she would "continue to play the predominate role" in farm operations. That demonstration requires some evidence regarding the proportionate contributions of the farm operator and the relative to the farm operation. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. Where the record includes no evidence or findings regarding whether a 119-acre parcel with a hay-growing operation constitutes a "commercial farm operation," for purposes of approving a farm relative dwelling under OAR 660-033-00130(9), remand is necessary to address that issue. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. OAR 660-033-0135(1) authorizes a farm dwelling on a "parcel," which obligates the local government to confirm that the subject property is a unit of land created in one of the ways described in ORS 92 and ORS 215.010, but it does not obligate the local government to determine whether the land use decision or process that created the property was legally correct in the sense that all applicable standards were properly applied and satisfied. Any legal errors in such decisions cannot be challenged in the appeal of a subsequent decision approving a dwelling on the parcel. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. The OAR 660-033-0135(1)(d) requirement allowing a farm dwelling on a parcel only if "there is no other dwelling on the subject tract" focuses on the "subject tract" as it exists when the local government approves the farm dwelling; that the parcel was once part of a different tract that included a

dwelling does not prohibit approval of the farm dwelling, if the tract the parcel is currently a part of has no dwelling. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. OAR 660-033-0135(1)(c) allows a farm dwelling upon a finding that the dwelling will be occupied by persons principally engaged in farm use of the land at a commercial scale. Although the rule is ambiguous regarding whether the "land" means the parcel on which the dwelling would be located or the tract that includes the parcel, based on context it is reasonably clear that the unit of analysis for the "commercial scale" inquiry is the tract. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. A county errs in finding that a farm dwelling will be occupied by persons principally engaged in farm use of the land at a "commercial scale" for purposes of OAR 660-033-0135(1)(c) based on evidence of ranching activities on a 17,000-acre ranch that the subject tract is associated with, instead of the tract on which the proposed dwelling will be located. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. A county is not required to impose a condition prohibiting use of a farm dwelling if the tract on which it is located is no longer used for farm use at a commercial scale. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. Seasonal occupation of a farm dwelling is not necessarily inconsistent with a finding that the dwelling will be occupied by persons "principally engaged" in farm use of the property, where the property is located in a high elevation area where pasture and farm use is possible only six months of the year. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. A farm dwelling is permitted under OAR 660-033-0135(7)(a) only if the property is "currently employed for the farm use * * * that produced" the requisite $80,000 income in farm products. As worded, the rule does not permit a farm dwelling if the current farm use of the property is significantly different from the farm use that produced the requisite income. *Chapman v. Marion County*, 60 Or LUBA 377 (2010).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. A hearings officer does not err in rejecting as not credible testimony that a 19-acre farm produced over $80,000 in revenue from hay grown on the property, where the applicant provided no evidence of how much hay was grown on the property, or documentation distinguishing revenue from the sale of hay grown on the property from revenue derived from the resale of $83,000 in hay that the applicant purchased that year, and substantial evidence in the record indicated that to derive $80,000 in revenue solely from hay grown on the property would mean the applicant achieved yields and prices several times higher than average for the county. *Chapman v. Marion County*, 60 Or LUBA 377 (2010).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. A code provision that allows a farm dwelling on a 160-acre rangeland parcel, rather than the minimum 320 acres specified in OAR 660-033-0135(1)(a), may be inconsistent with the rule. However, the county may rely on its code, acknowledged in 2001 to comply with Goal 3 and the Goal 3 rule, notwithstanding any inconsistency with the rule. *Oregon Natural Desert Assoc. v. Harney County*, 42 Or LUBA 149 (2002).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. OAR 660-033-0135(1)(c) allows a farm dwelling only if the occupant(s) will be "principally engaged" in farm use, as opposed to principally engaged in nonfarm uses. Consequently, in allowing a farm dwelling under OAR 660-033-0135(1)(c), it is not sufficient for the county to determine that the occupants, as opposed to someone else, will be the primary actors in farm use of the property, where the record shows that the occupants' primary economic livelihood is a nonfarm use. *Oregon Natural Desert Assoc. v. Harney County*, 42 Or LUBA 149 (2002).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. OAR 660-033-0135(1) provides that a dwelling may be considered customarily provided in conjunction with farm use if it satisfies four standards set forth in the rule. Nothing in the rule requires the county to make a separate determination, in addition to applying the four standards, that the predicate farm use is of the type that is customarily associated with a dwelling. *Oregon Natural Desert Assoc. v. Harney County*, 42 Or LUBA 149 (2002).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. Income and activities pursuant to a nonfarm business that is authorized by a conditional use permit on land zoned EFU may not be considered, for purposes of determining whether the farm uses proposed to support a farm dwelling are "at a commercial scale." *Oregon Natural Desert Assoc. v. Harney County*, 42 Or LUBA 149 (2002).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. The OAR 660-033-0140 provisions imposing time limits on and providing standards for extension of certain EFU zone permits, including farm dwelling permits, expressly apply only to permits approved after August 7, 1993. OAR 660-033-0140 does not prohibit extension of farm dwelling permits that were approved prior to August 7, 1993 and does not require that the standards adopted by that rule be applied to any extensions of such previously approved farm dwelling permits. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. OAR 660-033-0135 and 660-033-0140 have no legal effect on the continued validity of farm dwelling permits approved prior to the adoption of those rules or the county's authority to impose time limits on those previously approved permits or to adopt standards for extending those new time limits. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. Under ORS 215.428(3), OAR 660-033-0140 may not be applied to applications for farm dwelling permits that were filed prior to the effective date of the rule and were pending on the date the rule became effective. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. The county's findings are inadequate to establish compliance with OAR 660-05-030(4) where they do not show that once the proposed level of farm activity is established on the subject property, the property will be "currently employed for the primary purpose of obtaining a profit in money" as required by ORS 215.203. *Still v. Marion County*, 32 Or LUBA 40 (1996).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. Where a local code requires that a second farm dwelling be shown to be "necessary," absent a definition to the contrary or contrary legislative history, the term "necessary" has the same meaning in the Goal 3 context that it has in the Goal 4 context. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. While adding dwellings to the existing dwellings on one parcel of a multi-parcel commercial orchard may provide additional deterrence to trespass, vandalism and theft on that parcel, those dwellings will not provide deterrence on the other parcels and are not "necessary" for continuation of the commercial farm. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

7.7.2 Goal 3 – Agricultural Lands/ Goal 3 Rule – Farm Uses – Farm Dwellings. Following 1993 legislative amendments, small scale farm or forest dwellings are not allowable under Goals 3 and 4, and ORS 215.304(1) prohibits LCDC from adopting or implementing any rule which would permit counties to allow such small scale farm or forest dwellings. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. "In-home commercial activities" are not authorized by right in resource zones, even where (1) such activities are accessory to residential uses and would have minimal to no impact on resource lands, (2) such an approach would streamline local permitting by avoiding the conditional use process required for home occupations, and (3) such activities are consistent with a model ordinance prepared by DLCD. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where certain activities are allowed as accessory to a home occupation use, they may not be allowed through a Type I process (i.e., ministerial review of an application based on clear and objective standards and criteria) that does not provide the review that is required by ORS 215.448(1) and (4). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where local code amendments allow accessory uses and structures in an EFU zone, arguments that (1) the amendments improperly exempt such structures from a local code requirement that steps be taken to minimize adverse impacts on farm and forest uses and (2) the provisions governing such uses are inconsistent with ORS 215.213(3)(b) provide no basis for reversal or remand where the amended code is comparable to the prior code and where the petitioner does not develop any argument explaining why the amendments are substantive instead of technical. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A marginal lands county is not required to include in its code a requirement to consider the cumulative impacts from existing or potential lot-of-record dwellings in approving dwellings under OAR 660-033-0130(4)(a)(D)(ii) and (iii). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. ORS 215.441 does not provide an independent basis to approve a dwelling within a church on property zoned EFU, and, where a local code provision provides that "[e]xisting churches may be maintained, enhanced or expanded on the same tract," a construction of that provision to independently allow a residential use of a church as an enhancement to the church impermissibly conflicts with ORS 215.203, ORS 215.283, and ORS 215.441. *Wetherell v. Douglas County*, 80 Or LUBA 183 (2019).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Use. A county fails to correctly apply the farm impacts test at ORS 215.296(1) where it concludes that there are only a few farm or forest uses in the area but does not identify and discuss each farm or forest use, where it does not describe the operations on each of the surrounding properties devoted to farm or forest use, where it does not identify evidence of the unmitigated impacts of the proposed nonfarm use, and where it concludes that such impacts will be reduced but does not identify evidence that significant impacts are avoided. *Currie v. Douglas County*, 79 Or LUBA 585 (2019).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where the county found a boundary line adjustment application is in compliance with a county ordinance that requires that the "resulting parcel sizes do not change the existing land use" because before and after the boundary line adjustment there was one parcel conforming and one parcel non-conforming in size,

LUBA will remand the decision. On remand, the county shall consider and adopt any necessary findings regarding petitioners' argument that the ordinance could be interpreted to require the county to consider whether the "existing land use pattern" is changed when the subject parcel—that was previously deemed "generally unsuitable" for farm use due to its size and soil composition—qualifies for a nonfarm dwelling as a result of the boundary line adjustment because the parcel was expanded to include agricultural soils in a manner that possibly renders the resulting parcel suitable for farm use. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Although the county's approval of the boundary line adjustment for the siting of a nonfarm dwelling could effectively undercut the factual predicate for compliance with a statutory-based standard pursuant to ORS 215.263(4) designed to minimize loss of productive resource lands in exclusive farm use zones to non-resource uses, where petitioner has not cited anything in the county ordinance that constitutes an approval standard for a post-partition boundary line adjustment, even if the adjustment undercuts a factual predicate for the partition approval, this argument provides no basis for reversal or remand. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Although it is not clear a proposed "parsonage," which is a portion of a church to include a bedroom, kitchen and bathroom for use by the church's pastor, must be evaluated and approved or denied under the criteria that apply to a nonfarm dwelling under the county's land use ordinance implementing ORS 215.284, those land use standards require the exercise of discretion in approving the development of land. Further, it is possible, even probable, that any application for a proposed residential use associated with a church must be evaluated under the standards at ORS 215.441, and accordingly the county must process such an application according to its procedures that apply to permits. *Wetherell v. Douglas County*, 78 Or LUBA 33 (2018).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. When considering if a piece of property is "suitable for farm use" within the meaning of OAR 660-033-0020(1)(a)(B), the county must consider the parcel in full; it cannot exclude a portion of the property being constrained from farm use from consideration until it evaluates if a reasonable farmer would put the subject property to farm use and/or grazing using the applicable criteria. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 180 (2018).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. When deciding if a property is "suitable for farm use" the county must consider the adjacent or intermingled properties, and property lines or land ownership are not the sole deciding factors. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 180 (2018).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Based on an ESEE consequences analysis regarding conflicting uses, under OAR 660-023-0040(4) and (5), a county must develop a program to achieve Goal 5, and determine whether to allow, limit, or prohibit conflicting uses. A local government errs in its ESEE analysis and in its ultimate decision to modify its acknowledged Goal 5 program to eliminate the prohibition on churches in the Wildlife Area Combining Zone, when it relied in part on the cost of defending its existing Goal 5 program against

a hypothetical Religious Land Use and Institutionalized Persons Act (RLUIPA) lawsuit to support its decision to achieve Goal 5 by allowing without limits a new conflicting use, without providing an analysis establishing the county's Goal 5 program would be legally vulnerable to losing a hypothetical RLUIPA lawsuit if one were brought. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. To allow a conflicting use without limit under OAR 660-023-0040(5)(c), a county's ESEE analysis must (1) demonstrate that the conflicting use is of sufficient importance relative to the resource site, and (2) must indicate why measures to protect the resource "to some extent should not be provided." OAR 660-023-0040(5)(c) does not prohibit the county from allowing a conflicting use without limit, if there is another option that would both fully protect the resource at issue and satisfy the motivations prompting the county to decide in favor of the conflicting use. Instead, OAR 660-023-0040(5)(c) requires the county to justify its choice to allow a conflicting use without limit, and that justification must include a demonstration that alternatives, such as imposing limits or measures to provide some protection for the resource consistent with OAR 660-023-0040(5)(b) should not be provided. Assuming that demonstration is made, OAR 660-023-0040(5) and Goal 5 do not compel the local government to choose alternatives that fully or partially protect the resource. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. In the context of a county's Goal 5 analysis, LUBA will reject the county's argument that there are no measures that the county could adopt to protect wildlife habitat from the negative impacts of churches without running afoul of a Religious Land Use and Institutionalized Persons Act (RLUIPA) requirement–that governments not impose a "substantial burden" on religious exercise–where the county's ESEE analysis includes no evaluation of any measures or any findings on this point, and without actually evaluating any measures that would provide some protection to wildlife resources, it is difficult to understand how the county could reach a conclusion that no measures could be adopted to protect wildlife resources without also imposing a "substantial burden" on religious exercise. In such a circumstance, remand is necessary for the county to adopt an ESEE analysis that either does not rely on the mere threat of RLUIPA litigation, or that actually evaluates whether the county's existing Goal 5 program is inconsistent with the RLUIPA Equal Terms or Substantial Burden requirements, so that the county can consider whether there are measures it can adopt pursuant to OAR 660-023-0040(5)(b) and (c) to reduce impacts on wildlife resources and include those evaluations in the revised ESEE analysis. As part of that analysis, the county may consider, if necessary, whether identified measures would impose a "substantial burden" on the free exercise of religion. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Legislative history supports an interpretation of Oregon Laws 2013, chapter 462 (2013 Act), which amended ORS 215.213(2)(b)(A) and (B) (and its counterpart ORS 215.283(2)(b)(A) and (B)), that the default, and longest, assessment look-back period possible to allow a property owner to build a "replacement dwelling" on Exclusive Farm Use (EFU)-zoned land is five years. Section 2 of the 2013 Act provides that a dwelling may be replaced if the dwelling it replaces was assessed *ad valorem* taxes for the *lesser* of: (1) the previous five tax years, (2) the previous five tax years except those years where the dwelling had no value as a result of destruction or demolition of the dwelling,

or (3) where the dwelling was constructed within the last 5 years, for the rest of that 5-year period. The five-year look-back therefore may not be more than five years and applies to dwellings that were destroyed or demolished. *Landwatch Lane County v. Lane County*, 76 Or LUBA 250 (2017).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. OAR 660-033-0180(8), the Land Conservation and Development Commission (LCDC) rule that implements Oregon Laws 2013, chapter 462 (the 2013 Act), combines the first part of the 2013 Act's Section 2(2)(b)(A) and Section 2(2)(b)(B) into the rule's Section (B), and ties the first part of Section 2(2)(b)(B) to the five-year tax assessment look-back. Then, the rule's Section (C)(i) eliminates the duplication in the statute and achieves the same limitation the statute achieves, but the rule does not eliminate the statutory requirement to impose a look-back period of five years, essentially giving effect to the "lesser of" language that is not included in the rule. *Landwatch Lane County v. Lane County*, 76 Or LUBA 250 (2017).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. OAR 660-033-0140(1) provides that a discretionary permit on resource land is void two years from the date of the final decision "if the development action is not initiated within that period." However, reading OAR 660-033-0140(1) to allow the permit approval to remain valid indefinitely once it is initiated within the two-year period is inconsistent with OAR 660-033-0140(2), which allows an extension for one year if the applicant was unable to begin or "continue development during the approval period." The requirement to show that the application was unable to "continue development during the approval period" indicates that simply initiating the development within the two-year period is not sufficient in itself to render the permit valid indefinitely, without the need to seek an extension. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Interpreting OAR 660-033-0140(1) to allow a discretionary permit approval to remain valid indefinitely once it is initiated within the initial two-year approval period is inconsistent with OAR 660-033-0140(4), which provides that additional extensions beyond one year may be authorized where applicable criteria have not changed. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where in 2005 an applicant receives discretionary permit approval for three school buildings, and initiates the development action within the initial two-year period set forth in OAR 660-033-0140(1) by constructing two school buildings, but fails to seek extension of the permit or obtain building permits for the third building until seven years after the two-year period expired, long after the school use became a nonconforming use, the applicant can no longer rely on the 2005 approval to authorize issuance of building permits for the third building. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Hallways that are intended for human transit rather than human occupancy need not be counted toward the limit prescribed by OAR 660-033-0130(2)(a) on structures with a "design capacity" no greater than 100 people. *Oregon Coast Alliance v. Curry County*, 73 Or LUBA 52 (2016).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A local government's determination of the design capacity of a locker room that is based on the number of lockers and projected number of golfers using the locker room lockers at one time is supported by substantial evidence in the record where the applicant's architect provides testimony to support the determination. *Oregon Coast Alliance v. Curry County*, 73 Or LUBA 52 (2016).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. OAR 660-033-0130(2)(a) excludes structures that are not "enclosed structures" from the required maximum "design capacity" calculation and a county's exclusion of outdoor decks and patios that are not enclosed is consistent with the express language of the rule. *Oregon Coast Alliance v. Curry County*, 73 Or LUBA 52 (2016).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. The text and context of ORS 215.283(2)(c), which allows "private parks, playgrounds, hunting and fishing preserves and campgrounds" on EFU-zoned land, indicate that the qualifier "private" refers to private ownership, not private access. Accordingly, a "private park" for purposes of ORS 215.283(2)(c) is not limited to parks that exclude the public. *Central Oregon Landwatch v. Deschutes County*, 72 Or LUBA 61 (2015).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. The primary use of a "park" allowed under ORS 215.283(2)(c) on EFU-zoned land must be a recreational use of some kind. A proposed wedding event center is not a "park," because weddings and other focal events are not "recreational" uses, even if incidental activities associated with such events, such as dancing and lawn games, could be viewed as recreational activities. *Central Oregon Landwatch v. Deschutes County*, 72 Or LUBA 61 (2015).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. OAR 660-033-0130(18)(a) authorizes expansion of "[e]xisting facilities wholly within a farm use zone," but does not expressly require that the facility existed wholly within a farm use zone in 1996, on the date the rule language was adopted. As written, the rule includes no such temporal qualification, and would allow expansion of a facility that currently exists wholly within a farm use zone, but that did not in 1996. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. ORS 215.283(2)(k) allows a solid waste disposal facility on EFU-zoned land for which a DEQ permit has been granted. Where the record shows that a currently operating facility proposed for expansion had a DEQ permit that has been extended, but does not include a copy of the current DEQ permit, remand is not necessary to remedy that evidentiary defect where the petitioner offers no reason to believe that the landfill is operating without a current permit, and the county imposed a condition requiring the applicant to provide a copy of the current permit prior to undertaking any expansion. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. OAR 660-033-0130(20)(a)'s description of a regular 18-hole golf course permitted as a conditional use on EFU-zoned land, as "generally characterized by a site of about 120 to 150 acres of land," does not impose a strict upper limit of 150 acres. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. OAR 660-033-0130(2)(a) prohibits certain enclosed structures, including a clubhouse associated with a golf course, with a "design capacity" greater than 100 people, if located within three miles of an urban growth boundary. "Design capacity" denotes the capacity for human occupation that a structure is designed for, not the number of people anticipated to use the structure at any one time. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. "Design capacity" as used in OAR 660-033-0130(2)(a), which limits the design capacity of certain structures on EFU-zoned land within three miles of an urban growth boundary, is not the same concept as "maximum occupancy" as that term is used for purposes of fire and safety codes in issuing a building permit for structures. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Structures or portions of a structure that are not intended for human occupancy need not be counted toward the limit prescribed by OAR 660-033-0130(2)(a) on structures with a "design capacity" no greater than 100 people. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Establishing that the "design capacity" of a structure does not exceed the 100-person limit prescribed in OAR 660-033-0130(2)(a) will likely require the testimony of an architect or designer, together with any necessary calculations or explanations regarding the designed capacity of the structure. Remand is necessary where the applicant proposes a 10,000-square-foot golf clubhouse structure with restaurant, lounge, pro shop, etc., but provides no design or other evidence regarding the designed capacity of the clubhouse, other than testimony that the applicant expects no more than 50 golfers to use the clubhouse at any one time. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. OAR 660-033-0140 provides that certain permits on agricultural and forest land are void after two years if the use is not initiated within that time period. Where the county development code includes language that is nearly identical to much of the language in OAR 660-033-0140, it is reasonable to conclude the code was adopted to implement OAR 660-033-0140. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where a county makes it sufficiently clear that it adopted its similarly worded version of OAR 660-033-0140 to apply in all county zones, including those that apply to agricultural and forest lands, the county code version of OAR 660-033-0140 applies in place of OAR 660-033-0140 on agricultural and forest lands after the county code version of OAR 660-033-0140 is acknowledged. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Under 2010 legislation, wineries authorized by ORS 215.283(1)(n) and 215.452 may offer "[s]ervices directly related to the sale and promotion of wine," and host "private events." ORS 215.452 limits "gross income from the sale of incidental items and services" to "25 percent of the gross income from the retail sale on-

site of wine produced in conjunction with the winery." *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. The legislature in 2010 enacted amendments to ORS 215.452, which governs wineries that are a permitted use under ORS 215.283(1)(n), and those amendments failed to adopt a proposal to expressly preserve statutory authority to approve wineries under ORS 215.283(2)(a) as "commercial activities that are in conjunction with farm use." However, LUBA will not infer from that failure a legislative intent to eliminate ORS 215.283(2)(a) as basis for winery approval on EFU-zoned land, where it was common practice before 2010 to approve wineries under ORS 215.283(2)(a) as "commercial activities that are in conjunction with farm use" and the 2010 legislative history suggests that the legislature did not intended to eliminate that common practice. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Approval of wineries under ORS 215.283(2)(a) as "commercial activities that are in conjunction with farm use" and approval of wineries under ORS 215.283(1)(n) and 215.452, which specifically authorize "wineries" on EFU-zoned land, are *alternative* ways to seek approval for a winery. Approval under ORS 215.283(2)(a) for expansions to an existing winery that was originally approved under ORS 215.283(1)(n) and 215.452 that are not permitted under ORS 215.452, has the legal effect of converting ORS 215.283(1)(n) and 215.452 winery into an ORS 215.283(2)(a) winery. Therefore the expanded winery as a whole must comply with the limits imposed on ORS 215.283(2)(a) wineries. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. ORS 215.283(1)(r) authorizes "processing of farm crops" as a permitted use in EFU zones. While a winery that only produces wine from wine grapes might qualify for approval under ORS 215.283(1)(r), a winery that includes a tasting room and hosts numerous events at the winery to promote sale of wine is more than "processing of farm crops" and must be approved under ORS 215.283(1)(n), which authorizes wineries that are limited in accordance with ORS 215.452 and 215.453 or under ORS 215.283(2)(a), which authorizes "commercial activities that are in conjunction with farm use." *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A winery that is authorized to hold up to 44 public or private events annually to promote and sell wine produced at the winery and to prepare and serve meals at those events, but must limit sale of incidental items and services at the events and winery to no more than "25 percent of the gross income from the on-site sale of wine produced in conjunction with the winery," is permissible under the Supreme Court's and Court of Appeals' decisions in *Craven v. Jackson County*, because the events, food service and sale of incidental items and services are properly viewed as "incidental" and "secondary" to the winery. However, such a winery is approaching the point where the events, food service and sale of incidental items and services can no longer be said to be "incidental" and "secondary" to the winery. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A comprehensive plan policy implementing Statewide Planning Goal 3, which states that the county's policy is to "continue to

preserve" for farm use lands with agricultural soils, does not impliedly preclude the county from adopting a text amendment that authorizes in the EFU zone one of the non-farm uses allowed on EFU land under ORS 215.283(2). Authorizing on EFU land non-farm uses listed in ORS 215.283(2) is consistent with Goal 3 as a matter of law. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. In approving a public recreational vehicle (RV) campground under OAR 660-035-0035 and 0040, a local government need not limit infrastructure such as septic RV dumps, water and electric services to the most minimally intensive infrastructure that is possible, to avoid the necessity of taking an exception to Goal 3. *Linn County Farm Bureau v. Linn County*, 63 Or LUBA 347 (2011).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A county does not err in concluding that providing central septic dump sites for recreational vehicles (RVs) in a public RV campground does not require an exception to Statewide Planning Goal 3, where if the county did not provide central RV dump sites it would have to increase the size or number of communal restrooms to meet campers' needs, offsetting any reduction in septic infrastructure. *Linn County Farm Bureau v. Linn County*, 63 Or LUBA 347 (2011).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A county does not err in concluding that providing a water spigot and an electrical outlet in individual campsites in a public recreational vehicle campground does not require an exception to Goal 3, where providing necessary services to campers requires a dispersed water and electric grid in any event, and the additional infrastructure to supply water and electricity to individual sites is not significantly greater than that otherwise required to provide basic services. *Linn County Farm Bureau v. Linn County*, 63 Or LUBA 347 (2011).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. It is inappropriate to simply apply the restrictions that govern private park/campgrounds under OAR 660-033-0130(19) to public park/campgrounds governed by a different set of rules, because for whatever reason LCDC has chosen to treat public park/campgrounds more favorably than private park/campgrounds. Nonetheless, the rule governing private campgrounds is the only analogous area of law in which LCDC has attempted to delineate the type or intensity of uses allowed in a campground on EFU land as a conditional use without taking an exception to Goal 3, and is useful context in attempting to determine which local public park uses on EFU land require a Goal 3 exception in the absence of a local master park plan. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. The term "dwelling," as used in ORS 215.284 regarding nonfarm dwellings on farmland, includes any essential or accessory improvements or structures such as a well and septic system, and therefore, like the dwelling itself, those essential or accessory improvements or structures are authorized only on portions of the farm parcel that are generally unsuitable for farm use. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Under ORS 215.284, unlike the nonfarm dwelling itself or essential or accessory improvements or structures, driveways or access

roads serving the nonfarm dwelling do not have to be located on a portion of the parcel that is generally unsuitable for farm use. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. While a parcel may not be considered generally unsuitable "based solely on size or location" without considering whether it can be used in conjunction with other lands, if size or location are not the sole basis for a finding of general unsuitability, then a local government is just required to determine whether the parcel can be used in conjunction with other lands. *Williams v. Jackson County*, 55 Or LUBA 223 (2007).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. The proper inquiry under ORS 215.284(3)(b) is whether land is generally unsuitable "for the production of farm crops and livestock or merchantable tree species," not whether the land is generally unsuitable for "farm use." *Williams v. Jackson County*, 55 Or LUBA 223 (2007).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A parcel can satisfy the generally unsuitable standard even if portions of the parcel contain areas that, if considered alone, do not satisfy the standard. *Williams v. Jackson County*, 55 Or LUBA 223 (2007).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. OAR 660-034-0035—and by cross-reference OAR 660-034-0040—provide a list of uses that are allowed in state and local parks, some of which are generally not allowed on resource lands without an exception to the resource goals. However, no exception is required if the uses are authorized in a state or local park master plan. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. By implication, some of the park uses listed in OAR 660-034-0035(2) do not require a goal exception, even if there is no acknowledged park master plan. However, the rule does not specify which uses do or do not require a goal exception in the absence of a park master plan. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Park uses listed in OAR 660-034-0035(2) that are passive, low-intensity uses similar to those allowed in campgrounds in resource zones do not require a goal exception to be placed in state or local parks. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. In determining whether a property is generally unsuitable for the production of farm crops and livestock or merchantable tree species, a county's conclusion that any historic agricultural use on the property before that time does not provide a substantial hurdle is supported by substantial evidence where the county chooses to rely on an expert's opinion that proposed nonfarm parcels have not been used for agricultural operation in the past 20 years. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where the record reflects that 10 acres of irrigation rights were removed from two 20-acre parcels because irrigating with that water was extremely inefficient, (2) the nonfarm parcels consist of 85 percent bare ground, and (3) moving the irrigation rights back would provide no benefit, county's findings that returning

irrigation rights to the property would not render the nonfarm parcels generally suitable for the production of farm crops or livestock is supported by substantial evidence. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where the record reflects that at least 75 percent of the parcels proposed for nonfarm dwellings are incapable of supporting grazing, the county is not required to specifically consider whether neighboring ranchers could use the proposed nonfarm parcels in conjunction with other ranch land. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where a portion of a lot or parcel is predominantly composed of Class I-IV soils, OAR 660-033-0130(4)(c)(B)(ii) provides that the portion is presumed generally suitable for the production of farm crops and livestock or merchantable tree species; where the portion is predominantly composed of soils that are not Class I-IV, but the entire subject property is predominantly composed of Class I-IV soils, the presumption provided for in OAR 660-033-0130(4)(c)(B)(ii) does not apply. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where local land use regulation implements the statutory requirement in ORS 215.284(2)(b) that a portion of a lot or parcel on which a nonfarm dwelling will be located be generally unsuitable for the production of farm crops, the local regulation must be interpreted to be consistent with the statutory requirement it implements. An interpretation that improvements such as driveways, septic systems and wells may be located on the portion of the property that is suitable for production of farm crops is not consistent with the legislative intent of ORS 215.284(2)(b). *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. ORS 215.284(2)(a) requires a demonstration that a proposed nonfarm dwelling or "activities associated with the dwelling" will not force a significant change in or significantly increase the cost of accepted farming practices on nearby lands. Improvements such as driveways, wells and septic systems are not "activities associated with the dwelling." However, such improvements must be considered part of the proposed dwelling and thus must be considered when determining compliance with ORS 215.284(2)(a). *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. For purposes of determining whether a nonfarm dwelling proposed in the middle of an existing vineyard will force a significant change in or significantly increase the cost of accepted farming practices on "nearby lands," the county's determination of the dwelling's impact on nearby lands must include consideration of the impact of the dwelling on the existing vineyard on the subject property itself. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. An allegation that the county failed to consider the potential impact of a proposed nonfarm dwelling on wells located on nearby properties that serve *domestic* purposes does not provide a basis to reverse or remand the approval of a nonfarm dwelling, where the applicable approval criterion requires a demonstration of whether

the proposal will force a significant change in or significantly increase the cost of accepted *farming practices*. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Although a local land use regulation may not specifically require the justification of a 2,000-acre study area for purposes of determining whether a proposed nonfarm dwelling will "materially alter the stability of the overall land use pattern of the area," that regulation implements a statutory requirement, ORS 215.284(2)(d), which has been interpreted to require justification of the scope and contours of any study area used in applying the stability test. To the extent *Epp v. Douglas County*, 46 Or LUBA 480 (2004), concludes otherwise, it is overruled. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. For purposes of determining whether a proposed nonfarm dwelling will "materially alter the stability of the overall land use pattern of the area," OAR 660-033-0130(4)(a)(D)(ii) requires identification of the "number, location and type" of existing dwellings in an identified study area. Where a petitioner fails to explain why the county's alleged errors in identifying existing dwellings on nearby properties as nonfarm dwellings rather than farm dwellings would render its conclusion regarding the resulting stability of the area inadequate, it fails to provide a basis for reversal or remand of the challenged decision. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Findings that the subject property is generally unsuitable for the production of farm crops and livestock or merchantable tree species are inadequate where the findings are based on the presence of rock outcroppings and shallow soils, but the findings do not indicate the percentage of the property covered by rock outcroppings and shallow soils. *Peterson v. Crook County*, 49 Or LUBA 223 (2005).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where a property had water rights that the applicant transferred to other property, the county must consider the possibility of transferring those rights back to the property and the potential capability of the soils if the water rights were transferred back in determining whether the subject property satisfies the "generally unsuitable" standard under ORS 215.263(5). *Peterson v. Crook County*, 49 Or LUBA 223 (2005).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A herbaceous forage survey is not substantial evidence upon which a county may rely in determining that a property is "generally unsuitable" for the production of farm crops and livestock or merchantable tree species pursuant to ORS 215.263(5), where it impossible to ascertain what area the surveys studied and where the survey does not consider potential herbaceous forage capacity if the properties were irrigated. *Peterson v. Crook County*, 49 Or LUBA 223 (2005).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A county's conclusion that a proposed nonfarm dwellings will not alter the stability of the land use pattern in the area is not supported by substantial evidence where that conclusion is based on an estimate that 4 or 5 additional nonfarm dwellings could be approved, and that estimate is not supported by any evidence in the record. *Peterson v. Crook County*, 49 Or LUBA 223 (2005).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. The term "existing facilities" in OAR 660-033-0130 is limited to a facility that will continue in the same use. The rule does not allow an existing residence to be converted to a church merely because it is an existing facility. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where a local code criterion requires that a nonfarm dwelling be situated on a portion of a lot or parcel that is "generally unsuitable for the production of farm crops and livestock or merchantable tree species," and the code then spells out the considerations for determining whether a portion of a lot or parcel is "unsuitable for farm use," the term "farm use" is not properly read to require evaluation of the suitability for farm uses other than the production of farm crops and livestock or merchantable tree species. *Griffin v. Jackson County*, 48 Or LUBA 1 (2004).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. For land to constitute "high-value farmland" under OAR 660-033-0020(8)(d), the land must be (1) west of the Coast Range summit, (2) used in conjunction with a dairy operation on January 1, 1993, and (3) part of a "tract," one or more contiguous parcels in the same ownership, composed predominantly of listed soils. Separately owned parcels are not part of the same "tract" for purposes of OAR 660-033-0020(8)(d), even if those parcels were used together as part of a dairy operation on January 1, 1993. *Tallman v. Clatsop County*, 47 Or LUBA 240 (2004).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Prohibiting uses that are inconsistent with agriculture on high-value farmland, such as churches, while allowing agricultural-supportive structures and uses on high-value farmland, such as barns, wineries and farm stands, is rationally related to the policy of preserving high-value farmland for agricultural use, and neither treats religious assemblies on unequal terms with nonreligious assemblies nor discriminates against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Prohibiting establishment of new uses on high-value farmland, such as churches or golf courses, while allowing expansion of existing churches or golf courses on high-value farmland does not treat religious assemblies on unequal terms with nonreligious assemblies or discriminate against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. OAR 660-004-0000(2) does not, as a matter of law, impose a requirement that an applicant for an exception to Goal 3 to permit a single-family dwelling on a 10-acre parcel first exhaust all other potential avenues to obtain approval for that single-family dwelling. *DLCD v. Yamhill County*, 42 Or LUBA 126 (2002).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Comparative cost is an inherent consideration in determining under OAR 660-012-0065(5)(a) whether alternative road alignments can be constructed at "reasonable cost." *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 476 (2002).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. In determining under OAR 660-012-0065(5)(a) whether alternative road alignments can be constructed at "reasonable cost," possible benefits to properties that are unrelated to the application need not be considered. *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 476 (2002).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. In determining under OAR 660-012-0065(5)(a) whether alternative road alignments to serve seven existing lots can be constructed at "reasonable cost," a county does not err by rejecting as unreasonable an alternative alignment that would cost $285,000 where another alternative could be constructed at $93,000. *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 476 (2002).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. The OAR 660-033-0130(18) requirement that expansions of existing nonfarm uses on high-value soils must be limited to the "same tract" prohibits expansion of a church septic system onto a different tract, and the fact that DEQ rules permit such cross-boundary septic system expansions in certain circumstances does not modify or obviate the obligation to comply with OAR 660-033-0130(18). *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A church-owned parcel and an adjoining parcel on which the church owns an easement are not within the "same tract" for purposes of OAR 660-033-0130(18), which limits expansion of existing nonfarm uses on high-value soils to the "same tract." To constitute a "tract," the parcels must be in the same ownership, and the easement is legally insufficient to establish an identity of ownership in the two parcels. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. The limitations on activities in public parks imposed by OAR 660-034-0035 do not apply to private parks allowed on agricultural and forest lands under ORS 215.283(2)(c), OAR 660-033-0120 and OAR 660-006-0025(4)(e). *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Unlike Goal 4 and the Goal 4 rule, which limit recreational activities on forest lands to those "appropriate for a forest environment," ORS 215.283(2)(c) and OAR 660-033-0120 contain no express language restricting the scope or intensity of activities allowed in "private parks" on agricultural land. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where a neighboring farmer identifies significant changes and significant cost increases to his ranching operation from a proposed motocross race track and off-road vehicle park, the county must find that the proposed park, as conditioned, will not cause those impacts. Such findings are inadequate where the county does not address those identified impacts or explain why the proposed park, as conditioned, will not cause those impacts. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Conditions imposed on a proposed motocross race track and off-road vehicle park that noise from the park must comply

with DEQ standards and not exceed 99 decibels are inadequate to support a finding of compliance with the noninterference standard, where the county does not determine whether compliance with DEQ standards will prevent identified impacts on surrounding farm and forest practices, and the only mechanism for achieving compliance is to limit the noise from individual vehicles to 99 decibels. Without addressing the cumulative noise impacts of multiple vehicles, the county is no position to conclude that identified impacts will not occur. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A water utility's proposal to solve a water shortage by drilling wells and constructing related facilities on EFU-zoned land need not demonstrate that it is not feasible to solve the water shortage in some other way than drilling wells. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Once a water utility decides to solve a water shortage by drilling wells and constructing related facilities, the wells and related facilities must be located on non-EFU-zoned land, unless it is not feasible to do so. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A utility facility may be located on EFU-zoned land if it is not feasible to locate the utility facility on non-EFU-zoned land and, in that circumstance, ORS 215.213(1)(d) and 215.283(1)(d) do not require that the utility facility be located on the "least suitable" EFU-zoned land. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. In reviewing alternatives to locating a proposed utility facility on a proposed EFU-zoned site, a county is not required to examine alternatives that would also involve using EFU-zoned lands. *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Because OAR 660-033-0120 and 660-33-0130 prohibit establishment of a church on high-value farmland, the only procedure available to site a church on high-value farmland is to apply for an exception to the applicable goals under Goal 2. *Corp. of Presiding Bishop v. Klamath County*, 34 Or LUBA 131 (1998).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Under ORS 215.296(1), a local government must identify farm and forest uses on land surrounding the subject parcel and examine the practices necessary to continue those uses. The absence of findings sufficient to demonstrate compliance with ORS 215.296(1) undermines the conclusion that there will be no conflicts with surrounding farm or forest uses under Goal 5. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. The only difference between ORS 215.284(2) and 215.284(3) is that ORS 215.284(2) permits a nonfarm dwelling on an existing parcel, while ORS 215.284(3) permits a nonfarm dwelling on a newly created parcel. *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A new nonfarm parcel is not subject to minimum parcel size under ORS 215.780 where the new nonfarm parcel is created from a parent parcel under ORS 215.263(4) and 215.283(3). *Dorvinen v. Crook County*, 33 Or LUBA 711 (1997).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. OAR 660-33-120 and 660-33-130, which prohibit churches on high-value EFU land, are valid because the uses allowed under the rules are not less restrictive than the uses that would otherwise be allowed under ORS 215.283. *DLCD v. Clackamas County*, 33 Or LUBA 675 (1997).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Where a statute and local land use ordinance restricts personal use airports to "use by the owner," the applicant may utilize the airport for uses *incidental* to conducting private business, but not for the applicant's commercial aviation enterprise. *Berto v. Jackson County*, 33 Or LUBA 658 (1997).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Before a nonfarm dwelling on agricultural land can be approved, findings must be made showing the subject property satisfies the "generally unsuitable" standard and other standards stated in OAR 660-33-130(4)(c)(B). *Krieger v. Wallowa County*, 31 Or LUBA 96 (1996).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. A county must incorporate into its exclusive farm use zones, or otherwise implement, the restrictions on uses of high-value farmland required by OAR 660-33-020(8), 660-33-080, 660-33-090 and 660-33-120. *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

7.8 Goal 3 – Agricultural Lands/ Goal 3 Rule – Nonfarm Uses. Findings of fact stating that accepted farm practices which occurred on adjoining properties have continued after a golf course was constructed do not constitute an improper interpretation of ORS 215.296(1) as being met simply because those past accepted farm practices have continued. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. OAR 660-004-0010(2) does not provide authority for the proposition that an exception to Statewide Planning Goal 4 is unnecessary to plan and zone an inventoried Statewide Planning Goal 5 aggregate site on forest land for mining rather than for forest uses. Rather, OAR 660-004-0010(2) simply makes it clear that a decision under Statewide Planning Goal 5 not to protect Goal 5 resource need not be supported by an exception to Goal 5. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Because of the way Statewide Planning Goal 5 is written, a decision to protect a significant aggregate resource site on forest land for mining, and to apply planning and zoning map designations to allow mining in a way that is not fully consistent with Statewide Planning Goal 4, does not require an exception to Statewide Planning Goal 4. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. A board of county commissioners erroneously interprets a county zoning standard that replicates the OAR 660-006-0025(5)(a) requirement that certain nonforest uses in forest zones must not "[f]orce a significant change in, or significantly increase the cost of" forest practices, where under the board of commissioners' interpretation that standard is treated as a broader "significant impacts" standard that is unconnected to "costs" or "changes in" "forest practices." *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Even under the deferential standard of review required by ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 260-61, 243 P3d 776 (2010), interpreting a generally worded forest land protection policy so strictly that a use that is expressly allowed as a conditional use in the forest zone could never be approved is inconsistent with the text of the policy and implausible. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. OAR 660-033-0140 provides that a decision extending the expiration period for an ORS 215.402 permit decision on farm or forest land is not a "land use decision," and therefore such an extension decision is not within LUBA's jurisdiction. *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Where property includes a soil type that produces no wood fiber and another soil type that will produce some wood fiber, in determining whether the property qualifies as forest land because it is suitable for commercial forest uses, a local government does not err by considering that the property has both soil types. OAR 660-006-0010 is silent about how a local government must go about deciding whether a property with soils of differing productivity qualifies as suitable for commercial forest uses, and a local government does not err by considering the average productivity of those soils. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Because OAR 660-006-0010 and 660-006-0005(2) require that local governments collect information about the cf/ac/year wood fiber productivity of land, it is appropriate to infer that the Land Conservation and Development Commission intended that that information actually be used in determining whether land qualifies

as land that is suitable for commercial forest use. But it is not appropriate to infer that those rules require that only the required information may be considered in deciding whether land is suitable for commercial forest uses. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Where LUBA determines that land with wood fiber productivity of 40 cf/ac/yr to 80 cf/ac/yr is "unlikely to be unsuitable for commercial forest use unless there are additional factors that render those moderately productive soils unsuitable for commercial forest use," a county may not fail to appeal LUBA's decision and in its decision following LUBA's remand of the county's first decision reverse the suitability presumption for land with that level of wood fiber productivity and place the burden of proof on opponents of the applicant seeking a second county decision that the land is not suitable for commercial forest uses. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. An argument that a decision approving a boundary line adjustment under an acknowledged comprehensive plan and land use regulations violates Goal 4 provides no basis for reversal, where petitioner offers no legal theory for why Goal 4 applies to such a decision. Generally, unless a land use decision adopts new or amended comprehensive plan or land use regulation provisions, a post-acknowledgement land use decision is governed by the acknowledged comprehensive plan and land use regulations and need not apply the statewide planning goals directly. *Lulay v. Linn County*, 60 Or LUBA 432 (2010).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. OAR 660-006-0010, which requires that a forest land inventory include a mapping of forest site class, applies both to a local government's initial inventory of forest lands and to subsequent county decisions that modify that inventory, such as designating forest land as "marginal lands" under ORS 197.247 (1991). *Herring v. Lane County*, 54 Or LUBA 417 (2007).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. A county's conclusion that OAR 660-010-0010 does not apply to a decision designating forest land as marginal lands under ORS 197.247 (1991) is harmless error, where the decision is supported by an analysis that is based on objective, empirical measurements of forest productivity consistent with the rule's requirements. *Herring v. Lane County*, 54 Or LUBA 417 (2007).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Where an empirical study conducted according to any applicable Oregon Department of Forestry standards determines that National Resource Conservation Service (NRCS) timber productivity ratings for particular soils do not accurately reflect the actual productivity of soils on the subject parcel, the local government may choose to rely on that study rather than on the NRCS ratings in determining whether the parcel is suitable for commercial forest uses under Goal 4. *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. That National Resource Conservation Service timber productivity ratings for certain soils lists typical characteristics and limitations of such soils, such as southern exposure and rock outcrops, does not mean that a particular parcel may not exhibit more severe limitations than reflected in those ratings. *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. That an Oregon Department of Forestry (ODF) publication requires a "higher intensity soil survey" by a "soil scientist" where there are no trees available for site index calculations does not mean that such a survey is necessary to determine whether property without trees is suitable for commercial forest species under Goal 4, where the survey requirement appears to apply to circumstances in which there is doubt regarding the accuracy of the National Resource and Conservation Service (NRCS) soil maps. The survey requirement has no bearing where it is not disputed that the NRCS soil maps are accurate. *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. A study that evaluates the actual timber productivity of the property, using methods that generate quantitative site index and cubic feet per acre per year data is sufficient to determine whether the property is "suitable for commercial forestry," notwithstanding the absence of published NRCS data for the soils on the property. *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Absent countervailing evidence, expert testimony expressing doubt that Ponderosa pine can be established on a parcel even under intensive management techniques is substantial evidence supporting the local government's conclusion that the property cannot produce Ponderosa pine. *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. A parcel consisting almost entirely of scattered trees interspersed with brush and open areas is not "other forested land" within the meaning of the Goal 4 definition of "forest lands." *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Counties have no inherent authority to allow uses in forest zones free of restrictions imposed by the Goal 4 rule, although counties may regulate more restrictively than required by the rule. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. OAR 660-004-0025 divides the universe of uses allowed in forest zones into outright permitted and conditional uses, with limitations on the types of auxiliary and accessory uses allowed. It is inconsistent with the rule for a county to allow as an outright permitted "accessory" use a use that the rule expressly categorizes as a conditional use. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Where a county's zoning code, like the Goal 4 rule, categorizes certain less intensive uses as outright permitted uses and similar but more intensive or permanent uses as conditional uses allowable on forest lands, an interpretation that the more intensive use is allowed outright as an accessory use to forest operations free of restrictions imposed on the less-intensive use is inconsistent with the structure of the code. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Determining whether a "permanent logging equipment repair and storage" structure that is a listed conditional use under the Goal 4 rule but is not provided for at all under the county's forest zone is allowed as an outright permitted "accessory" use to forest operations requires interpretation of the text and context of the zoning

code. Accordingly, LUBA's review of that interpretation is governed by ORS 197.829(1)(d) rather than the principle described in *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 250 (1996). *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Contamination of drinking water through application of herbicides, pesticides and fertilizers on adjacent resource lands is not an occasional inconvenience accompanying rural life that rural residents must be willing to accept, and might provide the basis for a committed exception to Goal 4. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Where a county has developed a rate of return methodology for distinguishing between forest lands and nonresource lands, but it did not rate some soils that the Natural Resource Conservation Service noted were not suitable for commercial tree production, it may not assume the unrated soils are nonresource lands that fall outside the broad Goal 4 definition of forest land. *Sommer v. Josephine County*, 49 Or LUBA 134 (2005).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. While OAR 660-006-0005(2) allows a county to rely upon an "alternative method" for determining forest productivity of soils instead of the method provided by the Natural Resource Conservation Service, the alternative methodology must be described or set forth in the record, and there must be evidence that the Oregon Department of Forestry has approved the methodology. *Just v. Lane County*, 49 Or LUBA 456 (2005).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. It is consistent with OAR 660-006-0005(2) to rely upon timber productivity data generated by the Oregon Department of Forestry (ODF), notwithstanding that the (1) methodology ODF used is not described in the record, and (2) there is no indication that the methodology used conforms to that described in a 1998 ODF publication. ODF is free to follow or approve a different methodology for determining timber productivity than that described in the 1998 ODF publication. *Just v. Lane County*, 49 Or LUBA 456 (2005).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Arguments that an acknowledged comprehensive plan policy that rates certain soils as unsuitable for commercial forestry is inconsistent with the county soil survey or uses inaccurate figures are impermissible collateral attacks on the policy. *Doob v. Josephine County*, 48 Or LUBA 227 (2004).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Although it may be appropriate to focus exclusively or preponderantly on the poor quality of soils for farm and forest use in deciding whether a particular tract qualifies as agricultural lands or forest lands, such an exclusive or preponderant focus on the tract itself is not appropriate in considering an irrevocably committed exception, where the focus is on the relationship of the adjoining properties to the tract. *Friends of Linn County v. Linn County*, 42 Or LUBA 235 (2002).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Speculative impacts on an adjoining rural subdivision from possible future aerial application of herbicides, pesticides and fertilizer and future movement of trucks to and from a 39-acre parcel for future farm and forest use are the occasional inconveniences that rural residents must be willing to accept and do not provide a basis for a

committed exception to Goals 3 and 4. *Friends of Linn County v. Linn County*, 42 Or LUBA 235 (2002).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. A reasons exception for rural housing is not "necessary" under the last sentence of OAR 660-004-0022(2), if the county fails to demonstrate that land inside nearby urban growth boundaries or on nearby exception lands could not accommodate any identified market demand for housing, as required by OAR 660-004-0020(2)(b). *Friends of Linn County v. Linn County*, 42 Or LUBA 235 (2002).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. "Forest lands," as that term is used in Goal 4, are not limited to lands that have been acknowledged as forest lands. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Where a soil study is needed for approval of a forest template dwelling, OAR 660-006-0005(2) requires that determination of soil capability be based on NRCS data, unless the local government finds that data inaccurate or unavailable, in which case it may consider "equivalent data" generated by an approved method of determining the capability of soils to produce wood fiber. *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. The absence of an NRCS productivity rating for a particular soil means only that NRCS data regarding that soil are "not available" within the meaning of OAR 660-006-0005(2). *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. ORS 215.750 does not, through its text, context or legislative history, limit the meaning of the term "wood fiber" to Douglas fir wood fiber, to the exclusion of other commercial tree species. *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Where a soil study, intended to be an alternative method allowed by OAR 660-006-0005, fails to determine the capability of non-rated soils for producing wood fiber other than Douglas fir, the standard in OAR 660-006-0005 for determining the productivity of the soil by generating equivalent data, has not been met. *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Where an NRCS soil survey does not rate certain soils, that nonrating cannot be used to determine the capacity of the soil for producing wood fiber and cannot be the basis of a conclusion that such soils produce 0-49 cf/ac/yr. The nonrating says nothing in quantitative terms or otherwise about the soil's capacity to produce wood fiber, and therefore is not "equivalent data" as required by OAR 660-006-0005 for an alternative method of soil assessment. *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. To comply with OAR 660-06-025(5)(a), a local government's findings must describe the farm or forest practices on adjacent and nearby forest lands, as well as explain why the proposed use does not significantly affect those practices. Findings that do not address all nearby lands and that simply refer to an adjacent property as a

"woodlot" where a "small flock of sheep" is raised are inadequate. *Donnelly v. Curry County*, 33 Or LUBA 624 (1997).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Goal 4 does not apply to the adoption of a city tree-cutting regulation that has no application to acknowledged forestlands or lands suitable for commercial forest uses. *Ramsey v. City of Portland*, 30 Or LUBA 212 (1995).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. Where a county zoning district was acknowledged by LCDC as a forest zone, not a farm/forest zone, a regulation subsequently adopted by LCDC to apply immediately to uses in forest zones applies to uses within that zoning district. *Testa v. Clackamas County*, 29 Or LUBA 383 (1995).

8.1 Goal 4 – Forest Lands/ Goal 4 Rule – Generally. The general prohibition in the Forest Practices Act against counties applying their land use regulations to forest practices on forestlands located outside an urban growth boundary does not apply to a land use regulation prohibiting or regulating the siting or alteration of dwellings. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A post-acknowledgment plan amendment creating a new plan designation that excludes properties with productivity above roughly 80 cubic acre feet per year from eligibility for the new plan designation does not comply with the Goal 4 requirement to protect lands that are suitable for commercial forest uses because properties with productivity between 40 and 80 cubic acre feet per year are suitable for commercial forest uses unless additional factors make the soil unsuitable for commercial forest uses. *DLCD v. Douglas County*, 80 Or LUBA 98 (2019).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A PAPA that creates a new plan designation and zone and makes a parcel eligible for the new zone if it is at least 20 acres in size and if 60 percent of it is eligible for the new plan designation does not comply with the Goal 4 requirement to protect forest lands, even where the PAPA excludes lands that are suitable for commercial forest uses from eligibility for the new plan designation, where it does not also exclude nearby or adjacent lands which are necessary to permit forest operations or practices. *DLCD v. Douglas County*, 80 Or LUBA 98 (2019).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. While the mere presence of trees on property is not itself sufficient to establish that the property constitutes "other forested lands that maintain soil, air, water and fish and wildlife resources" under Goal 4, a county errs by concluding that property does not so qualify merely because it is not "predominately forested." In addition, a county errs by (1) concluding that property need not remain in forest zoning in order to protect wetlands merely because the applicant is "committed to development of the property without any disturbance to wetlands," without clarifying how the decision will ensure that result, and (2) failing to respond to testimony by neighbors that they have observed wildlife in the area and testimony by ODFW staff that they would expect such wildlife to exist. *Cattoche v. Lane County*, 79 Or LUBA 466 (2019).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. That a county's comprehensive plan was acknowledged in the 1990s to comply with Goal 4 does not shield the county from the obligation, at ORS 197.646(1) and (3), to apply subsequently adopted amendments to Goal 4 or the Goal 4 rule until the county incorporates those amendments into its comprehensive plan. Because the Goal 4 rule was amended in 2008 and 2011 to provide a prioritized list of data sources a county must consider when determining whether land is forest land subject to Goal 4, the county cannot simply apply its acknowledged comprehensive plan standards for identifying forest land, but must also apply the amended Goal 4 rule, until the county incorporates those rule amendments into its comprehensive plan. *Rogue Advocates v. Josephine County*, 66 Or LUBA 45 (2012).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Because OAR 660-006-0010 provides a set of prioritized, mandatory sources of data and a prescribed alternative method that must be used to determine whether land is forest land subject to Goal 4, the applicability of OAR 660-006-0010 cannot be avoided by concluding, based on different data or different methodology, that land is not forest land subject to Goal 4. *Rogue Advocates v. Josephine County*, 66 Or LUBA 45 (2012).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Despite some equivocal statements in a soil scientist's report regarding whether soil represents a variant of an existing soil type or a new unknown soil type, the county's conclusion that the soil represents a variant is supported by substantial evidence, where the only evidence on this point is the soil scientist's, and it is reasonably clear that he ultimately concluded that the soil is a variant. *Rogue Advocates v. Josephine County*, 66 Or LUBA 45 (2012).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where property includes a soil type that produces no wood fiber and another soil type that will produce some wood fiber, in determining whether the property qualifies as forest land because it is suitable for commercial forest uses, a local government does not err by considering that the property has both soil types. OAR 660-006-0010 is silent about how a local government must go about deciding whether a property with soils of differing productivity qualifies as suitable for commercial forest uses, and a local government does not err by considering the average productivity of those soils. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Because OAR 660-006-0010 and 660-006-0005(2) require that local governments collect information about the cf/ac/year wood fiber productivity of land, it is appropriate to infer that the Land Conservation and Development Commission intended that that information actually be used in determining whether land qualifies as land that is suitable for commercial forest use. But it is not appropriate to infer that those rules require that only the required information may be considered in deciding whether land is suitable for commercial forest uses. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where LUBA determines that land with wood fiber productivity of 40 cf/ac/yr to 80 cf/ac/yr is "unlikely to be unsuitable for commercial forest use unless there are additional factors that render those moderately productive soils unsuitable for commercial forest use," a county may not fail to appeal LUBA's decision and in its decision following LUBA's remand of the county's first decision reverse the suitability presumption for land with that level of wood fiber productivity and place the burden of proof on opponents of the applicant seeking a second county decision that the land is not suitable for commercial forest uses. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A forestry consultant's conclusion that land is not forest land subject to Goal 4 is not supported by the record, where it is based on an erroneous assumption that the county's comprehensive plan provides a productivity threshold of 80 cubic feet per acre of per year for lands suitable for commercial forestry. *Wetherell v. Douglas County*, 62 Or LUBA 80 (2010).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where evidence in the record indicates that the subject property has the potential to produce between 47 and 76 cubic feet per acre per year in wood fiber, the property has moderately productive soils that preclude a finding that the property is not suitable for commercial forestry, unless the county identifies additional factors other than soils that render the property unsuitable for commercial forest use. *Wetherell v. Douglas County*, 62 Or LUBA 80 (2010).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. The cf/ac/yr of wood fiber data that must be considered in inventorying lands that are suitable for commercial forest use under OAR 660-006-0010 and 660-006-0005(2) are not the only data that may be considered, but they must be considered. *Just v. Linn County*, 60 Or LUBA 74 (2009).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where a county considers a variety of evidence in concluding that a tract is not suitable for commercial forest use but does not consider the cf/ac/yr of wood fiber data that must be considered in inventorying lands that are suitable for commercial forest use under OAR 660-006-0010 and 660-006-0005(2), remand is required. *Just v. Linn County*, 60 Or LUBA 74 (2009).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. LUBA's decisions suggest that lands with wood fiber productivity of less than 20 cf/ac/yr may be unsuitable for commercial forest use unless there are compensating factors that make it suitable, whereas rural land with a wood fiber productivity of over 80 cf/ac/yr is almost certainly suitable for commercial forest use even if there are limiting factors. Land in the middle range is unlikely to be unsuitable for commercial forest use unless there are additional factors that render those moderately suitable soils unsuitable for commercial forest use. *Just v. Linn County*, 60 Or LUBA 74 (2009).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Whether land qualifies as suitable for commercial forest use need not be based solely on the data described in OAR 660-006-0010 and 660-006-0005(2), and can be based in part on other relevant factors. *Just v. Linn County*, 60 Or LUBA 74 (2009).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. The possibility that certain potential uses might cause some conflicts with existing farm and forest practices does not demonstrate that land is necessary for continued farm and forest operations. The fact that existing farm or forest operators propose conditions of approval for the subject property suggests that the property is not necessary to continue those farm or forest operations. *Walker v. Josephine County*, 60 Or LUBA 186 (2009).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. When a local code provision provides that property must be managed for wildlife or fisheries habitat to qualify as "other forested lands," and property is not managed for wildlife or fisheries under the county's management operations, property is not "other forested lands" for purposes of Goal 4 definition of forest lands. *Walker v. Josephine County*, 60 Or LUBA 186 (2009).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. In amending its inventory of Goal 4 forest lands, a county must consider the wood fiber productivity of the property in cubic feet/acre/year. That cubic feet/acre/year data must be from one of the sources authorized by OAR 660-006-0005(2). If that data is not available or is shown to be inaccurate, equivalent data may be used, as authorized by the rule and approved by the Oregon Department of Forestry. *Anderson v. Coos County*, 60 Or LUBA 247 (2009).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. If the cubic feet/acre/year wood fiber production analysis required by OAR 660-006-0010 and 660-006-0005(2) is not

conclusive in establishing whether the property qualifies as forest lands, a county may then consider other factors, provided those other factors are "not accurately reflected in or accounted for in the data described by OAR 660-006-0010 and 660-006-0005(2)." *Anderson v. Coos County*, 60 Or LUBA 247 (2009).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A post-acknowledgement plan amendment that adopts a policy for protecting forest land that defines forest lands to exclude certain lands that fall within the statewide planning goal definition of "forest lands" must be remanded. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. An objective measurement of productive capacity is required in determining whether land is "forest land" under the Goal 4 definition, either based on published data for particular soils or on an empirical evaluation if published data is not available or not indicative of the property's actual capacity or potential for producing timber. A purely qualitative evaluation is not sufficient. *Wetherell v. Douglas County*, 54 Or LUBA 678 (2007).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A county's conclusion that the property is not suitable for commercial forest uses is supported by substantial evidence where the property owner prepared a study of the forestland productivity of the subject property, which was reviewed by a forester from the Department of Forestry (DOF), that indicated that the property is capable of producing only 1.8 cubic feet per acre per year of wood fiber, and the record includes letters from the DOF stating that any attempts to produce commercial stands on the property would be futile. *Hecker v. Lane County*, 52 Or LUBA 91 (2006).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. An applicant seeking to redesignate property as nonresource by demonstrating that the property is not forest land under the Statewide Planning Goal 4 (Forest Lands) definition of "forest lands" need not rely exclusively on the Natural Resources Conservation Service productivity ratings, and may attempt to contradict those figures with empirical studies of the actual productivity of the soils on the subject property. *Hecker v. Lane County*, 52 Or LUBA 91 (2006).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Expert testimony is not required in order to satisfy the requirement that a demonstration of forest productivity of a property be shown by empirical evidence; a study, prepared by an applicant seeking to redesignate the subject property as nonresource, which is subsequently reviewed by a Department of Forestry forester, is evidence upon which a reasonable person would rely. *Hecker v. Lane County*, 52 Or LUBA 91 (2006).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where an empirical study conducted according to any applicable Oregon Department of Forestry standards determines that National Resource Conservation Service (NRCS) timber productivity ratings for particular soils do not accurately reflect the actual productivity of soils on the subject parcel, the local government may choose to rely on that study rather than on the NRCS ratings in determining whether the parcel is suitable for commercial forest uses under Goal 4. *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. That National Resource Conservation Service timber productivity ratings for certain soils lists typical characteristics and limitations of such soils, such as southern exposure and rock outcrops, does not mean that a particular parcel may not exhibit more severe limitations than reflected in those ratings. *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. That an Oregon Department of Forestry (ODF) publication requires a "higher intensity soil survey" by a "soil scientist" where there are no trees available for site index calculations does not mean that such a survey is necessary to determine whether property without trees is suitable for commercial forest species under Goal 4, where the survey requirement appears to apply to circumstances in which there is doubt regarding the accuracy of the National Resource and Conservation Service (NRCS) soil maps. The survey requirement has no bearing where it is not disputed that the NRCS soil maps are accurate. *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A study that evaluates the actual timber productivity of the property, using methods that generate quantitative site index and cubic feet per acre per year data is sufficient to determine whether the property is "suitable for commercial forestry," notwithstanding the absence of published NRCS data for the soils on the property. *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Absent countervailing evidence, expert testimony expressing doubt that Ponderosa pine can be established on a parcel even under intensive management techniques is substantial evidence supporting the local government's conclusion that the property cannot produce Ponderosa pine. *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A parcel consisting almost entirely of scattered trees interspersed with brush and open areas is not "other forested land" within the meaning of the Goal 4 definition of "forest lands." *Just v. Linn County*, 52 Or LUBA 145 (2006).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A county errs in construing a comprehensive plan finding that "lands producing less than eighty cubic feet per acre [cf/ac/yr] per year are generally not used for commercial uses" to define a threshold of 80 cf/ac/yr for "forest lands" protected by Goal 4, where the text and context indicate that the finding is a statement of historical fact not a minimum threshold, and the county's interpretation is undercut by the fact that the county's Goal 4 plan designations include lands capable of producing 85 cf/ac/yr as prime timberlands, and lands capable of producing considerably less than 80 cf/ac/yr as nonprime timberlands. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Goal 4 does not permit local governments to determine whether land is "forest land" subject to the goal based on the absence of timber productivity ratings for soils or the assumption that unrated soils cannot produce timber. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Some measurement of timber productivity is essential to any determination as to whether land is suitable for commercial forest uses under Goal 4, although such measurements need not be expressed in cubic feet per acre per year. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A landowner's representation to Curry County that land is "forest land" under Goal 4, in order to obtain a large tract forest dwelling under ORS 215.740, while representing to Coos County that the same land is not "forest land," may be less than forthright, but it does not provide a basis for reversal or remand of a Coos County decision declaring that the land is not forest land. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Economic analyses that rely on speculative assumptions regarding economic conditions, prices and costs 60 years in the future are inherently unreliable, and an impermissible means of determining whether land is forest land subject to Goal 4. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. The fact that two kinds of commercial tree species on a parcel are infected with incurable diseases is not a basis to conclude that the parcel is not "forest land" under the Goal 4 definition, absent a showing that the property cannot be restocked with non-susceptible commercial tree species or with disease-resistant seedlings. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A local government's finding that land is not "other forested lands that maintain soil, air, water and fish and wildlife resources" under the Goal 4 definition is inadequate, where the finding does not address ODFW testimony that the land must remain protected under Goal 4 to protect an adjacent estuary. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where a county has developed a rate of return methodology for distinguishing between forest lands and nonresource lands, but it did not rate some soils that the Natural Resource Conservation Service noted were not suitable for commercial tree production, it may not assume the unrated soils are nonresource lands that fall outside the broad Goal 4 definition of forest land. *Sommer v. Josephine County*, 49 Or LUBA 134 (2005).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Lands that are planned and zoned for resource use under Goals 3 and 4 may be redesignated for nonresource use by applying an acknowledged comprehensive plan policy that establishes standards for such redesignations. Where such a specific policy and local standards have been acknowledged, they apply in place of more general statewide planning goals standards that would otherwise apply to such a redesignation. *Sommer v. Josephine County*, 49 Or LUBA 134 (2005).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. That some trees are present on a parcel and that those trees presumably play some role in slowing erosion and supporting air and water quality is not a sufficient basis to conclude that the parcel is "other forested lands that

maintain soil, air, water and fish and wildlife resources," under the Goal 4 definition of forest lands. *Doob v. Josephine County*, 48 Or LUBA 227 (2004).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where the question of whether a property qualifies as forest land so that it may not be considered for a comprehensive plan Rural Use map designation is not governed by the same legal standard that governed the county's finding in a prior decision on the same application that the subject property does not qualify as forest land subject to Goal 4, the same issue is not presented. Therefore, even if the Goal 4 issue was conclusively resolved in the earlier decision, a different decision concerning whether the property qualifies as forest land in the second decision is not barred by the *Beck v. City of Tillamook* waiver principle. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. An ambiguous county code provision that allows lands that were incorrectly identified as agricultural or forest land under Goals 3 and 4 to be rezoned for rural residential use is correctly interpreted to require that an applicant show that a particular property is neither agricultural land nor forest land because land will frequently qualify as both agricultural and forest land and the Land Conservation and Development Commission's rules allow such lands to be zoned for either for exclusive farm use or for forest use. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A county does not err in interpreting its code provision to require that it compute the average cubic foot per year production capability based on the percentage of different soil types on the property. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. The presence of some trees on property does not necessarily establish that the subject property is "suitable for commercial forest uses," within the meaning of Goal 4. *Palmer v. Lane County*, 44 Or LUBA 334 (2003).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. An argument by petitioner that a property's soils are sufficient to produce 20 cu/ft/ac/yr of wood fiber and a finding by a county that a property's soils produce less than 50 cu/ft/ac/yr of wood fiber are not sufficient to establish as a matter of law that the property is or is not forest land, where neither the petitioner nor the county establish that the threshold they rely on is an adopted or acknowledged threshold for determining whether property is forest land subject to Goal 4. *Palmer v. Lane County*, 44 Or LUBA 334 (2003).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. LUBA will sustain a county finding that property should not be viewed as "other forested lands that maintain soil, air, water and fish and wildlife resources," within the meaning of Goal 4, where (1) the county finds that placing property in a forest zone and allowing forest operations on the property would have more negative impacts on a property's wetlands and fish and wildlife habitat than placing the property in a low density residential zone with a beaches and dunes protective overlay, and (2) petitioner offers no challenge to that reasoning. *Palmer v. Lane County*, 44 Or LUBA 334 (2003).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Whether property is "suitable for commercial forest uses" under the Goal 4 definition of forest land depends on the property's capability for production of commercial tree species, not necessarily the past or current level of production, or whether the property is or could be part of a commercial-scale timber business. *Potts v. Clackamas County*, 42 Or LUBA 1 (2002).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Petitioner fails to overcome the county's determination that property is forest land under Goal 4, and fails to demonstrate as a matter of law that land is not "suitable for commercial forest uses," where petitioner's own expert testifies that notwithstanding limitations on productivity the subject property is in a "medium productivity range" and would yield $81,300 worth of commercial timber at 50 years, after an investment of $7,450. *Potts v. Clackamas County*, 42 Or LUBA 1 (2002).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A comprehensive plan policy that allegedly was adopted to clarify that certain county soils that had never been rated for forest productivity were assumed to be non-forest soils was ineffective to accomplish that purpose, where the plan policy also provided an alternative procedure for determining the suitability of soils for forest use to be applied where "a determination cannot be made" using the county's soil rating system. *Doob v. Josephine County*, 41 Or LUBA 303 (2002).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where the applicant presents argument and evidence that property designated and zoned for forest use is not in fact forest land protected by Goal 4, making an exception to that goal unnecessary to rezone the property for residential use, the county errs in denying the rezoning application without addressing the issue or explaining why it believes the subject property is protected by Goal 4. *Potts v. Clackamas County*, 40 Or LUBA 371 (2001).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. The restrictive definition of cubic feet per acre per year located in OAR 660-006-0005(2) does not operate as an approval criterion for determining whether land is forest land under Goal 4, because that definition is only used in OAR chapter 660 division 6 to govern approval of dwellings in forest zones. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. When determining whether land is "forest land" under the Goal 4 suitability standard, if the subject property is smaller than the county's base forest zone minimum parcel size, all of the subject property, not a portion of it, must be considered. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A finding that the subject property contains no identified Goal 5 resources is not adequate to address the Goal 4 requirement that "other forested lands" be designated as forest lands if such lands are needed to maintain soil, water, air, fish and wildlife resources. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where the county concludes that the subject property is not forestland as defined by Goal 4 by defining "commercial forest

use" to mean "profitable forest use," that conclusion is unacceptably vague and not in accord with the Goal 4 definition of "commercial forest land." *DLCD v. Coos County*, 32 Or LUBA 430 (1997).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where the county chooses to define "nearby forest lands" for purposes of Goal 4 to only include forestlands that are actually contiguous to the subject property, the county has effectively eliminated the goal requirement that it consider not only adjacent parcels, but also nearby parcels. *DLCD v. Coos County*, 32 Or LUBA 430 (1997).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. A county's "clarifying policy," which substantively changes the requirements for compliance with the county's policy implementing Goal 4, amounts to an improper amendment of the county's comprehensive plan. *Doob v. Josephine County*, 31 Or LUBA 275 (1996).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where the findings indicate that there are soil, air, water, and fish and wildlife resources on the subject property, a county cannot rely solely on a finding that less than a majority of the site is forested to reach a conclusion that the site is not "other forested lands" within the meaning of Goal 4. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. In determining whether "other forested lands" exist on a parcel for purposes of Goal 4 analysis, while the amount of actual forested area on the parcel is relevant, it is only part of the equation. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where a local government properly determines certain land is not farm or forestland subject to Statewide Planning Goals 3 and 4, an exception to Goals 3 and 4 is *not* required to support comprehensive plan and zone map amendments designating such property for residential use. *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

8.2 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Land Definition. Where the acknowledged county comprehensive plan includes a methodology for rating forest soil types, a decision identifying and applying a soil type not included in the acknowledged plan provisions, to support a plan map amendment and zone change to nonresource designations, has the effect of improperly amending the acknowledged plan without following post-acknowledgment amendment procedures. *Doob v. Josephine County*, 27 Or LUBA 293 (1994).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. Where the county makes a finding that an electrical transmission project "will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands," and "forest practices" are defined pursuant to the Oregon Forest Practices Act, petitioners' argument that the proposed transmission line will remove 36 acres from forest production is not sufficient to explain why the development will result in "a significant change in * * * forest practices * * * on * * * forest lands." OAR 660-006-0025(5). OAR 660-006-0025(5) contemplates the approval of limited non-forest uses on forest land, including the removal of some forest land from production to accommodate a use that is allowed as a conditional use on forest land, including clearing a 100-foot right-of-way with 25 feet of clearance from the ground to the lines, for the purpose of constructing electric transmission lines on forest lands. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. The definition of "transmission line" for purposes of ORS 215.276 is inapposite for purposes of determining whether, under OAR 660-006-0025(4)(q), a liquefied natural gas pipeline is a "new distribution line." *McCaffree v. Coos County*, 70 Or LUBA 15 (2014).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. The text of OAR 660-006-0025(4)(q) reflects that for purposes of conditional uses that are allowed in the Forest zone, all *non-electrical* lines with rights-of-way of up to 50 feet in width are classified as "new distribution lines." *McCaffree v. Coos County*, 70 Or LUBA 15 (2014).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. A local government errs in concluding that the uses specified in OAR 660-004-0028(3) are impracticable because the property is not capable of supporting commercial levels of agriculture. The test under the rule is not whether the property is capable of supporting commercial levels of agriculture. *Gordon v. Polk County*, 55 Or LUBA 57 (2007).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. A metal storage structure placed on a permanent foundation that is designed and intended to support multiple forest operations over multiple growth cycles is not a "temporary on-site structure" within the meaning of OAR 660-006-0025(2)(b), which is limited to temporary structures that are not designed to remain for the entire planting to harvesting growth cycle and are removed when a particular forest practice has concluded. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. Counties have no inherent authority to allow uses in forest zones free of restrictions imposed by the Goal 4 rule, although counties may regulate more restrictively than required by the rule. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. OAR 660-004-0025 divides the universe of uses allowed in forest zones into outright permitted and conditional uses, with limitations on the types of auxiliary and accessory uses allowed. It is inconsistent with the rule for a county to allow as an outright permitted "accessory" use a use that the rule expressly categorizes as a conditional use. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. Riparian protection measures required under the Forest Practices Act are not "forest practices" for purposes of OAR 660-004-0028(3)(c), and a county may consider setbacks and other riparian protection measures in determining whether forest land is irrevocably committed to non-resource use. *Gordon v. Polk County*, 50 Or LUBA 647 (2005).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. Whether property is "suitable for commercial forest uses" under the Goal 4 definition of forest land depends on the property's capability for production of commercial tree species, not necessarily the past or current level of production, or whether the property is or could be part of a commercial-scale timber business. *Potts v. Clackamas County*, 42 Or LUBA 1 (2002).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. Under ORS 215.705(4), an application for a dwelling in a mixed farm/forest zone must comply with the siting standards appropriate for the predominant use of the tract on January 1, 1993. A showing that no farm use of the property, as that term is defined in ORS 215.203(2), was occurring on the tract as of January 1, 1993, does not mean that, by default, the property was predominantly in forest use on that date. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. ORS 215.705(4) requires that a county must determine whether farm or forest uses predominated on a "tract" on January 1, 1993. However, the configuration of the tract is considered as it exists as of the time an application for a dwelling is submitted. Once the scope of the tract is identified, the inquiry turns to whether farm or forest uses predominated on that tract on January 1, 1993. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. In considering which of two uses, farm or forest, predominate on a tract as of January 1, 1993, a county may consider more than the number of acres devoted to farm or forest use to determine predominant use. However, those considerations must flow from the use that was made of the tract on January 1, 1993. Thus, income from farm and forest uses and the amount of activity directed at those uses may be considered, but historic uses and soil capability may not. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. Portions of a tract that are used for nonfarm or nonforest activities have no relevance to the inquiry under ORS 215.705(4), which requires a county to determine whether farm or forest uses predominated on a tract as of January 1, 1993. If only a small portion of the property can reasonably be considered to be in farm or forest use, the county need only consider that portion in its determination of predominant use. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. There is no intrinsic relationship between the size of a parcel and whether the uses on it are "intensively developed" for purposes of the Goal 4 Rule. It is the nature and interrelationship of the uses that determine intensity, not the accidental fact of whether the uses are situated on a larger or smaller parcel. *Donnelly v. Curry County*, 33 Or LUBA 624 (1997).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. A local government misconstrues the meaning of "intensively developed recreational uses" under OAR 660-06-025(4)(e) when it assesses intensity as a product of the relative density of the proposed use with respect to the undeveloped portions of the parcel. *Donnelly v. Curry County*, 33 Or LUBA 624 (1997).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. For purposes of determining whether an RV camp is "intensively developed" and hence inappropriate "for a forest environment" under the Goal 4 Rule, a local government must compare the proposed use to other campgrounds on forest lands, or establish why it is appropriate to compare the proposed use with RV parks on nonresource lands. *Donnelly v. Curry County*, 33 Or LUBA 624 (1997).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. The question under Goal 4 is not whether a campground on forest lands is appropriately rural (*i.e.*, non-urban) in intensity, but whether the campground's intensity of development is "appropriate in a forest environment." *Donnelly v. Curry County*, 33 Or LUBA 624 (1997).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. Allowing a 180-day period of occupancy is inconsistent with the Goal 4 rule's limitation on the use of campgrounds to "overnight temporary use." *Donnelly v. Curry County*, 33 Or LUBA 624 (1997).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. A requirement that a *significant* amount of firearms training occur at a firearms training facility is not demanding enough under OAR 660-06-025(4)(m), because it places no limitation on other activities not directly related to or justified by firearms training. *J.C. Reeves Corp. v. Washington County*, 31 Or LUBA 115 (1996).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. OAR 660-33-030(6) requires that the "more detailed data" upon which the county may rely in determining soil capability for forest uses be related to the SCS soils classification system and, therefore, before the county can rely on more detailed data, the county must establish that the source of the data has the requisite knowledge of the classification system, including the qualifications and expertise to classify soils under the system. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

8.3 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Uses. A finding that soils could be reclassified to Class VII does not establish that the soils are Class VII or that even if they are Class VII, the classification renders the site unsuitable for forest use without evaluation of other relevant factors. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. "In-home commercial activities" are not authorized by right in resource zones, even where (1) such activities are accessory to residential uses and would have minimal to no impact on resource lands, (2) such an approach would streamline local permitting by avoiding the conditional use process required for home occupations, and (3) such activities are consistent with a model ordinance prepared by DLCD. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where certain activities are allowed as accessory to a home occupation use, they may not be allowed through a Type I process (i.e., ministerial review of an application based on clear and objective standards and criteria) that does not provide the review that is required by ORS 215.448(1) and (4). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A condition of approval requiring an applicant that has applied to site a solar facility in an area currently used for growing Christmas trees to offer a fire safety training course to the local fire district is inadequate to establish that "[t]he proposed use will not * * * significantly increase risks to fire suppression personnel" for purposes of OAR 660-006-0025(5)(b) and local code provisions implementing that rule. *Chang v. Clackamas County*, 80 Or LUBA 321 (2019).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Petitioner's argument that a proposed detached accessory structure for an "art studio" is not a permissible "accessory" structure allowed in the Impacted Forest Lands (F-2) zone provides no basis for reversal or remand where petitioner cites to no local code, state statute or administrative rule governing forest lands, suggesting limitations on accessory structures to a primary dwelling that is otherwise allowed on forest lands under state law. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A petitioner's argument that locating an art studio several hundred feet from an existing dwelling on forest land instead of adjacent to the dwelling and within the dwelling's existing fire breaks does not provide a basis for reversal or remand, where the petitioner does not identify any rule or other requirement that an accessory structure be clustered with the existing dwelling. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. LUBA will reject petitioner's argument that a proposed "art studio" is in reality an "accessory dwelling" in the forest zone in violation of state and local law where the county hearings officer imposed several conditions intended to ensure that the proposed "art studio" would not be used as an "accessory dwelling," and petitioner's speculation that the applicant might violate one or more conditions of approval provides no basis for reversal or remand. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A hearings officer's finding that land in the forest zone upon which development is proposed is "flat" is not supported by substantial evidence where the finding is supported only by the applicant's assertion that the relevant slope is "less than 3" percent, but the record includes two topographic maps that appear to show that the

slope exceeds 10 percent, which if so triggers additional fire safety requirements. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. In forest zones ORS 215.760 authorizes "agricultural buildings" as defined by ORS 455.315 but does not authorize "equine facilities," as defined by the statute. A county code provision that purported to define "agricultural building" broadly enough to allow equine facilities in the county's forest zone would be more permissive than ORS 215.760, and would therefore be inconsistent with ORS 215.760. *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where the issue is whether a statute and corresponding code provision that both authorize agricultural buildings and prohibit their conversion to other uses was in effect when a horse barn/arena was constructed in 2000, and the statute and corresponding code provision were first enacted in 2014, LUBA will conclude that the statutory and code authorization and prohibition do not apply to the horse barn/arena. *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A board of county commissioners erroneously interprets a county zoning standard that replicates the OAR 660-006-0025(5)(a) requirement that certain nonforest uses in forest zones must not "[f]orce a significant change in, or significantly increase the cost of" forest practices, where under the board of commissioners' interpretation that standard is treated as a broader "significant impacts" standard that is unconnected to "costs" or "changes in" "forest practices." *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Even under the deferential standard of review required by ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 260-61, 243 P3d 776 (2010), interpreting a generally worded forest land protection policy so strictly that a use that is expressly allowed as a conditional use in the forest zone could never be approved is inconsistent with the text of the policy and implausible. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. The meaning of "permanent facility for the primary processing of forest products" allowed as a conditional use in forest zones is unclear, but the plain dictionary meanings of "primary" and "processing" indicate that the phrase means the initial or first steps in transforming raw forest products into products for market, manufacturing or other commercial use. *Fritch v. Clackamas County*, 68 Or LUBA 184 (2013).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. The "primary processing of forest products" allowed as a conditional use in forest zones does not include subsequent steps in the process that constitute manufacturing. *Fritch v. Clackamas County*, 68 Or LUBA 184 (2013).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. The "primary processing of forest products" allowed as a conditional use in forest zones includes the initial steps employed in a log home manufacturing facility, such as log debarking, milling and curing or kilning of lumber, but

does not include the portions of a log home manufacturing facility that involve the partial assembly of log homes. *Fritch v. Clackamas County*, 68 Or LUBA 184 (2013).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. The "primary processing of forest products" allowed as a conditional use in forest zones does not include the portions of a log home manufacturing facility that involve custom notching and shaping of log ends to form the interlocking components of the walls of a log home. *Fritch v. Clackamas County*, 68 Or LUBA 184 (2013).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. In approving a wedding venue and event business in a forest zone under a code provision that allows, on a "temporary" basis, uses otherwise not allowable in the applicable zone, a county must consider whether the proposed use is properly characterized as a "home occupation," which is an allowed conditional use in the forest zone, subject to restrictions. If the proposed is properly characterized as a home occupation allowable in the forest zone, then the code does not allow the county to issue a temporary use permit for that use. *White v. Lane County*, 68 Or LUBA 423 (2013).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where a county fails to implement a new administrative rule, pursuant to ORS 197.646(3) the rule applies directly to county land use decisions until the county amends its code to implement the rule. However, once the county implements the Goal 4 rule at OAR 660-006-0025 by adopting the substance of the rule into its land use code, ORS 197.646(3) does not operate to apply the rule directly to nonforest uses the county approves in a forest zone. *White v. Lane County*, 68 Or LUBA 423 (2013).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. OAR 660-033-0140 provides that certain permits on agricultural and forest land are void after two years if the use is not initiated within that time period. Where the county development code includes language that is nearly identical to much of the language in OAR 660-033-0140, it is reasonable to conclude the code was adopted to implement OAR 660-033-0140. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where a county makes it sufficiently clear that it adopted its similarly worded version of OAR 660-033-0140 to apply in all county zones, including those that apply to agricultural and forest lands, the county code version of OAR 660-033-0140 applies in place of OAR 660-033-0140 on agricultural and forest lands after the county code version of OAR 660-033-0140 is acknowledged. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. OAR 660-006-0025(4)(q) authorizes a 50-foot right-of-way for gas pipelines in forest zones. It is not inconsistent with OAR 660-006-0025(4)(q), and is expressly authorized by ORS 772.510(3), for a utility provider to obtain a temporary construction easement for stockpiling, storage, etc., in addition to the 50-foot permanent right-of-way authorized under the rule. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. LUBA will affirm a hearings officer's determination that a short-term vacation rental operated using a dwelling on a forest-zoned parcel

is a commercial "visitor accommodation" use not permitted in the forest zone rather than a residential use permitted in the zone, where the county's code distinguishes between residential tenancies arranged on a month-to-month basis or longer and commercial "visitor accommodations" with a tenancy less than 30 days. *Davis v. Jackson County*, 63 Or LUBA 486 (2011).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where the Goal 4 rule incorporates a definition in the Oregon Structural Specialty Code, the version of the Code in effect when the Goal 4 rule was adopted controls, not the Code as subsequently amended, to avoid running afoul of constitutional prohibitions on delegating legislative authority. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 443 (2011).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Under OAR 660-006-0025(4)(w), which authorizes "private accommodations for fishing" limited to no more than "15 guest rooms," LCDC intended to authorize a single fishing lodge with up to 15 "rooms," meaning internal private sleeping areas within a larger structure, not 15 separate cabins with permanent provisions for living, sleeping, cooking and sanitation. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 443 (2011).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Single family dwellings, with permanent provisions for living, sleeping, cooking and sanitation, do not constitute "guest rooms" or "private accommodations for fishing" under OAR 660-006-0025(4)(w), even if the dwellings are not permanently occupied. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 443 (2011).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Exclusive owner-occupancy of a "guest room" in a fishing accommodation is likely inconsistent with the intent of OAR 660-006-0025(4)(w), which contemplates a fishing lodge-type accommodation with rooms temporarily rented to and occupied by visitors. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 443 (2011).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Occupancy of a guest room in a private accommodation for fishing authorized under OAR 660-006-0025(4)(w) for up to six months per year is not "temporary" occupancy for purposes of the rule. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 443 (2011).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where a proposed private accommodation for fishing is located on a large reservoir, the arms of which are easily accessible by boat but which are controlled by different fishing seasons, the limitation in OAR 660-006-0025(4)(w) that guest rooms at a fishing lodge be occupied during the "fishing season" is not limited to the particular arm of the lake that the lodge is located on. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 443 (2011).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Depending on the circumstances and a particular proposal for private accommodations for fishing, the county may have to impose conditions necessary to ensure that the accommodations will be occupied "for the purpose of

fishing" and not other purposes. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 443 (2011).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. The requirement that a dwelling sought to be replaced be a "building * * * which is occupied in whole or in part" does not include a requirement for continuous occupancy. *Dalton v. Polk County*, 61 Or LUBA 27 (2010).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. When a replacement dwelling approval standard requires that the dwelling sought to be replaced have been "lawfully constructed," if there is a final unappealed decision that removed a use restriction from a lawfully established dwelling, the fact that that decision may have been incorrect does not change the fact that dwelling was legally established and may be replaced. *Dalton v. Polk County*, 61 Or LUBA 27 (2010).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where a proposed replacement dwelling is in a forest zone rather than an EFU-zone, case law regarding the interpretation of "intact" for purposes of establishing that a dwelling sought to be replaced has "intact exterior walls" is not binding on the local government. *Dalton v. Polk County*, 61 Or LUBA 27 (2010).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. That a park model recreational vehicle (RV) is defined in the state building code as one type of recreational vehicle does not mean that the permanent installation of park model RVs on rural forest land is equivalent to temporary campground use by self-propelled or pull-behind RVs, under Oregon's statewide planning goals, administrative rules, and implementing land use regulations. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A county does not err in failing to define a geographic area of analysis for the impacts of a non-forest use in a forest zone under a code "significant change/increase" standard that does not implement the similar significant change/increase standard applicable to EFU zones and that, unlike the statute, does not require analysis of impacts on "surrounding lands" or any other particular geographic area. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Findings that describe the only forest practice that adjoining timber operators identified as impacted by proposed mining on forest land are adequate for purposes of a code significant change/increase standard, where the code standard does not implement the statutory significant change/increase standard, and the petitioners do not explain why the code standard requires an exhaustive description of all forest practices on nearby lands. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. LUBA will affirm a county's finding that fire protection measures that typically apply to logging operations are sufficient to ensure that a proposed mining operation in a forest zone will not significantly increase fire hazards, notwithstanding that a permanent mining operation will have greater duration and intensity than a seasonal logging operation, where the petitioners cite to no evidence substantiating their assertion

that the nature and intensity of the mining operation require more stringent fire protection measures than logging operations. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. In addressing a requirement that a proposed use on forestland not interfere with nearby farming practices, a county must address the impacts on an adjacent parcel when the petitioner alleges that there will be adverse impacts on the adjacent parcel. *Tennant v. Polk County*, 56 Or LUBA 455 (2008).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. In order to constitute a private park that can be allowed on Goal 4 forestlands pursuant to OAR 660-006-0025, a proposed use must not only be a public recreational use, but also must be appropriate in a forest environment. *Tennant v. Polk County*, 56 Or LUBA 455 (2008).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. In considering whether a paintball operation is appropriate for a forest environment as an allowed private park on forestlands, the fact that the paintball operation will be noisy does not in itself render the use inappropriate for a forest environment. *Tennant v. Polk County*, 56 Or LUBA 455 (2008).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. OAR 660-034-0035—and by cross-reference OAR 660-034-0040—provide a list of uses that are allowed in state and local parks, some of which are generally not allowed on resource lands without an exception to the resource goals. However, no exception is required if the uses are authorized in a state or local park master plan. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. By implication, some of the park uses listed in OAR 660-034-0035(2) do not require a goal exception, even if there is no acknowledged park master plan. However, the rule does not specify which uses do or do not require a goal exception in the absence of a park master plan. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Park uses listed in OAR 660-034-0035(2) that are passive, low-intensity uses similar to those allowed in campgrounds in resource zones do not require a goal exception to be placed in state or local parks. *Rural Thurston Inc. v. Lane County*, 55 Or LUBA 382 (2007).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. The scope of "accepted farming or forest practices" that must be evaluated under the no significant change/increase standard is a fact-specific inquiry. A hearings officer does not err in evaluating the scope and intensity of "accepted forest practices" on adjacent lands based on the forest uses currently or recently occurring in the area, and need not assume that forest practices on adjacent parcels will occur at the most intensive level possible. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A metal storage structure placed on a permanent foundation that is designed and intended to support multiple forest operations over multiple growth cycles is not a "temporary on-site structure" within the meaning of OAR 660-006-0025(2)(b), which is limited to temporary structures that are not designed to remain for the entire

planting to harvesting growth cycle and are removed when a particular forest practice has concluded. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Counties have no inherent authority to allow uses in forest zones free of restrictions imposed by the Goal 4 rule, although counties may regulate more restrictively than required by the rule. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. OAR 660-004-0025 divides the universe of uses allowed in forest zones into outright permitted and conditional uses, with limitations on the types of auxiliary and accessory uses allowed. It is inconsistent with the rule for a county to allow as an outright permitted "accessory" use a use that the rule expressly categorizes as a conditional use. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where two parcels are divided by a fee interest in a strip of land owned by the county for use as a public roadway, the two parcels are not contiguous and are not part of the same "tract." In that circumstance, where one of the parcels already contains a dwelling, the approval of a forest template dwelling on the other parcel does not violate ORS 215.750(4)(d), which prohibits the approval of a forest template dwelling on a "tract" that already includes a dwelling. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where a strip of land was transferred in fee title to the county for roadway purposes, the resulting units of land lying on either side of that strip do not violate the requirement in ORS 92.014 (1955) that "[n]o person shall create a street or way for the purpose of partitioning a parcel of land without the approval of the agency or body authorized to give approval of plans for subdivision," where the record does not indicate that the roadway was created "for the purpose of partitioning land." Accordingly, the county does not err in determining that one of those resulting units of land is a lawfully created "parcel," and complies with the requirement in ORS 215.705(1)(a) that the lot or parcel on which a forest template dwelling is proposed was lawfully created. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where the local code fire siting standards require that secondary fuel breaks (*i.e.*, a fuel break extending 130 feet in all directions around structures) "or their equivalent" apply to new residences, the county does not err in determining that secondary fuel breaks are not required in the riparian setback area, where the findings adopted in support of the riparian vegetation setback regulations acknowledge that riparian vegetation provides a sufficient natural barrier against the spread of fire. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Siting requirements for forest template dwellings that require that impacts and fire risks be "minimized" govern *where* a proposed dwelling should be sited rather than *whether* a dwelling should be approved. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. OAR 629-640-0100(2), an administrative rule implementing the Forest Practices Act (FPA), only applies to an "operation," which is a "commercial activity relating to the growing or harvesting of forest tree species." Because the clearing of a firebreak as a condition of approval for a forest template dwelling is not such an activity, the administrative rule requirements do not apply. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. The limitations on activities in public parks imposed by OAR 660-034-0035 do not apply to private parks allowed on agricultural and forest lands under ORS 215.283(2)(c), OAR 660-033-0120 and OAR 660-006-0025(4)(e). *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Even if conditioned to prohibit more intensive types of competition, a 25-acre motocross race track is not "appropriate in a forest environment" and thus not within the scope of recreational activities allowed in a "private park" on forest lands under OAR 660-006-0025. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A single-file off-road vehicle trail system dispersed over 200 acres is a recreational activity "appropriate in a forest environment" and thus allowed in a "private park" under OAR 660-06-0025. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where a neighboring farmer identifies significant changes and significant cost increases to his ranching operation from a proposed motocross race track and off-road vehicle park, the county must find that the proposed park, as conditioned, will not cause those impacts. Such findings are inadequate where the county does not address those identified impacts or explain why the proposed park, as conditioned, will not cause those impacts. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Conditions imposed on a proposed motocross race track and off-road vehicle park that noise from the park must comply with DEQ standards and not exceed 99 decibels are inadequate to support a finding of compliance with the noninterference standard, where the county does not determine whether compliance with DEQ standards will prevent identified impacts on surrounding farm and forest practices, and the only mechanism for achieving compliance is to limit the noise from individual vehicles to 99 decibels. Without addressing the cumulative noise impacts of multiple vehicles, the county is no position to conclude that identified impacts will not occur. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A parcel that lies wholly outside the 160-acre template required to site a nonforest dwelling under ORS 215.750 may not be counted as a qualifying parcel, even if that parcel is part of a tract, some part of which lies inside the template. *Smith v. Jackson County*, 37 Or LUBA 779 (2000).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Transactions that illegally alter access to a forest parcel do not affect whether that parcel was "lawfully created" for purposes of local and statutory provisions allowing the siting of nonforest dwellings on forest lands. Nothing in local or

statutory nonforest dwelling provisions requires that, once lawfully created, forest parcels must remain free of involvement in subsequent illegal transactions in order to retain their "lawfully created" status. *Tarjoto v. Lane County*, 36 Or LUBA 645 (1999).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A full-service 120-space recreational vehicle camp is not a "campground" within the meaning of OAR 660-006-0025(4). *Cotter v. Clackamas County*, 36 Or LUBA 172 (1999).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A county's finding that a proposed nonforest dwelling is inconsistent with forest uses is inadequate where the finding is so conclusory that it fails to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application can be approved. *Eddings v. Columbia County*, 36 Or LUBA 159 (1999).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where the county followed the wrong local procedure under its code in approving a proposed forest template dwelling and failed to provide required notice of the decision to an adjoining landowner, the county's action resulted in prejudice to the adjoining landowner's substantial rights. *Krieger v. Wallowa County*, 35 Or LUBA 305 (1998).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where a county's land use decision approving a forest template dwelling consists of a single-page form that contains blanks for the subject property's legal description, zoning, size and the names and addresses of the applicant and any representatives plus signature lines, the decision is not supported by adequate findings. *Krieger v. Wallowa County*, 35 Or LUBA 305 (1998).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A county's finding of compliance with a standard requiring that a nonforest dwelling not interfere with forest practices is inadequate, where the county merely finds that the proposed dwelling presents no greater risk of fire than posed by existing residential development, and fails to address evidence that the cumulative risk of fire from the proposed dwelling and existing development will require the owner of an adjacent forestry operation to change forestry practices and incur additional costs. *Thomas v. Wasco County*, 35 Or LUBA 173 (1998).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where a soil study is needed for approval of a forest template dwelling, OAR 660-006-0005(2) requires that determination of soil capability be based on NRCS data, unless the local government finds that data inaccurate or unavailable, in which case it may consider "equivalent data" generated by an approved method of determining the capability of soils to produce wood fiber. *Carlson v. Benton County*, 34 Or LUBA 140(1998).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. The absence of an NRCS productivity rating for a particular soil means only that NRCS data regarding that soil are "not available" within the meaning of OAR 660-006-0005(2). *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. ORS 215.750 does not, through its text, context or legislative history, limit the meaning of the term "wood fiber" to Douglas fir wood fiber, to the exclusion of other commercial tree species. *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where a soil study, intended to be an alternative method allowed by OAR 660-006-0005, fails to determine the capability of non-rated soils for producing wood fiber other than Douglas fir, the standard in OAR 660-006-0005 for determining the productivity of the soil by generating equivalent data, has not been met. *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where an NRCS soil survey does not rate certain soils, that nonrating cannot be used to determine the capacity of the soil for producing wood fiber and cannot be the basis of a conclusion that such soils produce 0-49 cf/ac/yr. The nonrating says nothing in quantitative terms or otherwise about the soil's capacity to produce wood fiber, and therefore is not "equivalent data" as required by OAR 660-006-0005 for an alternative method of soil assessment. *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A golf driving range is not a recreational use auxiliary to forest practices under OAR 660-06-025, where it is proposed as the primary use of the property and does not support or enable a forest practice. *McKy v. Josephine County*, 33 Or LUBA 687 (1997).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. An incidental conservation benefit such as irrigation does not bring a golf driving range within the conservation uses allowed on forest lands under OAR 660-06-025. *McKy v. Josephine County*, 33 Or LUBA 687 (1997).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A use proposed in a forest zone must be found within the list of specific uses identified in OAR 660-06-025 and 660-06-027, and cannot be permitted based only on the general description of uses in OAR 660-06-025(1). *McKy v. Josephine County*, 33 Or LUBA 687 (1997).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where a local government approved a conditional use permit for a nonforest dwelling in 1992, and petitioner's notice of intent to appeal simply identifies the local government's 1994 building permit approval as the appealed decision, petitioner's appeal has the legal effect of appealing only the 1994 building permit decision. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. Where conditions of a prior nonforest dwelling approval do not require a determination of compliance with any discretionary land use standard, the fact that a building permit may only be issued after it is determined that such conditions are satisfied provides no basis for LUBA's jurisdiction. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. OAR 660-06-025(4)(i) allows power generation facilities on forestlands without a Goal 4 exception, provided such facilities do not

remove more than 10 acres of land from resource use. OAR 660-33-130(23) includes similar provisions for power generation facilities on agricultural lands without a Goal 3 exception, but requires that the power generation facilities not remove more than *20* acres of land from resource use. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. ORS 215.780(1) unambiguously imposes an 80-acre minimum lot size on lands designated for forest use, unless the exceptions provided by ORS 215.780(2) or (3) apply. Neither of those exceptions allows the creation of parcels smaller than 80 acres for homestead dwellings. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

8.4 Goal 4 – Forest Lands/ Goal 4 Rule – Nonforest Uses. A local government interpretation of one of its forest zones in a manner that would permit asphalt batch plants to operate permanently, so long as there were periodic interruptions, does not conflict with the Goal 4 rule, which envisions both permanent and temporary asphalt batch plants. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

8.5.1 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Generally. ORS 92.190(3) embodies a requirement that, where local governments choose to provide an alternative procedure for property line adjustments other than using replat procedures, that alternative procedure must include local government approval of some kind. However, ORS 197.190(3) does not specify any particular procedures or form of approval, and does not necessarily require that final approval be obtained prior to recordation of the adjustment deeds. Given the absence of more specific statutory requirements a county does not err in verifying property as a legal lot, notwithstanding that the property lines were adopted in 2007 without prior county approval, where following recordation of the deeds, the county preliminarily verified the adjustments as lawful and issued a final approval in 2017 when the property owner applied for, and the county approved, a development permit. This process, although partially post-hoc, is consistent with ORS 92.190(3). *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

8.5.1 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Generally. Oregon Laws 2008, chapter 12, legislatively overruled the holding in *Phillips v. Polk County*, 53 Or LUBA 194, *aff'd*, 213 Or App 498, 162 P3d 338 (2007), which provided that it was unlawful to adjust property boundaries in a way that results in parcels that fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, authorizes property line adjustments of substandard size lots and parcels, even if the resulting lots or parcels continue to fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, section 6 made that legislation retroactive to "property line adjustments approved before, on or after the effective date of this 2008 Act." Therefore, Oregon Laws 2008, chapter 12 applies to a property line adjustment that took place in 2007, because the property line adjustment was "approved * * * before, on or after" the effective date of the 2008 Act. *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

8.5.1 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Generally. Where an approval standard for partitioning timber zoned property into nonresource parcels requires that the subject property be "generally unsuitable land for the production of farm or forest products," and petitioner does not challenge a county determination that the subject property is generally suitable for *farm use*, that determination provides an independent basis for affirming the county's decision to deny the partition. *Newsome v. Clackamas County*, 27 Or LUBA 578 (1994).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. Under ORS 215.780(2)(e)(A), in determining whether to approve the creation of a forest-zoned parcel that is less than the 80-acre minimum parcel size, the county may consider only the parcel that is the subject of the partition application, not a tax lot or other property that the subject parcel was adjacent to but not part of on November 4, 1993. *Landwatch Lane County v. Lane County*, 80 Or LUBA 19 (2019).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. ORS 92.190(3) embodies a requirement that, where local governments choose to provide an alternative procedure for property line adjustments other than using replat procedures, that alternative procedure must include local government approval of some kind. However, ORS 197.190(3) does not specify any particular procedures or form of approval, and does not necessarily require that final approval be obtained prior to recordation of the adjustment deeds. Given the absence of more specific statutory requirements a county does not err in verifying property as a legal lot, notwithstanding that the property lines were adopted in 2007 without prior county approval, where following recordation of the deeds, the county preliminarily verified the adjustments as lawful and issued a final approval in 2017 when the property owner applied for, and the county approved, a development permit. This process, although partially post-hoc, is consistent with ORS 92.190(3). *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. Oregon Laws 2008, chapter 12, legislatively overruled the holding in *Phillips v. Polk County*, 53 Or LUBA 194, *aff'd*, 213 Or App 498, 162 P3d 338 (2007), which provided that it was unlawful to adjust property boundaries in a way that results in parcels that fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, authorizes property line adjustments of substandard size lots and parcels, even if the resulting lots or parcels continue to fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, section 6 made that legislation retroactive to "property line adjustments approved before, on or after the effective date of this 2008 Act." Therefore, Oregon Laws 2008, chapter 12 applies to a property line adjustment that took place in 2007, because the property line adjustment was "approved * * * before, on or after" the effective date of the 2008 Act. *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. A petitioner fails to raise an issue with the specificity that is required by ORS 197.763(1) when the arguments in the cited record pages merely allege without developed explanation that the subject parcel was created by partition in 1980 as a sub-standard size parcel in the FF-20 zone, and therefore may not raise the issue that the post-partition zoning of the property to a zone that requires a 20-acre minimum parcel size means that the one-acre parcels approved by the county in 1980 were not lawfully created. *Landwatch Lane County v. Lane County*, 75 Or LUBA 151 (2017).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. Assignment in August 1979 of a zoning designation that required a minimum lot size of 20 acres to property that was previously partitioned in April 1979 into one-acre parcels does not mean that the parcel was not "lawfully created" in April 1979 when the county approved the partition application. *Landwatch Lane County v. Lane County*, 75 Or LUBA 151 (2017).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. ORS 215.750 and OAR 660-006-005(5) allow a county to approve a forest template dwelling if, after applying a 160-acre template centered on the subject property, at least 11 other "lots or parcels that existed on January 1, 1993, are" within the 160-acre area. A hearings officer's finding that the applicant met the 11-lot requirement by counting three parcels with boundaries that were later reconfigured pursuant to property line adjustment after January 1, 1993, as long as the parcels as they existed on January 1, 1993 were "partly or completely within the template boundaries," and counting a fourth parcel that was partitioned into two parcels after January 1, 1993 as one parcel is consistent with the statute and the rule, where the administrative rule history of OAR 660-006-0005(5) indicates the Land Conservation and Development Commission (LCDC) did not intend to prohibit an applicant from relying on the January 1, 1993 configuration of a later-reconfigured parcel so long as "the effect of" later properly line adjustments was not "to qualify a lot, parcel or tract for the siting of a dwelling." *Landwatch Lane County v. Lane County*, 75 Or LUBA 151 (2017).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. The minimum lot or parcel size requirements of ORS 215.780(1) for resource lands do not apply to decisions that rezone a portion of a resource parcel to nonresource use but do not partition or subdivide the parcel. *DLCD v. Coos County*, 39 Or LUBA 432 (2001).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. When determining whether land is "forest land" under the Goal 4 suitability standard, if the subject property is smaller than the county's base forest zone minimum parcel size, all of the subject property, not a portion of it, must be considered. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. Unless approval is given by LCDC under ORS 215.780(2) for a smaller minimum lot size or sizes, ORS 215.780(1) requires a county to apply minimum lot sizes of 80 acres (designated forestland and non-range farmland) or 160 acres (designated rangeland) in its farm and forest zones. *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. The 1993 legislature adopted specific minimum lot and parcel sizes. For forestland and farmland that is not designated rangeland, the minimum lot or parcel size is 80 acres. ORS 215.780(1)(a) and (c). For land zoned for exclusive farm use and designated as rangeland, the minimum lot or parcel size is 160 acres. ORS 215.780(1)(b). *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. The ORS 215.780(2) provisions that allow counties to adopt a minimum lot size smaller than would otherwise be required for farmland and forestland by ORS 215.780(1), require that a county obtain LCDC approval for such smaller lot sizes *before* adopting such smaller lot sizes. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

8.5.2 Goal 4 – Forest Lands/ Goal 4 Rule – Land Divisions – Minimum Lot Sizes. ORS 215.780(1) unambiguously imposes an 80-acre minimum lot size on lands designated for forest use, unless the exceptions provided by ORS 215.780(2) or (3) apply. Neither of those exceptions

allows the creation of parcels smaller than 80 acres for homestead dwellings. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

8.6 Goal 4 – Forest Lands/ Goal 4 Rule – Multiple Resource Lands. Where a county zoning district was acknowledged by LCDC as a forest zone, not a farm/forest zone, a regulation subsequently adopted by LCDC to apply immediately to uses in forest zones applies to uses within that zoning district. *Testa v. Clackamas County*, 29 Or LUBA 383 (1995).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. The county did not err in concluding that the "unique resource" at issue, a deepwater river port whose upland portions are located within the existing exception area, is still "located on agricultural or forest land" for purposes of OAR 660-004-0022(3)(a). Although "Agricultural Land" for purposes of Goal 3 and its implementing administrative rule does not include land areas subject to exceptions to Goal 3, it does not necessarily follow that agricultural land, as that term is used in OAR 660-004-0022 or other parts of the Goal 2 exception rule is subject to the same restriction. At least for the limited purpose of evaluating the need for and compliance with exception standards to allow new or changed uses contrary to the resource goals, land within an exception area potentially remains "agricultural land" subject to Goal 3, and where the original exception did not take an exception to Goal 4 the site potentially remains "forest land." *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d) require a finding that the proposed uses authorized by the proposed exception are "compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." To establish compliance with OAR 660-004-0020(2)(d), the county's finding that the likely adverse impacts of the proposed uses allowed under the proposed exception are similar to the impacts of the existing uses must be supported by substantial evidence. The absence of evidence that the impacts would be different is not a basis to conclude that the impacts would be similar. Where this unsupported presumption that the impacts would be similar is the foundation of the much of the county's subsequent analysis, the presumption is not supported by substantial evidence, and remand is necessary for the county to adopt more adequate findings regarding compatibility, supported by substantial evidence. *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. ORS 197.732(2)(c)(D) and OAR 660-004-0020(2)(d) require a finding that the proposed uses authorized by the proposed exception are "compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts." The potential adverse impacts of different types of liquid bulk terminals affiliated with a deepwater port, such as an oil terminal versus a fertilizer export operation, could be different enough to require a separate analysis. Adequate findings regarding compatibility would start by identifying the likely adverse impacts of typical uses authorized under approved use categories, evaluating each use category separately, and if necessary specific types of uses within each category. The findings should also address the characteristics of uses on adjoining areas, and assess vulnerability to potential externalities from industrial uses in the exception area. Informed by those analyses, the county can then reach sustainable conclusions regarding whether the proposed uses are compatible with adjoining uses, or can be rendered compatible via identified measures. *Columbia Riverkeeper v. Columbia County*, 78 Or LUBA 547 (2018).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. *VinCEP v. Yamhill County*, 215 Or App 414, 171 P3d 368 (2007), which involved a reasons exception to Goals 3, 4 and 14 to develop a hotel on land zoned exclusive farm use (EFU), and its holding which interprets the rules for reasons exceptions, is inapposite where no reasons exception is involved. Similarly, OAR 661-012-0070 and its requirements for exceptions for transportation improvements on rural land do not

apply where no exception to a resource goal is sought. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. ORS 215.448(1)(a) to (d) provide standards that apply to a proposed home occupation in "an exclusive farm use zone, forest zone or a mixed farm and forest zone that allows residential uses," and do not apply to an application for a proposed home occupation on property located in a rural residential zone. *Willis v. Clackamas County*, 76 Or LUBA 244 (2017).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A finding that taking an exception to Goal 4 is warranted to allow adaptive reuse of Goal 5 historic structures located on forest lands because allowed uses under Goal 4 will not raise sufficient revenue to offset the cost of maintaining those structures, if supported by substantial evidence, is a sufficient reason why the policy embodied in Goal 4 should not apply to the exception area. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A comprehensive plan provision prohibiting application of a Rural Residential plan designation to land that is currently designated farm or forest "unless an exception to the applicable Goal 3 or 4 is justified" could be interpreted such that the prohibition does not apply to nonresource land that is not subject to either goal. However, the stronger textual reading is that the qualifier "applicable" simply reflects that the subject property is currently designated under either Goal 3 or Goal 4, whichever is applicable, and an exception to the applicable goal is required in order to redesignate the property to Rural Residential. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Where a county's findings note that property contains a spring and a road and that adjacent lands contain dwellings, but do not otherwise explain why the spring and the road and the adjacent dwellings make resource use of the property impracticable, the county's findings are inadequate to demonstrate compliance with OAR 660-004-0028(2). *Gordon v. Polk County*, 55 Or LUBA 57 (2007).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A county errs in concluding that residential uses of properties in the vicinity of the property have committed the subject property to non-resource use, without explaining why those same residential uses will not result in committing other resource lands in the area to non-resource use. *Gordon v. Polk County*, 55 Or LUBA 57 (2007).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A prior exception to Goal 4 did not also serve as an exception to Goal 14 or authorize the proposed use of the property. *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Under OAR 660-004-0028(2)(c), findings must address "the relationship between the exception area and the lands adjacent to it." Findings that discuss lands located within a 2000-foot radius from the proposed exception area but do not discuss the lands adjacent to the exception area are inadequate. *Gordon v. Polk County*, 54 Or LUBA 351 (2007).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. The mere presence of adjoining residential uses is not a sufficient basis for concluding that resource lands are irreversibly committed to non-resource uses. *Gordon v. Polk County*, 54 Or LUBA 351 (2007).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Absent evidence of conflicts or similar impediments to resource use, the fact that access to forest land is via a county road that passes through an area of rural residential homes is not a sufficient basis to conclude that the property is irrevocably committed to uses not allowed by Goal 4. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Where a local government concludes that adjoining rural residential development commits resource land to uses not allowed by Goals 3 or 4, OAR 660-004-0018(2) requires the local government to explain why rural residential development of the subject property will not also result in committing other resource lands in the area. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A county's findings that chemicals are required in the future in order to make forest practices on a property practicable are not supported by substantial evidence where the record does not indicate whether chemicals were already applied to the property or that whatever applications might be necessary have not already occurred. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A county's finding that aerial spraying of chemicals is necessary in order to make forest practices on a 20-acre property practicable is not supported by substantial evidence where the evidence in the record supports a conclusion that manual application is the preferred method of application for properties 40 acres or smaller and the findings do not provide other reasons that manual spraying is not practicable. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Where the county's conclusion that forest uses are impracticable because of liability risks associated with possible contamination of drinking water through application of chemicals hinges upon its finding that aerial spraying is necessary, and that findings is unsupported by substantial evidence, the challenged decision fails to demonstrate that uses allowed by Goal 4 are impracticable. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Findings supporting a conclusion that a property is irrevocably committed to nonresource use that rely on the property's similarity to other properties already zoned for nonresource use and the presence of residences on adjacent lands are not sufficient to explain why the relationship between the property and adjacent lands make the property impracticable for resource uses. *Wetherell v. Douglas County*, 51 Or LUBA 730 (2006).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A landowner is not legally obligated to withdraw land from forest operations in order to protect adjoining rural residential lands from

the potential threat of windthrow, and the potential of such windthrow resulting from logging forest lands is not a basis to conclude that such lands are committed to non-resource uses. *Gordon v. Polk County,* 50 Or LUBA 647 (2005).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Riparian protection measures required under the Forest Practices Act are not "forest practices" for purposes of OAR 660-004-0028(3)(c), and a county may consider setbacks and other riparian protection measures in determining whether forest land is irrevocably committed to non-resource use. *Gordon v. Polk County*, 50 Or LUBA 647 (2005).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. That two-acres of a 41-acre parcel are subject to riparian setbacks and other limitations on logging does little to demonstrate that propagation and harvesting of forest products on the parcel is impracticable. *Gordon v. Polk County,* 50 Or LUBA 647 (2005).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Incidents of trespass and vandalism on forest lands are insufficient to demonstrate that such lands are irrevocably committed to non-resource use, where most of the cited incidents stem not from trespassers but from residential neighbors and their guests who enter the property as invitees. *Gordon v. Polk County*, 50 Or LUBA 647 (2005).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Some level of trespass and vandalism is an inevitable aspect of maintaining large tracts in forest use, particularly near rural residential areas. Unless such incidents rise to such a level that they actually hinder or preclude forest operations on a significant part of the property, such incidents do not demonstrate that forest use of the property is impracticable. *Gordon v. Polk County*, 50 Or LUBA 647 (2005).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. The focus of a committed exception under OAR 660-004-0028 is the relationship between the subject property and adjacent uses. Findings that describe and rely upon alleged impacts from rural residential uses up to one-half mile from the subject property, and that provide no description or analysis of adjacent uses, are insufficient to demonstrate that the subject property is committed to nonresource uses. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A county's reliance on reported incidents of vandalism and other crimes in a large rural residential area near a parcel are insufficient to demonstrate that the parcel is committed to nonresource uses, absent evidence that the cited criminal incidents interfere or are likely to interfere with farm or forest uses on the subject property. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Externalities from farm or forest operations such as dust, spray, smoke and noise are inherent aspects of rural life in agricultural or forest zones, and absent evidence that such externalities have or are likely to cause actual conflicts with resource operations, evidence of the possibility of such conflicts with rural residential uses is insufficient to demonstrate that resource uses are impracticable. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. The focus of analysis under OAR 660-004-0028 is on *existing* circumstances that contribute to the practicability of resource use in the exception area, not speculative future circumstances. *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Where a county concludes that conflicts with adjoining rural residential development commit a property to nonresource uses, the county's findings addressing OAR 660-004-0018(2)(b)(B) must explain why residential development of the subject property will not present the same risk of committing other adjacent resource lands to nonresource uses. Given the complex nature of that explanation, evidence of conflicts with rural residential uses do not "clearly support" a finding that residential zoning of the subject property will not commit adjacent resource lands, for purposes of ORS 197.835(11)(b). *Friends of Douglas County v. Douglas County*, 46 Or LUBA 757 (2004).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Absent recent or imminent changes in adjacent rural residential uses, where a neighboring subdivision has been developed for many years and the subject property has been in resource use during much of that time, the existence of those adjacent rural residential uses is insufficient to demonstrate that the subject property is irrevocably committed to nonresource use. *DLCD v. Lane County*, 39 Or LUBA 445 (2001).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. When the local government does not demonstrate that the uses allowed by the goals are impracticable, there is no need to resolve relevancy and evidentiary challenges to the findings. *DLCD v. Coos County*, 39 Or LUBA 432 (2001).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Findings supporting an irrevocably committed exception must address adjacent lands that may tend to make resource use of the proposed exception area practicable as well as adjacent lands that may tend to make resource use impracticable. *DLCD v. Coos County*, 39 Or LUBA 432 (2001).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. The mere existence of residential uses near a proposed exception area does not demonstrate that the proposed exception area is committed to nonresource use, especially when most of the nearby properties with residential uses also include resource uses. *DLCD v. Coos County*, 39 Or LUBA 432 (2001).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Before amending an urban growth boundary to add land with predominantly Class I soils to meet an identified need for commercial land, a county must determine whether alternatives to adding a site with predominantly Class I soils can reasonably accommodate the identified need. That alternatives analysis under OAR 660-004-0020(2)(b)(B) is a multi-factor analysis and rejecting alternative sites solely because they have soils that may increase development costs is error. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Land that is already included within a UGB is assumed to be available for urban development. That assumption is not rendered invalid

simply because sites that are planned and zoned for residential, industrial and commercial use have soil or other characteristics that make them less than ideal to develop. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Alternative sites to meet an identified need for commercially planned and zoned land may not be rejected solely because they have soils limitations that the USDA estimates may result in an average 39 percent development cost increase for some small commercial buildings. The estimated 39 percent cost increase is an average, so it may be lower in particular cases, and any added cost may be offset by other advantages the sites may possess. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Once a local government reaches a supportable conclusion that growing timber is impracticable on forest land, it does not need to address the practicability of other forest practices described in OAR 660-006-0025(2)(a). *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A conclusion that a property has a negative present net value if converted to forest uses, without explaining what relevance a forest operation's present value has on whether forest uses are impracticable, is inadequate to demonstrate that forest uses are in fact impracticable. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. In reviewing a county's decision that property is irrevocably committed to nonresource uses, LUBA is not required to give any deference to the county's explanation for why it believes the facts demonstrate compliance with the legal standards for a committed exception. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A reasons exception to Goals 3 and 4 must be based on the considerations set forth in Goal 2 and OAR 660-004-0020 and 660-004-0022. Under OAR 660-004-0022, the fact that farm and forest land is not prime timber or agricultural land is not a legally cognizable basis to adopt a reasons exception to Goals 3 and 4. *McLane v. Klamath County*, 37 Or LUBA 888 (2000).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A local government decision approving an irrevocably committed exception under OAR 660-04-028 to Goals 3 and 4 will be remanded where it does not include findings supported by substantial evidence establishing that uses allowed by Goals 3 and 4 are impracticable. *DLCD v. Columbia County*, 32 Or LUBA 221 (1996).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A local government decision approving a physically developed exception under OAR 660-04-025 to Goals 3 and 4 will be remanded where the findings do not establish that the property is physically developed with non-resource uses. *DLCD v. Columbia County*, 32 Or LUBA 221 (1996).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Findings adopted by the county approving a committed exception to Goals 3 and 4 are inadequate where they contain no discussion

or explanation of how the existing uses on adjacent parcels make resource use on the subject property impracticable. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. County findings that describe the physical characteristics and existing uses of adjacent lands in approving a committed exception to Goals 3 and 4 are adequate for purposes of OAR 660-04-028(2)(b) and (6)(a). Those rules do not require the county to make findings regarding the ownership of the adjacent parcels or the proximity of developed uses on adjacent lands. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. An exception to Goal 4 is not justified under OAR 660-04-022(1)(a) where the county fails to establish that a "need" for the proposed use exists by demonstrating that absent the proposed exception, the county would be unable to satisfy its obligations under one or more of Goals 3-19. *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. At a minimum, ORS 197.732(5) requires that the county's notice of a proposed goal exception must include a brief summary of the issues involved in the proposed exception, in addition to the list of applicable criteria required by ORS 197.763(3)(b). *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. The failure of adjacent property owners to manage their lands actively and successfully, the frustrated intentions of a developer in creating a large-capacity water system to serve the subject forest property, the earlier approval of a three-phase subdivision, the property's potential for non-resource use and similar considerations do not support a determination that the property is irrevocably committed to non-resource use. *1000 Friends of Oregon v. Columbia County*, 31 Or LUBA 47 (1996).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Capital expenditures for streets, water lines, electric power, design, engineering and surveying on an adjacent property are not relevant to finding a committed exception unless they detract from management of the subject property for forest uses. *1000 Friends of Oregon v. Columbia County*, 31 Or LUBA 47 (1996).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. When property is located in a combined agricultural and forest zone, findings in support of an irrevocably committed exception must establish that all uses allowed by Goals 3 and 4 are impracticable. A finding that the property has never been in agricultural use is insufficient. *DLCD v. Curry County*, 30 Or LUBA 294 (1996).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. A finding that commercial forestry is impracticable on certain property does not justify an irrevocably committed exception to Goal 4. The county must show the property is impracticable for all Goal 4 uses. *DLCD v. Curry County*, 30 Or LUBA 294 (1996).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. In order to justify an irrevocably committed exception, the county must determine, based on an evaluation of the facts, that surrounding residential uses make resource use of the subject property impracticable. *DLCD v. Coos County*, 30 Or LUBA 229 (1995).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. To justify an irrevocably committed exception on forestland, the county must explain in findings why the facts upon which it relies lead to a conclusion that uses allowed by Goal 4 are impracticable. *DLCD v. Coos County*, 30 Or LUBA 229 (1995).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Both Goal 4 and Goal 2 require the county to evaluate the practicability of all forest uses on the subject property before determining that such uses are impracticable and taking a committed exception. *DLCD v. Coos County*, 30 Or LUBA 229 (1995).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. The standards for approving a physically developed exception to Statewide Planning Goals 3 and 4 are demanding. The county must find that the property has been physically developed to such an extent that all Goal 3 or 4 resource uses are precluded. Uses established in accordance with the goals cannot be used to justify such an exception. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. To approve an irrevocably committed exception to Goals 3 and 4, the county must find that all uses allowed by the goals are impracticable, primarily as a result of uses established on adjacent parcels. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Even if petitioners' evidence supports a conclusion that a resource parcel is not adequate for commercial timber production, that conclusion does not justify an exception to Goals 3 and 4 since it does not establish that all uses allowed by the applicable goals are impracticable. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. The county's denial of a developed exception will be upheld when the county finds that the physical characteristics of the property do not render it irrevocably committed to nonresource uses; there is continuing resource use of properties to the north, east and west; and the existence of public facilities and services installed to serve the residence on the site do not irrevocably commit the remainder of the site to nonresource uses. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Findings that address only the practicability of commercial forestry uses, rather than all commercial and non-commercial uses allowed by Goals 3 and 4 on agricultural and forestlands, do not justify an irrevocably committed exception to either Goal 3 or Goal 4. *DLCD v. Coos County*, 29 Or LUBA 415 (1995).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Findings must address the practicability of commercial forestry uses on adjacent lands as well as in a proposed exception area to satisfy the requirements for an irrevocably committed exception to either Goal 3 or Goal 4. *DLCD v. Coos County*, 29 Or LUBA 415 (1995).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Findings to justify a committed exception to Goals 3 and 4 must address the factors of OAR 660-04-028(6) and must be supported by substantial evidence explaining how conflicts between existing uses and resource uses operate in a particular instance to render the subject property irrevocably committed. *DLCD v. Coos County*, 29 Or LUBA 415 (1995).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Where a local government properly determines certain land is not farm or forestland subject to Statewide Planning Goals 3 and 4, an exception to Goals 3 and 4 is *not* required to support comprehensive plan and zone map amendments designating such property for residential use. *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. The bias under Goals 3 and 4 in favor of commercial agricultural and forest enterprises does not mean a local government may assume that noncommercial farm and forest uses are not "uses allowed by the applicable goal" for which a proposed exception area's suitability must be considered in granting an exception. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. The impracticability standard for committed exceptions is a demanding standard, and findings must do more than recite facts addressing the relevant factors, they must also explain why those facts lead to a conclusion that uses allowed by Goals 3 and 4 are impracticable. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. In adopting exceptions to Goals 3 and 4 as post-acknowledgment plan amendments, a local government must also address Goal 5 if the exceptions concern or affect lands included on the local government's acknowledged inventory of Goal 5 resources. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

8.7 Goal 4 – Forest Lands/ Goal 4 Rule – Exceptions to. Findings that (1) an undisclosed portion of a 143-acre property is occupied by gravel roads, (2) an unspecified number of residences on adjacent properties create the possibility of trespass and complaints regarding forest operations, and (3) two powerline easements separate the property from other forestlands, are insufficient to explain why it is impracticable to use the subject property for uses allowed by Goal 4, as required by ORS 197.732(1)(b) for an irrevocably committed goal exception. *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474 (1994).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Where a county determines that a property qualifies for a forest template dwelling under ORS 215.750 because at least three dwellings existed on surrounding lots or parcels on January 1, 1993, based on a statement of the applicant, a recollection of the prior owner of one of the surrounding dwellings, an email from a contractor who worked on one of the surrounding dwellings, and a statement by the tax assessor that its records showed a dwelling in place on January 1, 1993, but where LUBA concludes that the county erred in accepting the email, where LUBA cannot determine whether the county would have reached the same conclusion without the email, and where the county's findings failed to address evidence that the tax rolls indicate existence of the dwelling as of July 1993 rather than January 1993, LUBA will remand for the county to adopt adequate findings. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Absent a legal definition for how the center point of a property must be established for purposes of determining whether it qualifies for a forest template dwelling under ORS 215.750, a county errs by not explaining the basis for its conclusion that its chosen method is the most appropriate and by not addressing opponents' arguments challenging that method. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the

record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

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8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Absent a legal definition for how the center point of a property must be established for purposes of determining whether it qualifies for a forest template dwelling under ORS 215.750, a county errs by not explaining the basis for its conclusion that its chosen method is the most appropriate and by not addressing opponents' arguments challenging that method. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Petitioner's argument that a proposed detached accessory structure for an "art studio" is not a permissible "accessory" structure allowed in the Impacted Forest Lands (F-2) zone provides no basis for reversal or remand where petitioner cites to no local code, state statute or administrative rule governing forest lands, suggesting limitations on accessory structures to a primary dwelling that is otherwise allowed on forest lands under state law. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A petitioner's argument that locating an art studio several hundred feet from an existing dwelling on forest land instead of adjacent to the dwelling and within the dwelling's existing fire breaks does not provide a basis for reversal or remand, where the petitioner does not identify any rule or other requirement that an accessory structure be clustered with the existing dwelling. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. LUBA will reject petitioner's argument that a proposed "art studio" is in reality an "accessory dwelling" in the forest zone in violation of state and local law where the county hearings officer imposed several conditions intended to ensure that the proposed "art studio" would not be used as an "accessory dwelling," and petitioner's speculation that the applicant might violate one or more conditions of approval provides no basis for reversal or remand. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A hearings officer's finding that land in the forest zone upon which development is proposed is "flat" is not supported by substantial evidence where the finding is supported only by the applicant's assertion that the relevant slope is

"less than 3" percent, but the record includes two topographic maps that appear to show that the slope exceeds 10 percent, which if so triggers additional fire safety requirements. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A county hearings officer errs in denying a forest template dwelling application on the sole basis that petitioner had not provided a fire safety inspection, where the applicable ordinance provision entitled "Wildfire Safety Requirements" requires "[o]ther measures as recommended by the fire agency commenting on the application or the County Fire Safety Inspector," and no fire agency recommended any measures or a fire inspection in any submitted comments. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Even though an applicant provides evidence of ownership of 200 or more acres in western Oregon after the application is deemed complete, a hearings officer correctly concludes that an application for a forest template dwelling satisfies ORS 215.740(3), where nothing in the statute or local development ordinances requires an applicant for a large tract forest dwelling to prove ownership of the parcel at the time an application is submitted. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A hearings officer correctly interprets ORS 215.740(3) in concluding that the minimum acreage requirement that applies to an application for a forest template dwelling is the minimum acreage for the applicant's tracts located in western Oregon where the forest template dwelling is proposed to be located, rather than the non-contiguous parcel located in an adjacent county designated as eastern Oregon. ORS 215.740 allows an owner seeking a dwelling on a tract that is located in western Oregon to rely on non-contiguous land in another adjacent county to meet the minimum acreage requirements; it does not require that the minimum acreage requirements for the non-contiguous county be the applicable standard. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A county decision to approve a dwelling on forest land under local land use regulations that implement ORS 215.705, 215.740 or 215.750 is a "permit" decision as defined at ORS 215.402(4), because the local code and statutes impose discretionary approval standards on such development. To remove any doubt, ORS 215.402(4) defines "permit" to include approvals of development under ORS 215.700 to 215.780, a range which includes ORS 215.705, 215.740 and 215.750. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A hearings officer's conclusion that the subject property was "lawfully created" is supported by substantial evidence in the record that includes (1) a set of receipts for 1980 recording fees for the final partition plat for submittal of a survey, (2) a set of 1980 recorded deeds, and (3) the recorded final partition plat, despite the fact that the final partition plat was not recorded until 1996, where a reasonable person could rely on that evidence to conclude the subject property was created in conformance with all applicable ordinances. *Landwatch Lane County v. Lane County*, 75 Or LUBA 151 (2017).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. ORS 215.750 and OAR 660-006-005(5) allow a county to approve a forest template dwelling if, after applying a 160-acre template centered on the subject property, at least 11 other "lots or parcels that existed on January 1, 1993, are" within the 160-acre area. A hearings officer's finding that the applicant met the 11-lot requirement by counting three parcels with boundaries that were later reconfigured pursuant to property line adjustment after January 1, 1993, as long as the parcels as they existed on January 1, 1993 were "partly or completely within the template boundaries," and counting a fourth parcel that was partitioned into two parcels after January 1, 1993 as one parcel is consistent with the statute and the rule, where the administrative rule history of OAR 660-006-0005(5) indicates the Land Conservation and Development Commission (LCDC) did not intend to prohibit an applicant from relying on the January 1, 1993 configuration of a later-reconfigured parcel so long as "the effect of" later properly line adjustments was not "to qualify a lot, parcel or tract for the siting of a dwelling." *Landwatch Lane County v. Lane County*, 75 Or LUBA 151 (2017).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. ORS 215.750 and OAR 660-006-0027(3) authorize local governments to approve forest template dwellings if at least three dwellings existed within a specified 160-acre area and those dwellings continue to exist at the time forest template dwelling approval is requested. But neither the statute nor the rule defines the key term "dwelling" and neither the statute nor the rule explicitly addresses whether a long abandoned, derelict structure may qualify as a "dwelling," for purposes of qualifying for a forest template dwelling. *West v. Multnomah County*, 70 Or LUBA 235 (2014).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. ORS 215.750 and OAR 660-006-0027(3) authorize local governments to approve forest template dwellings if at least three dwellings existed within a specified 160-acre area and those dwellings continue to exist at the time forest template dwelling approval is requested. A hearings officer's interpretation of the word "dwelling" in local laws adopted to implement ORS 215.750 and OAR 660-006-0027(3) such that a former dwelling that has been vacant for many years and is in a state of disrepair that would preclude use as a residence does not qualify as a "dwelling" for purposes of satisfying ORS 215.750 and OAR 660-006-0027(3) is more consistent with the underlying purpose of the statute and rule. That underlying purpose is to allow forest template dwellings in circumstances where there is existing limited residential development on forest lands, and the hearings officer's interpretation is more consistent with that underlying purpose than interpreting the word "dwelling" to include long abandoned structures, no matter how derelict and uninhabitable as a dwelling in its current condition. *West v. Multnomah County*, 70 Or LUBA 235 (2014).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. ORS 215.750 and OAR 660-006-0027(3) authorize local governments to approve forest template dwellings if at least three dwellings existed within a specified 160-acre area and those dwellings continue to exist at the time forest template dwelling approval is requested. Where the record supports a hearings officer's finding that a dwelling that was constructed in 1906 has been unoccupied for many years prior to an application for approval of a forest template dwelling, the hearings officer correctly found that the 1906 dwelling was a nonconforming use in the county's forest zone that was first applied long after the 1906 dwelling was constructed. And the hearings officer correctly found that under local laws adopted to implement ORS 215.750 and OAR 660-006-0027(3), the forest template dwelling applicant must establish that the right to continue residential use of the 1906 dwelling was not lost

through interruption or abandonment for two years or more before the 1906 dwelling could be counted as a dwelling that "continues to exist" at the time the application for approval of a forest template dwelling was filed. *West v. Multnomah County*, 70 Or LUBA 235 (2014).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. As defined in ORS 215.010(1), the word "parcel" includes units of land that have been "lawfully established." When the word "parcel" is used elsewhere in ORS Chapter 215, it means that in order for a unit of land to qualify as a "parcel" it must have been created in compliance with applicable partitioning laws or created prior to the enactment of those laws. *Friends of Yamhill County v. Yamhill County*, 58 Or LUBA 315 (2009).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A county's conclusion that the word "parcel" used in ORS 215.750(1)(c) should not have the meaning given it in ORS 215.010(1) is without support where ORS 215.010 specifies that the word "parcel" * * * "as used in" Chapter 215 has that meaning. *Friends of Yamhill County v. Yamhill County*, 58 Or LUBA 315 (2009).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. ORS 215.750 does not prohibit a local government from applying a local code provision requiring an applicant for a forest template dwelling to demonstrate that the dwelling is "necessary for and accessory to" the forest use. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Applying the contextual analysis that is required by *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), *adh'd to as modified on recons*, 179 Or App 409, 40 P3d 532 (2002), even though ORS 215.750(1) does not expressly state that the references in that statute to "lots" are limited to lawfully created lots, and even though the relevant definitions in ORS 92.010 do not expressly require that a lot must be a lawfully created lot, if those statutes are read in context with ORS 92.012, 92.018(1), 92.025(1) and ORS 215.010(1)(a), it is sufficiently clear that when the legislature used the term "lot" in ORS 215.750(1) it did not mean to include unlawfully created lots. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. County authority to approve forest template dwellings derives from ORS 215.750(1). In exercising the authority granted by ORS 215.750(1), a county may not apply a county definition of "lot" to recognize lots that could not be recognized under ORS 215.750(1). The county may not set a lower standard for approving forest template dwellings under county legislation than the standard that is set by ORS 215.750. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Findings concluding that a proposed dwelling will not significantly increase fire hazards in a forest zone are not necessarily adequate to also show that the dwelling will not significantly increase fire suppression costs or risks to fire suppression personnel. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A hearings officer errs in concluding, based on expert testimony that isolated dwellings force firefighters to choose either to abandon such homes or to devote insufficient resources to defend them, that the proposed isolated

dwelling will not significantly increase fire suppression costs or risks to fire suppression personnel because firefighters would simply abandon the dwelling. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Remand is necessary where the applicant's forest consultant recommends vegetation removal as necessary to ensure compliance with approval criteria for a large tract forest dwelling, but the hearings officer does not adopt a condition of approval to that effect or explain why such measures are not necessary to ensure compliance with approval criteria. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Under a code standard requiring that a forest dwelling be located at a site that minimizes the risks associated with wildfire, remand is necessary where the opponents' expert testified that the preferred site is isolated and will incur significantly more risk and cost to firefighters over alternative sites, there is no rebuttal of that testimony, and the findings do not state a sufficient basis to reject that testimony. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Where the purpose of code standards for siting a large tract forest dwelling is to identify a site that minimizes the loss of forest lands to non-forest uses, it is appropriate to favor sites that are already developed for non-forest uses over undeveloped sites, because developed sites do not require additional loss of forest lands to forest uses. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Under a code standard requiring that a proposed forest dwelling not significantly change or increase the cost of farm or forest practices on nearby resource lands, the hearings officer's failure to separately analyze more distant properties in the study area or identify its outer boundaries is not reversible error, where the hearings officer found no significant impacts on parcels adjacent to the subject property and, given the homogeneity of the surrounding area, significant impacts on non-adjoining parcels are unlikely. *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. The OAR 660-006-0029(1) requirement to identify a dwelling location that "least impacts" resource operations and "minimizes" wildfire risks and adverse impacts on resource use entails some discussion of alternative locations for the dwelling on the parcel and a demonstration that the preferred location is, on balance, equal or superior to other potential locations on the parcel. *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004).

8. 8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Even if a code provision is properly interpreted to require that a proposed forest dwelling be located within 300 feet of the road that provides access to the subject property, a decision that locates the dwelling within 300 feet of a road that does not currently provide access to the property is consistent with that provision, where the decision conditions approval on constructing a secondary access route from the dwelling site to that road. *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. When viewed alone, the word "within" in a code provision that requires that dwellings must be within a template area to be counted is ambiguous, because it could mean the dwelling must be at least partially within or it could mean the dwelling must be entirely within. However, where a related provision specifies that "all or part of" a parcel must be within the template, the failure to include the "all or part of" modifier provides contextual support for interpreting the provision without the modifier as requiring that the entire dwelling must be within the template area. *Worman v. Multnomah County*, 47 Or LUBA 410 (2004).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Forest restocking requirements imposed by OAR 660-006-0029 do not constitute approval criteria that determine whether a dwelling may be approved on property zoned for forest use. *Hodge Oregon Properties, LLC v. Lincoln County*, 46 Or LUBA 290 (2004).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Under OAR 660-033-0140(5) a forest template dwelling permit is valid for four years and can be extended for two additional years. Although OAR 660-033-0140(3) provides that such an extension of a permit for a forest template dwelling "is not subject to appeal as a land use decision," a county decision that grants a one-year extension of a forest template dwelling two years after it was issued, pursuant to general local legislation that allows permits to be extended, is a land use decision and is reviewable by LUBA. *Butori v. Clatsop County*, 45 Or LUBA 677 (2003).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. More detailed soils maps may be used to demonstrate that less detailed mapping by NRCS is "inaccurate," within the meaning of OAR 660-006-0005(2). *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. OAR 660-006-0005(2) controls how a decision maker must apply the legal standards for approval of dwellings on forest land that are contained in ORS 215.750. *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Under OAR 660-006-0005(2), NRCS data must be used to demonstrate compliance with ORS 215.750 unless NRCS data are shown to be inaccurate or unavailable. *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. The requirement of OAR 660-006-0005(2) that data from an alternative methodology must be equivalent to NRCS data means that the data must be expressed as "cubic feet per acre per year," or an equivalent measure. OAR 660-006-0005(2) does not require that the alternative methodology must be equivalent to the methodology that is employed by NRCS. *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Where reports submitted as an alternative method for establishing the capability of soils to grow trees under OAR 660-006-0005(2) take the position that the soils on the subject property will produce between 0 and 49 cubic feet per acre per year of wood fiber, that data is sufficiently quantified to constitute data that is equivalent to NRCS data, where the ultimate legal standard is whether the predominant soils are

capable of producing less than 49 cubic feet per acre per year of wood fiber. *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A county may reasonably rely on a report based on consideration of a broad sample of native tree species to determine whether the predominant soils on the property are capable of producing more than 49 cubic feet per acre per year of wood fiber of any kind where there is not reasonable basis presented for believing that planting one or more nonnative tree species on the predominate soils would produce more than 49 cubic feet per acre per year of wood fiber. *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. The requirement for Oregon Department of Forestry (ODF) approval of an alternative method of determining soils productivity is not met by ODF approval of a report prepared in a prior proceeding where the scope of that ODF approval is uncertain. The fact that "site visits" and "library research" formed the basis for the prior report and a later report does not allow the county to assume the alternative method in the later report is approved by ODF. *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Where a county finds in its initial decision that the soils on a property are less productive than the same types of soils on adjoining properties due to slope and soil wetness, and no party challenges that finding, the county need not consider that issue in making a decision on remand from LUBA of its initial decision. *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A county's improper reliance on poor past management practices in concluding a property is not suitable for commercial forest use provides no basis for reversal or remand, where there is other evidence in the record that a reasonable person could rely on to reach that conclusion. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. The permissive terms of ORS 215.750 do not prohibit a local government from adding forest template dwelling criteria that are more restrictive than statutory standards. *Yontz v. Multnomah County*, 34 Or LUBA 367 (1998).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A local government is not obligated by ORS 215.750(1) to allow the establishment of nonforest dwellings. If a local government chooses to allow nonforest dwellings, it is not obligated to allow nonforest dwellings under the alternative template test specified at ORS 215.750(5). *Yontz v. Multnomah County*, 34 Or LUBA 367 (1998).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Where a soil study is needed for approval of a forest template dwelling, OAR 660-006-0005(2) requires that determination of soil capability be based on NRCS data, unless the local government finds that data inaccurate or unavailable, in which case it may consider "equivalent data" generated by an approved method of determining the capability of soils to produce wood fiber. *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. The absence of an NRCS productivity rating for a particular soil means only that NRCS data regarding that soil are "not available" within the meaning of OAR 660-006-0005(2). *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. ORS 215.750 does not, through its text, context or legislative history, limit the meaning of the term "wood fiber" to Douglas fir wood fiber, to the exclusion of other commercial tree species. *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Where a soil study, intended to be an alternative method allowed by OAR 660-006-0005, fails to determine the capability of non-rated soils for producing wood fiber other than Douglas fir, the standard in OAR 660-006-0005 for determining the productivity of the soil by generating equivalent data, has not been met. *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Where an NRCS soil survey does not rate certain soils, that nonrating cannot be used to determine the capacity of the soil for producing wood fiber and cannot be the basis of a conclusion that such soils produce 0-49 cf/ac/yr. The nonrating says nothing in quantitative terms or otherwise about the soil's capacity to produce wood fiber, and therefore is not "equivalent data" as required by OAR 660-006-0005 for an alternative method of soil assessment. *Carlson v. Benton County*, 34 Or LUBA 140 (1998).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. The statutory definition of "public road" at ORS 368.001(5) is not applicable to approval of a forest template dwelling required by ORS 215.750(5) to be located on a tract that abuts a "road." Interpretation of a local code requirement that such dwellings be located on a "public road" is controlled by local legislative intent rather than by statute. *Petersen v. Yamhill County*, 33 Or LUBA 584 (1997).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Under ORS 215.750(4) and OAR 660-06-027(5)(a), contiguous parcels that would otherwise qualify for forest template dwellings on each parcel may qualify for only one dwelling if the parcels are part of a tract. *Parsons v. Clackamas County*, 32 Or LUBA 147 (1996).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. The mere conveyance of three contiguous parcels in a tract does not reconfigure the parcel boundaries for purposes of OAR 660-06-005(4). *Parsons v. Clackamas County*, 32 Or LUBA 147 (1996).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Unlike the lot-of-record statutes, the forest template dwelling provisions of ORS 215.750 specify no date by which parcels qualifying for template dwellings must have been created; thus, the lot-of-record rules set forth in OAR 660-06-005(4) regarding the parcels' date of creation do not apply to forest template dwellings. *Parsons v. Clackamas County*, 32 Or LUBA 147 (1996).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Where a local code requires that a second farm dwelling be shown to be "necessary," absent a definition to the contrary or contrary

legislative history, the term "necessary" has the same meaning in the Goal 3 context that it has in the Goal 4 context. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Following 1993 legislative amendments, small scale farm or forest dwellings are not allowable under Goals 3 and 4, and ORS 215.304(1) prohibits LCDC from adopting or implementing any rule which would permit counties to allow such small scale farm or forest dwellings. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. Where an applicable comprehensive plan policy requires that residential uses adjacent to forestlands have adequate setbacks and fire prevention measures, a local government decision approving a forest dwelling must be supported by findings establishing what setbacks and fire prevention measures are required and why they are adequate. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A reasonable person could not conclude that a proposed forest dwelling satisfies a "necessary for forest use" standard because the subject property is "quite remote," where the evidence in the record shows only that the subject property is five miles from an urban growth boundary and a 35 minute drive from a city. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

8.8 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Dwellings. A finding that a proposed forest dwelling will occupy only a small portion of the subject property is relevant to a determination of compliance with an "accessory to forest use" standard, but is not sufficient, in itself, to support a determination of compliance with the standard. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

8.9 Goal 4 – Forest Lands/ Goal 4 Rule – Lots of Record. When a previous approval for a partition required that the parcels not be used for residential purposes unless legal access was provided to the parcels, a current application for a lot of record dwelling cannot be approved unless the proposed dwelling satisfies the access standards that applied at the time of the partition or satisfies current standards. The fact that the applicant has an easement for residential use does not mean that the easement satisfies the local government standards for legal access. *Estremado v. Jackson County*, 61 Or LUBA 148 (2010).

8.9 Goal 4 – Forest Lands/ Goal 4 Rule – Lots of Record. Unlike the lot-of-record statutes, the forest template dwelling provisions of ORS 215.750 specify no date by which parcels qualifying for template dwellings must have been created; thus, the lot-of-record rules set forth in OAR 660-06-005(4) regarding the parcels' date of creation do not apply to forest template dwellings. *Parsons v. Clackamas County*, 32 Or LUBA 147 (1996).

8.9 Goal 4 – Forest Lands/ Goal 4 Rule – Lots of Record. A code provision allowing establishment of a dwelling on certain "lots of record," if the "lot or parcel" does not already have a dwelling, is impermissibly less strict than ORS 215.705(1)(b), which requires that the "tract" not have a dwelling. ORS 215.010(2) defines "tract" as "one or more contiguous lots or parcels under the same ownership." *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

8.10 Goal 4 – Forest Lands/ Goal 4 Rules – Forest Practice Act. Where the county makes a finding that an electrical transmission project "will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands," and "forest practices" are defined pursuant to the Oregon Forest Practices Act, petitioners' argument that the proposed transmission line will remove 36 acres from forest production is not sufficient to explain why the development will result in "a significant change in * * * forest practices * * * on * * * forest lands." OAR 660-006-0025(5). OAR 660-006-0025(5) contemplates the approval of limited non-forest uses on forest land, including the removal of some forest land from production to accommodate a use that is allowed as a conditional use on forest land, including clearing a 100-foot right-of-way with 25 feet of clearance from the ground to the lines, for the purpose of constructing electric transmission lines on forest lands. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

8.10 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Practices Act. A comprehensive plan policy statement that a local government "will rely" on the Forest Practices Act (FPA) to protect surface waters and fish and wildlife does not have the effect of making the FPA requirements into approval criteria for a forest template dwelling. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

8.10 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Practices Act. OAR 629-640-0100(2), an administrative rule implementing the Forest Practices Act (FPA), only applies to an "operation," which is a "commercial activity relating to the growing or harvesting of forest tree species." Because the clearing of a firebreak as a condition of approval for a forest template dwelling is not such an activity, the administrative rule requirements do not apply. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

8.10 Goal 4 – Forest Lands/ Goal 4 Rule – Forest Practices Act. The general prohibition in the Forest Practices Act against counties applying their land use regulations to forest practices on forestlands located outside an urban growth boundary does not apply to a land use regulation prohibiting or regulating the siting or alteration of dwellings. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. In conducting an ESEE analysis under OAR 660-023-0040(4), a local government does not err by analyzing multiple groups of similar resources and similarly zoned properties within a single resource site. *Restore Oregon v. City of Portland*, 80 Or LUBA 158 (2019).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. In conducting an ESEE analysis under OAR 660-023-0040(4), a local government does not err by estimating the economic impact to properties that would be affected by protecting the resource site based on assumptions that lead to a conclusion of greater economic impact to those properties than if the ESEE analysis used different assumptions that were applied in estimating the economic impact to other properties, nor does the local government err in failing to consider the cost of environmental remediation that will be incurred to develop specific properties. *Restore Oregon v. City of Portland*, 80 Or LUBA 158 (2019).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. While local governments have substantial discretion in determining the scope of the impacts that they may consider in conducting an ESEE analysis under OAR 660-023-0040(4), they may not fail to evaluate both the impacts of the resource site on conflicting uses and the impacts of the conflicting uses on the resource site. *ODOT v. Grant County*, 80 Or LUBA 192 (2019).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. In conducting an ESEE analysis under OAR 660-023-0040(4), a local government does not err by characterizing a proposed limitation on a conflicting use as a negative impact of the resource site on the conflicting use, even where the proposed limitation is already required under the local code, where the local code could be amended in the future to remove that requirement. *ODOT v. Grant County*, 80 Or LUBA 192 (2019).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Petitioners fail to establish that the city erred in concluding that rezoning a property to neighborhood commercial is consistent with Statewide Planning Goal 5 when the rezoning the subject property constitutes a PAPA for purposes of applying Goal 5, which provides that local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource by allowing new uses that "could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list." The city's PAPA is a very limited one, that in relevant part simply applies the zones implementing the city's comprehensive plan designations that the acknowledged comprehensive plan has already designated for the corresponding uses. Because the challenged PAPA simply implements that acknowledged plan designation choice with the exercise of little or no discretion, the PAPA does not authorize any "new uses" for purposes of OAR 660-023-0250(3) and Goal 5. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. LUBA will stay a city decision approving the demolition of historic contributing structures when, without a stay, demolition of the three buildings could begin immediately. A designated historic district is the sum of its parts, including specific historic contributing structures. A designated historic contributing structure is irreplaceable and its destruction is irreversible and causes an injury that cannot be compensated adequately in money damages. *Niederer v. City of Albany*, 79 Or LUBA 1016 (2019).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where a city decision approves demolition of three "historic contributing structures" and a petitioner moves to stay the decision pending a LUBA proceeding, although arguments that the structures are "degenerated into derelicts" and have been categorized as "dangerous buildings" by the police department may go to the merits of the city's decision, they do not bear on LUBA's consideration of whether petitioner will suffer "irreparable injury" under to ORS 197.845(1) and OAR 661-010-0068 and, therefore, whether a stay should be granted. *Niederer v. City of Albany*, 79 Or LUBA 1016 (2019).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. How to (1) plan and zone an inventoried significant mineral and aggregate resource site, and (2) plan and zone any adjoining areas that may be needed for processing or buffers or to otherwise mitigate identified conflicts are separate questions from what property is properly included on a comprehensive plan Statewide Planning Goal 5 inventory of significant aggregate sites. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. OAR 660-004-0010(2) does not provide authority for the proposition that an exception to Statewide Planning Goal 4 is unnecessary to plan and zone an inventoried Statewide Planning Goal 5 aggregate site on forest land for mining rather than for forest uses. Rather, OAR 660-004-0010(2) simply makes it clear that a decision under Statewide Planning Goal 5 not to protect Goal 5 resource need not be supported by an exception to Goal 5. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Because of the way Statewide Planning Goal 5 is written, a decision to protect a significant aggregate resource site on forest land for mining, and to apply planning and zoning map designations to allow mining in a way that is not fully consistent with Statewide Planning Goal 4, does not require an exception to Statewide Planning Goal 4. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A city commission's interpretation of its code to permit the city to exercise its property rights under ORS 197.772(1) to refuse to consent to historic landmark designation separately from the city's grant of authority to the historic review board to consider and approve applications for historic landmark designations is plausible, and therefore must be affirmed under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010). Therefore, the historic review board must terminate consideration of a neighborhood association's application to designate city-owned property as a historic landmark when the city manager refuses to consent to the proposed historic landmark designation. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A city commission's interpretation of a city manager's general authority to exercise "supervision over all city property" to be broad enough to include authority for the city manager to refuse to consent to a proposed historic landmark designation for city-owned property is not reversible under ORS

197.835(9)(a)(D) ("[i]mproperly construed the applicable law"). *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The ORS 197.772(2) right to refuse to consent to historic designation of property, which is given to "property owners," is not limited to owners of private property. A city may refuse to consent to historic designation of city-owned property, where a neighborhood organization files an application to designate that city-owned property as an historic landmark. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where an applicant for a historic landmark designation advances three arguments why a property owner may not refuse to consent under ORS 197.722(1) and thereby terminate consideration of the application, the historic review board errs by terminating consideration of the application without adopting findings that respond to those arguments. *McLoughlin Neighborhood Assoc. v. City of Oregon City*, 76 Or LUBA 180 (2017).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A 2,000-acre study area may be appropriate for calculating residential density for purposes of a density standard applied in inventoried big game habitat. But where the adequacy of that study area is questioned, and the county simply relies on an overbroad reading of a LUBA decision in an appeal of a prior quasi-judicial decision, remand is required. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where parties raise legitimate questions about how a study area will be used to calculate residential density and the local government fails to address those questions when it adopts the amendments governing use of the study area, the study area does not comply with the OAR 660-023-0050(1) requirement for "specific standards," or the OAR 660-023-0050(2) requirement for "clear and objective" standards. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A county does not necessarily err by distinguishing between a large part of the county where few people live and a smaller part of the county where the majority of the county's population lives as a basis for adopting programs with differing levels of protection for big game habitat. But a significant increase in permissible residential densities in the smaller more heavily impacted area must be justified. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Goal 5 does not allow a comprehensive plan Goal 5 program to defer to a future date conflict resolution and program development on a case by case basis. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where a county repeals an existing comprehensive plan policy to protect upland game bird habitat, without any

explanation for doing so, remand is required. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. In adopting a post-acknowledgment plan amendment, under OAR 660-023-0250(3)(b) a city is not required to apply Goal 5 directly "unless the [amendment] affects a Goal 5 resource." In changing the comprehensive plan and zoning map designations to allow higher intensity uses, a city may not assume the overlay protections that were previously applied to protect the Goal 5 resources from lower intensity uses will be adequate to ensure that no Goal 5 resource will be affected. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. When a county amends a zoning ordinance to require a particular study area when applying a maximum residential density standard within that zoning district, the county cannot rely on an earlier LUBA decision that allowed use of a similar study area in a quasi-judicial decision affecting a single property. Instead, the county must establish in amending the zoning ordinance that mandating the particular study area in all cases in that zone in the future is consistent with the maximum residential density standard and Goal 5, which the maximum residential density standard was adopted to implement. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A county must justify its decision to replace an ambiguous existing maximum residential density standard with a similarly worded but much more methodologically precise maximum residential standard and may not simply rely on the similar wording to conclude that the new standard is consistent with the county's comprehensive plan and Goal 5. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A post-acknowledgment plan amendment that makes only minor changes to a program to protect riparian areas may require little or no analysis under the Goal 5 rule, where the changes are consistent with Goal 5 safe harbor provisions for protecting riparian areas, or allow only types of public facilities that the safe harbor rules expressly allow in riparian areas. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. LUBA will deny an assignment of error that challenges the county's decision that Goal 5 does not apply to a proposed post-acknowledgement plan amendment to amend the county's map of lands eligible for a destination resort because the county failed to compare the location of "other inventoried Goal 5 resources" to the properties proposed to be included on the map where petitioners do not identify any inventoried Goal 5 resource that proposed plan amendment "would affect" under OAR 660-023-0250(3). *Root v. Klamath County*, 68 Or LUBA 124 (2013).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where the Metro Code requires that a city retain its Goal 5 protections for tree groves unless removing those protections "would allow no more than a *de minimis* increase in the amount of development that could occur in areas identified as upland wildlife habitat," a city does not err in comparing the area of each tree grove where development would occur with the remaining area of each tree grove,

rather than comparing the area of each tree grove where development would occur with the entire area identified as upland habitat Metro-wide or within the entire city. *Metro v. City of Lake Oswego*, 68 Or LUBA 136 (2013).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where the Metro Code requires that a city retain its Goal 5 protections for tree groves unless removing those protections "would allow no more than a *de minimis* increase in the amount of development that could occur in areas identified as upland wildlife habitat," a city erroneously applies the *de minimis* limitation by assuming, based on speculation that the owner of the large house will not want to further divide the property, that a one-acre lot with a large house on it in a zone that allows 7,500-square-foot lots will not be divided and developed with additional residences. *Metro v. City of Lake Oswego*, 68 Or LUBA 136 (2013).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where a comprehensive plan policy adopted to implement Goal 5 is just as open ended and aspirational as Goal 5 itself and in unchallenged findings the city explains Goal 5 has been fully implemented through the Goal 5 resource inventory and ESEE evaluation process, petitioner fails to establish that the policy must be considered directly in approving a conditional use permit. *Friends of the Hood River Waterfront v. City of Hood River*, 67 Or LUBA 179 (2013).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A city is not required to apply Goal 5 to a decision to annex property, where the annexation decision does not change the county planning and zoning designations of the property and does not make any of the changes specified in OAR 660-023-0250(3)(a) to (c) that would require application of Goal 5. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A county ordinance adopted solely to protect erodible soils and federally listed threatened species, neither of which are resources listed in the county's Goal inventory, does not amend the county's program to protect Goal 5 resources such as riparian areas, even if the ordinance would likely have the unintended effect of also protecting some inventoried Goal 5 resources. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A condition specifying future use of a reclaimed mining site is not inconsistent with OAR 660-023-0180(5)(f), which limits post-mining uses to farm uses under ORS 215.203, uses listed under ORS 215.283(1), and fish and wildlife habitat uses, where the condition requires reclamation for "fish and wildlife habitat" and eventual use "as a public park, if allowed by law." While ORS 215.203 and 215.283(1) do not currently allow public parks, the condition would only call for use as a public park if the statutes are amended to allow such a use. *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291 (2012).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where a local government amends its program to achieve Goal 5 with respect to inventoried natural resources, by adopting additional measures to protect those resources from an identified conflicting use, and thus adjusting the balance initially struck in its initial ESEE analysis to limit conflicting uses, the

local government must address the requirements of the Goal 5 rule at OAR chapter 660, division 23, revisit portions of its ESEE analysis as necessary and adopt findings based on that ESEE analysis explaining its choice to impose additional limitations on conflicting uses. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Because OAR 660-023-0190(2) expressly authorizes counties to proceed on a case-by-case basis to complete the Goal 5 inventory process with respect to energy resources, a county is not obligated to undertake a county-wide inventory of wind energy resources as a precondition to adopting legislative amendments protecting other types of Goal 5 resources from development impacts of wind energy facilities. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Before it is appropriate to consider the non-regulatory ESEE Consequences Determination portion of Goal 5 planning for a site as context for interpreting the regulatory Resource Protection Program there must first be an ambiguity in the Resource Protection Program. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where Goal 11 and 14 exceptions are necessary to complete a previously approved destination resort that is authorized under the county's acknowledged comprehensive plan and land use regulations, and the resort as completed is substantially similar to the resort as originally approved, the Goal 11 and 14 exceptions do not propose "new uses" that could be conflicting uses with a significant Goal 5 resource site and thus the county does not err in failing to apply the requirements of Goal 5 and the Goal 5 rule. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Under ORS 660-023-0250(3), a local government must consider Goal 5 if a post-acknowledgment plan amendment "would affect a Goal 5 resource." The threshold question under ORS 660-023-0250(3) is whether the plan amendment would either (1) amend a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5 or (2) allow new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A post-acknowledgment plan amendment that allows additional categories of conflicting uses that were already allowed under the acknowledged comprehensive plan allows new conflicting uses within the meaning of ORS 660-023-0250(3)(b), and the decision adopting the post acknowledgment plan amendment must therefore apply Goal 5. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A local government with an acknowledged Goal 5 inventory is not required to update that inventory when adopting a post-acknowledgment plan amendment that does not itself alter the acknowledged Goal 5 inventory. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where a county adopted a comprehensive plan policy that called for a 160-acre minimum lot size to protect big game winter range, but subsequently amended its zoning ordinance to provide for an 80-acre minimum lot size in the same area, that inconsistency created a plan/zoning ordinance conflict. If the county wishes to eliminate the inconsistency in favor of the 80-acre minimum lot size, it must demonstrate that the 80-acre minimum lot size leaves the county's Goal 5 program to protect big game winter range consistent with Goal 5. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where a county attempts to take advantage of the riparian corridor safe harbor authorized by OAR 660-023-0090(8) but defines "water dependent" and "water related" slightly differently than the statewide planning goal definitions of those terms, any ambiguity created by the different wording must be resolved consistently with the statewide planning goal definitions. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Under ORS 660-023-0250(3), a local government must consider Goal 5 if a post-acknowledgment plan amendment "would affect a Goal 5 resource." The threshold question under ORS 660-023-0250(3) is whether the plan amendment would either (1) amend a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5 or (2) allow new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Under OAR 660-023-0030(3), where a local government determines that it does not have adequate information about a potential Goal 5 site, the local government "shall not regulate land uses in order to protect such sites." *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The additional new roadways and traffic that might be associated with a destination resort are properly viewed as a new use, notwithstanding that new roadways and traffic could also be generated by other uses. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The new roadways and traffic that might be associated with a destination resort could be a conflicting use with inventoried big game habitat, where the evidentiary record is insufficient to support a conclusion that such roadways and traffic would not conflict with inventoried big game habitat. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A local government with an acknowledged Goal 5 inventory is not required to update that inventory when adopting a post-acknowledgment plan amendment that does not itself alter the acknowledged Goal 5 inventory. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A finding that a proposed aggregate site may have a large basalt outcrop in the middle of the site is not supported by substantial evidence, where the only evidence supporting the finding is data from an off-site well and that finding is inconsistent with a deep boring that is near the center of the site and between the center of the site and the off-site well that the finding relied on. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. To qualify as a "significant" aggregate resource site under OAR 660-023-0180(3)(d)(B)(ii), "the average thickness of the aggregate layer within the mining area" must exceed 25 feet. Where a county's findings suggest the county may have erroneously concluded that boulders should not be considered in determining whether the requisite 25-foot-thick layer is present on a proposed aggregate resource site, remand is necessary so that the county can either (1) adopt findings under OAR 660-0023-0180(3) that do not discount aggregate significance based on the possible presence of boulders or (2) explain why the presence of boulders properly affects the determination of significance under OAR 660-0023-0180(3). *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where an applicant seeking to establish that a proposed mining site qualifies as a significant aggregate resource site does not argue to the county that opponents' data from off-site wells is consistent with data from the applicant's on-site wells or that the data from the off-site wells is unreliable because it was not collected under the supervision of a geologist, it is not unreasonable for the county to rely on the opponents' evidence to conclude that the two on-site borings were not sufficient to establish that a 117-acre mining site qualifies as a significant aggregate resource site. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Two 25-foot-deep test pits that show an overburden of several feet on top of 20+ feet of aggregate material do not establish that there is an aggregate layer of more than 25 feet and they do not establish that the aggregate layer that is present on the site is less than 25 feet deep. The 25-foot-deep pit can only confirm the geology of the 25 feet below the surface where the test pit was dug. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. OAR 660-023-0250(3)(a) identifies the circumstances in which a post acknowledgment plan amendment must address Statewide Planning Goal 5. Under that rule, Goal 5 must be addressed if the amendment either (1) "amends * * * a portion of an acknowledged plan or land use regulation [that was] adopted in order to protect a significant Goal 5 resource," or (2) "allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]" *Wood v. Crook County*, 55 Or LUBA 165 (2007).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where a county limits application of its Goal 5 program to protect big game winter habitat to exclusive farm use zoned properties, a decision years later to remove exclusive farm use zoning amends an acknowledged land use regulation that was adopted to protect a Goal 5 resource, and under OAR

660-023-0250(3)(a) that rezoning decision must be justified under Goal 5. *Wood v. Crook County*, 55 Or LUBA 165 (2007).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. An argument that the Department of Land Conservation and Development erred in acknowledging the city's riparian protection ordinance is a collateral attack on the acknowledgment that cannot be advanced in an appeal of a permit decision applying the acknowledged ordinance. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. If an exception area does not include land on the county's acknowledged inventory of Goal 5 resources, the county need not adopt an exception to Goal 5. *Gordon v. Polk County*, 54 Or LUBA 351 (2007).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The extent to which a local government must undertake the standard Goal 5 process in adopting a post-acknowledgment plan amendment pursuant to OAR 660-023-0250(3) will depend on the nature of the amendment. For example, amendments that trigger the Goal 5 rule because they allow new uses that could conflict with significant Goal 5 resources under OAR 660-023-0250(3)(b) will not require the local government to redo the inventory process, the first step of the standard Goal 5 process. *NWDA v. City of Portland*, 50 Or LUBA 310 (2005).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where a local government already has an acknowledged program to achieve Goal 5 with respect to a particular resource site, and is considering whether proposed new uses that could conflict with the site are consistent with Goal 5, the local government need not in all cases undertake all steps of the standard Goal 5 process, or fully engage in steps it undertakes. *NWDA v. City of Portland*, 50 Or LUBA 310 (2005).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where the local government already has an acknowledged program to achieve Goal 5 with respect to a particular resource site, it has already made key choices about the relative importance of the site and a range of conflicting uses. In adopting amendments to allow new uses that could conflict with the site, the local government need not reconsider or re-justify those key choices. Where the new uses have similar impacts to the site that were considered in adopting the acknowledged program, the local government may simply choose to rely on its existing program to ensure compliance with Goal 5. *NWDA v. City of Portland*, 50 Or LUBA 310 (2005).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A local government's failure to conduct an explicit ESEE (economic, social, environmental and energy) analysis is not a basis for reversal or remand, where the decision adopts extensive findings finding compliance with statewide planning goals and comprehensive plan provisions governing economic, social, environmental and energy matters, and those findings appear to constitute, in all but name, an ESEE analysis. *NWDA v. City of Portland*, 50 Or LUBA 310 (2005).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A county's decision to amend its deer winter range map redesignating property from "critical" deer habitat to

"impacted deer winter range" is supported by substantial evidence where the county makes a reasonable choice to rely on the applicant's expert, who conducted only one site visit and reviewed data that had previously been prepared by the Oregon Department of Fish and Wildlife, and concluded that the proposal would not significantly impact deer winter range. *Anthony v. Josephine County*, 50 Or LUBA 573 (2005).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A finding that a proposed mine will have adverse effects on the livability, value and enjoyment of residential uses within the impact area might play some role in the required considerations under OAR 660-023-0180, but that finding is not, in and of itself, either a proper consideration under OAR 660-023-0180 or a sufficient basis for denying the requested permit. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A city is not required to demonstrate that annexation of an open space area that includes Goal 5 resources is consistent with Goal 5, where the annexation decision does not rezone the area, amend the plan designation, or otherwise affect the uses allowed in the territory or the protection of open space and natural resources. *Cutsforth v. City of Albany*, 49 Or LUBA 559 (2005).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where a post-acknowledgment plan amendment allows new uses that could conflict with significant Goal 5 resource sites, and thus triggers application of the Goal 5 rule under OAR 660-023-0250(3), the city need not in all cases repeat the entire Goal 5 process, including the ESEE analysis. In many cases no more is required than an explanation for why the existing program to protect Goal 5 resources continues to be sufficient to protect those resources. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. OAR 660-023-00180(4) establishes different requirements for evaluating conflicts between mining and agricultural practices and between mining and other uses. Therefore, a finding that proposed mining activities conflicts with nonagricultural uses will not be significant because air quality and traffic standards will be met does not necessarily establish that those conflicts will not either force a significant change in accepted agricultural practices or significantly increase the cost of those agricultural practices. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The standard for reviewing conflicts between mining and accepted agricultural practices set out in OAR 660-023-0180(4)(c) is limited to "farm uses," as that term is defined in ORS 215.203(2). Uses identified as non-farm uses permitted under ORS 215.213(1) are not farm uses or agricultural practices that must be evaluated under that standard. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where an applicant identifies groundwater as a "discharge" to be considered as a conflict pursuant to OAR 660-023-0180(4)(b)(A), that applicant may not argue on appeal to LUBA that (1) groundwater is not a "discharge" within the meaning of that rule; or (2) that the impact of mining on groundwater may

only be considered under OAR 660-023-0180(4)(b)(D) if the mining site is located within a critical groundwater area and is designated as such on the county's Goal 5 inventory of significant Goal 5 sites. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. OAR 660-023-0180(4) does not change an applicant's evidentiary burden to demonstrate that measures proposed to minimize of the impacts of mining are reasonable, practical and achievable. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. OAR 660-023-0180 establishes a comprehensive regulatory scheme for reviewing mining applications. A county errs when it denies an application for mining in part because it does not comply with local approval criteria that are unrelated to OAR 660-023-0180. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where LUBA cannot determine from the appealed decision or the record whether an approved parkway corridor crosses an inventoried Goal 5 significant vegetation and wildlife area, the decision must be remanded. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The statement in OAR 660-016-0005(a) that a local government is not required to "justify in its comprehensive plan a decision not to include a particular site" in its Goal 5 inventory simply means that the local government need not amend its comprehensive plan to justify a decision not to include a site on its Goal 5 inventory. The rule does not relieve local governments of the obligation to adopt adequate findings justifying a quasi-judicial decision to deny an application to include a site on the Goal 5 inventory. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. OAR 660-023-0180 prohibits application of local government standards to post-acknowledgment plan amendment to add a site to the plan inventory of significant aggregate sites, unless such standards (1) were adopted after 1989 and (2) provide "specific criteria" for proposals to amend the plan inventory of aggregate sites. A general agricultural policy requiring that nonagricultural development be based on demonstrated public need is not a "specific criteri[on]" regarding proposals to amend the aggregate inventory and therefore OAR 660-023-0180 prohibits application of the policy. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. No reasonable person could interpret a plan policy stating that the county plans to participate with other counties in a regional aggregate needs analysis as imposing a requirement that an applicant seeking to amend the county's aggregate inventory must establish a "public need" for aggregate. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Goal 5 does not impose decisional criteria that are independent of the criteria set out in OAR chapter 660, division 23. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The obligation to review proposed amendments to comprehensive plan and land use regulation provisions to ensure compliance with Goal 5 is implicated only in the circumstances described in OAR 660-023-0250(3). *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A change in the level of review of a particular use from conditional use review to an allowed use does not mean that the use is a "new use" as that term is used in OAR 660-023-0250(3)(a) that must be considered as a potentially conflicting use subject to review to ensure that the existing program to protect Goal 5 resources remain effective. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The conflicts analysis that is mandated by OAR 660-023-0180(4)(b)(B) is limited to local roads that are used for access and egress. Where a proposed aggregate mine will use a state highway for access and egress, there are no road conflicts to be considered under the rule. *Friends of the Applegate v. Josephine County*, 44 Or LUBA 786 (2003).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A statement that a party assumes for the sake of argument that a proposed mining area is subject to a Goal 5 rule governing lands that consist of more than 35 percent soils classified as Class I or II is insufficient to raise, with the required specificity, an issue regarding whether the proportion of Class I or II soils may be less than 35 percent, and therefore that the rule does not apply to the proposed mining area. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. An application to amend the county comprehensive plan list of non-significant aggregate sites to include a proposed new mining site is subject to review for compliance with any potentially applicable statewide planning goals. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Other than to require that the county "maintain a record" of a determination that a mining site is non-significant, OAR 660-023-0030(6) does not address or provide any criteria with respect to a request to add a mining site to the county's comprehensive plan list of non-significant sites, and does not authorize the county to approve or deny that request based on concerns regarding the impacts of mining. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Read in context, the ORS 215.298 provision allowing a mining operation on EFU-zoned lands if the site is on an "inventory" in a comprehensive plan is a reference to a Goal 5 "inventory" of mineral sites. Because under the 1982 Goal 5 rule the term "inventory" referred to an inventory of *significant* mineral sites, ORS 215.298 allows mining in an EFU zone only if the site is on a comprehensive plan inventory of significant mineral sites, not if the site is on a separate list of nonsignificant sites. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where a city's tree preservation ordinance was identified during acknowledgment as an implementing measure to achieve compliance with Statewide Planning Goal 5, a decision that amends the tree preservation ordinance concerns the application of Goal 5 and is therefore a statutory land use decision subject to LUBA's jurisdiction. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 453 (2002).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Absent a showing that amendments regulating natural resources not on the city's acknowledged Goal 5 inventory are intended to create or amend or have the effect of creating or amending a Goal inventory, such amendments need not comply with Goal 5 or the Goal 5 rule. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Under OAR 660-023-0250(3), a local government cannot adopt a post-acknowledgment plan amendment that amends the program to protect significant Goal 5 resources without establishing that the amendment complies with Goal 5 and the Goal 5 rule, even if the amendment merely increases the level of protection afforded inventoried Goal 5 resources. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Code provisions that were previously acknowledged to comply with Goal 5 and are carried forward into a new code without substantive change do not constitute an "amendment" of a Goal 5 regulation and thus do not trigger an obligation to establish that those amendments comply with the Goal 5 rule. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A zoning classification that implements a Goal 5 plan designation and is applied to an inventoried Goal 5 resource site is among the regulations that "protect a significant Goal 5 resource" for purposes of OAR 660-023-0250(3). Therefore, a substantive amendment to such a zoning classification must be evaluated under the Goal 5 rule. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where petitioners' interpretational challenge of a city's finding that proposed development complies with code provisions implementing Goal 5 is, in essence, an argument that the city's code provisions are insufficient to implement Goal 5, LUBA will reject the challenge as an impermissible collateral attack on the city's acknowledged Goal 5 regulations. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. OAR chapter 660, division 23, generally supersedes OAR chapter 660, division 16, subject to specified exceptions. Therefore, a county does not err in considering whether a proposed use affecting an inventoried Goal 5 resource is consistent with OAR chapter 660, division 23, notwithstanding that the county's unacknowledged Goal 5 regulations were adopted pursuant to division 16 rather than division 23. *Tylka v. Clackamas County*, 41 Or LUBA 53 (2001).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A "safe harbor" provision at OAR 660-023-0090(8) allowing local governments to adopt ordinances implementing Goal 5 that allow an "existing structure" in a riparian area to be repaired or replaced is not properly interpreted to require a threshold inquiry into whether the "existing structure" was lawfully approved or developed. *Tylka v. Clackamas County*, 41 Or LUBA 53 (2001).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Land use regulations may be adopted to comply with Goals 6 and 7 and related federal law requirements, without first complying with the Goal 5 planning requirements under OAR chapter 660, division 23, where the land use regulations are limited to those that may be required by Goals 6 and 7 and any related federal law requirements. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282 (2001).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The text and context of OAR 660-023-0180(4)(a) establish that the impact area for purposes of identifying conflicting uses with proposed aggregate mining is the 1,500-foot ring around the mining area, excluding the mining site itself. *Stockwell v. Benton County*, 38 Or LUBA 621 (2000).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Although ORS 215.296(10) allows a local government to impose additional standards on a conditional use permit for aggregate mining, it does not apply to a comprehensive plan amendment designating a significant resource site and establishing a surface mining overlay pursuant to the Goal 5 rules. *Stockwell v. Benton County*, 38 Or LUBA 621 (2000).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The conditional use approval criteria from local government ordinances do not apply to post-acknowledgement plan amendments pursuant to the Goal 5 rules. *Stockwell v. Benton County*, 38 Or LUBA 621 (2000).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. ORS 197.625(3)(b) requires that approval of a land use subject to an unacknowledged land use standard include findings of compliance with applicable goals. Until the land use standard is acknowledged to comply with applicable goals, the local government cannot rely solely upon the regulatory scope of that standard to avoid addressing compliance with potentially applicable goals. *Tylka v. Clackamas County*, 37 Or LUBA 922 (2000).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Petitioners' argument during local proceedings that OAR 660-023-0180 does not prohibit a county from applying its land use regulations to a proposed mining operation is not sufficient to raise an issue that LCDC's adoption of OAR 660-023-0180 is inconsistent with other statutory requirements. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. OAR 660-023-0180, which governs comprehensive plan amendments for mineral and aggregate resources, establishes the procedures required to comply with Goal 5 but does not obviate the requirement to

address other statewide planning goals. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. If a county has not yet amended its comprehensive plan and land use regulations to comply with OAR 660-023-0180, OAR 660-023-0180(7) requires that the county directly apply the substantive requirements and procedures of OAR 660-023-0180 to consideration of a post-acknowledgment plan amendment concerning mining authorization. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The scope of additional conflicts that may be considered under OAR 660-023-0180(4)(b)(F), is a question of state law and a county's interpretation of OAR 660-023-0180(4)(b)(F) is not entitled to the deferential standard of review required by ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. OAR 660-023-0180(4)(b)(F), which allows the county to consider land use conflicts with a proposed mine if such conflicts must be considered under a county mining ordinance adopted pursuant to ORS 517.780, does not permit a county to apply its comprehensive plan and land use regulations as decisional criteria for the proposed mine, notwithstanding a general provision in the mining ordinance that requires compliance with the county comprehensive plan and land use regulations. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A conflict or inconsistency with a comprehensive plan or land use regulation provision is not the kind of conflict that may be considered under OAR 660-023-0180(4)(b). The conflicts that may considered under the rule include conflicts between land uses. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where access to a mining site is via a "local road," OAR 660-023-0180(4)(b)(B) allows a county to consider conflicts with that local road. However, where access to a mining site is via an arterial highway there are no local roads used for access and egress to the mining site and OAR 660-023-0180(4)(b)(B) does not permit the county to consider conflicts with other roads. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A local government may not expand the 1,500-foot impact area required by OAR 660-023-0180(4)(a) based on potential conflicts that exceed the scope of conflicts that may be considered under OAR 660-023-0180(4)(b). *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. OAR 660-023-0180(4)(d) directs that a county proceed to "determine the ESEE consequences of either allowing, limiting, or not allowing mining at the site," only where conflicts with a mining site are properly identified under OAR 660-023-0180(4)(b) and there are not "reasonable and practical measures"

that would minimize those conflicts. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. LUBA will grant a city's motion for a voluntary remand in order to reconsider its Goal 5 determinations in light of petitioner's concerns, even though LUBA would owe no deference to the city's interpretation and application of Goal 5. *Hribernick v. City of Gresham*, 35 Or LUBA 329 (1998).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. LUBA will reject an assignment of error alleging that a post-acknowledgment plan amendment violates Goal 5, where petitioner does not demonstrate that the decision affects a Goal 5 resource in one of the ways specified in OAR 660-023-0250(3). *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Goal 5 is not implicated by a city decision that merely adopts an existing acknowledged county airport plan. *Northwest Aggregates Co. v. City of Scappoose*, 35 Or LUBA 30 (1998).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The new Goal 5 rule applies to applications filed on or after September 1, 1996. Where an application was filed in March 1997 but the old Goal 5 rule was applied, the decision must be remanded. *Kelley v. City of Cascade Locks*, 34 Or LUBA 374 (1998).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The purpose of the boundary delineation and mapping required by the first step of the Goal 5 rule is to make both feasible and meaningful the next step of the Goal 5 analysis: identifying the mutual impacts of Goal 5 resource sites and conflicting uses. *Doty v. Jackson County*, 34 Or LUBA 287 (1998).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Because the three steps of the Goal 5 analysis are so sequentially dependent, a flaw at step one renders subsequent steps equally flawed. *Doty v. Jackson County*, 34 Or LUBA 287 (1998).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where a comprehensive plan does not provide for a proposed expansion of a mining site, a conditional use permit is insufficient to permit the expansion. In that circumstance, OAR 660-023-0180 requires a post-acknowledgment plan amendment and Goal 5 analysis. *Trademark Construction, Inc. v. Marion County*, 34 Or LUBA 202 (1998).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. The Goal 5 rule does not mandate protection of resource use over conflicting uses. Implicit in the fact that the Goal 5 rule permits the local government to deny an application to mine a significant aggregate site is that in some circumstances, conflicting uses may prevail over resource use. *Trademark Construction, Inc. v. Marion County*, 34 Or LUBA 202 (1998).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Not every regulation that arguably furthers the objectives of Goal 5 applies Goal 5. *Ramsey v. City of Portland*, 30 Or LUBA 212 (1995).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where challenged post-acknowledgment comprehensive plan and land use regulation amendments do not directly affect a local government's acknowledged Goal 5 inventory, and petitioner does not identify any inventoried Goal 5 resources allegedly affected by the challenged amendments, petitioner provides no basis for reversal or remand. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Goal 5 establishes a comprehensive planning process that requires a local government to inventory the location, quality and quantity of listed resources within its territory; identify conflicting uses for the inventoried resources; (3) determine the ESEE consequences of the conflicting uses; and (4) develop programs to achieve the goal of resource protection. *Gage v. City of Portland*, 28 Or LUBA 307 (1994).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where, during local comprehensive plan map amendment and zone change proceedings, petitioner advised the local government that Statewide Planning Goal 5 requires an analysis regarding only a nearby aggregate operation, petitioner affirmatively waived any Goal 5 issues unrelated to the nearby aggregate operation. *DLCD v. Curry County*, 28 Or LUBA 205 (1994).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. Where post-acknowledgment legislative land use regulation amendments make portions of a county's acknowledged program for wetlands protection inapplicable to rural wetlands, the county must demonstrate, either in the decision or through argument and citations to the record in its brief, that with regard to rural wetlands, the amendments result in a program that complies with Goal 5 and the Goal 5 rule. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. In adopting exceptions to Goals 3 and 4 as post-acknowledgment plan amendments, a local government must also address Goal 5 if the exceptions concern or affect lands included on the local government's acknowledged inventory of Goal 5 resources. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

9.1 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Generally. A local government operates within its interpretive discretion in finding that plan policies committing it to complete the Goal 5 process for 1B resource sites in the future refer to comprehensive legislative proceedings and do not obligate the local government to do so for individual sites in permit proceedings. Such an interpretation also is consistent with the Goal 5 rule. OAR 660-16-000(5)(b). *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. In the context of an application to remove property from a county's Goal 5 inventory of significant aggregate resources, where the county has previously determined, in two separate final, acknowledged decisions—one based on area-specific soils mapping and the other based on periodic review which resulted in an updated inventory—that the property should not be included on the county's Goal 3 inventory of agricultural lands; where the county zoned the property for surface mining, a zone that does not implement Goal 3, after one of those previous determinations; and where the ESEE analysis for the property does not specify a post-mining zoning designation or use, a conclusion that the property is not agricultural land is supported by substantial evidence. The county, having previously determined that the property is not agricultural land, is not required to revisit whether the property is agricultural land. *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 252 (2019).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Although the holding in *Beaver State Sand and Gravel vs. Douglas County*, 187 Or App 241, 65 P3d 1123 (2003), determined that ORS 215.298(2) prohibits surface mining on EFU-zoned lands unless the property is included on a Goal 5 inventory of significant aggregate resources, nothing in OAR 660-023-0180 prohibits a local government from otherwise maintaining a "Non-Significant Mining Mineral and Aggregate Inventory," adding properties to that inventory, or allowing surface mining on properties included on that inventory pursuant to local code provisions regulating surface mining, and a local government is not required to apply any rules implementing Goal 5 to its decision to add property to that inventory. *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 252 (2019).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. When Community Plan adopted as part of the county's comprehensive plan includes a Significant Natural and Cultural Resources (SNR) Map, and an applicant for development of property that is included on the SNR Map provides the county with additional information identifying "the location of the natural resource(s)," as required by the applicable approval criteria, the requirement to precisely identify the location of the protected resource does not amount to an amendment of the SNR Map. *Warren v. Washington County*, 78 Or LUBA 107 (2018).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. When the hearings officer makes findings on a wildlife habitat area located within a Significant Natural and Cultural Resources (SNR) Map, the hearings officer's task is to consider all of the evidence in the record and determine whether the applicable approval criteria are satisfied. A hearings officer's task is not to determine whether intervenor's submittals in support of the application are "supported by substantial evidence in the record." Rather, the hearings officer must weigh the evidence submitted against the applicable standards and criteria, and make that determination. *Warren v. Washington County*, 78 Or LUBA 107 (2018).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Only the portion of a proposed mining site that qualifies as "significant," under OAR 660-023-0180(3)(a), is properly included on a county's comprehensive plan inventory of significant aggregate resource sites under Statewide Planning Goal 5. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. In determining whether a local government inventoried elk habitat as a significant Statewide Planning Goal 5 resource and adopted a program to protect that inventoried significant elk habitat, or instead determined not to inventory the elk habitat as significant or to defer adopting a protection program, LUBA considers what the local government actually adopted rather than the labels or terminology the local government used in adopting the comprehensive plan. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where petitioner fails to identify any zoning or subdivision regulations that would govern the city's decision whether or not to remove 35 trees from a city park and does not contend the park or trees in the park are inventoried as significant Goal 5 resources or identify any Goal 5 program that would apply to protect the trees at issue, petitioner fails to carry her burden to demonstrate that the challenged decision is a "land use decision" subject to LUBA's jurisdiction. *Carlson v. City of Brookings*, 77 Or LUBA 497 (2018).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A county does not necessarily err by distinguishing between a large part of the county where few people live and a smaller part of the county where the majority of the county's population lives as a basis for adopting programs with differing levels of protection for big game habitat. But a significant increase in permissible residential densities in the smaller more heavily impacted area must be justified. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where a property owner initially objects to designation of property as a historic resource, but later withdraws that objection or consents to the designation, the designation is not "imposed on the property" within the meaning of ORS 197.772(3). However, where a property owner objects to designation, and at later stages of the designation proceeding is simply silent regarding designation, that silence does not mean that the owner withdrew the objection or consented to the designation. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where pursuant to ORS 197.772(3) a local government removes property from an inventory of historic resources at the request of the property owner, code provisions implementing Goal 5 that would otherwise require evaluation of whether removal is consistent with Goal 5 do not apply. Removal under ORS 197.772(3) and removal under Goal 5 and implementing regulations are alternatives. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Because OAR 660-023-0190(2) expressly authorizes counties to proceed on a case-by-case basis to complete the Goal 5 inventory process with respect to energy resources, a county is not obligated to undertake a county-wide inventory of wind energy resources as a precondition to adopting legislative amendments protecting other types of Goal 5 resources from development impacts of wind energy facilities. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. In order to add a site to a local government's inventory of significant aggregate sites, an applicant must

demonstrate that threshold amounts of aggregate are present on the site based on a "representative set of samples of aggregate material in the deposit on the site" under OAR 660-023-0180(3)(a). Where nothing in the Goal 5 rule specifies any particular standards that govern the methodology used to collect "a representative set of samples," a county does not err in accepting and relying on samples collected using methods that a reasonable professional geologist would employ to determine the quantity of aggregate present on the site. *Protect Grand Island Farms v. Yamhill County,* 64 Or LUBA 179 (2011).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Under OAR 660-023-0180(3)(d)(B)(ii), in Yamhill County, an aggregate resource is not "significant" within the meaning of OAR 660-023-0180(3) unless "the average thickness of the aggregate layer within the mining area exceeds 25 feet." Where aggregate is present both above and below an intervening layer of clay, it is not inconsistent with the text or purpose of the rule for a local government to consider the intervening clay layer to constitute "overburden" for purposes of mining the lower aggregate deposit. *Protect Grand Island Farms v. Yamhill County*, 64 Or LUBA 179 (2011).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A decision that merely adds an aggregate site to a comprehensive plan inventory of significant aggregate resource sites may not trigger application of the transportation planning rule (TPR) in any of the ways described in OAR 660-012-0060(1). But when the county decides to allow mining of the site and places an overlay zone on the site to allow mining, that zone change authorizes a new, more traffic-intensive use of the property and may trigger application of the TPR. *Setniker v. Polk County,* 63 Or LUBA 38 (2011).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where the challenged decision approves (1) a comprehensive plan amendment adding a site to the county's Goal 5 inventory of significant sites, and (2) a zone change to allow mining of the site, because the zone change application is consolidated with, and dependent upon, the plan amendment, the goal-post rule at ORS 215.427(3) does not operate to "freeze" the standards that apply to the zone change to those applicable on the date the application was filed. *Setniker v. Polk County,* 63 Or LUBA 38 (2011).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Because the end of the planning period plays an important role under the Transportation Planning Rule (TPR) at OAR 660-012-0060(1) in determining whether proposed plan or zone amendments significantly affect transportation facilities, when the county amends its transportation system plan to change the planning period from 2020 to 2030, the county must apply the new planning period in determining whether the proposed plan/zone change complies with the TPR. *Setniker v. Polk County,* 63 Or LUBA 38 (2011).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. If there is sufficient information on the location, quality and quantity of a Goal 5 resource to determine that it is "significant," OAR 660-016-0000(5)(c) requires a local government to include the site on its resource inventory, and "proceed through the remainder of the Goal 5 process." *Hoffman v. Deschutes County,* 61 Or LUBA 173 (2010).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. The estimated quantity and quality of mineral resources determined to be present on a site play a larger role in the Goal 5 planning process than merely determining whether the resources cross a threshold of significance. Those estimates are also central to the Conflict Resolution/ESEE Consequences and Program to Achieve the Goal phases of Goal 5 planning under OAR chapter 660, division 16. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. With respect to quantity, absent some indication that a local government believed the estimated quantity to represent a maximum and took that maximum estimated quantity into account in its ESEE analysis and ultimate decisions regarding the Program to Achieve the Goal, a new or amended ESEE analysis is not required simply because the applicant discovers that a larger amount of inventoried mineral is present at the site than was originally estimated. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. While an amended ESEE analysis under Goal 5 will generally be required to mine mineral resources other than those that are included on the site's inventory, an amended ESEE analysis will not be needed for incidental mining of non-inventoried mineral resources. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. If a local government can establish that, had it known of the presence, quality and quantity of a non-inventoried mineral resource when it adopted the original ESEE analysis and Program to Achieve the Goal for a site based on other inventoried mineral resources, the differences between inventoried and non-inventoried resources are sufficiently minimal in terms of extraction methods, conflicts, etc., that the local government would have chosen to balance conflicts in the same way, and would have adopted the same Program to Achieve the Goal, mining of the non-inventoried mineral resource can be accurately viewed as "incidental" and such mining may proceed without an amended ESEE analysis for the site. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where a site is included on a local government's Goal 5 inventory based on one type of mineral resource, a local government's decision that mining of a different non-inventoried mineral resource on the site may proceed without an amended ESEE analysis under Goal 5 will be remanded where the quantity of the non-inventoried mineral resource is five times the amount of the inventoried mineral resource and the mining of the non-inventoried resource may leave a significantly larger and more visible headwall that will conflict with nearby uses more than if only the inventoried mineral resource were removed. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A proposed aggregate resource site is significant if it meets any one of the criteria at subsections (a) to (c) of OAR 660-023-0180(3). *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Even if an aggregate resource site is found to be "significant" under OAR 660-023-0180(3)(a) or (b), OAR

660-023-0180(3)(d) dictates that such aggregate resource sites are not "significant," within the meaning of OAR 660-023-0180(3), if (1) more than 35 percent of the site's soils are rated Class I by the Natural Resource and Conservation Service or (2) more than 35 percent of the site's soils are rated Class II or a combination of Class I and II by the Natural Resource and Conservation Service and the average thickness of the aggregate layer does not exceed specified minimums in the rule. *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where OAR 660-023-0180(3)(d)(B) applies, and the requisite average thickness of the aggregate layer is not shown to be present, an aggregate resource site is not "significant," within the meaning of OAR 660-023-0180(3). *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where a county has amended its comprehensive plan and land use regulations to include procedures and requirements for the consideration of post-acknowledgement plan amendments concerning aggregate resources, and the comprehensive plan and land use regulation amendments are acknowledged in periodic review as implementing OAR 660-023-0180, the provisions of OAR 660-023-0180(6) do not apply directly to an application to add a property to the county's inventory of significant aggregate resources. *Stern v. Josephine County*, 58 Or LUBA 511 (2009).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where applicable, OAR 660-023-0180(6)(a) requires satisfaction of conditional use criteria and the provisions of ORS 215.296 and ORS 215.402 to 215.416 only where an aggregate site has already been placed on the county's inventory of significant aggregate resources; it does not require satisfaction of those provisions where a county is making the initial decision whether to place a site on the county's inventory. *Stern v. Josephine County*, 58 Or LUBA 511 (2009).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. For purposes of OAR 660-023-0180(3)(d) (the 35% Rule) and local ordinances implementing the rule, as long as aggregate is present in the requisite quantity and mining is not conclusively prohibited on the property by federal, state or local law, the county is not required to determine the likelihood of a successful permitting process in determining whether a site is "significant" under the 35% Rule. *Stern v. Josephine County*, 58 Or LUBA 511 (2009).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A local government with an acknowledged Goal 5 inventory is not required to update that inventory when adopting a post-acknowledgment plan amendment that does not itself alter the acknowledged Goal 5 inventory. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Under OAR 660-023-0030(3), where a local government determines that it does not have adequate information about a potential Goal 5 site, the local government "shall not regulate land uses in order to protect such sites." *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A local government with an acknowledged Goal 5 inventory is not required to update that inventory when

adopting a post-acknowledgment plan amendment that does not itself alter the acknowledged Goal 5 inventory. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A finding that a proposed aggregate site may have a large basalt outcrop in the middle of the site is not supported by substantial evidence, where the only evidence supporting the finding is data from an off-site well and that finding is inconsistent with a deep boring that is near the center of the site and between the center of the site and the off-site well that the finding relied on. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. To qualify as a "significant" aggregate resource site under OAR 660-023-0180(3)(d)(B)(ii), "the average thickness of the aggregate layer within the mining area" must exceed 25 feet. Where a county's findings suggest the county may have erroneously concluded that boulders should not be considered in determining whether the requisite 25-foot-thick layer is present on a proposed aggregate resource site, remand is necessary so that the county can either (1) adopt findings under OAR 660-0023-0180(3) that do not discount aggregate significance based on the possible presence of boulders or (2) explain why the presence of boulders properly affects the determination of significance under OAR 660-0023-0180(3). *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where an applicant seeking to establish that a proposed mining site qualifies as a significant aggregate resource site does not argue to the county that opponents' data from off-site wells is consistent with data from the applicant's on-site wells or that the data from the off-site wells is unreliable because it was not collected under the supervision of a geologist, it is not unreasonable for the county to rely on the opponents' evidence to conclude that the two on-site borings were not sufficient to establish that a 117-acre mining site qualifies as a significant aggregate resource site. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Two 25-foot-deep test pits that show an overburden of several feet on top of 20+ feet of aggregate material do not establish that there is an aggregate layer of more than 25 feet and they do not establish that the aggregate layer that is present on the site is less than 25 feet deep. The 25-foot-deep pit can only confirm the geology of the 25 feet below the surface where the test pit was dug. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A decision that adds an aggregate mining site to the county's comprehensive plan inventory of significant mineral and aggregate resources and adopts background documents to the comprehensive plan, is a plan *text* amendment rather than a plan *map* amendment, and therefore under the county's code the decision is subject to procedures and standards applicable to legislative plan amendments. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. The final steps in the analysis required under OAR 660-023-0180 to review requests for mining are limited and structured: (1) the county must determine whether there are any conflicts with the

proposed mining, (2) if there are conflicts the county must consider whether there are measures that would minimize those conflicts, (3) if conflicts cannot be minimized, the county must determine the economic, social, environmental and energy consequences of allowing, limiting or not allowing mining. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Adoption of an ordinance that authorizes demolition of a structure that the city's Goal 5 historic inventory classifies as "noncontributing" and that is not protected under the city's historic resource protection program does not alter the Goal 5 inventory or "amend" the city's "resource list" within the meaning of OAR 660-023-0250(3)(a). *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where a local government has repealed its Goal 5 inventory of aggregate sites, the owner of EFU-zoned property listed on the repealed inventory is not entitled to a conditional use permit to mine the site under ORS 215.298(2). *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653 (2004).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. The lack of specific evidence on whether aggregate samples tested by a laboratory were "representative," as required by OAR 660-023-0180(3)(a), does not provide a basis for reversal or remand, where the samples came from an existing quarry and there is no suggestion in the record that the sample was not representative or that the quality of rock in the existing quarry was not uniform. *Bryant v. Umatilla County*, 45 Or LUBA 653 (2003).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Notwithstanding that OAR 660-023-0180(3)(a) requires that aggregate samples meet ODOT specifications for sodium sulfate soundness, where it is undisputed that ODOT in fact has not promulgated any such specifications, the failure of the applicant to test aggregate samples for sodium sulfate soundness does not provide a basis for reversal or remand. *Bryant v. Umatilla County*, 45 Or LUBA 653 (2003).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. The OAR 660-016-0000 requirement to identify the "location" of the resource within an identified "impact area" is intended to assist the local government to determine the "significance" of the resource and whether it should be included on the Goal 5 inventory. If found to be "significant," the resource must be included on the Goal 5 inventory. The OAR 660-016-0000 requirements are not intended to be a shortcut to the conflict identification and ESEE analysis required under OAR 660-016-0005 and 0010. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. The valid inventory description for site-specific resources required by OAR 660-016-0000(2) refers to resource sites rather than smaller parcels such as tax lots. *Ramsey v. Multnomah County*, 44 Or LUBA 722 (2003).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A county decision establishing a one-half-mile radius impact area around proposed dwellings within a Goal 5 wildlife habitat area is supported by substantial evidence, where the county relies on studies that

human impacts extend one-half mile from dwellings and elk prefer to be at least one-half mile from humans. *Doty v. Jackson County*, 43 Or LUBA 34 (2002).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Other than to require that the county "maintain a record" of a determination that a mining site is non-significant, OAR 660-023-0030(6) does not address or provide any criteria with respect to a request to add a mining site to the county's comprehensive plan list of non-significant sites, and does not authorize the county to approve or deny that request based on concerns regarding the impacts of mining. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Read in context, the ORS 215.298 provision allowing a mining operation on EFU-zoned lands if the site is on an "inventory" in a comprehensive plan is a reference to a Goal 5 "inventory" of mineral sites. Because under the 1982 Goal 5 rule the term "inventory" referred to an inventory of *significant* mineral sites, ORS 215.298 allows mining in an EFU zone only if the site is on a comprehensive plan inventory of significant mineral sites, not if the site is on a separate list of nonsignificant sites. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Absent a showing that amendments regulating natural resources not on the city's acknowledged Goal 5 inventory are intended to create or amend or have the effect of creating or amending a Goal inventory, such amendments need not comply with Goal 5 or the Goal 5 rule. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Code provisions protecting historic structures that are described in the county's inventory as significant, important or contributing to the significance of the overall resource are not properly interpreted to protect an accessory structure on the subject property that is not mentioned in the county's inventory. *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A local ordinance that institutes a process to remove property from a Goal 5 historic resources inventory but fails to include a method to determine whether the historic designation was "imposed" on the property, within the meaning of ORS 197.772(3), is inconsistent with that statute. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A local government may not apply only local code provisions to an application to remove property from a historic resources inventory, where the local code provisions are inconsistent with statutory provisions permitting removal of certain properties from a historic resources inventory. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. In addressing OAR 660-016-0000(2) and (3) for a proposed aggregate site expansion, the county must determine whether the aggregate resource on the subject site is of comparable or superior quality to aggregate resource sites already included on the acknowledged inventory, regardless of the availability of those sites for mining. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. For a local government to properly evaluate the quality and quantity of aggregate resources on a parcel, test holes or borings must be "representative." To be representative, a reasonable person must conclude that the local government's findings as to the quantity and quality of the resource *throughout* the subject property are supported by substantial evidence. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A finding that the subject property contains no identified Goal 5 resources is not adequate to address the Goal 4 requirement that "other forested lands" be designated as forest lands if such lands are needed to maintain soil, water, air, fish and wildlife resources. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where a county has an acknowledged Goal 5 program, which includes an acknowledged inventory, and rural wetlands are included in a special category that is not part of that inventory, amendments to the county's ordinance that modify protections to rural wetlands do not change the county's procedures for inventorying Goal 5 resources and do not conflict with Goal 5 because they continue to provide interim protection of resources in a special category. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 33 Or LUBA 152 (1997).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. In approving a comprehensive plan amendment, the county's analysis and findings regarding potential effects of an aggregate operation on surrounding lands are sufficient to support a 1B listing on the county's Goal 5 inventory. Because listing the site as a potential aggregate resource does not actually permit a mining operation, the county is not required to address the requirements of ORS 215.296 as part of its decision. *O'Rourke v. Union County*, 32 Or LUBA 447 (1997).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. In the absence of a showing that the county has followed the process set forth in OAR chapter 660, division 16, to place a state viewpoint on its Goal 5 inventory, it may not rely on Goal 5 to protect the viewpoint from the impact of growing trees on the subject property. *DLCD v. Yamhill County*, 31 Or LUBA 488 (1996).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Because listing a 1B site adds the site to the Goal 5 inventory and under ORS 215.298(2), inventoried sites are available to be mined under a conditional use permit, a 1B site that has not yet been subjected to a Goal 5 significance review process nonetheless may be mined under a conditional use permit. *O'Rourke v. Union County*, 31 Or LUBA 174 (1996).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where an issue raised by petitioners regarding the county's decision to include intervenor's site in its Goal 5 inventory was decided in a prior LUBA appeal of the same decision, that issue cannot be raised again. *O'Rourke v. Union County*, 31 Or LUBA 174 (1996).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A 1B designation on the county's Goal 5 inventory means that inadequate information exists on the site to determine its nature and, therefore, a county cannot rely on a site being listed as a 1B site to conclude that aggregate uses are allowed outright. *Tognoli v. Crook County*, 30 Or LUBA 272 (1996).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. OAR 660-16-000(3) recognizes practical limitations on information gathering with respect to both quantity and quality of aggregate resources at sites other than the one being evaluated under Goal 5 regulations. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. If a local government adds an aggregate site to its comprehensive plan inventory as a "1B" site, a statement in the inventory that the site "will be reviewed through the Goal 5 process before [the local government's] next periodic review" satisfies the requirement of OAR 660-16-000(5)(b) that the plan include a "time-frame" for completing the Goal 5 process. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. The analysis of resource location, quality and quantity and determination of site significance mandated by OAR 660-16-000(1) to (4) are required to be completed only if the 1A (do not put on inventory) or 1C (place on inventory and complete Goal 5 process) options are chosen. The 1B option is to be used where the available information indicates the possible existence of a resource site, but is not sufficient to perform the analysis required by OAR 660-16-000(1) to (4). *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. A decision to list a site on a plan aggregate resources inventory as a "1B" site simply indicates the possible existence of an aggregate resource site. Such a decision, of itself, neither plans for nor regulates the *development* of aggregate resources and, therefore, OAR 660-16-030(1) does not apply. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. If the local governing body's interpretation of its comprehensive plan as not already designating the subject property as a 1B aggregate resources site, or providing a method of doing so without amending the acknowledged plan, is not clearly wrong, LUBA will defer to the governing body's interpretation. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. In adopting post-acknowledgment comprehensive plan amendments, other than amendments to the plan's acknowledged Goal 5 inventory itself, a local government is entitled to rely on its acknowledged Goal 5 inventory and need not consider possible impacts on alleged Goal 5 resource sites that are not included on the Goal 5 inventory. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where petitioner challenges a local government's failure to address the impact of a plan amendment on

resources petitioner believes should be included on the local government's acknowledged Goal 5 inventory, but does not challenge the adequacy of the local government's findings concerning inventoried Goal 5 resources affected by the proposed plan amendment, petitioner fails to demonstrate the plan amendment violates Goal 5. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Where the only inventory of historic structures maintained by a city has not been adopted as part of the city's acknowledged comprehensive plan, a post-acknowledgment decision not to designate an inventoried building as a historical landmark is not a de facto post-acknowledgment plan amendment, even though the decision may ultimately allow the building to be demolished. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

9.2 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Inventory. Under the Goal 5 rule, 1B sites are those for which some information exists, but that information is not adequate to identify the site with particularity. For 1B sites, the local government must include the site in its plan as a special category and commit to complete the Goal 5 process in the future. However, the Goal 5 rule provides that special implementing measures are neither appropriate nor required for 1B sites. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. In redesignating and rezoning protected habitat from forest land to marginal land under *former* ORS 197.247 (1991), a local government errs by excluding adjacent forest land from the impact area under OAR 661-023-0040(3) without establishing that it is not also protected habitat. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where a post-acknowledgement plan amendment would increase the amount of impervious surfaces permitted on the subject property, resulting in increased runoff volume, and the city's stormwater manual states that stormwater treatment facilities are designed to capture and treat only 80 percent of runoff volume, a conclusory finding that "the City standards will adequately collect and treat stormwater runoff" is inadequate to demonstrate, for purposes of OAR 660-023-0250(3)(b), that the city standards will eliminate the possibility of conflicts with a nearby creek which is a Goal 5 resource. *Nicita v. City of Oregon City*, 79 Or LUBA 22 (2019).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where an economic, social, environmental and energy (ESEE) analysis identifies conflicting uses as the commercial and high-density residential development allowed under a proposed post-acknowledgement plan amendment, and concludes that the greater development intensity and imperviousness may result in greater direct impacts on water quality and water temperature in a nearby creek which is a Goal 5 resource, arguments that the ESEE analysis does not specifically address pollution from stormwater provide no basis for reversal or remand because OAR 660-023-0040(2) does not require a more detailed identification of conflicting uses. *Nicita v. City of Oregon City*, 79 Or LUBA 22 (2019).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Petitioners fail to establish that the city erred in concluding that rezoning a property to neighborhood commercial is consistent with Statewide Planning Goal 5 when the rezoning the subject property constitutes a PAPA for purposes of applying Goal 5, which provides that local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource by allowing new uses that "could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list." The city's PAPA is a very limited one, that in relevant part simply applies the zones implementing the city's comprehensive plan designations that the acknowledged comprehensive plan has already designated for the corresponding uses. Because the challenged PAPA simply implements that acknowledged plan designation choice with the exercise of little or no discretion, the PAPA does not authorize any "new uses" for purposes of OAR 660-023-0250(3) and Goal 5. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where a local code provision, which is acknowledged to comply with Goal 5, allows the construction of a reservoir for surface mining in conjunction with an irrigation district, but requires that sites proposed for that use be added to the local government's inventory of non-significant mineral sites through a post-acknowledgment plan amendment (PAPA), such a PAPA does not allow "new uses that could be conflicting uses" with a Goal 5 resource, and therefore does not require further analysis under Goal 5, where the construction of a reservoir is otherwise

allowed for a recreation-oriented facility without a PAPA. *Bishop v. Deschutes County*, 79 Or LUBA 380 (2019).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Under OAR 660-023-0040, in determining whether a post-acknowledgement plan amendment (PAPA) will allow uses that could conflict with a Goal 5 resource, a local government must evaluate all uses allowed outright or conditionally in the zones applied to the subject property, not just those uses proposed by the applicant. In addition, while a local government may conclude that existing regulations are sufficient to eliminate the possibility of such conflicts, a local government errs by concluding the PAPA will not allow potentially conflicting uses merely because the applicant's development plan limits development to a certain extent. Such a determination must instead be based on the uses allowed outright or conditionally in the zones applied to the subject property, regardless of the property's ownership, limitations in specific proposed development, or limitations imposed in the PAPA approval. *Cattoche v. Lane County*, 79 Or LUBA 466 (2019).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Under OAR 660-023-0180(5)(b) a local government must determine existing or approved land uses that may be adversely affected by mining at an inventoried significant aggregate resource site, including conflicts with Statewide Planning Goal 5 resource sites that are shown on an acknowledged inventory of significant resource sites for which the requirements of Statewide Planning Goal 5 have been completed. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Based on an ESEE consequences analysis regarding conflicting uses, under OAR 660-023-0040(4) and (5), a county must develop a program to achieve Goal 5, and determine whether to allow, limit, or prohibit conflicting uses. A local government errs in its ESEE analysis and in its ultimate decision to modify its acknowledged Goal 5 program to eliminate the prohibition on churches in the Wildlife Area Combining Zone, when it relied in part on the cost of defending its existing Goal 5 program against a hypothetical Religious Land Use and Institutionalized Persons Act (RLUIPA) lawsuit to support its decision to achieve Goal 5 by allowing without limits a new conflicting use, without providing an analysis establishing the county's Goal 5 program would be legally vulnerable to losing a hypothetical RLUIPA lawsuit if one were brought. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. To allow a conflicting use without limit under OAR 660-023-0040(5)(c), a county's ESEE analysis must (1) demonstrate that the conflicting use is of sufficient importance relative to the resource site, and (2) must indicate why measures to protect the resource "to some extent should not be provided." OAR 660-023-0040(5)(c) does not prohibit the county from allowing a conflicting use without limit, if there is another option that would both fully protect the resource at issue and satisfy the motivations prompting the county to decide in favor of the conflicting use. Instead, OAR 660-023-0040(5)(c) requires the county to justify its choice to allow a conflicting use without limit, and that justification must include a demonstration that alternatives, such as imposing limits or measures to provide some protection for the resource consistent with

OAR 660-023-0040(5)(b) should not be provided. Assuming that demonstration is made, OAR 660-023-0040(5) and Goal 5 do not compel the local government to choose alternatives that fully or partially protect the resource. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. In the context of a county's Goal 5 analysis, LUBA will reject the county's argument that there are no measures that the county could adopt to protect wildlife habitat from the negative impacts of churches without running afoul of a Religious Land Use and Institutionalized Persons Act (RLUIPA) requirement–that governments not impose a "substantial burden" on religious exercise–where the county's ESEE analysis includes no evaluation of any measures or any findings on this point, and without actually evaluating any measures that would provide some protection to wildlife resources, it is difficult to understand how the county could reach a conclusion that no measures could be adopted to protect wildlife resources without also imposing a "substantial burden" on religious exercise. In such a circumstance, remand is necessary for the county to adopt an ESEE analysis that either does not rely on the mere threat of RLUIPA litigation, or that actually evaluates whether the county's existing Goal 5 program is inconsistent with the RLUIPA Equal Terms or Substantial Burden requirements, so that the county can consider whether there are measures it can adopt pursuant to OAR 660-023-0040(5)(b) and (c) to reduce impacts on wildlife resources and include those evaluations in the revised ESEE analysis. As part of that analysis, the county may consider, if necessary, whether identified measures would impose a "substantial burden" on the free exercise of religion. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. The Goal 5 rule, at OAR chapter 660, division 23, includes a "standard" process for inventorying, evaluating and protecting natural resources, at OAR 660-023-0030 to 660-023-0050, that includes rules for evaluating the ESEE consequences for allowing, limiting, or prohibiting uses that conflict with a natural resource site. The Goal 5 rule also includes "special" standards and procedures for specific types of Goal 5 resources, including those that govern aggregate mineral resources, at OAR 660-023-0180. According to OAR 660-023-0020(1), sometimes both the standard process and a special process apply; sometimes the special process supersedes the standard process in whole, or in part, and in case of conflict the specific process controls. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. OAR 660-023-0180(5)(a) requires the local government to identify conflicts with existing and approved uses located within a determined "impact area" limited in size to 1,500 feet from the boundaries of the mining area, unless factual information indicates "significant potential conflicts" beyond 1,500 feet. After deciding to allow mining under OAR 660-023-0180(5), the county must also go on to consider whether to allow, limit, or prevent new or future conflicting uses within the impact area pursuant to OAR 660-023-0180(7). For this limited inquiry, the county must conduct the analysis pursuant to the standard ESEE process in OAR 660-023-0040 and-0050. OAR 660-023-0040(3) requires local governments to "determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource," which means that unlike the impact area

determined under OAR 660-023-0180(5)(a), the impact area determined under OAR 660-023-0040(3) is not initially limited to 1,500 feet and the geographic extent of the impact area is determined by evaluating whether "allowed uses could adversely affect the identified resource," rather than evaluating whether there is factual information indicating "significant potential conflicts" beyond an initial 1,500 feet. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Petitioners have not established that a county's failure to determine an impact area for purposes of OAR 660-023-0180(7) pursuant to the standard ESEE process at OAR 660-023-0040(3) is more than harmless error, where it is not clear that an impact area determined under OAR 660-023-0040(3) would be larger or different than the one the county established under OAR 660-023-0180(5)(a), petitioners have not identified any new conflicting uses within a more expansive impact area that could adversely impact the mining site and that therefore should have been limited or prevented based on the arguably more sensitive OAR 660-023-0040(3) test, compared to the "significant potential conflict" test that the county employed under OAR 660-023-0180(5)(a), and because the applicant is the only party that could possibly be harmed by employing a potentially smaller impact area as determined under OAR 660-023-0180(5)(a), and the applicant is not challenging that potentially smaller impact area but rather is actively defending it on appeal. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. In the context of a post-acknowledgment plan amendment to inventory a significant aggregate site and allow mining of that site under Goal 5, if the local government concludes based on its ESEE analysis that new conflicting uses should be allowed within the impact area under the existing comprehensive plan and land use regulations, the local government's program to achieve the goal in that regard may consist of simply relying on its acknowledged comprehensive plan and land use regulations to protect the resource site from new conflicting uses pursuant to OAR 660-023-0040(2)(a). *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A county does not necessarily err by distinguishing between a large part of the county where few people live and a smaller part of the county where the majority of the county's population lives as a basis for adopting programs with differing levels of protection for big game habitat. But a significant increase in permissible residential densities in the smaller more heavily impacted area must be justified. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. OAR 660-023-0030 to 660-023-0050 call for a step by step planning process that results in an analysis of the consequences of allowing, limiting, or prohibiting uses that conflict with inventoried Goal 5 resource sites. But after that planning process is complete, the rule does not require separately considering the cumulative impacts of all identified conflicting uses. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where the record includes only speculative testimony that mining would impact sage grouse causing them to relocate and conflict with grazing operations beyond the proposed one-half-mile mining impact area, thus justifying a larger impact area, a county finding that mining would neither impact sage grouse nor cause them to relocate nor result in conflicts with distant farming operations is supported by substantial evidence, where the record includes testimony from the manager of a nearby grazing operation that there were no nearby sage grouse and the proposed mine would not have any impacts on grazing. *Central Oregon Landwatch v. Deschutes County*, 72 Or LUBA 45 (2015).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where a city's acknowledged Goal 5 program to protect wetlands and natural resources already allows trails and bicycle and pedestrian ways in wetland and natural resources overlay districts, the city's adoption of a transportation system plan that authorizes a regional trail through wetland and natural resource areas does not authorize a new "conflicting use" for purposes of OAR 660-023-0250(3)(b) and thus does not require further analysis under Goal 5 or the Goal 5 rule. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. In determining the size of an impact area under OAR 660-023-0180(5)(a) and whether "factual information indicates significant potential conflicts beyond" the 1,500-foot impact area set out in the rule, a county reasonably concludes that the record does not include "factual information indicating significant potential conflicts" beyond one mile from the subject mine site, where the county reasonably relies on expert evidence from a hydrologist to conclude that blasting would not cause damage to wells either within or beyond one mile from the site. *Poto v. Linn County*, 67 Or LUBA 162 (2013).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. In determining the size of an impact area under OAR 660-023-0180(5)(a) and whether "factual information indicates significant potential conflicts beyond" the 1,500-foot impact area set out in the rule, nothing in ORS 215.301 obligates a county to expand the impact area to include a planted vineyard located within one mile of the mine site. ORS 215.301 is a law, and cannot reasonably be understood to be the "factual information" referenced in OAR 660-023-0180(5)(a). *Poto v. Linn County*, 67 Or LUBA 162 (2013).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. In considering conflicts with agricultural practices under OAR 660-023-0180(5)(b), nothing in ORS 215.301 mandates that the outcome of a county's conflicts analysis must be that batching is a conflict that cannot be minimized. If the evidence showed absolutely no conflicts between a batching plant and a vineyard located closer than two miles from the property, under the Goal 5 rule the county could add the site to its inventory of Significant Resource Sites with All Conflicts Minimized, but would be prohibited from approving batching *under ORS 215.301* unless the exemption in ORS 215.301(2) applies. *Poto v. Linn County*, 67 Or LUBA 162 (2013).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where there is no evidence in the record that diesel exhaust from trucks traveling to and from a proposed mining site on a public road will have a significant effect on berry farming on a nearby farm or will significantly increase the cost of berry farming, a local government reasonably concludes that there will be no significant effect on crops growing along the public road. *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291 (2012).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where the local government relied on the applicant's proposal to use a retrenching method to determine that dewatering from the mining operation will not affect groundwater levels of nearby wells and therefore not conflict with agricultural irrigation practices, but no condition of approval requires the retrenching method to be used, remand is required in order for the local government to condition its approval on use of the retrenching method. *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291 (2012).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Floodwater that enters and leaves a mining operation during a flood event is not an "other discharge" as that phrase is used in OAR 660-023-0180(5)(b)(A). *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291 (2012).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Remand is necessary to address testimony from a neighboring rancher that noise from blasting operations at a proposed quarry will force a significant change in or significantly increase the cost of the neighboring ranching operations, where the county's conclusion that cattle will not be grazing during the months when blasting occurs is based on a presumption in the applicant's expert's report that is not supported by anything in the record and that presumption is contradicted by other evidence in the record. *Nash v. Deschutes County*, 63 Or LUBA 27 (2011).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A local government errs in concluding that it is not required to apply Statewide Planning Goal 5 to a post acknowledgement plan amendment (PAPA) that adds lands to the county's map of lands eligible for a destination resort by relying on an ESEE analysis that was completed and adopted 16 years prior to the proposed PAPA and that does not include any analysis of the new lands proposed for inclusion on the destination resort map. *Root v. Klamath County*, 63 Or LUBA 230 (2011).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. The fact that the entire Goal 5 planning document that a local government adopted for a site was adopted as part of the comprehensive plan does not necessarily mean that the identification of conflicts and ESEE analysis portions of that document that were not included in the Program to Achieve the Goal must be given regulatory effect. Whether those portions of the ESEE analysis have regulatory effect depends on the text of those portions of the ESEE analysis and their context. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where the zoning ordinance definition of "noise-sensitive uses" is ambiguous and

could be interpreted to include the entire parcel where the use is located or more narrowly to include only the use's structure, and there is some contextual support for limiting the use to the structure, LUBA will defer to the local government's decision to adopt the more narrow interpretation. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. In determining the size of an impact area under OAR 660-023-0180(5)(a) and whether "factual information indicates significant potential conflicts beyond" the 1,500-foot impact area set out in the rule, a county must evaluate evidence submitted regarding land that is located beyond the 1,500-foot impact area and potentially some distance from the mining site. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Remand is necessary to address testimony from a neighboring rancher that noise from blasting rock at a proposed quarry will force a significant change in or significantly increase the cost of ranching practices, where the findings do not address that testimony or noise impacts in general, but instead rely on fencing and a 200-foot buffer area to conclude that mining would not impact nearby grazing operations. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where sage grouse habitat is not a significant resource shown on a county's Goal 5 inventory of significant resources, the county need not consider impacts of a mining operation on sage grouse habitat, except to the extent impacts on habitat also result in impacts to a sage grouse breeding site that is listed in the county's Goal 5 inventory. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A county reasonably concludes that the record does not include "factual information indicating significant potential conflicts" with respect to whether a proposed quarry will disrupt sage grouse flights to and from a protected breeding site, where the only evidence suggesting that grouse flights come near the quarry site is a map the significance of which is subject to conflicting expert testimony. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. OAR 660-023-0180(5)(b)(A) requires a county to consider conflicts due to noise, dust, etc. with "existing" uses that are sensitive to such discharges. There is no basis under the rule for a county to conclude that Native American cultural and religious visits to pictograms and native burial sites are not "existing" uses because those visits do not occur on a regular basis. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A condition requiring that the applicant for mining restrict rock blasting for up to three days after being notified of Native American cultural or religious visits to a nearby site is sufficient to ensure that noise from blasting will not conflict with such visits. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A county's failure to first determine the degree of adverse effects of blasting-generated dust on a nearby residence before conducting its ESEE analysis, as required by OAR 660-023-0180(5)(d)(A), is not reversible error, where the county's ESEE analysis finds that a condition of approval restricting blasting times to periods when the wind blows away from the residence will minimize or eliminate adverse impacts on the residence. That finding, if supported by the record, means that the county did not need to conduct an ESEE analysis at all with respect to impacts of dust on the residence. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. If a mineral and aggregate site is found to be significant under OAR 660-023-0180(3), then local governments must determine whether mining will be allowed. That in turn requires a number of additional determinations regarding: (1) an impact area, conflicts, and (3) whether conflicts can be minimized. OAR 660-023-0180(5)(a) - (c). If all identified conflicts can be minimized, mining must be allowed. OAR 660-023-0180(5)(c). If all identified conflicts cannot be minimized, the local government must then determine the economic, social, environmental, and energy consequences of allowing mining notwithstanding that the conflicts cannot be minimized. OAR 660-023-0180(5)(d). *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. As part of its identification of uses that conflict with the Goal 5 resource, a reasonable decision maker could determine that, given the evidence of long term and consistent opposition to the mine, the impacts from the mine on nearby residents would engender legal action and social and economic pressure on the mine that would conflict with the Goal 5 resource. *Hegele v. Crook County*, 56 Or LUBA 1 (2008).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. The language of OAR 660-016-0005(1) and the Court of Appeals' interpretation of that rule in *Hegele v. Crook County*, 190 Or App 376, 379, 78 P3d 1254 (2003) support the conclusion that conflicting uses may be uses that, while not specifically listed in the zoning district as allowed *land uses*, are nevertheless uses that could conflict with a Goal 5 resource. *Hegele v. Crook County*, 56 Or LUBA 1 (2008).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A county errs in identifying "recreational visitors, motorists, and bicycles" that are not incidental to or associated with the nearby residential uses as uses that conflict with the Goal 5 resource, where the evidence in the record regarding those activities is limited to such activities as incidental to residential uses. *Hegele v. Crook County*, 56 Or LUBA 1 (2008).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where there are unchallenged findings that an aggregate mine presents no actual risk of contamination to groundwater wells, a county is not obligated to adopt findings addressing the possibility that potential users of groundwater wells may *perceive* a risk of contamination. The mere perception of a risk is too tenuous and indirect to constitute a "negative impact" that must be analyzed under OAR 660-016-0005 and OAR 660-016-0010. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where a local government determines that there are no conflicting uses allowed under the applicable zoning districts, the local government need not undertake an ESEE analysis, but must simply adopt appropriate policies and ordinance provisions, such as zoning, to ensure preservation of the resource site. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. The final steps in the analysis required under OAR 660-023-0180 to review requests for mining are limited and structured: (1) the county must determine whether there are any conflicts with the proposed mining, (2) if there are conflicts the county must consider whether there are measures that would minimize those conflicts, (3) if conflicts cannot be minimized, the county must determine the economic, social, environmental and energy consequences of allowing, limiting or not allowing mining. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A county's obligation under OAR 660-023-0180(4)(c) to consider reasonable measures to minimize conflicts associated with mining and its obligation under OAR 660-023-0180(4)(d) to consider economic, social, environmental and energy consequences of allowing, limiting or not allowing mining are "findings" obligations, and they do not place an obligation on the county to produce evidence regarding an application for mining. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. OAR 660-016-0005 does not limit the size of the impact area or the types of conflicting uses that may be considered. Under the rule, a local government may consider visual impacts of proposed mining on residential use in the area as a "conflicting use," even if such conflicts do not rise to the level of nuisance or trespass claims. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where a staff report and evidentiary hearings focus on an area within 500 feet of the subject property as the relevant "impact area" for purposes of conducting the conflicts identification and ESEE analysis required by OAR 660-016-0005 and OAR 660-016-0010, the county may not deny an application under Goal 5 based on conflicts in a 15-square-mile area that is identified for the first time in its final decision, without offering the applicant an opportunity to submit evidence and argument responsive to the larger impact area. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. In determining whether conflicting uses can be minimized pursuant to OAR 660-023-0180(4), a local government may draw reasonable inferences from expert testimony to determine that a numerical standard for minimization, such as for turbidity, cannot be satisfied. *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251 (2002).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Under OAR 660-023-0180(4)(b) and OAR 660-023-0180(4)(c) a local government may either determine that there are no potential conflicts associated with a proposed aggregate mining proposal or that, although there are potential conflicts associated with the proposed aggregate mining, the conflicts can be minimized. The options available under these two rules are separate and distinct, and a decision that does not make it clear which option is being selected must be remanded. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Until the county has adopted findings that determine precisely what inventoried Goal 5 resource areas are located on the subject property, it is not possible to identify which county Goal 5 resource protection programs affect all or parts of the subject property, and the county is in no position to adopt findings explaining whether a committed-exception zone-change is consistent with the county's existing Goal 5 resource protection provisions. *Pekarek v. Wallowa County,* 36 Or LUBA 494 (1999).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where a conflicting use is proposed on property within the boundaries of a Goal 5 resource site, it is not sufficient for the county to consider only the location and quality of the resource on the subject property. It must also consider the location and quality of the resource in the area that is potentially subject to impacts from conflicting residential uses on the subject property. *Doty v. Jackson County,* 34 Or LUBA 287 (1998).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where a local government fails to identify the location and quality of winter range habitat potentially affected by proposed residences in the area, it is impossible to meaningfully evaluate the impact of conflicting residential uses on winter range habitat. *Doty v. Jackson County*, 34 Or LUBA 287 (1998).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A local government is required to consider all potential uses and their conflicts with a proposed Goal 5 use where the number of potential uses is limited. However, if it is evident that a use was effectively considered as part of a larger category of uses, the failure to specify the individual use by name or to relate it to a specific local code section is not an error. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. The level of precision required in the conflicting use analysis required by the Goal 5 rule is difficult to determine. The process is fluid and subject to refinement based on new information. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. In performing an ESEE consequences analysis, the local government is not required to quantify every conceivable conflict between the resource use and every conflicting use. The requirement is more general and is guided by *Columbia Steel Castings Co. v. City of Portland*, 314 Or 424, 840 P2d 71 (1992), which requires that the local government must be aware of the

general nature and scope of the identified conflicts and their interplay. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Under ORS 215.296(1), a local government must identify farm and forest uses on land surrounding the subject parcel and examine the practices necessary to continue those uses. The absence of findings sufficient to demonstrate compliance with ORS 215.296(1) undermines the conclusion that there will be no conflicts with surrounding farm or forest uses under Goal 5. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. Where a county comprehensive plan's Goal 5 ESEE analyses adequately describe the resource site and the conflicting uses, and their interaction, analysis of smaller parcels within the site is not required. *Buhler Ranch v. Wallowa County*, 33 Or LUBA 594 (1997).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A county's Goal 5 ESEE analysis is sufficient if it addresses the uses identified by the county as conflicting. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A local government decision changing the comprehensive plan and zone designations of land with identified Goal 5 resources, must identify conflicting uses potentially allowable under the proposed new designations. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

9.3 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Conflicting Use Identification. A local government may not simply assume a new residential plan designation will have less impacts on identified Goal 5 resources on the subject property than are allowable under the existing industrial plan designation, without considering limitations on industrial activity on the subject property that are imposed by an overlay district. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. In conducting an ESEE analysis under OAR 660-023-0040(4), a local government does not err by analyzing multiple groups of similar resources and similarly zoned properties within a single resource site. *Restore Oregon v. City of Portland*, 80 Or LUBA 158 (2019).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. In conducting an ESEE analysis under OAR 660-023-0040(4), a local government does not err by estimating the economic impact to properties that would be affected by protecting the resource site based on assumptions that lead to a conclusion of greater economic impact to those properties than if the ESEE analysis used different assumptions that were applied in estimating the economic impact to other properties, nor does the local government err in failing to consider the cost of environmental remediation that will be incurred to develop specific properties. *Restore Oregon v. City of Portland*, 80 Or LUBA 158 (2019).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. While local governments have substantial discretion in determining the scope of the impacts that they may consider in conducting an ESEE analysis under OAR 660-023-0040(4), they may not fail to evaluate both the impacts of the resource site on conflicting uses and the impacts of the conflicting uses on the resource site. *ODOT v. Grant County*, 80 Or LUBA 192 (2019).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. In conducting an ESEE analysis under OAR 660-023-0040(4), a local government does not err by characterizing a proposed limitation on a conflicting use as a negative impact of the resource site on the conflicting use, even where the proposed limitation is already required under the local code, where the local code could be amended in the future to remove that requirement. *ODOT v. Grant County*, 80 Or LUBA 192 (2019).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. In redesignating and rezoning protected habitat from forest land to marginal land under *former* ORS 197.247 (1991), a local government errs by excluding adjacent forest land from the impact area under OAR 661-023-0040(3) without establishing that it is not also protected habitat. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. An attorney-land-use-consultant-prepared ESEE analysis including numerous plans, reports, and other documents supporting the redesignation and rezoning of protected habitat from forest land to marginal land under *former* ORS 197.247 (1991) is not sufficient to rebut expert testimony including (1) a letter authored by an ODFW biologist that generally discusses the cumulative impact of development on habitat and (2) general ODFW guidance related to levels of residential density in areas of peripheral big game habitat absent evidence of the attorney land use consultant's expertise. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where an economic, social, environmental and energy (ESEE) analysis identifies conflicting uses as the commercial and high-density residential development allowed under a

proposed post-acknowledgement plan amendment, and concludes that the greater development intensity and imperviousness may result in greater direct impacts on water quality and water temperature in a nearby creek which is a Goal 5 resource, arguments that the ESEE analysis does not specifically address pollution from stormwater provide no basis for reversal or remand because OAR 660-023-0040(2) does not require a more detailed identification of conflicting uses. *Nicita v. City of Oregon City*, 79 Or LUBA 22 (2019).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. It is not sufficient for petitioners to simply point out that the sound study that was prepared to develop a Statewide Planning Goal 5 program to protect an aggregate resource site does not measure noise in precisely the manner required by the Oregon Department of Environmental Quality (DEQ) rules, without any attempt to show that any deviations from required sound measuring locations could have the effect of allowing noise levels that violate DEQ standards. Where the applicant's expert took the position that the selected sound measuring locations did not have the effect of inflating the ambient noise level or otherwise rendering those sound measurements inaccurate, at least some effort to challenge the expert's position is required to show the deviations may have led to inaccurate sound readings for purposes of determining if DEQ noise standards will be met. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Based on an ESEE consequences analysis regarding conflicting uses, under OAR 660-023-0040(4) and (5), a county must develop a program to achieve Goal 5, and determine whether to allow, limit, or prohibit conflicting uses. A local government errs in its ESEE analysis and in its ultimate decision to modify its acknowledged Goal 5 program to eliminate the prohibition on churches in the Wildlife Area Combining Zone, when it relied in part on the cost of defending its existing Goal 5 program against a hypothetical Religious Land Use and Institutionalized Persons Act (RLUIPA) lawsuit to support its decision to achieve Goal 5 by allowing without limits a new conflicting use, without providing an analysis establishing the county's Goal 5 program would be legally vulnerable to losing a hypothetical RLUIPA lawsuit if one were brought. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. To allow a conflicting use without limit under OAR 660-023-0040(5)(c), a county's ESEE analysis must (1) demonstrate that the conflicting use is of sufficient importance relative to the resource site, and (2) must indicate why measures to protect the resource "to some extent should not be provided." OAR 660-023-0040(5)(c) does not prohibit the county from allowing a conflicting use without limit, if there is another option that would both fully protect the resource at issue and satisfy the motivations prompting the county to decide in favor of the conflicting use. Instead, OAR 660-023-0040(5)(c) requires the county to justify its choice to allow a conflicting use without limit, and that justification must include a demonstration that alternatives, such as imposing limits or measures to provide some protection for the resource consistent with OAR 660-023-0040(5)(b) should not be provided. Assuming that demonstration is made, OAR 660-023-0040(5) and Goal 5 do not compel the local government to choose alternatives that fully or partially protect the resource. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. In the context of a county's Goal 5 analysis, LUBA will reject the county's argument that there are no measures that the county could adopt to protect wildlife habitat from the negative impacts of churches without running afoul of a Religious Land Use and Institutionalized Persons Act (RLUIPA) requirement–that governments not impose a "substantial burden" on religious exercise–where the county's ESEE analysis includes no evaluation of any measures or any findings on this point, and without actually evaluating any measures that would provide some protection to wildlife resources, it is difficult to understand how the county could reach a conclusion that no measures could be adopted to protect wildlife resources without also imposing a "substantial burden" on religious exercise. In such a circumstance, remand is necessary for the county to adopt an ESEE analysis that either does not rely on the mere threat of RLUIPA litigation, or that actually evaluates whether the county's existing Goal 5 program is inconsistent with the RLUIPA Equal Terms or Substantial Burden requirements, so that the county can consider whether there are measures it can adopt pursuant to OAR 660-023-0040(5)(b) and (c) to reduce impacts on wildlife resources and include those evaluations in the revised ESEE analysis. As part of that analysis, the county may consider, if necessary, whether identified measures would impose a "substantial burden" on the free exercise of religion. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. The Goal 5 rule, at OAR chapter 660, division 23, includes a "standard" process for inventorying, evaluating and protecting natural resources, at OAR 660-023-0030 to 660-023-0050, that includes rules for evaluating the ESEE consequences for allowing, limiting, or prohibiting uses that conflict with a natural resource site. The Goal 5 rule also includes "special" standards and procedures for specific types of Goal 5 resources, including those that govern aggregate mineral resources, at OAR 660-023-0180. According to OAR 660-023-0020(1), sometimes both the standard process and a special process apply; sometimes the special process supersedes the standard process in whole, or in part, and in case of conflict the specific process controls. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. OAR 660-023-0180(5)(a) requires the local government to identify conflicts with existing and approved uses located within a determined "impact area" limited in size to 1,500 feet from the boundaries of the mining area, unless factual information indicates "significant potential conflicts" beyond 1,500 feet. After deciding to allow mining under OAR 660-023-0180(5), the county must also go on to consider whether to allow, limit, or prevent new or future conflicting uses within the impact area pursuant to OAR 660-023-0180(7). For this limited inquiry, the county must conduct the analysis pursuant to the standard ESEE process in OAR 660-023-0040 and OAR 660-023-0050. OAR 660-023-0040(3) requires local governments to "determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource," which means that unlike the impact area determined under OAR 660-023-0180(5)(a), the impact area determined under OAR 660-023-0040(3) is not initially limited to 1,500 feet and the geographic extent of the impact area is determined by evaluating whether "allowed uses could adversely affect the identified resource," rather than evaluating whether there is factual information indicating "significant potential

conflicts" beyond an initial 1,500 feet. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Petitioners have not established that a county's failure to determine an impact area for purposes of OAR 660-023-0180(7) pursuant to the standard ESEE process at OAR 660-023-0040(3) is more than harmless error, where it is not clear that an impact area determined under OAR 660-023-0040(3) would be larger or different than the one the county established under OAR 660-023-0180(5)(a), petitioners have not identified any new conflicting uses within a more expansive impact area that could adversely impact the mining site and that therefore should have been limited or prevented based on the arguably more sensitive OAR 660-023-0040(3) test, compared to the "significant potential conflict" test that the county employed under OAR 660-023-0180(5)(a), and because the applicant is the only party that could possibly be harmed by employing a potentially smaller impact area as determined under OAR 660-023-0180(5)(a), and the applicant is not challenging that potentially smaller impact area but rather is actively defending it on appeal. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. In the context of a post-acknowledgment plan amendment to inventory a significant aggregate site and allow mining of that site under Goal 5, if the local government concludes based on its ESEE analysis that new conflicting uses should be allowed within the impact area under the existing comprehensive plan and land use regulations, the local government's program to achieve the goal in that regard may consist of simply relying on its acknowledged comprehensive plan and land use regulations to protect the resource site from new conflicting uses pursuant to OAR 660-023-0040(2)(a). *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where a county's ESEE analysis relies on an inflated estimate of the number of acres of big game habitat added to its Goal 5 inventory and greater existing residential densities in an area to justify allowing significantly increased residential densities on big game habitat in that area, remand is required for a better explanation of the county's rationale for increasing those residential densities. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where state agencies took the position before the county that two different county EFU zones were equally valuable for big game habitat, and without explanation the county amended its comprehensive plan Goal 5 protection program to allow significantly increased residential densities in one of those zones, remand is required for an explanation of the county's rationale. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. OAR 660-023-0030 to 660-023-0050 call for a step by step planning process that results in an analysis of the consequences of allowing, limiting, or prohibiting uses that conflict with inventoried Goal 5 resource sites. But after that planning process is complete, the rule does

not require separately considering the cumulative impacts of all identified conflicting uses. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. In order for the Goal 5 requirement at OAR 660-010-005 and OAR 660-023-0050(2) of an evaluation of the economic, social, environmental, and energy (ESEE) consequences of a plan amendment for a property which includes wetlands to apply, the wetlands must be on an acknowledged inventory of "Goal 5 resources." Absent any evidence in the record that the wetlands are included on a county inventory of Goal 5 resources, Goal 5 does not apply to require an ESEE analysis of wetlands on subject property. *Landwatch Lane County v. Lane County*, 75 Or LUBA 258 (2017).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where the issue of whether a county erred by removing property from its Goal 5 inventory of Deer General Winter Range was clearly resolved against petitioner in a prior appeal, petitioner's attempt to revive that issue in a subsequent appeal is barred under the holding in *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), and constitutes a position presented "without probable cause to believe the position was well-founded in law * * *" under ORS 197.830(15)(b). *Wood v. Crook County*, 75 Or LUBA 494 (2017).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where a county's Goal 5 ESEE analysis and program make a decision to fully allow uses that conflict with inventoried wildlife habitat, and the county zones the property to fully allow those conflicting uses, the county is not required to remove the property from its wildlife habitat inventory. But where the county does remove the property from its wildlife habitat inventory and LUBA rejects all challenges to the Goal 5 ESEE analysis and program and remands on a different issue, in a subsequent appeal of the county's decision on remand a petitioner may not assign error to the county's removal of the property from its wildlife habitat inventory because that is a resolved issue under *Beck v. Tillamook County*, 313 Or 148, 153, 831 P2d 678 (1992). *Wood v. Crook County*, 74 Or LUBA 278 (2016).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where a Goal 5 ESEE analysis is based on the uses authorized by a particular zoning district, but the program ultimately adopted by the county includes an amended version of the zoning district, adopting the amended version of the zoning district is not error, where petitioner neither alleges nor demonstrates that the amended zoning district allows any uses that are not allowed by the pre-amendment zoning district. *Wood v. Crook County*, 74 Or LUBA 278 (2016).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Under OAR 660-004-0020(2)(c), a county does not err when determining that permitting adaptive reuse of existing historic structures in the proposed exception area results in fewer adverse consequences, compared to locating the proposal on other resource lands that require an exception, which would require significant new construction of infrastructure and accordingly more adverse consequences. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. OAR 660-023-0180(7) requires that a local government conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses within the impact area of a Goal 5 resource. Where a petitioner raised general issues of compliance with OAR 660-023-0180(7) during the proceedings below, but in its findings the county declined to conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses, on appeal to LUBA the petitioner may challenge the county's finding that it need not conduct an ESEE analysis. The petitioner is not required to anticipate that the county will adopt findings concluding that no ESEE analysis is required. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Nothing in OAR 660-023-0180(7), which requires that a local government conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses within the impact area of a Goal 5 mining resource, allows a county to postpone the ESEE analysis to a future land use proceeding after it has approved the comprehensive plan and zoning changes to allow the mining use that triggers application of OAR 660-023-0180(7). *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where in an initial appeal LUBA concluded that the ESEE Consequences Determination portion of Goal 5 planning for a site was not part of the regulatory Resource Protection Program, any attempt in the decision on remand from LUBA to give regulatory effect to parts of that ESEE Consequences Determination portion of Goal 5 planning for a site will be rejected on appeal to LUBA. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Before it is appropriate to consider the non-regulatory ESEE Consequences Determination portion of Goal 5 planning for a site as context for interpreting the regulatory Resource Protection Program there must first be an ambiguity in the Resource Protection Program. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where in its initial decision the county applies the old Goal 5 rule at OAR chapter 660, division 16, instead of the new Goal 5 rule, and no issue was raised about that position in the first appeal to LUBA, the county is arguably constrained on appeal of its decision on remand from arguing that the old Goal 5 rule does not apply and instead the new Goal 5 rule applies. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. A local government errs in concluding that it is not required to apply Statewide Planning Goal 5 to a post acknowledgement plan amendment (PAPA) that adds lands to the county's map of lands eligible for a destination resort by relying on an ESEE analysis that was completed and adopted 16 years prior to the proposed PAPA and that does not include any analysis of the new lands proposed for inclusion on the destination resort map. *Root v. Klamath County*, 63 Or LUBA 230 (2011).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. The fact that the entire Goal 5 planning document that a local government adopted for a site was adopted as part of the comprehensive plan does not necessarily mean that the identification of conflicts and ESEE analysis portions of that document that were not included in the Program to Achieve the Goal must be given regulatory effect. Whether those portions of the ESEE analysis have regulatory effect depends on the text of those portions of the ESEE analysis and their context. *Hoffman v. Deschutes County,* 61 Or LUBA 173 (2010).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. A county's failure to first determine the degree of adverse effects of blasting-generated dust on a nearby residence before conducting its ESEE analysis, as required by OAR 660-023-0180(5)(d)(A), is not reversible error, where the county's ESEE analysis finds that a condition of approval restricting blasting times to periods when the wind blows away from the residence will minimize or eliminate adverse impacts on the residence. That finding, if supported by the record, means that the county did not need to conduct an ESEE analysis at all with respect to impacts of dust on the residence. *Walker v. Deschutes County,* 59 Or LUBA 488 (2009).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. If a mineral and aggregate site is found to be significant under OAR 660-023-0180(3), then local governments must determine whether mining will be allowed. That in turn requires a number of additional determinations regarding: (1) an impact area, (2) conflicts, and (3) whether conflicts can be minimized. OAR 660-023-0180(5)(a) - (c). If all identified conflicts can be minimized, mining must be allowed. OAR 660-023-0180(5)(c). If all identified conflicts cannot be minimized, the local government must then determine the economic, social, environmental, and energy consequences of allowing mining notwithstanding that the conflicts cannot be minimized. OAR 660-023-0180(5)(d). *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. At a minimum, the analysis of the ESEE consequences of allowing or prohibiting the mining operation should address the four ESEE factors (economic, social, environmental and energy), and should address the evidence petitioner submitted on those points. *Hegele v. Crook County,* 56 Or LUBA 1 (2008).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. The mere fact that a local government did not repeat the entire Goal 5 ESEE analysis process in adopting post-acknowledgement plan and land use regulation amendments does not provide a basis for remand. A local government must consider the new plan and land use regulation provisions and any new conflicting uses allowed and explain how its existing Goal 5 program continues to be adequate to protect its inventoried Goal 5 resources. *Johnson v. Jefferson County,* 56 Or LUBA 25 (2008).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Remand is necessary where the county's ESEE findings evaluate impacts of dust from daily mining activities on nearby residences, but fail to evaluate dust generated by blasting

or determine whether such impacts may be minimized or reduced. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Under OAR 660-016-0005(1), if the only identified negative impact is from the resource to an allowed use, then the allowed use is not a "conflicting use" for purposes of the rule. Such negative impacts on an allowed use are considered only when conducting the analysis of economic, social, environmental and energy consequences under OAR 660-016-0005(3). *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. OAR 660-010-0010(3) requires local governments to include in the comprehensive plan a statement of "reasons" that support the decision to protect a resource site, allow conflicting uses fully, or limit conflicting uses. That "reasons" statement may consist of a summary, and the local government need not incorporate the entire ESEE analysis into the comprehensive plan as its "reasons." *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. OAR 660-023-0007 exempts the determination of a "program to protect historic resources" from the requirement to conduct an ESEE (economic, social, environmental and energy) analysis. The scope of that exemption is ambiguous, and could plausibly exempt (1) a local government's entire historic resources "program," as that rule broadly defines that term, or (2) only those parts of the program that "protect" historic resources, which a rule definition narrowly limits to local government review of applications for demolition or alteration of historic resources. Given the intertwined nature of most historic resources programs, the better reading of OAR 660-023-0007 is that it comprehensively exempts from the ESEE analysis adoption or modification of the "program," not merely those parts of the program that require local government review of applications for demolition or alteration of historic resources. *NWDA v. City of Portland*, 50 Or LUBA 310 (2005).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where a local government determines that there are no conflicting uses allowed under the applicable zoning districts, the local government need not undertake an ESEE analysis, but must simply adopt appropriate policies and ordinance provisions, such as zoning, to ensure preservation of the resource site. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. The final steps in the analysis required under OAR 660-023-0180 to review requests for mining are limited and structured: (1) the county must determine whether there are any conflicts with the proposed mining, (2) if there are conflicts the county must consider whether there are measures that would minimize those conflicts, (3) if conflicts cannot be minimized, the county must determine the economic, social, environmental and energy consequences of allowing, limiting or not allowing mining. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. A county's obligation under OAR 660-023-0180(4)(c) to consider reasonable measures to minimize conflicts associated with mining and its obligation under OAR 660-023-0180(4)(d) to consider economic, social, environmental and energy consequences of allowing, limiting or not allowing mining are "findings" obligations, and they do not place an obligation on the county to produce evidence regarding an application for mining. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Because OAR 660-023-0200(7) provides that local governments are not required to apply the ESEE process in order to determine a program to protect historic resources, it follows that a local government is also not required to apply the ESEE process when the city allows a new use that could conflict with a particular historic resource. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. The OAR 660-016-0000 requirement to identify the "location" of the resource within an identified "impact area" is intended to assist the local government to determine the "significance" of the resource and whether it should be included on the Goal 5 inventory. If found to be "significant," the resource must be included on the Goal 5 inventory. The OAR 660-016-0000 requirements are not intended to be a shortcut to the conflict identification and ESEE analysis required under OAR 660-016-0005 and 0010. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. OAR 660-016-0005 does not limit the size of the impact area or the types of conflicting uses that may be considered. Under the rule, a local government may consider visual impacts of proposed mining on residential use in the area as a "conflicting use," even if such conflicts do not rise to the level of nuisance or trespass claims. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where a staff report and evidentiary hearings focus on an area within 500 feet of the subject property as the relevant "impact area" for purposes of conducting the conflicts identification and ESEE analysis required by OAR 660-016-0005 and OAR 660-016-0010, the county may not deny an application under Goal 5 based on conflicts in a 15-square-mile area that is identified for the first time in its final decision, without offering the applicant an opportunity to submit evidence and argument responsive to the larger impact area. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Under OAR 660-023-0180(4)(d), a local government, as part of its decision-making obligations, must conduct the environmental, social, energy, and environmental (ESEE) determination and, based on that determination, decide whether to allow, limit, or not allow mining. The burden of conducting the ESEE determination cannot be shifted to the applicant. *Molalla River Reserve, Inc. v. Clackamas County*, 42 Or LUBA 251 (2002).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. The level of precision required in the conflicting use analysis required by the Goal 5 rule is difficult to determine. The process is fluid and subject to refinement based on new information. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. In performing an ESEE consequences analysis, the local government is not required to quantify every conceivable conflict between the resource use and every conflicting use. The requirement is more general and is guided by *Columbia Steel Castings Co. v. City of Portland*, 314 Or 424, 840 P2d 71 (1992), which requires that the local government must be aware of the general nature and scope of the identified conflicts and their interplay. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Even though noise levels may be legally increased on a parcel under DEQ regulations, an ESEE analysis must consider the economic impact of actual increased noise throughout the impact area. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where a county comprehensive plan's Goal 5 ESEE analyses adequately describe the resource site and the conflicting uses, and their interaction, analysis of smaller parcels within the site is not required. *Buhler Ranch v. Wallowa County*, 33 Or LUBA 594 (1997).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. Where the county identifies Big Game Habitat Range as a Goal 5 resource that conflicts with a proposed aggregate operation, it must identify the evidence upon which it relies to support its finding that the proposed quarry will have insignificant impacts on big game more than one-quarter mile away. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. A county's Goal 5 ESEE analysis is sufficient if it addresses the uses identified by the county as conflicting. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. The county's finding, made as part of its Goal 5 ESEE analysis, that an aggregate site located within a Big Game Habitat Range is not uniquely suited to wildlife must be supported by substantial evidence, not just a statement that the wildlife can "freely relocate" to other parts of the Big Game Habitat Range. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

9.4 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – ESEE Consequence Determination. A local government may not simply assume a new residential plan designation will have less impacts on identified Goal 5 resources on the subject property than are allowable under the existing industrial plan designation, without considering limitations on industrial activity on the subject property that are imposed by an overlay district. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a significant resource overlay zone provision requires that (1) resource sites not be altered or impacted to a degree that destroys their significance, (2) the proposed development not result in the loss of habitat for threatened or endangered species, (3) all feasible alternatives to the development that would not result in a substantial adverse impact on identified resource values be considered and rejected, (4) the development be sited on the property in such a manner that minimizes adverse impacts on identified resources, and (5) documentation be provided regarding requirements for state or federal permits or licenses and that appropriate resource management agencies have reviewed the development proposal against their plans, policies, and programs, the local government does not err in concluding that that provision applies at the development stage rather than the PAPA stage. *VanSickle v. Klamath County*, 80 Or LUBA 241 (2019).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a local code provision, which is acknowledged to comply with Goal 5, allows the construction of a reservoir for surface mining in conjunction with an irrigation district, but requires that sites proposed for that use be added to the local government's inventory of non-significant mineral sites through a post-acknowledgment plan amendment (PAPA), such a PAPA does not allow "new uses that could be conflicting uses" with a Goal 5 resource, and therefore does not require further analysis under Goal 5, where the construction of a reservoir is otherwise allowed for a recreation-oriented facility without a PAPA. *Bishop v. Deschutes County*, 79 Or LUBA 380 (2019).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. How to (1) plan and zone an inventoried significant mineral and aggregate resource site, and (2) plan and zone any adjoining areas that may be needed for processing or buffers or to otherwise mitigate identified conflicts are separate questions from what property is properly included on a comprehensive plan Statewide Planning Goal 5 inventory of significant aggregate sites. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. In determining whether a local government inventoried elk habitat as a significant Statewide Planning Goal 5 resource and adopted a program to protect that inventoried significant elk habitat, or instead determined not to inventory the elk habitat as significant or to defer adopting a protection program, LUBA considers what the local government actually adopted rather than the labels or terminology the local government used in adopting the comprehensive plan. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. The OAR 660-023-0180(1)(b) requirement to minimize conflicts does not require an absolute guarantee that a proposed mining operation will never violate Oregon Department of Environmental Quality (DEQ) standards. A local government does not err by finding that DEQ noise standards will be met, based on the applicant's sound study, and by imposing a condition of approval that mining be monitored for noise in the future and any changes in mining be made in the future to fully comply with DEQ noise standards, without requiring that mining cease until the mine fully complies with DEQ noise standards. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. OAR 340-225-0040 and OAR 340-225-0050 modeling requirements to determine whether a proposed mining operation will comply with ambient air quality and new source air particulate standards are not mere procedural requirements an applicant is free to ignore. The applicant and local government must either perform the required modeling or demonstrate that the modeling is unnecessary to demonstrate the proposed mining will comply with the air particulate standards. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. In adopting a post-acknowledgment plan amendment, under OAR 660-023-0250(3)(b) a city is not required to apply Goal 5 directly "unless the [amendment] affects a Goal 5 resource." In changing the comprehensive plan and zoning map designations to allow higher intensity uses, a city may not assume the overlay protections that were previously applied to protect the Goal 5 resources from lower intensity uses will be adequate to ensure that no Goal 5 resource will be affected. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. LUBA will reject an interpretation of a county Wildlife Area overlay zone, which implements Statewide Planning Goal 5 to protect winter range in part by prohibiting new churches in winter range, to the effect that the WA overlay zone prohibits churches in winter range areas only where the underlying base zone categorizes churches as a conditional use, but that interpretation would allow churches in winter range areas if the underlying base zone categorizes churches as something other than a conditional use, given that conflicts between churches and winter range are the same whether churches are categorized as permitted or conditional uses. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A hearings officer Misconstrues the text and context of a county's Wildlife Area (WA) overlay zone, in concluding that prohibitions on certain new uses, including churches, in winter range areas are limited exclusively to areas where the underlying base zone categorizes such uses as conditional uses, where other provisions of the WA overlay zone make it clear that the prohibition on new uses in winter range is not limited to uses categorized as conditional uses in the underlying base zone. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. To address a historic design standard requiring that new construction be "compatible with the appearance and character of the historic district," adequate findings must, at a minimum, (1) describe the appearance and character of the historic district, as relevant, (2) describe the appearance and character of the proposed structure, and (3) explain why the proposed structure is or is not compatible with the appearance and character of the historic district. *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. To address a historic design standard requiring that new construction be "compatible

with the appearance and character of the historic district," the decision-maker is not required to reference the description of the appearance and character of a historic district included in the nomination to the federal historic register, but that description is a relevant and convenient source. Because the decision-maker must base the compatibility analysis on something, unless the decision-maker duplicates some of the descriptive work in the federal register nomination, there may be no practical substitute for considering the federal register nomination. *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Remand for more adequate findings is required where a historic design standard requires a finding that the relationship of new construction to the street and open space between buildings is compatible with the adjacent historic buildings and the historic character of the surrounding area, but the findings address only compliance with code setback requirements, and fail to identify or address compatibility with adjacent historic buildings and the historic character of the surrounding area. *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A finding that the height of new construction is "similar" to dwellings within a historic district is insufficient to establish compliance with a standard requiring that new construction not exceed the height of historic buildings in the surrounding area, where the surrounding area includes both historic and non-historic buildings, and the findings do not identify what buildings the height is compared to, or find that the height of new construction does not exceed the height of the tallest historic building in the surrounding area. *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. ORS 197.015(10)(b)(H)(iii) excludes from LUBA's jurisdiction a land use compatibility statement (LUCS) that identifies required local land use reviews that the applicant must obtain in order to carry out the proposed activity. However, where a LUCS suggests that the applicant could seek an exception to Statewide Planning Goal 5 in order to eliminate the requirement to obtain a permit to develop within a Goal 5 resource area, the suggestion to obtain a Goal 5 exception does not identify a type of required local land use review for purposes of ORS 197.015(10)(b)(H)(iii). *Todd v. Clackamas County*, 73 Or LUBA 369 (2016).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A computer-generated map that is based on adopted Goal 5 paper maps may be used as a convenient starting point for determining whether property is within a Goal 5 resource area, although if there is conflict between the digital map and the adopted Goal 5 paper maps, the latter control. *Todd v. Clackamas County*, 73 Or LUBA 369 (2016).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A finding that taking an exception to Goal 4 is warranted to allow adaptive reuse of Goal 5 historic structures located on forest lands because allowed uses under Goal 4 will not raise sufficient revenue to offset the cost of maintaining those structures, if supported by substantial evidence, is a sufficient reason why the policy embodied in Goal 4 should not apply to the exception area. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Goal 5 imposes obligations on local governments with respect to the preservation of historic resources and requires a local government to act in a way to help willing property owners achieve actual and not merely nominal preservation of historic resources. Such obligations can constitute a demonstrated need based on the requirements of Goal 5 as a basis for taking a reasons exception. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Under OAR 660-004-0022, a county does not err in finding that a proposed adaptive reuse of a historic structure has special features or qualities that necessitate its location because the proposed use, adaptive reuse of a historic structure, must occur within the structure and cannot occur elsewhere. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Under OAR 660-004-0020(2)(b), a county does not err in finding that an analysis of alternative non-resource sites for a proposed adaptive reuse of a Goal 5 historic structure is not required because reuse of a particular historical structure dictates that no alternative site not requiring an exception can reasonably accommodate the adaptive reuse. *King v. Clackamas County*, 72 Or LUBA 143 (2015).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. OAR 660-023-0040(1) provides that an ESEE analysis "should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected" when developing a program to protect Goal 5 resources. A challenge to this "clear understanding" requirement that challenges the summary of the ESEE analysis rather than the adopted ESEE analysis itself provides no basis for reversal or remand, where the ESEE analysis identifies conflicts and consequences and identifies possible mitigation measures. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. OAR 660-023-0040(5)(b) requires that when allowing conflicting uses fully the local government must show why measures to protect the resource to some extent should not be provided. Where a local government adopts a lengthy discussion regarding the extremely poor quality of a site for wildlife habitat and how wildlife that may be attracted to the site pose a serious risk of danger to airplanes landing and taking off from the airport, the decision adequately explains why the site should not be protected to some extent for wildlife habitat under Goal 5. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. OAR 660-023-0180(5)(g) requires the local government to allow "a currently approved" aggregate processing operation at a site that was previously included on the county's inventory of significant aggregate sites to process material from a new or expansion site without requiring a reauthorization of the existing processing operation, except in limited circumstances where limits on processing of material from a different site were established at the time the existing site was approved by the local government. *Pioneer Asphalt, Inc. v. Umatilla County*, 71 Or LUBA 65 (2015).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where OAR 660-023-0180(5)(g) does not define "currently approved," a county's interpretation of the phrase as meaning that a permit authorizing an existing aggregate processing operation was issued and remains effective is not inconsistent with the rule. *Pioneer Asphalt, Inc. v. Umatilla County*, 71 Or LUBA 65 (2015).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Evidence in the record consisting of (1) a permit issued in 1992 authorizing an aggregate processing operation on a site that is included on the county's inventory, and (2) subsequent annual review letters from the county confirming that the conditions of the permit are met and renewing the permit are substantial evidence supporting a county's conclusion that the aggregate processing operation is "currently approved" within the meaning of OAR 660-023-0180(5)(g). *Pioneer Asphalt, Inc. v. Umatilla County*, 71 Or LUBA 65 (2015).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. ORS 197.772(3) is silent regarding what procedure should be followed when a property owner requests removal of a property from a Goal 5 inventory of historic resources, pursuant to the statute. Because such removal constitutes a comprehensive plan amendment, the local government does not err in following the code procedures applicable for a comprehensive plan amendment, including local appeals to the governing body. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a local government approves an asphalt parking lot under a historic site review standard requiring that proposed development conform with the "character" of the historic district, LUBA will affirm the local government's interpretation that an asphalt parking lot conforms to the character of the district, because asphalt is a common building material in the district, even if asphalt paving is not itself a described feature of the historic district. *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Substantial evidence supports a finding that the value of proposed development outweighs the value of retaining rather than demolishing an historic structure, notwithstanding opponents' arguments that the city did not give weight to the architectural value of the structure, where the record indicates that the structure was designated only for its cultural, not architectural, significance. *Rushing v. City of Salem*, 70 Or LUBA 448 (2014).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Under a historic demolition permit standard requiring a finding that the value of proposed development outweighs the value of retaining the historic resource, evidence that there are better sites in the city for the proposed development, a playground, is irrelevant to the question posed by the standard, which requires a comparison of the value of constructing the playground on the site against the value of retaining the historic resource. *Rushing v. City of Salem*, 70 Or LUBA 448 (2014).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A city's finding that a historic resource is not capable of generating a reasonable economic return is supported by substantial evidence, where the applicant submitted detailed studies showing that the cost of rehabilitating the structure to meet current building codes would far exceed the reasonable rental value, notwithstanding conflicting testimony by opponents that rehabilitation costs could be lower, and rental returns higher, than the applicant's experts estimated. *Rushing v. City of Salem*, 70 Or LUBA 448 (2014).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. LUBA will affirm a city council's determination that a good faith effort to lease an historic building is sufficient to satisfy a historic resource demolition permit standard requiring the applicant to demonstrate a good faith effort to "sell" the resource, where the city's findings explain that only the structure, and not the underlying land, is a designated historic resource, the city lacks authority to require the owner to sell the land, and the structure cannot be relocated intact. *Rushing v. City of Salem*, 70 Or LUBA 448 (2014).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A post-acknowledgment plan amendment that makes only minor changes to a program to protect riparian areas may require little or no analysis under the Goal 5 rule, where the changes are consistent with Goal 5 safe harbor provisions for protecting riparian areas, or allow only types of public facilities that the safe harbor rules expressly allow in riparian areas. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a city's acknowledged Goal 5 program to protect wetlands and natural resources already allows trails and bicycle and pedestrian ways in wetland and natural resources overlay districts, the city's adoption of a transportation system plan that authorizes a regional trail through wetland and natural resource areas does not authorize a new "conflicting use" for purposes of OAR 660-023-0250(3)(b) and thus does not require further analysis under Goal 5 or the Goal 5 rule. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A county ordinance adopted solely to protect erodible soils and federally listed threatened species, neither of which are resources listed in the county's Goal inventory, does not amend the county's program to protect Goal 5 resources such as riparian areas, even if the ordinance would likely have the unintended effect of also protecting some inventoried Goal 5 resources. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a local government amends its program to achieve Goal 5 with respect to inventoried natural resources, by adopting additional measures to protect those resources from an identified conflicting use, and thus adjusting the balance initially struck in its initial ESEE analysis to limit conflicting uses, the local government must address the requirements of the Goal 5 rule at OAR chapter 660, division 23, revisit portions of its ESEE analysis as necessary and adopt findings based on that ESEE analysis explaining its choice to impose additional limitations on conflicting uses. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where in an initial appeal LUBA concluded that the ESEE Consequences Determination portion of Goal 5 planning for a site was not part of the regulatory Resource Protection Program, any attempt in the decision on remand from LUBA to give regulatory effect to parts of that ESEE Consequences Determination portion of Goal 5 planning for a site will be rejected on appeal to LUBA. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Before it is appropriate to consider the non-regulatory ESEE Consequences Determination portion of Goal 5 planning for a site as context for interpreting the regulatory Resource Protection Program there must first be an ambiguity in the Resource Protection Program. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Representations by a former owner that it only intended to mine 25 acres of an 80-acre site are insufficient legislative history to establish that the acknowledged Resource Protection Program for the site limits mining to 25 acres, where the programs for other sites expressly limited mining geographically but the program for the 80-acre site zoned all 80 acres for mining and imposed no express geographical limits. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A decision that merely adds an aggregate site to a comprehensive plan inventory of significant aggregate resource sites may not trigger application of the transportation planning rule (TPR) in any of the ways described in OAR 660-012-0060(1). But when the county decides to allow mining of the site and places an overlay zone on the site to allow mining, that zone change authorizes a new, more traffic-intensive use of the property and may trigger application of the TPR. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A local government's interpretation of its code to allow the setback distance from a wetland to be measured from the city's Goal 5 maps is correct where the applicable language allows the setback to be measured from either the Goal 5 map or a wetland delineation that is provided by the property owner, where a wetland delineation is submitted by an applicant who is not a property owner and is later withdrawn. *Willamette Oaks LLC v. Lane County*, 64 Or LUBA 328 (2011).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Maps based on a city's GIS database that do not differ in any material respect from the city's Goal 5 map and are not a smaller scale than the city's adopted Goal 5 map provide substantial evidence regarding the location of wetland boundaries. *Willamette Oaks LLC v. Lane County*, 64 Or LUBA 328 (2011).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where the challenged decision approves (1) a comprehensive plan amendment adding a site to the county's Goal 5 inventory of significant sites, and (2) a zone change to allow mining of the site, because the zone change application is consolidated with, and dependent upon, the plan amendment, the goal-post rule at ORS 215.427(3) does not operate to "freeze" the standards that apply to the zone change to those applicable on the date the application was filed. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Because the end of the planning period plays an important role under the Transportation Planning Rule (TPR) at OAR 660-012-0060(1) in determining whether proposed plan or zone amendments significantly affect transportation facilities, when the county amends its transportation system plan to change the planning period from 2020 to 2030, the county must apply the new planning period in determining whether the proposed plan/zone change complies with the TPR. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where in its initial decision the county applies the old Goal 5 rule at OAR chapter 660, division 16, instead of the new Goal 5 rule, and no issue was raised about that position in the first appeal to LUBA, the county is arguably constrained on appeal of its decision on remand from arguing that the old Goal 5 rule does not apply and instead the new Goal 5 rule applies. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a site is included on a local government's Goal 5 inventory based on one type of mineral resource, a local government's decision that mining of a different non-inventoried mineral resource on the site may proceed without an amended ESEE analysis under Goal 5 will be remanded where the quantity of the non-inventoried mineral resource is five times the amount of the inventoried mineral resource and the mining of the non-inventoried resource may leave a significantly larger and more visible headwall that will conflict with nearby uses more than if only the inventoried mineral resource were removed. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A local government's zoning ordinance definitions of "dust-sensitive uses" and "noise-sensitive uses" apply in place of the broader consideration of "dust-sensitive uses" and "noise-sensitive uses" that the local government employed during the conflict identification/ESEE consequences phase of its Goal 5 planning, where the zoning ordinance Surface Mining Zone is the heart of the local government's ultimate Program to Achieve the Goal and there is no suggestion that the local government intended the broader consideration of "dust-sensitive uses" and "noise-sensitive uses" in the earlier Goal 5 planning phase that led up to the Program to Achieve the Goal to apply in place of the zoning ordinance definitions. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. The fact that the entire Goal 5 planning document that a local government adopted for

a site was adopted as part of the comprehensive plan does not necessarily mean that the identification of conflicts and ESEE analysis portions of that document that were not included in the Program to Achieve the Goal must be given regulatory effect. Whether those portions of the ESEE analysis have regulatory effect depends on the text of those portions of the ESEE analysis and their context. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where the zoning ordinance definition of "noise-sensitive uses" is ambiguous and could be interpreted to include the entire parcel where the use is located or more narrowly to include only the use's structure, and there is some contextual support for limiting the use to the structure, LUBA will defer to the local government's decision to adopt the more narrow interpretation. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a local government's Goal 5 Program to Achieve the Goal for a particular mineral and aggregate site requires "ongoing incremental reclamation (subject to [Department of Geology and Mineral Industries] review and approval)" the local government likely could interpret that requirement to allow it to write a condition requiring "ongoing incremental reclamation" but expressly providing that DOGAMI is free to determine whether "ongoing incremental reclamation" is possible or desirable and that DOGAMI may modify or waive that requirement altogether in its permitting process as DOGAMI sees fit. However, the county cannot simply abandon the requirement for "ongoing incremental reclamation" by claiming it lacks expertise in reclamation and does not understand the meaning of that requirement. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a zoning ordinance expressly prohibits a county from issuing a use permit as a precondition of commencing mining until the applicant secures a state agency approval for a reclamation plan, the local government's failure to include such a requirement in the conditions attached to its conditional use and site plan approval decision is harmless error. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Conditions of approval are not too vague under the Court of Appeals' reasoning in *Sisters Forest Planning Committee v. Deschutes Cty.*, 198 Or App 311, 108 P3d 1175 (2005), where the conditions of approval are not any more vague than many of the standards they were imposed to address. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A requirement that mining "not be allowed closer than one-quarter mile from any noise or dust sensitive use" is properly interpreted to impose a minimum setback, leaving the applicant to select the mining site so long as the site selected is at least one-quarter mile from any noise or dust sensitive use. Any attempt by the local government to interpret the standard to allow it unbridled discretion to enlarge the one-quarter-mile setback would likely run afoul of the ORS 215.416(8)(a) requirement that permit applications be approved or denied based on "standards." *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a zoning ordinance requires a mining permit applicant to demonstrate that a proposed mining operation can meet certain state standards and a state standard prohibits mining "without taking reasonable precautions to prevent particulate matter from becoming airborne," and a local government interprets that state standard to require that the applicant successfully prevent all particulate matter from becoming airborne, the local government erroneously interprets the state standard. The state standard only requires that the applicant take reasonable precautions; it does not require the elimination of all airborne particulate matter. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where sage grouse habitat is not a significant resource shown on a county's Goal 5 inventory of significant resources, the county need not consider impacts of a mining operation on sage grouse habitat, except to the extent impacts on habitat also result in impacts to a sage grouse breeding site that is listed in the county's Goal 5 inventory. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A post-acknowledgment plan amendment that allows additional categories of conflicting uses that were already allowed under the acknowledged comprehensive plan allows new conflicting uses within the meaning of ORS 660-023-0250(3)(b), and the decision adopting the post acknowledgment plan amendment must therefore apply Goal 5. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Under OAR 660-023-0030(3), where a local government determines that it does not have adequate information about a potential Goal 5 site, the local government "shall not regulate land uses in order to protect such sites." *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where the Goal 5 program requires that the riparian setback be determined from the "top of high bank," as characterized by "an abrupt or noticeable change from a steeper grade to a less steep grade," a hearings officer errs in locating the top of high bank without addressing whether the location is characterized by an abrupt or noticeable change in grade. *The Piculell Group v. City of Eugene*, 56 Or LUBA 298 (2008).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A conclusion that the 374-foot elevation corresponds to the top of high bank, characterized by "an abrupt or noticeable change from a steeper grade to a less steep grade," is not supported by substantial evidence, where evidence in the record indicates that the 374-foot elevation is one point on a barely perceptible slope with no perceptible change in grade. *The Piculell Group v. City of Eugene*, 56 Or LUBA 298 (2008).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Remand is necessary where one element of the test for determining the location of top

of high bank is contingent on a finding that "natural conditions prevail," but the hearings officer locates the top of high bank under that element without finding or explaining why "natural conditions prevail." *The Piculell Group v. City of Eugene*, 56 Or LUBA 298 (2008).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A hearings officer correctly relied upon the city's Goal 5 resource map to identify the boundary of a protected riparian area, and rejected the applicant's argument that the riparian setback can be determined on a case-by-case basis depending on the location of existing riparian vegetation, where nothing in the city's Goal 5 program suggests that the location of resource sites can be "refined" based on a site-by-site analysis. *The Piculell Group v. City of Eugene*, 56 Or LUBA 298 (2008).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A county may use an area larger than the subject property as the denominator in applying a one-dwelling-per-160-acres standard intended to protect deer wintering range, if the area chosen is justified based on applicable code or comprehensive plan provisions, or shown to be consistent with the text, context and purpose of the standard. *Young v. Crook County*, 56 Or LUBA 704 (2008).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a county's code and comprehensive plan are silent regarding how a one-dwelling-per-160-acres wildlife habitat standard is to be calculated, the county does not err in averaging residential density within the same 2000-acre study area that is used for the stability standard. *Young v. Crook County*, 56 Or LUBA 704 (2008).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where the Oregon Department of Fish and Wildlife (ODFW) testifies that that county's Goal 5 program to protect Other Winter Range relies upon resource zoning to limit residential density, and the findings do not address that testimony or explain why the county believes it can rezone Other Winter Range land to nonresource use without amending the county's Goal 5 program, LUBA will remand the decision to address the issue. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A finding that rural residential development will have "minimal impact" on wildlife habitat is not supported by substantial evidence, where the only evidence relied upon is a study that addressed a different proposal under which one-fifth of the property would have been placed in a conservation easement, and the county fails to impose or require such a condition or easement, or explain why the proposed development satisfies the minimal impact standard without such a condition. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a county limits application of its Goal 5 program to protect big game winter habitat to exclusive farm use zoned properties, a decision years later to remove exclusive farm use zoning amends an acknowledged land use regulation that was adopted to protect a Goal 5 resource,

and under OAR 660-023-0250(3)(a) that rezoning decision must be justified under Goal 5. *Wood v. Crook County*, 55 Or LUBA 165 (2007).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a county inventoried big game habitat, identified conflicting uses, analyzed the ESEE consequences, and identified the subject property as a 3B site (allow the uses which conflict with the resource site fully), the county governing body's interpretation that its code exempts 3B sites from further ESEE analysis is entitled to deference. *Kemp v. Union County*, 50 Or LUBA 61 (2005).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. OAR 660-023-0007 exempts the determination of a "program to protect historic resources" from the requirement to conduct an ESEE (economic, social, environmental and energy) analysis. The scope of that exemption is ambiguous, and could plausibly exempt (1) a local government's entire historic resources "program," as that rule broadly defines that term, or (2) only those parts of the program that "protect" historic resources, which a rule definition narrowly limits to local government review of applications for demolition or alteration of historic resources. Given the intertwined nature of most historic resources programs, the better reading of OAR 660-023-0007 is that it comprehensively exempts from the ESEE analysis adoption or modification of the "program," not merely those parts of the program that require local government review of applications for demolition or alteration of historic resources. *NWDA v. City of Portland*, 50 Or LUBA 310 (2005).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a local government determines that there are no conflicting uses allowed under the applicable zoning districts, the local government need not undertake an ESEE analysis, but must simply adopt appropriate policies and ordinance provisions, such as zoning, to ensure preservation of the resource site. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where the "resource protection program" is zoning that protects open space, when a local government amends the zone to allow a new use that could conflict with preservation of open spaces, it must either apply Goal 5 or take an exception to Goal 5. If it applies Goal 5, it must either demonstrate that the new use is not a conflicting use or, if it is, conduct an ESEE analysis sufficient to determine whether to protect the resource fully, allow conflicting uses, or limit conflicting uses. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Findings that a text amendment adding a new use to a park zone are inadequate to address protection of historic sites under Goal 5, where the findings address only one of several parks with historic sites, and fail to explain why allowing a new potentially conflicting use on or near historic sites is consistent with Goal 5. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Comprehensive plan language stating that the county will contact the state fish and wildlife agency "for any matter which could affect existing or potential wildlife habitat" within

general deer winter range areas does not authorize the county to waive a plan policy imposing an 80-acre density limitation to such areas after consulting with the agency. *Wood v. Crook County*, 49 Or LUBA 682 (2005).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. That the county's Goal 5 program initially applied regulations protecting big game habitat to areas zoned for resource use does not mean that such regulations are automatically lifted from a parcel of land that the county rezones from a resource zone to a newly created nonresource zone. *Wood v. Crook County*, 49 Or LUBA 682 (2005).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Adoption of an ordinance that authorizes demolition of a structure that the city's Goal 5 historic inventory classifies as "noncontributing" and that is not protected under the city's historic resource protection program does not alter the Goal 5 inventory or "amend" the city's "resource list" within the meaning of OAR 660-023-0250(3)(a). *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Because OAR 660-023-0200(7) provides that local governments are not required to apply the ESEE process in order to determine a program to protect historic resources, it follows that a local government is also not required to apply the ESEE process when the city allows a new use that could conflict with a particular historic resource. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a post-acknowledgment plan amendment allows new uses that could conflict with significant Goal 5 resource sites, and thus triggers application of the Goal 5 rule under OAR 660-023-0250(3), the city need not in all cases repeat the entire Goal 5 process, including the ESEE analysis. In many cases no more is required than an explanation for why the existing program to protect Goal 5 resources continues to be sufficient to protect those resources. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. ORS 197.467 requires imposition of a conservation easement to protect Goal 5-designated resources on the site of a proposed destination resort, and that requirement is not obviated by the fact that the Oregon Department of Fish and Wildlife has indicated that it will not require a conservation easement. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A county errs in interpreting a one dwelling per 40 acres density standard intended to protect Goal 5 wildlife habitat to be satisfied if the average dwelling density over a 1.2-million-acre area of the county does not exceed the standard, where the county's interpretation gives the standard no regulatory effect until over 28,000 dwellings are built in the area, and is inconsistent with the purpose of the standard to protect wildlife habitat. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A local standard imposing a one-dwelling-per-40-acres density limitation on Goal 5-protected wildlife habitat must be construed in a way that is consistent with its purpose and context to allow no more than one dwelling per 40 acres on the subject property. As applied to a destination resort, such a standard may effectively prohibit a resort that proposes 200 single-family residential lots in a 500-acre area. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A plan provision that simply repeats the Goal 5 rule requirement that resource sites be preserved, where no conflicting uses are identified, does not apply directly to protect a resource site where no conflicts are identified, where the plan makes clear that it is the "results and conclusions" of applying that plan provision and others that constitutes the county's program to protect Goal 5 resource sites. *Dundas v. Lincoln County*, 43 Or LUBA 407 (2002).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where the county's comprehensive plan makes it clear that it relied on a particular zoning district as its program to protect an existing mining operation from conflicting uses, and that zone allows mining and dwellings as conditional uses, the county does not err in requiring that a conditional use application to reopen that mine after it had been closed for over 10 years to demonstrate that the mine would be compatible with nearby dwellings. Any error that the county may have committed in subjecting an existing mine with no conflicts to conditional use review in the future if the mine closed was rendered irrelevant by LCDC's acknowledgment of the comprehensive plan. *Dundas v. Lincoln County*, 43 Or LUBA 407 (2002).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a county considers the impacts that a proposed rezoning would have on inventoried Goal 5 resources, and concludes that the existing Goal 5 protection program continues to be adequate to protect those resources, the county's conclusion satisfies Goal 5. *Doty v. Coos County*, 42 Or LUBA 103 (2002).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Under OAR 660-023-0250(3), a local government cannot adopt a post-acknowledgment plan amendment that amends the program to protect significant Goal 5 resources without establishing that the amendment complies with Goal 5 and the Goal 5 rule, even if the amendment merely increases the level of protection afforded inventoried Goal 5 resources. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Code provisions that were previously acknowledged to comply with Goal 5 and are carried forward into a new code without substantive change do not constitute an "amendment" of a Goal 5 regulation and thus do not trigger an obligation to establish that those amendments comply with the Goal 5 rule. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A zoning classification that implements a Goal 5 plan designation and is applied to an inventoried Goal 5 resource site is among the regulations that "protect a significant Goal 5

resource" for purposes of OAR 660-023-0250(3). Therefore, a substantive amendment to such a zoning classification must be evaluated under the Goal 5 rule. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A "safe harbor" provision at OAR 660-023-0090(8) allowing local governments to adopt ordinances implementing Goal 5 that allow an "existing structure" in a riparian area to be repaired or replaced is not properly interpreted to require a threshold inquiry into whether the "existing structure" was lawfully approved or developed. *Tylka v. Clackamas County*, 41 Or LUBA 53 (2001).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. The terms and not the title of a code provision setting forth certain exceptions to prohibited activities in riparian areas control the scope of the exceptions in that provision. LUBA will affirm a hearings officer's interpretation to that effect where the text and context of the provision indicate that the provision applies more broadly than its title suggests. *Tylka v. Clackamas County*, 41 Or LUBA 53 (2001).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Code provisions protecting historic structures that are described in the county's inventory as significant, important or contributing to the significance of the overall resource are not properly interpreted to protect an accessory structure on the subject property that is not mentioned in the county's inventory. *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A code provision allowing a historic resource to be relocated if it is on land that is "needed to accommodate" a planned transportation project is not properly interpreted in context to require the county to determine if an alternative alignment would not require relocation, where a related code provision prohibits the county from considering alternative alignments. *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Remand is appropriate where the local government approves an aggregate mine that appears to impact an inventoried Goal 5 groundwater resource without addressing issues raised below regarding whether the proposed mine complies with local provisions that were adopted to protect Goal 5 resources. *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Under OAR 660-023-0180(4)(b) and OAR 660-023-0180(4)(c) a local government may either determine that there are no potential conflicts associated with a proposed aggregate mining proposal or that, although there are potential conflicts associated with the proposed aggregate mining, the conflicts can be minimized. The options available under these two rules are separate and distinct, and a decision that does not make it clear which option is being selected must be remanded. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Under OAR 660-023-0180(4)(f) where a proposed aggregate mining operation will be located on Class I, II or Unique Farm land, the comprehensive plan must be amended to limit post-mining uses to uses listed under ORS 215.213(1) or 215.283(1) and fish and wildlife habitat uses. A decision authorizing mining that does not so limit post-mining uses must be remanded. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A committed-exception zone-change decision that acknowledges the existence of Goal 5 resources on the subject property, but concludes that the county's existing Goal 5 plan provisions will address any conflicts, is not adequate to demonstrate compliance with Goal 5, where the findings do not state which of the county's existing Goal 5 plan provisions ensure continued compliance once the exception is taken, and the findings do not consider whether the zone change may introduce the possibility of new conflicting uses. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A land development ordinance amendment adopting a half-acre minimum lot size for a flood hazard zone is not reviewable for compliance with Goal 5 where the acknowledged comprehensive plan calls for a half-acre minimum in the flood hazard zone. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A Goal 5 program requiring a 100-yard setback from the crests of certain moraines satisfies the OAR 660-16-010(3) requirement for "clear and objective standards" where the crest of a moraine can be located using accepted survey techniques. *Buhler Ranch v. Wallowa County*, 33 Or LUBA 594 (1997).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. A Goal 5 program requirement for a "suitable visual buffer" does not satisfy the OAR 660-16-010(3) requirement for "clear and objective standards." Such a requirement must clearly specify the outcome to be achieved by the screening and the vantage point from which the proposed dwelling must be screened. *Buhler Ranch v. Wallowa County*, 33 Or LUBA 594 (1997).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Where a county has an acknowledged Goal 5 program, which includes an acknowledged inventory, and rural wetlands are included in a special category that is not part of that inventory, amendments to the county's ordinance that modify protections to rural wetlands do not change the county's procedures for inventorying Goal 5 resources and do not conflict with Goal 5 because they continue to provide interim protection of resources in a special category. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 33 Or LUBA 152 (1997).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. LUBA will defer to the local governing body's interpretation that under its code provisions governing permits for the demolition of historic properties, the planning director's determination regarding compliance with pre-application requirements is not reviewable by the

historic review board or appealable to the governing body. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Whereas ORS 358.653(1) imposes a duty on state agencies and local governments that have a proprietary interest in historically significant properties to consult with the state Historic Preservation Office prior to seeking demolition of such properties, it does not establish requirements for state agencies and local governments to follow in carrying out their authority to regulate property under the ownership and control of other entities. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. The provisions of ORS 358.920 to 358.950 and 97.740 to 97.760 concerning excavation of archaeological sites are not approval standards a local government must address in approving a planned development, so long as the local government does not approve the planned development in a way that obviates the applicant's responsibility to comply with those statues, without demonstrating (1) the statutes do not apply to the excavation or construction that may be carried out under the challenged decision, or (2) the statutory requirements have been met. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

9.5 Goal 5 – Open Spaces and Natural Resources/ Goal 5 Rule – Resource Protection Programs. Code provisions that provide interim resource protection to property not on a local government's acknowledged Goal 5 resource inventories, until the Goal 5 planning process can be carried out, do not implement Goal 5. Therefore, local interpretations of such code provisions are not subject to reversal by LUBA under ORS 197.829(4). *Gage v. City of Portland*, 28 Or LUBA 307 (1994).

10. Goal 6 – Air, Water and Land Resource Quality. The relevant Goal 6 inquiry for a decision that amends comprehensive plan and zoning map designations, without approving any particular new development, is whether there is a reasonable expectation that applicable state and federal environmental quality standards can be met at the time the property is developed in the future. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

10. Goal 6 – Air, Water and Land Resource Quality. In approving a change in the comprehensive plan and zoning map designations for a property to allow construction of a medical office building, a city only needs to establish that it is reasonable to expect that federal and state environmental standards will be met in the future when permits for the medical office building are sought. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

10. Goal 6 – Air, Water and Land Resource Quality. At the post-acknowledgment plan amendment stage, a local government only need show it is reasonable to expect that applicable state and federal environmental quality standards can be met in order to show compliance with Statewide Planning Goal 6 (Air, Water and Land Resources Quality). *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

10. Goal 6 – Air, Water and Land Resource Quality. ORS 468B.025(1)(b) is a prohibitory statute, and applies whether or not a concept plan or any zoning ordinance expressly includes the prohibition. Failing to include that prohibition in the concept plan does not mean that the concept plan fails to comply with Goal 6. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

10. Goal 6 – Air, Water and Land Resource Quality. Goal 6 requires that the local government establish that there is a reasonable expectation that the use for which land use approval is requested will also be able to comply with the state and federal environmental quality standards that it must satisfy to be built. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

10. Goal 6 – Air, Water and Land Resource Quality. Findings supporting a legislative decision that amends the Oregon Highway Plan to provide a process for modifying mobility standards need not address issues raised below regarding whether future decisions approving higher mobility standards will cause increased congestion of specific transportation facilities and increase pollution contrary to Goal 6, where Goal 6 will apply directly to any future decisions approving higher mobility standards for specific transportation facilities, and such issues cannot be meaningfully addressed in a legislative decision adopting general amendments to the Oregon Highway Plan. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

10. Goal 6 – Air, Water and Land Resource Quality. Before a local government is obligated to consider whether a land use regulation amendment implicates its obligations under Goal 6 to ensure that the amendment will not lead to violation of air quality standards, there must be at least some minimal basis for suspecting that the land use regulation amendment will have impacts on air quality that would threaten to violate air quality standards. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

10. Goal 6 – Air, Water and Land Resource Quality. Goal 6 does not require that a local government anticipate and precisely duplicate state and federal environmental permitting

requirements in approving a post-acknowledgment plan amendment for an aggregate mine. The local government is only required to establish that there is a reasonable expectation that the proposed mine will be able to comply with the applicable state and federal environmental quality standards. *Friends of the Applegate v. Josephine County*, 44 Or LUBA 786 (2003).

10. Goal 6 – Air, Water and Land Resource Quality. An argument that rezoning a property violates Goal 6 because the property allegedly contains hazardous waste provides no basis for reversal or remand under Goal 6 because that goal is not directed at existing site conditions. Goal 6 is directed at "waste and process discharges from future development." *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

10. Goal 6 – Air, Water and Land Resource Quality. Proposed development of a property with existing environmental hazards does not violate Goal 6 where those hazards are attributable to past uses of the property rather than to "future development," and where the local government adopts findings and imposes conditions adequate to demonstrate that the proposed development will not violate state or federal environmental standards. *Neighbors for Livability v. City of Beaverton*, 40 Or LUBA 52 (2001).

10. Goal 6 – Air, Water and Land Resource Quality. Land use regulations may be adopted to comply with Goals 6 and 7 and related federal law requirements, without first complying with the Goal 5 planning requirements under OAR chapter 660, division 23, where the land use regulations are limited to those that may be required by Goals 6 and 7 and any related federal law requirements. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282 (2001).

10. Goal 6 – Air, Water and Land Resource Quality. If a local government's watershed is already in violation of applicable state environmental standards, it may not amend its comprehensive plan to allow future development that will compound that violation without either finding that the amendment is consistent with Goal 6 or taking an exception to Goal 6. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

10. Goal 6 – Air, Water and Land Resource Quality. In determining whether a proposed quarry expansion should be approved, the local government must find it is feasible to comply with applicable environmental standards addressing air and water quality and noise. In doing so, it is appropriate to impose conditions of approval and defer responsibility for monitoring compliance to planning and engineering staff at a later stage of development. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

10. Goal 6 – Air, Water and Land Resource Quality. Goal 6 is limited by its terms to discharges of pollutants from future development itself. It does not apply to all such discharges that may occur consequentially as a result of the development. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

10. Goal 6 – Air, Water and Land Resource Quality. Goal 6 requires a finding that a proposed use will be able to comply with applicable environmental standards, and is not satisfied by findings stating only that the proposed use will be required through conditions to comply with the standards. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

10. Goal 6 – Air, Water and Land Resource Quality. When a property's plan and zone designations are changed to allow a particular use, Goal 6 requires the local government to adopt findings explaining why it is reasonable to expect that applicable state and federal environmental quality standards can be met by the proposed use. Goal 6 does not require the local government to demonstrate its decision will not cause any adverse environmental impact on individual properties. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

10. Goal 6 – Air, Water and Land Resource Quality. Where a city fails to consider (1) pollutant sources other than those associated with automobile emissions, and (2) the cumulative impacts of waste and process discharges from the uses to be established in a UGB expansion area and the discharges from existing sources, the city lacks an adequate factual base for determining the proposed UGB amendment complies with Goal 6 with regard to impacts on air quality. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

11. Goal 7 – Natural Disasters and Hazards. Where a decision includes findings addressing Goal 7 and petitioner argues the city erred by not adopting findings that address a comprehensive plan policy adopted to implement Goal 7, but does not argue the plan policy imposes any obligation beyond those imposed by Goal 7, the findings challenge does not demonstrate remandable error. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

11. Goal 7 – Natural Disasters and Hazards. Where findings in support of comprehensive plan and zoning map amendments point out that the affected property is already planned and zoned for development and subject to overlay zones that impose development restrictions to address natural hazards, as required by Goal 7, and in challenging those findings petitioner makes no attempt to explain why those restrictions will be inadequate to address any wildfire concerns posed by newly authorized uses, petitioner's argument is insufficiently developed to state a basis for remand. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

11. Goal 7 – Natural Disasters and Hazards. Where a petitioner argues that a county decision that adopts a new zoning district without applying that new zoning district to any property violates Goal 7, but fails to identify what part of Goal 7 is implicated by such a decision, the petitioner provides no basis for reversal or remand. *Carver v. Deschutes County*, 58 Or LUBA 323 (2009).

11. Goal 7 – Natural Disasters and Hazards. A county could reasonably conclude that numerous standards that it adopted to reduce the fire risk associated with constructing dwelling on forested lands are sufficient to comply with Goal 7, even though the focus of those standards is on protecting dwellings from forest fires, where some of the standards are to reduce the fire risk to forests from such dwellings. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

11. Goal 7 – Natural Disasters and Hazards. Goal 7 requires local governments to evaluate risks from natural hazards and to avoid or prohibit development in areas "where the risk to public safety cannot be mitigated." A county may reasonably conclude that wildfire risk from destination resorts will be mitigated by the fire siting standards that apply to destination resorts under the county's zoning ordinance. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

11. Goal 7 – Natural Disasters and Hazards. A county's interpretation that a comprehensive plan policy, which implements Statewide Planning Goal 7 (Natural Disasters and Hazards), requires regulation of development in known areas potentially subject to natural disasters and is aimed at reducing risks to life and property that are *caused by natural hazards*, is not applicable in the context of a determination whether development is appropriate in a beaches and dunes area, pursuant to a comprehensive plan policy that implements Statewide Planning Goal 18 (Beaches and Dunes), which is aimed at reducing impacts that may be *caused by the proposed development*. *Borton v. Coos County*, 52 Or LUBA 46 (2006).

11. Goal 7 – Natural Disasters and Hazards. A city finding that plan amendments that authorize residential and nonresidential development in a floodplain does not offend Goal 7 because residential development is already allowed in the floodplain under the acknowledged comprehensive plan is sufficient to demonstrate that the plan amendment does not violate Goal 7. That the development authorized in the acknowledged comprehensive plan is residential development and the city does not consider land in a floodplain for purposes of meeting its housing

obligations under Goal 10 does not mean that the land could not be developed residentially under the acknowledged comprehensive plan. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

11. Goal 7 – Natural Disasters and Hazards. Land use regulations may be adopted to comply with Goals 6 and 7 and related federal law requirements, without first complying with the Goal 5 planning requirements under OAR chapter 660, division 23, where the land use regulations are limited to those that may be required by Goals 6 and 7 and any related federal law requirements. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282 (2001).

11. Goal 7 – Natural Disasters and Hazards. Goal 7 prohibits development in known areas of natural hazards without appropriate safeguards. A county's decision designating land from agricultural to commercial uses to allow siting of an RV park within a floodplain provides "appropriate safeguards," where the county imposes conditions designed to minimize potential flood damage, including requiring that RVs be removed from the park in advance of floods. *Smith v. Douglas County*, 37 Or LUBA 801 (2000).

11. Goal 7 – Natural Disasters and Hazards. Goal 7, which restricts or discourages development in areas subject to natural disasters and hazards, is not applicable where a local government vacates a right-of-way within an area potentially subject to hazards, absent a showing that the vacation of the right-of-way itself authorizes or encourages development. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

12. Goal 8 – Recreational Needs. Where the Court of Appeals determines that LUBA's decision was "unlawful in substance" pursuant to ORS 197.850(9)(a) because LUBA affirmed the city's interpretation of Goal 8, Policy 1, and according to the court, the city's interpretation of Goal 8, Policy 1 is not affirmable under ORS 197.829(1) because the city's interpretation does not "plausibly account for the text and context of the policy," the appropriate disposition according to OAR 661-010-0071(2)(d) is for LUBA to remand the decision to the city for further proceedings, specifically for the city to adopt a sustainable interpretation of Goal 8, Policy 1, and apply that policy, as interpreted to the application before it. *Crowley v. City of Hood River*, 79 Or LUBA 77 (2019).

12. Goal 8 – Recreational Needs. ORS 197.435(5)(b) defines overnight lodgings, which are required at destination resorts. The overnight lodgings described in the first sentence of ORS 197.435(5)(b) are owned by the destination resort, whereas the "individually owned units" described in the second sentence of ORS 197.435(5)(b) are overnight lodgings that are not owned by the destination resort. Neither the resort-owned overnight lodgings authorized by the first sentence nor the individually owned overnight lodgings authorized by the second sentence must be "separately" owned. *Central Oregon Landwatch v. Deschutes County*, 76 Or LUBA 6 (2017).

12. Goal 8 – Recreational Needs. To qualify as a "separate rentable unit for overnight lodging" within the meaning of ORS 197.445(4), which requires a minimum number of overnight lodging units at destination resorts, a bedroom in an individually (privately) owned cabin with its own bathroom and lockable interior and exterior doors must actually be a "separate unit." The fact that the bedroom may be a "separately rentable accommodation" as described in the first sentence of ORS 197.435(5)(b)'s definition of "overnight lodgings" is irrelevant, since the first sentence of ORS 197.435(5)(b) governs overnight lodgings that are owned by the destination resort, not individually (privately) owned overnight lodgings. *Central Oregon Landwatch v. Deschutes County*, 76 Or LUBA 6 (2017).

12. Goal 8 – Recreational Needs. The purpose of the destination resort statutes is to ensure that the statutory minimum number of overnight lodging units is actually available to tourists seeking to use destination resort facilities and that the maximum 2.5 residences to each overnight lodging unit ratio is preserved. *Central Oregon Landwatch v. Deschutes County*, 76 Or LUBA 6 (2017).

12. Goal 8 – Recreational Needs. The Goal 8 (Recreation Needs) adoption history shows the purpose of the second sentence of ORS 197.435(5)(b), which authorizes individually owned overnight lodging units at destination resorts, was to allow individually owned homes to be counted as overnight lodging units in very limited circumstances. *Central Oregon Landwatch, v. Deschutes County* 76 Or LUBA 6 (2017).

12. Goal 8 – Recreational Needs. A city is not required to adopt findings addressing Goal 8 when adopting a zoning ordinance amendment to prohibit and strictly regulate transient occupancy vacation rentals where the city's comprehensive plan includes no indication that the city relied on transient occupancy vacation rental dwellings to meet its Goal 8 "recreational facilities" obligations under Goal 8. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

12. Goal 8 – Recreational Needs. Notwithstanding that the destination resort statutes at ORS 197.435 to 197.467 do not expressly authorize expansion of an existing destination resort, the statutes expressly allow destination resorts to be developed in phases, and therefore a proposal to expand an existing resort by adding the equivalent of a second phase that otherwise complies with all applicable approval criteria is consistent with the destination resort statutes. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

12. Goal 8 – Recreational Needs. Where the applicant for a proposal to expand an existing destination resort relies upon "lockoff rooms" in the existing resort in combination with new lockoff rooms to satisfy the statutory requirement to provide at least 150 overnight lodging units, at a ratio of residential to lodging units that does not exceed 2.5 to 1, a petitioner's challenge to that proposal is not a collateral attack against the existing resort. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

12. Goal 8 – Recreational Needs. Lockoff rooms, individual bedrooms in a single-family dwelling, are not "individually owned units" for purposes of the destination resort statute at ORS 197.435(5)(b), because individual bedrooms in a dwelling are not "individually owned." *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

12. Goal 8 – Recreational Needs. Renting individual bedrooms in a house, with common areas and kitchen facilities, does not qualify as providing "overnight lodgings" required in a destination resort, because renting individual rooms in a house is similar to providing accommodations in dormitory rooms, and ORS 197.435(5)(b) provides that "dormitory rooms and similar accommodations do not qualify as "overnight lodgings." *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

12. Goal 8 – Recreational Needs. A plan amendment that designates 33 acres for high-density residential development is not inconsistent with a plan policy requiring a minimum of 28 acres of high-density residential, including seven acres to provide public open space, notwithstanding the failure to specifically designate seven acres for open space, where the 33 designated acres can supply the required seven acres of open space. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

12. Goal 8 – Recreational Needs. The Goal 8 requirement that local governments shall plan to meet recreational needs "in coordination with private enterprise" is probably intended to require coordination with private recreational services and facilities, not general business or industrial enterprises. Failure of a city to meet with the owners of industrial parcels prior to planning a new regional trail through those parcels does not violate the Goal 8 coordination requirement, where the city conducted an extensive public outreach with property owners in the area and petitioners cite no reason why the parcel owners could not have participated in that outreach. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

12. Goal 8 – Recreational Needs. Under ORS 197.455(2), the map of lands eligible for destination resort siting that is adopted pursuant to the mapping criteria at ORS 197.455(1) is the "sole basis" for determining whether land is eligible for resort siting, and those mapping criteria are not revisited at the time of destination resort siting. Nonetheless, three of the ORS 197.455(1) mapping

criteria include prohibitions and exceptions focused on the specifics of resort development that are difficult to meaningfully address at the mapping stage. *Central Oregon Landwatch v. Deschutes County,* 66 Or LUBA 192 (2012).

12. Goal 8 – Recreational Needs. Nothing in the destination resort statutes prohibits a county from placing a site that is classified Fire Regime Condition Class 3 on its map of lands eligible for destination resort siting, as long as conditions or similar restrictions are imposed as part of the mapping decision that effectively ensure that prior to resort development the county has adopted a wildfire protection plan consistent with ORS 197.455(1)(f). *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

12. Goal 8 – Recreational Needs. Where the county adds a site to its map of lands eligible for destination resort siting, concludes based on site-specific traffic studies that destination resort development will significantly affect nearby transportation facilities within the meaning of OAR 660-012-0060, identifies the transportation improvements needed to ensure that allowed land uses are consistent with the performance standards of affected facilities, and requires the destination resort applicant to provide those improvements prior to development, the county has not deferred a determination of compliance with OAR 660-012-0060, but instead complied with the rule. That the county prudently imposed conditions requiring a second analysis and requiring additional improvements if needed at the time of development does not constitute an impermissible deferral of compliance with OAR 660-012-0060. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

12. Goal 8 – Recreational Needs. In concluding that a decision adding a site to the county's map of lands eligible for destination resort development complies with the Transportation Planning Rule, the county may "adopt" measures demonstrating that allowed land uses are consistent with the performance standard of affected transportation facilities within the meaning of OAR 660-012-0060(2)(a) by adopting conditions requiring that the destination resort applicant pay for and provide transportation improvements prior to resort development, and need not require that the improvements be in place on the date the county adds the site to its map of eligible lands. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

12. Goal 8 – Recreational Needs. The requirement at ORS 197.460(4) that an applicant for destination resort siting provide a traffic study that includes measures to mitigate a proportionate share of adverse impacts on transportation facilities is different from, and does not replace, the obligation to evaluate transportation impacts under OAR 660-012-0060 in amending the comprehensive plan map of lands eligible for destination resort siting. While a county might err if it relied entirely on ORS 197.460(4) to ensure compliance with OAR 660-012-0060, there is no error in citing ORS 197.460(4) as an additional basis to conclude that OAR 660-012-0060 is satisfied. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

12. Goal 8 – Recreational Needs. Where a local government rezones private property that once supported a private golf course, but which is not in the local government's park plan or Goal 8 inventory, Goal 8 does not require the local government to consider acquisition of that property to establish a new public golf course to satisfy a "recreational golf need." *Smith v. City of Salem*, 61 Or LUBA 87 (2010).

12. Goal 8 – Recreational Needs. OAR 660-034-0040(4), governing local park planning, clearly provides that "some" of the listed park uses permitted in a local park on EFU land require an exception to Goal 3, in the absence of a local master park plan. However, the rule is profoundly ambiguous regarding which of the listed park uses require an exception in the absence of a local master park plan. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

12. Goal 8 – Recreational Needs. A self-contained development providing visitor-oriented accommodations and developed recreational facilities, including a golf course, that a county previously approved as a "destination resort" under Goal 8 is a "destination resort" as that term is used in Goal 8 and under ORS 197.435 through 197.467. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

12. Goal 8 – Recreational Needs. The standards for approving a destination resort under Goal 8 and ORS 197.435 through 197.467 function as a "safe harbor" that allows local governments to approve resorts that meet minimum standards, without the necessity of adopting exceptions to Goals 11 and 14. However, the statutory process is not the only means of approving a destination resort, and counties continue to have the option of approving a destination resort subject to exceptions to Goals 3, 4, 11 and 14. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

12. Goal 8 – Recreational Needs. OAR chapter 660, division 034 governs "State and Local Park Planning." Where a local comprehensive plan recreation element is being adopted or amended in part to implement particular local park master plans, the detailed planning requirements of OAR 660-34-0040(1)(a) and (b) would apply. But OAR 660-34-0040(1)(a) and (b) do not apply when adopting comprehensive plan provisions that establish a city's policy for how it will decide how many acres it will devote to parks, what kinds of parks it will build and when it will build them. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006).

12. Goal 8 – Recreational Needs. OAR 660-034-0040(1) leaves local governments the option of including any existing park master plans for particular parks in their comprehensive plan. However, OAR 660-034-0040(1) does not make all comprehensive planning for parks and recreation under Goal 8 optional. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006).

12. Goal 8 – Recreational Needs. Any parks and recreation planning obligation that is imposed by the ORS 197.015(6) definition of "comprehensive plan" does not necessarily have to "indicate specific locations of any [recreational] area, activity or use." *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006).

12. Goal 8 – Recreational Needs. Goal 8 is "[t]o satisfy the recreational needs of the citizens of the state and visitors and, where appropriate, to provide for the siting of necessary recreational facilities including destination resorts." While it might be consistent with Goal 8 to do so, Goal 8 does not mandate that comprehensive plans include a list of park, open space and recreation facilities that will be constructed during the planning period or include an estimate of the costs of such facilities. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006).

12. Goal 8 – Recreational Needs. While Goal 8 requires a city to plan for recreational facilities consistent with availability of resources, nothing in Goal 8 requires a city to fully fund identified recreational improvements, or ensure that those improvements are available concurrently with projected growth. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

12. Goal 8 – Recreational Needs. Where ORS 197.435 requires that the county locate and exclude all high value crop areas from a destination resort zone overlay and the county's analysis of the high value crop areas is limited to farms that actually demonstrated the ability to grow high value crops, rather than those capable of producing them, the county's analysis is inconsistent with Goal 8 and the statute. *Boyer v. Baker County*, 35 Or LUBA 223 (1998).

12. Goal 8 – Recreational Needs. The statutory order of operations for confirming that a destination resort overlay amendment meets the requirements of Goal 8 and ORS 197.435(2) is to first map the concentrations of commercial farms and then determine which farms could produce the requisite $1,000 per-acre per-year yield. *Boyer v. Baker County*, 35 Or LUBA 223 (1998).

12. Goal 8 – Recreational Needs. A destination resort overlay zone based on the mapping and excluding of all high value farmland by definition also excludes "unique or prime farmland" as defined in ORS 197.455(1). *Boyer v. Baker County*, 35 Or LUBA 223 (1998).

12. Goal 8 – Recreational Needs. When LUBA reviews a post-acknowledgment comprehensive plan or land use regulation amendment for compliance with Goal 8, the relevant concern is whether the amendment has direct or secondary effects on "recreation areas, facilities and opportunities" inventoried and designated by the acknowledged plan to meet the local government's recreational needs. Goal 8 does not require that there will be no adverse effects on any recreational activity occurring in the vicinity of the proposed amendment. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

12. Goal 8 – Recreational Needs. Where a proposed transportation facility includes open space and pedestrian and bicycle facilities to satisfy comprehensive plan policies implementing Goal 8, petitioner's speculation that those facilities might be eliminated in the future in favor of more traffic lanes provides no basis for reversal or remand. Such changes would require a plan amendment and a demonstration that the altered facility complies with the plan policies. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

12. Goal 8 – Recreational Needs. Where an acknowledged comprehensive plan inventories certain property as a county park available to meet present and future recreational needs and includes a policy requiring that such property be designated and zoned for recreational use, it is inconsistent with Goal 8 to interpret the plan to allow changing the designation and zoning of that property to non-recreational uses without amending the plan text and demonstrating the amended plan remains in compliance with Goal 8. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 9 does not require local governments to accommodate any and all economic activities, or prevent local governments from restricting some economic activity based on a balancing of competing economic interests or other policy objectives. *Columbia Pacific v. City of Portland,* 76 Or LUBA 15 (2017).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 14 and OAR 660-024-0060(5) allow local governments to specify "size, topography or proximity" as site suitability characteristics and to limit consideration of alternative sites to land that has the specified characteristics. But OAR 660-024-0060(5) does not provide local governments with authority to geographically limit the scope of the required alternatives analysis to "subregions," a practice that was invalidated by *Residents of Rosemont v. Metro,* 173 Or App 321, 21 P3d 1108 (2001), and *City of West Linn v. LCDC,* 200 Or App 269, 113 P3d 935, *rev den,* 339 Or 609 (2005). *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

13. Goal 9 – Economy of the State/ Goal 9 Rule. It is one thing to say the alternative sites for meeting an identified short-term subregional need for jobs or shopping opportunities must be located within a specified "proximity" of the shoppers and potential employees that generate the identified need or that alternative sites for meeting that need must be within some stated "proximity" of necessary or supporting improvements. But it is quite another thing to say that the short-term, subregional need for jobs and shopping opportunities can only be satisfied on lands that are located within the subregion. The most obvious flaw in that latter reasoning is that for some of those subregional shoppers and potential employees near the boundaries of the subregion, lands in adjoining subregions will be closer (more proximate) than at least some of the more distant lands inside the subregion. *DLCD v. City of Klamath Falls* 76 Or LUBA 130 (2017).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A site suitability characteristic that property must be 22 acres in size to allow development of a "Lifestyle Center" is not appropriate under Goal 14 and OAR 660-024-0060(5), where the city fails to explain why a general subregional need for between 27 and 37.9 acres of land for commercial development must be satisfied by the "Lifestyle Center" proposed by the UGB amendment applicant on a single 22-acre site. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

13. Goal 9 – Economy of the State/ Goal 9 Rule. The fourth paragraph of Goal 9 (Economic Development) does not require that uses near all lands zoned commercial or industrial must be limited to compatible uses. That compatibility requirement only applies "where the local government has designated certain commercial or industrial zoned land for specific commercial or industrial uses with special site requirements." *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

13. Goal 9 – Economy of the State/ Goal 9 Rule. In amending a transportation systems plan (TSP) to locate a bypass through an industrial area, a local government is not obligated to adopt findings regarding the post-amendment adequacy of its inventory of commercial and industrial lands, where the acknowledged zoning district that applies to those lands already anticipates that at least some of those lands may be used for transportation facilities. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

13. Goal 9 – Economy of the State/ Goal 9 Rule. The OAR 660-024-0040(9)(a) safe harbor permits local government to "estimate that the current number of jobs in the urban area" will grow at a rate based on "the most recent forecast published by the Oregon Employment Department." A county errs by amending its UGB in 2015, based on OAR 660-024-0040(9)(a), but using the pre-2008 recession number of jobs rather than the 2015 number of jobs. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

13. Goal 9 – Economy of the State/ Goal 9 Rule. The OAR 660-024-0040(9)(a) safe harbor does not preclude taking into account additional demand for employment land that may be generated by regional forces that may have little or nothing to do with a city's population growth. The Goal 9 rule, OAR 660-009-0015 (1) and (2), expressly permits such considerations. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Petitioner has the burden of demonstrating error in the decision on appeal. Where LUBA cannot understand either petitioner's or respondent's arguments on a subassignment of error, LUBA will deny the subassignment of error. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A city must rely on its acknowledged Goal 9 inventory and Goal 9 elements to demonstrate that after a proposed plan amendment the city's comprehensive plan continues to comply with Goal 9, and the city cannot rely instead upon an unacknowledged economic opportunities analysis to make that demonstration. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Amendments that adopt new site design or similar development standards for commercial or industrial uses can trigger an obligation to evaluate the adequacy of a city's Goal 9 inventory only if (1) the amendments physically reduce the acreage of land in the Goal 9 inventory, or (2) threaten to convert lands inventoried for Goal 9 uses to uses not protected by the goal. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A Metro regional trail that is 22 miles long and includes a multi-use pathway, trailheads, parking, restrooms, shelters, picnic areas, interpretative and educational facilities etc. can constitute a "park" that is prohibited in regionally significant industrial areas, where the proposed trail falls within the broad definition of "park" as defined in the Metro Code, and treating the regional trail as a "park" is consistent with Metro Framework Plan provisions intended to protect regionally significant industrial areas from public amenities intended to serve persons other than workers or residents in the industrial area. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A Metro regional trail that includes a multi-use pathway, trailheads, parking, restrooms, shelters, picnic areas, interpretative and educational facilities etc. can constitute a "park" that is prohibited in a city industrial zone, where the proposed trail falls within the broad code definition of "park." That the industrial zone allows bicycle and pedestrian paths in greenways and natural areas does not mean that the proposed regional trail is allowed in the industrial zone, where the trail is not located in a greenway or natural area and is

more than a bicycle and pedestrian path. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A Metro regional trail that is 22 miles long, connects rivers, parks and natural areas, and includes a number of recreational and educational facilities, is most accurately characterized as a "park" for purposes of a Metro Plan prohibition on parks in regionally significant industrial areas, rather than a transportation facility or "public facility" that is allowed in industrial areas, where the regional trail is not intended to provide transportation for the residents and workers of the industrial area, but is primarily a community recreational amenity. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Where petitioner makes no attempt to identify specific or general vacation rental dwelling licensing requirements that might have Goal 9 implications, and any Goal 9 impacts of applying those licensing requirements to annexed property appear to be highly speculative and indirect, LUBA will reject petitioner's argument that it was error for the city to fail to adopt findings addressing Goal 9 to support its legislative annexation decision. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 9 requires local governments to provide adequate opportunities for a variety of economic activities, but does not require local governments to protect one type of economic activity against impacts created by other economic and non-economic uses. Goal 9 does not require that ODOT, in adopting higher mobility standards for state highways, address in its findings whether increased congestion from development allowed under the higher mobility standards will adversely affect existing economic activity. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goals 9 and 10 do not apply to a city decision on a conditional use application for a single family dwelling, and the city is not obligated to consider whether denying the conditional use application impacts the city's obligations under Goals 9 and 10 to maintain adequate inventories of commercially, industrially and residentially zoned lands. *Rudell v. City of Bandon*, 64 Or LUBA 201 (2011).

13. Goal 9 – Economy of the State/ Goal 9 Rule. ORS 197.829(1)(d) authorizes LUBA to reject an interpretation of a comprehensive plan provision or land use regulation that implements a statute, land use goal or rule, if the interpretation is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. ORS 197.829(1)(d) is not a vehicle to allow LUBA to reverse an interpretation of a code definition that implements and is consistent with Goal 18, based on arguments that if that interpretation is applied in other cases it might impact the adequacy of the city's Goal 9 and 10 inventories of commercial, industrial and residential lands. *Rudell v. City of Bandon*, 64 Or LUBA 201 (2011).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Where petitioners argue the city erroneously assumed that future industrial development would result in 10 employees per acre in arriving at an estimate of the gross buildable acres needed, but it is clear from the city's findings that its estimate of gross buildable acres needed did not rely on that assumption, petitioner's assignment of error

provides no basis for reversal or remand. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

13. Goal 9 – Economy of the State/ Goal 9 Rule. As defined by OAR 660-009-0005(11), site characteristics "means the attributes of a site necessary for a particular industrial or other employment use to operate." OAR 660-009-0015(2) directs that identification of needed industrial sites in an economic opportunities analysis is to be "based on the site characteristics typical of expected uses." The choice of the word "typical" in OAR 660-009-0015(2) strongly suggests that LCDC intended the word "necessary" in OAR 660-009-0005(11) to mean something other than "cannot be done without." While "typical" attributes would likely include those attributes that are absolutely necessary to construct and operate a business, "typical" attributes would also likely include those attributes that while not "necessary," in the dictionary sense of the word, are nevertheless typically required for a business to operate successfully. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

13. Goal 9 – Economy of the State/ Goal 9 Rule. As defined by OAR 660-009-0005(11), site characteristics "means the attributes of a site necessary for a particular industrial or other employment use to operate." OAR 660-009-0015(2) directs that identification of needed industrial sites in an economic opportunities analysis is to be "based on the site characteristics typical of expected uses." A site characteristic may be listed in an economic opportunities analysis if the site characteristic (1) is typical of the expected industrial or employment uses, and (2) has some meaningful connection with the operation of the expected industrial or employment uses. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A city's decision to list a minimum parcel size of five acres and location no more than one eighth of a mile from an arterial as typical industrial site characteristics in its economic opportunities analysis will be remanded where there are no findings that explain why those attributes are typical site characteristics and the evidentiary record is not sufficient to establish that they are typical site characteristics. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

13. Goal 9 – Economy of the State/ Goal 9 Rule. The safe harbor established by OAR 660-024-0040(9)(a) is only available to local governments when addressing the requirements of Goal 9, OAR chapter 660, division 9, Goal 14 and, if applicable, ORS 197.296, when determining its employment needs for purposes of a UGB amendment under OAR chapter 660, division 24. As OAR chapter 660, division 24 is now written, the OAR 660-024-0040(9)(a) safe harbor is simply not available for decisions that adopt or amend economic opportunities analyses, without also amending a UGB. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

13. Goal 9 – Economy of the State/ Goal 9 Rule. In relying on the OAR 660-024-0040(9)(a) safe harbor in amending an economic opportunities analysis to estimate employment growth, the Oregon Employment Department job growth projection rate authorized by OAR 660-024-0040(9)(a)(A) and the coordinated population forecast projection rate authorized by OAR 660-024-0040(9)(a)(B) are mutually exclusive alternatives. A local government must select one or the other and may not switch back and forth between those two projection methodologies in projecting

employment growth, if the local government is seeking the protection of the OAR 660-024-0040(9)(a) safe harbor. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Where a city's stated rationale for its 20-year employment projections in its economic opportunities analysis is the OAR 660-024-0040(9)(a) safe harbor, the city may not adopt an alternative legal rationale for the 20-year employment projections for the first time in its brief at LUBA. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 9, paragraph 3 provides in relevant part that comprehensive plans must provide for an adequate supply of sites for industrial and commercial uses. Where a city enacts zoning amendments that are likely to reduce the supply of buildable industrial and commercial lands, even if the administrative rules at OAR Chapter 660, division 9 do not apply to the decision, the city has an obligation to demonstrate that despite any such reductions in development potential for industrial and commercial lands, the city's land supply inventories continue to comply with Goal 9. *Gunderson, LLC v. City of Portland*, 62 Or LUBA 403 (2011).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Where amendments to the comprehensive plan require planting of vegetation on-site or off-site to mitigate the effects of development on industrial land, a local government must quantify the amount of land that the mitigation requirements will remove from potential industrial development and evaluate the impact of that reduction on the local government's supply of industrial lands. *Gunderson, LLC v. City of Portland*, 62 Or LUBA 403 (2011).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A local government's reliance on a draft economic opportunities analysis that has not been adopted as a part of the local government's comprehensive plan to conclude that new regulations will not affect the city's supply of industrial land runs afoul of Statewide Planning Goal 2, even if the draft economic opportunities analysis is part of the record and could provide an adequate factual base to support the decision. *Gunderson, LLC v. City of Portland*, 62 Or LUBA 403 (2011).

13. Goal 9 – Economy of the State/ Goal 9 Rule. An economic opportunities analysis that does not indicate any definite planning period or include projections about future demand for industrial or commercial land based on employment or other need projected over any specific period of time does not provide an adequate factual base to support a decision that the city has an adequate supply of land under Goal 9. *Gunderson, LLC v. City of Portland*, 62 Or LUBA 403 (2011).

13. Goal 9 – Economy of the State/ Goal 9 Rule. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 444 (2002), and *Opus Development Corp. v. City of Eugene*, Or LUBA 670, 691 (1995), do not stand for the principle that lands that are included in a local government's Goal 9 inventory of buildable lands for commercial and industrial development may not be subject to discretionary permit approval standards. Those cases simply hold that where a local government amends its comprehensive plan and land use regulations in ways that may call the assumptions that underlie its Goal 9 inventory into question, the local government must consider whether its

Goal 9 inventory will remain adequate after the amendments are adopted. *McDougal Bros. Investments v. City of Veneta*, 59 Or LUBA 207 (2009).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A new tree cutting regulation that applies to commercial and industrial development does not violate the Goal 9 requirement that there be an adequate inventory of land for commercial and industrial development, where the new tree cutting regulations, as they apply to commercial and industrial lands, include a standard that provides "[a]pplication of the standards of this section shall not result in a reduction of overall building square footage or loss of density." *McDougal Bros. Investments v. City of Veneta*, 59 Or LUBA 207 (2009).

13. Goal 9 – Economy of the State/ Goal 9 Rule. It is premature to argue that a legislative decision that adopts a new Airport Related zoning district violates a city's obligation to protect industrial and commercial land from incompatible uses under Statewide Planning Goal 9 and violates Goals 10 and 14 by impermissibly converting industrially zoned land, for which there is a shortage, to a residential airpark use, which is not needed under Goal 10. Such arguments must await a city decision that actually applies the new Airport Related zoning district to some property in the city. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Where a planning and zoning criterion requires that commercial retail uses be limited to those appropriate in "type and size" to serve the needs of businesses in a designated employment area, and a local government applies a zoning district that would allow any retail sales business that does not exceed 60,000 square feet in size, LUBA will remand for a better explanation for why the size limitation is sufficient to ensure compliance with the "type and size" limitation. *SEIU v. City of Happy Valley*, 58 Or LUBA 261 (2009).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Where a property's existing plan designation is exclusive farm use, a change in that plan designation does not implicate the planning obligations imposed by OAR 660-009-0010(4) because that rule only applies where the existing comprehensive plan designation is industrial or employment. *SEIU v. City of Happy Valley*, 58 Or LUBA 261 (2009).

13. Goal 9 – Economy of the State/ Goal 9 Rule. While Goal 9 itself has no specific requirements directed at rural or resource lands, and the Goal 9 rule explicitly states that comprehensive plans for rural areas are not required to plan for industrial or employment uses, Goal 9 in general applies throughout the state including rural areas and requires counties to "provide adequate opportunities * * * for a variety of economic activities." *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

13. Goal 9 – Economy of the State/ Goal 9 Rule. To establish a "demonstrated need" for a proposed hotel on agricultural land based on the requirements of Goal 9 under OAR 660-004-0022(1)(a) does not necessarily require demonstrating that the county is in violation of its Goal 9 obligations or that the county is faced with a circumstance in which it must choose between violating its Goal 9 or Goal 3 obligations. *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 9 does not require local governments to provide for every kind of productive economic activity, or to adopt regulations that allow for every market demand to be satisfied. *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

13. Goal 9 – Economy of the State/ Goal 9 Rule. To show a demonstrated need to locate a proposed hotel on resource land based on the general Goal 9 requirement to "provide adequate opportunities * * * for a variety of economic activities," the county must establish that the county has failed or is at risk of failing to provide adequate opportunities for a variety of economic activities, and that taking an exception to Goal 3 to provide for a hotel is a necessary step toward satisfying that goal requirement. *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A locally unsatisfied market demand for a particular sub-type of lodging accommodation targeted at a small demographic of users is insufficient to establish that there is a demonstrated need for a proposed hotel to satisfy the Goal 9 requirement that the county provide "adequate opportunities for a variety of economic activities." *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Zoning text amendments that make it much more likely that a commercial zone will be developed with non-Goal 9 uses are not necessarily consistent with the goal simply because the zone continues to allow commercial uses. *Sorensen v. City of Creswell*, 54 Or LUBA 468 (2007).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A city does not err in concluding that zoning text amendments that make it much more likely that a recreation commercial zone will be developed with noncommercial uses are consistent with the city's Goal 9 obligations, where the city's comprehensive plan indicates that there is a surplus of 18.8 vacant acres in the zone over the estimated 20-year need for recreational commercial uses. *Sorensen v. City of Creswell*, 54 Or LUBA 468 (2007).

13. Goal 9 – Economy of the State/ Goal 9 Rule. The guidelines to the Statewide Planning Goals are not standards that must be satisfied to approve a post-acknowledgment plan amendment, and thus alleged inconsistency between a plan amendment and a guideline to Goal 9 is not a basis to reverse or remand the plan amendment. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

13. Goal 9 – Economy of the State/ Goal 9 Rule. General, diffuse arguments based on Statewide Planning Goal 9 that do not cite or quote any specific Goal 9 language are insufficient to allow meaningful review of arguments that a plan amendment allowing new Goal 9 uses is inconsistent with Goal 9. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Where the issue raised at LUBA is the adequacy of a city's findings to address specific planning requirements of LCDC's Goal 9 rule, but no party mentioned the Goal 9 rule or otherwise raised any issues regarding the substantive requirements of the Goal 9 rule, that issue was waived and may not be raised for the first time at LUBA. *Cornelius First v. City of Cornelius*, 52 Or LUBA 486 (2006).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A general allegation during local rezoning proceedings that statewide planning goals have not been addressed is not sufficient to raise the very specific issue that Goal 9 and OAR 660-009-0015 may require preparation of an economic opportunities analysis. *Jaffer v. City of Monmouth*, 51 Or LUBA 633 (2006).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Local governments must address Goal 9 not only when post-acknowledgment plan amendments redesignate land to or from industrial or commercial use, but also when amendments effectively convert lands planned and zoned for industrial or commercial uses to nonindustrial and noncommercial uses. *Grahn v. City of Newberg*, 50 Or LUBA 219 (2005).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A post-acknowledgment plan amendment that authorizes on a specific parcel a transportation facility that (1) is permitted in the industrial zone and (2) serves industrial uses in the area is consistent with Goal 9, notwithstanding any current or longterm shortage in the city's industrial lands inventory. *Grahn v. City of Newberg*, 50 Or LUBA 219 (2005).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A plan amendment that authorizes a use permitted in an industrial zone and does not change the plan designation or zoning of any industrial-zoned property does not "change the plan designation" within the meaning of OAR 660-009-0010(4) and thus does not trigger the requirements of the Goal 9 rule. *Grahn v. City of Newberg*, 50 Or LUBA 219 (2005).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A post-acknowledgement plan amendment that redesignates more than two acres for commercial use must follow one of the three courses of action set out at OAR 660-009-0010(4). Although one of those permissible courses of action is to demonstrate that the post-acknowledgement plan amendment is consistent with the part of the acknowledged comprehensive plan that was adopted to implement the Goal 9 administrative rule, where the proposed action appears to be inconsistent with implementation strategies in the plan, the city must amend its acknowledged comprehensive plan following the planning requirements of OAR 660-009-0015 through 660-009-0025 and in doing so it must prepare an economic opportunities analysis. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Nothing in either Goal 9 or Goal 14 requires a city to take into account the supply and demand for commercial and industrial lands in portions of the regional UGB outside the city's planning jurisdiction in deciding whether to rezone industrial lands within the city to allow commercial uses. *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236 (2003).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A rezoning decision that leaves the city with only 55 buildable acres of industrial land is consistent with Goal 9, where the record shows that the city needs only 38.5 acres of land within the relevant planning period. The city may assume that all lands zoned for industrial uses are available for industrial uses for purposes of Goal 9, notwithstanding that the city's industrial zones allow a limited set of non-industrial uses. *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236 (2003).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Nothing in the Goal 9 rule suggests that a county must conduct the "Economic Opportunities Analysis" required by OAR 660-009-0015(4) at the time of periodic review, in the context of establishing a population forecast pursuant to ORS 195.036. *Tipperman v. Union County*, 44 Or LUBA 98 (2003).

13. Goal 9 – Economy of the State/ Goal 9 Rule. It is consistent with the Goal 9 requirement for an adequate supply of sites of "suitable sizes" for a city to preserve the limited supply of large commercial sites in the city, notwithstanding a relative abundance of smaller commercial-zoned sites. *Walker v. City of Dayton*, 44 Or LUBA 766 (2003).

13. Goal 9 – Economy of the State/ Goal 9 Rule. While Goal 9 does not require local governments to make land available for all kinds of economic uses, it grants local governments considerable discretion in shaping the economic future of their communities. Goal 9 authorizes a city to protect its initial choice to include one of the relatively few large commercial-zoned sites in its commercial lands inventory, and to deny a request to redesignate that site to noncommercial uses. *Walker v. City of Dayton*, 44 Or LUBA 766 (2003).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Where petitioners make a facially plausible showing that new tree protection and water resource regulations are likely to reduce the development potential for residential, commercial and industrial lands, the city has an obligation to demonstrate that despite any such reductions in development potential the city's inventories continue to comply with Goals 9 and 10. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goals 9 and 10 do not prohibit increases in regulatory burdens or require local governments to refrain from imposing any particular level of regulatory burden. Therefore, incorporation of comprehensive plan policies into the zoning code pursuant to ORS 197.195, in order to apply those policies as approval criteria to limited land use decisions, does not violate Goals 9 and 10 even if application of such policies as approval criteria would impose additional regulatory burdens on development of Goal 9 and 10 lands. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 9 does not obligate a local government to adopt a decision ensuring that large format retail uses will be approved. Rather, the local government's decision must demonstrate that it considered the impact of its decision on broad categories of commercial and industrial uses in light of competing policy objectives. *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 870 (2000).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A comprehensive plan amendment that increases the required right-of-way for major arterials from 80 feet to 100 feet may reduce the supply of buildable land and commercial sites and thus requires findings that address Statewide Planning Goals 9 and 10. *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

13. Goal 9 – Economy of the State/ Goal 9 Rule. The Statewide Planning Goal 9 administrative rule requires that comprehensive plans be amended to comply with the rule at the time of periodic review. Where a local government adopts a comprehensive plan amendment that identifies a future

shortfall of commercial lands, neither the Goal 9 rule nor Goal 9 itself requires that the local government correct that shortfall outside of the context of periodic review. *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 9 does not require that a city find that its "regulations will result in there being an adequate supply of sites for telecommunication facilities." *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

13. Goal 9 – Economy of the State/ Goal 9 Rule. A land use regulation does not "prohibit new telecommunication" facilities where such facilities are allowed as a permitted or conditional use in all zones and variances are allowed for otherwise applicable height limits and setback requirements. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 9, paragraph 3, which requires "an adequate supply of sites," applies to all commercial sites, not just vacant, buildable commercial sites. *Opus Development Corp. v. City of Eugene*, 30 Or LUBA 360 (1996).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 9, paragraph 3, which requires "an adequate supply of sites," is implemented by both OAR 660-09-015(2) and (3). *Opus Development Corp. v. City of Eugene*, 30 Or LUBA 360 (1996).

13. Goal 9 – Economy of the State/ Goal 9 Rule. When the city's inventory of both developed and undeveloped land was considered at the time the city determined its inventory of vacant, buildable commercial land was adequate, the city must consider the impact of restricting redevelopment of developed land in determining whether its inventory of vacant, buildable commercial land is still adequate. *Opus Development Corp. v. City of Eugene*, 30 Or LUBA 360 (1996).

13. Goal 9 – Economy of the State/ Goal 9 Rule. When the city's inventory of both developed and undeveloped land was considered at the time the city determined its supply of vacant, buildable industrial land was adequate, the city must consider the impact of restricting redevelopment of developed land in determining whether its supply of vacant, buildable industrial land is still adequate. *Opus Development Corp. v. City of Eugene*, 30 Or LUBA 360 (1996).

13. Goal 9 – Economy of the State/ Goal 9 Rule. The Goal 9 rule applies only to plan and land use amendments adopted during periodic review, but it provides interpretive guidance in applying Goal 9 to quasi-judicial changes to acknowledged comprehensive plans or land use regulations that affect continued compliance with Goal 9. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Because OAR 660-09-025(1) allows a fair degree of imprecision in both the number and acreage of sites needed to accommodate industrial and commercial uses, as well as broad site categories, it is not necessary in cases involving very minor changes in acreages to support Goal 9 findings with extensive analysis. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Legislative changes to acknowledged comprehensive plans or land use regulations that reduce a local government's supply of industrially designated land must be supported by (1) findings demonstrating the remaining industrially designated land is adequate to satisfy the requirements of Goal 9, (2) argument establishing compliance with Goal 9 based on plan provisions, code provisions and evidence in the record, or (3) both. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 9, paragraph 3 requires that a local government's inventory of suitable commercial and industrial sites be adequate not just with regard to total acreage, but also with regard to size, type, location and service levels, to provide for a "variety of industrial and commercial uses consistent with plan policies." *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 9, paragraph 4 does not impose a requirement that uses near *all* lands zoned for commercial or industrial use be limited to those compatible with commercial and industrial uses in general, but rather applies only where a local government has designated certain commercial or industrial zoned land for *specific* commercial or industrial uses with special site requirements. OAR 660-09-025(4). *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

13. Goal 9 – Economy of the State/ Goal 9 Rule. Goal 9 does not require that a post-acknowledgment plan amendment changing the designation of urban land from Industrial-Commercial to Industrial be supported by a demonstration that the proposed industrial use of the land is necessary to the local economy or will provide products that existing producers cannot supply. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

13. Goal 9 – Economy of the State/ Goal 9 Rule. OAR Chapter 660, Division 9 applies only to plan and land use regulation amendments adopted during periodic review. OAR 660-09-010(2). *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

13. Goal 9 – Economy of the State/ Goal 9 Rule. OAR 660-09-025 does not require the adoption of specific implementing plan designations and zoning districts, concurrent with the adoption of a UGB amendment, in all instances. OAR 660-09-025 simply establishes certain Goal 9 driven requirements that are applicable at the time certain local governments adopt measures implementing a UGB amendment. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

14. Goal 10 – Housing/ Goal 10 Rule. Where a cross-petitioner seeks a remedy not available to it by statute, it is an obstacle to LUBA's review of the cross-assignment of error. LUBA lacks authority to affirm in part, and reverse in part a local government's approval of cross-petitioner's project application. ORS 197.835(1). Even assuming that the city erred by applying Willamette Greenway standards to cross-petitioner's housing project application, because they are not "clear and objective," the city's decision approving the development could not be reversed because it is not "prohibited as a matter of law." If LUBA agreed with cross-petitioners, the correct disposition would be remand, except that remand was not requested and would have no effect on the city's decision approving the application. In such a situation, LUBA will consider the request a contingent cross-assignment of error. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

14. Goal 10 – Housing/ Goal 10 Rule. The city's comprehensive plan housing goal, Goal 10, and its policies and implementing measures, provide further contextual support for the city's interpretation of its code regarding a prohibition on lot size adjustment "[t]o allow an increase in density in the [low density residential] RL zone" by using as the denominator the gross acreage of a subdivision as a whole, rather than the acreage of individual properties. One of the Goal 10 housing goals is to "[p]romote the efficient use of vacant land by encouraging infill development which is sensitive to existing neighborhoods, and by encouraging new development which achieves the density allowed by the comprehensive plan." The city's interpretation is consistent with Goal 10 and the policies and implementing measures because it interprets "density" and "acre" to allow new infill development of vacant land to achieve a density that is allowed by the comprehensive plan. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

14. Goal 10 – Housing/ Goal 10 Rule. Nothing in ORS 197.296 requires that the city omit from its buildable lands inventory land that is developable with residential uses if that land is subject to local regulations that prohibit or restrict development. Rather, consideration of such regulations may result in an estimate of a lower development capacity than would otherwise exist if the regulations did not exist. *Home Builders Association v. City of Eugene*, 77 Or LUBA 56 (2018).

14. Goal 10 – Housing/ Goal 10 Rule. ORS 197.307(4) specifies regulations that cities may apply to *development of* needed housing on land included in the UGB and on the BLI. It does not apply to the city's initial determination of what land is included in a city's inventory. *Home Builders Association v. City of Eugene*, 77 Or LUBA 56 (2018).

14. Goal 10 – Housing/ Goal 10 Rule. That a city's acknowledged buildable lands inventory indicates that the city already has an adequate supply of land zoned for R-3 (high density residential) does not undermine the city council's conclusion that rezoning additional land to R-3 is necessary to address an identified shortage of affordable housing, where the city finds that the private housing market has been unable to address the need for affordable housing despite an adequate supply, and that rezoning surplus public land to R-3, to be donated to a housing agency, is necessary to facilitate development of affordable housing. *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

14. Goal 10 – Housing/ Goal 10 Rule. ORS 197.307(4) provides in relevant part that "a local government may adopt and apply only clear and objective standards, conditions and procedures

regulating the development of needed housing on buildable land described in subsection (3) of [ORS 197.307]." *Warren v. Washington County*, 76 Or LUBA 295 (2017).

14. Goal 10 – Housing/ Goal 10 Rule. Statewide Planning Goal 10 (Housing) and two statutes, ORS 197.307(3) and ORS 197.296, work together to require local and regional governments to plan and zone sufficient buildable land to accommodate "needed housing." *Warren v. Washington County*, 76 Or LUBA 295 (2017).

14. Goal 10 – Housing/ Goal 10 Rule. The needed housing statutes are set out at ORS 197.295 through 197.314. ORS 197.296(3)(b) requires that local governments inventory the supply of buildable lands with urban growth boundaries and "[c]onduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules relating to housing, to determine the number of units and amount of land needed for each needed housing type for the next 20 years." However, the needed housing planning obligations set out at ORS 197.296 *et seq.* apply directly to the Metropolitan Service District (Metro) and do not apply directly to the individual local governments within Metro's jurisdiction. *Housing Land Advocates v. City of Happy Valley*, 75 Or LUBA 227 (2017).

14. Goal 10 – Housing/ Goal 10 Rule. The purpose of OAR chapter 660, division 7 is to clarify the more general planning obligations with regard to ensuring an adequate supply of buildable lands and planning for a mix of housing types that are set out in a number of statutes, Goal 10 (Housing), and LCDC administrative rules. *Housing Land Advocates v. City of Happy Valley*, 75 Or LUBA 227 (2017).

14. Goal 10 – Housing/ Goal 10 Rule. The "mix" of housing requirement of the Metro Housing Rule at OAR 660-007-0030(1) is that jurisdictions must designate sufficient buildable lands to provide an opportunity for at least 50 percent of new housing to be attached single-family housing or multiple family housing. The minimum residential "density" requirement of OAR 660-007-0035(1) is that certain specified Metro cities must provide for an overall density of six or more dwelling units per net buildable acre. *Housing Land Advocates v. City of Happy Valley*, 75 Or LUBA 227 (2017).

14. Goal 10 – Housing/ Goal 10 Rule. A finding that a proposed 31-lot subdivision will provide some housing is not sufficient to establish that the proposal complies with the mix and density requirements of OAR chapter 660, division 7, which is what OAR 660-007-0060(2)(a) requires. *Housing Land Advocates v. City of Happy Valley*, 75 Or LUBA 227 (2017).

14. Goal 10 – Housing/ Goal 10 Rule. Applying a zone that allows both single-family and multi-family dwellings is consistent with the OAR 660-007-0030(1) "mix" requirement for "the opportunity for at least 50 percent of new housing to be attached single family housing or multiple family housing." *Housing Land Advocates v. City of Happy Valley*, 75 Or LUBA 227 (2017).

14. Goal 10 – Housing/ Goal 10 Rule. Under OAR 660-007-0060(2)(a), when adopting a post-acknowledgment plan or zoning map amendment, the focus is on "the amendment." OAR 660-007-0060(2)(a) only requires that the amendment itself must comply with the minimum six dwelling units per acre density standard. If that amendment, considered with all other post-

acknowledgment plan and land use regulation amendments, causes the city's supply of residentially zoned land, viewed as a whole, to fall under the "six or more dwelling units per net buildable acre" standard, the mechanism under OAR chapter 660, division 7 to correct that overall imbalance is periodic review. *Housing Land Advocates v. City of Happy Valley*, 75 Or LUBA 227 (2017).

14. Goal 10 – Housing/ Goal 10 Rule. Under Metro Code 3.07.120(e) "[A] city or county may reduce the minimum zoned capacity of a single lot or parcel so long as the reduction has a negligible effect on the city's or county's overall minimum zoned residential capacity." A finding that the area of the property affected is small when compared with the area of the entire city is not the comparison required by Metro Code 3.07.120(e). Metro Code 3.07.120(e) requires a comparison of (1) the reduction of the "minimum zoned capacity" of the subject property with (2) the "city's * * * overall minimum zoned residential capacity." *Housing Land Advocates v. City of Happy Valley,* 75 Or LUBA 227 (2017).

14. Goal 10 – Housing/ Goal 10 Rule. A unitary application for development of a road is not "needed housing" as defined in ORS 197.303(1). The definition includes a non-exclusive list of "housing types" in subsections (a) through (e), and a road is simply not a "housing type[;]" it is a road. *GPA 1, LLC v. City of Corvallis,* 73 Or LUBA 339 (2016).

14. Goal 10 – Housing/ Goal 10 Rule. ORS 197.307(4) requires a local government to apply only clear and objective conditions to proposed needed housing on buildable land. Conditions subject to ORS 197.307(4) include conditions imposed in earlier land use decisions that still govern development of buildable land. Accordingly, a local government may apply a condition of an earlier land use decision to needed housing on buildable land only if the condition is clear and objective. *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

14. Goal 10 – Housing/ Goal 10 Rule. A condition that prohibits the location of an assisted living facility within 135 feet of a property line is ambiguous and requires interpretation to determine whether the condition also prohibits the location of multi-family residential development within the 135-foot setback. Accordingly, the condition is not "clear and objective," and pursuant to ORS 197.307(4) cannot be applied to deny proposed development of needed housing. *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

14. Goal 10 – Housing/ Goal 10 Rule. Under ORS 197.307(6), a local government may impose unclear, subjective or discretionary standards and conditions on needed housing only if it offers an alternative path that allows needed housing subject only to clear and objective standards and conditions. It is not consistent with ORS 197.307(6) for a local government to require an applicant for needed housing to either (1) demonstrate that needed housing is consistent with an unclear and subjective condition of a 1981 development approval, or (2) apply under discretionary standards to modify the 1981 development approval to eliminate the unclear and subjective condition. *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

14. Goal 10 – Housing/ Goal 10 Rule. A local government may not require an applicant for needed housing to seek approval under discretionary standards to modify a condition of approval that was imposed on the subject property in an earlier decision approving planned development,

unless the condition was imposed on development of needed housing and the predecessor-in-interest chose the discretionary planned development path in lieu of an alternate path for needed housing subject only to clear and objective standards and conditions, consistent with the two-track framework embodied in ORS 197.307(6). *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

14. Goal 10 – Housing/ Goal 10 Rule. ORS 197.307(7) authorizes a local government to impose "special conditions" on needed housing. However, pursuant to ORS 197.307(4), any "special conditions" imposed on needed housing must be clear and objective. *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

14. Goal 10 – Housing/ Goal 10 Rule. A street design standard stating that "cul-de-sacs should not serve more than 18 dwelling units" is not a clear and objective approval standard that can be applied to approve or deny needed housing for purposes of ORS 197.307(4), where in order to apply the standard to deny proposed housing accessed by an existing cul-de-sac the local government had to interpret the street design standard to determine (1) whether it applied at all to the proposed needed housing, and (2) whether it imposes a mandatory approval standard. *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

14. Goal 10 – Housing/ Goal 10 Rule. Where a county applies a new rural zone that effectively prohibits new residential uses within a rural unincorporated community, the county may have to consider whether application of the new zone is consistent with its obligations under Statewide Planning Goal 10 (Housing), if the county has relied upon vacant lands within the rural unincorporated community to meet its Goal 10 obligation to provide an adequate inventory of buildable lands within urban growth boundaries. *Seabreeze Associates Limited Partnership v. Tillamook County*, 71 Or LUBA 218 (2015).

14. Goal 10 – Housing/ Goal 10 Rule. Where a county applies a new rural zone that effectively prohibits new residential uses within a rural unincorporated community, the county may have to consider whether application of the new zone is consistent with its comprehensive plan Housing Element if the county relies upon vacant land within that community to meet an identified need to serve local, rural housing needs. *Seabreeze Associates Limited Partnership v. Tillamook County*, 71 Or LUBA 218 (2015).

14. Goal 10 – Housing/ Goal 10 Rule. The ORS 197.307(4) obligation to apply only clear and objective standards and conditions to "needed housing" applies only to "needed housing on buildable land." Because "buildable land," as defined, is limited to land within urban growth boundaries, ORS 197.307(4) does not apply to land within a rural unincorporated community. *Seabreeze Associates Limited Partnership v. Tillamook County*, 71 Or LUBA 218 (2015).

14. Goal 10 – Housing/ Goal 10 Rule. If a county has relied on vacant lands within a rural unincorporated community to satisfy its obligation under Goal 10 to provide an adequate supply of building lands, in applying a new zone to that community that effectively prohibits new residential development, and which may effectively shift residential demand to other communities, OAR 660-008-0030(10) would require the county to "consider the needs of the relevant region in

arriving at a fair allocation of housing types and densities." *Seabreeze Associates Limited Partnership v. Tillamook County*, 71 Or LUBA 218 (2015).

14. Goal 10 – Housing/ Goal 10 Rule. Where a city comprehensive plan's Housing Element and Housing Inventory identifies single-family second homes as needed housing, but does not identify vacation rental dwellings as needed housing, the needed housing statute is not implicated by a city ordinance that amends the zoning code's regulations governing vacation rental of dwellings. *Oregonians in Action v. City of Lincoln City*, 71 Or LUBA 234 (2015).

14. Goal 10 – Housing/ Goal 10 Rule. Under Goal 10, the Goal 10 administrative rule and state statutes, local governments are limited in the kinds of standards they may apply to applications for "needed housing." Where an application is an application for "needed housing," it is entitled to the Goal, rule and statutory protections given to applications for "needed housing," even if the application would replace one kind of "needed housing" with another kind of "needed housing." *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

14. Goal 10 – Housing/ Goal 10 Rule. Where an applicant identifies seven land use regulation standards and takes the position that they are not "clear and objective," and for that reason may not be applied to deny its application for approval of "needed housing," a city errs by applying those standards to deny the request for approval of needed housing without explaining in its findings why the city believes it is entitled to apply those standards to deny the application for needed housing. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

14. Goal 10 – Housing/ Goal 10 Rule. The ORS 197.307(4) requirement that "needed housing" be subject only to "clear and objective" approval standards applies to all approval standards and is not limited to aesthetic criteria. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

14. Goal 10 – Housing/ Goal 10 Rule. A standard that requires that a proposal comply "with applicable elements of the Comprehensive Plan, including: Traffic Plan, Water Plan, Sewer Plan, Storm Drainage Plan, Bicycle Plan, and Park Plan" is not "clear and objective" and may not be applied to deny an application for needed housing. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

14. Goal 10 – Housing/ Goal 10 Rule. A standard that requires that "[p]otential land use conflicts have been mitigated through specific conditions of development" is not "clear and objective" and may not be applied to deny an application for needed housing. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

14. Goal 10 – Housing/ Goal 10 Rule. A standard that requires "[a]dequate basic urban services are available, or can be made available by the applicant as part of a proposed development, or are scheduled by the City Capital Improvement Plan" is not "clear and objective" and may not be applied to deny an application for needed housing. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

14. Goal 10 – Housing/ Goal 10 Rule. A standard that requires "[p]rovision of public facilities and services to the site will not cause service delivery shortages to existing development" is not "clear and objective" and may not be applied to deny an application for needed housing. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

14. Goal 10 – Housing/ Goal 10 Rule. A standard requires that "[t]he characteristics of existing adjacent development have been determined and considered in the development of the site plan" is not "clear and objective" and may not be applied to deny an application for needed housing. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

14. Goal 10 – Housing/ Goal 10 Rule. A standard that requires "[t]raffic conflicts and hazards are minimized on-site and off-site" is not "clear and objective" and may not be applied to deny an application for needed housing. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

14. Goal 10 – Housing/ Goal 10 Rule. A standard that requires "[t]here are adequate provisions for maintenance of open space and other common areas" is not "clear and objective" and may not be applied to deny an application for needed housing. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

14. Goal 10 – Housing/ Goal 10 Rule. Goal 10 requires the city to inventory buildable lands, and where a city has done that inventory, even if due to recent annexations and rezoning of annexed lands there is no longer a shortage of lands designated medium-high density, rezoning additional lands to create a surplus of medium-high density residential land is not inconsistent with Goal 10. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

14. Goal 10 – Housing/ Goal 10 Rule. A zoning text amendment that merely lists other existing development standards that may or may not apply to needed housing on their own terms cannot be challenged on the basis that the unamended development standards may include subjective or unclear standards applicable to needed housing, in violation of ORS 197.307(4) and Goal 10. If the existing unamended development standards violate ORS 197.307(4), such violations can be challenged only in an appeal of a decision that adopts, amends or applies those standards. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

14. Goal 10 – Housing/ Goal 10 Rule. Where a city adds 28 acres of land to its Goal 10 inventory to meet an identified need for residential land, the city's alleged failure to conduct public facilities planning to support future residential development of the inventoried lands may violate Goal 11, but does not violate Goal 10 or indicate that the city's Goal 10 inventory is inadequate. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

14. Goal 10 – Housing/ Goal 10 Rule. Whether a new standard requiring a five-acre minimum development area violates the ORS 197.307(4) and Goal 10 prohibition on standards that have the effect of discouraging needed housing through "unreasonable" cost or delay cannot be meaningfully addressed on appeal of the legislative decision adopting the new standard, because depending on numerous variables the new standard may cause little or no cost or delay to needed

housing. Such a standard can only be meaningfully challenged under the statute and goal in an as-applied challenge. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

14. Goal 10 – Housing/ Goal 10 Rule. The ORS 197.307(4) and Goal 10 prohibition on subjective and unclear standards or standards that cause unreasonable delay in providing needed housing is not violated by a code provision that requires peer review of applications proposing a major modification to a development standard. The statute and rule prohibitions do not apply when an applicant for needed housing seeks a variance to a clear and objective approval standard. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

14. Goal 10 – Housing/ Goal 10 Rule. That a local code provision prohibiting grading or development on portions of a site that exceed 20 percent slopes requires some interpretation in order to apply the provision does not necessarily mean that the provision is not clear and objective, or that it requires a subjective, value-laden analysis. *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51 (2013).

14. Goal 10 – Housing/ Goal 10 Rule. Nothing in the language of ORS 197.307, the needed housing statute, prohibits a city from offering a discretionary process for approval of a proposal for needed housing as long as the non-discretionary process remains available to an applicant. The needed housing statute protects an applicant for a permit for needed housing from the city's imposition of discretionary standards without its agreement, but an applicant may agree to be bound by discretionary standards without running afoul of the statute. *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51 (2013).

14. Goal 10 – Housing/ Goal 10 Rule. A legislative annexation decision that leaves existing county comprehensive plan and land use regulations in place, including county residential comprehensive plan and zoning map designations, does not implicate Goal 10. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

14. Goal 10 – Housing/ Goal 10 Rule. A zone change application is not "an application for development of needed housing" within the meaning of ORS 197.307(3)(b) and is not subject to the prohibition in ORS 197.307(6) (2009) against applying criteria that are not "clear and objective" to such applications. *EEC Holdings LLC v. City of Eugene*, 65 Or LUBA 179 (2012).

14. Goal 10 – Housing/ Goal 10 Rule. To the extent a code definition of "foredune" is an "approval standard" for purposes of the requirement at ORS 197.307(6) that approval standards applied to needed housing must be clear and objective, where the code defines "foredune" to include the "lee or reverse slope" that definition is sufficiently clear and objective, as the slope of a property is an objectively determinable fact that does not involve subjective, value-laden analysis. *Rudell v. City of Bandon*, 64 Or LUBA 201 (2011).

14. Goal 10 – Housing/ Goal 10 Rule. Goals 9 and 10 do not apply to a city decision on a conditional use application for a single family dwelling, and the city is not obligated to consider whether denying the conditional use application impacts the city's obligations under Goals 9 and 10 to maintain adequate inventories of commercially, industrially and residentially zoned lands. *Rudell v. City of Bandon*, 64 Or LUBA 201 (2011).

14. Goal 10 – Housing/ Goal 10 Rule. ORS 197.829(1)(d) authorizes LUBA to reject an interpretation of a comprehensive plan provision or land use regulation that implements a statute, land use goal or rule, if the interpretation is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. ORS 197.829(1)(d) is not a vehicle to allow LUBA to reverse an interpretation of a code definition that implements and is consistent with Goal 18, based on arguments that if that interpretation is applied in other cases it might impact the adequacy of the city's Goal 9 and 10 inventories of commercial, industrial and residential lands. *Rudell v. City of Bandon,* 64 Or LUBA 201 (2011).

14. Goal 10 – Housing/ Goal 10 Rule. Under the Federal Fair Housing Act Amendments of 1988 (FHAA), "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling" constitutes discrimination against that person and a violation of the FHAA. *Phillips v. Lane County*, 62 Or LUBA 92 (2010).

14. Goal 10 – Housing/ Goal 10 Rule. A hearing official decision to grant an accommodation under the Federal Fair Housing Amendments Act of 1988 (FHAA) to allow a proposed group care home to house up to 20 residents provides no basis for remand, even if the accommodation was not warranted under the FHAA, where the local government's regulations concerning group homes do not impose a numerical limit on the number of residents that could occupy a group care home. *Phillips v. Lane County,* 62 Or LUBA 92 (2010).

14. Goal 10 – Housing/ Goal 10 Rule. Where the OAR 660-008-0005(6) definition of "redevelopable land" specifically encompasses land on which the local government determines there is a "strong likelihood" that the lots will be redeveloped more intensively, a local government does not err in excluding land from its analysis of "redevelopable land" where it concludes that there is not a strong likelihood that redevelopment will occur on any lands within the city due to the arrangement of existing development and market factors. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 211 (2010).

14. Goal 10 – Housing/ Goal 10 Rule. OAR 660-008-0005(2) contains a presumption that land is "buildable land" unless it possesses one or more of the characteristics listed in the rule—topography, placement of buildings, and access issues—in which case the city may exclude it from the definition of buildable land, as long as the city explains why one or more of the listed factors render the excluded land undevelopable for residential uses. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 211 (2010).

14. Goal 10 – Housing/ Goal 10 Rule. Where ORS 197.296 does not apply, Goal 10 and its implementing statute and rules do not require a city to concurrently address a current, unmet need for more affordable housing when it conducts an evaluation of its residential land needs. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 211 (2010).

14. Goal 10 – Housing/ Goal 10 Rule. A local code requirement that an applicant for a dwelling in a certain zone show that "it is safe to build" the dwelling is a standard that is not "clear and objective" as required by ORS 197.307(6), and the local government may not deny the dwelling

application based on an alleged failure to satisfy that standard. *Rudell v. City of Bandon*, 62 Or LUBA 279 (2010).

14. Goal 10 – Housing/ Goal 10 Rule. The provisions in ORS 197.307 that relate directly to "needed housing," as defined in ORS 197.303(1), including the ORS 197.307(6) requirement that approval standards that are applied to needed housing must be clear and objective, are made inapplicable by ORS 197.303(2) to cities with populations under 2,500. *Montgomery v. City of Dunes City*, 60 Or LUBA 274 (2010).

14. Goal 10 – Housing/ Goal 10 Rule. A local government does not improperly defer rezoning of land within an urban growth boundary to the maximum planned residential density under OAR 660-008-0025 where the local government has zoned the lands challenged by petitioner R-3 and R-4, the R-3 zone allows densities that are twice the maximum planned residential density and the R-4 zone allows more than three times the maximum planned residential density. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

14. Goal 10 – Housing/ Goal 10 Rule. A zoning ordinance standard that makes the number of required parking spaces for multiple family development depend on the number of bedrooms in each unit does not violate the ORS 197.307(6) requirement that approval standards applied to needed housing must be clear and objective. The parking requirement is more properly viewed as a *performance* standard rather than an *approval* standard. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

14. Goal 10 – Housing/ Goal 10 Rule. Even if a zoning ordinance standard that makes the number of required parking spaces for multiple family development depend on the number of bedrooms in each unit is properly viewed as an approval standard that under ORS 197.307(6) must be clear and objective, making the required number of parking spaces depend on the number of bedrooms in each multiple family unit is sufficiently "clear and objective" to comply with ORS 197.307(6). *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

14. Goal 10 – Housing/ Goal 10 Rule. It is premature to argue that a legislative decision that adopts a new Airport Related zoning district violates a city's obligation to protect industrial and commercial land from incompatible uses under Statewide Planning Goal 9 and violates Goals 10 and 14 by impermissibly converting industrially zoned land, for which there is a shortage, to a residential airpark use, which is not needed under Goal 10. Such arguments must await a city decision that actually applies the new Airport Related zoning district to some property in the city. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

14. Goal 10 – Housing/ Goal 10 Rule. It may be that a city's buildable lands inventory (BLI) can be written and structured so that it can be updated without incorporating the update into the city's comprehensive plan. However, where a city's BLI is not the type of BLI that might be updated and relied upon without incorporating the updated BLI into the comprehensive plan, a city decision relying on that BLI update to enlarge the city's urban growth boundary, without first adopting the updated BLI as part of the city's comprehensive plan, is error. *Lengkeek v. City of Tangent*, 54 Or LUBA 160 (2007).

14. Goal 10 – Housing/ Goal 10 Rule. The obligation to adopt findings under OAR 660-007-0060(2), part of the Metropolitan Housing Rule, is triggered only by plan and land use regulation amendments that are either intended to comply with the construction and density mix standards in the rule or that impact local government provisions complying with those standards. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

14. Goal 10 – Housing/ Goal 10 Rule. A legislative decision that establishes a floor area ratio (FAR) standard for residential housing does not trigger application of the construction and density mix standards in OAR chapter 660, division 7, where the petitioner fails to demonstrate that the FAR standard affects the city's obligation to provide for an overall density of eight or more dwelling units per acre. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

14. Goal 10 – Housing/ Goal 10 Rule. Absent a focused challenge from petitioners, staff reports analyzing proposed floor area ratio (FAR) standards for residential development and concluding that the FAR standards would have no impact on future residential construction and development are sufficient to demonstrate that the FAR standards are consistent with Goal 10. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

14. Goal 10 – Housing/ Goal 10 Rule. A city properly relies on its established buildable lands inventory (BLI) to determine that a comprehensive plan amendment will not violate Goal 10 (Housing), even if the findings reference a more recent BLI that is not adopted in the comprehensive plan, where the reference is merely to explain that the city is not relying on the more recent BLI. *Columbia Empire Farms, Inc. v. City of Dundee*, 53 Or LUBA 39 (2006).

14. Goal 10 – Housing/ Goal 10 Rule. When a city has a 170-acre "reserve" that is zoned residential, but is not included in the city's buildable lands inventory as future residential land, the city does not violate Goal 10 (Housing) by adopting a comprehensive plan change that devotes approximately 17 acres of the 170-acre "reserve" to non-residential transportation uses. *Columbia Empire Farms, Inc. v. City of Dundee*, 53 Or LUBA 39 (2006).

14. Goal 10 – Housing/ Goal 10 Rule. Where there is uncertainty about when a proposed bypass will be approved, funded, or constructed, a city is not required to consider the indirect impacts of the bypass, such as increased housing demand due to shorter commute times to a regional center, on the city's residential lands inventory. *Columbia Empire Farms, Inc. v. City of Dundee*, 53 Or LUBA 39 (2006).

14. Goal 10 – Housing/ Goal 10 Rule. ORS 215.416(8)(a) simply requires that permit approval standards be included in a county's land use regulations. The ORS 215.416(8)(b) requirement that permit standards that apply to needed housing be "clear and objective" does not apply to permits for other kinds of development. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

14. Goal 10 – Housing/ Goal 10 Rule. Extrapolation of a local government's buildable lands inventory based on assumptions not contained in the comprehensive plan is not compatible with the Goal 2 requirement that decisions be based on the comprehensive plan. *Lengkeek v. City of Tangent*, 52 Or LUBA 509 (2006).

14. Goal 10 – Housing/ Goal 10 Rule. A local government may rely on population projections contained in the transportation system plan portion of the comprehensive plan in amending its urban growth boundary. *Lengkeek v. City of Tangent*, 52 Or LUBA 509 (2006).

14. Goal 10 – Housing/ Goal 10 Rule. Particular housing types are "needed housing" for purposes of ORS 197.303 through 197.307 if the local comprehensive plan identifies a need for that housing type at particular price ranges and rent levels. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

14. Goal 10 – Housing/ Goal 10 Rule. Where a city's UGB includes a surplus of 185 acres of land that is available for annexation and rezoning for residential use to meet the city's needs during its planning period, the city's decision to rezone less than one acre of residentially zoned land in the city for commercial use does not violate Goal 10. *Jaffer v. City of Monmouth*, 51 Or LUBA 633 (2006).

14. Goal 10 – Housing/ Goal 10 Rule. The lands that a city is relying on to meet its needs for residentially planned and zoned land for the planning period must be included inside the city's urban growth boundary. However, all of the land that the city is relying on to meet its need for residentially planned and zoned land is not required to be located within the city limits at the beginning of the planning period. *Jaffer v. City of Monmouth*, 51 Or LUBA 633 (2006).

14. Goal 10 – Housing/ Goal 10 Rule. The city's conclusion that there is a demonstrated need to add 90 acres of residential land to the city's residential buildable lands inventory, based on information submitted by the applicant that uses a planning period to the year 2020, is not inconsistent for purposes of Goal 2 (Land Use Planning) with the buildable lands inventory in the acknowledged comprehensive plan that relies on a planning period that ends in 2004 or 2005. *Lengkeek v. City of Tangent*, 50 Or LUBA 367 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. Goal 10 (Housing) requires local governments to inventory available residential buildable lands, and Goal 2 (Land Use Planning) requires those inventories to be part of the comprehensive plan. Where the residential buildable lands inventory in the comprehensive plan is not useable, and an applicant presents evidence regarding the current inventory of buildable lands, Goal 1 (Citizen Involvement), Goal 2 and Goal 10 require that the comprehensive plan be amended to incorporate that inventory. *Lengkeek v. City of Tangent*, 50 Or LUBA 367 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. Goal 10 (Housing), Goal 2 (Land Use Planning) and Goal 1 (Citizen Involvement) require that a population projection that forms the basis of a city's residential lands needs analysis be incorporated into the comprehensive plan. *Lengkeek v. City of Tangent*, 50 Or LUBA 367 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. Goal 10 requires that local governments make assumptions about the types and density of housing it expects over its planning period. Once those assumptions are adopted as part of the comprehensive plan, subsequent amendments to the comprehensive plan and land use regulations must ensure that the amendments do not render the assumptions invalid. *4-J Land Co., LLC v. City of Sandy*, 50 Or LUBA 525 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. It is not sufficient under Goal 10 to demonstrate that it remains theoretically possible to achieve anticipated development densities notwithstanding amendments to residential zoning standards. To be consistent with Goal 10, the local government must show that the amendments will not alter the types or densities of development that its acknowledged planning documents anticipate will actually occur during the planning period. *4-J Land Co., LLC v. City of Sandy*, 50 Or LUBA 525 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. Where a city has adopted a buildable lands inventory and a housing needs analysis to comply with Goal 10's requirement for a housing needs projection, even though the city may not have been required to adopt the inventory and analysis under ORS 197.296, when the city subsequently amends its comprehensive plan and land use regulations it must ensure that those amendments do not render the assumptions in the inventory and analysis invalid. *4-J Land Co., LLC v. City of Sandy*, 50 Or LUBA 525 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. A petitioner's challenge that a city may not rely on housing that is subject to conditional use and planned development standards that are not clear and objective to meet its needed housing goals will be rejected, where those standards are not a product of the comprehensive plan or land use regulation on appeal. *4-J Land Co., LLC v. City of Sandy*, 50 Or LUBA 525 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. Secondary effects from transportation projects such as noise or visual impacts do not render nearby residential lands "unavailable" or "unsuitable" for residential development, thereby taking them out of the definition of "buildable land." *1000 Friends of Oregon v. City of Dundee*, 49 Or LUBA 601 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. A city may rely on a recent buildable lands inventory (BLI) that is a completed final document in demonstrating that a proposed transportation project will not result in a deficiency of buildable land under Goal 10 (Housing), even if that BLI has not yet been incorporated into the comprehensive plan. *1000 Friends of Oregon v. City of Dundee*, 49 Or LUBA 601 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. When a city's population passes 2,500, more types of needed housing must be addressed, but the city does not have to amend its housing inventory before it can adopt any land use decision that will affect housing. *1000 Friends of Oregon v. City of Dundee*, 49 Or LUBA 601 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. Coordination requirements regarding a planned transportation corridor are not "approval standards" within the meaning of ORS 197.307(6), and therefore are not required to be "clear and objective." *1000 Friends of Oregon v. City of Newberg*, 49 Or LUBA 626 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. The city need not address Goal 10 impacts from a relocated transportation corridor when the impacts on the supply of buildable land from the relocated corridor will be less than impacts from the original corridor. Any challenge is an impermissible

collateral attack on the earlier decision. *1000 Friends of Oregon v. City of Newberg*, 49 Or LUBA 626 (2005).

14. Goal 10 – Housing/ Goal 10 Rule. A local code standard that prohibits development in wetlands does not violate the ORS 197.307(6) requirement for "clear and objective" approval standards for needed housing. Where an applicant seeks a variance to that local code prohibition against development in wetlands, ORS 197.307(6) does not prohibit application of subjective variance approval standards. *Linstromberg v. City of Veneta*, 47 Or LUBA 99 (2004).

14. Goal 10 – Housing/ Goal 10 Rule. A city finding that plan amendments that authorize residential and nonresidential development in a floodplain does not offend Goal 7 because residential development is already allowed in the floodplain under the acknowledged comprehensive plan is sufficient to demonstrate that the plan amendment does not violate Goal 7. That the development authorized in the acknowledged comprehensive plan is residential development and the city does not consider land in a floodplain for purposes of meeting its housing obligations under Goal 10 does not mean that the land could not be developed residentially under the acknowledged comprehensive plan. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

14. Goal 10 – Housing/ Goal 10 Rule. A city may rely on the residential buildable lands inventory in its acknowledged comprehensive plan and need not update that inventory when adopting a post-acknowledgment plan amendment. Where that inventory shows a surplus of residential buildable lands both before and after a plan amendment that designates some of those lands to allow other uses, the city may rely on that remaining surplus to find the plan amendment is consistent with Goal 10 housing planning requirements. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

14. Goal 10 – Housing/ Goal 10 Rule. A city decision that results in the potential for development of more high-density housing than is identified as needed in the acknowledged comprehensive plan does not offend Goal 10. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

14. Goal 10 – Housing/ Goal 10 Rule. Neither Goal 10 nor Goal 14 require a finding of "demonstrated need" for additional residential land within the meaning of Goal 2, Part II or Goal 14, factors 1 and 2 before the city may amend its comprehensive plan map to allow property to be zoned for residential rather than industrial uses. *Holcombe v. City of Florence*, 45 Or LUBA 59 (2003).

14. Goal 10 – Housing/ Goal 10 Rule. Although market demand for rural residential housing is not sufficient to establish "need" for such housing for purposes of taking an exception to statewide planning goals governing rural resource lands, there is no reason why market demand cannot suffice to establish "need" for rural residential housing for purposes of a local rezoning standard, nor any reason why such need must be evaluated against the county's Goal 10 inventory. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 97 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. Given that ORS 197.299 requires Metro to review the supply of residential land within the Metro UGB at least every five years, Metro is not obligated to provide a quasi-judicial UGB amendment process, in addition to a legislative process, to ensure

that the Metro UGB as a whole maintains an adequate supply of residential land. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. While the courts have held that Metro can consider housing need on a subregional basis, at least in some circumstances, no legislation compels Metro to do so, or prohibits Metro from relying exclusively on legislative reviews of the entire regional UGB to ensure compliance with Goals 10 and 14. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. The speculative possibility that a subregional housing shortage will arise in the interim between the five-year UGB reviews required by ORS 197.299, and that Metro will decline to initiate a legislative proceeding to address that interim shortage, is an insufficient basis to establish that a quasi-judicial UGB amendment process is essential to ensure continued compliance with Goals 10 and 14. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. Even assuming that the ORS 197.307(6) prohibition against procedures that "discourage needed housing through unreasonable cost or delay" applies to Metro, which does not process applications for development of needed housing, petitioner's speculation that Metro will delay initiating a legislative UGB amendment for housing needs is insufficient to establish that Metro's failure to also provide for a quasi-judicial UGB amendment process for housing need will result in "unreasonable delay." *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. Land use regulation purpose or applicability provisions that by their terms or the terms of other related code provisions do not apply as approval criteria for needed housing are not "standards" that must, pursuant to ORS 197.307(6), be clear and objective. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. Where a city adopts a comprehensive update to its zoning code in an effort to comply with the ORS 197.307(6) requirement that standards applied to needed housing statutes be "clear and objective," and in so doing carries forward preexisting standards that are not clear and objective, such standards are subject to review under ORS 197.307(6), and such review does not constitute an impermissible collateral attack on those standards. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. A code amendment that grants discretionary authority for city staff to impose conditions on approval of needed housing may constitute or contain "standards" or "procedures for approval" that must, under ORS 197.307(6), be clear and objective. Such standards are subject to review in an appeal of the city's legislative decision adopting the amendment. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. Even numerical standards such as setbacks and height limitations may not be clear and objective, if the reference point from which the setback or limitation is measured is stated in undefined descriptive terms. Absent reasonable means of locating the reference point, a needed housing standard requiring a 100-foot setback from any "rare

animal population" is not clear and objective. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. A needed housing standard requiring that new dwellings be within a 4-minute response time for emergency medical services is not clear and objective, where the city did not adopt a map or otherwise provide a clear and objective way to determine whether proposed needed housing is located in an area meeting the standard. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. The needed housing statute at ORS 197.307 is not concerned with the timing of development, nor does it require that all areas of the city be immediately available for development of needed housing under clear and objective standards. The statute is not offended by a standard that effectively requires needed housing developers to apply under discretionary standards designed to address public safety concerns until emergency services are extended to currently unserved portions of the city. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. Imposing a clear and objective standard that is impossible or virtually impossible to satisfy is a prohibition in the guise of a standard, and offends ORS 197.307 if the standard effectively forces the needed housing applicant to seek approval for needed housing under an alternative set of discretionary approval criteria. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. The needed housing statute at ORS 197.307 does not require a conflict mechanism for resolving potential conflicts between clear and objective criteria. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. Although ORS 197.307(6) prohibits standards or procedures that alone or cumulatively discourage needed housing through unreasonable cost or delay, it will be difficult to establish in an appeal of a legislative decision adopting standards or procedures that they cause *unreasonable* cost or delay and have the effect of discouraging needed housing. In most cases, such challenges can only be brought and meaningfully reviewed in the context of an "as-applied" challenge to a quasi-judicial decision. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. Any cost or delay attributable to a standard or procedure that is unreasonable as a matter of law, *i.e.*, lacks a rational basis, violates the statutory prohibition on standards or procedures that discourage needed housing through unreasonable cost or delay. An informational requirement that needed housing applicants prepare a geotechnical study lacks a rational basis, where the required geotechnical study functions only to supply the city with potentially expensive information that has no bearing on any approval standard. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. Where petitioners make a facially plausible showing that new tree protection and water resource regulations are likely to reduce the development potential for residential, commercial and industrial lands, the city has an obligation to demonstrate that

despite any such reductions in development potential the city's inventories continue to comply with Goals 9 and 10. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. Goals 9 and 10 do not prohibit increases in regulatory burdens or require local governments to refrain from imposing any particular level of regulatory burden. Therefore, incorporation of comprehensive plan policies into the zoning code pursuant to ORS 197.195, in order to apply those policies as approval criteria to limited land use decisions, does not violate Goals 9 and 10 even if application of such policies as approval criteria would impose additional regulatory burdens on development of Goal 9 and 10 lands. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. The Goal 10 coordination requirement at OAR 660-008-0030(1) that local governments coordinate with other governments in the region "in arriving at a fair allocation of housing types and densities" applies only if a local government ordinance affects the allocation of housing types and densities. Not all local government programs with arguable impacts on housing or Goal 10 will trigger the OAR 660-008-0030(1) coordination requirement. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

14. Goal 10 – Housing/ Goal 10 Rule. The housing needs projection required by the Goal 10 rule is the same housing needs analysis that is required by ORS 197.296(3) for conducting a review of an urban growth boundary. Because the Goal 10 rule requires that the housing needs projection must be "consistent with Goal 14 requirements," the housing needs analysis under ORS 197.296(3) must be consistent with Goal 14 requirements. *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001).

14. Goal 10 – Housing/ Goal 10 Rule. LCDC's choice to adopt rules that require the housing needs analysis required by ORS 197.296(3) to be "consistent with Goal 14 requirements" is essentially a choice to require that, where the analysis identifies a significant deficit in the supply of buildable land within the UGB, the city must complete the statutory process at ORS 197.296(4) through (7) and adopt one or more of the actions described in the statute to remedy the identified deficit. Because the statute and rule prescribe an iterative process highly integrated with Goal 14, the city cannot achieve finality with respect to the housing needs analysis under ORS 197.296(3) without also taking action under ORS 197.296(4) through (7). *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001).

14. Goal 10 – Housing/ Goal 10 Rule. Although rezoning a 1.94-acre parcel from residential to commercial may not violate Goal 10, a local government errs in finding that Goal 10 is irrelevant to the rezoning request. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

14. Goal 10 – Housing/ Goal 10 Rule. Goal 10 concerns needed housing, and nothing in the Goal 10 rules requires a local government to provide housing for a "recreational golf course lifestyle" absent support for such housing in the local comprehensive plan or Goal 10 inventory. *DLCD v. Umatilla County*, 39 Or LUBA 715 (2001).

14. Goal 10 – Housing/ Goal 10 Rule. A local government must rely on the housing inventory contained in its acknowledged comprehensive plan to determine whether rezoning property from

multi-family residential to commercial use will cause the local government's housing inventory to violate Goal 10. *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384 (2001).

14. Goal 10 – Housing/ Goal 10 Rule. A local government's determination that there is sufficient land designated multi-family residential to satisfy Goal 10 is supported by substantial evidence when the acknowledged Goal 10 housing inventory establishes that the city has a 238-acre surplus of land designated for multi-family development, and the proposal is to rezone only eight acres from multi-family residential to commercial. *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384 (2001).

14. Goal 10 – Housing/ Goal 10 Rule. The requirement under ORS 197.307(6) for clear and objective approval standards applies to "needed housing," as that concept is defined by statute and administrative rule. An argument that new land use regulations are not clear and objective provides no basis for reversal or remand, where petitioner fails to demonstrate that the new land use regulations apply to "needed housing." *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282 (2001).

14. Goal 10 – Housing/ Goal 10 Rule. Pursuant to ORS 197.480(5), a local government can apply clear and objective criteria for the placement and design of manufactured home parks. A local provision requiring that each home in manufactured home parks be within 500 feet of a fire hydrant capable of providing a defined minimum flow is a clear and objective criterion. *Doob v. Josephine County,* 39 Or LUBA 276 (2001).

14. Goal 10 – Housing/ Goal 10 Rule. That a local government has neither conducted the inventory and needs analysis required by ORS 197.480 nor made a determination of needed housing with respect to manufactured home parks does not prohibit the local government from approving a manufactured home park, or waive the local government's obligation to comply with ORS 197.480. *Doob v. Josephine County*, 39 Or LUBA 276 (2001).

14. Goal 10 – Housing/ Goal 10 Rule. Goal 10 does not prohibit including more land that is planned and zoned for multi-family development than is identified as needed in the comprehensive plan. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. Criteria governing an application to rezone property to allow for the siting of a mobile home park need not comply with requirements in ORS 197.307 and 197.480 for "clear and objective" standards regulating the siting of needed mobile homes when a city has otherwise planned and designated sufficient land to satisfy the need for mobile home parks within its jurisdiction. *Evergreen Development, Inc. v. City of Coos Bay*, 38 Or LUBA 470 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. A city is not required to permit the siting of mobile home or manufactured dwelling parks in all zones that permit residential densities of 6 to 12 units per acre. ORS 197.480(1) merely requires that areas designated for those residential densities contain enough land to accommodate the city's identified need for mobile home or manufactured dwelling parks. The accommodation may be achieved by allowing the parks only in one such zone. *Evergreen Development, Inc. v. City of Coos Bay*, 38 Or LUBA 470 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. ORS 197.307(6) does not prohibit a city from requiring an applicant for a zone change to demonstrate a need for that change where the city establishes that it has already designated sufficient land to accommodate its need for mobile home parks. *Evergreen Development, Inc. v. City of Coos Bay*, 38 Or LUBA 470 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. Unless a local government's findings establish a relationship between a housing study in the record and its acknowledged Goal 10 inventory, a local government may not rely on that study to support a finding that the loss of 41 acres of intermediate density housing is consistent with its acknowledged Goal 10 inventory. *DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. Goal 10 and OAR chapter 660, division 8 include a requirement that a local government ensure that amendments to its acknowledged land use regulations do not "discourage needed housing through unreasonable cost or delay." However, Goal 10 does not require that *all* house plans be held harmless from increased costs. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. Goal 10 and OAR 660-008-0015 are not violated where the record demonstrates that increased housing costs that may be attributable to an amended land use regulation can be avoided or minimized and that there are many existing house plans to comply with the amended land use regulation. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. The requirement under Goal 10 that land use regulations allow flexibility of housing "types" does not necessarily extend to protect particular housing design features. Where petitioner does not demonstrate that amended land use regulations so heavily regulate the permissible "design" of dwellings that the Goal 10 requirement for flexibility of housing "types" is violated, LUBA will reject the challenge. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. A petitioner's arguments that amended land use regulations violate a comprehensive plan policy by increasing housing costs and discouraging infill development provide no basis for remand, where the plan policy encourages both infill and preserving neighborhood livability and the city's findings explain that the regulations are needed to ensure that infill housing development can be accommodated in neighborhoods without eroding livability. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. A plan goal requiring preservation of neighborhood diversity does not require diversity of housing designs where, in context, the word "diversity" is properly interpreted to refer to "age, income, race and ethnic background" of the people in the neighborhood rather than housing designs. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. A comprehensive plan amendment that increases the required right-of-way for major arterials from 80 feet to 100 feet may reduce the supply of

buildable land and commercial sites and thus requires findings that address Statewide Planning Goals 9 and 10. *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. A decision amending an acknowledged comprehensive plan housing inventory without amending existing approval standards that are applied to needed housing is not required to demonstrate that those existing approval standards are "clear and objective," as required by ORS 197.307(6). *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

14. Goal 10 – Housing/ Goal 10 Rule. Subjective conditional use criteria designed to balance or mitigate the impacts of development on property or the adjoining community are not "clear and objective criteria and standards" that can be applied to approve or deny manufactured dwelling parks under ORS 197.480(5). *Multi/Tech Engineering v. Josephine County*, 37 Or LUBA 314 (1999).

14. Goal 10 – Housing/ Goal 10 Rule. Where a county fails to implement ORS 197.480 to designate residential areas in which manufactured dwelling parks can be located as allowed uses subject only to clear and objective criteria, and the county's ordinance subjects all manufactured dwelling parks to subjective conditional use criteria, the county cannot apply those criteria to approve or deny a manufactured dwelling park. *Multi/Tech Engineering v. Josephine County*, 37 Or LUBA 314 (1999).

14. Goal 10 – Housing/ Goal 10 Rule. A county plan amendment imposing a "sequencing" requirement that proposed attached housing be built before completing proposed detached housing is supported by an adequate factual base, where a reasonable decision maker could conclude, based on testimony in the record, that the sequencing requirement is necessary to forestall attempts to underbuild attached housing, which may subvert the county's minimum density standard. *West Hills Development Co. v. Washington County*, 37 Or LUBA 46 (1999).

14. Goal 10 – Housing/ Goal 10 Rule. Petitioners fail to demonstrate that a county's plan amendment lacks an adequate factual base and is inconsistent with Goal 10 where petitioners merely speculate that the county's plan amendment, which requires that proposed attached housing be built at a site before completing proposed detached housing, will adversely affect the county's buildable lands inventory. *West Hills Development Co. v. Washington County*, 37 Or LUBA 46 (1999).

14. Goal 10 – Housing/ Goal 10 Rule. Petitioners fail to demonstrate that a county's minimum density standard lacks an adequate factual base or is inconsistent with Goal 10 where petitioners merely speculate that application of the standard will make it impossible to develop certain lands at lower densities. Even if petitioners' speculations are correct, the only probable result is that those lands will be developed at higher densities, which is not inconsistent with Goal 10. *West Hills Development Co. v. Washington County*, 37 Or LUBA 46 (1999).

14. Goal 10 – Housing/ Goal 10 Rule. A decision to remove 40 acres of land from a city's inventory of multi-family residential land must be shown to be consistent with the inventory of buildable lands in the housing element of the city's comprehensive plan. A general finding that there are other available lands that would satisfy residential needs is inadequate to explain why the

city's inventory of multi-family residential land remains adequate to meet the city's needs despite a decision to remove 40 acres from that inventory. *Mulford v. Town of Lakeview*, 36 Or LUBA 715 (1999).

14. Goal 10 – Housing/ Goal 10 Rule. In determining whether rezoning of land from multi-family to single-family residential uses is consistent with Goal 10 and the city's obligation to provide for multi-family dwellings, the relevant inquiry is not limited by the amount of land designated for multi-family residential uses. The city can take into account multi-family dwellings that have been approved in other zones in determining whether the proposed rezoning is consistent with the city's obligation to provide a sufficient number of multi-family dwellings. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

14. Goal 10 – Housing/ Goal 10 Rule. Substantial evidence supports a city's rezoning of land from multi-family to single-family residential uses, where the city's inventory indicates a need for 1,081 multi-family dwellings, and a reasonable person could conclude that the number of existing and approved multi-family dwellings exceeds 1,081 units, notwithstanding flaws in the city's analysis that render the exact number of those dwellings uncertain. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

14. Goal 10 – Housing/ Goal 10 Rule. A county's conclusory finding that goals protecting housing are not violated by rezoning rural residential property for industrial use because proximity of the property to commercial and industrial uses and an interstate highway makes use of the property for rural residential uses impracticable is inadequate, where the record includes no evidence of conflicts with those uses that might make rural residential uses impracticable. *James v. Josephine County*, 35 Or LUBA 493 (1999).

14. Goal 10 – Housing/ Goal 10 Rule. Where petitioners do not develop their argument that Statewide Planning Goal 10 and an implementing comprehensive plan housing protection goal categorically prohibit changing the zoning or planning designations of rural residential lands to allow rural industrial use, LUBA will reject the argument. *James v. Josephine County*, 35 Or LUBA 493 (1999).

14. Goal 10 – Housing/ Goal 10 Rule. A comprehensive plan amendment that significantly reduces the supply of residential land implicates Goal 10. Findings that fail to discuss the current housing inventory and needs, anticipated population growth, or whether available vacant land is buildable are inadequate to demonstrate consistency with Goal 10. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. A legislative amendment that changes mobile home parks from a conditional use to a use in a floating zone which has not been applied to any particular site conflicts with ORS 197.480(1) and (2), which require that the city zone specific lands for mobile home parks, commensurate with the need for such parks. *Creswell Court v. City of Creswell*, 35 Or LUBA 234 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. It is inconsistent with Goal 10 to remove an entire category of housing types from a local government's future housing stock without supporting that decision

by a buildable lands inventory and housing needs projections. *Creswell Court v. City of Creswell*, 35 Or LUBA 234 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. A housing needs projection based on the unsupported assumption that the entirety of the city's future population growth will consist of middle to upper income residents is inconsistent with Goal 10. *Creswell Court v. City of Creswell*, 35 Or LUBA 234 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. Where a local government's acknowledged comprehensive plan identifies a need "for housing within an urban growth boundary at particular price ranges and rent levels," any housing types that are determined to be necessary to meet that need are considered "needed housing," within the meaning of ORS 197.303(1). *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. Even if high-cost housing could be excluded from "needed housing" under ORS 197.303(1), where such high-cost housing is included in the housing needs identified in the comprehensive plan, it constitutes "needed housing" within the meaning of the statute. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. OAR 660-008-0005 permits a local government to exclude lands with slopes in excess of 25 percent from its buildable lands inventory for housing. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. Where a city's buildable lands inventory does not include underdeveloped residential lands, it need not consider whether more restrictive land use regulations will have impacts on them. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. Where a city's decision adopts more restrictive land use regulations affecting residential lands, it must consider the impact of those regulations on unincorporated lands inside the UGB, if the city relies on such land to meet its identified housing needs. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. Legislative history makes it clear that "needed housing" is not to be subjected to standards, conditions or procedures that involve subjective, value-laden analyses designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. A city's failure to clearly and objectively identify the information that must be submitted in support of an application for approval to construct needed housing does not violate the statutory requirement for "clear and objective" "procedures for approval." Under ORS 227.178(2) the city is required to notify the applicant of exactly what information is missing from the application within 30 days of receipt of the application. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. A city code provision that allows it to impose conditions on applications to construct "needed housing" to "mitigate any potential negative impacts caused by the development" violates the statutory requirement for "clear and objective" procedures for such applications. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. A code requirement that vegetation included in a planting plan be "native vegetation" is a sufficiently clear and objective standard under ORS 197.307(6). That the requirement includes an option to use "similar species" in place of "native vegetation" does not mean the requirement is not clear and objective. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. A code requirement that needed housing site grading "shall consider the sensitive nature of these areas," "[retain] existing grades to the greatest extent possible [and] avoid an artificial appearance by creating smooth flowing contours of varying gradients" is not "clear and objective," within the meaning of ORS 197.307(6). *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. Local code standards requiring that trees of a particular diameter be "incorporated into the project design whenever possible" and that development must preserve "the maximum number of existing trees" and that "building envelopes must be located and sized to preserve the maximum number of trees" are sufficiently clear and objective to comply with ORS 197.307(6). *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. A post-construction enforcement provision that potentially affects "needed housing" does not violate ORS 197.307(6), because the statute only limits "standards, special conditions and procedures" when reviewing applications for needed housing. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. A local building design requirement to "cut buildings into hillsides to reduce visual bulk" is sufficiently clear and objective to comply with ORS 197.307(6), where the requirement includes a diagram making it clear that achieving a level building pad is to be accomplished by cutting rather than by filling or by a combination of cutting and filling. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. A code requirement for a detailed geotechnical study with an application to develop hillside lands could be applied in a way that would result in "unreasonable cost or delay" affecting needed housing, in contravention of ORS 197.307(6). However, the code requirement need not necessarily be applied in that manner and, therefore, the code requirement itself does not violate ORS 197.307(6), even though application of that requirement in particular cases might. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. The ORS 197.307(3) requirement for clear and objective conditions and standards for certain housing when regulating for appearance or aesthetic purposes does not apply to regulations adopted to regulate for other purposes, even if those regulations may

also regulate for appearance or aesthetic purposes. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. OAR 660-008-0015 requires that local governments apply nondiscretionary approval standards to needed housing. A standard that requires that the color, material and appearance of new exterior siding and roofing be "similar to" the color, material and appearance of existing siding and roofing in the community is not nondiscretionary. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. Where plan amendments undermine assumptions that support acknowledged plan provisions directed at Goal 10 requirements, the local government must demonstrate that the plan as amended still complies with Goal 10. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

14. Goal 10 – Housing/ Goal 10 Rule. When the size of the city's buildable lands inventory was calculated, deemed adequate and acknowledged on the assumption there would be redevelopment resulting in 2,400 multiple family units within a mile of downtown, the city must, before adopting new regulations which undermine that assumption, consider the impact of the new regulations on the city's buildable lands inventory. *Opus Development Corp. v. City of Eugene*, 30 Or LUBA 360 (1996).

14. Goal 10 – Housing/ Goal 10 Rule. When adopting post-acknowledgment plan and zone map amendments affecting residentially designated land within an urban growth boundary, a local government must demonstrate that it continues to satisfy its Goal 10 obligation to maintain an adequate inventory of buildable lands. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

14. Goal 10 – Housing/ Goal 10 Rule. Under OAR 660-08-015(12) and (13), a buildable lands inventory may include "redevelopable" residentially designated land that is already built upon. However, land which has a mixed-use comprehensive plan designation, rather than a residential plan designation, cannot be included in a buildable lands inventory. OAR 660-08-020(1). *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

14. Goal 10 – Housing/ Goal 10 Rule. Where a city has a population of less than 2,500 people, the city's comprehensive plan and land use regulations do not implement the "needed housing" provisions of either ORS 197.307(6) or Goal 10 and, therefore, the city's interpretation of its plan and land use regulations is not subject to reversal or remand on the basis of inconsistency with statutory and goal standards relating to "needed housing." *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Only "transportation facilities and improvements" that meet the requirements of OAR 660-012-0065 are allowed on EFU-zoned "rural land" without an exception to Goals 3, 11 and 14. OAR 660-012-0070 provides that "transportation facilities" that do not meet the requirements of OAR 660-012-0065 cannot be constructed on "rural land" without an exception to the applicable goals. However, OAR 660-012-0070 does not require an exception to the applicable resource and urban goals where the city concurrently includes the land within its urban growth boundary, because the land is no longer "rural land" as defined in that rule. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. OAR 660-011-0060(9)(a) and (b) provide examples of "[a]ppropriate reasons and facts for an exception to Goal 11" that are context for determining the scope of the general term "appropriate reasons and facts," but they do not state the only "appropriate reasons and facts for an exception to Goal 11" to extend a sewer system into a rural area to solve a public health problem. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 455 (2016).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. OAR 660-011-0060(9) is not intended to describe the complete universe of situations that could justify a reasons exception to Goal 11. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 455 (2016).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A county decision that it "may be" necessary to allow sewers systems to serve up to 11,000 lots in a 180-square-mile area of the county to address a future potential health hazard if the county later determines that septic systems and other treatment systems are not the best solution does not state "appropriate reasons and facts" for justifying a Goal 11 exception. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 455 (2016).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. In approving an exception to Goal 11 to extend sewers onto rural land in the county, a county's failure to distinguish between 3,353 high groundwater lots that are either already developed with houses or that are vacant but could be developed with houses, and other areas that it is proposing to serve with sewers in order to more easily allow future houses on rural lands but that the record does not demonstrate are located in high groundwater areas, makes the county's ordinance adopting an exception to Goal 11 an ordinance that "establish[es] a planning or zoning policy of general applicability" in contravention of ORS 197.732(1)(b), rather than an ordinance that adopts an exception. Central Oregon Landwatch v. Deschutes County, 74 Or LUBA 455 (2016).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Where a county approves a reasons exception to Goal 11 to allow extension of city water to serve a highway rest area, and imposes a condition of approval requiring city approval, but later modifies the condition to substitute rural irrigation water for city water to be used to irrigate landscaping, the modification does not necessarily change the "type" of public facilities and service and thus require a new reasons exception pursuant to OAR 660-004-0018(4)(b). Generally, a new reasons exception is required under OAR 660-004-0018(4)(b) only for changes that make the exception area less conforming to the goal. Foland v. Jackson County, 70 Or LUBA 247 (2014).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Because Goal 11 defines "water system" as a system for the provision of piped water for human consumption, modifying a condition of approval so that city water is not used for irrigating landscaping, but used only for human consumption, does not constitute a change in the type or intensity of the "water system" for purposes of OAR 660-044-0018(2)(b) and thus modifying the condition does not require a new reasons exception. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Where a city adds 28 acres of land to its Goal 10 inventory to meet an identified need for residential land, the city's alleged failure to conduct public facilities planning to support future residential development of the inventoried lands may violate Goal 11, but does not violate Goal 10 or indicate that the city's Goal 10 inventory is inadequate. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A decision that adopts a refinement plan that describes a 15-inch wastewater pipeline that is not included in the city's acknowledged public facilities plan does not present a Goal 2 consistency problem or violation of Goal 11, where under the acknowledged plan 15-inch pipelines need not be included in the plan and the petitioner's argument that the plan must include the proposed pipeline represents a collateral attack on the acknowledged public facilities plan. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Goal 11 requires the city to adopt a public facilities plan for areas within its urban growth boundary. A public facility plan is consistent with Goal 11 where the plan includes future projects and improvements to serve areas inside the city's existing urban growth boundary. *Central Oregon Landwatch v. City of Bend*, 68 Or LUBA 173 (2013).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. OAR 660-011-0010(1)(g) requires a public facility plan to include "[a] discussion of the provider's existing funding mechanisms and the ability of these and possible new mechanisms to fund the development of each public facility project or system." A city's multiple page discussion of its existing Capital Improvement Program, systems development charges, leasing revenue and use of utility user fees to fund development of public facility project satisfies the requirement of the rule. *Central Oregon Landwatch v. City of Bend*, 68 Or LUBA 173 (2013).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. OAR 660-011-0010(1)(f) requires a public facility plan to include "[a]n estimate of when each facility project will be needed[.]" A public facility plan that identifies each project as a "short term project (years 1-5)" or a "long term project (years 6-20)" satisfies the requirements of the rule. Central Oregon Landwatch v. City of Bend, 68 Or LUBA 173 (2013).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A hearings officer does not err in concluding that connecting a dwelling to a rural sewer service district's existing system constitutes either the establishment of a "new community sewer system" or a "new extension of a sewer system from within an urban growth boundary." *Purtzer v. Jackson County,* 67 Or LUBA 205 (2013).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. The Goal 11 requirement to provide "timely, orderly and efficient arrangement of public facilities and services" is not particularly concerned with the performance standards governing state highways, a concern that is more specifically addressed under Goal 12 and the Transportation Planning Rule. Goal 11 does not add anything new or different to the specific Goal 12 requirements with respect to the performance of state highways, and findings addressing Goal 11 are not inadequate simply because they fail to consider whether modified highway performance standards are consistent with Goal 11. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Nothing in Goal 2, Goal 11, or an urban growth management agreement between the city and the county for lands within the urban growth boundary requires the city to consider the impacts of a public facilities project on a county-identified Goal 5 resource, where the county was given an opportunity to and did not raise any concerns about the project's impact on a county-identified Goal 5 resource. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 392 (2012).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. OAR 660-011-0015(3) allows the city to incorporate by reference private water service providers' planning documents. Where there is no evidence that the private service providers' planning documents are inadequate to meet the requirements of OAR 660-011-0010(a), the city is entitled to rely on those planning documents to assess the private service providers' systems. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 392 (2012).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. OAR 660-011-0010 requires the city to provide in its public facility plan an identification of "significant public facility projects which are to support the land uses designated in the acknowledged comprehensive plan." A public facility plan is inconsistent with OAR 660-011-0010 where the plan includes future projects and improvements to serve areas outside the city's existing urban growth boundary. *Central Oregon Landwatch v. City of Bend,* 66 Or LUBA 392 (2012).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. If a particular urban use of rural land authorized under an exception to Goal 14 does not require urban levels or sources of water, it is consistent with Goal 11 to allow the urban use to be served with non-urban levels or sources of water, and no exception to Goal 11 is required. Foland v. Jackson County, 64 Or LUBA 265 (2011).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Nothing in Goal 11 or the Goal 11 rule requires a local government to amend its public facilities plan to include a new bridge that an applicant agrees to construct at its expense to mitigate the traffic effects of a zone change and planned unit development. Willamette Oaks LLC v. City of Eugene, 63 Or LUBA 75 (2011).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Reasons that justify a goal exception under OAR 660-012-0070 may be sufficient to justify a goal exception under Goal 11, OAR 660-011-0060(9) and OAR 660-004-0020 and 660-004-0022. Where a local government reasonably concludes under OAR 660-12-0070 that an on-site septic system would not be adequate to handle the volume of projected waste from a transportation facility, a local government may also be able to rely on the same evidence to conclude that an exception to Goal 11 is justified. *Foland v. Jackson County*, 61 Or LUBA 264 (2010).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. OAR 660-011-0065 does not purport to identify the universe of Goal 11 concerns regarding extension of water systems onto rural land. Where the extension of a water system onto rural lands is proposed to facilitate an urban use of that land, the extension is prohibited without an exception to Goal 11. *Foland v. Jackson County*, 61 Or LUBA 264 (2010).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A county adequately ensures consistency with the Goal 11 prohibition on a "sewer system" that serves more than one parcel on rural lands, where the county approves a sewer system for a proposed public RV park/ campground on two existing parcels, but conditions approval on consolidation of the two parcels into a single parcel. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. The standards for approving a destination resort under Goal 8 and ORS 197.435 through 197.467 function as a "safe harbor" that allows local governments to approve resorts that meet minimum standards, without the necessity of adopting exceptions to Goals 11 and 14. However, the statutory process is not the only means of approving a destination resort, and counties continue to have the option of approving a destination resort subject to exceptions to Goals 3, 4, 11 and 14. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A county may rely on the reasons that justified a Goal 4 exception earlier approved by the county and Land Conservation and Development Commission (LCDC) for a proposed destination resort to justify reasons exceptions to Goals 11 and 14, where the record supports the county's finding that the Goal 4 reasons are still valid and the Goals 11 and 14 exceptions merely implement and complete the earlier county and LCDC approval. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Because Goal 11 and Goal 14 serve congruent policy objectives, the reasons sufficient to justify a Goal 14 exception for a destination resort may also be sufficient to justify an exception to Goal 11 to authorize a community sewer system to serve the destination resort. Friends of Marion County v. Marion County, 59 Or LUBA 323 (2009).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Where Goal 11 and 14 exceptions are necessary to complete a previously approved destination resort that is authorized under the county's acknowledged comprehensive plan and land use regulations, and the resort as completed is substantially similar to the resort as originally approved, the Goal 11 and 14 exceptions do not propose "new uses" that could be conflicting uses with a significant Goal 5 resource site and thus the county does not err in failing to apply the requirements of Goal 5 and the Goal 5 rule. Friends of Marion County v. Marion County, 59 Or LUBA 323 (2009).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. The first sentence of Goal 11 simply requires planning for "a timely, orderly and efficient arrangement of public facilities and services." That language does not prohibit providing public facility capacity that exceeds current or planned demand. *SEIU v. City of Happy Valley*, 58 Or LUBA 261 (2009).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. The second sentence of Goal 11 provides that "[u]rban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to, the needs and requirements of the urban, urbanizable, and rural areas to be served." That language does not bar construction of urban public facilities or services that will have more capacity than is presently needed or needed in the planning period. *SEIU v. City of Happy Valley*, 58 Or LUBA 261 (2009).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Where a planning and zoning criterion requires that commercial retail uses be limited to those appropriate in "type and size" to serve the needs of businesses in a designated employment area, and a local government applies a zoning district that would allow any retail sales business that does not exceed 60,000 square feet in size, LUBA will remand for a better explanation for why the size limitation is sufficient to ensure compliance with the "type and size" limitation. *SEIU v. City of Happy Valley*, 58 Or LUBA 261 (2009).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A decision annexing new territory to a city in order to extend city sewer to the new territory is not a "modification" of a project in a public facilities plan for purposes of the Goal 11 rule, and therefore OAR 660-011-0045 does not require an amendment to the public facilities plan, where the annexation decision does not make any modification to existing sewer projects in the plan or make any decisions regarding such projects. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. That an annexation may ultimately lead to a city extending sewer service to urbanizable lands along a different route than contemplated in the city's public facilities plan does not demonstrate that the annexation is "unreasonable" under *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952). *Link v. City of Florence*, 58 Or LUBA 348 (2009).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Even where a development does not propose residential uses, a proposed RV Park that plans a community wastewater treatment system is a "planned unit development" as that term is used in OAR 660-011-0060(1)(f), and is prohibited by OAR 660-011-0060(2) without an exception to Goal 11. Baxter v. Coos County, 58 Or LUBA 624 (2009).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Where the applicant proposes to install a community wastewater treatment system that will dispose of wastewater generated by all of the proposed uses and buildings in the RV Park, it is a "sewer system" as that term is used in OAR 660-011-0060(1)(f) and is prohibited by OAR 660-011-0060(2) without an exception. Oregon Shores Conservation Coalition v. Coos County, 55 Or LUBA 545 (2008).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Because OAR 660-004-0020(2)(b)(B)(iv) requires a local government to determine whether the "proposed use" can be "reasonably accommodated without the provision of a proposed public facility or service," it is reasonably clear under the rule that the "proposed use" and the "public facility" are two different things. In the context of a Goal 11 exception to extend public facilities to serve proposed development on lands outside the urban growth boundary, the "proposed use" can only be the proposed development to be served by the facility extension, and not the extended public facility. *Todd v. City of Florence*, 52 Or LUBA 445 (2006).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. In granting a Goal 11 exception to extend a public sewer system outside the urban growth boundary, OAR 660-004-0020(2)(b) through (d) require a city to evaluate the "proposed use," the development served by that extended sewer facility, even if that development is not subject to the city's approval authority and does not require a goal exception. *Todd v. City of Florence*, 52 Or LUBA 445 (2006).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. The reasons set out in OAR 660-004-0022(1) are not the exclusive set of reasons that may justify an exception to applicable goals, and it is at least theoretically possible to identify a sufficient reason why the state policy embodied in the applicable goal should not apply that does not require evaluation of the ultimate use or proposed development of the exception area. *Todd v. City of Florence*, 52 Or LUBA 445 (2006).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. That it is economically advantageous to a developer to rely on public services extended from the urban growth boundary rather than develop such services on site is an insufficient "reason" why the state policy embodied in Goal 11 should not apply. *Todd v. City of Florence*, 52 Or LUBA 445 (2006).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Goal 11 requires an "orderly and efficient arrangement of public facilities and services." That requirement is little offended by allowing a single sewer system to serve two adjoining areas that each have the legal right and ability to develop urban uses and urban-level public facilities, notwithstanding that one area is within an urban growth boundary and the other outside. *Todd v. City of Florence*, 52 Or LUBA 445 (2006).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. OAR 660-011-0060(9) requires that a local government adopting an exception to Goal 11 to extend a sewer system outside the urban growth boundary also adopt land use regulations that prohibit the sewer system from serving uses other than those justified in the exception. A provision in an intergovernmental agreement (IGA) that limits sewer access to residential and commercial uses is insufficient to satisfy OAR 660-011-0060(9), because the provision does not limit uses served by the sewer to uses specifically justified in the exception. Todd v. City of Florence, 52 Or LUBA 445 (2006).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A decision that changes the comprehensive plan and zoning map designations for a parcel to allow residential development with a two-acre minimum lot size does not violate the OAR 660-011-0065(2) prohibition against allowing increased residential development density outside urban growth boundaries due to the presence of a community water system, where the two-acre minimum lot size applies under the changed plan and zoning map designations with or without a community water system. *Holloway v. Clatsop County*, 52 Or LUBA 644 (2006).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. ORS 223.314 provides a statutory exclusion from the statutory definition of land use decision. But that exclusion only applies to the extent "a plan * * * adopted pursuant to ORS 223.309" is adopted for the limited purpose of supplying the public facility list that is required by ORS 223.309 as a precondition of adopting a systems development charge methodology. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 109 (2005).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Goal 11 does not prohibit local governments from pursuing separate, contemporaneous decision making processes—one to adopt a regional sewerage plan to comply with ORS 223.309 and state and federal environmental regulations and another to adopt corresponding amendments to the regional comprehensive plan to comply with the local governments' planning obligations. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 109 (2005).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. So long as sewerage facilities recommended in a regional sewerage plan cannot be built until the applicable comprehensive plan is amended to recommend those facilities, the regional sewerage plan may be adopted before the comprehensive plan is amended and the decision to adopt that regional sewerage plan to comply with state and federal environmental regulations and the requirements of ORS 223.309 for adoption of a systems development charge methodology is not a land use decision that is reviewable by LUBA. The reviewable land use decision will be adopted when the corresponding comprehensive plan amendments are adopted. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 109 (2005).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A Goal 11 Public Facility Plan that includes a single listing for a "water pollution control facility treatment project" as a significant public facility project is inadequate where that project is actually many different projects to be constructed in different phases over a 15-year period at a cost of $120 million. To comply with Goal 11, the significant public facility project components of that larger project must be broken down and identified in the public facility plan. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 134 (2005).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Where a local comprehensive plan policy defines "Urban Exception Areas" as lands with acknowledged exceptions to Statewide Planning Goals 3, 4 and 11, the county need not require an exception to Goal 11 where it limits uses in approved exception area to those uses that do not require or impact urban public facilities. Doob v. Josephine County, 49 Or LUBA 113 (2005).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Absent an exception to Goal 11, a county cannot apply a zone that allows clustered residential development served by communal water supply and sewage treatment or disposal facilities on rural lands outside unincorporated communities. *Wood v. Crook County*, 49 Or LUBA 682 (2005).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Neither Goal 11 nor Goal 14 identifies annexation or application of city zoning as the decision points at which (1) a specific development proposal must be approved and (2) any public service or facility inadequacies at the property must be corrected. *Just v. City of Lebanon*, 45 Or LUBA 179 (2003).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Findings that establish that a proposed motor speedway must be centrally located in its market area, that it will provide significant local economic benefits, and that it has characteristics that make locating the speedway within nearby urban growth boundaries an unreasonable alternative are sufficient to provide reasons for an exception to Goals 11 and 14. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A county may not rely on a previously adopted Goal 3 exception for airport related industrial uses to justify approving a major automobile speedway and speedway related uses on rural agricultural land. Although the same factors that the county relied on to justify Goal 11 and Goal 14 exceptions for the speedway and related uses might justify a new Goal 3 exception, a new Goal 3 exception must be adopted to replace the one that was adopted for the airport related industrial uses. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Assuming that a public park is a "public facility or service" governed by Goal 11, because a public park is permitted by statute on EFU land without taking an exception to Goal 11, a public park is also allowed on rural land zoned other than EFU without taking an exception to Goal 11, or requiring that the park serve only rural lands. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A public stormwater facility is or can be a "utility facility necessary for public service" allowed by statute in the EFU zone. Such a facility is also allowed on rural lands zoned other than EFU without taking an exception to Goal 11 or requiring that the stormwater facility serve only rural lands. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A city's failure to enter into an urban services agreement with a rural fire protection district prior to annexing property located within the fire district does not violate either Goal 2 or Goal 11. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 546 (2003).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Although Goal 11 does not require lot-by-lot approvals of individual septic systems at the time property is rezoned, a local government's findings must establish that it is feasible to provide adequate individual sewage disposal systems. DLCD v. Klamath County, 38 Or LUBA 769 (2000).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Where issues of the availability of public facilities and services are raised, the local government must determine the need for and the existence of an appropriate level of service to support the proposed development before making a finding that the goal has been satisfied. *Riggs v. Douglas County*, 37 Or LUBA 432 (1999).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. To determine whether sufficient services are available to support a proposed rural development, the local government shall (1) determine the type of services that are currently available, if any; (2) determine the appropriate level of service for the proposed development; and (3) determine the feasibility of providing such service, if it does not already exist. *Riggs v. Douglas County*, 37 Or LUBA 432 (1999).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A proposed subdivision in which the dwellings will connect to existing water lines within a water district's existing service area does not violate Goal 11's prohibition on the "establishment or extension of a water line." *DeShazer v. Columbia County*, 35 Or LUBA 689 (1999).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A committed exception to Goal 11 will be remanded, where the effect of taking the exception is to allow urban uses that would not be supported by levels of public facilities and services appropriate for a rural area and the county has not shown that it is impracticable to continue using the property for rural residential use. *James v. Josephine County*, 35 Or LUBA 493 (1999).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A finding that a proposed subdivision will be connected to the city's storm drainage system is not supported by substantial evidence, where the proposed drainage system stops short of the city's storm drainage system and a condition of approval requiring paved access to the subdivision is not adequate to ensure that the storm drainage connection will be constructed along with that paved access. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Goal 11 applies when a local government redesignates land to allow for more intensive uses that place greater demand on public facilities than uses allowed under an existing designation. Goal 11 is not implicated when a local government redesignates land to allow a shopping center that will place fewer demands on public facilities than the residential uses allowed under the current designation. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Goal 11 prohibits relying on "establishment or extension of a water system" as a basis for allowing higher residential density outside UGBs. Where a local government approves a rural subdivision with a higher density based on provision of water service, it must explain why the apparently applicable Goal 11 prohibition does not apply. DeShazer v. Columbia County, 34 Or LUBA 416 (1998).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Where it is not apparent that provision of water to a rural subdivision merely constitutes attachment to an existing proximate water supply rather than an "extension" of the water system, which is prohibited by Goal 11, LUBA will remand the decision for Goal 11 findings. DeShazer v. Columbia County, 34 Or LUBA 416 (1998).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. That a proposed mine expansion might impact a water supply does not implicate Goal 11. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. The county's finding that the same level of public facilities and services that will be available to the subject property is presently available to all the surrounding land is not helpful to a determination of compliance with Goals 11 and 14 where the finding does not explain whether or how the goals were applied to the surrounding properties. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. While Goal 11 requires that a local government "plan and develop a timely, orderly and efficient arrangement of public facilities," a local government need not provide an expedited process for public facilities and retains its ability to ensure the appropriate juxtaposition of land uses. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. The Goal 11 prohibition on extending sewer systems from inside urban growth boundaries to land outside those boundaries does not invalidate or prohibit a county requirement that all new subdivisions be connected to municipal sewer systems. *Gisler v. Deschutes County*, 33 Or LUBA 272 (1997).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Goal 11 prohibits justifying higher residential densities than would otherwise be permitted in a rural-residential zone on the basis that water service can be extended to serve the lots. *DeShazer v. Columbia County*, 31 Or LUBA 300 (1996).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. That a water district agrees to provide water service to the subject parcel, or that a water main extends to the boundaries of the parcel, does not establish that a proposed partition will not require the extension of a water system. *DeShazer v. Columbia County*, 31 Or LUBA 300 (1996).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. After the December 5, 1994 effective date of amendments to Statewide Planning Goal 11, local governments may not rely on acknowledged comprehensive plan or ordinance provisions to establish goal compliance if those provisions violate the Goal 11 amendments. *DeShazer v. Columbia County*, 31 Or LUBA 300 (1996).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Under Goal 11, county land use regulations may not rely upon the extension of a water system, where "extension" refers to either an extension of a water system beyond district boundaries or a connection of a water system to individual properties, to authorize a higher residential density than would be authorized without a water system. DLCD v. Lincoln County, 31 Or LUBA 240 (1996).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Under Goal 11, county land use regulations may not rely upon the prior and future establishment of a water system to authorize a higher residential density than would be authorized without a water system. DLCD v. Lincoln County, 31 Or LUBA 240 (1996).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Because OAR 660-22-070 applies only to "unincorporated communities," the schedule for compliance with Goal 11 amendments set forth in OAR 660-22-070 does not apply to property not within unincorporated communities. *DLCD v. Lincoln County*, 31 Or LUBA 240 (1996).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Where a local government redesignates and rezones what had previously been designated and zoned as agricultural or forestland, and applies a zoning district allowing residential development on existing lots much smaller than 10 acres, the local government must address compliance with Goals 11 and 14. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. ORS 197.175(2), Goals 11 and 14 and OAR Chapter 660, Division 11 provide authority for a city and county to adopt a comprehensive plan policy requiring that owners of unincorporated property within an urban growth boundary sign consents to annexation in order to receive sewer service. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Where amendments to an exclusive farm use (EFU) zoning district do not change the maximum allowable density of nonfarm dwellings in PUDs, but may have the effect of increasing the numbers of, and circumstances in which, residential PUDs may be approved on EFU-zoned land, the county must consider these potential secondary effects of the amendments in determining whether the EFU zone, as amended, complies with Goals 11 and 14. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. The comprehensive plan provisions comprising a city's urban growth management program are clearly designed to implement Statewide Planning Goals 11 and 14. Therefore, a city errs in interpreting such plan provisions to allow the extension of urban sewage treatment service outside an urban growth boundary. *DLCD v. City of Donald*, 27 Or LUBA 208 (1994).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. Where the county plan and zone designations applied to certain rural property at the time of acknowledgment permit a level of activity that requires sewer service, a petitioner may not challenge proposed development allowed by the acknowledged plan and land use regulations on the basis that the allowed development violates Goals 11 and 14. DLCD v. Fargo Interchange Service District, 27 Or LUBA 150 (1994).

15. Goal 11 – Public Facilities and Services/ Goal 11 Rule. A comprehensive plan policy that "urban services shall only be established within recognized urban growth boundaries" implements Goals 11 and 14. Because Goals 11 and 14 prohibit the extension of urban level services outside of urban growth boundaries, LUBA will not defer to a local government interpretation of that plan policy as allowing extension of service from an urban sewage treatment plant to a rural area. ORS 197.829(4). DLCD v. Fargo Interchange Service District, 27 Or LUBA 150 (1994).

16. Goal 12 – Transportation/ Goal 12 Rule. The inventory of existing bicycle facilities in a revised Transportation System Plan (TSP) does not violate the requirement, under OAR 660-012-0020(3)(a), that TSPs include "[a]n inventory and general assessment of existing and committed transportation facilities and services by function, type, capacity and condition" merely because the inventory includes narrow or substandard bike lanes. In addition, such an inventory does not violate the requirement, under Goal 2, that decisions be supported by an adequate factual base where the local government relies on a Level of Stress (LTS) analysis to reflect the capacity and condition of the facilities and where a petitioner fails to explain why LTS does not reflect capacity and condition. *Shaff v. City of Medford*, 79 Or LUBA 317 (2019).

16. Goal 12 – Transportation/ Goal 12 Rule. Arguments that a revised Transportation System Plan (TSP) fails to comply with the requirement, under OAR 660-012-0035(4), that it be designed to achieve adopted standards for reducing reliance on the automobile because it applies benchmarks that the local government failed to meet over the prior planning period provide no basis for reversal or remand where, as under OAR 660-012-0016, -0055(1)(b), and -0055(6), such benchmarks are established in the Regional Transportation Plan and the TSP is merely required to be consistent therewith. *Shaff v. City of Medford*, 79 Or LUBA 317 (2019).

16. Goal 12 – Transportation/ Goal 12 Rule. Arguments that a revised Transportation System Plan (TSP) fails to provide a "safe and convenient" bicycle network, as required under OAR 660-12-0045(3)(d), because (1) the safety analysis on which the local government relied in selecting projects is biased toward improving the safety of motor vehicle travel and (2) the revised TSP does not allocate sufficient funding for construction of bicycle safety projects, fail to demonstrate noncompliance with Goal 12 or the Goal 12 rule where a petitioner fails to identify a requirement that a particular study method be used, where the TSP sets forth numerous bicycle facility projects and establishes a preference for separating bicycle traffic from automobile traffic on heavily travelled roads, and where the local code includes regulations requiring pedestrian and bicycle facility improvements in conjunction with new development. *Shaff v. City of Medford*, 79 Or LUBA 317 (2019).

16. Goal 12 – Transportation/ Goal 12 Rule. Arguments that a revised Transportation System Plan (TSP) does not provide for a more energy efficient transportation system, and fails to forecast or plan for an increase in bicycle modal share, fail to demonstrate a violation of Goal 13 since Goal 13 does not state requirements with respect to other land use provisions, even where those provisions have incidental impacts on energy use and conservation, and therefore does not require a maximization of alternative modes. *Shaff v. City of Medford*, 79 Or LUBA 317 (2019).

16. Goal 12 – Transportation/ Goal 12 Rule. A fossil fuel terminal (FFT) qualifies as a "transportation facility" for purposes of Statewide Planning Goal 12, and the Transportation Planning Rule at OAR 660-012-0060, because FFTs move or assist in the movement of goods, notwithstanding that they also involve storage of fossil fuels. However, a local government's failure to recognize that FFTs are transportation facilities is not reversible error, so long as amendments comply with the substantive requirements of Goal 12 and the Transportation Planning Rule. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. Zoning ordinance text amendments that reclassify fossil fuel terminals (FFTs) from the general land use category of "Warehouse and Freight Movement," to a new land use category does not "change the functional classification of an existing or planned transportation facility" or "change standards implementing a functional classification system," pursuant to the Transportation Planning Rule at OAR 660-012-0060(1), because the land use categories included are not part of a functional classification scheme, a scheme that sorts the universe of transportation facilities into a hierarchical classification scheme and assigns different function, capacity, mobility or access standards to each classification. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. A city's zoning ordinance text amendments that essentially downzone the development potential for fossil fuel terminals (FFTs) within a city's industrial districts, effectively freezing the development capacity of FFTs at current levels is not the type of amendment that could directly cause increased traffic compared to the unamended zoning regulations (which allow unrestricted expansion or siting of FFTs), and therefore does not implicate OAR 660-012-0060(1)(c). The OAR 660-012-0060(1)(c) requirement for local governments to evaluate impacts on transportation facilities when amendments "significantly affect[] a transportation facility" does not require governments to evaluate the possibility that downzoning the intensity of one particular type of land use at one location may indirectly cause compensatory development and related traffic generation elsewhere in the city. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. A city's zoning ordinance text amendments must be consistent with Statewide Planning Goal 12 and the Transportation Planning Rule (TPR), even if the city's Transportation System Plan (TSP) is acknowledged to comply with Goal 12, the amendments do not amend the city's TSP, and the amendments are not found to have a "significant effect on a transportation facility" as defined by OAR 660-012-0060(1). A zoning amendment that changes the zoning classification for a specific type of transportation facility, particularly one that has regional and statewide significance, could potentially affect whether the local TSP remains in compliance with applicable Goal 12 or TPR requirements that are in addition to those imposed under OAR 660-012-0060. If so, the local government is obliged to consider that question in adopting the zoning amendment. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. While nothing may require the city to directly apply the Oregon Transportation Plan (OTP) to a city zoning code amendment where the city prohibits new or expanded fossil fuel terminals, the OTP represents a state-level body of information and policy guidance that speaks directly to the state's interest in maintaining and improving the flow of goods and services throughout the state, and thus may be a pertinent consideration in determining whether the amendment is consistent with the Goal 12 requirement to facilitate the flow of goods and services in the state. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. Only "transportation facilities and improvements" that meet the requirements of OAR 660-012-0065 are allowed on EFU-zoned "rural land" without an exception to Goals 3, 11 and 14. OAR 660-012-0070 provides that "transportation facilities" that do not meet the requirements of OAR 660-012-0065 cannot be constructed on "rural land"

without an exception to the applicable goals. However, OAR 660-012-0070 does not require an exception to the applicable resource and urban goals where the city concurrently includes the land within its urban growth boundary, because the land is no longer "rural land" as defined in that rule. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0035(4) requires local governments to design their transportation system plans to achieve adopted standards for reducing reliance on cars. Although a city errs in finding that OAR 660-012-0035(4) does not apply to specific projects or to targeted amendments to a transportation system plan (TSP), where the findings also (1) identify adopted standards within the city's TSP, the city's comprehensive plan, and revised code that include measures to reduce reliance on cars, and (2) additionally conclude that the amendments comply with OAR 660-012-0035(4), and petitioner neither challenges those findings nor identifies any adopted standards in the TSP, comprehensive plan or revised code that the TSP amendments fail to satisfy, petitioners' arguments provide no basis for reversal or remand. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. Where petitioners argue that the city's calculation of future travel demand that relies on projections in the adopted and acknowledged regional transportation analysis prepared by state, regional and local governments is not supported by substantial evidence and petitioners fail to point to any evidence that contradicts or undercuts the city's traffic models based on the regional transportation analysis, petitioners have failed to set forth a basis for remand or reversal. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. *VinCEP v. Yamhill County*, 215 Or App 414, 171 P3d 368 (2007), which involved a reasons exception to Goals 3, 4 and 14 to develop a hotel on land zoned exclusive farm use (EFU), and its holding which interprets the rules for reasons exceptions, is inapposite where no reasons exception is involved. Similarly, OAR 661-012-0070 and its requirements for exceptions for transportation improvements on rural land do not apply where no exception to a resource goal is sought. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. A city's decision to add new facilities to the transportation system does not violate Oregon Highway Plan (OHP) policies, which direct that state and local governments should implement higher priority measures first unless a lower priority measure such as adding new facilities to the transportation system is (1) more cost effective or (2) it "clearly better supports safety, growth management, or other livability and economic viability considerations." OHP policies are not absolute, and a city can rely on a less cost-effective and lower priority measure that "clearly better supports safety, growth management, or other livability and economic viability considerations." *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. Although proposed development of a new bridge will cost close to the total amount that the region expects to receive in funding from all sources over the next 20 years, and although there is no evidence that full funding can be expected, a decision to approve comprehensive plan amendments to facilitate the bridge does not necessarily violate an Oregon Highway Plan (OHP) policy that requires state and local government to approve major improvements to state highway facilities in local comprehensive plans and transportation

system plans only if the improvements "would be a cost-effective means to achieve the objective," because the OHP policy is not a mandatory criterion, but an evaluation factor the Oregon Department of Transportation will use in their evaluation of a project for inclusion in the OHP. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060(2)(c) allows a local government to mitigate significant effects by, among other methods, "[a]mending the [transportation system plan] TSP to modify the * * * performance standards of the transportation facility." Where a local government adopts amendments to its TSP that include findings that "[s]ome of the intersections on the State roadway system will also not meet the State [M]obility [T]argets, for which the State proposes to adopt Alternative Mobility Targets into the Oregon Highway Plan," the amendments to the TSP are sufficient to satisfy the mitigation requirement in the Transportation Planning Rule. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. Where an existing state highway off-ramp will likely be closed in order to construct a new proposed bridge, and the decision to adopt amendments to a city's transportation system plan (TSP) does not actually close the highway off-ramp, a city does not err when it adopts amendments to the city's TSP that state that the "City will not support close of the [existing highway off ramp] until a facility plan has been adopted that addresses access to the southwest portion of [the city]." The potential *future* decision to close the existing off-ramp will require future coordination between the Oregon Department of Transportation (ODOT) and the city, and presumably will require a new TSP amendment, at which point the city and ODOT will be required to demonstrate that closure of the highway off-ramp satisfies the Transportation Planning Rule at OAR 660-012-0060. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-024-0050(6) requires that when land is added to an urban growth boundary (UGB), the local government "must assign appropriate urban plan designations to the added land, consistent with the need determination and the requirements of section (7) of this rule, if applicable." OAR 660-024-0050(7) provides lands included with a UGB for a public facility "must be planned and zoned for the intended use and must remain planned and zoned for that use unless the city removes the land from the UGB." A city decision to retain the land's existing Exclusive Farm Use zoning until the land is annexed into the city is inconsistent with the OAR 660-024-0050(7) requirement to adopt concurrent plan and zone re-designation "for [that] intended use." *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. Pursuant to OAR 660-004-0018(4)(a), where a city finds that "[e]xisting plan and zoning designations" will be maintained for land subject to a Goal 15 exception, but does not explain why "existing plan and zoning designations" "limit the uses * * * public facilities and services, and activities" to only those that are justified in the exception, remand is required for the city to explain why the land subject to an exception to Goal 15 satisfies the requirement in OAR 660-004-0018(4)(a) that the plan and zone designations "limit the uses * * * public facilities and services, and activities" to those justified in the exception, or apply plan and zone designations that limit the uses to the transportation facilities that are justified in the exception. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. A city's process in adopting amendments to a subarea plan to approve a proposal to construct a new bridge does not violate Goal 2 where the city provided opportunities for review and comment on the proposed plan amendments by the public, and provided notice to neighborhood associations of the plan amendment proceedings, despite a very compressed period of time for public input regarding a fairly complex proposal. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. On remand from LUBA to address issues regarding compliance with the Transportation Planning Rule (TPR) at OAR 660-012-0060, a hearings officer errs in refusing to consider a new issue raised on remand regarding testimony that access to the approved mining haul road across adjoining property and access point on a county road are no longer available for development purposes, due to intervening changes in ownership of the adjoining land. Such a new issue is within the scope of LUBA's remand, because the locations of the haul road and access point are important predicates for compliance with the TPR. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. LUBA will reject an assignment of error based on OAR 660-012-0035(3)(b), where petitioner makes no attempt to explain why the OAR 660-012-0035(3)(b) transportation system planning obligation has any bearing on or relevance to a quasi-judicial comprehensive plan and zoning map amendment that makes no changes to the city's acknowledged transportation system plan. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. In determining whether comprehensive plan and zoning map amendments will significantly affect existing and planned transportation facilities under the transportation planning rule, an applicant may make use of a theoretical worst case scenario development proposal under existing planning and zoning without actually requesting and obtaining approval of that worst case scenario development proposal. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. In developing a worst case traffic generation scenario under existing planning and zoning, to address the transportation planning rule and show that the proposed planning and zoning will have no greater traffic impact than the existing planning and zoning, it is permissible to assume development under the existing planning and zoning will take advantage of the full array of opportunities under existing regulations. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

16. Goal 12 – Transportation/ Goal 12 Rule. In amending a transportation systems plan (TSP) to locate a bypass through an industrial area, a local government is not obligated to adopt findings regarding the post-amendment adequacy of its inventory of commercial and industrial lands, where the acknowledged zoning district that applies to those lands already anticipates that at least some of those lands may be used for transportation facilities. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0015(3)(a), which requires that "[l]ocal TSPs shall establish a system of transportation facilities and services adequate to meet identified local transportation needs and shall be consistent with regional TSPs and adopted

elements of the state TSP," does not require, at the time a transportation facility is identified as needed in the TSP, that the local government establish that the facility is "viable," in the sense that all necessary siting permits will be issued in the future if that facility is sited in the location shown on the amended TSP. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

16. Goal 12 – Transportation/Goal 12 Rule. Arguments that a proposed concept plan that is part of the comprehensive plan fails to comply with Statewide Planning Goal 12 (Transportation) provide no basis for reversal or remand of a decision to adopt the concept plan where the concept plan relies on and is consistent with a previously adopted Transportation System Plan that is consistent with Goal 12. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

16. Goal 12 – Transportation/ Goal 12 Rule. In comparing uses across different zoning districts for purposes of determining whether a rezone "significantly affects" a transportation facility under the Transportation Planning Rule (TPR), consistent assumptions must be used, with the only variables reflecting the different zoning standards. Where the opposition traffic expert used different assumptions about development under the original zone and the new zone that are not based on the differences between the two zones, that testimony does not undermine reliance on the applicant's expert's conclusion that the new zone does not allow more traffic-intensive uses than the old zone. *Save Downtown Canby v. City of Canby*, 70 Or LUBA 68 (2014).

16. Goal 12 – Transportation/ Goal 12 Rule. The Transportation Planning Rule (TPR) at OAR 660-012-0060 requires analysis of whether a zone change would significantly affect a transportation facility by, among other things, affecting the functional classification or performance standards of the facility as "measured through the end of the planning period." However, nothing in OAR 660-012-0060 requires an analysis of potential safety conflicts between site access and a nearby pedestrian crossing, much less an analysis of such conflicts through the end of the planning period. *Save Downtown Canby v. City of Canby*, 70 Or LUBA 68 (2014).

16. Goal 12 – Transportation/ Goal 12 Rule. While a railroad is a "transportation facility" as defined under the Transportation Planning Rule (TPR), nothing in the TPR requires local governments to adopt functional classifications or performance standards for railroads. Because OAR 660-012-0060(1) defines the ways that a plan amendment can "significantly affect" a transportation facility exclusively in terms of functional classifications or performance standards, absent any functional classification or performance standards for railroads OAR 660-012-0060(1) does not apply to require a local government to evaluate whether a plan amendment significantly affects a railroad. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

16. Goal 12 – Transportation/ Goal 12 Rule. In order to determine whether a redesignation "significantly affects" a transportation facility within the meaning of OAR 660-012-0060(1) a local government should compare the most traffic-generative use reasonably allowed in the current zone with the most traffic-generative use reasonably allowed in the new zone. Comparing the amount of traffic generated by the *current uses* of the property with the most-traffic generative use allowed in the new zone does not answer the question posed by OAR 660-012-0060(1), and may in fact provide misleading answers, unless the current uses of the property happen to be the most traffic-intensive uses allowed in the current zone. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

16. Goal 12 – Transportation/ Goal 12 Rule. The Transportation Planning Rule (TPR) at OAR 660-012-0060 does not require that estimates of background traffic levels include consideration of the traffic impacts from a proposed golf course adjacent to property that is the subject of a zone change application, because the golf course is a conditional use in the current zone in which it will be developed. *Reading v. Douglas County*, 70 Or LUBA 458 (2014).

16. Goal 12 – Transportation/ Goal 12 Rule. A city's conclusion that proposed high-density residential zoning complies with Goal 12 and the Transportation Planning Rule is not supported by an adequate factual base, where the city assumed full development under the old zoning but only partial development under the new zoning, for general economic reasons that apply equally to both development scenarios. Absent an explanation for using different background assumptions, a comparison of traffic-generative capacity allowed under new and old zoning under OAR 660-012-0060 must use consistent assumptions. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060(6)(a) allows a local government to reduce by 10 percent the estimated traffic generated under new zoning for a mixed-use, pedestrian friendly area, but only if the new zone prohibits uses that rely on automobile trips, such as motels. A city may still take advantage of the 10 percent reduction notwithstanding that the new zone allows hotels, given the significant differences between motels and hotels. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. Remand is necessary where the city assumes, without explanation, a 10 percent reduction in estimated traffic when zoning new areas for high-density uses, but assumes no similar reduction in comparing traffic generated under existing high-density zoning. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a local government finds that a zone change will not generate more traffic than allowed under the existing zoning, and thus cannot significantly affect a transportation facility within the meaning of the Transportation Planning Rule, it is not reversible error for the local government to also adopt measures to ensure that development under the new zoning does not exceed estimated traffic levels. While such measures cannot substitute for compliance with the Rule, adoption of such precautionary measures are not erroneous. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. Raising a general transportation issue under a local zoning change approval criterion that addresses a number of concerns, without citing the transportation planning rule (TPR) or any of the substantive requirements of the TPR, is not sufficient to preserve a technical TPR argument for review at LUBA. *Savage v. City of Astoria*, 68 Or LUBA 225 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. Where planning staff initially takes a position that a zoning amendment proposal does not comply with an applicable approval standard, but later changes its position and takes the position that the proposal complies with the approval standard, the planning staff's initial position may be sufficient to preserve the issue of whether the proposal

complies with the applicable approval standard for LUBA review. But where planning staff takes the position that a proposed zone change complies with the transportation planning rule (TPR) and never changes its position regarding the TPR, the staff position is not sufficient to preserve an issue of TPR compliance for LUBA review. *Savage v. City of Astoria*, 68 Or LUBA 225 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. A Metro regional trail that is 22 miles long, connects rivers, parks and natural areas, and includes a number of recreational and educational facilities, is most accurately characterized as a "park" for purposes of a Metro Plan prohibition on parks in regionally significant industrial areas, rather than a transportation facility or "public facility" that is allowed in industrial areas, where the regional trail is not intended to provide transportation for the residents and workers of the industrial area, but is primarily a community recreational amenity. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060, which requires that amendments to an acknowledged functional plan, comprehensive plan or land use regulation that significantly effect a transportation facility must put in place measures to offset that significant effect, does not apply to a local government's adoption of a transportation system plan (TSP). *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a city's bureau of transportation has adopted a rule that requires that development not cause signalized and stop-controlled intersections to operate below a specified level of service (LOS), and petitioner cites no authority that access drives that are not stop controlled or signalized are subject to the LOS requirement, LUBA will reject petitioner's argument that it was error for city to fail to find that access drives would operate within the specified LOS. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. One option a local government has to determine whether a zoning map amendment significant affects a transportation facility within the meaning of OAR 660-012-0060(1)(c) is to first evaluate whether the new zone authorizes more traffic intensive uses, compared to the old zone. If the two zones authorize the exact same set of uses, then the local government could conclude, without more, that development under the new zone will not generate more traffic than under the old zone, and no further inquiry is necessary for purposes of OAR 660-012-0060(1)(c). *Save Downtown Canby v. City of Canby*, 67 Or LUBA 385 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a local government rezones property from a commercial zone that allows the same set of use categories as the old commercial zone, but the new zone has much larger maximum building footprint and other development standards intended to allow larger scale commercial development, the local government is required to consider whether the larger scale development allowed under the new zone could generate additional traffic compared to smaller scale development under the old zone and, if so, conduct further analysis as required by OAR 660-012-0060. *Save Downtown Canby v. City of Canby*, 67 Or LUBA 385 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. That the city's transportation facilities were found to be sufficient to support planned and allowed uses when the city originally adopted its zoning

ordinance is not a sufficient basis to conclude that a zoning map amendment is consistent with OAR 660-012-0060. *Save Downtown Canby v. City of Canby*, 67 Or LUBA 385 (2013).

16. Goal 12 – Transportation/ Goal 12 Rule. While Goal 1 requires ODOT to make use of existing local citizen involvement programs in amending the Oregon Highway Plan, it does not require ODOT to create new local citizen involvement programs, or mandate that local governments create or invoke local citizen involvement programs in coordinating future OHP future amendments to the Oregon Highway Plan. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. Findings supporting a legislative decision that amends the Oregon Highway Plan to provide a process for modifying mobility standards need not address issues raised below regarding whether future decisions approving higher mobility standards will cause increased congestion of specific transportation facilities and increase pollution contrary to Goal 6, where Goal 6 will apply directly to any future decisions approving higher mobility standards for specific transportation facilities, and such issues cannot be meaningfully addressed in a legislative decision adopting general amendments to the Oregon Highway Plan. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. Goal 9 requires local governments to provide adequate opportunities for a variety of economic activities, but does not require local governments to protect one type of economic activity against impacts created by other economic and non-economic uses. Goal 9 does not require that ODOT, in adopting higher mobility standards for state highways, address in its findings whether increased congestion from development allowed under the higher mobility standards will adversely affect existing economic activity. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. The Goal 11 requirement to provide "timely, orderly and efficient arrangement of public facilities and services" is not particularly concerned with the performance standards governing state highways, a concern that is more specifically addressed under Goal 12 and the Transportation Planning Rule. Goal 11 does not add anything new or different to the specific Goal 12 requirements with respect to the performance of state highways, and findings addressing Goal 11 are not inadequate simply because they fail to consider whether modified highway performance standards are consistent with Goal 11. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. Goal 13 is mostly a planning goal, and includes few substantive requirements that could directly conflict with Oregon Highway Plan amendments that increase mobility standards for state highways. To the extent higher mobility standards encourage denser development that causes increased traffic congestion, that is not inconsistent with Goal 13. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. Oregon Highway Plan (OHP) amendments that provide a process to adopt alternative mobility standards for state highways where it is infeasible to comply with the OHP mobility standard do not eliminate or conflict with the OAR 660-012-0035 requirement for local governments to consider system alternatives in adopting a

transportation system plan. The OHP process and OAR 660-012-0035 requirement to evaluate system alternatives are cumulative, not conflicting. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. Oregon Highway Plan (OHP) amendments to the "no further degradation" standard to allow "small increases" in average daily traffic to already failing state highways do not conflict with the general OAR 660-012-0015(1) obligation to adopt transportation plans that identify transportation facilities "adequate to meet identified state transportation needs." The "no further degradation" standard is applied under the specific provisions of OAR 660-012-0060, and the "small increases" exception to that standard was adopted in coordination with LCDC amendments to OAR 660-012-0060. Because the "small increases" exception is consistent with the specific requirements of OAR 660-012-0060, it does not violate the general requirements of OAR 660-012-0015. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. Where the county adds a site to its map of lands eligible for destination resort siting, concludes based on site-specific traffic studies that destination resort development will significantly affect nearby transportation facilities within the meaning of OAR 660-012-0060, identifies the transportation improvements needed to ensure that allowed land uses are consistent with the performance standards of affected facilities, and requires the destination resort applicant to provide those improvements prior to development, the county has not deferred a determination of compliance with OAR 660-012-0060, but instead complied with the rule. That the county prudently imposed conditions requiring a second analysis and requiring additional improvements if needed at the time of development does not constitute an impermissible deferral of compliance with OAR 660-012-0060. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. In concluding that a decision adding a site to the county's map of lands eligible for destination resort development complies with the Transportation Planning Rule, the county may "adopt" measures demonstrating that allowed land uses are consistent with the performance standard of affected transportation facilities within the meaning of OAR 660-012-0060(2)(a) by adopting conditions requiring that the destination resort applicant pay for and provide transportation improvements prior to resort development, and need not require that the improvements be in place on the date the county adds the site to its map of eligible lands. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. The requirement at ORS 197.460(4) that an applicant for destination resort siting provide a traffic study that includes measures to mitigate a proportionate share of adverse impacts on transportation facilities is different from, and does not replace, the obligation to evaluate transportation impacts under OAR 660-012-0060 in amending the comprehensive plan map of lands eligible for destination resort siting. While a county might err if it relied entirely on ORS 197.460(4) to ensure compliance with OAR 660-012-0060, there is no error in citing ORS 197.460(4) as an additional basis to conclude that OAR 660-012-0060 is satisfied. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government may "adopt" measures under OAR 660-012-0060(2)(a) requiring a private developer to pay for and provide needed

transportation improvements, and such measures need not be supported by evidence that the road authority for that facility has accepted the proposed improvement or evidence that private funding is available. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government does not err in not applying OAR 660-012-0070(5) and (6), which govern the analysis for transportation improvements that do not require a new exception, to evaluate the petitioner's alternative site for a highway interchange, where the record does not support the petitioner's claim that the new interchange could be located without expanding an existing exception area that was approved for a two-lane rural overpass. In that circumstance, OAR 660-012-0070(7) applies to govern the alternatives analysis when a transportation improvement requires a new exception. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. Where constructing a new highway interchange in an existing exception area would constitute a change in the type of use or change in the intensity of the use justifying an existing exception, OAR 660-012-0070(10) and OAR 660-004-0018(4)(b) require a new exception as a matter of law, even if the existing exception area could accommodate the proposed interchange as a matter of engineering. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. A petitioner's arguments that the local government misconstrued OAR 660-012-0070(5) and (6) and adopted inadequate findings not supported by substantial evidence do not provide a basis for reversal or remand, where OAR 660-012-0070(7) governs the local government's decision instead of OAR 660-012-0070(5) and (6), and the two sets of rules have different substantive terms, requirements and standards. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. In approving an exception to allow construction of a temporary $25 million highway interchange, a local government is not required to include guarantees that the temporary interchange will not be converted to a permanent interchange or identify reasons to justify the interchange as permanent, where the exception decision approves only a temporary interchange, and any attempt to convert it into a permanent interchange will require a new goal exception. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. Where the Court of Appeals remands a decision to LUBA to address the proper application of the Transportation Planning Rule (TPR), at OAR 660-012-0060, and on remand to LUBA the parties dispute the meaning of a TPR provision, LUBA need not resolve that dispute when during the pendency of the appeal the TPR is amended to delete the disputed TPR provision, and the TPR as amended will govern the local proceedings on remand from LUBA. *Setniker v. Polk County*, 65 Or LUBA 49 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. LUBA will affirm a governing body's interpretation of a code standard allowing imposition of a limited use overlay zone if "it is required to limit the uses permitted in the proposed zone" by the reasons exception rule at OAR chapter 660, division 4, to employ the overlay zone to limit uses to ensure consistency with Statewide Planning Goal 12 (Transportation), and the need to take an exception to Goal 12, even though the county took reasons

exceptions only to other statewide planning goals, where the county's interpretation is not inconsistent with the express language, purpose or underlying policy of the code standard. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. Where the county's decision on remand and supporting findings state that a condition is imposed requiring the applicant to construct a left-turn lane, a condition to that effect has been adequately imposed, notwithstanding that the county did not expressly amend the list of conditions imposed in its initial decision to include the requirement to construct a left-turn lane. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. LUBA will affirm a governing body's interpretation of a local code provision to require only consideration of current adequacy of transportation facilities, notwithstanding local traffic analysis guidelines that require analysis of impacts from future planned uses, where the county interprets the guidelines to be non-mandatory, and that interpretation is not inconsistent with the express language, purpose or policy of the relevant local provisions. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. Uncontradicted evidence that a legislative text amendment allowing for the expansion of existing landfills would not affect the county's transportation facilities, because traffic generated by landfill expansion is not a net increase but simply replaces traffic generated by portions of the existing landfill that are at capacity and will be closed, is sufficient to demonstrate that the text amendment does not "significantly affect" any transportation facility within the meaning of the Transportation Planning Rule at OAR 660-012-0060(1). *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

16. Goal 12 – Transportation/ Goal 12 Rule. Raising a number of transportation issues, without any specific reference to the regimented transportation planning analysis that is required under the transportation planning rule, is not sufficient to preserve the right to assign error at LUBA based on the city's failure to apply the regimented transportation planning analysis that is required by the transportation planning rule. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. A decision that merely adds an aggregate site to a comprehensive plan inventory of significant aggregate resource sites may not trigger application of the transportation planning rule (TPR) in any of the ways described in OAR 660-012-0060(1). But when the county decides to allow mining of the site and places an overlay zone on the site to allow mining, that zone change authorizes a new, more traffic-intensive use of the property and may trigger application of the TPR. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. Because the end of the planning period plays an important role under the Transportation Planning Rule (TPR) at OAR 660-012-0060(1) in determining whether proposed plan or zone amendments significantly affect transportation facilities, when the county amends its transportation system plan to change the planning period from 2020 to 2030, the county must apply the new planning period in determining whether the proposed plan/zone change complies with the TPR. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. Where the county's initial 2006 decision relies upon a traffic study to demonstrate compliance with the Transportation Planning Rule (TPR) at OAR 660-012-0060(1)(c), and the decision is remanded but the county takes no action on remand until 2010, the county need not require that the traffic study be updated to reflect current 2010 traffic conditions. The focus of OAR 660-012-0060(1)(c) is on the end of the planning period, based on projected traffic growth from a base condition, and for purposes of the rule it does not matter whether growth is projected from 2006 or 2010. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a local government relies upon conditions limiting traffic through a failing intersection turning movement from 4:00 to 6:00 p.m. to ensure compliance with the Transportation Planning Rule, but undisputed expert evidence shows that the turning movement is also failing during the a.m. peak hour and the off-peak p.m. hour of 3:00 to 4:00 p.m., the conditions are insufficient to ensure compliance with the rule. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. A condition requiring an aggregate company's trucks to avoid a particular intersection is likely to be effective, where the employer has sufficient authority to require its employees and contract haulers to avoid the intersection and, despite some economic incentives for noncompliance, a reasonable decision maker could rely on the condition to be effective to prevent impacts on the intersection. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060(2)(e) and 660-012-0060(3) provide a complementary and non-exclusive set of measures to ensure that uses allowed by a plan amendment are consistent with the function, capacity and performance standards of a transportation facility. Depending on the situation, one or both will apply to authorize use of measures to ensure compliance with the Transportation Planning Rule, and there is no gap between the two rule provisions or circumstance where neither provision applies and no mitigatory measures are possible. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. Where on remand a county relies for the first time on signalization of an intersection to ensure compliance with the Transportation Planning Rule, the issue of whether the county could rely on signalization could not have been raised in the initial appeal, and is not waived under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (2002). *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. Under the Transportation Planning Rule at OAR 660-012-0060(1) and (4), a local government generally can rely only upon "planned facilities or improvements" to ensure compliance with the rule, and cannot assume that unplanned, unfunded facility improvements will be put in place prior to the end of the planning period. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. In general, in order to determine whether a land use regulation amendment significantly affects a transportation facility under OAR 660-012-0060(1)(c)(B) or (C), a comparison is required between the traffic associated with the most traffic-

intensive uses allowed under the existing zoning with traffic associated with the most traffic-intensive uses allowed under the proposed zoning. *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. In determining whether a proposed zone change significantly affects a transportation facility under OAR 660-012-0060(1), a proper baseline for comparison of the differences in traffic generated under the current zone and the proposed zone is development that is proposed concurrently with the zone change, where that zone change decision includes a condition of approval that imposes a vehicle trip cap to limit the transportation impacts from development under the new zone to transportation impacts that would have been generated under the current zone. *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. To the extent *DLCD v. City of Warrenton*, 37 Or LUBA 933, 940-42 (2000), suggests that proposed zoning conditions of approval that limit the number of additional trips that could otherwise be expected under a proposed zoning map amendment cannot be considered when determining whether the proposed conditional rezoning will significantly affect a transportation facility, that suggestion is incorrect. *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060(1)(a) is directed at decisions that change the functional classification of a transportation facility included in a TSP through an amendment to the TSP, and does not apply where no such plan amendment is sought. *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. If a mitigation measure under OAR 660-012-0060(2) or (3) would require transportation improvements that are inconsistent with a local government's adopted TSP, then a local government might be required to amend its TSP in order to comply with Statewide Planning Goal 2 (Land Use Planning). *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. Although amendments to county standards for mapping sites that are eligible for destination resort siting are comprehensive plan amendments, and therefore potentially could result in significant affects on transportation facilities that could implicate OAR 660-012-0060, altering the standards for adding sites to the map in the future has no impact on transportation facilities. It is the future map amendments themselves that might significantly affect a transportation facility and implicate OAR 660-012-0060, and a county must consider OAR 660-012-0060 at the time those comprehensive plan amendments are adopted in the future. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government errs in adopting a finding of significant affect under OAR 660-012-0060(1) (TPR) on unspecified transportation facilities, unsupported by any analysis at all, and then requiring that the TPR be addressed at the time of specific destination resort development. Such an approach is substantially equivalent to the approach of deferring the OAR 660-012-0060(1) determination to a later development stage that was rejected in *Willamette Oaks, LLC v. City of Eugene*, 232 Or App 29, 36, 220 P3d 445 (2009), and is inadequate to satisfy the TPR. *Root v. Klamath County*, 63 Or LUBA 230 (2011).

16. Goal 12 – Transportation/ Goal 12 Rule. A city does not err by requiring that an applicant for development approval dedicate and construct a road extension through the area proposed for development where the transportation system plan shows the road extension. It does not matter that the extension shown on the transportation system plan is conceptual. *Reeves v. City of Wilsonville*, 62 Or LUBA 142 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. Where an assignment of error and the argument in support of that assignment of error does not specifically mention a transportation system plan policy that requires a public hearing before selecting a roadway alignment, the issue of whether that policy has been violated is adequately stated for LUBA review where the petitioner does include an argument that a public hearing is required and was not provided and in the petition for review cites to pages in the record where another party specifically cites the transportation system plan policy. *Reeves v. City of Wilsonville*, 62 Or LUBA 142 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. A condition of zone change approval limiting use of the property to a proposed travel plaza is insufficient to ensure consistency with the Transportation Planning Rule at OAR 660-012-0060, where the record indicates that even limited to the travel plaza the zone change will significantly affect nearby transportation facilities, and the county failed to require other mitigation or improvements necessary to ensure that allowed uses are consistent with the capacity and performance measures of affected intersections. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. To approve an exception for a transportation facility on rural resource land, OAR 660-012-0070(4) requires that a county supply reasons why state policy in the applicable goals should not apply and also requires the county to demonstrate that there are transportation needs identified in the county's TSP that cannot reasonably be satisfied by one or more of the non-exception measures specified in the rule. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. A county may not rely on transportation needs in a city's transportation system plan to justify an exception for a new rural arterial road through the county, where the county transportation system plan states there is no need for new transportation facilities in the area and does not identify those city transportation needs as county transportation needs. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0070(4) requires that a county determine whether there are reasonable alternative measures to satisfy an identified transportation need that would not require a statewide planning goal exception. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0070(5) imposes a requirement to consider whether a proposed transportation facility on rural resource land could reasonably be sited in alternative locations that would not require an exception. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0070(6) sets out how a county must go about determining whether any identified alternative measures and alternative locations are reasonable under OAR 660-012-0070(4) and OAR 660-012-0070(5). OAR 660-012-0070(6) requires that certain specified factors and "other relevant factors" be considered and that "thresholds" be identified and applied in rejecting any alternatives as unreasonable. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. As OAR 660-012-0070(4) is currently written, it cannot be assumed that an identified transportation need is necessarily sufficient to provide a reason that justifies "why the state policy in the applicable goals should not apply." *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. In determining whether a plan amendment would significantly affect a transportation facility, the impact must be measured at the end of the planning period. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a county approves an exception for a transportation facility that will cross privately owned and federally owned EFU-zoned land, the county must approve the exception for both the privately and federally owned land. *Central Oregon Landwatch v. Deschutes County*, 62 Or LUBA 302 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. For reasons exceptions that are required in order to site "transportation facilities and improvements" on rural lands, the exceptions standards set out at OAR 660-012-0070 apply, rather than the standards set out in OAR 660-004-0020. *Foland v. Jackson County*, 61 Or LUBA 264 (2010).

16 16. Goal 12 – Transportation/ Goal 12 Rule. A rest area is a facility that "assists in the movement of people and goods" and thus falls within the Transportation Planning Rule definition of "transportation facilities" set out at OAR 660-012-0005(30). *Foland v. Jackson County*, 61 Or LUBA 264 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. In considering alternative measures and locations under OAR 660-012-0070(4) and (5), a local government may rely on applicant-identified required characteristics that a proposed location must possess, or thresholds, in order to address the identified transportation need, as long as the local government justifies any such thresholds. If an alternative measure or location not requiring an exception does not satisfy a threshold, then the local government is not required to consider it in determining whether to approve an exception. OAR 660-012-0070(6)(b). *Foland v. Jackson County*, 61 Or LUBA 264 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0070(7) implements Goal 2, Part II(c)(3) and requires a local government to evaluate whether there are alternative sites, which would also require an exception, that would have fewer adverse impacts than the proposed site. *Foland v. Jackson County*, 61 Or LUBA 264 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. Even where no authority requires findings in support of a legislative decision, there must be enough in the way of findings or accessible material

in the record to show that applicable criteria were applied and required considerations considered. Where the record of the legislative rezoning decision includes no findings or accessible material supporting the local government's view that the Transportation Planning Rule (TPR) does not apply to the decision, the local government can avoid remand only if it demonstrates in its response brief, as a matter of law, that the TPR does not apply to the rezoning decision and is not a required consideration. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. An ordinance that applies a new Airport zone to an existing airport that is a nonconforming use in the former industrial zone may "significantly affect" nearby transportation facilities within the meaning of the Transportation Planning Rule (TPR), where under the former industrial zone it would be difficult to expand the nonconforming use airport and under the new zone an airport is an outright permitted use that can be easily expanded or intensified. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. In many cases, determining whether a zoning change "significantly affects" a transportation facility for purposes of the Transportation Planning Rule (TPR) can be accomplished by comparing the most traffic-intensive uses allowed in the old zone against the most traffic-intensive uses allowed in the new zone. If the reasonable "worst-case" scenario under the new zone would result in fewer impacts on transportation facilities than the reasonable "worst-case" scenario under the old zone, then no further inquiry under the TPR is required. *Barnes v. City of Hillsboro,* 61 Or LUBA 375 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. Where an ordinance applies a new Airport zone to an existing airport that is a nonconforming use in the former industrial zone, and the surrounding transportation system is designed and planned to accommodate the existing nonconforming use airport, the most meaningful approach to determining whether the zone change "significantly affects" a transportation facility within the meaning of OAR 660-012-0060 may be a comparison of the traffic impacts of the airport use under the city's Transportation System Plan with the airport as it may reasonably be expanded under the new Airport zone. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. When a prior ordinance and settlement agreement require a city to apply a 20-year planning horizon for evaluating transportation impacts and improvements, the city does not err by applying a 20-year planning horizon in a study that was conducted in preparation for the application submittal instead of applying a 20-year planning horizon measured from the date of the decision. *Citizens for Responsible Development v. City of The Dalles*, 60 Or LUBA 12 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. When the proposed development is for a Wal-Mart that includes a full service grocery department, a city does not err in applying the Institute of Transportation Engineers (ITE) land use category for a "shopping center" rather than the ITE category for a "free standing discount store" because free standing discount stores do not include full service grocery departments. *Citizens for Responsible Development v. City of The Dalles*, 60 Or LUBA 12 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. When a traffic impact analysis (TIA) states that it was based on ODOT recommended guidelines but fails to follow those ODOT guidelines, and the final decision relies on that TIA and does not respond to opponents' challenges to the failure to comply with the ODOT guidelines, the decision to rely on a TIA is not reasonable and the decision is not supported by substantial evidence. *Citizens for Responsible Development v. City of The Dalles*, 60 Or LUBA 12 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. When relying on a condition of development under OAR 660-012-0060(2)(e) to approve development that would significantly affect a transportation facility, a local government cannot rely on a suggestion in a letter from ODOT when the suggestion is not reflected as a condition of approval. *Walker v. Josephine County*, 60 Or LUBA 186 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. Under *Dept. of Transportation v. Coos County*, 158 Or App 568, 976 P2d 68 (1999), a comprehensive plan or land use regulation amendment that would generate traffic that would worsen the operation of an intersection that was already performing at a failing level of service D, but would not change that level of service to level of service F, would not "significantly affect" that failing intersection, within the meaning of the version of OAR 660-012-0060 that was at issue in *Dept. of Transportation v. Coos County*. *Eder v. Crook County*, 60 Or LUBA 204 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. Under *DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000), a land use regulation amendment that would generate traffic that would worsen the volume to capacity ratio of a transportation facility that was already operating at a failing volume to capacity ratio would "significantly affect" that transportation facility, within the meaning of the 1998 version of OAR 660-012-0060. *Eder v. Crook County*, 60 Or LUBA 204 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. Under *Department of Transp. v. City of Klamath Falls*, 177 Or App 1, 9, 34 P3d 667 (2001) and the 1998 version of OAR 660-012-0060, a comprehensive plan or land use regulation amendment would "significantly affect" a transportation facility that was not already failing but was projected to fail during the planning period, if that amendment would cause the performance standard to be "violated sooner than it otherwise would be during the planning period." *Eder v. Crook County*, 60 Or LUBA 204 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. Where petitioner assigns error under OAR 660-012-0060, arguing that the county inadequately mitigated for the traffic impacts of a proposed destination resort, but petitioner neither assigns error to the county's finding that the destination resort will not "significantly affect" the transportation facilities within the meaning of OAR 660-012-0060 nor challenges the legal reasoning that the county adopted in support of that finding, LUBA will deny the assignment of error. *Eder v. Crook County*, 60 Or LUBA 204 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a local code only requires that subdivision applicants provide a traffic study if the local government requests one, a cryptic statement in a letter that a subdivision applicant planned to provide a traffic study was not sufficient to trigger a requirement under the code that the applicant provide a traffic study or make it unnecessary for the local government to request a traffic study before denying the application for subdivision

approval for failure to provide a traffic study. *Montgomery v. City of Dunes City*, 60 Or LUBA 274 (2010).

16. Goal 12 – Transportation/ Goal 12 Rule. A condition of rezoning approval that defers consideration of compliance with OAR 660-012-0060 to a subsequent review process at the time actual development of the property is proposed is permissible, provided that the zone change is effectively conditioned to prohibit traffic or other impacts inconsistent with the requirements of OAR 660-012-0060. *Willamette Oaks, LLC v. City of Eugene*, 59 Or LUBA 60 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a local government considering an application for a zone change defers consideration of compliance with OAR 660-012-0060 to a later review process that does not involve a comprehensive plan amendment or zone change, the local government must ensure that the Department of Land Conservation and Development (DLCD) receives notice of the subsequent review process by imposing an overlay zone or a condition of approval on the zone change that requires such notice to DLCD. *Willamette Oaks, LLC v. City of Eugene*, 59 Or LUBA 60 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government's interpretation of its land use regulations to limit application of (1) its land use regulation's requirement for preparation of a transportation impact analysis and (2) its minimum level of service standard to zone change decisions and certain planned unit development decisions cannot be sustained, where the text of the relevant land use regulation sections is inconsistent with that interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a comprehensive plan policy calls for a local government to "review parking requirements for residential development with the purpose of reducing the required number of spaces per unit," a legislative decision that amends parking space requirements for multiple family dwellings to increase the required number of parking spaces must be remanded so that the local government can adopt findings that explain how that legislative decision is consistent with the comprehensive plan policy. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. Where there is (1) a lack of evidence that the additional parking spaces that would be required under a legislative land use regulation amendment will materially increase the total number of vehicle trips, (2) some evidence that the legislative amendment will not cause trips to increase materially, and (3) petitioner does not identify which transportation facilities it believes will be significantly affected by the amendment, a local government's brief finding that the legislative amendment will not significantly affect transportation facilities is adequate. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government's legislative land use regulation amendment that increases the required number of off-street parking spaces for multiple family dwellings could impact the local government's plan to comply with OAR 660-012-0045(5)(c)(A), which requires that the local government have a parking plan which "[a]chieves a 10% reduction in the number of parking spaces per capita in the MPO." Where such a legislative land use decision

is not supported by findings that address OAR 660-012-0045(5)(c)(A), the decision must be remanded. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. Remand is necessary where the local government adopts exceptions to Statewide Planning Goals 11 and 14 to approve a destination resort, but fails to address comprehensive plan transportation policies that appear to implement Statewide Planning Goal 12 (Transportation), for which the local government did not adopt an exception, and the decision fails to explain why those policies are either satisfied or not applicable. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a city does not rely on the ORS 836.640 through 836.642 "through the fence" pilot program to adopt an Airport Related zoning district that authorizes airpark residential development with through the fence access to an airport, arguments that ORS 836.640 through 836.642 do not authorize the kind of through the fence access that is permitted in the city's new Airport Related zoning district provide no basis for reversal or remand. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

16. Goal 12 – Transportation/ Goal 12 Rule. A city's legislative decision to adopt a new Airport Related zoning district without applying the new zoning district to any property is not reversible where petitioner fails to demonstrate that the zone could in no circumstances be applied to property in the future without violating applicable legal standards. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

16. Goal 12 – Transportation/ Goal 12 Rule. A city satisfies its Goal 2 and Airport Planning Rule coordination responsibilities where the city considers an airport's and the Federal Aviation Administration's (FAA's) concerns about a zoning district that allows through the fence access for residential development next to a public airport and the city requires that any applicant for such residential development secure a through the fence agreement with the airport and a letter of support from the FAA. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

16. Goal 12 – Transportation/ Goal 12 Rule. Remand is necessary where a county approves a truck stop with restaurant and truck wash based on a traffic study that, without explanation, uses a trip generation category of "Gasoline/Service Station" rather than the apparently more appropriate category of "Gasoline/Service Station with Car Wash," and fails to take into account trips generated by the restaurant. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. A finding that a proposed truck stop will not create a traffic hazard is not supported by substantial evidence, where the traffic impact analysis finds that the nearest intersection presents only a "marginal safety concern" but fails to take into account the 1,000 daily truck and vehicle trips the proposed truck stop will send through the intersection, and there is no evidence that the additional traffic will not significantly decrease the intersection's safety or significantly increase the crash rate. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. A code provision stating that permitted types of traffic impact mitigation "may include such improvements" as paving, curbing, contributions to traffic signals, etc. is not an exclusive list, and does not preclude a county from requiring an applicant to contribute money toward a future improvement project instead of requiring the applicant to actually construct the improvement. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

16. Goal 12 – Transportation/ Goal 12 Rule. Under OAR 660-012-0060(2)(e), if imposition of conditions of approval would require transportation improvements that are inconsistent with the acknowledged TSP, a local government may be required to amend its adopted transportation system plan, either pursuant to OAR 660-012-0060(2)(d) or simply to ensure that the amendment complies with the Goal 2 (Land Use Planning) consistency requirement. *Lufkin v. City of Salem*, 56 Or LUBA 719 (2008).

16. Goal 12 – Transportation/ Goal 12 Rule. When a local government fails to make a finding as to whether a proposed zone change will cause a significant effect on a transportation facility, the decision must be remanded for such a determination. *ODOT v. City of Madras*, 55 Or LUBA 347 (2007).

16. Goal 12 – Transportation/ Goal 12 Rule. The absence of explicit conditions of approval mandating that a rezoning applicant construct necessary transportation improvements is not necessarily reversible error, where the local government expressly incorporates the traffic analysis that requires the improvements, and thus the decision itself requires the improvements. However, remand is necessary to adopt conditions of approval where the decision does not purport to incorporate the traffic analysis or require the necessary improvements to be constructed. *Nygaard v. City of Warrenton*, 55 Or LUBA 648 (2008).

16. Goal 12 – Transportation/ Goal 12 Rule. Remand is necessary where the rezoning decision relies on conditions of approval to comply with OAR 660-012-0060(4)(b)(B), which requires that the city ensure that necessary transportation improvements are actually funded, but fails to impose any such conditions. *Nygaard v. City of Warrenton,* 55 Or LUBA 648 (2008).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a local government finds that OAR 660-012-0060 is satisfied, the findings adopt and incorporate the applicant's traffic impact analysis (TIA), and the TIA includes mitigation measures, the local government does not err in failing to expressly impose a condition of approval requiring those mitigation measures to be implemented. *Hildenbrand v. City of Adair Village*, 54 Or LUBA 734 (2007).

16. Goal 12 – Transportation/ Goal 12 Rule. In determining whether a plan or land use regulation amendment will "significantly affect a transportation facility" under the OAR 661-012-0060(1)(c)(C) non-degradation test, a city does not err in allowing the before and after volume to capacity (v/c) ratio to be computed to two decimal places rather than three decimal places. *Rice v. City of Monmouth,* 53 Or LUBA 55 (2006).

16. Goal 12 – Transportation/ Goal 12 Rule. Under OAR 660-012-0060(4), a local government errs in relying on conceptual highway improvements for which there is no funding mechanism in

place or a written statement from the Oregon Department of Transportation that such improvements are reasonably likely to be provided by the end of the planning period, to conclude that plan amendments will not "significantly affect" the highway. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

16. Goal 12 – Transportation/ Goal 12 Rule. A condition of approval requiring that an applicant's employees avoid a failing intersection and instead use a much longer circuitous route to the site is inadequate to ensure that the proposed amendment will not "significantly affect" that intersection, where the condition does not take into account non-employee traffic generated by the proposed use, and there is no mechanism to monitor compliance by employees. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

16. Goal 12 – Transportation/ Goal 12 Rule. While OAR 660-012-0060 requires that local governments evaluate traffic impacts of uses allowed under a comprehensive plan designation or zoning district amendment, with focus on the most traffic-intensive uses among the uses allowed under the amendment, the rule does not require local governments to assume the most-traffic intensive use will occur at the maximum theoretically possible intensity. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

16. Goal 12 – Transportation/ Goal 12 Rule. A city's interpretation that its community service overlay (CSO) zoning designation functions as a conditional use rather than a traditional overlay zone is sustainable under *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), and ORS 197.829(1). Therefore, because the CSO zone overlay can only be applied to approve a specific use, and unlike other city overlay zones, the CSO zone does not require a zoning map amendment, the CSO designation does not trigger the obligation to address the transportation planning rule. *Oregon Transfer Company v. City of Milwaukie*, 53 Or LUBA 119 (2006).

16. Goal 12 – Transportation/ Goal 12 Rule. Even if the city's use of a community service overlay (CSO) zoning designation may constitute an "end run" around the transportation planning rule, because the city's code is acknowledged, any challenge to the CSO zoning designation is an impermissible attack on the city's acknowledged code. *Oregon Transfer Company v. City of Milwaukie*, 53 Or LUBA 119 (2006).

16. Goal 12 – Transportation/ Goal 12 Rule. A code provision that encourages the city to expand local maritime activities is not a "minimum acceptable performance standard" for purposes of the OAR 660-012-0060(1)(c)(B) requirement that plan amendments not reduce a transportation facility's performance below the minimum acceptable performance standard identified in the transportation system plan or comprehensive plan. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

16. Goal 12 – Transportation/ Goal 12 Rule. Findings addressing the standards for a reasons exception for transportation improvements under OAR 660-012-0070 are also sufficient to satisfy the standards for a reasons exception under OAR 660-004-0020(2), where the findings in fact address the substantive differences between the two standards, and the petitioner does not explain why failure to directly address the OAR 660-004-0020(2) standards warrants reversal or remand. *1000 Friends of Oregon v. Yamhill County*, 52 Or LUBA 418 (2006).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060(3) allows a local government to approve a plan amendment that would significantly affect a transportation facility that is already expected to perform below its identified performance standard at the end of the planning period, if the applicant mitigates that impact so that there will be no further degradation of the performance of that facility at the end of the planning period. However, OAR 660-012-0060(3) does not require an absolute guarantee that a facility improvement that would be hastened by a required financial contribution mitigation will actually be built. Where the facility to be benefited is already included in the relevant transportation system plans and the TSP anticipates that the facility will be funded at some point in the planning period, that is sufficient. *Cornelius First v. City of Cornelius*, 52 Or LUBA 486 (2006).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a specific financial contribution mitigation is identified that would satisfy the mitigation requirement of OAR 660-012-0060(3)(c) to prevent a plan amendment from resulting in further degradation of a transportation facility located in a neighboring city that is already expected to be failing at the end of the planning period, a city does not err by authorizing the neighboring city to instead apply that financial contribution to fund other intersection improvements that would also result in the plan amendment satisfying the OAR 660-012-0060(3)(c) non-degradation standard. *Cornelius First v. City of Cornelius*, 52 Or LUBA 486 (2006).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a city amends its transportation system plan to include an access management plan that was previously prepared by ODOT, it is the city's obligation to comply with the OAR 660-012-0015(5) requirement for coordination with affected private providers of transportation services. While the city may be able to rely on ODOT's coordination efforts at the time the access management plan was adopted, the city must establish that such coordination in fact occurred. *Rhodes v. City of Talent*, 50 Or LUBA 415 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. Transportation system planning and transportation project planning under the transportation planning rule may not always constitute separate and distinct phases with no overlap. But where a transportation system plan already calls for highway improvements and petitioner does not explain why additional transportation systems alternatives analyses are required, LUBA will reject petitioner's argument that the city was obligated to conduct additional transportation systems alternatives analyses under OAR 660-012-0035(1). *Rhodes v. City of Talent*, 50 Or LUBA 415 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. Where the drawings that accompany an access management plan are unclear, LUBA will assume that the more detailed construction plans that will be necessary to construct proposed improvements will call for improvements that are consistent with applicable design standards, where there is nothing in the record that suggests otherwise. *Rhodes v. City of Talent*, 50 Or LUBA 415 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. Where an access management plan appears to deviate slightly from two applicable design standards, and the city's decision does not explain why such deviation is permissible, LUBA will remand for that explanation. *Rhodes v. City of Talent*, 50 Or LUBA 415 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. A transportation system plan policy that "construction of transportation facilities shall be timed to coincide with community needs" suggests that community needs should not be allowed to outstrip the capacity of transportation facilities and that transportation facilities should not unnecessarily predate the community's need for those facilities. Where a city's decision includes no findings interpreting the transportation system plan policy or explaining why the proposed improvements are timely under the policy, LUBA will remand so that the city can adopt those findings. *Rhodes v. City of Talent*, 50 Or LUBA 415 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060(2)(d) requires a comparison of traffic impacts allowed under pre- and post-amendment plan and zoning, usually by comparing the most traffic intensive use allowed in each zone. However, the proper point of comparison is "allowed land uses," not uses allowed under a specific development plan, particularly development plans that can be modified at any time without a plan amendment or zone change. *Griffiths v. City of Corvallis*, 50 Or LUBA 588 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. While it could potentially be error for a local government to evaluate only "likely" uses rather than "allowed land uses" in comparing traffic impacts under OAR 660-012-0060(2)(d), where the local government in fact evaluates both, any error in evaluating likely uses is harmless error. *Griffiths v. City of Corvallis*, 50 Or LUBA 588 (2005).

16. Goal 12 – Transportation/Goal 12 Rule. Where a petitioner argues at the local level that the Transportation Planning Rule (TPR) applies to the challenged decision because a condition of approval of a previous zone change arguably requires application of the TPR, the decision maker is required to at least address the issue in its decision and explain why the TPR does not apply. *Wal-Mart Stores, Inc. v. City of Medford*, 49 Or LUBA 52 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. An amendment of a city's zoning map to change the zoning designation of property is an amendment of a land use regulation and, therefore, is subject to OAR 660-012-0060(1). *Just v. City of Lebanon*, 49 Or LUBA 180 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. Where ODOT does not explain why it changed its mind and concluded that a zoning map amendment does not implicate the transportation planning rule, a city may not approve a change in zoning that will allow more intense development without requiring a transportation impact analysis to determine whether the potential additional traffic may "significantly affect a transportation facility." *Just v. City of Lebanon*, 49 Or LUBA 180 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0050(1) exempts certain ODOT projects from the transportation planning rule, but that rule does not excuse a city from considering whether its decision to rezone property may be subject to the transportation planning rule. *Just v. City of Lebanon*, 49 Or LUBA 180 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. A city may not defer its obligations to determine whether a rezoning decision will "significantly affect a transportation facility" or its decision

whether to impose measures to mitigate that impact to a later date when specific development is proposed for the property, where the rezoning decision does not include a condition of approval that the transportation planning rule requirement be considered at that later stage and the city's land use regulations do not require that the transportation planning rule be considered at that later stage. *Just v. City of Lebanon*, 49 Or LUBA 180 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. If the adopted transportation system plan assumes that property will be rezoned in the future to allow more intense development, the city may assume at the time of the assumed rezoning that the zone change has no significant impact on transportation facilities. However, a city may not assume that its rezoning decision will have no significant impact on transportation facilities where (1) it has not adopted the transportation system plan required by the transportation planning rule and (2) the transportation plan the city has adopted does not assume the property will be developed under the more intense zoning. *Just v. City of Lebanon*, 49 Or LUBA 180 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a city has not adopted a transportation system plan, as required by the transportation planning rule, a zoning map change cannot significantly affect a city transportation facility under OAR 660-012-0060(2)(d) by causing the performance of a city transportation facility to fall "below the minimum acceptable level identified in the [transportation system plan]." If the city has no transportation system plan for the city transportation facility, there is no minimum acceptable performance level to violate. *Just v. City of Lebanon*, 49 Or LUBA 180 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0055(4)(b) does not require that a city that has not adopted a transportation system plan must first prepare such a plan before amending its land use regulations. *Just v. City of Lebanon*, 49 Or LUBA 180 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. Even if a city has not adopted a transportation system plan to establish performance standards for city transportation facilities, the Oregon Highway Plan establishes performance standards for state transportation facilities. Therefore, when amending its zoning map under OAR 660-012-0060 a city must consider whether the new zoning would allow development that will exceed those performance standards and thereby "significantly affect" those state transportation facilities within the meaning of OAR 660-012-0060(2). *Just v. City of Lebanon*, 49 Or LUBA 180 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. Where the city's acknowledged transportation system plan (TSP) assumed that the subject property would develop at urban densities allowed under a city comprehensive plan designation, and did not assume that the property would develop under the pre-existing low-density county zoning, in conducting the comparison of traffic impacts allowed under the amended and unamended plan and zoning under OAR 660-012-0060 it is appropriate to use the city plan designation assumed in the TSP rather than the county zone. *Mason v. City of Corvallis*, 49 Or LUBA 199 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. The focus of OAR 660-012-0060(1) is on the land uses that are *allowed* under the amended plan and zoning regulations, not on the particular uses that the applicant may contemplate. Absent adequate justification for a different approach, the

local government must assume that the property will develop at the most traffic-intensive use allowed under the amended plan and zoning, in determining whether the amendments "significantly affect" a transportation facility. *Mason v. City of Corvallis*, 49 Or LUBA 199 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government may assume that property will not develop under the most traffic-intensive uses allowed in the amended plan and zoning regulations for purposes of OAR 660-012-0060, where the presence of steep slopes, wetlands, significant natural features or other limitations on development potential make it highly improbable that the site can be developed with the most traffic-intensive uses allowed under the amended plan and zoning regulations. *Mason v. City of Corvallis*, 49 Or LUBA 199 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. Implicit in OAR 660-012-0060(2)(d) is a causative element that triggers application of the rule only when the amendments (1) allow uses that generate more traffic than uses allowed under the unamended plan and zoning and (2) the additional traffic would reduce a facility's performance standards below the minimum acceptable level. Where the amended plan and zoning would generate less traffic than the unamended plan and zoning, then the amendment cannot significantly affect a transportation facility within the meaning of OAR 660-012-0060(2)(d). *Mason v. City of Corvallis*, 49 Or LUBA 199 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. The requirements of OAR 660-012-0060 only apply to amendments "to functional plans, acknowledged comprehensive plans and land use regulations." Where a city took separate actions to approve a master plan of development and to amend its comprehensive plan to conform to the master plan of development and petitioners only appealed the master plan of development approval decision to LUBA, the requirements of OAR 660-012-0060 did not apply to the only decision that was before LUBA in that appeal. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. A city land use regulation requirement that a master plan of development demonstrate that transportation facilities are "adequate," does not require any particular level of internal or external roadway connectivity. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. Arguments that application of a city zoning district to an annexed area will conflict with Goal 12 are misdirected, where the challenged decision merely annexes the area but does not rezone it. *Cutsforth v. City of Albany*, 49 Or LUBA 559 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0040 merely requires that cities' transportation system plans (TSP) include a financing program. The rule does not require that the financing program must be amended every time the TSP is amended. *1000 Friends of Oregon v. City of Newberg*, 49 Or LUBA 626 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. Identifying a transportation need under OAR 660-012-0070 is sufficient to justify an exception under ORS 197.732(1)(c)(A). The county need not separately demonstrate that the state policies embodied in the applicable goals should not apply. *1000 Friends of Oregon v. Yamhill County*, 49 Or LUBA 640 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. Under OAR 660-012-0070(6), the reasonableness of non-exception alternatives is determined by the thresholds established by the local government, which include consideration of "cost, operational feasibility, economic dislocation and other relevant factors." *1000 Friends of Oregon v. Yamhill County*, 49 Or LUBA 640 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. When taking an exception for a transportation facility on rural lands, the more specific provisions of OAR 660-012-0070 apply in place of the more general ESEE analysis requirements of Goal 2, Part II (c)(3), ORS 197.732(1)(c)(C), and OAR 660-004-0020(2)(c). *1000 Friends of Oregon v. Yamhill County*, 49 Or LUBA 640 (2005).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government may not avoid the obligation to adopt findings addressing whether a proposed plan amendment complies with the Transportation Planning Rule (TPR) by relying on subsequent permit approvals to address traffic impacts of uses allowed by the amendment, where the criteria governing permit approvals do not require compliance with the TPR or include standards similar to TPR standards. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. An attempt to incorporate documents in the record as findings of compliance with the Transportation Planning Rule fails, where the decision purports to incorporate hundreds of pages of minutes and written testimony without adequately identifying those documents, and the incorporation is qualified in a manner that makes it difficult or impossible to understand the facts relied upon and the justification for the decision. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. A condition of rezoning approval that prohibits any development until a master plan is approved, under criteria identical to OAR 660-012-0060, is sufficient to ensure that traffic generated by uses allowed by the rezoning decision will be consistent with the function, capacity and performance standards of affected transportation facilities, and thus ensure compliance with OAR 660-012-0060 and Goal 12. *Citizens for Protection of Neighborhoods v. City of Salem*, 47 Or LUBA 111 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060 does not require preparation or analysis of a traffic impact statement, although depending on the nature of the proposed plan amendment and the local government's approach to finding or ensuring compliance with the rule, some kind of traffic generation or traffic impact analysis may be necessary. *Citizens for Protection of Neighborhoods v. City of Salem*, 47 Or LUBA 111 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. Although a petitioner waived its right to challenge a decision for failure to apply Goal 12 (Transportation) or the Transportation Planning Rule, LUBA will consider the legal arguments that the petitioner presents under that assignment of error when LUBA considers petitioner's arguments concerning nearly identically worded county code transportation standards under a different assignment of error. *Concerned Citizens v. Malheur County*, 47 Or LUBA 208 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. A county does not improperly defer a determination that a rezoning decision will not significantly affect transportation facilities under county code provisions that parallel the Transportation Planning Rule, where (1) the rezoning decision effectively precludes development of the rezoned site without site design review, (2) the rezoning decision prohibits uses that would generate traffic that would be inconsistent with highway facility functional classifications or exceed levels of service and (3) any future site design review determination that the development of the site would not significantly affect transportation facilities would be a discretionary permit decision that would be appealable to LUBA. *Concerned Citizens v. Malheur County*, 47 Or LUBA 208 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. Unless required by local standards, a city is not required to ensure that development permitted outright under existing plan and zoning standards will not cause transportation facilities to fall below operational thresholds during the relevant planning period. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a city's functional classification scheme distinguishes street types based on the type or source of traffic, and requires that the majority of trips on a neighborhood collector serve traffic that starts and ends within the neighborhood, in rezoning land to higher-intensity commercial uses the city must evaluate whether the rezoning "significantly affects" the collector within the meaning of OAR 660-012-0060(2)(c), by allowing levels of travel that are inconsistent with the functional classification of that facility. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. Where two traffic studies indicate that post-acknowledgment plan amendments may cause a transportation facility to fall below the minimum acceptable performance standard, and the respondent cites no evidence to the contrary that a reasonable person would rely upon, remand is necessary for the city to address whether the plan amendment will "significantly affect" that transportation facility within the meaning of OAR 660-012-0060(2)(d). *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. Nothing in the Transportation Planning Rule at OAR Chapter 660, Division 12 requires that a local government amend its transportation system plan before or contemporaneously with adopting a new fund to finance identified transportation improvements. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. Because OAR 734-051-0155(4)(d) requires that access management plans shall be consistent with a city's transportation system plan and because OAR 734-051-0155(4)(k) requires that the access management plan be "adopted into" the city's transportation system plan, the city's adoption of the access management plan "concerns the adoption, amendment or application of * * * [a] comprehensive plan provision" within the meaning of ORS 197.015(10)(a) and, for that reason, is a land use decision subject to LUBA's jurisdiction. *Rhodes v. City of Talent*, 47 Or LUBA 574 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. A city errs by adopting an access management plan without adopting that access management plan as part of its transportation system plan and without

following the procedures for a post acknowledgment plan amendment. *Rhodes v. City of Talent*, 47 Or LUBA 574 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. The OAR 660-012-0060 requirement that plan and land use regulation amendments "*shall assure* that allowed land uses *are* consistent with the identified function, capacity, and performance standards" of transportation facilities is written in the present tense. That the rule is written in the present tense is some indication that the rule drafters did not intend to require only that the traffic that would be generated by a plan amendment "will be" consistent with the function, capacity and performance standards of affected transportation facilities at the end of the planning period, but intended to require such consistency throughout the planning period. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060, which governs amendments to comprehensive plans, serves a different purpose than the standards that apply to development of a transportation system plan. OAR 660-012-0060 was adopted to *prevent* local governments from allowing new uses that are not provided for in the plan and code, or anticipated in the TSP, which are inconsistent with the function and capacity of transportation facilities. The transportation system plan may be unconcerned with temporary failures of transportation facilities caused by already allowed uses, because there may be little the local government can do to address such temporary failures. But it does not follow that OAR 660-012-0060 is also unconcerned with temporary facility failures, or that its regulatory concerns are confined to those that animate the standards for developing a TSP. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060(1) provides a set of flexible tools that local governments must use to "assure" that allowed uses are consistent with the function, capacity and performance standards of transportation facilities. Those tools must be applied to mitigate both "temporary" failures that might be caused by plan amendments and to assure that such amendments do not hasten permanent failures. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. Under OAR 660-012-0040(4), LUBA does not have jurisdiction to review "timing and financing provisions" in a transportation financing program. However, LUBA does have jurisdiction to review a city decision that determines that a particular facility alternative is consistent with its transportation system plan, notwithstanding that such a decision may be driven in part by timing or financing considerations. *Ramsey v. City of Philomath*, 46 Or LUBA 241 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. A city decision that elects to construct a transportation facility that completes part but omits part of a recommended facility in a city's transportation system plan will be affirmed by LUBA where the facility to be constructed can be viewed as a first phase of the planned-for facility and the city's decision to construct the facility in phases is not inconsistent with the TSP. *Ramsey v. City of Philomath*, 46 Or LUBA 241 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. If after a first phase of a transportation system plan recommended facility is constructed a city determines to abandon the final phase, the city must

amend the transportation system plan to reflect that choice. *Ramsey v. City of Philomath*, 46 Or LUBA 241 (2004).

16. Goal 12 – Transportation/ Goal 12 Rule. A threshold question under OAR 660-012-0060(2)(d) is whether development under proposed zoning will cause greater traffic impacts than development under existing zoning. If not, the inquiry under OAR 660-012-0060(2)(d) ends there. If so, the local government must go on to evaluate whether the increased traffic will cause affected transportation facilities to fall below applicable performance standards. *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. In evaluating whether development under proposed zoning will cause greater traffic impacts than development under existing zoning for purposes of OAR 660-012-0060(2)(d), the local government must use consistent assumptions. *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. Where the challenged decision increases the proportion of commercial-zoned lands in an area and decreases the proportion of industrial-zoned lands in that area, and does not alter the types of uses allowed in those commercial and industrial zones, a consistent comparison of traffic impacts for purposes of OAR 660-012-0060(2)(d) requires the local government to assume that the same uses will develop in industrial zones under the existing and proposed zoning, and the same uses will develop in commercial zones under the existing and proposed zoning. *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. An erroneous assumption in a supplemental study regarding traffic impacts of development under proposed zoning for purposes of OAR 660-012-0060(2)(d) is harmless error, where the initial traffic study reached the same conclusion of compliance with the rule using the correct assumption, and petitioner offers no reason to believe that remand to correct the erroneous assumption in the supplemental study will alter that ultimate conclusion. *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. Where the challenged decision rezones 32 acres of land from a light industrial zone that allows traffic-intensive office uses to a heavy industrial zone that does not allow such office uses, the local government is not required to assume the proposed heavy industrial zone will be developed with office uses not allowed in the zone, for purposes of comparing traffic impacts under OAR 660-012-0060(2)(d). *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. The Oregon Department of Transportation's (ODOT's) general observation during local proceedings that it did not believe the city had adequately addressed the requirements of OAR 660-012-0060, which was followed up with specific concerns that the city addressed to ODOT's satisfaction, is not sufficient to allow a petitioner at LUBA to raise for the first time on appeal specific issues other than the specific concerns identified by ODOT. *Thomas v. City of Veneta*, 44 Or LUBA 5 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. A county population projection that does not itself "significantly affect" a transportation facility in any of the four ways described in OAR 660-012-0060 need not comply with that rule or local equivalents, notwithstanding that the population projection may set the stage for later decisions that will significantly affect transportation facilities. *Tipperman v. Union County*, 44 Or LUBA 98 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0070(8) requires that a local government describe the adverse effects that the accessibility associated with an urban transportation facility may have on rural lands and adopt "measures which minimize [such] accessibility." Where an assignment of error is essentially a collateral challenge to a parkway that is already included in a transportation system plan rather than to the realignment of a portion of that already-approved parkway that is approved by the challenged decision, the assignment of error provides no basis for reversal or remand. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a county has alternative performance measures that have been approved by LCDC under OAR 660-012-0035(5), which establish a year 2015 target internal vehicle miles traveled (VMT) of 3,224,037 miles and establish a VMT/capita of 10.9, a decision to amend a transportation system plan such that the expect VMT/capita for 2015 remains at 10.9 but the expected internal VMT for the year 2015 increases slightly to 3,232,977 miles does not violate the alternative performance measures. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. A transportation system plan amendment that improves the expected performance of 13 intersections as compared to the existing transportation system plan does not significantly affect a transportation facility within the meaning of OAR 660-012-0060(2) and does not implicate the remedial measures that are required under OAR 660-012-0060(1), notwithstanding that a facility improvement that will be required to keep another section of roadway from failing within the planning period is placed in a less certain funding category. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. The Oregon Highway Plan Major Improvements Policy imposes a priority system favoring protection of the existing transportation system and improvements to or added capacity for the existing transportation system before building new transportation facilities. A transportation system plan amendment does not violate that priority policy where the findings demonstrate that for several decades those higher priority measures have been taken and are now inadequate to address local and regional traffic needs. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. In determining whether swapping plan designations between two similar areas of a parcel would result in a net increase in traffic impacts for purposes of the OAR 660-012-0060 requirement that plan amendments not "significantly affect" a transportation facility, a local government must consider the development potential of each area as zoned and planned, but need not consider extrinsic limitations on development, such as security concerns arising from threats of terrorism, that cast doubt on whether one of the areas could be

developed to its full potential, under its existing designation. *Excelsior Investment Co. v. City of Medford*, 44 Or LUBA 553 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. Amendments to a city's comprehensive plan and land use regulations that result in an aerial tram being listed as a "basic utility" and an allowed use in the city's open space zone do not change the functional classification of the rights-of-way that the tram will pass over and, therefore, those amendments do not "substantially affect" a transportation facility within the meaning of OAR 660-012-0060. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a transportation plan has been submitted to LCDC for acknowledgment review and LCDC has conducted that review with regard to Goal 12 and the Transportation Planning Rule (TPR), LUBA does not have authority to thereafter review the regional transportation plan for compliance with the TPR. That limit on LUBA's scope of review is not affected by the fact that the TPR was adopted to implement both Goal 12 and the ORS 197.712(2)(e) obligation concerning public facility plans, where the statutory obligation is not shown to impose transportation planning obligations that are different than those imposed by Goal 12. *Citizens Against Irresponsible Growth v. Metro*, 40 Or LUBA 426 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. Findings concluding that traffic from proposed industrial development will not change the functional classification of affected transportation facilities under OAR 660-012-0060(2)(a) and (b) are not sufficient to also conclude, for purposes of OAR 660-012-0060(2)(c), that levels of travel from the proposed development are consistent with the functional classification of affected facilities. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. Depending on how functional classifications are defined in the pertinent transportation plan, evidence that levels of traffic generated by proposed development will violate the performance measure of affected transportation facilities may also be relevant to determining whether the development "significantly affects" a facility under OAR 660-012-0060(2)(c) by allowing levels of travel inconsistent with the functional classification of a transportation facility. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. A finding that the proposed buildout of a subdivision will take longer than originally anticipated, and will generate less traffic during the planning period, is insufficient to demonstrate that the proposed development will not significantly affect a transportation facility that is projected to fail under increases in background traffic, where the proposed development, even if built out at a slower pace, may cause the facility to fail earlier than it otherwise would. *DLCD v. Klamath County*, 40 Or LUBA 221 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. For an amendment to significantly affect a transportation facility under OAR 660-012-0060, the amendment must play a causative role in reducing the applicable performance standards below the minimum acceptable level. The focus of the inquiry is on the transportation impacts allowed by the amendment, not on impacts from uses

already allowed by the existing plan or zoning. *ODOT v. City of Klamath Falls*, 39 Or LUBA 641 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. Although a local government may rely on improvements identified in its transportation system plan to avoid a finding of significant effect, a local government may not avoid the requirements of OAR 660-012-0060(1) by assuming the existence of unplanned future transportation improvements. *ODOT v. City of Klamath Falls*, 39 Or LUBA 641 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. Even if a transportation facility would fall below the applicable performance standard without the proposed amendment, a proposed plan amendment significantly affects the transportation facility if it would reduce the performance standard below the applicable performance standard sooner than would otherwise occur. *ODOT v. City of Klamath Falls,* 39 Or LUBA 641 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government may proceed under an assumption that a plan amendment significantly affects a transportation facility without making a specific determination under OAR 660-012-0060(2)(c) that the amendment is inconsistent with the functional classification of the facility. Although such a course creates difficulty in determining what level of mitigation is necessary under OAR 660-012-0060(1)(a) through (d), a condition that prevents the amendment from affecting the facility at all until necessary improvements are made overcomes that difficulty and complies with OAR 660-012-0060(1)(a). *ODOT v. City of Klamath Falls,* 39 Or LUBA 641 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. The transportation planning rule does not apply to the amendment of the Metro UGB where the amendment only converts rural land to urbanizable land, and does not alter the types or intensity of allowed land uses, reduce the performance standards of transportation facilities, or otherwise "significantly affect" a transportation facility within the meaning of OAR 660-012-0060. *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 539 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. The requirement under OAR 660-012-0065(3)(o) that the travel capacity and level of service of transportation facilities sited on rural EFU-zoned land must "be limited to that necessary to support rural land uses identified in the acknowledged comprehensive plan" is satisfied where the proposed facility would serve seven lot of record dwellings, the comprehensive plan authorizes rural dwellings and the EFU zoning statutes specifically authorize lot of record dwellings in EFU zones. *Friends of Yamhill County v. Yamhill County*, 39 Or LUBA 478 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. An existing road cannot be rejected as an alternative under OAR 660-012-0065(5)(a) because it is (1) unsafe, (2) does not meet "applicable standards," or (3) has not previously been "approved by a registered professional engineer." Under the rule, the county must also establish that the existing road cannot be improved to be "safe," meet "applicable standards," and be "approved by a registered professional engineer" "at a reasonable cost, not considering raw land costs, with available technology." *Friends of Yamhill County v. Yamhill County*, 39 Or LUBA 478 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. A decision that an existing road need not be considered as an alternative under OAR 660-012-0065(5)(a) is not supported by substantial evidence where there is no attempt to identify how costly it would be to address safety problems and bring the road up to applicable standards so that it could be approved by a registered engineer. *Friends of Yamhill County v. Yamhill County*, 39 Or LUBA 478 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0065(5)(a) prohibits consideration of "land costs," in determining whether the cost of an alternative is reasonable. "Land costs" are not limited to purchase of the fee title and include purchase of an easement. *Friends of Yamhill County v. Yamhill County*, 39 Or LUBA 478 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a zoning map is part of the city's zoning ordinance, an amendment of the zoning map constitutes a land use regulation amendment, within the meaning of OAR 660-012-0060, and must meet the requirements of OAR 660-012-0060(1) if the zoning map amendment will significantly affect a transportation facility. *Adams v. City of Medford*, 39 Or LUBA 464 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a city's finding that a zoning map amendment will not significantly affect transportation facilities is based on a lengthy transportation impact study, and petitioner attacks that finding based on other evidence of questionable relevance without developing any arguments challenging the transportation impact study, petitioner provides no basis for reversal or remand. *Adams v. City of Medford*, 39 Or LUBA 464 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government may rely on existing or planned facilities to determine whether its transportation facilities are adequate to handle additional traffic that will be generated by a proposed amendment. *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. If a local government relies on planned-for facilities to accommodate additional vehicle trips that will be generated by a proposed plan amendment, then the local government must find that those planned-for facilities will be built or improved on a schedule that will accommodate those additional trips. *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. If a proposed amendment will generate additional trips that cannot be absorbed by existing or planned-for facilities, then a local government must adopt one or more of the strategies set out in OAR 660-012-0060(1) to make the proposal consistent with "the identified function, capacity and level of service of the [affected] facility," as is required by OAR 660-012-0060(1). *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. A determination by a local government that a proposed amendment will not *currently* significantly affect a transportation facility is insufficient to satisfy OAR 660-012-0060(1), because the rule requires a demonstration of no significant effect

over the *entire* relevant planning period. *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government may rely on a transportation facility improvement that is not fully set out in the local transportation systems plan, where that improvement has been identified and deferred to a future refinement plan pursuant to OAR 660-012-0025. *Craig Realty Group v. City of Woodburn*, 39 Or LUBA 384 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060 has no applicability to a decision vacating a county road, where the decision does not amend a functional plan, comprehensive plan or land use regulation. *Mekkers v. Yamhill County*, 39 Or LUBA 367 (2001).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government may not explicitly rely on a traffic study to demonstrate compliance with Goal 12 and then ignore a portion of the traffic study that describes anticipated deterioration in level of service. *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. Where development will result in a change in the level of service and reduce performance standards of the facility below the minimum acceptable level of service over the relevant planning horizon, the proposed amendment "significantly affects" a transportation facility. *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. The establishment of a new public use airport runway, along with associated road realignment and expansion of the airport boundary, is considered to be part of the "expansion of a public use airport," pursuant to OAR 660-012-0065(3)(n). *Lentz v. Lane County*, 38 Or LUBA 669 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. As long as the expansion of the public use airport continues to serve the same class of airplanes pursuant to OAR 660-012-0065, the expansion is considered to be consistent with Goals 3, 4, 11, and 14, and an exception to those goals is not required. *Lentz v. Lane County*, 38 Or LUBA 669 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. The "air, rail, water and pipeline transportation plan" required by OAR 660-012-0020(2)(e) to be included in a local government's Transportation System Plan need not include any information other than that specified in the rule, *i.e.*, the location and extent of existing or planned facilities. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. The coordination requirement at OAR 660-012-0015(5) provides that the adopting local government must provide notice and an opportunity to comment to affected local governments. However, the rule does not require that the adopting local government provide additional notice and opportunity to comment each time the proposal is modified. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060(1) and (2) contemplate that any mitigation measures that may be necessary to ensure that land uses allowed by amendments

remain consistent with a facility's function, capacity and performance standards are considered after the local government has determined whether the proposed plan amendment significantly affects a transportation facility within the meaning of OAR 660-012-0060(2). It is inconsistent with that scheme to consider such mitigation measures as a means of avoiding the conclusion that an amendment significantly affects a transportation facility. *DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. Where an applicable transportation systems plan adopts particular performance standards, a local government errs by not using those standards to analyze whether a proposed amendment significantly affects a transportation facility, as defined by OAR 660-012-0060(2). *DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0045(5)(c) requires local governments to adopt legislation to comply with the rule's parking reduction requirements; it is not an independent decisional criterion applicable to every quasi-judicial application involving parking. *Douglas v. City of Lake Oswego*, 37 Or LUBA 826 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. A zoning ordinance text amendment that, as conditioned, would not permit development that would add more traffic to the transportation system than could be added under the zoning ordinance before the text amendment does not "significantly affect a transportation system," within the meaning of OAR 660-012-0060(2) (1998). *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060(2) (1998) does not require that a local government consider whether a proposed zoning text amendment to raise the permissible building height on one property will in some general way encourage development in the future on nearby properties that may, in turn, "significantly affect a transportation facility. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government's failure to adopt a transportation system plan (TSP) by the date required by OAR 660-012-0055 does not preclude the local government from amending the transportation element of its comprehensive plan until it adopts a TSP, where it is clear under the comprehensive plan that the transportation element is a separate policy document than the TSP, and the amendments to the transportation element are not intended to and do not have the effect of adopting a TSP. *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. A comprehensive plan amendment that changes a minor arterial to a major arterial changes the functional classification of a transportation facility and thus requires findings of compliance with OAR 660-012-0060. *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. The focus of OAR 660-012-0060 is on protecting transportation facilities from impacts inconsistent with their identified function, capacity and level of service, not on protecting adjacent residential land uses from the adverse impacts of transportation facilities. *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government's decision to rezone land to allow an industrial use generating up to 120 truck trips per day through local streets and a state highway must demonstrate compliance with Goal 12. LUBA will not exercise its authority under ORS 197.835(11)(b) to affirm the decision notwithstanding inadequate findings of compliance with Goal 12, where the parties cannot identify traffic studies or other evidence in the record sufficient to make it "obvious" or "inevitable" that the decision complies with Goal 12's requirement for a safe, convenient and economic transportation system. *Mulford v. Town of Lakeview*, 36 Or LUBA 715 (1999).

16. Goal 12 – Transportation/ Goal 12 Rule. A local provision that merely recites language from the Transportation Planning Rule, OAR 660-012-0045(2)(g), is not adequate to implement that rule, where the local provision does not contain any operative terms actually implementing the rule, and does not ensure that all amendments to land use designations, densities and design standards are consistent with the function, capacity and level of service of transportation facilities, as the rule requires. *Dept. of Transportation v. Douglas County*, 36 Or LUBA 686 (1999).

16. Goal 12 – Transportation/ Goal 12 Rule. Findings and conditions that require only external pedestrian improvements, and that require pedestrians in one part of the development to leave the subject property in order to go to another part of the development, are inadequate to demonstrate compliance with the Transportation Planning Rule's requirement for internal pedestrian facilities and clustering of buildings. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a plan policy, implementing the Transportation Planning Rule, requires that the parking spaces per capita ratio must be reduced by 10 percent but does not specify how the starting point for computing the reduction must be computed, a city council interpretation that the starting point computation may include approved but not yet constructed parking spaces is within the city's interpretive discretion under ORS 197.829. *Baughman v. City of Portland*, 36 Or LUBA 353 (1999).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a city approves a development plan for a university district as part of a quasi-judicial proceeding, but does not incorporate it into the city's comprehensive plan or land use regulations, the development plan is not a comprehensive plan or land use regulation, and thus amendments to that plan are not subject to review for compliance with statewide planning goals or the Transportation Planning Rule. *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

16. Goal 12 – Transportation/Goal 12 Rule. A county's transportation plan is inconsistent with the Transportation Planning Rule where it fails to inventory existing and committed bicycle and pedestrian facilities in the county, assess the capability and condition of those facilities, develop a system of planned improvements to those facilities, and depict planned improvements on a map, as required by OAR 660-012-0020. *Dept. of Transportation v. Douglas County*, 36 Or LUBA 131 (1999).

16. Goal 12 – Transportation/Goal 12 Rule. A letter from an ODOT employee regarding negotiations between ODOT and the county does not constitute an affirmative waiver of issues

related to minimum street width standards under OAR 660-012-0045(7), where it is unclear what was resolved between the parties and whether the county implemented the parties' resolution. Even if petitioner ODOT had waived that issue, such waiver would not apply to petitioner DLCD. *Dept. of Transportation v. Douglas County*, 36 Or LUBA 131 (1999).

16. Goal 12 – Transportation/Goal 12 Rule. The requirement at OAR 660-012-0045(7) that the county evaluate whether its street width standards are the minimum consistent with operational needs is not satisfied by a county procedure to consider, on a case-by-case basis, whether certain street widths should be reduced. *Dept. of Transportation v. Douglas County*, 36 Or LUBA 131 (1999).

16. Goal 12 – Transportation/ Goal 12 Rule. A city does not err by failing to require that a subdivision access road be improved to particular city standards, where the applicable city criterion merely requires that the subdivision provide "paved" access. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

16. Goal 12 – Transportation/ Goal 12 Rule. Under OAR 660-012-0060(2)(d), a plan amendment "significantly affects" a transportation facility if it would reduce the level of service of that facility below the minimum identified acceptable level of service. Under that definition, a plan amendment that would further degrade a facility that is already operating below the minimum identified acceptable level of service "significantly affects" that facility. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-012-0060 does not require that a local government impose exactions to ensure that impacts from a plan amendment do not violate Transportation Planning Rule Level of Service requirements. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. Compliance with OAR 660-012-0060 does not deprive a property of all beneficial use, where the current comprehensive plan and zoning designations allow a range of uses that may generate any amount of traffic and are not subject to the rule. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. The Transportation Planning Rule, OAR 660-012-0060, requires that when a plan amendment "significantly affects" a transportation facility the local government must either ensure that the amendment is consistent with its transportation plan or amend its plan. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. When a land use allowed by a comprehensive plan amendment would "significantly affect" a transportation facility, a local government may not avoid the requirements of the Transportation Planning Rule, OAR 660-012-0060, by conditioning the amendment on improvements that maintain the facility above the thresholds provided in OAR 660-012-0060(2). *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government's reliance on a traffic study using a method not currently preferred but nonetheless required by the state Department of

Transportation (ODOT) does not provide a basis for reversal or remand, where traffic analysis under either of two methods recognized by ODOT supports the conclusion reached by the local government. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government fails to satisfy the requirement of the Transportation Planning Rule, OAR 660-012-0060, to coordinate with affected jurisdictions, where it amends its comprehensive plan to allow a shopping mall designed to be a regional destination point, but limits its coordination efforts to ODOT and the surrounding county. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. When a local government has not adopted requirements in the Transportation Planning Rule at OAR 660-012-0045 regarding pedestrian and bicycle facilities, those requirements apply directly to local government land use decisions. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. Although Oregon Laws 1997, chapter 859 (HB 2605) repeals two sections of the legislation that directed DLCD to adopt the Airport Planning Rule (APR), the 1997 legislation does not completely supersede the APR or DLCD's authority to adopt rules regarding airport planning. *Northwest Aggregates Co. v. City of Scappoose*, 35 Or LUBA 30 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. Where the TPR and Airport Planning Rule specifically require that a jurisdiction include areas of its airport that extend beyond its corporate limits, a city action doing so does not violate the ORS 221.720 limitation of a city's municipal power to its city limits. *Northwest Aggregates Co. v. City of Scappoose*, 35 Or LUBA 30 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. Where petitioner adequately raised the issue of whether a street would continue to function as a local street, failure to specify the TPR or comprehensive plan provision that required that the street continue to function as a local street does not result in waiver of the issue. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998) (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. Requiring that a street be connected to allow through traffic does not inevitably mean the street will cease to function as a local street, where there are identified measures that can be used to discourage non-local traffic. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. A city's findings are adequate to demonstrate compliance with a criterion requiring that development approval not result in "unreasonable congestion," where the findings acknowledge that the required street connectivity will change the nature of the traffic on the street but also discuss "traffic calming measures" that are incorporated into the design. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. An applicant does not carry his burden to demonstrate compliance with transportation-related criteria, where the findings supporting denial identify a flaw in the applicant's evidence resulting from conducting a traffic study in the summer

when school trips would not be reflected in the study. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. Petitioner's allegations that decreases in potential housing density could affect transportation facilities are insufficient to show the challenged decision will "significantly affect a transportation facility," within the meaning of OAR 660-012-0060(1), where petitioner fails to identify any allegedly affected transportation facilities. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. The Transportation Planning Rule requirements set forth at OAR 660-012-0045(2) by their terms apply directly to local codes, not local comprehensive plans. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. Under OAR 660-012-0045(2) local codes must require compliance with ODOT access standards or require that an applicant obtain an access permit from ODOT as a condition of approval. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. The OAR 660-012-0045(2)(g) requirement that local governments adopt "regulations assuring that amendments to land use designations, densities, and design standards are consistent with the functions, capacities and levels of service of facilities identified in the TSP" is not satisfied by a plan provision that fails to refer to the Transportation Planning Rule by name or number and that imposes a different threshold for application of the rule standard than is required by the rule. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. The requirement of OAR 660-012-0015(2)(a) that regional TSPs be consistent with the state TSP is violated by a comprehensive plan amendment that purports to require that ODOT provide access under circumstances that are not consistent with ODOT policies. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. The term "rural community" as used in OAR 660-012-0045(3) of the Transportation Planning Rule is broader than the term "rural community" as defined in OAR 660-022-0010(7) of the Unincorporated Communities rules. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. An amendment to a future streets plan does not significantly affect a transportation facility, and the TPR does not apply, where the record demonstrates that the decision does not change a functional classification or any standards relating to functional classifications and traffic levels would not be increased. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. Plan map and zoning amendments that significantly affect a transportation facility must be consistent with the Transportation Planning Rule (TPR). Therefore findings must address Goal 12 and the TPR as they apply to all access to the subject

property unless the local government restricts access by imposing conditions of approval. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

16. Goal 12 – Transportation/ Goal 12 Rule. When a city finds a proposed development will not result in levels of travel or access inconsistent with the existing functional classification, the development does not "significantly affect a transportation facility" under OAR 660-12-060(2)(c), and OAR 660-12-060(1) does not apply. *Melton v. City of Cottage Grove*, 30 Or LUBA 331 (1996).

16. Goal 12 – Transportation/ Goal 12 Rule. When, prior to an appeal to LUBA, a city satisfies the coordination requirement of OAR 660-12-060(3) by consulting with the county, and the development proposal does not change between LUBA's remand order and a second appeal, the city is not required to consult with the county again during the proceedings on remand. *Melton v. City of Cottage Grove*, 30 Or LUBA 331 (1996).

16. Goal 12 – Transportation/ Goal 12 Rule. Where evidence identified in the city's brief clearly supports a finding that a proposed development will not significantly affect a transportation facility, LUBA will affirm that part of the city's decision under ORS 197.835(9), notwithstanding the city's failure to make the required finding. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. Where petitioners claim a local government decision authorizing improvements to a public right-of-way violates the Transportation Planning Rule (TPR), but fail to establish how the TPR applies to the challenged decision or how the proposed road improvements will frustrate compliance with the TPR, LUBA will deny petitioners' assignment of error. *Leathers v. Washington County*, 29 Or LUBA 343 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-12-045(4)(b) establishes minimum standards for preferential access to transit that local government regulations must meet, not maximum limitations beyond which local government regulation is prohibited. *Common Ground v. City of Gresham*, 29 Or LUBA 164 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. The requirements of OAR 660-12-045(4)(b)(B) and (C), for "clustering" buildings around transit stops and locating buildings "as close as possible" to transit stops, are not satisfied by requiring that buildings on designated transit streets abut sidewalks and that no more than 50 percent of the frontage on transit streets be occupied by auto parking and maneuvering areas. *Common Ground v. City of Gresham*, 29 Or LUBA 164 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. Local government prohibitions against auto parking and maneuvering areas between a building and a transit street, and limitation of such areas to no more than 50 percent of the frontage along a transit street, are not inconsistent with or prohibited by OAR 660-12-045(4)(b). *Common Ground v. City of Gresham*, 29 Or LUBA 164 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. The requirements of OAR 660-12-045(3)(b) for facilities providing safe and convenient pedestrian and bicycle access are *minimum* requirements. Nothing in OAR 660-12-045(3)(b) or any other provision of the TPR prohibits local government

adoption of architectural standards "to provide street safety and a comfortable pedestrian environment," even if they are not required by the TPR. *Common Ground v. City of Gresham*, 29 Or LUBA 164 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. In adopting a quasi-judicial comprehensive plan and land use regulation amendment, a local government is obligated either to demonstrate compliance with the Transportation Planning Rule (TPR) or, alternatively, establish that the TPR does not apply. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a comprehensive plan amendment adopts a map indicating a street may be considered to receive a "Green Street" classification in the future, and future application of the "Green Street" classification will itself require a plan amendment, petitioners' challenge to the plan amendment based on Goal 12 and the Transportation Planning Rule is premature. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a comprehensive plan map amendment to allow a proposed concrete batch plant will result in all aggregate and concrete trucks entering the subject property via a road that provides the sole access to certain existing dwellings, Goal 12 requires the local government to demonstrate the amendment will result in use of the road being safe and adequate. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. Where a local government finds that a proposed road alignment is consistent with plan policies calling for a balanced transportation system designed to minimize energy impacts because it will shorten travel distance to a light rail station, that the facility will also shorten travel distance to a major arterial does not, of itself, mean the plan policies are violated. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. Realigning a proposed minor arterial to run along an adjoining right-of-way does not "significantly affect a transportation facility" by changing "the functional classification of an existing or planned transportation facility," as those concepts are used in OAR 660-12-060(2). *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. Where petitioner alleges a realigned minor arterial will in fact operate as a major arterial, but fails to challenge the local government's findings explaining why it believes the realigned roadway is properly classified as a minor arterial, petitioner provides no basis for reversal or remand. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

16. Goal 12 – Transportation/ Goal 12 Rule. Nothing in the Transportation Planning Rule authorizes local governments to exempt any type of retail, office or institutional buildings from the building orientation and location requirements of OAR 660-12-045(4)(b). *Sensible Transportation v. Washington County*, 28 Or LUBA 375 (1994).

16. Goal 12 – Transportation/ Goal 12 Rule. The building orientation and location requirements of OAR 660-12-045(4)(b) apply to new buildings located near transit stops, regardless of whether

such buildings are located on a transit street. *Sensible Transportation v. Washington County*, 28 Or LUBA 375 (1994).

16. Goal 12 – Transportation/ Goal 12 Rule. The OAR 660-12-045(4)(b)(C) requirement that certain new buildings be located "as close as possible" to transit stops is not satisfied by code setback limitations that (1) allow a new building on a small lot fronting on a transit street to be situated 100 feet away from the transit street, or (2) require only that half of a new building on a large lot fronting on a transit street be located on the front half of such lot. *Sensible Transportation v. Washington County*, 28 Or LUBA 375 (1994).

16. Goal 12 – Transportation/ Goal 12 Rule. Where the deadlines established by OAR 660-12-055(1) and (2) for adoption of regional and local transportation system plans (TSPs) have not yet passed, and the local government has not yet adopted a TSP, the requirements of OAR 660-12-045(2) and (3) for regulations implementing TSPs are inapplicable to a decision amending the local code. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

16. Goal 12 – Transportation/ Goal 12 Rule. That an amendment to an acknowledged local code may result in decreasing the level of service at an interchange does not, of itself, mean the amendment "significantly affects a transportation facility" under OAR 660-12-060(2). *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

16. Goal 12 – Transportation/ Goal 12 Rule. That the record shows a code amendment will affect a site that has direct access onto a particular road is a sufficient basis for requiring the local government's determination under OAR 660-12-060(2)(c), that the amendment does not allow land uses resulting in "levels of travel or access * * * inconsistent with the functional classification of a transportation facility," to include consideration of impacts on that road. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

16. Goal 12 – Transportation/ Goal 12 Rule. The coordination requirement of OAR 660-12-060(3) should be interpreted the same as the coordination provision in Goal 2, which requires the jurisdiction developing plan or land use regulation provisions (1) to exchange information with other affected governmental units; and (2) to consider and accommodate the needs of such governmental units as much as possible in formulating or revising the plan or regulations. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-12-060(1) is applicable to comprehensive plan amendments which significantly affect a transportation facility. Compliance with this rule provision must be addressed when a UGB amendment is adopted; it cannot be deferred to future annexation decisions within the UGB expansion area. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

16. Goal 12 – Transportation/ Goal 12 Rule. OAR 660-12-060(4) prohibits using the existence of transportation facilities as a basis for approving (1) exceptions to the requirements of OAR 660-12-065, adopted under OAR 660-12-070; or (2) exceptions to statewide planning goals, adopted under OAR 660-04-022 (reasons exceptions) or OAR 660-04-028 (committed exceptions). OAR 660-12-060(4) does not apply to an exception for a change to an established UGB, adopted under

OAR 660-04-010(1)(c)(B). *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

16. Goal 12 – Transportation/ Goal 12 Rule. A local government can show an amendment to its acknowledged comprehensive plan and zoning maps complies with Goal 12 (Transportation) by establishing either (1) there is a safe and adequate transportation system to serve development under the proposed map designations, or (2) development of the property under the proposed designations will not create greater or different transportation demands and impacts than development under the existing, acknowledged designations. *ODOT v. Clackamas County*, 27 Or LUBA 141 (1994).

17. Goal 13 – Energy Conservation. Arguments that a revised Transportation System Plan (TSP) does not provide for a more energy efficient transportation system, and fails to forecast or plan for an increase in bicycle modal share, fail to demonstrate a violation of Goal 13 since Goal 13 does not state requirements with respect to other land use provisions, even where those provisions have incidental impacts on energy use and conservation, and therefore does not require a maximization of alternative modes. *Shaff v. City of Medford*, 79 Or LUBA 317 (2019).

17. Goal 13 – Energy Conservation. The Goal 13 requirement for local governments to "maximize the conservation of all forms of energy" does not impose an affirmative obligation on local governments to promote the development of renewable energy, or provide a basis to conclude that there is a "demonstrated need" to meet a goal requirement, in order to satisfy the standards at OAR 660-004-0022(1)(a) for adopting a reasons exception in order to site a solar energy facility on agricultural land. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

17. Goal 13 – Energy Conservation. Goal 13 is mostly a planning goal, and includes few substantive requirements that could directly conflict with Oregon Highway Plan amendments that increase mobility standards for state highways. To the extent higher mobility standards encourage denser development that causes increased traffic congestion, that is not inconsistent with Goal 13. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

17. Goal 13 – Energy Conservation. Goal 13 is to "conserve energy," but Goal 13 does not require that comprehensive plans ensure a net decrease in energy use, or prohibit any plan amendment that would result in a net increase in energy use. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

17. Goal 13 – Energy Conservation. Goal 13 is not violated by a proposal for a 102-unit assisted living facility bordering an arterial street, with nearby mass transit and a clientele that will not be heavy users of automobiles, when there is nothing in the record to suggest the proposal will waste energy or otherwise affect the city's compliance with Goal 13. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

17. Goal 13 – Energy Conservation. Goal 13 does not require that a local government maximize residential density or consider the energy consequences of different levels of residential development in amending its land use regulations. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Goal 14 prohibits urban uses on rural lands. Where a county's text amendments to its comprehensive plan do not allow any urban uses on rural land, but merely expand the allowable locations in the county that could be the subject of an application to change the plan designation to rural industrial, and the text amendments require the applicant to demonstrate that the proposed use for which the rural industrial plan designation change is consistent with all statewide planning goals, including Goal 14, a petitioner's arguments that the amendments violate Goal 14 do not provide a basis for reversal or remand. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. A petitioner's challenge to a county's amendments to its comprehensive plan that expand the allowable locations in the county that could be the subject of an application to change the plan designation to rural commercial and rural industrial, that argue that the county's adopted and acknowledged rural commercial and rural industrial zones impermissibly allow urban uses in contravention of Goal 14 are an impermissible collateral attack on an acknowledged land use regulation where no provisions of the county's code were amended by the challenged decision. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. In *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001), the Court of Appeals concluded that under Goal 14 (effective 10/04/00), Metro could identify a subregional (*i.e.*, geographically localized) need for housing, but when considering alternatives to amending the UGB to meet that subregional housing need, Metro could not limit its consideration to lands within the subregion. That broader geographic consideration of alternatives applies both to alternative sites inside the UGB, and to alternative sites outside the UGB subject to the priorities set out in ORS 197.298 and the Goal 14 locational factors, if a UGB amendment is required to meet the identified need. In this way, *Residents of Rosemont* distinguishes between subregional need and subregional analyses of alternatives. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. In *City of West Linn v. LCDC*, 200 Or App 269, 113 P3d 935, *rev den*, 339 Or 609 (2005), and *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001), the Court of Appeals clarified that pursuant to Goal 14 (effective 10/04/00), Metro can identify a subregional need for housing, and that the Department of Land and Conservation and Development's rules to that effect were not inconsistent with Goal 14. But the Court of Appeals held that the part of the rules that authorized Metro to limit its consideration of alternatives (both inside the UGB and outside the UGB) for satisfying that subregional housing need to lands within or near the subregion, was inconsistent with Goal 14. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. In *City of West Linn v. LCDC*, 200 Or App 269, 113 P3d 935, *rev den*, 339 Or 609 (2005), and *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001), the Court of Appeals determined the subregional need which can be identified under Goal 14 (effective 10/04/00), is a subregional need for *housing*, as opposed to a subregional need for a *specified number of acres for development of housing that must be located within that subregion*. Accordingly, Metro may not assume that a subregional need for housing can only be satisfied by constructing housing on land that is physically located within that

subregion. Rather, according to Goal 14, Metro may consider *proximity* in determining whether an alternative site is a suitable alternative, as opposed to simply eliminating alternative sites if they are not located in the subregion. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. It is one thing to say the alternative sites for meeting an identified short-term subregional need for jobs or shopping opportunities must be located within a specified "proximity" of the shoppers and potential employees that generate the identified need or that alternative sites for meeting that need must be within some stated "proximity" of necessary or supporting improvements. But it is quite another thing to say that the short-term, subregional need for jobs and shopping opportunities can only be satisfied on lands that are located within the subregion. The most obvious flaw in that latter reasoning is that for some of those subregional shoppers and potential employees near the boundaries of the subregion, lands in adjoining subregions will be closer (more proximate) than at least some of the more distant lands inside the subregion. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. A site suitability characteristic that property must be 22 acres in size to allow development of a "Lifestyle Center" is not appropriate under Goal 14 and OAR 660-024-0060(5), where the city fails to explain why a general subregional need for between 27 and 37.9 acres of land for commercial development must be satisfied by the "Lifestyle Center" proposed by the UGB amendment applicant on a single 22-acre site. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. OAR 660-004-0040, which provides standards consistent with Goal 14 for certain rural residential development in rural residential zones, does not purport to constitute a complete implementation of Goal 14 with respect to all residential development on rural lands. The rule's silence regarding some types of residential uses, for example, floating homes, does not allow the inference that such development is either consistent or inconsistent with Goal 14. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Because OAR 660-004-0040, which provides standards consistent with Goal 14 for certain rural residential development in rural residential zones, does not include standards for floating homes, ORS 197.646(1) does not oblige the county to adopt land use regulation amendments to implement the rule with respect to floating homes. Consequently, that the county's land use regulations governing floating homes do not include standards based on OAR 660-004-0040 does not mean that the county failed to implement the rule, or that the rule applies directly to land use decisions concerning floating homes, pursuant to ORS 197.646(3). *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. The Oregon Supreme Court decision in *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986), did not obligate local governments to apply Goal 14 as interpreted directly to land use decisions made under acknowledged land use regulations, although *amendments* to those regulations must be consistent with Goal 14 as interpreted by *Curry Co.* Where a county's regulations governing floating homes were adopted and acknowledged to comply with Goal 14 in 1982, and have not been amended since, those regulations remain acknowledged to comply with Goal 14, and thus Goal 14 would

not apply directly to a decision to approve floating homes under that acknowledged ordinance. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Under Goal 14, OAR 660-024-0030(1) and 660-024-0040(1), urban growth boundary amendments must be consistent with the city's 20-year population projections, which in turn must be consistent with the county's population projection for the county and urban areas within the county. For purposes of urban growth boundary amendments, both the county's and the city's population projections must be "included in the comprehensive plan or in a document referenced by the plan." *Hawksworth v. City of Roseburg*, 64 Or LUBA 171 (2011).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Although it may be likely that an urban growth boundary that was adopted to include a 20-year supply of buildable land no longer has a 20-year supply of buildable land 30 years later, a city must first amend its comprehensive plan to include an updated population projection, before amending its urban growth boundary based on the updated population projections rather that the old population projections in its comprehensive plan. *Hawksworth v. City of Roseburg*, 64 Or LUBA 171 (2011).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Remand is required where a light rail project that is located partially outside the UGB is approved under a special siting statute that only authorizes light rail projects that are located inside the UGB. *Weber Coastal Bells v. Metro*, 64 Or LUBA 221 (2011).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Where the OAR 660-008-0005(6) definition of "redevelopable land" specifically encompasses land on which the local government determines there is a "strong likelihood" that the lots will be redeveloped more intensively, a local government does not err in excluding land from its analysis of "redevelopable land" where it concludes that there is not a strong likelihood that redevelopment will occur on any lands within the city due to the arrangement of existing development and market factors. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 211 (2010).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. In approving a Goal 14 exception to allow urban development on rural land, OAR 660-014-0040(3)(c) requires the local government to determine whether that urban development will detract from the ability of existing cities and service districts to provide services and whether continued resource management on surrounding lands is assured. While LUBA might be able to overlook a local government's failure to specifically address OAR 660-014-0040(3)(c) if the exception limited development on the site to the four houses the applicant requested, where it is possible that as many as 14 dwellings might be developed under the exception remand is required. *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 240 (2010).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. DLCD's Goal 14 rule was amended in 2007 to require that the coordinated population projections required by ORS 195.025 and 195.036 must be "developed using commonly accepted practices and standards for population forecasting" and "based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic

Analysis (OEA). OAR 660-024-0030. A county may not simply rely on county population projections that were found to be valid when they were adopted in 1998 to adopt updated population projections in 2009. While the county is not required to use the OEA long range forecast, it must conduct a review of its 1998 assumptions to determine whether they remain reliable in light of actual population growth and the OEA forecast. *Meyer v. Douglas County*, 61 Or LUBA 412 (2010).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. DLCD's Goal 14 rule was amended in 2007 to require that the coordinated population projections required by ORS 195.025 and 195.036 must be "developed using commonly accepted practices and standards for population forecasting" and "based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic Analysis (OEA)." OAR 660-024-0030. If in adopting a coordinated population projection under ORS 195.025 and 195.036 a county relies on a city's undocumented preference for a particular growth rate, the county forecast is not supported by an adequate factual base. *Meyer v. Douglas County*, 61 Or LUBA 412 (2010).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. DLCD's Goal 14 rule was amended in 2007 to require that the coordinated population projections required by ORS 195.025 and 195.036 must be "developed using commonly accepted practices and standards for population forecasting" and "based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic Analysis (OEA)." OAR 660-024-0030. A county decision to apply its assumed population growth rate for unincorporated areas of the county to the unincorporated areas of the county located inside urban growth boundaries is not supported by an adequate factual base where there is no explanation for why that assumption is reasonable for urban areas around cities that project a much lower population growth rate. *Meyer v. Douglas County*, 61 Or LUBA 412 (2010).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Where it is not clear from the record whether a county-adopted 20-year population forecast is the forecast for an urban area or merely for a city within the county, a city is not entitled to rely on the safe harbor provision at ORS 195.034(1) to extend the county's current forecast to a 20-year period using the same growth trend as assumed by the county in its adopted population forecast. *Sane Orderly Development v. City of Roseburg*, 59 Or LUBA 356 (2009).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. A Metro regional plan provision that requires the Metro Chief Operating Office to conform Metro's maps to the comprehensive plan mapping that local governments adopt after Metro adds land to the urban growth boundary suggests that local governments have some authority to deviate from Metro's map designations for the property that is added to the urban growth boundary when they first applies their comprehensive plan map to that property. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. It is premature to argue that a legislative decision that adopts a new Airport Related zoning district violates a city's obligation to protect industrial and commercial land from incompatible uses under Statewide Planning Goal 9 and

violates Goals 10 and 14 by impermissibly converting industrially zoned land, for which there is a shortage, to a residential airpark use, which is not needed under Goal 10. Such arguments must await a city decision that actually applies the new Airport Related zoning district to some property in the city. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Where it is not clear whether a county believes a prior county decision delineated the boundaries of a resort unincorporated community, but petitioners do not allege that the appealed county decision that adopts a large scale map that precisely delineated the resort unincorporated community boundaries violates the OAR 660-022-0020 standards that govern such delineations, petitioners provide no basis for reversal or remand. *Friends of the Metolius v. Jefferson County*, 58 Or LUBA 284 (2009).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Under the Unincorporated Community Rule, the boundaries of unincorporated communities must be shown on the county's comprehensive plan map "at a scale sufficient to determine accurately which properties are included." OAR 660-022-0020(2). Where a comprehensive plan is amended to designate an area as an unincorporated community but that area is not shown on the comprehensive plan at the scale required by OAR 660-022-0020(2), remand is required. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Under OAR 660-022-0030(5), hotels and motels in unincorporated communities must be served by a community sewer system. Where the zoning applied to an unincorporated community allows lodges without specifying whether the lodge must be connected to a community sewer system, and the zoning ordinance term "lodges" could overlap with the rule terms "hotels and motels," an ambiguity and potential inconsistency with the rule is created. But since the zoning ordinance was adopted to implement the unincorporated community rule, any lodge that is also a hotel or motel as the rule uses those terms would have to be connected to a community sewer system. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. A petitioner who alleges in a LUBA appeal that a rezoning of rural land is defective because it allows conversion of rural land to urban uses without an adequate Goal 14 justification or exception is obligated to develop his or her argument to that effect. Mere speculation that the uses allowed in the new zone are so uncertain or could be approved in a manner in the future that would result in such improper conversion of rural land to urban uses is not sufficient. *Wood v. Crook County*, 55 Or LUBA 165 (2007).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. A county cannot lawfully include resource lands within an urban unincorporated community unless that land remains planned and zoned for resource uses or the county takes an exception to Goals 3 and 4. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. That a comprehensive plan identifies only a portion rather than the entirety of the geographic extent of a proposed unincorporated community as a "rural community," "service center," "rural center," "resort community" or similar term is not fatal, for purposes of OAR 660-022-0010(10)(b). As long as the proposed community

indeed qualifies as an "unincorporated community" under OAR 660-022-0010(10), the geographic extent of the proposed community is determined under OAR 660-022-0020, which allows certain areas outside the community to be included within the community. *Oregon Shores Cons. Coalition v. Tillamook County*, 48 Or LUBA 423 (2005).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. OAR 660-022-0010(10)(b) embodies a policy choice that the universe of "unincorporated communities" is limited to settlements or communities of some kind that the local government has explicitly recognized in its comprehensive plan prior to October 28, 1994, or that are listed in the Department of Land Conservation and Development (DLCD) survey. If not listed in the DLCD survey, the comprehensive plan must describe the proposed community either by one of the terms listed in the rule or a similar term that suggests the county views the area as a community of some kind. *Oregon Shores Cons. Coalition v. Tillamook County*, 48 Or LUBA 423 (2005).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. A description of an industrial park in a comprehensive plan as an "industrial park" is not a "similar term" to "service center," for purposes of establishing a new unincorporated community under OAR 660-022-0010, where nothing in the comprehensive plan suggests that the county viewed the industrial park as a community of some kind, and in adopting the comprehensive plan the county failed to list or discuss the industrial park in the plan element that addresses unincorporated communities. *Oregon Shores Cons. Coalition v. Tillamook County*, 48 Or LUBA 423 (2005).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. OAR 660-022-0010(8) defines a rural service center in part based on what uses on the property existed or predated October 28, 1994. Where the county fails to establish what current uses of the property existed on or predated October 28, 1994, it cannot determine whether the proposed community qualifies as a rural service center under the rule. *Oregon Shores Cons. Coalition v. Tillamook County*, 48 Or LUBA 423 (2005).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. The requirement in OAR 660-022-0010(8) that a rural service center consist "*primarily* of commercial or industrial uses providing goods and services to the surrounding rural area or persons traveling through the area" means that a *majority* of the subject property must consist of qualifying commercial and industrial uses, and not other uses. *Oregon Shores Cons. Coalition v. Tillamook County*, 48 Or LUBA 423 (2005).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Rural industrial uses that manufacture products and ship them to urban areas for retail sale do not provide "goods and services to the surrounding rural area or to persons traveling through the area," for purposes of qualifying a community as a "rural service center" under OAR 660-022-0010(8). *Oregon Shores Cons. Coalition v. Tillamook County*, 48 Or LUBA 423 (2005).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. A county's approval of a five-acre lot subdivision inside the UGB with a condition requiring that the applicant record CC&Rs that effectively prohibit further subdivision of those five-acre lots violates ORS 197.752. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. The Court of Appeals has held that the "unneeded but committed" exception, that allows the inclusion of lands within an urban growth boundary (UGB) without demonstrating a "need" for additional land, is a valid method of amending a UGB, without regard to the Goal 14 "need" factors. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Neither Goal 10 nor Goal 14 require a finding of "demonstrated need" for additional residential land within the meaning of Goal 2, Part II or Goal 14, factors 1 and 2 before the city may amend its comprehensive plan map to allow property to be zoned for residential rather than industrial uses. *Holcombe v. City of Florence*, 45 Or LUBA 59 (2003).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Nothing in either Goal 9 or Goal 14 requires a city to take into account the supply and demand for commercial and industrial lands in portions of the regional UGB outside the city's planning jurisdiction in deciding whether to rezone industrial lands within the city to allow commercial uses. *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236 (2003).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. A use permitted by statute on EFU land is not subject to the additional requirement that the use be rural or that an exception to Goal 14 be taken, even if the use is urban in nature. Where such a use is expressly permitted on EFU land, it is also implicitly permitted by statute on rural land zoned other than EFU. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Because a public park is permitted by statute on EFU land without requiring compliance with Goal 14 or an exception to that goal, it is also permitted on rural land zoned other than EFU without requiring compliance with Goal 14 or an exception, even if the park would primarily serve urban residents. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. A residential subdivision that includes 136 lots on 680 acres does not undermine the integrity of a UGB, in violation of Goal 14, where the subdivision is located two and one-half miles from the UGB, the lots in the subdivision will not be served by public water or sewer systems and there is evidence that the potential buyers of the proposed lots have different characteristics than potential buyers of lots within the UGB. *DLCD v. Klamath County*, 42 Or LUBA 368 (2002).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. The use of a state highway by commuters from a 136-lot subdivision, and the enrollment of children from that subdivision in city schools, do not impermissibly undermine the effectiveness of a UGB in contravention of Goal 14, where there is evidence that the highway and the school system will not be substantially impacted by the additional trips or by the number of students generated by the subdivision. *DLCD v. Klamath County*, 42 Or LUBA 368 (2002).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Nothing in Goal 14 expressly requires a county to analyze the potential impact of a proposed rezoning from non-resource to rural

residential on similar property in the area or the cumulative impact of the potential rezonings and development in the area surrounding a UGB. *DLCD v. Klamath County*, 42 Or LUBA 368 (2002).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. The housing needs projection required by the Goal 10 rule is the same housing needs analysis that is required by ORS 197.296(3) for conducting a review of an urban growth boundary. Because the Goal 10 rule requires that the housing needs projection must be "consistent with Goal 14 requirements," the housing needs analysis under ORS 197.296(3) must be consistent with Goal 14 requirements. *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. LCDC's choice to adopt rules that require the housing needs analysis required by ORS 197.296(3) to be "consistent with Goal 14 requirements" is essentially a choice to require that, where the analysis identifies a significant deficit in the supply of buildable land within the UGB, the city must complete the statutory process at ORS 197.296(4) through (7) and adopt one or more of the actions described in the statute to remedy the identified deficit. Because the statute and rule prescribe an iterative process highly integrated with Goal 14, the city cannot achieve finality with respect to the housing needs analysis under ORS 197.296(3) without also taking action under ORS 197.296(4) through (7). *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. LCDC's 1985 acknowledgement of a county's rural residential zone has the legal effect of establishing that the rural residential zoning district *may* be applied consistent with Goal 14 to rural lands outside a UGB. However, the 1985 acknowledgment does not have the legal effect of establishing that *all* future applications of the zoning district to particular properties, no matter what the circumstances, will necessarily comply with Goal 14. *DLCD v. Klamath County*, 40 Or LUBA 221 (2001).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. A finding that Goal 14 is satisfied because the provision of community sewer or water systems would be economically infeasible does not establish that such systems will not be constructed, where it is possible that an application for clustered residential development may make such community services economically feasible and the county did not adopt conditions of approval or other mechanisms to prohibit the establishment of community sewer or water systems. *DLCD v. Klamath County*, 40 Or LUBA 22 (2001).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Where a local government decision does not incorporate a new city but erroneously applies LCDC's rules concerning incorporation of new cities in the course of taking an exception to Goal 14, the error is harmless and provides no basis for reversal or remand. *James v. Josephine County*, 35 Or LUBA 493 (1999).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. A proposal to redesignate urban land within city limits to allow for other urban uses does not implicate Goal 14's requirements regarding conversion of urbanizable land to urban uses. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. Goal 14 does not apply to property within a city's limits, and therefore a city's conclusory finding of compliance with Goal 14 is harmless error. *Larvik v. City of La Grande*, 34 Or LUBA 467 (1998).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. The term "public facilities," as it is used in Goal 14, includes transportation facilities. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

18.1 Goal 14 – Urbanization/ Goal 14 Rule – Generally. ORS 197.175(2), Goals 11 and 14 and OAR Chapter 660, Division 11 provide authority for a city and county to adopt a comprehensive plan policy requiring that owners of unincorporated property within an urban growth boundary sign consents to annexation in order to receive sewer service. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

18.2 Goal 14 – Urbanization/ Goal 14 Rule – Establishment of UGB. Under Goal 14, OAR 660-024-0030(1) and OAR 660-024-0040(1), urban growth boundary amendments must be consistent with the city's 20-year population projections, which in turn must be consistent with the county's population projection for the county and urban areas within the county. For purposes of urban growth boundary amendments, both the county's and the city's population projections must be "included in the comprehensive plan or in a document referenced by the plan." *Hawksworth v. City of Roseburg*, 64 Or LUBA 171 (2011).

18.2 Goal 14 – Urbanization/ Goal 14 Rule – Establishment of UGB. Although it may be likely that an urban growth boundary that was adopted to include a 20-year supply of buildable land no longer has a 20-year supply of buildable land 30 years later, a city must first amend its comprehensive plan to include an updated population projection, before amending its urban growth boundary based on the updated population projections rather that the old population projections in its comprehensive plan. *Hawksworth v. City of Roseburg*, 64 Or LUBA 171 (2011).

18.2 Goal 14 - Urbanization/ Goal 14 Rule - Establishment of UGB. A comprehensive plan policy governing "establish[ment] and change" of an urban growth boundary is not applicable to a local government decision amending the plan and zoning map designations of property that is entirely within the urban growth boundary. *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. In order to add land to a UGB, there must be a demonstrated need for land under the first Goal 14 need factor. Goal 14 prohibits a city from amending its UGB if the UGB has adequate capacity to satisfy the city's urban land needs for the next 20 years, and a city decision that approves a UGB amendment where the undisputed evidence in the record was that the city's UGB has adequate capacity to satisfy the city's urban land needs for the next 20 years must be reversed as prohibited by law. *DLCD v. City of Klamath Falls*, 80 Or LUBA 180 (2019).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Pursuant to OAR 660-032-0040(1)(b), for purposes of projecting land need during the interim period before Portland State University Population Research Center (PRC) forecasts are available, a local government must use a population forecast that was "acknowledged prior to the effective date of" OAR 660-032-0040—March 25, 2015. Because OAR 660-032-0040(1)(b) took effect March 25, 2015, a local government may not use a February 2016 population forecast because that forecast was not acknowledged prior to March 25, 2015. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. OAR 660-024-0050(6) requires that when land is added to an urban growth boundary (UGB), the local government "must assign appropriate urban plan designations to the added land, consistent with the need determination and the requirements of section (7) of this rule, if applicable." OAR 660-024-0050(7) provides lands included with a UGB for a public facility "must be planned and zoned for the intended use and must remain planned and zoned for that use unless the city removes the land from the UGB." A city decision to retain the land's existing Exclusive Farm Use zoning until the land is annexed into the city is inconsistent with the OAR 660-024-0050(7) requirement to adopt concurrent plan and zone re-designation "for [that] intended use." *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where a petitioner argues a Geographic Information System map in the record suggests that a portion of the Willamette River Greenway included in a city's Goal 15 exception is located outside the city limits, but within county limits, and therefore the county is also required to join in or approve its own Goal 15 exception, petitioner fails to allege a basis for remand or reversal because as a matter of law the official Willamette River Greenway overlay zone boundary is the boundary mapped by the Oregon Department of Transportation, which confirms the greenway overlay zone is entirely within city limits. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. In *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001), the Court of Appeals concluded that under Goal 14 (effective 10/04/00), Metro could identify a subregional (*i.e.*, geographically localized) need for housing, but when considering alternatives to amending the UGB to meet that subregional housing need, Metro could not limit its consideration to lands within the subregion. That broader geographic consideration of alternatives applies both to alternative sites inside the UGB, and to alternative sites outside the UGB subject to the priorities set out in ORS 197.298 and the Goal 14 locational factors, if a UGB amendment is required to meet the identified need. In this way, *Residents of Rosemont* distinguishes between subregional need and subregional analyses of alternatives. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. In *City of West Linn v. LCDC*, 200 Or App 269, 113 P3d 935, *rev den*, 339 Or 609 (2005), and *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001), the Court of Appeals clarified that pursuant to Goal 14 (effective 10/04/00), Metro can identify a subregional need for housing, and that the Department of Land and Conservation and Development's rules to that effect were not inconsistent with Goal 14. But the Court of Appeals held that the part of the rules that authorized Metro to limit its consideration of alternatives (both inside the UGB and outside the UGB) for satisfying that subregional housing need to lands within or near the subregion, was inconsistent with Goal 14. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. In *City of West Linn v. LCDC*, 200 Or App 269, 113 P3d 935, *rev den*, 339 Or 609 (2005), and *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001), the Court of Appeals determined the subregional need which can be identified under Goal 14 (effective 10/04/00), is a subregional need for *housing*, as opposed to a subregional need for a *specified number of acres for development of housing that must be located within that subregion*. Accordingly, Metro may not assume that a subregional need for housing can only be satisfied by constructing housing on land that is physically located within that subregion. Rather, according to Goal 14, Metro may consider *proximity* in determining whether an alternative site is a suitable alternative, as opposed to simply eliminating alternative sites if they are not located in the subregion. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A local government complies with Goal 14 (effective 04/28/06), and OAR 661-024-0050(4) (effective 04/16/09), where it first demonstrates that the need cannot reasonably be accommodated on land already inside the UGB. Only if land within the UGB cannot reasonably accommodate the identified need would the local government proceed to consider sites outside the UGB to satisfy the identified need. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Goal 14 and OAR 660-024-0060(5) allow local governments to specify "size, topography or proximity" as site suitability characteristics and to limit consideration of alternative sites to land that has the specified characteristics. But OAR 660-024-0060(5) does not provide local governments with authority to geographically limit the scope of the required alternatives analysis to "subregions," a practice that was invalidated by *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001), and *City of West Linn v. LCDC*, 200 Or App 269, 113 P3d 935, *rev den*, 339 Or 609 (2005). *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. It is one thing to say the alternative sites for meeting an identified short-term subregional need for jobs or shopping opportunities must be located within a specified "proximity" of the shoppers and potential employees that generate the identified need or that alternative sites for meeting that need must be within some stated "proximity" of necessary or supporting improvements. But it is quite another thing to say that the short-term, subregional need for jobs and shopping opportunities can only be satisfied on lands that are located within the subregion. The most obvious flaw in that latter

reasoning is that for some of those subregional shoppers and potential employees near the boundaries of the subregion, lands in adjoining subregions will be closer (more proximate) than at least some of the more distant lands inside the subregion. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A site suitability characteristic that property must be 22 acres in size to allow development of a "Lifestyle Center" is not appropriate under Goal 14 and OAR 660-024-0060(5), where the city fails to explain why a general subregional need for between 27 and 37.9 acres of land for commercial development must be satisfied by the "Lifestyle Center" proposed by the UGB amendment applicant on a single 22-acre site. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Goal 14 and OAR 660-024-0060(5) do not permit use of a site suitability characteristic to reject alternative sites if those sites cannot be developed at a cost that is commensurate with the cost of developing a Lifestyle Center on a site owned by the UGB amendment applicant or simply because those alternative sites face development constraints. The correct inquiry is whether alternative sites "cannot reasonably * * * accommodate[]" the identified need. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Whether property is "available for purchase" is not a valid site suitability characteristic to be used to eliminate alternative sites that are already within the Urban Growth Boundary (UGB) from consideration, when determining whether a UGB amendment is necessary to add land to the UGB. Requiring sites to be currently available for purchase sets too low a threshold, impermissibly narrows the statutory, goal and rule alternatives analysis, and is not authorized pursuant to Goal 14 and OAR 660-024-0060(5). *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A city improperly rejected alternative sites already within the Urban Growth Boundary (UGB) pursuant to the Goal 14 and OAR 660-024-0060(5) alternatives analysis for determining whether a UGB amendment is necessary, when it rejected some sites because they were not already zoned commercial but the site the city ultimately selected was also not currently zoned commercial. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Although OAR 660-024-0060(5) grants authority to local governments to consider "proximity" as a required alternative site characteristic when considering alternative sites under Goal 14 and OAR 660-024-0060(5) for a potential amendment to the Urban Growth Boundary (UGB), a city may not divide the city into four subregions and eliminate any requirement to consider alternative sites inside or outside the UGB for meeting identified subregional needs simply because those alternative sites are not located within the subregion. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. LUBA will not adopt a categorical rule that a lack of 20-year need within a city's Urban Growth Boundary (UGB) under Goal 14, need factor 1 precludes a UGB amendment to correct a short-term subregional need. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Under ORS 197.298(3), lower priority land can be included in the UGB instead of higher priority land, where the higher priority land "is found to be inadequate to accommodate the amount of land" needed based on any of three reasons. Those three reasons are: (1) "specific types of identified land needs cannot be reasonably accommodated on higher priority lands," (2) "[f]uture urban services could not reasonably be provided to higher priority land due to topographical or other physical constraints," or (3) "[m]aximum efficiencies of land uses within a proposed [UGB] requires inclusion of lower priority land in order to include or provide services to higher priority land." *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. In *1000 Friends of Oregon v. LCDC*, 244 Or App 239, 259 P3d 1021 (2011) (*McMinnville*), the Court of Appeals went through a lengthy analysis of the interaction between ORS 197.298 and Goal 14 and explained that under ORS 197.298 and Goal 14, UGB amendments require a three-step process. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Under ORS 197.298 the exception lands that are high priority lands for UGB amendments must be "adjacent" to a UGB. But given the ORS 660-024-0060(4) definition of "adjacent lands" which includes "land within the vicinity of the UGB that has a reasonable potential to satisfy the identified need deficiency," a county errs by ruling out high priority exception lands simply because they are separated by short distances from the UGB or other adjacent exception lands. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Absent an identified need for residential land with particular parcel sizes, a county may not exclude exception lands as inadequate to meet identified urban land needs simply because they are parcelized. Parcel size is one of the factors that can be relied on to justify an irrevocably committed exception in the first place under 660-004-0028(6)(c). *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Excluding candidate exception lands based on incompatibility between existing agricultural operations on nearby lands and the proposed residential development of lands to be added to the UGB must identify those agricultural practices and explain why any incompatibility justifies deviating from the ORS 197.298(1) priority scheme. Where all candidate lands for UGB expansion adjoin farm lands, there will be some level of conflict no matter which lands are selected. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. It would be appropriate under Step 3 of *1000 Friends of Oregon v. LCDC*, 244 Or App 239, 259 P3d 1021 (2011) (*McMinnville*), to apply comprehensive plan urban form policies to select among the available and suitable exception lands to add to the UGB. But it is not appropriate to apply comprehensive plan urban form policies under Step 2 of McMinnville to rule out exception lands as inadequate. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. It is possible that circumstances on higher priority irrevocably committed lands could pose such challenges to development of multi-family housing that a local government could find and justify a decision that multi-family housing cannot "be reasonably accommodated" on such exception lands, within the meaning of ORS 197.298(3)(a). But generalized concerns about parcelization of such irrevocably committed lands complicating site acquisition or property owner opposition to multi-family housing fall far short of making the demonstration required under ORS 197.298(3)(a) that "specific types of identified land needs cannot be reasonably accommodated on higher priority lands." *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The OAR 660-024-0040(9)(a) safe harbor permits local government to "estimate that the current number of jobs in the urban area" will grow at a rate based on "the most recent forecast published by the Oregon Employment Department." A county errs by amending its UGB in 2015, based on OAR 660-024-0040(9)(a), but using the pre-2008 recession number of jobs rather than the 2015 number of jobs. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The OAR 660-024-0040(9)(a) safe harbor does not preclude taking into account additional demand for employment land that may be generated by regional forces that may have little or nothing to do with a city's population growth. The Goal 9 rule, OAR 660-009-0015 (1) and (2), expressly permits such considerations. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Petitioner has the burden of demonstrating error in the decision on appeal. Where LUBA cannot understand either petitioner's or respondent's arguments on a subassignment of error, LUBA will deny the subassignment of error. *Land Watch of Lane County v. Lane County*, 74 Or LUBA 76 (2016).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Under Goal 14, OAR 660-024-0030(1) and 660-024-0040(1), urban growth boundary amendments must be consistent with the city's 20-year population projections, which in turn must be consistent with the county's population projection for the county and urban areas within the county. For purposes of urban growth boundary amendments, both the county's and the city's population projections must be "included in the comprehensive plan or in a document referenced by the plan." *Hawksworth v. City of Roseburg*, 64 Or LUBA 171 (2011).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Although it may be likely that an urban growth boundary that was adopted to include a 20-year supply of buildable land no longer has a 20-year supply of buildable land 30 years later, a city must first amend its comprehensive plan to include an updated population projection, before amending its urban growth boundary based on the updated population projections rather that the old population projections in its comprehensive plan. *Hawksworth v. City of Roseburg*, 64 Or LUBA 171 (2011).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The safe harbor established by OAR 660-024-0040(9)(a) is only available to local governments when addressing the

requirements of Goal 9, OAR chapter 660, division 9, Goal 14 and, if applicable, ORS 197.296, when determining its employment needs for purposes of a UGB amendment under OAR chapter 660, division 24. As OAR chapter 660, division 24 is now written, the OAR 660-024-0040(9)(a) safe harbor is simply not available for decisions that adopt or amend economic opportunities analyses, without also amending a UGB. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. In relying on the OAR 660-024-0040(9)(a) safe harbor in amending an economic opportunities analysis to estimate employment growth, the Oregon Employment Department job growth projection rate authorized by OAR 660-024-0040(9)(a)(A) and the coordinated population forecast projection rate authorized by OAR 660-024-0040(9)(a)(B) are mutually exclusive alternatives. A local government must select one or the other and may not switch back and forth between those two projection methodologies in projecting employment growth, if the local government is seeking the protection of the OAR 660-024-0040(9)(a) safe harbor. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where a city's stated rationale for its 20-year employment projections in its economic opportunities analysis is the OAR 660-024-0040(9)(a) safe harbor, the city may not adopt an alternative legal rationale for the 20-year employment projections for the first time in its brief at LUBA. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. OAR 660-024-0040(4) requires a city that is amending its urban growth boundary to use "the adopted 20-year coordinated population forecast for the urban area" that has been adopted by the county in which the city is located according to the procedures set out in ORS 195.025 and 195.036. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 211 (2010).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. DLCD's Goal 14 rule was amended in 2007 to require that the coordinated population projections required by ORS 195.025 and 195.036 must be "developed using commonly accepted practices and standards for population forecasting" and "based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic Analysis (OEA). OAR 660-024-0030. A county may not simply rely on county population projections that were found to be valid when they were adopted in 1998 to adopt updated population projections in 2009. While the county is not required to use the OEA long range forecast, it must conduct a review of its 1998 assumptions to determine whether they remain reliable in light of actual population growth and the OEA forecast. *Meyer v. Douglas County*, 61 Or LUBA 412 (2010).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. DLCD's Goal 14 rule was amended in 2007 to require that the coordinated population projections required by ORS 195.025 and 195.036 must be "developed using commonly accepted practices and standards for population forecasting" and "based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon

Office of Economic Analysis (OEA)." OAR 660-024-0030. If in adopting a coordinated population projection under ORS 195.025 and 195.036 a county relies on a city's undocumented preference for a particular growth rate, the county forecast is not supported by an adequate factual base. *Meyer v. Douglas County*, 61 Or LUBA 412 (2010).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. DLCD's Goal 14 rule was amended in 2007 to require that the coordinated population projections required by ORS 195.025 and 195.036 must be "developed using commonly accepted practices and standards for population forecasting" and "based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic Analysis (OEA)." OAR 660-024-0030. A county decision to apply its assumed population growth rate for unincorporated areas of the county to the unincorporated areas of the county located inside urban growth boundaries is not supported by an adequate factual base where there is no explanation for why that assumption is reasonable for urban areas around cities that project a much lower population growth rate. *Meyer v. Douglas County*, 61 Or LUBA 412 (2010).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Under ORS 197.825(2)(c)(A), LUBA does not have initial jurisdiction to review a decision by a city with a population over 2,500 to amend its urban growth boundary to add more than 50 acres of land where that decision is submitted to the Department of Land Conservation and Development (DLCD) for review under ORS 197.626. LUBA may later acquire jurisdiction over certain matters addressed in the decision if the director of DLCD transfers those matters to LUBA. *Swalley Irrigation District v. City of Bend*, 59 Or LUBA 52 (2009).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where a county adopts an ordinance that amends its comprehensive plan map in conjunction with a city's urban growth boundary (UGB) amendment, and the county's ordinance is submitted in conjunction with the city's UGB amendment to the Department of Land Conservation and Development for review, under ORS 197.825(2)(c)(A), LUBA does not have jurisdiction to review the county's decision. *Swalley Irrigation District v. Deschutes County*, 59 Or LUBA 192 (2009).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where it is not clear from the record whether a county-adopted 20-year population forecast is the forecast for an urban area or merely for a city within the county, a city is not entitled to rely on the safe harbor provision at ORS 195.034(1) to extend the county's current forecast to a 20-year period using the same growth trend as assumed by the county in its adopted population forecast. *Sane Orderly Development v. City of Roseburg*, 59 Or LUBA 356 (2009).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A Metro regional plan provision that requires the Metro Chief Operating Office to conform Metro's maps to the comprehensive plan mapping that local governments adopt after Metro adds land to the urban growth boundary suggests that local governments have some authority to deviate from Metro's map designations for the property that is added to the urban growth boundary when they first applies their comprehensive plan map to that property. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A Metro decision to amend the urban growth boundary to include 308 acres for Industrial development that was based on an assumption that only 120 acres of the 308 acres would be developed for Industrial use likely would provide a basis for the local government to plan all but 120 acres of the 308 acres for non-industrial uses. But where the 120 acres the local government designates for industrial uses include acres that were already within the UGB, the local government's comprehensive plan mapping is inconsistent with Metro's map designation for the 308 acres. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where Metro has designated 308 acres for industrial development, a city decision to plan only 120 of those acres for industrial development based on a finding that Metro only intended 120 acres to be developed industrially must be remanded where the record does not include substantial evidence that Metro only intended 120 of the 308 acres to be developed industrially. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A decision to add land to a UGB to attract a particular type of employer cannot be totally divorced from the population projections and job growth estimates required by OAR 660-024-0040(1) and (5). *Friends of French Prairie v. Marion County*, 58 Or LUBA 387 (2009).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The locational factors of Goal 14 are not separate approval criteria and only require a comparison of alternate sites and consideration of which alternatives will be more compatible with farm and forest uses. The locational factors do not require that UGB expansion areas must in all cases be compatible with farm and forest uses. *Friends of French Prairie v. Marion County*, 58 Or LUBA 387 (2009).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where the record shows that a local government initiated a UGB amendment prior to April 5, 2007 by notifying DLCD of the proposed amendment, OAR 660-024-0000(3)(b) allows the local government to choose to not apply OAR Chapter 660, Division 24 to the UGB amendment. *Sommer v. City of Grants Pass*, 55 Or LUBA 400 (2007).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. OAR 660-024-0060(2) specifically allows UGB amendments that add less than the total amount of land that has been identified as needed, if that UGB amendment is adopted following a post-acknowledgement plan amendment process pursuant to ORS 197.610 to 197.625 outside of periodic review or a legislative review. *Sommer v. City of Grants Pass*, 55 Or LUBA 400 (2007).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where a local government finds that there is a lack of evidence that vacant buildable lands inside an urban growth boundary are available for development, the local government impermissibly avoids the burden placed on it by Goal 14 and the applicable administrative rules to demonstrate that additional land is needed inside the urban growth boundary for urban development. *Hildenbrand v. City of Adair Village*, 54 Or LUBA 734 (2007).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. It is appropriate for a local government to rely on assumptions included in the city's acknowledged comprehensive plan policies in computing the acreage needed for an urban growth boundary expansion. *Hildenbrand v. City of Adair Village*, 54 Or LUBA 734 (2007).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A local government does not err in allowing resource land to be included in an urban growth boundary where existing exception lands located adjacent to the urban growth boundary are inadequate due to the high cost of extending services to that exception land and the location of the exception lands across a major highway. *Hildenbrand v. City of Adair Village*, 54 Or LUBA 734 (2007).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. An urban growth boundary (UGB) amendment that purports to include within the UGB a 90-acre area that was included inside the UGB by an earlier ordinance does not add the 90-acre area to the UGB. In that circumstance, even if LUBA were to reverse the second ordinance, the 90 acres would still be located within the UGB. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The Court of Appeals has held that the "unneeded but committed" exception, that allows the inclusion of lands within an urban growth boundary (UGB) without demonstrating a "need" for additional land, is a valid method of amending a UGB, without regard to the Goal 14 "need" factors. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. When a local government decides that lands are committed to urban uses under the "unneeded but committed" exception, it need not demonstrate that each of the five "locational factors" of Goal 14 is independently satisfied. The local government must demonstrate that, considering all of the "locational factors," the overall picture shows commitment. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where an urban growth boundary amendment is not based upon a showing of need, as under the "unneeded but committed" exception, the ORS 197.298 priority system for including land within the urban growth boundary does not apply to the decision. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. When a local government demonstrates that land may be included in an urban growth boundary under OAR 660-004-0010(1)(c)(B)(i) by demonstrating compliance with the seven factors of Goal 14, the local government need not take exceptions to other goals individually. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Although OAR 661-004-0010(1)(c)(B)(i) nominally requires a local government to apply all seven of the Goal 14 factors, when the local government is proceeding under the "unneeded but committed" exception, the two "need" factors of Goal 14 need not be addressed. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. When a local government amends its urban growth boundary under the "unneeded but committed" exception it demonstrates that the land is committed to urban uses under the five "locational factors" of Goal 14. The local government need not adopt an irrevocably committed exception under OAR 660-004-0028. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Given that ORS 197.299 requires Metro to review the supply of residential land within the Metro UGB at least every five years, Metro is not obligated to provide a quasi-judicial UGB amendment process, in addition to a legislative process, to ensure that the Metro UGB as a whole maintains an adequate supply of residential land. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. While the courts have held that Metro can consider housing need on a subregional basis, at least in some circumstances, no legislation compels Metro to do so, or prohibits Metro from relying exclusively on legislative reviews of the entire regional UGB to ensure compliance with Goals 10 and 14. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The speculative possibility that a subregional housing shortage will arise in the interim between the five-year UGB reviews required by ORS 197.299, and that Metro will decline to initiate a legislative proceeding to address that interim shortage, is an insufficient basis to establish that a quasi-judicial UGB amendment process is essential to ensure continued compliance with Goals 10 and 14. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Petitioner's argument that land formerly within a city's urban growth boundary is necessarily subject to an exception to Goal 3 provides no basis for remand where it is not clear that the property was subject to a Goal 3 exception when included in the UGB and, even if it was, petitioner does not explain why removal of the property from the UGB would leave the property subject to a Goal 3 exception as a matter of law. *Manning v. Marion County*, 42 Or LUBA 56 (2002).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. An applicant has not demonstrated that a property is committed to urban uses in order to justify an expansion of a UGB to include the property where the property (1) is currently vacant; is not presently served by community water or sewer systems; and (3) is bordered on three side by parcels zoned EFU. *Friends of Linn County v. Linn County*, 41 Or LUBA 342 (2002).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A desire to include land within a UGB to provide a more logical dividing line between urban uses and rural uses and to bring parkland and transportation links within the city's general planning control is insufficient to demonstrate that there is a need to expand the UGB to address livability under Goal 14, factor 2. *Friends of Linn County v. Linn County*, 41 Or LUBA 342 (2002).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where a city has adopted a buildable lands inventory that concludes that there is a 98-acre surplus of land within the UGB that

is available for park and residential needs, and a decision to expand a UGB to include land to be used for residential and park lands does not address why lands within the UGB are inadequate to accommodate parks and housing, the decision to expand the UGB fails to adequately address Goal 14, factor 4. *Friends of Linn County v. Linn County*, 41 Or LUBA 342 (2002).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A county finding that concludes that property containing Class II through IV soils may be included in the UGB because the present owner of a portion of the property does not intend to farm his parcel and other residential neighbors are opposed to farm activities that generate dust does not properly address the inquiry presented by Goal 14, factor 6. *Friends of Linn County v. Linn County*, 41 Or LUBA 342 (2002).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where a county finding concludes that a proposed UGB expansion is consistent with Goal 14, factor 7 because it will result in greater compatibility between residential and adjacent agricultural uses, but fails to consider and compare the compatibility of alternative sites with agricultural uses, the finding is inadequate to address Goal 14, factor 7. *Friends of Linn County v. Linn County*, 41 Or LUBA 342 (2002).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where the local government's Goal 14, factor 1 and 2 findings rely on two separate methods to determine the need for industrial land, a petitioner's challenge to the evidentiary sufficiency of one method does not provide a basis for remand, where petitioner fails to challenge the other method. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Sustainable findings under the seven Goal 14 factors state a legally sufficient "reason" justifying why the state policy embodied in Goal 14 should not apply, for purposes of adopting the exception necessary to include resource land within a UGB under OAR 660-004-0010(1)(c)(B)(i). *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. To demonstrate reversible error in a local government's Goal 14 findings, a petitioner must demonstrate that the local government misapplied the pertinent factors or reached key conclusions that are not supported by substantial evidence, in a manner that shows legal error or insufficiency in the local government's ultimate conclusion that the subject property is the "best" land to include in the UGB, considering and balancing each factor. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Evidence that an alternative site zoned for residential use is needed to satisfy a shortfall in residential lands, and is adjacent to high-density residential development, is sufficient to demonstrate that the alternative site cannot "reasonably accommodate" a proposed need for industrial land, for purposes of OAR 660-004-0010(1)(c)(B)(ii). *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Land owned by the federal government and not subject to local zoning and planning need not be considered as an alternative

site to proposed industrial development on resource land, for purposes of OAR 660-004-0010(1)(c)(B)(ii). The rule does not require the local government to consider the speculative possibility that federal land might someday be exchanged or otherwise become subject to the local government's zoning and planning jurisdiction. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Evidence that an alternative site (1) is needed to satisfy a city's identified need for future residential lands, is surrounded by residential uses, (3) does not have adequate access for industrial uses, and (4) is located far from existing industrial uses, is sufficient to demonstrate that the alternative site cannot "reasonably accommodate" an identified need for industrial land, for purposes of OAR 660-004-0010(1)(c)(B)(ii). *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Findings that other resource lands that are potential candidates for inclusion in the UGB are better or more productive resource lands than the subject property, and therefore the environmental, social, energy, and economic (ESEE) consequences of urbanizing other resource lands would be more adverse than urbanizing the subject property, are adequate for purposes of OAR 660-004-0010(1)(c)(B)(iii). Such findings need not specifically identify and discuss each ESEE consequence with respect to each alternative site, absent issues raised below that would require more detailed discussion. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. It is not inconsistent for findings to reject alternative sites under OAR 660-004-0010(1)(c)(B)(ii) because proposed industrial uses would conflict with surrounding high-density residential uses, while concluding under OAR 660-004-0010(1)(c)(B)(iv) that, as limited by conditions of approval, industrial use of the subject property is compatible with rural residential uses that border the subject property on one side. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The requirement that a proposed development of resource land be compatible with adjacent uses under OAR 660-004-0010(1)(c)(B)(iv) does not require that all conflicts or adverse impacts be eliminated. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Any error in failing to comply with code provisions for amending the Metro UGB is harmless, where the pertinent code provisions are not based on statute, goal or rule; the provisions have been superseded by new standards that would apply on remand; and it is undisputed that the decision does not violate the new standards. *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 539 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Goal 14, factor 3 is one of several factors that must be considered and balanced, not an isolated criterion that establishes a threshold for including land within a UGB. *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 539 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The focus of Goal 14, factor 3 is the comparative cost and feasibility of providing urban services and facilities among lands considered for inclusion within the UGB, and determining which of the alternatives is most consistent with the orderly and economic provision of public facilities and services. The focus of factor 3 is not on determining whether existing facilities are adequate or can be made adequate. *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 539 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The transportation planning rule does not apply to the amendment of the Metro UGB where the amendment only converts rural land to urbanizable land, and does not alter the types or intensity of allowed land uses, reduce the performance standards of transportation facilities, or otherwise "significantly affect" a transportation facility within the meaning of OAR 660-012-0060. *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 539 (2001).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The impracticability standard of the Metro Code (MC) for locational amendments to the Urban Growth Boundary (UGB) performs a limited version of the functional role that Goal 14, factor 6, and Goal 2, Part II(c)(2), play in the context of more comprehensive UGB amendments: ensuring that agricultural land is included in the UGB only when nonagricultural lands cannot reasonably accommodate the proposed use. Because the MC must be consistent with Goals 2 and 14, the decision is not entitled to deference under ORS 197.829(1). *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. "Practicable" has two distinct connotations: (1) technical possibility; and (2) prudential balancing of costs and other relevant considerations. An alternative is impracticable where it is either technically infeasible or, based on all relevant considerations, including consideration of cost, it would not be a feasible alternative. *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Evidence that alternatives to a preferred option require a sewer connection to a different drainage basin, a pump station contrary to applicable regulations and the removal of mature trees, and that they are significantly more expensive, demonstrates that the alternatives are impracticable. *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. An identification of a need for additional lands under Goal 14, factors 1 and 2, is to be an essential predicate for application of the ORS 197.298 priorities. Where a proposed urban growth boundary amendment is not based upon a demonstration of need, but rather upon locational considerations, ORS 197.298 is not applicable. *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Goal 14, factors 1 and 2, must both be applied and considered in determining "need" for an urban growth boundary expansion, or at the least, the less determinative or unsatisfied factor must be given appropriate consideration and weight. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. It is inconsistent with Goal 14 to determine that a subregional or geographically specific need exists without considering the role played by that need and efforts to meet it in the context of the entire urban growth boundary. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Goal 14, factors 1 and 2, the two "need" factors, are interdependent, but not identical. Metro did not err in interpreting factor 2 to focus on subregional need and factor 1 to focus on regional need, as it properly considered subregional need in the context of the larger regional need, and in so doing gave appropriate weight to both factors. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Metro's Regional Framework Plan, a master plan that incorporates and coordinates Metro's various functional plans, is a planning document of the type contemplated by Goal 2 that Metro must rely upon in making its required need determination for expanding the urban growth boundary, even though the 1997 population and demand figures in the plan do not reflect subsequent updates. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. It would be inconsistent with ORS 197.625 to allow a local government to rely on an unacknowledged urban reserve designation as a means to avoid the necessity of finding compliance with Goal 14 and other applicable criteria. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A "specific type of identified land need" for purposes of the ORS 197.298(3)(a) exception to the urban growth boundary priority scheme refers to types of development that require land with particular site or locational characteristics. An identified subregional need for additional residential housing is not a "specific type of identified land need." *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. ORS 197.298(3)(c) allows inclusion of lower priority lands in an urban growth boundary (UGB) expansion if maximum efficiency of land uses within a proposed UGB requires inclusion of lower priority lands in order to provide services to higher priority lands. Although minimizing the cost burden alone is insufficient to demonstrate compliance with ORS 197.298(3)(c), evidence that higher priority land cannot be provided with sewer and other utility lines without first developing the preferred resource site satisfies the statutory requirement. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Before amending an urban growth boundary to add land with predominantly Class I soils to meet an identified need for commercial land, a county must determine whether alternatives to adding a site with predominantly Class I soils can reasonably accommodate the identified need. That alternatives analysis under OAR 660-004-0020(2)(b)(B) is a multi-factor analysis and rejecting alternative sites solely because they have soils that may increase development costs is error. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Land that is already included within a UGB is assumed to be available for urban development. That assumption is not rendered invalid simply because sites that are planned and zoned for residential, industrial and commercial use have soil or other characteristics that make them less than ideal to develop. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Alternative sites to meet an identified need for commercially planned and zoned land may not be rejected solely because they have soils limitations that the USDA estimates may result in an average 39 percent development cost increase for some small commercial buildings. The estimated 39 percent cost increase is an average, so it may be lower in particular cases, and any added cost may be offset by other advantages the sites may possess. *DLCD v. Douglas County*, 38 Or LUBA 542 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A demonstration of need for a UGB amendment must be based upon and consistent with the local government's planning documents adopted pursuant to the Goal 2-mandated planning process. In order to amend the UGB based on different population and capacity projections than those in the local government's comprehensive plan, the local government must amend the plan to include those different projections. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A UGB amendment based on a subregional need to provide affordable housing must ensure that the land included in the UGB will be used to satisfy that need. Adoption of a master plan that imposes zoning and other measures to allow for a significant number of high-density dwellings is sufficient to ensure that the land included in the UGB will be used to satisfy that need, given evidence that the lack of affordable housing in the subregion is the result of the relative absence of high-density dwellings and that such dwellings will be affordable to 83 percent of the employees in the subregion. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A UGB amendment adopted pursuant to acknowledged local code provisions that implement Goal 14 is nonetheless subject to direct review for compliance with Goal 14 unless such review would necessarily invalidate some provision of the acknowledged code. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Allowing affected local governments only seven days to comment on a revised UGB amendment master plan is consistent with the Goal 2 coordination requirement, where the local governments had opportunity to comment on the original master plan, the revisions reflect and attempt to accommodate those comments, and the affected local governments failed to request any additional time to comment on the revisions. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The exception to the priority scheme for including lands within UGBs under ORS 197.298 for resource lands that are "completely surrounded" by exception areas requires, like the similar exception in OAR 660-012-0030(3), that the local government determine that those resource lands, considered as a whole, do not constitute high-value farmland. The local government cannot include within the UGB a subset

of such resource lands without first determining that the larger set of resource lands completely surrounded by exception areas is not high-value farmland. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Like the functionally identical priority scheme at OAR 660-021-0030, the elements of the priority scheme for including lands within the UGB under ORS 197.298 must be applied in a sequential manner. A local government cannot include lower priority lands within the UGB pursuant to an exception to that priority scheme without first applying the priority scheme to determine whether higher priority lands can accommodate the identified need. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Goal 14, factors 1 and 2 do not require a local government to demonstrate a need for the particular commercial use proposed by the owner of land being considered for inclusion within the urban growth boundary. However, where a local government's alternative sites analysis under the Goal 14 locational factors relies upon an identified need for a specific type of commercial development, the local government must have established that specific need in considering Goal 14, factors 1 and 2. *Smith v. Douglas County*, 37 Or LUBA 801 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. While a local government is not required to amend its urban growth boundary to accommodate a specific type of proposed use, Goal 14 does not prohibit a local government from attempting to identify a specific type of use as a "need" under Goal 14, factors 1 and 2. *Smith v. Douglas County*, 37 Or LUBA 801 (2000).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The county did not err by relying on population projections and a commercial land-to-population ratio of 10.85 acres per 1,000 persons to establish its need for commercial land under Goal 14, Factors 1 and 2, where the ratio of 10.85 acres per 1,000 persons is included as an objective in the acknowledged comprehensive plan. *DLCD v. Douglas County*, 36 Or LUBA 26 (1999).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Language in the comprehensive plan stating that a particular freeway interchange will be given priority for future urban growth boundary amendments has no legal effect on whether the interchange may be added to the urban growth boundary based on consideration of the Goal 14 factors. *DLCD v. Douglas County*, 36 Or LUBA 26 (1999).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A county fails to justify amending its UGB to include commercial land at a freeway interchange where, although the interchange land would have advantages over lands further from the freeway but already inside the UGB, the county fails to demonstrate a particular need for commercial land at the interchange or that the lands inside the UGB are unsuitable for commercial development. *DLCD v. Douglas County*, 36 Or LUBA 26 (1999).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. That a property may be significantly better for commercial development than lands already inside the UGB does not mean

that lands already inside the UGB cannot reasonably be redesignated and developed for commercial use. *DLCD v. Douglas County*, 36 Or LUBA 26 (1999).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where a county's findings do not establish that a need for commercial land can only be satisfied at a freeway interchange, its findings considering alternatives outside the UGB are also inadequate where those findings fail to consider Class II through VI agricultural or nonresource lands simply because they are not close to a freeway interchange. *DLCD v. Douglas County*, 36 Or LUBA 26 (1999).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Factor 3 of Goal 14 is not met if the public facilities and services have to be upgraded to serve land that is added to its UGB and alternative sites within the UGB that could accommodate identified needs already have public facilities and services. *DLCD v. Douglas County*, 36 Or LUBA 26 (1999).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Population projections of a witness who is not shown to be qualified by education or experience to evaluate evidence and draw conclusions concerning a highly technical and complex subject raise substantial evidence concerns, particularly when they are contradicted by the official population estimates prepared by the Center for Population Research and Census (CPRC) and letters from CPRC experts. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. In determining whether a UGB amendment is justified on the basis of housing need, a local government cannot focus its needs analysis on the needs of the existing population if the proposed development is intended for a different population. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. If a city seeking to expand its UGB wishes to recognize a housing need for a population other than the existing population, it must amend its population projections to recognize both the natural growth of the existing population and the addition of a new population group, and must describe the proposed development with enough specificity that it is reasonably clear the UGB amendment will accomplish the desired objective. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Findings addressing livability must identify an existing livability problem justifying a UGB expansion and must evaluate potential negative impacts from the expansion. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where an amendment to a city's UGB is proposed in order to achieve a particular mix of housing, recreation and population, the amendment must beconditioned on zoning and developing the subject property to achieve the desired result. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. To defer making a necessary discretionary determination beyond the date that a UGB amendment becomes final creates a possibility the UGB will be amended before Goal 14 is satisfied. Either (1) a determination that

all standards requiring discretion in their application are satisfied must be made prior to the amendment of the UGB itself; or (2) the UGB amendment must be conditioned on making the necessary determination at a time subsequent when the statutory notice and hearing requirements are observed. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. In applying Goal 14, factor 4, a local government must consider cost of services and must encourage development within urban areas before the expansion of a UGB. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. A city may satisfy Goal 14, factor 4 by carefully evaluating the availability of land within the UGB before reaching a conclusion that none will accommodate a proposed development. That evaluation must include consideration of (1) changing planning designations within the existing UGB to allow for greater densities; (2) assembling lots within the existing UGB; and (3) reconfiguring the proposed use to maximize the use of land within the existing UGB. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. To satisfy ORS 197.732(1)(c)(D), Goal 2, Part II(c)(4) and OAR 660-04-020(2)(d) as they apply to a UGB amendment, findings must explain, with respect to the subject property, what the adjacent uses, natural resources, and management or production practices are, and then explain why the proposed use is compatible with them. If setbacks and other mitigation requirements are necessary, these should be stated, and approval of the UGB amendment should be conditioned upon compliance. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where the need for available land for urban development is the basis for approving a UGB amendment, a Goal 14, factor 5 ESEE analysis cannot ignore that some or all of the land to be included within the expanded UGB may be precluded from development by state or federal law. If the land cannot become available for urban development, the UGB amendment should not be approved. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. To show a need to amend an acknowledged UGB to include more land for residential development, a local government may either increase its projected population or alter the land use planning assumptions that are applied to the projected population in determining the amount of urban and urbanizable land needed for residential purposes. *Simnitt Nurseries v. City of Canby*, 27 Or LUBA 468 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where a local government has a sufficient amount of vacant residential land within its acknowledged UGB to accommodate the projected population, the local government's failure to zone that land for residential development at densities consistent with its plan designation does not support a finding that there is a need to amend the UGB to add more land for residential development. *Simnitt Nurseries v. City of Canby*, 27 Or LUBA 468 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where a city's decision to almost double its UGB relies on a study assuming a particular combination of uses in the UGB expansion area, the city must ensure the plan designations and zoning districts applied to land within the UGB expansion area will accommodate those uses. A condition that land use allocations will be determined upon annexation is inadequate. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. If a city located outside the Metro UGB wishes to plan to capture growth currently anticipated to occur within the Metro UGB, it must specifically coordinate that desire with Metro and the affected units of government within the Metro UGB. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where an "urban planning area agreement" between a city and county does nothing to establish that designation thereunder of an area as an "area of interest" replaces the application of Goal 14 to a proposed UGB amendment involving the "area of interest," Goal 14 remains directly applicable. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. To justify a UGB amendment under Goal 14, factor 3, a local government must show its public facilities will have adequate capacity to serve the uses contemplated within the UGB expansion area over the local government's planning period. A local government is not required to show that it *currently* has adequate public facility capacity to serve uses to be made of the proposed UGB expansion area in the future. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Goal 14, factor 6 requires a local government to determine that other sites with less impact on high priority resource land are unavailable or unsuited to satisfy the particular need which justifies a proposed UGB amendment. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. The determination required by Goal 14, factor 7 regarding compatibility between a proposed UGB expansion and nearby farming activities cannot be made until the city identifies and limits the type and intensity of uses allowed in the UGB expansion area. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. OAR 660-12-060(1) is applicable to comprehensive plan amendments which significantly affect a transportation facility. Compliance with this rule provision must be addressed when a UGB amendment is adopted; it cannot be deferred to future annexation decisions within the UGB expansion area. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. OAR 660-12-060(4) prohibits using the existence of transportation facilities as a basis for approving exceptions to the requirements of OAR 660-12-065, adopted under OAR 660-12-070; or (2) exceptions to statewide planning goals, adopted under OAR 660-04-022 (reasons exceptions) or OAR 660-04-028

(committed exceptions). OAR 660-12-060(4) does not apply to an exception for a change to an established UGB, adopted under OAR 660-04-010(1)(c)(B). *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. Where a city fails to consider (1) pollutant sources other than those associated with automobile emissions, and (2) the cumulative impacts of waste and process discharges from the uses to be established in a UGB expansion area and the discharges from existing sources, the city lacks an adequate factual base for determining the proposed UGB amendment complies with Goal 6 with regard to impacts on air quality. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

18.3 Goal 14 – Urbanization/ Goal 14 Rule – Amendment of UGB. OAR 660-09-025 does not require the adoption of specific implementing plan designations and zoning districts, concurrent with the adoption of a UGB amendment, in all instances. OAR 660-09-025 simply establishes certain Goal 9 driven requirements that are applicable at the time certain local governments adopt measures implementing a UGB amendment. *1000 Friends of Oregon v. City of North Plains*

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. In *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001), the Court of Appeals concluded that under Goal 14 (effective 10/04/00), Metro could identify a subregional (*i.e.*, geographically localized) need for housing, but when considering alternatives to amending the UGB to meet that subregional housing need, Metro could not limit its consideration to lands within the subregion. That broader geographic consideration of alternatives applies both to alternative sites inside the UGB, and to alternative sites outside the UGB subject to the priorities set out in ORS 197.298 and the Goal 14 locational factors, if a UGB amendment is required to meet the identified need. In this way, *Residents of Rosemont* distinguishes between subregional need and subregional analyses of alternatives. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. In *City of West Linn v. LCDC*, 200 Or App 269, 113 P3d 935, *rev den*, 339 Or 609 (2005), and *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001), the Court of Appeals clarified that pursuant to Goal 14 (effective 10/04/00), Metro can identify a subregional need for housing, and that the Department of Land and Conservation and Development's rules to that effect were not inconsistent with Goal 14. But the Court of Appeals held that the part of the rules that authorized Metro to limit its consideration of alternatives (both inside the UGB and outside the UGB) for satisfying that subregional housing need to lands within or near the subregion, was inconsistent with Goal 14. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. In *City of West Linn v. LCDC*, 200 Or App 269, 113 P3d 935, *rev den*, 339 Or 609 (2005), and *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001), the Court of Appeals determined the subregional need which can be identified under Goal 14 (effective 10/04/00), is a subregional need for *housing*, as opposed to a subregional need for a *specified number of acres for development of housing that must be located within that subregion*. Accordingly, Metro may not assume that a subregional need for housing can only be satisfied by constructing housing on land that is physically located within that subregion. Rather, according to Goal 14, Metro may consider *proximity* in determining whether an alternative site is a suitable alternative, as opposed to simply eliminating alternative sites if they are not located in the subregion. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. A local government complies with Goal 14 (effective 04/28/06), and OAR 661-024-0050(4) (effective 04/16/09), where it first demonstrates that the need cannot reasonably be accommodated on land already inside the UGB. Only if land within the UGB cannot reasonably accommodate the identified need would the local government proceed to consider sites outside the UGB to satisfy the identified need. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Goal 14 and OAR 660-024-0060(5) allow local governments to specify "size, topography or proximity" as site suitability characteristics and to limit consideration of alternative sites to land that has the specified characteristics. But OAR 660-024-0060(5) does not provide local governments with authority to geographically limit the scope of the required alternatives analysis to "subregions," a practice that was invalidated by *Residents of Rosemont v. Metro*, 173 Or App 321, 21 P3d 1108 (2001), and

City of West Linn v. LCDC, 200 Or App 269, 113 P3d 935, *rev den*, 339 Or 609 (2005). *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. A site suitability characteristic that property must be 22 acres in size to allow development of a "Lifestyle Center" is not appropriate under Goal 14 and OAR 660-024-0060(5), where the city fails to explain why a general subregional need for between 27 and 37.9 acres of land for commercial development must be satisfied by the "Lifestyle Center" proposed by the UGB amendment applicant on a single 22-acre site. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Goal 14 and OAR 660-024-0060(5) do not permit use of a site suitability characteristic to reject alternative sites if those sites cannot be developed at a cost that is commensurate with the cost of developing a Lifestyle Center on a site owned by the UGB amendment applicant or simply because those alternative sites face development constraints. The correct inquiry is whether alternative sites "cannot reasonably * * * accommodate[]" the identified need. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Whether property is "available for purchase" is not a valid site suitability characteristic to be used to eliminate alternative sites that are already within the Urban Growth Boundary (UGB) from consideration, when determining whether a UGB amendment is necessary to add land to the UGB. Requiring sites to be currently available for purchase sets too low a threshold, impermissibly narrows the statutory, goal and rule alternatives analysis, and is not authorized pursuant to Goal 14 and OAR 660-024-0060(5). *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. A city improperly rejected alternative sites already within the Urban Growth Boundary (UGB) pursuant to the Goal 14 and OAR 660-024-0060(5) alternatives analysis for determining whether a UGB amendment is necessary, when it rejected some sites because they were not already zoned commercial but the site the city ultimately selected was also not currently zoned commercial. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Although OAR 660-024-0060(5) grants authority to local governments to consider "proximity" as a required alternative site characteristic when considering alternative sites under Goal 14 and OAR 660-024-0060(5) for a potential amendment to the Urban Growth Boundary (UGB), a city may not divide the city into four subregions and eliminate any requirement to consider alternative sites inside or outside the UGB for meeting identified subregional needs simply because those alternative sites are not located within the subregion. *DLCD v. City of Klamath* Falls, 76 Or LUBA 130 (2017).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. LUBA will not adopt a categorical rule that a lack of 20-year need within a city's Urban Growth Boundary (UGB) under Goal 14, need factor 1 precludes a UGB amendment to correct a short-term subregional need. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. The locational factors of Goal 14 are not separate approval criteria and only require a comparison of alternate sites and consideration of which alternatives will be more compatible with farm and forest uses. The locational factors do not require that UGB expansion areas must in all cases be compatible with farm and forest uses. *Friends of French Prairie v. Marion County*, 58 Or LUBA 387 (2009).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Goal 14, factors 3 through 7 implicitly require a determination that the sites chosen to be included in an urban growth boundary (UGB) are better than other alternative sites that are also considered for inclusion and rejected. Therefore, a local code provision requiring a demonstration that "the recommended site was better than alternative sites," does not "go further" or require more than the requirements of Goal 14, and assignments of error concerning that local code provision therefore involve "matters" that fall within the Land Conservation and Development Commission's exclusive jurisdiction in periodic review. *City of West Linn v. Metro*, 49 Or LUBA 403 (2005).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. When a local government decides that lands are committed to urban uses under the "unneeded but committed" exception, it need not demonstrate that each of the five "locational factors" of Goal 14 is independently satisfied. The local government must demonstrate that, considering all of the "locational factors," the overall picture shows commitment. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. That the local government's Goal 14 findings incorporate other findings by reference does not demonstrate inadequacy in the county's Goal 14 findings, absent a showing that the county's findings as a whole, including the incorporated findings, are inadequate. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Where the local government's Goal 14, factor 1 and 2 findings rely on two separate methods to determine the need for industrial land, a petitioner's challenge to the evidentiary sufficiency of one method does not provide a basis for remand, where petitioner fails to challenge the other method. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Sustainable findings under the seven Goal 14 factors state a legally sufficient "reason" justifying why the state policy embodied in Goal 14 should not apply, for purposes of adopting the exception necessary to include resource land within a UGB under OAR 660-004-0010(1)(c)(B)(i). *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. To demonstrate reversible error in a local government's Goal 14 findings, a petitioner must demonstrate that the local government misapplied the pertinent factors or reached key conclusions that are not supported by substantial evidence, in a manner that shows legal error or insufficiency in the local government's ultimate conclusion that the subject property is the "best" land to include in the UGB, considering and balancing each factor. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 304 (2001).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Goal 14, factor 3 is one of several factors that must be considered and balanced, not an isolated criterion that establishes a threshold for including land within a UGB. *Citizens Against Irresponsible Growth v. Metro,* 39 Or LUBA 539 (2001).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. The focus of Goal 14, factor 3 is the comparative cost and feasibility of providing urban services and facilities among lands considered for inclusion within the UGB, and determining which of the alternatives is most consistent with the orderly and economic provision of public facilities and services. The focus of factor 3 is not on determining whether existing facilities are adequate or can be made adequate. *Citizens Against Irresponsible Growth v. Metro,* 39 Or LUBA 539 (2001).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. A local government may limit the geographic scope of its alternate sites analysis for lands needed for a subregional need to lands that can satisfy the identified need. A local government is not required to consider an urban growth boundary expansion within other regional centers that would not alleviate the identified needs of the regional center being addressed. *1000 Friends of Oregon v. Metro,* 38 Or LUBA 565 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Goal 14, factors 3 through 7 are directed at finding the "best" land for expansion of an urban growth boundary, balancing Goal 14 factors 3 through 7. However, if the preferred site requires an exception, then OAR 660-004-0010(1)(c) requires a separate inquiry into whether existing exception lands can reasonably accommodate the proposed use. *1000 Friends of Oregon v. Metro,* 38 Or LUBA 565 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. When comparing exception lands to resource lands under the alternate sites analysis of OAR 660-004-0010(1)(c), it is not sufficient to determine that the exception lands cannot accommodate the proposed use "as well as" the resource lands. Development must be directed to exception lands rather than resource lands if the exception lands can "reasonably accommodate" the proposed development. *1000 Friends of Oregon v. Metro,* 38 Or LUBA 565 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. The requirement that exception lands be included in an urban growth boundary expansion prior to resource lands if the exception lands can reasonably accommodate the use does not place any categorical restrictions on the type of considerations that may be employed in making the determinations. *1000 Friends of Oregon v. Metro,* 38 Or LUBA 565 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Under the Goal 14, factor 3, analysis regarding public facilities and services, a local government may consider relative cost differences between urbanizing the preferred site or alternative sites. *1000 Friends of Oregon v. Metro,* 38 Or LUBA 565 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. The analysis of maximum efficiency of land under Goal 14, factor 4, allows a local government to consider the ability of a

site to accommodate a compact urban form. The term "maximum efficiency of land uses" invokes a concern for avoiding leapfrog or sprawling development inconsistent with the density and connectivity associated with urban development. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Goal 14, factor 5, requires an environmental, social, energy, and economic analysis (ESEE) of the consequences of expanding the urban growth boundary (UGB) at the preferred site, compared to alternate sites. A local government may not assume that similar types of residential development will have similar types of ESEE consequences no matter where the UGB is expanded. In order to compare the ESEE consequences, an ESEE analysis must be conducted for both the preferred site and for alternate sites. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Proceeding under the exceptions scheme of ORS 197.298(3) does not eliminate the need to consider Goal 14, factor 6, regarding retention of agricultural land. When there are an additional 120 acres of exclusive farm use (EFU)-zoned land in the vicinity of the 109-acre EFU preferred site, the additional 120 acres must also be considered for inclusion in an urban growth boundary expansion along with the preferred site. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Goal 14, factor 7, regarding compatibility with agricultural activities, requires a comparison of the preferred site's compatibility with that of alternate sites. A local government's balancing of this factor would have little meaning if the only analysis was of the impacts of urbanizing the proposed expansion area and not alternate sites. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. In conducting the alternative site analysis required to include lower priority resource lands in the UGB under Goal 2, Part II and ORS 197.298(3)(a), the relevant question is whether higher priority exception lands can "reasonably accommodate" the identified need, not whether such exception lands can satisfy that need as well as or better than resource lands. Findings that, due to parcelization and existing development patterns, exception lands cannot accommodate as much or as dense residential development per acre as resource lands are not sufficient to establish that exception lands cannot "reasonably accommodate" that residential development. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Goal 14, factors 1 and 2 do not require a local government to demonstrate a need for the particular commercial use proposed by the owner of land being considered for inclusion within the urban growth boundary. However, where a local government's alternative sites analysis under the Goal 14 locational factors relies upon an identified need for a specific type of commercial development, the local government must have established that specific need in considering Goal 14, factors 1 and 2. *Smith v. Douglas County*, 37 Or LUBA 801 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. While a local government is not required to amend its urban growth boundary to accommodate a specific type of proposed use,

Goal 14 does not prohibit a local government from attempting to identify a specific type of use as a "need" under Goal 14, factors 1 and 2. *Smith v. Douglas County*, 37 Or LUBA 801 (2000).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Findings addressing lands available for rural residential development need not consider residential land within urban growth boundaries. Land within urban growth boundaries is not rural land. *Turrell v. Harney County*, 36 Or LUBA 244 (1999).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Under Goal 14, factor 4, which requires "the encouragement of development within urban areas before the conversion of urbanizable areas," the city and county seeking to expand an urban growth boundary must explain in their findings what efforts were made to encourage development short of expanding the urban growth boundary and why those efforts were unsuccessful. *Roth v. Yamhill County*, 31 Or LUBA 181 (1996).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. Goal 14, factor 3, which requires that an expansion of an urban growth boundary be based on consideration of "orderly and economic provision of public facilities and services," is not satisfied by findings that water and sewer lines can be connected to the subject property, but must include findings explaining what impact, if any, the proposed expansion of the water and sewer systems will have on existing services. *Roth v. Yamhill County*, 31 Or LUBA 181 (1996).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. The disinclination of two property owners to develop their residentially zoned property for residential uses does not, of itself, create a need that justifies expansion of the city's urban growth boundary. *Roth v. Yamhill County*, 31 Or LUBA 181 (1996).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. A city may not justify noncompliance with provisions of Goal 14 and policies in the city's own comprehensive plan on the ground that noncompliance is necessary to accommodate a particular development proposal. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

18.4 Goal 14 – Urbanization/ Goal 14 Rule – Conversion Factors. In performing an alternative sites analysis under Goal 14 and its own zoning ordinance, a city may not assume that the cost of a previously developed site within the city limits is excessive or that forecasted redevelopment expenses will be prohibitive. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Only "transportation facilities and improvements" that meet the requirements of OAR 660-012-0065 are allowed on EFU-zoned "rural land" without an exception to Goals 3, 11 and 14. OAR 660-012-0070 provides that "transportation facilities" that do not meet the requirements of OAR 660-012-0065 cannot be constructed on "rural land" without an exception to the applicable goals. However, OAR 660-012-0070 does not require an exception to the applicable resource and urban goals where the city concurrently includes the land within its urban growth boundary, because the land is no longer "rural land" as defined in that rule. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. *VinCEP v. Yamhill County*, 215 Or App 414, 171 P3d 368 (2007), which involved a reasons exception to Goals 3, 4 and 14 to develop a hotel on land zoned exclusive farm use (EFU), and its holding which interprets the rules for reasons exceptions, is inapposite where no reasons exception is involved. Similarly, OAR 661-012-0070 and its requirements for exceptions for transportation improvements on rural land do not apply where no exception to a resource goal is sought. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. It is inconsistent to approve a committed exception to Goal 14 to allow urban uses of the property (because all rural uses are impracticable) and then apply a zoning district that was adopted to limit industrial uses to rural industrial uses. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016)

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. LUBA will not affirm a hearings officer's decision based on a legal theory that application of a rural industrial zone to rural property does not require an exception to Goal 14, where the hearings officer did not adopt that theory and instead approved an exception to Goal 14 to apply the rural industrial zone. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. OAR 660-004-0040, which provides standards consistent with Goal 14 for certain rural residential development in rural residential zones, does not purport to constitute a complete implementation of Goal 14 with respect to all residential development on rural lands. The rule's silence regarding some types of residential uses, for example, floating homes, does not allow the inference that such development is either consistent or inconsistent with Goal 14. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Because OAR 660-004-0040, which provides standards consistent with Goal 14 for certain rural residential development in rural residential zones, does not include standards for floating homes, ORS 197.646(1) does not oblige the county to adopt land use regulation amendments to implement the rule with respect to floating homes. Consequently, that the county's land use regulations governing floating homes do not include standards based on OAR 660-004-0040 does not mean that the county failed to implement the rule, or that the rule applies directly to land use decisions concerning floating homes, pursuant to ORS 197.646(3). *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. The Oregon Supreme Court decision in *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986), did not obligate local governments to apply Goal 14 as interpreted directly to land use decisions made under acknowledged land use regulations, although *amendments* to those regulations must be consistent with Goal 14 as interpreted by *Curry Co.* Where a county's regulations governing floating homes were adopted and acknowledged to comply with Goal 14 in 1982, and have not been amended since, those regulations remain acknowledged to comply with Goal 14, and thus Goal 14 would not apply directly to a decision to approve floating homes under that acknowledged ordinance. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Absent LCDC rule-making, whether proposed industrial use of rural land is rural or urban in nature requires consideration of the factors described in case law. Where a county takes a reason exception to allow a wide range of unspecified industrial uses without considering the factors described in case law, the county's bare finding that the proposed amendments do not authorize urban use of rural land is inadequate and conclusory. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A local government errs in purporting to adopt an exception to Goal 14 based solely on the general exception standards at OAR 660-004-0020. Those general exception standards are not a fungible substitute for the specific standards for taking an exception to Goal 14 at OAR 660-014-0040. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. OAR 660-004-0040(7)(i)(B) requires a Goal 14 exception to designate rural residential areas with lot sizes smaller than 10 acres and applies to land that is "planned and zoned primarily for residential uses and for which an exception to Statewide Planning Goal 3 (Agricultural Lands), Goal 4 (Forest Lands) or both has been taken." If OAR 660-004-0040 does not apply because goal exceptions have not been taken, a Goal 14 exception may nevertheless be required to designate rural land for residential use if the factors discussed in *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986) make an Goal 14 exception necessary. *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 240 (2010).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. The proximity of an RV camp/campground to an urban growth boundary, the proposed density of campground spaces, and the provision of utilities to individual camp sites temporarily occupied by RVs are not sufficient, in themselves, to convert a rural campground to an "urban use" requiring an exception to Goal 14. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where a county's Rural Residential plan designation implements OAR 660-004-0040, which applies exclusively to rural residential areas that are subject to Goal 3 or 4 exceptions, and expressly does not apply to nonresource lands not subject to those goals, it is reasonable to presume that the Rural Residential designation also applies exclusively to resource lands for which a Goal 3 or 4 exception is taken,

and is not intended to apply to nonresource lands. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. ORS 197.493(1), which prohibits local governments from limiting the occupancy of a recreational vehicle (RV) solely on the grounds that the occupancy is in an RV, is not intended to undermine the statewide land use planning system by allowing urban-level residential uses in RV parks in rural zones. By excluding from the definition of RV park an area "designated" for overnight camping, the legislature intended that counties may continue to enforce code restrictions on residential occupancy of RVs in RV parks, in rural zones that do not permit residential occupancy of RV parks. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where it is not clear whether a county believes a prior county decision delineated the boundaries of a resort unincorporated community, but petitioners do not allege that the appealed county decision that adopts a large scale map that precisely delineated the resort unincorporated community boundaries violates the OAR 660-022-0020 standards that govern such delineations, petitioners provide no basis for reversal or remand. *Friends of the Metolius v. Jefferson County*, 58 Or LUBA 284 (2009).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. OAR 660-022-0030(4) requires that counties impose limits on new commercial uses in unincorporated communities. Where a county has imposed such limits and a petitioner does not challenge the adequacy of those limits but instead argues that a particular future development proposal might violate OAR 660-022-0030(4), the petitioner provides no basis for reversal or remand where the challenged decision does not approve any particular development proposal. *Carver v. Deschutes County*, 58 Or LUBA 323 (2009).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where the challenged decision only creates a new zoning district without applying that zoning district to any property, a petitioner's argument that future development proposals may violate the new zoning district's requirement that new commercial development be small-scale and low impact is premature. *Carver v. Deschutes County*, 58 Or LUBA 323 (2009).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Oregon Administrative Rules promulgated for the purpose of establishing minimum safety standards for the design and construction of "Recreation Parks" and that define certain structures as "Recreational Vehicles" are not particularly dispositive in resolving the question of whether a proposed development is an urban use of rural land. *Baxter v. Coos County*, 58 Or LUBA 624 (2009).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A proposed RV Park with permanently stationed recreational vehicles is an urban use of rural land under the first factor set out in *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986). *Baxter v. Coos County*, 58 Or LUBA 624 (2009).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A proposed RV Park with a density of 6 units per acre on land zoned recreation and exclusive farm use is an urban use of rural land. *Baxter v. Coos County*, 58 Or LUBA 624 (2009).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Under the Unincorporated Community Rule, the boundaries of unincorporated communities must be shown on the county's comprehensive plan map "at a scale sufficient to determine accurately which properties are included." OAR 660-022-0020(2). Where a comprehensive plan is amended to designate an area as an unincorporated community but that area is not shown on the comprehensive plan at the scale required by OAR 660-022-0020(2), remand is required. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Under OAR 660-022-0030(5), hotels and motels in unincorporated communities must be served by a community sewer system. Where the zoning applied to an unincorporated community allows lodges without specifying whether the lodge must be connected to a community sewer system, and the zoning ordinance term "lodges" could overlap with the rule terms "hotels and motels," an ambiguity and potential inconsistency with the rule is created. But since the zoning ordinance was adopted to implement the unincorporated community rule, any lodge that is also a hotel or motel as the rule uses those terms would have to be connected to a community sewer system. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where a county post-acknowledgment plan amendment designates an area as an incorporated community to allow a higher density of residential development that would otherwise violate Goal 14, it need not require that vacation rental units only allow *de minimis* occupancy by the units' owners. Whereas that occupancy limitation had been required before the area was designated as an unincorporated community to preserve the distinction between low density single family dwelling development and higher density vacation rental development under Goal 14, after the unincorporated community designation the distinction is no longer legally required. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. So long as the zoning that is applied to an unincorporated community is consistent with OAR chapter 660, division 22, the unincorporated community rule, a county need not apply Goal 14 directly when applying zoning to the designated unincorporated community. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. While it may be incorrect to refer to a 43-lot subdivision with many 2-acre lots as "rural," simply because it is located outside an urban growth boundary, a county commits no error in referring to the subdivision as rural in applying a subdivision approval criterion that requires a finding that the subdivision "will not create urban-farm conflicts," where the county did not rely entirely on that characterization in applying the urban-farm conflicts standard. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A petitioner who alleges in a LUBA appeal that a rezoning of rural land is defective because it allows conversion of rural land to urban uses without an adequate Goal 14 justification or exception is obligated to develop his or her argument to that effect. Mere speculation that the uses allowed in the new zone are so uncertain or could be approved in a manner in the future that would result in such improper conversion of rural land to urban uses is not sufficient. *Wood v. Crook County*, 55 Or LUBA 165 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A finding that the economic success of a proposed wine country hotel would be enhanced by location in a "quiet rural atmosphere among vineyards and near wineries" is insufficient to demonstrate under OAR 660-004-0020(2) that the hotel "requires a location on resource land" as opposed to otherwise suitable non-resource land. *VinCEP v. Yamhill County*, 55 Or LUBA 433 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A proposed RV Park on land zoned recreation and exclusive farm use, with 179 permanent spaces for stationary trailers, is more similar to permanent residential occupancy found in a high-density residential subdivision than to temporary or seasonal uses found in an RV Park, and thus is an urban use of rural land. *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A proposed RV Park with a density of 7 to 12 units per acre on land zoned recreation and exclusive farm use that is located approximately one mile from a city's urban growth boundary functions more like a residential suburb that would undermine the effectiveness of the city's UGB to contain high-density residential development within the UGB, and is an urban use of rural land. *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A proposed development that includes on-site water and sewer systems that are designed to support a high intensity, dense collection of residential uses is an urban use of rural land. *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Viewing the factors set forth in *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986), together, a proposed use of land for an RV Park is an urban use of rural land that is prohibited without an exception to Goal 14. *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. OAR 660-004-0040(6) requires that a local government ensure that amendments to its rural residential zones to authorize lots as small as two acres are justified with exceptions to Goal 14. However, when a local government does so, OAR 660-004-0040(6) does not apply to unamended portions of the local government's comprehensive plan and land use regulations. *Oregon Shores Cons. Coalition v. Curry County*, 53 Or LUBA 503 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. OAR 660-004-0040(3)(b) requires that when a local government "amends its plan's provisions or land use regulations that apply to any rural residential area, it shall do so in accordance with this rule." However, when a local government does so, OAR 660-004-0040 does not apply to unamended portions of the local government's comprehensive plan and land use regulations. *Oregon Shores Cons. Coalition v. Curry County*, 53 Or LUBA 503 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A 50-unit deluxe "wine country" hotel that is intended to attract customers from urban areas is "urban development" for purposes of adopting a reasons exception to Goal 14 under OAR 660-014-0040. That the rural setting of the hotel is part of its commercial appeal does not mean the hotel is rural development. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Because the provisions OAR 660-004 govern the exception process as it applies to statewide planning goals "except as provided for" in OAR 660-014, it is reasonably clear that the Land Conservation and Development Commission intends that a reasons exception for proposed urban development be evaluated under OAR 660-014, not OAR 660-004. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Given the strong family resemblance between the various rules that interpret and apply Goal 2, Part II and ORS 197.732 in different contexts, any cases interpreting OAR 660-004-0022, the goal or the statute are at least potentially helpful in interpreting OAR 660-014-0040(2), or in evaluating a reasons exception under that rule. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where a local government proceeds to justify an exception under reasons listed in OAR 660-014-0040(2) or OAR 660-004-0022, the decision must demonstrate that each of the elements set out in the listed reason is met. That the listed reasons are not exclusive does not mean that an exception is permissible in circumstances where only some of the elements for each listed reason are met. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. In adopting a reasons exception to allow urban development on rural land under OAR 660-014-0040(2), a local government must justify any "essential characteristic" of the proposed development, where those characteristics have the effect of eliminating the need to consider alternative locations to site the proposed urban development within urban growth boundaries under OAR 660-014-0040(3). *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where a local government justifies a 12-acre exception area for proposed urban development under OAR 660-014-0040, the local government cannot evaluate alternative sites under OAR 660-014-0040(3) based on a minimum 33-acre parcel size. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Under OAR 660-014-0040, a local government may not treat as an "essential characteristic" of a proposed wine country hotel a location that is proximate to the densest concentration of wineries, absent evidence that locations near lesser but still significant concentrations of wineries cannot reasonably accommodate the proposed need for the hotel. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Not every feature, such as "rural ambiance," that would increase the odds of economic success of a proposed urban hotel on rural lands is an essential characteristic of the use, that can be used to categorically reject otherwise suitable alternative sites within or adjacent to urban areas under OAR 660-014-0040(2) and (3). *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A mere consumer preference among wine connoisseurs for luxury hotels in rural settings is not a sufficient basis to render a rural setting an essential characteristic of a hotel designed to accommodate affluent wine tourists, for purposes of OAR 660-014-0040, absent evidence that there is an economically significant demographic of wine tourist that will only stay in rural luxury hotels and will not stay in urban luxury hotels. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A county does not err in rejecting an argument that a reasons exception is not available to allow a proposed hotel on rural land, because the proposed development is in essence a destination resort, and therefore potentially allowable without an exception, under the reasoning in *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002), where the applicable goals, rules and statutes effectively prohibit a destination resort of any kind on the subject property, and thus there is no means short of a goal exception to approve the proposed use on the property. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. OAR 660-004-0030(7) authorizes a county to adopt an exception to Goal 14 for rural residential zone or planning designations in a legislative proceeding, and to subsequently apply such zones or plan designations to specific properties without the necessity of applying or taking an exception to Goal 14. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A county commits no error in failing to apply OAR 660-004-0040 to land that is either resource land or non-resource land. OAR 660-004-0040 specifically does not apply to either resource land or nonresource land; it applies to rural lands for which an exception to resource goals has been approved, when they are planned and zoned for rural residential development. *Sommer v. Josephine County*, 49 Or LUBA 134 (2005).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Goal 14 implicitly requires that the intensity of uses allowed on rural lands outside unincorporated communities be less than the maximum intensity allowed inside unincorporated communities. That a plan amendment allows industrial facilities only slightly less intensive than the maximum allowed in

unincorporated communities under OAR 660-022-0030(1) does little to establish that the amendment is consistent with Goal 14. *Friends of Yamhill County v. Yamhill County*, 49 Or LUBA 529 (2005).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A large public storage facility that derives almost all of its customer base from residents within the nearby UGB is not a rural use that can be allowed on rural land consistent with Goal 14. *Friends of Yamhill County v. Yamhill County*, 49 Or LUBA 529 (2005).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Goal 14 is implicated by a decision that rezones rural land to allow a planned unit development with no minimum lot size, potentially allowing clustered residential density less than one dwelling per 10 acres. *Wood v. Crook County*, 49 Or LUBA 682 (2005).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Simply because OAR 660-004-0018(1) has clarified since 1986 that an exception to one goal does not relieve a local government from other goal requirements does not mean that the converse was true prior to adoption of the rule. Rezoning property located in a Goal 3 exception area adjacent to a UGB requires consideration of Goal 14, even if OAR 660-004-0018(1) was not applicable at the time the Goal 3 exception was taken. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 160 (2004).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Because Goal 14 requires that rural industrial uses in areas outside of rural unincorporated communities be less intensive than industrial uses allowed in such communities, such rural industrial uses must be smaller in size than the 40,000-square-foot maximum allowed for industrial uses in rural unincorporated communities, under OAR 660-022-0030. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 160 (2004).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. An administrative rule that prohibits new churches and schools on land within three miles of an urban growth boundary (UGB), while allowing community centers "operated primarily by and for residents of the local rural community" within three miles of a UGB, does not violate the "equal terms" and nondiscrimination clauses of the Religious Land Use and Institutionalized Persons Act (RLUIPA), where the membership of the proposed church is primarily composed of people who reside within the UGB. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Findings that establish that a proposed motor speedway must be centrally located in its market area, that it will provide significant local economic benefits, and that it has characteristics that make locating the speedway within nearby urban growth boundaries an unreasonable alternative are sufficient to provide reasons for an exception to Goals 11 and 14. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Findings that establish that a gasoline station is needed to avoid forcing some departing speedway attendees to

travel out-of-direction to buy gasoline when such out-of-direction travel would thereby adversely affect transportation facilities, are sufficient to provide a reason justifying and exception to Goal 14 to site the gas station next to a speedway on rural land, where the challenged decision imposes conditions to prevent the gasoline station from becoming a standalone facility that competes with nearby gas stations in urban areas. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A challenged decision establishes sufficient reasons to allow a restaurant and bar next to a speedway on rural land to satisfy significant on-site demand for such facilities, where locational and signage conditions are imposed to limit the possibility that those facilities would compete with nearby facilities inside urban areas for other customers not associated with the speedway. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Identified needs to (1) attract speedway fans early and keep them on site longer to spread traffic impacts, and (2) provide on-site activities for family members accompanying racing spectators may provide sufficient reasons to permit siting indoor and outdoor speedway related recreational facilities on rural land. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Findings that merely suggest that speedway-dependent and related industrial uses may require close proximity to the speedway and state that they may generate sufficient noise to make an urban location inappropriate provide weak reasons for approving a rural location for such industries. However, where petitioner does not challenge that rationale, those findings may provide sufficient reasons for a Goal 14 exception. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where a county's findings addressing the comparative environmental, economic, social and energy consequences of siting a proposed speedway at the proposed rural location rather than other possible rural locations identify a number of unchallenged energy considerations that favor the proposed rural site, the county's failure to require that the applicant supply a fuel consumption analysis does not provide a basis for remand. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A county may not rely on a previously adopted Goal 3 exception for airport related industrial uses to justify approving a major automobile speedway and speedway related uses on rural agricultural land. Although the same factors that the county relied on to justify Goal 11 and Goal 14 exceptions for the speedway and related uses might justify a new Goal 3 exception, a new Goal 3 exception must be adopted to replace the one that was adopted for the airport related industrial uses. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Nothing in Goal 14 expressly requires consideration of the cumulative impact of proposed rural residential development with existing or future land uses on rural lands, to determine if the proposed residential development is urban in nature. The fact that OAR 660-004-0040, which governs the Goal 14 analysis of rural residential development, does not require such cumulative impacts

analysis is some indication that Goal 14 does not implicitly require such analysis. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 97 (2002).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. OAR 660-004-0040 provides that a zone that prohibits new residential lots on less than 2 acres in a rural residential area is consistent with Goal 14. Even where that rule does not apply, it provides pertinent guidance as to whether a rezoning decision that would allow residential lots larger than 2 acres is consistent with Goal 14. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 97 (2002).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Because a public park is permitted by statute on EFU land without requiring compliance with Goal 14 or an exception to that goal, it is also permitted on rural land zoned other than EFU without requiring compliance with Goal 14 or an exception, even if the park would primarily serve urban residents. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A use permitted by statute on EFU land is not subject to the additional requirement that the use be rural or that an exception to Goal 14 be taken, even if the use is urban in nature. Where such a use is expressly permitted on EFU land, it is also implicitly permitted by statute on rural land zoned other than EFU. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. The redesignation of a 680-acre non-resource-zoned parcel to rural residential use will not result in impermissible urban uses on rural lands where the resulting 136 lots will not be served by public water or sewer systems, commercial uses are prohibited and no additional public services will be extended to the subject property from the nearest urban area, located two and one-half miles away. *DLCD v. Klamath County*, 42 Or LUBA 368 (2002).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. The Oregon land use planning scheme contemplates that some rural land will be available for homesites. That residential lots may be permitted within UGBs does not, ipso facto, mean that residential uses of lands outside UGBs are forbidden. *DLCD v. Klamath County*, 42 Or LUBA 368 (2002).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A petitioner must do more than merely raise an issue concerning Goal 14 to raise an issue concerning compliance with local provisions that implement Goal 14. Failure to raise an issue concerning the local provisions below precludes a petitioner from raising an issue concerning those local provisions for the first time on appeal. *Durig v. Washington County*, 40 Or LUBA 1. (2001)

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. The rural fire service facilities authorized by ORS 215.283(1)(w) are not required to serve rural areas exclusively. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. In considering whether a rural fire service facility authorized by ORS 215.283(1)(w) primarily serves rural rather than urban areas, areas inside UGBs and any areas outside a UGB for which an exception to Goal

14 has been approved to allow urban-level development must be considered urban. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A fire station with only five percent of its service area inside a UGB and somewhere between 67 percent and 76 percent of its incident responses going to rural areas outside the UGB primarily serves rural areas. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Seven lot of record dwellings on lots that range in size from as small as two acres to as large as eight acres are properly viewed as rural land uses. *Friends of Yamhill County v. Yamhill County*, 39 Or LUBA 478 (2001).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A farm and feed store does not become an impermissible urban use in a rural residential zone simply because 10 percent of its sales are nonfarm-related items and its customer base may include residents in nearby urban areas. *Barge v. Clackamas County*, 39 Or LUBA 183 (2000).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Rezoning a 680-acre parcel to allow it to be developed as a residential planned unit development with commercial development at a density of one unit per five acres with no minimum lot size is not necessarily a permissible "rural" use of land, even if community water and sewer are not allowed. *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. The present development intentions of current owners are not determinative as to whether undeveloped lands may require urban services in the near future. A local government may assume that continued resource use will render near term urbanization of property within the urban growth boundary impracticable, even if the current owners of urbanizable land testify that they do not intend to develop their property for urban uses anytime soon. *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where petitioner argues that a Goal 3 exception to allow a subdivision of 10 five-acre lots on rural land also requires an exception to Goal 14, but petitioner fails to explain why such a subdivision constitutes an urban use and fails to challenge the county's findings that the proposal would be served by rural services, LUBA will reject the argument. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489 (2000).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A county urbanization policy that was adopted to implement Goal 14 must be interpreted consistently with Goal 14's prohibition against approval of urban uses on rural land. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. In approving applications for permits for uses that are specifically allowed in rural EFU zones by ORS 215.213 and 215.283, counties are not required to apply the case-by-case urban/rural analysis that is

required under Goal 14 and *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986), on non-EFU-zoned rural lands. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A county provision requiring that schools outside urban growth boundaries be "scaled to serve the rural population" is not unconstitutionally vague where a reasonable applicant would understand that to comply with that provision, the applicant must submit evidence that the school is no larger than needed to serve the anticipated number of rural students. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A county provision requiring that schools outside urban growth boundaries be "scaled to serve the rural population" does not infringe directly on religious practices, and thus is not subject to strict scrutiny, absent a showing that the proposed parochial school must exist on the same rural property as its supporting church for members to exercise their rights to free exercise of religion and their right to direct their children's education. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. The Free Exercise Clause does not require an exemption from a county zoning ordinance that prohibits urban-sized schools on rural land, where the county has a strong interest in maintaining the boundaries between rural and urban uses, and the ordinance imposes only the minimal burden on religious practice of requiring the applicant to build a smaller parochial school than desired or locate the school on property within the nearby urban growth boundary. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where the county approves a golf course expansion without adopting findings addressing a comprehensive plan provision that prohibits approval of urban uses outside urban growth boundaries, LUBA will remand the decision so that the county can adopt findings addressing whether the subject golf course is "urban" and whether the proposed expansion of the golf course is consistent with the comprehensive plan provision. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. The term "rural community" as used in OAR 660-012-0045(3) of the Transportation Planning Rule is broader than the term "rural community" as defined in OAR 660-022-0010(7) of the Unincorporated Communities rules. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Goal 14 is applicable to a plan amendment redesignating rural land as commercial, where the land is outside the UGB and the commercial designation would permit any commercial use of any size or intensity, including large commercial uses such as a Wal-Mart store that are urban in character and intensity. *Geaney v. Coos County*, 34 Or LUBA 189 (1998).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. In approving comprehensive plan and zoning map amendments, the county's findings must demonstrate that

Goal 14 is satisfied without reliance on past practices or on plan and code provisions that are subject to revision during periodic review. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Under Goal 14, a decision to allow an intensification of use outside an urban growth boundary cannot be allowed to undermine the effectiveness of adjacent urban growth boundaries; one way this may occur is through the provision of urban facilities and services to rural areas. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. The county's finding that the same level of public facilities and services that will be available to the subject property is presently available to all the surrounding land is not helpful to a determination of compliance with Goals 11 and 14 where the finding does not explain whether or how the goals were applied to the surrounding properties. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A two-acre minimum lot size on property located within two miles of a UGB, in combination with the provision of an urban water system and access to public schools, raises valid concerns about the impacts of a proposed subdivision on the UGB, and a finding that consists solely of a city administrator's opinion that the city has no concerns regarding the impact of the proposed subdivision is not substantial evidence to support the county's conclusion that the proposed subdivision will not affect the UGB. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where a county imposes specific requirements on proposed guest houses relating to minimum lot size, maximum square footage, site location and utility connections, and the county addresses the rural nature of the area, the county does not err by failing to specifically address Goal 14. *Doob v. Josephine County*, 33 Or LUBA 27 (1997).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. The county's determination that Goal 14 is not applicable to a zone change because the change does not convert rural land to urban uses must address relevant site-specific factors, including the location of the use relative to urban growth boundaries and the availability of urban services. *Doob v. Josephine County*, 32 Or LUBA 376 (1997).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. When a county rezones a 13-acre parcel to rural residential, one-acre minimum, the county's finding acknowledging that the applicant agreed to a deed restriction creating a maximum of eight lots, with a minimum lot size of 1.5 acres, does not support a determination that the rezone does not allow an urban use. *Doob v. Josephine County*, 32 Or LUBA 364 (1997).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Churches are not inherently urban in nature. A church that does not require urban services, serves a primarily rural congregation, and is used for religious services and educational programs is not an urban use requiring an exception from Goal 14. *Cox v. Yamhill County*, 29 Or LUBA 263 (1995).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. By definition, all land outside an acknowledged UGB and not the subject of an exception to Goal 14 is "rural" land. When amending its acknowledged comprehensive plan and zone designations for such land, a local government must demonstrate that the new plan and zone designations comply with Goal 14 or adopt an exception to Goal 14. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Plan and zone designations that allow residential development on lots smaller than one-half acre, with community water and sewer services, allow urban uses. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where a local government redesignates and rezones what had previously been designated and zoned as agricultural or forestland, and applies a zoning district allowing residential development on existing lots much smaller than 10 acres, the local government must address compliance with Goals 11 and 14. *1000 Friends of Oregon v. Yamhill County*, 27 Or LUBA 508 (1994).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where amendments to an exclusive farm use (EFU) zoning district do not change the maximum allowable density of nonfarm dwellings in PUDs, but may have the effect of increasing the numbers of, and circumstances in which, residential PUDs may be approved on EFU-zoned land, the county must consider these potential secondary effects of the amendments in determining whether the EFU zone, as amended, complies with Goals 11 and 14. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. The comprehensive plan provisions comprising a city's urban growth management program are clearly designed to implement Statewide Planning Goals 11 and 14. Therefore, a city errs in interpreting such plan provisions to allow the extension of urban sewage treatment service outside an urban growth boundary. *DLCD v. City of Donald*, 27 Or LUBA 208 (1994).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. Where the county plan and zone designations applied to certain rural property at the time of acknowledgment permit a level of activity that requires sewer service, a petitioner may not challenge proposed development allowed by the acknowledged plan and land use regulations on the basis that the allowed development violates Goals 11 and 14. *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150 (1994).

18.5 Goal 14 – Urbanization/ Goal 14 Rule – Urban Uses on Rural Land. A comprehensive plan policy that "urban services shall only be established within recognized urban growth boundaries" implements Goals 11 and 14. Because Goals 11 and 14 prohibit the extension of urban level services outside of urban growth boundaries, LUBA will not defer to a local government interpretation of that plan policy as allowing extension of service from an urban sewage treatment plant to a rural area. ORS 197.829(4). *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150 (1994).

18.6.1 Goal 14 – Urbanization/ Goal 14 Rule – Annexations/Incorporation – Goal Standards. OAR 660-014-0060 requires that local governments apply acknowledged comprehensive plans and ordinances to annexation decisions in lieu of the statewide planning goals, unless the plan and ordinance do not "control the annexation." A comprehensive plan policy need not be a mandatory approval criterion to "control the annexation" for purposes of OAR 660-014-0060; it is sufficient that the policy provides relevant guidance with respect to annexations. *Costco Wholesale Corporation v. City of Beaverton*, 50 Or LUBA 476 (2005).

18.6.1 Goal 14 – Urbanization/ Goal 14 Rule – Annexations/Incorporation – Goal Standards. Under OAR 660-014-0060, which requires that local governments apply acknowledged comprehensive plans and ordinances to annexation decisions in lieu of the statewide planning goals, unless the plan and ordinance do not "control the annexation," whether the plan and ordinances control the annexation depends on whether the plan and ordinances include substantive standards guiding a city's determination whether or not to annex land, not whether the plan and ordinances include procedures specific to annexations. *Patterson v. City of Independence*, 49 Or LUBA 589 (2005).

18.6.1 Goal 14 – Urbanization/ Goal 14 Rule – Annexations/Incorporation – Goal Standards. Which substantive comprehensive plan and ordinance standards that local governments apply to annexation decisions under OAR 660-014-0060 depend in part on the nature of the annexation. The considerations governing annexation of right-of-way will differ from those that govern annexation of a parcel for industrial, commercial or residential uses. *Patterson v. City of Independence*, 49 Or LUBA 589 (2005).

18.6.1 Goal 14 – Urbanization/ Goal 14 Rule – Annexations/Incorporation – Goal Standards. Given the limited nature of a proposed annexation of a city-maintained right-of-way, comprehensive plan policies implementing Goals 12 and 14 that provide general guidance regarding annexation decisions are sufficient to "control the annexation" of the right-of-way for purposes of OAR 660-014-0060, and thus make it unnecessary to apply the goals directly. *Patterson v. City of Independence*, 49 Or LUBA 589 (2005).

18.6.1 Goal 14 – Urbanization/ Goal 14 Rule – Annexations/Incorporation – Goal Standards. Neither Goal 11 nor Goal 14 identifies annexation or application of city zoning as the decision points at which (1) a specific development proposal must be approved and (2) any public service or facility inadequacies at the property must be corrected. *Just v. City of Lebanon*, 45 Or LUBA 179 (2003).

18.6.2 Goal 14 – Urbanization/ Goal 14 Rule – Annexations/Incorporation – LCDC Rule. OAR 660-024-0050(6) requires that when land is added to an urban growth boundary (UGB), the local government "must assign appropriate urban plan designations to the added land, consistent with the need determination and the requirements of section (7) of this rule, if applicable." OAR 660-024-0050(7) provides lands included with a UGB for a public facility "must be planned and zoned for the intended use and must remain planned and zoned for that use unless the city removes the land from the UGB." A city decision to retain the land's existing Exclusive Farm Use zoning until the land is annexed into the city is inconsistent with the OAR 660-024-0050(7) requirement to adopt concurrent plan and zone re-designation "for [that] intended use." *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

18.6.2 Goal 14 – Urbanization/ Goal 14 Rule – Annexations/Incorporation – LCDC Rule. Petitioners' argument that a proposed golf course expansion violates Goal 14 because it constitutes an expansion of an urban use onto rural EFU-zoned land provides no basis for reversal or remand, because Goal 14 does not apply to a permit to expand a use allowed in an EFU zone. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

18.6.2 Goal 14 – Urbanization/ Goal 14 Rule – Annexations/Incorporation – LCDC Rule. Where a local government decision does not incorporate a new city but erroneously applies LCDC's rules concerning incorporation of new cities in the course of taking an exception to Goal 14, the error is harmless and provides no basis for reversal or remand. *James v. Josephine County*, 35 Or LUBA 493 (1999).

18.7 Goal 14 – Urbanization – Exceptions to. Only "transportation facilities and improvements" that meet the requirements of OAR 660-012-0065 are allowed on EFU-zoned "rural land" without an exception to Goals 3, 11 and 14. OAR 660-012-0070 provides that "transportation facilities" that do not meet the requirements of OAR 660-012-0065 cannot be constructed on "rural land" without an exception to the applicable goals. However, OAR 660-012-0070 does not require an exception to the applicable resource and urban goals where the city concurrently includes the land within its urban growth boundary, because the land is no longer "rural land" as defined in that rule. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

18.7 Goal 14 – Urbanization – Exceptions to. *VinCEP v. Yamhill County*, 215 Or App 414, 171 P3d 368 (2007), which involved a reasons exception to Goals 3, 4 and 14 to develop a hotel on land zoned exclusive farm use (EFU), and its holding which interprets the rules for reasons exceptions, is inapposite where no reasons exception is involved. Similarly, OAR 661-012-0070 and its requirements for exceptions for transportation improvements on rural land do not apply where no exception to a resource goal is sought. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

18.7 Goal 14 – Urbanization – Exceptions to. In adopting an exception to Goal 14 based on commitment to urban levels of development, a county must do more than address all the factors set out at OAR 660-014-0030(3) and adopt findings of fact. OAR 660-014-0030(4) requires "a statement of reason explaining why the facts found support the conclusion that the land in question is committed to urban uses and urban level development rather than a rural level of development." Where that explanation for why the facts the county found support a conclusion that the property is committed to urban use is entirely missing, LUBA will sustain the challenge to the Goal 14 exception. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

18.7 Goal 14 – Urbanization – Exceptions to. It is inconsistent to approve a committed exception to Goal 14 to allow urban uses of the property (because all rural uses are impracticable) and then apply a zoning district that was adopted to limit industrial uses to rural industrial uses. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

18.7 Goal 14 – Urbanization – Exceptions to. LUBA will not affirm a hearings officer's decision based on a legal theory that application of a rural industrial zone to rural property does not require an exception to Goal 14, where the hearings officer did not adopt that theory and instead approved an exception to Goal 14 to apply the rural industrial zone. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

18.7 Goal 14 – Urbanization – Exceptions to. The statewide planning goal exception standards are set out at ORS 197.732 (statutory standard); Goal 2, Part II (goal standard); OAR chapter 660, division 4 (general administrative rule standard); OAR 660-012-0070) (transportation improvements on rural land); and OAR chapter 660, division 14 (urban development of rural land). Those different exception standards vary somewhat in their wording and level of detail, and where a Goal 14 exception is required to allow residential development on rural land, OAR 660-014-0040 is the more particular standard and the exception standard that applies to such

Goal 14 exceptions. *VinCEP v. Yamhill County*, 215 Or App 414, 422-23, 171 P3d 368 (2007). *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 240 (2010).

18.7 Goal 14 – Urbanization – Exceptions to. A net reduction in potential development density on rural land could be a sufficient reason under OAR 660-014-0040(2) to allow existing rural residential zoning to be relocated and reduced in size. *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 240 (2010).

18.7 Goal 14 – Urbanization – Exceptions to. The proximity of an RV camp/campground to an urban growth boundary, the proposed density of campground spaces, and the provision of utilities to individual camp sites temporarily occupied by RVs are not sufficient, in themselves, to convert a rural campground to an "urban use" requiring an exception to Goal 14. *Linn County Farm Bureau v. Linn County*, 61 Or LUBA 323 (2010).

18.7 Goal 14 – Urbanization – Exceptions to. The standards for approving a destination resort under Goal 8 and ORS 197.435 through 197.467 function as a "safe harbor" that allows local governments to approve resorts that meet minimum standards, without the necessity of adopting exceptions to Goals 11 and 14. However, the statutory process is not the only means of approving a destination resort, and counties continue to have the option of approving a destination resort subject to exceptions to Goals 3, 4, 11 and 14. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

18.7 Goal 14 – Urbanization – Exceptions to. A county may rely on the reasons that justified a Goal 4 exception earlier approved by the county and Land Conservation and Development Commission (LCDC) for a proposed destination resort to justify reasons exceptions to Goals 11 and 14, where the record supports the county's finding that the Goal 4 reasons are still valid and the Goals 11 and 14 exceptions merely implement and complete the earlier county and LCDC approval. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

18.7 Goal 14 – Urbanization – Exceptions to. Because Goal 11 and Goal 14 serve congruent policy objectives, the reasons sufficient to justify a Goal 14 exception for a destination resort may also be sufficient to justify an exception to Goal 11 to authorize a community sewer system to serve the destination resort. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

18.7 Goal 14 – Urbanization – Exceptions to. Where the county and the Land Conservation and Development Commission previously approved a Goal 4 exception for a destination resort under conditions requiring specified on-site accommodations and facilities, and the county imposed an overlay zone to ensure that the resort includes those on-site accommodations and facilities, in later adopting a reasons exception to Goal 14 to complete the proposed resort the county can consider those required accommodations and facilities to be essential characteristics of the proposed use, for purposes of the alternative sites analysis required under OAR 660-014-0040(3)(a). In that circumstance, the county does not err in concluding that alternative sites within urban growth boundaries cannot reasonably accommodate the proposed use. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

18.7 Goal 14 – Urbanization – Exceptions to. Where Goal 11 and 14 exceptions are necessary to complete a previously approved destination resort that is authorized under the county's acknowledged comprehensive plan and land use regulations, and the resort as completed is substantially similar to the resort as originally approved, the Goal 11 and 14 exceptions do not propose "new uses" that could be conflicting uses with a significant Goal 5 resource site and thus the county does not err in failing to apply the requirements of Goal 5 and the Goal 5 rule. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

18.7 Goal 14 – Urbanization – Exceptions to. Viewing the factors set forth in *1000 Friends of Oregon v. LCDC (Curry County)*, 301 Or 447, 724 P2d 268 (1986), together, a proposed use of land for an RV Park is an urban use of rural land that is prohibited without an exception to Goal 14. *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008).

18.7 Goal 14 – Urbanization – Exceptions to. OAR 660-004-0040(6) requires that a local government ensure that amendments to its rural residential zones to authorize lots as small as two acres are justified with exceptions to Goal 14. However, when a local government does so, OAR 660-004-0040(6) does not apply to unamended portions of the local government's comprehensive plan and land use regulations. *Oregon Shores Cons. Coalition v. Curry County*, 53 Or LUBA 503 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. OAR 660-004-0040(3)(b) requires that when a local government "amends its plan's provisions or land use regulations that apply to any rural residential area, it shall do so in accordance with this rule." However, when a local government does so, OAR 660-004-0040 does not apply to unamended portions of the local government's comprehensive plan and land use regulations. *Oregon Shores Cons. Coalition v. Curry County*, 53 Or LUBA 503 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. A 50-unit deluxe "wine country" hotel that is intended to attract customers from urban areas is "urban development" for purposes of adopting a reasons exception to Goal 14 under OAR 660-014-0040. That the rural setting of the hotel is part of its commercial appeal does not mean the hotel is rural development. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. Because the provisions OAR 660-004 govern the exception process as it applies to statewide planning goals "except as provided for" in OAR 660-014, it is reasonably clear that the Land Conservation and Development Commission intends that a reasons exception for proposed urban development be evaluated under OAR 660-014, not OAR 660-004. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. Given the strong family resemblance between the various rules that interpret and apply Goal 2, Part II and ORS 197.732 in different contexts, any cases interpreting OAR 660-004-0022, the goal or the statute are at least potentially helpful in interpreting OAR 660-014-0040(2), or in evaluating a reasons exception under that rule. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. Where a local government proceeds to justify an exception under reasons listed in OAR 660-014-0040(2) or OAR 660-004-0022, the decision must demonstrate that each of the elements set out in the listed reason is met. That the listed reasons are not exclusive does not mean that an exception is permissible in circumstances where only some of the elements for each listed reason are met. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. In adopting a reasons exception to allow urban development on rural land under OAR 660-014-0040(2), a local government must justify any "essential characteristic" of the proposed development, where those characteristics have the effect of eliminating the need to consider alternative locations to site the proposed urban development within urban growth boundaries under OAR 660-014-0040(3). *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. Where a local government justifies a 12-acre exception area for proposed urban development under OAR 660-014-0040, the local government cannot evaluate alternative sites under OAR 660-014-0040(3) based on a minimum 33-acre parcel size. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. Under OAR 660-014-0040, a local government may not treat as an "essential characteristic" of a proposed wine country hotel a location that is proximate to the densest concentration of wineries, absent evidence that locations near lesser but still significant concentrations of wineries cannot reasonably accommodate the proposed need for the hotel. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. Not every feature, such as "rural ambiance," that would increase the odds of economic success of a proposed urban hotel on rural lands is an essential characteristic of the use, that can be used to categorically reject otherwise suitable alternative sites within or adjacent to urban areas under OAR 660-014-0040(2) and (3). *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. A mere consumer preference among wine connoisseurs for luxury hotels in rural settings is not a sufficient basis to render a rural setting an essential characteristic of a hotel designed to accommodate affluent wine tourists, for purposes of OAR 660-014-0040, absent evidence that there is an economically significant demographic of wine tourist that will only stay in rural luxury hotels and will not stay in urban luxury hotels. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. A county does not err in rejecting an argument that a reasons exception is not available to allow a proposed hotel on rural land, because the proposed development is in essence a destination resort, and therefore potentially allowable without an exception, under the reasoning in *DLCD v. Yamhill County*, 183 Or App 556, 53 P3d 462 (2002), where the applicable goals, rules and statutes effectively prohibit a destination resort of any kind on the subject property, and thus there is no means short of a goal exception to approve the proposed use on the property. *VinCEP v. Yamhill County*, 53 Or LUBA 514 (2007).

18.7 Goal 14 – Urbanization – Exceptions to. Where a previously adopted exception to Goal 14 establishes a two-acre minimum lot size for a specific parcel, a county does not err in later rezoning that parcel to allow subdivision and residential development of that parcel with a minimum lot size of two acres without taking an exception to Goal 14 or adopting findings to establish that the development that would be allowed under that new zoning would constitute rural rather than urban development. It does not matter that the parcel was located outside the Goal 14 exception area where the prior Goal 14 exception clearly identified the parcel and clearly authorized a two-acre minimum lot size for that parcel. *Holloway v. Clatsop County*, 52 Or LUBA 644 (2006).

18.7 Goal 14 – Urbanization – Exceptions to. Where a proposed plan amendment, zone change and goal exception would result in a split-zoned parcel with the northern portion planned and zoned for residential use and the southern portion planned and zoned for resource use, and a policy in the county's comprehensive plan at least arguably permits land divisions along boundaries separating exception areas from resource lands, and such a division would result in lots smaller than the minimum lot size permitted by the county's acknowledged Goal 14 exception, the county must adopt Goal 14 findings or, if necessary, adopt a specific exception to Goal 14. *Wetherell v. Douglas County*, 51 Or LUBA 730 (2006).

18.7 Goal 14 – Urbanization – Exceptions to. OAR 660-004-0030(7) authorizes a county to adopt an exception to Goal 14 for rural residential zone or planning designations in a legislative proceeding, and to subsequently apply such zones or plan designations to specific properties without the necessity of applying or taking an exception to Goal 14. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

18.7 Goal 14 – Urbanization – Exceptions to. In adopting a committed exception to Goal 14, a county does not err in assuming that residential properties less than 2 acres constitute "urban levels of development," to support its conclusion that all rural uses on the subject property are impractical. *Doob v. Josephine County*, 49 Or LUBA 113 (2005).

18.7 Goal 14 – Urbanization – Exceptions to. When a local government demonstrates that land may be included in an urban growth boundary under OAR 660-004-0010(1)(c)(B)(i) by demonstrating compliance with the seven factors of Goal 14, the local government need not take exceptions to other goals individually. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

18.7 Goal 14 – Urbanization – Exceptions to. Although OAR 661-004-0010(1)(c)(B)(i) nominally requires a local government to apply all seven of the Goal 14 factors, when the local government is proceeding under the "unneeded but committed" exception, the two "need" factors of Goal 14 need not be addressed. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

18.7 Goal 14 – Urbanization – Exceptions to. When a local government amends its urban growth boundary under the "unneeded but committed" exception it demonstrates that the land is committed to urban uses under the five "locational factors" of Goal 14. The local government need not adopt an irrevocably committed exception under OAR 660-004-0028. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

18.7 Goal 14 – Urbanization – Exceptions to. Even when the Goal 14 rule on rural residential development at OAR 660-004-0040 does not apply to a proposed plan or zone change for residential development on rural land, a local government must still address whether the proposed residential development is consistent with Goal 14. *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247 (2002).

18.7 Goal 14 – Urbanization – Exceptions to. A finding that property is "not ideal" for rural residential use under current zoning is not sufficient to demonstrate that it is "impracticable" to use the property for such rural residential use, where a rural residence exists on the property and the decision does not explain why proximity to the interstate highway or other abutting uses make continued rural residential use impracticable. *James v. Josephine County*, 35 Or LUBA 493 (1999).

18.7 Goal 14 – Urbanization – Exceptions to. Where a local government decision does not incorporate a new city but erroneously applies LCDC's rules concerning incorporation of new cities in the course of taking an exception to Goal 14, the error is harmless and provides no basis for reversal or remand. *James v. Josephine County*, 35 Or LUBA 493 (1999).

18.7 Goal 14 – Urbanization – Exceptions to. An exception to Goal 14 is not required where the local government imposes a zoning overlay that limits the subject property to rural uses. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

18.7 Goal 14 – Urbanization – Exceptions to. When a change in the type or intensity of an existing use is proposed for an exception area, the county must (1) make findings showing either that Goal 14 does not apply or the proposal complies with an existing Goal 14 exception; or (2) take a new Goal 14 exception. *Leathers v. Marion County*, 31 Or LUBA 220 (1996).

18.7 Goal 14 – Urbanization – Exceptions to. By definition, all land outside an acknowledged UGB and not the subject of an exception to Goal 14 is "rural" land. When amending its acknowledged comprehensive plan and zone designations for such land, a local government must demonstrate that the new plan and zone designations comply with Goal 14 or adopt an exception to Goal 14. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

18.8 Goal 14 – Urbanization – Urban Reserves. Although the county concedes it erred in denying a plan amendment and zone change application based on the belief that the subject property was, at the time the county made its decision, within a designated urban reserve area, when the LCDC's urban reserve designation regarding the subject property had not actually become final at the time in question, LUBA will not remand the decision if the county's decision identifies at least one valid basis for denial that is affirmed on appeal. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

18.8 Goal 14 – Urbanization – Urban Reserves. LUBA will uphold a county's interpretation of its own comprehensive plan policy regarding when a property may be designated rural commercial where the county evaluated the historic uses of the subject property and concluded that those uses did not demonstrate a "historical commitment to commercial uses," after concluding that (1) temporary commercial uses, (2) incidental or accessory commercial uses to permitted residential or farm uses on the property, and (3) the current unlawful commercial uses on the property were not sufficient to demonstrate "historical commitment" of the property to commercial use, where the county chose to focus on "commitment" which the county understood to require an inquiry into the nature of the historic uses on the property and a determination of whether commercial uses have constrained the scope of the uses on the property such that going forward only commercial uses are feasible, rather than defining commitment in terms of years of commercial use. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

18.8 Goal 14 – Urbanization – Urban Reserves. Under OAR 660-021-0040(4), when resource lands are designated as an Urban Reserve, they must continue to be planned and zoned for the resource uses they were planned and zoned for under Goal 3, Goal 4, Goal 16, Goal 17 or Goal 18 until they are included in the UGB and made available for urban development. *Central Oregon Landwatch v. Jefferson County*, 65 Or LUBA 75 (2012).

18.8 Goal 14 – Urbanization/ Goal 14 Rule – Urban Reserves. It would be inconsistent with ORS 197.625 to allow a local government to rely on an unacknowledged urban reserve designation as a means to avoid the necessity of finding compliance with Goal 14 and other applicable criteria. *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. A local government does not violate the Goal 2 consistency requirement by using updated population projections instead of population projections in its comprehensive plan to determine the size of the urban land need under the urban reserve rule, OAR 660-021-0030, where the two projections serve different purposes and use of the updated projections does not undermine or conflict with the comprehensive plan or implementing regulations. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. The urban reserve rule does not require local governments to study *all* adjacent lands for suitability for inclusion in urban reserves. However, the inventory of suitable lands that the local government compiles must be responsive in size and composition to the urban land need and the priorities provided in OAR 660-021-0030(3). *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. A local government cannot rely upon an inadequate supply of higher priority lands to designate lower priority lands into urban reserves under OAR 660-021-0030(3) or (4), where the local government created the inadequacy it relies upon by failing to include enough higher priority lands in the inventory of suitable lands it compiled under OAR 660-021-0030(2). *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. The primary purpose of OAR 660-021-0030(5) is to develop findings that can form the basis of comprehensive plan language to guide future urbanization decisions. Thus, OAR 660-021-0030(5) requires that the local government adopt findings describing the results of its consideration of the suitability criteria in OAR 660-010-0030(2) for all lands included in urban reserves. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. In determining whether land is suitable for inclusion in urban reserves under the criteria at OAR 660-021-0030(2), evaluation of suitability under Goal 14, factors 3 to 7 is sufficient to show that land is suitable under each of the criteria at Goal 2, Part II, ORS 197.732(1)(c) and OAR 660-004-0010(1)(c)(B), with the exception of the alternative sites analysis required under Goal 2, Part II (b), ORS 197.732(1)(c)(ii), and OAR 660-004-0010(1)(c)(B)(ii). *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. In determining whether land is suitable for inclusion in urban reserves, OAR 660-021-0030(2) requires that, prior to including any lower priority land in urban reserves pursuant to OAR 660-021-0030(4), the local government must conduct an alternative sites analysis sufficient to demonstrate that nonresource lands cannot reasonably accommodate the need that justifies the inclusion of land under OAR 660-021-0030(4). *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. In order to find that land is suitable for inclusion in urban reserves under OAR 660-021-0030(2), the local government must define a threshold for each applicable Goal 14 factor, and determine with respect to the lands studied whether the land achieves that defined threshold for each of the applicable Goal 14 factors. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. In determining whether land is suitable for inclusion in urban reserves under OAR 660-021-0030(2), "maximum efficiency of land uses" under Goal 14, factor 4 means that including the land under consideration in urban reserves would encourage (1) urbanization of lands proximate to existing urbanization over more distant lands and (2) urbanization of partially developed lands over undeveloped lands. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. Because land found suitable for urban reserves can be included in urban reserves only under the priorities established in OAR 660-021-0030(3), a local government cannot apply criteria extrinsic to the urban reserve rule to exclude otherwise suitable land from consideration, where doing so alters the inventory of suitable lands

in a manner that allows designation of lands in violation of the OAR 660-0021-0030(3) priorities. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. Local governments can include resource land in urban reserves as first priority lands under OAR 660-021-0030(3)(a) only where the resource land is completely bordered on all sides by lands for which an exception to Goals 3 or 4 has been taken. Resource land that is partially surrounded by other resource lands is not "completely surrounded by exception areas" within the meaning of OAR 660-021-0030(3)(a). *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. Any lands designated as "marginal lands" pursuant to ORS 197.247 retain that status, notwithstanding repeal of that statute. Where the local government is considering lands for inclusion in urban reserves that might include marginal lands, it must correctly identify those lands and assign them second priority status pursuant to OAR 660-021-0030(3)(b). Failure to do so is inconsistent with the urban reserve rule because it treats second priority marginal lands as fourth priority resource lands. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. A local government may include third priority "secondary lands" within urban reserves under OAR 660-021-0030(3)(c) only if such lands have been designated as secondary lands pursuant to a statutory or rule-based definition. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. A local government may substitute lower priority lands for higher priority lands under the exceptions in OAR 660-021-0030(4) only where no land higher in priority than the land under consideration is adequate to accommodate the identified land need. To make that evaluation, the local government must first categorize the inventory of suitable lands according to the OAR 660-021-0030(3) priority scheme. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. The OAR 660-021-0030(4)(a) "jobs/housing" exception requires an analysis of whether higher priority lands, considered cumulatively, can reasonably accommodate the number of housing units or jobs needed to meet the identified need. Local governments err in limiting their analysis under that provision to whether higher priority lands considered individually are reasonable alternatives to the lower priority land under consideration. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. Where a local government includes lands in urban reserves under one or more of the exceptions provided in OAR 660-021-0030(4), it must adopt findings as required by OAR 660-021-0030(5) that are sufficient to ensure that those lands are developed in accordance with the justification for including them in urban reserves. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. Lower priority land may be included in urban reserves under OAR 660-021-0030(4)(c) where inclusion of that land is required in order for a proposed urban reserve area to achieve a maximally efficient urban form. That including

lower priority land in urban reserves would allow provision of urban services to those reserves at least-cost is not a sufficient basis to include land under OAR 660-021-0030(4)(c). *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. Where a local government includes lower priority lands in urban reserves under OAR 660-021-0030(4)(c) because inclusion of such lands is required to achieve the maximum efficiency of land uses, the local government must justify the extent of the lower priority lands included in reserves, and may not include more lower priority lands than are required to achieve that purpose. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. OAR 660-021-0030(4)(c) does not permit a local government to include lower priority lands in urban reserves because those lands are in the vicinity of higher priority lands and their inclusion would amortize costs or achieve an economy of scale in providing urban services to those higher priority lands. The exception in OAR 660-021-0030(4)(c) is directed at circumstances where the geographic relationship between higher priority lands, the urban area, and the lower priority lands under consideration is such that lower priority lands must be included in reserves in order to achieve the maximum efficiency of land uses. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. The requirement at OAR 660-021-0020 that a local government coordinate with affected governmental units in including lands within urban reserves is coextensive with the Goal 2 coordination requirement. Under either requirement, the local government must consider and accommodate as much as possible the needs of affected jurisdictions, and must respond in its findings to the legitimate concerns raised by those jurisdictions. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

18.8 Urbanization/ Goal 14 Rule – Urban Reserves. Designation of "First Tier" urban reserves that will be urbanized or be considered for urbanization before other urban reserves are urbanized or considered for urbanization is inconsistent with Goal 14 where that designation is based on a single Goal 14 factor, rather than on consideration and balancing of all of the Goal 14 factors. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

19. Goal 15 – Willamette River Greenway. Goal 15 guidelines and county code requirements that require to "the greatest possible degree, necessary and adequate public access will be provided along the Willamette River by appropriate legal means," can be met where the city finds that current public access along the river provided by a public riverfront path is adequate, and the city does not err in construing the provision as requiring access only "along" the river instead of "to" the river. *Hulme v. City of Eugene,* 79 Or LUBA 218 (2019).

19. Goal 15 – Willamette River Greenway. Where a cross-petitioner seeks a remedy not available to it by statute, it is an obstacle to LUBA's review of the cross-assignment of error. LUBA lacks authority to affirm in part, and reverse in part a local government's approval of cross-petitioner's project application. ORS 197.835(1). Even assuming that the city erred by applying Willamette Greenway standards to cross-petitioner's housing project application, because they are not "clear and objective," the city's decision approving the development could not be reversed because it is not "prohibited as a matter of law." If LUBA agreed with cross-petitioners, the correct disposition would be remand, except that remand was not requested and would have no effect on the city's decision approving the application. In such a situation, LUBA will consider the request a contingent cross-assignment of error. *Hulme v. City of Eugene,* 79 Or LUBA 218 (2019).

19. Goal 15 – Willamette River Greenway. Pursuant to OAR 660-004-0018(4)(a), where a city finds that "[e]xisting plan and zoning designations" will be maintained for land subject to a Goal 15 exception, but does not explain why "existing plan and zoning designations" "limit the uses * * * public facilities and services, and activities" to only those that are justified in the exception, remand is required for the city to explain why the land subject to an exception to Goal 15 satisfies the requirement in OAR 660-004-0018(4)(a) that the plan and zone designations "limit the uses * * * public facilities and services, and activities" to those justified in the exception, or apply plan and zone designations that limit the uses to the transportation facilities that are justified in the exception. *Deumling v. City of Salem,* 76 Or LUBA 99 (2017).

19. Goal 15 – Willamette River Greenway. Where a petitioner argues a Geographic Information System map in the record suggests that a portion of the Willamette River Greenway included in a city's Goal 15 exception is located outside the city limits, but within county limits, and therefore the county is also required to join in or approve its own Goal 15 exception, petitioner fails to allege a basis for remand or reversal because as a matter of law the official Willamette River Greenway overlay zone boundary is the boundary mapped by the Oregon Department of Transportation, which confirms the greenway overlay zone is entirely within city limits. *Deumling v. City of Salem,* 76 Or LUBA 99 (2017).

19. Goal 15 – Willamette River Greenway. OAR 660-004-0022(6), which provides the standards for approving an exception to Goal 15, allows adverse effect on habitat as long as the adverse effect is not "significant." An argument that challenges a local government's findings that with mitigation, impacts to riparian habitat from a proposed new bridge project will not be significant because the need for mitigation at all demonstrates that the bridge will have a "significant adverse effect" on riparian values provides no basis for reversal or remand. *Deumling v. City of Salem,* 76 Or LUBA 99 (2017).

19. Goal 15 – Willamette River Greenway. Goal 15 requires that the Willamette Greenway setback be based on the inventory of uses and resources within the Greenway. Remand is necessary where a city adopts a 75-foot setback that is not based on the acknowledged Greenway inventory. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

19. Goal 15 – Willamette River Greenway. The category of "water-related uses" that may be allowed within the Greenway setback include waterfront paths, boardwalks, educational displays and similar public facilities used to provide public access to the waterfront. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

19. Goal 15 – Willamette River Greenway. Roads and highways are not water related uses allowed within a Greenway setback without an exception to Goal 15. However, a code provision authorizing "bridges for pedestrians, bicycles and motor vehicles" within the Greenway setback is not categorically inconsistent with Goal 15, as some bridges could qualify as water related uses. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

19. Goal 15 – Willamette River Greenway. Goal 15 requires that the Greenway boundaries be shown on a comprehensive plan map, but does not require local governments to show the Greenway setback from the river on a comprehensive plan map. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

19. Goal 15 – Willamette River Greenway. Even if a county is not required to issue Willamette Greenway approvals at the same time it issues a use permit to retroactively approve a wedding event business within the Greenway, a county must nonetheless impose conditions or other measures sufficient to ensure that required Greenway permits will be obtained. *White v. Lane County*, 68 Or LUBA 423 (2013).

19. Goal 15 – Willamette River Greenway. When a local government amends its greenway boundary to include additional land not previously included within the boundary, the local government must also amend its Goal 15, Paragraph B inventory to include the new land in the inventory. *Gunderson, LLC v. City of Portland*, 67 Or LUBA 290 (2013).

19. Goal 15 – Willamette River Greenway. Goal 15 is silent regarding whether amendments to the greenway regulations trigger an obligation to update the greenway inventory, and if so whether the entire inventory must be updated or only the parts of the inventory that are affected by the amendments. However, the phrase "develop the plans and * * * programs" can be fairly read to encompass not only the initial development of the plans and programs but continued development and evolution of the plans and programs through changes to them. Where a current inventory or portions of that inventory were used in developing new greenway regulations, or if the new greenway regulations are of such a nature that the inventory or some part of the inventory must be updated, the inventory must be updated. *Gunderson, LLC v. City of Portland*, 67 Or LUBA 290 (2013).

19. Goal 15 – Willamette River Greenway. LUBA will affirm a planning commission's conclusion that ponds and a slough area were included within the city's Willamette River Greenway boundary for their important natural values, and not because the area is a "channel" of

the Willamette River, where the city's adopted greenway boundary map and a study the city relied on in setting the boundaries support the city's conclusion. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351 (2013).

19. Goal 15 – Willamette River Greenway. The phrase "flows water at ordinary low water" as used in ORS 390.310(1) most likely refers to the flow of water of a surface body of water from the main channel of the Willamette River into the disputed body of water. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351 (2013).

19. Goal 15 – Willamette River Greenway. Water flowing from the main channel of the Willamette River through gravel and rocks of a man-made weir is not a method of transmitting water from the river that falls within the ORS 390.310(1) description of "flows water at ordinary low water." *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351 (2013).

19. Goal 15 – Willamette River Greenway. A hearings officer's interpretation of the phrase "Willamette River" found in the portion of the city's code that implements Statewide Planning Goal 15 (Willamette River Greenway) as meaning only the main channel of the Willamette River is inconsistent with the definition of "Willamette River" set out at ORS 390.310(3), which is referenced in Goal 15 and which defines Willamette River to include all "channels" of the river. *Willamette Oaks LLC v. Lane County*, 64 Or LUBA 328 (2011).

19. Goal 15 – Willamette River Greenway. Goal 15, Paragraph (C)(3)(j) does not provide a blanket exemption from development review for expansions or intensifications of existing urban uses that are located within the Willamette River Greenway, but merely recognizes that urban uses that were already located along the riverfront at Goal 15's adoption are allowed to remain along the riverfront without having to be relocated "away from the river." *Gunderson, LLC v. City of Portland*, 62 Or LUBA 403 (2011).

19. Goal 15 – Willamette River Greenway. Challenges to a local government's amendment of the Willamette River Greenway boundary for compliance with Statewide Planning Goal 15 are not within LUBA's scope of review. ORS 390.322 gives LCDC jurisdiction to approve greenway boundary amendments, and OAR 660-020-0065(6) provides that such amendments are to be approved by rule making. ORS 197.825(2)(d) provides that LUBA does not have jurisdiction to review administrative agency decisions that result in rule making. *Gunderson, LLC v. City of Portland*, 62 Or LUBA 403 (2011).

19. Goal 15 – Willamette River Greenway. A city finding that the "top of the bank" is located entirely within 50 horizontal feet of the high water line is not supported by substantial evidence, where the applicant submitted a survey showing that at two points the top of the bank is further than 50 horizontal feet, and the city cites no specific evidence to the contrary. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

19. Goal 15 – Willamette River Greenway. Where a city code requires that one of two different methods for determining the top of the bank be applied, depending on which of two specified site conditions are found, the choice of method for determining the top of the bank is governed by the corresponding site condition, notwithstanding that the resulting top of the bank is discontinuous.

The city errs in determining the location of the top of the bank based not on one of the two specified methods, but rather on the city's preference for a continuous setback. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

19. Goal 15 – Willamette River Greenway. Goal 15 requires that local comprehensive plans designate lands within the Willamette River Greenway that are suitable for acquisition so that they may be put to one of a number of uses identified in Goal 15. *Willamette Oaks, LLC v. City of Eugene*, 46 Or LUBA 813 (2004).

19. Goal 15 – Willamette River Greenway. A final city decision to purchase property within the Willamette River Greenway is a land use decision, where the city is required to apply its comprehensive plan provisions that identify the property the city will purchase within the Willamette River Greenway for Willamette River Greenway purposes. *Willamette Oaks, LLC v. City of Eugene,* 46 Or LUBA 813 (2004).

19. Goal 15 – Willamette River Greenway. A statement that the requested Willamette River Greenway permit is to allow placement of a dwelling on the identified subject property is sufficient to satisfy the requirement of ORS 197.763(3)(a) that the notice of hearing "[e]xplain the nature of the application and the proposed use or uses which could be authorized." *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

20. Goal 16 – Estuarine Resources. Goal 16, Implementation Requirement 2 (allows dredging in the estuary based on a finding of demonstrated need (*e.g.*, a substantial public benefit), which necessarily requires consideration of the need for or public benefit of the land-based use that the dredging serves, because dredging in itself provides no public benefits apart from the uses that dredging serves. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

20. Goal 16 – Estuarine Resources. While Goal 16, Implementation Requirement 2 (IR2) requires a demonstration of need (*e.g.*, a substantial public benefit) for a proposed land use served by dredging estuarine waters, IR2 does not require that the decision-maker weigh potential benefits of the proposed use against potential detriments to arrive a "net" public benefit. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

20. Goal 16 – Estuarine Resources. A county errs in finding that the Goal 16, Implementation Requirement 2 "demonstrated need" standard is met based on the fact that the proposed water-dependent use is an allowed use in the estuarine zone, which generally allows only water-dependent uses, as that approach conflates the separate requirements for a "water-dependent" use and a "demonstrated need" for the use. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

20. Goal 16 – Estuarine Resources. Remand is necessary where a county finds that exclusion zones around liquefied natural gas tankers in a narrow estuary will not interfere with public trusts right to use the estuary based on the county's understanding that the Coast Guard will allow "known" boats to traverse the exclusion zone without delay, but the expert evidence in the record does not support that finding. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

20. Goal 16 – Estuarine Resources. In reviewing a proposed liquefied natural gas (LNG) terminal, the "demonstrated need/substantial public benefits" requirement of Goal 16, Implementation Requirement 2, does not require a county to consider the adverse effects of greenhouse gases on climate change that could be attributed to overseas consumption of natural gas that is shipped to markets via the proposed LNG. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

20. Goal 16 – Estuarine Resources. The "clearly supports" standard at ORS 197.835(11)(b) does not authorize LUBA to affirm a decision notwithstanding inadequate findings, where the lack of adequate findings concern a subjective approval standard under Goal 16 requiring that the local government, in approving development in an estuary, identify the "public need [for] and gain" from the project warrant any modification or loss to estuarine values that would result from the development, and evaluate and minimize the adverse impacts of development. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

20. Goal 16 – Estuarine Resources. A local government errs in imposing a condition of approval deferring consideration of compliance with a comprehensive plan policy requiring the applicant and county to undertake a process to consult and resolve differences with local Native American tribes before approving development in an estuary, where the deferral is to an *ad hoc* proceeding without any assurances that the deferred proceeding will actually occur, and the deferral is not

supported by findings demonstrating that deferral is permissible under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), or *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009). *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

20. Goal 16 – Estuarine Resources. A liquefied natural gas export facility is a "terminal" for purposes of OAR 660-037-0040(6)(a)(C)(iii), and thus properly viewed as a use that qualifies as a "water-dependent use" allowed in estuarine zones. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

20. Goal 16 – Estuarine Resources. Deferral of compliance with an approval standard to a subsequent proceeding under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), or *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009), may not be permissible at all where the approval standard at issue invokes a particular process that is explicitly linked to submittal of the development application, requiring consultation and dispute resolution between the applicant, the local government, and a sovereign Native American Tribe before development approval. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

20. Goal 16 – Estuarine Resources. Comprehensive plan amendments must be consistent with both Goal 16 and city comprehensive plan policies that implement Goal 16. Where the comprehensive plan implements Goal 16 in identical language, there is no practical difference in the way that LUBA reviews findings that apply one rather than the other. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

20. Goal 16 – Estuarine Resources. Goal 16, Implementation Requirement 1 requires that actions that would potentially alter the estuarine ecosystem be preceded by a clear assessment of the impacts of the proposed alteration. Read in the context of Goal 16 itself, which requires protection of the environmental values of the estuary, Implementation Requirement 1 is best understood to require that the local government (1) review an impact assessment that adequately identifies potential adverse impacts on the estuary's physical processes or biological values from development allowed under proposed comprehensive plan or zoning amendments, and (2) ensure that such impacts are avoided or minimized. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

20. Goal 16 – Estuarine Resources. A finding that development will have no "significant" adverse impacts on estuarine resources does not indicate that the decision maker misunderstood the applicable test under Goal 16, Implementation Requirement 1, which is focused on evaluation of "potential" adverse impacts, where other findings address the potential for adverse impacts. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

20. Goal 16 – Estuarine Resources. Under Goal 16, Implementation Requirement 1, a city errs in finding that development allowed under proposed residential zoning will not result in potential adverse impacts on adjacent estuarine resources, based on a comparison of potential impacts of hypothetical industrial uses that could be allowed under a former county zone. Goal 16, Implementation Requirement 1 requires evaluation and avoidance or minimization of impacts of development allowed under the proposed zoning, regardless of whether such impacts would be

greater or lesser compared to the impacts of hypothetical uses allowed in former zones. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

20. Goal 16 – Estuarine Resources. While the evaluation of impacts on estuarine resources required by Goal 16, Implementation Requirement 1 need not be prepared by an expert, the nature of some types of potential adverse impacts caused by development on estuarine resources may be such that some technical expertise is necessary to provide substantial evidence to support conclusions based on the evaluation. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

20. Goal 16 – Estuarine Resources. Where the record includes expert testimony that residential development may adversely impact endangered salmon species in an adjacent estuary through pollution from stormwater runoff, some level of scientific or professional expertise is necessary to rebut that testimony in order to provide supporting evidence for a contrary conclusion. A letter from the applicant's attorney opining that stormwater runoff will not adversely impact salmon is not substantial evidence to support that conclusion. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

20. Goal 16 – Estuarine Resources. LUBA will remand for more adequate findings where a city finds that a stormwater conveyance system constructed to city standards will minimize potential adverse impacts of stormwater pollutants on estuarine fish resources, where the finding does not describe potential adverse impacts, address expert testimony regarding those impacts, or explain why compliance with city stormwater construction standards is sufficient to minimize potential adverse impacts. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

20. Goal 16 – Estuarine Resources. Remand is required where a city's only finding responding to testimony that pesticides and herbicides runoff from residential development will harm fish in the adjacent estuary is that pesticides and herbicides will not be applied within a riparian buffer, but the finding does not address runoff from the residential development itself, and no condition is imposed that prohibits application of pesticides or herbicides within the riparian buffer. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

20. Goal 16 – Estuarine Resources. Goal 16, Implementation Requirement 1 requires evaluation of the impacts of development allowed under proposed zoning, but does not require the local government to evaluate potential adverse impacts of alterations approved in earlier land use decisions. *Oregon Coast Alliance v. City of Brookings*, 72 Or LUBA 222 (2015).

20. Goal 16 – Estuarine Resources. Findings are inadequate to establish that rezoning land adjacent to an estuary to allow for urban residential development is consistent with Goal 16, where federal agencies testified that development allowed under the rezone would adversely affect estuarine resources, but the findings do not address that testimony, or evaluate impacts of development on the estuary as Goal 16, Implementation Requirement 1 requires. *Oregon Coast Alliance v. City of Brookings*, 71 Or LUBA 14 (2015).

20. Goal 16 – Estuarine Resources. A finding that impacts of a proposed underwater pipeline on aquatic species will be "temporary and insignificant" is consistent with the Goal 16 obligation to "protect" estuarine resources. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

20. Goal 16 – Estuarine Resources. Where the applicant's expert assumed that a particular species of native oyster is not found near a pipeline crossing, but opponents raised the issue below, based on a 2009 scientific article, that that species of oyster has recently repopulated the crossing area and may be impacted by the pipeline, the findings do not address that issue, and LUBA cannot tell from the record or findings whether additional measures may be necessary to protect the native oysters beyond those in place to protect other aquatic species, remand is necessary for more adequate findings. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

20. Goal 16 – Estuarine Resources. LUBA will affirm a finding that a proposed mining operation will not add significantly to the cumulative impact of development activities within an estuary, based on findings that the mining operation will essentially replace an existing mining operation that is approaching its end point, and the proposed operation is conditioned to minimize adverse impacts on estuarine values. *Oregon Shores Cons. Coalition v. Curry County*, 61 Or LUBA 8 (2010).

20. Goal 16 – Estuarine Resources. When a local comprehensive plan provision that implements Goal 16 requires the local government to "protect" a resource, any development allowed is not consistent with the Goal 16 definition of "protect" unless there is at most a *de minimis* or insignificant impact on the resource that the provision requires to be protected. *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 96 (2010).

20. Goal 16 – Estuarine Resources. A comprehensive plan provision that implements Goal 16 and requires the local government to "protect" wildlife habitat within an estuary may be satisfied through off-site mitigation within the Goal 16 definition of "protect" if such mitigation results in no net loss to the protected habitat within the estuary, even if there is an impact at the development site. *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 96 (2010).

20. Goal 16 – Estuarine Resources. Where the petitioner submits written testimony that the proposal is inconsistent with Goal 16, an argument that presumes Goal 16 is applicable, and the planning commission responds to that testimony with a finding that Goal 16 is inapplicable, the issue of whether Goal 16 is applicable has been sufficiently raised for purposes of ORS 197.763(1) and 197.835(3). The petitioner is not required to anticipate how the local government will respond in its findings to issues raised below. *Sommer v. Douglas County*, 60 Or LUBA 32 (2009).

20. Goal 16 – Estuarine Resources. LUBA will affirm a finding that an upland dredged material disposal site is not part of the estuary and therefore not subject to Goal 16, where the petitioner cites nothing in the county's comprehensive plan or elsewhere indicating that the disposal site is within the estuary or otherwise subject to Goal 16. *Sommer v. Douglas County*, 60 Or LUBA 32 (2009).

20. Goal 16 – Estuarine Resources. Where a small scale estuarine management unit map is ambiguous, even if the evidence in the record established that a tax lot was being mined in 1981

when estuary management unit designations were applied to the property, that would not conclusively establish an intent to place the tax lot in an estuary management unit that allows mining, as opposed to a management unit that does not allow mining, when the small scale map was adopted in 1981. However, such evidence would likely constitute substantial evidence of an intent to place the tax lot into an estuary management unit that allows mining, when the map was adopted in 1981. *Oregon Shores Cons. Coalition v. Curry County*, 60 Or LUBA 415 (2010).

20. Goal 16 – Estuarine Resources. Comprehensive plan maps that are not tax lot specific and post-1981 aerial photographs are not substantial evidence that a small tax lot was being mined in 1981 when the comprehensive plan was first adopted. *Oregon Shores Cons. Coalition v. Curry County,* 60 Or LUBA 415 (2010).

20. Goal 16 – Estuarine Resources. The Goal 16 obligation that comprehensive plans "maintain the diversity of important and unique environmental, economic and social features within the estuary" is an on-going obligation that is potentially applicable to a post-acknowledgement plan amendment, and is not merely applicable to the initial development and adoption of the comprehensive plan. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

20. Goal 16 – Estuarine Resources. Goal 16 Implementation Requirement 1 directs the local government to adopt land use regulations that require an impact assessment of proposed alterations in estuarine waters. Once the local government adopts such regulations, the local government is not required conduct an impact assessment when adopting plan amendments that allow a range of development uses in the estuary. Compliance with the Goal is assured by the fact that any specific development proposal will be evaluated under code standards that directly implement Implementation Requirement 1. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

20. Goal 16 – Estuarine Resources. The Goal 16 requirement that comprehensive plans "maintain the diversity" of important and unique economic features within the estuary does not require a local government to evaluate all potential negative economic consequences of particular uses allowed by post-acknowledgment plan amendments, or require that local governments protect existing economic uses against new, perhaps competing or conflicting economic uses. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

20. Goal 16 – Estuarine Resources. In adopting a plan amendment that redesignates a portion of the estuary from conservation to development to facilitate construction of a proposed Liquefied Natural Gas terminal, the city is not required to evaluate speculative concerns that the terminal will delay and inconvenience maritime traffic in order to comply with the Goal 16 requirement to "maintain the diversity" of important and unique economic features in the estuary. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

20. Goal 16 – Estuarine Resources. Where it is unknowable at the time the local government considers a post-acknowledgment plan amendment that allows a range of development in the estuary whether and the extent to which a specific use potentially allowed by the amendments will adversely affect maritime traffic in the estuary, it is appropriate to find that the plan amendment

complies with Goal 16, based in part on reliance that speculative issues raised regarding adverse impacts of particular uses will be adequately addressed under code standards that apply to such uses at the time of construction and that are designed to address such impacts. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

20. Goal 16 – Estuarine Resources. While it may be error to adopt findings of compliance with Goal 16 that consider only the positive economic benefits of the plan amendment without considering countervailing evidence of negative impacts, petitioners demonstrate no such error where the local government in fact considered the countervailing evidence and rejected it as unpersuasive and speculative. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

20. Goal 16 – Estuarine Resources. In adopting post-acknowledgment plan amendments that allow a range of uses in estuarine waters, a local government may adopt findings concluding that the types of uses allowed by the amendment are consistent with applicable Goal 16 requirements, while relying on specific permitting processes that implement the goal and that are designed to address and mitigate the possibility that particular development proposals may have more intense impacts than others, as an additional basis for concluding that the amendment complies with Goal 16. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

20. Goal 16 – Estuarine Resources. Loss of two acres of estuarine habitat is not necessarily inconsistent with Goal 16, where the Oregon Department of Fish and Wildlife regulations provide that the goal for the habitat is "no net loss of habitat quality or quantity," there is expert testimony that potential mitigation sites are available in the vicinity, and any development allowed under the post-acknowledgment plan amendment that might result in loss of the two acres will be subject to federal, state and local permit requirements that will require mitigation. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

20. Goal 16 – Estuarine Resources. A code provision that encourages the city to expand local maritime activities is not a "minimum acceptable performance standard" for purposes of the OAR 660-012-0060(1)(c)(B) requirement that plan amendments not reduce a transportation facility's performance below the minimum acceptable performance standard identified in the transportation system plan or comprehensive plan. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181 (2006).

20. Goal 16 – Estuarine Resources. While the Goal 16 conservation unit description does not mention riprap, the administrative rule implementing Goal 16 states that riprap is appropriate in conservation units, subject only to findings that riprap is consistent with the resource capabilities and the purpose of the management unit. *Oregon Shores Cons. Coalition v. Lane County*, 52 Or LUBA 471 (2006).

20. Goal 16 – Estuarine Resources. In an appeal of a post-acknowledgment plan amendment that redesignates an estuarine area from a natural management unit to a conservation management unit, the petitioner cannot argue that the acknowledged conservation unit provisions that allow riprap as a conditional use are inconsistent with Goal 16. *Oregon Shores Cons. Coalition v. Lane County*, 52 Or LUBA 471 (2006).

20. Goal 16 – Estuarine Resources. Goal 16 requires that, in adopting a post-acknowledgment plan amendment redesignating an estuarine area to a conservation management unit in order to allow riprap to be placed in an estuary, the local government must adopt plan language that evaluates the "potential cumulative impacts of alterations and development activities envisioned." *Oregon Shores Cons. Coalition v. Lane County*, 52 Or LUBA 471 (2006).

20. Goal 16 – Estuarine Resources. A local government may rely on evidence that clam beds that partially justified a previous natural management unit designation have been smothered by erosion, and the reduced habitat value warrants redesignation of the area to a conservation management unit, notwithstanding conflicting evidence over the remaining habitat value. *Oregon Shores Cons. Coalition v. Lane County*, 52 Or LUBA 471 (2006).

20. Goal 16 – Estuarine Resources. A comprehensive plan policy that applies only to estuarine areas governed by Goal 16 does not apply to proposed development within a zone that includes only coastal shorelands governed by Goal 17. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005).

21. Goal 17 – Coastal Shorelands. The petitioner failed to raise the issue below that the upland portion of a creek should be included within the coastal shoreland boundary as a riparian resource, where the only arguments made below regarding the creek concerned flooding and the only arguments regarding the shoreland boundary and riparian resources did not concern the creek. *Oregon Coast Alliance v. City of Brookings*, 71 Or LUBA 14 (2015).

21. Goal 17 – Coastal Shorelands. LUBA will affirm a local government's interpretation of the provisions of its comprehensive plan that implement Goal 17 to be as protective as, but not more protective than, Goal 17, where the text of the comprehensive plan provisions make clear that the local government did not intend to regulate coastal shorelands more protectively than Goal 17. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

21. Goal 17 – Coastal Shorelands. LUBA is required under ORS 197.829(1) to affirm a local government's interpretation of a provision of its comprehensive plan that identifies the location of the coastal shorelands boundary as "the top of the seacliff along the seacliff shoreline" as a "general guide as to the location of the [boundary]" rather than a specific minimum elevation, where the interpretation is not inconsistent with the express language of the provision or the comprehensive plan map, and is plausible. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

21. Goal 17 – Coastal Shorelands. Goal 17 provides in part that coastal shorelands must include "adjacent areas of geologic instability where the geologic instability is related to or will impact a coastal water body[.]" In order to be consistent with Goal 17, a cliff erosion geologic hazard analysis that is relied on to determine the location of the coastal shorelands boundary must consider geologic instability from all causes of cliff erosion where the cliff erosion could impact the ocean. A geologic hazard analysis that does not analyze "adjacent areas of geologic instability" from causes of erosion other than waves hitting the shore cannot be relied on to locate the boundary consistent with Goal 17. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

21. Goal 17 – Coastal Shorelands. Goal 17 requires in part that coastal shorelands must include "lands within 100 feet of the ocean shore[.]" A county decision that locates the coastal shorelands boundary at the top of the beach and at the bottom or mid-point of shorefront cliffs is inconsistent with Goal 17, because such locations are arguably where the "ocean shore," as defined in ORS 390.605(2), ends and that interpretation gives little or no depth to the coastal shorelands boundary beyond the "ocean shore" in some places. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

21. Goal 17 – Coastal Shorelands. Remand is necessary where county regulations implementing Goal 17 require that the county delineate the coastal shorelands boundary based on a geological hazard analysis of areas of geological instability adjacent to the ocean, but the county instead adopts a delineation that does not consider geological instability and is not based on a geological hazard analysis. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

21. Goal 17 – Coastal Shorelands. Where in approving a destination resort in coastal shorelands that is dependent on groundwater the county addresses a number of comprehensive plan policies implementing Goal 17, but does not address a potentially applicable plan policy in the plan Goal 17 element that requires the county take measures to protect groundwater, remand is necessary for

the county to either address the policy or explain why it is not applicable. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

21. Goal 17 – Coastal Shorelands. Where a county finds that the comprehensive plan and zoning map designations for a parcel that is subject to Goal 17 can be amended consistently with the county's acknowledged Goal 17 program because that Goal 17 program is unaffected by the amendment, an argument that "this casual dismissal of Goal 17 cannot provide the basis for the rezoning decision" is not sufficiently developed for review. *Holloway v. Clatsop County*, 52 Or LUBA 644 (2006).

21. Goal 17 – Coastal Shorelands. Even if the Goal 17 requirements governing shorelands "suitable for water-dependent uses" and "especially suited for water-dependent uses" have an independent significance under Goal 17, where the county's acknowledged code and plan treat the two phrases interchangeably, any error in conflating the meaning of the two phrases cannot be challenged in a permit decision. *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500 (2006).

21. Goal 17 – Coastal Shorelands. LUBA will affirm a governing body's interpretation that only a portion of a coastal shorelands zone is designated as "suitable for water-dependent uses" and therefore subject to a policy that limits non-water-dependent development, where the zone refers to a comprehensive map that depicts only a portion of the zone as being "especially suited for water-dependent uses" and read in context it is clear that the policy is not intended to apply throughout the zone. *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500 (2006).

21. Goal 17 – Coastal Shorelands. The purpose of OAR 660-037-0080(3) is to preserve suitable shorelands for water-dependent uses, by allowing non-water-dependent uses in such shorelands only if those uses are "incidental and subordinate." It is inconsistent with that purpose to include large areas of coastal waters in calculating the ratio of water-dependent to non-water-dependent uses, because that greatly increases the size and extent of non-water-dependent uses allowed on coastal shorelands. *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500 (2006).

21. Goal 17 – Coastal Shorelands. Outdoor spaces that may be attributed to water-dependent or non-water-dependent uses, in applying the ratio test at OAR 660-037-0080(3), include developed outdoor spaces such as parking lots, and undeveloped outdoor spaces that are committed by nearby development to either water-dependent or non-water-dependent uses. *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 506 (2006).

21. Goal 17 – Coastal Shorelands. A set of stairs 144 square feet in size providing pedestrian access to a 67,607-square-foot area of beach and tideland does not "commit" that beach area to water-dependent uses, for purposes of OAR 660-037-0080(3). *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500 (2006).

21. Goal 17 – Coastal Shorelands. Under the Goal 17 rule, a water-dependent use is a commercial, industrial or recreational use that requires location in proximity to an estuary in order to access the estuary. An artificial wetland used to mitigate wetland losses to residential development and filter storm water generated by residential development is not a "water-

dependent use" for purposes of the rule, notwithstanding that the wetland function is dependent on water. *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500 (2006).

21. Goal 17 – Coastal Shorelands. 130,000 square feet of open space areas interspersed between 115,945 square feet of non-water-dependent residential development is effectively committed to non-water-dependent uses, and must be counted as a nonwater-dependent use for purposes of the ratio test at OAR 660-037-0080(3). *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500 (2006).

21. Goal 17 – Coastal Shorelands. A facility that allows public viewing of estuarine waters, such as a boardwalk or a wetland viewing area, is not a recreational water-dependent use for purposes of OAR 660-037-0080(3). *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500 (2006).

21. Goal 17 – Coastal Shorelands. Issues that could have been, but were not, raised in the first appeal to LUBA are waived in any appeal of the decision on remand under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). Findings adopted on remand explaining why proposed development is allowed in a public facility zone do not open the door to allow a petitioner to raise issues regarding whether the development is consistent with Statewide Planning Goal 17 (Coastal Shorelands). *Moreland v. City of Depoe Bay*, 50 Or LUBA 44 (2005).

21. Goal 17 – Coastal Shorelands. A comprehensive plan policy that applies only to estuarine areas governed by Goal 16 does not apply to proposed development within a zone that includes only coastal shorelands governed by Goal 17. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005).

21. Goal 17 – Coastal Shorelands. A requirement in the Goal 17 rule that non-water-dependent uses be constructed at the same time or after the water-dependent use is "established" does not mean that the water-dependent uses must be operating at full capacity before non-water-dependent uses may be constructed. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005).

21. Goal 17 – Coastal Shorelands. The Goal 17 rule requires that non-water-dependent uses be "incidental and subordinate" to water dependent uses, based on a 1-to-3 ratio between the square footage of indoor floor space and "outdoor acreage" distributed between the two uses. However, "outdoor acreage" includes only outdoor areas that are developed for either non-water dependent or water dependent uses, such as parking lots or boat ramps, and does not include vacant, undeveloped uplands or tidal areas that are left in their natural state. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005).

21. Goal 17 – Coastal Shorelands. Where legislative history indicates that the location of the Goal 17 Coastal Shorelands boundary is to be decided on case-by-case basis after site review for geologic hazards under the city's code, the city errs in failing to conduct the required site review to locate the Coastal Shorelands boundary. *Crowley v. City of Bandon*, 43 Or LUBA 79 (2002).

21. Goal 17 – Coastal Shorelands. Where legislative history indicates that the location of the Goal 17 Coastal Shorelands boundary is to be decided on case-by-case basis after site review for

geologic hazards under the city's code, the city errs in failing to conduct the required site review to locate the Coastal Shorelands boundary. *Crowley v. City of Bandon*, 43 Or LUBA 79 (2002).

21. Goal 17 – Coastal Shorelands. A city errs in interpreting a comprehensive plan provision implementing Goal 17 to allow the top of a bluff and the Coastal Shorelands boundary located along that bluff to be moved westward as a result of excavating the top of the bluff, at least absent evidence that the area between the original boundary and the relocated boundary is geologically stable. *Crowley v. City of Bandon*, 43 Or LUBA 79 (2002).

21. Goal 17 – Coastal Shorelands. Where a petitioner does not explain why approval criteria for fill in a floodplain and coastal shoreland necessitated precise delineation of the floodplain boundaries and precise knowledge about the location, amount and nature of the fill, the local government's failure to precisely delineate and describe the floodplain and fill provides no basis for remand. *Willhoft v. City of Gold Beach*, 41 Or LUBA 130 (2001).

21. Goal 17 – Coastal Shorelands. Plan policies that were clearly adopted to implement Goal 17 are not rendered inapplicable to a decision to approve fill in a coastal shoreland simply because the city codified those policies under the part of the comprehensive plan that is nominally devoted to Goal 16. *Willhoft v. City of Gold Beach*, 41 Or LUBA 130 (2001).

21. Goal 17 – Coastal Shorelands. A zoning ordinance provision that expresses a preference for nonstructural over structural solutions to erosion and flooding problems does not apply to an application for recreational vehicle park expansion that proposes erosion or flooding measures, at least where the proposal does not make structural erosion or flood control measures likely or inevitable. *Willhoft v. City of Gold Beach*, 41 Or LUBA 130 (2001).

21. Goal 17 – Coastal Shorelands. Where the city's comprehensive plan locates the boundary of a Goal 17 overlay zone at the "top edge" of the bluff overlooking the ocean, but nothing in the record supports the city's conclusion that proposed expansion of a dwelling built into the bluff will occur outside the overlay zone, remand is necessary for the city to identify the "top edge" of the bluff and the existing dwelling's location in relation to the zoning boundary. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

21. Goal 17 – Coastal Shorelands. Excavation or grading within a setback area in coastal shorelands is inconsistent with Goal 17, implementation requirement 5, and implementing local provisions to the extent excavation or grading increases the erosion rate of existing ocean bank material protecting new structures from erosion. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

21. Goal 17 – Coastal Shorelands. Where LCDC requires a county to adopt comprehensive plan amendments implementing a statewide planning goal by a certain date, and the county fails to implement the goal as of that date, the goal becomes directly applicable to county decisions pursuant to ORS 197.646, even if the goal did not become "effective" as to that county when LCDC adopted the goal. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

21. Goal 17 – Coastal Shorelands. Implementation Requirement 6 of Goal 17, which requires that local governments shall retain or replace existing rights-of-way that provide access to or along coastal waters, unambiguously provides mandatory approval requirements. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

21. Goal 17 – Coastal Shorelands. The extent of "coastal shorelands" subject to the requirements of Goal 17 are not limited to the "ocean shore" as that term is defined in ORS 390.065, but extend inland from the ocean shore at least 100 feet. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

21. Goal 17 – Coastal Shorelands. Nothing in Implementation Requirement 6 of Goal 17, which requires that local governments shall retain or replace existing rights-of-way that provide access to or along coastal waters, limits the applicability of that requirement to rights-of-way that are currently being used to provide access to or along coastal waters. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

21. Goal 17 – Coastal Shorelands. Goal 17, Implementation Requirement 6, requires that in vacating rights-of-way that provide access to or along the ocean shore, the vacating body must provide alternative rights-of-way that, individually or cumulatively, functionally replace the access lost through vacation. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

21. Goal 17 – Coastal Shorelands. Where the vacation of a right-of-way subject to Goal 17, Implementation Requirement 6, is premised on providing alternative rights-of-way to replace access lost through vacation, the alternative rights-of-way must not be based on speculative acquisition of easements, and must be within both the "affected site" of the vacated right-of-way and within "coastal shorelands." *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

21. Goal 17 – Coastal Shorelands. Even where a county determines that a comprehensive plan amendment and zone change would not allow development within the Coastal Shorelands Boundary, the county must also demonstrate that the level of development permitted in the proposed rural residential zone outside the boundary will not adversely affect Goal 17 resources within the boundary. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

22. Goal 18 – Beaches and Dunes. Where neither Goal 18 nor relevant statewide planning goal definitions of "Dune" or "Foredune, Active" describe how to determine the location of the landward edge of a foredune or prescribe that a foredune includes only the top or upper portion of the landform, a local code definition of "foredune" that includes the entire "lee or reverse slope" of the foredune is not inconsistent with Goal 18 or the goal definitions. *Rudell v. City of Bandon,* 64 Or LUBA 201 (2011).

22. Goal 18 – Beaches and Dunes. A local government may regulate dunes and foredunes more protectively than the minimum required by Goal 18, as long as the regulation does not conflict with any other Goal, administrative rule or statutory requirement. *Rudell v. City of Bandon*, 64 Or LUBA 201 (2011).

22. Goal 18 – Beaches and Dunes. In some cases boundaries between Goal 18 landforms such as different types of dunes and interdunal areas may be indeterminate or briefly overlap each other. To the extent there is doubt or overlap, it is not inconsistent with Goal 18 to apply to the boundary area the regulations that govern the more heavily regulated or protected landform. *Rudell v. City of Bandon,* 64 Or LUBA 201 (2011).

22. Goal 18 – Beaches and Dunes. A local government is not bound to apply a federal definition of "primary frontal zone" to determine the landward extent of a foredune for purposes of Goal 18, where the federal definition is used to determine the location of the flood hazard velocity zone and has no bearing on the meaning of "foredune" under Goal 18. *Rudell v. City of Bandon,* 64 Or LUBA 201 (2011).

22. Goal 18 – Beaches and Dunes. ORS 197.829(1)(d) authorizes LUBA to reject an interpretation of a comprehensive plan provision or land use regulation that implements a statute, land use goal or rule, if the interpretation is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. ORS 197.829(1)(d) is not a vehicle to allow LUBA to reverse an interpretation of a code definition that implements and is consistent with Goal 18, based on arguments that if that interpretation is applied in other cases it might impact the adequacy of the city's Goal 9 and 10 inventories of commercial, industrial and residential lands. *Rudell v. City of Bandon,* 64 Or LUBA 201 (2011).

22. Goal 18 – Beaches and Dunes. A county's interpretation that a comprehensive plan policy, which implements Statewide Planning Goal 18 (Beaches and Dunes) and provides criteria for a determination whether development is appropriate in a beaches and dunes area, requires the county to address only adverse geologic or geotechnical impacts and not general development issues, is consistent with the text and context of the policy and the goal. *Borton v. Coos County,* 52 Or LUBA 46 (2006).

22. Goal 18 – Beaches and Dunes. A county's interpretation that a comprehensive plan policy, which implements Statewide Planning Goal 7 (Natural Disasters and Hazards), requires regulation of development in known areas potentially subject to natural disasters and is aimed at reducing risks to life and property that are *caused by natural hazards,* is not applicable in the context of a determination whether development is appropriate in a beaches and dunes area, pursuant to a comprehensive plan policy that implements Statewide Planning Goal 18 (Beaches and Dunes),

which is aimed at reducing impacts that may be *caused by the proposed development*. *Borton v. Coos County*, 52 Or LUBA 46 (2006).

22. Goal 18 – Beaches and Dunes. The Goal 18, Implementation Requirement 5 restriction that "[b]eachfront protective structures may be permitted only where development existed on January 1, 1977" is ambiguous because it could refer to locations where beachfront protective structures may be allowed or it could refer to what development those structures may be constructed to protect. *Regen v. Lincoln County*, 49 Or LUBA 386 (2005).

22. Goal 18 – Beaches and Dunes. The Goal 18, Implementation Requirement 5 restriction that "[b]eachfront protective structures may be permitted only where development existed on January 1, 1977" need not be interpreted to allow construction of a beachfront protective structure anywhere along an eleven-acre parcel simply because one house was located on that eleven-acre parcel on January 1, 1977. *Regen v. Lincoln County*, 49 Or LUBA 386 (2005).

22. Goal 18 – Beaches and Dunes. A party's contention that an alternative setback must either satisfy Goal 18 or an exception must be taken to that goal is not sufficient to raise an issue regarding whether application of an alternative oceanside setback criterion requires that the city first find the standard oceanside setback is "further from the westerly property line than is required for the protection of the Foredune Management Area." *Slepack v. City of Manzanita*, 44 Or LUBA 301 (2003).

22. Goal 18 – Beaches and Dunes. The Goal 18 requirement that structural development be prohibited on "beaches, active dunes [and] on other foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping" applies only to a proposed development site and not to the entire subject property or the entire dune upon which the proposed development site is located. *Save Oregon's Cape Kiwanda v. Tillamook County*, 40 Or LUBA 143 (2001).

22. Goal 18 – Beaches and Dunes. Expert testimony that existing riprap will prevent dune retreat if repaired when damaged is substantial evidence supporting the county's finding under Goal 18 that the dune upon which development is proposed is stabilized and not subject to wave overtopping or ocean undercutting, notwithstanding conflicting expert evidence that the riprap may be insufficient or may fail. *Save Oregon's Cape Kiwanda v. Tillamook County*, 40 Or LUBA 143 (2001).

22. Goal 18 – Beaches and Dunes. Where the accumulation of sand on petitioner's beachfront property is caused by time and nature, and not city's sand removal regulations, denial of petitioner's permit request to remove the sand does not fall within the "physical invasion" category of takings cases. *Beta Trust v. City of Cannon Beach*, 33 Or LUBA 576 (1997).

22. Goal 18 – Beaches and Dunes. Findings regarding the impact of a proposed access road across a dune area are inadequate to establish compliance with Goal 18 where those findings discuss the comparative impacts that would be generated by agricultural or forest uses, but do not directly evaluate the development impacts of the proposed road. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

22. Goal 18 – Beaches and Dunes. Although some of the Goal 18 implementation measures apply to older stabilized dunes, Implementation Requirement 1 does not require the county to make findings regarding older stabilized dunes. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

There are currently no headnotes under this topic.

24.1 Standing – Before Local Government. A zone verification is subject to LUBA's jurisdiction and a person adversely affected by the decision may appeal the decision to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required." ORS 197.830(5)(b). The city was not obligated to and did not provide notice of the zone verification decision to petitioner. Petitioner was put on inquiry notice of the zone verification decision when the city provided petitioner multiple notices of a subsequent land use application, review, and approval for site review, traffic impact analysis, and adjustment review for the same subject property and development described in the zone verification decision. The city invited petitioner to participate in that subsequent land use action and to review public planning documents at the planning division and online. The appeal was untimely filed and must be dismissed because petitioner failed to make such inquiries and the 21-day appeal period expired before petitioner filed the appeal. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

24.1 Standing – Before Local Government. Any error in a planning commission's finding that the petitioner lacked standing to file a local appeal is harmless, where on appeal to the board of commissioners the board disposed of petitioner's appeal on the merits and did not rely on standing as a basis to deny the appeal. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

24.1 Standing – Before Local Government. A county cannot apply more rigorous standing or timely appeal requirements on (1) local appeals of permit decisions than are authorized under ORS 215.416(11) or (2) local appeals of permit decisions under circumstances where, but for the county choosing to provide a local appeal, the petitioner would have the right to appeal the permit decision directly to LUBA under ORS 197.830(3). *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

24.1 Standing – Before Local Government. A county is not required to evaluate a petitioner's standing to file a local appeal based on the presumption that the petitioner was entitled to notice of the decision, where there is no dispute that the petitioner did not live within the notice area and was not entitled to notice of the decision at the time the decision was made. That the petitioner now lives within the notice area does not establish entitlement under state or local law to notice of the decision or to file a local appeal. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

24.1 Standing – Before Local Government. A petitioner's actual knowledge that the applicant has applied to the county for a dwelling permit and that the county intends to approve it, and that a well dug on the property is to perfect the permit for a dwelling, is more than sufficient knowledge to place the petitioner on "inquiry notice" that the county has approved a dwelling on the applicant's property. Where the petitioner waits more than a year after being placed on "inquiry notice" that the county had approved a dwelling to actually discover the permit decision and file a local appeal, the local appeal is untimely filed, under local appeal provisions based on ORS 197.830(3)(b). *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

24.1 Standing – Before Local Government. Observation of well-digging equipment traveling on a dead-end road toward one of several nearby properties is insufficient in itself to place a reasonable person on "constructive" or "inquiry notice" that the county had approved development on a specific property, for purposes of ORS 197.830(3)(b) and local code equivalents. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

24.1 Standing – Before Local Government. Information sufficient to place a petitioner on "inquiry notice" for purposes of ORS 197.830(3)(b) must, at a minimum, allow the petitioner to identify the property on which development has been approved. If the petitioner must conduct factual inquiries to determine which property in the neighborhood is being developed, the 21-day deadline to discover the decision approving the development may expire before the petitioner has acquired information sufficient to make effective inquiries with the local government. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

24.1 Standing – Before Local Government. Information sufficient to place a petitioner on "inquiry notice" for purposes of ORS 197.830(3)(b) must indicate to a reasonable person that the local government has likely issued a land use approval of some kind. Observation of road traffic associated with well-digging activities is insufficient in itself, because the activity of digging a well does not necessarily mean that the county has issued a land use approval. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

24.1 Standing – Before Local Government. Absent a local provision or other authority that limits standing to appeal a permit revocation decision only to current owners of the property to which the permit applies, a city errs in dismissing the permit holder's local appeal of a permit revocation decision for lack of standing, solely because the permit holder informs the city that the property has been sold to a third party. *Merton v. City of Jefferson*, 53 Or LUBA 559 (2007).

24.1 Standing – Before Local Government. Where a county code grants standing to file a local appeal to parties who are "adversely affected" by planning commission decisions, but the local code does not define the term "adversely affected," LUBA will assume the county's intended meaning of that term is consistent with its meaning in other land use laws. As that term is used in the 1979 statute that governed standing to appeal to LUBA, adversely affected means the "decision impinges upon the petitioner's use and enjoyment of his or her property or otherwise detracts from interests personal to the petitioner." *Jefferson Landfill Comm. v. Marion Co.*, 297 Or 280, 283, 686 P2d 310 (1984). *Burke v. Crook County*, 46 Or LUBA 413 (2004).

24.1 Standing – Before Local Government. Where a local code grants standing to appeal planning commission decisions to parties who are "adversely affected," a county may not limit standing to appeal to the applicant, nearby property owners and persons who testified, where the local code does not clearly adopt that limited interpretation of the term "adversely affected." *Burke v. Crook County*, 46 Or LUBA 413 (2004).

24.1 Standing – Before Local Government. LUBA will reject a challenge to a petitioner's standing based on an allegation that petitioner appeared below as an agent of the property owner and not on its own behalf, where the only evidence cited to support that allegation is a letter from the property owner that does not authorize petitioner to act as an agent of the property owner; petitioner filed the application leading to the challenged decision; and it is clear from the record that petitioner appeared on its own behalf and not the property owner's. *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385 (2002).

24.1 Standing – Before Local Government. When undisputed evidence in the record establishes that petitioner appeared below, and therefore establishes petitioner's standing before LUBA, the

Board will not take evidence outside of the record for purposes of establishing standing before the Court of Appeals, because such evidence will not "affect the outcome" of LUBA's proceedings, within the meaning of OAR 661-010-0045(2). *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247 (2002).

24.1 Standing – Before Local Government. An organization that appears before a hearings officer and county board of commissioners has standing to appeal the county's decision to LUBA under ORS 197.830(2), and need not establish that it also meets the test for representational standing under *1000 Friends of Oregon v. Multnomah Co.*, 39 Or App 917, 593 P2d 1171 (1979). *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111 (2001).

24.1 Standing – Before Local Government. Where the notice of intent to appeal challenges a governing body's decision determining that petitioner has no standing to file a local appeal of a planning director's decision, but the petition for review assigns error only to the planning director's decision, the petition for review provides no basis to reverse or remand the governing body's decision. *Doob v. Josephine County*, 39 Or LUBA 301 (2001).

24.1 Standing – Before Local Government. A person's previous experience in appealing land use decisions or his philosophical interest in the correct application of the county's land use regulations may be germane to whether that person, who appears before the county, might qualify as "aggrieved" by a county permit decision, but such experience or interest is not germane to whether that person is "adversely affected" by the decision. *Doob v. Josephine County*, 39 Or LUBA 301 (2001).

24.1 Standing – Before Local Government. The question of whether intervenor was a proper party in an earlier local proceeding is determined by the local ordinance governing standing and not the ordinance that regulates the content of materials that may be presented in that proceeding. Where a party appeared during the local proceeding, the party has standing at LUBA under OAR 661-10-050. *Evans v. Multnomah County*, 33 Or LUBA 555 (1997).

24.1 Standing – Before Local Government. Where the local code provides that a property owner may file a conditional use application, a property owner has standing to file an application for approval of a home occupation, even though the property owner does not propose to reside in the dwelling and conduct the home occupation. *Tarbell v. Jefferson County*, 21 Or LUBA 294 (1991).

24.1 Standing – Before Local Government. Where the local code makes no distinction among "interested persons," "disinterested witnesses," and "parties," any person who appears at a local hearing is recognized as an "interested person" who could be aggrieved by the local decision. *Lowrie v. Polk County*, 19 Or LUBA 564 (1990).

24.1 Standing – Before Local Government. A statement in a governing body's decision that a person is not adversely affected by a hearings officer's decision is not equivalent to a determination that such a person is not "aggrieved" for purposes of determining standing. *Lowrie v. Polk County*, 19 Or LUBA 564 (1990).

24.2.1 Standing – Before LUBA – Generally. Where LUBA concludes it lacks jurisdiction because the challenged decision is not a "land use decision" under ORS 197.015(10)(a), LUBA will not resolve a challenge to petitioner's standing to appeal the decision to LUBA. *McLaughlin v. Douglas County*, 76 Or LUBA 77 (2017).

24.2.1 Standing – Before LUBA – Generally. A county cannot apply more rigorous standing or timely appeal requirements on (1) local appeals of permit decisions than are authorized under ORS 215.416(11) or (2) local appeals of permit decisions under circumstances where, but for the county choosing to provide a local appeal, the petitioner would have the right to appeal the permit decision directly to LUBA under ORS 197.830(3). *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

24.2.1 Standing – Before LUBA – Generally. Observation of well-digging equipment traveling on a dead-end road toward one of several nearby properties is insufficient in itself to place a reasonable person on "constructive" or "inquiry notice" that the county had approved development on a specific property, for purposes of ORS 197.830(3)(b) and local code equivalents. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

24.2.1 Standing – Before LUBA – Generally. Information sufficient to place a petitioner on "inquiry notice" for purposes of ORS 197.830(3)(b) must, at a minimum, allow the petitioner to identify the property on which development has been approved. If the petitioner must conduct factual inquiries to determine which property in the neighborhood is being developed, the 21-day deadline to discover the decision approving the development may expire before the petitioner has acquired information sufficient to make effective inquiries with the local government. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

24.2.1 Standing – Before LUBA – Generally. Information sufficient to place a petitioner on "inquiry notice" for purposes of ORS 197.830(3)(b) must indicate to a reasonable person that the local government has likely issued a land use approval of some kind. Observation of road traffic associated with well-digging activities is insufficient in itself, because the activity of digging a well does not necessarily mean that the county has issued a land use approval. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

24.2.1 Standing – Before LUBA – Generally. Where the notice of a hearing described a proposal for a conditional use permit for a home occupation to host events in a pole barn, and the county's decision approved a conditional use permit for a home occupation to host events in a pole barn, a petitioner may not rely on ORS 197.830(3) to file its appeal, because the local government did not make a land use decision that was different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions. *Willis v. Clackamas County*, 76 Or LUBA 479 (2017).

24.2.1 Standing – Before LUBA – Generally. LUBA will decline to exercise its discretion to grant petitioners an opportunity on remand from the Court of Appeals to offer additional evidence to establish standing to appeal a land use decision to LUBA under ORS 197.830(3), where petitioners had multiple opportunities in the initial appeal to offer the additional evidence, which was at all times within petitioners' possession, but failed to do so. *Rogue Advocates v. Jackson County*, 75 Or LUBA 174 (2017).

24.2.1 Standing – Before LUBA – Generally. Exercise of LUBA's discretion to allow petitioners an opportunity on remand from the Court of Appeals to offer additional evidence to establish standing to appeal to LUBA would be inconsistent with the legislative policy at ORS 197.805 that time is of the essence in reaching finality in land use matters, because granting the motion would entail a lengthy round of pleadings, discovery, depositions, and resolution of conflicting evidence that would significantly delay reaching finality in the appeal. *Rogue Advocates v. Jackson County*, 75 Or LUBA 174 (2017).

24.2.1 Standing – Before LUBA – Generally. Exercise of LUBA's discretion to allow petitioners an opportunity on remand from the Court of Appeals to offer additional evidence to establish standing to appeal to LUBA would be inconsistent with the legislative policy at ORS 197.805 that LUBA's decisions be made consistent with sound principles of judicial review, because it would depart from the general principle that LUBA's jurisdiction over the appeal must be established prior to LUBA's issuance of its final opinion resolving the merits of an appeal. *Rogue Advocates v. Jackson County,* 75 Or LUBA 174 (2017).

24.2.1 Standing – Before LUBA – Generally. For purposes of the "knew or should have known" standard in ORS 197.830(3)(b) to gain standing to appeal to LUBA, the actual or constructive knowledge of a co-owner of property adjoining development is not imputed as a matter of law to the other co-owner, the petitioner. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

24.2.1 Standing – Before LUBA – Generally. The presence of surveyor stakes on adjoining property is not sufficient to provide actual or constructive knowledge that a county has issued a lot of record decision for the property, for purposes of the "knew or should have known" standard at ORS 197.830(3)(b), because a property owner may hire a surveyor for reasons that have nothing to do with development or land use approvals. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

24.2.1 Standing – Before LUBA – Generally. Persons who own property within sight or sound of property that is the subject of an appeal are presumptively adversely affected by an appealed decision concerning the property. However, a petitioner who claims its property is located "approximately 6,280 feet" from the subject property, and does not claim that its property is within sight or sound, is not presumptively adversely affected by the decision. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 188 (2016).

24.2.1 Standing – Before LUBA – Generally. Nothing in the express language of ORS 197.830(3) identifies it as either the exclusive or a required statutory basis to appeal a decision in cases where a hearing is not provided. *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 420 (2014).

24.2.1 Standing – Before LUBA – Generally. OAR 661-010-0045(1) limits LUBA's consideration of extra-record evidence to circumstances where there are "disputed factual allegations" in the parties briefs concerning, among other things, standing. Where there is no dispute in the parties' briefs regarding petitioner's standing to appeal to LUBA, LUBA will deny a motion to take evidence outside the record to consider evidence of a lease that the petitioner

asserts may be necessary to establish injury and hence constitutional standing under federal law. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

24.2.1 Standing – Before LUBA – Generally. LUBA lacks the equitable power of a court to apply the doctrine of laches to dismiss an appeal based on allegations that a petitioner knew from conversations with a neighbor about the challenged decision long before filing the LUBA appeal. The legislature has comprehensively prescribed in ORS 197.830(3) and other relevant statutes the deadlines to appeal land use decisions to LUBA, including what states of knowledge are relevant in applying those deadlines. *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

24.2.1 Standing – Before LUBA – Generally. Standing to appeal a post-acknowledgment plan amendment to LUBA is governed by ORS 197.620(1), which requires only that the petitioner participate in the proceedings below. No statute governing LUBA requires that petitioners who wish to advance a facial constitutional challenge to an ordinance at LUBA must first demonstrate that the ordinance injures their legally protected interests. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

24.2.1 Standing – Before LUBA – Generally. When the original applicant would be allowed to intervene in an appeal under ORS 197.830(7)(b)(A) as the "applicant who initiated the action before the local government," the original applicant's successor in interest may also intervene. *Biggerstaff v. Yamhill County*, 58 Or LUBA 665 (2008).

24.2.1 Standing – Before LUBA – Generally. Persons who made an appearance during the local government proceedings that led to a city decision that was remanded by LUBA satisfy the ORS 197.830(7)(b) requirement that a person who moves to intervene in a subsequent LUBA appeal of the city's decision following LUBA's remand must have "appeared." The appearance during the initial local government proceedings is sufficient to satisfy the ORS 197.830(7)(b) appearance requirement, and it does not matter that the local government refused those persons' attempt to appear during the remand proceedings. *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

24.2.1 Standing – Before LUBA – Generally. Where a person attempts but is denied the right to appear during a local government's proceedings that lead to a land use decision, in a subsequent LUBA appeal that attempt to appear is sufficient to satisfy the ORS 197.830(7)(b) appearance requirement, to allow that person to intervene in the LUBA appeal to assign error to the local government's refusal to allow a local appearance. *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

24.2.1 Standing – Before LUBA – Generally. Where persons appeared during the local government proceedings that led to a LUBA appeal and remand, that local appearance is sufficient to satisfy the ORS 197.830(7)(b) requirement for an appearance to have standing to intervene in a subsequent LUBA appeal challenging the local government's decision following the LUBA remand. For purposes of satisfying the ORS 197.830(7)(b) "appearance" requirement, it does not matter that those persons did not file a brief in the first LUBA appeal. *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

24.2.1 Standing – Before LUBA – Generally. The general standing rule that governs standing to appeal land use decisions other than post-acknowledgement plan and land use regulation amendments is set out at ORS 197.830(2) and the first sentence of ORS 197.830(9). Under those statutes, a petitioner must have "[a]ppeared before the local government," and must file a notice of intent to appeal with LUBA "not later than 21 days after the date the decision sought to be reviewed becomes final." *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

24.2.1 Standing – Before LUBA – Generally. A petitioner appealing a post-acknowledgment plan and land use regulation amendment to LUBA must have "participated" in the proceedings that led to the amendment, whereas a petitioner appealing other kinds of land use decisions only must have "appeared" in the local proceedings. The participation standard is higher than the appearance standard. *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

24.2.1 Standing – Before LUBA – Generally. Under the first sentence of ORS 197.830(9), which applies to appeals of land use decisions other than post-acknowledgment plan amendments, the 21-day appeal period commences on the date the decision is final. Under the second sentence of ORS 197.830(9), which applies to applies to appeals of post-acknowledgment plan and land use regulation amendments, the notice of intent to appeal must be "filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615." *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

24.2.1 Standing – Before LUBA – Generally. Where a petitioner files a timely notice of intent to appeal a post-acknowledgment land use regulation amendment within the time prescribed by the second sentence of ORS 197.830(9) but that petitioner did not participate in the local proceedings that led to the challenged decision, that petitioner does not have standing to appeal under the general standing rule that applies to appeals of post-acknowledgment land use regulation amendments. *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

24.2.1 Standing – Before LUBA – Generally. Read in context, the ORS 197.830(2) requirement that a person must file a notice of intent to appeal in order to "petition [LUBA] for review" does not implicitly prohibit parties who have not filed a notice of intent to appeal from filing a cross-petition for review, as provided by OAR 661-010-0030(7). *Horning v. Washington County*, 51 Or LUBA 303 (2006).

24.2.1 Standing – Before LUBA – Generally. The legislature's use of different terms to describe the actions required to have standing to appeal to LUBA is some indication that the legislature intended to impose different standing requirements. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572 (2006).

24.2.1 Standing – Before LUBA – Generally. To have standing to appeal a post-acknowledgment plan amendment under ORS 197.620(1) an appellant must have "participated" during the local proceedings, whereas to have standing to appeal under ORS 197.830(2) an appellant must have "appeared." The dictionary definitions of "participated" and "appeared" suggest more is required to participate than to appear, but those definitions do not identify what more is required. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572 (2006).

24.2.1 Standing – Before LUBA – Generally. When ORS 197.620(1) was first adopted, the requirement that a person must have "participated" during the local proceedings that led to adoption of a post-acknowledgment plan amendment required that an appellant have done more than make a bare neutral appearance during the local proceedings. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572 (2006).

24.2.1 Standing – Before LUBA – Generally. The text, context and statutory history of ORS 197.620(1) and ORS 197.830(2) establish that while a bare neutral appearance will satisfy the standing requirement under ORS 197.830(2) that an appellant must have "appeared," such a bare neutral appearance will not satisfy the standing requirement under ORS 197.620(1) that an appellant must have "participated." To have participated under ORS 197.620(2), an appellant must have asserted a position on the merits. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572 (2006).

24.2.1 Standing – Before LUBA – Generally. Standing to appeal to LUBA is a matter of state law, and a local government cannot adopt code provisions that purport to enlarge or diminish the requirements for establishing standing to appeal to LUBA. *Multnomah County v. Multnomah County*, 46 Or LUBA 365 (2004).

24.2.1 Standing – Before LUBA – Generally. The legislature did not contemplate in adopting the standing requirements to appeal to LUBA at ORS 197.830(2) that a local government could "appear" before itself and thereby gain standing to appeal the local government's own decision to LUBA. *Multnomah County v. Multnomah County*, 46 Or LUBA 365 (2004).

24.2.1 Standing – Before LUBA – Generally. While it may be possible for a local government to adopt code provisions that allow a department or subdivision within the local government to "appear" before the local government decision maker and establish standing for that department or subdivision to appeal the final land use decision to LUBA for purposes of ORS 197.830(2), the statute does not permit a local government to appeal its own decision and appear before LUBA as both petitioner and respondent. *Multnomah County v. Multnomah County*, 46 Or LUBA 365 (2004).

24.2.1 Standing – Before LUBA – Generally. When a party submits an affidavit in response to a jurisdictional challenge and the assertions in that affidavit are unchallenged, absent some other reason to question those assertions LUBA will accept them as true for purposes of resolving a jurisdictional issue. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

24.2.1 Standing – Before LUBA – Generally. Under *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), a party seeking judicial review of a LUBA decision under ORS 197.850(1), in addition to meeting the statutory standing requirements, must also establish that the Court of Appeals' decision will have a practical effect on the appealing party's rights. LUBA is an executive branch agency rather than a court. Therefore, the standing requirements to appeal a local government land use decision to LUBA are established by ORS 197.830; and the statute does not require that the appellant establish that LUBA's decision will have a practical effect on the appellant. *Doob v. Josephine County*, 41 Or LUBA 569 (2001).

24.2.1 Standing – Before LUBA – Generally. The standing concerns identified by the Court of Appeals in *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), involve an appellant's standing before the judicial branch. Because LUBA is part of the executive branch, the separation of powers problem involved in *Utsey* does not apply to a petitioner's standing before LUBA. *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247 (2002).

24.2.1 Standing – Before LUBA – Generally. ORS 197.830(7)(b)(B) allows intervention in a LUBA appeal by "[p]ersons who appeared before the local government, * * * orally or in writing." A city is a "person," as that term is defined by ORS 197.015(18). *Wynnyk v. Jackson County*, 39 Or LUBA 500 (2001).

24.2.1 Standing – Before LUBA – Generally. Persons who appeared during local proceedings may intervene in a LUBA appeal on the side of respondent without demonstrating that the appeal will result in any actual damage or harm. *Wynnyk v. Jackson County*, 39 Or LUBA 500 (2001).

24.2.1 Standing – Before LUBA – Generally. ORS 197.830(6)(b)(A) permits an applicant to intervene in proceedings before LUBA even if the applicant did not appear below, so long as the motion to intervene is filed within 21 days of the date the notice of intent to appeal is filed. *Dowrie v. Benton County*, 37 Or LUBA 998 (1999).

24.2.1 Standing – Before LUBA – Generally. An internal vote prohibiting an unincorporated organization from pursuing an appeal does not, in itself, affect that organization's standing before LUBA. *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).

24.2.1 Standing – Before LUBA – Generally. As it applies to appeals to LUBA, the definition of "person" in ORS 197.015(8) includes an association. *Helvetia Community Assoc. v. Washington County*, 31 Or LUBA 446 (1996).

24.2.1 Standing – Before LUBA – Generally. A party has standing to appeal a moratorium if it has interests that are substantially affected by it. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).

24.2.1 Standing – Before LUBA – Generally. Where a local hearing is provided, and petitioner appears at that hearing and becomes entitled to notice of the challenged land use decision under ORS 215.416(10) or 227.173(3), the filing of petitioner's notice of intent to appeal is governed by ORS 197.830(2) and (8), *not* ORS 197.830(3). *Ramsey v. City of Portland*, 28 Or LUBA 763 (1994).

24.2.1 Standing – Before LUBA – Generally. Being the owner of the property that is the subject of a LUBA appeal proceeding does not automatically establish that person's standing to intervene. *Noble v. City of Fairview*, 28 Or LUBA 711 (1994).

24.2.1 Standing – Before LUBA – Generally. ORS 197.830(2) establishes two requirements for standing to bring a LUBA appeal. Petitioner must have (1) filed a timely notice of intent to appeal, and (2) appeared during the local proceedings. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

24.2.1 Standing – Before LUBA – Generally. Where an attorney states during local proceedings that he represents unspecified "appellants" and "opponents" but (1) nothing in the local record establishes who such persons are, and (2) the attorney fails to submit an affidavit or other evidence to establish who such persons are, the attorney's appearance below is inadequate to confer standing on the unspecified appellants and opponents. *Townsend v. City of Newport*, 21 Or LUBA 286 (1991).

24.2.1 Standing – Before LUBA – Generally. The amendments to ORS 197.830(3) adopted by the 1989 legislature, concerning standing to appeal a land use decision made without hearing or with inadequate notice of hearing, do not apply to decisions made before October 3, 1989, the effective date of the amendments. *Torgeson v. City of Canby*, 19 Or LUBA 623 (1990).

24.2.1 Standing – Before LUBA – Generally. Where standing is not an issue, an affidavit attached to the petition for review for the sole purpose of establishing petitioner's standing is not subject to a motion to strike. *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990).

24.2.2 Standing – Before LUBA – Requirement to Establish. LUBA will decline to exercise its discretion to grant petitioners an opportunity on remand from the Court of Appeals to offer additional evidence to establish standing to appeal a land use decision to LUBA under ORS 197.830(3), where petitioners had multiple opportunities in the initial appeal to offer the additional evidence, which was at all times within petitioners' possession, but failed to do so. *Rogue Advocates v. Jackson County*, 75 Or LUBA 174 (2017).

24.2.2 Standing – Before LUBA – Requirement to Establish. Pursuant to ORS 197.830(4), there are three circumstances under which a petitioner may appeal a local government's land use decision without a hearing directly to LUBA: (1) if petitioner was not provided notice of the decision; (2) if petitioner was not entitled to notice of the decision but is "adversely affected or aggrieved by the decision"; or (3) if petitioner received notice of the decision, but "the notice did not reasonably describe the nature of the decision." *Levy v. Jackson County*, 75 Or LUBA 401 (2017).

24.2.2 Standing – Before LUBA – Requirement to Establish. Even though a county's notice of its decision made without a hearing did not state that "The [] person who is mailed written notice of the decision cannot appeal the decision directly to [LUBA] under ORS 197.830" as required under ORS 215.416(11), such an omission does not constitute a failure to reasonably describe the nature of the decision, and therefore petitioner may not appeal the decision directly to LUBA under ORS 197.830(4)(c). *Levy v. Jackson County*, 75 Or LUBA 401 (2017).

24.2.2 Standing – Before LUBA – Requirement to Establish. A party does not establish that the party "appeared" during the proceedings below where the record of the proceedings that led to the challenged decision includes only evidence of the appearance by that party in a different land use proceeding. *Sommer v. Josephine County*, 58 Or LUBA 505 (2009).

24.2.2 Standing – Before LUBA – Requirement to Establish. LUBA will deny a motion to dismiss based on a petitioner's failure to allege facts demonstrating her standing to appeal, where the party moving to dismiss alleges facts that demonstrate that petitioner filed a timely notice of intent to appeal and appeared during the local proceedings. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

24.2.2 Standing – Before LUBA – Requirement to Establish. When undisputed evidence in the record establishes that petitioner appeared below, and therefore establishes petitioner's standing before LUBA, the Board will not take evidence outside of the record for purposes of establishing standing before the Court of Appeals, because such evidence will not "affect the outcome" of LUBA's proceedings, within the meaning of OAR 661-010-0045(2). *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247 (2002).

24.2.2 Standing – Before LUBA – Requirement to Establish. LUBA's rules require that the petition for review "[s]tate the facts that establish petitioner's standing," but do not require that such allegations of fact appear in any particular form or any particular portion of the petition for review. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

24.2.2 Standing – Before LUBA – Requirement to Establish. It is petitioner's responsibility to establish standing. Where the parties stipulate to suspend the appeal proceeding until respondent's motion to dismiss for lack of standing is resolved, and petitioner does not respond to the motion, LUBA will dismiss the appeal. *Strauss v. Jackson County*, 28 Or LUBA 56 (1994).

24.2.2 Standing – Before LUBA – Requirement to Establish. That petitioners' allegations of standing were made in their answer to a motion to dismiss, rather than in the petition for review as required by OAR 661-10-030(3)(a), is a technical violation of LUBA's rules which does not prejudice respondent's substantial rights where respondent had a full opportunity to respond to petitioners' allegations in its response brief. *Schatz v. City of Jacksonville*, 21 Or LUBA 214 (1991).

24.2.2 Standing – Before LUBA – Requirement to Establish. After the petition for review is filed, respondents may, in their response brief or in a motion to dismiss, identify disputed allegations of fact, and explain why under their version of the facts petitioners lack standing. Petitioners may then request permission to file a reply brief to respond to respondent's legal arguments, move for an evidentiary hearing to present facts establishing standing or do both. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

24.2.2 Standing – Before LUBA – Requirement to Establish. If a petitioner's standing to appeal to LUBA on any basis can be established without the necessity of an evidentiary hearing, LUBA will not conduct an evidentiary hearing to enable the petitioner to establish standing to appeal on a different basis. *Lowrie v. Polk County*, 19 Or LUBA 564 (1990).

24.2.3 Standing – Before LUBA – Appearance. Whether an individual "appeared" during the proceedings below and thus has standing to appeal or intervene before LUBA is a mixed question of law and fact that often requires extra-record evidence to evaluate, including the circumstances surrounding whatever action is the basis for the asserted appearance. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

24.2.3 Standing – Before LUBA – Appearance. The inclusion of a party's name and address in a list of residents who "endorse" a report that was prepared by opponents to a project application, which includes a complete list of residents in the project area, and states that "100% of the residents * * * do not support" the project, and designates various individuals as "lead authors" and "supporting authors," but which does not list the party in question as one of the authors, is not sufficient to constitute an "appearance" for purposes of ORS 197.830(7)(b)(B). The party's intent regarding the inclusion of her name in the report is irrelevant; to demonstrate an appearance, the party must submit a document or oral testimony that the local government would reasonably recognize as an appearance by that party. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

24.2.3 Standing – Before LUBA – Appearance. Where an entity named "Shepherdsfield Ministries" moves to intervene in an appeal to LUBA, but the entity fails to establish that it appeared during the proceedings below under that name, or that it has met the requirements for representational or organizational standing, the entity has not established standing to intervene. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 664 (2016).

24.2.3 Standing – Before LUBA – Appearance. Where it is undisputed that a corporation named "Shepherdsfield Church" appeared during the proceedings below, but the motion to intervene mistakenly identifies the appearing party as "Shepherdsfield Ministries," LUBA will allow the motion to intervene to be revised to name the correct party as long as the correction does not prejudice the substantial rights of other parties. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 664 (2016).

24.2.3 Standing – Before LUBA – Appearance. For purposes of standing to appeal to LUBA under ORS 197.830(2), a petitioner "appeared" on his own behalf where the petitioner filed the local appeal statement in his own name and the challenged decision identifies petitioner as the local appellant, nothwithstanding that the petitioner also appeared on behalf of other persons. *Martin v. City of Central Point*, 73 Or LUBA 422 (2016).

24.2.3 Standing – Before LUBA – Appearance. Where a local government combines proceedings on two related land use matters, and a party moving to intervene in an appeal of one of the resulting land use decisions testified at the combined hearing, that party has appeared in the proceedings before the decision-maker and has standing to intervene in the appeal, even if the party's testimony did not specifically refer to the decision that was appealed. *Iyer v. Washington County*, 72 Or LUBA 491 (2015).

24.2.3 Standing – Before LUBA – Appearance. An email that was sent to the planning director prior to the date and time that she made her administrative decision on an application, and that included a request that the email be included in the record of the proceeding, is sufficient to

constitute an "appearance" for purposes of satisfying ORS 197.830(2)(b). *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 512 (2014).

24.2.3 Standing – Before LUBA – Appearance. A planning consultant did not "appear" and does not have standing to join in his client's appeal of a land use decision to LUBA, where the planning consultant's only appearances during the local land use proceeding were on behalf of his clients. The appearances a planning consultant makes on behalf of his clients are not sufficient to satisfy the ORS 197.830(2)(b) "appearance" requirement for standing to appeal to LUBA. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

24.2.3 Standing – Before LUBA – Appearance. Where a principal or owner in a corporation appears in a local proceeding by submitting a letter on corporate letterhead, but the letter is phrased in the first person singular and appears to set out the views of the principal in his individual capacity, LUBA will presume that the letter constitutes an individual appearance as well as a representative appearance on behalf of the corporation. *Pliska v. Umatilla County*, 61 Or LUBA 429 (2010).

24.2.3 Standing – Before LUBA – Appearance. Under ORS 197.620(1) there is no requirement that to "participate" in a local government proceeding a person must articulate an individual position on the merits, and joining in a position on the merits asserted by others is not categorically insufficient to "participate." *Smith v. City of Salem*, 60 Or LUBA 478 (2010).

24.2.3 Standing – Before LUBA – Appearance. A mere statement in favor or opposition to a proposal, without some explanation why the local government should approve or deny the application, does not suffice to present a position on the merits for purposes of ORS 197.620(1). An argument that an existing use plays a significant role in flood mitigation that would be eliminated by the proposed application, while brief, presents an argument that is sufficient to constitute "participation" under ORS 197.620(1). *Smith v. City of Salem*, 60 Or LUBA 478 (2010).

24.2.3 Standing – Before LUBA – Appearance. A party does not establish that the party "appeared" during the proceedings below where the record of the proceedings that led to the challenged decision includes only evidence of the appearance by that party in a different land use proceeding. *Sommer v. Josephine County*, 58 Or LUBA 505 (2009).

24.2.3 Standing – Before LUBA – Appearance. Where a local government failed to provide DLCD with the notice required by OAR 660-041-0030 within the time set forth in the rule, LUBA will not dismiss an appeal on the grounds that DLCD did not make the required appearance, where DLCD's failure to appear can be attributed to the local government's failure to provide the notice. *DLCD v. Deschutes County*, 54 Or LUBA 799 (2007).

24.2.3 Standing – Before LUBA – Appearance. Persons who made an appearance during the local government proceedings that led to a city decision that was remanded by LUBA satisfy the ORS 197.830(7)(b) requirement that a person who moves to intervene in a subsequent LUBA appeal of the city's decision following LUBA's remand must have "appeared." The appearance during the initial local government proceedings is sufficient to satisfy the ORS 197.830(7)(b) appearance requirement, and it does not matter that the local government refused those persons'

attempt to appear during the remand proceedings. *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

24.2.3 Standing – Before LUBA – Appearance. Where a person attempts but is denied the right to appear during a local government's proceedings that lead to a land use decision, in a subsequent LUBA appeal that attempt to appear is sufficient to satisfy the ORS 197.830(7)(b) appearance requirement, to allow that person to intervene in the LUBA appeal to assign error to the local government's refusal to allow a local appearance. *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

24.2.3 Standing – Before LUBA – Appearance. Where persons appeared during the local government proceedings that led to a LUBA appeal and remand, that local appearance is sufficient to satisfy the ORS 197.830(7)(b) requirement for an appearance to have standing to intervene in a subsequent LUBA appeal challenging the local government's decision following the LUBA remand. For purposes of satisfying the ORS 197.830(7)(b) "appearance" requirement, it does not matter that those persons did not file a brief in the first LUBA appeal. *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

24.2.3 Standing – Before LUBA – Appearance. LUBA will assume an applicant's planner has standing to intervene under ORS 197.830(7)(b) on the side of the applicant-petitioner, notwithstanding the planner's failure to allege in his unopposed motion to intervene that he was also an applicant or made an appearance on his own behalf, where there is no dispute that the petitioner has standing and both petitioner and the planner signed the petition for review. *Gillette v. Lane County*, 52 Or LUBA 1 (2006).

24.2.3 Standing – Before LUBA – Appearance. When on remand a local government conducts an evidentiary hearing regarding a modified application, the local government may not restrict participation in the public hearing to parties to the original LUBA appeal. *Lengkeek v. City of Tangent*, 52 Or LUBA 509 (2006).

24.2.3 Standing – Before LUBA – Appearance. A petitioner appealing a post-acknowledgment plan and land use regulation amendment to LUBA must have "participated" in the proceedings that led to the amendment, whereas a petitioner appealing other kinds of land use decisions only must have "appeared" in the local proceedings. The participation standard is higher than the appearance standard. *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

24.2.3 Standing – Before LUBA – Appearance. Under the first sentence of ORS 197.830(9), which applies to appeals of land use decisions other than post-acknowledgment plan amendments, the 21-day appeal period commences on the date the decision is final. Under the second sentence of ORS 197.830(9), which applies to applies to appeals of post-acknowledgment plan and land use regulation amendments, the notice of intent to appeal must be "filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615." *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

24.2.3 Standing – Before LUBA – Appearance. Where a petitioner files a timely notice of intent to appeal a post-acknowledgment land use regulation amendment within the time prescribed by

the second sentence of ORS 197.830(9) but that petitioner did not participate in the local proceedings that led to the challenged decision, that petitioner does not have standing to appeal under the general standing rule that applies to appeals of post-acknowledgment land use regulation amendments. *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

24.2.3 Standing – Before LUBA – Appearance. Without regard to whether a local government erred in doing so, its refusal to allow a person to appear during a land use hearing obviates the ORS 197.830(2) requirement that a petitioner at LUBA must have appeared below. *Rice v. City of Monmouth*, 52 Or LUBA 780 (2006).

24.2.3 Standing – Before LUBA – Appearance. Where a city's land use hearing following a remand by LUBA is a continuation of the proceedings that led to the initial, remanded decision, a party's appearance during the proceedings that led to the initial decision is sufficient to constitute an appearance in the continued proceedings. *Rice v. City of Monmouth*, 52 Or LUBA 780 (2006).

24.2.3 Standing – Before LUBA – Appearance. Where the local record has not yet been filed, and petitioners assert that when filed the record will show that petitioners appeared before the local government, LUBA will deny as premature a motion to dismiss based on the petitioners' alleged failure to appear. *Sommer v. Josephine County*, 52 Or LUBA 806 (2006).

24.2.3 Standing – Before LUBA – Appearance. Where an individual represents in a letter that is submitted in a local land use permit proceeding that the letter is submitted "on behalf of" an organization, it is reasonable to infer that the individual is authorized to submit the letter for the organization. Unless there is some reason to question that inference, LUBA will assume the letter constitutes an appearance for the organization. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

24.2.3 Standing – Before LUBA – Appearance. Where a party seeks an evidentiary hearing to challenge whether an individual who submitted a letter on behalf of an organization in a local land use permit proceeding was in fact authorized to submit that letter on the organization's behalf, the moving party must provide more than speculation that the individual was not authorized to appear on behalf of the organization. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

24.2.3 Standing – Before LUBA – Appearance. Where an individual who submits a letter in a local land use permit proceeding in which he represents that the letter is submitted "on behalf of" an organization, but the letter does not expressly state that the individual is "authorized" to make the written appearance for the organization, that failure and a party's speculation that such authorization is "implausible" are not sufficient reasons to authorize an evidentiary hearing to consider extra-record evidence regarding whether the individual was actually authorized to appear on behalf of the organization. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

24.2.3 Standing – Before LUBA – Appearance. Where a private organization appears during a local land use permit proceeding and later files a LUBA appeal, the fact that the private organization later changes its organizational structure to become a nonprofit corporation does not

mean it is not the same person who appeared during the local land use permit proceeding. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

24.2.3 Standing – Before LUBA – Appearance. When ORS 197.620(1) was first adopted, the requirement that a person must have "participated" during the local proceedings that led to adoption of a post-acknowledgment plan amendment required that an appellant have done more than make a bare neutral appearance during the local proceedings. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572 (2006).

24.2.3 Standing – Before LUBA – Appearance. The text, context and statutory history of ORS 197.620(1) and ORS 197.830(2) establish that while a bare neutral appearance will satisfy the standing requirement under ORS 197.830(2) that an appellant must have "appeared," such a bare neutral appearance will not satisfy the standing requirement under ORS 197.620(1) that an appellant must have "participated." To have participated under ORS 197.620(2), an appellant must have asserted a position on the merits. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572 (2006).

24.2.3 Standing – Before LUBA – Appearance. For purposes of standing to appeal to LUBA under ORS 197.830(2), petitioner "appeared" on his own behalf, and not only as a representative of the organization that owns property near the subject property, pursuant to ORS 197.830(2), where petitioner filed the local appeal statement in his own name, the challenged decision identifies petitioner as the local appellant, and petitioner made a statement indicating that he was appearing on his own behalf. *Heiller v. Josephine County*, 50 Or LUBA 562 (2005).

24.2.3 Standing – Before LUBA – Appearance. The ORS 197.830(7) "appearance" requirement is not satisfied and a motion to intervene will be denied where movant's request to participate in local hearing after the close of the record is denied, and movant does not argue that participation was erroneously denied. *Anthony v. Josephine County*, 50 Or LUBA 703 (2005).

24.2.3 Standing – Before LUBA – Appearance. Absent state or local requirements to the contrary, individuals may appear on behalf of other individuals or artificial entities in local land use proceedings. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005).

24.2.3 Standing – Before LUBA – Appearance. Unless some challenge is made and some reason presented to question a person's claim that he or she is appearing on behalf of another person, an allegation to that effect is sufficient, provided the allegation adequately identifies the person he or she is appearing for. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005).

24.2.3 Standing – Before LUBA – Appearance. A person's allegation that he is appearing on behalf of a citizen organization's "membership in [the city] and surrounding area" is not sufficient to constitute an appearance on behalf of individual members of the organization. A more precise delineation of the represented persons is required to identify those persons adequately so that the city or any other party who might have grounds for challenging those appearances could do so. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005).

24.2.3 Standing – Before LUBA – Appearance. A petitioner's decision to rely on a city website that stated the city council meetings generally are held at 7 p.m. does not excuse the petitioner's failure to appear at a 6 p.m. hearing on a variance request where, although petitioner was not entitled to written notice of the hearing, the written notice of the variance hearing accurately stated the hearing would begin at 6 p.m. and was provided to all persons who were entitled to written notice of the hearing. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005).

24.2.3 Standing – Before LUBA – Appearance. LUBA will deny a motion to dismiss based on a petitioner's failure to allege facts demonstrating her standing to appeal, where the party moving to dismiss alleges facts that demonstrate that petitioner filed a timely notice of intent to appeal and appeared during the local proceedings. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

24.2.3 Standing – Before LUBA – Appearance. Where a city sends notice of a public hearing to adjacent landowners and other interested parties, advises them that the city council will consider a use determination request, and provides for an opportunity to testify and submit written evidence to the city council at the city council meeting, that meeting constitutes a "hearing" within the meaning of ORS 197.830(3) and, therefore, petitioner must have appeared at that meeting in order to have standing to file an appeal at LUBA, as required by ORS 197.830(2). *Boly v. City of Portland*, 46 Or LUBA 197 (2004).

24.2.3 Standing – Before LUBA – Appearance. The legislature did not contemplate in adopting the standing requirements to appeal to LUBA at ORS 197.830(2) that a local government could "appear" before itself and thereby gain standing to appeal the local government's own decision to LUBA. *Multnomah County v. Multnomah County*, 46 Or LUBA 365 (2004).

24.2.3 Standing – Before LUBA – Appearance. While it may be possible for a local government to adopt code provisions that allow a department or subdivision within the local government to "appear" before the local government decision maker and establish standing for that department or subdivision to appeal the final land use decision to LUBA for purposes of ORS 197.830(2), the statute does not permit a local government to appeal its own decision and appear before LUBA as both petitioner and respondent. *Multnomah County v. Multnomah County*, 46 Or LUBA 365 (2004).

24.2.3 Standing – Before LUBA – Appearance. Where a city makes a separate, appealable limited land use decision approving a final subdivision plat, a party's appearance during proceedings that led to the approval of the tentative subdivision plat is not an "appearance" before the local decision maker for purposes of appealing the final subdivision plat decision pursuant to ORS 197.830(2). *6710 LLC v. City of Portland*, 45 Or LUBA 136 (2003).

24.2.3 Standing – Before LUBA – Appearance. A city's failure to provide notice of a limited land use decision to a neighboring property owner's attorney does not excuse that property owner's failure to appear before the local decision maker, where there is no dispute that the city mailed notice of the limited land use decision to the address listed for the property in the tax rolls, pursuant to ORS 197.195(3)(b). *6710 LLC v. City of Portland*, 45 Or LUBA 136 (2003).

24.2.3 Standing – Before LUBA – Appearance. A petitioner alleging standing to appear before LUBA pursuant to ORS 197.830(5) must either point to evidence in the record that shows that petitioner is adversely affected by the decision, or file a motion requesting that LUBA consider evidence not in the record demonstrating that petitioner is adversely affected. *6710 LLC v. City of Portland*, 45 Or LUBA 136 (2003).

24.2.3 Standing – Before LUBA – Appearance. A member of the local governing body who adopted a land use decision is not a person who "appeared" before the local governing body and may not intervene as a party in a LUBA appeal. *Roe v. City of Union*, 45 Or LUBA 736 (2003).

24.2.3 Standing – Before LUBA – Appearance. Under ORS 197.830(2)(b) a petitioner's appearance before the city planning commission is adequate to constitute an appearance before "the local government;" the petitioner need not have appeared before the city council that rendered the final decision following a local appeal of the planning commission decision. *Thomas v. City of Veneta*, 44 Or LUBA 5 (2003).

24.2.3 Standing – Before LUBA – Appearance. LUBA will reject a challenge to a petitioner's standing based on an allegation that petitioner appeared below as an agent of the property owner and not on its own behalf, where the only evidence cited to support that allegation is a letter from the property owner that does not authorize petitioner to act as an agent of the property owner; petitioner filed the application leading to the challenged decision; and it is clear from the record that petitioner appeared on its own behalf and not the property owner's. *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385 (2002).

24.2.3 Standing – Before LUBA – Appearance. An organization that appears before a hearings officer and county board of commissioners has standing to appeal the county's decision to LUBA under ORS 197.830(2), and need not establish that it also meets the test for representational standing under *1000 Friends of Oregon v. Multnomah Co.*, 39 Or App 917, 593 P2d 1171 (1979). *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111 (2001).

24.2.3 Standing – Before LUBA – Appearance. Where a local government cites no legal requirement that a petitioner must have (1) submitted written opposition to a proposed annexation with a request for public hearing and (2) appeared in person at the public meeting where the city council considered the written opposition and hearing request, LUBA will reject the local government's argument that both a written and personal appearance are required to exhaust local administrative remedies. *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

24.2.3 Standing – Before LUBA – Appearance. ORS 197.830(2), which grants standing to appeal to LUBA if petitioner files a timely appeal to LUBA and appeared during the local proceedings, is not limited to local proceedings that include a public hearing. Where a local government does not provide a public hearing, but provides an opportunity for written appearance, a written appearance is sufficient to confer standing to appeal to LUBA under ORS 197.830(2). *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

24.2.3 Standing – Before LUBA – Appearance. Where a transcript that is attached to a brief in accordance with OAR 661-010-0030(5) shows that a letter signed by petitioners was read to the

local decision maker during the proceedings below and that the local decision maker stated that the letter would be made part of the record, the transcript is sufficient to show that petitioners made a written appearance in accordance with ORS 197.830(2) and have standing at LUBA to appeal the local government's decision. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

24.2.3 Standing – Before LUBA – Appearance. Persons who appeared during local proceedings may intervene in a LUBA appeal on the side of respondent without demonstrating that the appeal will result in any actual damage or harm. *Wynnyk v. Jackson County*, 39 Or LUBA 500 (2001).

24.2.3 Standing – Before LUBA – Appearance. Where a local government procedure requires each participant in a land use proceeding to establish their status as either a party or a witness, and an individual representing an organization at no point advises the local government that she is appearing on her own behalf as well as on behalf of the organization, LUBA will not presume that the individual has appeared on her own behalf for purposes of ORS 197.830(2)(b). *Friends of Douglas County v. Douglas County*, 39 Or LUBA 156 (2000).

24.2.3 Standing – Before LUBA – Appearance. The notice of the date of final hearing required by ORS 197.610(1) (1997) and OAR 660-018-0020(1) safeguard the ability of the Department of Land Conservation and Development and other interested parties to participate in proceedings leading up to decisions amending comprehensive plan and code provisions. The failure of a local government to submit notice at least 45 days before the date stated as the final hearing obviates the appearance requirement of ORS 197.830(2) and ORS 197.610(2)(b), even if another hearing is conducted at least 45 days after the submission of notice. *OTCNA v. City of Cornelius*, 38 Or LUBA 921 (2000).

24.2.3 Standing – Before LUBA – Appearance. Where proceedings are pending before a lower body, a decision of the governing body to decline review of the lower body's decision in advance of that lower body's decision either (1) is not properly viewed as a separate land use decision, making a separate appearance by intervenors unnecessary, or (2) is so integral to the permit decision, that appearing before the planning commission satisfies the ORS 197.830(6) (1997) appearance requirement. *SBA Towers, Inc. v. Linn County*, 37 Or LUBA 1049 (2000).

24.2.3 Standing – Before LUBA – Appearance. An appearance through an attorney during the proceedings before the local government is sufficient to satisfy the appearance requirement as required by ORS 197.830(2). *Dowrie v. Benton County*, 37 Or LUBA 998 (1999).

24.2.3 Standing – Before LUBA – Appearance. Petitioners have standing to appeal an annexation decision to LUBA when they demonstrate that they appeared before the local government during the proceedings leading up to the challenged decision and that they filed a timely notice of intent to appeal with LUBA. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

24.2.3 Standing – Before LUBA – Appearance. Where a city was not obliged to permit petitioners, who resided outside city limits, the opportunity to testify at a hearing that was scheduled to allow city residents an opportunity to comment on a proposed annexation pursuant to ORS 222.120, the fact that the city did permit petitioners to appear and present testimony in

opposition to the annexation is sufficient to satisfy the "appearance requirement" of ORS 197.830(2). *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

24.2.3 Standing – Before LUBA – Appearance. Where a local government refuses to consider petitioner's letters and refuses petitioner's requests to present testimony during the local proceedings, the appearance requirement of ORS 197.830(2) is obviated. *Hugo v. Columbia County*, 34 Or LUBA 577 (1998).

24.2.3 Standing – Before LUBA – Appearance. Petitioners' letter to the governing body, entered into the local record after the evidentiary hearing was closed but before the final decision was made, is sufficient to establish that petitioners appeared before the local government, where the governing body accepted the letter into the record and did not expressly exclude it. *Wolverton v. Crook County*, 34 Or LUBA 515 (1998).

24.2.3 Standing – Before LUBA – Appearance. Where a local government provides no prehearing notice of a proposed amendment as required by statute, and thus fails to provide a reasonable description of the nature of the local government's proposed decision, the exception to the appearance requirement set forth in ORS 197.620(2) applies. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

24.2.3 Standing – Before LUBA – Appearance. An appeal will be dismissed where petitioner failed to "appear" below and therefore lacks standing to appeal to LUBA. In that circumstance, the LUBA appeal will be dismissed notwithstanding the intervention as a petitioner of a party who did appear below, where that intervenor-petitioner did not also file his own timely notice of intent to appeal. *Waters v. Marion County*, 33 Or LUBA 751 (1997).

24.2.3 Standing – Before LUBA – Appearance. The question of whether intervenor was a proper party in an earlier local proceeding is determined by the local ordinance governing standing and not the ordinance that regulates the content of materials that may be presented in that proceeding. Where a party appeared during the local proceeding, the party has standing at LUBA under OAR 661-10-050. *Evans v. Multnomah County*, 33 Or LUBA 555 (1997).

24.2.3 Standing – Before LUBA – Appearance. Petitioner's oral statement to the planning director in the planning director's office does not constitute an "appearance before the local government" that would allow petitioner standing to appeal to LUBA under ORS 197.830(2)(b). *Field v. Grant County*, 32 Or LUBA 346 (1997).

24.2.3 Standing – Before LUBA – Appearance. When a county provides several opportunities for both sides to a dispute to be heard, but does not hold a hearing, as the term is defined in ORS 215.402 and used in ORS 197.830, a petitioner that did not appear earlier has standing to appeal to LUBA under ORS 197.830(3). *Boom v. Columbia County*, 31 Or LUBA 318 (1996).

24.2.3 Standing – Before LUBA – Appearance. A real estate agency employee's quietly held view, not shared with the local decision makers or the other parties to the local proceedings, that he represents certain persons during those proceedings does not constitute an appearance by those

persons for purposes of determining standing to appeal to LUBA. *Krieger v. Wallowa County*, 31 Or LUBA 96 (1996).

24.2.3 Standing – Before LUBA – Appearance. Where petitioner identifies himself in eight letters to city planners as the representative of the Forest Park Neighborhood Association, but signs one letter with his own name, and expresses views throughout that are both his own and those of the association, petitioner will be treated, for purposes of standing before LUBA, as having appeared personally in the local proceedings before the city. *Rochlin v. City of Portland*, 31 Or LUBA 509 (1996).

24.2.3 Standing – Before LUBA – Appearance. When county provides a hearing on appeal of a planning director's decision made without a hearing, but the hearings officer concludes she lacks jurisdiction over the appeal, the county has not provided a hearing on the decision, and petitioner may appeal to LUBA pursuant to ORS 197.830(3). *Franklin v. Deschutes County*, 30 Or LUBA 33 (1995).

24.2.3 Standing – Before LUBA – Appearance. An appearance by a person before a local government on behalf of an artificial entity does not, of itself, constitute an appearance on behalf of each individual member of that entity. *Ramsey v. City of Portland*, 28 Or LUBA 763 (1994).

24.2.3 Standing – Before LUBA – Appearance. If a person moving to intervene in a LUBA appeal does not contend (1) the local government failed to follow statutorily required procedures in making the challenged decision and such failure prevented movant from being able to appear below, or (2) the local government improperly refused to allow movant to appear below, the appearance requirement of ORS 197.830(6)(b) is not obviated. *Ramsey v. City of Portland*, 28 Or LUBA 763 (1994).

24.2.3 Standing – Before LUBA – Appearance. Petitioners may appeal a legislative post-acknowledgment amendment to LUBA despite failing to appear during the local proceedings if (1) they requested, in writing, notice of the challenged decision and such notice was not mailed to them more than 21 days before they filed the notice of intent to appeal (ORS 197.830(8)); (2) DLCD's notice of the proposed amendment did not reasonably describe the nature of the local government's final decision (ORS 197.620(2)); or (3) published notice of the local hearing did not reasonably describe the final decision (ORS 197.830(3)). *Williams v. Clackamas County*, 27 Or LUBA 602 (1994).

24.2.3 Standing – Before LUBA – Appearance. Local government failure to provide 20 days prior notice of a quasi-judicial land use hearing does not obviate the requirement of ORS 197.830(2)(b) for a local appearance for standing to appeal to LUBA, where petitioner (1) was not entitled to written notice, (2) received oral notice prior to the hearing, (3) attended the hearing, and (4) presented no oral or written testimony before the hearing was closed. *Lester v. City of Eugene*, 26 Or LUBA 453 (1994).

24.2.3 Standing – Before LUBA – Appearance. Where a local government refused to allow a person to appear during the proceedings below, that person has standing to intervene in a LUBA appeal to challenge the local government's determination that he not be allowed to appear.

However, if the person does not successfully challenge the local government's refusal to allow an appearance below, his motion to intervene will be denied. *McKenzie v. Multnomah County*, 26 Or LUBA 619 (1993).

24.2.3 Standing – Before LUBA – Appearance. Where a local government denies a person the right to present testimony on her own behalf, that person "appeared" within the meaning of ORS 197.830(6) and OAR 661-10-050(1), at least for the purpose of challenging the local government's decision to limit testimony. *Sorte v. City of Newport*, 25 Or LUBA 828 (1993).

24.2.3 Standing – Before LUBA – Appearance. Local government proceedings conducted after LUBA remand of the initial local government decision, regarding the same application, are a continuation of the initial local government proceedings. Where a petitioner submitted testimony to the local government at some point during the local proceedings, petitioner "appeared before the local government," as required by ORS 197.830(2)(b). *DLCD v. Klamath County*, 25 Or LUBA 355 (1993).

24.2.3 Standing – Before LUBA – Appearance. Where a challenged decision does not purport to amend an acknowledged plan or land use regulation, the requirement of ORS 197.610(1) for notice to DLCD of a proposed post-acknowledgment amendment is not applicable. In such circumstances, a local government's failure to give DLCD the notice required by ORS 197.610(1) does not obviate the appearance requirement of ORS 197.830(6)(b) for intervention by DLCD in an appeal before LUBA. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

24.2.3 Standing – Before LUBA – Appearance. It is not customary for individuals testifying in local land use proceedings to specifically state they are appearing on their own behalf. Where a person submitted written and oral testimony on behalf of an organization of which she is an active member, LUBA will assume the views she offered were her own, as well as the organization's, and therefore will conclude that person "appeared" before the local government. *Terra v. City of Newport*, 24 Or LUBA 579 (1992).

24.2.3 Standing – Before LUBA – Appearance. Where a county has never entered into any cooperative agreements with special districts pursuant to ORS 197.185(2), what such a cooperative agreement might contain is entirely speculative and, therefore, the lack of such an agreement between the county and a district does not render inapplicable the ORS 197.830(6)(b)(B) "appearance" requirement for intervention in an appeal of a district decision. *Adkins v. Heceta Water District*, 22 Or LUBA 840 (1992).

24.2.3 Standing – Before LUBA – Appearance. Under ORS 197.620(1), a person who submitted oral and written testimony while acting as a consultant in the local government proceedings leading to the adoption of a post-acknowledgment comprehensive plan or land use regulation amendment has standing to appeal that amendment to LUBA. *Gray v. Clatsop County*, 22 Or LUBA 270 (1991).

24.2.3 Standing – Before LUBA – Appearance. Where no local hearings are conducted and no notice of the proceeding is provided, it is not possible to appear before the local decision maker and, consequently, it is unnecessary for a potential intervenor to have "appeared" below, as

required by ORS 197.830(6)(b), to have standing to intervene in an appeal to LUBA. *Weeks v. City of Tillamook*, 22 Or LUBA 797 (1991).

24.2.3 Standing – Before LUBA – Appearance. For purposes of establishing standing to intervene in a LUBA appeal under ORS 197.830(6)(a)(B), it is adequate to allege that (1) the persons requesting intervenor status were the property owners below, (2) their signatures or names appeared on the development applications at issue, and (3) the local government held no hearings to enable a more formal appearance. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 787 (1991).

24.2.3 Standing – Before LUBA – Appearance. Where a city fails to provide the statutorily required notice of hearing and hearing or notice of decision and opportunity for local appeal, the "appearance" and "aggrievement" requirements of ORS 197.830(3) for standing to appeal to LUBA do not apply. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

24.2.3 Standing – Before LUBA – Appearance. "Appearance" is not a requirement for standing to appeal the adoption of a moratorium or corrective program to LUBA. *Schatz v. City of Jacksonville*, 20 Or LUBA 565 (1991).

24.2.3 Standing – Before LUBA – Appearance. An appearance in writing before a local government may take the form of a memorandum, letter, petition or other document. However, regardless of the nature of the writing, in order for it to constitute a person's *appearance* before the local government, it must have been *submitted* to the local government by or on behalf of that person during the course of the proceedings below. *Schatz v. City of Jacksonville*, 20 Or LUBA 546 (1991).

24.2.3 Standing – Before LUBA – Appearance. Petitioner's submittal of a letter to the planning commission, in which he opposed the subject application, is sufficient to constitute an appearance during the local proceedings within the meaning of ORS 197.830(2)(b). *Cecil v. City of Jacksonville*, 19 Or LUBA 446 (1990).

24.2.3 Standing – Before LUBA – Appearance. Where an organization is the only petitioner in an appeal to LUBA, there is nothing in the record which demonstrates that the *organization* itself appeared before the local government below and the organization does not claim representational standing on behalf of members who did appear below, the organization lacks standing to seek LUBA review of the local government's decision. *East McAndrews Neigh. Assoc. v. City of Medford*, 19 Or LUBA 390 (1990).

24.2.3 Standing – Before LUBA – Appearance. Where a county finds applicable approval standards are or can be met and grants first stage PUD approval, but includes a condition that (1) final grading and drainage plans be submitted later, and (2) approval of such plans follow a procedure that does not provide notice or an opportunity for further public involvement, the proper way to challenge the county's decision to proceed in such a manner is to appeal the first stage PUD approval decision. Parties may not fail to challenge that decision and appeal the subsequent approval of the final grading and drainage plans, arguing that such approvals are permits subject to the notice and hearing requirements of ORS 215.416, and that their failure to "appear" or file

an appeal of such approvals within 21 days is excused because of the county's failure to observe such notice and hearing requirements. *J.P. Finley & Son v. Washington County*, 19 Or LUBA 263 (1990).

24.2.3 Standing – Before LUBA – Appearance. Giving oral testimony, during the "oral communication" portion of a regular board of county commissioners meeting, which concerns only the appeal to LUBA of an individual farm dwelling permit, does not constitute an appearance in legislative county code update proceedings. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 537 (1990).

24.2.4 Standing – Before LUBA – Right to Notice. A zone verification is not a statutory land use "permit" as defined at ORS 227.160(2)(b), and the city is not required to provide notice of the decision or opportunity for a local appeal of the decision. However, a zone verification decision is subject to LUBA review and a 21-day appeal period. ORS 227.175(11); ORS 197.830(5)(b). *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

24.2.4 Standing – Before LUBA – Right to Notice. A zone verification is subject to LUBA's jurisdiction and a person adversely affected by the decision may appeal the decision to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required." ORS 197.830(5)(b). The city was not obligated to and did not provide notice of the zone verification decision to petitioner. Petitioner was put on inquiry notice of the zone verification decision when the city provided petitioner multiple notices of a subsequent land use application, review, and approval for site review, traffic impact analysis, and adjustment review for the same subject property and development described in the zone verification decision. The city invited petitioner to participate in that subsequent land use action and to review public planning documents at the planning division and online. The appeal was untimely filed and must be dismissed because petitioner failed to make such inquiries and the 21-day appeal period expired before petitioner filed the appeal. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

24.2.4 Standing – Before LUBA – Right to Notice. For purposes of the "knew or should have known" standard in ORS 197.830(3)(b) to gain standing to appeal to LUBA, the actual or constructive knowledge of a co-owner of property adjoining development is not imputed as a matter of law to the other co-owner, the petitioner. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

24.2.4 Standing – Before LUBA – Right to Notice. For purposes of the "knew or should have known" standard in ORS 197.830(3)(b) to gain standing to appeal to LUBA, the actual or constructive knowledge of a co-owner of property adjoining development is not imputed as a matter of law to the other co-owner, the petitioner. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

24.2.4 Standing – Before LUBA – Right to Notice. The presence of surveyor stakes on adjoining property is not sufficient to provide actual or constructive knowledge that a county has issued a lot of record decision for the property, for purposes of the "knew or should have known" standard at ORS 197.830(3)(b), because a property owner may hire a surveyor for reasons that have nothing to do with development or land use approvals. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

24.2.4 Standing – Before LUBA – Right to Notice. Where a local government failed to provide DLCD with the notice required by OAR 660-041-0030 within the time set forth in the rule, LUBA will not dismiss an appeal on the grounds that DLCD did not make the required appearance, where DLCD's failure to appear can be attributed to the local government's failure to provide the notice. *DLCD v. Deschutes County*, 54 Or LUBA 799 (2007).

24.2.4 Standing – Before LUBA – Right to Notice. Where nothing in a conditional use permit proceeding concerning development of three lots in an existing subdivision is sufficient to put

petitioner on notice of the existence of an earlier decision approving reconfiguration of those three lots, petitioner knew or should have known of the challenged reconfiguration decision only when her consultant informed her of the existence of that decision. *Borton v. Coos County*, 51 Or LUBA 478 (2006).

24.2.4 Standing – Before LUBA – Right to Notice. Contrary to *dicta* in *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000), "actual notice" of a decision is provided under ORS 197.830(3)(a) only when the local government provides the written notice of decision required by law. Other circumstances that would lead a reasonable person to know that the local government has made a decision, or that would be sufficient to impute such knowledge, may trigger the 21-day appeal period in ORS 197.830(3)(b) for persons who are not entitled to notice of the decision, but such circumstances are not sufficient to trigger the 21-day deadline in ORS 197.830(3)(a) for persons who are entitled to actual notice of the decision. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

24.2.4 Standing – Before LUBA – Right to Notice. Where a local government fails to recognize that it is rendering a permit decision without providing a hearing or the opportunity for a local appeal as required by ORS 215.416(11) or 227.175(10), ORS 197.830(4) provides the applicable deadline for filing an appeal with LUBA. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

24.2.4 Standing – Before LUBA – Right to Notice. ORS 197.830(3)(a) (1997) applies, and a notice of intent to appeal must be filed with LUBA within 21 days after a petitioner receives "actual notice" of a decision, where (1) the city mistakenly fails to realize it should be proceeding under ORS 227.175(10)(a) (1997); (2) the city therefore fails to provide notice to persons who are entitled to receive notice of the decision under ORS 227.175(10)(a) (1997); and (3) no local appeal is available that must be exhausted before appealing to LUBA. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000).

24.2.4 Standing – Before LUBA – Right to Notice. Petitioners' appeal was timely filed pursuant to the second sentence of ORS 197.830(8) where the city failed to provide notice of the decision to petitioner pursuant to ORS 197.615(2). Petitioners were entitled to notice under ORS 197.615(2) notwithstanding that they requested notice of a limited land use decision rather than a land use decision. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

24.2.4 Standing – Before LUBA – Right to Notice. Petitioners are not entitled to notice of a permit decision and an opportunity for a local appeal as a party adversely affected or aggrieved under ORS 215.416(11)(a), where petitioners only allege they will be adversely affected by solid waste disposal, but the challenged decision approves a waste treatment facility and does not establish, control or limit where the treated waste will be disposed. *Wilbur Residents v. Douglas County*, 33 Or LUBA 412 (1997).

24.2.4 Standing – Before LUBA – Right to Notice. The "most recent county property tax assessment roll" to which ORS 197.763(2)(a) refers is the property tax assessment roll, whether printed out or not, that shows, as nearly as possible, the current ownership of each property in the

county and that notes any property owner's change of address. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

24.2.4 Standing – Before LUBA – Right to Notice. A county may not rely on its failure to update its tax rolls as soon as possible to defeat the purpose of the notice requirement stated in ORS 197.763. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

24.2.4 Standing – Before LUBA – Right to Notice. ORS 215.416(11)(a), which requires notice and an opportunity for appeal of a decision made without a hearing be provided to "those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision," establishes two categories of people to whom notice must be given. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

24.2.5 Standing – Before LUBA – Adverse Effect. A property owner is adversely affected for purposes of ORS 197.830(3) where an impediment to development of property within sight and sound of their property is removed by an interpretation, such as a similar use determination, that applies county-wide and that potentially allows uses in addition to or beyond those listed in the adopted and acknowledged zoning ordinance, even where the zoning ordinance allows for such an interpretation without notice to any property owners or any persons if the interpretation does not relate to a specific property. *Jones v. Clackamas County*, 80 Or LUBA 1041 (2019).

24.2.5 Standing – Before LUBA – Adverse Effect. A zone verification is subject to LUBA's jurisdiction and a person adversely affected by the decision may appeal the decision to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required." ORS 197.830(5)(b). The city was not obligated to and did not provide notice of the zone verification decision to petitioner. Petitioner was put on inquiry notice of the zone verification decision when the city provided petitioner multiple notices of a subsequent land use application, review, and approval for site review, traffic impact analysis, and adjustment review for the same subject property and development described in the zone verification decision. The city invited petitioner to participate in that subsequent land use action and to review public planning documents at the planning division and online. The appeal was untimely filed and must be dismissed because petitioner failed to make such inquiries and the 21-day appeal period expired before petitioner filed the appeal. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

24.2.5 Standing – Before LUBA – Adverse Effect. Where the petitioners file a motion to take evidence for LUBA to consider affidavits and other documents to establish that petitioners filed a timely appeal and are adversely affected, along with a reply brief addressing the same jurisdictional issues, petitioners have sufficiently "explain[ed] with particularity" the facts petitioners seek to establish for purposes of OAR 661-010-0045(2)(a). *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

24.2.5 Standing – Before LUBA – Adverse Effect. While an unsigned or improperly signed declaration of a petitioner asserting facts that go to standing and whether the petitioner is adversely affected may be less persuasive in the face of conflicting evidence than a properly signed declaration, nothing in LUBA's rules requires that such declarations be signed in any particular manner, in order to be considered for the proffered purpose. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

24.2.5 Standing – Before LUBA – Adverse Effect. Notwithstanding a petitioners' failure to identify the location of their property in relation to the property being developed, in order to establish that the decision to approve the development adversely affects petitioners under ORS 197.830(3), allegations that traffic from the development, which includes a 200-unit hotel, will adversely impact the petitioners' use of a narrow rural road for recreation and access to their property are sufficient to establish that the decision adversely affects the petitioners, absent evidence to the contrary. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

24.2.5 Standing – Before LUBA – Adverse Effect. A petitioner fails to establish that an intergovernmental agreement (IGA) between a city and a county that establishes a county process and review procedure for a road improvement project on a county-owned road located within the

city will adversely affect petitioner within the meaning of ORS 197.830(3), where the petitioner argues that the road improvement project, if approved, will adversely affect petitioner, the IGA does not approve the road project or any proposed design or construction and does not apply any city or county approval criteria or standards that may apply to the road project, and allocates responsibility between the city and the county for the planning, design, approval and construction of the road project. *MGP X Properties, LLC, LLC v. Washington County* 74 Or LUBA 378 (2016).

24.2.5 Standing – Before LUBA – Adverse Effect. A petitioner fails to establish that an intergovernmental agreement (IGA) between a city and a county that establishes a county process and review procedure for a road improvement project located within the city on a county-owned road will adversely affect petitioner within the meaning of ORS 197.830(3), where the petitioner argues that the IGA eliminates petitioner's ability to participate in a city planning process for the road improvement project but petitioner does not take the position that the county planning process is an insufficient forum for petitioner to present its arguments against the road improvement project, explain how the county planning process differs from the city planning process in a way that adversely affects petitioner, or argue that petitioner will be prevented from participating in the county planning process for the road improvement project. *MGP X Properties, LLC, LLC v. Washington County* 74 Or LUBA 378 (2016).

24.2.5 Standing – Before LUBA – Adverse Effect. Persons who own property within sight or sound of property that is the subject of an appeal are presumptively adversely affected by an appealed decision concerning the property. However, a petitioner who claims its property is located "approximately 6,280 feet" from the subject property, and does not claim that its property is within sight or sound, is not presumptively adversely affected by the decision. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 188 (2016).

24.2.5 Standing – Before LUBA – Adverse Effect. To have standing to appeal under ORS 197.830(3), a person must be "adversely affected" by the appealed decision. Petitioner's undeveloped allegations that the use approved by that decision will use the same city road and water systems as petitioner are not sufficient to demonstrate the petitioner will be adversely affected by the use, where petitioner's property is located over a mile away from the approved use. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 188 (2016).

24.2.5 Standing – Before LUBA – Adverse Effect. To have standing to appeal under ORS 197.830(3), a person must be "adversely affected" by the appealed decision. Petitioner's undeveloped allegations that the use approved by that decision will have economic impacts and violates petitioner's due process and equal protection rights lack sufficient specificity to demonstrate the use will have an adverse effect on petitioner. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 188 (2016).

24.2.5 Standing – Before LUBA – Adverse Effect. A petitioner fails to establish that it is "adversely affected" by a land use decision within the meaning of ORS 197.830(3) where the petitioner does not allege any adverse physical effect to its properties from the decision, and the only adverse effect alleged is economic harm to the petitioner as a business operator from business operations that will be conducted on the property that is the subject of the decision. *Devin Oil Co. Inc. v. Morrow County*, 72 Or LUBA 14 (2015).

24.2.5 Standing – Before LUBA – Adverse Effect. The statutes that confer standing to appeal to LUBA require a petitioner to establish that it has standing to appeal each decision that is made by a local government. The fact that a party may have appeared before the local government in a separate proceeding on a different application does not establish that that party is "adversely affected," within the meaning of ORS 197.830(3), by a different, albeit related, decision on a different application. *Devin Oil Co. Inc. v. Morrow County*, 72 Or LUBA 14 (2015).

24.2.5 Standing – Before LUBA – Adverse Effect. A party is not "adversely affected" within the meaning of ORS 197.830(3), by a land use decision merely because it requests notice of the decision under the notice provisions of the local government's code. *Devin Oil Co. Inc. v. Morrow County*, 72 Or LUBA 14 (2015).

24.2.5 Standing – Before LUBA – Adverse Effect. "Adverse affect" within the meaning of ORS 197.830(3) and (5) does not include purely economic effects on a business competitor that will suffer no physical effects from the proposed use of the subject property because it is located more than a hundred miles from the subject property. *Schnitzer Steel Industries, Inc. v. City of Eugene*, 67 Or LUBA 444 (2013).

24.2.5 Standing – Before LUBA – Adverse Effect. Standing to appeal a post-acknowledgment plan amendment to LUBA is governed by ORS 197.620(1), which requires only that the petitioner participate in the proceedings below. No statute governing LUBA requires that petitioners who wish to advance a facial constitutional challenge to an ordinance at LUBA must first demonstrate that the ordinance injures their legally protected interests. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

24.2.5 Standing – Before LUBA – Adverse Effect. The demonstration that must be made to demonstrate adverse affect under ORS 197.830(3) is not the same demonstration that must be made to demonstrate irreparable injury under ORS 197.845(1) to obtain a stay of a land use decision pending appeal at LUBA. The irreparable injury standard is a much more exacting standard. *Zirker v. City of Bend*, 55 Or LUBA 188 (2007).

24.2.5 Standing – Before LUBA – Adverse Effect. Even though a mining operation on the applicant's property may be indistinguishable from mining on adjacent properties that does not mean that there is no adverse effect on petitioner's adjacent property. The cumulative effects of the additional mining may increase the adverse effects on petitioners. *Michaels v. Douglas County*, 53 Or LUBA 16 (2006).

24.2.5 Standing – Before LUBA – Adverse Effect. A city is adversely affected by a second city's annexation ordinance, within the meaning of ORS 197.830(3), where the first city has annexed some of the same territory that was annexed by the second city and an appeal is pending challenging the first city's annexation ordinance. *City of Damascus v. City of Happy Valley*, 51 Or LUBA 150 (2006).

24.2.5 Standing – Before LUBA – Adverse Effect. Where a county code grants standing to file a local appeal to parties who are "adversely affected" by planning commission decisions, but the

local code does not define the term "adversely affected," LUBA will assume the county's intended meaning of that term is consistent with its meaning in other land use laws. As that term is used in the 1979 statute that governed standing to appeal to LUBA, adversely affected means the "decision impinges upon the petitioner's use and enjoyment of his or her property or otherwise detracts from interests personal to the petitioner." *Jefferson Landfill Comm. v. Marion Co.*, 297 Or 280, 283, 686 P2d 310 (1984). *Burke v. Crook County*, 46 Or LUBA 413 (2004).

24.2.5 Standing – Before LUBA – Adverse Effect. Where a local code grants standing to appeal planning commission decisions to parties who are "adversely affected," a county may not limit standing to appeal to the applicant, nearby property owners and persons who testified, where the local code does not clearly adopt that limited interpretation of the term "adversely affected." *Burke v. Crook County*, 46 Or LUBA 413 (2004).

24.2.5 Standing – Before LUBA – Adverse Effect. Voter approval of a initiative that adopts additional impediments to residential development of land that includes petitioner's property is sufficient to render petitioner "adversely affected" by the initiative for purposes of ORS 197.830(3), notwithstanding that petitioner does not currently propose residential development and current zoning does not allow for additional residential development of petitioner's property. *Sievers v. Hood River County*, 46 Or LUBA 635 (2004).

24.2.5 Standing – Before LUBA – Adverse Effect. For purposes of establishing standing to appeal to LUBA under ORS 197.830(3), petitioners who reside within sight of a disputed sign are presumptively adversely affected. Exactly how the sign affects petitioners and how many times petitioners have seen it are irrelevant considerations under that presumption, and depositions to resolve those matters are not warranted. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

24.2.5 Standing – Before LUBA – Adverse Effect. Depositions of two petitioners to inquire into their allegations that they are adversely affected by the challenged decision for purposes of ORS 197.830(3) are not warranted, where the movant fails (1) to specifically controvert those allegations, and (2) to establish that depositions of two petitioners are likely to affect the outcome of LUBA's review proceeding. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

24.2.5 Standing – Before LUBA – Adverse Effect. Under *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), a party seeking judicial review of a LUBA decision under ORS 197.850(1), in addition to meeting the statutory standing requirements, must also establish that the Court of Appeals' decision will have a practical effect on the appealing party's rights. LUBA is an executive branch agency rather than a court. Therefore, the standing requirements to appeal a local government land use decision to LUBA are established by ORS 197.830; and the statute does not require that the appellant establish that LUBA's decision will have a practical effect on the appellant. *Doob v. Josephine County*, 41 Or LUBA 569 (2001).

24.2.5 Standing – Before LUBA – Adverse Effect. A petitioner's undisputed claim that he owns property adjoining the property on which a proposed waste water processing facility will be located and is therefore within sight and sound of the proposed facility is sufficient to establish that the petitioner is adversely affected by the proposal. *Farrell v. Jackson County*, 39 Or LUBA 149 (2000).

24.2.5 Standing – Before LUBA – Adverse Effect. Petitioner's allegations that a decision extending approval for an RV park expansion to be constructed partially on fill in a floodplain will exacerbate flooding and traffic problems on the road that serves petitioner's property and that the development will harm fishing in an adjoining creek where petitioner fishes are sufficient to demonstrate that petitioner is adversely affected by the decision. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000).

24.2.5 Standing – Before LUBA – Adverse Effect. LUBA will consider supplemental affidavits, submitted after oral argument in support of petitioners' standing, where the parties' arguments did not focus on the theory of standing supported by the affidavits and the facts asserted in the affidavits are not disputed. In that circumstance, an evidentiary hearing is not required for LUBA to consider the affidavits. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

24.2.5 Standing – Before LUBA – Adverse Effect. Whether a person is "adversely affected" within the meaning of ORS 215.416(11)(a) is a fact-specific inquiry that depends upon the nature of the development and its externalities, the proximity of the person's property to the development, and any factors regarding the person's property or activities thereon that render the property more or less susceptible to impacts from the development. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

24.2.5 Standing – Before LUBA – Adverse Effect. Merely because a person owns property from which he can see or hear a proposed development does not necessarily render that person adversely affected by the decision. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

24.2.5 Standing – Before LUBA – Adverse Effect. Petitioners demonstrate they are adversely affected by a sewage treatment facility, where there is no attempt to rebut petitioners' allegations that they are adversely affected because they are within "sight and smell" of the facility and petitioners also allege "direct, specific, tangible and negative impacts" from the proposed facility. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

24.2.5 Standing – Before LUBA – Adverse Effect. Where a county makes a permit decision without a hearing and fails to send the notice of decision required by ORS 215.416(11)(a) to persons "adversely affected" by the decision, such adversely affected persons have standing to appeal to LUBA within 21 days of actual notice of the decision. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

24.2.5 Standing – Before LUBA – Adverse Effect. Where the procedure followed by the county to approve a permit only provided the applicant a right to participate or appeal, the county may not rely on ORS 215.416(11)(a) to contend petitioner lacks standing to appeal because petitioner is not "adversely affected." *Hugo v. Columbia County*, 34 Or LUBA 577 (1998).

24.2.5 Standing – Before LUBA – Adverse Effect. Although a lot line adjustment only has intangible impacts, those impacts may nevertheless adversely affect proximate property owners. Persons within sight or sound of property are presumptively adversely affected by a property line adjustment decision affecting the property. *Goddard v. Jackson County*, 34 Or LUBA 402 (1998).

24.2.5 Standing – Before LUBA – Adverse Effect. A party may not claim standing before LUBA exclusive of all other parties on the grounds that it is the only party adversely affected by a local decision. *Purdy v. City of Shady Cove*, 33 Or LUBA 331 (1997).

24.2.5 Standing – Before LUBA – Adverse Effect. When challenged decision requires that some of petitioners' property be acquired and dedicated as a road, petitioners are "adversely affected" and have standing under ORS 197.830(3). *Franklin v. Deschutes County*, 30 Or LUBA 33 (1995).

24.2.5 Standing – Before LUBA – Adverse Effect. Persons within sight and sound of a development proposal are presumed to be adversely affected by it. *Kamppi v. City of Salem*, 21 Or LUBA 498 (1991).

24.2.5 Standing – Before LUBA – Adverse Effect. Statements that petitioners' interests in developing their property are substantially impaired by local government adoption of a corrective program which will not correct the problem justifying a previously adopted moratorium, and will create a situation in which there is no foreseeable end to that moratorium, are adequate to allege petitioners have interests which are substantially affected by the adopted corrective program. *Schatz v. City of Jacksonville*, 21 Or LUBA 214 (1991).

24.2.5 Standing – Before LUBA – Adverse Effect. Where petitioner's affidavit in support of standing includes allegations concerning economic impact of the challenged decision on his law practice and is the only testimony or evidence in the record specifically addressing the alleged economic injury, the allegations in the affidavit are sufficient to establish standing based on the alleged economic impact. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

24.2.5 Standing – Before LUBA – Adverse Effect. Allegations that (1) petitioners have ownership interests in land which is subject to an adopted moratorium on new construction, and (2) the moratorium prevents petitioners from developing such land for purposes for which it is zoned, are sufficient to demonstrate that petitioners' interests are substantially affected by the moratorium and, therefore, petitioners have standing to appeal the adoption of the moratorium to LUBA. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

24.2.5 Standing – Before LUBA – Adverse Effect. An allegation that a person is adversely affected by the *appeal* of a land use decision to LUBA does not satisfy the standing requirement of ORS 197.830(2)(1987) that an appellant be adversely affected by *the land use decision*. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 537 (1990).

24.2.6 Standing – Before LUBA – Aggrievement. Where a local government procedure requires each participant in a land use proceeding to establish their status as either a party or a witness, and an individual representing an organization at no point advises the local government that she is appearing on her own behalf as well as on behalf of the organization, LUBA will not presume that the individual has appeared on her own behalf for purposes of ORS 197.830(2)(b). *Friends of Douglas County v. Douglas County*, 39 Or LUBA 156 (2000).

24.2.6 Standing – Before LUBA – Aggrievement. A county's code cannot define which participants in a land use proceeding are "aggrieved" by a land use decision, within the meaning of ORS 215.416, more restrictively than the statute. *Friends of Douglas County v. Douglas County*, 39 Or LUBA 156 (2000).

24.2.6 Standing – Before LUBA – Aggrievement. A county errs in denying the opportunity for local appeal of a permit approval on the grounds that the petitioner is not "aggrieved" by the county's decision within the meaning of ORS 215.416(11), where petitioner is an organization interested in the correct application of the county's land use laws and it appeared before the county to oppose the county's approval. That petitioner is a recently formed organization and appears for the first time before the county is not a basis to conclude that petitioner is not aggrieved by the county's decision. *Friends of Douglas County v. Douglas County*, 39 Or LUBA 156 (2000).

24.2.6 Standing – Before LUBA – Aggrievement. Amendments adopted in 1989 to ORS 197.830 eliminated the requirement that a petitioner be "adversely affected" or "aggrieved" to have standing to appeal a land use decision to LUBA. *Pacific Western Co. v. Lincoln County*, 32 Or LUBA 317 (1997).

24.2.6 Standing – Before LUBA – Aggrievement. Where the local code provides that any interested person may appear in a land use hearing and that any person appearing on the record has standing and is a party to the proceeding, and petitioners appeared and asserted a position on the merits contrary to the challenged decision, petitioners are "aggrieved" by the challenged decision. *Schob v. Deschutes County*, 24 Or LUBA 147 (1992).

24.2.6 Standing – Before LUBA – Aggrievement. Where a city fails to provide the statutorily required notice of hearing and hearing or notice of decision and opportunity for local appeal, the "appearance" and "aggrievement" requirements of ORS 197.830(3) for standing to appeal to LUBA do not apply. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

24.2.6 Standing – Before LUBA – Aggrievement. Where the local code makes no distinction among "interested persons," "disinterested witnesses," and "parties," any person who appears at a local hearing is recognized as an "interested person" who could be aggrieved by the local decision. *Lowrie v. Polk County*, 19 Or LUBA 564 (1990).

There are currently no headnotes under this topic.

24.2.8 Standing – Before LUBA – Legislative Decision. Standing to appeal a post-acknowledgment plan amendment to LUBA is governed by ORS 197.620(1), which requires only that the petitioner participate in the proceedings below. No statute governing LUBA requires that petitioners who wish to advance a facial constitutional challenge to an ordinance at LUBA must first demonstrate that the ordinance injures their legally protected interests. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

24.2.8 Standing – Before LUBA – Legislative Decision. Where a local government adopts plan or land use regulation amendments but fails to provide the Department of Land Conservation and Development with timely notice as required by ORS 197.610(1), the Department or any other person has standing to appeal the decision to LUBA notwithstanding failure to appear before the local government. *Home Depot, Inc. v. City of Beaverton*, 37 Or LUBA 1020 (2000).

24.2.8 Standing – Before LUBA – Legislative Decision. Petitioners' appeal was timely filed pursuant to the second sentence of ORS 197.830(8) where the city failed to provide notice of the decision to petitioners pursuant to ORS 197.615(2). Petitioners were entitled to notice under ORS 197.615(2) notwithstanding that they requested notice of a limited land use decision rather than a land use decision. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1988).

24.2.8 Standing – Before LUBA – Legislative Decision. Petitioners may appeal a legislative post-acknowledgment amendment to LUBA despite failing to appear during the local proceedings if (1) they requested, in writing, notice of the challenged decision and such notice was not mailed to them more than 21 days before they filed the notice of intent to appeal (ORS 197.830(8)); (2) DLCD's notice of the proposed amendment did not reasonably describe the nature of the local government's final decision (ORS 197.620(2)); or (3) published notice of the local hearing did not reasonably describe the final decision (ORS 197.830(3)). *Williams v. Clackamas County*, 27 Or LUBA 602 (1994).

24.2.8 Standing – Before LUBA – Legislative Decision. Where a local government's final decision is not to adopt a legislative amendment to its acknowledged comprehensive plan and land use regulations, ORS 197.830(2) and ORS 197.620(1) deny standing to appeal such a final decision to LUBA. *ODOT v. Klamath County*, 25 Or LUBA 761 (1993).

24.2.8 Standing – Before LUBA – Legislative Decision. Giving oral testimony, during the "oral communication" portion of a regular board of county commissioners meeting, which concerns only the appeal to LUBA of an individual farm dwelling permit, does not constitute an appearance in legislative county code update proceedings. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 537 (1990).

24.2.9 Standing – Before LUBA – Limitations on. Where LUBA issues an interlocutory order approving or denying a motion to intervene, an appeal of LUBA's Final Opinion and Order to the Oregon Court of Appeals would allow challenge to that interlocutory order. Where the contested motion to intervene is briefed and ripe for resolution, delaying the resolution of the motion would unnecessarily prejudice the other parties, and complicate final resolution of the appeal by allowing a person LUBA has determined lacks standing to intervene to file a petition for review. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

24.2.9 Standing – Before LUBA – Limitations on. After the petitioner withdraws from an appeal, any intervenor-petitioner who has not timely filed a separate notice of intent to appeal may not continue the appeal, and the appeal must be dismissed. *Marylhurst Neighborhood Assoc. v. City of West Linn*, 52 Or LUBA 612 (2006).

24.2.9 Standing – Before LUBA – Limitations on. Standing to appeal to LUBA is a matter of state law, and a local government cannot adopt code provisions that purport to enlarge or diminish the requirements for establishing standing to appeal to LUBA. *Multnomah County v. Multnomah County*, 46 Or LUBA 365 (2004).

24.2.9 Standing – Before LUBA – Limitations on. The legislature did not contemplate in adopting the standing requirements to appeal to LUBA at ORS 197.830(2) that a local government could "appear" before itself and thereby gain standing to appeal the local government's own decision to LUBA. *Multnomah County v. Multnomah County*, 46 Or LUBA 365 (2004).

24.2.9 Standing – Before LUBA – Limitations on. While it may be possible for a local government to adopt code provisions that allow a department or subdivision within the local government to "appear" before the local government decision maker and establish standing for that department or subdivision to appeal the final land use decision to LUBA for purposes of ORS 197.830(2), the statute does not permit a local government to appeal its own decision and appear before LUBA as both petitioner and respondent. *Multnomah County v. Multnomah County*, 46 Or LUBA 365 (2004).

24.2.9 Standing – Before LUBA – Limitations on. A party attempting to intervene in a LUBA appeal need only have appeared before the local government and file a timely motion to intervene with LUBA. Unlike petitioners before LUBA, there is no requirement that intervenors have exhausted all administrative remedies below. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

24.2.9 Standing – Before LUBA – Limitations on. ORS 197.805 can be read in isolation to suggest that LUBA must apply the "practical effect" limitation on the judicial power described in *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), as a "sound principle of judicial review." However, read in context with ORS 197.830, it is clear that the legislature did not intend to require that petitioners invoking LUBA's review under ORS 197.830(2) establish that the challenged decision impacts their interests. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 524 (2002).

24.2.10 Standing – Before LUBA – State Agencies. Where a local government failed to provide DLCD with the notice required by OAR 660-041-0030 within the time set forth in the rule, LUBA will not dismiss an appeal on the grounds that DLCD did not make the required appearance, where DLCD's failure to appear can be attributed to the local government's failure to provide the notice. *DLCD v. Deschutes County*, 54 Or LUBA 799 (2007).

24.3 Standing – Representational. The inclusion of a party's name and address in a list of residents who "endorse" a report that was prepared by opponents to a project application, which includes a complete list of residents in the project area, and states that "100% of the residents * * * do not support" the project, and designates various individuals as "lead authors" and "supporting authors," but which does not list the party in question as one of the authors, is not sufficient to constitute an "appearance" for purposes of ORS 197.830(7)(b)(B). The party's intent regarding the inclusion of her name in the report is irrelevant; to demonstrate an appearance, the party must submit a document or oral testimony that the local government would reasonably recognize as an appearance by that party. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

24.3 Standing – Representational. Where an entity named "Shepherdsfield Ministries" moves to intervene in an appeal to LUBA, but the entity fails to establish that it appeared during the proceedings below under that name, or that it has met the requirements for representational or organizational standing, the entity has not established standing to intervene. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 664 (2016).

24.3 Standing – Representational. Where a principal or owner in a corporation appears in a local proceeding by submitting a letter on corporate letterhead, but the letter is phrased in the first person singular and appears to set out the views of the principal in his individual capacity, LUBA will presume that the letter constitutes an individual appearance as well as a representative appearance on behalf of the corporation. *Pliska v. Umatilla County*, 61 Or LUBA 429 (2010).

24.3 Standing – Representational. An organization that appears before a hearings officer and county board of commissioners has standing to appeal the county's decision to LUBA under ORS 197.830(2), and need not establish that it also meets the test for representational standing under *1000 Friends of Oregon v. Multnomah Co.*, 39 Or App 917, 593 P2d 1171 (1979). *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111 (2001).

24.3 Standing – Representational. Where a local government procedure requires each participant in a land use proceeding to establish their status as either a party or a witness, and an individual representing an organization at no point advises the local government that she is appearing on her own behalf as well as on behalf of the organization, LUBA will not presume that the individual has appeared on her own behalf for purposes of ORS 197.830(2)(b). *Friends of Douglas County v. Douglas County*, 39 Or LUBA 156 (2000).

24.3 Standing – Representational. The fact that a neighborhood association did not exist on the date of the challenged local decision does not, of itself, preclude its standing; an organization that was not in existence at the time of a land use decision may assert standing to represent the interests of members who would have standing in their own right. *Wilbur Residents v. Douglas County*, 33 Or LUBA 761 (1997).

24.3 Standing – Representational. An unincorporated association formed after the appealed decision was rendered cannot satisfy statutory "appearance" and "aggrievement" requirements and, therefore, may only assert representational standing to represent the interests of its members who satisfy the statutory standing requirements. *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991).

24.3 Standing – Representational. To establish representational standing, an organization must show that (1) its members have standing to sue in their own right, (2) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit, and (3) the interests the organization seeks to protect are germane to the organization's purpose. *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

24.3 Standing – Representational. The principles applicable to determining whether an organization has representational standing to appeal a decision to LUBA are also applicable to determining whether an organizational petitioner acting in its representational capacity is deemed to have *actual notice* for purposes of calculating the time for filing the notice of intent to appeal under ORS 197.830(3). *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

24.3 Standing – Representational. Where one of a petitioner organization's members did not receive actual notice of a land use decision more than 21 days prior to the time the notice of intent to appeal was filed, an evidentiary hearing to establish that *other* individual members of the organization or the organization's board of directors had actual notice of the challenged decision more than 21 days before the challenged decision was made, is not warranted. Even if other members received such actual notice, petitioner's notice of intent to appeal in its *representational* capacity would be timely. *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

24.3 Standing – Representational. Where an organizational petitioner timely files a notice of intent to determine in its representational capacity, it is only necessary to determine whether petitioner also filed the notice of intent to appeal within 21 days of the date it, as an *organization*, is deemed to have actual notice of the challenged decision, if there were a dispute concerning the member's standing upon whom petitioner's representational capacity to bring the appeals and its representational standing depend. *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

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

25.1 Local Government Procedures – Generally. A county ordinance that adopts a text amendment to a comprehensive plan that discontinues a coastal advisory committee that is provided for in the comprehensive plan, and replaces it with a process for "appointing advisory committees to address specific land use issues" does not violate the requirements of Statewide Planning Goal 1 (Citizen Involvement) to provide for "clearly define[d] * * * procedures by which the general public will be involved in the on-going land-use planning process" and for the "continuity of citizen participation and of information that enables citizens to identify and comprehend issues." *Oregon Coast Alliance v. Clatsop County*, 75 Or LUBA 277 (2017).

25.1 Local Government Procedures – Generally. ORS 197.015(10)(b)(H) is silent regarding what procedures a local government may apply to a request for a land use compatibility statement (LUCS). LUBA's conclusion that a LUCS decision is excluded from LUBA's jurisdiction does not mean that the county lacked "land use jurisdiction" to process the LUCS request pursuant to land use procedures that provide for local appeal. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

25.1 Local Government Procedures – Generally. Under ORS 192.660(2)(H), a city may consult with legal counsel to determine whether it should limit the subjects on which it will allow the presentation of additional evidence following a LUBA remand. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

25.1 Local Government Procedures – Generally. In the limited circumstance in which an applicant has withdrawn an application that led to a decision that is pending before LUBA, a local government could, consistent with *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, 660, *rev'd on other grounds*, 97 Or App 687, 776 P2d 1315 (1989), adopt a new land use decision that revokes the decision that has been appealed to and is pending before LUBA. That new decision would likely have the effect of rendering the pending appeal of the previous decision moot. *Jacobsen v. Douglas County*, 62 Or LUBA 461 (2010).

25.1 Local Government Procedures – Generally. The failure of a local government to provide LUBA with the entire local record does not in itself require remand. However, where the record is so inadequate that LUBA cannot adequately review the decision, the local government's failure to provide the whole record may result in remand. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005).

25.1 Local Government Procedures – Generally. ORS 215.185 and ORS 197.825(3)(a) do not provide the exclusive procedures by which a county may enforce its zoning ordinance to require that property owners stop using their property in a way that the county believes violates its zoning ordinance. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

25.1 Local Government Procedures – Generally. Where a local ordinance limits appeals of local land use decisions to "land use decisions" as that term is defined in the local ordinance, a petitioner is not entitled to a local appeal where petitioner fails to demonstrate that the decision he wishes to appeal is a "land use decision" within the city's definition of the term. *Robinson v. City of Silverton*, 40 Or LUBA 159 (2001).

25.1 Local Government Procedures – Generally. Where petitioner submits a letter to the city that expresses an opinion concerning the elevation of petitioner's property but provides no evidence to support that opinion, the city's failure to object to the opinion in the letter does not constitute a waiver of the city's right to disagree with petitioner's opinion at a later time. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

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

25.1 Local Government Procedures – Generally. A city is not estopped from finding that a dwelling exceeds a code-mandated 28-foot height limit where a city building official approved the plans for the proposed dwelling, but the city building official who approved the plans did not have the authority to authorize a dwelling in excess of 28 feet. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

25.1 Local Government Procedures – Generally. A county does not commit a procedural error where local ordinances allow the county to call up a hearings officer decision and refer it back for reconsideration without first providing an opportunity for a hearing. A party is not prejudiced by such a summary procedure where it is provided an opportunity to appeal the hearings officer's decision on reconsideration. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

25.1 Local Government Procedures – Generally. The failure of a city council expressly to consider denial of an application is not a basis for reversal or remand when the city council concluded the record supported approval. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

25.1 Local Government Procedures – Generally. A city does not err by adopting an alternative decision on the merits in addition to dismissing a local appeal, where petitioner is not prejudiced by the alternative decision. *Shaffer v. City of Salem*, 33 Or LUBA 57 (1997).

25.1 Local Government Procedures – Generally. Where petitioner appealed a planning director determination that a solid waste transfer station is an outright permitted use in a particular zone, the city was neither required nor authorized to expand the scope of the local appeal hearing to

include consideration of whether a solid waste transfer station is also an appropriate use in that zone. *Pend-Air Citizen's Comm. v. City of Pendleton*, 29 Or LUBA 362 (1995).

25.1 Local Government Procedures – Generally. A local government does not violate Goal 1 or comprehensive plan policies implementing Goal 1 by adopting a decision six weeks after the final planning staff report is available, where a great deal of citizen involvement and participation preceded issuance of the final staff report. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

25.1 Local Government Procedures – Generally. A local government adjustment committee's failure to adopt written rules of procedure is a procedural error and provides a basis for reversal or remand only if petitioners' substantial rights are violated. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

25.1 Local Government Procedures – Generally. That a stipulation concerning the applicability of a local government's land use regulations to certain property is entered into by the local government and a property owner outside the confines of a land use proceeding and without following the procedures required for land use decision making does not make the decision any less a land use decision. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

25.1 Local Government Procedures – Generally. There is no basis for the application of the "exclusionary rule," which applies to criminal proceedings, to local land use proceedings. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

25.1 Local Government Procedures – Generally. There is no general legal requirement that petitioners be provided an opportunity to rebut proposed local government findings. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

25.1 Local Government Procedures – Generally. Claim preclusion applies to preclude relitigation of a claim that has been litigated. Where a party's claim of a vested right to residential use of certain property was determined in a circuit court judgment, to which the local government and other parties to the LUBA appeal were also parties, the local government is precluded from making a new determination on that vested right claim, even if it would otherwise have jurisdiction to do so. *Joines v. Linn County*, 24 Or LUBA 456 (1993).

25.1 Local Government Procedures – Generally. In the absence of a specific provision in the local code to the contrary, there is no general requirement that a party have an opportunity to object to proposed findings submitted to the local decision maker by the prevailing party in a local land use proceeding. *Adler v. City of Portland*, 24 Or LUBA 1 (1992).

25.1 Local Government Procedures – Generally. Where the maximum penalty for each separate violation of an ordinance is 500 dollars, and there is no possibility of imprisonment for violating the ordinance, the penalties provided by the ordinance are civil, not criminal, in nature. Therefore, a vagueness challenge based solely on the constitutional vagueness analysis applied where criminal sanctions are possible, provides no basis for reversal or remand of such ordinance *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

25.1 Local Government Procedures – Generally. Where petitioners are afforded a *de novo* evidentiary hearing before a hearings officer, and where petitioners had an adequate opportunity to explain to the hearings officer why the planning department decision appealed from was wrong, that the planning department decision may have been based on erroneous assumptions provides no basis for reversal or remand of the hearings officer's decision. *Ralston v. Clackamas County*, 22 Or LUBA 573 (1992).

25.1 Local Government Procedures – Generally. A local code provision requiring that only members of the board of commissioners reviewing the entire record may act on a matter under review does not impose an affirmative obligation on each county commissioner to demonstrate he or she reviewed the entire record. Absent some indication in the record to the contrary, LUBA will assume a county commissioner performed her duties in accordance with the local code provision. *Toth v. Curry County*, 22 Or LUBA 488 (1991).

25.1 Local Government Procedures – Generally. Although a local decision maker is required to *consider and weigh* all relevant evidence before it in making its decision, it is not required to *refer to* all evidence considered in its findings. *Angel v. City of Portland*, 21 Or LUBA 1 (1991).

25.1 Local Government Procedures – Generally. City charter requirement for a majority vote of the governing body (as opposed to a majority vote of a quorum) is to be given effect and may leave a quorum of the governing body unable to achieve the required majority vote. *Strawn v. City of Albany*, 20 Or LUBA 344 (1990).

25.1 Local Government Procedures – Generally. It is not error for a governing body to provide a lower local tribunal with a memorandum in the nature of a declaratory ruling interpreting certain code provisions while an application to which those code provisions apply is pending before the lower tribunal. Even if it were a procedural error, there would be no prejudice if petitioners had an adequate opportunity in a local appeal to address the interpretation and applicability of the code provisions in question before the governing body. *Hoffman v. City of Lake Oswego*, 20 Or LUBA 64 (1990).

25.1 Local Government Procedures – Generally. A city charter provision delaying the effective date of an ordinance does not also delay the date the ordinance becomes a final decision subject to appeal to LUBA. *Club Wholesale v. City of Salem*, 19 Or LUBA 576 (1990).

25.2 Local Government Procedures – Authority to Act. Neither the filing of an injunctive and declaratory action in circuit court seeking to require that uses which are in violation of applicable land use regulations be removed and that a site be restored to its former state, nor an appeal to the Court of Appeals of the circuit court's denial of such relief divests a local government of authority to process land use applications which seek approval of the challenged uses. *Bishop v. Deschutes County,* 79 Or LUBA 380 (2019).

25.2 Local Government Procedures – Authority to Act. Where a city code provides that a property owner must, as a condition of permit or partition approval, either provide the improvements or pay into an improvement fund if a street adjoining property without direct access to the street does not have standard full-width improvements, and petitioner argues that the code provision is not applicable to his proposed property partition, LUBA will sustain, in part, petitioner's challenge upon remand from the Court of Appeals, where the arguments on appeal have evolved and it is apparent that remand is necessary for the hearings officer to adopt findings regarding LUBA's underlying conclusion that the hearings officer was correct in concluding that the condition requiring a waiver of remonstrance against a street or stormwater facility improvement was justified under *Clark v. City of Albany*, 31 Or LUBA 375, 380, *aff'd*, 144 Or App 192, 924 P2d 877 (1966), and did not constitute a taking. *Hill v. City of Portland*, 78 Or LUBA 334 (2018).

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

25.2 Local Government Procedures – Authority to Act. While a local government may not generally be required to expand the scope of remand to include new issues that could not have been raised during the initial proceedings, where on remand a new issue is raised regarding the continuing jurisdiction of the local government to process the underlying zone change application, the local government has an obligation to address the jurisdictional issue. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

25.2 Local Government Procedures – Authority to Act. Where a property owner whose property is subject to a rezoning application withdraws consent to the zone change, that withdrawal of consent may be effective to deprive a county of jurisdiction to proceed on the zone change application, even if it is possible that a circuit court will ultimately determine that the nonconsenting property owner is contractually obligated to support the zone change by contracts entered into by their predecessor-in-interest. *Setniker v. Polk County,* 75 Or LUBA 1 (2017).

25.2 Local Government Procedures – Authority to Act. *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647 (1989), holds that a local government lacks jurisdiction to modify a decision that is currently on appeal to LUBA or the Court of Appeals. However, *Standard Insurance Co.* does not prohibit a local government from *commencing* local proceedings to modify a condition of approval of a decision that is on appeal to LUBA, as long as the final decision adopting the modification is issued after all appeals of the original decision have been concluded. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

25.2 Local Government Procedures – Authority to Act. Where a county code requires that the application be deemed denied on a tie vote, unless the planning commission members present at the hearing vote to reschedule the deliberation, but the planning commission does not vote to reschedule the deliberation until a subsequent hearing which does not include all of the same members present at the initial hearing, the planning commission may have committed procedural error. However, absent code language to the contrary, that procedural error does not deprive the planning commission of jurisdiction or authority to conduct a second vote on the application. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

25.2 Local Government Procedures – Authority to Act. When LUBA remands a land use decision, absent some authority to the contrary the decision becomes ineffective, and remains ineffective unless and until the local government takes action on remand to re-adopt the decision or otherwise render the decision or portions of it effective. *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

25.2 Local Government Procedures – Authority to Act. Even if a local government lacks authority under its code to modify the location of a driveway allowed under a previous permit approval, and can only modify express conditions of permit approval, petitioner does not demonstrate error where the permit included an express condition of approval limiting the use to that proposed by the applicant, including the location of the driveway, and thus modifying the location is a modification of the condition of approval. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

25.2 Local Government Procedures – Authority to Act. In the limited circumstance in which an applicant has withdrawn an application that led to a decision that is pending before LUBA, a local government could, consistent with *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, 660, *rev'd on other grounds*, 97 Or App 687, 776 P2d 1315 (1989), adopt a new land use decision that revokes the decision that has been appealed to and is pending before LUBA. That new decision would likely have the effect of rendering the pending appeal of the previous decision moot. *Jacobsen v. Douglas County*, 62 Or LUBA 461 (2010).

25.2 Local Government Procedures – Authority to Act. An application that is incomplete on the one hundred and eighty-first day after it has been submitted becomes void where the applicant has not taken one of the steps enumerated in ORS 228.178(4)(a) through (c). A city exceeds its jurisdiction when it thereafter approves such an application. *Painter v. City of Redmond*, 56 Or LUBA 311 (2008).

25.2 Local Government Procedures – Authority to Act. Where a hearings officer's authority to issue a declaratory ruling has not been properly invoked, the hearings officer has no authority to issue the ruling, and the erroneous exercise of that authority is not accurately characterized as a mere procedural error that may be overlooked absent a demonstration of prejudice to the petitioner's substantial rights. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

25.2 Local Government Procedures – Authority to Act. Absent a code provision to the contrary, a governing body does not exceed its authority in an appeal of a planning commission decision by approving a modification of the development application that the planning commission did not consider, and does not commit procedural error in doing so if all participants were provided an opportunity to present argument and evidence on the proposed modification. *O'Rourke v. Union County*, 54 Or LUBA 614 (2007).

25.2 Local Government Procedures – Authority to Act. A hearings officer had authority to issue a declaratory ruling interpreting a condition of approval in a prior decision, where the code allows a declaratory ruling when there is "doubt or a dispute" as to the meaning of a permit decision, and the condition of approval at issue was ambiguous regarding what components of the development must be located within a defined area. *Chackel Family Trust v. City of Bend*, 53 Or LUBA 385 (2007).

25.2 Local Government Procedures – Authority to Act. A failure to appeal an ambiguous condition of approval does not preclude the applicant from seeking a declaratory ruling regarding the meaning of the condition, under a code provision allowing such declaratory rulings if it is not a "substitute for appeal," where no party recognized the potential ambiguity until long after the appeal period had run. *Chackel Family Trust v. City of Bend*, 53 Or LUBA 385 (2007).

25.2 Local Government Procedures – Authority to Act. A hearings officer had authority to modify a prior permit's condition of approval requiring a perimeter fence, notwithstanding a code provision that prohibits a modification that is a "substitute for an appeal," where the requested modification is to approve a different fence location following a court order two years after the permit decision, and thus the modification could not have been the subject of an appeal. *Chackel Family Trust v. City of Bend*, 53 Or LUBA 385 (2007).

25.2 Local Government Procedures – Authority to Act. ORS 223.930(1) does not require that a city, rather than a subdivision developer, construct public street improvements, in order to exercise its condemnation authority to acquire the street right-of-way. *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006).

25.2 Local Government Procedures – Authority to Act. When a city issues a variance to applicable driveway distance requirements while an approval of a previously issued driveway permit is on appeal to LUBA, the variance does not modify the driveway permit decision. Because the variance decision does not modify the earlier driveway permit decision, it does not run afoul of the jurisdictional principle in *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, *rev'd on other grounds*, 97 Or App 687, 776 P2d 1315 (1989). *Delk v. City of Salem*, 51 Or LUBA 123 (2006).

25.2 Local Government Procedures – Authority to Act. When local government counsel denies a local appeal and returns the appeal fee, unless the local government takes some action to disavow its counsel's actions, LUBA will assume counsel had authority to take the actions. *Wells v. Yamhill County*, 51 Or LUBA 659 (2006).

25.2 Local Government Procedures – Authority to Act. Where a city council exercises its authority to review a decision of a hearings officer granting approval of site development review, sensitive lands review and adjustments for a proposed development and, in substance, affirms the hearings officer's decision, its action is a final land use decision and is subject to LUBA's jurisdiction. *Beilke v. City of Tigard*, 51 Or LUBA 837 (2006).

25.2 Local Government Procedures – Authority to Act. Absent legal authority to the contrary, withdrawal of an application for land use approval prior to reaching a final decision on that application results in the local government losing jurisdiction over the application. *Grabhorn v. Washington County*, 50 Or LUBA 344 (2005).

25.2 Local Government Procedures – Authority to Act. Where the applicant requests in writing that an application be withdrawn, and planning staff with apparent authority to do so responds by sending a letter refunding the application fees for "withdrawal" of the application, the letter constitutes a decision allowing withdrawal of the application. *Grabhorn v. Washington County*, 50 Or LUBA 344 (2005).

25.2 Local Government Procedures – Authority to Act. That a planner may have erred in failing to address a code provision governing withdrawal of applications in issuing a letter allowing withdrawal of an application does not mean that the letter is not a final effective decision allowing withdrawal. Unless that decision is appealed or formally rescinded or reconsidered in some way authorized under applicable law, the decision is a final decision that deprives the local government of jurisdiction to proceed on the application. *Grabhorn v. Washington County*, 50 Or LUBA 344 (2005).

25.2 Local Government Procedures – Authority to Act. ORS 227.180(1) requires that a local government take action within 90 days of the date LUBA remands a decision or within 90 days of the date of final resolution of judicial review. ORS 227.180(1) does not authorize a local government to take action on a decision before LUBA prior to the effective date of LUBA's order or the date of the Court of Appeals' appellate judgment, if LUBA's decision is appealed to the court. *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005).

25.2 Local Government Procedures – Authority to Act. Under *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647 (1989), absent statutory authority to the contrary, a local government has no jurisdiction to modify a land use decision that is before LUBA or the Court of Appeals. *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005).

25.2 Local Government Procedures – Authority to Act. A local government does not lose its inherent authority to interpret or reinterpret an ambiguous code provision in a quasi-judicial context when it decides to initiate a legislative code amendment process to resolve the code ambiguity. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

25.2 Local Government Procedures – Authority to Act. Contrary to *Thede v. Polk County*, 1 Or LUBA 339 (1980), irregularities in signing and approving a final city decision does not mean that the challenged decision is not a "final decision" subject to LUBA's jurisdiction. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 618 (2004).

25.2 Local Government Procedures – Authority to Act. A county does not exceed the authority granted under ORS 195.025(1) or 197.005(3) by adopting county comprehensive plan amendments that inform cities what considerations will suffice to gain county concurrence in UGB amendments or other decisions requiring county concurrence. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

25.2 Local Government Procedures – Authority to Act. An assignment of error that alleges a planning commission may only make recommendations to the city council and may not make a final decision on an application for a conditional use permit for a home occupation is without merit where (1) ORS 227.090(h) specifically authorizes planning commissions to carry out the statutory provisions governing land use permits and (2) the city's zoning code specifically authorizes the planning commission to make decisions on conditional use permits. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

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

25.2 Local Government Procedures – Authority to Act. A local government decision maker has authority under ORS 197.830(13)(b) to make a decision on reconsideration from LUBA even when the appeal that led to the withdrawal of the decision has been dismissed. *6710 LLC v. City of Portland*, 43 Or LUBA 177 (2002).

25.2 Local Government Procedures – Authority to Act. A local governing body may not adopt an order to disregard its acknowledged land use regulations, simply because those ordinance provisions are perceived to be too onerous. If the local governing body believes that ordinance provisions are either unnecessary or do not further land use planning goals, it must amend the ordinance to delete those provisions; it may not by order elect to ignore them. *Palaske v. Clackamas County*, 43 Or LUBA 202 (2002).

25.2 Local Government Procedures – Authority to Act. ORS 197.620(1), which states that a decision not to adopt a legislative amendment or new land use regulation is not appealable to LUBA, does not explicitly or implicitly limit a local government's authority to define what matters it will consider on a quasi-judicial or legislative basis. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

25.2 Local Government Procedures – Authority to Act. An urban growth area management agreement that identifies the county as having the decision making authority over all land use

actions that "affect" the urban growth area does not confer authority on the county to decide any matters concerning property within the city that may affect property located within the urban growth area. *ODOT v. City of Mosier*, 41 Or LUBA 73 (2001).

25.2 Local Government Procedures – Authority to Act. A city has authority under ORS 92.040 and 92.180 to review and approve subdivision plats. Where a city requires an application for a subdivision replat to show revised easements and applies its land use regulations to approve the replat, the city's decision is a land use decision or limited land use decision subject to LUBA's review. *Haber v. City of Gates*, 39 Or LUBA 137 (2000).

25.2 Local Government Procedures – Authority to Act. Where petitioner submits a letter to the city that expresses an opinion concerning the elevation of petitioner's property but provides no evidence to support that opinion, the city's failure to object to the opinion in the letter does not constitute a waiver of the city's right to disagree with petitioner's opinion at a later time. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

25.2 Local Government Procedures – Authority to Act. A city is not estopped from finding that a dwelling exceeds a code-mandated 28-foot height limit where a city building official approved the plans for the proposed dwelling, but the city building official who approved the plans did not have the authority to authorize a dwelling in excess of 28 feet. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

25.2 Local Government Procedures – Authority to Act. Where the process a county utilizes to determine whether its land use regulations have been violated affords petitioners a hearing, a right to present and rebut evidence and a written decision, petitioners are not deprived of their substantial rights by the county's alleged failure to follow the procedures set out in its ordinance. *Crook v. Curry County*, 38 Or LUBA 677 (2000).

25.2 Local Government Procedures – Authority to Act. A county has authority or jurisdiction to deny a permit application on its merits, where the permit applicant fails to demonstrate he was authorized to submit the permit application but the code limitations on who can submit permit applications do not impose a "jurisdictional" requirement. *Base Enterprises, Inc. v. Clackamas County*, 38 Or LUBA 614 (2000).

25.2 Local Government Procedures – Authority to Act. Where the city council's review of a planning commission decision is limited to whether the lower decision is supported by substantial evidence, and petitioner argues that the city council exceeded its review authority by reweighing the evidence, LUBA will deny the assignment of error where it concludes that the city council understood and applied the substantial evidence standard correctly. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472 (2000).

25.2 Local Government Procedures – Authority to Act. Where LUBA remands a decision for additional proceedings requiring that the current members of the county board of commissioners review the record compiled before the previous board, such remand cures the procedural error, if any, resulting from the fact that, due to an intervening election, only one of the three commissioners who signed the final written order attended the evidentiary hearings and

participated in the oral vote on the merits of the application. *Greer v. Josephine County*, 37 Or LUBA 261 (1999).

25.2 Local Government Procedures – Authority to Act. A city must have jurisdiction over property before it approves applications for development on it. Therefore, in the absence of a specific agreement between the city and the county, the county retains regulatory control over property within its unincorporated boundaries. *Benchmark Enterprises v. City of Stayton*, 36 Or LUBA 433 (1999).

25.2 Local Government Procedures – Authority to Act. Where provisions allowing enforcement of the city's ordinance only specifically authorize judicial remedies, the city's interpretation of the enforcement provisions as allowing the city to conduct quasi-judicial proceedings to determine nonconforming use status is inconsistent with the terms of that provision and not entitled to deference under *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992), or ORS 197.829(1). *Dept. of Transportation v. City of Mosier*, 35 Or LUBA 701 (1999).

25.2 Local Government Procedures – Authority to Act. A county is not equitably estopped from denying the nonconforming use status of a dog kennel because of the applicant's reliance on a previous county decision approving site design for a dog kennel. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

25.2 Local Government Procedures – Authority to Act. A county hearings officer is not legally bound to defer to a board of county commissioners' determination that a particular site is necessary for a proposed utility facility, where the board of county commissioners adopted its determination in its capacity as the governing body of a service district. *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998).

25.2 Local Government Procedures – Authority to Act. ORS 215.130(2) authorizes a city to process and approve a zone change contingent on future annexation to the city. *Lodge v. City of West Linn*, 35 Or LUBA 42 (1998).

25.2 Local Government Procedures – Authority to Act. Where an intergovernmental agreement authorizes a city to grant conditional use and design review approval provided a pre-annexation agreement has been recorded, the city may grant such conditional use and design review approval subject to a condition of actual annexation. *Lodge v. City of West Linn*, 35 Or LUBA 42 (1998).

25.2 Local Government Procedures – Authority to Act. A city may generally exercise land use planning authority within its corporate limits, except where a county or the state grants the city the right to exercise land use planning authority beyond the city's corporate limits. *Northwest Aggregates Co. v. City of Scappoose*, 35 Or LUBA 30 (1998).

25.2 Local Government Procedures – Authority to Act. Where a hearings officer's decision on a previous application for design review on the subject property determined that no nonconforming use existed, but specifically left the door open for intervenors to establish such a legal use, the

hearings officer in a subsequent proceeding is not bound by the earlier determination. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

25.2 Local Government Procedures – Authority to Act. Local governing body may not determine an appeal to be moot and reinstate an earlier, rescinded decision, based on petitioner's collateral challenge to the authority of the planning director to rescind that earlier decision, when the rescission decision was not timely appealed. *Petterson v. Klamath County*, 31 Or LUBA 402 (1996).

25.2 Local Government Procedures – Authority to Act. The absence of relevant or even essential information in an application does not preclude consideration by the city, although it may result in a denial of the application. *Sullivan v. City of Woodburn*, 31 Or LUBA 192 (1996).

25.2 Local Government Procedures – Authority to Act. Even if a local decision maker had no authority to make a land use decision, LUBA has jurisdiction over an appeal of that decision if it falls within the class of decisions over which LUBA has review authority. *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

25.2 Local Government Procedures – Authority to Act. Since a local appeal is not available from an ORS 197.825 administrative decision made without authority, a petitioner may appeal the decision directly to LUBA. *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

25.2 Local Government Procedures – Authority to Act. Where local land use regulations permit the governing body to render its own formal interpretation of its zoning ordinance either in response to an interpretation made by the planning commission or upon its own motion, the delegation of initial interpretive authority is not total, and the governing body may render an interpretation in the first instance. *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147 (1995).

25.2 Local Government Procedures – Authority to Act. Where the local code requires the governing body to review the planning commission's recommendation on a proposed comprehensive plan amendment, but does not limit the governing body's authority to adopt a plan amendment to instances where the planning commission recommendation is free from error, that there was an error in the procedures by which the planning commission arrived at its recommendation does not deprive the governing body of jurisdiction over the proposed plan amendment. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

25.2 Local Government Procedures – Authority to Act. Where the county code specifically authorizes the board of commissioners to make the initial determination on a land use application, the board of commissioners had jurisdiction to initially consider and approve a floodplain permit application, regardless of other code provisions stating the planning commission should make the initial determination on such applications. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

25.2 Local Government Procedures – Authority to Act. ORS 433.750 completely occupies the field of regulation of outdoor mass gatherings of less than 120 hours duration. There is no room

for more restrictive local regulation of such gatherings. However, ORS 433.735(1) authorizes a county to adopt a more expansive definition of outdoor mass gatherings of less than 120 hours duration. *Fence v. Jackson County,* 29 Or LUBA 147 (1995).

25.2 Local Government Procedures – Authority to Act. Where a challenged local government decision finds the subject property is entirely within the local government's boundaries, and those findings are supported by substantial evidence in the record, the local government did not exceed its jurisdiction in approving the subject development application. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

25.2 Local Government Procedures – Authority to Act. Where the local code requires a local government to make a particular determination in acting on a partition application, the local government does not lack authority to make that determination. *Hilderbrand v. Marion County*, 28 Or LUBA 703 (1995).

25.2 Local Government Procedures – Authority to Act. Where the local code gives the planning director authority to make an initial determination on the existence of a nonconforming use, that the planning director made a previous determination on the existence of the nonconforming use does not mean he lacks authority to adopt a subsequent determination, pursuant to an agreement of the parties. *Huiras v. Clackamas County*, 28 Or LUBA 667 (1994).

25.2 Local Government Procedures – Authority to Act. Limitations on a local government's authority over development applications must be specifically expressed in the local code. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

25.2 Local Government Procedures – Authority to Act. With regard to siting a lot of record dwelling on high-value farmland, a county does not have authority to require that an Oregon Department of Agriculture hearings officer make determinations other than those specified in ORS 215.705(2)(c). *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

25.2 Local Government Procedures – Authority to Act. Where the local code provides for discretionary review of certain development applications by the planning director, and also provides a process for the planning director to refer questions concerning code interpretation to the governing body, the code does not divest the planning director of authority to interpret the code in carrying out his duties. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

25.2 Local Government Procedures – Authority to Act. A local government loses jurisdiction over an application for land use approval when the application is withdrawn before a final decision is rendered. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

25.2 Local Government Procedures – Authority to Act. Where a local code neither expressly allows a local appellant to withdraw his appeal of a planning commission decision to the governing body, nor expressly provides the governing body retains jurisdiction over such an appeal once filed, a local government acts within its interpretive discretion under ORS 197.829 in concluding that it retains jurisdiction over such an appeal notwithstanding the local appellant's attempt unilaterally to withdraw the appeal. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

25.2 Local Government Procedures – Authority to Act. ORS 197.835(8) applies only where LUBA determines a local government made a land use decision exceeding the local government's discretionary authority under applicable comprehensive plan and land use regulation provisions, not where LUBA determines the local government misconstrued its permissible scope of review on remand from a previous LUBA appeal. *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32 (1994).

25.2 Local Government Procedures – Authority to Act. ORS 275.320 to 275.340 deal with a county's proprietary power to manage county-acquired land. The designation of county-acquired real property as "county forests, public parks or recreational areas" under ORS 275.320 does not supersede the comprehensive land use planning process established under ORS chapter 197. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

25.2 Local Government Procedures – Authority to Act. Absent other limitations, if a local code gives local decision makers authority to impose conditions of approval that protect the public from adverse effects associated with a proposed use, this authority to impose conditions is not limited to conditions required to establish compliance with a particular permit approval standard. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

25.2 Local Government Procedures – Authority to Act. Where a school district concludes a proposed school site complies with a city's comprehensive plan in a school district proceeding in which the city participates, the city council nevertheless may reach a contrary conclusion concerning the proposed site's compliance with the city comprehensive plan in a subsequent city proceeding. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

25.2 Local Government Procedures – Authority to Act. Neither ORS 222.173 nor ORS 222.115 purports to preempt local government use of consents to annexation in circumstances other than those identified in ORS 222.173(1). Statements by individual legislators during legislative proceedings leading to adoption of ORS 222.115 expressing general hostility towards involuntary annexation do not establish a legislative intent to preclude city or county legislation concerning consents to annexation. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

25.2 Local Government Procedures – Authority to Act. Where LUBA has remanded a city decision annexing certain property, a subsequent city decision amending the comprehensive plan and zoning designations for that property, in reliance on the annexation, exceeds the city's authority. *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

25.2 Local Government Procedures – Authority to Act. That a county zoning ordinance authorizes imposition of "fines" for its violation, whereas a separate county compliance ordinance authorizes imposition of "civil penalties" in amounts determined under ORS 203.065(1) or the violated ordinance, does not prevent the county from imposing a civil penalty for violation of its zoning ordinance, based on the amount of the fines allowed by the zoning ordinance for violations. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

25.2 Local Government Procedures – Authority to Act. Circuit court jurisdiction to grant declaratory relief does not include jurisdiction to make a land use decision in the process of granting declaratory relief. The appropriate local government must render any required land use decisions. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

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

25.2 Local Government Procedures – Authority to Act. A condition of permit approval prohibiting remonstrance against the formation of an LID does not violate ORS 260.665 (protecting voting rights) where petitioners are neither prevented from voting nor required to vote in any particular manner. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

25.2 Local Government Procedures – Authority to Act. The validity of a challenged city council decision that ratifies and affirms a letter written by a city manager is unaffected by arguments that the city manager lacked authority to write the letter. *Poddar v. City of Cannon Beach*, 26 Or LUBA 429 (1994).

25.2 Local Government Procedures – Authority to Act. A local government may interpret its code requirement for a "description" of the subject property showing "access" not to require a final legal determination concerning the existence of access adequate to serve the proposed use, where the subject property is served by a disputed easement. Only the circuit court can provide a final legal determination concerning the nature and scope of a disputed easement. *Mohler v. Josephine County*, 26 Or LUBA 1 (1993).

25.2 Local Government Procedures – Authority to Act. Where a local governing body fails to initiate rehearing of a matter within the period provided in the local code, the governing body has no authority to conduct a rehearing proceeding. *Rochlin v. Multnomah County*, 25 Or LUBA 637 (1993).

25.2 Local Government Procedures – Authority to Act. Unless the local code specifically provides to the contrary, the local governing body may ratify the authority of a local official to act on the local government's behalf. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

25.2 Local Government Procedures – Authority to Act. Where the governing body ratifies an act of another local government official in the challenged decision, that aspect of the challenged decision is itself substantial evidence that the local official possessed authority to accomplish the disputed act. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

25.2 Local Government Procedures – Authority to Act. Where a challenged decision simply expresses a conclusion that the county court has discretion to act on a subdivision application without that application having first been acted on by the county planning commission, but does not identify the source of that discretion or interpret apparently relevant code provisions, the basis

for the challenged decision is not sufficiently articulated for review, and the challenged decision must be remanded. *Larson v. Wallowa County*, 25 Or LUBA 537 (1993).

25.2 Local Government Procedures – Authority to Act. Where petitioner fails to establish a false representation was made, and also fails to establish that the representation made was made by a person with authority to bind the local decision maker, petitioner has not adequately alleged estoppel against the local decision maker. *DLCD v. Wasco County*, 25 Or LUBA 529 (1993).

25.2 Local Government Procedures – Authority to Act. After a mandamus proceeding has been initiated pursuant to ORS 215.428(7), a county retains jurisdiction to make a "land use decision" on a pending permit application at any time before the circuit court issues a final judgment in the mandamus proceeding. Although made while circuit court mandamus proceedings are pending, such a "land use decision" is reviewable by LUBA under ORS 197.825(1). *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 507 (1993).

25.2 Local Government Procedures – Authority to Act. Where the evidence in the record is insufficient to establish a zoning inspector's representation concerning nonconforming use status was made with knowledge of the material facts that present and certain past commercial uses of the subject property occurred without required local government approvals, the local government is not estopped from denying petitioners' application for the establishment of a nonconforming use. *Pesznecker v. City of Portland*, 25 Or LUBA 463 (1993).

25.2 Local Government Procedures – Authority to Act. The use of land for a recreational parachuting center and for parachute landings is a "land use" subject to regulation by local land use ordinances. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

25.2 Local Government Procedures – Authority to Act. Federal preemption of local authority to regulate is not presumed. Rather it is necessary to determine whether preemption was the "clear and manifest purpose of Congress." *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

25.2 Local Government Procedures – Authority to Act. Nothing in the federal regulatory scheme relating to the regulation of parachute jumping purports to foreclose state and local land use regulation of the ground based impacts of parachuting. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

25.2 Local Government Procedures – Authority to Act. Where a condition of approval imposing a fine for a violating the terms of a conditional use permit, regardless of the amount of actual damage sustained due to the violation, is not specifically authorized by the local code, such condition is beyond the local government's authority to impose. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

25.2 Local Government Procedures – Authority to Act. Although ORS 459.017(1)(a) provides that the "planning, location, acquisition, development and operation of landfill disposal sites is a matter of statewide concern," ORS chapter 459 also contains numerous references to the power of local governments to enact legislation affecting solid waste landfills and, therefore, ORS chapter

459 does not preempt local regulation of landfill siting. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

25.2 Local Government Procedures – Authority to Act. Claim preclusion applies to preclude relitigation of a claim that has been litigated. Where a party's claim of a vested right to residential use of certain property was determined in a circuit court judgment, to which the local government and other parties to the LUBA appeal were also parties, the local government is precluded from making a new determination on that vested right claim, even if it would otherwise have jurisdiction to do so. *Joines v. Linn County*, 24 Or LUBA 456 (1993).

25.2 Local Government Procedures – Authority to Act. A city ordinance rezoning property located outside the city's municipal boundaries exceeds the city's jurisdiction and must be reversed. *Hofmann v. City of Seaside*, 24 Or LUBA 183 (1992).

25.2 Local Government Procedures – Authority to Act. Where local land use regulations delegate the authority to act initially on an application to a planning commission or hearings officer, and reserve to the governing body *only* the power to review the planning commission's or hearings officer's decision, the governing body exceeds its authority if it approves such an application without it having first been acted on by the planning commission or hearings officer. *Larson v. Wallowa County*, 23 Or LUBA 527 (1992).

25.2 Local Government Procedures – Authority to Act. Subsequent changes in county ordinances do not affect an energy facility for which a site certificate has been approved by EFSC. Under ORS 469.400(5), a county is required to issue the "appropriate permits" for such an energy facility, regardless of whether a subsequent change in county ordinances makes the "appropriate permit" a type different from that which was appropriate when the site certificate was approved. *McDole v. Lane County*, 23 Or LUBA 500 (1992).

25.2 Local Government Procedures – Authority to Act. A local ordinance which prohibits the short term rental use of dwellings in residential zones is not an unlawful rent control regulation under ORS 91.225. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

25.2 Local Government Procedures – Authority to Act. In order to establish estoppel, petitioners must show (1) the local government made a false representation with knowledge of the facts, (2) petitioner was ignorant of the truth, (3) the local government intended that petitioner act upon the false representation, and (4) petitioner in fact acted upon the false representation. That a local government planner stated his opinion that an application is approvable is not adequate to establish estoppel. *Schoppert v. Clackamas County*, 23 Or LUBA 138 (1992).

25.2 Local Government Procedures – Authority to Act. A use which is industrial in nature, involving the *processing* of both logging debris and woody debris from other sources, does not constitute "forest practices on forest lands" and, therefore, is not subject to the prohibition of ORS 527.722(1) against regulation by local governments. *Wastewood Recyclers v. Clackamas County*, 22 Or LUBA 258 (1991).

25.2 Local Government Procedures – Authority to Act. Where an applicant seeks approval for development outside of a "stream corridor area," but has already placed related development within the "stream corridor area" on the same property without obtaining necessary local permits, the local government has authority to impose conditions on approval of the applicant's proposed development requiring that the unauthorized development be removed or that necessary local permits be obtained for the unauthorized development. *Tylka v. Clackamas County*, 22 Or LUBA 166 (1991).

25.2 Local Government Procedures – Authority to Act. Where local land use regulations delegate the authority to act initially on an application to a hearings officer, and reserve to the governing body *only* the power to review the hearings officer's decision, the governing body exceeds its authority if it approves such an application without it having first been acted on by the hearings officer. *Scott v. Josephine County*, 22 Or LUBA 82 (1991).

25.2 Local Government Procedures – Authority to Act. A city is not prohibited from issuing a building permit pursuant to an unappealed planning commission decision, notwithstanding that a second application seeking to expand the scope of the project approved by the unappealed planning commission decision was denied by the city council. *Townsend v. City of Newport*, 21 Or LUBA 286 (1991).

25.2 Local Government Procedures – Authority to Act. A local government cannot deny building permits for approved conditional uses based on subsequent local code interpretations, where the subject conditional use permit remains effective and was not appealed locally or to LUBA. *Townsend v. City of Newport*, 21 Or LUBA 286 (1991).

25.2 Local Government Procedures – Authority to Act. City charter requirement for a majority vote of the governing body (as opposed to a majority vote of a quorum) is to be given effect and may leave a quorum of the governing body unable to achieve the required majority vote. *Strawn v. City of Albany*, 20 Or LUBA 344 (1990).

25.2 Local Government Procedures – Authority to Act. A county does not exceed its jurisdiction in taking final action on a permit application after the 120-day time limits established by ORS 215.428(1) and its code have elapsed; and its decision will be given effect. *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

25.2 Local Government Procedures – Authority to Act. Where the county charter and code grant the county administrator broad administrative powers, but do not explicitly grant the county administrator authority to determine whether decisions are appealable under the county code, LUBA will accept the county's interpretation of the charter and code as granting the administrator such authority, so long as that interpretation is not inconsistent with the charter and code. *Von Lubken v. Hood River County*, 20 Or LUBA 208 (1990).

25.2 Local Government Procedures – Authority to Act. Even if the planning commission chairman's participation in the planning commission proceedings on a proposed comprehensive plan amendment were improper, and without his participation the planning commission would not have had a quorum, there would be no basis for reversal or remand of the city council decision

approving the plan amendment, because no provisions of state statute or city plan or land use regulations make a planning commission recommendation on a proposed plan amendment a necessary prerequisite to action by the city council. *Burk v. Umatilla County*, 20 Or LUBA 54 (1990).

25.2 Local Government Procedures – Authority to Act. If petitioners believe the assessor has not properly considered the restrictions the county's timber zone puts on their property, their remedy is with the county board of equalization. Petitioners cannot claim in an appeal to LUBA that the assessment of their property over the years constituted a "false representation," such that the county is estopped from denying their application for a nonforest dwelling. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

25.2 Local Government Procedures – Authority to Act. Where city regulations governing applications for conditional use approval do not make all contiguous property owned by an applicant subject to the conditional use review, and an applicant files a conditional use application for only a portion of his property, the city does not have authority to impose conditions on contiguous property owned by the applicant which is not the subject of the application. *Goodman v. City of Portland*, 19 Or LUBA 289 (1990).

25.2 Local Government Procedures – Authority to Act. The local governing body has the *authority* to conduct either an evidentiary or on the record *de novo* review of planning commission decisions in circumstances where local ordinances are silent on the scope of review. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Under ORS 197.610(6), if a proposed PAPA is altered to such an extent that the notice submitted to DLCD under ORS 197.610(1) and (3) no longer reasonably describes it, the local government must submit notice of the alterations to DLCD at least 10 days before the final evidentiary hearing, which DLCD thereafter provides to the public. The larger statutory scheme at ORS 197.610 to 197.625 is intended to expand notice and participatory options for DLCD and a broader audience that may not receive local notice. A local government's errors under ORS 197.610(6) require remand where they are of a kind or degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function. *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where notice under ORS 197.610(6) is sent to DLCD 17 days *after* the final evidentiary hearing occurred and describes the "date of first evidentiary hearing" and the "date of final hearing" but does not identify the date of the "final evidentiary hearing," where there is a disparity between the text of the notice and the text of an ordinance included with the notice regarding the subject acreage, and where the notice is sent during a time when the record is left open only for evidence that is responsive to evidence that was submitted earlier, the totality of the errors in the submission of the notice and in the notice itself are of a kind and degree that make it doubtful that the ORS 197.610 to 197.625 process performed its function, and remand is required. *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where separate applications to partition two parcels under a single ownership into three parcels each receive final approval in the same calendar year, the resultant units of land are not "lawfully created" where state statute requires that divisions of "an area or tract of land into four or more lots within a calendar year when such area or tract of land exists as a unit or contiguous units of land under a single ownership" receive subdivision approval. *Landwatch Lane County v. Lane County*, 79 Or LUBA 65 (2019).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where a county approves a "forest template dwelling" under ORS 215.750(1)(c), arguments that the county relied on units of land that were unlawfully created through partition approval, rather than subdivision approval, provide no basis for reversal or remand since any procedural error the county committed in approving the land division cannot be collaterally attacked in an appeal of a subsequent decision that depends on the prior approval. *Landwatch Lane County v. Lane County*, 79 Or LUBA 65 (2019).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. The fact that an adopted local code amendment includes language which was not included in the notice to DLCD required by ORS 197.610(1) is not by itself sufficient to explain why the notice was inadequate so as to require reversal or remand of the amendment decision. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. The statute of limitations in ORS 131.125(8)(c) is inapplicable to a county's separate land use enforcement proceeding procedures pursuant to a county code that does not contain any time limitation for

enforcement actions for violations of the county's land use code, because the county has authority over land use code enforcement matters independent from any statutorily derived authority in ORS Title 14 pursuant to county charter, and because ORS 153.030(4) expressly provides that "[n]othing in this chapter affects the ability of any other political subdivision of this state to provide for the administrative enforcement of the charter, ordinances, rules and regulations of the political subdivision, including enforcement through imposition of monetary penalties." *A Walk on the Wild Side v. Washington County*, 78 Or LUBA 356 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. When the city has a general track for requesting planned unit development (PUD) approval and a clear and objective track for requesting PUD approval, the city is not required to demonstrate that the applicant is able to gain approval for some development on the subject property under its needed housing track. ORS 197.307(6)(a) requires only that the city allow the applicant the "option of proceeding" under the needed housing track, and does not require a guarantee or demonstration of any kind that development is likely to be approved under the clear and objective approval standards in the needed housing track. *Dreyer v. City of Eugene*, 78 Or LUBA 391 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Senate Bill (SB) 1051 (2018), section 12 did not require cities to amend their land use regulations to implement SB 1051 by July 1, 2018. SB 1051 itself is silent regarding any requirement, much less a deadline for a city to amend its land use regulations to comply with its provisions. SB 1051, section 12 provides for a delayed "operative date" of July 1, 2018. That delayed operative date provides a grace period before which the provisions of SB 1051 did not apply, and after which, the statute applies directly and cities are required to "allow" accessory dwelling in areas required by the statue. But SB 1051 does not direct cities as to the mechanism by which to allow accessory dwellings. *Home Builders Assoc. v. City of Eugene*, 78 Or LUBA 441 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. While ORS 197.646(1) requires the city to amend its land use regulations to implement SB 1051 (2018), ORS 197.646(2)(b) requires the Land Conservation and Development Commission (LCDC) to establish by rule the time period within which a local government must amend its code to implement a new land use statute "if the legislation does not specify a time period for compliance[.]" LCDC has not adopted any rules specifying a time period for implementation of SB 1051, and SB 1051 itself does not require cities to adopt amendments to their codes that implement all of the provisions of SB 1051 by July 1, 2018. *Home Builders Assoc. v. City of Eugene*, 78 Or LUBA 441 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where in evaluating petitioner's zone verification request pursuant to Eugene Code (EC) 9.2741(2), the city failed to consider the ORS 197.312(5) requirement that all accessory dwellings must be allowed "subject to reasonable local regulations relating to siting and design," the proper remedy is for LUBA to remand the decision to the city for the city to consider in the first instance whether EC 9.2741(2) is a "reasonable local regulation[] relating to siting and design" pursuant to ORS 197.312(5). *Kamps-Hughes v. City of Eugene*, 78 Or LUBA 457 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A city's rejection of petitioner's as-applied challenge of a city's appeal fee during the city's proceeding on

intervenor's land use application, and legal challenges to the city's future assessment of actual attorney's fees is not excluded from LUBA's jurisdiction by the "fiscal" exception. However, to the extent petitioner challenges the amount of the actual attorney fees, that challenge is outside the Board's scope of review because that fee dispute arose after the city issued the fee invoice and after the city made a decision on petitioner's underlying appeal, and is therefore a "fiscal" decision. The fact that the local record includes the invoice for the actual attorney fees petitioner was charged for his local appeal does not convert the amount of the fees in that invoice into an issue that is reviewable by LUBA. *Nicita v. City of Oregon City*, 78 Or LUBA 463 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. In an as-applied challenge, a petitioner cannot challenge the manner in which the city adopted its appeal fee structure. Instead, LUBA's inquiry regarding petitioner's as-applied challenge to the appeal fee charged by the city, is whether petitioner has produced a *prima facie* case that the fee that the city charged petitioner pursuant to the city's previously adopted fee schedule is "more than the average cost of such appeals or the actual cost of the appeal." ORS 227.180(1)(c). *Nicita v. City of Oregon City*, 78 Or LUBA 463 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A criterion that requires a county to determine whether a proposed short term rental home occupation will not "unreasonably interfere" with other uses permitted in the zone requires the exercise of discretion, and a decision applying that criterion is a decision on a permit as defined in ORS 215.402(4). A county errs in failing to process the short term rental home occupation application according to the procedures for permits in the local code. *Hood River Valley Residents' Committee v. Hood River County*, 77 Or LUBA 7 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Based on an ESEE consequences analysis regarding conflicting uses, under OAR 660-023-0040(4) and (5), a county must develop a program to achieve Goal 5, and determine whether to allow, limit, or prohibit conflicting uses. A local government errs in its ESEE analysis and in its ultimate decision to modify its acknowledged Goal 5 program to eliminate the prohibition on churches in the Wildlife Area Combining Zone, when it relied in part on the cost of defending its existing Goal 5 program against a hypothetical Religious Land Use and Institutionalized Persons Act (RLUIPA) lawsuit to support its decision to achieve Goal 5 by allowing without limits a new conflicting use, without providing an analysis establishing the county's Goal 5 program would be legally vulnerable to losing a hypothetical RLUIPA lawsuit if one were brought. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. To allow a conflicting use without limit under OAR 660-023-0040(5)(c), a county's ESEE analysis must (1) demonstrate that the conflicting use is of sufficient importance relative to the resource site, and (2) must indicate why measures to protect the resource "to some extent should not be provided." OAR 660-023-0040(5)(c) does not prohibit the county from allowing a conflicting use without limit, if there is another option that would both fully protect the resource at issue and satisfy the motivations prompting the county to decide in favor of the conflicting use. Instead, OAR 660-023-0040(5)(c) requires the county to justify its choice to allow a conflicting use without limit, and that justification must include a demonstration that alternatives, such as imposing limits or measures

to provide some protection for the resource consistent with OAR 660-023-0040(5)(b) should not be provided. Assuming that demonstration is made, OAR 660-023-0040(5) and Goal 5 do not compel the local government to choose alternatives that fully or partially protect the resource. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. In the context of a county's Goal 5 analysis, LUBA will reject the county's argument that there are no measures that the county could adopt to protect wildlife habitat from the negative impacts of churches without running afoul of a Religious Land Use and Institutionalized Persons Act (RLUIPA) requirement–that governments not impose a "substantial burden" on religious exercise–where the county's ESEE analysis includes no evaluation of any measures or any findings on this point, and without actually evaluating any measures that would provide some protection to wildlife resources, it is difficult to understand how the county could reach a conclusion that no measures could be adopted to protect wildlife resources without also imposing a "substantial burden" on religious exercise. In such a circumstance, remand is necessary for the county to adopt an ESEE analysis that either does not rely on the mere threat of RLUIPA litigation, or that actually evaluates whether the county's existing Goal 5 program is inconsistent with the RLUIPA Equal Terms or Substantial Burden requirements, so that the county can consider whether there are measures it can adopt pursuant to OAR 660-023-0040(5)(b) and (c) to reduce impacts on wildlife resources and include those evaluations in the revised ESEE analysis. As part of that analysis, the county may consider, if necessary, whether identified measures would impose a "substantial burden" on the free exercise of religion. *Central Oregon Landwatch v. Deschutes County*, 77 Or LUBA 395 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 92.190(3) embodies a requirement that, where local governments choose to provide an alternative procedure for property line adjustments other than using replat procedures, that alternative procedure must include local government approval of some kind. However, ORS 197.190(3) does not specify any particular procedures or form of approval, and does not necessarily require that final approval be obtained prior to recordation of the adjustment deeds. Given the absence of more specific statutory requirements a county does not err in verifying property as a legal lot, notwithstanding that the property lines were adopted in 2007 without prior county approval, where following recordation of the deeds, the county preliminarily verified the adjustments as lawful and issued a final approval in 2017 when the property owner applied for, and the county approved, a development permit. This process, although partially post-hoc, is consistent with ORS 92.190(3). *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Oregon Laws 2008, chapter 12, legislatively overruled the holding in *Phillips v. Polk County*, 53 Or LUBA 194, *aff'd*, 213 Or App 498, 162 P3d 338 (2007), which provided that it was unlawful to adjust property boundaries in a way that results in parcels that fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, authorizes property line adjustments of substandard size lots and parcels, even if the resulting lots or parcels continue to fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, section 6, made that legislation retroactive to "property line adjustments approved before, on or after the effective date of this 2008 Act." Therefore, Oregon Laws 2008, chapter 12, applies to a property line adjustment that took place in

2007, because the property line adjustment was "approved * * * before, on or after" the effective date of the 2008 Act. *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 197.763 sets out a relatively structured process for conducting local government quasi-judicial land use proceedings. However, local governments frequently deviate slightly from those procedures and may do so provided the deviation from statutory procedures does not deny a party a substantial right the party is entitled to under the statute. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Under ORS 197.763(6)(a), prior to the close of the initial evidentiary hearing, a party is entitled to request an opportunity to submit additional evidence. If a party does so, a local government is obligated to either (1) continue the hearing or (2) leave the record open for at least seven days to allow "for additional written evidence, arguments or testimony[.]" But the right to submit additional testimony under ORS 197.763(6)(a) only exists until the close of the initial evidentiary hearing. After the close of the initial evidentiary hearing a local government may, but is not required to, grant a request for a continued hearing or open record period to submit additional evidence, and if it does so the local government is obligated to carry out the continued hearing in accordance with ORS 197.763(6)(b) or (c). *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Any party may request an opportunity under ORS 197.763(6)(c) to respond to "additional written evidence" that was submitted during an open record period prior to the conclusion of the initial evidentiary hearing. But that response must be limited to responding to the "additional written evidence" that is submitted during the open record period. *Grahn v. City of Yamhill,* 76 Or LUBA 258 (2017).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where a party's evidentiary response to "additional written evidence" that was submitted during the initial open record period at the conclusion of the initial evidentiary hearing pursuant to ORS 197.763(6)(c) includes additional evidence that goes beyond responding to that "additional written evidence" that was submitted during the initial open record period, a local government must either reject the additional evidence or give all parties an opportunity to rebut the additional evidence. *Grahn v. City of Yamhill,* 76 Or LUBA 258 (2017).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Subsection (1) of ORS 215.427 imposes either a 120-day or a 150-day deadline for a local government to take final action on a permit or zone change application. Subsection (2) of that statute gives a county 30 days to advise permit applicants who submit incomplete applications what is needed to make the application complete, and also sets out the three ways an application may be deemed complete. Subsection (3) of that statute freezes the approval standards, as of the date the application was first submitted, if the application is complete when submitted or rendered complete "within 180 days of the date the application was first submitted." Subsection (4) of that statute renders the application "void" on the one hundred and eighty-first day after the application was "first * * * submitted," if the applicant has not by that time complied with one of the submittal requirements set out in that subsection or subsection (2) to make the application complete. *Bora Architects, Inc. v. Tillamook County,* 76 Or LUBA 330 (2017).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. The date a permit application was first submitted is important because new or modified permit criteria enacted after that date do not apply if the application was complete when submitted or is rendered complete in accordance with ORS 215.427(2). The date a permit application is first submitted is also important because on the one hundred and eighty-first day after it is submitted it becomes void if the applicant has been notified that additional information is needed to make the application complete and the applicant has not taken one of the three steps set out at ORS 215.427(4)(a) through (c). *Bora Architects, Inc. v. Tillamook County*, 76 Or LUBA 330 (2017).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A permit applicant initiates the permit approval process by advising the county what it seeks approval for and requesting that the county act to grant land use approval. ORS 215.427 clearly recognizes that when an application is first submitted it may be incomplete, and a permit application that does not include the required filing fee may be incomplete, but nevertheless be sufficient to initiate the permit approval process. *Bora Architects, Inc. v. Tillamook County*, 76 Or LUBA 330 (2017).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A permit application is not deemed complete under ORS 215.427(2) where the applicant never takes the position that the application was complete when submitted or deemed complete 30 days after it was submitted because the county did not advise the applicant that additional information was needed within 30 days after the application was first submitted. That is particularly the case where the county belatedly advises the applicant of the information that is needed for a complete application and the applicant thereafter provides that additional information, after expiration of the 30-day period. *Bora Architects, Inc. v. Tillamook County*, 76 Or LUBA 330 (2017).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A county decision that approves a permit application that has become void under ORS 215.427(4) is "prohibited as a matter of law" and must be reversed. *Bora Architects, Inc. v. Tillamook County*, 76 Or LUBA 330 (2017).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 215.050 and 215.060 require the county governing body to approve revisions to the comprehensive plan and to conduct at least one hearing on proposed revisions. A county violates ORS 215.050 and 215.060, where on remand of an initial governing body decision approving plan amendments, the governing body delegates to a hearings officer final decision-making authority and the conduct of the only hearing, and on remand the hearings officer approves new comprehensive plan amendments that the governing body did not consider in the governing body's initial decision leading to the appeal to LUBA. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A county governing body's consent agenda "ratification" of a hearings officer's decision approving comprehensive plan amendments is insufficient to comply with ORS 215.050 and 215.060, which require the county governing body to approve comprehensive plan amendments and to conduct at least one hearing on proposed amendments. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where a local government implements OAR 660-033-0120, Table 1, and OAR 660-033-0130(2)(c), by adopting land use regulations that expressly authorize the expansion of all of the "Parks/Public/Quasi-Public" uses listed in Table 1 except an ORS 197.770 existing firearms training facility in an EFU zone, the unmistakable conclusion is that the local government deliberately chose not to allow expansion of a firearms training facility in the EFU zone. *H.T. Rea Farming Corp. v. Umatilla County*, 71 Or LUBA 125 (2015).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where a local government implements OAR 660-033-0130(2)(c) by adopting land use regulations that expressly authorize the expansion of a number of uses in the EFU zone, but did not amend its regulations to provide for expansion of an ORS 197.770 firearms training facility in the EFU zone, the local government must apply its EFU zone regulations as adopted, and cannot directly apply the administrative rule to approve the expansion of an ORS 197.770 firearms training facility that its EFU zone does not authorize. *H.T. Rea Farming Corp. v. Umatilla County*, 71 Or LUBA 125 (2015).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 197.772(3) is silent regarding what procedure should be followed when a property owner requests removal of a property from a Goal 5 inventory of historic resources, pursuant to the statute. Because such removal constitutes a comprehensive plan amendment, the local government does not err in following the code procedures applicable for a comprehensive plan amendment, including local appeals to the governing body. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 227.175(1), which authorizes cities to establish fees for processing permits at an amount no more than the actual or average cost of processing, is not violated by a pre-application requirement for an applicant to provide, at the applicant's expense, a peer-review analysis of impacts of a proposed major modification, and present that analysis at the required pre-application conference. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 197.763(8) provides that a property owner's failure to receive notice required under ORS 197.763(2) will not "invalidate [the city's] proceedings" if the city can produce an affidavit that notice was given. ORS 197.763(8) does not say a city's affidavit is sufficient to establish that the city in fact sent the required notice, where there is a factual dispute over whether the city actually sent the required notice. *Aleali v. City of Sherwood*, 68 Or LUBA 153 (2013).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Whatever difference there may be between the word "consistent" in a local standard that requires conditional use permits to be consistent with the comprehensive plan and the word "comply" as used in ORS 197.175(2)(d), which requires that land use decisions be adopted in compliance with the comprehensive plan, land use decisions must comply with both requirements. *Friends of the Hood River Waterfront v. City of Hood River*, 67 Or LUBA 179 (2013).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where a city consolidates three related applications pursuant to ORS 227.175(2), but suspends processing of two applications and proceeds to issue a decision approving the third application, absent language that defers its finality the decision on the third application is a final decision subject to LUBA's jurisdiction. Consolidation of applications under ORS 227.175(2) is at the request of the applicant, and nothing in the statute prevents a city, with the applicant's consent, making a final decision on one application while separately processing other applications, or renders an otherwise final decision non-final until the city completes separate processing of the other applications. *Save Downtown Canby v. City of Canby*, 67 Or LUBA 385 (2013).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Failure to make a staff report available during the entire minimum period required by ORS 197.763(4)(b) is not a basis for remand, where petitioners had the opportunity during the subsequent hearing to adequately respond to any issues raised or evidence presented in the staff report. *Poe v. City of Warrenton*, 66 Or LUBA 108 (2012).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 215.030, which provides that no more than two voting members of a county planning commission can be principally engaged in real estate sales or development, does not specify that a planning commission decision is invalid or subject to reversal or remand because the planning commission membership violates the statute. ORS 215.030 is silent regarding the consequences and potential remedies for violation of the membership requirement. *O'Brien v. Lincoln County*, 65 Or LUBA 286 (2012).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where the decision before LUBA is a governing body decision based on the recommendation of a planning commission, that the planning commission membership may have violated the requirements of ORS 215.030 limiting the number of members principally engaged in real estate sales or development does not provide a basis to reverse or remand the governing body's decision. *O'Brien v. Lincoln County*, 65 Or LUBA 286 (2012).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Even if county code language could be interpreted to bar non-applicant parties who participated in the evidentiary phase of a local permit proceeding from participating in an on-the-record appeal filed by the applicant to challenge permit conditions of approval, such a local appeal procedure would violate ORS 197.763 and 215.422. *Families for a Quarry Free Neighborhood v. Lane County*, 64 Or LUBA 297 (2011).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. City council members are not required under ORS 227.180(3) to disclose receipt of an e-mail chain that was forwarded to them by one of the opponents to the application, where the substance of the e-mail chain was placed into the record and the only portion not placed in the record includes nothing related to any issue before the city council that could possibly be rebutted. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Approval of a lot of record dwelling under the standards at ORS 215.705(1) constitutes the "discretionary approval of a proposed development of land" and is thus a "permit" decision subject to ORS 215.416, a conclusion made even clearer under ORS 215.417, which specifically describes dwellings provided under a number of statutes, including ORS 215.705(1), as permits approved under ORS 215.416. *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where one petitioner was an adjoining property owner and entitled to written notice of a permit decision under ORS 215.416, but was not provided the required notice, the deadline for filing an appeal of a decision approving the permit is within 21 days of "actual notice" of the decision, pursuant to ORS 197.830(3)(a). For other petitioners who were not entitled to notice of the decision, the deadline for filing the appeal is within 21 days of the date the petitioners "knew or should have known" of the decision, pursuant to ORS 197.830(3)(b). *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A city decision to charge a subdivision applicant the actual cost of processing his subdivision application is not a land use decision that is subject to review by LUBA, where the city's final decision demanding payment of the actual costs was not made as part of its decision on the merits of the subdivision application and instead postdates that decision on the merits by over one year. The city's later decision to demand payment of the actual cost of processing the subdivision application is a "fiscal" decision, and under the reasoning in *Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), *rev dismissed*, 291 Or 878, 635 P2d 647 (1981), is not a land use decision subject to LUBA review. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 227.173(1) requires that "[a]pproval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance." A development code that permits the city engineer to waive or modify city street and roadway improvement standards where "in his/her judgment special circumstances dictate such change" is sufficient to comply with the ORS 227.173(1) requirement for "standards and criteria." *Zirker v. City of Bend*, 59 Or LUBA 1 (2009).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Approving or denying a tentative subdivision plat within an urban growth boundary is a limited land use decision and therefore not a "permit" decision. Because the ORS 227.175(10)(a) directive that local appeal issues not be limited to those issues identified in the notice of appeal only applies to permit decisions, that statute does not apply to decisions involving the approval or denial of subdivisions. *Frewing v. City of Tigard*, 59 Or LUBA 23 (2009).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Even when an applicant forfeits the right to process a subdivision application under the limited land use provisions of a local code and processes the application under the procedures for permits, the decision approving or denying the subdivision is still a limited land use decision and the provisions of ORS 227.175(10)(a) do not apply. *Frewing v. City of Tigard*, 59 Or LUBA 23 (2009).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. There is a difference between an application having enough information to allow staff to begin review and having enough information and evidence needed to demonstrate that all applicable approval criteria are met. It is not inconsistent with ORS 227.178 to determine that there is enough information for an application to be complete, but still allow the submittal of additional information to demonstrate compliance with applicable approval criteria. *Frewing v. City of Tigard*, 59 Or LUBA 23 (2009).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A petitioner fails to establish a basis for reversal or remand under ORS 227.186 (Measure 56 Notice) where the notice of hearing that the local government gave was given within the time required by ORS 227.186, that notice appears to substantially comply with ORS 227.186 and petitioner merely states it is not clear from the record that the statutorily required notice was given. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A street connectivity requirement that development street systems not create "excessive travel lengths" is sufficient to qualify as a standard or criterion, and therefore does not violate the ORS 227.173(1) requirement that permit decisions must "be based on standards and criteria." *Konrady v. City of Eugene*, 59 Or LUBA 466 (2009).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 197.610(1) and OAR 660-018-0020(1)(c) and (2) require that a local government provide the Department of Land Conservation and Development with a copy of the proposed text of any post acknowledgment comprehensive plan or land use regulation amendment. Where a local government's notice of its post acknowledgment action does not include the proposed text, remand is required. *SEIU v. City of Happy Valley*, 58 Or LUBA 261 (2009).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where a party challenges a resolution adopting fees charged by the county for permits and appeals, the burden is on the county to include evidence in the record that demonstrates that the fees were set consistent with the statute's mandate that the fees that are subject to ORS 215.416(1) and ORS 215.422(1)(c) will not exceed average or actual costs of processing permits or appeals. *Sommer v. Josephine County*, 58 Or LUBA 505 (2009).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. The ORS 203.045(3) general requirement that county ordinances be fully read in an open meeting on two days at least 13 days apart does not apply in cases where the ordinance is authorized by another statute. Although ORS 215.050(1) does not expressly require or authorize counties to adopt comprehensive plans by ordinance, the statute is properly interpreted to authorize counties to do so. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. OAR 660-018-0020 does not require that the Department of Land Conservation and Development be provided a redlined version of a post-acknowledgment comprehensive plan amendment. In addition, OAR 660-018-0020 does not provide that any failure on a local government's part to adequately identify

the text to be repealed or adopted by a post-acknowledgment comprehensive plan amendment has the legal consequence of requiring that the post-acknowledgment comprehensive plan amendment be viewed as an entirely new comprehensive plan such that unamended portions of the comprehensive plan must be shown to comply with the statewide planning goals. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. The ORS 203.045(3) general requirement that county ordinances be fully read in an open meeting on two days at least 13 days apart does not apply in cases where the ordinance is authorized by another statute. Although ORS 215.050(1) does not expressly require or authorize counties to adopt comprehensive plans by ordinance, the statute is properly interpreted to authorize counties to do so. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 215.060 provides that action regarding a comprehensive plan shall have no effect, unless 10 days' advance public notice of each hearing is published in a newspaper of general circulation. Where the required 10 days' notice is given, the county's subsequent decision to adopt different parts of the proposed comprehensive plan amendments by separate ordinances does not require new notice under ORS 215.060. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. An ordinance that is deemed acknowledged under ORS 197.625 is not immune from an as-applied challenge based on an alleged inconsistency with state law. Acknowledgement under ORS 197.625 means only that the ordinance complies with statewide planning goals. *Porter v. Marion County*, 56 Or LUBA 635 (2008).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Even if an expert testifies that property is in a high landslide risk area, if the property is not located in a "further review area" as defined by OAR 632-007-0010(1) ORS 215.260(1)(b) does not require that DOGAMI review a geotechnical report on the property. *Boucot v. City of Corvallis*, 56 Or LUBA 662 (2008).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 215.427(2) merely provides that a local government may request additional information before proceeding with a permit or rezoning application if it believes such information is necessary. The statute does not mean that once a local government indicates the application is complete that necessarily means the application includes substantial evidence that all applicable criteria are satisfied. *Sperber v. Coos County*, 56 Or LUBA 763 (2008).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A local government errs in finding that an appeal of a denial of a sign permit involves only a "request for interpretation" rather than a "permit" to which the provisions of ORS 227.175(10) applied to require a *de novo* hearing that is not limited to issues raised by the appellant in an appeal statement. *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295 (2007).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A hearings officer errs in declining to review proposed flight instruction, scenic tours and forest patrol uses as "new uses" rather than "existing uses" under the Aviation Protection Act, ORS 836.608, and in requiring the applicant to submit a new application requesting approval for those "new uses," where the initial application sought approval of those uses under criteria that apply to new uses, county staff understood that the applicant sought approval as new uses and not existing uses, and the applicant requested that the hearings officer evaluate those uses as new uses if they did not qualify as existing uses. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. OAR 660-041-0030, which requires notice to the Department of Land Conservation and Development (DLCD) of an application for or decision on a permit pursuant to a Ballot Measure 37 waiver, is not inconsistent with ORS 197.763(2)(c), which requires a local government if requested by the applicant to notify DLCD of a hearing on a land use application. *DLCD v. Deschutes County*, 54 Or LUBA 799 (2007).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A decision that merely relocates or eliminates a common property line between abutting properties is not a "permit" decision as that term is defined in ORS 227.160(2) and 215.402(4), even if the decision involves the exercise of discretion. *South v. City of Portland*, 53 Or LUBA 362 (2007).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A decision that relocates or eliminates a common boundary between two properties does not involve the "proposed development of land" and thus is not a "permit" as that term is defined in ORS 227.160(2) and 215.402(4). The statutory requirements for notice and hearing that govern "permit" decisions do not apply to a property line adjustment decision. *South v. City of Portland*, 53 Or LUBA 362 (2007).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Absent some explanation for why a building permit decision that modifies a condition of partition approval involves the kind and degree of discretion that distinguishes a statutory "permit" as that term is defined at ORS 215.402(4) from other kinds of permits, LUBA will not presume that challenged permit is an ORS 215.402(4) permit. *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. While deviations from the post acknowledgment plan amendment notice requirements at ORS 197.610(1) may constitute procedural errors that will not provide a basis for remand absent prejudice to a petitioner's substantial rights, a complete failure to provide notice to the Department of Land Conservation and Development under ORS 197.610(1) is a substantive error and requires remand without regard to whether the failure prejudiced petitioner's substantial rights. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A resolution that adopts a fee schedule is not a zoning ordinance, land division ordinance or similar ordinance, and is therefore not a "land use regulation," the adoption of which requires compliance with the

procedural requirements of ORS 197.610 to 197.615. *Doty v. City of Bandon*, 49 Or LUBA 411 (2005).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 227.178 and 227.179 envision three routes to final action on a permit application: (1) a final local government decision within 120 days; (2) a final local government decision in more than 120 days followed by a refund of one-half of the application fee; or (3) a failure to issue a final decision within 120 days followed by a petition for a writ of mandamus to compel the local government to approve the permit or demonstrate to the circuit court that approval of the permit would violate a substantive provision of its comprehensive plan or land use regulations. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. If a city or county adopts a "spurious, bad faith" denial of a "permit, limited land use decision or zone change application" under ORS 215.427 or 227.178 for the purpose of avoiding one of the statutory consequences for failing to take timely action on an application, such a decision constitutes an "action * * * for the purpose of avoiding the requirements of ORS 215.427 or 227.178," within the meaning of ORS 197.835(10)(b)(B). *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A provision in a local subarea plan allowing submittal of master plan application without the consent of all owners of property subject to the application does not violate ORS 227.175(1). *Lowery v. City of Keizer*, 48 Or LUBA 568 (2005).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A zoning code amendment that purports to legalize lots or parcels that were created by deed or land sales contract in violation of the applicable local criteria at the time of creation is inconsistent with ORS 92.010 and ORS 215.010(1). *Stevens v. Jackson County*, 47 Or LUBA 381 (2004).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Oregon Laws 1993, chapter 590, section 6, allows counties to avoid implementing statutory changes to the destination resort requirements until no later than their next periodic review. Even if a county has not concluded its next periodic review, it cannot substantially amend its pre-1993 destination resort regulations without implementing those changes. *Stevens v. Jackson County*, 47 Or LUBA 381 (2004).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A use determination adopted pursuant to ORS 227.160(2)(b) may include a description of the procedures the city anticipates will be used to consider an application for that use. *Boly v. City of Portland*, 46 Or LUBA 197 (2004).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. An ordinance that allows an up-or-down vote by the county electorate on permit approval decisions is incompatible with, and therefore preempted by, ORS 215.402, which requires that approval or denial of permit applications be governed by standards and criteria set forth in the county's code

and findings explaining why the proposal complies or fails to comply with those standards. *Sievers v. Hood River County*, 46 Or LUBA 635 (2004).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A building permit may also constitute a statutory "permit" as defined by ORS 227.160 or 215.402, and thus require a local government to provide notice and opportunity for hearing before taking action on that permit, where approval or denial of the permit requires a discretionary determination regarding whether the proposed use is allowed or not allowed under applicable land use regulations. *Frymark v. Tillamook County*, 45 Or LUBA 486 (2003).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Under ORS 227.178(2), even if a city believes that an application is incomplete or it needs more information to render a decision, the city must conduct a hearing and render a decision based on the information submitted, if the applicant insists. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. It is inconsistent with the statutory scheme for processing permit applications at ORS 227.160 *et seq.* for city planning staff to reject a permit application because staff believes more information is necessary or because staff believes additional or different applications are necessary for approval. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. While a city may deny a permit application if the applicant fails to submit information that is necessary for approval, under ORS 227.175 that decision must be made by a hearings officer or proper designate, after a hearing or other procedure that affords the applicant and others to present evidence and argument. Under the statute, planning staff may not effectively prejudge the merits of the application by rejecting an application that staff feels cannot be approved in the form submitted. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A local government quasi-judicial land use decision maker is not legally required to verbally explain how all legal and evidentiary issues are resolved. It is the written decision that the decision maker ultimately adopts that is subject to LUBA's review on appeal. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where a local government departs from the procedures for continuing a hearing set out in ORS 197.763(6)(a) to (c), the revised procedures must be clearly communicated to all parties and, preferably, reduced to writing. *Hawman v. Umatilla County*, 42 Or LUBA 223 (2002).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where the circumstances under which oral testimony would be allowed at a continued hearing are not clearly defined, and petitioners allege that they were prejudiced by being denied an opportunity to present oral testimony at the continued hearing based on the ambiguity of the procedures, remand is appropriate to ensure that petitioners receive an opportunity to present that oral testimony. *Hawman v. Umatilla County*, 42 Or LUBA 223 (2002).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A decision maker does not violate ORS 244.040(1)(a), which prohibits an elected official from using his or her official position to obtain a personal financial gain or avoid a financial detriment, where the decision maker is a member of a church congregation, the church is an applicant for a land use permit that is appealed to LUBA, and the decision maker joins in a request for a voluntary remand of the decision, in part to avoid the legal fees involved in defending the appeal. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137 (2002).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Approval of a building permit for a use that is unquestionably a permitted use in the applicable zone is not a "permit" as defined in ORS 227.160(2)(a) simply because, in issuing the permit, the local government interprets an ambiguous term in a land use regulation that applies to that permitted use. An interpretation of such a regulation in such circumstances is not the type of "discretionary approval" that results in a "permit" under ORS 227.160(2)(a). *Tirumali v. City of Portland*, 41 Or LUBA 231 (2002).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A hearings officer's order that leaves the record open for seven weeks after a public hearing to allow the applicant to submit additional evidence and also allows opponents seven additional days to respond to any new evidence submitted by the applicant during that seven weeks provides the rights guaranteed by ORS 197.763(6)(c) even though the order does not precisely mirror the statute. *Norway Development v. Clackamas County*, 40 Or LUBA 276 (2001).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A city cannot rely on the existence of its urban growth boundary to provide the "annexation plan" required by *Skourtes v. City of Tigard*, 250 Or 537, 444 P2d 22 (1968), and ORS 222.175 as necessary for informed consent to annexation. *Johnson v. City of La Grande*, 39 Or LUBA 377 (2001).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 227.175(2) requires that a city provide the opportunity for a consolidated permit application and review process; the statute does not require that each ordinance that adopts a new land use permitting process must separately set out provisions for such consolidated review. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282 (2001).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A Land Use Compatibility Statement requirement that a proposal to apply process water from a fruit processing operation to EFU-zoned land must "comply with all applicable local land use requirements" requires at a minimum that the county determine whether the proposal is a farm use and whether it is a utility facility. These determinations require the exercise of sufficient discretion that the county's decision is both a "land use decision" and a "permit," as those terms are defined by statute. *Farrell v. Jackson County*, 39 Or LUBA 149 (2000).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 368.361(4) requires a county to apply vacation procedures applicable to counties, even if the property to be vacated is inside a city. Even when a county applies city ordinances governing road

vacations, it is not required to obtain the consent of all abutting property owners as would be required by the vacation procedures which are only applicable to cities. *Oregon Shores Cons. Coalition v. Lincoln County*, 38 Or LUBA 699 (2000).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Even assuming ORS 467.136 allows local regulation of shooting ranges in certain situations, the statute preempts regulation of "normal and accepted activity" on shooting ranges. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. "Normal and accepted activity" on a shooting range refers to the activity itself, rather than the noise generated by the activity. Because target shooting is a normal and accepted shooting range activity, ORS 467.136 prohibits local governments from adopting or enforcing regulations that make such activity a nuisance or trespass, no matter how noisy the target shooting may be. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 215.416(2) does not obligate a county to follow a consolidated procedure in considering a request for a local land use approval. Rather, the statute provides that if an applicant chooses to submit a consolidated application, the county must have a procedure available to review the consolidated application as a whole. *McKenney v. Deschutes County*, 37 Or LUBA 685 (2000).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. The ORS 92.285 prohibition against adopting retroactive ordinances includes ordinances that allow retroactive application. *Church v. Grant County*, 37 Or LUBA 646 (2000).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. An ordinance allowing a county to revoke otherwise final and unreviewable partition approvals is a "retroactive ordinance" within the meaning of ORS 92.285. *Church v. Grant County*, 37 Or LUBA 646 (2000).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where LUBA rejects as a matter of law a county's erroneous interpretation of its comprehensive plan as imposing a 2.3-acre minimum residential density, procedural errors the county may have committed in considering evidence outside the record in reaching that erroneous interpretation provide no additional basis for remand. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A 3,500-square-foot memorial garden including nine-foot-high granite walls, landscaping and walkways causes a "material change in the use or appearance of land" and is thus "development" for purposes of determining whether approval of the proposed memorial is a permit as defined at ORS 227.160(2). *Carlsen v. City of Portland*, 36 Or LUBA 614 (1999).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A city errs in accepting new evidence from the applicant as part of the applicant's final written argument under

ORS 197.763(6)(e), without offering other parties an opportunity to respond to that new evidence. *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. That a local government might in future quasi-judicial proceedings recognize that the procedures required by its amended zoning ordinance conflict with the procedures required by ORS 215.416(11) for permit decisions, and therefore follow the procedures required by the statute, does not make the procedures required by the amended zoning ordinance consistent with the statute and does not make a LUBA appeal challenging the zoning ordinance amendment premature. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 215.130(2) authorizes a city to process and approve a zone change contingent on future annexation to the city. *Lodge v. City of West Linn*, 35 Or LUBA 42 (1998).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. The permissive terms of ORS 215.750 do not prohibit a local government from adding forest template dwelling criteria that are more restrictive than statutory standards. *Yontz v. Multnomah County*, 34 Or LUBA 367 (1998).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A local government is not obligated by ORS 215.750(1) to allow the establishment of nonforest dwellings. If a local government chooses to allow nonforest dwellings, it is not obligated to allow nonforest dwellings under the alternative template test specified at ORS 215.750(5). *Yontz v. Multnomah County*, 34 Or LUBA 367 (1998).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 92.175 does not abrogate the requirement of ORS 92.014 that no instrument dedicating land for public use may be recorded without the prior approval of the city or county authorized to accept the dedication. *Petersen v. Yamhill County*, 33 Or LUBA 584 (1997).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 197.646 does not preclude a local government from imposing a regulation that is more restrictive than what is required by ORS 215.750 before that regulation is reviewed by DLCD. *Evans v. Multnomah County*, 33 Or LUBA 555 (1997).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Under ORS 227.215, the definition of "development" is sufficiently broad to encompass the removal of a tree for landscaping purposes, and a local government may regulate tree removal through the issuance of development permits. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where a city's motion to supplement the record with notice of adoption of ordinance will not supplement or complete the challenged decision in any way that is challenged by petitioner, the motion will be denied due to its lack of bearing on the merits of the appeal. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. In adopting land use regulations, including emergency and temporary land use regulations, a city is bound by the substantive and procedural requirements established by ORS 197.610 and Statewide Planning Goals 1 and 2. These statutory and Goal requirements must be followed notwithstanding contrary city charter provisions. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. The city's failure to comply with ORS 197.610(1) in not submitting proposed comprehensive plan amendments to LCDC or DLCD is a substantive error that requires remand. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A county was not required to apply the Statewide Planning Goals to minor partitions approved prior to LCDC acknowledgment of the county's comprehensive plan if the county did not regulate minor partitions under its subdivision ordinance. *Joseph v. Baker County*, 33 Or LUBA 38 (1997).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. The public meetings law, ORS 192.610 to 192.690, and a local ordinance that requires all evidence, deliberation, and decisions to be made before the public and on the record, do not prohibit the board of county commissioners from having an off-the-record consultation with legal counsel during the course of a public hearing. *Collins v. Klamath County*, 32 Or LUBA 338 (1997).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. In making a zoning classification determination, the city properly relied on the definition and review procedures set forth in ORS 227.160(2) and ORS 227.175(11), and was not required to follow the local procedural requirements for a Type I review. *North Portland Citizens v. City of Portland*, 32 Or LUBA 70 (1996).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 215.431(1) and (2) allow delegation by a county governing body to the county planning commission or hearings officer of the authority to conduct hearings and make decisions on applications for plan amendments, subject to appeal to the county governing body. However, under ORS 215.413(5)(a), ORS 215.431(1) and (2) do not apply to any plan amendment for which an exception to any of the Statewide Planning Goals is required. *Young v. Douglas County*, 31 Or LUBA 545 (1996).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Statute authorizing counties to establish local appeal fees and setting standards for the amount of fees does not require the county to evaluate each appeal to determine whether an appeal fee established by ordinance meets the statutory standard. ORS 215.422(1)(c). *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A local government violates a substantial right when it charges more than the maximum appeal fee allowed

by ORS 227.175(10)(b) for a hearing requested under ORS 227.175(10)(a). *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. If a local government chooses to treat an application as one for a land use decision, rather than a limited land use decision, and a local appeal as one under ORS 227.175(10)(a), it may not charge more than the maximum appeal fee allowed by ORS 227.175(10)(b). *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Determining whether an advisory body, which submitted a recommendation to the local decision maker in a land use proceeding, violated provisions of the Public Meetings Law in the manner its meetings were held is beyond LUBA's scope of review. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Absent a local regulation to the contrary, where documents supporting a land use application are available for review in the local government planning office, a local government is not required to give copies of such documents to individuals free of charge. *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where comprehensive plan and zoning map amendments simply change the designation and zone of a county park to ones that allow parks as a conditional use, the amendments are not inherently inconsistent with an existing dedication of the subject property for public use as a park. Therefore, that the amendments may not comply with statutory requirements for vacation of such a dedication provides no basis for reversal or remand. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. An annexation of contiguous property with the written consent of the property owners, pursuant to ORS 222.125, is subject to the requirement of ORS 197.175(1) that the annexation be determined to be consistent with applicable land use requirements, and the recognized procedural requirements for such quasi-judicial land use decision making. *Roloff v. City of Milton-Freewater*, 27 Or LUBA 80 (1994).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. There is no prohibition against decision makers consulting with staff during quasi-judicial land use proceedings and no requirement that such consultation occur in the presence of other parties. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Absent some legal requirement to the contrary, a local government is not bound to assure that its final written decision conforms to its oral decision in all particulars. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. The exclusive forum for enforcement of public meetings laws is circuit court. That public meetings law violations

may have occurred during the land use decision making process does not, of itself, provide a basis for reversal or remand. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Local regulations govern the determination of *when* a local government decision is final for purposes of LUBA review, so long as the local regulations do not conflict with applicable statutes or LUBA's rules. *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 215.283 establishes standards directly applicable to county land use decisions concerning nonfarm uses of EFU-zoned land. Regardless of whether a county adopts an exception to Goal 3 for EFU-zoned land, it cannot allow a nonfarm use not listed under ORS 215.283 on such land without changing the zone. *Schrock Farms, Inc. v. Linn County*, 25 Or LUBA 187 (1993).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 197.279(2) establishes the procedures required for adoption of a wetland conservation plan. A local government's failure to adopt a wetland conservation plan, provides no basis for reversal or remand of a challenged decision, because local governments are not required to adopt such plans. *Clarke v. City of Hillsboro*, 25 Or LUBA 195 (1993).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Under ORS 517.780(1), where a county surface mining ordinance in effect on July 1, 1972 has been amended, but not repealed, the county's surface mining ordinance and amendments thereto are not subject to the fee limitations established by ORS 517.780(4) and 517.800. *Oregon City Leasing, Inc. v. Columbia County*, 25 Or LUBA 129 (1993).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where a settlement agreement in a lawsuit previously filed by intervenor against a county simply says the county will consider a rezoning application for intervenor's property, as it is required to do under ORS 215.416(2) in any case, the settlement agreement is irrelevant to an application for a replacement dwelling on the subject property, and does not establish bias or prejudgment by the county decision maker. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A local ordinance which prohibits the short term rental use of dwellings in residential zones is not an unlawful rent control regulation under ORS 91.225. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Where intervenors filed a conditional use permit application as an agent of the property owner, there is no violation of the provision in ORS 215.416(1) stating that an owner of property may apply for a permit. *Silani v. Klamath County*, 22 Or LUBA 735 (1992).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A board of county commissioners need not provide parties an opportunity to rebut a memorandum in which the county counsel provides legal advice concerning a pending local land use appeal. Such

communications are not *ex parte* contacts. ORS 215.422(4). *Toth v. Curry County*, 22 Or LUBA 488 (1991).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A local governing body is required by ORS 197.175(2)(d) to apply applicable provisions of its comprehensive plan and land use regulations in determining whether a wrecking certificate should be approved, notwithstanding that it has not adopted regulations as authorized by ORS 822.140(3). *Bradbury v. City of Independence*, 22 Or LUBA 398 (1991).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. In the absence of a local or other regulation making provisions of ORS chapter 468, pertaining to pollution control, applicable to an application for a wrecking certificate as independent approval standards, that statute does not govern local approval of a wrecking certificate. *Bradbury v. City of Independence*, 22 Or LUBA 398 (1991).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. ORS 215.431 does not apply to designated forestlands and, therefore, comprehensive plan amendments concerning such forestlands must be adopted by the county governing body. *Wickwire v. Clackamas County*, 21 Or LUBA 278 (1991).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Although a decision rendered in violation of statutory public meeting law requirements may be voided, the circuit court for the county in which the governing body ordinarily meets has jurisdiction, not LUBA. ORS 192.680. *Strawn v. City of Albany*, 21 Or LUBA 172 (1991).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. A zoning clearance approval which requires determinations on whether a proposed use is incidental and subordinate to an existing use, and whether and the extent to which an existing use is a lawful nonconforming use, requires interpretation and the exercise of judgment within the meaning of ORS 197.015(10)(b)(A) and (C) and, therefore, is a "permit" under ORS 215.402(4). *Komning v. Grant County*, 20 Or LUBA 481 (1990).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. The written notice of a decision on a permit application required by ORS 227.173(3) is written notice of the local government's final decision. *Harvard Medical Park, Ltd. v. City of Roseburg*, 19 Or LUBA 555 (1990).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. While a decision to approve a zone change does not approve a "permit," within the meaning of ORS 227.160(2), a decision which approves both a variance and a minor partition does approve a "permit." *Harvard Medical Park, Ltd. v. City of Roseburg*, 19 Or LUBA 555 (1990).

25.3.1 Local Government Procedures – Compliance with Statutes – Generally. Use of a process, established by county plan and ordinance provisions, which allows a county to refine its mapping of areas where destination resorts are permitted, with regard to prime farmland, through

determination of compliance with the statutory and goal siting criteria on a case-by-case basis, is not precluded by the destination resort statute. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A county may not defer a determination of compliance with applicable approval criteria to a future proceeding that does not allow for public participation merely because the deferred criteria require no interpretation or judgment. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Traffic performance standards in the local government's transportation system plan (TSP) are not approval criteria applicable to a limited land use decision that were incorporated pursuant to ORS 197.195(1), where the applicable criteria either do not refer to the TSP at all or where they only generally "incorporate[] by reference the city's public facility master plans, including plans for domestic water, sanitary sewer, storm drainage, parks, and transportation." *Oster v. City of Silverton*, 79 Or LUBA 447 (2019).

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25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. When considering if a piece of property is "suitable for farm use" within the meaning of OAR 660-033-0020(1)(a)(B), the county must consider the parcel in full; it cannot exclude a portion of the property being constrained from farm use from consideration until it evaluates if a reasonable farmer would put the subject property to farm use and/or grazing using the applicable criteria. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 180 (2018).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. When deciding if a property is "suitable for farm use" the county must consider the adjacent or intermingled properties, and property lines or land ownership are not the sole deciding factors. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 180 (2018).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. When local code sets out independent grounds for granting a variance, and when only one of three rezoning criteria must be met in order to grant a rezoning, and the city adequately demonstrated that one criterion was satisfied, LUBA need not consider arguments relating to the other two criteria. *American Tower Corp v. City of Tualatin*, 78 Or LUBA 350 (2018).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. When the city has a general track for requesting planned unit development (PUD) approval and a clear and objective track for requesting PUD approval, the city is not required to demonstrate that the applicant is able to gain approval for some development on the subject property under its needed housing track. ORS 197.307(6)(a) requires only that the city allow the applicant the "option of proceeding" under the needed housing track, and does not require a guarantee or demonstration

of any kind that development is likely to be approved under the clear and objective approval standards in the needed housing track. *Dreyer v. City of Eugene*, 78 Or LUBA 391 (2018).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Senate Bill (SB) 1051 (2018), section 12 did not require cities to amend their land use regulations to implement SB 1051 by July 1, 2018. SB 1051 itself is silent regarding any requirement, much less a deadline for a city to amend its land use regulations to comply with its provisions. SB 1051, section 12 provides for a delayed "operative date" of July 1, 2018. That delayed operative date provides a grace period before which the provisions of SB 1051 did not apply, and after which, the statute applies directly and cities are required to "allow" accessory dwelling in areas required by the statue. But SB 1051 does not direct cities as to the mechanism by which to allow accessory dwellings. *Home Builders Assoc. v. City of Eugene*, 78 Or LUBA 441 (2018).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. While ORS 197.646(1) requires the city to amend its land use regulations to implement SB 1051 (2018), ORS 197.646(2)(b) requires the Land Conservation and Development Commission (LCDC) to establish by rule the time period within which a local government must amend its code to implement a new land use statute "if the legislation does not specify a time period for compliance[.]" LCDC has not adopted any rules specifying a time period for implementation of SB 1051, and SB 1051 itself does not require cities to adopt amendments to their codes that implement all of the provisions of SB 1051 by July 1, 2018. *Home Builders Assoc. v. City of Eugene*, 78 Or LUBA 441 (2018).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where in evaluating petitioner's zone verification request pursuant to Eugene Code (EC) 9.2741(2), the city failed to consider the ORS 197.312(5) requirement that all accessory dwellings must be allowed "subject to reasonable local regulations relating to siting and design," the proper remedy is for LUBA to remand the decision to the city for the city to consider in the first instance whether EC 9.2741(2) is a "reasonable local regulation[] relating to siting and design" pursuant to ORS 197.312(5). *Kamps-Hughes v. City of Eugene*, 78 Or LUBA 457 (2018).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Subsection (1) of ORS 215.427 imposes either a 120-day or a 150-day deadline for a local government to take final action on a permit or zone change application. Subsection (2) of that statute gives a county 30 days to advise permit applicants who submit incomplete applications what is needed to make the application complete, and also sets out the three ways an application may be deemed complete. Subsection (3) of that statute freezes the approval standards, as of the date the application was first submitted, if the application is complete when submitted or rendered complete "within 180 days of the date the application was first submitted." Subsection (4) of that statute renders the application "void" on the one hundred and eighty-first day after the application was "first * * * submitted," if the applicant has not by that time complied with one of the submittal requirements set out in that subsection or subsection (2) to make the application complete. *Bora Architects, Inc. v. Tillamook County*, 76 Or LUBA 330 (2017).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. The date a permit application was first submitted is important because new or modified permit criteria

enacted after that date do not apply if the application was complete when submitted or is rendered complete in accordance with ORS 215.427(2). The date a permit application is first submitted is also important because on the one hundred and eighty-first day after it is submitted it becomes void if the applicant has been notified that additional information is needed to make the application complete and the applicant has not taken one of the three steps set out at ORS 215.427(4)(a) through (c). *Bora Architects, Inc. v. Tillamook County*, 76 Or LUBA 330 (2017).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A local government does not violate the "goalpost" rule at ORS 215.427(3)(a) when it applies a 1983 master plan to govern development within the master planned community, consistent with a code provision providing that a master plan stays in effect until repealed, and rejects arguments that the master plan had been impliedly repealed, notwithstanding that the local government had not previously applied the master plan as a source of development standards. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Code procedures and submittal requirements for a pre-application conference are not "applicable criteria" for purposes of ORS 197.835(4)(a), which allows a petitioner to raise new issues regarding applicable approval criteria that a local government omits from the notice of hearing, and the local government's failure to list pre-application conference code provisions in the notice of hearing does not allow a petitioner to avoid the raise it or waive it requirements of ORS 197.763(1). *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A local code provision that prohibits grading or development on portions of a site that exceed 20 percent is "clear enough for an applicant to know what [it] must show during the application process." *Lee v. City of Portland*, 57 Or App 798, 802, 646 P2d 662 (1982). Nothing in the language of ORS 227.173(1) requires that a *method* of measuring slope must be included in the provision in order to determine whether the 20 percent standard is met. *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51 (2013).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A permit applicant may not insist that a permit application be reviewed based on the standards and criteria in effect on the date the permit application was submitted, if the application is later changed in a material way. *Zirker v. City of Bend*, 64 Or LUBA 114 (2011).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. After an application for permit approval is denied, ORS 227.178(3) does not preclude the permit applicant from filing a second application for permit approval of the same proposal under amended standards and criteria that are in effect when the second application is filed. *Zirker v. City of Bend*, 64 Or LUBA 114 (2011).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where the challenged decision approves (1) a comprehensive plan amendment adding a site to the county's Goal 5 inventory of significant sites, and (2) a zone change to allow mining of the site, because the zone change application is consolidated with, and dependent upon, the plan

amendment, the goal-post rule at ORS 215.427(3) does not operate to "freeze" the standards that apply to the zone change to those applicable on the date the application was filed. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. The goal-post rule at ORS 215.427(3)(a) is concerned with preventing local governments from changing the substantive criteria that apply to permit applications after application is filed. That concern is not implicated where the applicant is contemporaneously seeking both (1) permit approval and (2) a zone change, and the only "new" standards being applied to the permit application are the standards under the requested new zone. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 215.416(2) requires counties to provide for a consolidated procedure for processing permit applications and zone or plan changes necessary to authorize the permit. Where permit and zone change applications are subject to different procedures or deadlines or for some other reason the two applications cannot be entirely consolidated, it is consistent with the goal-post rule at ORS 215.427(3)(a) to process the different applications together on the same time-line as much as possible and, if necessary, impose conditions to ensure that permit decisions do not take effect prior to the date accompanying zone changes become final. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Even if local ordinances do not incorporate state Department of Environmental Quality (DEQ) noise control regulations, a local government may not authorize noise levels that violate the DEQ regulations. *Scott v. City of Jacksonville*, 60 Or LUBA 307 (2010).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Nothing in ORS 197.763(3) requires that the notice of a hearing on remand summarize LUBA's bases for remand, and such bases for remand are not "applicable criteria" that must be listed in the notice of remand hearing. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. If a local government interprets its code to the effect that federal particulate matter standards supply the relevant test for compliance with local approval standards, articulates that interpretation for the first time in its final decision, and denies the application for failure to present evidence of compliance with the federal standards, remand would likely be necessary to give the applicant an opportunity to present evidence addressing the federal standards. However, remand is not warranted where the decision merely discusses federal standards, but ultimately concludes that those standards do not govern. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A street connectivity requirement that development street systems not create "excessive travel lengths" is sufficient to qualify as a standard or criterion, and therefore does not violate the ORS 227.173(1) requirement that permit decisions must "be based on standards and criteria." *Konrady v. City of Eugene*, 59 Or LUBA 466 (2009).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. When an applicant files a consolidated set of applications for: (1) a comprehensive plan amendment; (2) a zone change that is dependent on that plan map amendment; and (3) a development permit that is dependent on that zone change, the goal post rule at ORS 197.427(3)(a) does not apply to "freeze" in place the standards and criteria that applied to that development permit as of the date the applications were filed. Instead the standards and criteria that apply are those supplied by the new plan and zoning designations. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 215.427(3)(a), which is referred to as the fixed goalpost rule, has the legal effect of fixing or freezing the law, as it existed on the date a complete permit application was received. ORS 215.427(3)(a) does not require that the county limit its evidentiary review to the facts as they existed on the date a complete permit application was submitted. *Hegele v. Crook County*, 56 Or LUBA 156 (2008).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. While the probable intent of the "goal-post" statute at ORS 215.427(3)(a) is to prevent local governments from approving or denying a permit based on legislative amendments that post-date the application, the statute is not expressly limited to legislative amendments. The goal-post statute arguably also operates to prevent local governments from approving or denying a permit application based on state or local regulations that were initially waived under Ballot Measure 37 (ORS 197.352) but later become "applicable" when the claimant dies, the property is transferred, and the right to seek development approval free of the waived regulations is lost. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. The drafters of Ballot Measure 37 (ORS 197.352) limited development or use rights to the claimant, and that limitation is a central feature of the measure. LUBA will not presume that the voters intended that limitation to be avoided by operation of the goal-post statute at ORS 215.427(3)(a), which if given full effect would allow the local government to grant development approvals based on ORS 197.352 waivers to persons who are not the claimant. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where Ballot Measure 37 (ORS 197.352) and the goal-post statute at ORS 215.427(3)(a) operate together, they come into conflict and cannot both be given full effect. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. In circumstances where the goal-post statute at ORS 215.427(3)(a) conflicts with Ballot Measure 37 (ORS 197.352), the latter prevails, because ORS 197.352 is the more specific and later-adopted statute. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 215.427(3) does not preclude the local government's compliance with OAR 660-041-0030, which requires notice to DLCD of an application for a permit pursuant to a Ballot Measure 37 waiver, because the rule is not an "approval standard or criteria" applicable to a permit application. *DLCD v. Deschutes County*, 54 Or LUBA 799 (2007).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Although local governments frequently attempt to advise permit applicants regarding the scope and nature of evidence that will be required to demonstrate that a proposal complies with applicable land use approval criteria, it is not the local government's burden to accurately predict in advance all of the evidence that may ultimately be needed to obtain approval of a land use application. *Gillette v. Lane County*, 52 Or LUBA 1 (2006).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. The fixed goal posts rule in ORS 215.427(3)(a) only applies where the county's comprehensive plan and land use regulations are acknowledged at the time the permit application is submitted. *Niederhof v. Deschutes County*, 48 Or LUBA 626 (2004).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. When neither the notice, nor the staff report, nor the local government's public discussion, nor the decision ever mentions the applicable criteria, a local government commits procedural errors that prejudice a petitioner's substantial rights. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304 (2004).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. An ordinance that allows an up-or-down vote by the county electorate on permit approval decisions is incompatible with, and therefore preempted by, ORS 215.402, which requires that approval or denial of permit applications be governed by standards and criteria set forth in the county's code and findings explaining why the proposal complies or fails to comply with those standards. *Sievers v. Hood River County*, 46 Or LUBA 635 (2004).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 227.173(1) requires that permit approval standards must be included in a city's land use regulations, but that statute does not require that a city adopt standards to guide a permit applicant's evidentiary presentation. *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680 (2004).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A city's failure to identify standards that set out the elements of an easement that must be recorded to satisfy the city's access requirements does not provide a basis for reversal or remand where those standards are not approval criteria. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Even if ORS 197.522 can be read to apply to a city decision to approve a partition and can be read to limit the types of conditions that may be imposed to "reasonable conditions," ORS 197.522 does not place a burden on a local government to demonstrate that its conditions are reasonably

necessary to address particular circumstances presented in the proposed partition. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Even if ORS 197.522 is applicable to a decision to approve a minor partition, ORS 197.522 does not require a city to modify its minimum right-of-way requirements to respond to arguments that the right-of-way requirements are excessive in a particular case. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. The fixed goal post rule established by ORS 215.427(3) does not apply to an application for a zone change where (1) that application for a zone change is part of, or submitted contemporaneously with, an application for a comprehensive plan amendment, and (2) the zone change is requested to implement the requested comprehensive plan amendment rather than as a separate request that could be approved independently of the requested comprehensive plan map amendment. *Friends of the Applegate v. Josephine County*, 44 Or LUBA 786 (2003).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 197.685(3) and (4) *allow* local governments to adopt clear and objective approval criteria for seasonal farmworker housing that do not have the result of discouraging needed seasonal farmworker housing, but do not *require* local governments to adopt additional approval criteria, and do not make unrelated approval criteria applicable in the absence of legislation incorporating those criteria. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A city is allowed latitude under ORS 227.173(1) in adopting nonspecific and highly subjective criteria, and in explaining what such criteria require in particular cases. Design review criteria requiring that proposed signs enhance the character of historic districts are not impermissibly vague under ORS 227.173(1), where a reasonable applicant could discern from the criteria and the city's explanation of the district's character why the proposed sign violates the criteria. *Multi-Light Sign Co. v. City of Portland*, 39 Or LUBA 605 (2001).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. LUBA will deny a motion to dismiss based on an argument that the challenged decision is a ministerial decision, where the decision interprets and applies a local land use ordinance adopted to implement a statute and that interpretation requires the exercise of discretion. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A local ordinance that institutes a process to remove property from a Goal 5 historic resources inventory but fails to include a method to determine whether the historic designation was "imposed" on the property, within the meaning of ORS 197.772(3), is inconsistent with that statute. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A local government may not apply only local code provisions to an application to remove property

from a historic resources inventory, where the local code provisions are inconsistent with statutory provisions permitting removal of certain properties from a historic resources inventory. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a city code provision states that, following approval of a permit application, impacts of the proposal must be mitigated, a requirement that the city manager adopt rules to implement that code mitigation requirement does not violate ORS 227.173(1), which requires that the "standards and criteria" for approval or denial of a land use permit be included in the city's development ordinances. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282 (2001).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. After a city has approved a permit application, the city may not apply code provisions to require that development occur within a particular time frame when the permit was initially approved without the application of those code provisions, and the city's past practice did not include the imposition of the development deadlines contained in those code provisions. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 193 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. When a variance approval is based on a specific finding that the proposed use is permitted in the underlying zone, the variance approval establishes a time frame for constructing the proposed use, and when the applicant applies for the building permit within the allotted time, the city is obligated by ORS 227.178(3) to apply the same "standards and criteria" that were applicable at the time the variance application was submitted. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 227.178(3) implicitly requires that a city apply a consistent set of standards to the discretionary approval of the proposed development of land and the construction of that development in accordance with the discretionary approval. A city may not apply one set of standards to the discretionary approval of a proposed development of land and subsequently apply an amended standard to deny a building permit to construct the development in accordance with the discretionary permit. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. The approval of a "permit" under ORS 227.160(2) and 227.178(3) carries with it the right to obtain the building permits that are necessary to build the approved proposed development of land, provided the applicant seeks and obtains those building permits within the time specified in the permit itself or in accordance with any applicable land use regulations that establish a deadline for seeking and obtaining required building permits. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Even if the decision makers were persuaded to reverse their initial decision by a change in city policy that occurred after the subject application was filed, a local government may reinterpret the meaning of indisputably applicable approval standards. *Anderson v. City of Medford*, 38 Or LUBA 792 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a permit authorizing residential use of a property is granted without specifically authorizing a dwelling of any particular height, and detailed building plans are submitted 10 months after the residential permit is approved, the city is not obligated to apply the building height limitation that was in effect when the residential permit was approved. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A city's failure to provide notice that it considered a particular comprehensive plan goal to be an approval criterion is a procedural error, and where that failure denies the applicant an opportunity to present argument and evidence concerning that plan goal, the procedural error prejudices the applicant's substantial rights. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A code criterion requiring that a proposal be shown to be compatible with the surrounding area and to not have more than a minimal impact on the livability and appropriate development of the surrounding area is not unconstitutionally vague and does not violate the ORS 227.173(1) requirement that permit approval criteria be included in the city's land use regulations. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A city's decision violates ORS 227.173(1) where the city relies on "factors" or "considerations" that are unconnected to approval standards established in its land use regulations to deny a permit application. *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A permit application may be approved based on adopted standards and criteria that are not yet acknowledged. However, under ORS 197.625(3), if the standards and criteria are not ultimately acknowledged, any improvements that have been made in reliance on a permit issued under the unacknowledged standards and criteria may have to be removed. *Western States v. Multnomah County*, 37 Or LUBA 835 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A permit application may be approved based on adopted standards and criteria that are not yet acknowledged. However, under ORS 197.625(3), if the standards and criteria are not ultimately acknowledged, any improvements that have been made in reliance on a permit issued under the unacknowledged standards and criteria may have to be removed. *Western States v. Multnomah County*, 37 Or LUBA 835 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. An argument that a local government failed to provide adequate notice of evidence needed to satisfy applicable criteria will fail where the county's staff report interprets the code to require certain evidence and petitioner in fact provides evidence to show that the criterion, as interpreted, is satisfied. *McKenney v. Deschutes County*, 37 Or LUBA 685 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. To establish a challenge under ORS 227.173(1) or ORS 215.416(8), a petitioner must demonstrate that a standard is so vague that an applicant is unable to determine whether and how approval may be granted. *McKenney v. Deschutes County*, 37 Or LUBA 685 (2000).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 227.178(3) constrains a city's ability to change existing interpretations regarding the *applicability* of approval criteria during the course of proceedings on an application, but does not constrain a city's ability to reinterpret the *meaning* of indisputably applicable standards. *Greer v. Josephine County*, 37 Or LUBA 261 (1999).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 227.178(3) provides that the standards and criteria that are in effect when a subdivision application is submitted govern approval of the subdivision application, but ORS 227.178(3) does not limit a local government's authority to adopt construction or development standards that apply after the subdivision is approved. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. While petitioners may raise issues concerning compliance with approval criteria that are not identified in the local notice of hearing, petitioners must supply some explanation why they believe a "purpose statement" should be viewed as an approval criterion; petitioners may not simply assume that it is a criterion. *Rouse v. Tillamook County*, 34 Or LUBA 530 (1998).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where preliminary subdivision and PUD approval is not modified, approval of the final subdivision and PUD plans is governed by the standard in effect when the application for preliminary approval was submitted. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), circumscribes a local government's authority under ORS 215.283(1) with respect to substantive standards, but it does not prescribe the procedure the county must use when considering whether a proposed use is permitted. *Corp. of Presiding Bishop v. Klamath County*, 34 Or LUBA 131 (1998).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A local government's failure to list a possible zoning restriction in the notice of hearing, as required by ORS 197.763, is harmless error, where the zoning restriction is a basis for imposing conditions rather than an approval standard. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where the notice of hearing contained an error in identifying the zoning map designation being requested, the error provides no basis for reversal or remand where the error had no effect on the approval standards the zone change request was subject to and therefore resulted in no prejudice to petitioner. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 227.178(3) does not prevent a city from adopting an interpretation of a comprehensive plan that is different than the interpretation that was in effect on the date the permit application was submitted, and applying that new interpretation to the permit application. *Holland v. City of Cannon Beach*, 34 Or LUBA 1 (1998).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Under ORS 215.284(3) a partition of EFU-zoned land must leave a remainder parcel that meets the applicable minimum parcel size. *Lyle v. Wheeler County*, 33 Or LUBA 746 (1997).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Under ORS 197.625, when a county code provision has not yet been acknowledged by LCDC, a land use application is subject to that provision, as well as to the applicable land use goal and its implementing rules. *Evans v. Multnomah County*, 33 Or LUBA 555 (1997).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Unless a specific process is followed to eliminate lot lines, under ORS 92.107 lots remain discrete lots. *Koo v. Polk County*, 33 Or LUBA 487 (1997).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Under ORS 215.428(3), petitioner's application is subject to the statutes and rules in effect at the time the application was first submitted. *Still v. Marion County*, 32 Or LUBA 40 (1996).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 258.036, which governs jurisdiction over election contests, does not apply to the election of members to a county citizen planning advisory committee (CPAC). *Boom v. Columbia County*, 31 Or LUBA 318 (1996).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. To grant approval for a replacement dwelling under ORS 215.283(1)(t), the county need only find that the original dwelling was lawfully established. *Drake v. Polk County*, 30 Or LUBA 199 (1995).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. To the extent parties were not properly apprised of the applicable criteria during the initial hearing, they must be provided the information required by ORS 197.763(3)(b) on remand. *Noble v. City of Fairview*, 30 Or LUBA 180 (1995).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 227.178(3), which requires that approval or denial of a land use application be based upon the standards and criteria that were applicable at the time the application was first submitted, would be frustrated if amendments to state regulations had the effect of changing the criteria affecting an application during the proceedings. *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147 (1995).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Provision in Transportation Planning Rule (OAR 660-12-055(3)) that requires direct application

of certain provisions after a certain date does not override ORS 227.178(3), which requires that approval or denial of a land use application be based upon the standards and criteria that were in effect at the time the application was first submitted. *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147 (1995).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 215.428(3), which states that approval or denial of an application shall be based upon the standards and criteria that were applicable at the time the application was first submitted, does not require a local government processing a partition application to proceed as if factual circumstances existing at the time of application remain unchanged. *Petree v. Marion County*, 29 Or LUBA 449 (1995).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A code provision requiring that certain applications for changes to an approved planned development (PD) final development plan "shall be processed in the same manner as for a new PD" must be interpreted consistently with ORS 227.178(3) to mean that any standard which would be applicable to a new application for PD approval is applicable to such applications for changes to approved PDs. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A code definition of "nonconforming use," together with a code provision that a "nonconforming use may be continued," embody the standards applicable to determining the existence of a protected nonconforming use sufficiently to satisfy ORS 215.416(8). A county may consider relevant legal principles concerning the existence of nonconforming uses set out in the opinions of LUBA and the Oregon appellate courts, without having to adopt such principles as county regulations. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 197.763(3)(b) and (5)(a) require a local government to provide notice of the standards applicable to an application for a quasi-judicial land use decision, prior to its hearing on such an application. *Laine v. City of Rockaway Beach*. 27 Or LUBA 493 (1994).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A code requirement that a parking structure be "consistent with the City's short term parking strategy" does not, in itself, satisfy the requirement of ORS 227.173(1) that permit standards and criteria be set forth in development ordinances, because it explains nothing about the basis on which such an application will be approved or denied. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where consistency with the city's "short term parking strategy" is a code requirement, a city cannot determine its "short term parking strategy" is something that *underlies* various provisions of its plan and code and cannot announce that strategy for the first time in a decision on a permit application. This violates the requirement of ORS 227.173(1) that permit standards and criteria *themselves* must be set out in the city's development ordinances. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. The meaning of the term "standards and criteria" in ORS 227.178(3) is a question of state law, and a city's interpretation and application of this term does not bind LUBA. The role of the term "standards and criteria" in ORS 227.178(3) is to assure both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on a decision permitting or denying an application will remain constant throughout the proceedings. *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a city has created a two-stage (tentative plan and final plat) approval process for subdivision applications, under ORS 227.178(3), both subdivision tentative plan and final plat approvals must be based on the "standards and criteria" in effect when the subdivision application is initially filed. *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 215.130(2) allows cities to adopt contingent plan and zoning designations for property to be annexed in the future, but it does not allow cities to grant contingent permits for property to be annexed in the future. *Recht v. City of Newport*, 26 Or LUBA 316 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Unless a county notifies the applicant that its permit application is incomplete, as required by ORS 215.428(2), and the deficiency is not remedied within 180 days, under ORS 215.428(3) the county must apply the standards and criteria in effect when the application was filed. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A local code provision that imposes "compatibility" as a permit approval criterion adequately informs interested parties of the basis on which an application will be approved or denied and, therefore, complies with ORS 215.416(8). *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. The fact that a PUD proposal was altered in 1992 to eliminate a need for story variances, does not retroactively cause the underlying application, submitted in 1990, to be incomplete at the time it was submitted. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a proposal is changed after the permit application is submitted, ORS 227.178(3) locks in the standards in effect at the time the application was first submitted, so long as the original proposal remains "fundamentally intact" after the change. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a city's plan and land use regulations were unacknowledged at the time the subject permit application was initially filed, ORS 227.178(3) does not restrict the applicable standards to those in effect when the application was filed. *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. While ORS 215.416(9) does not require that findings include citations to, or verbatim quotes of, applicable approval standards, it does require that a reasonable person be able to determine from the local government's decision what it considered to be the relevant criteria and standards. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a sign-permitting process involves two steps—obtaining a sign permit and architectural review approval—and each step requires the filing of an application and an application fee, and is subject to different standards which are intended to be applied in addition to the requirements of the other, under ORS 227.178(3) an application for sign permit or architectural review approval is subject to the standards in effect when that particular application is submitted. *A Storage Place v. City of Tualatin*, 25 Or LUBA 202 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Under ORS 215.428(1) to (3), an application for permit approval is considered complete when it is filed, unless the county notifies the permit applicant that information is missing. ORS 215.428(2). *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. LUBA will not assume changes in a PUD proposal between outline development plan approval and preliminary development plan approval constitute a new PUD application (requiring application of then existing approval standards), where there is nothing in the local code to support so characterizing the amended PUD proposal. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. For purposes of identifying the "standards and criteria" that are "applicable at the time the application was first submitted" under ORS 227.178(3), the *acknowledged* comprehensive plan standards and criteria continue to apply, even after adoption of an ordinance repealing or amending those acknowledged standards and criteria, until the newly adopted plan standards and criteria are themselves deemed acknowledged. *Davenport v. City of Tigard*, 25 Or LUBA 67 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Under ORS 227.178(3), the quasi-judicial land use decision-making procedures of ORS 197.763 apply to an urban subdivision decision, where the subdivision application was submitted after ORS 197.763 became effective, but before the effective date of legislation exempting limited land use decisions from the requirements of ORS 197.763. *Warren v. City of Aurora*, 25 Or LUBA 11 (1993).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. While ORS 227.178(3) identifies the criteria that a city must apply to a permit application, it has *no* bearing on whether the city *must*, following reversal or remand of a permit decision by this Board, (1) accept an amended application reviewable against the criteria in effect when the original application was submitted, or (2) require a new application reviewable against the criteria in effect when the new application is submitted. *Seitz v. City of Ashland*, 24 Or LUBA 311 (1992).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where (1) a standard was deleted from the local comprehensive plan prior to the filing of a permit application, (2) the ordinance deleting the standard was remanded by LUBA while the permit application was pending, but (3) the local government made a second decision to delete the standard and that decision was deemed acknowledged prior to the local government's final decision on the permit application, the standard does not apply to the permit application. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a local government advised petitioners of the substance of an applicable requirement, but failed to identify the ordinance that is the source of the requirement, this is a procedural error which does not prejudice petitioners' substantial rights. *Woosley v. Marion County*, 24 Or LUBA 231 (1992).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a "substantial construction" standard in a local code is clear enough for an applicant to know what he must show during the application process, such a standard is not impermissibly vague. *Columbia River Television v. Multnomah County*, 24 Or LUBA 82 (1992).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a PUD amendment application is a separate and distinct application from the original PUD application previously approved, the standards in effect when the PUD amendment application was first filed apply. ORS 227.178(3). *Gage v. City of Portland*, 24 Or LUBA 47 (1992).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Under ORS 227.178(3), so long as additional information required by the city is submitted within 180 days of when a permit application was first submitted, the standards in effect when the application was first submitted apply to the application. *Gage v. City of Portland*, 24 Or LUBA 47 (1992).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. The standards in effect at the time a development application is filed are the standards applicable to approval of such development applications. *Veach v. Wasco County*, 23 Or LUBA 515 (1992).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Counties may adopt EFU zones that are more restrictive than statutory EFU zoning requirements, but may not adopt EFU zones that are less restrictive than the statutory requirements. *Harris v. Polk County*, 23 Or LUBA 152 (1992).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a city's comprehensive plan and land use regulations were not acknowledged when a permit application was initially filed, ORS 227.178(3) does not restrict the standards applicable to that application to those in effect when the application was filed. *Schatz v. City of Jacksonville*, 23 Or LUBA 40 (1992).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a local government held further evidentiary hearings on a permit application after issuance of an LCDC enforcement order, and made its final decision approximately four months after the enforcement order was issued, the local government was required to consider and comply with the enforcement order in adopting its decision. *Schatz v. City of Jacksonville*, 23 Or LUBA 40 (1992).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where the height limitation for the underlying zone is a standard applicable to approval of a PUD preliminary development plan, under ORS 227.178(3) the preliminary development plan must comply with the building height limitation in effect when the preliminary development plan application was first submitted. *Gilson v. City of Portland*, 22 Or LUBA 343 (1991).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where the standards upon which conceptual development approval was based are changed to disallow the use conceptually approved, and later decisions authorizing a building permit and final development approval for the use are adopted on the basis the prior standards continue to apply, a petitioner is entitled to challenge the later decisions notwithstanding petitioner's failure to challenge the conceptual development approval. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Nothing in ORS 215.428(3) requires a county to apply standards in effect at the time one development application is submitted to a distinct and subsequent development application. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a "conceptual approval" decision requires that an applicant file a new application for final development approval, and the challenged decision is made on the basis of that new application, the second development approval request is an "application" as that term is used in ORS 215.428(3) and the code provisions in effect at the time the second development application was submitted are applicable to the second development application. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where petitioners contend that under ORS 215.428(3), the county erred by applying standards adopted after their permit application was initially filed, petitioners claim the county "improperly construed the applicable law." ORS 197.835(7)(a)(D). *McCaw Communications, Inc. v. Polk County*, 20 Or LUBA 456 (1991).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. If petitioners' letter to the county planning director constituted an "application" for the necessary permit for the proposed facility, the county (1) could not require petitioners to submit a different application after its subsequent adoption of additional standards, and (2) erred in applying the subsequently adopted standards to the initial "application." *McCaw Communications, Inc. v. Polk County*, 20 Or LUBA 456 (1991).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where a letter to the county planning director describes the proposed use and location and clearly requests the county to take action to grant land use approval, and it is at best unclear whether the local code required a conditional use application for such a proposal, petitioners' letter constitutes an "application" under ORS 215.428(3). *McCaw Communications, Inc. v. Polk County*, 20 Or LUBA 456 (1991).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Under ORS 215.428(3), the county flood standards in effect at the time the "application" was first submitted to the county apply. However, for the purpose of determining which county flood standards must be applied, the dispositive "application" is the one to which county flood standards are applicable. *Komning v. Grant County*, 20 Or LUBA 355 (1990).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Neither ORS 92.044(1) nor 227.173(1) requires that local governments set out the Statewide Planning Goals in their ordinances as approval standards applicable prior to acknowledgment. *Knapp v. City of Jacksonville*, 20 Or LUBA 189 (1990).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. ORS 215.428(3) does not preclude an applicant from submitting a new permit application, similar or identical to a previous permit application found inconsistent with applicable standards, for the purpose of obtaining review under amended approval standards in effect when the new application is filed. *Eckis v. Linn County*, 19 Or LUBA 15 (1990).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. Where permit approval standards are amended, ORS 227.178(3) does not preclude an applicant from submitting a new application, similar or identical to a previous application found inconsistent with the previous approval standards, for the purpose of obtaining review under the amended standards. *Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695 (1990).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A "new" application was filed, within the meaning of ORS 227.178(3), where the record includes, in addition to documents filed in support of a prior application, a new application form signed by the applicant's employee, and the city conducted a full *de novo* review of the new application, after remand by LUBA of its decision on a prior identical application. *Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695 (1990).

25.3.2 Local Government Procedures – Compliance with Statutes – Applicable Criteria. A petitioner does not waive its right under ORS 215.428(3) to have its application reviewed under the criteria in effect when the application was first submitted, where petitioner's statements in the proceedings to amend the criteria do not show petitioner was aware of such rights and petitioner did assert its rights before the planning commission and board of commissioners. *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 651 (1990).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. That an alteration to a proposed PAPA is required by LUBA's decision in a prior appeal and reduces the subject acreage does not mean as a matter of law that the proposed PAPA is not "altered to such an extent that the materials submitted no longer reasonably describe the proposed change," thereby requiring notice of the alteration to DLCD pursuant to ORS 197.610(6). *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Under ORS 197.610(6), if a proposed PAPA is altered to such an extent that the notice submitted to DLCD under ORS 197.610(1) and (3) no longer reasonably describes it, the local government must submit notice of the alterations to DLCD at least 10 days before the final evidentiary hearing, which DLCD thereafter provides to the public. The larger statutory scheme at ORS 197.610 to 197.625 is intended to expand notice and participatory options for DLCD and a broader audience that may not receive local notice. A local government's errors under ORS 197.610(6) require remand where they are of a kind or degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function. *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where notice under ORS 197.610(6) is sent to DLCD 17 days *after* the final evidentiary hearing occurred and describes the "date of first evidentiary hearing" and the "date of final hearing" but does not identify the date of the "final evidentiary hearing," where there is a disparity between the text of the notice and the text of an ordinance included with the notice regarding the subject acreage, and where the notice is sent during a time when the record is left open only for evidence that is responsive to evidence that was submitted earlier, the totality of the errors in the submission of the notice and in the notice itself are of a kind and degree that make it doubtful that the ORS 197.610 to 197.625 process performed its function, and remand is required. *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A zone verification is subject to LUBA's jurisdiction and a person adversely affected by the decision may appeal the decision to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required." ORS 197.830(5)(b). The city was not obligated to and did not provide notice of the zone verification decision to petitioner. Petitioner was put on inquiry notice of the zone verification decision when the city provided petitioner multiple notices of a subsequent land use application, review, and approval for site review, traffic impact analysis, and adjustment review for the same subject property and development described in the zone verification decision. The city invited petitioner to participate in that subsequent land use action and to review public planning documents at the planning division and online. The appeal was untimely filed and must be dismissed because petitioner failed to make such inquiries and the 21-day appeal period expired before petitioner filed the appeal. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A zone verification is not a statutory land use "permit" as defined at ORS 227.160(2)(b), and the city is not required to provide notice of the decision or opportunity for a local appeal of the decision.

However, a zone verification decision is subject to LUBA review and a 21-day appeal period. ORS 227.175(11); ORS 197.830(5)(b). *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The fact that an adopted local code amendment includes language which was not included in the notice to DLCD required by ORS 197.610(1) is not by itself sufficient to explain why the notice was inadequate so as to require reversal or remand of the amendment decision. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. When a county opts to approve a permit without a public hearing, any person who is adversely affected or aggrieved, or who is entitled to notice of the decision may appeal a decision made without a hearing. The county cannot require participation prior to a decision, either by attending a conference (that may or may not have occurred), or providing written comments, or in any other manner. Additionally, the county may not enact additional restrictions to prevent a person who is entitled to file an appeal under the ORS 215.416(11)(a)(A) right to file a local appeal. *Hood River Valley Residents Comm. v. Hood River County*, 78 Or LUBA 282 (2018).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Ballot Measure 56 (codified at ORS 215.503) requires a county to provide advance, individual, written notice by mail of the first hearing on an ordinance to property owners whose property could be "rezoned" by the proposed ordinance. Where an ordinance amending a county's land use and development code "limits" the size of, or in some cases "prohibits" entirely, a use – the growing of cannabis – that was previously allowed in the applicable zone, Measure 56 notice is required. *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Ballot Measure 56 (codified at ORS 215.503) contains mandatory language and is specific regarding what is required to be included in the notice of a land use change. Where a county's notice does not: identify the date of the first hearing or even reference a hearing regarding the ordinance, reference any proposed ordinance or identify an ordinance by number, and was not sent at least 20 days but not more than 40 days before the date of the first hearing on the ordinance, the notice is defective. *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a county failed to provide petitioners adequate Ballot Measure 56 (codified at ORS 215.503) notice of a proposed ordinance that proposed to limit the size of, or in some cases prohibit entirely, a use – the growing of cannabis – that was previously allowed in the applicable zone, causing some petitioners to only be able to participate at the final hearing before the board of county commissioners on the proposed ordinance by submitting written comments prior to the record closing, such last-minute participation at the last of many hearings is not "an adequate opportunity to prepare and submit their case and a full and fair hearing" and therefore "prejudiced the substantial rights" of the petitioners. ORS 197.835(9)(a)(B). *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A county decision to approve a dwelling on forest land under local land use regulations that implement ORS 215.705, 215.740 or 215.750 is a "permit" decision as defined at ORS 215.402(4), because the local code and statutes impose discretionary approval standards on such development. To remove any doubt, ORS 215.402(4) defines "permit" to include approvals of development under ORS 215.700 to 215.780, a range which includes ORS 215.705, 215.740 and 215.750. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a decision approving a dwelling does not approve, or mention, access to that dwelling, the fact that the petitioner's property is adjacent to the public road that will provide access to the dwelling does not mean that the county is required under ORS 197.763 or any other statute to provide notice of the decision to that petitioner, if petitioner's property lies outside the mandatory notice area. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Under ORS 197.835(4), where a local government fails to list an applicable permit approval standard in its notice of hearing, a petitioner is generally entitled to raise issues for the first time at LUBA based on the standard omitted from the notice. But under the last sentence of ORS 197.835(4), LUBA may refuse to allow a petitioner to raise a new issue in that circumstance, where LUBA finds the omitted standard was discussed during the local proceedings and petitioner could have raised issues concerning that standard during the local proceedings. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A county fails to comply with ORS 215.060, which requires "the governing body" to (1) conduct at least one hearing; and (2) conduct those hearings after at least 10 days advance notice of "each of the hearings" is published in a newspaper of general circulation, where the county fails to publish in a newspaper of general circulation the notice of the public hearing before the board of county commissioners regarding proposed text amendments to a comprehensive plan. *Oregon Coast Alliance v. Clatsop County*, 75 Or LUBA 277 (2017).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. In *Aleali v. City of Sherwood*, 262 Or App 59, 325 P3d 747 (2014), the Court of Appeals held that the "local government makes a land use decision without providing a hearing" prong of ORS 197.830(3), which suspends the 21-day deadline for filing a notice of intent to appeal until a petitioner receives actual notice of the decision, includes (1) cases where a local government held no hearing at all, and also (2) cases where the local government held a hearing but failed to provide the petitioner a notice of hearing that the petitioner was entitled to under state (as opposed to local) law. *Phillips v. City of Corvallis*, 75 Or LUBA 315 (2017).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. One prong of ORS 197.830(3) suspends the 21-day deadline for filing a notice of intent to appeal, where "the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions." To take advantage of the delayed deadline for filing

a notice of intent to appeal under ORS 197.830(3)(b), which allows petitioner to file the notice of intent to appeal within 21 days of the date petitioner "knew or should have known of the decision," petitioner must establish that she was entitled to the defective notice of hearing under state (as opposed to local) law. *Phillips v. City of Corvallis*, 75 Or LUBA 315 (2017).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A petitioner's right to raise an issue concerning an applicable approval criterion that is not listed in the prehearing notice required by ORS 197.763(3) is a qualified right under ORS 197.835(4), and LUBA may refuse to consider that issue if LUBA finds that notwithstanding the notice failure "the issues could have been raised before the local government[.]"*Long v. City of Tigard*, 75 Or LUBA 390 (2017).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the Metro Code requires that a city give Metro notice 35 days before the first hearing on a comprehensive plan or land use regulation amendment, and a city fails to do so, but that hearing was continued twice and Metro was given notice more than 35 days before the continued hearing, any error was not prejudicial. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A zoning classification decision described in ORS 227.160(2)(b) is not a statutory "permit" decision described in ORS 227.160(2), requiring notice and opportunity for a hearing, unless the decision goes beyond classifying a proposed use and applies discretionary standards to approve or deny the proposed use. *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763(7) prescribes the procedure for reopening the record and allowing new evidence after the record has closed, and does not prohibit a local government from reopening a record or require a local government to provide individual written notice when the local government decides to reopen a record that was previously closed. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.830(3) does not require a local government to provide a second written notice to persons who were given pre-hearing written notice of a quasi-judicial land use hearing, when the local government decides to reopen the record. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The 20-day notice period required by ORS 197.763(3)(f)(A) applies only when the local government provides a single evidentiary hearing. Nothing in ORS 197.763(3)(f) requires the local government to provide 20 days' notice of a second evidentiary hearing. *Harrison v. City of Cannon Beach*, 72 Or LUBA 182 (2015).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A mistaken reference to prior review and decision by the city's design review board, when in fact the city's planning commission actually conducted the prior review, is not reversible procedural error within the meaning of ORS 197.835(9)(a)(B), where the petitioner fails to establish that the mistake in the notice caused the petitioner to fail to prepare for and submit his case to the city

council in person, and the evidence in the record demonstrates that previous commitments caused the petitioner to fail to attend the city council hearing in person. *Harrison v. City of Cannon Beach*, 72 Or LUBA 182 (2015).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a local government provides written prehearing notice to petitioner and in fact holds a hearing on a proposal to annex and rezone property, the part of ORS 197.830(3) that delays the deadline for filing a notice of intent to appeal a decision that is rendered "without providing a hearing" until 21 days after a petitioner receives actual or constructive notice does not apply. *Phillips v. City of Happy Valley*, 71 Or LUBA 5 (2015).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a city's prehearing notice identifies the 10 properties to be annexed and rezoned, and identifies the city zoning to be applied to the 10 properties, and then after the hearing the city adopts an ordinance that annexes and applies the same zoning identified in the prehearing notice, the city does not make "a decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final action," within the meaning of ORS 197.830(3). In that circumstance, the 21-day deadline specified in ORS 197.830(9) for filing the notice of intent to appeal applies, not the delayed ORS 197.830(3) deadline. *Phillips v. City of Happy Valley*, 71 Or LUBA 5 (2015).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. While failures to comply with the notice requirements set out at ORS 197.763(3) could also be sufficient to constitute a failure to "reasonably describe the local government's final actions," within the meaning of ORS 197.830(3), it does not necessarily follow that any failure to comply with ORS 197.763(3) results in a failure to "reasonably describe the local government's final action." The inquiries under those two statutes are not the same. *Phillips v. City of Happy Valley*, 71 Or LUBA 5 (2015).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Identifying existing county zoning and proposed new city zoning to be applied to the annexed property using abbreviated references and acronyms for the zoning districts does not mean the city gave notice that "did not reasonably describe the local government's final actions," within the meaning of ORS 197.830(3). A reasonable person would be put on inquiry notice by such a notice and would not assume no substantive change was proposed through the annexation and rezoning. *Phillips v. City of Happy Valley*, 71 Or LUBA 5 (2015).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Under ORS 197.763(2)(a), a local government may rely on tax lot boundaries for the purposes of determining the exterior boundaries of the lots or parcels that make up the "property which is the subject of the notice" and thus the notice area, absent some reason to believe that the tax lot boundaries do not correspond to relevant lot or parcel boundaries. *Mackenzie v. City of Portland*, 71 Or LUBA 155 (2015).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763(2)(a) does not require local governments to use the boundaries of all lots or parcels in

common "ownership" as the basis for determining the notice area in circumstances where the proposed development does not involve all of the contiguous lots or parcels under common ownership. *Mackenzie v. City of Portland*, 71 Or LUBA 155 (2015).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A petitioner does not waive her right to assign error to a hearings officer's conclusion that a structure qualifies as a nonconforming use, and the hearings officer's approval of an alteration of that nonconforming use, where the applicant did not apply for verification of a nonconforming use or an alteration of a nonconforming use and the notices of hearing did not identify the county's nonconforming use regulations as applicable criteria for the decision. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where an "Article" of the community development code includes 373 single spaced pages of land use regulations made up of 44 separate sections devoted to a variety of topics, a notice of hearing that identifies that article of the community development code as an applicable standard is not sufficient, under ORS 197.763(3), to provide notice of an eight-page section of that article devoted to nonconforming uses. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763(8) provides that a property owner's failure to receive notice required under ORS 197.763(2) will not "invalidate [the city's] proceedings" if the city can produce an affidavit that notice was given. ORS 197.763(8) does not say a city's affidavit is sufficient to establish that the city in fact sent the required notice, where there is a factual dispute over whether the city actually sent the required notice. *Aleali v. City of Sherwood*, 68 Or LUBA 153 (2013).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Whether a building permit also qualifies as a statutory "permit," as ORS 227.160(2) defines that term does not turn on the complexity of the applicable land use regulations. Whether the building permit qualifies as a statutory permit turns on whether the applicable land use regulations are ambiguous about (1) the nature of the proposed use or (2) whether the proposed use is among the uses that are identified in the land use regulation as permitted. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where there is no question under applicable land use regulations that a proposed apartment building is permitted outright in the applicable zone, and the only ambiguities concern the development regulations that apply in approving the apartment use, those ambiguities mean the building permit approving the apartment building is a land use decision and that none of the ORS 197.015(10)(b) exclusions for nondiscretionary decisions apply. But that building permit is not a statutory "permit," as ORS 227.160(2) defines that term, since the use is permitted outright and the only ambiguities concern the development standards that apply to that permitted use. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Whether a building permit also qualifies as a statutory "permit," as ORS 227.160(2) defines that

term does not turn on the complexity of the applicable land use regulations. Whether the building permit qualifies as a statutory permit turns on whether the applicable land use regulations are ambiguous about (1) the nature of the proposed use or (2) whether the proposed use is among the uses that are identified in the land use regulation as permitted. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where there is no question under applicable land use regulations that a proposed apartment building is permitted outright in the applicable zone, and the only ambiguities concern the development regulations that apply in approving the apartment use, those ambiguities mean the building permit approving the apartment building is a land use decision and that none of the ORS 197.015(10)(b) exclusions for nondiscretionary decisions apply. But that building permit is not a statutory "permit," as ORS 227.160(2) defines that term, since the use is permitted outright and the only ambiguities concern the development standards that apply to that permitted use. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. To preserve the issue of whether the statewide planning goals apply to a rezoning decision and thus whether notice of hearing must be provided to DLCD under ORS 197.610, the issue must be raised during the proceedings below to avoid waiver under ORS 197.763(1) and, additionally, specified in the local notice of appeal to avoid waiver under the exhaustion/waiver principle in *Miles v. City of Florence*, 190 Or App 500 (2003). *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.610(2) provides that a local government need not provide notice of hearing to DLCD if the local government concludes that no statewide planning goals apply. However, the failure to adopt in the final decision *express* findings that no goals apply is not a basis for remand, where no statute requires express findings that the goals do not apply and the petitioner fails to demonstrate that any goals in fact do apply. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a local government defers a finding of compliance with an applicable discretionary approval criterion to a future review proceeding, it must ensure, either in a condition of approval or by necessary operation of its code, that the second review proceeding is infused with the same participatory rights as those provided in the initial review proceeding. A condition of approval that simply provides that a geologic hazard analysis required for tentative plan approval will be provided "prior to any structural development" is insufficient to ensure that geologic hazard approval standards will be addressed in a proceeding that provides the same notice and hearing required of the initial proceeding on the tentative plan. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where it is not clear under a county's code that the planning commission proceeding on a final master plan application for a destination resort will necessarily be conducted as an ORS 197.763 quasi-judicial hearing with notice, the final master plan proceedings appear to be ministerial under the code, and nothing in the tentative master plan approval requires hearing and notice, the county errs

in deferring discretionary tentative master plan approval standards to the proceedings on the application for final master plan approval without ensuring that those proceedings will infused with the same participatory rights as the tentative master plan approval. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A city's failure to provide adequate notice that it had recharacterized the application from an application to modify an existing permit to an application for a new permit might constitute procedural error, but that error does not prejudice the petitioner's substantial rights, where the recharacterization was in response to petitioner's arguments, the applicable criteria are the same whether it is a modification or new application, and petitioner had ample opportunity to submit evidence and argument after it became clear that the city was treating the application as one for a new permit. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.830(3) tolls the 21-day appeal deadline in ORS 197.830(9) for persons who are misled by the differences between the proposal described in the notice of hearing and the proposal as approved, and due to that misleading notice failed to appear at the hearing and become entitled to the notice of decision. If a petitioner did not view the notice of hearing, then the petitioner could not have been misled by the notice. *Brodersen v. City of Ashland*, 62 Or LUBA 471 (2010).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Applying the "notice of hearing did not reasonably describe the proposal" language in ORS 197.830(3) to a *legislative* decision is problematic, because generally no individual notice is required, and the only notice of hearing required for a legislative decision is the notice provided to the Department of Land Conservation and Development and any general publication notices in local newspapers. *Brodersen v. City of Ashland*, 62 Or LUBA 471 (2010).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The "notice of hearing did not reasonably describe" the proposal language in ORS 197.830(3) focuses on the difference between the final action and the proposal described in the notice of hearing, not on differences between the final action and the proposal itself as it may be modified during the proceedings below. *Brodersen v. City of Ashland*, 62 Or LUBA 471 (2010).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. That an intermediate draft of a proposed ordinance posted on the city's website differed from the city's final ordinance as adopted is not sufficient to toll the 21-day deadline to appeal the final ordinance under ORS 197.830(3), where the notice of hearing for the original draft of the proposed ordinance reasonably described the final ordinance. *Brodersen v. City of Ashland*, 62 Or LUBA 471 (2010).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the comprehensive plan and land use regulation standards that a county relies on in its decision to deny an application for partition approval were not identified in the notice of hearing, in the planning staff report or in the hearing, the applicant's substantial rights were prejudiced by the county's error in failing to provide notice of relevant approval standards and remand is required. *MEK Properties, LLC v. Coos County*, 61 Or LUBA 360 (2010).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A notice of hearing that states that a proposed land use is a "mixed-use development" planned unit development with 82 residential dwelling units and includes a map that shows the proposed buildings and provides additional details is sufficient to "reasonably describe the local government's final actions," within the meaning of ORS 197.830(3), where the approved development is a mixed residential and commercial use. *Duenweg v. City of Medford*, 60 Or LUBA 1 (2009).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The failure of a notice of hearing for a mixed-use residential and commercial PUD to specifically mention that the PUD housing will be occupied by the families of recovering addicts and senior citizen mentors for those families does not result in a notice of hearing that does "not reasonably describe the local government's final actions," within the meaning of ORS 197.830(3). *Duenweg v. City of Medford*, 60 Or LUBA 1 (2009).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a petitioner was not entitled to receive written notice of a hearing on a mixed-use planned unit development and did not see the published notice of hearing, he could not have been misled by the notice of hearing. The deadline for filing the petition for review expired 21 days after the decision became final under ORS 197.830(9) and ORS 197.830(3) does not operate to delay the deadline for filing a petition for review to 21 days after petitioner knew or should have known of the decision. *Duenweg v. City of Medford*, 60 Or LUBA 1 (2009).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Under ORS 197.763(2)(a), property owners within certain distances of the property that is "the subject of the notice" must be provided with notice of hearing. The property that is the "subject of the notice" is only the property that is being developed, and does not include off site transportation mitigation improvements in which the applicant does not possess a property interest. *Plaid Pantries, Inc. v. City of Tigard*, 60 Or LUBA 441 (2010).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. *Fasano v. Washington County*, 264 Or 574, 507 P2d 23 (1973), does not give a party an independent constitutional right to notice of a hearing in addition to a statutory or local code right to notice of a hearing. *Plaid Pantries, Inc. v. City of Tigard*, 60 Or LUBA 441 (2010).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. In order to appeal to LUBA under the "different notice/final action" language of ORS 197.830(3), the nature or scope of the proposed use as described in the notice of proposed action must differ to such a degree from the final action that the notice does not "reasonably describe" the final action. Where there is no difference between the nature and scope of the property line adjustment described in the notice of hearing and the property line adjustment described in the notice of decision, ORS 197.830(3) does not apply. *Ebar v. Harney County*, 59 Or LUBA 201 (2009).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The "different notice/final action" provisions of ORS 197.830(3) generally apply to persons who are

misled by a deviation in substance between the notice of proposed action and the final action, and because of that deviation do not appear at the hearing and thereby become entitled to timely notice of the decision and hence notice of the opportunity to appeal the decision to LUBA. *Ebar v. Harney County*, 59 Or LUBA 201 (2009).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.610(1) and OAR 660-018-0020(1)(c) and (2) require that a local government provide the Department of Land Conservation and Development with a copy of the proposed text of any post acknowledgment comprehensive plan or land use regulation amendment. Where a local government's notice of its post acknowledgment action does not include the proposed text, remand is required. *SEIU v. City of Happy Valley*, 58 Or LUBA 261 (2009).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a city denies a partition application based on a code provision that was not listed as an approval standard in the notice of hearing and not discussed until late in the hearing, the petitioner's failure to raise issues below regarding application of that code provision does not preclude petitioner from challenging denial under that code provision before LUBA. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.610(1) requires that the Land Conservation and Development Commission be given notice at least 45 days before the first evidentiary hearing on adoption of a post-acknowledgment comprehensive plan amendment. Where the required notice is given, a second notice is not required under ORS 197.610(1) simply because the local government decides to adopt different parts of the proposed comprehensive plan amendment by separate ordinances. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Whether an ordinance adopting text amendments to zoning districts "rezones" property within the meaning of Ballot Measure 56, triggering the statutory obligation to provide notice to property owners, depends on whether the ordinance, on its face, restricts the range or extent of permissible uses of the property, compared to existing law. *Murray v. Multnomah County*, 56 Or LUBA 370 (2008).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the preexisting ordinance did not provide for consolidation of lots or parcels at all, a text amendment that provides for consolidation and replatting of lots and parcels in each zone as a new "use" does not "limit or prohibit land uses previously allowed in the affected zone" for purposes of Ballot Measure 56, and thus does not trigger the obligation to provide individual written notice to property owners. *Murray v. Multnomah County*, 56 Or LUBA 370 (2008).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. To the extent a petitioner may appeal a legislative decision to LUBA under ORS 197.830(3) and *Leonard v. Union County*, 24 Or LUBA 362 (1992), because the county failed to provide written notice to property owners as required under Ballot Measure 56, petitioner must establish that he or she is entitled to notice under the statute. Failure to provide notice to other persons, even petitioner's

predecessor in interest, is insufficient to allow petitioner to file a belated appeal to LUBA under ORS 197.830(3). *Murray v. Multnomah County*, 56 Or LUBA 370 (2008).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Failure to provide publication notice as required by ORS 215.223 is not the kind of notice failure that can allow a petitioner to appeal a legislative decision to LUBA under ORS 197.830(3) and *Leonard v. Union County*, 24 Or LUBA 362 (1992). *Murray v. Multnomah County*, 56 Or LUBA 370 (2008).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Even if a local government violates ORS 197.830(5), which requires that the notice for a limited land use decision reasonably describe the decision that is made, the remedy for such a violation is a tolling of the 21-day deadline for appealing the decision to LUBA. Violation of ORS 197.830(5) does not provide a basis for reversal or remand. *Boucot v. City of Corvallis*, 56 Or LUBA 662 (2008).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Unlike quasi-judicial decisions, a local government is not required to provide a list of the approval criteria in its notice for legislative decisions. *Jacobsen v. City of Winston*, 55 Or LUBA 181 (2007).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A notice of hearing does not "reasonably describe the final action" for purposes of tolling the appeal period under ORS 197.830(3) when the parties are misled by the deviation between the notice of the proposed action and the substance of the decision. *Pacific Cascade Resources v. Columbia County*, 55 Or LUBA 216 (2007).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A notice of hearing stating that the county will consider an application to renew a mining permit subject to approval criteria listed in the notice is a fair description of the final action for purposes of ORS 197.830(3), where the final action approves the application to renew a mining permit under the listed criteria. *Pacific Cascade Resources v. Columbia County*, 55 Or LUBA 216 (2007).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. That a notice of hearing does not list the conditions of approval the county might decide to impose or indicate that the county might impose conditions of approval does not mean that the notice fails to "reasonably describe the final action" for purposes of ORS 197.830(3), particularly where petitioner knew or should have known that the county intended to impose conditions of approval on petitioner's application. *Pacific Cascade Resources v. Columbia County*, 55 Or LUBA 216 (2007).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763(6)(b) requires that if a quasi-judicial land use hearing is continued, "the hearing shall be continued to a date, time and place certain * * *." ORS 197.763(6)(b) does not apply where the final evidentiary hearing is closed and a later date is set for a public meeting at which the local government will adopt its decision in a quasi-judicial land use matter. *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Published notice of a hearing to consider potential increased permit and planning fees, while vague, is not misleading, when the land use decision adopted increases land use appeal fees. Therefore, the exception to the 21-day deadline for filing a notice of intent to appeal under ORS 197.830(3), when the land use decision made is sufficiently different from the notice of the proposed action, does not apply. *Jacobsen v. City of Winston*, 54 Or LUBA 730 (2007).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. OAR 660-041-0030, which requires notice to the Department of Land Conservation and Development (DLCD) of an application for or decision on a permit pursuant to a Ballot Measure 37 waiver, is not inconsistent with ORS 197.763(2)(c), which requires a local government if requested by the applicant to notify DLCD of a hearing on a land use application. *DLCD v. Deschutes County*, 54 Or LUBA 799 (2007).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A land use compatibility statement that determines the appropriate zoning classification for a proposed use of land within an urban growth boundary may constitute a "zoning classification" decision as defined by ORS 227.160(2)(b), and thus not constitute a statutory "permit" that would require the city to provide notice and an opportunity for hearing. *Hallowell v. City of Independence*, 53 Or LUBA 165 (2006).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Absent some authority to the contrary, in approving a preliminary grading plan the local government is not required to determine what procedures will govern consideration of the final grading plan. Where the decision approving the preliminary grading plan does not determine and is not required to determine the procedures that govern the final grading plan, LUBA will reject arguments that the local government erred in failing to impose conditions requiring the county to provide notice and opportunity to request a hearing in considering the final grading plan. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763 does not require local governments to treat staff-generated proposed findings that are submitted to the final decision maker for review and adoption at the final meeting as a "staff report" that must be made available to the public seven days prior to the meeting. Absent local provisions to the contrary, there is no right for parties to review or rebut proposed findings prior to their adoption. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where neither the local government nor LUBA has jurisdiction to resolve the legality of a condition requiring necessary facilities to be constructed prior to obtaining final approval of a two-step subdivision approval process, the local government may (1) adopt findings establishing that fulfillment of the condition of approval is not precluded as a matter of law, and (2) ensure that the condition will be fulfilled prior to final subdivision approval or actual development. *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.830(3) and 197.620(2) are similarly worded and impose the same legal standard. Under those statutes there are certain legal consequences where the notice of hearing is inadequate to describe the local government's ultimate decision. *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.830(3) applies where the nature or scope of the proposed use that is described in the notice that precedes the local government's public hearing is later changed and the proposed use is approved as changed in the local government's decision. *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Any questions that may be raised regarding how a local government chooses to go about applying the approval criteria that are listed in a notice of hearing to the proposal described in the notice implicate the merits of this appeal; those questions do not implicate the adequacy of the city's notice under ORS 197.620(2) and 197.830(3). *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where petitioners fail to establish that any statute obligates a county to provide petitioners notice of a building permit decision that modifies a condition of partition approval, the "knew or should have known" standard at ORS 197.830(3)(b) applies rather than the "actual notice" standard at ORS 197.830(3)(a), in determining whether an appeal is timely filed under that statute. *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Given the Department of Land Conservation and Development Commission's (DLCD's) critical role in the plan amendment review process, complete failure to provide notice of post-acknowledgment plan amendments to DLCD may be a "substantive" error that obviates the requirement to show that the procedural error prejudiced the petitioner's substantial rights. However, it does not follow that failure to provide other types of notice to other parties in other contexts is also a "substantive" error obviating the ORS 197.835(9) requirement that the petitioner show prejudice. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. While ORS 215.223(3) requires a county to provide notice of the hearing on a "zone change," a proposal to correct the official zoning map to accurately reflect previously adopted ordinances is not a "zone change" within the meaning of ORS 215.223(3), and therefore the county's failure to provide notice of such a map correction does not violate the statute. *Sullivan v. Polk County*, 51 Or LUBA 107 (2006).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. While deviations from the post acknowledgment plan amendment notice requirements at ORS 197.610(1) may constitute procedural errors that will not provide a basis for remand absent prejudice to a petitioner's substantial rights, a complete failure to provide notice to the Department of Land Conservation and Development under ORS 197.610(1) is a substantive error and requires remand

without regard to whether the failure prejudiced petitioner's substantial rights. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A petitioner's decision to rely on a city website that stated the city council meetings generally are held at 7 p.m. does not excuse the petitioner's failure to appear at a 6 p.m. hearing on a variance request where, although petitioner was not entitled to written notice of the hearing, the written notice of the variance hearing accurately stated the hearing would begin at 6 p.m. and was provided to all persons who were entitled to written notice of the hearing. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. To comply with ORS 197.763(3)(b), a notice of hearing must identify the applicable approval criteria by code number or similar means of identification sufficient to direct the recipient to the actual code or plan provisions that the city deems to be approval criteria. Reference to a code provision that itself merely requires "conformance with the comprehensive plan" is insufficient to provide effective notice of any comprehensive plan provisions. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The city's failure to list certain plan policies as approval criteria in the notice of hearing does not allow petitioner to raise new issues regarding those plan policies under ORS 197.835(4)(a), where two staff reports and a planning commission decision address the plan policies as approval criteria and petitioner is given ample constructive notice that the city believed the policies to be approval criteria. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. An issue regarding compliance with an approval criterion is waived if not raised below, unless the petitioner demonstrates that the local government failed to list the criterion in the notice of hearing under ORS 197.835(4). However, LUBA will not address an issue under ORS 197.835(4) where the petitioner fails to explain why the notice of hearing is defective. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where statutory notice of hearing requirements are not jurisdictional, failure to comply with those statutory requirements is reviewed under ORS 197.835(9)(a)(B), which establishes LUBA's scope of review for procedural errors. *Kneeland v. Douglas County*, 48 Or LUBA 347 (2005).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a notice for the required second hearing on formation of a special district corrects certain errors in the notice of the first hearing, any defects in the first notice are cured. *Kneeland v. Douglas County*, 48 Or LUBA 347 (2005).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A planning commission permit approval can defer findings of compliance with a conditional use standard requiring that proposed structures "complement" the design of the area, by relying on

subsequent review by an architectural review committee, where the committee's review provides the same notice and opportunity for hearing required by state law for the conditional use decision, and the committee will determine compliance with the deferred standard as part of its architectural review. *McCulloh v. City of Jacksonville*, 46 Or LUBA 267 (2004).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. For the purposes of ORS 197.830(3), a notice of hearing that explains that a county is considering the annexation of property to a sewer district adequately describes the proposed action to be taken by the county, even if the area described in the notice is later amended to delete one parcel. *Miner v. Clatsop County*, 46 Or LUBA 467 (2004).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Providing only 22 days' notice of hearing to DLCD of a post-acknowledgment plan amendment, rather than the full 45 days' notice required by ORS 196.610(1), is not reversible error, where both petitioner and DLCD participated in the proceedings, and there is no attempt to demonstrate that short notice prevented any other person that might rely on the notice from participating in the local government's proceedings. *Bryant v. Umatilla County*, 45 Or LUBA 653 (2003).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Providing notice and a copy of proposed zoning ordinance amendments to DLCD under ORS 197.610(1) and then adopting an additional zoning ordinance amendment that was not included with the notice without providing additional notice to DLCD is not error. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The broad notice and potential for participation by DLCD and others under ORS 197.610 is the *quid pro quo* for ORS 197.625, which deems post-acknowledgment land use regulation amendments to be consistent with the statewide planning goals as a matter of law, if the amendment is not appealed or is affirmed on appeal. Therefore, whether errors in a city's notice to DLCD under ORS 197.610 warrant remand depends upon whether the errors are of the kind or of a degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function. If so, remand may be required, without regard to whether petitioners before LUBA can demonstrate prejudice to their substantial rights. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a city's notice to DLCD under ORS 197.610(1) states that the initial evidentiary hearing on a proposed zoning ordinance amendment will be held on November 7 and the hearing is actually held on November 6, and LUBA cannot determine whether persons who may have been depending on notice that DLCD subsequently provided of that initial evidentiary hearing may have been prejudiced by the city's error, LUBA will remand the city's decision. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Although a complete failure to provide advanced published notice pursuant to ORS 215.060 renders an ordinance of "no legal effect," if published notice is provided, challenges to the adequacy of that notice are analyzed as procedural errors and provide a basis for reversal or remand

if such errors prejudice a petitioner's substantial rights. *Ramsey v. Multnomah County*, 44 Or LUBA 722 (2003).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 215.503 (2003) requires a county to provide mailed written notice of the first hearing on an ordinance to property owners whose property could be rezoned due to a comprehensive plan amendment, but it does not require additional public notice every time LUBA remands an ordinance. *Ramsey v. Multnomah County,* 44 Or LUBA 722 (2003).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Because ORS 215.060 specifically provides that a county's failure to provide notice of an action regarding its plan as required by the statute shall result in the county's action having "no legal effect," LUBA may not overlook a county's failure to provide the notice required by ORS 215.060, notwithstanding that the lack of notice did not prejudice petitioner's substantial rights. *Ramsey v. Multnomah County,* 43 Or LUBA 25 (2002).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Mailing individual notice of a proposed comprehensive plan amendment to affected property owners is not sufficient to meet the requirement under ORS 215.060 that a county publish notice of such action in a "newspaper of general circulation" or "in the territory * * * concerned." *Ramsey v. Multnomah County,* 43 Or LUBA 25 (2002).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 216.060 provides that a county may give notice of a plan amendment by mail, radio, television or other means *in addition to* publishing notice in a "newspaper of general circulation," but the statute does not allow a county to provide notice by such other means *instead of* by publication in a newspaper. *Ramsey v. Multnomah County*, 43 Or LUBA 25 (2002).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Absent a local code requirement to the contrary, ORS 197.763 does not require that every hearing notice given by a local government must provide an overview of local appeal procedures and how those procedures may affect an appeal at LUBA, as long as the notices inform participants of their obligation to raise issues regarding compliance with applicable criteria at the earliest opportunity. *Scheyer v. City of Hood River*, 43 Or LUBA 112 (2002).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Not every violation of the requirement at ORS 197.610(1) and its implementing rule that a local government provide notice of proposed post-acknowledgment plan amendments to the Department of Land Conservation and Development Commission (DLCD) more than 45 days before the initial public hearing is a substantive error that must result in remand. Failure to specify all of the proposed zone changes on the form provided to DLCD is, at most, procedural error that does not warrant remand absent a demonstration of prejudice to petitioner's substantial rights. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A county commits no error in applying a zoning code requirement that a conditional use be found to

be in harmony with the purpose and intent of the zone as a mandatory approval criterion where the provision expressly requires that determination. The county's identification in its notice of hearing of the chapter in which that zoning code requirement appears is sufficient to give the applicant notice of that approval criterion where the chapter is short and code requirement for a finding concerning that criterion is clear. *Hick v. Marion County*, 43 Or LUBA 483 (2003).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where petitioner argues the city erred by approving an expedited annexation while failing to "(1) publish public notice, (2) notify adjacent property owners, (3) post a notice on the properties, (4) notify property owners within created 'service islands,' or (5) notify the community in time for this issue to be included on public agendas to be discussed," but petitioner identifies no legal requirement for any of these kinds of notice, petitioner fails to provide a basis for reversal or remand. *Cape v. City of Beaverton*, 41 Or LUBA 515 (2002).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the local government adopts a finding of current compliance and imposes conditions to ensure compliance with an approval criterion, that those conditions require additional informal review by local government staff does not mean that the local government has impermissibly "deferred" a finding of compliance with that criterion to a later stage without notice or hearing. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Under ORS 197.763(2)(a)(C), the owners of property that is located within specified distances of the "subject property" must be given notice of a hearing concerning a permit to allow development of the "subject property." In identifying the property owners who are entitled to notice of hearing under that statute, a newly proposed access road crossing federally owned property pursuant to a federal permit is properly viewed as part of the "subject property" to be developed. *Shrader v. Deschutes County*, 39 Or LUBA 782 (2001).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.047 imposes specified notice requirements where statutes or administrative rules "limit or prohibit otherwise permissible uses." A statute that expands the list of authorized uses does not implicate the ORS 197.047 notice requirements. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a county fails to provide 45 days' advance notice to the Department of Land Conservation and Development prior to the first hearing on a post acknowledgment plan amendment, and provides no explanation for why emergency circumstances warrant shorter notice, the county's decision must be remanded. *Donnell v. Union County*, 39 Or LUBA 419 (2001).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763(3)'s requirement that a notice of hearing shall provide "a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings" does not require that the notice of hearing include notice of a contingent right under a city's code to conduct cross-examination of witnesses. *Mitchell v. Washington County*, 39 Or LUBA 240 (2000).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Failure to provide proper notice pursuant to ORS 197.763(3) is a procedural error and does not provide a basis for reversal or remand unless the error prejudices a party's substantial rights. *Lange-Luttig v. City of Beaverton*, 39 Or LUBA 80 (2000).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where petitioners appeared below and testified about the uses that would be authorized by a conditional use permit, petitioners may not claim that their substantial rights were prejudiced by a local government's failure to specifically identify all proposed uses in the notice of the hearing. *Lange-Luttig v. City of Beaverton*, 39 Or LUBA 80 (2000).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The notice of the date of final hearing required by ORS 197.610(1) (1997) and OAR 660-018-0020(1) safeguard the ability of the Department of Land Conservation and Development and other interested parties to participate in proceedings leading up to decisions amending comprehensive plan and code provisions. The failure of a local government to submit notice at least 45 days before the date stated as the final hearing obviates the appearance requirement of ORS 197.830(2) and ORS 197.610(2)(b), even if another hearing is conducted at least 45 days after the submission of notice. *OTCNA v. City of Cornelius*, 38 Or LUBA 921 (2000).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A city's failure to provide notice that it considered a particular comprehensive plan goal to be an approval criterion is a procedural error, and where that failure denies the applicant an opportunity to present argument and evidence concerning that plan goal, the procedural error prejudices the applicant's substantial rights. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Because a local government's proceedings on remand from LUBA are a continuation of its original proceedings and not a new proceeding, a local government that has sent notice of a proposed post-acknowledgment plan amendment to DLCD as required by ORS 197.610 is not required under the statute or rules implementing the statute to send additional notice of the proposed amendment during the remand proceedings. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291 (2000).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The requirement at ORS 197.610(1) (1997) that local governments send notice of comprehensive plan and land use regulation amendments to the Department of Land Conservation and Development at least 45 days before the "final hearing on adoption" refers to the final *evidentiary* hearing, and does not refer to nonevidentiary proceedings where the local government actually adopts the amendment. *Home Depot, Inc. v. City of Beaverton*, 37 Or LUBA 1020 (2000).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a local government adopts plan or land use regulation amendments but fails to provide the Department of Land Conservation and Development with timely notice as required by ORS

197.610(1), the Department or any other person has standing to appeal the decision to LUBA notwithstanding failure to appear before the local government. *Home Depot, Inc. v. City of Beaverton*, 37 Or LUBA 1020 (2000).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where petitioner fails to allege that it was entitled to written notice of hearing under Ballot Measure 56, a local government's failure to provide written notice of hearing under Ballot Measure 56 did not prejudice petitioner's substantial rights and provides no basis for reversal or remand. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.830(3) authorizes the filing of a notice of intent to appeal after the 21-day deadline specified by ORS 197.830(8) where the approved proposal differs in some significant way from the proposal that is described in the notice of hearing, such that the notice "did not reasonably describe the local government's final action." A multifaceted zoo conditional use master plan with a permanent parking lot does not so differ from a multifaceted zoo conditional use master plan with a temporary parking lot that the notice of hearing "did not reasonably describe the local government's final action." *Bigley v. City of Portland*, 37 Or LUBA 544 (2000).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763(3) requires only that applicable local comprehensive plan and ordinance provisions be listed in the notice of quasi-judicial proceedings. Failure to list applicable statutory criteria is not a basis for remand. *Friends of Linn County v. Linn County*, 37 Or LUBA 297 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A notice of hearing that fails to describe any proposed uses that could be authorized by a decision to amend the zoning of property from residential to industrial is "different from the proposal described in the notice to such a degree" that the notice does not "reasonably describe the local government's final action" and thus petitioner may raise new issues pursuant to ORS 197.835(4)(b) notwithstanding petitioner's failure to raise those issues during the proceedings below. *Mulford v. Town of Lakeview*, 36 Or LUBA 715 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A city commits procedural error where it fails to identify the relevant approval criteria in its notice of hearing or in its oral statement at the beginning of the hearing on a conditional use request. The city also commits procedural error where the staff report that identifies the relevant approval criteria is not made available seven days before the hearing and the report is only provided to the city council at the hearing. Where these errors contribute to confusion about the nature of the use for which approval is requested and the city's legal theory for approving the request, petitioners' substantial rights are prejudiced by the city's procedural errors and remand is required. *Latta v. City of Joseph*, 36 Or LUBA 708 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Petitioner's failure to cite ORS 215.402 to 215.428 as authority for its position that the challenged decision required notice and an opportunity for a hearing does not require that LUBA reject the assignment of error where (1) it is clear from its brief that respondent was aware that ORS 215.402

to 215.428 require notice and an opportunity for a hearing for land use decisions that constitute "permits" under ORS 215.402(4), and (2) the city argues in its brief that the challenged decision does not constitute a "permit" decision, within the meaning of ORS 215.402(4). *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A decision authorizing construction of facilities necessary to apply sewage effluent to farm land constitutes the approval of a "proposed development of land" and thus is a "permit" within the meaning of ORS 215.215.402(4) if the decision involves the exercise of discretion. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A decision authorizing construction of a lagoon on EFU-zoned land to store treated effluent constitutes the approval of a "proposed development of land" and thus constitutes a "permit" within the meaning of ORS 215.402(4) if the decision involves the exercise of discretion. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A city's procedural error in failing to send notice of a hearing at which zone changes affecting petitioner's property would be considered does not prejudice petitioner's substantial rights, where petitioner nonetheless participated in the hearing and the city continued the hearing to allow petitioner an adequate time to prepare. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A quasi-judicial plan and zone map amendment initiated by the city planning commission is an "application for a land use decision," for purposes of the notice requirements of ORS 197.763(3), and thus the city's notice of hearing must list the applicable criteria from its ordinance and plan. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Listing the "Comprehensive Plan goals, policies and land use map" as applicable criteria on the notice of hearing without listing specific applicable plan provisions is insufficient to satisfy ORS 197.763(3)(b), and such a general listing does not support a conclusion that petitioner could have raised issues regarding specific plan provisions below. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Although deficiencies in a hearings officer's notice of hearing may provide a basis for direct appeal of the hearings officer's decision to LUBA under ORS 197.830(3), where a local appeal is filed and the city council makes a decision in the appeal, the hearings officer's decision is not the city's final decision and is not subject to appeal to LUBA under ORS 197.830(3). *Bigley v. City of Portland*, 36 Or LUBA 517 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Petitioner may raise new issues before LUBA regarding plan provisions that were not considered by the county where the notice of hearing did not list any applicable comprehensive plan

provisions. Petitioner is not obligated by ORS 197.835(4)(a) to comb through the entire comprehensive plan looking for applicable provisions omitted from the notice, in order to avoid a finding that issues regarding applicable plan provisions could have been raised below. *City of Newberg v. Yamhill County*, 36 Or LUBA 473 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A county's failure to explain in its notice of hearing that all evidence and the staff report would be available for review seven days before the hearing provides no basis for reversal or remand, where petitioner did not object to the adequacy of the notice, does not claim he was surprised by anything in the staff report and does not explain how his substantial rights were violated by the inadequate notice. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the county's notice of hearing failed to include notice of the procedures to be followed at the hearing, but petitioner did not object below to the inadequate notice and does not explain how his substantial rights were violated by the defective notice, the notice defect provides no basis for reversal or remand. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A petitioner does not waive his right to object to the county's failure to list the applicable criteria governing permit revocation in the notice of hearing by failing to object below, where it was not clear until the end of the hearing what criteria would be applied or that the decision makers intended to revoke petitioner's permit. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where petitioner was provided a local appeal and hearing before the county governing body, the failure of the planning commission to give notice before its hearing of the criteria that it intended to apply or that it intended to revoke petitioner's permit provides no basis for reversal or remand, where petitioner does not explain why the appeal to the governing body was inadequate to avoid any prejudice to his substantial rights. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a local government approves a preliminary planned unit development application based on findings of current compliance with applicable criteria, an argument that the local government impermissibly deferred findings of compliance with applicable criteria to a second stage of review where notice and hearing requirements are not observed is more appropriately framed as an inquiry into whether the findings of current compliance are adequate and supported by substantial evidence. *Salo v. City of Oregon City*, 36 Or LUBA 415 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The property that is the "subject of the notice," within the meaning of ORS 197.763(2)(a), depends on the proposal being considered. Where an applicant for subdivision approval proposes construction of a right-of-way across a parcel that adjoins the parcel to be subdivided, the notice must be given to the properties within the distances specified by ORS 197.763(2)(a) from both the adjoining parcel and the subdivided parcel. *Warrick v. Josephine County*, 36 Or LUBA 81 (1999).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A county procedure that does not require that all of the information required by ORS 215.416(11) and 197.763(3) be included in the notice of hearing on a local appeal of a permit decision violates the statutes. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A county procedure that does not require that notice of hearing be given to all of the persons who are entitled to notice of hearing on a permit under ORS 197.763(2) violates the statute. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the zoning ordinance requirements for giving notice of permit hearings are inconsistent with statutory requirements, the statutory conflict is not rendered harmless error by a zoning code requirement that the county give "any other notice required by law." *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A *pro forma* declaration of "emergency circumstances," unaccompanied by stated reasons directed at the necessity for expedited review, is insufficient to satisfy ORS 197.610. Cited concerns about unregulated development in the floodplain constitute a sufficient declaration of emergency under ORS 197.610 to allow expedited adoption proceedings. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Even if a local government's notice is not sufficiently specific to identify all approval criteria, petitioner fails to establish any prejudice to its substantial rights when the approval criteria are identified in a staff report and petitioner was in fact made aware of and addressed the criteria in the proceedings below. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the notice of a hearing fails to list all of the criteria required for approval of an application, that procedural error does not prejudice petitioners' substantial rights where all of the applicable criteria were raised and addressed at the public hearing. *Turrell v. Harney County*, 34 Or LUBA 423 (1998).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. If the city committed a procedural error by approving final subdivision and PUD plans without providing a hearing or opportunity for local appeal, such error provides no basis for remand where the petitioner at LUBA was allowed to submit 65 pages of comments to the city prior to its decision. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a local government provides no prehearing notice of a proposed amendment as required by statute, and thus fails to provide a reasonable description of the nature of the local government's proposed decision, the exception to the appearance requirement set forth in ORS 197.620(2) applies. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A local government's failure to list a possible zoning restriction in the notice of hearing, as required by ORS 197.763, is harmless error, where the zoning restriction is a basis for imposing conditions rather than an approval standard. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the notice of hearing contained an error in identifying the zoning map designation being requested, the error provides no basis for reversal or remand where the error had no effect on the approval standards the zone change request was subject to and therefore resulted in no prejudice to petitioner. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Identification of a development code section number is sufficient to provide notice of the applicable criteria in a notice of hearing. It is not necessary to interpret the development code section in the notice of hearing to identify the portions of the identified development code section that institute mandatory approval criteria. *Fjarli v. City of Medford*, 33 Or LUBA 451 (1997).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A local government's findings cannot defer a determination on discretionary approval criteria to a later stage without providing the same notice and comment period provided in the initial proceeding. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Under ORS 197.763(8) a local government has a duty to give notice of quasi-judicial land use hearings, but does not have a duty to ensure the notice is received. *Epling v.Washington County*, 33 Or LUBA 392 (1997).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A county's failure to use the most recent property tax assessment rolls in generating its notice mailing list is not error, where the county establishes by affidavit, as required by ORS 197.763(8), that it actually mailed notice to petitioner's residence. *Epling v.Washington County*, 33 Or LUBA 392 (1997).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the county's first notice to petitioner was faulty and was not received before the initial local hearing, but a second notice that complied with ORS 197.763(8) was sent before subsequent local hearings, a petitioner is not denied his right to a hearing and is not excused from his obligation to file a timely notice of intent to appeal with LUBA. *Epling v.Washington County*, 33 Or LUBA 392 (1997).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The provision of ORS 197.610(2) allowing "less than 45 days' notice" to the Director of DLCD of decisions adopting new land use regulations in emergency circumstances does not authorize not giving any notice at all. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 215.060, which requires notice and public hearings prior to action by the governing body of a county "regarding the plan," does not apply to a statement on a notice of adoption to DLCD that the Statewide Planning Goals do not apply to a newly adopted land use regulation. *Petersen v. Columbia County*, 33 Or LUBA 253 (1997).

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

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a party receives notice of a decision and subsequent appeal, and the record contains no evidence that the party attempted to appear at the hearing, that party cannot claim that it was denied the opportunity to participate in the appeal hearing when it had no notice of the withdrawal of the appeal. *DLCD v. Polk County*, 33 Or LUBA 30 (1997).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the notice provided by the city does not indicate that an application will be processed as a limited land use decision, and the application is in fact processed as a quasi-judicial land use decision under the provisions of ORS 197.763, the city will be required to provide all of the procedural safeguards required for land use decisions. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The city's failure to provide petitioner with the notice of hearing to which she was entitled under ORS 197.763(2) effectively denied petitioner the right to participate in the hearings process and to present evidence, thereby violating her substantial rights. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the notice provided by the city of a proposed partition provides a complete street address, and includes an illustration of the property subject to the partition, that notice is not rendered inadequate by a failure to specify that the partition will involve two parcels. *Thierolf v. City of Ashland*, 32 Or LUBA 182 (1996).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The county's failure to provide adequate notice of a proposed goal exception under ORS 197.732(5) is a procedural error that will not result in reversal or remand where the record demonstrates that petitioners' substantial rights were not prejudiced. *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. At a minimum, ORS 197.732(5) requires that the county's notice of a proposed goal exception must include a brief summary of the issues involved in the proposed exception, in addition to the list of applicable criteria required by ORS 197.763(3)(b). *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the city's notice of hearing describes only a proposed zone change, and not the proposed general development plan or tentative plan for a subdivision, the city's notice violates ORS 197.763(3). *Tucker v. City of Adair Village*, 31 Or LUBA 382 (1996).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The "most recent county property tax assessment roll" to which ORS 197.763(2)(a) refers is the property tax assessment roll, whether printed out or not, that shows, as nearly as possible, the current ownership of each property in the county and that notes any property owner's change of address. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A county may not rely on its failure to update its tax rolls as soon as possible to defeat the purpose of the notice requirement stated in ORS 197.763. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 215.416(11)(a), which requires notice and an opportunity for appeal of a decision made without a hearing be provided to "those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision," establishes two categories of people to whom notice must be given. *Walz v. Polk County*, 31 Or LUBA 363 (1996).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.830(b), which allows appeals "within 21 days of the date a person knew or should have known of the decision where no notice is required," does not apply where city and county provide properly noticed hearings of proceedings to amend local zoning ordinances. *Waite v. City of La Grande*, 31 Or LUBA 77 (1996).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a local ordinance specifies that board of commissioner hearings are conducted on the record, and where petitioners establish no violation of any statutory notice requirement, petitioners establish no basis for relief in alleging that they relied on various notices, which appeared to petitioners to be contradictory, to conclude they were not required to present all evidence before the planning commission, but would be able to present their case *de novo* before the board of commissioners. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1996).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A local government's violations of the notice provisions of ORS 197.763 in its original proceedings do not permit a petitioner who fails to raise certain issues during proceedings on remand to elude the waiver provisions of ORS 197.835 during a second appeal to LUBA. *Noble v. City of Fairview*, 30 Or LUBA 180 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. When petitioner was apprised by the local government of the applicable criteria, but failed to raise an issue before the local government during proceedings on remand, ORS 197.835(3) precludes petitioner from raising the issue on appeal to LUBA. *Noble v. City of Fairview*, 30 Or LUBA 180 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A local government that intends to process limited land use decisions differently from land use decisions must, under ORS 197.195(2)(c)(I), either make that intent clear in the initial notice or provide all of the ORS 197.763 procedural safeguards. *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a local government makes a permit decision without a hearing, pursuant to local procedures implementing ORS 215.416(11) or 227.175(10), the provisions of ORS 197.830(3) allowing a person to appeal a decision to LUBA if the local government does not provide a hearing do not apply, because the local government did not fail to provide a hearing or the notice of such hearing required by state or local law. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. General notice of the applicability of a local government's mineral and aggregate code chapter does not provide adequate notice of the applicability of local floodplain permit requirements, when the mineral and aggregate code chapter does not clearly establish the applicability of the floodplain permit requirements. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A local government's failure to provide notice that it was considering a floodplain permit application was a procedural error which prejudiced petitioners' substantial rights because the error deprived petitioners of an adequate opportunity to address floodplain issues relevant to local floodplain permit requirements. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A local government's failure to provide notice of its hearings to persons other than petitioners is a procedural error that does not prejudice petitioners' substantial rights if petitioners received notice of the local government hearings and participated in them. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. If a local government fails to give a person an individual written notice of hearing to which that person is entitled under state or local law, the local government fails to provide a hearing with regard to that person, within the meaning of ORS 197.830(3). *Orenco Neighborhood v. City of Hillsboro*, 29 Or LUBA 186 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Listing an entire zoning ordinance as the applicable criteria in a local government's notice of its initial evidentiary hearing on a quasi-judicial land use application does not satisfy ORS 197.763(3)(b).

Neither does listing entire chapters of the zoning ordinance, where such chapters contain criteria for several different types of applications. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the local government wishes to defer a determination of compliance with an applicable approval standard it must ensure that the later approval process provides any statutorily or locally required notice and an opportunity for input. *Hilderbrand v. Marion County*, 28 Or LUBA 703 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763(8) applies only to a local government's notice of its initial evidentiary hearing. It does not apply to local hearings conducted after remand by LUBA. *Collins v. Klamath County*, 28 Or LUBA 553 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the local government's notice of its first evidentiary hearing before the planning commission failed to list the applicable standards, as required by ORS 197.763(3)(b), petitioners may raise issues at LUBA even though such issues may not have been raised during the local proceedings. However, this procedural error provides no basis for reversal or remand of the decision where petitioners fail to establish the error caused prejudice to their substantial rights. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a local government fails to list a single applicable approval criterion in its notice of initial evidentiary hearing, issues may be raised at LUBA even though they were not raised during the local proceedings. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the challenged decision includes a determination that a nonconforming use of the subject property exists, but the notice of hearing indicated the only issue to be addressed was an expansion of an existing nonconforming use, the notice of hearing failed to adequately describe the nature of the application, as required by ORS 197.763(3)(a), and failed to reasonably describe the county's final action under ORS 197.835(2)(b). Either of these deficiencies means petitioners may raise issues before LUBA regardless of whether they were raised below. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 215.416(5) and 197.763(3)(b) require a county to identify applicable approval standards in its notices of hearing. Where petitioner's right to participate in the local proceedings is impaired by the county's failure to identify relevant standards, the challenged decision must be remanded. *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A statement that a list of applicable criteria will be available at City Hall seven days prior to the hearing does not satisfy the requirements of ORS 197.195(3)(b) that the notice of proposed action list the applicable criteria. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the notice of public hearing given by the local government is inadequate, such that it does not "reasonably describe the local government's final [decision]," ORS 197.830(3) potentially provides a person adversely affected by the inadequate notice a right to file an appeal at LUBA long after the local decision is reduced to writing, notice of the decision is given, and the decision otherwise becomes final. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.830(3) imposes a requirement that a reasonable person be able to tell from the notice of public hearing that the local government might take the action that the local government ultimately takes. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. While changes in the proposal described in a notice of public hearing can be of such a degree that the notice "did not reasonably describe the local government's final [decision]," not every change in the proposal described in the notice of public hearing necessarily implicates ORS 197.830(3). *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763(3)(c) does not require that the addresses of all properties included within a proposal for quasi-judicial land use approval be set out in the notice of public hearing. An "easily understood geographical reference" may be provided instead. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A notice of local hearing that includes a map showing all three tax lots included in a proposal is adequate to "reasonably describe the local governments final [decision]," within the meaning of ORS 197.830(3), notwithstanding the failure of the notice to list each tax lot's address and the attachment of other maps to the notice which show only a portion of the property. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Absent local code provisions analogous to ORS 197.830(3), where a notice of local hearing in a quasi-judicial land use proceeding fails to adequately describe the action ultimately taken by the local government and the time for filing a local appeal has expired, an adversely affected person's exclusive route of appeal is directly to LUBA. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A statement that the requested Willamette River Greenway permit is to allow placement of a dwelling on the identified subject property is sufficient to satisfy the requirement of ORS 197.763(3)(a) that the notice of hearing "[e]xplain the nature of the application and the proposed use or uses which could be authorized." *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the relevant local government notices did not list the applicable approval criteria, as required by

both ORS 197.763(3)(b) and 197.195(3)(c)(C), then regardless of whether the challenged decision is a land use decision or limited land use decision, issues may be raised before LUBA irrespective of whether they were raised during the proceedings below. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. If a county implements ORS 215.418(1) by providing in its code that it will notify DSL of "developments" in wetlands identified on the State-wide Wetlands Inventory, it must interpret "developments" consistently with the types of development applications and approvals for which such notice is required by ORS 215.418(1)(a) to (e). *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the record shows petitioner was aware of the applicable approval criteria in the comprehensive plan and participated effectively in the local hearing, a local government's failure to comply with the requirements of ORS 197.763(3)(b) and (j), regarding listing applicable criteria from the plan and explaining hearing procedures in its notice of hearing, does not prejudice petitioner's substantial rights or provide a basis for reversal or remand. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763(3)(b) and (5)(a) require a local government to provide notice of the standards applicable to an application for a quasi-judicial land use decision, prior to its hearing on such an application. *Laine v. City of Rockaway Beach*. 27 Or LUBA 493 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where certain comprehensive plan and code provisions are mentioned in the local government's decision, but are not applied as approval criteria for the subject application, ORS 197.763(3)(b) does not require that those provisions be listed in the local government's notice of hearing. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where petitioners presented evidence and argument concerning the necessity for a solar height adjustment and argued the relevant standards were not met, the city's procedural error in not providing notice that it would consider approval of the solar height adjustment did not prejudice petitioners' substantial rights and provides no basis for reversal or remand. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A local government's failure to make available all evidence in support of a quasi-judicial land use application at the time the notice of hearing is provided, as required by ORS 197.763(4)(a), is a procedural error. However, if such evidence is made available prior to or at the hearing and the hearing record is left open for seven days to allow time for additional written testimony from the parties, petitioners' substantial rights are not violated. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the applicant submits a new application following remand by LUBA of a decision approving an earlier application, a local government is under no obligation to include the record of the prior application or to provide explicit notice that parties have to submit evidence from the previous record that they wish the local government to consider in reviewing the new application. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763(3)(b) requires a local government to identify, in its notice of hearing on a quasi-judicial land use application, *which* comprehensive plan goals and policies the local government considers to be "applicable" criteria for the subject application. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Local government failure to comply with ORS 197.763(3) notice of hearing requirements (1) means that under ORS 197.835(2)(a), LUBA may consider issues that were not raised below; and (2) is a procedural error which, under ORS 197.835(7)(a)(B), provides a basis for reversal or remand of the challenged decision only if such error prejudices petitioners' substantial rights. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A statement in the local government notice of hearing required under ORS 197.763(3), to the effect that the applicable criteria can be reviewed at the local government planning office, does not constitute listing the applicable criteria, as is required by ORS 197.763(3)(b). *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The hearing notice content requirements of ORS 197.763(3) apply to the notice ORS 197.763(3)(f) requires to be given a certain number of days before the local government's *evidentiary* hearing on a quasi-judicial land use application. They do not apply to notice of a hearing by the governing body on such application, based on the record before a lower local body. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A statement that applicable criteria can be viewed at the local government planning office does not satisfy the requirement of ORS 197.763(3)(b) that a local government hearing notice list the applicable criteria from the comprehensive plan and ordinances. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A statement that failure to raise an issue before the planning commission precludes appeal to the local governing body does not satisfy the requirement of ORS 197.763(3)(e) that a local government hearing notice include a statement that failure to raise an issue precludes appeal to LUBA on that issue. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. While a showing of prejudice to substantial rights is generally required in order to secure a remand for procedural error, no such showing is required to secure a remand where the procedural requirements of ORS 215.060 are not followed. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508 (1993).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The notice of hearing required by ORS 215.060 must designate the property involved such that the recipients of the notice can reasonably ascertain from it that property in which they are interested may be affected by the proposed action. *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978). *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508 (1993).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the notice of a public hearing that preceded adoption of a comprehensive plan amendment did not clearly identify the geographic scope of the plan amendment, the notice nevertheless was adequate to comply with ORS 215.060 where the plan amendment was preceded by an extensive public participation process such that a reasonable person could have ascertained from the notice what property might be affected. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508 (1993).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A local government's failure to specifically state the location of a continued hearing on a comprehensive plan amendment when announcing the continuation is harmless error, where the continued hearing was held at the same place as the hearing from which it was continued and petitioners appeared at and participated in the continued hearing. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508 (1993).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a challenged decision does not purport to amend an acknowledged plan or land use regulation, the requirement of ORS 197.610(1) for notice to DLCD of a proposed post-acknowledgment amendment is not applicable. In such circumstances, a local government's failure to give DLCD the notice required by ORS 197.610(1) does not obviate the appearance requirement of ORS 197.830(6)(b) for intervention by DLCD in an appeal before LUBA. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. In rendering a decision on a permit, a city is required to hold at least one public hearing or provide notice of the decision and an opportunity for an appeal. A city's failure to do so requires that the decision be remanded. *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A local government's failure to provide a person with a required individual written notice of hearing is not sufficient, by itself, to entitle that person to be given individual written notice of the decision or to toll the 21-day deadline for filing a notice of intent to appeal with LUBA until individual written notice of the decision is provided. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a local government fails to give a person an individual written notice of hearing to which the person is entitled, the local government fails to provide a hearing with regard to that person, within the meaning of ORS 197.830(3). *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. LUBA will only reverse or remand a challenged decision on procedural grounds where the error causes prejudice to petitioner's substantial rights. A local government's failure to list certain DEQ rules in the notice of hearing does not prejudice petitioner's substantial rights, where petitioner was provided an opportunity to respond to those DEQ rules during the local proceedings. *Stockwell v. Clackamas County*, 24 Or LUBA 358 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Even if petitioner were entitled under state statute to notice of local government hearings on comprehensive plan and land use regulation amendments and goal exceptions, and the local government failed to provide that notice, petitioner's notice of intent to appeal would only be timely if it was filed within 21 days after petitioner received actual notice of the challenged decision. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The requirement of ORS 197.830(6)(b) that a person wishing to intervene in an appeal at LUBA have appeared during the local government proceedings is obviated where a city fails to observe statutory notice and hearing requirements of ORS 227.173 and 227.175 prior to issuing the challenged decision granting approval for a permit. *Hood River Sand v. City of Mosier*, 24 Or LUBA 604 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A local government may, by imposing conditions or otherwise, defer a final determination concerning compliance with an applicable permit approval standard to a later stage. However, if the decision to be made at the later stage is itself discretionary, the approval process for the later stage must provide the statutorily required notice and opportunity for hearing, even though the code may not require such notice and hearing. *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where some of the notices preceding local government quasi-judicial hearings on a land use application failed to identify applicable approval criteria, but the notice of the first hearing identified the applicable approval criteria and the record shows all parties were aware of the applicable criteria, the notice errors are at most procedural errors which did not prejudice the parties' substantial rights. Such errors provide no basis for reversal or remand. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the local government fails to identify the relevant plan and land use regulation standards in the notice of hearing, a petitioner is free to raise noncompliance with those standards in an appeal to

LUBA, even though compliance with such standards was not raised as an issue below. *Ruff v. Harney County*, 23 Or LUBA 521 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. By statute, adjoining property owners within specified distances of property for which discretionary development approval is requested are entitled to notice of the local proceedings and an opportunity for a public hearing. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a local government concludes a permit applicant has submitted insufficient evidence to demonstrate it is feasible to comply with an applicable approval criterion, it may defer the required determination of compliance with that standard to a later stage in the approval process, but must assure that statutory notice and hearing requirements are observed in that later stage of approval. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Because OAR 660-12-060 is not part of a county's ordinances or comprehensive plan, it need not be listed as an applicable criterion under ORS 197.763(3)(b), and the county's failure to so list OAR 660-12-060 as an applicable criterion in its notice of hearing does not excuse petitioner from having to raise the issue of compliance with OAR 660-12-060 during the proceedings below in order to have it reviewed by LUBA. *ODOT v. Clackamas County*, 23 Or LUBA 370 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Even if a local government erred by failing to provide notice of local hearings following remand from LUBA to persons other than parties in the LUBA appeal, that failure results in no prejudice to the substantial rights of the parties who did receive notice of the local hearings on remand. *Bartels v. City of Portland*, 23 Or LUBA 182 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The failure of local notices of hearing to summarize the issues involved in a proposed goal exception, as required by ORS 197.732(5), constitutes procedural error and does not provide a basis for reversal or remand of the challenged decision in the absence of prejudice to petitioner's substantial rights. *Caine v. Tillamook County*, 22 Or LUBA 687 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where no specific use is proposed in conjunction with a zone change, the notice of hearing is not required to indicate all of the possible uses of the property under the proposed new zone. However, where a reasons goal exception for a particular use is also proposed, ORS 197.763(3)(a) requires that the notice of hearing identify the particular use proposed to be made of the property. *Caine v. Tillamook County*, 22 Or LUBA 687 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Local government failure to comply with ORS 197.763(3) notice of hearing requirements (1) is a procedural error, which will result in reversal or remand of the challenged decision only if such error prejudices petitioner's substantial rights; and (2) under ORS 197.835(2)(a), allows LUBA to consider issues that were not raised below. *Caine v. Tillamook County*, 22 Or LUBA 687 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. A local government's failure to include notice of the right to request a continuance under ORS 197.763(4)(b) or that the record be held open under ORS 197.763(6) in the notice of hearing required by ORS 197.763(3) is procedural error, and the parties' substantial rights are violated where it is clear from the record that they would have exercised such rights if they had known about them. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where adoption of the challenged decision required the exercise of factual and legal judgment, the decision required the exercise of discretion and, consequently, approves a "permit." Under these circumstances, it is error for the local government to fail to provide petitioner with notice and opportunity for hearing, where at least some of petitioner's members were entitled to notice if a public hearing had been scheduled. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. ORS 197.763(3)(b) does not require a local government to list related code provisions as "applicable criteria" in its notice of a quasi-judicial land use hearing in order to be able to consider them in interpreting the central code provisions at issue consistently with such related code provisions. *Ward v. City of Lake Oswego*, 21 Or LUBA 470 (1991).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a local code standard which petitioners allege is violated by the challenged decision was not identified as an applicable standard in the local government's notices of hearing, as required by ORS 197.763(3)(b), petitioners may raise the issue of compliance with that local code standard in a LUBA appeal, even though they did not raise the issue during the local proceedings. ORS 197.835(2)(a). *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The notice of hearing to "other interested persons" required by ORS 227.175(5) requires that a city provide notice beyond that provided to the applicant. A city may not rely on its failure to provide in its code for notice to persons other than the applicant to argue no such notice is required by law. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where there is no local appeal available and a local government fails to provide the notice of hearing or hearing required by ORS 227.175(3) and (5) or 215.416(3) and (5) before making a decision on a permit, such permit decisions may be appealed to LUBA within 21 days after a person receives actual notice of the permit decision. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The failure of a local government to identify its general procedures for the conduct of hearings in its notice of hearing, as required by ORS 197.763(3)(j), is a procedural error, for which LUBA is empowered to reverse or remand the challenged decision only if such error "prejudiced the

substantial rights of the petitioner." ORS 197.835(7)(a)(B). *Stefan v. Yamhill County*, 21 Or LUBA 18 (1991).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Generally, the failure to send notice of hearing to parties other than petitioner would not prejudice the substantial rights of petitioner, so long as petitioner received proper notice. *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where the record demonstrates that petitioner was fully aware of the criteria applicable to its land use application prior to the local hearing, local failure to comply with the requirement of ORS 197.763(3)(b) that notice of hearing list applicable plan and code approval criteria did not prejudice petitioner's substantial rights. ORS 197.835(7)(a)(B). *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Under ORS 197.763(3)(j), a local government is required to provide in its notice of hearing a general explanation regarding the right under ORS 197.763(6) to request that the record of the initial evidentiary hearing remain open. A local government's failure to provide such notice is a procedural error which, if it prejudiced the parties' substantial rights, would require reversal or remand of the challenged decision. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. When there is no specific proposed use, as in the case of a simple zone change, the requirement of ORS 197.763(3)(a) that notices of quasi-judicial land use hearings "explain the nature of * * * the proposed use or uses which could be authorized" does not apply, and it is sufficient if the notices of hearing explain that the application is for a change from one identified zoning district to another identified zoning district. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 421 (1990).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. The provisions of ORS 197.763, which became effective October 3, 1989, concerning required notice of quasi-judicial hearings do not apply to hearings held before October 3, 1989. *Torgeson v. City of Canby*, 19 Or LUBA 623 (1990).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. If the notice of hearing required by ORS 227.175(5) fails to indicate the possibility of the final action actually taken by the city, a petitioner's notice of intent to appeal to LUBA is timely if filed within 21 days after petitioner received actual notice of the decision. *Torgeson v. City of Canby*, 19 Or LUBA 623 (1990).

25.3.3 Local Government Procedures – Compliance with Statutes – Notice of Hearing. Where a county finds applicable approval standards are or can be met and grants first stage PUD approval, but includes a condition that (1) final grading and drainage plans be submitted later, and (2) approval of such plans follow a procedure that does not provide notice or an opportunity for further public involvement, the proper way to challenge the county's decision to proceed in such a manner

is to appeal the first stage PUD approval decision. Parties may not fail to challenge that decision and appeal the subsequent approval of the final grading and drainage plans, arguing that such approvals are permits subject to the notice and hearing requirements of ORS 215.416, and that their failure to "appear" or file an appeal of such approvals within 21 days is excused because of the county's failure to observe such notice and hearing requirements. *J.P. Finley & Son v. Washington County*, 19 Or LUBA 263 (1990).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. While ORS 197.763(6)(a) does not require "magic words" for a party to exercise their right to have either the record held open or the hearing continued, where the local government provides notice of that right at the beginning of the hearing, a process question about whether a request for a continuance or to keep the record open can be made is not sufficient to exercise that right. *Norman v. Washington County*, 80 Or LUBA 500 (2019).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where state statute requires that a local government provide either a public hearing before ruling on an application for a statutory permit or an opportunity for an appeal that includes a *de novo* public hearing, although the local government may require a notice of appeal that sets forth with reasonable particularity the issues that the appealing party will raise at the hearing, the local government may not, consistent with the statute, (1) make that notice requirement a jurisdictional bar to obtaining the hearing, (2) limit the issues specified to five types of issues, or (3) approve or reject requests for hearings based on a qualitative assessment of how well the appellant has explained the issues specified. *Landwatch Lane County v. Lane County*, 79 Or LUBA 96 (2019).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local code provision requires applicants for destination resorts to demonstrate that "[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource," where a proposed resort's consumptive use of groundwater is anticipated to impact the quantity and quality of water in an offsite stream, and where the applicant's final master plan includes a mitigation plan requiring the applicant to replace the water consumed by the resort with a quantity and quality of water that will maintain fish habitat in the stream, the local government may not impose a condition of approval allowing the applicant to demonstrate that the source of the mitigation water provides the requisite quantity and quality of water at a later date without review or input by interested persons. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. When a county opts to approve a permit without a public hearing, any person who is adversely affected or aggrieved, or who is entitled to notice of the decision may appeal a decision made without a hearing. The county cannot require participation prior to a decision, either by attending a conference (that may or may not have occurred), or providing written comments, or in any other manner. Additionally, the county may not enact additional restrictions to prevent a person who is entitled to file an appeal under the ORS 215.416(11)(a)(A) right to file a local appeal. *Hood River Valley Residents Comm. v. Hood River County*, 78 Or LUBA 282 (2018).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A condition of planned unit development (PUD) approval that requires the applicant to obtain a city engineer's public works permit to improve the pavement of a city street does not represent a deferral of findings of compliance with a PUD approval standard requiring that the PUD be supported by a "safe and adequate transportation system," where the public works permit process will not evaluate compliance with the PUD approval standard, but consider only compliance with whatever standards apply to a city engineer public works permit. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government errs in imposing a condition of approval deferring consideration of compliance with a comprehensive plan policy requiring the applicant and county to undertake a process to consult and resolve differences with local Native American tribes before approving development in an estuary, where the deferral is to an *ad hoc* proceeding without any assurances that the deferred proceeding will actually occur, and the deferral is not supported by findings demonstrating that deferral is permissible under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), or *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009). *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Deferral of compliance with an approval standard to a subsequent proceeding under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), or *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009), may not be permissible at all where the approval standard at issue invokes a particular process that is explicitly linked to submittal of the development application, requiring consultation and dispute resolution between the applicant, the local government, and a sovereign Native American Tribe before development approval. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where during the hearing a party objects that a city councilor disclosed the existence, but not the substance, of *ex parte* communications, the objection is sufficient under ORS 197.763(1) to raise an issue regarding the adequacy of the disclosure. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Remand is necessary where two city councilors disclose the existence, but not the substance, of an *ex parte* communication, and the record includes no basis to conclude that the substance of the communications was incidental or immaterial. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A city councilor's social media communications with constituents regarding an application for an annexation pending before the city council are *ex parte* communications that must be disclosed under ORS 227.180(3). *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where LUBA sustains an assignment of error that a city councilor failed to disclose *ex parte* communications, but the city councilor is no longer on the city council, and the decision must be remanded for other reasons which will require a new decision adopted by a new city council, LUBA will decline to expand the scope of remand to require the former councilor to disclose the substance of the *ex parte* communications. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where during deliberations on an application for an annexation under a new state statute, a city councilor

mentions a city attorney letter discussing the costs of joining litigation to challenge the statute, the letter is exempt from disclosure as an *ex parte* communication under ORS 227.180(4), and the city commits no procedural error in failing to include the letter in the record of the annexation proceeding. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where city procedure on an annexation proposal provides a first evidentiary hearing before the planning commission, followed by a second evidentiary hearing before the city council, the planning commission hearing is the "initial evidentiary hearing" for purposes of ORS 197.763(6)(a), which requires the local government to grant a request for a continuance or open record period that is made prior to the conclusion of the initial evidentiary hearing. The local government is not required to grant such a request made at subsequent evidentiary hearings. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 197.763(6)(b) or (c), where a party requests in writing the opportunity to respond to new evidence submitted at a continued hearing or during an open record period, any such opportunity is limited to responses to new evidence submitted during the continued hearing or the first open record period. A hearings officer is not compelled by ORS 197.763(6)(b) or (c) to allow a party to submit, during a second open record period, responses to evidence submitted during the initial evidentiary hearing. *Landwatch Lane County v. Lane County*, 75 Or LUBA 302 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A zoning classification decision described in ORS 227.160(2)(b) is not a statutory "permit" decision described in ORS 227.160(2), requiring notice and opportunity for a hearing, unless the decision goes beyond classifying a proposed use and applies discretionary standards to approve or deny the proposed use. *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 197.763(6)(a) through (c), prior to the conclusion of the initial evidentiary hearing any party may request an opportunity to present additional evidence. In that event, the hearing body must either continue the hearing or leave the record open to receive the additional evidence, and failure to do so is a procedural error. However, where the party making the request appeals and is given a de novo hearing before the local appellate body at which it is allowed to submit additional evidence, the hearings body's error did not result in prejudice to the party's substantial rights and therefore provides no basis for LUBA to remand. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government provides written prehearing notice to petitioner and in fact holds a hearing on a proposal to annex and rezone property, the part of ORS 197.830(3) that delays the deadline for filing a notice of intent to appeal a decision that is rendered "without providing a hearing" until 21 days after a petitioner receives actual or constructive notice does not apply. *Phillips v. City of Happy Valley*, 71 Or LUBA 5 (2015).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Modifying a condition of approval to change the source of water used for irrigating landscaping does not obligate the local government to also review and approve a landscaping plan as part of the hearing on the modification, where an unmodified condition provides for review and approval of the landscaping plan as an administrative decision to be issued prior to building permits, and the petitioner's argument that review of the landscaping plan will be discretionary and must be made under proceedings providing notice and hearing is a collateral attack on the unmodified condition. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Failure to provide hearing participants an adequate opportunity to rebut an *ex parte* communication may not warrant remand, if the communication includes no factual or legal assertions relating to a basis for approval or denial. However, remand is necessary to provide an adequate opportunity for rebuttal where the *ex parte* communication concerns disputed testimony regarding whether and how many neighborhood associations oppose the project, and the decision makers believe such testimony to be relevant to an approval criterion that requires the project to meet the overall needs of the community. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. To provide a meaningful opportunity for hearings participants to rebut a disclosed *ex parte* communication, the decision-maker must (1) consider any objections that the initial disclosure was inadequate and (2) make some response to specific requests for additional information or clarifications that are reasonably necessary for participants to develop rebuttal to material factual and legal assertions in the communication. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Communications between a staff person and the decision maker, and between a staff person and a party, are not *ex parte* contacts. However, a decision maker could potentially receive an *ex parte* contact where a staff person conveys a communication from a party to the decision maker that concerns the land use decision under consideration. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. An affidavit indicating that one week after issuing the final decision a decision maker knew that the applicant had agreed to the proposed conditions is an insufficient showing that an *ex parte* contact might have occurred during the hearing to warrant depositions under OAR 661-010-0045, where there is no indication when or how the decision maker acquired that knowledge. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Even assuming that a staff member conveyed to a decision maker during the proceedings below that the applicant had agreed to proposed conditions, that communication is not the kind of communication that requires the decision maker to disclose and offer other parties the opportunity to rebut. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. To constitute an *ex parte* communication that obligates a local government to provide an opportunity for rebuttal, the content of the communication must include something concerning the land use decision at issue that is capable of rebuttal. Where the only content of the alleged communication is that the applicant has agreed to city-proposed conditions, there is simply nothing to rebut or respond to. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The requirements for continuances and open record periods in ORS 197.763(6)(a), (b) and (c) only apply to the initial evidentiary hearing and do not apply to subsequently continued hearings or open record periods. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government does not err by granting additional seven-day open record periods following the conclusion of an initial seven-day open record period, where the local government's code specifically authorizes additional continuances and open record periods. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Whether a building permit also qualifies as a statutory "permit," as ORS 227.160(2) defines that term does not turn on the complexity of the applicable land use regulations. Whether the building permit qualifies as a statutory permit turns on whether the applicable land use regulations are ambiguous about (1) the nature of the proposed use or (2) whether the proposed use is among the uses that are identified in the land use regulation as permitted. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where there is no question under applicable land use regulations that a proposed apartment building is permitted outright in the applicable zone, and the only ambiguities concern the development regulations that apply in approving the apartment use, those ambiguities mean the building permit approving the apartment building is a land use decision and that none of the ORS 197.015(10)(b) exclusions for nondiscretionary decisions apply. But that building permit is not a statutory "permit," as ORS 227.160(2) defines that term, since the use is permitted outright and the only ambiguities concern the development standards that apply to that permitted use. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

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outright in the applicable zone, and the only ambiguities concern the development regulations that apply in approving the apartment use, those ambiguities mean the building permit approving the apartment building is a land use decision and that none of the ORS 197.015(10)(b) exclusions for nondiscretionary decisions apply. But that building permit is not a statutory "permit," as ORS 227.160(2) defines that term, since the use is permitted outright and the only ambiguities concern the development standards that apply to that permitted use. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Following closure of a quasi-judicial land use hearing following an open record period under ORS 197.763(6)(c), that statute authorizes any participant to request an opportunity "to respond to" any new evidence submitted during the open record period. If such a request is made, "the hearings authority shall reopen the record pursuant to [ORS 197.763(7)]." A city council may not refuse to reopen the record, based on an assumption that the evidence a permit opponent will submit will not "respond" to new evidence, and it may not limit the requesting participant to "rebuttal" of party opponents. *Friends of the Hood River Waterfront v. City of Hood River*, 67 Or LUBA 179 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A hearings officer's failure to clearly explain to petitioner that the applicable procedures limit final written argument to the applicant does not constitute procedural error; indeed, allowing petitioner to submit final written argument as petitioner requested would violate the applicable procedures. *Purtzer v. Jackson County*, 67 Or LUBA 205 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The fact that a city believed it was making a decision on the last day allowed by the ORS 227.181 for a decision after remand does not absolve the city from following the procedures applicable to quasi-judicial hearings, including giving all parties the opportunity to respond to new evidence submitted at the hearing. The city could have rejected the new evidence and avoided the procedural conundrum that it apparently believed it faced or could have left the record open to respond to the new evidence under ORS 197.763(4)(b). *Poe v. City of Warrenton*, 66 Or LUBA 108 (2012).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where an applicant's final written argument rebuts evidence submitted by opponents regarding three mining sites by discussing information about the three sites from the county's inventory of mining sites already in the record, that rebuttal does not introduce "new evidence" into the record contrary to ORS 197.763(6)(e). *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government defers a finding of compliance with an applicable discretionary approval criterion to a future review proceeding, it must ensure, either in a condition of approval or by necessary operation of its code, that the second review proceeding is infused with the same participatory rights as those provided in the initial review proceeding. A condition of approval that simply provides that a geologic hazard analysis required for tentative plan approval will be provided "prior to any structural development" is insufficient to ensure that geologic hazard approval standards will be addressed in a proceeding that provides the same notice and hearing required of the initial

proceeding on the tentative plan. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where it is not clear under a county's code that the planning commission proceeding on a final master plan application for a destination resort will necessarily be conducted as an ORS 197.763 quasi-judicial hearing with notice, the final master plan proceedings appear to be ministerial under the code, and nothing in the tentative master plan approval requires hearing and notice, the county errs in deferring discretionary tentative master plan approval standards to the proceedings on the application for final master plan approval without ensuring that those proceedings will infused with the same participatory rights as the tentative master plan approval. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. An argument that the county erred in accepting "new evidence" in the applicant's final written argument contrary to ORS 197.763(6)(e) does not provide a basis for reversal or remand, where the petitioner makes no effort to demonstrate that the alleged new evidence is in fact new evidence, or challenge the county's findings that the final written argument included no new evidence. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A petitioner fails to establish a basis for reversal or remand under ORS 227.186 (Measure 56 Notice) where the notice of hearing that the local government gave was given within the time required by ORS 227.186, that notice appears to substantially comply with ORS 227.186 and petitioner merely states it is not clear from the record that the statutorily required notice was given. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The obligation to conduct a "hearing at least for argument" under ORS 227.180(1)(a)(B) only applies when a city council conducts a review of a lower body's decision. The obligation does not apply when the city council declines review thereby making the lower body's decision the city's final determination. *Mazorol v. City of Bend*, 59 Or LUBA 260 (2009).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The provisions of ORS 197.763(6), dealing with when and how hearings may be continued or the record left open for additional evidence, only apply to the initial evidentiary hearing in a proceeding. Any evidentiary hearing on remand from LUBA is not the initial evidentiary hearing and ORS 197.763(6) does not apply. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If a hearing is not the initial evidentiary hearing as is usually the case on remand, when a party submits new evidence as part of its rebuttal to another's party's evidence, as long as that new evidence is limited to rebutting the other party's evidence the other party has no right to surrebuttal. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 215.416(11)(a)(E)(ii) prohibits local governments from limiting issues that can be raised in an appeal of a permit decision made without a prior hearing to those issues specified in the local notice of appeal. A local government cannot avoid that prohibition by allowing parties to raise the issue at the appeal hearing, and then summarily dismissing the local appeal for failure to specify the basis for the appeal in the local notice of appeal. *Woodard v. Yamhill County*, 56 Or LUBA 141 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Because a city council meeting to deliberate on a land use application is a "hearing" for purposes of ORS 227.180(3) and code provisions requiring declaration of *ex parte* contacts at a hearing and the right of the participants to rebut the substance of such contacts, it is also a "hearing" for purposes of a code provision allowing the participants to challenge the qualifications of any city councilor for bias. *Gooley v. City of Mt. Angel*, 56 Or LUBA 319 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The ORS 215.422(3)(b) requirement that the governing body make a public announcement of the content of an *ex parte* communication and offer the parties the right to rebut the substance of the communication at the first hearing following the communication is not satisfied by entering the communication into the record of the land use proceeding at an irregular meeting for which participants to the land use proceeding have no notice or reasonable opportunity to attend. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government re-opens the record to accept "new evidence, arguments or testimony" from the applicant, ORS 197.763(7) requires the local government to do so at a hearing or meeting that is a previously announced or noticed continuation of earlier evidentiary proceedings, or otherwise provide reasonable notice to the participants of earlier evidentiary proceedings that the decision maker intends to re-open the evidentiary record. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government re-opens the record under ORS 197.763(7) to accept new evidence, argument or testimony, it must offer any participant who requests it an opportunity to "raise new issues" regarding the new evidence, argument or testimony. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a city approves a floodplain permit to construct a driveway within a floodplain, the city does not err in conditioning approval on obtaining a separate encroachment permit from the city to authorize encroachment of a portion of the driveway into a public right-of-way. Such a condition does not impermissibly "defer" any determination of compliance with the floodplain permit before the city. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the preliminary subdivision plat approval appears to defer a determination of compliance with a

discretionary subdivision approval standard to the final plat decision, but does not explain why the standard does not apply at the time of preliminary plat approval, LUBA will remand the decision to the county to determine when the standard applies and, if it applies at the time of final plat approval, whether the proceedings that govern final plat approval are consistent with the county's statutory obligation to address discretionary land use standards as part of a public process that affords notice and opportunity for public input. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government impermissibly defers a finding of compliance with an approval standard requiring that the proposed use will not impose an undue burden on the transportation system, where the local government makes no findings of compliance with respect to a disputed intersection, but instead imposes conditions of approval requiring the applicant to submit a traffic study to determine impacts on the intersection, and to execute a development agreement determining the applicant's contribution to improve the intersection, under a process that does not provide for a hearing or public participation. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The first of three options under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), is to find that "feasible solutions to identified problems exist" and impose necessary conditions to ensure compliance with approval standards. LUBA will reject a claim that a local government has implicitly exercised the first option under *Rhyne*, where there is no evidence in the record that the proposed use complies with a particular approval standard, and no findings of compliance or feasibility of compliance. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the local government on remand allows the permit applicant an opportunity to rebut the permit opponent's response to the new evidence, it must allow other parties an opportunity to rebut the permit opponent's response; but the local government is not obligated on remand to allow other permit opponents an additional opportunity to enhance their evidentiary presentation. *Rice v. City of Monmouth*, 53 Or LUBA 55 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A land use compatibility statement that determines the appropriate zoning classification for a proposed use of land within an urban growth boundary may constitute a "zoning classification" decision as defined by ORS 227.160(2)(b), and thus not constitute a statutory "permit" that would require the city to provide notice and an opportunity for hearing. *Hallowell v. City of Independence*, 53 Or LUBA 165 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government errs in accepting new information into the record after the public hearing on a matter is closed without allowing other parties an adequate opportunity to respond to the new evidence. *Gunzel v. City of Silverton*, 53 Or LUBA 174 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government errs in deferring a requirement for submission of a geotechnical analysis to a later

stage of the proceedings that does not provide for notice or hearing. *Township 13 Homeowners Assoc. v. City of Waldport*, 53 Or LUBA 250 (2007).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A planning director decision not to refer a revocation request to the planning commission for a hearing is not a "permit" decision as that term is defined at ORS 227.160(2), because it does not constitute the "discretionary approval of a proposed development of land." *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A proceeding to revoke a permit is more analogous to an enforcement action than to a permit proceeding under ORS 227.175, and thus is not subject to the statutory procedural and other requirements applicable to permit proceedings. *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under a preliminary subdivision approval standard requiring a finding, based on the preliminary grading plan, that it is feasible for the *final* grading plan to comply with code standards governing final grading plans, a finding to that effect is not a deferral of findings of compliance with the standards governing final grading plans. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Absent some authority to the contrary, in approving a preliminary grading plan the local government is not required to determine what procedures will govern consideration of the final grading plan. Where the decision approving the preliminary grading plan does not determine and is not required to determine the procedures that govern the final grading plan, LUBA will reject arguments that the local government erred in failing to impose conditions requiring the county to provide notice and opportunity to request a hearing in considering the final grading plan. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Although a local government is obligated to open the evidentiary record to allow the parties to address any new criteria that may be applied on remand from LUBA, where a local government applies the same criterion on remand that it did in its initial decision and merely cites different comprehensive plan policies to explain how it interprets that criterion, the local government is not obligated to reopen the evidentiary record. *Neighbors 4 Responsible Growth v. City of Veneta*, 52 Or LUBA 325 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. When on remand a local government conducts an evidentiary hearing regarding a modified application, the local government may not restrict participation in the public hearing to parties to the original LUBA appeal. *Lengkeek v. City of Tangent*, 52 Or LUBA 509 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where neither the local government nor LUBA has jurisdiction to resolve the legality of a condition requiring necessary facilities to be constructed prior to obtaining final approval of a two-step subdivision approval process, the local government may (1) adopt findings establishing that fulfillment of the

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

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Technical revisions to a tentative subdivision plan need not be decided with public participation, and a condition of tentative subdivision plan approval requiring that, prior to submittal of the final plat, county staff will "red-line" the plat and return to applicant's surveyor for corrections is not an impermissible deferral of findings to the second step of a two-step process. *Angius v. Washington County*, 50 Or LUBA 33 (2005).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Limiting issues addressed in a decision following a *de novo* hearing under ORS 214.416 to issues specifically raised in the local notice of appeal is inconsistent with ORS 215.416(11)(a)(E), which provides that the "testimony, argument and evidence shall not be limited to issues raised in a notice of appeal[.]" *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government errs in deferring a determination of compliance with a discretionary permit criterion requiring that development protect riparian vegetation and aesthetic resources to a subsequent staff review that does not provide for notice or hearing. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a city is required to apply discretionary criteria in issuing a temporary approval decision, and that temporary approval decision is the only effective city decision that authorizes a broadcast tower and sets the stage for issuance of building permits to construct the tower, that temporary approval decision constitutes "discretionary approval of a proposed development of land" and is therefore a "permit," within the meaning of ORS 227.160(2). The city must either provide a public hearing before issuing an ORS 227.160(2) permit, or provide the opportunity for a local *de novo* appeal of that permit decision after it is issued. *Curl v. City of Bend*, 48 Or LUBA 530 (2005).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The ORS 197.763(6)(b) right to request that a hearing be continued must be exercised prior to the close of the initial evidentiary hearing. Where the initial evidentiary hearing was held before the planning commission, a party has no right under ORS 197.763(6)(b) to request a continuance in a subsequent hearing before the city council, notwithstanding that the planning commission was evenly divided and could not reach a majority vote to approve or to deny an application for subdivision approval. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A city's decision to follow quasi-judicial procedures in adopting a decision concerning a two-mile long highway project affecting a large portion of the city does not convert a legislative decision into a quasi-judicial decision. A city need not require that parties in a legislative land use proceeding follow any particular order in presenting evidence. *Ramsey v. City of Philomath*, 46 Or LUBA 241 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Nothing in the ORS 197.763 statutory procedures for quasi-judicial land use decisions prohibits an applicant from reserving its entire presentation at a continued hearing to its final rebuttal. If an applicant submits new evidence at that continued hearing, ORS 197.763(6) allows a party to request an opportunity to submit additional written evidence to respond to that new evidence. *Ramsey v. City of Philomath*, 46 Or LUBA 241 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A planning commission permit approval can defer findings of compliance with a conditional use standard requiring that proposed structures "complement" the design of the area, by relying on subsequent review by an architectural review committee, where the committee's review provides the same notice and opportunity for hearing required by state law for the conditional use decision, and the committee will determine compliance with the deferred standard as part of its architectural review. *McCulloh v. City of Jacksonville*, 46 Or LUBA 267 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Once an administrative permit approval decision is appealed locally, ORS 227.175(10)(a)(A) and (D) require that a city provide a *de novo* appeal and a decision on that appeal. A city fails to provide the statutorily required *de novo* appeal when it relies on a committee rule that is not part of the zoning ordinance and was not adopted by the city council to decide that a 2-2 vote of the committee results in denial of the appeal. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. That comprehensive plan policies apply to a challenged grading permit, and thus the permit is a "land use decision" as defined by ORS 197.015(10), does not necessarily mean that the city is obligated to provide a hearing on the grading permit. Not all permits that are land use decisions are also statutory "permits" as defined by ORS 215.402 and 227.160 and subject to statutory requirements to provide a hearing or opportunity for a hearing. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A city commits no error by processing a lot line adjustment as a quasi-judicial land use matter before the planning commission rather than as a ministerial matter before the planning department, where the lot line adjustment decision requires that the city exercise significant legal and factual judgment. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 227.178(2), even if a city believes that an application is incomplete or it needs more information to render a decision, the city must conduct a hearing and render a decision based on the information submitted, if the applicant insists. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. It is inconsistent with the statutory scheme for processing permit applications at ORS 227.160 *et seq.* for city planning staff to reject a permit application because staff believes more information is necessary

or because staff believes additional or different applications are necessary for approval. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. While a city may deny a permit application if the applicant fails to submit information that is necessary for approval, under ORS 227.175 that decision must be made by a hearings officer or proper designate, after a hearing or other procedure that affords the applicant and others to present evidence and argument. Under the statute, planning staff may not effectively prejudge the merits of the application by rejecting an application that staff feels cannot be approved in the form submitted. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 227.180 does not require that a city council hold a *de novo* hearing on appeal of a land use decision after a *de novo* hearing by the city planning commission. *Scheyer v. City of Hood River*, 43 Or LUBA 112 (2002).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a county order establishes a fee of $700 to, among other things, request a hearing on a permit application or file a local appeal of a permit decision rendered without a hearing, LUBA will remand the order where the $700 fee appears to violate the $250 maximum fee established by ORS 215.416(11)(b), and the county offers no defense of the order. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 270 (2002).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a county holds the record open to permit opponents of an application to submit additional evidence and allows additional time for the applicant to respond to any new evidence submitted, in the absence of a request by the opponents for an opportunity to submit surrebuttal evidence, ORS 197.763(6)(c) does not require that the county provide such an opportunity and the county's failure to provide such an opportunity is not error. *Van Nalts v. Benton County*, 42 Or LUBA 497 (2002).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government's decision to request that an applicant prepare revised findings to respond to a LUBA remand does not, by itself, obligate the local government to provide a hearing following LUBA's remand. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Parties that seek to demonstrate that a local government erred by adopting an interpretation of local land use legislation after the opportunity for argument and evidentiary presentations closes must demonstrate (1) that the interpretation was unforeseeable, and (2) that the party can produce new evidence that is different from evidence in the record and is directly responsive to the unanticipated interpretation. *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998). *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where LUBA remands a land use decision for inadequate findings, parties have no unqualified right to demand a hearing to present additional argument or evidence under *Morrison v. City of Portland*, 70 Or

App 437, 689 P2d 1027 (1984). *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where an applicant's final legal rebuttal under ORS 197.763(6)(e) is not limited to legal arguments and includes factual assertions, but petitioner fails to demonstrate that the factual assertions concerned a legally relevant issue, such factual assertions provide no basis for reversal or remand. *Donnell v. Union County*, 40 Or LUBA 455.

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 215.060 provides that a county governing body's actions regarding its comprehensive plan are without legal effect unless the governing body conducts one or more public hearings with advance public notice. However, ORS 215.060 does not impose any explicit requirements for the required public hearings. *Waibel v. Crook County*, 40 Or LUBA 67.

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A county governing body's decision to enter a settlement agreement that includes an agreement that the governing body will adopt certain ordinances does not render the public hearings that are subsequently held prior to adopting such ordinances something other than the kind of public hearing required by ORS 215.060, where the county counsel advised the governing body that it was free not to adopt the settlement ordinances and a transcript of the local proceedings shows the governing body did not believe it was legally bound to adopt the settlement ordinances without modification. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The requirement imposed by *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), for a fair and impartial tribunal does not apply to legislative land use proceedings. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

25.3.4 Local Government Procedures – Compliance With Statutes – Hearings. ORS 227.175 sets forth certain minimum procedural requirements for processing permit applications, but does not prohibit or regulate informal, nonbinding proceedings for preliminary approvals of PUDs that may precede the public hearing(s) required by statute. *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 21 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. When a local government accepts and relies on evidence submitted after the close of the record, without offering participants an opportunity for rebuttal, the decision will be remanded even though a petitioner mistakenly characterizes the procedural error as improper *ex parte* contact. *DLCD v. Umatilla County*, 39 Or LUBA 715 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The ORS 227.175(10)(a)(D) requirement that an appeal with a *de novo* hearing be provided where permit decisions are initially made without a hearing is not violated where the reviewing body is permitted to review the decision on appeal fully, but is limited to remanding the decision to the initial local decision maker. ORS 227.175(10)(a)(D) addresses the nature of the required hearing and does not

address the nature of the local remedies on appeal that the city must provide. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Even though petitioners may have obtained a continuance or caused the record to be left open had they made either request, a local government is not required to provide a continuance or leave the record open unless it is requested. *Lange-Luttig v. City of Beaverton*, 39 Or LUBA 80 (2000).

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

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A governing body's refusal to admit audio tapes of the planning commission proceedings into the record on appeal is not reversible error, where the party seeking to enter the tapes into the record fails to demonstrate that the refusal to admit the audio tapes in some way prejudiced the party's participation in the local proceedings. *Friends of Linn County v. Linn County*, 37 Or LUBA 297 (1999).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a partial transcript of a planning commission hearing contains relevant testimony, a local governing body errs by refusing to accept that partial transcript during its *de novo* appeal hearing. That the local governing body's review is *de novo* does not mean the local governing body may refuse to accept relevant evidence simply because the evidence was also submitted to a lower level decision maker. *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 215.416(11)(a), a hearings officer is obligated to conduct a *de novo* hearing that allows the introduction and consideration of all relevant evidence notwithstanding that the evidence could have been presented to the initial decision maker, but was not. *Johnson v. Clackamas County*, 37 Or LUBA 73 (1999).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the city does not dispute petitioners' allegations that city council members are honorary members of the applicant's organization and that the council members received and failed to disclose the existence and substance of *ex parte* communications during the proceedings below, LUBA will remand the decision for disclosure and an opportunity to rebut those communications. *Carlsen v. City of Portland*, 36 Or LUBA 614 (1999).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Petitioner's failure to cite ORS 215.402 to 215.428 as authority for its position that the challenged decision required notice and an opportunity for a hearing does not require that LUBA reject the assignment of error where (1) it is clear from its brief that respondent was aware that ORS 215.402 to 215.428 require notice and an opportunity for a hearing for land use decisions that constitute "permits"

under ORS 215.402(4), and (2) the city argues in its brief that the challenged decision does not constitute a "permit" decision, within the meaning of ORS 215.402(4). *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a city improperly accepts evidence submitted into the record as part of the final written argument allowed by ORS 197.763(6), that submission is not an "ex parte" communication within the meaning of ORS 227.180(3). *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

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

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government refuses to consider petitioner's letters and refuses petitioner's requests to present testimony during the local proceedings, the appearance requirement of ORS 197.830(2) is obviated. *Hugo v. Columbia County*, 34 Or LUBA 577 (1998).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the procedure followed by the county to approve a permit only provided the applicant a right to participate or appeal, the county may not rely on ORS 215.416(11)(a) to contend petitioner lacks standing to appeal because petitioner is not "adversely affected." *Hugo v. Columbia County*, 34 Or LUBA 577 (1998).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If the city committed a procedural error by approving final subdivision and PUD plans without providing a hearing or opportunity for local appeal, such error provides no basis for remand where the petitioner at LUBA was allowed to submit 65 pages of comments to the city prior to its decision. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The local government may be required to reopen the evidentiary hearing where the local government (1) changes to a significant degree an established interpretation of an approval standard; (2) the change makes relevant a different type of evidence that was irrelevant under the old interpretation; and (3) the party seeking to submit evidence responsive to the new interpretation identifies what evidence not already in the record it seeks to submit. *Gutoski v. Lane County*, 34 Or LUBA 219 (1998).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Presenting evidence that petitioner knew a final hearing was scheduled for a certain date would not establish that a petitioner knew that a final decision was actually adopted on that date. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 33 Or LUBA 845 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government's findings cannot defer a determination on discretionary approval criteria to a later

stage without providing the same notice and comment period provided in the initial proceeding. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.763(6)(c) requires a participant to file a written request with the local government for an opportunity to respond to new evidence submitted during the period after a hearing that the record is left open. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.763(6)(e) allows an applicant seven days after the record is closed to all other parties to submit final written arguments in support of the application. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

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

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government is not required to conduct a hearing, ORS 197.830(3) does not apply, nor does that statute operate to allow a party's lack of notice of a decision to toll the time limit for appeal. *DLCD v. Polk County*, 33 Or LUBA 30 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 197.835(4)(a), petitioners may raise new issues before LUBA if the city failed to follow applicable local procedures as required by ORS 197.195(3)(a). If the local code requires a public hearing as an applicable procedure, the city's failure to follow that procedure would allow petitioners to raise the issue before LUBA. *Venable v. City of Albany*, 33 Or LUBA 1 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The provisions of ORS 197.763(6)(c) only apply to the "initial evidentiary hearing," and therefore do not require the city council to reopen the record for rebuttal upon the request of a participant in a subsequent evidentiary hearing. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The county violates ORS 215.422 when it reopens the record to accept a report received by a commissioner from intervenor, but does not provide an opportunity for other parties to rebut the substance of the *ex parte* communication. *Brown v. Union County*, 32 Or LUBA 168 (1996).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Because the county's violation of ORS 215.422 is not a procedural error, petitioner is not required to show that his substantial rights were prejudiced by the county's error in order to obtain a remand. *Brown v. Union County*, 32 Or LUBA 168 (1996).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 197.763(6), the local government is only obligated to leave the record open for seven days after the *initial* evidentiary hearing; language in a local hearing notice to the contrary cannot create additional requirements under that statute. *Gross v. City of Tigard*, 32 Or LUBA 93 (1996).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where intervenors submit a memorandum to the city council after the closing of the record, but before a final decision is adopted, ORS 197.763(6) requires the city to provide petitioners an opportunity to respond to such material. *Tucker v. City of Adair Village*, 31 Or LUBA 382 (1996).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The requirement of ORS 197.763(4)(b) that a staff report be available seven days prior to a land use hearing is a procedural requirement; under ORS 197.835(9)(c), its violation is ground for reversal or remand only if petitioner demonstrates that his substantial rights were prejudiced. *Simonds v. Hood River County*, 31 Or LUBA 305 (1996).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If a city makes a land use decision without providing a required hearing, ORS 197.830(3) extends the LUBA appeal period. However, ORS 197.830(5) limits the extension to three years unless petitioners establish that the required notice was not provided. *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. When county provides a hearing on appeal of a planning director's decision made without a hearing, but the hearings officer concludes she lacks jurisdiction over the appeal, the county has not provided a hearing on the decision, and petitioner may appeal to LUBA pursuant to ORS 197.830(3). *Franklin v. Deschutes County*, 30 Or LUBA 33 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. When the city zoning ordinance makes final approval of a tentative subdivision plan a limited land use decision appealable to LUBA, a decision applying the ordinance is not a "tentative decision" that can be appealed locally at a hearing pursuant to ORS 227.175(10). *Azevedo v. City of Albany*, 29 Or LUBA 516 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government violates a substantial right when it charges more than the maximum appeal fee allowed by ORS 227.175(10)(b) for a hearing requested under ORS 227.175(10)(a). *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If a local government chooses to treat an application as one for a land use decision, rather than a limited land use decision, and a local appeal as one under ORS 227.175(10)(a), it may not charge more than the maximum appeal fee allowed by ORS 227.175(10)(b). *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. While ORS 215.416(11) allows a county to make land use permit decisions without a hearing, it protects an individual's right to participate in a local hearing by requiring that notice of the decision be given to affected persons and that the opportunity for a *de novo* local appeal be provided. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government makes a permit decision without a hearing, pursuant to local procedures implementing ORS 215.416(11) or 227.175(10), the provisions of ORS 197.830(3) allowing a person to appeal a decision to LUBA if the local government does not provide a hearing do not apply, because the local government did not fail to provide a hearing or the notice of such hearing required by state or local law. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.763 governs how a quasi-judicial land use hearing is conducted, not whether one is required. ORS 197.763 does not confer a right to a quasi-judicial land use hearing where such a right does not otherwise exist. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 215.422(4), a communication between a member of the board of commissioners and county staff is not an *ex parte* contact required to be disclosed pursuant to ORS 215.422(3). Therefore, that the board chairman did not disclose in the local record the contents of his conversation with the county code compliance officer is not error. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If a local government fails to give a person an individual written notice of hearing to which that person is entitled under state or local law, the local government fails to provide a hearing with regard to that person, within the meaning of ORS 197.830(3). *Orenco Neighborhood v. City of Hillsboro*, 29 Or LUBA 186 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where new information in support of an application is received by a local government on the last day the record is left open, pursuant to a request that the record be left open under ORS 197.763(6), an opposing party is entitled to a continuance under ORS 197.763(4)(b), if it requests a continuance. A request for a continuance under ORS 197.763(4)(b) is not specifically required to be made before the evidentiary record closes. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. In a quasi-judicial hearing on a land use application, an applicant has a right to rebut evidence submitted by opponents. However, if the applicant's rebuttal includes "additional documents or evidence * * * in support of the application," ORS 197.763(4)(b) gives opponents a right to request a continuance. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the local government wishes to defer a determination of compliance with an applicable approval standard

it must ensure that the later approval process provides any statutorily or locally required notice and an opportunity for input. *Hilderbrand v. Marion County*, 28 Or LUBA 703 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where during the local proceedings petitioners affirmatively waived their right to request a continuance, petitioners cannot raise the local government's failure to provide such a continuance as a basis for reversal or remand in an appeal to LUBA. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government commits error by approving a modified partition application after the local evidentiary hearing is closed and refusing petitioner an opportunity to comment on the modified application before approving it. *Tognoli v. Crook County*, 28 Or LUBA 527 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 215.422(3), parties in county permit proceedings are entitled to disclosure on the record of the substance of any *ex parte* communications and an opportunity to rebut the substance of the *ex parte* communication at the first hearing following the communication. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.763(4)(b) establishes a remedy for failure to comply with ORS 197.763(4)(a). Where a document supporting a land use application was not available for review prior to the initial local evidentiary hearing, as required by ORS 197.763(4)(a), but the local government continued the hearing to a later date and made a copy of the document available for review in its planning office prior to the continued hearing, the local government complied with ORS 197.763(4)(b). *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.195, which establishes minimum procedural requirements for making limited land use decisions, does not require that local governments provide either a public hearing or a local appeal. ORS 227.175(3) and (10) do not apply to limited land use decisions, because they are not "permits," as defined in ORS 227.160(2). *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Although it is uncertain whether ORS 203.810 concerning prosecution of county offenses applies to a county zoning ordinance enforcement proceeding, that the county is represented in such proceedings by a non-attorney planning staff member does not violate ORS 203.810(2), if a county ordinance provides for county representation in such proceedings by county staff members other than the district attorney or county counsel. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.763(5)(a) requires that a statement listing the applicable substantive criteria from the local government comprehensive plan and code be made at the beginning of a quasi-judicial land use hearing. Where such a statement is not made, or other requirements of ORS 197.763 are not met,

petitioners may raise new issues in an appeal to LUBA. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Allegations that the local decision maker failed to disclose *ex parte* contacts, as required by ORS 215.422(3), provide no basis for reversal or remand where there is no admission by the decision maker or other evidence, either in the record or offered through a motion for evidentiary hearing pursuant to ORS 197.830(13)(b), that an *ex parte* contact occurred. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a permit applicant receives a public hearing and decision from a local government and, under the local code, an appeal to the governing body may be decided without further public hearing, the governing body commits no error by denying the applicant's appeal at a public meeting without further notice or public hearing. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the local code provides a possibility of, but not a right to, a second public hearing on appeal of a hearings officer's decision, the appeal may be denied without providing an additional public hearing, and the code need not include standards for determining whether to grant an additional public hearing. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local hearing is provided and a party is entitled to written notice of the decision under ORS 215.416(10), ORS 197.830(8) rather than ORS 197.830(3) establishes the deadline for filing a notice of intent to appeal. Under ORS 197.830(8), a notice of intent to appeal must be filed within 21 days after a decision becomes final. *DLCD v. Crook County*, 25 Or LUBA 826 (1993).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If the *contents* of an *ex parte* communication are not publicly announced and placed in the record, as required by ORS 227.180(3), a city official's request for responses to the *ex parte* communication does not provide the opportunity for rebuttal required by ORS 227.180(3)(b). *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a city decision maker receives an *ex parte* contact, failure to follow the procedures required by ORS 227.180(3) constitutes a basis for remand by LUBA, regardless of whether the party seeking remand objected during the proceedings below. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. That a local governing body ultimately adopts an interpretation of an applicable code standard that is different from that adopted by the hearings officer, and declines to reopen the evidentiary record, does not provide a basis for reversal or remand where (1) there was no "established" local interpretation of the code standard, (2) the governing body's interpretation does not make relevant any new type of

evidence, and (3) petitioner does not identify any evidence it wishes to submit if the evidentiary hearing is reopened. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government fails to give a person an individual written notice of hearing to which the person is entitled, the local government fails to provide a hearing with regard to that person, within the meaning of ORS 197.830(3). *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 197.830(3), where a local government renders a decision without providing a hearing, an appeal to LUBA must be filed within 21 days of actual notice of the decision, where notice of the decision is required, or within 21 days of the date a person knew or should have known of the decision, where no notice of the decision is required. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The requirement of ORS 197.830(6)(b) that a person wishing to intervene in an appeal at LUBA have appeared during the local government proceedings is obviated where a city fails to observe statutory notice and hearing requirements of ORS 227.173 and 227.175 prior to issuing the challenged decision granting approval for a permit. *Hood River Sand v. City of Mosier*, 24 Or LUBA 604 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government may, by imposing conditions or otherwise, defer a final determination concerning compliance with an applicable permit approval standard to a later stage. However, if the decision to be made at the later stage is itself discretionary, the approval process for the later stage must provide the statutorily required notice and opportunity for hearing, even though the code may not require such notice and hearing. *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. By statute, adjoining property owners within specified distances of property for which discretionary development approval is requested are entitled to notice of the local proceedings and an opportunity for a public hearing. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government concludes a permit applicant has submitted insufficient evidence to demonstrate it is feasible to comply with an applicable approval criterion, it may defer the required determination of compliance with that standard to a later stage in the approval process, but must assure that statutory notice and hearing requirements are observed in that later stage of approval. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where additional evidence in support of an application is received after the notice of hearing required by ORS 197.763(3) is provided, the parties are entitled to request a continuance under ORS 197.763(4)(b), but a continuance need not be granted unless it is requested. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where parties are entitled to a continuance following the introduction of new evidence in support of an application under ORS 197.763(4)(b), and make it clear they wish to present additional evidence at a later hearing, a local government commits error in not continuing the evidentiary hearing, even though a continuance under ORS 197.763(4)(b) was never explicitly requested. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a city approves a permit without providing the public hearing or notice of decision and opportunity for a local appeal required by ORS 227.175(3) and (10), a notice of intent to appeal at LUBA is timely filed if it is filed within 21 days after petitioners received actual notice of the permit decision. *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where adoption of the challenged decision required the exercise of factual and legal judgment, the decision required the exercise of discretion and, consequently, approves a "permit." Under these circumstances, it is error for the local government to fail to provide petitioner with notice and opportunity for hearing, where at least some of petitioner's members were entitled to notice if a public hearing had been scheduled. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A city attorney's statement at the beginning of the city council hearing, to the effect that parties are welcome to rebut *ex parte* communications, satisfies the requirement of ORS 227.180(3)(b) that a public announcement of the parties' right to rebut the substance of an *ex parte* communication be made at the first hearing following the communication. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Pursuant to 215.406(1) and 215.422(2), a county governing body may designate a hearings officer to conduct hearings on permit applications and may provide that the hearings officer's decision is the final county decision. *Wickwire v. Clackamas County*, 21 Or LUBA 278 (1991).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where there is no local appeal available and a local government fails to provide the notice of hearing or hearing required by ORS 227.175(3) and (5) or 215.416(3) and (5) before making a decision on a permit, such permit decisions may be appealed to LUBA within 21 days after a person receives actual notice of the permit decision. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The requirements of ORS 197.763(4)(b) and the local code that staff reports be available a certain number of days prior to land use hearings are procedural requirements; their violation is grounds for reversal or remand of the local government's decision only if petitioner demonstrates prejudice to its substantial rights. ORS 197.835(7)(a)(B). *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 227.175(10), allowing city approval or denial without a hearing, if notice of the decision is given and an opportunity for an appeal at the city level provided, applies only to *permit* applications, not to zone changes. *Torgeson v. City of Canby*, 19 Or LUBA 623 (1990).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If a county neither (1) holds a public hearing before making a decision on an application for a "permit," as defined in ORS 215.402(4), nor (2) provides an opportunity to appeal that decision at the county level, it fails to comply with the requirements of ORS 215.416(3), (5) and (11). *Flowers v. Klamath County*, 18 Or LUBA 647 (1990).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Subsection (1) of ORS 215.427 imposes either a 120-day or a 150-day deadline for a local government to take final action on a permit or zone change application. Subsection (2) of that statute gives a county 30 days to advise permit applicants who submit incomplete applications what is needed to make the application complete, and also sets out the three ways an application may be deemed complete. Subsection (3) of that statute freezes the approval standards, as of the date the application was first submitted, if the application is complete when submitted or rendered complete "within 180 days of the date the application was first submitted." Subsection (4) of that statute renders the application "void" on the one hundred and eighty-first day after the application was "first * * * submitted," if the applicant has not by that time complied with one of the submittal requirements set out in that subsection or subsection (2) to make the application complete. *Bora Architects, Inc. v. Tillamook County*, 76 Or LUBA 330 (2017).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Where a petition for writ of mandamus to compel a decision approving a permit application was filed with the circuit court before the earliest date on which the county took action to reduce its final decision to writing, the circuit court has exclusive jurisdiction regarding the permit application. *Rogue Advocates v. Josephine County*, 73 Or LUBA 98 (2016).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Where a petitioner's notice of intent to appeal a decision was filed at LUBA after the board of county commissioners was unable to take action on a local appeal of a planning director's decision that approved a permit application, but before the board of county commissioners reduced its decision to writing, the notice of intent to appeal was filed prematurely. Where the permit applicant files a petition for writ of mandamus more than 14 days after the board of commissioners' hearing at which they failed to take action, and before the board of commissioners approved the minutes of that hearing, the circuit court has exclusive jurisdiction regarding the permit application, and LUBA does not have jurisdiction over the appeal. ORS 215.429(2) and (4). *Rogue Advocates v. Josephine County*, 73 Or LUBA 98 (2016).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. An application is not void under ORS 227.178(4) where the city does not identify any missing information, and the petitioner provided a clear statement that no additional information will be provided, resulting in the application being deemed complete under ORS 227.178(2). *Smith v. City of Gearhart*, 71 Or LUBA 184 (2015).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. ORS 227.178, the "120-Day Rule," requires cities to take final action on a permit application within 120 days after the application is deemed complete. If the city does not take final action within 120 days, then ORS 227.179(1) provides a remedy for applicants: the right to seek a writ of mandamus in circuit court to compel the city to approve the permit application. *Leathers Oil Company v. City of Newberg*, 63 Or LUBA 176 (2011).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. ORS 227.178(5) allows an applicant to extend the 120-day deadline for a final decision on a permit application for a specified period of time up to 245 days, and potentially gives the city

up to one year to take final action. Only the applicant can seek to extend the 120-day deadline, and such a request or requests must be made in writing. *Leathers Oil Company v. City of Newberg*, 63 Or LUBA 176 (2011).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Where an applicant voluntarily and completely waives the 120-day deadline and the associated right to seek mandamus if the city exceeds that deadline, nothing in ORS 227.178(5) divests a city of jurisdiction to act and rely upon such a waiver in making a decision on an application more than 365 days after the application is deemed complete. *Leathers Oil Company v. City of Newberg*, 63 Or LUBA 176 (2011).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. A written request for more time to correct land use violation on property that arose under a previously issued permit does not constitute a "written request" under ORS 215.427(5) to extend the 120-day deadline for the county to take final action on a subsequent application to partition the property. *Sperber v. Coos County*, 61 Or LUBA 477 (2010).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Under ORS 215.427(8), when a county fails to take timely action on a permit application, a permit applicant is entitled to a refund of "either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater," and ORS 215.427(8) further provides that in that circumstance "[t]he applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits." Under ORS 215.427(8), when a county is required to refund initial permit application fees, it may not require the permit applicant to pay additional fees for any additional proceedings that may be required to respond to a LUBA remand of the county's permit decision. *Sperber v. Coos County*, 61 Or LUBA 477 (2010).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Under ORS 215.427 and 215.429, where a county does not issue a final decision within the applicable 120 or 150-day deadline, the consequence is that the applicant may either elect to continue with the application process or file a petition for writ of mandamus to compel the county to approve the application. Where the applicant elects to continue with the application process after the deadline, a subsequent county decision approving or denying the application is not void or moot because it is issued after the applicable deadline. *Davis v. Polk County*, 58 Or LUBA 1 (2008).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Where a city discovers late in a proceeding on a partition application that its code may require application of certain subdivision approval standards, the city should identify any applicable subdivision standards and give the applicant the opportunity to demonstrate compliance with them, even if that would require the city to make its decision after the statutory deadline for taking final action on the application has passed. However, it is inconsistent with ORS 227.178(3) for the city to summarily deny the partition and effectively force the applicant to submit a new application, where that denial is not based on any applicable standard or criteria. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Reversal is not warranted under ORS 197.835(10)(a)(A) where a city denies a partition application three weeks prior to expiration of the 120-day deadline based on the city's belief that the proposed partition must be processed as a subdivision, where the city mistakenly believed that its only option was to deny the application and effectively require the applicant to submit a new application, but there is no indication in the record that the city denied the application to avoid the 120-day rule. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Under ORS 227.178(4), an incomplete application becomes automatically void on the one hundred and eighty-first day after it is submitted unless the applicant takes one of the steps enumerated in the statute to preserve the application from becoming void. *Painter v. City of Redmond*, 56 Or LUBA 311 (2008).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Although a city may not take procedural short-cuts that it knows or reasonably should know will prejudice one or more party's substantial rights and thereby provide a reasonably certain basis for an appeal to and remand by LUBA, ORS 197.835(10)(a)(B) or ORS 227.178 do not prohibit a city from expediting its local review process to meet the 120-day deadline, provided that expedited process does not require one or more parties to sacrifice their substantial right to fully and fairly present their position on the merits of the application. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. The ORS 227.178(1) requirement that a city render a final decision on a permit application within 120 days is not satisfied by a *pro forma* denial. To comply with ORS 227.178(1) and comply with the ORS 197.835(10)(a)(B) requirement that the city not take action to avoid the requirements of ORS 227.178, the city's decision must be a *real* decision that is made in good faith, in the sense that the decision is supported by findings and is based on an evidentiary record that the city could reasonably believe are adequate to allow that decision to be defended in the event of an appeal to LUBA. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Neither the text of ORS 197.835(10)(a)(B) nor contextual statutes dictate that *any* deviation by a city from its procedures to render a timely final decision within the 120-day deadline imposed by ORS 227.178(1) necessarily constitutes an "action [taken] to avoid the requirements of ORS * * * 227.178," within the meaning of ORS 197.835(10)(a)(B). *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. The actions taken to avoid the requirements of ORS 227.178, which may provide a basis for reversal by LUBA under ORS 197.835(10)(a)(B), are not limited to a city's final action. Actions the city takes before adopting its final decision may also violate the statute. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. LUBA may consider extra-record evidence where there are disputed allegations regarding whether a city took action for the purpose of avoiding the ORS 227.178 requirement that the city take final action on certain permit applications within 120 days. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. ORS 227.178 and 227.179 envision three routes to final action on a permit application: (1) a final local government decision within 120 days; (2) a final local government decision in more than 120 days followed by a refund of one-half of the application fee; or (3) a failure to issue a final decision within 120 days followed by a petition for a writ of mandamus to compel the local government to approve the permit or demonstrate to the circuit court that approval of the permit would violate a substantive provision of its comprehensive plan or land use regulations. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. If a city or county adopts a "spurious, bad faith" denial of a "permit, limited land use decision or zone change application" under ORS 215.427 or 227.178 for the purpose of avoiding one of the statutory consequences for failing to take timely action on an application, such a decision constitutes an "action * * * for the purpose of avoiding the requirements of ORS 215.427 or 227.178," within the meaning of ORS 197.835(10)(b)(B). *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Generally, where a civil statute of limitation is changed to shorten the limitation period, the change is applied prospectively only. But where the statute is changed to lengthen the limitation period, the change applies both prospectively and retroactively. Applying that principle to ORS 215.417, forest template dwelling permits with a two-year duration that were issued before ORS 215.417 took effect, but which had not yet expired on the date ORS 215.417 took effect, must be honored for four years. *Butori v. Clatsop County*, 45 Or LUBA 553 (2003).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. An assignment of error that alleges a planning commission may only make recommendations to the city council and may not make a final decision on an application for a conditional use permit for a home occupation is without merit where (1) ORS 227.090(h) specifically authorizes planning commissions to carry out the statutory provisions governing land use permits and (2) the city's zoning code specifically authorizes the planning commission to make decisions on conditional use permits. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Petitioners may not argue that a city's decision to deny its application was for the purpose of avoiding the 120-day decision deadline set out at ORS 227.178, when the challenged decision was rendered five days after that deadline. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Where a county has a unified zoning map and comprehensive plan map, any application for a zoning map amendment is by necessity also an application for a comprehensive plan map amendment. A combined zoning and comprehensive plan map amendment application is not one of the three kinds of land use applications described in ORS 215.427(1), and for that reason the fixed goal post rule at ORS 215.427(3) does not apply. *Rutigliano v. Jackson County*, 42 Or LUBA 565 (2002).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. That the city council declined to hear petitioner's local appeal of a planning commission site design approval does not provide a basis to reverse the city's decision or award attorney fees to petitioner under ORS 197.835(10), even if the city council's decision was motivated by a desire to avoid violating the ORS 227.178(1) requirement that the city issue a final decision on an application for a limited land use decision within 120 days. ORS 197.835(10) applies where the local government *denies* an application in a bad faith attempt to avoid the requirements of ORS 227.178. It does not apply to a decision approving an application. *Elliott v. City of Redmond*, 40 Or LUBA 242 (2001).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. For purposes of ORS 215.428(1), a decision is not "final" at the time the oral decision is made where the local code provides the decision becomes final 10 days after the written decision is filed unless the county board grants a rehearing on its own motion. *Miller v. Multnomah County*, 33 Or LUBA 644 (1997).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. ORS 197.835(10)(a)(B), which allows LUBA to reverse a local government's decision and order development approval when denial of the application was for the purpose of avoiding the 120-day limit of ORS 215.428, does not apply to good faith denials on the merits of the application, whether timely or untimely. *Miller v. Multnomah County*, 33 Or LUBA 644 (1997).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Backdating of a final written decision to correspond to the date of an earlier oral decision denying an application does not constitute an action taken to avoid the 120-day rule established by ORS 215.428, within the meaning of ORS 197.835(10)(a)(B), when the denial was made on the merits and not for the purpose of avoiding the 120-day rule. *Miller v. Multnomah County*, 33 Or LUBA 644 (1997).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. The 120-day time limit for local government action stated in ORS 215.428 applies by its terms only to initial local proceedings on an application, not to proceedings on remand. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Where a local ordinance requires the city to act on an application within 36 days after filing, LUBA will read that ordinance consistently with state statute to require the city to act within

36 days of the date the application is deemed complete. *Thornton v. City of St. Helens*, 31 Or LUBA 287 (1996).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. The existence of a writ of mandamus remedy in circuit court under ORS 227.178(7) for delay in processing an application does not affect either the city's review of the application or LUBA's jurisdiction if the remedy is not exercised. *Sullivan v. City of Woodburn*, 31 Or LUBA 192 (1996).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. Where a county's approval of a permit is mandated by an order of the circuit court issued pursuant to a writ of mandamus under ORS 215.428(7), the county's decision approving the permit is not a "land use decision," as defined in ORS 197.015(10), because the county was not required to apply its comprehensive plan or land use regulations in adopting that decision. *Gearhard v. Klamath County*, 22 Or LUBA 377 (1991).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. An applicant for development approval has the burden of establishing compliance with all relevant approval criteria during the local proceedings, regardless of whether the 120-day period referred to in ORS 215.428(7) expires. *Adams v. Jackson County*, 20 Or LUBA 398 (1991).

25.3.5 Local Government Procedures – Compliance with Statutes – Time Limit for Final Action. A county does not exceed its jurisdiction in taking final action on a permit application after the 120-day time limits established by ORS 215.428(1) and its code have elapsed; and its decision will be given effect. *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. A condition of approval requiring that an applicant construct a proposed fence between a proposed trail and adjoining farms; specifying only that the proposed fence must be "capable of preventing dogs and people from entering adjacent farm fields"; punting all determinations regarding fence design, materials, construction, etc. to a subsequent master planning process that offers no opportunity for a public hearing or other public input; and allowing adjacent landowners to opt out of installing a fence on their property line is inadequate where the county relies on the proposed fence to address a wide variety of different potential impacts, which might require different fence designs, materials, construction techniques, and maintenance routines in order to ensure that the trail will not cause significant impacts on farm practices for purposes of the farm impacts test at ORS 215.296(1). Such a condition is also not clear and objective for purposes of ORS 215.296(2). *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Where a county determines that a property qualifies for a forest template dwelling under ORS 215.750 because at least three dwellings existed on surrounding lots or parcels on January 1, 1993, based on a statement of the applicant, a recollection of the prior owner of one of the surrounding dwellings, an email from a contractor who worked on one of the surrounding dwellings, and a statement by the tax assessor that its records showed a dwelling in place on January 1, 1993, but where LUBA concludes that the county erred in accepting the email, where LUBA cannot determine whether the county would have reached the same conclusion without the email, and where the county's findings failed to address evidence that the tax rolls indicate existence of the dwelling as of July 1993 rather than January 1993, LUBA will remand for the county to adopt adequate findings. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Absent a legal definition for how the center point of a property must be established for purposes of determining whether it qualifies for a forest template dwelling under ORS 215.750, a county errs by not explaining the basis for its conclusion that its chosen method is the most appropriate and by not addressing opponents' arguments challenging that method. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

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whether it qualifies for a forest template dwelling under ORS 215.750, a county errs by not explaining the basis for its conclusion that its chosen method is the most appropriate and by not addressing opponents' arguments challenging that method. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. When and if a board of county commissioners adopts a revised staff report as its findings, it must identify the applicable standards, the facts used to meet those standards and explain how those facts led to the conclusion that the applicable criteria has been met. Simply adopting the report or incorporating the applicant's burden of proof statement is not sufficient to serve as support for adequate findings. *VanSickle v. Klamath County*, 78 Or LUBA 56 (2018).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. When a county has evaluated facts, evidence, and argument in the record in reaching its decision and adopted findings in support of its decision, it is not necessary for the county to incorporate specific documents as findings. *Wachal v. Linn County*, 78 Or LUBA 227 (2018).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. When comprehensive plan policies are not mandatory approval standards for a land use application, but the application must be evaluated for consistency with applicable plan policies, the evaluation may require some weighing and balancing of competing policy directions embodied in the applicable plan provisions. The local government's evaluation, weighing and balancing of competing interests as well as ambiguous comprehensive plan provisions are entitled to a deferential standard of review under ORS 197.829(1)(a)–(c) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 245 (2018).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. When the decision maker has determined that the application must be denied based on findings of noncompliance with one or more approval standards, the decision maker is not obligated to adopt findings of compliance or noncompliance with all approval standards. LUBA has no reason to remand a decision it would otherwise affirm to require the decision maker to adopt such findings. *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 245 (2018).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. When a city modifies a condition of approval in lieu of citing specific evidence and findings, the decision will be remanded for the city to adopt more adequate findings based on substantial evidence regarding compliance with local code. If the city cannot determine based on substantial evidence in the record that local codes are complied with, and the city chooses to defer that issue to a subsequent proceeding, that subsequent proceeding must provide notice and opportunity for public participation. *Dreyer v. City of Eugene*, 78 Or LUBA 391 (2018).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. LUBA will reject a petitioner's challenges to a local government's conclusion that evidence of mere intent and capability to provide training or issue certifications is sufficient to demonstrate that the facility qualifies as a "firearms training facility" under ORS 197.770, where the petitioner does not acknowledge or challenge the local government's alternative findings that the facility had in fact

provided training and issued certification sufficient to demonstrate that the facility qualifies as a "firearms training facility." *H.T. Rea Farming Corp. v. Umatilla County*, 71 Or LUBA 125 (2015).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Where the final decision consists of a single page stating that the application is "approved with conditions" and an attached staff report, which includes findings of compliance with approval standards and recommended conditions of approval, LUBA will conclude that the final decision adopts the staff report as incorporated findings and conditions. *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Remand is necessary where the decision fails to adopt any findings addressing an applicable standard that limits fill to 20 feet of the "edge of the shoulder of driveways," even if the city implicitly adopted the applicant's position that the edge of a parking lot constitutes the edge of the shoulder of a "driveway," where the site plan appears to show fill placement more than 20 feet from the edge of the parking lot. *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. ORS 197.610(2) provides that a local government need not provide notice of hearing to DLCD if the local government concludes that no statewide planning goals apply. However, the failure to adopt in the final decision *express* findings that no goals apply is not a basis for remand, where no statute requires express findings that the goals do not apply and the petitioner fails to demonstrate that any goals in fact do apply. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Remand is necessary where a traffic manual requires that "local data" should be used to generate traffic counts when a proposed large format store falls outside the size range for that type of use, but the local government does not require that traffic counts be derived from local data, or adopt reviewable findings or an interpretation that explain why that requirement can be ignored. *Keep Keizer Livable v. City of Keizer*, 64 Or LUBA 53 (2011).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. A permit decision consisting of a checklist with marginal notations that approval criteria are "Satisfied" or "Conditionally Satisfied" falls short of providing the findings and explanation why the evidence shows that the criteria are satisfied that is required by ORS 215.416(9). *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. A county errs in failing to address whether a mitigation plan for a destination resort is consistent with applicable comprehensive plan policies governing wildlife protection, and instead finding that issues raised regarding compliance with those policies will be addressed by requiring the applicant to obtain approval of the plan from the Oregon Department of Fish and Wildlife. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Arguments that in approving a tentative subdivision plat a city is required to adopt findings addressing ORS

195.250 to 197.260 do not provide a basis for reversal or remand, where the statutes simply authorize local governments to require a geotechnical report before issuing a building permit for properties located in landslide hazard "further review areas," and the challenged decision does not approve a building permit for property located in a "further review area." *Papadopoulos v. City of Corvallis*, 59 Or LUBA 384 (2009).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Because ORS 197.763(6)(e) allows an applicant the opportunity to submit final written argument, which may include proposed findings, it is consistent with the statutory scheme to allow an applicant to submit revised proposed findings or conditions of approval and arguments in favor of those revised findings or conditions of approval after the decision maker's tentative oral decision in circumstances where planning staff has objected to some proposed findings or conditions and suggested modified findings or conditions. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. ORS 197.763 does not require local governments to treat staff-generated proposed findings that are submitted to the final decision maker for review and adoption at the final meeting as a "staff report" that must be made available to the public seven days prior to the meeting. Absent local provisions to the contrary, there is no right for parties to review or rebut proposed findings prior to their adoption. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. A local government may not avoid the obligation to adopt findings addressing whether a proposed plan amendment complies with the Transportation Planning Rule (TPR) by relying on subsequent permit approvals to address traffic impacts of uses allowed by the amendment, where the criteria governing permit approvals do not require compliance with the TPR or include standards similar to TPR standards. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Because ORS 227.175(10) specifies that a *de novo* hearing on a permit application is not limited to the issues raised in the local notice of appeal, a city errs in failing to address an issue raised before the local appeal body on the grounds that the issue was not raised in the notice of local appeal. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. An ordinance that allows an up-or-down vote by the county electorate on permit approval decisions is incompatible with, and therefore preempted by, ORS 215.402, which requires that approval or denial of permit applications be governed by standards and criteria set forth in the county's code and findings explaining why the proposal complies or fails to comply with those standards. *Sievers v. Hood River County*, 46 Or LUBA 635 (2004).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. ORS 836.623(1) requires explanatory findings addressing evidence that public safety requires a higher level of protection than the minimum set forth under the Airport Transportation Planning rule, even if the

local government rejects that evidence and concludes that existing standards are sufficient to protect public safety. *Graham Oil Co. v. City of North Bend*, 44 Or LUBA 18 (2003).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. It is inconsistent with a county's findings obligation under ORS 215.416(9) for the county to simply declare, without explanation, that it prefers the staff count of existing dwellings in the area and is not persuaded by petitioners' evidence of fewer dwellings, where petitioners provided specific, direct evidence supporting their dwelling count, and the staff figure is conclusory and based on evidence not in the record. *Matiaco v. Columbia County*, 42 Or LUBA 277 (2002).

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

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. A city's finding that it is feasible to comply with an approval standard requiring that public facilities can accommodate the proposed use is supported by substantial evidence, where the city conditions approval on the applicant making improvements to an intersection, including improvements that ODOT had imposed on a previous application for a more traffic-intensive use on the subject property. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. The practice of incorporating other documents as findings runs the risk of adopting inconsistent findings. However, where a decision expressly incorporates other documents as findings, such an express incorporation is sufficient to adopt the other document as findings. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Under ORS 215.296(1), a local government must identify farm and forest uses on land surrounding the subject parcel and examine the practices necessary to continue those uses. The absence of findings sufficient to demonstrate compliance with ORS 215.296(1) undermines the conclusion that there will be no conflicts with surrounding farm or forest uses under Goal 5. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. A local government misconstrues the meaning of "intensively developed recreational uses" under OAR 660-06-025(4)(e) when it assesses intensity as a product of the relative density of the proposed use with respect to the undeveloped portions of the parcel. *Donnelly v. Curry County*, 33 Or LUBA 624 (1997).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. For purposes of determining whether an RV camp is "intensively developed" and hence inappropriate "for a forest environment" under the Goal 4 Rule, a local government must compare the proposed use to other

campgrounds on forest lands, or establish why it is appropriate to compare the proposed use with RV parks on nonresource lands. *Donnelly v. Curry County*, 33 Or LUBA 624 (1997).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. To comply with OAR 660-06-025(5)(a), a local government's findings must describe the farm or forest practices on adjacent and nearby forest lands, as well as explain why the proposed use does not significantly affect those practices. Findings that do not address all nearby lands and that simply refer to an adjacent property as a "woodlot" where a "small flock of sheep" is raised are inadequate. *Donnelly v. Curry County*, 33 Or LUBA 624 (1997).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Comments made by city council members during the course of their deliberations that are not reflected in the county's final written findings are not relevant in determining whether the county complied with ORS 227.173(2). *Miller v. City of Joseph*, 31 Or LUBA 472 (1996).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Absent local code provisions extending such a right, parties have no right to rebut proposed findings. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. A party's submission of proposed findings to a local decision maker does not constitute an *ex parte* contact warranting reversal or remand. In the absence of a local code provision to the contrary, there is no error in a local government's utilization of such a process. *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

25.3.6 Local Government Procedures – Compliance with Statutes – Findings. Where a local government concludes a permit applicant has submitted insufficient evidence to demonstrate it is feasible to comply with an applicable approval criterion, it may defer the required determination of compliance with that standard to a later stage in the approval process, but must assure that statutory notice and hearing requirements are observed in that later stage of approval. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A zone verification is not a statutory land use "permit" as defined at ORS 227.160(2)(b), and the city is not required to provide notice of the decision or opportunity for a local appeal of the decision. However, a zone verification decision is subject to LUBA review and a 21-day appeal period. ORS 227.175(11); ORS 197.830(5)(b). *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a county's notice described a proposed project as a bed and breakfast inn and campground, but the county only approved the bed and breakfast inn but not the campground, petitioners had an inadequate opportunity to object to the alleged procedural error because they could not know until the county issued its decision that the final decision would approve something different than the proposal that was noticed. *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. ORS 197.830(3) operates to potentially allow a petitioner a delayed period of time to file a LUBA appeal, but it is not a source of procedural requirements that a local government approved development that differs from the development described in the notice of hearing is not procedural error. *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Nothing in LUBA's rules requires that returned mail envelopes be included in the record. Returned mail documentation does not fall within the description of "[n]otices of * * * adoption of a final decision * * * mailed during the course of the land use proceeding" at OAR 661-010-0025(1)(d). *Conte v. City of Eugene*, 78 Or LUBA 1001 (2018).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a decision approving a dwelling does not approve, or mention, access to that dwelling, the fact that the petitioner's property is adjacent to the public road that will provide access to the dwelling does not mean that the county is required under ORS 197.763 or any other statute to provide notice of the decision to that petitioner, if petitioner's property lies outside the mandatory notice area. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Under ORS 197.830(3)(a) where a land use decision was rendered "without providing a hearing," a petitioner with standing may appeal that decision to LUBA "[w]ithin 21 days of actual notice, where notice is required[.]" The actual notice of a disputed property line adjustment decision that is required by ORS 197.830(3)(a) is not provided by notice of a subsequent forest template dwelling decision that includes a reference to the property line adjustment decision. *Bowerman v. Lane County*, 73 Or LUBA 399 (2016).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A city errs when it accepts an appeal of a decision to deny a permit, holds an appeal hearing, and fails to issue a written decision on the appeal. ORS 227.173(3) requires the city to issue a written decision. *Smith v. City of Gearhart*, 71 Or LUBA 184 (2015).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a local government has rendered a permit decision without recognizing that its decision was a permit decision and without providing notice of that decision as required by ORS 215.416(11), ORS 197.830(3)(a) applies, and the "actual notice" that the statute requires is provided only when the local government provides the written notice of the decision that is required by law or a copy of the decision itself. *Keith v. Washington County*, 66 Or LUBA 80 (2012).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. The deadline to appeal a post-acknowledgment plan amendment to LUBA is 21 days from the date notice is mailed to parties entitled to notice under ORS 197.615. A party entitled to notice under ORS 197.615(4) who receives that notice must appeal within 21 days of the date notice is mailed, and that deadline is not tolled simply because the local government failed to submit a copy of the decision to DLCD as required by ORS 197.615(1). *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A petitioner receives "actual notice" of a decision for purposes of ORS 197.830(3)(a) on the date the local government mails a letter to petitioner informing petitioner of the decision, not on the date that the petitioner obtains a copy of the decision from the local government's files. *Brodersen v. City of Ashland*, 66 Or LUBA 369 (2012).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. LUBA will deny a motion to take evidence to consider e-mails between the petitioner and the local government to establish that the local government was aware following the proceedings below that it had failed to provide timely notice of hearing and notice of the decision to DLCD, where there is no factual dispute that the local government did not provide the notice of hearing or that the local government failed to provide timely notice of the decision, only a legal dispute as to whether such notices were required and if so the consequences of failure to provide them. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. LUBA will accept a reply brief that responds to a local government's argument that the petition for review failed to assign error to the local government's failure to provide DLCD with post-adoption notice of the decision as required by ORS 197.610(1). However, to the extent the reply brief includes arguments that purport to advance a new assignment of error or new basis for reversal or remand, LUBA will not consider such arguments. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where one petitioner was an adjoining property owner and entitled to written notice of a permit decision under ORS 215.416, but was not provided the required notice, the deadline for filing an appeal of a decision approving the permit is within 21 days of "actual notice" of the decision, pursuant to ORS 197.830(3)(a). For other petitioners who were not entitled to notice of the decision, the deadline for filing the appeal is within 21 days of the date the petitioners "knew or should have known" of the decision, pursuant to ORS 197.830(3)(b). *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Because ORS 197.830(3)(a) applies in circumstances where written notice of the decision is required, but not provided, "actual notice" of the decision corresponds to (1) actual written notice of the decision or (2) a copy of the decision, or similar method of notice that is equally authoritative and informative as the written notice of the decision. *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. When a local government is processing a post-acknowledgement plan amendment pursuant to ORS 197.610 to 197.625 and a person requests in writing that he or she be provided notice of the decision, the deadline for appealing that decision to LUBA begins to run when that person is provided notice of the decision. *Jacobsen v. City of Winston*, 62 Or LUBA 493 (2010).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where the relevant approval criteria for a variance to allow a 120-foot-tall wind turbine require evaluation of the adverse effects of the variance on the neighborhood and neighboring residences, a reasonably accurate description of the location of the proposed turbine is an integral part of the "nature of the decision" under ORS 197.830(4). Where the notice of decision describes the wind turbine as being located "near the center of [a 35-acre] property" but the decision approves the location of the wind turbine near the property line 190 feet from petitioners' residence, the notice of the decision does not reasonably describe the nature of the decision. *Wright v. Marion County*, 62 Or LUBA 542 (2010).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a local government considering an application for a zone change defers consideration of compliance with OAR 660-012-0060 to a later review process that does not involve a comprehensive plan amendment or zone change, the local government must ensure that the Department of Land Conservation and Development (DLCD) receives notice of the subsequent review process by imposing an overlay zone or a condition of approval on the zone change that requires such notice to DLCD. *Willamette Oaks, LLC v. City of Eugene*, 59 Or LUBA 60 (2009).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a party appeals a decision on a permit and that party was not entitled to notice of the permit, the appeal to LUBA must be filed within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416(11). ORS 197.830(4)(b). Where the appeal is filed approximately 18 months after the expiration of the period for filing a local appeal, the appeal must be dismissed. *Thalman v. Marion County*, 58 Or LUBA 23 (2008).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. ORS 215.060 provides that action regarding a comprehensive plan shall have no effect, unless 10 days' advance public notice of each hearing is published in a newspaper of general circulation. Where the required 10 days' notice is given, the county's subsequent decision to adopt different parts of the proposed comprehensive plan amendments by separate ordinances does not require new notice under ORS 215.060. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where an urban renewal plan does not establish standards for implementing a city's comprehensive plan, the urban renewal plan is not a new "land use regulation" requiring notice to DLCD under ORS 197.610. *Granada Land Co. v. City of Albany*, 56 Or LUBA 475 (2008).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Petitioners' arguments to LUBA that a local government failed to give notice of its annexation decision within the deadlines specified by statute and by a regional government provide no basis for reversal or remand, where petitioners raised no issue below concerning the adequacy of the notice and petitioners do not allege that the claimed late notice prejudiced petitioners' substantial rights. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. An ambiguous finding that is included in a 23-page findings document supporting a subdivision approval decision is not sufficient to provide actual or constructive notice of a prior county decision that approved a land use compatibility statement concerning grading related to that subdivision. *Wolfgram v. Douglas County*, 52 Or LUBA 536 (2006).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A mistake in a city notice of decision regarding the number of days the notice recipient has to file an appeal with LUBA will not extend the statutory deadline for filing an appeal with LUBA. However, where a city does not clearly state that its notice of a post-acknowledgment land use regulation amendment is a "courtesy notice," rather than notice the city is required to send under ORS 197.615(2), the notice recipient is entitled to 21 days from the date the post-acknowledgment plan amendment notice is provided to file an appeal with LUBA under ORS 197.830(9). *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Under ORS 197.615(2)(a), a petitioner's appearance during the local proceedings that led to city adoption of post acknowledgment land use regulation amendments is not sufficient, by itself, to obligate the city to provide individual written notice of its post acknowledgment decision to petitioner. Under ORS 197.615(2)(a), the person making an appearance during such post acknowledgment proceedings must make a written request that the city provide such notice. *Dobson v. City of Newport*, 47 Or LUBA 589 (2004).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Under the second sentence of ORS 197.830(1), the 21-day deadline for filing an appeal with LUBA does not begin to run until the city gives individual written notice of its post acknowledgment land use regulation amendment to persons who are entitled to receive such notice. Even if the Department of Land Conservation and Development is the only person entitled to receive written notice of the city's decision, the agency is always entitled to such notice and all other persons with standing to appeal to LUBA have 21 days from the date notice is given to the Department of Land Conservation and Development to file an appeal. *Dobson v. City of Newport*, 47 Or LUBA 589 (2004).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. If a city wishes to send courtesy notices that post-date the notices that the city is required to send under ORS 197.615, it must make it clear that the later courtesy notice is not notice that the city is required to send under ORS 197.615. If the city fails to do so, the persons who receive the later courtesy notice are entitled to treat that notice as though it is notice that is required under ORS 197.615, and therefore notice that starts the 21-day period for appealing to LUBA on the date the notice was mailed. *Dobson v. City of Newport*, 47 Or LUBA 589 (2004).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Contrary to *dicta* in *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000), "actual notice" of a decision is provided under ORS 197.830(3)(a) only when the local government provides the written notice of decision required by law. Other circumstances that would lead a reasonable person to know that the local government has made a decision, or that would be sufficient to impute such knowledge, may trigger the 21-day appeal period in ORS 197.830(3)(b) for persons who are not entitled to notice of the decision, but such circumstances are not sufficient to trigger the 21-day deadline in ORS 197.830(3)(a) for persons who are entitled to actual notice of the decision. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. That petitioners signed a petition to the local governing body expressing concern regarding the height of a dwelling is not sufficient to demonstrate knowledge of a building permit to construct that dwelling or the interpretation concerning the proper method of measuring building height contained in that building permit, for purposes of beginning the 21-day deadline for appealing the building permit to LUBA under ORS 197.830(3). *Tirumali v. City of Portland*, 40 Or LUBA 565 (2001).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A 1995 decision *denying* a request for a variance to build a house that exceeds zoning height limits by 6.5 feet does not constitute a decision *approving* construction of a house that is 6.5 feet shorter. An appeal challenging a subsequent building permit that approves construction of a house that is reduced in height is not a collateral attack on the 1995 variance decision and will not be dismissed as untimely filed. *Tirumali v. City of Portland*, 40 Or LUBA 565 (2001).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. The mailing of notice of a conditional use permit decision pursuant to OAR 661-010-0010(3)(b) necessarily requires that notice be sent to the address that was provided by a person entitled to notice. *Norway Development v. Clackamas County*, 40 Or LUBA 276 (2001).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Although a local government cannot be required to provide notice of a land use decision to the correct address when the correct address has not been provided, when the local government has clearly been informed of the correct address, the notice must be sent to the correct address. *Norway Development v. Clackamas County*, 40 Or LUBA 276 (2001).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Any procedural error by a local government in failing to provide written notice of a proposed

annexation decision to persons other than petitioner resulted in no prejudice to petitioner's substantial rights, and therefore provides no basis for reversal or remand of the annexation decision, where petitioner learned of the proposal and made a written appearance opposing the proposal. *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Reference to "a portion of Sunset Highway" in a notice of proposed annexation decision is likely insufficient to provide reasonable notice of the decision under applicable code and statutory requirements. However, where a petitioner nevertheless was able to determine the nature and scope of the proposal and submit written opposition to the proposal, the petitioner may not successfully assert possible injury to other persons' substantial rights as a basis for reversal or remand. *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a local government fails to recognize that it is rendering a permit decision without providing a hearing or the opportunity for a local appeal as required by ORS 215.416(11) or 227.175(10), ORS 197.830(4) provides the applicable deadline for filing an appeal with LUBA. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. The "actual notice" standard of ORS 197.830(4)(a) is identical to the "actual notice" standard of ORS 197.830(3)(a). A petitioner receives "actual notice" of a decision when the petitioner is: (1) provided a copy of the decision; (2) provided written notice of the decision; or (3) circumstances exist that are sufficient to inform the petitioner of both the existence and substance of the decision. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. The brief mention in a staff report that an application was "approved in principle" is not sufficient to provide a petitioner with "actual notice" of a final, appealable land use decision pursuant to ORS 197.830(4)(a). *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. The "actual notice" requirement of ORS 197.830(5) does not necessarily require receipt of a limited land use decision. "Actual notice" is achieved when a person is informed of both the existence and substance of the decision. *Robinson v. City of Silverton*, 38 Or LUBA 785 (2000).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. ORS 197.830(3)(a) (1997) applies, and a notice of intent to appeal must be filed with LUBA within 21 days after a petitioner receives "actual notice" of a decision, where (1) the city mistakenly fails to realize it should be proceeding under ORS 227.175(10)(a) (1997); (2) the city therefore fails to provide notice to persons who are entitled to receive notice of the decision under ORS 227.175(10)(a) (1997); and (3) no local appeal is available that must be exhausted before appealing to LUBA. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Under ORS 197.830(3)(a) (1997), a petitioner receives "actual notice" of the decision when the petitioner

is provided (1) a copy of the decision; (2) written notice of the decision; or (3) information that is equivalent to written notice or a copy of the decision. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where the events a petitioner observed were not sufficient, in and of themselves, to provide "actual notice" of a land use decision more than 21 days before petitioner filed his notice of intent to appeal, the notice of intent to appeal is timely filed under the "actual notice" standard of ORS 197.830(3)(a). That those events may have been sufficient to obligate petitioner to make inquires with the city if the deadline for filing the notice of intent to appeal were governed by the "knew or should have known of the decision" standard in ORS 197.830(3)(b) is irrelevant. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. ORS 197.615(1) and OAR 660-018-0040 require that a local government send a copy of an ordinance amending local land use regulations and the findings supporting the ordinance, "accompanied by appropriate forms provided by" DLCD. Failure to submit the appropriate form with the decision and findings tolls the time to file a notice of intent to appeal with LUBA until 21 days after the proper notice is given. *Craig Realty Group v. City of Woodburn*, 37 Or LUBA 1041 (2000).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Under ORS 197.830(8), the time for appealing an amendment to an acknowledged plan or land use regulation is measured from the time the decision was mailed in accordance with ORS 197.615 and OAR 660-018-0040. Where a party files a notice of intent to appeal within 21 days of the date the decision was mailed in accordance with the statute and rule, the notice of intent to appeal is timely filed. *Craig Realty Group v. City of Woodburn*, 37 Or LUBA 1041 (2000).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. ORS 197.763(2)(b) and 215.416(11) require counties to provide notice and an opportunity for local appeal to "recognized" neighborhood associations; the county cannot apply its code in a manner that limits notice and appeal rights extended by statute. *McKy v. Josephine County*, 37 Or LUBA 554 (2000).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where the county's legislation is ambiguous with respect to whether the county "recognizes" a neighborhood association for purposes of statutory notice and local appeal requirements, LUBA will remand to the county for interpretation in the first instance. *McKy v. Josephine County*, 37 Or LUBA 554 (2000).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where the county administratively approves development under ORS 215.416(11), but fails to provide an adjacent landowner with either the notice or the opportunity for local appeal required by statute, the time to file an appeal of that approval to LUBA is tolled until the landowner receives actual notice, pursuant to ORS 197.830(3). *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Whether petitioner had "actual notice" of the decision under ORS 197.830(3)(a) depends on whether petitioner has received written notice of the decision. That petitioner knew or should have known of the challenged decision more than 21 days before filing the notice of intent to appeal is a dispositive consideration under ORS 197.830(3)(b), but not under ORS 197.830(3)(a). *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. An evidentiary hearing is not warranted to establish that the county orally advised petitioner that the county had approved the challenged application more than 21 days before petitioner filed the notice of intent to appeal, when the relevant issue under ORS 197.830(3)(a) is when the petitioner received actual written notice of the decision. *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A local government's notice of a post-acknowledgment decision is not sufficient to start the 21-day appeal period in ORS 197.830(8) where the post-acknowledgment decision is not yet final. *Schaffer v. City of Turner*, 35 Or LUBA 744 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Even if no one requests notice of a post-acknowledgment plan amendment decision under ORS 197.615(2), the local government is required to mail notice of the decision to DLCD, thus there is always a mailing requirement under ORS 197.615 from which the period for appealing post-acknowledgment plan amendments is measured. *City of Hillsboro v. Metro*, 34 Or LUBA 775 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. The appeal period provided in the second sentence of ORS 197.830(8) applies to any person with standing to appeal, and not only to the person or persons who are entitled to notice under ORS 197.615. *City of Hillsboro v. Metro*, 34 Or LUBA 775 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Whether a person is "adversely affected" within the meaning of ORS 215.416(11)(a) is a fact-specific inquiry that depends upon the nature of the development and its externalities, the proximity of the person's property to the development, and any factors regarding the person's property or activities thereon that render the property more or less susceptible to impacts from the development. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Merely because a person owns property from which he can see or hear a proposed development does not necessarily render that person adversely affected by the decision. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Petitioners demonstrate they are adversely affected by a sewage treatment facility, where there is no attempt to rebut petitioners' allegations that they are adversely affected because they are within "sight and smell" of the facility and petitioners also allege "direct, specific, tangible and negative

impacts" from the proposed facility. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a county makes a permit decision without a hearing and fails to send the notice of decision required by ORS 215.416(11)(a) to persons "adversely affected" by the decision, such adversely affected persons have standing to appeal to LUBA within 21 days of actual notice of the decision. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where notice of a permit decision rendered without a hearing is not provided to persons "adversely affected" by the decision, such adversely affected persons' right to a local appeal is denied and their substantial rights are prejudiced. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where the procedure followed by the county to approve a permit only provided the applicant a right to participate or appeal, the county may not rely on ORS 215.416(11)(a) to contend petitioner lacks standing to appeal because petitioner is not "adversely affected." *Hugo v. Columbia County*, 34 Or LUBA 577 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A local government fails to comply with the notice of decision requirement of ORS 215.416(11)(a) when it fails to send notice to a tribal government's registered agent, where the tribal government has no tax address or other address for receipt of land use notices and the county has for over a decade provided notice to the registered agent. *Confederated Tribes v. Jefferson County*, 34 Or LUBA 565 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Providing a copy of the decision constitutes the notice of the decision and opportunity for appeal required by ORS 215.416(11)(a) if it unambiguously states that a particular decision has been made and provides sufficient information concerning the opportunity for a local appeal. *Confederated Tribes v. Jefferson County*, 34 Or LUBA 565 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Whether notice of decision is "required" under ORS 197.830(3) is determined by the procedure the local government followed, not by the procedure the local government should have followed. *Fechtig v. City of Albany*, 34 Or LUBA 561 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Petitioners' appeal was timely filed pursuant to the second sentence of ORS 197.830(8) where the city failed to provide notice of the decision to petitioners pursuant to ORS 197.615(2). Petitioners were entitled to notice under ORS 197.615(2) notwithstanding that they requested notice of a limited land use decision rather than a land use decision. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. The statutory appeal period under ORS 197.830(8), which provides that the 21-day deadline to appeal to LUBA does not begin until required notice of the decision is given, applies notwithstanding the failure of a local government to correctly process a comprehensive plan or land use regulation amendment under ORS 197.610 to 197.625, and, accordingly, to provide the notice of decision as required by ORS 197.615. *ODOT v. City of Oregon City*, 34 Or LUBA 57 (1998).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. When amendments to a county's comprehensive plan are processed according to post-acknowledgment procedures, the second sentence of ORS 197.830(8) governs, and appeals may be filed within 21 days of the date the decision is mailed, rather than the date the decision becomes final. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A plan and land use regulation amendment processed pursuant to post-acknowledgment procedures may be appealed within 21 days of the date the decision is mailed, as provided in ORS 197.830(8), notwithstanding a local government's failure to comply with all required post-acknowledgment procedures. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A notice of intent to appeal to LUBA must be filed within 21 days of the date the decision becomes final, and misleading or outdated information regarding appeals to LUBA provided in a local government's notice of final decision does not affect that deadline. *Elinski v. City of Lincoln City*, 33 Or LUBA 670 (1997).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Petitioners are not entitled to notice of a permit decision and an opportunity for a local appeal as a party adversely affected or aggrieved under ORS 215.416(11)(a), where petitioners only allege they will be adversely affected by solid waste disposal, but the challenged decision approves a waste treatment facility and does not establish, control or limit where the treated waste will be disposed. *Wilbur Residents v. Douglas County*, 33 Or LUBA 412 (1997).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A county's delay in providing petitioner with notice of decision does not toll the 21-day appeal period set forth in ORS 197.830(8), and under *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625 (1997), LUBA has no jurisdiction over an appeal filed more than 21 days after the county's decision became final. *Michael-Mark v. Yamhill County*, 33 Or LUBA 409 (1997).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Under ORS 197.610 to ORS 197.625, only state notice requirements must be followed to avoid tolling, under ORS 197.830(3), the 21-day appeal period provided in ORS 197.830(8). *Petersen v. Columbia County*, 33 Or LUBA 253 (1997).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a secretarial processing sheet does not list names of persons who testified at a hearing, a notation on the sheet that "Person testifying/submitting comments" was sent notice of decision is

insufficient to demonstrate that petitioner actually was sent the required notice of decision. *Shaffer v. City of Salem*, 33 Or LUBA 57 (1997).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A party cannot claim an exception to the appearance requirement of ORS 197.830(2)(b) when that party is not entitled to notice of a decision, even where the local decision maker has sent to that party notice of related previous decisions. *DLCD v. Polk County*, 33 Or LUBA 30 (1997).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A decision becomes final for purposes of an appeal to LUBA when the prescribed written notice of decision is mailed or personally delivered to the party seeking to appeal. *J.C Reeves Corp. v. Washington County*, 32 Or LUBA 263 (1996).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. If statutory and local code requirements are satisfied, the failure of certain affected persons to receive notice of a zoning ordinance amendment does not make notice of the amendment legally inadequate. *Waite v. City of La Grande*, 31 Or LUBA 77 (1996).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. If a city makes a land use decision without providing a required hearing, ORS 197.830(3) extends the LUBA appeal period. However, ORS 197.830(5) limits the extension to three years unless petitioners establish that the required notice was not provided. *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. If petitioners do not establish they were entitled to notice of a decision, the fact that they did not receive such notice is not evidence that the notice required of the city was not provided. *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. The existence of procedural error resulting from defects in a notice of final decision fails to establish prejudice to substantial rights in the absence of a causal relationship between the defects and petitioner's failure to participate in the process. *Thomas v. Wasco County*, 30 Or LUBA 142 (1995).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. When the city does not deliver notice of a comprehensive plan map amendment and facilities plan amendment to DLCD, as required by ORS 197.615(1), the amendments will not be deemed acknowledged under ORS 197.625(1) by the passage of time. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. While ORS 215.416(11) allows a county to make land use permit decisions without a hearing, it protects an individual's right to participate in a local hearing by requiring that notice of the decision be given to affected persons and that the opportunity for a *de novo* local appeal be provided. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. If a local government fails to provide the notice of a permit decision made without a hearing required by ORS 215.416(11) or 227.175(10), the time for filing a local appeal does not begin to run until an appellant is provided the notice of decision to which he or she is entitled. Because a local appeal is available to such an individual, under ORS 197.825(2)(a) that local appeal must be exhausted before appealing to LUBA. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. When a party is entitled to notice of a post-acknowledgment plan or land use regulation amendment under ORS 197.615(2)(a)(A) and (B), ORS 197.830(8) provides that the local government decision becomes final as to that party on the date the notice of the decision is mailed, rather than on the date the notice of the decision is received. *1000 Friends of Oregon v. Columbia County*, 29 Or LUBA 597 (1995).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where ORS 227.173(3) requires a city to give written notice of its final decision to petitioner, the 21-day period provided by ORS 197.830(8) for filing a notice of intent to appeal to LUBA cannot expire before petitioner receives the notice to which she is entitled. Where such required written notice is not given, a notice of intent to appeal filed after a city planner orally informs petitioner that the city considers certain city council minutes to be its final decision is timely filed. *Noble v. City of Fairview*, 27 Or LUBA 649 (1994).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. If a local government does not provide notice to DLCD of a post-acknowledgment comprehensive plan or land use regulation amendment, as required by ORS 197.610 and 197.615, it improperly construes substantive provisions of applicable law and, under ORS 197.835(7)(a)(D), the challenged post-acknowledgment amendment decision must be remanded. *Oregon City Leasing, Inc. v. Columbia County*, 26 Or LUBA 203 (1993).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a local hearing is provided and a party is entitled to written notice of the decision under ORS 215.416(10), ORS 197.830(8) rather than ORS 197.830(3) establishes the deadline for filing a notice of intent to appeal. Under ORS 197.830(8), a notice of intent to appeal must be filed within 21 days after a decision becomes final. *DLCD v. Crook County*, 25 Or LUBA 826 (1993).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Under ORS 197.830(8) and 215.416(10), a decision becomes final for purposes of appealing to LUBA "only after the required written notice of the decision is mailed or personally delivered to the party seeking to appeal." *League of Women Voters v. Coos County*, 82 Or App 673, 729 P2d 588 (1986). *DLCD v. Crook County*, 25 Or LUBA 826 (1993).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. If a notice of intent to appeal a post-acknowledgment zone change is filed more than 21 days after petitioner was given the notice of decision it is entitled to under ORS 197.615, the appeal must be dismissed. *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. The purpose of the notice of decision required by ORS 227.173(3) is to inform the parties that a city has made a final, appealable decision on a permit application. A notice that identifies the application to which it relates, states the city council made a decision denying the application on a particular date and provides that the city council's decision may be appealed to LUBA, satisfies ORS 227.173(3). *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where the challenged decision approves a "permit," and the petitioner was entitled to written notice of the decision under ORS 227.173(3), the petitioner has 21 days from the date the notice was mailed to him to appeal the challenged decision to LUBA. *A Storage Place v. City of Tualatin*, 24 Or LUBA 637 (1993).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. In rendering a decision on a permit, a city is required to hold at least one public hearing or provide notice of the decision and an opportunity for an appeal. A city's failure to do so requires that the decision be remanded. *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. A local government's failure to provide a person with a required individual written notice of hearing is not sufficient, by itself, to entitle that person to be given individual written notice of the decision or to toll the 21-day deadline for filing a notice of intent to appeal with LUBA until individual written notice of the decision is provided. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Under ORS 197.830(3), where a local government renders a decision without providing a hearing, an appeal to LUBA must be filed within 21 days of actual notice of the decision, where notice of the decision is required, or within 21 days of the date a person knew or should have known of the decision, where no notice of the decision is required. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a person participated in the legislative proceedings that led to the challenged decision and also participated in a related land use proceeding where the challenged decision was discussed, that person knew or should have known of the challenged decision as early as the date the discussion of the challenged decision occurred. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. The 21-day period for filing a notice of intent to appeal established by ORS 197.830(8) begins to run only after the party seeking to appeal is given notice of the local government decision to which he is entitled by statute. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. ORS 197.830(8) tolls the running of the time for filing a notice of intent to appeal a post-acknowledgment comprehensive plan or land use regulation amendment for a petitioner who did

not receive notice to which *that petitioner* is entitled under ORS 197.615. It does not toll the time for the filing of *all* notices of intent to appeal post-acknowledgment amendments simply because DLCD, or any other person entitled to notice under ORS 197.615, was not given such notice. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. By statute, adjoining property owners within specified distances of property for which discretionary development approval is requested are entitled to notice of the local proceedings and an opportunity for a public hearing. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. That a local government is required to provide particular individuals with written notice of a land use decision has no bearing on the requirement that available local administrative remedies be exhausted before appealing to LUBA. *Pautler v. City of Lake Oswego*, 23 Or LUBA 339 (1992).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a city approves a permit without providing the public hearing or notice of decision and opportunity for a local appeal required by ORS 227.175(3) and (10), a notice of intent to appeal at LUBA is timely filed if it is filed within 21 days after petitioners received actual notice of the permit decision. *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Individual written notice of decision is not required for a county to make a legislative land use decision. *Crone v. Clackamas County*, 21 Or LUBA 102 (1991).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a local government provides neither notice of the decision nor an opportunity to appeal a decision rendered without a public hearing, to anyone other than the applicant, it does not comply with ORS 227.175(10). *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a local government fails to provide the statutorily required written notice of decision to a party entitled to receive such notice, the 21-day deadline for filing an appeal with LUBA does not begin to run until the required written notice of decision is provided. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a local government fails to provided the statutorily required notice of hearing and hearing prior to making a decision on a permit, a person does not thereby become entitled to written notice of the decision simply because that person might have appeared and become a party entitled to written notice of the decision had the statutorily required notice of hearing and hearing been provided. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where petitioners were entitled under ORS 215.416(11) to written notice of a local permit decision made without a hearing, and such written notice was not given, the time for filing petitioners' local

appeal did not begin to run and, therefore, their subsequent appeal to the planning commission was timely filed. *Komning v. Grant County*, 20 Or LUBA 481 (1990).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. ORS 197.615(2)(a) requires that a local government give notice of decisions amending its acknowledged comprehensive plan and land use regulations to persons who participate during the local proceedings and request such notice in writing. *Club Wholesale v. City of Salem*, 19 Or LUBA 576 (1990).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a local government has no rules establishing specific procedures or forms for persons participating in post-acknowledgment plan and land use regulation amendment proceedings to utilize in making a written request for notice under ORS 197.615(2)(a)(B), and has no rules establishing to whom requests for such notice must be directed, a request for a copy of the city's final *decision* directed to the city attorney is sufficient to satisfy ORS 197.615(2)(a)(B). *Club Wholesale v. City of Salem*, 19 Or LUBA 576 (1990).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a local government provides a party with a copy of the decision amending its comprehensive plan and land use regulations, but fails to advise the party of the date the challenged decision became final or of the requirements for appealing the decision to LUBA, the notice requirements of ORS 197.615(2)(b)(B) and (D), applicable to post-acknowledgment plan and land use regulation amendments, are not satisfied. *Club Wholesale v. City of Salem*, 19 Or LUBA 576 (1990).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where a county finds applicable approval standards are or can be met and grants first stage PUD approval, but includes a condition that (1) final grading and drainage plans be submitted later, and (2) approval of such plans follow a procedure that does not provide notice or an opportunity for further public involvement, the proper way to challenge the county's decision to proceed in such a manner is to appeal the first stage PUD approval decision. Parties may not fail to challenge that decision and appeal the subsequent approval of the final grading and drainage plans, arguing that such approvals are permits subject to the notice and hearing requirements of ORS 215.416, and that their failure to "appear" or file an appeal of such approvals within 21 days is excused because of the county's failure to observe such notice and hearing requirements. *J.P. Finley & Son v. Washington County*, 19 Or LUBA 263 (1990).

25.3.7 Local Government Procedures – Compliance with Statutes – Notice of Decision. Where the petitioner was never provided the written notice to which it was entitled under ORS 227.173(3), the 21-day period for the petitioner to appeal to LUBA did not expire. *Harvard Medical Park, Ltd. v. City of Roseburg*, 19 Or LUBA 555 (1990).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where state statute requires that a local government provide either a public hearing before ruling on an application for a statutory permit or an opportunity for an appeal that includes a *de novo* public hearing, although the local government may require a notice of appeal that sets forth with reasonable particularity the issues that the appealing party will raise at the hearing, the local government may not, consistent with the statute, (1) make that notice requirement a jurisdictional bar to obtaining the hearing, (2) limit the issues specified to five types of issues, or (3) approve or reject requests for hearings based on a qualitative assessment of how well the appellant has explained the issues specified. *Landwatch Lane County v. Lane County*, 79 Or LUBA 96 (2019).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A city's rejection of petitioner's as-applied challenge of a city's appeal fee during the city's proceeding on intervenor's land use application, and legal challenges to the city's future assessment of actual attorney's fees is not excluded from LUBA's jurisdiction by the "fiscal" exception. However, to the extent petitioner challenges the amount of the actual attorney fees, that challenge is outside the Board's scope of review because that fee dispute arose after the city issued the fee invoice and after the city made a decision on petitioner's underlying appeal, and is therefore a "fiscal" decision. The fact that the local record includes the invoice for the actual attorney fees petitioner was charged for his local appeal does not convert the amount of the fees in that invoice into an issue that is reviewable by LUBA. *Nicita v. City of Oregon City*, 78 Or LUBA 463 (2018).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. In an as-applied challenge, a petitioner cannot challenge the manner in which the city adopted its appeal fee structure. Instead, LUBA's inquiry regarding petitioner's as-applied challenge to the appeal fee charged by the city, is whether petitioner has produced a *prima facie* case that the fee that the city charged petitioner pursuant to the city's previously adopted fee schedule is "more than the average cost of such appeals or the actual cost of the appeal." ORS 227.180(1)(c). *Nicita v. City of Oregon City*, 78 Or LUBA 463 (2018).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A county is not required to evaluate a petitioner's standing to file a local appeal based on the presumption that the petitioner was entitled to notice of the decision, where there is no dispute that the petitioner did not live within the notice area and was not entitled to notice of the decision at the time the decision was made. That the petitioner now lives within the notice area does not establish entitlement under state or local law to notice of the decision or to file a local appeal. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. The exhaustion/waiver principle articulated in *Miles v. City of Florence*, 190 Or App 500 (2003), requires the petitioner to identify issues in the local appeal to the local appeal body, regardless of whether the appeal body conducts a hearing or whether the local appeal proceeding is on the record or *de novo*. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. ORS 215.422(1) authorizes a county to impose a local appeal fee to defray the costs of "acting upon an appeal," but that authorization is not limited to local appeal processes where the county conducts a full local

appeal, and does not exclude local appeal processes where the county initially makes a determination whether to hear the full appeal and declines to do so. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a county's local appeal regulations provide an opportunity to request a *de novo* evidentiary hearing, in order to preserve the ability to challenge the reasonableness of the local appeal fee before LUBA, the petitioner must at a minimum request a *de novo* evidentiary hearing before the final decision maker at which the petitioner can submit evidence to establish a *prima facie* case that the fee is unreasonable. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A petitioner's challenge to a city's local appeal fee, on the grounds that the record does not include evidence establishing that the fee is consistent with ORS 227.180(1)(c), is not a basis for reversal or remand, where the city's final decision maker lacks authority under the city code to develop an evidentiary record regarding the appeal fee. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Even if county code language could be interpreted to bar non-applicant parties who participated in the evidentiary phase of a local permit proceeding from participating in an on-the-record appeal filed by the applicant to challenge permit conditions of approval, such a local appeal procedure would violate ORS 197.763 and 215.422. *Families for a Quarry Free Neighborhood v. Lane County*, 64 Or LUBA 297 (2011).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. In order to allow effective review of an as-applied appeal fee challenge in circumstances where, due to local regulations, the delegated local final decision maker does not have authority to accept new evidence or to consider appeal fee challenges, the local final decision maker must allow the fee challenger to submit argument and evidence into the record so that LUBA can perform its review function. *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2011).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. In *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995), LUBA held the city's land use appeal fees were "an integral part of the zoning code provisions governing the processing and review of land use applications." LUBA has relied on that holding in a number of subsequent appeals to reject jurisdictional challenges to appeals of local government decisions that adopt or amend application or appeal fee schedules. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. LUBA has relied on *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995) in a number of decisions to reject jurisdictional challenges to appeals that assert "as-applied" challenges to previously adopted land use permit and appeal fee schedules. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A city decision to charge a subdivision applicant the actual cost of processing his subdivision application is not a land use decision that is subject to review by LUBA, where the city's final decision demanding payment of the actual costs was not made as part of its decision on the merits of the subdivision application and instead postdates that decision on the merits by over one year. The city's later decision to demand payment of the actual cost of processing the subdivision application is a "fiscal" decision, and under the reasoning in *Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), *rev dismissed*, 291 Or 878, 635 P2d 647 (1981), is not a land use decision subject to LUBA review. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. An approval standard requiring a finding that a proposed boardwalk in a natural resource area will not "seriously interfere with the preservation of fish and wildlife habitat areas and habitat" appears to involve the "discretionary approval of a proposed development of land," and is therefore a "permit" as defined at ORS 215.402(4). If so, ORS 215.416(11)(b) limits to $250 the local appeal fee the county can charge for the initial hearing on the appeal. *Jensen Properties v. Washington County*, 61 Or LUBA 155 (2010).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. ORS 215.422(1)(c) allows counties to set fees to defray the costs of local appeals. Determining the "average cost of such appeals" for purposes of ORS 215.422(1)(c) requires some kind of arithmetic calculation of the average of a set of numbers. *1000 Friends of Oregon v. Crook County*, 60 Or LUBA 232 (2009).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. To reliably determine the "average" costs of an appeal under ORS 215.422(1)(c), the set of numbers used to generate the required average must be broadly representative or reflective of the range of appeal costs that the county is likely to experience. *1000 Friends of Oregon v. Crook County*, 60 Or LUBA 232 (2009).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. ORS 215.422(1)(c) does not require a county to calculate appeal costs based on a contemporaneous accounting of actual staff time and costs in past appeals, or provide that appeal costs derived solely from estimates of costs cannot constitute substantial evidence for purposes of establishing an appeal fee under the statute. Any evaluation of appeal costs will involve some estimation, even if the county bases that evaluation as much as possible on records of actual costs incurred in prior appeals. *1000 Friends of Oregon v. Crook County*, 60 Or LUBA 232 (2009).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. The principal regulatory concern of ORS 215.422(1)(c) is to place limitations on the maximum amounts a county can charge for processing a local appeal. That concern is not implicated by adoption of multiple appeal fees that apply to different types of appeals, as long as the fees so adopted are consistent with the statute's limitations within each different type of appeal. *1000 Friends of Oregon v. Crook County*, 60 Or LUBA 232 (2009).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A county may define different categories of appeals that tend to have similar levels of appeal costs, and within a specific category determine a set of costs for processing that type of appeal. Based on that set of costs, the county can calculate the arithmetic average of the set, and determine the average cost of appeals in that category. Having determined the relevant average, the county can then establish an appeal fee applicable only to that category of appeals that does not exceed the average cost of appeals in that category. *1000 Friends of Oregon v. Crook County*, 60 Or LUBA 232 (2009).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Under ORS 215.422(c), if a county chooses not to require a county-produced transcript and fee, it may instead allow appellants to submit a transcript of those "portions" of the media recording of one or more hearings that are deemed "relevant." *1000 Friends of Oregon v. Crook County*, 60 Or LUBA 232 (2009).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. As-applied challenges to previously adopted fee schedules are permissible, overruling *Maxwell v. Lane County*, 39 Or LUBA 556, *rev'd and rem'd on other grounds*, 178 Or App 210, 35 P3d 1128 (2001), and *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995). *Mazorol v. City of Bend*, 59 Or LUBA 260 (2009).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A petitioner establishes a *prima facie* case that a city appeal fee schedule may violate ORS 227.180(1)(c) when the city has a two-tiered review system where the city council can either review a lower decision on the merits or decline review and the city refunds 75 percent of the appeal when the city council declines review *except* when an appellant appeals to LUBA, in which case the city does not refund any of the appeal fee. Once a petitioner has established a *prima facie* case, the burden shifts to the city to demonstrate that the appeal fee schedule does not violate ORS 227.180(1)(c). *Mazorol v. City of Bend*, 59 Or LUBA 260 (2009).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A county erred by dismissing a local appeal of a building permit where (1) the county's land use regulations provided a right of local appeal to challenge decisions that required the exercise of significant discretion, (2) the county was required to determine if the dwelling that was the subject of the building permit was lawfully established, and (3) the history of the development of the property required the county to exercise considerable discretion to determine if the dwelling was lawfully established. *Kuhn v. Deschutes County*, 58 Or LUBA 483 (2009).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a party challenges a resolution adopting fees charged by the county for permits and appeals, the burden is on the county to include evidence in the record that demonstrates that the fees were set consistent with the statute's mandate that the fees that are subject to ORS 215.416(1) and ORS 215.422(1)(c) will not exceed average or actual costs of processing permits or appeals. *Sommer v. Josephine County*, 58 Or LUBA 505 (2009).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. ORS 215.416(11)(a)(E)(ii) prohibits local governments from limiting issues that can be raised in an

appeal of a permit decision made without a prior hearing to those issues specified in the local notice of appeal. A local government cannot avoid that prohibition by allowing parties to raise the issue at the appeal hearing, and then summarily dismissing the local appeal for failure to specify the basis for the appeal in the local notice of appeal. *Woodard v. Yamhill County*, 56 Or LUBA 141 (2008).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a county provides two rounds of appeals to the governing body, both rounds of appeals constitute as single proceeding, and the fact that the county did not require that petitioner pay a second appeal fee for the second appeal does not preclude petitioner from challenging imposition of the first appeal fee. *Young v. Crook County*, 56 Or LUBA 704 (2008).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. While acknowledged comprehensive plans and regulations are not reviewable for compliance with statewide planning goals and rules, quasi-judicial land use decisions that apply local regulations that were adopted in an earlier, unappealed legislative decision are not generally immune from an as-applied challenge for compliance with applicable statutes. *Young v. Crook County*, 56 Or LUBA 704 (2008).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A county is not required to produce evidence during the hearing on a local appeal that the appeal fee charged to the petitioner is "more than the average cost of such appeals or the actual cost of the appeal" under ORS 215.422(1), where the petitioner merely asserts that the appeal fee does not comply with the statute but there is no evidence in the record supporting that assertion. *Young v. Crook County*, 56 Or LUBA 704 (2008).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A planning director decision not to refer a revocation request to the planning commission for a hearing is not a "permit" decision as that term is defined at ORS 227.160(2), because it does not constitute the "discretionary approval of a proposed development of land." *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A proceeding to revoke a permit is more analogous to an enforcement action than to a permit proceeding under ORS 227.175, and thus is not subject to the statutory procedural and other requirements applicable to permit proceedings. *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Because ORS 215.422(1)(c) explicitly limits the appeal fee that counties can charge for certain land use appeals, evidence that total annual revenues produced by over 200 county fees fall short of total planning department annual expenses is not sufficient to demonstrate that the fees collected for three types of appeals comply with ORS 215.422(1)(c). A more particularized evidentiary effort to focus on the costs and expenses associated with the three types of appeals subject to ORS 215.422(1)(c) is required. *Landwatch Lane County v. Lane County*, 52 Or LUBA 140 (2006).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Absent any contravening evidence or need for more detailed analysis, staff testimony that proposed application fee increases accurately reflect increased costs and are less than the maximum amount that cities may charge under ORS 227.175(1) is substantial evidence supporting a finding of compliance with the statute. *Doty v. City of Bandon*, 49 Or LUBA 411 (2005).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Limiting issues addressed in a decision following a *de novo* hearing under ORS 214.416 to issues specifically raised in the local notice of appeal is inconsistent with ORS 215.416(11)(a)(E), which provides that the "testimony, argument and evidence shall not be limited to issues raised in a notice of appeal[.]" *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a local code appeal requirement merely requires that the local appellant include a "statement of interest of the person seeking review," the local government may not dismiss the local appeal because the local appellant does not demonstrate in the notice of local appeal that the appellant is "adversely affected or aggrieved." If a local appellant is going to be required to demonstrate he or she is adversely affected in the local notice of appeal, and is not going to be allowed an opportunity to make that demonstration at the statutorily required *de novo* hearing, the local code must make that requirement clear. *Crowley v. City of Bandon*, 48 Or LUBA 545 (2005).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. By statute, an opportunity for a *de novo* appeal must be provided where a permit decision is made without first providing a hearing. ORS 227.175(10)(a)(E)(ii) provides that at the required *de novo* hearing "[t]he presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal[.]" Under these statutes it is highly unlikely that the legislature could have intended that a city may dismiss a local appeal, without first providing a *de novo* hearing, simply because the appellant's local notice of appeal did not sufficiently identify the issues to be asserted on appeal. *Crowley v. City of Bandon*, 48 Or LUBA 545 (2005).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Once an administrative permit approval decision is appealed locally, ORS 227.175(10)(a)(A) and (D) require that a city provide a *de novo* appeal and a decision on that appeal. A city fails to provide the statutorily required *de novo* appeal when it relies on a committee rule that is not part of the zoning ordinance and was not adopted by the city council to decide that a 2-2 vote of the committee results in denial of the appeal. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Under ORS 227.180(1)(c), the question of whether local appeal fees are "reasonable" is not separable from the question of whether the appeal fees are not more than the average or actual cost of such appeals, absent evidence that the local government spends an unreasonable amount of time or incurs unreasonable expenses in processing appeals. *Friends of Linn County*, 45 Or LUBA 408 (2003).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. That the legislature has capped local fees for providing a hearing under ORS 215.416(11)(b) and 227.175(10)(b) at $250 does not demonstrate that a $500 fee to appeal a planning commission

decision to the governing body is unreasonable, for purposes of ORS 227.180(1)(c). *Friends of Linn County*, 45 Or LUBA 408 (2003).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Land use decisions appealed to LUBA pursuant to ORS 197.830(3) or (4) are not subject to the ORS 197.825(2)(a) exhaustion of remedies requirement absent circumstances where the local government voluntarily grants a local appeal, while decisions appealed pursuant to ORS 197.830(9) are subject to the exhaustion of remedies requirement. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a local government conducts a hearing but fails to provide notice of the decision to a petitioner who appeared at the hearing, that failure of process does not obviate the requirement that the petitioner exhaust all administrative remedies below before appealing to LUBA. In such circumstances, the local government must accept a properly filed local appeal from the petitioner and cannot reject that local appeal on the basis of an imperfection that is caused by the local government's own procedural error. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a county order establishes a fee of $700 to, among other things, request a hearing on a permit application or file a local appeal of a permit decision rendered without a hearing, LUBA will remand the order where the $700 fee appears to violate the $250 maximum fee established by ORS 215.416(11)(b), and the county offers no defense of the order. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 270 (2002).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a timely request is filed to locally appeal a decision made without a hearing under ORS 215.416(11) or 227.175(10), the local government must conduct a *de novo* hearing and render a final decision approving or denying the permit application. Where the local government conducts a *de novo* hearing and renders a final decision, the decision made without a hearing is not and cannot become a final decision, and cannot be appealed to LUBA under ORS 197.830(4) or any other provision of law. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 597 (2002).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a timely request is filed to locally appeal a decision made without a hearing under ORS 215.416(11) or 227.175(10) and a *de novo* hearing is held, but the request is withdrawn and the local appeal dismissed prior to reaching a final decision on the local appeal, the underlying decision made without a hearing becomes the county's final land use decision on the permit application. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 597 (2002).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where the *de novo* hearing provided under ORS 215.416(11) or 227.175(10) is dismissed without reaching a decision on the permit application, the underlying decision made without a hearing becomes the final land use decision on the permit application, as of the date of the order dismissing the local appeal. The underlying decision does not become final retroactively back to the date the local

appeal period expired. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 597 (2002).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A local code providing that the scope of review for an appeal of a planning commission decision to the city council is a "Record Hearing," and defining a "Record Hearing" as a hearing limited to review of the existing record or evidence previously submitted, does not limit the *legal issues* or arguments that may be presented on appeal; only the *evidence* that may be considered. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A local appellate body may, on its own, raise issues that are not presented in the notice of local appeal, where the local code does not specifically limit the scope of review on appeal to the issues identified in the notice of local appeal. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where new evidence is improperly submitted as part of an applicant's final legal arguments, but that evidence has no bearing on the relevant approval criteria, the error in accepting the new evidence results in no prejudice to other parties' substantial rights and provides no basis for reversal or remand. *Farrell v. Jackson County*, 41 Or LUBA 1 (2001).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. That the city council declined to hear petitioner's local appeal of a planning commission site design approval does not provide a basis to reverse the city's decision or award attorney fees to petitioner under ORS 197.835(10), even if the city council's decision was motivated by a desire to avoid violating the ORS 227.178(1) requirement that the city issue a final decision on an application for a limited land use decision within 120 days. ORS 197.835(10) applies where the local government *denies* an application in a bad faith attempt to avoid the requirements of ORS 227.178. It does not apply to a decision approving an application. *Elliott v. City of Redmond*, 40 Or LUBA 242 (2001).

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

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A county's code cannot define which participants in a land use proceeding are "aggrieved" by a land use decision, within the meaning of ORS 215.416, more restrictively than the statute. *Friends of Douglas County v. Douglas County*, 39 Or LUBA 156 (2000).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A county errs in denying the opportunity for local appeal of a permit approval on the grounds that the petitioner is not "aggrieved" by the county's decision within the meaning of ORS 215.416(11), where petitioner is an organization interested in the correct application of the county's land use laws and it appeared before the county to oppose the county's approval. That petitioner is a recently formed organization and appears for the first time before the county is not a basis to conclude that

petitioner is not aggrieved by the county's decision. *Friends of Douglas County v. Douglas County*, 39 Or LUBA 156 (2000).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. ORS 197.763(2)(b) and 215.416(11) require counties to provide notice and an opportunity for local appeal to "recognized" neighborhood associations; the county cannot apply its code in a manner that limits notice and appeal rights extended by statute. *McKy v. Josephine County*, 37 Or LUBA 554 (2000).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where the county's legislation is ambiguous with respect to whether the county "recognizes" a neighborhood association for purposes of statutory notice and local appeal requirements, LUBA will remand to the county for interpretation in the first instance. *McKy v. Josephine County*, 37 Or LUBA 554 (2000).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a local government refuses to consider petitioner's letters and refuses petitioner's requests to present testimony during the local proceedings, the appearance requirement of ORS 197.830(2) is obviated. *Hugo v. Columbia County*, 34 Or LUBA 577 (1998).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Providing a copy of the decision constitutes the notice of the decision and opportunity for appeal required by ORS 215.416(11)(a) if it unambiguously states that a particular decision has been made and provides sufficient information concerning the opportunity for a local appeal. *Confederated Tribes v. Jefferson County*, 34 Or LUBA 565 (1998).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Neither ORS 215.416(11)(a) nor 197.763 provides any requirements regarding what constitutes "filing" a local appeal. Nothing in those statutes precludes a local government from requiring that a local appeal be physically delivered to the county within the appeal period. *Confederated Tribes v. Jefferson County*, 34 Or LUBA 565 (1998).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. There is no basis for applying the doctrine of unique circumstances to local land use decisions. If local regulations make failure to timely file an appeal a jurisdictional defect, LUBA has no authority to develop an equitable remedy that overcomes such a defect. *Mountain Gate Homeowners v. Washington County*, 34 Or LUBA 169 (1998).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Although a local government may narrow its own scope of review in local appeals, it cannot narrow LUBA's scope of review over issues raised at any time below. *Laurence v. Douglas County*, 33 Or LUBA 292 (1997).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a party receives notice of a decision and subsequent appeal, and the record contains no evidence that the party attempted to appear at the hearing, that party cannot claim that it was denied the opportunity

to participate in the appeal hearing when it had no notice of the withdrawal of the appeal. *DLCD v. Polk County*, 33 Or LUBA 30 (1997).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a local government is not required to conduct a hearing, ORS 197.830(3) does not apply, nor does that statute operate to allow a party's lack of notice of a decision to toll the time limit for appeal. *DLCD v. Polk County*, 33 Or LUBA 30 (1997).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A pro forma review by the county board of commissioners that must result in approval of a planning commission decision does not satisfy the requirement stated in ORS 197.050 and 197.060 that exceptions to the Statewide Planning Goals be adopted by the county governing body. *Young v. Douglas County*, 31 Or LUBA 545 (1996).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A petitioner is not required to go through the process of appealing from the county planning commission to the county board of commissioners to obtain a review the board of commissioners is already required by statute to give. *Young v. Douglas County*, 31 Or LUBA 545 (1996).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. The local appeal from an administrative decision provided by ORS 227.175(10) must be exhausted prior to an appeal to LUBA, which otherwise lacks jurisdiction under ORS 197.825(2)(a). *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. When petitioners fail to satisfy the county's jurisdictional appeal provision requiring local appellants to state the basis of their standing, the county is not at liberty to take notice of petitioners' standing or to excuse their failure satisfy the requirement as "harmless error." *Tipton v. Coos County*, 29 Or LUBA 474 (1995).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. When a county zoning ordinance provision states that a local appeal will be dismissed if the requirements of the provision are not satisfied, the provision is jurisdictional. An appellant's failure to satisfy a jurisdictional requirement results in dismissal of the appeal. *Tipton v. Coos County*, 29 Or LUBA 474 (1995).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. While ORS 215.416(11) allows a county to make land use permit decisions without a hearing, it protects an individual's right to participate in a local hearing by requiring that notice of the decision be given to affected persons and that the opportunity for a *de novo* local appeal be provided. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a local appeal is available, the purpose of the exhaustion requirement of ORS 197.825(2)(a) is to assure that the local government decision is reviewed by the highest level local decision making body the

local code makes available, before an appeal to LUBA is pursued. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. If a local government fails to provide the notice of a permit decision made without a hearing required by ORS 215.416(11) or 227.175(10), the time for filing a local appeal does not begin to run until an appellant is provided the notice of decision to which he or she is entitled. Because a local appeal is available to such an individual, under ORS 197.825(2)(a) that local appeal must be exhausted before appealing to LUBA. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. ORS 227.180(1) prescribes procedures only for appeals from a *hearings officer's* decision to a planning commission or city council, not for appeals from a *planning commission* decision to a city council. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Petitioner's contention that the fee charged for a local appeal violates ORS 227.180(1)(c) must fail where there is no evidence in the record establishing that the local appeal fee is unreasonable or that it exceeds the average or actual cost of such an appeal, and petitioner does not move for an evidentiary hearing to submit such evidence. *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where petitioner appeals a decision by a local governing body not to accept petitioner's appeal of a planning commission decision, LUBA's scope of review is limited to whether the governing body correctly decided not to accept petitioner's local appeal. LUBA will not review the merits of the planning commission decision. *Cummings v. Tillamook County*, 29 Or LUBA 550 (1995).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a county code allows a "permit" decision to be made without a hearing, but provides for a local appeal only by the permit applicant, ORS 215.416(11) nevertheless requires the county to provide an opportunity to obtain a hearing through an appeal to persons who would have had a right to notice if a hearing had been scheduled and who are adversely affected or aggrieved by the decision. In these circumstances, a county does not err by allowing such persons to pursue a local appeal. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where the local code provides for an initial decision on a permit application without a hearing, subject to obtaining a hearing through a *de novo* local appeal, regardless of a code requirement that the bases for appeal be specified in the local notice of appeal, the local appellant is entitled to raise any relevant issue during the local appeal. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where ORS 215.416(3) and (11) require a county to provide an opportunity for a local appeal of a design review decision made by the planning director without a hearing, the county cannot interpret a code provision requiring that "final design review approval" has been granted to be satisfied when a

local appeal of the planning director's design review approval decision is pending. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. ORS 197.195, which establishes minimum procedural requirements for making limited land use decisions, does not require that local governments provide either a public hearing or a local appeal. ORS 227.175(3) and (10) do not apply to limited land use decisions, because they are not "permits," as defined in ORS 227.160(2). *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A statement that failure to raise an issue before the planning commission precludes appeal to the local governing body does not satisfy the requirement of ORS 197.763(3)(e) that a local government hearing notice include a statement that failure to raise an issue precludes appeal to LUBA on that issue. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Even where a governing body's review of the decision of a lower level decision maker is limited to the evidentiary record below, the governing body must either make its own decision and findings regarding compliance with applicable approval standards, adopt by reference the decision and findings of the lower level decision maker, or in some other way take action such that a decision regarding compliance with applicable approval standards becomes final and subject to appeal to LUBA as part of the governing body's decision. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Local government provisions narrowing the scope of review during local appeals do not similarly narrow LUBA's scope of review under ORS 197.763(1) and 197.835(2). *Davenport v. City of Tigard*, 25 Or LUBA 67 (1993).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where neither the local code nor or any statute creates a "duty" on the part of a local government to advise local appellants of local appeal requirements stated in the local code itself, that the county provided petitioners with a detailed information sheet concerning local appeals which did not indicate the existence of the county's "jurisdictional" requirement that a local appeal document be signed, provides no basis for reversal or remand of the challenged decision. *Breivogel v. Washington County*, 24 Or LUBA 63 (1992).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Pursuant to 215.406(1) and 215.422(2), a county governing body may designate a hearings officer to conduct hearings on permit applications and may provide that the hearings officer's decision is the final county decision. *Wickwire v. Clackamas County*, 21 Or LUBA 278 (1991).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. ORS 215.416 and 215.422 do not prohibit a county from establishing a fee requirement for appeals of decisions

on permit applications made by the planning director without a hearing. *DLCD v. Jackson County*, 21 Or LUBA 93 (1991).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a local government provides neither notice of the decision nor an opportunity to appeal a decision rendered without a public hearing, to anyone other than the applicant, it does not comply with ORS 227.175(10). *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Local government requirements that an appeal be filed and that a fee be paid before a second evidentiary hearing is held do not violate the requirement of ORS 197.763(3)(f)(B) that two or more evidentiary hearings be "allowed," where only 10 days notice of the first hearing is provided. *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7 (1990).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Where a local government elects to give only 10 days notice of the initial evidentiary hearing, subject to a right to a second evidentiary hearing on appeal, ORS 197.763(3)(f)(B) requires that a participant be allowed to raise new issues during the second evidentiary hearing. A local government could not, consistent with ORS 197.763(1), (3)(f)(B), and (5)(b) cut off that right prematurely by requiring that all issues to be raised in the second hearing be identified in the notice of appeal. *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7 (1990).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. A city's failure to adopt ordinances specifying the city council's scope of review in appeals of planning commission decisions and providing procedures for hearings on such appeals, as required by ORS 227.170, is a procedural error. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. If a county neither (1) holds a public hearing before making a decision on an application for a "permit," as defined in ORS 215.402(4), nor (2) provides an opportunity to appeal that decision at the county level, it fails to comply with the requirements of ORS 215.416(3), (5) and (11). *Flowers v. Klamath County*, 18 Or LUBA 647 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A petitioner fails to satisfy OAR 661-010-0030(4)(d) or to establish that the issues raised in its six assignments of error were raised as required by ORS 197.763(1) and ORS 197.835(3) where the petitioner broadly cites its submittals into the record during the proceedings before the local government. Such a broad citation is not a technical violation where it interferes with the substantial rights of the parties by improperly shifting the burden to the respondents to review over one hundred pages of the record to determine whether the issues raised in six assignments of error in an overlength, 68-page petition for review have been preserved. *H2D2 Properties, LLC v. Deschutes County*, 80 Or LUBA 528 (2019).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). While the "raise it or waive it" requirement of ORS 197.763(1) and 197.835(3) does not apply to legislative proceedings, where a party has an opportunity to object to a procedural error during a legislative proceeding, the party must do so in order to seek remand based on that error. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where petitioner had the opportunity to object to the use of the 2017 USGS report and requested more time to respond but did not use that opportunity to raise the issue of which report's data to use. The right to raise the issue under ORS 197.763 was waived. *Gould v. Deschutes County*, 78 Or LUBA 118 (2018).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a county's notice described a proposed project as a bed and breakfast inn and campground, but the county only approved the bed and breakfast inn but not the campground, petitioners had an inadequate opportunity to object to the alleged procedural error because they could not know until the county issued its decision that the final decision would approve something different than the proposal that was noticed. *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.830(3) operates to potentially allow a petitioner a delayed period of time to file a LUBA appeal, but it is not a source of procedural requirements that a local government approved development that differs from the development described in the notice of hearing is not procedural error. *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Even if a motion to take evidence outside the record under OAR 661-010-0045(1) were otherwise proper, LUBA will deny such motion where petitioners have failed to demonstrate that the issue the proffered evidence goes to was raised with the specificity required by ORS 197.763(1), and even if LUBA viewed petitioners' arguments as one particular "argument" toward the general issue, that issue does not appear to have raised even in a most general way. Because the proffered evidence goes to an issue that is not within the Board's scope of review, petitioners have not established a basis under OAR 661-010-0045(1) to grant the motion to consider the evidence for any purpose, and such motion will be denied. *Renken v. City of Oregon City*, 78 Or LUBA 1070 (2018).

25.3.9 Local Government Procedures – Compliance with Statute – Raise It/Waive It (ORS 197.763). An argument that the issue raised in an assignment of error is waived is not a basis to dismiss the appeal as moot. If LUBA agrees with that argument, the appropriate disposition would be to deny the assignment of error and affirm the local government's decision, not to dismiss the appeal as moot. *McNichols v. City of Canby*, 78 Or LUBA 1090 (2018).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Under ORS 197.763(6)(c), if a party requests in writing an opportunity to respond to new evidence submitted during an open record period, the hearings authority must allow that opportunity. But nothing in the statute requires the hearings authority to expand this second open record period to include submittal of any evidence, arguments and testimony a person desires to submit. *Martucci v. Jackson County*, 77 Or LUBA 252 (2018).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Principles of preservation that would govern a quasi-judicial decision, e.g., the "raise it

or waive it" requirements of ORS 197.763(1), do not apply to an appeal of a legislative decision. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A petitioner does not waive her right to assign error to a hearings officer's conclusion that a structure qualifies as a nonconforming use, and the hearings officer's approval of an alteration of that nonconforming use, where the applicant did not apply for verification of a nonconforming use or an alteration of a nonconforming use and the notices of hearing did not identify the county's nonconforming use regulations as applicable criteria for the decision. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where an "Article" of the community development code includes 373 single spaced pages of land use regulations made up of 44 separate sections devoted to a variety of topics, a notice of hearing that identifies that article of the community development code as an applicable standard is not sufficient, under ORS 197.763(3), to provide notice of an eight-page section of that article devoted to nonconforming uses. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). In circumstances where the local government makes a decision without holding a hearing, ORS 197.835(3) does not apply to limit the issues that LUBA may consider in an appeal of that decision. *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 420 (2014).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where issues regarding compliance with approval criteria were raised below, petitioners may challenge the adequacy of findings that are ultimately adopted regarding those approval criteria. *League of Women Voters v. City of Corvallis*, 63 Or LUBA 432 (2011).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). The "raise it or waive it" rule does not apply outside of the context of a quasi-judicial proceeding. ORS 197.763(1). *Santiam Water Control District v. City of Stayton*, 62 Or LUBA 149 (2010).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). When the state administrative rules applicable to a comprehensive plan amendment are amended during the local proceedings, raising the issue of compliance with the old administrative rules is not sufficient under ORS 197.763(1) and ORS 197.835(3) to raise the issue of whether the application complies with the new provisions of the amended rules. *Walker v. Josephine County*, 60 Or LUBA 186 (2009).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Although ORS 197.835(4) provides an exception to the "raise it or waive it" rule, it only allows a petitioner to raise new issues based upon applicable criteria that were omitted from the notice. A local provision that tentative approval will expire if not completed and the ORS 227.178(5) limit on the number of days an applicant may extend the deadline for a local government to make a final decision on an application are not "applicable criteria." Therefore, a

petitioner may not raise issues concerning the statutes and local provision for the first time at LUBA, even though they were not listed in the notice. *Oh v. City of Gold Beach*, 60 Or LUBA 356 (2010).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Even though an issue is raised below, if only one point of view on that issue is raised and the local government is not asked to consider alternative points of view, a petitioner may not argue an alternative point of view at LUBA. *Boucot v. City of Corvallis*, 56 Or LUBA 662 (2008).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). To comply with ORS 197.763(3)(b), a notice of hearing must identify the applicable approval criteria by code number or similar means of identification sufficient to direct the recipient to the actual code or plan provisions that the city deems to be approval criteria. Reference to a code provision that itself merely requires "conformance with the comprehensive plan" is insufficient to provide effective notice of any comprehensive plan provisions. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). The city's failure to list certain plan policies as approval criteria in the notice of hearing does not allow petitioner to raise new issues regarding those plan policies under ORS 197.835(4)(a), where two staff reports and a planning commission decision address the plan policies as approval criteria and petitioner is given ample constructive notice that the city believed the policies to be approval criteria. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). An issue regarding compliance with an approval criterion is waived if not raised below, unless the petitioner demonstrates that the local government failed to list the criterion in the notice of hearing under ORS 197.835(4). However, LUBA will not address an issue under ORS 197.835(4) where the petitioner fails to explain why the notice of hearing is defective. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Language in a subarea plan that allows submittal of master plan application with fewer than all of the owners of affected property and requires a particular planning focus for property not controlled by the applicant is a mandatory approval criterion that must be listed in the hearing notice because the city could deny or require modification of the application based on that language. *Lowery v. City of Keizer*, 48 Or LUBA 568 (2005).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where language in master plan that is a mandatory approval criterion was not listed in the hearing notice, no criterion listed in the notice reasonably would have led petitioners to that language, and petitioners otherwise could not have anticipated the issue because the city's final decision was the first notice petitioners had that the master plan language applied, petitioners did not waive the issue by failing to raise it at the local level. *Lowery v. City of Keizer*, 48 Or LUBA 568 (2005).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). The ORS 197.763(6)(b) right to request that a hearing be continued must be exercised prior to the close of the initial evidentiary hearing. Where the initial evidentiary hearing was held before the planning commission, a party has no right under ORS 197.763(6)(b) to request a continuance in a subsequent hearing before the city council, notwithstanding that the planning commission was evenly divided and could not reach a majority vote to approve or to deny an application for subdivision approval. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Any right that a party may have to rebut new evidence under *Fasano* or ORS 197.763(6)(b) requires that the party contemporaneously assert that right of rebuttal at the time the new evidence is submitted, so that the local government can rule on the merits of the request and allow an appropriate opportunity for rebuttal where such an opportunity is warranted. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). In order to preserve the right before LUBA to challenge the adequacy of findings addressing an approval criterion and the supporting evidence, a petitioner must demonstrate that the proposal's compliance with that criterion was raised below accompanied by statements or evidence sufficient to afford other parties an adequate opportunity to respond. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Absent a local code requirement to the contrary, ORS 197.763 does not require that every hearing notice given by a local government must provide an overview of local appeal procedures and how those procedures may affect an appeal at LUBA, as long as the notices inform participants of their obligation to raise issues regarding compliance with applicable criteria at the earliest opportunity. *Scheyer v. City of Hood River*, 43 Or LUBA 112 (2002).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a hearings officer concludes that a local code provision setting out seven potential methods of creating a parcel applies in determining whether a parcel was lawfully created, the hearings officer is obligated to consider each of the arguably applicable methods, notwithstanding that the applicant below did not specifically raise issues regarding which of the arguably applicable methods applies. *DeBoer v. Jackson County*, 43 Or LUBA 219 (2002).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). The raise it or waive it provisions of ORS 197.763(1) apply only where the local government provides a hearing at which issues may be raised. Where the county did not provide a hearing where petitioners could raise issues, petitioners may raise issues before LUBA in the first instance. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 511 (2003).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). An ambiguous assertion that a driveway providing access to a proposed flag lot does not qualify as a street is insufficient to raise an issue that the proposed minor partition creates a street

and therefore must be approved as a major partition and comply with the criteria applicable to major partitions. *Webb v. City of Bandon,* 39 Or LUBA 584 (2001).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). The predicate to application of the "raise it or waive it" principle in ORS 197.835(3) is a local proceeding pursuant to ORS 197.195 or 197.763. That principle does not apply to proceedings to vacate county roads under ORS 368.346. *Mekkers v. Yamhill County*, 39 Or LUBA 367 (2001).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a city determines that revisions to easements within a previously approved subdivision require a replat, verbal testimony and a letter submitted by the applicants' attorney noting that the applicants will comply with the city's determination but consider a replat unnecessary under the statutes cited by the city are sufficient to preserve the issue for appeal to LUBA, notwithstanding that the applicants did not expressly submit the disputed replat application under protest. *Haber v. City of Gates,* 39 Or LUBA 137 (2000).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Even though petitioners may have obtained a continuance or caused the record to be left open had they made either request, a local government is not required to provide a continuance or leave the record open unless it is requested. *Lange-Luttig v. City of Beaverton*, 39 Or LUBA 80 (2000).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Failure to list applicable criteria in a pre-hearing notice in violation of ORS 197.763(3)(a) allows petitioner to raise issues at LUBA relating to the omitted criteria without having raised those issues before the local government. However, failure to list applicable criteria does not, in itself, provide a basis for reversal or remand. *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). After the petition for review is filed, petitioner must respond to allegations that issues that are raised in the petition for review were not raised during the local proceedings. If petitioner fails to do so, those issues are waived. However, petitioner is not initially obligated to specify in the petition for review where the issues that are raised in the petition for review were raised below. *Robinson v. City of Silverton,* 37 Or LUBA 521 (2000).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). An issue that could have, but was not, raised in the initial petition for review before LUBA in an appeal that was voluntarily remanded, may not be included in an assignment of error in a later appeal of a decision following remand. *Riggs v. Douglas County*, 37 Or LUBA 432 (1999).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Listing the "Comprehensive Plan goals, policies and land use map" as applicable criteria on the notice of hearing without listing specific applicable plan provisions is insufficient to satisfy

ORS 197.763(3)(b), and such a general listing does not support a conclusion that petitioner could have raised issues regarding specific plan provisions below. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(3)(b) only requires that the notice of hearing list the applicable criteria from the local government's ordinance and comprehensive plan. The failure of the notice to list applicable statutory provisions is not a violation of ORS 197.763(3), and does not excuse petitioner from the obligation to raise the issue of compliance with those statutes during the local proceedings. *Van Dyke v. Yamhill County*, 35 Or LUBA 676 (1999).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where the record shows petitioner knew or should have known of the existence and potential applicability of criteria in the county ordinance and comprehensive plan that were omitted from the notice of hearing, LUBA will conclude pursuant to ORS 197.835(4)(a) that petitioner could have raised the applicability of those criteria during the local proceedings below, and thus petitioner cannot raise new issues before LUBA regarding those criteria. *Van Dyke v. Yamhill County*, 35 Or LUBA 676 (1999).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A petitioner would not likely have noticed an arguably relevant plan provision where the plan provision was located in a different section of the plan from the plan provisions identified as relevant by the local government in their notice of hearing. Petitioner is therefore not barred by ORS 197.835(4)(a) from raising an issue concerning compliance with the plan provision. *Visher v. City of Cannon Beach*, 35 Or LUBA 74 (1998).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.835(3) and 197.763 require that petitioners at LUBA have raised the issues they wish to raise at LUBA during the local proceeding. However, this statutory restriction does not apply to individual arguments regarding those issues. *DLCD v. Tillamook County*, 34 Or LUBA 586 (1998).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where an issue is adequately raised below, ORS 197.763 does not limit particular arguments related to that issue on appeal. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Under ORS 197.763(1) and ORS 197.835(3), all petitioner must do is raise the issue before the final evidentiary hearing record is closed to enable petitioner to raise an issue before LUBA. *Central Bethany Dev. Co. v. Washington County*, 33 Or LUBA 463 (1997).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A petitioner failing to respond to a local government's request to make his general objections more detailed fails to afford the city an opportunity to respond, may not make those objections more detailed for the first time at LUBA and waives the right to appeal based on those objections. *Arnett v. City of Lake Oswego*, 33 Or LUBA 384 (1997).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where the city's application form requests a written narrative, but petitioner does not identify an applicable legal standard or criterion that requires its submission, petitioner may not raise new issues as a result of the city's failure to include such a criterion on the notice of hearings. *Design Home Construction v. City of Silverton*, 32 Or LUBA 452 (1997).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a local government limits discussion of an ordinance not identified in the hearing notice as an applicable criterion, and then adopts findings based on that ordinance, petitioners had no opportunity to address or rebut the ordinance, and their failure to do so does not waive their right to appeal its application. *Nicholson v. Clatsop County*, 32 Or LUBA 399 (1997).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). The provisions of ORS 197.763(6)(c) only apply to the "initial evidentiary hearing," and therefore do not require the city council to reopen the record for rebuttal upon the request of a participant in a subsequent evidentiary hearing. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where petitioners contend a decision fails to address an applicable approval criterion that was not identified in the local government's hearing notice as required by ORS 197.763(3)(b), and respondents contend petitioners cannot raise this issue because they failed to raise it below, LUBA must decide whether the provision in question establishes an approval criterion for the subject application, in which case petitioners may raise the new issue before LUBA pursuant to ORS 197.835(4)(b). *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). The 1995 amendment to ORS 197.763(1) adds a requirement that issues not only be raised, but also be *accompanied by statements or evidence* sufficient to afford the local decision maker an opportunity to respond. What is "sufficient" still depends upon whether the governing body, planning commission, hearings body or hearings officer, and the parties are afforded an adequate opportunity to respond to each issue. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where defining the relevant area is an essential, stated component of the stability standard for nonfarm dwellings, petitioner must object below to the area selected by the county in order to avoid waiving the objection on appeal. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Under ORS 197.835(4)(b), petitioners may raise an issue for the first time on appeal only if it relates to an applicable criterion that was omitted from the notice provided by the local government in violation of ORS 197.763(3)(b). *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 (1996).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where petitioners contend a local government's notice of hearing on a conditional use permit application did not comply with the requirement of ORS 197.763(3)(a) to explain the nature of the application and the uses that could be authorized, but do not contend their substantial rights were prejudiced by the alleged error, petitioners provide no basis for reversal or remand. ORS 197.835(7)(a)(B). *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A local government's failure to comply with the requirements of ORS 197.763(3)(h) and (i) that its notice of hearing state the staff report and applicant's materials are available for inspection and that copies will be provided at reasonable cost is a procedural error, and does not provide a basis for reversal or remand unless petitioners explain how their substantial rights were prejudiced by the error. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where petitioners do not move for an evidentiary hearing, and the only undisputed fact alleged by petitioners is that a petitioner was required to pay 14 dollars for the local government's 14-page staff report, petitioners fail to establish the local government's failure to provide a copy of the staff report at a reasonable cost, as required by ORS 197.763(3)(i), violated petitioners' substantial rights. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). If the local government did not hold a land use hearing, subject to the requirements of ORS 197.763, before making the challenged decision, petitioners cannot waive the right to raise issues for the first time on appeal to LUBA, because they were not provided the forum in which to raise such issues at the local level. *Leathers v. Washington County*, 29 Or LUBA 343 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763 governs how a quasi-judicial land use hearing is conducted, not whether one is required. ORS 197.763 does not confer a right to a quasi-judicial land use hearing where such a right does not otherwise exist. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a local government's "initial evidentiary hearing" on a quasi-judicial land use application was held before the planning commission, the local government does not violate ORS 197.763(6) by denying petitioner's request to leave open the record of a subsequent evidentiary hearing before the governing body. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Listing an entire zoning ordinance as the applicable criteria in a local government's notice of its initial evidentiary hearing on a quasi-judicial land use application does not satisfy ORS 197.763(3)(b). Neither does listing entire chapters of the zoning ordinance, where such chapters contain criteria for several different types of applications. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where petitioner submits detailed argument to the local government regarding the applicability of a particular code provision and whether that code provision is satisfied by the subject application, the local government's failure to list that code provision as an applicable criterion in the notice of its initial evidentiary hearing, as required by ORS 197.763(3)(b), did not prejudice petitioner's substantial rights. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where new information in support of an application is received by a local government on the last day the record is left open, pursuant to a request that the record be left open under ORS 197.763(6), an opposing party is entitled to a continuance under ORS 197.763(4)(b), if it requests a continuance. A request for a continuance under ORS 197.763(4)(b) is not specifically required to be made before the evidentiary record closes. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). In a quasi-judicial hearing on a land use application, an applicant has a right to rebut evidence submitted by opponents. However, if the applicant's rebuttal includes "additional documents or evidence * * * in support of the application," ORS 197.763(4)(b) gives opponents a right to request a continuance. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Because a local code enforcement proceeding does not involve an "application" or an "applicant" in the sense those terms are used in ORS 197.763, the "raise it or waive it" provisions of ORS 197.763 and 197.835(2) do not apply to such proceedings. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where petitioners do not argue the challenged decision violates any criterion which they failed to raise below because that criterion was not listed in the local government's notice of initial hearing or proposed action, as required by ORS 197.763(3)(b) or ORS 197.195(3)(c)(C), petitioners fail to show their substantial rights were prejudiced by the error and establish no basis for reversal or remand. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(8) applies only to a local government's notice of its initial evidentiary hearing. It does not apply to local hearings conducted after remand by LUBA. *Collins v. Klamath County*, 28 Or LUBA 553 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where the local government's notice of its first evidentiary hearing before the planning commission failed to list the applicable standards, as required by ORS 197.763(3)(b), petitioners may raise issues at LUBA even though such issues may not have been raised during the local proceedings. However, this procedural error provides no basis for reversal or remand of the decision where petitioners fail to establish the error caused prejudice to their substantial rights. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where during the local proceedings petitioners affirmatively waived their right to request a continuance, petitioners cannot raise the local government's failure to provide such a continuance as a basis for reversal or remand in an appeal to LUBA. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a local government fails to list a single applicable approval criterion in its notice of initial evidentiary hearing, issues may be raised at LUBA even though they were not raised during the local proceedings. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where the challenged decision includes a determination that a nonconforming use of the subject property exists, but the notice of hearing indicated the only issue to be addressed was an expansion of an existing nonconforming use, the notice of hearing failed to adequately describe the nature of the application, as required by ORS 197.763(3)(a), and failed to reasonably describe the county's final action under ORS 197.835(2)(b). Either of these deficiencies means petitioners may raise issues before LUBA regardless of whether they were raised below. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 215.416(5) and 197.763(3)(b) require a county to identify applicable approval standards in its notices of hearing. Where petitioner's right to participate in the local proceedings is impaired by the county's failure to identify relevant standards, the challenged decision must be remanded. *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(3)(c) does not require that the addresses of all properties included within a proposal for quasi-judicial land use approval be set out in the notice of public hearing. An "easily understood geographical reference" may be provided instead. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A statement that the requested Willamette River Greenway permit is to allow placement of a dwelling on the identified subject property is sufficient to satisfy the requirement of ORS 197.763(3)(a) that the notice of hearing "[e]xplain the nature of the application and the proposed use or uses which could be authorized." *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Under ORS 197.830(10) and 197.835(2), LUBA's review of both land use decisions and limited land use decisions is limited to issues raised below, unless (1) the local government did not satisfy the procedural requirements of ORS 197.763 or ORS 197.195, or (2) the land use decision or limited land use decision adopted differs significantly from what was described in the local government's notice. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where the relevant local government notices did not list the applicable approval criteria, as required by both ORS 197.763(3)(b) and 197.195(3)(c)(C), then regardless of whether the challenged decision is a land use decision or limited land use decision, issues may be raised before LUBA irrespective of whether they were raised during the proceedings below. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(4)(b) establishes a remedy for failure to comply with ORS 197.763(4)(a). Where a document supporting a land use application was not available for review prior to the initial local evidentiary hearing, as required by ORS 197.763(4)(a), but the local government continued the hearing to a later date and made a copy of the document available for review in its planning office prior to the continued hearing, the local government complied with ORS 197.763(4)(b). *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a party is entitled to and requests a continuance under ORS 197.763(4), and the local government decision maker does not respond to the request or grant a continuance prior to the close of the evidentiary hearing portion of a quasi-judicial land use proceeding, the party does not waive its right to allege failure to grant the continuance as error in a LUBA appeal by failing to repeat the continuance request at subsequent local government meetings held to adopt a final written decision. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where the record shows petitioner was aware of the applicable approval criteria in the comprehensive plan and participated effectively in the local hearing, a local government's failure to comply with the requirements of ORS 197.763(3)(b) and (j), regarding listing applicable criteria from the plan and explaining hearing procedures in its notice of hearing, does not prejudice petitioner's substantial rights or provide a basis for reversal or remand. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(3)(b) and (5)(a) require a local government to provide notice of the standards applicable to an application for a quasi-judicial land use decision, prior to its hearing on such an application. *Laine v. City of Rockaway Beach*. 27 Or LUBA 493 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a local government mistakenly believes it is adopting a limited land use decision, and for that reason fails to follow the notice and hearing requirements of ORS 197.763, no issues petitioner wishes to raise at LUBA were waived because they were not raised below. ORS 197.835(2)(a). *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A local government's failure to follow the notice and hearing requirements of ORS 197.763 provides no basis for reversal or remand, where petitioner neither assigns that failure as

error nor explains how his substantial rights were prejudiced by that failure. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where certain comprehensive plan and code provisions are mentioned in the local government's decision, but are not applied as approval criteria for the subject application, ORS 197.763(3)(b) does not require that those provisions be listed in the local government's notice of hearing. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(3)(b) requires a local government to identify, in its notice of hearing on a quasi-judicial land use application, *which* comprehensive plan goals and policies the local government considers to be "applicable" criteria for the subject application. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(5)(a) requires that a statement listing the applicable substantive criteria from the local government comprehensive plan and code be made at the beginning of a quasi-judicial land use hearing. Where such a statement is not made, or other requirements of ORS 197.763 are not met, petitioners may raise new issues in an appeal to LUBA. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Under ORS 197.763, absent consideration of a new development application, local proceedings after remand by LUBA are part of a single, continuous land use process. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(6), concerning requests by participants to leave the local evidentiary record open, applies only to the "initial evidentiary hearing" and not to local proceedings after remand by LUBA. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). It is unclear whether the provisions of ORS 197.763(4) entitling parties to a continuance of a local government quasi-judicial land use hearing if additional evidence is provided in support of the application, applies to local remand proceedings. Nevertheless, to trigger the requirement of ORS 197.763(4) to continue the hearing, a party must request a continuance. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A local government's failure to list a comprehensive plan provision establishing different standards for comprehensive plan map and text amendments as an applicable approval criterion constitutes a failure to follow the procedures required by ORS 197.763. *Nathan v. City of Turner*, 26 Or LUBA 382 (1994).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(7) does not preclude a local government from reopening an evidentiary record for limited purposes after it has been closed. It simply provides that if the record is reopened, new issues may be raised in an appeal to LUBA with regard to the evidence accepted after the record is reopened. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Local government failure to comply with ORS 197.763(3) notice of hearing requirements (1) means that under ORS 197.835(2)(a), LUBA may consider issues that were not raised below; and (2) is a procedural error which, under ORS 197.835(7)(a)(B), provides a basis for reversal or remand of the challenged decision only if such error prejudices petitioners' substantial rights. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A statement in the local government notice of hearing required under ORS 197.763(3), to the effect that the applicable criteria can be reviewed at the local government planning office, does not constitute listing the applicable criteria, as is required by ORS 197.763(3)(b). *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where petitioners contend that under ORS 197.835(2)(a), they may raise new issues before LUBA because the local government failed to comply with ORS 197.763, and petitioners allege specific respects in which the local government failed to follow the procedural requirements of ORS 197.763, the local government or other respondents must demonstrate that the local government complied with the relevant requirements of ORS 197.763. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where the local government's notice of hearing did not include the list of applicable criteria or the explanation of the rights to request a continuance and to keep the record open that are required by ORS 197.763(3)(b) and (j), petitioners may raise issues in their appeal to LUBA irrespective of whether they were raised during the proceedings below. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where ORS 197.763 was not in effect at the time the subject application was submitted to the local government, LUBA's scope of review is not limited to issues raised during the local proceedings. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Under the "raise it or waive it" provisions of ORS 197.763 and ORS 197.835(2), a local government's failure to list a single relevant criterion means petitioner need not have raised an issue locally as a prerequisite for raising that issue before LUBA, even where the issue pertains to plan or land use regulation criteria that were listed in the notice required by ORS 197.763(3)(b). *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). LUBA's scope of review is limited by ORS 197.835(2) and 197.763(1) to issues raised during the local government proceedings, only where the local government complies with the requirements of ORS 197.763. *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where (1) the local government's plan and land use regulations were unacknowledged when the original development application was submitted, (2) there has been no proceeding in which the local government identified the applicable standards after limited acknowledgment and enforcement orders were issued by LCDC, and (3) a prior LUBA opinion specifically required the local government to identify the applicable standards, the requirements of ORS 197.763 must be applied to the local proceedings on remand. *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). The hearing notice content requirements of ORS 197.763(3) apply to the notice ORS 197.763(3)(f) requires to be given a certain number of days before the local government's *evidentiary* hearing on a quasi-judicial land use application. They do not apply to notice of a hearing by the governing body on such application, based on the record before a lower local body. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A statement that applicable criteria can be viewed at the local government planning office does not satisfy the requirement of ORS 197.763(3)(b) that a local government hearing notice list the applicable criteria from the comprehensive plan and ordinances. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A statement that failure to raise an issue before the planning commission precludes appeal to the local governing body does not satisfy the requirement of ORS 197.763(3)(e) that a local government hearing notice include a statement that failure to raise an issue precludes appeal to LUBA on that issue. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where petitioner failed to object to the board of commissioners concerning the county's failure to comply with the procedural requirements of ORS 197.763 in the notice of, and announcement at, a planning commission hearing, petitioner cannot assign those errors as a basis for reversing or remanding the county's decision. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A local government is required to provide parties with an opportunity to rebut evidence submitted during local proceedings on remand from this Board under either ORS 197.763(4)(b) or *Fasano*. A local government's failure to provide petitioner with such opportunity is a procedural

error that prejudices petitioner's substantial rights. *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A local government's failure to comply with procedural requirements of ORS 197.763 on remand from LUBA does not allow a petitioner to raise issues in a second appeal to LUBA that are otherwise barred by the doctrine of waiver articulated in *Mill Creek Glen Protection Assoc. v. Umatilla County*, 88 Or App 522, 527, 746 P2d 728 (1987). *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where petitioners contend a decision fails to address an applicable approval criterion that was *not* identified in the local government's hearing notice as required by ORS 197.763(3)(b), and respondents contend petitioners cannot raise this issue because they failed to raise it below, LUBA must decide whether the provision in question establishes an approval criterion for the subject application, in which case petitioners may raise the new issue before LUBA pursuant to ORS 197.835(2)(a). *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). While a local government is not obliged to respond to a taking claim raised during the local proceedings, the local government should, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should have the opportunity to adopt an interpretation that is constitutional. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Under ORS 227.178(3), the quasi-judicial land use decision-making procedures of ORS 197.763 apply to an urban subdivision decision, where the subdivision application was submitted after ORS 197.763 became effective, but before the effective date of legislation exempting limited land use decisions from the requirements of ORS 197.763. *Warren v. City of Aurora*, 25 Or LUBA 11 (1993).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where some of the notices preceding local government quasi-judicial hearings on a land use application failed to identify applicable approval criteria, but the notice of the first hearing identified the applicable approval criteria and the record shows all parties were aware of the applicable criteria, the notice errors are at most procedural errors which did not prejudice the parties' substantial rights. Such errors provide no basis for reversal or remand. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where the local government fails to identify the relevant plan and land use regulation standards in the notice of hearing, a petitioner is free to raise noncompliance with those standards in an appeal to LUBA, even though compliance with such standards was not raised as an issue below. *Ruff v. Harney County*, 23 Or LUBA 521 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Because OAR 660-12-060 is not part of a county's ordinances or comprehensive plan, it need not be listed as an applicable criterion under ORS 197.763(3)(b), and the county's failure to so list OAR 660-12-060 as an applicable criterion in its notice of hearing does not excuse petitioner from having to raise the issue of compliance with OAR 660-12-060 during the proceedings below in order to have it reviewed by LUBA. *ODOT v. Clackamas County*, 23 Or LUBA 370 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a local government's notice of hearing does not comply with ORS 197.763(3)(b) because it fails to identify an applicable statewide planning goal as an approval criterion, petitioners may raise the local government's failure either to comply with or to adopt an exception from that goal as an issue in a LUBA appeal proceeding. *Murray v. Marion County*, 23 Or LUBA 269 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where petitioners argued below that in view of the outside storage of automobiles, a major portion of a home occupation is conducted outside of the dwelling, in violation of local code requirements, petitioners may argue at LUBA that the outside storage of automobiles violates the local code, regardless of whether the outside storage of automobiles constitutes a *major* portion of the home occupation. *Stevenson v. Douglas County*, 23 Or LUBA 227 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a local government contends an issue was not raised below, and the petitioner fails to cite any portions of the record which he contends demonstrate that he raised the issue during the local proceedings, under ORS 197.763(1) and 197.835(2) that issue may not be raised in an appeal to LUBA. *Coyner v. City of Portland*, 23 Or LUBA 79 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where no specific use is proposed in conjunction with a zone change, the notice of hearing is not required to indicate all of the possible uses of the property under the proposed new zone. However, where a reasons goal exception for a particular use is also proposed, ORS 197.763(3)(a) requires that the notice of hearing identify the particular use proposed to be made of the property. *Caine v. Tillamook County*, 22 Or LUBA 687 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Local government failure to comply with ORS 197.763(3) notice of hearing requirements (1) is a procedural error, which will result in reversal or remand of the challenged decision only if such error prejudices petitioner's substantial rights; and (2) under ORS 197.835(2)(a), allows LUBA to consider issues that were not raised below. *Caine v. Tillamook County*, 22 Or LUBA 687 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(1) does not require that arguments identical to those in the petition for review were presented during the local proceedings, but it does require that the argument presented

in the local proceedings sufficiently raise an issue sought to be raised in the petition for review, so that the local government and other parties had a chance to respond to that issue in the local proceedings. *Schellenberg v. Polk County*, 22 Or LUBA 673 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where additional evidence in support of an application is received after the notice of hearing required by ORS 197.763(3) is provided, the parties are entitled to request a continuance under ORS 197.763(4)(b), but a continuance need not be granted unless it is requested. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where parties are entitled to a continuance following the introduction of new evidence in support of an application under ORS 197.763(4)(b), and make it clear they wish to present additional evidence at a later hearing, a local government commits error in not continuing the evidentiary hearing, even though a continuance under ORS 197.763(4)(b) was never explicitly requested. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). A local government's failure to include notice of the right to request a continuance under ORS 197.763(4)(b) or that the record be held open under ORS 197.763(6) in the notice of hearing required by ORS 197.763(3) is procedural error, and the parties' substantial rights are violated where it is clear from the record that they would have exercised such rights if they had known about them. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(3)(b) and (5)(a) require a local government to identify the standards it believes to be applicable to an application for quasi-judicial land use approval prior to conducting hearings on the application. LUBA is required to reverse or remand a local government's decision if it failed to follow applicable procedures in a manner that prejudiced petitioner's substantial rights, which include "rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." *Bradbury v. City of Independence*, 22 Or LUBA 783 (1991).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). The statutory procedural requirements of ORS 197.763 are limited to quasi-judicial land use hearings and do not apply to local government legislative land use decision making. *Parmenter v. Wallowa County*, 21 Or LUBA 490 (1991).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(3)(b) does not require a local government to list related code provisions as "applicable criteria" in its notice of a quasi-judicial land use hearing in order to be able to consider them in interpreting the central code provisions at issue consistently with such related code provisions. *Ward v. City of Lake Oswego*, 21 Or LUBA 470 (1991).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a party alleges petitioner failed to raise an issue during local proceedings, and petitioner neither contends he raised the issue below nor claims the local government failed to

follow the procedures required by ORS 197.763, petitioner may not raise the issue for the first time at LUBA. ORS 197.763(1); 197.835(2). *Wethers v. City of Portland*, 21 Or LUBA 78 (1991).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). The failure of a local government to identify its general procedures for the conduct of hearings in its notice of hearing, as required by ORS 197.763(3)(j), is a procedural error, for which LUBA is empowered to reverse or remand the challenged decision only if such error "prejudiced the substantial rights of the petitioner." ORS 197.835(7)(a)(B). *Stefan v. Yamhill County*, 21 Or LUBA 18 (1991).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Regardless of whether a local government informed participants of their right under ORS 197.763(6) to request that the record remain open after the close of the initial evidentiary hearing, if the local government did *not* leave the record open, it was not obliged to accept a subsequently offered letter as part of the local record. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Under ORS 197.763(3)(j), a local government is required to provide in its notice of hearing a general explanation regarding the right under ORS 197.763(6) to request that the record of the initial evidentiary hearing remain open. A local government's failure to provide such notice is a procedural error which, if it prejudiced the parties' substantial rights, would require reversal or remand of the challenged decision. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where petitioners allege the local government violated the procedural requirements of ORS 197.763, but do not contend that violation is a basis for reversal or remand of the challenged decision, and respondents do not argue that petitioners are precluded from raising any issue raised in the petition for review, LUBA need not determine whether the local government committed a procedural error. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a local government's notice of hearing, rather than listing applicable approval criteria, states the applicable criteria "are attached to this notice," but the record does not include any such attachment, LUBA will conclude the notice does not comply with the requirement of ORS 197.763(3)(b) to list applicable criteria and will review issues raised by petitioners regardless of whether they were raised below. *Thormahlen v. City of Ashland*, 20 Or LUBA 218 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a local government's notice of hearing did not comply with ORS 197.763(3)(b), in that it failed to identify an approval criterion relevant to the proposed development, petitioners may raise the local government's failure to require compliance with that approval criterion as an issue in a LUBA appeal proceeding. ORS 197.835(2)(a). *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763 and 197.835(2) represent a quid pro quo, whereby local governments are required to give broader and more detailed notice of quasi-judicial land use hearings and make staff reports available in advance of such hearings, in exchange for participants being required to raise an issue during the local proceedings in order to be able to raise that issue before LUBA. *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Nothing in the language of ORS 197.763(3)(f) or the overall statutory purpose of ORS 197.763 requires that in order for the mailing of notice 10 days before the first evidentiary hearing to be sufficient under ORS 197.763(3)(f)(B), the "two or more evidentiary hearings * * * allowed" must be held at the same level of local government. *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Local governments may not impose unreasonable conditions or restrictions on persons seeking to exercise their right under ORS 197.763(3)(f)(B) to two evidentiary hearings, where only 10 days notice of the first hearing is provided. *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Local government requirements that an appeal be filed and that a fee be paid before a second evidentiary hearing is held do not violate the requirement of ORS 197.763(3)(f)(B) that two or more evidentiary hearings be "allowed," where only 10 days notice of the first hearing is provided. *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). Where a local government elects to give only 10 days notice of the initial evidentiary hearing, subject to a right to a second evidentiary hearing on appeal, ORS 197.763(3)(f)(B) requires that a participant be allowed to raise new issues during the second evidentiary hearing. A local government could not, consistent with ORS 197.763(1), (3)(f)(B), and (5)(b) cut off that right prematurely by requiring that all issues to be raised in the second hearing be identified in the notice of appeal. *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). When there is no specific proposed use, as in the case of a simple zone change, the requirement of ORS 197.763(3)(a) that notices of quasi-judicial land use hearings "explain the nature of * * * the proposed use or uses which could be authorized" does not apply, and it is sufficient if the notices of hearing explain that the application is for a change from one identified zoning district to another identified zoning district. *McKay Creek Valley Assoc. v. Washington County,* 19 Or LUBA 421 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). The requirement of ORS 197.763 that the procedures for the conduct of quasi-judicial land use hearings set out therein "shall be incorporated into [local government] comprehensive plan[s] and land use regulations" is *not* satisfied by local government land use regulations which

set out procedures inconsistent with ORS 197.763, but include a general statement that those procedures apply *unless* state law mandates different procedures. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 421 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763, interpreted as a whole and considering its legislative history, expresses an intent to provide participants in quasi-judicial land use hearings with an adequate opportunity to prepare and submit evidence for such hearings. While ORS 197.763 does not guarantee participants in such hearings *20 days* between mailing of notice of the hearing and the date evidence is required to be submitted to the local government, a local ordinance requirement that certain written evidence be submitted within *10 days* of when notice is mailed is not consistent with ORS 197.763. *1000 Friends of Oregon v. Lane County*, 18 Or LUBA 858 (1990).

25.3.9 Local Government Procedures – Compliance with Statutes – Raise It/Waive It (ORS 197.763). ORS 197.763(3)(f)(A) and (4)(a) provide an applicant must submit all evidence relied on in support of an application to the local government at least 20 days before the evidentiary hearing. However, under ORS 197.763(4)(b), if the applicant does submit additional evidence in support of the application after that deadline, the appropriate local government response is to continue the evidentiary hearing in order to provide participants sufficient time to prepare for the evidentiary hearing. *1000 Friends of Oregon v. Lane County*, 18 Or LUBA 858 (1990).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. When a county is evaluating an application for housing, including needed housing, ORS 197.307(4) (2017) prohibits the county from applying any standards, conditions and procedures that are not clear and objective to the application to develop a residential project, without regard to whether applicant's property is "buildable land" within the meaning of ORS 197.295(1). *Warren v. Washington County*, 78 Or LUBA 375 (2018).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. A limited land use decision may be approved through a notice and comment process, and a local government may provide a right of local appeal. ORS 197.195(5). In such an appeal, the appeal hearing may be based on the existing administrative record or new evidence may be allowed. Should an appeal hearing allow the introduction of new evidence, the hearing is subject to the quasi-judicial hearing procedures set forth in ORS 197.763. In such a situation, a hearings officer may properly consider new evidence and analysis offered by the local government, as well as a petitioner's response, and LUBA's review includes the hearings officer's consideration of that evidence and those issues. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. LUBA will reject an argument that because a city's discretionary site review standards apply to proposed development, the city's approval is thus a "permit" as defined at ORS 227.160(2) (discretionary approval of the development of land), where even if the city's site review standards apply, the result would be a limited land use decision as defined at ORS 197.015(12), which is excluded from the ORS 227.160(2) definition of permit. *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. A decision that approves an application for site plan and design review within a city falls squarely within the definition of "limited land use decision" at ORS 197.015(12)(a)(B), and the fact that the city applied the procedural protections of ORS 197.763 to the hearings on the applications does not convert the challenged decision into something other than a limited land use decision. *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. A decision to "incorporate" comprehensive plan policies into a local government's land use regulations, to make those policies criteria directly applicable to a limited land use decision, must be accomplished by as post-acknowledgment plan amendment that expressly makes specific policies applicable approval criteria for limited land use decisions. The mere adoption of land use regulations to implement comprehensive policies does not "incorporate" such policies into land use regulations as directly applicable criteria. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Approving or denying a tentative subdivision plat within an urban growth boundary is a limited land use decision and therefore not a "permit" decision. Because the ORS 227.175(10)(a) directive that local appeal issues not be limited to those issues identified in the notice of appeal only applies to permit decisions, that statute does not apply to decisions involving the approval or denial of subdivisions. *Frewing v. City of Tigard*, 59 Or LUBA 23 (2009).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Even when an applicant forfeits the right to process a subdivision application under the limited land use provisions of a local code and processes the application under the procedures for permits, the decision approving or denying the subdivision is still a limited land use decision and the provisions of ORS 227.175(10)(a) do not apply. *Frewing v. City of Tigard*, 59 Or LUBA 23 (2009).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. If a decision falls within the ORS 197.015(13) definition of "limited land use decision," a local government must ensure that the minimum procedures required by ORS 197.195 are observed. *Zirker v. City of Bend*, 55 Or LUBA 188 (2007).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. A decision that denies an application based on a determination that the proposed use is not permitted and is not processed under a procedure to make limited land use decisions is not a "limited land use decision" under ORS 197.015(13). *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295 (2007).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. The fact that procedures for making limited land use decisions are used for making a decision to approve or deny a final partition plat does not convert that decision into a limited land use decision or override the language of ORS 92.100(7) providing that decisions to approve or deny a final partition plat are not limited land use decisions. *Ehle v. City of Salem*, 54 Or LUBA 688 (2007).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Local governments that intend to use statutory procedures for limited land use decisions must make an initial effort to identify in their plan or land use regulations which kinds of uses they view as qualifying for approval as a limited land use decision. *Papst v. Clackamas County*, 53 Or LUBA 344 (2007).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. In making limited land use decisions, it is error for local governments to consider evidence submitted after the close of the comment period. By requesting and accepting a mini traffic study from the applicant that the decision maker relied upon after the close of the comment period, without giving petitioners an opportunity to review and respond to the study, the local government violates petitioners' substantial rights. *Delk v. City of Salem*, 51 Or LUBA 123 (2006).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Failure to provide notice of withdrawal of a permit application required by local ordinance is not a failure to provide the "notice of decision" required by the statutes governing limited land use decisions at ORS 197.195, for purposes of the statute of ultimate repose at ORS 197.830(6), where it is undisputed that the subject property is not within an urban growth boundary and for that reason alone a decision with respect to the application cannot be a limited land use decision. *Kamp v. Washington County*, 51 Or LUBA 670 (2006).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. In making limited land use decisions, local governments may not consider evidence submitted after the close of the comment period, no matter the source of the new evidence. *Wal-Mart Stores, Inc. v. City of Oregon City*, 50 Or LUBA 87 (2005).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. When new evidence is submitted after the close of the comment period during limited land use proceedings, as with land use decisions, the local government must either (1) reopen the record to allow participants an opportunity to respond to the new evidence or (2) reject the new evidence as untimely. *Wal-Mart Stores, Inc. v. City of Oregon City*, 50 Or LUBA 87 (2005).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. In order to "incorporate" a comprehensive plan standard into a local government's land use regulations within the meaning of ORS 197.195(1) and thus apply that plan standard to a limited land use decision as an approval criterion, the local government must at least amend its land use regulation to identify specific plan policies or provisions that apply to a limited land use decision as approval criteria. A code requirement to "comply with the comprehensive plan" is insufficient to incorporate any comprehensive plan standard under ORS 197.195(1). *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Where a challenged decision approving a subdivision does not purport to adopt a zone change, grant a variance or grant conditional use approval, the county's failure to grant such approvals, even if required, does not convert the decision from a "limited land use decision" into a "land use decision." *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. A local government cannot assign review of an application for a limited land use decision to two separate review bodies, without ensuring that the proceedings before both review bodies comply with statutory procedures for limited land use decisions, including notice to property owners within 100 feet of the subject property. *McCulloh v. City of Jacksonville*, 46 Or LUBA 462 (2004).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Goals 9 and 10 do not prohibit increases in regulatory burdens or require local governments to refrain from imposing any particular level of regulatory burden. Therefore, incorporation of comprehensive plan policies into the zoning code pursuant to ORS 197.195, in order to apply those policies as approval criteria to limited land use decisions, does not violate Goals 9 and 10 even if application of such policies as approval criteria would impose additional regulatory burdens on development of Goal 9 and 10 lands. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Whatever prejudice to petitioners' substantial rights might have occurred before the initial decision maker, when the city arguably failed to provide petitioners an adequate opportunity

to comment before the planning commission on whether a proposed design complied with applicable criteria, was cured by providing petitioners an opportunity to present testimony directed at applicable criteria in a subsequent appeal to the city council. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. The "actual notice" requirement of ORS 197.830(5) does not necessarily require receipt of a limited land use decision. "Actual notice" is achieved when a person is informed of both the existence and substance of the decision. *Robinson v. City of Silverton*, 38 Or LUBA 785 (2000).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. A local government violates ORS 197.195(3)(c) if it accepts evidence into the record after the statutory period for comments has run, even if the opposing party was generally aware of the issues discussed in the evidence and did not raise arguments regarding those issues below. *Johnston v. City of Albany*, 34 Or LUBA 32 (1998).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Where the notice provided by the city does not indicate that an application will be processed as a limited land use decision, and the application is in fact processed as a quasi-judicial land use decision under the provisions of ORS 197.763, the city will be required to provide all of the procedural safeguards required for land use decisions. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. When the city closed the comment period required by ORS 197.195(3)(c)(A) prior to making a limited land use decision, but continued to accept new evidence from the applicant over a six-month period, the city violated ORS 197.195(3)(c)(F), which requires that all evidence relied upon by the applicant be available for review during the comment period. *Azevedo v. City of Albany*, 29 Or LUBA 516 (1995).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. When the city zoning ordinance makes final approval of a tentative subdivision plan a limited land use decision appealable to LUBA, a decision applying the ordinance is not a "tentative decision" that can be appealed locally at a hearing pursuant to ORS 227.175(10). *Azevedo v. City of Albany*, 29 Or LUBA 516 (1995).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. If a local government chooses to treat an application as one for a land use decision, rather than a limited land use decision, and a local appeal as one under ORS 227.175(10)(a), it may not charge more than the maximum appeal fee allowed by ORS 227.175(10)(b). *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. A local government that intends to process limited land use decisions differently from land use decisions must, under ORS 197.195(2)(c)(I), either make that intent clear in the initial

notice or provide all of the ORS 197.763 procedural safeguards. *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. ORS 197.195(3)(c)(B) does not require an applicant, at risk of waiver, to comment in writing on conditions a local government imposes as part of approval, since the application itself states what the applicant will accept without objection. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. OAR 661-10-021, which allows a local government to withdraw a limited land use decision for reconsideration, does not impose an obligation on the parties to make or waive additional objections after the 14-day period for comment allowed under ORS 197.195(3)(c)(A). *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Where petitioners do not argue the challenged decision violates any criterion which they failed to raise below because that criterion was not listed in the local government's notice of initial hearing or proposed action, as required by ORS 197.763(3)(b) or ORS 197.195(3)(c)(C), petitioners fail to show their substantial rights were prejudiced by the error and establish no basis for reversal or remand. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Where a local government provides public hearings before the planning commission and city council before making a limited land use decision, petitioner's allegations that the notice preceding the city council hearing fails to comply the requirements of ORS 197.195(3)(b) for notice of the application provide no basis for reversal or remand where petitioner fails to challenge the adequacy of the notice of hearing that preceded the planning commission hearing. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. LUBA's review of limited land use decisions is limited to issues raised before the local government, unless (1) the local government did not satisfy the procedural requirements of ORS 197.195, or (2) the limited land use decision adopted differs significantly from the proposal described in the local notice of proposed action. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. A statement that a list of applicable criteria will be available at City Hall seven days prior to the hearing does not satisfy the requirements of ORS 197.195(3)(b) that the notice of proposed action list the applicable criteria. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Under ORS 197.830(10) and 197.835(2), LUBA's review of both land use decisions and limited land use decisions is limited to issues raised below, unless (1) the local government did not satisfy the procedural requirements of ORS 197.763 or ORS 197.195, or (2) the land use

decision or limited land use decision adopted differs significantly from what was described in the local government's notice. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Where the relevant local government notices did not list the applicable approval criteria, as required by both ORS 197.763(3)(b) and 197.195(3)(c)(C), then regardless of whether the challenged decision is a land use decision or limited land use decision, issues may be raised before LUBA irrespective of whether they were raised during the proceedings below. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. A local government wishing to identify in its plan or land use regulations uses qualifying for approval as limited land use decisions under ORS 197.015(12)(b) must make it clear the discretionary approval standards applied to such uses may only be applied to regulate the use's physical characteristics and may not be used to deny approval of the use altogether. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. The ORS 197.195(3)(c)(B) provision that only issues raised "with sufficient specificity" below may be raised before LUBA in an appeal of a limited land use decision requires only that an issue be raised sufficiently to afford the local government and other parties an opportunity to respond. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. A city's failure to incorporate comprehensive plan provisions applicable to limited land use decisions into its land use regulations, as required by ORS 197.195(1), means only that applicable plan provisions continue to apply to limited land use decisions. It has no bearing on whether a development proposal meets the ORS 197.015(12) definition of "limited land use decision." *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Where the applicability of certain comprehensive plan policies was debated during the local proceedings, and petitioners had opportunities to and did present argument concerning these policies, the local government's failure to list the policies as applicable approval standards, as required by ORS 197.195(3)(c)(C), is harmless and provides no basis for reversal or remand. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. ORS 197.195, which establishes minimum procedural requirements for making limited land use decisions, does not require that local governments provide either a public hearing or a local appeal. ORS 227.175(3) and (10) do not apply to limited land use decisions, because they are not "permits," as defined in ORS 227.160(2). *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. The 21-day period provided by ORS 197.830(8) for appealing a limited land use decision to LUBA does not begin to run until a petitioner has been given the explanation of appeal rights to which it is entitled under ORS 197.195(3)(c)(H). *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

25.3.10 Local Government Procedures – Compliance with Statutes – Limited Land Use Decisions. Under ORS 227.178(3), the quasi-judicial land use decision-making procedures of ORS 197.763 apply to an urban subdivision decision, where the subdivision application was submitted after ORS 197.763 became effective, but before the effective date of legislation exempting limited land use decisions from the requirements of ORS 197.763. *Warren v. City of Aurora*, 25 Or LUBA 11 (1993).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A petitioner is not required to anticipate erroneous findings or interpretations in a final decision in order to challenge them at LUBA. Where petitioner raised an issue before the city council regarding fees and argued that the local appeal was invalid because of an allegedly invalid fee waiver decision, petitioner could not have anticipated the city's decision along with its attendant findings and interpretations, until the city issued its final decision. Accordingly, petitioner did not have the opportunity to raise specific challenges to the city's decision regarding the fee waiver during the local proceeding and therefore may raise them for the first time on appeal to LUBA. *Riverview Abbey Mausoleum Company v. City of Portland*, 79 Or LUBA 38 (2019).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where a city's interpretation of its former version of a city code requirement that required that an appeal request include either the appeal fee or a fee waiver that had been approved by the planning director prior to the appeal deadline, and LUBA affirmed the city's interpretation, but the city code has since been amended and the city's code no longer requires a fee waiver be approved prior to the appeal deadline, and instead allows a local appellant to submit a fee waiver request and appeal request together, the city is not bound by its prior code, nor its interpretation of its prior code, and prior LUBA case law applying prior city code is no longer controlling. *Riverview Abbey Mausoleum Company v. City of Portland*, 79 Or LUBA 38 (2019).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A hearings officer does not misconstrue a development code requirement that a project applicant must demonstrate that environmental impacts have been "minimized to the extent practicable," in finding that the project applicant is not required to propose a smaller sized dwelling. *McAndrew v. Washington County*, 78 Or LUBA 21 (2018).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. LUBA will affirm a city governing body's code interpretation where a prohibition on adjustment "[t]o allow an increase in density in the [low density residential] RL zone" does not specify what denominator should be used to determine whether a proposed adjustment increases the density in the RL zone, or explain how "density in the RL zone" is measured, and the city used as the denominator the gross acreage of a subdivision as a whole, rather than the acreage of individual properties. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. The city's comprehensive plan housing goal, Goal 10, and its policies and implementing measures, provide further contextual support for the city's interpretation of its code regarding a prohibition on lot size adjustment "[t]o allow an increase in density in the [low density residential] RL zone" by using as the denominator the gross acreage of a subdivision as a whole, rather than the acreage of individual properties. One of the Goal 10 housing goals is to "[p]romote the efficient use of vacant land by encouraging infill development which is sensitive to existing neighborhoods, and by encouraging new development which achieves the density allowed by the comprehensive plan." The city's interpretation is consistent with Goal 10 and the policies and implementing measures because it interprets "density" and "acre" to allow new infill development of vacant land to achieve a density that is allowed by the comprehensive plan. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where petitioner argues the city governing body's finding regarding the applicability of a zoning ordinance was erroneous, and the city concedes the finding is erroneous, but when the error is not critical to the city council's interpretation or ultimate conclusions, the error does not provide a basis for reversal or remand. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A city is not required to defer to a permit applicant's characterization of its proposal to remove up to 500,000 cubic yards of rock from a five-acre site as mere site preparation that is necessary for a possible future proposal for residential development. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A land use regulation that assigns the burden of proof to the permit "applicant" does not require that "only the applicant" carry the burden of proof. Assigning the burden of proof to the applicant does not preclude other parties from presenting evidence and legal positions or preclude the decision maker from relying on such evidence. *Pacificorp v. Deschutes County*, 70 Or LUBA 89 (2014).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A letter objecting that a county commissioner is biased and should not participate in the appeal is not an *ex parte* contact, where county code does not require that documents submitted in the land use matter be served on the other parties in the appeal and the letter is submitted to the board of county commissioners in the same way many other documents in the appeal were submitted. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.3.8 Local Government Procedures – Compliance with Statutes – Appeals. Even if county code language could be interpreted to bar non-applicant parties who participated in the evidentiary phase of a local permit proceeding from participating in an on-the-record appeal filed by the applicant to challenge permit conditions of approval, such a local appeal procedure would violate ORS 197.763 and 215.422. *Families for a Quarry Free Neighborhood v. Lane County*, 64 Or LUBA 297 (2011).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. The procedure a city is bound to follow in its land use public hearings is dictated in part by the notice of hearing that it gives. Where the notice of hearing represents that written evidence may be submitted for the first time at the hearing and makes no mention of the city council's general rules and guidelines that state written evidence may not be considered if not submitted at least 10 days before the public hearing, it is error for the city to rely on the general rules and guidelines to refuse to accept written testimony that is submitted for the first time at the public hearing. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. The issue of compliance with a local procedural rule requiring the local government to offer participants the opportunity to request a continuance of a hearing that is not the initial

evidentiary hearing was not raised below with sufficient specificity, where the petitioner did not cite the local rule to the decision maker, but instead requested a continuance only under ORS 197.763(6), which applies only to the initial evidentiary hearing. *Pliska v. Umatilla County*, 61 Or LUBA 429 (2010).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Under ORS 215.427(8), when a county fails to take timely action on a permit application, a permit applicant is entitled to a refund of "either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater," and ORS 215.427(8) further provides that in that circumstance "[t]he applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits." Under ORS 215.427(8), when a county is required to refund initial permit application fees, it may not require the permit applicant to pay additional fees for any additional proceedings that may be required to respond to a LUBA remand of the county's permit decision. *Sperber v. Coos County*, 61 Or LUBA 477 (2010).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where a local code only requires that subdivision applicants provide a traffic study if the local government requests one, a cryptic statement in a letter that a subdivision applicant planned to provide a traffic study was not sufficient to trigger a requirement under the code that the applicant provide a traffic study or make it unnecessary for the local government to request a traffic study before denying the application for subdivision approval for failure to provide a traffic study. *Montgomery v. City of Dunes City*, 60 Or LUBA 274 (2010).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. In determining that an increase from a 32 to 60 bed homeless shelter would not have significant additional impacts on surrounding properties, that there is a justifiable change in circumstances, and that a previous condition of approval is satisfied—the city exercised significant discretion and was required under its code to provide notice and the opportunity for a hearing. *Allan Donald Bruckner Trust v. City of Bend*, 56 Or LUBA 699 (2008).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A county does not commit error in approving a reduced minimum lot or parcel size in a portion of its exclusive farm use zone simply because it did not require the applicant to supply an accurate map of the affected area, where the record includes an accurate metes and bounds description of the affected area and an assessors map that shows the affected tax lots. *Thompson v. Umatilla County*, 54 Or LUBA 531 (2007).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. ORS 215.750 does not prohibit a local government from applying a local code provision requiring an applicant for a forest template dwelling to demonstrate that the dwelling is "necessary for and accessory to" the forest use. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where petitioner does not challenge a city's findings that invoke a development code

provision that allows the city community development director to change the review procedure that would otherwise apply where there is a "compelling public interest," LUBA will deny an assignment of error that challenges the community development director's decision to apply a different procedure that causes an appeal to go directly to the city council rather than to the planning commission. The development code provision need not be interpreted to prohibit a change the applicable review procedure after the city's deliberations on an application have begun. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. LUBA will reject a petitioner's argument that a city adjustment committee erred by failing to find that the zoning of a property reverted to its prior zoning because a rezoning condition of approval was violated, where petitioner fails to cite any authority to contradict the city's position that the adjustment committee lacks authority to question the zoning shown on the city's official zoning map. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Any prejudice to petitioners' substantial rights that might have resulted from late filing of a staff report and late evidentiary submissions prior to a final hearing was avoided by providing petitioners an opportunity to submit additional evidence and testimony after that hearing. *McCulloh v. City of Jacksonville*, 46 Or LUBA 267 (2004).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A local government may defer a determination that an application to site a dwelling in a forest zone complies with certain siting criteria, provided the local government allows petitioner and other interested parties an opportunity to participate in the proceedings where that determination is made. *Hodge Oregon Properties, LLC v. Lincoln County*, 46 Or LUBA 290 (2004).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where a local code neither expressly authorizes a city council on appeal to reconsider a city's engineer's assessment of a traffic impact report and needed transportation improvements nor expressly prohibits such reconsideration, LUBA will defer to the city council's interpretation of the local code to allow reconsideration of the adequacy of the engineer's assessment. *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680 (2004).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A planning commission is not precluded from voting on a new motion to approve a conditional use permit when the first motion fails, where applicable procedures do not prohibit the planning commission from making and voting on a new motion. *Gumtow-Farrior v. Crook County*, 45 Or LUBA 612 (2003).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A city subarea plan that includes policies that may affect land development outside that subarea's boundaries does not violate a city code provision that limits the applicability of subarea development regulations to that subarea alone. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where a city code provision regarding the siting of a telecommunication tower does not require a showing that a particular tower height at a specific location is the only way an applicant for the telecommunication tower can achieve its coverage objectives, a city decision that does not require an alternatives analysis is not inadequate, in the absence of evidence that feasible alternatives exist. *Johnson v. City of Eugene*, 42 Or LUBA 353 (2002).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. In applying a zoning code process that permits ministerial correction of zoning maps to conform to the map or legal description that was adopted by or referenced in the enacting ordinance, the first step is to locate the relevant map or legal description, and the second step is to determine whether a nondiscretionary correction is possible based on that map or legal description. *6710 LLC v. City of Portland*, 40 Or LUBA 389 (2001).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A city decision to approve a one-story building addition rather than a two-story addition will be affirmed where the petitioner fails to demonstrate that general comprehensive plan policies that advocate a compact urban form (1) apply to the challenged application, and (2) are violated by the city's decision. *Thompson v. City of Ashland*, 40 Or LUBA 298 (2001).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A letter that is addressed to and received by a local decision maker may not be omitted from the record of a variance proceeding because the letter did not specifically include a request that it be included in the local record, where there is no local code requirement that the letter include such a specific request and it is obvious that the letter concerns the requested variance. *Reagan v. City of Oregon City*, 39 Or LUBA 738 (2000).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A city does not err in failing to provide a local appeal of a design review decision under design review procedures, where the subject property is within an historic district and the city's code specifies that design review proposals in historic districts are governed by historic design procedures that provide no right of local appeal. *Multi-Light Sign Co. v. City of Portland*, 39 Or LUBA 605 (2001).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. An assignment of error that a city erred by approving a floodplain permit in the absence of a valid conditional use permit for the proposed use provides no basis for reversal or remand where petitioner fails to demonstrate that a conditional use permit for the proposed use must be obtained prior to obtaining a floodplain permit. *Willhoft v. City of Gold Beach*, 39 Or LUBA 353 (2001).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. After a city has approved a permit application, the city may not apply code provisions to require that development occur within a particular time frame when the permit was initially approved without the application of those code provisions, and the city's past practice did not

include the imposition of the development deadlines contained in those code provisions. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 193 (2000).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A county has authority or jurisdiction to deny a permit application on its merits, where the permit applicant fails to demonstrate he was authorized to submit the permit application but the code limitations on who can submit permit applications do not impose a "jurisdictional" requirement. *Base Enterprises, Inc. v. Clackamas County*, 38 Or LUBA 614 (2000).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where a local plan provision requires that the local government enter into a memorandum of understanding with a neighboring municipality, that requirement is not satisfied by the local government's determination that a letter from the municipality is the equivalent of a memorandum of understanding, where the letter does not address the plan policy's requirements, is not signed by both governments, and does not set out what the parties mutually agreed to. *Cedar Mill Creek Corr. Comm. v. Washington County*, 38 Or LUBA 333 (2000).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Unless a local code *requires* the governing body to remand a decision to the planning commission if it finds that the decision is unsupported by findings, the governing body's decision to modify the planning commission's decision rather than remand it provides no basis for reversal or remand. *Dutchuk v. City of Prineville*, 38 Or LUBA 323 (2000).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A local government is not required to adopt conditions of approval for a conditional use permit that replicate conditions of approval for a tentative subdivision plat that covers a portion of the same property. *Dutchuk v. City of Prineville*, 38 Or LUBA 323 (2000).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. When the scope of a "planning action," as that term is used in the city's code, is uncertain and subject to multiple interpretations, LUBA will remand to allow the city to decide the scope in the first instance. *Davis v. City of Ashland*, 37 Or LUBA 224 (1999).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where an intergovernmental agreement requires that parties to the agreement must approve amendments to the agreement in writing, a local government errs in invoking a dispute resolution process that allows it to effectively amend the agreement without the agreement of the other parties. *City of Salem/Marion County v. City of Keizer*, 36 Or LUBA 262 (1999).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Consideration of a legislative action more than once within a 12-month period despite a code requirement that such actions be considered only once in a 12-month period provides no basis for reversal or remand, where all parties were given a full opportunity to participate in the proceedings and there was no prejudice to a party's substantial rights. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A local government has not deferred compliance with mandatory approval criteria where it grants tentative subdivision approval with the condition that development plans be reviewed by a geotechnical engineer prior to the issuance of construction permits. Once a local government has determined that compliance with a mandatory criterion is feasible, it may impose conditions of approval to ensure compliance with that criterion. No hearing on the geotechnical report is required. *Property Rights and Owners, Ltd. v. City of Salem*, 34 Or LUBA 258 (1998).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Absent a specific local requirement that the governing body formally adopt the written decision and findings before the decision becomes final, failure to formally adopt the written findings and decision does not mean the decision is not final. *North Park Annex Bus. Trust v. City of Independence*, 33 Or LUBA 695 (1997).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Under ORS 197.625, when a county code provision has not yet been acknowledged by LCDC, a land use application is subject to that provision, as well as to the applicable land use goal and its implementing rules. *Evans v. Multnomah County*, 33 Or LUBA 555 (1997).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A local decision is final for purposes of appeal at the time that it meets the requirements of OAR 661-10-010. That a local ordinance requires that the decision be recorded before it becomes "effective" does not affect the date upon which the decision becomes "final" for purposes of appeal. *Friends of Yamhill County v. Yamhill County*, 33 Or LUBA 530 (1997).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A city's denial of an application to *develop* a legally transferable lot has no bearing on the city's obligation to recognize that lot as legally transferable under ORS 92.017. *Eagle Point Development v. City of Shady Cove*, 33 Or LUBA 509 (1997).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. That a parcel may be separately transferable under ORS 92.017 does not determine whether the parcel may be separately developed. *Eagle Point Development v. City of Shady Cove,* 33 Or LUBA 509 (1997).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A city does not err by adopting an alternative decision on the merits in addition to dismissing a local appeal, where petitioner is not prejudiced by the alternative decision. *Shaffer v. City of Salem*, 33 Or LUBA 57 (1997).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. The county is not bound by a hearings officer's previous legal interpretation of a local ordinance where the county determines that the earlier interpretation is incorrect. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where a local ordinance requires the city to act on an application within 36 days after filing, LUBA will read that ordinance consistently with state statute to require the city to act within 36 days of the date the application is deemed complete. *Thornton v. City of St. Helens*, 31 Or LUBA 287 (1996).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A local government decision may not defer compliance with discretionary standards without ensuring the full opportunity for public involvement provided in the initial stage of the review process. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. An appeal to LUBA challenging the amount of a local appeal fee established by ordinance adopted under ORS 215.422(1)(c) amounts to an impermissible collateral attack on the fee ordinance. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. When the city's comprehensive plan states it is the city's policy to participate in a joint review procedure of proposed annexations involving the county planning commission, the citizens' planning advisory committee, and the city planning commission, the city may not disregard the policy. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where petitioners contend the governing body failed to follow procedures arguably required by the local code for making the challenged legislative land use decision, LUBA must defer to the governing body's interpretation of the code and cannot interpret the code provisions in the first instance. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 429 (1995).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Neither ORS 197.830(12) nor OAR 661-10-021 establishes any requirements regarding the nature of the local government proceedings conducted after withdrawal. However, the local government must follow any applicable requirements its own land use regulations impose for making a new final decision. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A code provision that prohibits taking "notice of any communications * * * or other materials prepared in connection with the particular case unless the parties are afforded an opportunity to contest the material" prohibits a hearings officer from considering communications from the local government counsel, or proposed findings submitted by a party, without providing other parties an opportunity for rebuttal. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where a local code provides that a planning commission decision becomes final 10 days after "submittal" of the written decision to the clerk of the governing body, the local government is not clearly wrong in interpreting "submittal" to the clerk to mean "receipt" by the

clerk, and its interpretation will be sustained. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. That a county zoning ordinance authorizes imposition of "fines" for its violation, whereas a separate county compliance ordinance authorizes imposition of "civil penalties" in amounts determined under ORS 203.065(1) or the violated ordinance, does not prevent the county from imposing a civil penalty for violation of its zoning ordinance, based on the amount of the fines allowed by the zoning ordinance for violations. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. The fact that a local zoning ordinance describes the financial penalties that may be imposed for violations as "fines" is not, of itself, a sufficient basis for determining that proceedings to enforce that zoning ordinance are criminal in nature. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A county can establish procedures for determinations concerning nonconforming uses as part of its zoning ordinance and, if it does so, can require parties to seek a determination regarding the existence or expansion of a nonconforming use through such zoning ordinance procedures, rather than allowing such issues to be initially determined in the county's code enforcement process. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. It is questionable whether a local government could ever be equitably estopped from requiring compliance with applicable comprehensive plan and land use regulation requirements. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Even if misstatement of material fact can provide a basis for equitable estoppel against a local government requiring compliance with applicable comprehensive plan and land use regulation requirements, an erroneous legal conclusion cannot provide a basis for such an equitable estoppel. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Absent some legal requirement to the contrary, a local government is not bound to assure that its final written decision conforms to its oral decision in all particulars. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Absent local code provisions extending such a right, parties have no right to rebut proposed findings. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where petitioners fail to cite any applicable standard prohibiting the cutting of trees in

a comprehensive plan "Distinctive Natural Area," their assertion that cutting trees is inconsistent with the subject parcels' Distinctive Natural Area designation provides no basis for reversal or remand of the challenged decision. *Forest Highlands Neigh. Assoc. v. City of Lake Oswego*, 24 Or LUBA 215 (1992).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where the local code requires that the decision maker give an oral statement at the beginning of a local hearing to the effect that any party may request that the record remain open for a period of seven days, and where such oral statement is not given, petitioners' substantial right to submit their case is thereby prejudiced and this error provides a basis for remanding the challenged decision. *Adler v. City of Portland*, 24 Or LUBA 1 (1992).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A local government satisfies plan coordination requirements where it provides notice of proposed plan amendments to affected governmental units, the applicant contacts those governments by telephone shortly before the plan amendment hearing and the affected governmental units either express support or show no interest in participating in the proceedings. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A local government must determine compliance with a code standard requiring that a proposed golf course will have no significant adverse impact on wildlife. The local government may not leave a determination of compliance with a code approval standard to a state agency. *Kaye v. Marion County*, 23 Or LUBA 452 (1992).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where a challenged decision defers consideration of certain code mandatory approval standards until a later stage, but fails to provide that such later stage will include the full opportunity for public involvement provided at the initial stage, and where nothing in the local code requires such opportunity to be provided in any subsequent proceedings, the decision to defer consideration of such mandatory standards constitutes a basis for remand of the challenged decision. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. An ordinance governing comprehensive plan amendment procedures does not apply to a local proceeding where no comprehensive plan amendment application was filed, no notice of a proposed comprehensive plan amendment was given, and no comprehensive plan amendment was adopted. *Schrock Farms, Inc. v. Linn County*, 22 Or LUBA 836 (1992).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A local code provision requiring that only members of the board of commissioners reviewing the entire record may act on a matter under review does not impose an affirmative obligation on each county commissioner to demonstrate he or she reviewed the entire record. Absent some indication in the record to the contrary, LUBA will assume a county commissioner performed her duties in accordance with the local code provision. *Toth v. Curry County*, 22 Or LUBA 488 (1991).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Where an applicant seeks approval for development outside of a "stream corridor area," but has already placed related development within the "stream corridor area" on the same property without obtaining necessary local permits, the local government has authority to impose conditions on approval of the applicant's proposed development requiring that the unauthorized development be removed or that necessary local permits be obtained for the unauthorized development. *Tylka v. Clackamas County*, 22 Or LUBA 166 (1991).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. Even where the local code provides for the type of *de novo* review in which the governing body develops its own evidentiary record and renders its decision based on that new record, the code may require that the planning commission record be included as part of the evidentiary record before the governing body in its *de novo* review proceeding. *Union Gospel Ministries*, 21 Or LUBA 580 (1991).

25.4.1 Local Government Procedures – Compliance with Local Ordinances/Regs – Generally. A city commits no error where it reviews an entire land development application, portions of which are subject to different types of local review procedures, utilizing the type of review procedure requiring the greatest notice and opportunity to participate. *J.K. Land Corporation v. City of Gresham*, 19 Or LUBA 66 (1990).

Local Government Procedure – Compliance with Rules and Ordinances. That the subject lots are the only lots in the vicinity which fail to meet an ordinance access requirement does not describe conditions inherent in the land which constitute exceptional or extraordinary circumstances justifying a variance from that access requirement. *Cope v. Cannon Beach*, 15 Or LUBA 546 (1986).

Local Government Procedure – Compliance with Rules and Ordinances. Circumstances which do not affect a lot's ability to comply with an ordinance access requirement do not constitute exceptional or extraordinary circumstances justifying a variance from that access requirement. *Cope v. Cannon Beach*, 15 Or LUBA 546 (1986).

Local Government Procedure – Compliance with Rules and Ordinances. A city's involvement policy giving residents "the opportunity to be involved in all phases of the planning efforts of the city" does not grant citizens the right to go upon private property over the objection of the landowner to gather information regarding land use proceedings. *Cope v. Cannon Beach*, 15 Or LUBA 546 (1986).

Local Government Procedure – Compliance with Rules and Ordinances. City comprehensive plan policy requiring conformity with slope and density guidelines and calling for geologic sit3e investigation under certain circumstances is satisfied by findings regarding slope and relying on a geologist's report conclusion that geologic hazards would not be increased as a result of the proposed development. *Cope v. Cannon Beach*, 15 Or LUBA 546 (1986).

Local Government Procedure – Compliance with Rules and Ordinances. Comprehensive plan requirement calling for a geologist's site inve3stigation is satisfied by the report of a registered geologist. *Cope v. Cannon Beach,* 15 Or LUBA 546 (1986).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A permit applicant initiates the permit approval process by advising the county what it seeks approval for and requesting that the county act to grant land use approval. ORS 215.427 clearly recognizes that when an application is first submitted it may be incomplete, and a permit application that does not include the required filing fee may be incomplete, but nevertheless be sufficient to initiate the permit approval process. *Bora Architects, Inc. v. Tillamook County*, 76 Or LUBA 330 (2017).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. An applicant may file an application to modify a planned unit development (PUD), while also objecting to the need to file a PUD modification application, without thereby waiving the objection. *Recovery House VI v. City of Eugene*, 150 Or App 382, 946 P2d 242 (1997). *Tokarski v. City of Salem*, 74 Or LUBA 124 (2016).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where an applicant seeking to remove property from a city's Goal 5 inventory of historic resources withdraws the request based on city code standards, but continues to request removal under ORS 197.772(3), the city correctly continues to process the application, notwithstanding a local code standard providing that the proceeding shall terminate on the date the application is withdrawn, where the city correctly concludes that the standard refers to complete withdrawal of the application, not withdrawal of one requested basis for the application. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Even if application requirements have not been satisfied, that failure does not provide a basis for reversal or remand of the decision where the alleged failure to comply with the application requirements has not resulted in noncompliance with any approval standards. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A local code provision that provides that where a proposal will have significant impacts on an area, the proponent of the proposal may be required to submit more detailed and reliable evidence that the proposal will comply with applicable approval criteria than would otherwise be required in order for the county to approve an application with fewer impacts is consistent with *Fasano v. Washington Co. Comm.*, 264 Or 574, 586, 507 P2d 23 (1973), regarding the burden of proof in a quasi-judicial application for rezoning. *Tidewater Contractors v. Curry County*, 65 Or LUBA 424 (2012).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where the county code requires the signature of all owners of the property, and to ensure compliance with respect to a proposed pipeline crossing multiple properties the county imposes a condition requiring that the approval becomes effective only when the utility provider supplies all required signatures, an ambiguity in the condition regarding whether all signatures of all property owners are required for the approval to become effective is not a basis to remand the decision, where it is reasonably clear from the condition and findings that the county intended that all signatures of all owners be obtained before the approval becomes effective and

building permits for any part of the pipeline can be obtained. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A county errs in deferring a county code requirement to obtain the signatures of all property owners to a subsequent administrative proceeding that does not provide notice or opportunity for public input, in which staff is granted the discretion to determine whether a circuit court order condemning an easement or less-than-fee interest in property "obviates" the need to obtain the signature of the fee owner. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A county errs in deferring the requirement to obtain the signatures of all property owners to a subsequent administrative proceeding, in which staff are granted the discretion to determine whether the county signature requirement is preempted or rendered invalid under federal law. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where a petitioner assigns error to a county's failure to require an applicant for destination resort approval to pay the required $20,000 application fee, but the record shows that (1) the applicant paid the required $20,000 application fee for a previous application for destination resort approval that was withdrawn and replaced by the destination resort application on appeal and (2) the county applied the prior application fee to the second application for destination resort approval, petitioner's assignment of error will be denied. *Eder v. Crook County*, 60 Or LUBA 204 (2009).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where a city's code requires that the applicant submit a geotechnical report addressing hazards on the subject property, but does not require the report to address off-site hazards or conditions, the city does not err in relying on a geotechnical report that does not include data or soil tests from adjoining properties. *Papadopoulos v. City of Corvallis*, 59 Or LUBA 384 (2009).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. The mere fact that a plat or an application is modified does not automatically require a new application to be filed where the original application remains fundamentally intact. *Welch v. Yamhill County*, 56 Or LUBA 166 (2008).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A local government does not err in failing to require an easement holder to sign or authorize the landowner's permit application, where the code requires only the "owner" to sign and the code defines "owner" to refer only to the owner of record, not easement holders. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. When local approval criteria are amended after an application is filed

and the local ordinance requires that the notice state the applicable criteria, it is not a procedural error for the local government to list the older approval criteria that are applicable to the application rather than the amended approval criteria that are not applicable. *Painter v. City of Redmond*, 56 Or LUBA 264 (2008).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. There is no prejudice to a party's substantial rights when a notice of a hearing does not list the applicable criteria if the staff report that was available before the hearing lists the applicable criteria, the party was aware of the applicable criteria, and the party had an adequate opportunity to address the applicable criteria. *Painter v. City of Redmond*, 56 Or LUBA 264 (2008).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. When a local code provision prevents the filing of the same or "substantially similar" application within a certain time period after a previous application is denied, the plain ordinary meaning of "substantially similar" means that a second application is barred only when there is a high degree of similarity. *Henkel v. Clackamas County*, 56 Or LUBA 495 (2008).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. When a local code provision prevents the filing of substantially similar applications after the denial of a previous application, a home occupation permit application that proposes the same general construction contracting activity as the first application is nonetheless not substantially similar to the first application when it significantly reduces the scope and intensity of the proposed use. *Henkel v. Clackamas County*, 56 Or LUBA 495 (2008).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Failure to submit required information in the application materials is not necessarily a basis for remand, if the respondent identifies other evidence in the record that is sufficient to support a finding of compliance with the approval criteria, or at least explains why required information is not necessary to support the decision. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where the purpose of a zoning code requirement that a permit application be initiated in one of six specified ways is to ensure that the current property owner or purchaser of the affected property knows about and agrees with the application, and the record establishes that the current property owner agrees with the application, the county's procedural error in allowing the permit application to be initiated in other than one of the six ways specified in the zoning code could not prejudice a permit opponent's rights and provides no basis for reversal or remand. *Womble v. Wasco County*, 54 Or LUBA 68 (2007).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. The applicant's failure to provide a survey of individual trees on property to be subdivided is not a basis for reversal or remand, where the applicable approval standards do not require preservation of individual trees, and the information necessary to show

compliance with those standards need not include that level of detail. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Under ORS 227.178(4), where a city has notified a conditional use permit applicant that the application requires additional supporting information, and the applicant fails to provide the information and fails to provide the city notice that the applicant will not provide the requested information, the city may treat the application as void. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Although a city may deny a conditional use permit application on the basis that there is not substantial evidence to support findings that all applicable approval criteria are met, a city may not simply deny a conditional use permit application that has already been deemed complete under ORS 227.178(2) for failure to provide requested information. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. If a city gives notice that additional information is required in support of a conditional use permit application, but nevertheless continues to review and make a decision on that application despite the permit applicant's failure to provide the requested additional information, the local government may not simply cite that failure to provide the requested information as the basis for denying the permit application. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. That a conditional use permit application is deemed complete under ORS 227.178 does not necessarily mean that the application is supported by substantial evidence that demonstrates compliance with all applicable approval criteria. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where a tentative plan omits information required to determine if the plan complies with approval criteria, and the omitted information is not contained in the record, the failure to provide the required information provides a basis for remand. *Township 13 Homeowners Assoc. v. City of Waldport*, 53 Or LUBA 250 (2007).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. The purpose and intent of ORS 227.175(2) is to facilitate the processing of development proposals that require multiple applications by consolidating permit reviews that will apply existing laws with zone changes that will alter existing laws. *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277 (2007).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A failure to comply with a submittal requirement does not automatically require that the city reject an application if other evidence in the record can be relied

on to find that applicable approval criteria are met. *Douglas v. City of Salem*, 53 Or LUBA 567 (2007).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Absent local code provisions that prohibit re-submittal of denied land use applications, nothing prohibits an applicant from re-submitting, or the local government from accepting, a previously denied application supported by the same or additional evidence. *Gordon v. Polk County*, 50 Or LUBA 502 (2005).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A code provision requiring that where the applicant is not the owner of the subject property the owner be provided a copy of the application prior to approval is satisfied, where there are only two potential owners and both are notified of the application. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where the applicable area plan specifically allows submittal of a master plan application without the signatures of all owners of the property subject to the application, petitioners cannot collaterally attack that provision when a master plan application is filed, and city's interpretation that the provision in area plan controls over a more general code provision requiring the consent of all owners is supportable under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Lowery v. City of Keizer*, 48 Or LUBA 568 (2005).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A land use regulation requiring a city to consider all related applications in one proceeding does not require the applicant to submit all applications necessary for development at the same time, or prevent the city from approving those applications before it, notwithstanding that further applications may be necessary. *Nielson v. City of Stayton*, 47 Or LUBA 52 (2004).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Any error in a hearings officer's conclusion that the terms of an easement allow a public utility to file a land use application without the property owner's signature is harmless, where the code allows a public utility with condemnation authority to sign land use applications, and there is no dispute that the applicant is a public utility with condemnation powers under applicable statutes. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. An assignment of error that alleges that petitioners' substantial rights were prejudiced by a city's failure to provide notice of an applicable approval criterion provides no basis for reversal or remand, where (1) the record shows that the criterion was identified at a public hearing as being applicable; (2) petitioners had an opportunity to respond to the assertion that the criterion was applicable; and (3) petitioners' attorney responded to the assertion by contending that the criterion was not applicable. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A standard that imposes both an analytical requirement and an ultimate legal standard that public services be adequate to accommodate a proposed zone change is not satisfied by a conclusion that the ultimate legal standard is met, if the required analysis has not been conducted. *Fay v. City of Portland*, 43 Or LUBA 390 (2002).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A city code requirement that multiple requests for adjustments must cumulatively comply with the overall purpose of the zone does not require the city to consider potential future adjustment requests that are not before it. The city's interpretation that limiting its consideration and approval to the adjustment request before it does not preclude the possibility of future adjustments is reasonable and correct. *Lee v. City of Portland*, 40 Or LUBA 498 (2001).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where a zoning ordinance includes no provisions specifying how a zoning map amendment application must be withdrawn, a local government commits no error in continuing to process a zoning map amendment request after the applicant attempts to withdraw the application and commits no error in failing to require a new application fee. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. The omission of required information from an application does not necessarily constitute error if the information is later submitted and included in the record. *McNern v. City of Corvallis*, 39 Or LUBA 591 (2001).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where a permit application omits required information, the omitted information is not contained elsewhere in the record, and the omitted information is necessary to demonstrate compliance with an applicable approval standard, the failure to provide the required information is not harmless procedural error and provides a basis for reversal or remand. *Hausam v. City of Salem*, 39 Or LUBA 51 (2000).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A lack of supporting information in an application does not provide a basis for reversal or remand when the missing information is not necessary to determine compliance with a specific approval standard. *Roth v. Jackson County*, 38 Or LUBA 894 (2000).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A school district that obtained title to property through a circuit court condemnation proceeding judgment is an "owner" within the meaning of a code provision defining an owner as a person with a legal interest in property, notwithstanding the Court of Appeals' issuance of a stay pending resolution of an appeal of the circuit court's order denying a motion to intervene in the condemnation proceedings. *Lodge v. City of West Linn*, 35 Or LUBA 42 (1998).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A code requirement that an application be accompanied by a

complete site plan is not satisfied by an application that includes a site plan for only four of 15 lots. *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A city cannot find it is feasible to comply with all approval criteria based on a site plan for only four of the total 15 lots and defer submission of a complete site plan, and the record does not clearly support a determination of compliance with the approval criteria where the complete site plan is not included in the record. *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where a local code provision requires the consent of all property owners affected by a land use application, a present owner must sign the application, notwithstanding an agreement obligating the present owner to convey the property in the future to a party who signed the application. *Johnston v. City of Albany*, 34 Or LUBA 32 (1998).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. In the absence of a code prohibition or some other obstacle identified by petitioner, a city may find a proposal that is substantially modified on remand from LUBA to be a continuation of the original application. *Sullivan v. City of Woodburn*, 33 Or LUBA 356 (1997).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A county errs in not requiring a scaled drawing of a proposed dwelling as required by local code, where the drawing is necessary to determine that the proposed dwelling complies with applicable height and roof pitch standards, and the missing information is not otherwise in the record. *Pekarek v. Wallowa County*, 33 Or LUBA 225 (1997).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. The omission of information required by a local code from a development application is harmless procedural error if the required information is located elsewhere in the record. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Omission of required information from an application is a procedural error that does not prejudice petitioners' substantial rights if the information is not necessary to determine compliance with applicable approval standards. *Venable v. City of Albany*, 33 Or LUBA 1 (1997).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. The county's application requirements for a conditional use permit are not approval criteria; the fact that application requirements may not have been satisfied provides no basis for remand absent a showing that the failure to satisfy the requirements resulted in non-compliance with at least one mandatory approval criterion. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. If a code provision simply provides the decision maker "may require" an applicant to submit a traffic capacity analysis, but petitioners identify no legal standard arguably requiring such an analysis in the instant case or establishing standards for local government decisions on whether to require such an analysis, the local government's failure to require such an analysis does not provide a basis for reversal or remand. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Whether certain persons are "applicants" for destination resort preliminary development plan approval, as defined in the local code, requires an interpretation by the local governing body in the first instance. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. To obtain reversal or remand of a decision because information required by the local code is missing from the application, petitioner must explain why the missing information is necessary to determine compliance of the proposed development with applicable approval standards, and the missing information must not be found elsewhere in the record. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Code provisions which simply require a land use application to contain certain information, and explain the burden is on the applicant to establish compliance with relevant approval criteria, do not impose an affirmative requirement on the applicant to disclose a dispute the applicant may have with another jurisdiction concerning another permit. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Limitations on a local government's authority over development applications must be specifically expressed in the local code. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Absent a statutory or local code provision to the contrary, a local government may recognize a property owner who signs a permit application as an applicant, or allow a change in the applicants for a permit. *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. In order for a petitioner to obtain reversal or remand of a decision because information required by the local code is missing from the application, petitioner must explain why the missing information is necessary to determine compliance of the proposed development with applicable approval standards, and the missing information must not be found elsewhere in the record. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where a local code provision does not explicitly state the requirements listed thereunder for a complete development application are "jurisdictional," the local government's interpretation of the code provision as imposing procedural rather than jurisdictional requirements is not inconsistent with the express words, purpose or policy of the code and, therefore, must be affirmed. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where the applicant is a general partnership, a code requirement that the application bear the signature of the applicant is satisfied if the record indicates the person who signed the application is a general partner. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A local government acts within the interpretive discretion afforded by ORS 197.829 in finding a code requirement for a statement of the nature of the applicant's interest in the subject property is satisfied where the application states the applicant is the "future property owner" and there is evidence in the record that the applicant has acquired or will acquire the property. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. An applicant's failure to include particular information required by the local code on a permit application provides no basis for reversal or remand, unless petitioner explains why the missing information is necessary to determine compliance with specific applicable approval standards. *Wissusik v. Yamhill County*, 27 Or LUBA 94 (1994).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. The fact that a PUD proposal was altered in 1992 to eliminate a need for story variances, does not retroactively cause the underlying application, submitted in 1990, to be incomplete at the time it was submitted. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where a proposal is changed after the permit application is submitted, ORS 227.178(3) locks in the standards in effect at the time the application was first submitted, so long as the original proposal remains "fundamentally intact" after the change. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where a local government's interpretation of its own code, that a county department manager may initiate an application for development approval on behalf of the local government, is not clearly contrary to the express words, policy or context of the local code, LUBA will defer to it. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where LUBA's decision on petitioners' first appeal found the local government erred by failing to interpret and apply certain code provisions to the subject application, and petitioners did not appeal that LUBA decision, petitioners have waived the argument that a separate application is required to give the local government jurisdiction to apply the code provisions in question. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. In the absence of a code provision to the contrary, a local government is not required to allow modifications to a subdivision application to enable its approval. *Schatz v. City of Jacksonville,* 25 Or LUBA 327 (1993).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. In order for a petitioner to obtain reversal or remand by LUBA of a challenged decision because information required by the local code is missing from the subject land development application, petitioner must argue that the missing information is not found elsewhere in the record and explain why the missing information is necessary to determine compliance of the proposed development with applicable approval standards. *Murphy Citizens Advisory Comm. v. Josephine County,* 25 Or LUBA 312 (1993).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where local subdivision approval standards adopted pursuant to ORS 92.044(1) specifically provide that a subdivision application may be approved with modifications, the local government may accept a modified application for subdivision approval following submittal of the initial application without requiring that the entire approval process be repeated. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Following LUBA reversal of a city decision approving a permit application, the choice between whether to allow the permit application to be amended or to require that a new permit application be submitted is within the city's discretion, provided any local code requirements governing that choice are followed. *Seitz v. City of Ashland*, 24 Or LUBA 311 (1992).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where an applicant's attorney represents that the applicant is acting as the agent of the property owner, the application for land use approval is initiated by the authorized agent of the record owner, as required by the local code. *Columbia River Television v. Multnomah County,* 24 Or LUBA 82 (1992).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where intervenors filed a conditional use permit application as an agent of the property owner, there is no violation of the provision in ORS 215.416(1) stating that an owner of property may apply for a permit. *Silani v. Klamath County,* 22 Or LUBA 735 (1992).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. A local code requirement that a review body may not consider a

request for a conditional use permit within one year following a previous denial of "such" request, prohibits submission of a conditional use permit application for the same use on the same property as previously denied. It does not prohibit the submission of a conditional use permit application for a different use of the property. *Silani v. Klamath County*, 22 Or LUBA 735 (1992).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Although the party initiating a challenged zoning ordinance amendment was not clearly identified on the application and notices of local public hearings as required by the local code, such procedural errors provide no basis for reversal or remand where petitioners' substantial rights were not prejudiced. *Parmenter v. Wallowa County*, 21 Or LUBA 490 (1991).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where the local code provides that a property owner may file a conditional use application, a property owner has standing to file an application for approval of a home occupation, even though the property owner does not propose to reside in the dwelling and conduct the home occupation. *Tarbell v. Jefferson County*, 21 Or LUBA 294 (1991).

25.4.2 Local Government Procedures – Compliance with Local Ordinances/Regs – Application Requirements. Where the local code allows a property owner's agent to file a land use application "provided the application is accompanied by proof of the agent's authority," but proof of the agent's authority was not submitted until after the application was filed, the local government at most committed a procedural error, not grounds for reversal or remand unless petitioners were prejudiced by the delay in submitting the authorization. *Bridges v. City of Salem*, 19 Or LUBA 373 (1990).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. When a county opts to approve a permit without a public hearing, any person who is adversely affected or aggrieved, or who is entitled to notice of the decision may appeal a decision made without a hearing. The county cannot require participation prior to a decision, either by attending a conference (that may or may not have occurred), or providing written comments, or in any other manner. Additionally, the county may not enact additional restrictions to prevent a person who is entitled to file an appeal under the ORS 215.416(11)(a)(A) right to file a local appeal. *Hood River Valley Residents Comm. v. Hood River County*, 78 Or LUBA 282 (2018).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where a county code limits administrative review to applications that do not require interpretation or the exercise of policy or legal judgment, and requires quasi-judicial review with notice to nearby property owners for all other applications, the county commits procedural error that is prejudicial to property owners within the notice area by administratively processing without notice an application for a floodplain development permit that requires the exercise of legal judgment. *Rogue Advocates v. Jackson County*, 77 Or LUBA 181 (2018).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where petitioner alleges a local government failed to meet its obligations under ORS 227.186 to provide notice of a comprehensive plan amendment, a zone change, or a change in a land use regulation that may affect the permissible uses of property to be mailed to the owner of each lot or parcel that the ordinance proposes to rezone or that would be affected by a change in the permissible uses of the property, petitioner fails to allege a basis for reversal or remand when petitioner fails to allege the "procedural error" prejudiced petitioner's "substantial rights." *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. ORS 197.763(3)(b) does not require the local government to list all potentially applicable state statutes in its notice of hearing, and therefore any failure to list applicable state statutes is not a procedural error. *Talbott v. City of Happy Valley*, 74 Or LUBA 143 (2016).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where no statute or local code provision requires that a city council, in making the city's final decision on a request for a zoning classification as described in ORS 227.160(2)(b), conduct the city council meeting pursuant to quasi-judicial land use procedures requiring notice and an evidentiary hearing, the city council does not err in conducting the meeting pursuant only to the procedures governing a public meeting. *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A county's failure to give written notice to a party is not rendered harmless error simply because the governing body is given discretion under the code not to allow that party to participate at the hearing. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where a party would have had at least 10 days to prepare for a hearing, giving that

party the right to share 30 minutes with two other persons to present evidence at the end of the hearing is not sufficient to avoid prejudice to the party's substantial rights. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A city's failure to provide a party who is entitled to notice under the city's code with notice of (1) a hearings officer's decision and (2) an appeal hearing on another party's appeal of the hearings officer's decision prejudices the party's right to participate in the planning commission appeal hearing and remand is required. *Oakleigh-McClure Neighbors v. City of Eugene*, 71 Or LUBA 317 (2015).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. ORS 197.763(3)(b) requires a local government's notice of quasi-judicial land use hearing "[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue." The transportation planning rule (TPR) is not part of a local government's "ordinance" or "plan" and a local government's failure to list the TPR in its notice of hearing does not excuse petitioner's failure to preserve her issue concerning the TPR for LUBA review by raising it before the local government. *Savage v. City of Astoria*, 68 Or LUBA 225 (2013).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. If a planning commission relies on a comprehensive plan policy as a separate and independent basis for its decision to deny a permit application, and the permit applicant fails to challenge the planning commission's reliance on the comprehensive plan policy in its notice of local appeal, the board of county commissioners could affirm the planning commission's decision based on that failure alone, without regard to the merits of the permit applicant's challenge to other bases for the planning commission's decision. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where a zoning ordinance requires that a notice of local appeal "include" "a clear and distinct identification of the specific grounds" for appeal and that compliance with that requirement is "jurisdictional," a local government may insist on strict compliance with the zoning ordinance requirements of a local notice of appeal. It is not inconsistent with the text of the zoning ordinance to conclude that a local appeal should be dismissed where the notice of intent to appeal includes no grounds for appeal and instead attempts to incorporate by reference legal issues stated in a different document that was created for a different reason, without attaching a copy of that document. *Lang v. City of Ashland*, 64 Or LUBA 250 (2011).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A person filing a notice of local appeal to seek a local appeal of a land use decision may not shift to the local government the burden for ensuring that a local appeal fully complies with all jurisdictional requirements. *Lang v. City of Ashland*, 64 Or LUBA 250 (2011).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where a local government is uncertain whether its decision to dismiss a local appeal for failure to comply with zoning ordinance requirements for filing a local notice of appeal

will be affirmed by LUBA, it may adopt alternative decisions to dismiss the appeal and to proceed with the appeal. In doing so, a local government does not waive its right to argue at LUBA that the local government correctly dismissed the local appeal. *Lang v. City of Ashland*, 64 Or LUBA 250 (2011).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. The procedure a city is bound to follow in its land use public hearings is dictated in part by the notice of hearing that it gives. Where the notice of hearing represents that written evidence may be submitted for the first time at the hearing and makes no mention of the city council's general rules and guidelines that state written evidence may not be considered if not submitted at least 10 days before the public hearing, it is error for the city to rely on the general rules and guidelines to refuse to accept written testimony that is submitted for the first time at the public hearing. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Although ORS 197.835(4) provides an exception to the "raise it or waive it" rule, it only allows a petitioner to raise new issues based upon applicable criteria that were omitted from the notice. A local provision that tentative approval will expire if not completed and the ORS 227.178(5) limit on the number of days an applicant may extend the deadline for a local government to make a final decision on an application are not "applicable criteria." Therefore, a petitioner may not raise issues concerning the statutes and local provision for the first time at LUBA, even though they were not listed in the notice. *Oh v. City of Gold Beach*, 60 Or LUBA 356 (2010).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where a petitioner is only entitled to notice of a hearing under local provisions, and is not entitled to such notice under state statutes, under *Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 899 P2d 720 (1995), any failure to provide notice of a hearing does not toll the 21-day appeal deadline under ORS 197.830(9), pursuant to ORS 197.830(3). *Plaid Pantries, Inc. v. City of Tigard*, 60 Or LUBA 441 (2010).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. *Fasano v. Washington County*, 264 Or 574, 507 P2d 23 (1973), does not give a party an independent constitutional right to notice of a hearing in addition to a statutory or local code right to notice of a hearing. *Plaid Pantries, Inc. v. City of Tigard*, 60 Or LUBA 441 (2010).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where the applicable process for review of an application requires notice and an opportunity for a hearing, the local government fails to provide such notice and provides no opportunity for a hearing, and those failures prejudice a party's substantial rights, including the right to participate in the decision, those failures constitute a procedural error that provides a basis for remand. *Johnson v. Jackson County*, 59 Or LUBA 94 (2009).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. ORS 197.835(4) allows a petitioner at LUBA to raise issues that were not raised below and that a petitioner would otherwise be precluded from raising under ORS 197.763(1)

regarding applicable criteria that were omitted from the notice. A mere allegation that the notice omitted applicable criteria does not, in itself, provide a basis to reverse or remand a decision absent an allegation that the failure to list all applicable criteria in the notice resulted in prejudice to the petitioner's substantial rights. *Knapp v. City of Corvallis*, 59 Or LUBA 285 (2009).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where the underlying approval that is being extended is a permit, the extension of that permit is also a permit. *Thalman v. Marion County*, 58 Or LUBA 23 (2008).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. ORS 197.830(5) gives additional appeal rights to parties where a local government makes a decision that is different from the proposal described in the notice. That statute does not require notice of a change to an application. *Welch v. Yamhill County*, 56 Or LUBA 166 (2008).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. When local approval criteria are amended after an application is filed and the local ordinance requires that the notice state the applicable criteria, it is not a procedural error for the local government to list the older approval criteria that are applicable to the application rather than the amended approval criteria that are not applicable. *Painter v. City of Redmond*, 56 Or LUBA 264 (2008).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. There is no prejudice to a party's substantial rights when a notice of a hearing does not list the applicable criteria if the staff report that was available before the hearing lists the applicable criteria, the party was aware of the applicable criteria, and the party had an adequate opportunity to address the applicable criteria. *Painter v. City of Redmond*, 56 Or LUBA 264 (2008).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where written notice is given 12 days in advance of a rezoning hearing, instead of 20 days before the hearing as required by local law, but the local government continues the initial hearing to a date 25 days after the initial notice, and provides a second notice of that continued hearing, neither notice technically complies with the 20-days prior notice requirement. However, where petitioners make no attempt to challenge the adequacy of the two notices other than to challenge their timing, the local government's action to continue the initial hearing until a date 25 days after the initial notice was sufficient to avoid any prejudice, and the timing of those notices provides no basis for reversal or remand. *Citizens Against Annexation v. City of Florence*, 55 Or LUBA 407 (2007).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A local government does not err in interpreting a local requirement that a notice of land use hearing be published three times in the newspaper to be satisfied where the notice was published twice in one newspaper and once in a second newspaper. *Citizens Against Annexation v. City of Florence*, 55 Or LUBA 407 (2007).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Assuming a local government is legally obligated to provide participants in a quasi-judicial land use hearing notice of the date and time of the meeting at which it will adopt its decision in a quasi-judicial land use matter, where the local government provides such notice orally immediately after the conclusion of the final evidentiary hearing it satisfies that legal requirement. *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A county's procedural error in providing a permit opponent notice of a planning commission decision on the permit rather than a copy of the permit decision itself could result in prejudice to the opponent's substantial rights, where it prevented the opponent from being able to file a timely appeal to the board of county commissioners. However, where the opponent was nevertheless able to file a timely local appeal, there was no prejudice to the opponent's substantial rights, and the county's failure provides no basis for reversal or remand at LUBA. *Womble v. Wasco County*, 54 Or LUBA 68 (2007).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Local governments are generally required to provide notice of proceedings on remand to the parties before LUBA, even if those parties would not otherwise be entitled to notice under the code. However, such notice is not necessarily required where, following remand, the local government elects to proceed on what is essentially a new and different application involving the same property, under code procedures that do not require notice. *Sullivan v. Polk County*, 51 Or LUBA 107 (2006).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A city's failure to make a staff report available 15 days prior to a hearing as required by the local code prejudices a petitioner's substantial rights where the staff report is made available only 7 days before the hearing and the application is particularly complex. *Hammons v. City of Happy Valley*, 49 Or LUBA 38 (2005).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A code provision requiring that where the applicant is not the owner of the subject property the owner be provided a copy of the application prior to approval is satisfied, where there are only two potential owners and both are notified of the application. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Absent a local code requirement to the contrary, ORS 197.763 does not require that every hearing notice given by a local government must provide an overview of local appeal procedures and how those procedures may affect an appeal at LUBA, as long as the notices inform participants of their obligation to raise issues regarding compliance with applicable criteria at the earliest opportunity. *Scheyer v. City of Hood River*, 43 Or LUBA 112 (2002).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. ORS 197.830(4) comprehensively addresses the situation where a local

government makes a permit decision without a hearing pursuant to ORS 215.416(11) or 227.175(10). *Warf v. Coos County*, 42 Or LUBA 84 (2002).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where petitioner argues the city erred by approving an expedited annexation while failing to "(1) publish public notice, (2) notify adjacent property owners, (3) post a notice on the properties, (4) notify property owners within created 'service islands,' or (5) notify the community in time for this issue to be included on public agendas to be discussed," but petitioner identifies no legal requirement for any of these kinds of notice, petitioner fails to provide a basis for reversal or remand. *Cape v. City of Beaverton*, 41 Or LUBA 515 (2002).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A county's error in providing notice of a planning commission hearing to property owners within 500 feet of the subject property, rather than to those within 750 feet of the subject property as required by local legislation, is a procedural error and provides no basis for reversal or remand unless petitioner's substantial rights are violated by the error. Where petitioner received notice of the planning commission hearing and the proper notice was given prior to a subsequent hearing by the board of county commissioners, there was no prejudice to petitioner's substantial rights. *Donnell v. Union County*, 39 Or LUBA 419 (2001).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. ORS 197.763(3)'s requirement that a notice of hearing shall provide "a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings" does not require that the notice of hearing include notice of a contingent right under a city's code to conduct cross-examination of witnesses. *Mitchell v. Washington County*, 39 Or LUBA 240 (2000).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A newspaper insert that describes a proposed legislative plan amendment, sets out a timetable for future proceedings and instructs citizens how to obtain more information is sufficient to satisfy the citizen involvement element of the city's plan, which grants the city considerable discretion to determine whether and how to notify the public of proposed legislation. *OTCNA v. City of Cornelius*, 39 Or LUBA 62 (2000).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A county's notice of a permit revocation hearing was adequate to comply with a code requirement that the notice be "reasonably calculated to give notice of [the property's] actual location" notwithstanding the notice's reference to the wrong tax lot, where the correct tax lot adjoined the tax lot listed in the notice and both tax lots were owned by the permit holder. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A county's failure to explain in its notice of hearing that all evidence and the staff report would be available for review seven days before the hearing provides no basis for reversal or remand, where petitioner did not object to the adequacy of the notice, does not claim he was

surprised by anything in the staff report and does not explain how his substantial rights were violated by the inadequate notice. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where the county's notice of hearing failed to include notice of the procedures to be followed at the hearing, but petitioner did not object below to the inadequate notice and does not explain how his substantial rights were violated by the defective notice, the notice defect provides no basis for reversal or remand. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A petitioner does not waive his right to object to the county's failure to list the applicable criteria governing permit revocation in the notice of hearing by failing to object below, where it was not clear until the end of the hearing what criteria would be applied or that the decision makers intended to revoke petitioner's permit. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where petitioner was provided a local appeal and hearing before the county governing body, the failure of the planning commission to give notice before its hearing of the criteria that it intended to apply or that it intended to revoke petitioner's permit provides no basis for reversal or remand, where petitioner does not explain why the appeal to the governing body was inadequate to avoid any prejudice to his substantial rights. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where the county followed the wrong local procedure under its code in approving a proposed forest template dwelling and failed to provide required notice of the decision to an adjoining landowner, the county's action resulted in prejudice to the adjoining landowner's substantial rights. *Krieger v. Wallowa County*, 35 Or LUBA 305 (1998).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A local government fails to comply with a local code provision requiring that notice of decision be provided to persons commenting on the application where it sends notice directly to a tribal government, rather than to its registered agent who commented on the application. *Confederated Tribes v. Jefferson County*, 34 Or LUBA 565 (1998).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. The city's failure to provide any notice of the hearing at which the challenged ordinance was adopted was procedural error that prejudiced petitioners' substantial rights to participate in the process, notwithstanding that petitioners had participated in earlier proceedings leading to the challenged decision. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. The failure of the notices of the city and county planning commission hearings to include a listing of applicable review criteria from the city and county zoning ordinances and plans is not an error justifying remand where the criteria were listed in the staff report, the parties were

provided an opportunity to comment on the staff report at the hearing at which it was presented, the parties were provided almost two weeks to submit written comments on the staff report and petitioners have not demonstrated substantial prejudice. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where the city code requires public hearings before the planning commission and the city council prior to the adoption of a legislative amendment to the city's comprehensive plan, the failure to hold any hearings is a substantive violation of the city code which affects the rights of anyone who might have appeared and commented. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A party cannot claim an exception to the appearance requirement of ORS 197.830(2)(b) when that party is not entitled to notice of a decision, even where the local decision maker has sent to that party notice of related previous decisions. *DLCD v. Polk County*, 33 Or LUBA 30 (1997).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. If a notice of hearing does not mention a potentially applicable code provision and the participants below were therefore unaware of its existence or possible applicability, petitioners may raise new issues associated with that provision before LUBA. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where the notice provided by the city of a proposed partition provides a complete street address, and includes an illustration of the property subject to the partition, that notice is not rendered inadequate by a failure to specify that the partition will involve two parcels. *Thierolf v. City of Ashland*, 32 Or LUBA 182 (1996).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where the challenged decision includes a separate sheet providing detailed information regarding how to appeal an administrative decision to the planning commission, the county has satisfied a local ordinance requiring that the notice of decision must inform interested persons that they "may appeal the decision." *Fletcher v. Douglas County*, 31 Or LUBA 204 (1996).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. The county has made a "good faith attempt" to provide notice where it provides the requisite notice to the petitioners, but inadvertently neglects to mail the notice to the petitioners' attorney as requested. *Fletcher v. Douglas County*, 31 Or LUBA 204 (1996).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. The essence of a "good faith" requirement in a county's notice provisions is the requirement for honesty. *Fletcher v. Douglas County*, 31 Or LUBA 204 (1996).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. If statutory and local code requirements are satisfied, the failure of certain affected persons to receive notice of a zoning ordinance amendment does not make notice of the amendment legally inadequate. *Waite v. City of La Grande*, 31 Or LUBA 77 (1996).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where a local ordinance specifies that board of commissioner hearings are conducted on the record, and where petitioners establish no violation of any statutory notice requirement, petitioners establish no basis for relief in alleging that they relied on various notices, which appeared to petitioners to be contradictory, to conclude they were not required to present all evidence before the planning commission, but would be able to present their case *de novo* before the board of commissioners. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1996).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. LUBA may reverse or remand a local decision based on a local government's failure to comply with applicable notice requirements only if the defect prejudices a petitioner's substantial rights. *Thomas v. Wasco County*, 30 Or LUBA 142 (1995).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A decision of the city planning commission has no legal effect where the city failed to provide notice of the public proceeding, did not reduce the decision to writing, and did not provide notice of the decision as required by local ordinance. *Sparks v. City of Bandon*, 30 Or LUBA 69 (1995).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Petitioners fail to demonstrate prejudice to their substantial rights arising out of an inaccurate notice published by the city when the mayor correctly stated the applicable criteria prior to the hearing. *Sparks v. City of Bandon*, 30 Or LUBA 69 (1995).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. When the mailed notice of a local government decision expressly, but erroneously, stated the deadline for filing a local appeal and also provided a formula that could be used to calculate the correct deadline, the local government acted properly in processing a local appeal that was filed by the date expressly stated. *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Under ORS 197.835(7)(a)(B), LUBA may reverse or remand a challenged decision because the decision maker failed to follow applicable procedural requirements, including notice requirements, only if that failure prejudiced the substantial rights of the *petitioner*. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A local government's failure to provide notice of its hearings to persons other than petitioners is a procedural error that does not prejudice petitioners' substantial rights if petitioners received notice of the local government hearings and participated in them. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. If a local government fails to give a person an individual written notice of hearing to which that person is entitled under state or local law, the local government fails to provide a hearing with regard to that person, within the meaning of ORS 197.830(3). *Orenco Neighborhood v. City of Hillsboro*, 29 Or LUBA 186 (1995).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where an ordinance amends the text of a zoning ordinance by adding a temporary overlay district, identifies a map showing where the overlay district applies an "attachment to" the zoning map and does not purport to amend the section of the zoning ordinance under which the zoning map is adopted, it is reasonable and correct to interpret a code notice of hearing provision governing amendments to the text of the zoning ordinance, rather than another provision governing amendments to the "zoning map," as applicable. *Orenco Neighborhood v. City of Hillsboro*, 29 Or LUBA 186 (1995).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where petitioner alleges the local government's notice of public hearing violates local code requirements, but petitioner fails to provide LUBA with the local code requirements allegedly violated, LUBA will deny the assignment of error. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where a code provision governing notice of decisions on a certain type of land use action does not expressly provide it applies only to a decision by the planning director, LUBA will defer to a local government's interpretation that the code provision also applies to a decision by the hearings officer on appeal from a decision by the planning director. *Reusser v. Washington County*, 25 Or LUBA 252 (1993).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Even though a local code requirement for publication of notice 10 days prior to hearing is mandatory, it is a procedural requirement, and any error in failing to provide the required notice provides a basis for reversal or remand only if petitioner's substantial rights were prejudiced by the error. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508 (1993).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where the petitioner is a neighborhood association that did not come into existence until after the local government committed an alleged procedural error, and petitioner and its members participated in hearings held after the alleged procedural error, the error did not prejudice petitioner's substantial rights and provides no basis for reversal or remand. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508 (1993).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where a local code requirement for notice of hearing on plan and land use regulation amendments makes no distinction between legislative and quasi-judicial land use decisions, the code notice of hearing requirements apply to all plan and land use regulation

amendments, without regard to whether they are legislative or quasi-judicial. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A local government's failure to provide a person with a required individual written notice of hearing is not sufficient, by itself, to entitle that person to be given individual written notice of the decision or to toll the 21-day deadline for filing a notice of intent to appeal with LUBA until individual written notice of the decision is provided. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where a local government fails to give a person an individual written notice of hearing to which the person is entitled, the local government fails to provide a hearing with regard to that person, within the meaning of ORS 197.830(3). *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Under ORS 197.830(3), where a local government renders a decision without providing a hearing, an appeal to LUBA must be filed within 21 days of actual notice of the decision, where notice of the decision is required, or within 21 days of the date a person knew or should have known of the decision, where no notice of the decision is required. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where the local code requires that the decision maker give an oral statement at the beginning of a local hearing to the effect that any party may request that the record remain open for a period of seven days, and where such oral statement is not given, petitioners' substantial right to submit their case is thereby prejudiced and this error provides a basis for remanding the challenged decision. *Adler v. City of Portland*, 24 Or LUBA 1 (1992).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. A local government satisfies plan coordination requirements where it provides notice of proposed plan amendments to affected governmental units, the applicant contacts those governments by telephone shortly before the plan amendment hearing and the affected governmental units either express support or show no interest in participating in the proceedings. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Petitioners' allegation that the local government failed to provide required notice of local proceedings following LUBA's remand of a land use decision provides no basis for remand, where petitioners do not contend they were in any way prejudiced by the alleged failure to provide the required notice of the local proceedings. *Wentland v. City of Portland*, 23 Or LUBA 321 (1992).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Where adoption of the challenged decision required the exercise of factual and

legal judgment, the decision required the exercise of discretion and, consequently, approves a "permit." Under these circumstances, it is error for the local government to fail to provide petitioner with notice and opportunity for hearing, where at least some of petitioner's members were entitled to notice if a public hearing had been scheduled. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

25.4.3 Local Government Procedures – Compliance with Local Ordinances/Regs – Notice Requirements. Although the party initiating a challenged zoning ordinance amendment was not clearly identified on the application and notices of local public hearings as required by the local code, such procedural errors provide no basis for reversal or remand where petitioners' substantial rights were not prejudiced. *Parmenter v. Wallowa County*, 21 Or LUBA 490 (1991).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Under the codification requirement at ORS 215.416(8)(a), permit approval standards and criteria must inform interested parties of the basis on which an application will be approved or denied. *Waveseer of Oregon, LLC v. Deschutes County*, 80 Or LUBA 435 (2019).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. A board of county commissioners' broad interpretation of "youth activity center" that encompasses a wide variety of youth-oriented activities that may occur outdoors or in a farm structure as part of an existing farm use or that may occur in and around a residence as accessory to a residential use is unreasonable under ORS 475B.486 and violates the codification requirement at ORS 215.416(8)(a). *Waveseer of Oregon, LLC v. Deschutes County*, 80 Or LUBA 435 (2019).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where an applicant proposes to vacate an existing right-of-way and construct a replacement, and where approval criteria require that the vacation "not create an access configuration which violates present development standards," arguments that the proposed replacement (1) is adjacent to a private street which is in noncompliance with development standards requiring curbs and sidewalks, a planter strip with trees, and on-street parking, or (2) connects to an existing sidewalk and crosses an existing driveway which are in noncompliance with development standards regulating their width and the length, provide no basis for reversal or remand because neither the vacation nor the proposed replacement cause or create the noncompliance. Similarly, arguments that the proposed replacement violates development standards regulating fencing and requiring that certain pedestrian connections be identified by more than striping alone provide no basis for reversal or remand because those standards have nothing to do with access configurations. *Neighbors for Smart Growth v. Washington County*, 79 Or LUBA 1 (2019).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where a city's code lists a number of "factors" to be considered in approving an annexation, including "[a]dequacy and availability of public facilities and services to service potential development," but the city's code does not require that the city identify how infrastructure will be paid for, or by whom, as part of an annexation decision, and the city's findings suggest the city's capital improvement program (CIP) will be amended prior to development to list the new water main as a public facility, although the city does not intend to rely upon the CIP as a source of funding or authority for the new water main, petitioners have not established a CIP amendment must be required as a condition of approval or that the city otherwise erred in assigning a positive value to this factor in approving the proposed annexation. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where a city rezones a portion of a property designated mixed use corridor (MUC) on the city's comprehensive plan, from FU-10 (future urban 10-acre) to NC (neighborhood commercial), and petitioners argue that the NC zone is inconsistent with the city's comprehensive plan which directs the city to "[f]ocus transit-oriented, higher intensity,

mixed-use development along selected transit corridors," because the subject property is not near a transit corridor, petitioners' premise—that the MUC plan designation is used only where the city intends to promote transit-oriented development along transit corridors—is incorrect. The MUC plan designation is implemented by four commercial zoning districts: one of which is the NC zone, which is not a transit-oriented zone, and is clearly not intended to be placed along transit corridors. Therefore, the city's decision to rezone its property to NC is not inconsistent with the property's MUC comprehensive plan designation. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Petitioners fail to establish that the city erred in concluding that rezoning a property to neighborhood commercial is consistent with Statewide Planning Goal 5 when the rezoning the subject property constitutes a PAPA for purposes of applying Goal 5, which provides that local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource by allowing new uses that "could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list." The city's PAPA is a very limited one, that in relevant part simply applies the zones implementing the city's comprehensive plan designations that the acknowledged comprehensive plan has already designated for the corresponding uses. Because the challenged PAPA simply implements that acknowledged plan designation choice with the exercise of little or no discretion, the PAPA does not authorize any "new uses" for purposes of OAR 660-023-0250(3) and Goal 5. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where the city code defines "net density" to mean "the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development," and excludes public and private streets, the city did not err in including in the net density acreage calculation parking drives designed primarily to provide vehicular circulation to parking spaces in the apartment complex for resident and visitor parking and a leasing office and maintenance building. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where the county planning director processed a similar use determination under the county's Type II review to determine whether an electrical transmission line is allowed in a particular zone, the board of county commissioners reviewed the director's similar use determination in a consolidated appeal under a Type III process, and petitioners argue that the county erred by not providing an intermediate decision by a decisionmaker other than the county governing body, that alleged procedural error provides no basis for reversal or remand because that alleged error does not prejudice petitioner's substantial rights. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where a county determines an electrical transmission line is a "similar use" authorized in a particular zone pursuant to the county's "similar use determination" process, which allows a similar use "[w]here a proposed use is not specifically identified by [the code], or [the code] is unclear as to whether the use is allowed in a particular zone," petitioners' argument that the county may make a similar use determination only if the

proposed use is not specifically identified anywhere in the county's code is without merit. A similar use determination is not necessary or appropriate where the use is specifically permitted or prohibited in the subject zone. In adopting the similar use determination process, the county contemplated instances where a use is specifically identified as an allowed use in some zones but not specifically identified as an allowed use in the subject zone. *Tilla-Bay Farms, Inc. v. Tillamook County,* 79 Or LUBA 235 (2019).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Traffic performance standards in the local government's transportation system plan (TSP) are not approval criteria applicable to a limited land use decision that were incorporated pursuant to ORS 197.195(1), where the applicable criteria either do not refer to the TSP at all or where they only generally "incorporate[] by reference the city's public facility master plans, including plans for domestic water, sanitary sewer, storm drainage, parks, and transportation." *Oster v. City of Silverton,* 79 Or LUBA 447 (2019).
25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Traffic performance standards in the local government's transportation system plan (TSP) are not approval criteria applicable to a limited land use decision that were incorporated pursuant to ORS 197.195(1), where the applicable criteria either do not refer to the TSP at all or where they only generally "incorporate[] by reference the city's public facility master plans, including plans for domestic water, sanitary sewer, storm drainage, parks, and transportation." *Oster v. City of Silverton,* 79 Or LUBA 447 (2019).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. A hearings officer does not misconstrue a development code requirement that a project applicant must demonstrate that environmental impacts have been "minimized to the extent practicable," in finding that the project applicant is not required to propose a smaller sized dwelling. *McAndrew v. Washington County*, 78 Or LUBA 21 (2018).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where a county's development ordinance provides that the county shall not approve a minor partition unless the proposal complies with the county's zoning ordinance that specifies that minimum parcel size for all new parcels in designated big game habitat "shall be 160 acres or larger if required by the underlying zone," the zoning ordinance does not provide any exceptions to the minimum parcel size requirement, and there is no dispute that the subject property is located within designated big game habitat, "considerations" such as existence of a farm dwelling, other structures, and intense farm use do not provide a legally sufficient basis for deviating from the minimum parcel size requirement, and such a partition is prohibited as a matter of law. *ODFW v. Lake County*, 78 Or 53 (2018).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. When a hearings officer's findings are based on substantial evidence that the proposed instream mitigation is likely and reasonably certain to succeed in mitigating any adverse impacts caused by increased summer pumping, the hearings officer did not misconstrue the code requirement that any negative impact on fish resources be completely mitigated so that there is no net loss or net degradation of the resource. *Gould v. Deschutes County*, 78 Or LUBA 118 (2018).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Petitioners did not demonstrate that the county hearings officer erred where local county standards apply to development in "areas designated as floodways [as found on Federal Emergency Management Agency (FEMA) maps] or by methods described" elsewhere in the code, and the county hearings officer determined that because the development was not located within the "floodway," those standards did not apply. This is so, even where petitioners argue the FEMA maps are inaccurate and another section of code authorizes the county floodplain administrator to determine where the floodway is currently located based on "actual field conditions," but the county administrator has chosen not to exercise the authority granted in that section. *Meyer v. Jackson County*, 78 Or LUBA 150 (2018).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where the county hearings officer agreed that the proposed project involved "the alteration of a watercourse" and that therefore standards applied which required the project applicant to show that the development "will not diminish the carrying capacity of a watercourse" by submitting "certification by an Oregon registered professional engineer," that in the engineer's opinion the watercourse "will not be diminished," the applicant has met those requirements by submitting the certification by a licensed engineer, even though another section of the county's code requires the applicant to "submit technical data" and a "Conditional Letter of Map Revision" from FEMA "when an alteration of a watercourse results in the expansion, relocation or elimination of the special flood hazard area [SFHA]" because the engineer certified that the project has not resulted in the expansion, relocation or elimination of the SFHA. *Meyer v. Jackson County*, 78 Or LUBA 150 (2018).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. When local code sets out independent grounds for granting a variance, and when only one of three rezoning criteria must be met in order to grant a rezoning, and the city adequately demonstrated that one criterion was satisfied, LUBA need not consider arguments relating to the other two criteria. *American Tower Corp v. City of Tualatin*, 78 Or LUBA 350 (2018).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. When a city modifies a condition of approval in lieu of citing specific evidence and findings, the decision will be remanded for the city to adopt more adequate findings based on substantial evidence regarding compliance with local code. If the city cannot determine based on substantial evidence in the record that local codes are complied with, and the city chooses to defer that issue to a subsequent proceeding, that subsequent proceeding must provide notice and opportunity for public participation. *Dreyer v. City of Eugene*, 78 Or LUBA 391 (2018).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. That a county's amended Transportation System Plan (TSP) includes language recommending that the county acquire property to develop a transportation facility does not mean that whatever land use permits are required to actually construct the facility under the local code or state law are thereby waived. The county could choose

to approve whatever land use permits are required under law at the same time it approves an amendment to its TSP, but the latter is not a substitute for the former, or vice versa. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. A project applicant is not required to file and win a quiet title action in circuit court as a condition precedent to filing the application simply because another party disputes the applicant's title to the property on which the proposed development is to occur. When a party disputes the applicant's title under a legal theory that can only be resolved in circuit court, neither the county nor LUBA is in a position to resolve the legal dispute over whether the applicant/deed owner's title is good. For that reason, the county is also not obligated to adopt findings resolving the title dispute. In circumstances where consent or lack of ownership has a bearing on an approval criteria, we have held that the decision maker may be required to impose conditions to ensure that the required consent is obtained prior to construction. However, where ownership of the subject property is not an approval criterion, we have never held that the applicant has the obligation to quiet title in the subject property where some doubt is raised during the proceedings below as to the legality of that title, or that the decision maker is obliged to adopt findings addressing the likelihood that the applicant will prevail in a quiet title action. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. A city council errs in concluding that a city council-devised future modification to a submitted but unsatisfactory drainage and grading plan that will be reviewed in a future non-public proceeding can satisfy a requirement that the storm drainage plan "maintain[s] pre-existing levels and meet[s] planning and engineering requirements." Pursuant to *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007), the city council must determine whether the submitted drainage and grading plan complies with the approval criteria or must consider the modifications to the drainage plan identified by the city council in a proceeding that allows public participation. *Dodds v. City of West Linn*, 75 Or LUBA 24 (2017).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where a city code requires that the city find that "[t]he granting of the proposal will provide for a facility that is consistent with the overall needs of the community," the city did not err by concluding that the "needs of the community" to preserve more mature Douglas fir trees in the location of a proposed stormwater facility are met by a requirement to preserve at least seven more mature trees, and imposing a condition of approval requiring that the trees be preserved. *Dodds v. City of West Linn*, 75 Or LUBA 24 (2017).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Under the Court of Appeals' reasoning in *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993), the statutory term "standards and criteria" is sufficiently malleable to encompass a two-step code requirement that first requires that an applicant submit sufficient information to allow the local government to determine whether mitigation conditions of approval are needed for the proposed mining use, and second requires that the local government determine if conditions of approval are needed and develop and impose those conditions if they are needed. *Tidewater Contractors v. Curry County*, 65 Or LUBA 424 (2012).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. A code provision stating that when it appears that the area of a proposed partition is to be ultimately divided into four or more lots or parcels the code provisions pertaining to subdivisions apply simply authorizes the city to apply subdivision procedures and standards to a partition application, and does not itself constitute "standard" or "criteria" under which the city could deny the partition application. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where the local code does not provide procedures or standards governing a specific decision, the local government may, consistent with the federal due process clause, borrow and apply procedures and standards applicable to other types of decisions. *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where a local government has no procedures governing a particular type of decision, it is consistent with the federal due process clause to adopt a written set of procedures and standards that significantly cabin the local government's discretion and that offer all participants a reasonable opportunity to present evidence and argument. That such procedures are one-time and temporary in nature, rather than permanent code provisions does not offend the due process clause. *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. An applicants' engineer's discussion of national traffic safety standards as an illustration of why proposed road design is safe does not have the legal effect of making those national safety standards local mandatory approval criteria where they have not been adopted as such. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where a permit authorizing residential use of a property is granted without specifically authorizing a dwelling of any particular height, and detailed building plans are submitted 10 months after the residential permit is approved, the city is not obligated to apply the building height limitation that was in effect when the residential permit was approved. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. A city's decision violates ORS 227.173(1) where the city relies on "factors" or "considerations" that are unconnected to approval standards established in its land use regulations to deny a permit application. *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where the existence or extent of an access is disputed, and an approval criterion requires demonstration of access, that criterion may be satisfied by a condition of approval that access be confirmed by an agreement of the parties or circuit court

declaratory relief. Such a condition is not an impermissible delegation of authority. *Highland Condominium Assoc. v. City of Eugene*, 37 Or LUBA 13 (1999).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. LUBA will defer to a local government's broad interpretation of the term "transportation terminal" as including "airports" and "airport related uses" where the interpretation is not inconsistent with the text, purpose or policy of the zoning ordinance. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. The failure of the notices of the city and county planning commission hearings to include a listing of applicable review criteria from the city and county zoning ordinances and plans is not an error justifying remand where the criteria were listed in the staff report, the parties were provided an opportunity to comment on the staff report at the hearing at which it was presented, the parties were provided almost two weeks to submit written comments on the staff report and petitioners have not demonstrated substantial prejudice. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where a local subdivision ordinance requires compliance with both the comprehensive plan policies and the ordinance provisions, and petitioner was provided with notice of the applicable approval criteria, including both comprehensive plan and local ordinance criteria, petitioner was adequately informed of the standards upon which the application would be evaluated. *Holland v. City of Cannon Beach*, 30 Or LUBA 85 (1995).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where the local code requires that a proposed driving range not alter the character of the surrounding area "in a manner which substantially limits, impairs or precludes the use of surrounding properties" for listed permitted uses, and findings acknowledge safety as a relevant consideration but simply rely upon the striking areas being more than 300 yards from adjacent properties to satisfy that safety consideration, the findings are inadequate to explain how the code standard is satisfied. *Moore v. Clackamas County*, 26 Or LUBA 40 (1993).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. A county does not improperly rely on unadopted, unofficial criteria where its findings make it sufficiently clear that the county is simply relying on material submitted by the Oregon Department of Forestry as expert testimony in determining whether a code "necessary for and accessory to" standard for approval of forest management dwellings is met. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. Where a local code requires that a stream corridor and buffer zone be established prior to development of property, once the corridor and buffer zone are established by the local government as part of a minor partition decision, it is unnecessary for the local government to reexamine those boundaries in order to issue building and tree cutting permits

for parcels created by the partition. *Forest Highlands Neigh. Assoc. v. City of Lake Oswego*, 24 Or LUBA 215 (1992).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. In the absence of a local code requirement to the contrary, a local government has no legal obligation to impose conditions of approval in lieu of denying an application for conditional use approval. *Adler v. City of Portland*, 24 Or LUBA 1 (1992).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. That a city code standard for requiring that a land use application be subject to a public hearing before the planning commission, rather than being initially decided by the planning director, is subjective is not a basis for reversal or remand of the city's decision. *J.K. Land Corporation v. City of Gresham*, 19 Or LUBA 66 (1990).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. A plan standard delegating to city staff the authority to determine the level of detail required in reports supporting the development application is not improperly vague, where the city interprets that standard to require the ultimate decision maker to determine whether sufficient detail is provided in the supporting reports. Where the city council obtains expert assessment of the subject property and provides in its findings detailed reasons why the report submitted by the applicant is inadequate, there is no basis for remand. *J.K. Land Corporation v. City of Gresham*, 19 Or LUBA 66 (1990).

25.4.4 Local Government Procedures – Compliance with Local Ordinances/Regs – Requirements for Standards/Criteria. A plan standard requiring a development to be designed so that "as many trees as possible can be preserved" is not impermissibly vague. *J.K. Land Corporation v. City of Gresham*, 19 Or LUBA 66 (1990).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. When a city modifies a condition of approval in lieu of citing specific evidence and findings, the decision will be remanded for the city to adopt more adequate findings based on substantial evidence regarding compliance with local code. If the city cannot determine based on substantial evidence in the record that local codes are complied with, and the city chooses to defer that issue to a subsequent proceeding, that subsequent proceeding must provide notice and opportunity for public participation. *Dreyer v. City of Eugene*, 78 Or LUBA 391 (2018).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. A petitioner's argument that the city erred in processing the application as a minor rather than major site plan modification does not provide a basis for remand, where the city adopted findings that the only difference between a major and minor modification is procedural, and the petitioner does not argue that the procedures the city provided, including a hearing that petitioner attended, prejudiced petitioner's substantial rights. *Aboud v. City of Stayton*, 77 Or LUBA 300 (2018).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. A code requirement that the planning commission hold a hearing on a local appeal at the next regular planning commission meeting is not a jurisdictional requirement, and the planning commission does not lose jurisdiction over the appeal when it holds the hearing at a later regular planning commission meeting. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. A hearings officer does not err in approving development notwithstanding that the applicant failed to comply with a code requirement to determine levels of service based on existing intersection signal timing, where the code contemplates that the city may vary from the strict letter of the code to address unusual situations, based on expert recommendations, and the hearings officer agreed with the applicant's experts that due to ongoing transportation construction in the area it would serve no purpose to consider existing signal timing. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Where petitioner does not challenge a city's findings that invoke a development code provision that allows the city community development director to change the review procedure that would otherwise apply where there is a "compelling public interest," LUBA will deny an assignment of error that challenges the community development director's decision to apply a different procedure that causes an appeal to go directly to the city council rather than to the planning commission. The development code provision need not be interpreted to prohibit a change the applicable review procedure after the city's deliberations on an application have begun. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Where a planning commission recommendation to correct the zoning map is a condition precedent to the governing body's correction of the zoning map under the local code, the governing body cannot "substitute" for the required recommendation a planning commission

recommendation to rezone the subject property under a different code provision. *Sullivan v. Polk County*, 51 Or LUBA 107 (2006).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Where the evidentiary record has closed and a party believes a local government has improperly allowed legal argument that includes new testimonial evidence, a party arguing that such an impropriety warrants remand by LUBA must (1) adequately identify the objectionable testimony, (2) explain why that testimony goes beyond legal argument or commentary on evidence that is already in the record or for some other reason constitutes new evidence and (3) offer some substantial reason to believe the objectionable testimony had some effect on the ultimate decision. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Where a local code provision limits a city council's scope of review on appeal from a planning commission to "determining whether there is substantial evidence to support the findings" and whether "errors of law were committed," the city council violates its limited scope of review where it makes its own findings of fact and determines on its own that the applicant failed to establish compliance with the applicable criteria. *Wal-Mart Stores, Inc. v. City of Medford*, 49 Or LUBA 52 (2005).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. A citizen participation requirement for appointment of a three-person citizens' advisory committee when considering major land use regulation amendments is a procedural requirement. A petitioner who wishes to assign error to the local government's failure to appoint such a committee must have objected to that failure during the proceedings below. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Where a planning commission fails to formally appoint a three-person citizens' advisory committee from the community at large when considering major land use regulation amendment, as required by an applicable citizen involvement comprehensive plan requirement, that failure does not constitute reversible error where the planning commission in fact seeks the advice of four members of the city's design review committee who are citizens of the community. Where no party disputes that the design review committee members are members of the community at large, the planning commission's decision to seek input from the design review committee either constitutes de facto compliance with the citizen involvement requirement or renders any failure to formally appoint a citizens advisory committee a procedural error that resulted in no prejudice to the petitioner or other citizens of the community. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Where a local code neither expressly authorizes a city council on appeal to reconsider a city's engineer's assessment of a traffic impact report and needed transportation improvements nor expressly prohibits such reconsideration, LUBA will defer to the city council's interpretation of the local code to allow reconsideration of the adequacy of the engineer's assessment. *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680 (2004).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Absent some explanation by the county as to why it has the authority to deviate from local regulations establishing the time at which a use is considered abandoned, a county errs in adopting a decision imposing a condition of approval that is flatly inconsistent with those regulations. *Hiebenthal v. Polk County*, 45 Or LUBA 297 (2003).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. LUBA will not remand a decision based on an allegation that the decision maker failed to follow the consultation and coordination requirements of OAR 340-252-0060, where the record makes clear that all parties required by the rule to be consulted were aware of and actively participated in the process leading to the challenged decision, and any failure to follow the procedures set out by the rule was attributable to someone other than the decision maker. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Citizen involvement guidelines that recommend certain types of advisory committees for large transportation improvement projects, subject to the discretion of the county transportation director, are not mandatory in the circumstances for which they are recommended, nor do they require findings justifying the director's exercise of the discretion granted by the guidelines. *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Where a zoning ordinance includes no provisions specifying how a zoning map amendment application must be withdrawn, a local government commits no error in continuing to process a zoning map amendment request after the applicant attempts to withdraw the application and commits no error in failing to require a new application fee. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Consideration of a legislative action more than once within a 12-month period despite a code requirement that such actions be considered only once in a 12-month period provides no basis for reversal or remand, where all parties were given a full opportunity to participate in the proceedings and there was no prejudice to a party's substantial rights. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. A local government may approve a partition and defer determination of an applicable approval criterion, provided the subsequent approval process provides the same notice and opportunity for public input as the original proceeding and the approval criteria are not so dependent on each other that they must be applied together. *Sunningdale-Case Heights Assoc. v. Washington Co.*, 34 Or LUBA 549 (1998).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Where the comprehensive plan requires that the planning commission forward findings and a report to the city council for consideration with a proposed plan amendment, the

planning commission commits a procedural error by not forwarding the required findings and report. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Where a local code requires that manufactured home parks "which contain land within the floodplain district" be subject to a "Type III" review, Type III review is required to approve a proposed manufactured home park, notwithstanding that no "development" is proposed for the portion of the park located in the floodplain district. *Johnston v. City of Albany*, 34 Or LUBA 32 (1998).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. A county impermissibly defers a finding that a proposed dwelling complies with applicable land use design standards when, in the absence of substantial evidence supporting a finding of compliance, the county imposes a condition that the dwelling's compliance with design standards be reviewed at a later building permit stage. *Pekarek v. Wallowa County*, 33 Or LUBA 225 (1997).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. A city council may not convert an on-the-record quasi-judicial appeal of a planning commission decision into a *de novo* legislative hearing where the city code: (1) provides that legislative proceedings may only be commenced by the planning commission or city council, and the subject proceeding was initiated by an individual; (2) includes no provisions for converting a quasi-judicial appeal proceeding into a legislative proceeding; and (3) requires that appeals of planning commission quasi-judicial decisions be heard on the record. *Anderson v. City of Shady Cove*, 33 Or LUBA 173 (1997).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Where a local governing body has not adopted regulations providing for reconsideration of its decisions, the governing body commits no error by denying a request to reconsider a decision, where the request was received after the final written order is entered. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From.A zoning ordinance requirement may be jurisdictional, in the sense that failure to comply with the requirement may not be waived by the local government or cured by later performance of the requirement. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Although the existence of an agency relationship between the applicant for land use approval and the property owner on the date the application was filed may be a jurisdictional requirement, the manner of creating and disclosing that agency relationship is not jurisdictional where the code language does not clearly so provide. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. Where the local code requires physical constraints review to be conducted

simultaneously with site review, and approval of a physical constraints review permit requires application of substantive criteria which could result in denial of the proposed development, the city's failure to require a proposed development to obtain a required physical constraints review permit at the time of site review approval is not a mere procedural error. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From.A hearings officer's acceptance of evidence submitted after the deadline established by local code provides no basis for reversal or remand where petitioner did not request a continuance, and petitioner fails to explain how he was prejudiced by the hearings officer's action. *Reed v. Lane County*, 19 Or LUBA 276 (1990).

25.4.5 Local Government Procedures – Compliance with Local Ordinances/Regs – Deviations From. The requirement to comply with ordinance criteria applicable to the resolution/conceptual site plan stage of the destination resort review process cannot be avoided by deferring those determinations to the preliminary development plan stage of the review process, through restatement of the first stage approval criteria as conditions of approval for the second stage. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. Where both the hearings officer and planning commission declined to address an argument regarding the standards and criteria that might apply to a hypothetical future building permit application for approved housing, and where petitioner points to nothing in the local government's code that requires the hearings officer or planning commission to address petitioner's argument, LUBA will decline to issue what is in essence an advisory opinion regarding that argument. *Wiper v. City of Eugene*, 75 Or LUBA 109 (2017).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. In *Pete's Mountain Homeowners Assn. v. Clackamas Cty.*, 227 Or App 140, 204 P3d 802, *rev den*, 346 Or 589, 214 P3d 821 (2009), the Court of Appeals held that Ballot Measure 49, which was approved to replace previously approved Ballot Measure 37, must be given effect and replaces Ballot Measure 37 which would otherwise apply to a particular permit application, notwithstanding the ORS 215.427(3)(a) goal post statute that requires that a permit application be subject to the standards in effect when the permit application was filed. The holding in *Pete's Mountain* does not mean that new county cell tower regulations apply to a permit application that was submitted before the new cell tower regulations were adopted. In that circumstance the goal post statute applies and the new cell tower regulations do not apply, because there is no statutory conflict. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. When the state administrative rules applicable to a comprehensive plan amendment are amended during the local proceedings, raising the issue of compliance with the old administrative rules is not sufficient under ORS 197.763(1) and ORS 197.835(3) to raise the issue of whether the application complies with the new provisions of the amended rules. *Walker v. Josephine County*, 60 Or LUBA 186 (2009).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. ORS 215.750 does not prohibit a local government from applying a local code provision requiring an applicant for a forest template dwelling to demonstrate that the dwelling is "necessary for and accessory to" the forest use. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. The purpose and intent of ORS 227.175(2) is to facilitate the processing of development proposals that require multiple applications by consolidating permit reviews that will apply existing laws with zone changes that will alter existing laws. *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277 (2007).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. A 1979 board of county commissioners decision directing the county planning department to issue septic and building permits for a single-family dwelling does not necessarily confer a continuing right to construct a dwelling where no permits were ever issued, no steps have been taken to construct the approved development, and county approval standards have changed in the years since the 1979 decision such that the proposed development no longer complies with applicable criteria. *PJT, Inc. v. Jackson County*, 42 Or LUBA 536 (2002).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. Where a county has adopted specific ordinances to shield certain land use permits from subsequent changes in law without regard to whether the permit holder has a vested right to complete construction of the use based on substantial construction of the authorized use prior to the change in law, uses approved by land use permits that are not shielded from subsequent changes in law by the ordinances are not similarly shielded from those changes in law and must comply with existing law. *PJT, Inc. v. Jackson County*, 42 Or LUBA 536 (2002).

25.4.6 Local Government Procedures – Local Ordinances/Regs – Changes in Law. When a variance approval is based on a specific finding that the proposed use is permitted in the underlying zone, the variance approval establishes a time frame for constructing the proposed use, and when the applicant applies for the building permit within the allotted time, the city is obligated by ORS 227.178(3) to apply the same "standards and criteria" that were applicable at the time the variance application was submitted. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000).

25.4.6 Local Government Procedures – Local Ordinances/Regs – Changes in Law. ORS 227.178(3) implicitly requires that a city apply a consistent set of standards to the discretionary approval of the proposed development of land and the construction of that development in accordance with the discretionary approval. A city may not apply one set of standards to the discretionary approval of a proposed development of land and subsequently apply an amended standard to deny a building permit to construct the development in accordance with the discretionary permit. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000).

25.4.6 Local Government Procedures – Local Ordinances/Regs – Changes in Law. The approval of a "permit" under ORS 227.160(2) and 227.178(3) carries with it the right to obtain the building permits that are necessary to build the approved proposed development of land, provided the applicant seeks and obtains those building permits within the time specified in the permit itself or in accordance with any applicable land use regulations that establish a deadline for seeking and obtaining required building permits. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. Where a permit authorizing residential use of a property is granted without specifically authorizing a dwelling of any particular height, and detailed building plans are submitted 10 months after the residential permit is approved, the city is not obligated to apply the building height limitation that was in effect when the residential permit was approved. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. A local government may change a prior interpretation that a plan provision is not an approval criterion and apply that plan provision as an approval criterion to a request for permit approval. *Holland v. City of Cannon Beach*, 34 Or LUBA 1 (1998).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. The commencement of proceedings to amend a local code provision cannot justify a variance; a variance cannot be granted without reference to variance standards existing at the time the application is submitted. *Krieger v. Wallowa County*, 31 Or LUBA 96 (1996).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. ORS 215.428(3), which states that approval or denial of an application shall be based upon the standards and criteria that were applicable at the time the application was first submitted, does not require a local government processing a partition application to proceed as if factual circumstances existing at the time of application remain unchanged. *Petree v. Marion County*, 29 Or LUBA 449 (1995).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. Where the standards upon which conceptual development approval was based are changed to disallow the use conceptually approved, and later decisions authorizing a building permit and final development approval for the use are adopted on the basis that the prior standards continue to apply, a petitioner is entitled to challenge the later decisions notwithstanding petitioner's failure to challenge the conceptual development approval. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. Nothing in ORS 215.428(3) requires a county to apply standards in effect at the time one development application is submitted to a distinct and subsequent development application. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

25.4.6 Local Government Procedures – Compliance with Local Ordinances/Regs – Changes in Law. Where a "conceptual approval" decision requires that an applicant file a new application for final development approval, and the challenged decision is made on the basis of that new application, the second development approval request is an "application" as that term is used in ORS 215.428(3) and the code provisions in effect at the time the second development application was submitted are applicable to the second development application. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where state statute requires that a local government provide either a public hearing before ruling on an application for a statutory permit or an opportunity for an appeal that includes a *de novo* public hearing, although the local government may require a notice of appeal that sets forth with reasonable particularity the issues that the appealing party will raise at the hearing, the local government may not, consistent with the statute, (1) make that notice requirement a jurisdictional bar to obtaining the hearing, (2) limit the issues specified to five types of issues, or (3) approve or reject requests for hearings based on a qualitative assessment of how well the appellant has explained the issues specified. *Landwatch Lane County v. Lane County*, 79 Or LUBA 96 (2019).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. When a county opts to approve a permit without a public hearing, any person who is adversely affected or aggrieved, or who is entitled to notice of the decision may appeal a decision made without a hearing. The county cannot require participation prior to a decision, either by attending a conference (that may or may not have occurred), or providing written comments, or in any other manner. Additionally, the county may not enact additional restrictions to prevent a person who is entitled to file an appeal under the ORS 215.416(11)(a)(A) right to file a local appeal. *Hood River Valley Residents Comm. v. Hood River County*, 78 Or LUBA 282 (2018).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. In an as-applied challenge, a petitioner cannot challenge the manner in which the city adopted its appeal fee structure. Instead, LUBA's inquiry regarding petitioner's as-applied challenge to the appeal fee charged by the city, is whether petitioner has produced a *prima facie* case that the fee that the city charged petitioner pursuant to the city's previously adopted fee schedule is "more than the average cost of such appeals or the actual cost of the appeal." ORS 227.180(1)(c). *Nicita v. City of Oregon City*, 78 Or LUBA 463 (2018).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Any error in a planning commission's finding that the petitioner lacked standing to file a local appeal is harmless, where on appeal to the board of commissioners the board disposed of petitioner's appeal on the merits and did not rely on standing as a basis to deny the appeal. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A county cannot apply more rigorous standing or timely appeal requirements on (1) local appeals of permit decisions than are authorized under ORS 215.416(11) or (2) local appeals of permit decisions under circumstances where, but for the county choosing to provide a local appeal, the petitioner would have the right to appeal the permit decision directly to LUBA under ORS 197.830(3). *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A county is not required to evaluate a petitioner's standing to file a local appeal based on the presumption that the petitioner was entitled to notice of the decision, where there is no dispute that the petitioner did not live within the notice area and was not entitled to notice of the decision at the time the decision was made. That the petitioner now lives within the notice area

does not establish entitlement under state or local law to notice of the decision or to file a local appeal. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A petitioner's actual knowledge that the applicant has applied to the county for a dwelling permit and that the county intends to approve it, and that a well dug on the property is to perfect the permit for a dwelling, is more than sufficient knowledge to place the petitioner on "inquiry notice" that the county has approved a dwelling on the applicant's property. Where the petitioner waits more than a year after being placed on "inquiry notice" that the county had approved a dwelling to actually discover the permit decision and file a local appeal, the local appeal is untimely filed, under local appeal provisions based on ORS 197.830(3)(b). *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Unless some exclusion applies, LUBA has jurisdiction over the appeal of a land use compatibility statement concluding that no local appeal is available to petitioner, if the decision applies a land use regulation. Arguments that the local government correctly concluded that no local appeal is available go to the merits of the appeal, and does nothing to demonstrate that LUBA lacks jurisdiction over the decision. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A party fails to establish "party status" within the meaning of a local code provision requiring such a demonstration in order to file a local appeal of a planning commission decision, when that party does not provide oral or written testimony prior to the close of the evidentiary record before the planning commission. Oral testimony given (1) after the record was closed and (2) during the public comment portion of a planning commission meeting does not provide testimony prior to the close of the evidentiary record. *Dilley v. City of North Bend*, 71 Or LUBA 56 (2015).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. When a party provides her name and address on a public comment sign-in sheet for a planning commission meeting and the city subsequently sends her notice of the planning commission's decision based on that sign-in sheet request for notice, a party has established that she requested notice of a planning commission decision within the meaning of the local code, and demonstrates "party status" to file a local appeal on that basis. *Dilley v. City of North Bend*, 71 Or LUBA 56 (2015).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A statement that a person merely "endorses" or "supports" a party's appeal does not confer co-appellant status on that person, where no local or statutory standards are cited that would authorize persons who may or may not have party status, to join an appeal that is filed by someone who has party status. *Dilley v. City of North Bend*, 71 Or LUBA 56 (2015).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a city's code provides that the city administrator's actions may be appealed to the planning commission, and the planning commission's decision on that local appeal may be

appealed to the city council, but the city council agrees to bypass the planning commission and hear a petitioner's appeal, the city may not argue at LUBA that that petitioner failed to exhaust her administrative remedies in bypassing the planning commission. *Smith v. City of Gearhart,* 71 Or LUBA 184 (2015).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. If a planning commission relies on a comprehensive plan policy as a separate and independent basis for its decision to deny a permit application, and the permit applicant fails to challenge the planning commission's reliance on the comprehensive plan policy in its notice of local appeal, the board of county commissioners could affirm the planning commission's decision based on that failure alone, without regard to the merits of the permit applicant's challenge to other bases for the planning commission's decision. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a planning commission almost entirely relied on the EFU zoning statutes to find that a permit applicant inadequately considered alternatives to a proposed EFU-zoned site for a transmission line, and only belatedly and obscurely relied on a comprehensive plan policy to impose a similar alternatives analysis, the permit applicant's general challenge to the planning commission's legal analysis on cited pages of the planning commission's decision where the comprehensive plan policy was mentioned is sufficient to preserve the permit applicant's right to challenge the planning commission's reliance on the plan policy in its appeal to the board of commissioners. *WKN Chopin LLC v. Umatilla County,* 66 Or LUBA 1 (2012).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the applicant appeals a hearings officer's decision, challenging a condition of approval under a local appeal standard that limits the planning commission's review to the issues raised in the appeal, the planning commission's authority to impose new conditions is limited to conditions necessary to ensure that the application, with the challenged condition eliminated, continues to comply with applicable approval criteria. *Treadmill Joint Venture v. City of Eugene,* 65 Or LUBA 213 (2012).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the applicant appeals a hearings officer's decision challenging a condition of approval limiting building height, under a local appeal standard that limits the planning commission's review to the issues raised in the appeal, the planning commission errs in imposing a new condition requiring additional setbacks, where the condition requiring additional setback is unrelated to the building height condition. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A notice of local appeal requirement that the bases for appeal be specified in detail is satisfied by the statement that the local appellant disagreed with the decision, where the appealed local decision was a planning commission decision denying permit approval and that denial was based on a single criterion. *Johnson v. City of Gladstone*, 65 Or LUBA 225 (2012).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A city's interpretation of a local code provision governing appeals that determines that the consequence for underpayment of an appeal fee is not to dismiss the local appeal but rather to notify the appellant of the underpayment and request prompt payment of the remaining amount due is correct, where nothing in the applicable code section specifies that the consequence for an underpayment of an appeal fee based on misinformation from planning staff is dismissal of a local appeal. *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2011).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A code requirement that the planning commission hold a hearing on a local appeal at the next regular planning commission meeting is not a jurisdictional requirement, and the planning commission does not lose jurisdiction over the appeal when it holds the hearing at a later regular planning commission meeting. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code requires the appellant to pay the local appeal fee "specified in the Notice of Decision," but instead the notice simply directs recipients to contact planning staff to find out the amount of the appeal fee, the failure to specify an appeal fee in the notice does not mean that the local government is precluded from charging an appeal fee or that the local government must provide a free local appeal. *Jensen Properties v. Washington County*, 61 Or LUBA 155 (2010).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Under ORS 215.427(8), when a county fails to take timely action on a permit application, a permit applicant is entitled to a refund of "either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater," and ORS 215.427(8) further provides that in that circumstance "[t]he applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits." Under ORS 215.427(8), when a county is required to refund initial permit application fees, it may not require the permit applicant to pay additional fees for any additional proceedings that may be required to respond to a LUBA remand of the county's permit decision. *Sperber v. Coos County*, 61 Or LUBA 477 (2010).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Approving or denying a tentative subdivision plat within an urban growth boundary is a limited land use decision and therefore not a "permit" decision. Because the ORS 227.175(10)(a) directive that local appeal issues not be limited to those issues identified in the notice of appeal only applies to permit decisions, that statute does not apply to decisions involving the approval or denial of subdivisions. *Frewing v. City of Tigard*, 59 Or LUBA 23 (2009).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Even when an applicant forfeits the right to process a subdivision application under the limited land use provisions of a local code and processes the application under the procedures for permits, the decision approving or denying the subdivision is still a limited land use decision and the provisions of ORS 227.175(10)(a) do not apply. *Frewing v. City of Tigard*, 59 Or LUBA 23 (2009).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local code requires a notice of review to contain "the specific grounds relied on in the petition request for review," and petitioners challenged a planning commission decision on the grounds that the county failed to identify other available industrially zoned properties throughout the county, petitioners may not on appeal to LUBA challenge the decision on different grounds that the county did not properly identify available industrially zoned lands within the specific rural community in which the applicant proposes the plan amendment. *Miles v. City of Florence*, 190 Or App 500, 506-507, 79 P3d 382 (2003). *Kinnett v. Douglas County*, 59 Or LUBA 293 (2009).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the underlying approval that is being extended is a permit, the extension of that permit is also a permit. *Thalman v. Marion County*, 58 Or LUBA 23 (2008).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. When an appellant asks a local government to either approve or deny a building permit application and the local government ignores the request, the local government's actions may constitute a de facto denial. That the local government declines to reduce its de facto denial to writing does not mean that the applicant's attempt to file a local appeal of that de facto denial was untimely filed. *Huessy v. Tillamook County*, 58 Or LUBA 172 (2009).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Dismissal of a local appeal for failure to comply with an informational requirement like specifying the date of the appealed decision in the local notice of appeal is a sufficiently harsh sanction that a local government may only dismiss the appeal if its code expressly provides that dismissal is the sanction for not complying with the informational requirement. *Golden v. City of Silverton*, 58 Or LUBA 399 (2009).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A county erred by dismissing a local appeal of a building permit where (1) the county's land use regulations provided a right of local appeal to challenge decisions that required the exercise of significant discretion, (2) the county was required to determine if the dwelling that was the subject of the building permit was lawfully established, and (3) the history of the development of the property required the county to exercise considerable discretion to determine if the dwelling was lawfully established. *Kuhn v. Deschutes County*, 58 Or LUBA 483 (2009).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a planning department is authorized to treat nondiscretionary building permit applications as discretionary permits for which there is a right of local appeal, and the planning department gives notice that a local appeal is available and accepts and processes petitioner's local appeal, a hearings officer errs by later dismissing the appeal. In that circumstance, LUBA will assume the planning department intended to exercise its authority to treat the nondiscretionary application as a discretionary application. *Kuhn v. Deschutes County*, 58 Or LUBA 483 (2009).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local ordinance allows for a de novo hearing on appeal where new evidence and testimony may be presented, it does not mean that a local government also intends to allow new issues to be raised that were not specified in the notice of appeal, when the local ordinance requires issues on appeal to be specified. *Stricklin v. City of Astoria*, 56 Or LUBA 535 (2008).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a county provides two rounds of appeals to the governing body, both rounds of appeals constitute as single proceeding, and the fact that the county did not require that petitioner pay a second appeal fee for the second appeal does not preclude petitioner from challenging imposition of the first appeal fee. *Young v. Crook County*, 56 Or LUBA 704 (2008).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where nothing in the county's code supports a claim that payment of a local appeal fee is a jurisdictional requirement, failure to pay the appeal fee is not grounds for dismissal of the appeal at the local level. *Ratzlaff v. Polk County*, 56 Or LUBA 740 (2008).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A local government correctly concludes that no timely local appeal of a building permit was filed where nothing in two letters sent to the city after the permit was granted indicated that the letters were intended to constitute appeals of the building permit. *Ortman v. City of Forest Grove*, 55 Or LUBA 426 (2007).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local government's adopted appeal procedure requires the city council to conduct a de novo hearing on appeal, the city council's interpretation of that provision to allow it to decide for itself whether the land use application that is the subject of the appeal complies with applicable standards must be affirmed. Contextual provisions that refer to city council *review* of the appealed decision are not sufficient to require that the city council limit its review to a review of the planning commission's decision on appeal. *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003), does not hold that a requirement under local law that the issues to be considered in a local land use appeal must be specified in the notice of local appeal has the legal effect of limiting the local appellate body's authority to raise and consider issues *sua sponte* that are not specified in the notice of local appeal. The question of the legal effect of such a provision on the local appellate body's authority to raise and consider issues that go beyond the issues specified in the notice of local appeal *sua sponte* was specifically left open in *Johns v. City of Lincoln City*, 146 Or App 594, 602 n 1, 933 P2d 978 (1997), and was not addressed further in *Miles*. *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A local government's interpretation of its code provisions governing appeals to

require co-appellants to either submit the same appeal form and sign in the spaces provided on that form for "appellant" and "co-appellant," or file separate appeal fees, is reasonable. *Yantis v. Josephine County*, 55 Or LUBA 619 (2008).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. The general grant of authority in ORS 215.422(1)(c) does not impose a specific limit on local land use appeal fees, but ORS 215.416(11)(b) imposes a specific $250 dollar limit on local appeal fees that counties can charge for local appeal of a permit decision that is rendered initially without a hearing. For such appeals, the $250 dollar limit applies in place of the higher appeal fee that might otherwise be permissible under ORS 215.422(1)(c). *Meadow Neighborhood Assoc. v. Washington County*, 54 Or LUBA 124 (2007).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A local government errs in finding that an appeal of a denial of a sign permit involves only a "request for interpretation" rather than a "permit" to which the provisions of ORS 227.175(10) applied to require a *de novo* hearing that is not limited to issues raised by the appellant in an appeal statement. *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295 (2007).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where petitioner does not challenge a city's findings that invoke a development code provision that allows the city community development director to change the review procedure that would otherwise apply where there is a "compelling public interest," LUBA will deny an assignment of error that challenges the community development director's decision to apply a different procedure that causes an appeal to go directly to the city council rather than to the planning commission. The development code provision need not be interpreted to prohibit a change the applicable review procedure after the city's deliberations on an application have begun. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A city errs in dismissing as moot a local appeal of a decision revoking a conditional use permit after the permit holder informed the city that he no longer owns the subject property. While the revocation decision may or may not be enforceable against the new owner, dismissal of the local appeal leaves the revocation decision in effect. *Merton v. City of Jefferson*, 53 Or LUBA 559 (2007).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Absent a local provision or other authority that limits standing to appeal a permit revocation decision only to current owners of the property to which the permit applies, a city errs in dismissing the permit holder's local appeal of a permit revocation decision for lack of standing, solely because the permit holder informs the city that the property has been sold to a third party. *Merton v. City of Jefferson*, 53 Or LUBA 559 (2007).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the standard to refer a permit revocation request to a hearing is whether the petitioner has shown a "reasonable suspicion" to believe that a misrepresentation in the permit application was the "sole basis" for approval, because the ultimate standard (sole basis for

approval) is so difficult to satisfy, application of the threshold "reasonable suspicion" standard to that ultimate standard makes it relatively difficult to obtain referral of a revocation request to a hearing. *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where no statute or other authority provides otherwise, a code provision that limits local appeal issues to those issues raised in the notice of local appeal also limits the issues that can be raised before LUBA. *Ray v. Josephine County*, 51 Or LUBA 443 (2006).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local appeal deadline is a mandatory standard, and planning staff provides erroneous information to petitioner regarding the local appeal deadline, petitioner's reliance on that information does not excuse petitioner's untimely filing of the local appeal. *Jacobsen v. City of Winston*, 51 Or LUBA 602 (2006).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A local government's rejection of a local appeal may be a land use decision even if the underlying decision sought to be appealed would not itself be a land use decision. *Wells v. Yamhill County*, 51 Or LUBA 659 (2006).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A local government correctly interprets its zoning code only to allow local appeals of decisions that will constitute land use decisions when they become final. *Wells v. Yamhill County*, 51 Or LUBA 659 (2006).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. LUBA will not review an assignment of error alleging that a county improperly retained part of the petitioner's local appeal fee, where the county's alleged actions in retaining the fee postdate the challenged decision before LUBA and are embodied in a different decision that is not before LUBA. *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local government's code makes certain local appeal requirements "jurisdictional," or mandatory prerequisites to filing or maintaining an appeal, such code provisions authorize planning staff to reject or dismiss a local appeal that does not satisfy those requirements. *Siuslaw Rod and Gun Club v. City of Florence*, 48 Or LUBA 163 (2004).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local government code provides that failures to comply with three specified appeal requirements are "jurisdictional," *i.e.*, will result in rejection or dismissal of the local appeal, but does not so provide with respect to other appeal requirements, the authority of planning staff to reject or dismiss the appeal for failure to comply with such "non-jurisdictional" appeal requirements is limited. *Siuslaw Rod and Gun Club v. City of Florence*, 48 Or LUBA 163 (2004).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local government code provides that the planning director will review "petitions" for missing information or fees, and give the petitioner written notice of the missing information or fees and an opportunity to cure, the planning director lacks authority to summarily dismiss a petition for local appeal for failure to provide required information or to pay required fees, without providing written notice and an opportunity to cure. *Siuslaw Rod and Gun Club v. City of Florence*, 48 Or LUBA 163 (2004).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local code appeal requirement merely requires that the local appellant include a "statement of interest of the person seeking review," the local government may not dismiss the local appeal because the local appellant does not demonstrate in the notice of local appeal that the appellant is "adversely affected or aggrieved." If a local appellant is going to be required to demonstrate he or she is adversely affected in the local notice of appeal, and is not going to be allowed an opportunity to make that demonstration at the statutorily required *de novo* hearing, the local code must make that requirement clear. *Crowley v. City of Bandon*, 48 Or LUBA 545 (2005).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local code requires that a local appellant state "specific grounds" for review, and the local appellant specifies some grounds for review, the local government errs in dismissing the local appeal. If the local government finds the stated grounds for review do not provide a basis for sustaining the appeal, it may deny the appeal, but it must first provide the statutorily required *de novo* appeal hearing. *Crowley v. City of Bandon*, 48 Or LUBA 545 (2005).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. By statute, an opportunity for a *de novo* appeal must be provided where a permit decision is made without first providing a hearing. ORS 227.175(10)(a)(E)(ii) provides that at the required *de novo* hearing "[t]he presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal[.]" Under these statutes it is highly unlikely that the legislature could have intended that a city may dismiss a local appeal, without first providing a *de novo* hearing, simply because the appellant's local notice of appeal did not sufficiently identify the issues to be asserted on appeal. *Crowley v. City of Bandon*, 48 Or LUBA 545 (2005).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local government regulation requires the local appellate body to review the record of the decision under appeal and additionally consider any new evidence submitted into the record at the appeal hearing, the record of decision on appeal becomes part of the appellate body's record as a matter of law. *Papadopoulos v. Benton County*, 48 Or LUBA 634 (2004).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. The logic of the exhaustion requirement at ORS 197.825(2)(a) dictates that, where the local government determines that the petitioner failed to perfect an otherwise available local remedy, LUBA has no jurisdiction over an appeal of the underlying decision. Under such circumstances, petitioner's only recourse is to appeal the decision rejecting the local appeal and

demonstrate to LUBA that the local government erred in determining that petitioner failed to perfect the local appeal. *Siuslaw Rod and Gun Club v. City of Florence*, 47 Or LUBA 615 (2004).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where two pages of legal argument are attached to a local appellant's jurisdictional statement of the grounds for local appeal, and the county refuses to consider those two pages simply because they are unsigned and include a non-appellant's fax header, the county commits error. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where local appellants (1) sign a local appeal form, (2) indicate "see attached" in the part of the appeal form where the grounds for the local appeal are to be specified, and (3) attach two pages that identify alleged legal errors in the decision, it is error for the county to refuse to consider the attached pages simply because there is no signature at the bottom of those pages and the pages include the fax header of a non-appellant. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. LUBA will not assume a county rejected a local appeal, where petitioner and the county dispute whether the county rejected petitioner's attempted local appeal or whether petitioner voluntarily withdrew his local appeal to correct identified deficiencies and later failed to refile the local appeal, and the record does not establish that the county rejected the local appeal. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a county's local appeal form invites five local appellants to utilize a single local appeal form and attach documents in support of the appeal to that local appeal form, the county may not impose additional signature and express incorporation requirements that are not reflected in the form to limit the right of individual local appellants to rely on attached documents to support their local appeal. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Once an administrative permit approval decision is appealed locally, ORS 227.175(10)(a)(A) and (D) require that a city provide a *de novo* appeal and a decision on that appeal. A city fails to provide the statutorily required *de novo* appeal when it relies on a committee rule that is not part of the zoning ordinance and was not adopted by the city council to decide that a 2-2 vote of the committee results in denial of the appeal. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a land use decision is rendered without a hearing and parties belatedly learn of the decision, ORS 197.830(3) provides a right of direct appeal to LUBA except where petitioners also seek and are granted a local appeal. *Warf v. Coos County*, 42 Or LUBA 84 (2002).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. ORS 197.830(4) applies where a local government is attempting to render a permit

decision without a prior hearing pursuant to ORS 215.416(11) or 227.175(10). ORS 197.830(3) applies in all other cases where a local government adopts a decision without providing a hearing, including where the local government mistakenly believes its decision is not a discretionary "permit" decision and for that reason does not provide the required notice and opportunity for a local appeal. *Warf v. Coos County*, 42 Or LUBA 84 (2002).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a code criterion can be interpreted to impermissibly shift the burden of proof from an applicant to an appellant in a local land use appeal, but it is reasonably clear that the county did not apply the code criterion to shift the burden in that manner, petitioner's assignment of error that the county improperly shifted the burden of proof will be denied. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a board of commissioners declares that it is biased, recuses itself from an appeal of a hearings officer's land use decision, and designates a hearings officer's decision as the county's final decision, the hearings officer's decision may be appealed to LUBA, notwithstanding local code provisions that grant a party a right to a local appeal before the board of commissioners. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. The right to an impartial tribunal will supersede petitioners' right to a local appeal, where denying the local appeal will not deprive petitioners of an opportunity to have a local decision reviewed on the merits. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Local appeal provisions that require an appellant to specify issues in its notice of appeal to the city council have a preclusive effect on subsequent review only where the council recognizes and imposes that effect. Where the governing body appears to view petitioners' failure to specify an issue in the notice of appeal as giving the governing body the option to address or reject the issue, and the issue is then addressed, LUBA will not presume that the governing body assigned preclusive effect to petitioners' violation of the issue-specification provision. *Pearl District Neigh. Assoc. v. City of Portland*, 40 Or LUBA 436 (2001).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A determination that there is no further local appeal under a local government's code is a land use decision that may be challenged at LUBA. *Robinson v. City of Silverton*, 39 Or LUBA 792 (2001).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. LUBA will not dismiss an appeal for failure to exhaust local administrative remedies where the local code provisions regarding appeals are ambiguous and petitioner followed a directive in a planning commission notice of decision that appeals from its decision would be directly to LUBA. *Mountain West Investment v. City of Silverton*, 39 Or LUBA 788 (2001).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A local notice of appeal is inadequate to preserve a specific issue on appeal when the notice of appeal does not identify that issue, and the local ordinance requires that appeal issues be raised in the notice of appeal. *Hausam v. City of Salem*, 39 Or LUBA 51 (2000).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the city council is legally obligated to review the planning commission's legislative recommendation to adopt proposed land use regulations, petitioner is not required to perform the redundant task of appealing the planning commission's decision to the city council. *Home Depot, Inc. v. City of Beaverton*, 37 Or LUBA 1020 (2000).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the city council's review of a planning commission decision is limited to whether the lower decision is supported by substantial evidence, and petitioner argues that the city council exceeded its review authority by reweighing the evidence, LUBA will deny the assignment of error where it concludes that the city council understood and applied the substantial evidence standard correctly. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472 (2000).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A local government is not estopped from following the appeal procedure that is required by its code where it is unclear whether county staff (1) made any false statements to the applicant concerning appeal procedures, (2) were aware that any of their representations were incorrect, or (3) intended that the applicant take any action based on such representations; and the applicant does not identify how she was induced to act differently by the county's representations. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a county code provision requires a *de novo* review and a hearings officer's decision includes language that suggests the hearings officer erroneously believed a *de novo* review was not required, there is no basis for reversal or remand where record makes it clear that the hearings officer nevertheless conducted the requisite *de novo* review. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A notice of local appeal is inadequate to raise an issue concerning a particular code provision where the code provision is not identified in the notice of local appeal. The fact that the notice uses some of the same words that are used in a document in the record that addresses that code criterion is not sufficient, in itself, to raise an issue concerning the code criterion. *Johns v. City of Lincoln City*, 35 Or LUBA 421 (1999).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where no code provision prohibits a planning commission from raising an issue on its own motion during a local appeal hearing and petitioner was aware of the issue prior to the hearing, the planning commission may raise the issue on its own motion. *Johns v. City of Lincoln City*, 35 Or LUBA 421 (1999).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. The applicant retains the burden of proof throughout the local process to demonstrate compliance with all applicable approval criteria. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local notice of appeal is sufficient to invoke the issue of compliance with a code criterion, the local notice of appeal is not required to also describe the precise ways in which the code criterion is allegedly violated. *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local government decision maker commits a procedural error by failing to require a transcript of the proceedings below, but petitioner fails to demonstrate that failure prejudiced his substantial rights, the procedural error provides no basis for remand. *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A city council's procedural error in failing to require preparation of a transcript of proceedings on remand before the planning commission cannot have any bearing on whether the challenged decision is supported by substantial evidence, where the proceedings on remand were on the record. *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A county does not commit a procedural error where local ordinances allow the county to call up a hearings officer decision and refer it back for reconsideration without first providing an opportunity for a hearing. A party is not prejudiced by such a summary procedure where it is provided an opportunity to appeal the hearings officer's decision on reconsideration. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A city council may not convert an on-the-record quasi-judicial appeal of a planning commission decision into a *de novo* legislative hearing where the city code: (1) provides that legislative proceedings may only be commenced by the planning commission or city council, and the subject proceeding was initiated by an individual; (2) includes no provisions for converting a quasi-judicial appeal proceeding into a legislative proceeding; and (3) requires that appeals of planning commission quasi-judicial decisions be heard on the record. *Anderson v. City of Shady Cove*, 33 Or LUBA 173 (1997).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Because petitioners failed to demonstrate the county's announcement of a higher appeal fee two hours before the deadline for filing a local appeal precluded them from exercising their local appeal rights, they failed to show they exhausted their local administrative remedies, and LUBA must dismiss. *Westall v. Polk County*, 32 Or LUBA 443 (1997).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A petitioner is not required to go through the process of appealing from the county

planning commission to the county board of commissioners to obtain a review the board of commissioners is already required by statute to give. *Young v. Douglas County*, 31 Or LUBA 545 (1996).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A county is not estopped from applying a provision providing that appeals to the board of commissioners are conducted on the record by a county employee's representation that the county has not consistently applied the provision. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1996).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. If a city hearings officer issues an amended decision and the amendments are so integrated into the decision that a page-by-page review is required to locate them, petitioners may file a local appeal of the entire amended decision within the period allowed by local ordinance. *Wilmington Neighbors v. City of Bend*, 30 Or LUBA 415 (1996).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. When the city council did not attempt to limit the issues addressed by petitioner at a city council hearing on appeal from the planning commission, petitioner may raise at LUBA any issues raised before the city council. *Thompson v. City of St. Helens*, 30 Or LUBA 415 (1996).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A local government must make clear prior to the commencement of a local appeal period that a local appeal is available or it cannot contend that a petitioner who fails to appeal locally has not exhausted all local remedies. *New v. Clackamas County*, 30 Or LUBA 453 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. When county ordinance is unclear and county decision maker's remarks were self-contradictory and confusing as to whether a local appeal was available, a local appeal was not an available local remedy that petitioner was required to exhaust prior to appealing to LUBA. *New v. Clackamas County*, 30 Or LUBA 453 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where two separate ordinance provisions arguably establish two different deadlines for the filing of a local appeal, the more general ordinance provision is controlled by the more specific provision. *Sparks v. City of Bandon*, 30 Or LUBA 69 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Statute authorizing counties to establish local appeal fees and setting standards for the amount of fees does not require the county to evaluate each appeal to determine whether an appeal fee established by ordinance meets the statutory standard. ORS 215.422(1)(c). *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. An appeal to LUBA challenging the amount of a local appeal fee established by

ordinance adopted under ORS 215.422(1)(c) amounts to an impermissible collateral attack on the fee ordinance. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local regulation allows certain development applicants to apply for a waiver of their application fees, no interpretation of that regulation would allow a development opponent to qualify for a waiver of appeal fees, and to remand for such findings would be devoid of substantive purpose. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. In the absence of county regulations under which petitioner could be granted an appeal fee waiver, the county was not required to accept petitioner's appeal without payment of required fees notwithstanding that the appeal was accompanied by a request for a waiver of fees. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where petitioner challenges the method of calculating appeal fees as provided in the county's regulations and not the accuracy of the calculation or conformity with the regulations, the challenge constitutes an impermissible collateral attack on the regulation. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Failure to waive a local appeal fee violates no federal constitutional rights of due process or access to the courts; ORS 215.422(1)(c) does not create a right to a free appeal. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Under ORS 215.422(1)(a), a county is not required to accept a local appeal if it is filed after the deadline stated in the county ordinance. *Hick v. Marion County*, 30 Or LUBA 1 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. When the city zoning ordinance makes final approval of a tentative subdivision plan a limited land use decision appealable to LUBA, a decision applying the ordinance is not a "tentative decision" that can be appealed locally at a hearing pursuant to ORS 227.175(10). *Azevedo v. City of Albany*, 29 Or LUBA 516 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. The purpose of ORS 197.825(2)(a) is to assure a local government decision is reviewed by the highest-level local decision-making body that the local code makes available, and a party's failure to exercise a right to a local appeal is grounds for dismissal of that party's appeal to LUBA. *Shaffer v. City of Salem*, 29 Or LUBA 479 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A party's fear that a local appeal would be futile does not excuse the party's failure

to make the appeal, for purposes of determining whether local remedies have been exhausted. *Shaffer v. City of Salem*, 29 Or LUBA 479 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. When the city planning manager rejects a local appeal without a hearing, adversely affecting a party's interests, and the local zoning ordinance establishes a procedure for appeals to the city council of land use decisions for which the ordinance provides no right to notice of a hearing, the party has an unqualified right to appeal the planning manager's decision to the city council. *Shaffer v. City of Salem,* 29 Or LUBA 479 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. When petitioners fail to satisfy the county's jurisdictional appeal provision requiring local appellants to state the basis of their standing, the county is not at liberty to take notice of petitioners' standing or to excuse their failure satisfy the requirement as "harmless error." *Tipton v. Coos County*, 29 Or LUBA 474 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. When a county zoning ordinance provision states that a local appeal will be dismissed if the requirements of the provision are not satisfied, the provision is jurisdictional. An appellant's failure to satisfy a jurisdictional requirement results in dismissal of the appeal. *Tipton v. Coos County,* 29 Or LUBA 474 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. LUBA will defer to the local governing body's interpretation that under its code provisions governing permits for the demolition of historic properties, the planning director's determination regarding compliance with pre-application requirements is not reviewable by the historic review board or appealable to the governing body. *Save Amazon Coalition v. City of Eugene,* 29 Or LUBA 238 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Although ORS 197.825(2)(a) requires that local appeals be exhausted, the fact that the local code may limit the scope of review of a local appellate body in considering a local appeal does not similarly limit LUBA's scope of review. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local governing body improperly accepts potentially relevant new evidence while conducting an on-the-record review of a lower level decision maker's decision, and does not provide petitioners an opportunity to rebut that new evidence, petitioners' substantial rights are prejudiced, and the local government's decision must be remanded. *Penland v. Josephine County,* 29 Or LUBA 213 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A hearings officer's decision to approve a zone change and planned unit development is a land use decision. Therefore, a planning department decision not to accept petitioner's local appeal of that decision is not subject to the ORS 197.015(10)(b)(A) exception to

LUBA's jurisdiction for "ministerial" decisions. *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A local government may interpret relevant code provisions to require that either (1) the required appeal fee, or (2) a fee waiver previously approved by the planning director, be included in a local appeal when it is filed. In such circumstance, it is a local appellant's responsibility to obtain approval of a fee waiver request prior to submitting an appeal. *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Petitioner's contention that the fee charged for a local appeal violates ORS 227.180(1)(c) must fail where there is no evidence in the record establishing that the local appeal fee is unreasonable or that it exceeds the average or actual cost of such an appeal, and petitioner does not move for an evidentiary hearing to submit such evidence. *Ramsey v. City of Portland,* 29 Or LUBA 139 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where petitioner appeals a decision by a local governing body not to accept petitioner's appeal of a planning commission decision, LUBA's scope of review is limited to whether the governing body correctly decided not to accept petitioner's local appeal. LUBA will not review the merits of the planning commission decision. *Cummings v. Tillamook County*, 29 Or LUBA 550 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. The city council must provide an appeal of a planning commission decision to approve a building permit, regardless of whether the planning commission was the proper body to approve a building permit, where the planning commission in fact approves the building permit and the zoning code provides that "any action of the planning commission pursuant to [the zoning code] may be appealed to the city council." *Mills v. City of Yachats,* 29 Or LUBA 1 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. The exception to LUBA's jurisdiction in ORS 197.015(10)(b) does not apply where applicable local code standards concerning the timely filing of a local appeal require interpretation and the exercise of legal judgment. *Hick v. Marion County*, 28 Or LUBA 782 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local governing body is authorized to limit issues on appeal to issues raised before the planning commission but the local government failed to keep an adequate record of the planning commission proceedings, and LUBA cannot determine whether the governing body correctly limited its review to two particular issues, LUBA will remand the governing body's decision. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A local governing body may interpret a code requirement that "[b]efore granting any appeal, [the governing body] shall make findings of fact, setting forth wherein the planning

commission's findings were in error," to allow the governing body to substitute its judgment for that of the planning commission on questions of fact or law, and to find the planning commission erred because it relied on different evidence or reached a different conclusion than did the governing body. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632 (1995).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Although a local government is free to adopt local code provisions narrowing the scope of review in local appeal proceedings, such local code provisions do not have the legal effect of limiting LUBA's scope of review. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a planning director exercises discretion in applying the local code and correctly rejecting an attempted local appeal as untimely filed, the decision to reject the attempted local appeal is a land use decision, and the proper disposition of a LUBA appeal challenging that decision is to affirm the decision rather than to dismiss the LUBA appeal. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code explicitly provides that a tie vote of the decision making body means the appealed decision of a lower level decision maker stands, the general rule that a tie vote of a decision maker amounts to a failure of the applicant to carry the burden of proof does not apply. *Derry v. Douglas County*, 28 Or LUBA 212 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local code neither expressly allows a local appellant to withdraw his appeal of a planning commission decision to the governing body, nor expressly provides the governing body retains jurisdiction over such an appeal once filed, a local government acts within its interpretive discretion under ORS 197.829 in concluding that it retains jurisdiction over such an appeal notwithstanding the local appellant's attempt unilaterally to withdraw the appeal. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. The record of a challenged local governing body decision includes the record of the planning commission proceeding on the subject application if either (1) the planning commission record was actually placed before the governing body, or (2) local code provisions require that the planning commission record be made part of the record before the governing body as a matter of law. *Salem Golf Club v. City of Salem*, 27 Or LUBA 715 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a county code allows a "permit" decision to be made without a hearing, but provides for a local appeal only by the permit applicant, ORS 215.416(11) nevertheless requires the county to provide an opportunity to obtain a hearing through an appeal to persons who would have had a right to notice if a hearing had been scheduled and who are adversely affected or aggrieved by the decision. In these circumstances, a county does not err by allowing such persons to pursue a local appeal. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code makes payment of a local appeal fee, "as specified by the Planning Director," a jurisdictional requirement, so long as the local appellant pays the fee specified by the director there is no jurisdictional defect, regardless of whether the director made a mistake in calculating the amount of the appeal fee. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code provides for an initial decision on a permit application without a hearing, subject to obtaining a hearing through a *de novo* local appeal, regardless of a code requirement that the bases for appeal be specified in the local notice of appeal, the local appellant is entitled to raise any relevant issue during the local appeal. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Even after an initial local government decision is made approving a permit application, and a local appeal is filed, the applicant has the burden of establishing that the proposal satisfies relevant approval standards. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Although a local governing body may be authorized to conduct a *de novo* review of a development application, its refusal to allow petitioner to submit the planning commission decision and staff report on the subject application into the record as relevant evidence prejudices petitioner's substantial right to submit evidence. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code explicitly establishes a right to a local appeal only for decisions made pursuant to certain procedures set out in the code, a the local government's interpretation that no local appeal is available if the decision sought to be appealed was not made through those procedures is not clearly wrong, and LUBA will defer to it. *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a permit applicant receives a public hearing and decision from a local government and, under the local code, an appeal to the governing body may be decided without further public hearing, the governing body commits no error by denying the applicant's appeal at a public meeting without further notice or public hearing. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code provides a possibility of, but not a right to, a second public hearing on appeal of a hearings officer's decision, the appeal may be denied without providing an additional public hearing, and the code need not include standards for determining whether to grant an additional public hearing. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local governing body has not adopted regulations providing for reconsideration of its decisions, the governing body commits no error by denying a request to reconsider a decision, where the request was received after the final written order is entered. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code makes filing a transcript of the initial local hearing an essential part of perfecting a local appeal, and contains no provision providing procedures or standards for granting an extension of time to file such transcript, LUBA will affirm a local government's decision to dismiss a local appeal because the transcript was not filed within the required time. *Bjerk v. Deschutes County*, 26 Or LUBA 439 (1994).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. LUBA's scope of review is determined by ORS 197.835 and 197.763(1). That local government regulations may allow or require the local governing body's scope of review to be narrowed during local appeals does not similarly narrow LUBA's scope of review. *Cummings v. Tillamook County*, 26 Or LUBA 139 (1993).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Although a local appellant may have the burden under local code provisions of demonstrating error in a lower local decision maker's decision, the *applicant* for permit approval retains the burden of proof concerning compliance with all applicable approval criteria throughout the local appeals process. *Mohler v. Josephine County*, 26 Or LUBA 1 (1993).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. The failure to initiate a timely local rehearing process is *not* a procedural defect which LUBA may overlook if no prejudice is shown. *Rochlin v. Multnomah County*, 25 Or LUBA 637 (1993).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. An interpretation of local code provisions, that the local appeal time runs from the date the decision is mailed to parties, is not clearly wrong, and LUBA will defer to it. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code states that "failure to comply with this subsection shall be a jurisdictional defect," and a local appellant fails to establish compliance with that subsection, the local government is free to interpret its code to require dismissal of the local appeal, and LUBA will defer to that interpretation. *DLCD v. Wasco County*, 25 Or LUBA 529 (1993).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local code does not either specifically prohibit or allow the filing of appeals and appeal fees by facsimile, it is not "clearly wrong" for the local government to determine that a local appeal is not properly filed under the local code where both appeal fees and

the appeal document itself are filed by facsimile. *DLCD v. Wasco County*, 25 Or LUBA 529 (1993).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A permit approval condition that amendments to the approved master plan must be approved by the planning department is not inconsistent with, and does not eliminate, the right established by the local code to appeal a decision by the planning director on such an administrative action to the planning commission. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where one code provision requires a local government's notice of decision to identify the local appeal fee, and another provision states that failure to pay the proper local appeal fee prior to expiration of the period for filing an appeal constitutes a "jurisdictional" defect, the local government may interpret the two code provisions together to mean that the period for filing an appeal does not begin to run until the required notice of decision, identifying the proper appeal fee, is provided to the appealing party. *Reusser v. Washington County*, 25 Or LUBA 252 (1993).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where parties object that petitioner failed to properly perfect its local appeal, but the local government nevertheless allows the local appeal, petitioner satisfies the requirement that it exhaust available administrative remedies, as ORS 197.825(2)(a) requires. Although the local government may have committed reversible error in considering the local appeal, LUBA has jurisdiction to review the local government's final decision. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where an applicant neither files its own appeal of the local governing body's decision granting the requested development approval nor files a cross-petition for review in the LUBA appeal filed by the opponents, the question of whether a local appeal by the opponents should have been dismissed by the governing body is not properly presented to LUBA. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code provides that a conditional use permit expires one year after it is approved, unless construction occurs demonstrating the CUP has been "used," and where the code also prohibits the local government from issuing building or other permits required for construction until appeals have been "completed," the running of the one-year period for "using" a conditional use permit is tolled during those periods of time when a building or other permit necessary to "use" the conditional use permit cannot properly be issued due to an appeal. *Weeks v. City of Tillamook*, 24 Or LUBA 155 (1992).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local planning official refuses to accept petitioner's local appeal of a hearings officer's decision on a permit application, but another local appeal of the same decision is processed, the refusal is either (1) a final land use decision, in which case a NITA must be timely

filed with LUBA; or (2) part of the ongoing local proceedings on the subject application, in which case in an appeal of the local government's final decision, LUBA can only consider issues concerning the refusal to accept petitioner's appeal if those issues were raised below. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local code provision clearly requires that in the event a decision maker's initial decision is modified by a subsequent decision after an appeal of the initial decision is filed, the appellant must file an appeal of the modified decision; an appellant may not simply rely upon the previously filed appeal of the initial decision. *Breivogel v. Washington County*, 24 Or LUBA 63 (1992).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where neither the local code nor or any statute creates a "duty" on the part of a local government to advise local appellants of local appeal requirements stated in the local code itself, that the county provided petitioners with a detailed information sheet concerning local appeals which did not indicate the existence of the county's "jurisdictional" requirement that a local appeal document be signed, provides no basis for reversal or remand of the challenged decision. *Breivogel v. Washington County*, 24 Or LUBA 63 (1992).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Even though petitioners may have complied with the "spirit" of a local jurisdictional signature requirement by having identified the local appellants in the appeal document, LUBA may not disregard petitioners' failure to comply with the jurisdictional signature requirement. *Breivogel v. Washington County*, 24 Or LUBA 63 (1992).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where local code provisions governing appeals state the governing body may "affirm, reverse or modify in whole or in part, any decision * * * of the planning commission," the code does *not* limit the governing body's scope of review to issues raised in the notice of appeal of a planning commission decision. *Horizon Construction, Inc. v. City of Newberg*, 23 Or LUBA 159 (1992).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. A local code jurisdictional requirement that the local appeal document, which under the code includes the required appeal fee, be "signed" but which does not state *where* such signature must be located, is satisfied by the local appellant's signature on his personal check submitted as the filing fee. *Breivogel v. Washington County*, 23 Or LUBA 143 (1992).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. In a local appeal of an initial local decision maker's decision approving an application for land use approval, the applicant retains the burden of proof. However, the opponents of the application also have a burden in the local appeal, in that unless they are able to convince the appellate decision maker that the initial decision maker erred, the appellate decision maker may affirm that earlier decision or adopt it as its own. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Persons within sight and sound of a development proposal are presumed to be adversely affected by it. *Kamppi v. City of Salem*, 21 Or LUBA 498 (1991).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Even where the local code provides for the type of *de novo* review in which the governing body develops its own evidentiary record and renders its decision based on that new record, the code may require that the planning commission record be included as part of the evidentiary record before the governing body in its *de novo* review proceeding. *Union Gospel Ministries*, 21 Or LUBA 580 (1991).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local code gives "aggrieved parties" the right to appeal a decision, but does not require notice and a hearing prior to making that decision, petitioners were not given an opportunity to become "aggrieved parties" and therefore had no local remedies to exhaust. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code vests total discretion to refuse to reconsider a decision with the local decision maker, it is not error for the decision maker to refuse to reconsider a disputed decision. *West v. Clackamas County*, 20 Or LUBA 433 (1991).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. If the local code states that certain provisions are applicable where the governing body assumes jurisdiction, on its own motion, to review a decision of a lower body, those provisions do not apply to appeals of such decisions initiated by persons other than the governing body. *Adams v. Jackson County*, 20 Or LUBA 398 (1991).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. In a *de novo* local appeal of an inferior tribunal's decision granting land use approval, the applicant retains its burden of proof before the appellate tribunal. *Strawn v. City of Albany*, 20 Or LUBA 344 (1990).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local government provides for *de novo* review of an inferior tribunal's decision, the applicant must carry the burden of proof before the appellate tribunal. If the appellate tribunal is unable to agree on a decision, the applicant is deemed to have failed to carry its burden of proof, whether or not the applicant prevailed before the inferior tribunal. *Strawn v. City of Albany*, 20 Or LUBA 344 (1990).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where a local code provides that (1) planning commission decisions become final 10 days after they are filed with the clerk, *unless* the governing body orders review; and (2) a governing body order for review must be made at the governing body's next meeting concerning land use matters; then a planning commission decision is not final if the governing body adopts an

order for review at such meeting, even if the order is adopted more than 10 days after the planning commission's decision was filed. *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the county charter and code grant the county administrator broad administrative powers, but do not explicitly grant the county administrator authority to determine whether decisions are appealable under the county code, LUBA will accept the county's interpretation of the charter and code as granting the administrator such authority, so long as that interpretation is not inconsistent with the charter and code. *Von Lubken v. Hood River County*, 20 Or LUBA 208 (1990).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. The applicant for land use approval has the burden of proof that applicable approval standards are met; an opponent is not obligated to prove such standards are not met. Local code provisions which require that an appellant identify the reasons for an appeal, and alter the order in which parties present argument and evidence, do not impermissibly alter the burden of proof regarding compliance with applicable approval standards. *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7 (1990).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where petitioners' local notice of review specifically identifies as the subject of the appeal a building permit (the only local government decision concerning the proposed use of which petitioners were aware), but also indicated an intent to request review of any local decision authorizing the proposed use, LUBA will interpret petitioners' local notice of review to appeal both the building permit and an earlier zoning clearance decision required for issuance of the building permit. *Komning v. Grant County*, 20 Or LUBA 481 (1990).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code states that a person may appeal to the planning commission from "a decision" made pursuant to the code by the planning director, *all* decisions made by the planning director, whether ministerial or discretionary, are appealable to the planning commission. *Komning v. Grant County*, 20 Or LUBA 481 (1990).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where petitioners were entitled under ORS 215.416(11) to written notice of a local permit decision made without a hearing, and such written notice was not given, the time for filing petitioners' local appeal did not begin to run and, therefore, their subsequent appeal to the planning commission was timely filed. *Komning v. Grant County*, 20 Or LUBA 481 (1990).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where the local code requires that the governing body remand an appeal to the planning commission if evidence is presented which could not have been presented to the planning commission, and parties offer to the governing body relevant evidence that the planning commission refused to consider, it is error for the governing body not to remand the appeal to the

planning commission to consider such evidence. *Bloomer v. Baker County*, 19 Or LUBA 319 (1990).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. The local governing body has the *authority* to conduct either an evidentiary or on the record *de novo* review of planning commission decisions in circumstances where local ordinances are silent on the scope of review. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

25.4.7 Local Government Procedures – Compliance with Local Ordinances/Regs – Appeal Requirements. Where petitioner was not given notice of the city council's *de novo* scope of review in appeals of planning commission decisions, but the city council continued its hearing to provide an opportunity for parties to submit evidence, petitioner's substantial rights were not prejudiced by the procedural error. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

25.5 Local Government Procedures – Delegation of Authority. A condition of approval requiring that an applicant construct a proposed fence between a proposed trail and adjoining farms; specifying only that the proposed fence must be "capable of preventing dogs and people from entering adjacent farm fields"; punting all determinations regarding fence design, materials, construction, etc. to a subsequent master planning process that offers no opportunity for a public hearing or other public input; and allowing adjacent landowners to opt out of installing a fence on their property line is inadequate where the county relies on the proposed fence to address a wide variety of different potential impacts, which might require different fence designs, materials, construction techniques, and maintenance routines in order to ensure that the trail will not cause significant impacts on farm practices for purposes of the farm impacts test at ORS 215.296(1). Such a condition is also not clear and objective for purposes of ORS 215.296(2). *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

25.5 Local Government Procedures – Delegation of Authority. Where a local code provision requires a finding that "[t]he proposed use is appropriate, considering the adequacy of public facilities and services existing or planned for the area affected by the use," and where the record includes undisputed expert testimony that fire and emergency access are inadequate unless a proposed trail and its bridges are built to certain standards, it is insufficient for the local government to state, without any supporting evidence, that it is "feasible" to design the trail and bridges to provide adequate fire and emergency access and then punt all determinations regarding trail and bridge design to a subsequent master planning process. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

25.5 Local Government Procedures – Delegation of Authority. A county may not defer a determination of compliance with applicable approval criteria to a future proceeding that does not allow for public participation merely because the deferred criteria require no interpretation or judgment. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.5 Local Government Procedures – Delegation of Authority. A county may not defer a determination of compliance with applicable approval criteria to a future proceeding that does not allow for public participation merely because the deferred criteria require no interpretation or judgment. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.5 Local Government Procedures – Delegation of Authority. Where a local code provision requires applicants for destination resorts to demonstrate that "[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource," where a proposed resort's consumptive use of groundwater is anticipated to impact the quantity and quality of water in an offsite stream, and where the applicant's final master plan includes a mitigation plan requiring the applicant to replace the water consumed by the resort with a quantity and quality of water that will maintain fish habitat in the stream, the local government may not impose a condition of approval allowing the applicant to demonstrate that the source of the mitigation water provides the requisite quantity and quality of water at a later date without review or input by interested persons. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019).

25.5 Local Government Procedures – Delegation of Authority. LUBA will reject a county's interpretation of its code—that a code provision which sets forth approval criteria regarding an

application for a variance to the minimum lot size requirements within the county's urban growth area may not apply to the county's decision because it only applies to decisions made by the county's planning director but not to decisions made by the planning commission or board of county commissioners—that was made for the first time in its response brief, because that interpretation is not reflected in the decision and is therefore not an interpretation by the local government. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

25.5 Local Government Procedures – Delegation of Authority. ORS 215.050 and 215.060 require the county governing body to approve revisions to the comprehensive plan and to conduct at least one hearing on proposed revisions. A county violates ORS 215.050 and 215.060, where on remand of an initial governing body decision approving plan amendments, the governing body delegates to a hearings officer final decision-making authority and the conduct of the only hearing, and on remand the hearings officer approves new comprehensive plan amendments that the governing body did not consider in the governing body's initial decision leading to the appeal to LUBA. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

25.5 Local Government Procedures – Delegation of Authority. A county governing body's consent agenda "ratification" of a hearings officer's decision approving comprehensive plan amendments is insufficient to comply with ORS 215.050 and 215.060, which require the county governing body to approve comprehensive plan amendments and to conduct at least one hearing on proposed amendments. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

25.5 Local Government Procedures – Delegation of Authority. Where a county code provides a methodology for interpreting ambiguous code provisions, and provides that the "Planning Official shall interpret the meaning of the term," that provision does not operate as a delegation of exclusive interpretative authority to the Planning Official, or require the county governing body to defer to the Planning Official's interpretation. *Stevens v. City of Island City*, 71 Or LUBA 275 (2015).

25.5 Local Government Procedures – Delegation of Authority. Where the city code makes the planning commission the city's final decision maker, but limits the planning commission's review on appeal to errors committed by the hearings officer, the planning commission lacks authority to consider legal challenges to the city's appeal fee. In that circumstance, LUBA lacks authority to reverse or remand the planning commission decision to the planning commission based on a legal challenge to the city's local appeal fee. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

25.5 Local Government Procedures – Delegation of Authority. Where a city zoning ordinance delegates authority to a hearings official to "interpret" the zoning ordinance, the hearings official does not err by interpreting that delegation not to authorize the hearings official to declare city land use legislation ineffective to achieve the purpose it was clearly adopted to accomplish. Such a request is not a request for an "interpretation." *Goodpasture Partners LLC v. City of Eugene*, 64 Or LUBA 258 (2011).

25.5 Local Government Procedures – Delegation of Authority. Where a city zoning ordinance delegates authority to a hearings official to "interpret" the zoning ordinance, without expressly

limiting such interpretations to ambiguous zoning text, that delegation nevertheless does not authorize the hearings official to interpret unambiguous zoning text to say what it does not say. *Goodpasture Partners LLC v. City of Eugene*, 64 Or LUBA 258 (2011).

25.5 Local Government Procedures – Delegation of Authority. An ordinance does not improperly delegate legislative responsibility to a city manager to exercise in administrative rulemaking, where that delegation was accomplished by an earlier unappealed ordinance. Any allegedly improper adoption of legislation via rulemaking in a future action by the city manager may be challenged at the time that future rulemaking occurs. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

25.5 Local Government Procedures – Delegation of Authority. A county errs in failing to address whether a mitigation plan for a destination resort is consistent with applicable comprehensive plan policies governing wildlife protection, and instead finding that issues raised regarding compliance with those policies will be addressed by requiring the applicant to obtain approval of the plan from the Oregon Department of Fish and Wildlife. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

25.5 Local Government Procedures – Delegation of Authority. Absent a code provision to the contrary, a governing body does not exceed its authority in an appeal of a planning commission decision by approving a modification of the development application that the planning commission did not consider, and does not commit procedural error in doing so if all participants were provided an opportunity to present argument and evidence on the proposed modification. *O'Rourke v. Union County*, 54 Or LUBA 614 (2007).

25.5 Local Government Procedures – Delegation of Authority. Where planning staff prepare a final written decision based on an oral decision by the governing body, the far better practice is to have the governing body review and approve the final written decision prior to its issuance, rather than have staff sign and issue the written decision, to avoid potential inconsistencies between the oral decision and the final written decision. *O'Rourke v. Union County*, 54 Or LUBA 614 (2007).

25.5 Local Government Procedures – Delegation of Authority. A local government errs in deferring a requirement for submission of a geotechnical analysis to a later stage of the proceedings that does not provide for notice or hearing. *Township 13 Homeowners Assoc. v. City of Waldport*, 53 Or LUBA 250 (2007).

25.5 Local Government Procedures – Delegation of Authority. LUBA will reject a petitioner's argument that a city adjustment committee erred by failing to find that the zoning of a property reverted to its prior zoning because a rezoning condition of approval was violated, where petitioner fails to cite any authority to contradict the city's position that the adjustment committee lacks authority to question the zoning shown on the city's official zoning map. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

25.5 Local Government Procedures – Delegation of Authority. When a city steps into the shoes of a county to make land use decisions pursuant to an intergovernmental agreement, unless some controlling authority specifies otherwise, the resulting decision on behalf of the county is subject

to the statutes applicable to counties rather than those applicable to cities. *Stoloff v. City of Portland*, 51 Or LUBA 560 (2006).

25.5 Local Government Procedures – Delegation of Authority. Where a county code requires the "development proposal" to include a survey and assessment of archaeological sites and, if indicated, a management plan, a condition requiring that a management plan be completed prior to final plat approval is not permissible where neither the code nor the condition provides an opportunity for public participation in final plat approvals. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

25.5 Local Government Procedures – Delegation of Authority. A local government may defer a determination that an application to site a dwelling in a forest zone complies with certain siting criteria, provided the local government allows petitioner and other interested parties an opportunity to participate in the proceedings where that determination is made. *Hodge Oregon Properties, LLC v. Lincoln County*, 46 Or LUBA 290 (2004).

25.5 Local Government Procedures – Delegation of Authority. A local government's decision that it is feasible to satisfy an approval criterion that a private road can be dedicated to the public, by imposing conditions of approval, is supported by substantial evidence where: (1) the underlying easement requires a public dedication upon request; (2) the ownership of all property underlying the proposed road is demonstrated; and (3) all owners are bound by the public dedication request. *Sisters Forest Planning Comm. v. Deschutes County*, 45 Or LUBA 145 (2003).

25.5 Local Government Procedures – Delegation of Authority. Even though a local government may be in a position to require a modified application, that does not mean it must do so, when a condition of approval requiring submission of a revised plat neither constitutes procedural error nor prejudices a party's substantial rights. *Sisters Forest Planning Comm. v. Deschutes County*, 45 Or LUBA 145 (2003).

25.5 Local Government Procedures – Delegation of Authority. A prerequisite for application of the deferential standard of review under ORS 197.829(1) is, at a minimum, a written decision or document adopted by the governing body that contains an express or implicit interpretation of a local provision that is adequate for review. A city attorney's interpretation of a local provision is not entitled to deference under that standard, even assuming that the city council informally directed the city attorney to apply that interpretation in denying the challenged building permits. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

25.5 Local Government Procedures – Delegation of Authority. Where a hearings officer finds that it is feasible to comply with an approval standard, and imposes conditions to ensure compliance, the issue becomes whether that finding is adequate and supported by substantial evidence, not whether the hearings officer improperly deferred a finding of compliance to a later review stage. The fact that the hearings officer addresses the possibility that the solution found to be feasible might not work, and finds that if so DEQ would require that the project be scaled back, does not mean that the hearings officer deferred a finding of compliance with the approval standard or impermissibly delegated that finding to DEQ. *Baker v. Lane County*, 43 Or LUBA 493 (2003).

25.5 Local Government Procedures – Delegation of Authority. Where a board of commissioners declares that it is biased, recuses itself from an appeal of a hearings officer's land use decision, and designates a hearings officer's decision as the county's final decision, the hearings officer's decision may be appealed to LUBA, notwithstanding local code provisions that grant a party a right to a local appeal before the board of commissioners. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

25.5 Local Government Procedures – Delegation of Authority. Where the local government adopts a finding of current compliance and imposes conditions to ensure compliance with an approval criterion, that those conditions require additional informal review by local government staff does not mean that the local government has impermissibly "deferred" a finding of compliance with that criterion to a later stage without notice or hearing. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

25.5 Local Government Procedures – Delegation of Authority. A city rezoning decision conditioned on the applicant providing a geotechnical report and allowing the city to retain an independent engineer to ensure adequate monitoring and mitigation of environmental hazards during construction as part of the site development permit process, which does not provide for public hearings, does not defer discretionary decision making to a later stage of review. In that circumstance, the conditions are properly viewed as being designed to support the city's threshold finding that environmental hazards on the subject property do not impact adjoining properties in violation of comprehensive plan objectives. *Neighbors for Livability v. City of Beaverton*, 40 Or LUBA 52 (2001).

25.5 Local Government Procedures – Delegation of Authority. A planned unit development (PUD) condition of approval that requires a future variance for a long cul-de-sac does not constitute an improper deferral of decision making to a later stage where the applicable variance procedures will provide substantially the same full opportunity for public involvement that would have been provided had the variance been adopted prior to or as part of the challenged PUD decision. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

25.5 Local Government Procedures – Delegation of Authority. Under ORS 215.406, which authorizes a county governing body to appoint a hearings officer, the county governing body may use a planning commission or itself as the hearings officer. *Crook v. Curry County*, 38 Or LUBA 677 (2000).

25.5 Local Government Procedures – Delegation of Authority. A finding of feasibility of compliance with a code standard requiring adequate fire protection, conditioned on the fire marshal's written approval of a proposed emergency turnaround, does not impermissibly defer a finding of compliance with that standard to a second stage of review that fails to provide notice and opportunity for hearing, where the finding of feasibility of compliance is based on evidence that the proposed emergency turnaround is acceptable to the fire marshal. *Mitchell v. Washington County*, 37 Or LUBA 452 (2000).

25.5 Local Government Procedures – Delegation of Authority. Where the existence or extent of an access is disputed, and an approval criterion requires demonstration of access, that criterion

may be satisfied by a condition of approval that access be confirmed by an agreement of the parties or circuit court declaratory relief. Such a condition is not an impermissible delegation of authority. *Highland Condominium Assoc. v. City of Eugene,* 37 Or LUBA 13 (1999).

25.5 Local Government Procedures – Delegation of Authority. A county governing body does not exceed its interpretive discretion in interpreting a zoning ordinance provision that delegates responsibility to the planning director to interpret the zoning ordinance as not preventing the governing body from interpreting the comprehensive plan in the first instance following an appeal of a planning director decision to the planning commission and the county governing body. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

25.5 Local Government Procedures – Delegation of Authority. Where a local government approves a preliminary planned unit development application based on findings of current compliance with applicable criteria, an argument that the local government impermissibly deferred findings of compliance with applicable criteria to a second stage of review where notice and hearing requirements are not observed is more appropriately framed as an inquiry into whether the findings of current compliance are adequate and supported by substantial evidence. *Salo v. City of Oregon City*, 36 Or LUBA 415 (1999).

25.5 Local Government Procedures – Delegation of Authority. Approval of a 15-lot, multi-family dwelling development based on a site plan for only four of the 15 lots with a condition that the complete site plan be submitted later, impermissibly defers findings of compliance with approval criteria to a later stage without an opportunity for a hearing or a current finding that compliance with approval criteria is feasible. *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998).

25.5 Local Government Procedures – Delegation of Authority. A local government may approve a partition and defer determination of an applicable approval criterion, provided the subsequent approval process provides the same notice and opportunity for public input as the original proceeding and the approval criteria are not so dependent on each other that they must be applied together. *Sunningdale-Case Heights Assoc. v. Washington Co.*, 34 Or LUBA 549 (1998).

25.5 Local Government Procedures – Delegation of Authority. Where an applicable approval criterion requires storm drainage plans that meet certain standards, the local government may not approve a land division without such storm drainage plans, or without finding that such plans are feasible and delegating the required evaluation to a sewerage agency. *Sunningdale-Case Heights Assoc. v. Washington Co.*, 34 Or LUBA 549 (1998).

25.5 Local Government Procedures – Delegation of Authority. A local code provision requiring an "adequate turnaround" is not satisfied by deferring the decision concerning the design of the turnaround to the fire district where (1) there will be no opportunity for public comment or a hearing, and (2) designs required by the fire district will require adjustments to or elimination of one or more lots. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

25.5 Local Government Procedures – Delegation of Authority. In order for a county to find it is feasible to comply with a code requirement for an "adequate turnaround," it must have a proposed turnaround to review. The county may not defer development and approval of a proposed

turnaround to a later stage where there is no opportunity for public hearing. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

25.5 Local Government Procedures – Delegation of Authority. Because a county's interpretation of its code to allow deferral of compliance with an approval criterion to a later stage with no opportunity for public hearing is contrary to ORS 197.763(2) and 215.416, LUBA owes that interpretation no deference under ORS 197.829(1). *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

25.5 Local Government Procedures – Delegation of Authority. Where the county code specifically authorizes the board of commissioners to make the initial determination on a land use application, the board of commissioners had jurisdiction to initially consider and approve a floodplain permit application, regardless of other code provisions stating the planning commission should make the initial determination on such applications. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

25.5 Local Government Procedures – Delegation of Authority. A city may not delegate the responsibilities associated with the administration and collection of assessments to improve streets to the city's public street standards to private parties. *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

25.5 Local Government Procedures – Delegation of Authority. ORS 197.190(1) and 268.285(1) both require that a Metropolitan Service District decision to coordinate be an action taken "through its governing body." Where the product of a Metro sponsored mediation is not formally adopted by the Metro governing body, it does not constitute an exercise of Metro's coordination obligation under those statutes. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

25.5 Local Government Procedures – Delegation of Authority. When conducting a multi-stage permit approval process, if a local government finds compliance, or feasibility of compliance, with all approval criteria during the first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure those criteria are met and to defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a later stage. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

25.6.1 Local Government Procedures – Hearings – Generally. While ORS 197.763(6)(a) does not require "magic words" for a party to exercise their right to have either the record held open or the hearing continued, where the local government provides notice of that right at the beginning of the hearing, a process question about whether a request for a continuance or to keep the record open can be made is not sufficient to exercise that right. *Norman v. Washington County*, 80 Or LUBA 500 (2019).

25.6.1 Local Government Procedures – Hearings – Generally. Any party may request an opportunity under ORS 197.763(6)(c) to respond to "additional written evidence" that was submitted during an open record period prior to the conclusion of the initial evidentiary hearing. But that response must be limited to responding to the "additional written evidence" that is submitted during the open record period. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

25.6.1 Local Government Procedures – Hearings – Generally. Where a party's evidentiary response to "additional written evidence" that was submitted during the initial open record period at the conclusion of the initial evidentiary hearing pursuant to ORS 197.763(6)(c) includes additional evidence that goes beyond responding to that "additional written evidence" that was submitted during the initial open record period, a local government must either reject the additional evidence or give all parties an opportunity to rebut the additional evidence. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

25.6.1 Local Government Procedures – Hearings – Generally. Under ORS 197.763(6)(a) through (c), prior to the conclusion of the initial evidentiary hearing any party may request an opportunity to present additional evidence. In that event, the hearing body must either continue the hearing or leave the record open to receive the additional evidence, and failure to do so is a procedural error. However, where the party making the request appeals and is given a de novo hearing before the local appellate body at which it is allowed to submit additional evidence, the hearings body's error did not result in prejudice to the party's substantial rights and therefore provides no basis for LUBA to remand. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

25.6.1 Local Government Procedures – Hearings – Generally. The requirements for continuances and open record periods in ORS 197.763(6)(a), (b) and (c) only apply to the initial evidentiary hearing and do not apply to subsequently continued hearings or open record periods. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.6.1 Local Government Procedures – Hearings – Generally. A local government does not err by granting additional seven-day open record periods following the conclusion of an initial seven-day open record period, where the local government's code specifically authorizes additional continuances and open record periods. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.6.1 Local Government Procedures – Hearings – Generally. Where a local government accepts opponent evidence that goes beyond the stated scope of a seven-day open record period, but grants the applicant final argument and evidentiary rebuttal, the applicant's substantial rights are not prejudiced and the local government's error in accepting the opponent evidence does not provide a basis for remand. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.6.1 Local Government Procedures – Hearings – Generally. Where petitioners' were allowed to present evidence during the hearings on a decision that is appealed to LUBA and remanded, the city need not allow petitioners a second opportunity to enhance their evidentiary presentation following LUBA's remand where neither the city's regulations nor LUBA's remand require a further evidentiary hearing. *Rosenzweig v. City of McMinnville,* 66 Or LUBA 164 (2012).

25.6.1 Local Government Procedures – Hearings – Generally. Parties to a land use proceeding have the right to review and respond to substantive changes in the application that occur during the proceedings. If such a change occurs after the close of the record or hearing, the local government may be required to re-open the record to allow other parties a reasonable opportunity to submit responsive testimony and evidence. Failure to do so can be procedural error and a basis for remand, if the petitioners demonstrate the error prejudiced their substantial rights. *Conte v. City of Eugene,* 66 Or LUBA 334 (2012).

25.6.1 Local Government Procedures – Hearings – Generally. ORS 197.763 sets out the minimum procedures the county is required to follow in the conduct of quasi-judicial land use hearings under ORS chapter 215, and ORS 197.763 does not require that the county provide an applicant with prior copies or notice of the evidence that the county submits at the initial evidentiary hearing on a permit application. *Emmert v. Clackamas County*, 65 Or LUBA 1 (2012).

25.6.1 Local Government Procedures – Hearings – Generally. Absent any allegation that the city council is required by its development code, other provisions of the city's code or charter, or state law to adhere to Robert's Rules of Order in voting on matters before it, failure to adhere to Robert's Rules does not amount to a procedural error under ORS 197.835(9)(a)(B). *Jones v. City of Grants Pass*, 64 Or LUBA 103 (2011).

25.6.1 Local Government Procedures – Hearings – Generally. A county's alleged failure to process a permit application under "Type II" procedures, which provide for a *de novo* hearing on appeal of an administrative decision, does not provide a basis for remand, where the county initially processed the application under "Type I" procedures that provide for a hearing limited to the issues raised in the appeal petition, but in fact the county provided a *de novo* hearing on the appeal not limited to the issues raised in the appeal petition. *Jensen Properties v. Washington County*, 61 Or LUBA 155 (2010).

25.6.1 Local Government Procedures – Hearings – Generally. When a local code provision limits participation at a public hearing on remand from LUBA to persons who obtained "party" status at the initial hearing and excludes persons who had "witness" status, the local government may properly prevent persons who were "witnesses" at the initial hearing from participating on remand. *Wetherell v. Douglas County,* 60 Or LUBA 131 (2009).

25.6.1 Local Government Procedures – Hearings – Generally. Where a local ordinance allows for a de novo hearing on appeal where new evidence and testimony may be presented, it does not mean that a local government also intends to allow new issues to be raised that were not specified in the notice of appeal, when the local ordinance requires issues on appeal to be specified. *Stricklin v. City of Astoria,* 56 Or LUBA 535 (2008).

25.6.1 Local Government Procedures – Hearings – Generally. Oral statements made by a decision maker in a public hearing that may conflict with a later vote do not provide a basis for reversal or remand. LUBA reviews the written findings made in support of a decision not statements made during public hearings. *Sommer v. Josephine County*, 52 Or LUBA 209 (2006).

25.6.1 Local Government Procedures – Hearings – Generally. A member of the governing body, who was absent from the meeting at which a land use application was orally approved, but who otherwise participated throughout the local proceedings, may properly sign the final written decision. *Sommer v. Josephine County*, 49 Or LUBA 134 (2005).

25.6.1 Local Government Procedures – Hearings – Generally. A city council does not err in denying an applicant's request for a *de novo* appeal hearing before the city council, where the city code provides that local appeals are limited to the record before the planning commission and a zoning ordinance provision that permits the city council to hear appeals *de novo* does not limit the city council's discretion in determining whether it will do so. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

25.6.1 Local Government Procedures – Hearings – Generally. ORS 227.180 does not require that a city council hold a *de novo* hearing on appeal of a land use decision after a *de novo* hearing by the city planning commission. *Scheyer v. City of Hood River*, 43 Or LUBA 112 (2002).

25.6.1 Local Government Procedures – Hearings – Generally. Pursuant to ORS 197.830(3), a city decision maker must disclose all *ex parte* contacts at the first opportunity and must inform participants of their right to rebut the substance of the disclosure. However, a city's failure to inform a petitioner of his right to rebut the substance of an *ex parte* disclosure will not result in reversal or remand where (1) the disclosure of the *ex parte* contact was promptly made; (2) petitioner had more than one opportunity to object to the adequacy and the content of the disclosure; and (3) no party appears to dispute the facts alleged in the disclosure. *DLCD v. City of Gold Beach*, 43 Or LUBA 319 (2002).

25.6.1 Local Government Procedures – Hearings – Generally. In considering a request to continue a quasi-judicial land use hearing, a local government must evaluate the particular circumstances of the request, and balance the due process rights of the moving party against the potential prejudice to the other parties involved, including the local jurisdiction. *Reeder v. City of Oregon City*, 37 Or LUBA 794 (2000).

25.6.1 Local Government Procedures – Hearings – Generally. Where a local appeal is on the record, and the issues to be considered are limited to those raised in the notice of appeal, and there is likely to be a significant delay in the resolution of the appeal if a hearing is continued, a city does not abuse its discretion by denying an applicant's request for a continuance. *Reeder v. City of Oregon City*, 37 Or LUBA 794 (2000).

25.6.1 Local Government Procedures – Hearings – Generally. Where a county code provision requires a *de novo* review and a hearings officer's decision includes language that suggests the hearings officer erroneously believed a *de novo* review was not required, there is no basis for

reversal or remand where record makes it clear that the hearings officer nevertheless conducted the requisite *de novo* review. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

25.6.1 Local Government Procedures – Hearings – Generally. An opportunity to rebut undisclosed evidence obtained on a site visit is not required when that evidence is not the sole basis for a finding, but merely provides a context for integrating other evidence into findings. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

25.6.1 Local Government Procedures – Hearings – Generally. The provisions of ORS 197.763(6)(c) only apply to the "initial evidentiary hearing," and therefore do not require the city council to reopen the record for rebuttal upon the request of a participant in a subsequent evidentiary hearing. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

25.6.1 Local Government Procedures – Hearings – Generally. Statements made by individual decision makers during local government hearings that express erroneous interpretations of law or legally improper reasons for adopting a land use decision provide no basis for reversal or remand unless such statements are adopted in the final written decision or findings supporting the written decision. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996).

25.6.1 Local Government Procedures – Hearings – Generally. Petitioners fail to demonstrate prejudice to their substantial rights arising out of an inaccurate notice published by the city when the mayor correctly stated the applicable criteria prior to the hearing. *Sparks v. City of Bandon*, 30 Or LUBA 69 (1995).

25.6.1 Local Government Procedures – Hearings – Generally. Where a local government decision includes a determination that an existing use of the subject property is lawful, it was improper for the local government to refuse to accept evidence or argument on this issue during the local proceedings. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

25.6.1 Local Government Procedures – Hearings – Generally. Where a local government's "initial evidentiary hearing" on a quasi-judicial land use application was held before the planning commission, the local government does not violate ORS 197.763(6) by denying petitioner's request to leave open the record of a subsequent evidentiary hearing before the governing body. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

25.6.1 Local Government Procedures – Hearings – Generally. Where petitioner submitted evidence and argument to the city council during its *de novo* review of a decision of the city landmarks commission, even if procedural errors were made in the proceeding before the landmarks commission, petitioner's substantial rights were not prejudiced. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

25.6.1 Local Government Procedures – Hearings – Generally. Where the local government gives notice of a hearing before two different hearings bodies on a development application, and those hearings are continued to another time, both hearings bodies must continue the hearing to avoid having to repeat the original notice process. *Collins v. Klamath County*, 28 Or LUBA 553 (1995).

25.6.1 Local Government Procedures – Hearings – Generally. In order to defer determinations of compliance with mandatory approval standards to a later stage where no public hearing is contemplated, the local government must first determine that compliance with those standards is possible. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

25.6.1 Local Government Procedures – Hearings – Generally. A code provision that prohibits taking "notice of any communications * * * or other materials prepared in connection with the particular case unless the parties are afforded an opportunity to contest the material" prohibits a hearings officer from considering communications from the local government counsel, or proposed findings submitted by a party, without providing other parties an opportunity for rebuttal. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

25.6.1 Local Government Procedures – Hearings – Generally. Where petitioner had notice that the applicant revised his subdivision proposal to include cluster housing, and had an opportunity to present and rebut evidence regarding the proposed cluster housing in a *de novo* evidentiary hearing before the city council, petitioner's substantial rights were not prejudiced simply because the cluster housing proposal was not referred to the hearings officer for hearing. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

25.6.1 Local Government Procedures – Hearings – Generally. It is reasonable to expect that a local government, in applying subjective comprehensive plan and code provisions, will include interpretive findings in its final decision. The parties to such local proceedings should know to include arguments concerning proper interpretation of such provisions in their presentations. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

25.6.1 Local Government Procedures – Hearings – Generally. Although a party to a quasi-judicial land use proceeding has the right to rebut new evidence, a request for the record to remain open so that a party can "complete her report" is not a request to rebut new evidence. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994).

25.6.1 Local Government Procedures – Hearings – Generally. Where a local government fails to give a person an individual written notice of hearing to which the person is entitled, the local government fails to provide a hearing with regard to that person, within the meaning of ORS 197.830(3). *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.6.1 Local Government Procedures – Hearings – Generally. Poor quality tape recordings of local land use proceedings provide no basis for reversal or remand where petitioner fails to demonstrate that any properly submitted evidence was not considered by the local decision makers. *Reed v. Benton County*, 23 Or LUBA 486 (1992).

25.6.1 Local Government Procedures – Hearings – Generally. Where there are oral statements during local proceedings suggesting confusion about who has the burden of proof in a local appeal, but there is nothing in the written decision to suggest the local government made an erroneous allocation of the burden of proof, LUBA will not assume the burden of proof was erroneously assigned to the opponents of the application. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

25.6.1 Local Government Procedures – Hearings – Generally. The right to rebut evidence placed before the local decision maker in a quasi-judicial land use proceeding extends to requiring disclosure of and opportunity to rebut the substance of *ex parte* communications to and personal site observations by the local decision maker. *Angel v. City of Portland*, 21 Or LUBA 1 (1991).

25.6.1 Local Government Procedures – Hearings – Generally. Where a city is not required under its code to allow surrebuttal if rebuttal is limited to nonevidentiary testimony and evidence already in the local record, parties asserting city denial of surrebuttal as reversible error must show that the rebuttal included new evidence and that denial of an opportunity to rebut such evidence prejudices their substantial rights. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Any party may request an opportunity under ORS 197.763(6)(c) to respond to "additional written evidence" that was submitted during an open record period prior to the conclusion of the initial evidentiary hearing. But that response must be limited to responding to the "additional written evidence" that is submitted during the open record period. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a party's evidentiary response to "additional written evidence" that was submitted during the initial open record period at the conclusion of the initial evidentiary hearing pursuant to ORS 197.763(6)(c) includes additional evidence that goes beyond responding to that "additional written evidence" that was submitted during the initial open record period, a local government must either reject the additional evidence or give all parties an opportunity to rebut the additional evidence. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Neither ORS 197.830(13)(b) nor OAR 661-010-0021 dictate the scope of the issues that must be addressed when a local government withdraws a decision for reconsideration after it has been appealed to LUBA. The statute and rule also do not dictate how a local government must address offers of additional evidence at a reconsideration hearing. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Under ORS 197.763(6)(a) through (c), prior to the conclusion of the initial evidentiary hearing any party may request an opportunity to present additional evidence. In that event, the hearing body must either continue the hearing or leave the record open to receive the additional evidence, and failure to do so is a procedural error. However, where the party making the request appeals and is given a de novo hearing before the local appellate body at which it is allowed to submit additional evidence, the hearings body's error did not result in prejudice to the party's substantial rights and therefore provides no basis for LUBA to remand. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local government does not err in rejecting as "new evidence" annotated site plans and calculations that were submitted after the close of the record in order to rebut the applicant's testimony that the proposed development complies with lot coverage standards. *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. The requirements for continuances and open record periods in ORS 197.763(6)(a), (b) and (c) only apply to the initial evidentiary hearing and do not apply to subsequently continued hearings or open record periods. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A hearings officer's failure to clearly explain to petitioner that the applicable procedures limit final written argument to the applicant does not constitute procedural error; indeed, allowing petitioner to

submit final written argument as petitioner requested would violate the applicable procedures. *Purtzer v. Jackson County*, 67 Or LUBA 205 (2013).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a city councilor at first announces that she will not participate in a land use appeal but later elects to participate, she must (1) disclose the substance of any *ex parte* communications she had in the matter as soon as possible after that election, and (2) give all parties an opportunity to respond to and rebut the substance of those communications. *Wal-Mart Stores, Inc. v. City of Hood River*, 67 Or LUBA 332 (2013).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a quasi-judicial land use decision maker fails to disclose any *ex parte* contacts, a petitioner does not waive its right to assign error to that failure at LUBA by failing to object below to the failure to disclose *ex parte* contacts. *Wal-Mart Stores, Inc. v. City of Hood River,* 67 Or LUBA 332 (2013).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A city councilor cannot claim to be unbiased and participate as a decision maker in a quasi-judicial land use appeal where that city councilor initially declared she would not participate as a decision maker due to bias or potential bias, and thereafter submitted documents as a party opposing the application. *Wal-Mart Stores, Inc. v. City of Hood River*, 67 Or LUBA 332 (2013).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Although there are LUBA decisions that have found a decision maker was biased because the decision maker exhibited an "emotional commitment" for or against a land use application, an "emotional commitment" is not required for disqualifying bias. A decision make who, while acting as a party in a quasi-judicial land use proceeding, expresses opposition to a proposal in focused, unemotional and analytical terms can be just as biased as a decision maker who does so in emotional terms. *Wal-Mart Stores, Inc. v. City of Hood River*, 67 Or LUBA 332 (2013).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where the record suggests that a deadlocked city council might have broken that deadlock with continued deliberations and thereby avoided the need to invoke the "rule of necessity" to permit a biased city councilor to vote and break the tie, the city council invoked the rule of necessity prematurely. *Wal-Mart Stores, Inc. v. City of Hood River*, 67 Or LUBA 332 (2013).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where the rule of necessity is properly invoked, because the votes necessary to break a tie and take action on a land use appeal cannot be achieved through further deliberation and there is no other body that can render the decision, the rule of necessity may be invoked and a decision maker who previously withdrew from participation due to bias or potential bias may participate as a decision maker to break the tie and allow the city council to take action. *Wal-Mart Stores, Inc. v. City of Hood River,* 67 Or LUBA 332 (2013).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Parties to a land use proceeding have the right to review and respond to substantive changes in the application that occur during the proceedings. If such a change occurs after the close of the record or hearing,

the local government may be required to re-open the record to allow other parties a reasonable opportunity to submit responsive testimony and evidence. Failure to do so can be procedural error and a basis for remand, if the petitioners demonstrate the error prejudiced their substantial rights. *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Remand is warranted, where a city's procedural error in rejecting the petitioner's request to submit evidence to respond to a substantive change in the application after the close of the record prejudiced the petitioner's substantial rights to respond to the changed application. *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. LUBA will deny a motion to consider petitioner's affidavit regarding how his testimony to the planning commission would have been different if he had not been misinformed regarding the time limits, where the decision before LUBA is the city council decision conducted after an evidentiary hearing, and petitioner does not explain why any error committed by the planning commission was not cured by the proceedings before the city council. *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A petitioner's allegations that the city mayor cut off his oral testimony to censor the content of petitioner's testimony is not supported by the record, where the mayor gave the petitioner the same amount of time to speak as other participants and there is no indication in the record that the mayor's attempt to hold petitioner to the announced three-minute time limit was based on the content of petitioner's testimony. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A city council hearing on a planning commission recommendation to approve a planned unit development application is not a "continued" evidentiary hearing for purposes of a code provision implementing ORS 197.763(6) that allows participants to request the opportunity to respond to new evidence submitted at a continued hearing. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Limiting a party to 10 minutes for oral testimony in a quasi-judicial land use hearing before a design review board, while allowing unlimited written testimony, and limiting an appeal of the design review board to the city council to an on-the-record review does not violate the party's right to due process. *Reeves v. City of Wilsonville*, 62 Or LUBA 142 (2010).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. When during the proceedings on remand from LUBA, the local government allows additional argument but no new evidence, and the local government redacts written testimony that it considers new evidence, the unredacted documents are not properly part of the record. *Columbia Riverkeeper v. Clatsop County*, 60 Or LUBA 454 (2009).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. When during the proceedings on remand from LUBA, the local government allows additional argument but no

new evidence, the local government is not required to erase oral testimony that contains new evidence from the recordings of meetings submitted to LUBA. OAR 661-010-0025(1)(b) only applies to *written* documents, not oral testimony. *Columbia Riverkeeper v. Clatsop County*, 60 Or LUBA 454 (2009).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local government that accepts a letter on the last day of the rebuttal period does not err in accepting a signed version of the same letter one day later after the rebuttal period has ended. *Oregon Shores Cons. Coalition v. City of Brookings*, 58 Or LUBA 421 (2009).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local government may allow public testimony and materials to be submitted into the record for the limited purpose of determining whether the proposed decision properly describes a prior oral decision, even if that testimony and materials relate to the merits of the underlying decision, *if* the local government makes clear that the scope of the hearing is limited to that narrow issue. *Thompson v. Jackson County*, 53 Or LUBA 317 (2007).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A hearings officer's refusal to leave the record open to allow the petitioners to respond to alleged "new evidence" that was submitted during the final evidentiary hearing is not a basis to reverse or remand the decision, where petitioners fail to establish that in fact "new evidence" was submitted or that there is anything to rebut under the hearings officer's unchallenged interpretation of the applicable code provision. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A city council does not err in denying an applicant's request for a *de novo* appeal hearing before the city council, where the city code provides that local appeals are limited to the record before the planning commission and a zoning ordinance provision that permits the city council to hear appeals *de novo* does not limit the city council's discretion in determining whether it will do so. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. If a county rejects evidence that was submitted after the close of the record, and does not consider that evidence in making its decision, the county's refusal to permit rebuttal of that late submittal does not provide a basis for reversal or remand. *Sheppard v. Clackamas County*, 45 Or LUBA 507 (2003).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where it is clear that a decision maker considered evidence that was submitted after the close of the record, and that the decision maker may have relied on that evidence in making its decision, the decision maker errs in refusing to allow rebuttal to that evidence, notwithstanding a statement in the final decision document that the disputed evidence was rejected. *Sheppard v. Clackamas County*, 45 Or LUBA 507 (2003).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local government properly rejects evidence submitted after the close of the evidentiary record, where

the proponent of the evidence did not adequately request or preserve the opportunity to submit additional evidence. *Doty v. Jackson County*, 43 Or LUBA 34 (2002).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Even where no specific statutory or local provisions govern limits on presentation of evidence on remand from LUBA, the parties have a fundamental right during an evidentiary proceeding to present and rebut evidence. An evidentiary proceeding on remand that fails to offer any opportunity to rebut new evidence submitted on remand is inconsistent with *Fasano v. Washington Co. Comm.*, 264 Or 574, 503 P2d 23 (1973). *Crowley v. City of Bandon*, 43 Or LUBA 79 (2002).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local government does not commit reversible error by limiting a party to two minutes of testimonial rebuttal where (1) the party agreed to the two-minute limit, (2) there is no legal obligation for the city to hold the record open or continue the evidentiary hearing to allow written rebuttal, and (3) the party does not demonstrate to LUBA that the evidence the party wishes to rebut is relevant. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a party and the party's attorney are given an adequate opportunity to rebut the substance of a short letter, the local government commits no error in refusing to provide an additional hearing for the party to offer further rebuttal of the letter. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local code providing that the scope of review for an appeal of a planning commission decision to the city council is a "Record Hearing," and defining a "Record Hearing" as a hearing limited to review of the existing record or evidence previously submitted, does not limit the *legal issues* or arguments that may be presented on appeal; only the *evidence* that may be considered. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local appellate body may, on its own, raise issues that are not presented in the notice of local appeal, where the local code does not specifically limit the scope of review on appeal to the issues identified in the notice of local appeal. *Haug v. City of Newberg*, 42 Or LUBA 411 (2002).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a local government departs from the procedures for continuing a hearing set out in ORS 197.763(6)(a) to (c), the revised procedures must be clearly communicated to all parties and, preferably, reduced to writing. *Hawman v. Umatilla County*, 42 Or LUBA 223 (2002).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where the circumstances under which oral testimony would be allowed at a continued hearing are not clearly defined, and petitioners allege that they were prejudiced by being denied an opportunity to present oral testimony at the continued hearing based on the ambiguity of the procedures, remand is appropriate to ensure that petitioners receive an opportunity to present that oral testimony. *Hawman v. Umatilla County*, 42 Or LUBA 223 (2002).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where, on remand from LUBA, the local government adopts a procedure that is proposed by the parties and that allows all sides to submit written evidence and written rebuttals, but limits oral testimony at the evidentiary hearing before the local government to summaries and explanations of previous submittals, the procedure is not correctly interpreted to prohibit an oral explanation of previously submitted evidence that includes additional supportive facts in response to the previously submitted written rebuttal. *Terra v. City of Newport*, 40 Or LUBA 286 (2001).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Under ORS 197.763(6)(e), a local government may consider final written legal argument. However, a local government may not consider new factual allegations, as part of legal arguments submitted under ORS 197.763(6)(a), without providing an opportunity for rebuttal. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a city allows one party more time to present oral testimony during a land use hearing than is allowed another party, the unequal allocation of time will not constitute error so long as the city's decision explains the reason for the differentiation, there is an unlimited opportunity to submit written testimony, and the unequal allocation of time does not cause substantial prejudice. *Kane v. City of Beaverton*, 38 Or LUBA 183 (2000).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local government may limit oral testimony if adequate opportunity is provided for the submission of written testimony. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368 (1999).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Under ORS 215.416(11)(a), a hearings officer is obligated to conduct a *de novo* hearing that allows the introduction and consideration of all relevant evidence notwithstanding that the evidence could have been presented to the initial decision maker, but was not. *Johnson v. Clackamas County*, 37 Or LUBA 73 (1999).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Absent land use regulations that specify a particular procedure when a decision is withdrawn for reconsideration pursuant to OAR 661-010-0021, the procedures that govern depend on what stage in the process the local government returns to on reconsideration. Procedures governing evidentiary hearings are not applicable when the local government does not reopen the evidentiary record during the reconsideration proceedings. *McElroy v. City of Corvallis*, 36 Or LUBA 185 (1999).

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

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. ORS 197.763(6)(c) requires a participant to file a written request with the local government for an

opportunity to respond to new evidence submitted during the period after a hearing that the record is left open. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. ORS 197.763(6)(e) allows an applicant seven days after the record is closed to all other parties to submit final written arguments in support of the application. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a continuance required by ORS 197.753(4)(b) to allow opponents to respond to new evidence was not granted before the city and county planning commissions made their recommendation to the city council and county commissioners, a procedural error occurred, but that error is no basis for remand when the opponents submitted a detailed rebuttal during the year-long interim between the date of the recommendation and the decision of the governing bodies, who considered additional evidence and testimony as part of a de novo review of the applications. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local government commits procedural error when it does not allow petitioners the opportunity to address the applicability of an ordinance that had not been identified as an applicable criterion, and then adopts findings based on that ordinance. If the ordinance is extrinsic to the applicable criteria, then it is evidence which the parties have the right to rebut; if the ordinance is an applicable criterion, then it must be identified in the hearing notice with greater specificity than "all other adopted county ordinances." *Nicholson v. Clatsop County*, 32 Or LUBA 399 (1997).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where petitioners are qualified participants in a local appeal, but are denied the opportunity to respond to issues raised in the local appeal, their substantial rights are prejudiced and the challenged decision must be remanded. *Spencer Creek Neighbors v. Lane County*, 32 Or LUBA 349 (1997).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Under ORS 197.763(6), the local government is only obligated to leave the record open for seven days after the *initial* evidentiary hearing; language in a local hearing notice to the contrary cannot create additional requirements under that statute. *Gross v. City of Tigard*, 32 Or LUBA 93 (1996).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. The city council's notice of hearing stating that any participant "may request" that the record remain open for seven days after the hearing does not bind the city to grant such a request when it is not otherwise required by statute, and petitioner is not deprived of procedural due process rights where the city denies his request that the record be left open. *Gross v. City of Tigard*, 32 Or LUBA 93 (1996).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Although the county's refusal to permit a party below to participate in a hearing on remand prejudiced that party's substantial rights, ORS 197.835(9)(a)(B) permits remand only where the failure to satisfy

applicable procedural requirements prejudiced the substantial rights of the *petitioner*. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Statements by city staff at a local appeal hearing regarding evidence already in the record do not give petitioner a right to rebuttal. *Thornton v. City of St. Helens*, 31 Or LUBA 287 (1996).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a local ordinance specifies that board of commissioner hearings are conducted on the record, and where petitioners establish no violation of any statutory notice requirement, petitioners establish no basis for relief in alleging that they relied on various notices, which appeared to petitioners to be contradictory, to conclude they were not required to present all evidence before the planning commission, but would be able to present their case *de novo* before the board of commissioners. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1996).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. When the city council did not attempt to limit the issues addressed by petitioner at a city council hearing on appeal from the planning commission, petitioner may raise at LUBA any issues raised before the city council. *Thompson v. City of St. Helens*, 30 Or LUBA 339 (1996).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a local governing body is authorized to limit issues on appeal to issues raised before the planning commission but the local government failed to keep an adequate record of the planning commission proceedings, and LUBA cannot determine whether the governing body correctly limited its review to two particular issues, LUBA will remand the governing body's decision. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local government commits error by approving a modified partition application after the local evidentiary hearing is closed and refusing petitioner an opportunity to comment on the modified application before approving it. *Tognoli v. Crook County*, 28 Or LUBA 527 (1995).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a decision maker improperly refuses to allow relevant testimony, and it is not clear whether the decision maker's later allowance of expanded oral and written testimony rendered the initial error harmless, the decision will be remanded. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. ORS 197.763(7) does not preclude a local government from reopening an evidentiary record for limited purposes after it has been closed. It simply provides that if the record is reopened, new issues may be raised in an appeal to LUBA with regard to the evidence accepted after the record is reopened. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a local government denies a person the right to present testimony on her own behalf, that person

"appeared" within the meaning of ORS 197.830(6) and OAR 661-10-050(1), at least for the purpose of challenging the local government's decision to limit testimony. *Sorte v. City of Newport*, 25 Or LUBA 828 (1993).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local government decision maker is entitled to consult with its attorney regarding evidence submitted during the evidentiary phase of the local proceeding and interpretive issues. Parties have no right to rebut the substance of a local government attorney's advice to the local government decision maker. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A local government may limit its proceedings on remand from LUBA to correcting the deficiencies that led to the remand and, unless the local code so requires, need not repeat the entire process it followed in making the initial decision. *Bartels v. City of Portland*, 23 Or LUBA 182 (1992).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. An uncontroverted allegation that a party was provided *no opportunity* to rebut evidence placed before the decision maker through *ex parte* contacts and site observations is sufficient to demonstrate prejudice to that party's substantial rights. *Angel v. City of Portland*, 21 Or LUBA 1 (1991).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where the local record indicates a petitioner was not allowed to speak at a hearing because his testimony would include new evidence, the acceptance of which would indisputably have been improper, and petitioners do not claim that his testimony would *not* have included new evidence, petitioners fail to identify a basis upon which LUBA may grant relief. *White v. City of Oregon City*, 20 Or LUBA 470 (1991).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where petitioners have adequate notice of hearing, and are not surprised by a modified application or by newly applicable standards, the right to rebut evidence does not require the county to continue its hearings to provide petitioners more time to develop a rebuttal. *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. Where a city is not required under its code to allow surrebuttal if rebuttal is limited to nonevidentiary testimony and evidence already in the local record, parties asserting city denial of surrebuttal as reversible error must show that the rebuttal included new evidence and that denial of an opportunity to rebut such evidence prejudices their substantial rights. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

25.6.2 Local Government Procedures – Hearings – Limitations on Presentation. A city does not commit error in refusing to accept irrelevant evidence. A petitioner challenging a city's refusal to accept evidence on the basis of irrelevancy must demonstrate that the offered evidence is relevant to the approval criteria. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

25.6.3 Local Government Procedures – Hearings – Evidence. Where "new evidence" enters the record during a non-evidentiary remand proceeding but plays no role in the decision, such procedural error provides no basis for reversal or remand pursuant to ORS 197.835(9)(a)(B) because it could not possibly have "prejudiced the substantial rights of the petitioner." *Neighbors for Smart Growth v. Washington County*, 79 Or LUBA 1 (2019).

25.6.3 Local Government Procedures – Hearings – Evidence. A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.6.3 Local Government Procedures – Hearings – Evidence. A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.6.3 Local Government Procedures – Hearings – Evidence. A party asserting a procedural error must demonstrate that the procedural error was objected to during the proceedings below, if there was an opportunity to lodge an objection. Accordingly, where a dispute may exist regarding whether petitioners objected to the county's process during the proceedings below, LUBA will allow a motion to take evidence outside the record to consider a document for the limited purpose of allowing petitioners to cite to that document to establish, if the point is disputed in a response brief, that petitioners attempted to lodge objections to the county's process. *Eng v. Wallowa County*, 79 Or LUBA 1024 (2019).

25.6.3 Local Government Procedures – Hearings – Evidence. When a hearings officer weighs the testimony of several experts and articulates how and why he came to his decision based on the experience and findings of the experts, petitioner needs to provide adequate reason before LUBA will second-guess the hearings officer's decision. Without reason to review the hearings officer's decision LUBA will conclude that the findings are adequate and supported by substantial evidence. *Gould v. Deschutes County*, 78 Or LUBA 118 (2018).

25.6.3 Local Government Procedures – Hearings – Evidence. When petitioner disputes the findings of a hearings officer, the burden of providing sufficient evidence and showing the law was improperly applied lies with the petitioner. If the petitioner does not show the hearings officer erred, the decision will be affirmed. *Johnson v. City of Portland*, 78 Or LUBA 158 (2018).

25.6.3 Local Government Procedures – Hearings – Evidence. When a county acknowledges that no evidence in the record supports a determination that an adequate flow of water exists, and essentially follows the third *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), option, it must comply with all of the third *Rhyne* option and defer its decision making to a proceeding that provides the statutorily required notice and hearing. *Wachal v. Linn County*, 78 Or LUBA 227 (2018).

25.6.3 Local Government Procedures – Hearings – Evidence. A limited land use decision may be approved through a notice and comment process, and a local government may provide a right of local appeal. ORS 197.195(5). In such an appeal, the appeal hearing may be based on the existing administrative record or new evidence may be allowed. Should an appeal hearing allow the introduction of new evidence, the hearing is subject to the quasi-judicial hearing procedures set forth in ORS 197.763. In such a situation, a hearings officer may properly consider new evidence and analysis offered by the local government, as well as a petitioner's response, and LUBA's review includes the hearings officer's consideration of that evidence and those issues. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

25.6.3 Local Government Procedures – Hearings – Evidence. Any party may request an opportunity under ORS 197.763(6)(c) to respond to "additional written evidence" that was submitted during an open record period prior to the conclusion of the initial evidentiary hearing. But that response must be limited to responding to the "additional written evidence" that is submitted during the open record period. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a party's evidentiary response to "additional written evidence" that was submitted during the initial open record period at the conclusion of the initial evidentiary hearing pursuant to ORS 197.763(6)(c) includes additional evidence that goes beyond responding to that "additional written evidence" that was submitted during the initial open record period, a local government must either reject the additional evidence or give all parties an opportunity to rebut the additional evidence. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. A city may err in introducing a copy of the application into the record after the close of the evidentiary record before the city council, the final decision maker. However, the procedural error does not provide a basis for

remand under ORS 197.835(9)(a)(B) where the petitioner does not demonstrate that the procedural error played a role in the final decision, or otherwise prejudiced the petitioner's substantial rights. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. Where during deliberations on an application for an annexation under a new state statute, a city councilor mentions a city attorney letter discussing the costs of joining litigation to challenge the statute, the letter is exempt from disclosure as an *ex parte* communication under ORS 227.180(4), and the city commits no procedural error in failing to include the letter in the record of the annexation proceeding. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. While it might constitute procedural error for a local government to accept new evidence late in the proceedings without providing other parties a reasonable opportunity to respond to that new evidence, no error occurs where the alleged new evidence was introduced early in the final hearing, and the petitioner had an opportunity to respond to that evidence during the hearing. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. Under ORS 197.763(6)(b) or (c), where a party requests in writing the opportunity to respond to new evidence submitted at a continued hearing or during an open record period, any such opportunity is limited to responses to new evidence submitted during the continued hearing or the first open record period. A hearings officer is not compelled by ORS 197.763(6)(b) or (c) to allow a party to submit, during a second open record period, responses to evidence submitted during the initial evidentiary hearing. *Landwatch Lane County v. Lane County*, 75 Or LUBA 302 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government does not run afoul of ORS 197.763(6)(e) when it allows an applicant to present as part of its final argument an argument that the needed housing statutes at ORS 197.303 prohibit the city from applying criteria that are not "clear and objective," because the argument is not "evidence" within the meaning of ORS 197.763(9)(b). *Talbott v. City of Happy Valley*, 74 Or LUBA 143 (2016).

25.6.3 Local Government Procedures – Hearings – Evidence. Where on remand a planning commission elects to reopen the record and accept new evidence, arguments, and testimony, and persons subsequently provide evidence, arguments, and testimony that is accepted into the record and not rejected, pursuant to ORS 197.763(7), any party may raise new issues related to that new evidence, testimony, and argument and criteria for decision-making which apply to the matter at issue. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

25.6.3 Local Government Procedures – Hearings – Evidence. Where as part of final written argument the applicant submits five letters from experts that include new evidence, a general objection that the five letters include new evidence is sufficient to preserve that objection before LUBA. Because expert testimony almost always includes new professional opinion, even if limited to commenting on other evidence already in the record, an opponent need not specify which portions of the expert testimony the opponent believes constitutes new evidence, in order to satisfy

the "raise it or waive it" requirement of ORS 197.763(1). *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

25.6.3 Local Government Procedures – Hearings – Evidence. A land use regulation that assigns the burden of proof to the permit "applicant" does not require that "only the applicant" carry the burden of proof. Assigning the burden of proof to the applicant does not preclude other parties from presenting evidence and legal positions or preclude the decision maker from relying on such evidence. *Pacificorp v. Deschutes County*, 70 Or LUBA 89 (2014).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government does not err in rejecting as "new evidence" annotated site plans and calculations that were submitted after the close of the record in order to rebut the applicant's testimony that the proposed development complies with lot coverage standards. *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

25.6.3 Local Government Procedures – Hearings – Evidence. A governing body errs in relying upon the personal knowledge of its members who are farmers to resolve a disputed issue regarding whether proposed disturbances to topsoil would render the subject property unfit for future agricultural use. The effect of topsoil disturbance on agricultural productivity is an arcane subject, and even if the farmer/commissioners have expert personal knowledge of that subject, it is inappropriate to approve or deny an application based on the decision-makers' personal knowledge of disputed facts rather than on the evidence submitted during the evidentiary proceeding. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

25.6.3 Local Government Procedures – Hearings – Evidence. The fact that a city believed it was making a decision on the last day allowed by the ORS 227.181 for a decision after remand does not absolve the city from following the procedures applicable to quasi-judicial hearings, including giving all parties the opportunity to respond to new evidence submitted at the hearing. The city could have rejected the new evidence and avoided the procedural conundrum that it apparently believed it faced or could have left the record open to respond to the new evidence under ORS 197.763(4)(b). *Poe v. City of Warrenton*, 66 Or LUBA 108 (2012).

25.6.3 Local Government Procedures – Hearings – Evidence. A letter from the applicant that simply requests withdrawal of a request to vacate a portion of a right-of-way does not constitute "evidence" as defined at ORS 197.763(9)(b), because it does not constitute facts or information offered to demonstrate compliance or noncompliance with the standards believed to be relevant to the decision. *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

25.6.3 Local Government Procedures – Hearings – Evidence. ORS 197.763 sets out the minimum procedures the county is required to follow in the conduct of quasi-judicial land use hearings under ORS Chapter 215, and ORS 197.763 does not require that the county provide an applicant with prior copies or notice of the evidence that the county submits at the initial evidentiary hearing on a permit application. *Emmert v. Clackamas County*, 65 Or LUBA 1 (2012).

25.6.3 Local Government Procedures – Hearings – Evidence. A petitioner waives an assignment of error arguing that the hearings officer committed procedural error in accepting new evidence after the close of the evidentiary record, where the petitioner could have objected to the

alleged error in the appeal of the hearings officer's decision to the planning commission, but did not. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

25.6.3 Local Government Procedures – Hearings – Evidence. Where an applicant's final written argument rebuts evidence submitted by opponents regarding three mining sites by discussing information about the three sites from the county's inventory of mining sites already in the record, that rebuttal does not introduce "new evidence" into the record contrary to ORS 197.763(6)(e). *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

25.6.3 Local Government Procedures – Hearings – Evidence. A city council hearing on a planning commission recommendation to approve a planned unit development application is not a "continued" evidentiary hearing for purposes of a code provision implementing ORS 197.763(6) that allows participants to request the opportunity to respond to new evidence submitted at a continued hearing. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

25.6.3 Local Government Procedures – Hearings – Evidence. An argument that the county erred in accepting "new evidence" in the applicant's final written argument contrary to ORS 197.763(6)(e) does not provide a basis for reversal or remand, where the petitioner makes no effort to demonstrate that the alleged new evidence is in fact new evidence, or challenge the county's findings that the final written argument included no new evidence. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

25.6.3 Local Government Procedures – Hearings – Evidence. Because ORS 197.763(6)(e) allows an applicant the opportunity to submit final written argument, which may include proposed findings, it is consistent with the statutory scheme to allow an applicant to submit revised proposed findings or conditions of approval and arguments in favor of those revised findings or conditions of approval after the decision maker's tentative oral decision in circumstances where planning staff has objected to some proposed findings or conditions and suggested modified findings or conditions. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009).

25.6.3 Local Government Procedures – Hearings – Evidence. A staff memorandum submitted after the close of the evidentiary proceedings that includes only staff advice regarding what conclusions the city council could reach based on the evidence in the record is not itself "new evidence" that might trigger the obligation to re-open the record to allow other participants an opportunity to respond. *Gooley v. City of Mt. Angel*, 56 Or LUBA 319 (2008).

25.6.3 Local Government Procedures – Hearings – Evidence. In resolving an evidentiary challenge, LUBA will not consider evidence supporting the application (1) that was submitted as part of final legal argument after the evidentiary record closed, and (2) that the hearings officer declined to consider for that reason. *Lenox v. Jackson County*, 54 Or LUBA 272 (2007).

25.6.3 Local Government Procedures – Hearings – Evidence. Where the local government on remand allows the permit applicant an opportunity to rebut the permit opponent's response to the new evidence, it must allow other parties an opportunity to rebut the permit opponent's response; but the local government is not obligated on remand to allow other permit opponents an additional

opportunity to enhance their evidentiary presentation. *Rice v. City of Monmouth*, 53 Or LUBA 55 (2006).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government errs in accepting new information into the record after the public hearing on a matter is closed without allowing other parties an adequate opportunity to respond to the new evidence. *Gunzel v. City of Silverton*, 53 Or LUBA 174 (2006).

25.6.3 Local Government Procedures – Hearings – Evidence. A hearings officer's refusal to leave the record open to allow the petitioners to respond to alleged "new evidence" that was submitted during the final evidentiary hearing is not a basis to reverse or remand the decision, where petitioners fail to establish that in fact "new evidence" was submitted or that there is anything to rebut under the hearings officer's unchallenged interpretation of the applicable code provision. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

25.6.3 Local Government Procedures – Hearings – Evidence. Where the evidentiary record has closed and a party believes a local government has improperly allowed legal argument that includes new testimonial evidence, a party arguing that such an impropriety warrants remand by LUBA must (1) adequately identify the objectionable testimony, (2) explain why that testimony goes beyond legal argument or commentary on evidence that is already in the record or for some other reason constitutes new evidence and (3) offer some substantial reason to believe the objectionable testimony had some effect on the ultimate decision. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

25.6.3 Local Government Procedures – Hearings – Evidence. Remand is necessary where a decision maker engages in a conversation with the applicant during a site visit regarding a fact in dispute, and later discloses the conversation but does not disclose its content or allow petitioner an opportunity for rebuttal. *Gordon v. Polk County*, 50 Or LUBA 502 (2005).

25.6.3 Local Government Procedures – Hearings – Evidence. The time to reject or accept new evidence that is submitted after the close of the evidentiary record is before the decision maker deliberates and reaches a tentative decision. A local government cannot accept such untimely evidence, reach a tentative decision based on the entire record, and then adopt a final written decision that belatedly rejects or purports not to rely on the evidence. *Ploeg v. Tillamook County*, 50 Or LUBA 608 (2005).

25.6.3 Local Government Procedures – Hearings – Evidence. Petitioners are in no position to fault the city for accepting new evidence during a non-evidentiary hearing, where petitioners were the only persons who testified and were the persons who submitted the new evidence. That the city accepted petitioners' evidence did not convert the hearing into an evidentiary hearing, or require the city to renotice the hearing and provide additional opportunities to present evidence. *Patterson v. City of Independence*, 49 Or LUBA 589 (2005).

25.6.3 Local Government Procedures – Hearings – Evidence. A site visit is not in itself an *ex parte* contact subject to ORS 227.180(3) or ORS 215.422(3), unless it involves communication

between a decision maker and a party or other interested person. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

25.6.3 Local Government Procedures – Hearings – Evidence. The case law requirement that a decision maker disclose information gained from a site visit and offer an opportunity to rebut that information serves a similar purpose to the statutory requirements regarding *ex parte* contacts: to ensure that land use decisions are based on information received during the public process, and not based on information received outside the public process. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

25.6.3 Local Government Procedures – Hearings – Evidence. Any right that a party may have to rebut new evidence under *Fasano* or ORS 197.763(6)(b) requires that the party contemporaneously assert that right of rebuttal at the time the new evidence is submitted, so that the local government can rule on the merits of the request and allow an appropriate opportunity for rebuttal where such an opportunity is warranted. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

25.6.3 Local Government Procedures – Hearings – Evidence. LUBA is unable to perform its review function and remand is required where the county rejects, without any explanation, evidence that is arguably relevant to an applicable criterion. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

25.6.3 Local Government Procedures – Hearings – Evidence. ORS 215.422(4), which excludes certain contacts between planning staff and the local decision maker from the definition of *ex parte* contacts, does not authorize a decision maker to rely on evidence provided by planning staff that it specifically refuses to include in the record, after the close of the record, without providing an opportunity for rebuttal. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

25.6.3 Local Government Procedures – Hearings – Evidence. A city council does not err in denying an applicant's request for a *de novo* appeal hearing before the city council, where the city code provides that local appeals are limited to the record before the planning commission and a zoning ordinance provision that permits the city council to hear appeals *de novo* does not limit the city council's discretion in determining whether it will do so. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a staff report and evidentiary hearings focus on an area within 500 feet of the subject property as the relevant "impact area" for purposes of conducting the conflicts identification and ESEE analysis required by OAR 660-016-0005 and 660-016-0010, the county may not deny an application under Goal 5 based on conflicts in a 15-square-mile area that is identified for the first time in its final decision, without offering the applicant an opportunity to submit evidence and argument responsive to the larger impact area. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

25.6.3 Local Government Procedures – Hearings – Evidence. A blanket request to leave the record open in the event new evidence is submitted sometime in the future is insufficient to invoke any right to a continued evidentiary proceeding. To adequately assert such a right, a party must

identify the alleged new evidence and request that the record be left open to respond to that identified evidence. *Doty v. Jackson County*, 43 Or LUBA 34 (2002).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government properly rejects evidence submitted after the close of the evidentiary record, where the proponent of the evidence did not adequately request or preserve the opportunity to submit additional evidence. *Doty v. Jackson County*, 43 Or LUBA 34 (2002).

25.6.3 Local Government Procedures – Hearings – Evidence. That certain documents may not have been provided to the planning commission provides no basis for remand, where the planning commission decision was appealed to the city governing body, the governing body adopted the city's final decision and there is no contention that the disputed documents were provided to the city governing body. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a party and the party's attorney are given an adequate opportunity to rebut the substance of a short letter, the local government commits no error in refusing to provide an additional hearing for the party to offer further rebuttal of the letter. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

25.6.3 Local Government Procedures – Hearings – Evidence. Petitioners fail to establish that they are entitled to a new evidentiary hearing to respond to an interpretation setting an unanticipated evidentiary standard, where petitioners do not describe what additional evidence responsive to the unanticipated interpretation they would produce, or how that evidence differs in substance from evidence already in the record. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a county holds the record open to permit opponents of an application to submit additional evidence and allows additional time for the applicant to respond to any new evidence submitted, in the absence of a request by the opponents for an opportunity to submit surrebuttal evidence, ORS 197.763(6)(c) does not require that the county provide such an opportunity and the county's failure to provide such an opportunity is not error. *Van Nalts v. Benton County*, 42 Or LUBA 497 (2002).

25.6.3 Local Government Procedures – Hearings – Evidence. A county errs to the extent it declares that the county's rural address map is the only source of evidence it will consider in determining the number of existing dwellings in the relevant area. A county may not refuse to consider petitioners' evidence that fewer dwellings exist in the area than shown on the rural address map. *Matiaco v. Columbia County*, 42 Or LUBA 277 (2002).

25.6.3 Local Government Procedures – Hearings – Evidence. Where, on remand from LUBA, the local government adopts a procedure that is proposed by the parties and that allows all sides to submit written evidence and written rebuttals, but limits oral testimony at the evidentiary hearing before the local government to summaries and explanations of previous submittals, the procedure is not correctly interpreted to prohibit an oral explanation of previously submitted evidence that includes additional supportive facts in response to the previously submitted written rebuttal. *Terra v. City of Newport*, 40 Or LUBA 286 (2001).

25.6.3 Local Government Procedures – Hearings – Evidence. When a local government accepts and relies on evidence submitted after the close of the record, without offering participants an opportunity for rebuttal, the decision will be remanded even though a petitioner mistakenly characterizes the procedural error as improper *ex parte* contact. *DLCD v. Umatilla County*, 39 Or LUBA 715 (2001).

25.6.3 Local Government Procedures – Hearings – Evidence. A city governing body is not required to apply the Oregon Rules of Evidence in its land use proceedings and may rely on hearsay evidence in a planning staff report to reach a conclusion regarding representations that were made to a permit applicant. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

25.6.3 Local Government Procedures – Hearings – Evidence. Under ORS 197.763(6)(e), a local government may consider final written legal argument. However, a local government may not consider new factual allegations, as part of legal arguments submitted under ORS 197.763(6)(a), without providing an opportunity for rebuttal. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

25.6.3 Local Government Procedures – Hearings – Evidence. Absent a state or local provision to the contrary, once the local record is closed to new evidence the local government is not compelled to reopen the record to accept new evidence, no matter how relevant that evidence is to the local government's decision. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

25.6.3 Local Government Procedures – Hearings – Evidence. A governing body's refusal to admit audio tapes of the planning commission proceedings into the record on appeal is not reversible error, where the party seeking to enter the tapes into the record fails to demonstrate that the refusal to admit the audio tapes in some way prejudiced the party's participation in the local proceedings. *Friends of Linn County v. Linn County*, 37 Or LUBA 297 (1999).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a partial transcript of a planning commission hearing contains relevant testimony, a local governing body errs by refusing to accept that partial transcript during its *de novo* appeal hearing. That the local governing body's review is *de novo* does not mean the local governing body may refuse to accept relevant evidence simply because the evidence was also submitted to a lower level decision maker. *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

25.6.3 Local Government Procedures – Hearings – Evidence. Under ORS 215.416(11)(a), a hearings officer is obligated to conduct a *de novo* hearing that allows the introduction and consideration of all relevant evidence notwithstanding that the evidence could have been presented to the initial decision maker, but was not. *Johnson v. Clackamas County*, 37 Or LUBA 73 (1999).

25.6.3 Local Government Procedures – Hearings – Evidence. A city errs in accepting new evidence from the applicant as part of the applicant's final written argument under ORS 197.763(6)(e), without offering other parties an opportunity to respond to that new evidence. *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government does not violate any statutory or local procedural requirement by allowing an engineer to testify on behalf of the applicant, notwithstanding that the notice of hearing limited the presentation of evidence to applicant and petitioners. *DeShazer v. Columbia County*, 35 Or LUBA 689 (1999).

25.6.3 Local Government Procedures – Hearings – Evidence. Even though the county's admission of evidence may have violated the procedures described in its written notice of hearing, that procedural error does not prejudice petitioners' substantial rights where petitioners had ample opportunity to rebut or object to the admission of that evidence but failed to do so. *DeShazer v. Columbia County*, 35 Or LUBA 689 (1999).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government commits procedural error when it does not allow petitioners the opportunity to address the applicability of an ordinance that had not been identified as an applicable criterion, and then adopts findings based on that ordinance. If the ordinance is extrinsic to the applicable criteria, then it is evidence which the parties have the right to rebut; if the ordinance is an applicable criterion, then it must be identified in the hearing notice with greater specificity than "all other adopted county ordinances." *Nicholson v. Clatsop County*, 32 Or LUBA 399 (1997).

25.6.3 Local Government Procedures – Hearings – Evidence. The county violates ORS 215.422 when it reopens the record to accept a report received by a commissioner from intervenor, but does not provide an opportunity for other parties to rebut the substance of the *ex parte* communication. *Brown v. Union County*, 32 Or LUBA 168 (1996).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners are denied the opportunity to rebut evidence that is potentially relevant to applicable approval standards in a quasi-judicial land use proceeding, their substantial rights are prejudiced and the challenged decision must be remanded. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners allege the planning commission denied them an opportunity to submit evidence relevant to a proposed comprehensive plan amendment, but petitioners were able to submit the evidence during a *de novo* hearing on the proposed plan amendment before the governing body, the alleged error in the planning commission proceedings was cured by the governing body's *de novo* review. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a local government decision includes a determination that an existing use of the subject property is lawful, it was improper for the local government to refuse to accept evidence or argument on this issue during the local proceedings. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a local governing body improperly accepts potentially relevant new evidence while conducting an on-the-record review of a lower level decision maker's decision, and does not provide petitioners an opportunity to rebut that new evidence, petitioners' substantial rights are prejudiced, and the local government's decision must be remanded. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners were allowed to submit evidence to the planning commission, and do not identify any additional evidence they tried to submit which was refused by the governing body, any error by the governing body in conducting its hearing "on the record" did not prejudice petitioners' substantial rights. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners submitted an additional proposal after the local evidentiary record was closed, but petitioners' proposal was nevertheless accepted into the local record, the decision maker did not err by also accepting a staff response to petitioners' proposal. *Neuman v. Benton County*, 29 Or LUBA 172 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Petitioner's argument that it was denied a meaningful opportunity to rebut evidence presented at a local government hearing does not provide a basis for remand, if petitioner does not identify any evidence relevant to applicable approval standards that was submitted at the hearing and which petitioner was denied an opportunity to rebut. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. The improper exclusion of evidence relevant to an arguably applicable approval standard is a prejudicial procedural error, where LUBA is unable to determine the improperly excluded evidence could not have affected the decision reached. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where the local governing body improperly accepts new evidence while conducting an on-the-record review of a lower level decision maker's decision, and does not provide petitioners an opportunity to rebut that new evidence, petitioners' substantial rights are prejudiced. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners do not identify any code, statute or regulation provision requiring a local government to allow parties in land use proceedings to incorporate items into the local record by reference, the local government's refusal to do so is not error. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where (1) a local decision maker makes a procedural error in allowing new evidence to be submitted during an on-the-record review; (2) petitioners object to receipt of that new evidence; and (3) the local decision maker does not provide petitioners with an opportunity to rebut the new evidence; LUBA will remand the challenged decision for the local decision maker to provide the required opportunity for rebuttal. *Tucker v. Douglas County*, 28 Or LUBA 134 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. If the applicant presented new *evidence* relevant to the applicable approval standards during the rebuttal period of the local government hearing, and petitioner was denied an opportunity to rebut that evidence, petitioner's substantial rights were prejudiced. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government may specify the methodology for making documents that are not submitted at the local hearings part of the local record in the local code, or may identify the methodology during the course of the local proceedings. *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. ORS 197.763(4)(b) establishes a remedy for failure to comply with ORS 197.763(4)(a). Where a document supporting a land use application was not available for review prior to the initial local evidentiary hearing, as required by ORS 197.763(4)(a), but the local government continued the hearing to a later date and made a copy of the document available for review in its planning office prior to the continued hearing, the local government complied with ORS 197.763(4)(b). *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. Although a local governing body may be authorized to conduct a *de novo* review of a development application, its refusal to allow petitioner to submit the planning commission decision and staff report on the subject application into the record as relevant evidence prejudices petitioner's substantial right to submit evidence. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government's failure to make available all evidence in support of a quasi-judicial land use application at the time the notice of hearing is provided, as required by ORS 197.763(4)(a), is a procedural error. However, if such evidence is made available prior to or at the hearing and the hearing record is left open for seven days to allow time for additional written testimony from the parties, petitioners' substantial rights are not violated. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners are denied the opportunity to rebut evidence that is relevant to applicable approval standards in a quasi-judicial land use proceeding, their substantial rights are prejudiced and the challenged decision must be remanded. ORS 197.835(7)(a)(B). *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. There is no basis for the application of the "exclusionary rule," which applies to criminal proceedings, to local land use proceedings. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. In the absence of a local code requirement to the contrary, a local government is not required to allow parties to rebut staff summaries of evidence in the record. *McInnis v. City of Portland*, 25 Or LUBA 376 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government is free to disregard or give little weight to a party's allegations concerning the substance of a telephone conversation between that party and another person not present at the local hearing. *Decuman v. Clackamas County*, 25 Or LUBA 152 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. Even though a city may have committed error in accepting evidence concerning traffic impacts, if the issue of traffic impacts was not properly before the city, such a procedural error would provide no basis for reversal or remand. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. LUBA will not look past the written decision to determine whether local government decision makers were influenced by improperly accepted evidence, where the written decision takes the position that the issue to which the disputed evidence relates was not subject to review and that determination concerning the local scope of review is not dependent on the disputed evidence. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners identify no provision of state statute or local ordinance requiring parties to a quasi-judicial land use proceeding to serve documents they submit to the local government on other parties, another party's failure to serve such documents on petitioners does not violate petitioners' *Fasano* right to rebut evidence. *Chauncey v. Multnomah County*, 23 Or LUBA 599 (1992).

25.6.3 Local Government Procedures – Hearings – Evidence. Rejection of relevant evidence by a local decision maker is, at most, a procedural error. Where a planning commission improperly rejected relevant evidence offered by petitioner, but the governing body conducted a *de novo* evidentiary hearing and petitioner did not attempt to submit the evidence to the governing body, petitioner's substantial right to submit evidence was not prejudiced. *Heiller v. Josephine County*, 23 Or LUBA 551 (1992).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a local code provision prohibits submission of an application for a conditional use permit for a use previously denied within one year of denial, it is error for the local government to refuse to accept evidence concerning whether a proposed conditional use is the same as the conditional use previously denied. *Silani v. Klamath County*, 22 Or LUBA 735 (1992).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a local government improperly rejected relevant evidence during its proceeding below, LUBA must remand the challenged decision. *Silani v. Klamath County*, 22 Or LUBA 735 (1992).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners failed to take advantage of an opportunity to rebut evidence presented in proceedings below, they did not establish how the local decision maker's alleged procedural error in admitting such evidence caused harm to their substantial rights. ORS 197.835(7)(a)(B). *White v. City of Oregon City*, 20 Or LUBA 470 (1991).

25.6.3 Local Government Procedures – Hearings – Evidence. Regardless of whether a local government informed participants of their right under ORS 197.763(6) to request that the record remain open after the close of the initial evidentiary hearing, if the local government did *not* leave the record open, it was not obliged to accept a subsequently offered letter as part of the local record. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

25.6.3 Local Government Procedures – Hearings – Evidence. Petitioner's delivery of evidence to the county counsel's office is adequate to place those materials before the county decision maker and make them part of the local record subject to LUBA review, where (1) the procedures for submitting evidence at times other than during county hearings are not specified in the county code or regulations and were not identified during the course of the proceedings below, (2) the county failed to respond to petitioners' previous request for information regarding the proper procedure for submitting evidence, and (3) petitioner had previously submitted evidence to the county counsel's office, and that material was included in the local record. *Wade v. Lane County*, 20 Or LUBA 499 (1990).

25.6.3 Local Government Procedures – Hearings – Evidence. Where the local code requires that the governing body remand an appeal to the planning commission if evidence is presented which could not have been presented to the planning commission, and parties offer to the governing body relevant evidence that the planning commission refused to consider, it is error for the governing body not to remand the appeal to the planning commission to consider such evidence. *Bloomer v. Baker County*, 19 Or LUBA 319 (1990).

25.6.3 Local Government Procedures – Hearings – Evidence. A hearings officer's acceptance of evidence submitted after the deadline established by local code provides no basis for reversal or remand where petitioner did not request a continuance, and petitioner fails to explain how he was prejudiced by the hearings officer's action. *Reed v. Lane County*, 19 Or LUBA 276 (1990).

25.6.4 Local Government Procedures – Hearings – Site Visits. LUBA will affirm a governing body's interpretation of a code provision requiring notice to all parties to a land use proceeding that the members of the governing body intend to conduct a site visit "with any party or his representative," as requiring notice only when the members of the governing body expect to conduct the site visit with a party, and not to require notice where a safety escort is unexpectedly provided during the site visit. *Stop the Dump Coalition v. Yamhill County,* 72 Or LUBA 341 (2015).

25.6.4 Local Government Procedures – Hearings – Site Visits. A site visit is not in itself an *ex parte* contact subject to ORS 227.180(3) or ORS 215.422(3), unless it involves communication between a decision maker and a party or other interested person. *Carrigg v. City of Enterprise,* 48 Or LUBA 328 (2004).

25.6.4 Local Government Procedures – Hearings – Site Visits. The case law requirement that a decision maker disclose information gained from a site visit and offer an opportunity to rebut that information serves a similar purpose to the statutory requirements regarding *ex parte* contacts: to ensure that land use decisions are based on information received during the public process, and not based on information received outside the public process. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

25.6.4 Local Government Procedures – Hearings – Site Visits. A petitioner's failure to object to untimely disclosure of a site visit and to request the opportunity to rebut the site visit precludes assigning error to that disclosure, where the disclosure was made 10 days prior to the hearing at which the local government adopted the final decision, and petitioner could have entered an objection at any time during those 10 days or during the final hearing, but did not. *Carrigg v. City of Enterprise,* 48 Or LUBA 328 (2004).

25.6.4 Local Government Procedures – Hearings – Site Visits. Where a party is present at a rezoning hearing where a county commissioner discloses that he and a county planner made a site visit to the subject property, and that party testifies after the disclosure without objecting to the site visit, the planner's attendance at the site visit or the adequacy of the county commissioner's disclosure of the site visit, that party waives his right to assign error based on the site visit in an appeal at LUBA. *Mattson v. Clackamas County,* 46 Or LUBA 552 (2004).

25.6.4 Local Government Procedures – Hearings – Site Visits. An opportunity to rebut undisclosed evidence obtained on a site visit is not required when that evidence is not the sole basis for a finding, but merely provides a context for integrating other evidence into findings. *Sanders v. Yamhill County,* 34 Or LUBA 69 (1998).

25.6.4 Local Government Procedures – Hearings – Site Visits. Where members of a local decision making body disclose, at the beginning of the initial evidentiary hearing, that they made site visits to the subject property, and petitioners fail to object to the adequacy of that disclosure, insufficiency of the disclosure cannot be assigned as grounds for reversal or remand. *Wicks v. City of Reedsport,* 29 Or LUBA 8 (1995).

25.6.4 Local Government Procedures – Hearings – Site Visits. Where the local governing body is the final decision maker, after a *de novo* review of a planning commission decision, failure of members of the planning commission to disclose the substance of observations made during a site visit provides no basis for reversal or remand. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

25.6.4 Local Government Procedures – Hearings – Site Visits. Where the local decision maker conducted a site view, but failed to place on the record the substance of its site observations and failed to provide the parties any opportunity to rebut the evidence obtained from the site view, the decision maker committed procedural errors that prejudiced petitioners' substantial rights. *McNamara v. Union County*, 28 Or LUBA 396 (1994).

25.6.4 Local Government Procedures – Hearings – Site Visits. Where a hearings officer improperly conducted a site visit without providing prior notice and an opportunity for rebuttal, a governing body decision that relies on findings of the hearings officer based on that improper site visit is subject to reversal or remand. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

25.6.4 Local Government Procedures – Hearings – Site Visits. That a hearings officer committed procedural error by conducting a site visit without providing prior notice to the parties, disclosing his observations and providing an opportunity to rebut such observations, does not prejudice petitioners' substantial rights where the final decision on the subject application was made by the governing body, after a *de novo* review. *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 708 (1992).

25.6.4 Local Government Procedures – Hearings – Site Visits. A hearings officer commits error in conducting a site visit after the public hearing in the local proceeding is closed and without prior notice to the parties of the site visit or an opportunity for the parties to rebut observations that were made during the site visit and relied upon in the decision. *Waker Assoc., Inc. v. Clackamas County*, 22 Or LUBA 233 (1991).

25.6.4 Local Government Procedures – Hearings – Site Visits. Where a hearings officer conducts a site visit without giving notice to the parties or providing an opportunity to attend, and states in the decision that his observations during the site visit influenced his analysis of previously submitted evidence, the observations constitute evidence the parties were entitled to know about and to have an opportunity to rebut. *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

25.6.4 Local Government Procedures – Hearings – Site Visits. The right to rebut evidence placed before the local decision maker in a quasi-judicial land use proceeding extends to requiring disclosure of and opportunity to rebut the substance of *ex parte* communications to and personal site observations by the local decision maker. *Angel v. City of Portland*, 21 Or LUBA 1 (1991).

25.6.4 Local Government Procedures – Hearings – Site Visits. If a decision which relies on evidence from site observations by local decision makers is appealed to LUBA and challenged on substantial evidence grounds, LUBA will review the evidentiary support for that decision,

including evidence from such site observations and rebuttal evidence, to determine whether it would be reasonable to rely upon it. *Angel v. City of Portland*, 21 Or LUBA 1 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. For purposes of taking evidence not in the record under OAR 661-010-0045, a petitioner cannot establish that a person who is not a member of the decision-making body engaged in undisclosed *ex parte* contacts in violation of ORS 227.180(3), and there can be no legally significant or reversible bias on the part of such a person. *Carroll v. City of Malin*, 80 Or LUBA 1001 (2019).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. For purposes of taking evidence not in the record under OAR 661-010-0045, where a local government denies an application to rezone property, mere allegations that (1) a decision-maker "habitually engaged in *ex parte* contacts" that they did not then disclose in compliance with ORS 227.180(3), (2) the decision-maker previously moved to rezone a neighboring property, (3) the local government rezoned the neighboring property "by using procedures and requirements that paled in comparison" to those used in evaluating the subject application, and (4) the decision-maker voted against the subject application are insufficient to establish that the decision-maker may have engaged in *ex parte* contacts or been motivated by improper biased. *Carroll v. City of Malin*, 80 Or LUBA 1001 (2019).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. For purposes of taking evidence not in the record under OAR 661-010-0045, allegations that a decision-maker is related to (1) individuals who own property close to the subject property and who oppose the application and (2) the city recorder are insufficient to establish that the decision-maker may have engaged in *ex parte* contacts or that the decision-maker's vote denying the application may have been motivated by improper bias. *Carroll v. City of Malin*, 80 Or LUBA 1001 (2019).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A city councilor's statement at the public hearing that he had "made up" his mind to approve the application after reading the materials in the record may be some evidence of bias, viewed in isolation, but where the city councilor subsequently stated that he misspoke, and clarified that he would consider all evidence in the record, including testimony at the hearing, the city councilor's statements, viewed as a whole, are insufficient to demonstrate bias under *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 341 P3d 790 (2014). *Aboud v. City of Stayton*, 77 Or LUBA 300 (2018).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Speculation by the non-prevailing party in a quasi-judicial land use proceeding that there may have been *ex parte* contact between the prevailing party's attorney and the local governing body which may have resulted in bias, based solely on the fact that prevailing party's attorney prepared drafts of the decision and findings as well as the final decision and findings that the local governing body adopted falls considerably short of establishing a substantial reason to believe that the prevailing party's attorney had *ex parte* contacts with the local governing body. *Rawson v. Hood River County*, 77 Or LUBA 571 (2018).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Statements by a county commissioner that express no more than general appreciation for the economic benefits of a large development proposal fall short of demonstrating that the commissioner is biased or incapable of rendering a decision on the proposal based on the evidence and arguments of the parties. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A letter sent by a county commission chair to the Federal Energy Regulatory Commission providing comments in favor of a proposed liquefied natural gas facility is not an "ex parte contact" for purposes of ORS 215.422(3)(a), because it is a not a communication "receiv[ed]" by the county commissioner. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A hearings officer's expressed preference for hearing arguments from the lawyers for represented parties, rather than arguments from unrepresented parties, is insufficient to demonstrate that the hearings officer was biased for or against the application. Further, because the hearings officer was not the final decision-maker, any potential bias on the part of the hearings officer provides a basis for reversal or remand only if that bias tainted the proceedings before the final decision-maker. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. While ORS 215.422(4) exempts communication between staff and decision-makers from the scope of *ex parte* contacts that must be disclosed under that statute, nonetheless, a county can commit procedural error if a staff communication to a decision-maker includes new evidence outside the record that is relied upon to approve or deny the application. However, a petitioner must offer more than speculation that staff communications with a local decision-maker included new evidence outside the record to establish procedural error requiring remand. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. LUBA will reject arguments that planning staff exhibited bias in favor of the applicant by requesting the applicant submit additional evidence to address concerns raised at the public hearing before the hearings officer, where nothing in the code or elsewhere prohibits such a request and, in any case, the hearings officer, not planning staff, was the final decision maker. *Frewing v. City of Portland*, 74 Or LUBA 59 (2016).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Whether a city commissioner's reference to "banana" as an acronym for "build absolutely nothing anywhere near anything" was intended as a criticism of opponents' request for a continuance or was intended as a broader criticism of opponents, it does not demonstrate that the city commissioner was biased against opponents. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Read in context, the ORS 227.180(3) requirement for local decision makers to disclose *ex parte* contacts is limited to proceedings on applications for a permit or zone change, and does not extend to decisions on a zoning classification decision described at ORS 227.160(2)(b). *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. LUBA will deny an assignment of error seeking remand for additional disclosures of *ex parte* communications between citizens and elected commissioners regarding a controversial landfill, where during the

proceedings below the county re-opened the record to allow additional disclosures and opportunity for rebuttal, and adopted findings concluding that the county had done everything possible to place into the record the content of *ex parte* contacts, and the petitioner does not establish that remand for additional disclosures would provide any more detail regarding the content of *ex parte* communications. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. LUBA will deny a record objection asserting that a newspaper clipping in the record was not placed before the city council, where the minutes of the city council hearing reflect that a city council member read from the clipping as part of her disclosure of *ex parte* communications, which supports the city's position that the clipping was placed into the record. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Failure to provide hearing participants an adequate opportunity to rebut an *ex parte* communication may not warrant remand, if the communication includes no factual or legal assertions relating to a basis for approval or denial. However, remand is necessary to provide an adequate opportunity for rebuttal where the *ex parte* communication concerns disputed testimony regarding whether and how many neighborhood associations oppose the project, and the decision makers believe such testimony to be relevant to an approval criterion that requires the project to meet the overall needs of the community. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To provide a meaningful opportunity for hearings participants to rebut a disclosed *ex parte* communication, the decision-maker must (1) consider any objections that the initial disclosure was inadequate and (2) make some response to specific requests for additional information or clarifications that are reasonably necessary for participants to develop rebuttal to material factual and legal assertions in the communication. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Remand is necessary where a city's code requires that the city council "shall" vote on a valid challenge to the impartiality of a council member, but the city council ignores a valid challenge and does not vote. That the code provisions governing the required vote state that the city council "may" disqualify the challenged member is properly read in context as authorizing disqualification, and not as granting the city council the discretion to vote or not, as it sees fit. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Failure of a city council to vote on a valid challenge to the impartiality of a city council member, as required by city code, prejudices the substantial rights of the challenger, regardless of whether the vote would result in the disqualification of the city council member or whether the member's alleged bias influenced other decision makers. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Communications between a staff person and the decision maker, and between a staff person and a party, are not *ex parte* contacts. However, a decision maker could potentially receive an *ex parte* contact where a staff person conveys a communication from a party to the decision maker that concerns the land use decision under consideration. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. An affidavit indicating that one week after issuing the final decision a decision maker knew that the applicant had agreed to the proposed conditions is an insufficient showing that an *ex parte* contact might have occurred during the hearing to warrant depositions under OAR 661-010-0045, where there is no indication when or how the decision maker acquired that knowledge. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Even assuming that a staff member conveyed to a decision maker during the proceedings below that the applicant had agreed to proposed conditions, that communication is not the kind of communication that requires the decision maker to disclose and offer other parties the opportunity to rebut. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To constitute an *ex parte* communication that obligates a local government to provide an opportunity for rebuttal, the content of the communication must include something concerning the land use decision at issue that is capable of rebuttal. Where the only content of the alleged communication is that the applicant has agreed to city-proposed conditions, there is simply nothing to rebut or respond to. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A letter objecting that a county commissioner is biased and should not participate in the appeal is not an *ex parte* contact, where county code does not require that documents submitted in the land use matter be served on the other parties in the appeal and the letter is submitted to the board of county commissioners in the same way many other documents in the appeal were submitted. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a county code requires that bias challenges be filed at least 48 hours before the public hearing on a quasi-judicial matter, and there is no reason why the challenge could not have been filed before or during that hearing, petitioner's challenge filed three days before board of commissioners meeting where the board approved the written decision and findings comes too late. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Bias on the part of a decision maker in a quasi-judicial land use proceeding may be a basis for remand. However, in a LUBA appeal of a city council decision that followed *de novo* review of a planning commission decision, allegations of bias on the part of a single planning commissioner will provide a basis for remand only if the petitioner shows the alleged bias of the planning commissioner tainted the

record that was reviewed by the city council. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A petitioner's motion for an evidentiary hearing to establish bias on the part of a planning commissioner will be denied where (1) the decision on review is a city council decision that followed a *de novo* review of a planning commission decision, (2) the only claim of impropriety on the part of the planning commission that might have tainted the record on review was a planning commission majority vote to refuse to consider evidence offered by petitioner, and (3) the allegedly biased planning commissioner voted with the planning commission minority to accept the evidence offered by petitioner. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a county commissioner writes a newspaper editorial criticizing petitioner as a "terrorist" because petitioner appeals a land use decision before the county commission, the editorial is evidence of a strong emotional bias that obligates the commissioner to recuse himself. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a county commissioner who is biased against the petitioner correctly recuses himself from participating in the decision, but nonetheless makes brief comments in favor of denying petitioner's appeal during the commissioners' deliberations, remand may be necessary if it is impossible for LUBA to determine whether or not the biased commissioner's limited participation influenced the votes or deliberations of the other decision makers. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The failure by a member of the decision making body to disclose *ex parte* contacts that occurred after the hearing at which the decision making body initially voted to deny an application and before the next meeting at which the decision making body adopted the order denying the application violates ORS 227.180(3). *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The remedy for violation of ORS 227.180 is not to require an entire rehearing on an application. An adequate remedy is a remand to the city that allows interested persons the opportunity to prepare and present evidence and argument in response to the substance of the *ex parte* contact. *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A hearings officer's existing contractual relationship as an independent part time hearings officer for a local government who is an applicant for a permit from a different jurisdiction, and his participation as an independent hearings officer for the decision-making jurisdiction does not create an appearance that he was biased in the proceedings on the applications. *Newell v. Clackamas County*, 65 Or LUBA 384 (2012).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. LUBA will not infer bias based on an argument that a hearings officer's decision did not modify any conditions of approval that the county's planning staff suggested or add any additional conditions. *Newell v. Clackamas County*, 65 Or LUBA 384 (2012).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. An *ex parte* contact provides no basis for reversal or remand where the contact is disclosed as soon as possible after the contact occurs, the record is reopened, the parties are given an opportunity to request an opportunity to rebut or further explore the contact, and no one takes advantage of that opportunity. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A local government decision maker only has a "conflict of interest," as ORS 244.020(1) defines that term, if the decision would result in a "pecuniary benefit" to the decision maker. Any economic benefit a decision maker might indirectly realize for her accounting and financial planning business by voting in favor of a non-profit organization's permit application to curry favor among the organization's members is too indirect to constitute a "pecuniary benefit," as that term is used in ORS 244.020(1). *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To establish that a land use decision maker is biased, petitioners must establish that the decision maker's decision was a product of positive or negative bias rather than a product of independent view of the facts and law. Any inferences that might be drawn from the fact that a decision maker previously served on a permit applicant non-profit organization's board of directors falls substantially short of establishing the decision maker is biased. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. City council members are not required under ORS 227.180(3) to disclose receipt of an e-mail chain that was forwarded to them by one of the opponents to the application, where the substance of the e-mail chain was placed into the record and the only portion not placed in the record includes nothing related to any issue before the city council that could possibly be rebutted. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Even though the challenged decision did not involve an application, similar to *ex parte* communications before an application is filed, any communications that occurred before a county initiated proceedings to sell park property under ORS 275.330 are not *ex parte* communications that may run afoul of ORS 215.422(3). *Kaye v. Marion County*, 62 Or LUBA 57 (2010).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Failure of city council members to disclose that they sit on the board of the city's urban renewal agency, an independent body that earlier had approved modifications to a land sale contract between the agency and the applicant for a planned unit development on the same property sold to the applicant is not a basis for remand under ORS 227.180(3), where the petitioner identifies no "ex parte" communications

that occurred between the applicant and city council members sitting on the urban renewal agency board. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A mayor's pre-hearing statements of general support for a proposed planned unit development are not sufficient to demonstrate bias in favor of the proposal or that the mayor was unable to engage in the necessary fact-finding and application of law to the facts. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Claiming that a hearings officer is biased because he is paid by the local government is far from sufficient to demonstrate that the hearings officer is biased. *West v. City of Salem*, 61 Or LUBA 166 (2010).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A hearings officer's reference to a separate enforcement proceeding against petitioner for conducting wedding events on his property is not sufficient to demonstrate bias on the part of the hearing s officer. *Reed v. Jackson County*, 61 Or LUBA 253 (2010).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. LUBA will deny a motion to consider extra-record evidence of the minutes of an urban renewal agency meeting at which the agency's board of directors, made up of the city council members, considered amendments to a sale agreement between the urban renewal agency and the applicant for a land use application then pending before the city planning commission, where the petitioner fails to demonstrate that the minutes include anything that constitutes evidence of bias or an *ex parte* communication between the applicant and city council members concerning the land use application. *Claus v. City of Sherwood*, 61 Or LUBA 520 (2010).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Allegations that the planning staff, who were not the final decision makers, were biased in favor of an application are insufficient, even if true, to demonstrate that the final decision makers were biased. *Hoskinson v. City of Corvallis*, 60 Or LUBA 93 (2009).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A one-way communication from a decision maker to a party is probably not an *ex parte* communication requiring disclosure under ORS 215.422(3). While such a communication might be some evidence of bias or predisposition, and might be an indication that a meeting subsequently occurred at which *ex parte* communications were made, the communication itself is not an *ex parte* communication that requires disclosure. *Grubaugh v. Gilliam County*, 60 Or LUBA 124 (2009).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. When *ex parte* contacts are not disclosed until after the close of the record and public hearing, the failure to object to the *ex parte* contacts does not preclude a petitioner from raising an issue concerning the *ex parte* contact at LUBA. *Grubaugh v. Gilliam County*, 60 Or LUBA 124 (2009).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A county commissioner's ownership of nearby property and a residence 1.2 miles away from a proposed

church office, without more, is not enough to establish an actual conflict of interest. *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157 (2009).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A county commissioner's attendance at a planning commission hearing with his wife who opposed an application for a church office falls far short of the evidence that LUBA has required to support an allegation of bias. To establish bias, LUBA has generally required evidence of a strong emotional commitment by a decision maker to approve or to defeat an application for land use approval. *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157 (2009).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Parties in a quasi-judicial land use proceeding have a right to a decision by a "tribunal which is impartial in the matter * * *." *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973). However, there is no authority for the propositions that planning staff may not assist applicants for land use permit approval or that planning staff—as opposed to the ultimate local government decision maker—must be impartial in their dealings with applicants for land use permit approval and opponents of such permits. *Lulay v. Linn County*, 60 Or LUBA 432 (2010).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Failure to disclose *ex parte* communications that have no bearing on applicable approval criteria or to issues material to approving or denying a land use application does not necessarily warrant remand. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. General expressions of support or opposition to a proposed annexation are not *ex parte* contacts within the meaning of ORS 227.180(3), because they include no factual or legal assertions that bear on approval criteria or on any issue material to approval of the annexation that could possibly be rebutted. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. When a petitioner is able to submit all of her evidence into the record and discuss the evidence with the decision maker, the fact that the hearing was contentious and some decision makers were hostile to the petitioner does not mean that the petitioner was denied the opportunity to present her case or failed to receive a full and fair hearing. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Because a city council meeting to deliberate on a land use application is a "hearing" for purposes of ORS 227.180(3) and code provisions requiring declaration of *ex parte* contacts at a hearing and the right of the participants to rebut the substance of such contacts, it is also a "hearing" for purposes of a code provision allowing the participants to challenge the qualifications of any city councilor for bias. *Gooley v. City of Mt. Angel*, 56 Or LUBA 319 (2008).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A city's position that bias challenges can be made under the city code only at ORS 197.763 evidentiary hearings and cannot be advanced at deliberative meetings is inconsistent with the purpose of that code provision,

to ensure that the city's quasi-judicial decision-making is as free from bias as possible. *Gooley v. City of Mt. Angel*, 56 Or LUBA 319 (2008).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Allegations that two city councilors were biased because their close relatives were parties to the land use proceeding were sufficient to invoke city procedures to resolve bias challenges, and the city's failure to follow those procedures requires remand. *Gooley v. City of Mt. Angel*, 56 Or LUBA 319 (2008).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. An isolated statement by a design review commission member that an application is "a poster-child for floor-area transfer" is not sufficient to show he prejudged an application for permit approval. And even if it was, it would provide no basis for reversal or remand where (1) the design review commissioner did not participate in the decision on the permit, and (2) the decision on appeal to LUBA is a city council decision that affirmed the design review commission decision and there is no basis for imputing any prejudgment by the design review commissioner to the city council. *Trinkaus v. City of Portland*, 56 Or LUBA 771 (2008).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where evidence was introduced at a city council hearing by the mayor and a city councilor, but that evidence was not directed at any approval criterion and the city did not deny the application on any grounds that were based on or related to the improperly generated evidence, their actions did not demonstrate that they were incapable of making a decision based on the evidence before them. *Taylor v. City of Canyonville*, 55 Or LUBA 658 (2008).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Actions or statements by a city council member supporting a land use application pending before the county is not indication of bias with respect to a related land use proposal that later comes before the city council, because the council member's earlier actions and statements occurred when the councilor was not constrained by the obligation of a quasi-judicial decision maker. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Comments made by city council members during proceedings on an earlier application may be considered in determining whether the council members exhibited bias in a later, closely related application. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. City council members impermissibly departed from their roles as impartial quasi-judicial decision makers and exhibited animus towards opponents where the council members independently acted to obtain evidence outside the record that was inflammatory towards the opponents and where one council member co-signed a letter personally attacking one of the opponents. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Bias sufficient to disqualify a quasi-judicial decision maker was not shown where a mayor was present at but did not participate in the biased actions of other council members and further demonstrated the ability

to decide the matter based on applicable laws and evidence properly before the decision maker. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Oral statements made by a decision maker in a public hearing that may conflict with a later vote do not provide a basis for reversal or remand. LUBA reviews the written findings made in support of a decision not statements made during public hearings. *Sommer v. Josephine County*, 52 Or LUBA 209 (2006).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Arguments that a planning commission member was biased do not provide a basis to reverse or remand a city council's decision, at least where the city council conducted its own evidentiary hearing, adopted its own written order and findings, and was the final decision maker on the application. *Krishchenko v. City of Canby*, 52 Or LUBA 290 (2006).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Under a code provision prohibiting *ex parte* contacts "in connection with any issue involved in the hearing," petitioner fails to demonstrate that communication between staff and the decision maker involving potential donation of land on the property is an indirect *ex parte* contact with the developer, where the remand hearing is limited to a single issue, and potential donation of land has nothing to do with that remand issue. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A petitioner fails to demonstrate that the decision maker is biased or improperly influenced to approve a subdivision by the possibility that the developer may donate open space land to the city, where the decision maker twice voted to approve the subdivision prior to learning that the developer and staff had discussed donation. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. An elected decision maker's desire to please the voters by approving development that may lead to a donation of open space land to the city, combined with receipt of a stipend for service as an elected official, does not constitute a potential or actual financial conflict of interest that would prevent the decision maker from participating in a land use decision. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where petitioner appeals the city council's determination that a local appeal of a planning commission decision was untimely filed, petitioner's allegation that members of the planning commission are biased does not provide a basis for reversal or remand. *Jacobsen v. City of Winston*, 51 Or LUBA 602 (2006).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Petitioner fails to demonstrate bias on the part of the decision maker where a member of county board of commissioners acknowledges that he has "some issues and conflicts" with petitioner, but then expresses his belief that those issues will not affect his ability to make a neutral decision. The Board member's failure to address petitioner's bias challenge in detail is not, in itself, sufficient to demonstrate bias. *Heiller v. Josephine County*, 50 Or LUBA 562 (2005).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Statements by city officials that they would prefer a privately funded convention center rather than a publicly financed one, do not demonstrate that the city decision makers are biased and incapable of making a decision on the merits. *O'Shea v. City of Bend*, 49 Or LUBA 498 (2005).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Local quasi-judicial decision makers are not expected to be free of bias but they are expected to (1) put whatever bias they may have aside when deciding individual permit applications and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The ORS 227.178(3) prohibition on "shifting the goal posts" and the prohibition described in *Alexanderson v. Clackamas County*, 126 Or App 549, 869 P2d 873 (1994), on reinterpretations of local provisions that are a "product of a design to act arbitrarily and inconsistently from case to case" are distinct and independent prohibitions, although both may be invoked in particular circumstances. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Comments by city council members expressing frustration at being placed in a position of either having to reinterpret a code provision or apply a preexisting interpretation that the city council believed to be erroneous fall short of demonstrating that the city council's decision to reinterpret the code provision and apply the new interpretation is a "product of a design to act arbitrarily and inconsistently from case to case," where the record as a whole indicates that the city council was primarily motivated to make a legally correct decision rather than to act arbitrarily or inconsistently from case to case. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A site visit is not in itself an *ex parte* contact subject to ORS 227.180(3) or ORS 215.422(3), unless it involves communication between a decision maker and a party or other interested person. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The case law requirement that a decision maker disclose information gained from a site visit and offer an opportunity to rebut that information serves a similar purpose to the statutory requirements regarding *ex parte* contacts: to ensure that land use decisions are based on information received during the public process, and not based on information received outside the public process. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. *Ex parte* contacts between the hearings officer and planning staff are likely to constitute reversible error, for purposes of determining whether evidentiary proceedings under OAR 661-010-0045 are warranted, only if those contacts involve discussion of the substance or merits of the decision. *Grabhorn v. Washington County*, 48 Or LUBA 657 (2005).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A deposition of the decision maker to determine the content of *ex parte* contacts is warranted under OAR 661-010-0045, where the record and affidavits submitted by the parties demonstrate that such contacts occurred and may have involved discussion of the merits of the decision, but the record and affidavits do not include information necessary for LUBA to resolve anticipated assignments of error seeking to reverse the decision based on those *ex parte* contacts. *Grabhorn v. Washington County*, 48 Or LUBA 657 (2005).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. An ambiguous statement that could be understood to refer to *ex parte* contacts, but could also be understood to refer to contacts that were not *ex parte* contacts might be sufficient to warrant an evidentiary hearing to clarify the meaning of the reference, but is not sufficient to support a conclusion that there were improper undisclosed *ex parte* contacts. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. ORS 215.422(4), which excludes certain contacts between planning staff and the local decision maker from the definition of *ex parte* contacts, does not authorize a decision maker to rely on evidence provided by planning staff that it specifically refuses to include in the record, after the close of the record, without providing an opportunity for rebuttal. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where petitioner alleges bias of a planning commissioner who was not the final decision maker, petitioner must show that the record before the final decision is somehow tainted by the involvement of the allegedly biased planning commissioner. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a decision maker discloses that he had participated in a newspaper interview that dealt with development on marginal farmland in general, but that he had not made up his mind with respect to a pending application for a partition and nonfarm dwellings on allegedly marginal farmland, that disclosure does not demonstrate that the decision maker could not make a decision based on the facts and applicable approval standards and, therefore, the decision maker was not obliged to recuse himself from participating in the decision regarding the pending application. *Knoche v. Crook County*, 46 Or LUBA 85 (2003).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Viewed in context with other evidence of tension between a city councilor and an applicant, the councilor's refusal to withdraw her motion to deny the applicant's appeal of a planning commission decision that denied a request for lot line adjustment, after the city attorney explained that the motion was premature because the city council had not yet conducted the required hearing on the appeal, makes the issue of the city councilor's impartiality an exceedingly close one. However, LUBA will not conclude the city councilor was biased against the applicant, where the councilor's statements suggest it is possible that the city councilor made her premature motion based on her review of the

planning commission record and did not understand that an on-the-record hearing was required before the city council could make its final decision. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Alleged statements made by a decision maker at a social function that the decision maker would listen to the evidence and testimony regarding an application for a plan amendment and zone change, but would nevertheless vote to approve the application are not sufficient to establish prejudgment bias where the accuracy of those statements were disputed and the decision maker stated that he had considered the testimony and evidence and was prepared to make a decision based on that testimony and evidence. *Roberts v. Clatsop County*, 44 Or LUBA 178 (2003).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. LUBA will deny an assignment of error alleging a subdivision approval should be remanded because a decision maker had a potential conflict of interest where (1) the statements that petitioners rely on to establish a potential conflict do not appear to do so, and (2) the petitioner made no attempt to question the decision maker below about the statements. *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Contacts between a local government and its attorney regarding a pending rezoning proceeding are not *ex parte* contacts, even where the local government is the applicant. *Dimone v. City of Hillsboro*, 44 Or LUBA 805 (2003).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where evidence relating to an approved application for a Head Start program might lend support to petitioners' allegation that denial of their subsequent application for a migrant worker Head Start program was based on improper discrimination, LUBA will grant a motion to take evidence not in the record to compare the two applications. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Newspaper articles reflecting community members' bias against an application for a migrant worker Head Start program are not properly attributable to the decision makers, and LUBA will deny a motion to consider the newspaper articles in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A proposed city comprehensive plan amendment that could have the effect of preventing the establishment of a Head Start program in the proposed amendment area does not demonstrate that the city's denial of an earlier, unrelated application for a migrant worker Head Start program in that area was based on racial prejudice or discrimination, and LUBA will deny a motion to take evidence related to the comprehensive plan amendment in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The fact that an application for a migrant worker Head Start program was hotly debated at the local level does not

demonstrate that the decision makers engaged in undisclosed *ex parte* contacts, and LUBA will deny a motion to take evidence relating to the local debate in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Decision maker bias in a land use matter must be deduced from the totality of the circumstances. Where a decision maker is a member of a church congregation and the church is an applicant for a land use permit, the decision maker's church membership does not, in itself, require the decision maker's recusal for bias. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137 (2002).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a land use decision maker is a member of a church congregation and the church has applied for a land use permit, and the decision maker has expressed concern regarding the impact proposed conditions of approval would have on church operations but nevertheless declares that she is able to render a decision regarding the church's application based on the facts and law before her, that decision maker has not impermissibly prejudged the application. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137 (2002).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a land use decision maker is a member of a church congregation and the church has applied for a land use permit, and the decision maker has (1) testified as an individual in favor of the application prior to his election to the decision making body; and (2) stated that he did not believe he had to be objective regarding the application and would support the application "all the way to the Supreme Court," the decision maker has impermissibly prejudged the church's application and, absent some need for his participation in order to reach a decision, recusal is required. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137 (2002).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Statements by a decision maker that he is "kinda prejudiced" are insufficient to demonstrate bias or prejudgment where, read in context, it is clear that the decision maker was capable of and did make his decision based on the evidence and argument before him. *Potts v. Clackamas County*, 42 Or LUBA 1 (2002).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. LUBA will deny a motion to take evidence not in the record to consider the affidavits of three county commissioners explaining that they are biased against the applicant and cannot impartially hear a local appeal involving the applicant, where the commissioners' declaration of bias is stated in the challenged decision, the assignment of error directed at the commissioners' bias presents a legal question not dependent on the facts stated in the affidavits, and the proponent fails to demonstrate to LUBA that the affidavits are necessary to resolve that assignment of error. *Hiebenthal v. Polk County*, 41 Or LUBA 573 (2001).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a board of commissioners declares that it is biased, recuses itself from an appeal of a hearings officer's land use decision, and designates a hearings officer's decision as the county's final decision, the hearings officer's decision may be appealed to LUBA, notwithstanding local code provisions that

grant a party a right to a local appeal before the board of commissioners. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The right to an impartial tribunal in quasi-judicial land use proceedings, as first articulated in *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973), permits a board of commissioners to refuse to hear an appeal where the board of commissioners determines it is biased and there is a hearings officer decision that may be designated as the final decision of the county on the merits. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The right to an impartial tribunal will supersede petitioners' right to a local appeal, where denying the local appeal will not deprive petitioners of an opportunity to have a local decision reviewed on the merits. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where the only evidence of decision maker bias is a transcript of a recorded telephone conversation between petitioner and a former city councilor 10 months after the challenged decision was made, and the context and content of the conversation make it relatively clear that the councilor based his decision on the evidence and testimony provided during the proceedings leading up to the challenged decision, petitioner fails to demonstrate that the councilor prejudged petitioner's application merely because the councilor did not make any comments during the city proceedings, and made the motion to deny petitioner's appeal. *Howard v. City of Madras*, 41 Or LUBA 122 (2001).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. An allegation that a city councilor told a city planning commissioner that he "did not want any new service stations" in the city is not sufficient to establish a reasonable basis to believe that the city councilor was biased, and a motion to take evidence not in the record will be denied. *Space Age Fuels, Inc. v. City of Sherwood*, 40 Or LUBA 577 (2001).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Evidence that a county has approved all prior applications for telecommunications towers does not, by itself, demonstrate that the county is biased in favor of siting telecommunications towers. *Jordan v. Douglas County*, 40 Or LUBA 192 (2001).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A county governing body's decision to enter a settlement agreement that includes an agreement that the governing body will adopt certain ordinances does not render the public hearings that are subsequently held prior to adopting such ordinances something other than the kind of public hearing required by ORS 215.060, where the county counsel advised the governing body that it was free not to adopt the settlement ordinances and a transcript of the local proceedings shows the governing body did not believe it was legally bound to adopt the settlement ordinances without modification. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The requirement imposed by *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), for a fair and impartial tribunal does not apply to legislative land use proceedings. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A city councilor has prejudged an application and must recuse himself from participating in a decision on the application where the councilor, prior to the time a land use matter came before the city council, actively opposed an application, and sent correspondence to the other city councilors in which he advocated in opposition to the application, stating that the law and evidence point to denial of the application. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The bias of one decision maker may warrant reversal or remand of a land use decision pursuant to ORS 197.835(9)(a)(B), where participation of that decision maker prevented petitioner from receiving a full and fair hearing, one of petitioner's substantial rights. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. It is error for a member of a local governing body to announce that he is close friends with the parties and will not participate in the decision on a variance request, but nevertheless later make the motion to approve the written decision and vote on the written decision. However, the error is harmless where the member of the governing body does not participate in the evidentiary hearing or the 4-0 oral vote at the conclusion of the evidentiary hearing to approve the variance. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The speculative possibility that a part-time hearings officer with a private legal practice might, in the future, represent developers of a lot within a subdivision approved by that hearings officer does not constitute a potential conflict of interest that would preclude that hearings officer from approving or denying the application. *Mitchell v. Washington County*, 39 Or LUBA 240 (2000).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. That a local government is both the applicant and decision maker does not, in itself, mean the local government decision maker is biased, and does not preclude the local government from making a decision on its own application. *Crook v. Curry County*, 38 Or LUBA 677 (2000).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. An *ex parte* communication must be disclosed only if it concerns the decision or action at issue in a land use decision. When the complaint about contact with the local government does not contain an assertion that the contact concerned issues material to the land use proceeding, the alleged communication does not provide a basis for invalidating the decision. *Crook v. Curry County*, 38 Or LUBA 677 (2000).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A mayor's and city councilor's statements that they personally disliked an applicant's business are not sufficient to

demonstrate the city council was biased or denied the applicant a fair and impartial hearing, where other statements by the mayor and city council make it clear that they put aside their personal feelings about the applicant's business in making their decision. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Debatable reasoning in a land use decision is not sufficient to demonstrate the decision maker is biased. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A local government decision on an application for land use approval that is made without disclosing or offering an opportunity to rebut an *ex parte* communication must be remanded for a plenary rehearing on the application. *Opp v. City of Portland*, 38 Or LUBA 251 (2000).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Because ORS 227.180(3) protects participants' right to a decision free of undisclosed *ex parte* contacts, redressing a violation of the statute on remand requires more than reopening the record to disclose and offer an opportunity to rebut the substance of those communications. Although the city need not repeat the evidentiary proceedings leading up to the initial decision, the city must adopt a new decision approving or denying the application based on the record as a whole, including any evidence submitted in rebuttal. *Opp v. City of Portland*, 38 Or LUBA 251 (2000).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a decision maker discloses *ex parte* contacts at the beginning of the local proceedings, petitioners must request clarification of the *ex parte* contacts or otherwise object to the adequacy of the disclosure during the local proceedings. Because petitioner failed to object below, petitioner's assignment of error does not provide a basis for reversal or remand. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368 (1999).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A petitioner moving to present evidence of *ex parte* contacts or bias must offer some substantial reason to believe that evidence of such *ex parte* contacts or bias can be established and that such *ex parte* contacts or bias would lead to reversal or remand. This burden is not carried where petitioner simply speculates that the decision maker's and a local opponent's membership in an animal rights organization may have led to improper *ex parte* contacts or bias during local proceedings on petitioner's dog kennel. *Tri-River Investment Co. v. Clatsop County*, 36 Or LUBA 743 (1999).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Council members have a duty to disclose whether the proximity of their residences to the subject property causes a potential or actual conflict of interest. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Bias or prejudgment sufficient to disqualify a public official must be demonstrated by clear and unmistakable evidence. Evidence that the city council adopted a resolution reserving a site for a proposed memorial and comments by one city council member that he intended to take into account the applicant's reliance on the resolution fails to demonstrate in a clear and unmistakable manner that the city council's

subsequent decision to approve the memorial was biased or the result of prejudgment. *Carlsen v. City of Portland*, 36 Or LUBA 614 (1999).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Petitioner's speculations that *ex parte* communications regarding a proposed rezoning might have occurred between a local decision maker and the decision maker's spouse, who was a proponent of the rezoning, are insufficient to establish that such communications occurred, or that the decision maker has a personal interest in the proposal. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Failure by a hearings officer to comment on certain opposition testimony or adopt the legal interpretations offered in that testimony does not establish bias. *Cotter v. Clackamas County*, 36 Or LUBA 172 (1999).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. An evidentiary hearing to establish decision makers' "personal interest" in a proposal due to their ownership of proximate property is not warranted because, even if true, such a "personal interest" could not provide a basis for reversing or remanding the decision. *ODOT v. City of Mosier*, 34 Or LUBA 797 (1998).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Communication between a local governing body or its staff and its insurance carrier are not *ex parte* contacts requiring disclosure under ORS 227.180(3). *Marshall v. City of Yachats*, 34 Or LUBA 724 (1998).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a challenged decision is a legislative decision, the statutory provision requiring disclosure of *ex parte* contacts does not apply. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Petitioner must show, in a clear and unmistakable manner, that a decision maker was incapable of reaching a decision based on the evidence and argument in order to establish a claim of personal bias against the decision maker. *St. Johns Neighborhood v. City of Portland*, 34 Or LUBA 46 (1998).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a local code prohibits *ex parte* contacts between a decision maker and a "person interested in the outcome of the proceeding," a party moving for an evidentiary hearing to prove such *ex parte* contacts occurred must provide specific reasoning why that person qualifies as such an "interested" party. Merely describing the person as a professional land developer or community leader is not specific enough. *Opp v. City of Portland*, 33 Or LUBA 820 (1997).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. If a local government determines an *ex parte* contact that is prohibited by local code occurred during local proceedings, other parties must be allowed the opportunity to rebut the substance of the *ex parte* contact. *Opp v. City of Portland*, 33 Or LUBA 654 (1997).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The public meetings law, ORS 192.610 to 192.690, and a local ordinance that requires all evidence, deliberation, and

decisions to be made before the public and on the record, do not prohibit the board of county commissioners from having an off-the-record consultation with legal counsel during the course of a public hearing. *Collins v. Klamath County*, 32 Or LUBA 338 (1997).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The county violates ORS 215.422 when it reopens the record to accept a report received by a commissioner from intervenor, but does not provide an opportunity for other parties to rebut the substance of the *ex parte* communication. *Brown v. Union County*, 32 Or LUBA 168 (1996).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Because the county's violation of ORS 215.422 is not a procedural error, petitioner is not required to show that his substantial rights were prejudiced by the county's error in order to obtain a remand. *Brown v. Union County*, 32 Or LUBA 168 (1996).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Petitioners' speculation concerning contacts that could have occurred between county staff and the board of commissioners and postulation regarding bias fails to establish that the city commissioners were incapable of making a decision based on the evidence and arguments before them due to bias or that the commissioners prejudged the application. *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76 (1996).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A single, unexplained reference to an earlier use in a nonconforming use determination hearing is not a reasonable basis for a belief that an undisclosed *ex parte* contact took place and would not justify granting a motion for an evidentiary hearing. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Waiver of fees, expressions of sympathy for the plight of the applicant and the postponement of a vote resulting in continuance of a hearing do not establish that the county commission did not reach its decision by applying relevant standards based on the evidence and arguments presented. *Moore v. Coos County*, 31 Or LUBA 347 (1996).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A memorandum from planning staff to the city council concerning interpretation of the city code is not evidence. Therefore, that petitioners had no opportunity to rebut the substance of staff's memorandum at a continued hearing provides no basis for reversal or remand of the challenged decision. *Sullivan v. City of Woodburn*, 31 Or LUBA 192 (1996).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Under ORS 197.763(6)(b), oral evidence submitted at a continued hearing provides no basis for a request that the record be left open for a response. Therefore, that petitioners had no opportunity to rebut the substance of testimony given at a continued hearing provides no basis for reversal or remand of the challenged decision. *Sullivan v. City of Woodburn*, 31 Or LUBA 192 (1996).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A motion for evidentiary hearing will be denied where petitioners do not make the requisite threshold showing

that there is a reasonable basis to believe that *ex parte* contacts probably took place, and offer no supporting legal authority indicating that such contacts would warrant reversal or remand of the county's decision. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540 (1996).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A site visit attended by several of the petitioners, the applicant, and one of the county commissioners that occurred a month prior to the filing of the conditional use application at issue was not an *ex parte* contact between the applicant and the decision maker. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540 (1996).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Because communication between a county commissioner and an attorney representing the county regarding a pending conditional use application is not an *ex parte* contact required to be disclosed under ORS 215.422(4), an evidentiary hearing is not warranted to determine if such communication occurred. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540 (1996).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To establish bias, petitioners must establish that the decision maker was incapable of making a decision based on the evidence and arguments of the parties; petitioners' assertions and conjecture regarding the conclusions of one or more city councilors do not meet this standard. *Sparks v. City of Bandon*, 30 Or LUBA 69 (1995).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. In contending their right to an impartial tribunal was denied, petitioners have the burden of showing the local decision maker was biased or prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To establish bias, petitioner must show that the decision makers were either unable or unwilling to make a decision by applying relevant standards to the evidence and arguments before them. *Pend-Air Citizen's Comm. v. City of Pendleton*, 29 Or LUBA 362 (1995).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Under ORS 215.422(4), a communication between a member of the board of commissioners and county staff is not an *ex parte* contact required to be disclosed pursuant to ORS 215.422(3). Therefore, that the board chairman did not disclose in the local record the contents of his conversation with the county code compliance officer is not error. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To establish bias, petitioners must establish the decision maker was incapable of making a decision based on the evidence and arguments of the parties. *Nalette v. City of Klamath Falls*, 28 Or LUBA 709 (1995).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To demonstrate a decision maker is biased, petitioners must establish the decision maker was incapable of making a

fair decision in the matter, considering all of the evidence and arguments presented. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A letter signed by three of seven city councilors requesting that the planning commission expedite its consideration of a permit, which was never given to the planning commission, is not an *ex parte* contact and does not show the city council was biased. *Smith v. City of Phoenix*, 28 Or LUBA 517 (1995).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where the record demonstrates that two city council members had numerous *ex parte* contacts with the applicant and failed to disclose those contacts and provide an opportunity for rebuttal, as required by ORS 227.180(3), remand is required. *Smith v. City of Phoenix*, 28 Or LUBA 517 (1995).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. That a hearings officer, after withdrawal of the challenged decision pursuant to ORS 197.830(12)(b), accepted proposed findings from intervenors without notice to petitioners, and subsequently adopted those findings as his own, is insufficient to establish bias or prejudgment. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A petitioner may not assert his own *ex parte* contacts with the decision maker as a basis for reversal or remand, where the contacts were disclosed and petitioner did not object to the adequacy or completeness of the disclosure. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A hearings officer's failure to disclose that his father and petitioner were teaching colleagues at the same junior high school and the hearings officer attended that junior high school as a student does not provide a basis for questioning the hearings officer's impartiality. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Neither language in a hearings officer's decision rejecting petitioners arguments as "groundless" or "without merit," nor the hearings officer's knowledge of county civil penalty proceedings against petitioner and petitioner's pending legal action against the county concerning the civil penalty proceedings, demonstrates the hearings officer lacked the requisite impartiality in reaching a decision. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Under ORS 215.422(3), parties in county permit proceedings are entitled to disclosure on the record of the substance of any *ex parte* communications and an opportunity to rebut the substance of the *ex parte* communication at the first hearing following the communication. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. That a local decision maker's two separate disclosures of an *ex parte* contact are inconsistent to some degree, does not

mean they are insufficient to constitute the "public announcement of the content of the [*ex parte*] communication" required by ORS 215.422(3). *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where an *ex parte* contact occurs after close of the evidentiary hearing in a county permit proceeding, and the county reopens the evidentiary hearing, announces the *ex parte* contacts and allows the parties to rebut those *ex parte* contacts, the county's action satisfies the ORS 215.422(3) requirement that the "announcement of the content of the communication and of the parties' right to rebut the substance of the communication [be] made at the first hearing following the communication where the action will be considered[.]" *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. That a local government owns certain property and is the applicant for plan and zone map amendments for that property does not, in itself, mean the local government decision maker is biased, and does not preclude the local government decision maker from making a decision on its own application. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Correspondence and conversations between parties to a local land use proceeding and local government staff are not unlawful *ex parte* contacts. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The existence of a "potential" conflict of interest does not disqualify an elected local government official from voting on a legislative land use decision. *Rea v. City of Seaside*, 27 Or LUBA 443 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. An adjustment committee's vote to adopt a tentative decision on an application for an adjustment prior to close of the evidentiary record does not demonstrate bias, where the adjustment committee subsequently considered, and its final decision addresses, evidence and arguments submitted after its tentative decision was adopted. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To demonstrate the local government decision maker was biased, petitioner must establish the decision maker exhibited personal bias or was incapable of making a decision by applying relevant standards to the facts and argument presented. *Stern v. City of Portland*, 26 Or LUBA 544 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Allegations that the local decision maker failed to disclose *ex parte* contacts, as required by ORS 215.422(3), provide no basis for reversal or remand where there is no admission by the decision maker or other evidence, either in the record or offered through a motion for evidentiary hearing pursuant to ORS 197.830(13)(b), that an *ex parte* contact occurred. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To establish actual bias or prejudgment on the part of a local decision maker, petitioners have the burden of showing the decision maker was biased or prejudged the application and did not reach a decision by

applying relevant standards based on the evidence and argument presented. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. LUBA will not presume that a letter influenced subsequent decisions of a local decision maker. In order to support a claim of bias, petitioner must establish that the decision maker was incapable of making a decision based on the evidence and argument presented. *Poddar v. City of Cannon Beach*, 26 Or LUBA 429 (1994).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. There is no prohibition against decision makers consulting with staff during quasi-judicial land use proceedings and no requirement that such consultation occur in the presence of other parties. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a member of a decision making body fails to disclose an *ex parte* contact until after the evidentiary record is closed, ORS 227.180(3) is violated, and LUBA must remand the decision. *Derry v. Douglas County*, 26 Or LUBA 25 (1993).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a local decision maker discloses an *ex parte* contact during local deliberations on a proposal, and provides no opportunity for rebuttal, LUBA will remand the decision for the local government to provide petitioner with an opportunity to explore the nature of the contact and to provide rebuttal. *Garrigus v. City of Lincoln City*, 25 Or LUBA 754 (1993).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Local decision makers in quasi-judicial land use proceedings are not required to maintain the "appearance of impartiality" required of judges, but rather to have "actual impartiality," the ability to make a decision based on the argument and evidence before them, rather than on prejudgment or personal interest. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To establish actual bias or prejudgment on the part of a local decision maker, the petitioner has the burden of showing the decision maker was biased or prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. If the *contents* of an *ex parte* communication are not publicly announced and placed in the record, as required by ORS 227.180(3), a city official's request for responses to the *ex parte* communication does not provide the opportunity for rebuttal required by ORS 227.180(3)(b). *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A general objection to the record requesting that speakers in a transcript be identified, because it would be easier to prepare the petition for review, does not provide a sufficient basis to sustain the objection. A

request that a particular speaker in a transcript in the record be identified, because that speaker was a decision maker below and his dialogue establishes the existence of impermissible *ex parte* contacts, provides a sufficient basis to sustain that aspect of the record objection. *Derry v. Douglas County*, 25 Or LUBA 790 (1993).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a local government's staff briefs an absentee decision maker concerning matters in the record and does not impermissibly advocate denial of the application, but rather simply provides administrative support to the decision maker, the fact that petitioners had no opportunity to rebut the substance of that staff briefing provides no basis for reversal or remand of the challenged decision. *McInnis v. City of Portland*, 25 Or LUBA 376 (1993).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A party's submission of proposed findings to a local decision maker does not constitute an *ex parte* contact warranting reversal or remand. In the absence of a local code provision to the contrary, there is no error in a local government's utilization of such a process. *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a settlement agreement in a lawsuit previously filed by intervenor against a county simply says the county will consider a rezoning application for intervenor's property, as it is required to do under ORS 215.416(2) in any case, the settlement agreement is irrelevant to an application for a replacement dwelling on the subject property, and does not establish bias or prejudgment by the county decision maker. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A local government decision maker is entitled to consult with its attorney regarding evidence submitted during the evidentiary phase of the local proceeding and interpretive issues. Parties have no right to rebut the substance of a local government attorney's advice to the local government decision maker. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. In establishing actual bias or prejudgment on the part of a local decision maker, the burden is on petitioner to show the decision maker was biased or prejudged the application and did not reach its decision by applying applicable standards based on the evidence and argument presented. *Heiller v. Josephine County*, 23 Or LUBA 551 (1992).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To establish actual bias or prejudgment on the part of a local government decision maker, the burden is on petitioners to establish that the decision maker was biased or prejudged the application and did not reach its decision by applying applicable standards based on the evidence and argument presented. *Rath v. Hood River County*, 23 Or LUBA 200 (1992).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Delay in disclosing an *ex parte* contact until after the close of the public hearing, and failure to make an announcement of the right to rebut the substance of the *ex parte* communication, as required by ORS

227.180(3)(b), are at most procedural errors. *Horizon Construction, Inc. v. City of Newberg*, 23 Or LUBA 159 (1992).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a new city councilor discloses his prior participation in a quasi-judicial land use proceeding and declares that he can render an unbiased decision on the matter following a remand from LUBA, that the city councilor is a realtor who might benefit through sale of lots in the subdivision in the future is too speculative to support a determination that his decision is influenced by bias or self interest. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where the planning department is not the decision maker, contacts between the planning department and neighbors of the applicant need not be disclosed by the decision maker under ORS 215.422(3). *Marson v. Clackamas County*, 22 Or LUBA 497 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Although under ORS 215.422(3) it may be error for a hearings officer to fail to disclose prior contacts with the planning department, it is a procedural error. LUBA may not reverse or remand on the basis of procedural error unless such error prejudices petitioner's substantial rights. Petitioner's substantial rights are not prejudiced by such error where petitioner was aware of and had an opportunity to respond to the substance of the contacts with the planning department. *Marson v. Clackamas County*, 22 Or LUBA 497 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A board of county commissioners need not provide parties an opportunity to rebut a memorandum in which the county counsel provides legal advice concerning a pending local land use appeal. Such communications are not *ex parte* contacts. ORS 215.422(4). *Toth v. Curry County*, 22 Or LUBA 488 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A petitioner may not assert the occurrence of his own *ex parte* contacts with the decision maker as a basis for reversal or remand, where the contacts were disclosed and petitioner did not object to the adequacy or completeness of the disclosure of such *ex parte* contacts. *Toth v. Curry County*, 22 Or LUBA 488 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. LUBA will not presume a local government decision maker is partial simply because the local government is the applicant for land use approval. *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 452 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. In establishing actual bias or prejudgment on the part of a local government decision maker, the burden is on petitioner to show the decision maker was biased or prejudged the application and did not reach its decision by applying applicable standards based on the evidence and argument presented. *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 452 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. That the initial administrative decision maker was not impartial would be insufficient grounds to reverse or remand a challenged decision, where petitioner was afforded a *de novo* review of the administrative decision, including a public hearing, by a hearings officer. *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 452 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. To establish a claim of bias sufficient to result in reversal or remand of a challenged decision, a petitioner is required to clearly demonstrate that the public officials charged with bias are incapable of making a decision on the basis of the evidence and argument presented. *Cummins v. Washington County*, 22 Or LUBA 129 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Personal bias sufficiently strong to disqualify a public official must be clearly demonstrated. A petitioner has the burden of demonstrating that the public official was incapable of making a decision based on the evidence and argument before him. *Schmaltz v. City of Hood River*, 22 Or LUBA 115 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Contacts between city decision makers and planning staff are by definition not *ex parte* contacts. ORS 227.180(3) and (4). *Holladay Investors, Ltd. v. City of Portland*, 22 Or LUBA 90 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. While the requirement that local governments carrying out public land development projects grant land use approvals to themselves presents inherent appearance of bias problems, such appearance problems, in and of themselves, present no basis for reversal or remand. *Holladay Investors, Ltd. v. City of Portland*, 22 Or LUBA 90 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A city attorney's statement at the beginning of the city council hearing, to the effect that parties are welcome to rebut *ex parte* communications, satisfies the requirement of ORS 227.180(3)(b) that a public announcement of the parties' right to rebut the substance of an *ex parte* communication be made at the first hearing following the communication. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. That a decision maker may have interpreted the local plan and code incorrectly in some respects does not establish that the decision maker was biased or had undisclosed *ex parte* contacts. *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Read in context, a hearings officer's findings and conclusions describing a commercial development as "garish" do not demonstrate bias or prejudgment. *Carsey v. Deschutes County*, 21 Or LUBA 118 (1991).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. In order to establish bias on the part of the decision maker, petitioner must show that the decision maker either has a personal stake in the outcome of the proceeding or has prejudged the matter. LUBA will not infer

the existence of bias on the part of a decision maker. *Kittleson v. Lane County*, 20 Or LUBA 286 (1990).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where the city council conducted a *de novo* review of the planning commission's decision, only the city council members are the *decision makers*, and actions by the city planner and planning commission members do not demonstrate bias on the part of the city *decision makers*. *Knapp v. City of Jacksonville*, 20 Or LUBA 189 (1990).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Allegations that the city council misinterpreted plan and code provisions and overlooked items in the record, even if true, would simply demonstrate error in the decision made by the city council, not that the council members had prejudged the matter and were incapable of making an objective decision on petitioners' subdivision application based on the evidence and argument before them. *Knapp v. City of Jacksonville*, 20 Or LUBA 189 (1990).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. It is not error for a governing body to provide a lower local tribunal with a memorandum in the nature of a declaratory ruling interpreting certain code provisions while an application to which those code provisions apply is pending before the lower tribunal. Even if it were a procedural error, there would be no prejudice if petitioners had an adequate opportunity in a local appeal to address the interpretation and applicability of the code provisions in question before the governing body. *Hoffman v. City of Lake Oswego*, 20 Or LUBA 64 (1990).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Even if the planning commission chairman's participation in the planning commission proceedings on a proposed comprehensive plan amendment were improper, *de novo* review of the proposed plan amendment by the city council cured any such impropriety. *Burk v. Umatilla County*, 20 Or LUBA 54 (1990).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. That a member of the county counsel's office acts as hearings officer does not, itself, deny the petitioner an unbiased decision maker, nor does it necessarily imply that improper *ex parte* contacts occurred between the hearings officer and the board of commissioners. *McNulty v. Marion County*, 19 Or LUBA 367 (1990).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. The planning commission's error in failing to consider the propriety of a commissioner's participation in the decision on the subject application, where the issue was raised before the commission, is procedural and, therefore, petitioner must establish the error caused prejudice to his substantial rights. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. If the governing body holds a *de novo* hearing on an appeal of the planning commission's decision on the subject application, such hearing cures any prejudice due to a planning commissioner's allegedly improper participation in the planning commission proceedings. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where a mayor's *ex parte* contacts were completely disclosed, although late in the deliberations and after an incomplete disclosure earlier in the proceedings, and the mayor invited challenges and inquiries, the remedial purpose of ORS 227.180(3) is nevertheless served. Where petitioners did not object to the timing and manner of the disclosure, and do not show their substantial rights were violated, there is no basis for remand. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. A mayor's disclosure of *ex parte* contacts with former associates and political supporters at most creates an appearance of impropriety and does not show actual bias. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Where the record shows the *ex parte* contacts alleged by petitioner were disclosed during local hearings, such *ex parte* contacts provide no basis for reversal or remand. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

25.6.5 Local Government Procedures – Hearings – Impartial Tribunal. Standing alone, the fact that a city council approved a federal block grant for a homeless shelter does not disqualify the city council on the basis of bias from considering a subsequent land use application for the homeless shelter. *Beck v. City of Tillamook*, 18 Or LUBA 587 (1990).

25.6.6 Local Government Procedures – Hearings – When Required. Where state statute requires that a local government provide either a public hearing before ruling on an application for a statutory permit or an opportunity for an appeal that includes a *de novo* public hearing, although the local government may require a notice of appeal that sets forth with reasonable particularity the issues that the appealing party will raise at the hearing, the local government may not, consistent with the statute, (1) make that notice requirement a jurisdictional bar to obtaining the hearing, (2) limit the issues specified to five types of issues, or (3) approve or reject requests for hearings based on a qualitative assessment of how well the appellant has explained the issues specified. *Landwatch Lane County v. Lane County*, 79 Or LUBA 96 (2019).

25.6.6 Local Government Procedures – Hearings – Impartial Tribunal. A city councilor's statement in the comment section of an online blog article that a specific application should be approved in order to "get[] this particular monkey off of [the applicant's] back" is sufficient to demonstrate both actual bias and that the councilor has so prejudged the matter as to be incapable of determining its merits based on the evidence and arguments presented, and any subsequent decision on the application in which the biased councilor participates will be remanded, to allow the council to consider the application without the biased councilor's participation. A statement made by the biased councilor during a public hearing on the application that he will render an impartial decision does not cure his demonstrated actual bias. *Niederer v. City of Albany*, 79 Or LUBA 305 (2019).

25.6.6 Local Government Procedures – Hearings – When Required. When a county opts to approve a permit without a public hearing, any person who is adversely affected or aggrieved, or who is entitled to notice of the decision may appeal a decision made without a hearing. The county cannot require participation prior to a decision, either by attending a conference (that may or may not have occurred), or providing written comments, or in any other manner. Additionally, the county may not enact additional restrictions to prevent a person who is entitled to file an appeal under the ORS 215.416(11)(a)(A) right to file a local appeal. *Hood River Valley Residents Comm. v. Hood River County*, 78 Or LUBA 282 (2018).

25.6.6 Local Government Procedures – Hearings – When Required. Deferral of compliance with an approval standard to a subsequent proceeding under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), or *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009), may not be permissible at all where the approval standard at issue invokes a particular process that is explicitly linked to submittal of the development application, requiring consultation and dispute resolution between the applicant, the local government, and a sovereign Native American Tribe before development approval. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

25.6.6 Local Government Procedures – Hearings – When Required. A local government errs in imposing a condition of approval deferring consideration of compliance with a comprehensive plan policy requiring the applicant and county to undertake a process to consult and resolve differences with local Native American tribes before approving development in an estuary, where the deferral is to an *ad hoc* proceeding without any assurances that the deferred proceeding will actually occur, and the deferral is not supported by findings demonstrating that deferral is permissible under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), or *Gould v. Deschutes*

County, 227 Or App 601, 206 P3d 1106 (2009). *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

25.6.6 Local Government Procedures – Hearings – When Required. Where no statute or local code provision requires that a city council, in making the city's final decision on a request for a zoning classification as described in ORS 227.160(2)(b), conduct the city council meeting pursuant to quasi-judicial land use procedures requiring notice and an evidentiary hearing, the city council does not err in conducting the meeting pursuant only to the procedures governing a public meeting. *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

25.6.6 Local Government Procedures – Hearings – When Required. If a local government in granting planned development approval wishes to defer a finding that is required at the time of planned development approval to a subsequent, future proceeding, it must ensure that the public will be provided the same participatory rights at the future proceeding that they have at the time of planned development approval. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

25.6.6 Local Government Procedures – Hearings – When Required. A tentative subdivision approval decision that imposes a condition of approval that the applicant must submit a revised tentative subdivision plat to reflect an amendment to the application that was submitted before the local government adopted its decision is not accurately characterized as an improper requirement for a replat without public participation. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

25.6.6 Local Government Procedures – Hearings – When Required. When approving a subdivision where approval criteria must be applied in a proceeding where the public has participatory rights, a city may defer findings on a required approval criterion to a later proceeding, so long as that later proceeding is one in which the public has participatory rights. *Boucot v. City of Corvallis*, 61 Or LUBA 459 (2010).

25.6.6 Local Government Procedures – Hearings – When Required. The obligation to conduct a "hearing at least for argument" under ORS 227.180(1)(a)(B) only applies when a city council conducts a review of a lower body's decision. The obligation does not apply when the city council declines review thereby making the lower body's decision the city's final determination. *Mazorol v. City of Bend*, 59 Or LUBA 260 (2009).

25.6.6 Local Government Procedures – Hearings – When Required. Code procedures that distinguish between "Type II" permit decisions that can be made without an initial hearing, with an opportunity for affected persons to appeal to a *de novo* hearing, and "Type III" permit decisions that require an initial hearing, do not violate the privileges and immunities clause by granting "privileges" to participants of Type III proceedings that are denied Type II participants. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

25.6.6 Local Government Procedures – Hearings – When Required. Although a local government is obligated to open the evidentiary record to allow the parties to address any new criteria that may be applied on remand from LUBA, where a local government applies the same criterion on remand that it did in its initial decision and merely cites different comprehensive plan

policies to explain how it interprets that criterion, the local government is not obligated to reopen the evidentiary record. *Neighbors 4 Responsible Growth v. City of Veneta*, 52 Or LUBA 325 (2006).

25.6.6 Local Government Procedures – Hearings – When Required. A local government errs in deferring a determination of compliance with a discretionary permit criterion requiring that development protect riparian vegetation and aesthetic resources to a subsequent staff review that does not provide for notice or hearing. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

25.6.6 Local Government Procedures – Hearings – When Required. That comprehensive plan policies apply to a challenged grading permit, and thus the permit is a "land use decision" as defined by ORS 197.015(10), does not necessarily mean that the city is obligated to provide a hearing on the grading permit. Not all permits that are land use decisions are also statutory "permits" as defined by ORS 215.402 and 227.160 and subject to statutory requirements to provide a hearing or opportunity for a hearing. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

25.6.6 Local Government Procedures – Hearings – When Required. A local government does not err in failing to provide an evidentiary hearing on remand to accept updated information regarding the current status of petitioner's property, where LUBA's remand did not require the local government to conduct additional evidentiary hearings, and petitioner fails to identify any authority that requires the local government to conduct an additional evidentiary hearing to accept updated information. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

25.6.6 Local Government Procedures – Hearings – When Required. A city denial of petitioners' request for an evidentiary hearing after remand from LUBA is not error, where (1) petitioners had an opportunity to present evidence and argument during the city's initial proceedings; (2) the city did not apply new approval criteria or consider new evidence in making its decision on remand; and (3) petitioners do not provide a reason why the initial evidentiary proceedings were inadequate to address petitioners' application. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

25.6.6 Local Government Procedures – Hearings – When Required. Where a hearings officer finds that it is feasible to comply with an approval standard, and imposes conditions to ensure compliance, the issue becomes whether that finding is adequate and supported by substantial evidence, not whether the hearings officer improperly deferred a finding of compliance to a later review stage. The fact that the hearings officer addresses the possibility that the solution found to be feasible might not work, and finds that if so DEQ would require that the project be scaled back, does not mean that the hearings officer deferred a finding of compliance with the approval standard or impermissibly delegated that finding to DEQ. *Baker v. Lane County*, 43 Or LUBA 493 (2003).

25.6.6 Local Government Procedures – Hearings – When Required. A local government's decision to request that an applicant prepare revised findings to respond to a LUBA remand does not, by itself, obligate the local government to provide a hearing following LUBA's remand. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.6.6 Local Government Procedures – Hearings – When Required. Parties that seek to demonstrate that a local government erred by adopting an interpretation of local land use legislation after the opportunity for argument and evidentiary presentations closes must demonstrate (1) that the interpretation was unforeseeable, and (2) that the party can produce new evidence that is different from evidence in the record and is directly responsive to the unanticipated interpretation. *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998). *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.6.6 Local Government Procedures – Hearings – When Required. Where LUBA remands a land use decision for inadequate findings, parties have no unqualified right to demand a hearing to present additional argument or evidence under *Morrison v. City of Portland*, 70 Or App 437, 689 P2d 1027 (1984). *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.6.6 Local Government Procedures – Hearings – When Required. A city rezoning decision conditioned on the applicant providing a geotechnical report and allowing the city to retain an independent engineer to ensure adequate monitoring and mitigation of environmental hazards during construction as part of the site development permit process, which does not provide for public hearings, does not defer discretionary decision making to a later stage of review. In that circumstance, the conditions are properly viewed as being designed to support the city's threshold finding that environmental hazards on the subject property do not impact adjoining properties in violation of comprehensive plan objectives. *Neighbors for Livability v. City of Beaverton*, 40 Or LUBA 52 (2001).

25.6.6 Local Government Procedures – Hearings – When Required. A nonbinding preliminary PUD approval is equivalent to a tentative decision following a pre-application conference or review, and therefore does not trigger the statutory requirement under ORS 227.175(3) for a public hearing or the right of local appeal to challenge a permit decision rendered without a prior public hearing. *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 21 (2001).

25.6.6 Local Government Procedures – Hearings – When Required. A finding of feasibility of compliance with a code standard requiring adequate fire protection, conditioned on the fire marshal's written approval of a proposed emergency turnaround, does not impermissibly defer a finding of compliance with that standard to a second stage of review that fails to provide notice and opportunity for hearing, where the finding of feasibility of compliance is based on evidence that the proposed emergency turnaround is acceptable to the fire marshal. *Mitchell v. Washington County*, 37 Or LUBA 452 (2000).

25.6.6 Local Government Procedures – Hearings – When Required. A local code provision requiring an "adequate turnaround" is not satisfied by deferring the decision concerning the design of the turnaround to the fire district where (1) there will be no opportunity for public comment or a hearing, and (2) designs required by the fire district will require adjustments to or elimination of one or more lots. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

25.6.6 Local Government Procedures – Hearings – When Required. In order for a county to find it is feasible to comply with a code requirement for an "adequate turnaround," it must have a proposed turnaround to review. The county may not defer development and approval of a proposed

turnaround to a later stage where there is no opportunity for public hearing. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

25.6.6 Local Government Procedures – Hearings – When Required. A local government has not deferred compliance with mandatory approval criteria where it grants tentative subdivision approval with the condition that development plans be reviewed by a geotechnical engineer prior to the issuance of construction permits. Once a local government has determined that compliance with a mandatory criterion is feasible, it may impose conditions of approval to ensure compliance with that criterion. No hearing on the geotechnical report is required. *Property Rights and Owners, Ltd. v. City of Salem*, 34 Or LUBA 258 (1998).

25.6.6 Local Government Procedures – Hearings – When Required. Where a local code requires that manufactured home parks "which contain land within the floodplain district" be subject to a "Type III" review, Type III review is required to approve a proposed manufactured home park, notwithstanding that no "development" is proposed for the portion of the park located in the floodplain district. *Johnston v. City of Albany*, 34 Or LUBA 32 (1998).

25.6.6 Local Government Procedures – Hearings – When Required. A county does not commit a procedural error where local ordinances allow the county to call up a hearings officer decision and refer it back for reconsideration without first providing an opportunity for a hearing. A party is not prejudiced by such a summary procedure where it is provided an opportunity to appeal the hearings officer's decision on reconsideration. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

25.6.6 Local Government Procedures – Hearings – When Required. ORS 197.175(10)(a) requires the city to provide, on appeal from a decision made without a hearing, at least one hearing at which any issue may be raised. *Johns v. City of Lincoln City*, 32 Or LUBA 195 (1996).

25.6.6 Local Government Procedures – Hearings – When Required. Where, on remand from LUBA, the county corrects an error in its decision, it is not required to follow the procedures that were required during the initial proceeding. *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76 (1996).

25.6.6 Local Government Procedures – Hearings – When Required. When the city zoning ordinance makes final approval of a tentative subdivision plan a limited land use decision appealable to LUBA, a decision applying the ordinance is not a "tentative decision" that can be appealed locally at a hearing pursuant to ORS 227.175(10). *Azevedo v. City of Albany*, 29 Or LUBA 516 (1995).

25.6.6 Local Government Procedures – Hearings – When Required. ORS 197.763 governs how a quasi-judicial land use hearing is conducted, not whether one is required. ORS 197.763 does not confer a right to a quasi-judicial land use hearing where such a right does not otherwise exist. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335 (1995).

25.6.6 Local Government Procedures – Hearings – When Required. *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), does not independently confer a right to a hearing

prior to a local government determination on compliance with particular code requirements, where none is conferred by the statutes or local regulations governing such land use decisions. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335 (1995).

25.6.6 Local Government Procedures – Hearings – When Required. Where LUBA remands a decision because the local decision maker failed to adopt findings explaining its determination of compliance with relevant approval standards, and the local decision maker was not required to hold a hearing before making its initial decision, the local decision maker is not required to hold a hearing on remand. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335 (1995).

25.6.6 Local Government Procedures – Hearings – When Required. Where LUBA remands a local government decision because it lacks findings of compliance with relevant approval standards, the local government must, at a minimum, conduct a hearing on remand to allow the parties an opportunity to present argument based on the possible interpretations to be adopted by the local government on remand. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

25.6.6 Local Government Procedures – Hearings – When Required. Where a local government is required to adopt a new decision on remand, it must conduct a hearing and provide notice of that hearing, at least for the purpose of allowing argument on the proposal's compliance with the standards to be addressed on remand. *Collins v. Klamath County*, 28 Or LUBA 553 (1995).

25.6.6 Local Government Procedures – Hearings – When Required. If a "permit" decision is erroneously is processed as a limited land use decision, without a public hearing or an opportunity to request a hearing through a local appeal, then the challenged decision is a "land use decision" made without providing a hearing, and the deadline for filing a notice of intent to appeal with LUBA is governed by ORS 197.830(3). *Fechtig v. City of Albany*, 27 Or LUBA 666 (1994).

25.6.6 Local Government Procedures – Hearings – When Required. Decisions concerning development of property applying the elements of equitable estoppel require the exercise of factual and legal judgment and, therefore, are permits. Where a local government fails to provide a local public hearing or opportunity for appeal of such a permit decision, the deadline for filing a notice of intent to appeal the decision to LUBA is governed by ORS 197.830(3). *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

25.6.6 Local Government Procedures – Hearings – When Required. Where a permit applicant receives a public hearing and decision from a local government and, under the local code, an appeal to the governing body may be decided without further public hearing, the governing body commits no error by denying the applicant's appeal at a public meeting without further notice or public hearing. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

25.6.6 Local Government Procedures – Hearings – When Required. Where the local code provides a possibility of, but not a right to, a second public hearing on appeal of a hearings officer's decision, the appeal may be denied without providing an additional public hearing, and the code need not include standards for determining whether to grant an additional public hearing. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

25.6.6 Local Government Procedures – Hearings – When Required. Where adoption of the challenged decision required the exercise of factual and legal judgment, the decision required the exercise of discretion and, consequently, approves a "permit." Under these circumstances, it is error for the local government to fail to provide petitioner with notice and opportunity for hearing, where at least some of petitioner's members were entitled to notice if a public hearing had been scheduled. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

25.6.6 Local Government Procedures – Hearings – When Required. Where the local code establishes procedures and notice requirements for hearings on administrative actions, but does not require that determinations of compliance with conditions imposed on administrative action approvals themselves be processed as administrative actions, proceedings to determine compliance with such conditions are not required to follow the hearing and notice procedures for administrative actions. *Von Lubken v. Hood River County*, 20 Or LUBA 208 (1990).

25.6.6 Local Government Procedures – Hearings – When Required. Where LUBA determined in a previous appeal that a local government properly found compliance with applicable code standards and, through conditions, deferred responsibility for developing particular technical solutions to the planning commission, and LUBA's decision was not appealed, the local government is entitled to determine compliance with the conditions of approval administratively, without notice and public hearing. *Von Lubken v. Hood River County*, 20 Or LUBA 208 (1990).

25.6.6 Local Government Procedures – Hearings – When Required. Where an amended code provides discretionary criteria for approval of minor land divisions, it is error for the code to fail to require or provide for notice and hearing before the local government makes a final decision concerning a proposed minor land division. *Nicolai v. City of Portland*, 19 Or LUBA 142 (1990).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A proposed land use that requires a conditional land use permit must be processed under quasi-judicial, rather than legislative, procedures where the applicable county code provision specifies that conditional uses in the exclusive farm use zone are subject to conditional use criteria and "shall be reviewed" according to the county's quasi-judicial review procedures. Further, according to *Strawberry Hill 4 Wheelers v. Board of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979), the Oregon Supreme Court established a three-factor test to determine whether a land use matter is quasi-judicial or legislative, and where all three factors indicate that the county's action is quasi-judicial in nature, the county also erred in processing the application under its legislative rather than its quasi-judicial procedures. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Where a county code provision governing the conduct of proceedings on remand is not limited by text or context to remands of quasi-judicial decisions, a county does not err in applying those provisions to govern the conduct of proceedings on remand of a legislative decision. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. An ordinance that amends the width and features of a buffer area between urban and rural lands is properly viewed as a legislative rather than quasi-judicial decision, where the ordinance was adopted as part of a legislative process that was not bound to result in a decision, the modified buffer affects over 135 acres of land that stretch over one mile in length, and the amendments potentially affect hundreds of property owners. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. That a comprehensive plan map amendment may be quasi-judicial, and therefore potentially approvable by a planning commission, does not mean relevant statutes may not require that action be taken by the governing body before the map amendment can become final and effective. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A hearings officer's decision on a property owner's request for an interpretation as to whether approving a floating home development in a zone that allows such development requires an exception to Goal 14 is a quasi-judicial decision rather than a legislative decision. Consequently, the "raise it or waive it" provisions of ORS 197.763(1) apply. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. The fact that some changes to uses allowed in a zoning district that are adopted by a legislative land use regulation amendment could also have been accomplished through a quasi-judicial rezoning decision does not provide a basis for recharacterizing a legislative land use decision as a quasi-judicial land use decision. *Stevens v. Clackamas County*, 68 Or LUBA 490 (2013).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A notice of decision's characterization of a decision as legislative when it is actually a quasi-judicial decision does not, in itself, warrant remand so long as the relevant criteria were applied and there were no

procedural errors that prejudiced petitioner's substantial rights. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Where a right-of-way vacation process was initiated by a city council and could be abandoned at any time after initiation, the first *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), factor, which is whether the process is bound to result in a decision, suggests the decision is legislative rather than quasi-judicial. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Where a right-of-way vacation decision was bound to "apply preexisting criteria to concrete facts,' the second *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), factor suggests the decision is quasi-judicial rather than legislative. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. The third *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), factor is whether the action is directed at a closely circumscribed factual situation or a relatively small number of persons. Where a decision vacates a vacant alley right-of-way over a small, 673-square-foot area with a handful of adjoining property owners, the third *Strawberry Hill 4 Wheelers* factor suggests the decision is quasi-judicial rather than legislative. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. The *Strawberry Hills 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979), factors for distinguishing between legislative and quasi-judicial decisions are difficult to apply to distinguish between legislative and quasi-judicial decisions in the land use context, since almost all land use decisions that are initiated by an application require that the decision making body reach a decision, and in almost all cases a land use decision maker is bound to apply some sort of "preexisting criteria to concrete facts." That leaves the third inquiry, "closely circumscribed factual situation," which the Court of Appeals has said is less important than the other inquiries. *Weber Coastal Bells v. Metro*, 64 Or LUBA 221 (2011).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Where the "preexisting criteria" that must be applied in approving a regional light rail facility are more in the nature of a delegation of authority to site the facility where the approving body prefers, the second of the *Strawberry Hills 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979), factors does not require that the decision be viewed as quasi-judicial. *Weber Coastal Bells v. Metro*, 64 Or LUBA 221 (2011).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. ORS 227.186(2), which requires that legislative acts be adopted by ordinance, does not apply retroactively to invalidate neighborhood boundaries that were established by resolution before ORS 227.186(2) took effect in 1998. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A quasi-judicial decision on an application for a property line adjustment is not transformed into a de facto legislative zoning code amendment simply because the property line adjustment is arguably inconsistent with an approval criterion. Such a decision is at most an erroneous quasi-judicial decision that may be subject to reversal or remand if timely appealed, but it does not abrogate or amend the zoning code. *Ebar v. Harney County*, 59 Or LUBA 201 (2009).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Where a petitioner alleges a county erred by adopting a land use decision as a legislative decision rather than a quasi-judicial decision, but petitioner identifies no error that resulted from adopting the decision as a legislative decision rather than a quasi-judicial decision, petitioner's allegations provide no basis for reversal or remand. *Carver v. Deschutes County*, 58 Or LUBA 323 (2009).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A land use decision that amends comprehensive plan and zoning ordinance text to create a new plan map and zoning map district, without applying that new district to any property, is properly viewed as a legislative decision rather than a quasi-judicial decision. *Carver v. Deschutes County*, 58 Or LUBA 323 (2009).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Under *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-603, 601 P2d 769 (1979), three factors are considered to distinguish between quasi-judicial and legislative decisions. The "apply existing criteria to concrete facts" factor is less important than the other two, particularly where the decision adopts new land use laws and does not apply those new laws or existing land use laws to grant land use approval for a single property or a small number of properties. *Carver v. Deschutes County*, 58 Or LUBA 323 (2009).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. While respondents may supply argument and record citations in support of a local governments' legislative decision to supplement any adopted findings, respondents cannot recharacterize or change a legislative decision's stated decision-making rationale to be something that is at odds with the decision-making rationale that is expressed in the legislative decision itself. *Friends of French Prairie v. Marion County*, 58 Or LUBA 387 (2009).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A decision that adds an aggregate mining site to the county's comprehensive plan inventory of significant mineral and aggregate resources and adopts background documents to the comprehensive plan, is a plan *text* amendment rather than a plan *map* amendment, and therefore under the county's code the decision is subject to procedures and standards applicable to legislative plan amendments. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A decision that amends the comprehensive plan and zoning maps for a 20-acre parcel in single ownership is properly viewed as a quasi-judicial decision under *Strawberry Hill 4 Wheelers*, and therefore the county erred in conducting the hearing and adopting the decision under legislative procedures,

which do not provide written notice to adjoining landowners. *Sullivan v. Polk County*, 49 Or LUBA 543 (2005).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Annexation of a portion of road with one owner, though not required to result in a decision, is quasi-judicial, and therefore must be supported by findings addressing applicable standards. *Patterson v. City of Independence*, 48 Or LUBA 155 (2004).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A city-initiated annexation involving an area of 310 acres consisting of 97 parcels that is neither bound to result in a decision, nor an action directed at a closely circumscribed factual situation or relatively small number of persons is a legislative rather than quasi-judicial decision under *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979). *Cutsforth v. City of Albany*, 48 Or LUBA 304 (2004).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A decision that repeals comprehensive plan text, adopts new plan text to allow for mixed-use development throughout the city, and applies newly adopted plan and zoning designations to a 275-acre property is a legislative "major plan change" rather than a quasi-judicial "minor plan change," where the local code definition limits "minor plan changes" to plan map changes. *Citizens for Protection of Neighborhoods v. City of Salem*, 47 Or LUBA 111 (2004).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Where a decision includes discrete determinations that, viewed in isolation, would constitute quasi-judicial decisions, whether the decision is viewed as legislative or quasi-judicial depends on the character of the whole decision. The entire decision will either be legislative or quasi-judicial, not a hybrid of both. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Assuming, without deciding, that it is reversible error to combine a unitary legislative proceeding with a geographically and otherwise unrelated site-specific proposal, a city decision that applies a height bonus to a particular property that is within a 535-acre study area subject to a number of legislative plan and land use regulation amendments is not geographically or otherwise unrelated to the legislative proceeding. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A city's decision to follow quasi-judicial procedures in adopting a decision concerning a two-mile long highway project affecting a large portion of the city does not convert a legislative decision into a quasi-judicial decision. A city need not require that parties in a legislative land use proceeding follow any particular order in presenting evidence. *Ramsey v. City of Philomath*, 46 Or LUBA 241 (2004).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Comprehensive plan and land use regulation amendments that affect two tax lots and 6.4 acres are correctly characterized as a "circumscribed factual situation" and "a relatively small number of persons" are affected, thus satisfying the third step of the three-step inquiry in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979), for determining whether a

proceeding is quasi-judicial rather than legislative in nature. *Thomas v. City of Veneta*, 44 Or LUBA 5 (2003).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Where an ordinance amends a number of different sections of zoning ordinance text, the ordinance is a legislative land use decision. That one of those zoning ordinance amendments may be directed at a small number of persons does not make the ordinance a quasi-judicial/legislative hybrid and does not obligate the city that enacted the ordinance to follow the quasi-judicial land use decision making procedures at ORS 197.763. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A decision that annexes property into city limits using quasi-judicial land use processes set out in the local code for such annexation decisions is reviewable as a quasi-judicial land use decision. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 546 (2003).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. As used in OAR 661-010-0025(1)(b), the term "placed before" is a term of art and does not merely describe the act of setting documents in front of the decision maker. Legislative decision making often involves less precisely defined procedures for compiling an evidentiary record than quasi-judicial decision making. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Given that ORS 197.299 requires Metro to review the supply of residential land within the Metro UGB at least every five years, Metro is not obligated to provide a quasi-judicial UGB amendment process, in addition to a legislative process, to ensure that the Metro UGB as a whole maintains an adequate supply of residential land. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. The speculative possibility that a subregional housing shortage will arise in the interim between the five-year UGB reviews required by ORS 197.299, and that Metro will decline to initiate a legislative proceeding to address that interim shortage, is an insufficient basis to establish that a quasi-judicial UGB amendment process is essential to ensure continued compliance with Goals 10 and 14. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Even assuming that the ORS 197.307(6) prohibition against procedures that "discourage needed housing through unreasonable cost or delay" applies to Metro, which does not process applications for development of needed housing, petitioner's speculation that Metro will delay initiating a legislative UGB amendment for housing needs is insufficient to establish that Metro's failure to also provide for a quasi-judicial UGB amendment process for housing need will result in "unreasonable delay." *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. ORS 197.620(1), which states that a decision not to adopt a legislative amendment or new land use regulation is not appealable to LUBA, does not explicitly or implicitly limit a local government's authority to define

what matters it will consider on a quasi-judicial or legislative basis. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176 (2002).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. The requirement imposed by *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973) for a fair and impartial tribunal does not apply to legislative land use proceedings. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A county decision to amend a property description of a significant aggregate site in its comprehensive plan to mirror the property description contained in its mineral sites inventory, along with other, unrelated policy and housekeeping amendments, is a legislative, and not a quasi-judicial, decision. *DeBell v. Douglas County*, 39 Or LUBA 695 (2001).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. The Portland City Code does not require that the city adopt findings of fact to support its legislative decisions. Therefore, on appeal to LUBA, the city may rely upon citations to the comprehensive plan, code, the record and arguments in its brief to demonstrate that the legislative decision is consistent with applicable plan and code provisions. *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 870 (2000).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. An annexation is a quasi-judicial decision if (1) the initiation of the annexation is bound to result in a decision; (2) the local government is bound to apply pre-existing criteria to concrete facts; and (3) the action is directed at a closely circumscribed factual situation or a relatively small number of persons. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. An annexation decision is not a quasi-judicial decision when the initiation of the annexation does not require that the city complete the process, and where the annexation applies to 155 parcels owned by 127 different persons. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A citywide zone change affecting only petitioners' proposed mobile home park is not directed at a closely circumscribed factual situation or a relatively small number of persons for purposes of the third factor described in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), where the decision does not address or hinge on details of petitioners' proposal, but rather on broader policies regarding regulation of mobile home parks. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Even if local policy allows a proposed amendment to be referred for further study and provides no express time requirement to make a final decision, the local decision maker is bound to reach a decision on a proposed plan amendment if a natural reading of local policy requires a final decision at some point in time. *Dean v. City of Oakland*, 33 Or LUBA 806 (1997).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Although evidence suggests that a local decision maker's deliberation of a proposed plan amendment was bound to result in a final decision, this fact does not conclusively establish that the decision was quasi-judicial. *Dean v. City of Oakland*, 33 Or LUBA 806 (1997).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. When the specific facts of a proposal drive the evaluation, and the final decision applies preexisting criteria to concrete facts, the decision satisfies the second of the *Strawberry Hill 4 Wheelers* factors, even if the local decision maker considers policy arguments in the decision's findings and conclusions. *Dean v. City of Oakland*, 33 Or LUBA 806 (1997).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A decision that affects an entire zone is more likely to be legislative. However, when the decision focuses primarily on specific provisions of a proposal and the characteristics of the land owned by the person making the proposal, the decision satisfies the third of the *Strawberry Hill 4 Wheelers* factors and may be quasi-judicial rather than legislative. *Dean v. City of Oakland*, 33 Or LUBA 806 (1997).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Where a local land use decision-making process is not bound to result in a decision and affects a large area with many owners, the resulting decision is a legislative decision. *Valerio v. Union County*, 33 Or LUBA 604 (1997).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. There is no legal requirement that decision makers disclose the substance of their site observations and provide an opportunity for rebuttal where the decision is legislative rather than quasi-judicial. *Valerio v. Union County*, 33 Or LUBA 604 (1997).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A city council may not convert an on-the-record quasi-judicial appeal of a planning commission decision into a *de novo* legislative hearing where the city code: (1) provides that legislative proceedings may only be commenced by the planning commission or city council, and the subject proceeding was initiated by an individual; (2) includes no provisions for converting a quasi-judicial appeal proceeding into a legislative proceeding; and (3) requires that appeals of planning commission quasi-judicial decisions be heard on the record. *Anderson v. City of Shady Cove*, 33 Or LUBA 173 (1997).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Even when an application involves a UGB amendment that would double the size of the city's urbanizable land, where the amendment is prompted by one development proposal, the city and county decisions to approve are "directed at a closely circumscribed factual situation," and under *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), the decisions are therefore quasi-judicial. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. When a proposal to amend the city and county zoning ordinances is bound to apply preexisting criteria to concrete

facts, but is neither bound to result in a decision nor directed at a closely circumscribed factual situation or a relatively small number of persons, the decision to amend is a legislative land use decision. *Waite v. City of La Grande*, 31 Or LUBA 77 (1996).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A county decision concerning a 2,400-foot section of a minor arterial which will affect more than 40 properties, accommodate 18,000 trips per day and is shown on a regional transportation plan as an arterial of regional significance is not a decision involving "a closely circumscribed factual situation or a relatively small number of persons," under *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979). *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Even if a local government committed a procedural error in following legislative rather quasi-judicial procedures, if the only claimed prejudice to petitioner's substantial rights is inadequate time to prepare its case and LUBA concludes the local government provided petitioner ample time to prepare its case, there is no basis for reversal or remand. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. ORS 215.503(2)(a), requiring all legislative acts related to comprehensive plans or zoning adopted by a county governing body to be by ordinance, applies to legislative decisions adopting or amending comprehensive plans and zoning ordinances, not to quasi-judicial plan or zone changes. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A comprehensive plan amendment is quasi-judicial in nature if it results from a private development application, must comply with criteria in the Statewide Planning Goals and the plan itself, and affects a specific area, involving one property owner and a single property. *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583 (1994).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Applying the three-factor analysis used by the Oregon Supreme Court in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), a city council-initiated ordinance amending the city code to list non-profit rehabilitation training centers as a conditional use in several of the city's residential zones is legislative in nature. *Andrews v. City of Brookings*, 27 Or LUBA 39 (1994).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. There is no legal requirement that local governments adopt findings in support of legislative land use decisions. Where a local government does not adopt findings explaining why a challenged legislative land use decision complies with applicable approval criteria, LUBA relies on the responding parties to provide argument and citations to the record to assist in the resolution of petitioners' allegations. *Andrews v. City of Brookings*, 27 Or LUBA 39 (1994).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. That a local government subsequently readopted a challenged decision changing the plan and zone designations of many properties, minus the plan and zone designation change affecting petitioner's property, is irrelevant to the question of whether the original decision itself is legislative or quasi-judicial. *McInnis v. City of Portland*, 27 Or LUBA 1 (1994).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Testimony and discussion concerning specific properties, presented during the course of legislative proceedings concerning many thousands of acres, owned and occupied by many thousands of people, does not convert such legislative proceedings into a collection of many quasi-judicial proceedings. *McInnis v. City of Portland*, 27 Or LUBA 1 (1994).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. In determining whether a decision is legislative or quasi-judicial, that the decision is "bound to apply preexisting criteria to concrete facts" should be given lesser weight where the decision also establishes new policy objectives. *McInnis v. City of Portland*, 27 Or LUBA 1 (1994).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. The proper test for determining whether a decision is quasi-judicial or legislative is set out in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979). However, no one of the three criteria set out in *Strawberry Hill* is determinative. *ODOT v. Klamath County*, 25 Or LUBA 761 (1993).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A local government decision not to adopt proposed plan and land use regulation amendments designating a single 10.5-acre property as a Goal 5 resource site is quasi-judicial, rather than legislative. *ODOT v. Klamath County*, 25 Or LUBA 761 (1993).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. ORS 215.130(1) indicates the legislature contemplated that legislative land use decisions could be adopted by the electorate. However, nothing exempts legislative land use decisions from the procedural and substantive requirements applicable to the enactment of legislation affecting land use. Therefore, a decision adopted by the electorate is subject to the requirements governing legislative land use decisions. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. While nothing requires that all legislative land use decisions be supported by findings, in order for LUBA to perform its review function, it is necessary either that legislative land use decisions be accompanied by findings of compliance with relevant legal standards or that respondents explain in their briefs how the legislative decision complies with applicable legal standards. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. There is no statutory requirement that legislative decisions be supported by substantial evidence. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A decision adopting an aggregate study, plan and zoning text amendments, and new zoning and plan map designations for six separate properties comprising 227 acres, and making recommendations for future action regarding one of the six properties, is correctly viewed as a whole and, so viewed, is legislative rather than quasi-judicial. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. A general plan policy concerning transportation safety does not require that findings supporting a legislative comprehensive plan transportation map amendment negate every potential safety problem that might result from future implementation of the improvements authorized by the plan amendment. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. ORS 197.835(7)(a)(C) does not require a legislative land use decision to be supported by substantial evidence. Where petitioners cite no independent basis for a requirement that the challenged legislative land use decision be supported by substantial evidence, petitioners provide no basis for reversal or remand. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. ORS 197.835(7)(a)(C) does not impose a substantive requirement that legislative land use decisions be supported by substantial evidence in the whole record. *Alexiou v. Curry County*, 22 Or LUBA 639 (1992).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. The factors which must be considered in determining whether a local government decision is quasi-judicial in nature are whether (1) the process is bound to result in a decision, (2) the decision is bound to apply preexisting criteria to concrete facts, and (3) the action is directed at a closely circumscribed factual situation or a relatively small number of persons. *Alexiou v. Curry County*, 22 Or LUBA 639 (1992).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. In determining whether a plan map amendment is quasi-judicial rather than legislative, the third of three factors to be considered under *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), is whether the decision is "directed at a closely circumscribed factual situation or a relatively small number of persons." A decision directed at a variety of transportation planning issues for a study area encompassing a large area of the city does not satisfy that factor. *Davenport v. City of Tigard*, 22 Or LUBA 577 (1992).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. That a plan map amendment is legislative rather than quasi-judicial does not mean that the statewide planning goals or comprehensive plan or code provisions do not apply to the decision. Neither does it necessarily mean findings in support of the decision are not required. *Davenport v. City of Tigard*, 22 Or LUBA 577 (1992).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Where substantive approval standards are the same, a local government error in characterizing a plan map

amendment as legislative, rather than quasi-judicial, is procedural in nature and warrants reversal or remand only if petitioners demonstrate their substantial rights were prejudiced because of failure to provide the procedural safeguards required in a quasi-judicial proceeding. *Gray v. Clatsop County*, 22 Or LUBA 270 (1991).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Individual written notice of decision is not required for a county to make a legislative land use decision. *Crone v. Clackamas County*, 21 Or LUBA 102 (1991).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Both legislative and quasi-judicial land use decisions must comply with applicable land use standards, including the statewide planning goals. *Jentzsch v. City of Sherwood*, 20 Or LUBA 575 (1991).

25.7 Local Government Procedures – Legislative/Quasi-judicial Distinction. Findings addressing land use standards may or may not be required to support a legislative land use decision. However, the absence of such findings has no bearing on whether a decision actually is a land use decision. *Jentzsch v. City of Sherwood*, 20 Or LUBA 575 (1991).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. A county may not defer a determination of compliance with applicable approval criteria to a future proceeding that does not allow for public participation merely because the deferred criteria require no interpretation or judgment. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. Where issuing a floodplain review permit requires calculating whether the cumulative effect of a proposed development in a designated floodplain increases the base flood elevation more than one foot, and that calculation can require either interpretation or the exercise of legal judgment, a decision to issue the permit is a land use decision. *Johnson v. Jackson County*, 59 Or LUBA 94 (2009).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. In determining that an increase from a 32 to 60 bed homeless shelter would not have significant additional impacts on surrounding properties, that there is a justifiable change in circumstances, and that a previous condition of approval is satisfied – the city exercised significant discretion and was required under its code to provide notice and the opportunity for a hearing. *Allan Donald Bruckner Trust v. City of Bend*, 56 Or LUBA 699 (2008).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. In applying a zoning code process that permits ministerial correction of zoning maps to conform to the map or legal description that was adopted by or referenced in the enacting ordinance, the first step is to locate the relevant map or legal description, and the second step is to determine whether a nondiscretionary correction is possible based on that map or legal description. *6710 LLC v. City of Portland*, 40 Or LUBA 389 (2001).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. A Land Use Compatibility Statement requirement that a proposal to apply process water from a fruit processing operation to EFU-zoned land must "comply with all applicable local land use requirements" requires at a minimum that the county determine whether the proposal is a farm use and whether it is a utility facility. These determinations require the exercise of sufficient discretion that the county's decision is both a "land use decision" and a "permit," as those terms are defined by statute. *Farrell v. Jackson County*, 39 Or LUBA 149 (2000).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. A decision that disposal of sewage effluent by applying it to farm land constitutes a "utility facility necessary for public service" within the meaning of ORS 215.283(1)(d) requires the exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of land use decision provided by ORS 197.015(10)(b)(A) for certain ministerial decisions. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. A decision that disposal of sewage effluent by applying it to farm land constitutes a "farm use" within the meaning of ORS 215.203 requires the exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of "land use decision" provided by ORS 197.015(10)(b)(A) for certain ministerial decisions. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. A decision authorizing construction of facilities necessary to apply sewage effluent to farm land constitutes the approval of a "proposed development of land" and thus is a "permit" within the meaning of ORS 215.215.402(4) if the decision involves the exercise of discretion. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. A decision that a proposal to transport treated effluent to an EFU-zoned parcel and apply that effluent to poplar trees constitutes a "farm use" within the meaning of ORS 215.283(1)(d) requires the exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of land use decision provided by ORS 197.015(10)(b)(A) for certain ministerial decisions. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. A decision authorizing construction of a lagoon on EFU-zoned land to store treated effluent constitutes the approval of a "proposed development of land" and thus constitutes a "permit" within the meaning of ORS 215.402(4) if the decision involves the exercise of discretion. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. The calculation of the amount of a tree preservation performance bond is ministerial, and does not require further city council review. *Squires v. City of Portland*, 31 Or LUBA 335 (1996).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. Decisions concerning development of property applying the elements of equitable estoppel require the exercise of factual and legal judgment and, therefore, are permits. Where a local government fails to provide a local public hearing or opportunity for appeal of such a permit decision, the deadline for filing a notice of intent to appeal the decision to LUBA is governed by ORS 197.830(3). *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. Where determining whether an existing quarry qualifies as a nonconforming use under applicable city code provisions requires a city to determine whether the existing quarry lawfully existed at the time the existing zoning was last amended and whether the use has been discontinued for a year, the nonconforming use determination involves the exercise of significant legal and factual judgment and is a "permit" as that term is used in ORS 227.160(2). *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. Where an amended code provides discretionary criteria for approval of minor land divisions, it is error for the code to fail to require or provide for notice and hearing before the local government makes a final decision concerning a proposed minor land division. *Nicolai v. City of Portland*, 19 Or LUBA 142 (1990).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. Code provisions requiring that existing streets will not be "partially or fully blocked" and "[a]ccess to adjacent property from streets * * * will not be partially or fully eliminated," do not require the exercise of interpretation or judgment. *Nicolai v. City of Portland*, 19 Or LUBA 142 (1990).

25.8 Local Government Procedures – Discretionary/Ministerial Distinction. A code provision requiring that "[a]ll requirements of the City Engineer must be met" is discretionary where there are no standards to guide the planning director in choosing between (1) denying the application because the engineer's requirements are not met, or (2) determining it is feasible to satisfy the city engineer's requirements and imposing conditions requiring the engineer's criteria be met. *Nicolai v. City of Portland*, 19 Or LUBA 142 (1990).

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

25.9 Local Government Procedures – Formalities of Decisions. Just as the non-prevailing party in a quasi-judicial land use proceeding has no right to object to or rebut a proposed written final decision and supporting findings that are prepared by the prevailing party in a quasi-judicial land use proceeding, the non-prevailing party has no right to participate in that process and no right to notice that the prevailing party is working with planning staff to prepare a proposed final decision and supporting findings for the local decision maker to adopt. *Rawson v. Hood River County*, 77 Or LUBA 571 (2018).

25.9 Local Government Procedures – Formalities of Decisions. Where a hearings officer denies an application on multiple grounds, it may be prudent and appropriate for governing body, when affirming one basis for denial, to address all other bases for denial. However, absent authority that requires the governing body to address all issues raised on local appeal, or to address and resolve all bases for denial, the governing body commits no error in failing to address all bases for denial identified in the hearings officer's decision. *Kine v. Deschutes County*, 75 Or LUBA 407 (2017).

25.9 Local Government Procedures – Formalities of Decisions. Where two county commissioners are disqualified from participating in a decision on a local appeal of a permit approval decision, the final written decision reflecting that action would look somewhat different from a decision on the merits of the local appeal. But the requirement in OAR 661-010-0010(3) that a decision must be reduced to writing before it can become final does not depend on the nature of the decision. *Rogue Advocates v. Josephine County*, 73 Or LUBA 98 (2016).

25.9 Local Government Procedures – Formalities of Decisions. ORS 197.015(10)(b)(H) is silent regarding what procedures a local government may apply to a request for a land use compatibility statement (LUCS). LUBA's conclusion that a LUCS decision is excluded from LUBA's jurisdiction does not mean that the county lacked "land use jurisdiction" to process the LUCS request pursuant to land use procedures that provide for local appeal. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

25.9 Local Government Procedures – Formalities of Decisions. A city errs when it accepts an appeal of a decision to deny a permit, holds an appeal hearing, and fails to issue a written decision on the appeal. ORS 227.173(3) requires the city to issue a written decision. *Smith v. City of Gearhart*, 71 Or LUBA 184 (2015).

25.9 Local Government Procedures – Formalities of Decisions. That a planning staff decision is initialed but not signed, and does not take the form of an "order," does not render that decision

void or otherwise constitute reversible error, where the petitioner does not identify any code provision or other authority that requires a planning staff decision to take the form of a signed order. *Kane v. City of Beaverton*, 64 Or LUBA 351 (2011).

25.9 Local Government Procedures – Formalities of Decisions. That a planning commission deliberated only briefly in making a land use decision does not violate ORS 192.620, which states a policy that the "Oregon form of government requires an informed public aware of deliberations and decisions by governing bodies[.]" Assuming ORS 192.620 applies to a planning commission decision, the statute does not require deliberations of any particular duration or quality. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

25.9 Local Government Procedures – Formalities of Decisions. The ORS 203.045(3) general requirement that county ordinances be fully read in an open meeting on two days at least 13 days apart does not apply in cases where the ordinance is authorized by another statute. Although ORS 215.050(1) does not expressly require or authorize counties to adopt comprehensive plans by ordinance, the statute is properly interpreted to authorize counties to do so. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

25.9 Local Government Procedures – Formalities of Decisions. The ORS 203.045(3) general requirement that county ordinances be fully read in an open meeting on two days at least 13 days apart does not apply in cases where the ordinance is authorized by another statute. Although ORS 215.050(1) does not expressly require or authorize counties to adopt comprehensive plans by ordinance, the statute is properly interpreted to authorize counties to do so. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

25.9 Local Government Procedures – Formalities of Decisions. An alleged inconsistency between the oral decision by the governing body and the final written decision signed on the governing body's behalf by the planning director is at most harmless error and is not itself a basis for remand, where the governing body's decision must be remanded for additional findings in any case, and the decision on remand will supersede the challenged decision, rendering any error moot. *O'Rourke v. Union County*, 54 Or LUBA 614 (2007).

25.9 Local Government Procedures – Formalities of Decisions. A member of the governing body, who was absent from the meeting at which a land use application was orally approved, but who otherwise participated throughout the local proceedings, may properly sign the final written decision. *Sommer v. Josephine County*, 49 Or LUBA 134 (2005).

25.9 Local Government Procedures – Formalities of Decisions. City planning staff cannot informally modify or void two earlier final, written decisions issued pursuant to code-required procedures that altered the deadlines for filing a final plat approval application. At a minimum, modification or revocation of those final, written decisions to restore the original deadline must be accomplished by a final, written decision. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282 (2004).

25.9 Local Government Procedures – Formalities of Decisions. A final, written decision that effectively, if implicitly, restores the original deadline for filing the final subdivision plat

application, and then extends that deadline, is properly viewed as a modification or revocation of an earlier decision that places the tentative plat approval on inactive status, subject to a different final plat application deadline. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282 (2004).

25.9 Local Government Procedures – Formalities of Decisions A petitioner's substantial rights include the right to a final written decision by the final decision maker on petitioner's local appeal. An allegation that the city council failed to adopt a final written decision on petitioner's appeal is sufficient to allege prejudice to petitioner's substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

25.9 Local Government Procedures – Formalities of Decisions. A notice of decision and a set of findings drafted by the city planning director are not part of the city council's final decision, where the documents are not signed or approved by the city council, and nothing in the record indicates that the city council adopted or otherwise incorporated those documents into its decision. petitioner's appeal is sufficient to allege prejudice to petitioner's substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

25.9 Local Government Procedures – Formalities of Decisions. Once a planning commission decision is appealed to the city council, the planning commission decision cannot become the city's final decision on the application, although it may be adopted or incorporated as part of the city council's final decision. petitioner's appeal is sufficient to allege prejudice to petitioner's substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

25.9 Local Government Procedures – Formalities of Decisions. Where a city council fails to adopt any document as its written decision on a local appeal, the city council action as reflected in minutes adopted by the city council may constitute the city council's final written decision on the appeal, although defects or inadequacies that flow from adopting a written decision in that form may be a basis for reversal or remand. petitioner's appeal is sufficient to allege prejudice to petitioner's substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

25.9 Local Government Procedures – Formalities of Decisions. A city council decision approving a subdivision with modifications for required road access must be remanded where it is unclear which documents if any the city council adopted as part of its decision, and the city council decision includes no findings explaining the modification, or reducing the required road access to a condition of approval. petitioner's appeal is sufficient to allege prejudice to petitioner's substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

25.9 Local Government Procedures – Formalities of Decisions. In an appeal to LUBA of a county decision that a 6.67-acre portion of a 10-acre parcel is not a legally created developable parcel, preclusive legal effect need not be given to separate 1989 and 1993 decisions recognizing the legality of the remaining 3.33-acre parcel, where the 1989 decision was essentially no more than the county's acquiescence to the property owner's desire to have the property recognized as a separate parcel and the 1993 decision includes a finding that the decision maker was bound by the 1989 decision. *DeBoer v. Jackson County*, 43 Or LUBA 219 (2002).

25. 9 Local Government Procedures – Formalities of Decisions. Draft minutes that are prepared after a notice of a land use decision has been mailed and the 21-day deadline for filing appeals at LUBA has ended may not be used by a local government as the written final decision. *Martin v. City of Dunes City*, 43 Or LUBA 354 (2002).

25.9 Local Government Procedures – Formalities of Decisions. A local government quasi-judicial land use decision maker is not legally required to verbally explain how all legal and evidentiary issues are resolved. It is the written decision that the decision maker ultimately adopts that is subject to LUBA's review on appeal. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

25.9 Local Government Procedures – Formalities of Decisions. The practice of incorporating other documents as findings runs the risk of adopting inconsistent findings. However, where a decision expressly incorporates other documents as findings, such an express incorporation is sufficient to adopt the other document as findings. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998).

25.9 Local Government Procedures – Formalities of Decisions. Where more than one site plan appears in the record, a local government errs if its decision does not adequately identify which site plan is approved. *Brown v. City of Portland*, 33 Or LUBA 700 (1997).

25.9 Local Government Procedures – Formalities of Decisions. For purposes of ORS 215.428(1), a decision is not "final" at the time the oral decision is made where the local code provides the decision becomes final 10 days after the written decision is filed unless the county board grants a rehearing on its own motion. *Miller v. Multnomah County*, 33 Or LUBA 644 (1997).

25.9 Local Government Procedures – Formalities of Decisions. Backdating of a final written decision to correspond to the date of an earlier oral decision denying an application does not constitute an action taken to avoid the 120-day rule established by ORS 215.428, within the meaning of ORS 197.835(10)(a)(B), when the denial was made on the merits and not for the purpose of avoiding the 120-day rule. *Miller v. Multnomah County*, 33 Or LUBA 644 (1997).

25.9 Local Government Procedures – Formalities of Decisions. Where a local code does not specify a date upon which a decision becomes final, OAR 661-10-010(3) specifies that the decision becomes final on the date it is reduced to writing and signed by the decision maker. *Adams v. City of Ashland*, 33 Or LUBA 552 (1997).

25.9 Local Government Procedures – Formalities of Decisions. Erroneous information provided by the county to the petitioner does not change the date upon which a decision becomes final. *Friends of Yamhill County v. Yamhill County*, 33 Or LUBA 530 (1997).

25.9 Local Government Procedures – Formalities of Decisions. If local ordinance does not define when a decision becomes final, it becomes final under OAR 661-10-010(3) when it is reduced to writing and bears the necessary signatures of the decision makers, regardless of the date notice of the decision is sent or erroneous information provided in that notice. *DeBates v. Yamhill County*, 33 Or LUBA 526 (1997).

25.9 Local Government Procedures – Formalities of Decisions. The failure of a city council expressly to consider denial of an application is not a basis for reversal or remand when the city council concluded the record supported approval. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

25.9 Local Government Procedures – Formalities of Decisions. While a local government can make a de facto land use decision without satisfying procedural or substantive requirements for a land use decision, a county does not make a de facto land use decision by merely acquiescing to a property owner's desired characterization of his property. *Higgins v. Marion County*, 30 Or LUBA 426 (1996).

25.9 Local Government Procedures – Formalities of Decisions. Under OAR 661-10-010(3), a document containing findings of fact and conclusions of law that is signed by the mayor and attested by the city recorder is a final decision, but if the city has no authority to take the action reflected in the decision, the final decision is not a land use decision. Subsequent adoption with authority is a land use decision appealable to LUBA. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

25.9 Local Government Procedures – Formalities of Decisions. Where the challenged decision is that of the governing body, made on appeal from a planning commission decision, allegations of procedural error in the manner in which the planning commission adopted its order and findings do not provide a basis for reversal or remand. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

25.9 Local Government Procedures – Formalities of Decisions. Because petitioners do not have a right to seek a referendum on a quasi-judicial land use decision, a local government error in adopting such a decision as an emergency ordinance provides no basis for reversal or remand. *Neuman v. City of Albany*, 28 Or LUBA 337 (1994).

25.9 Local Government Procedures – Formalities of Decisions. Where a local code provides that a planning commission decision becomes final 10 days after "submittal" of the written decision to the clerk of the governing body, the local government is not clearly wrong in interpreting "submittal" to the clerk to mean "receipt" by the clerk, and its interpretation will be sustained. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

25.9 Local Government Procedures – Formalities of Decisions. That a local government's final written order may not accurately reflect oral comments made by the local decision maker during its deliberations provides no basis for reversal or remand of a challenged decision. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

25.9 Local Government Procedures – Formalities of Decisions. ORS 197.190(1) and 268.285(1) both require that a Metropolitan Service District decision to coordinate be an action taken "through its governing body." Where the product of a Metro sponsored mediation is not formally adopted by the Metro governing body, it does not constitute an exercise of Metro's coordination obligation under those statutes. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

25.9 Local Government Procedures – Formalities of Decisions. That a stipulation concerning the applicability of a local government's land use regulations to certain property is entered into by the local government and a property owner outside the confines of a land use proceeding and without following the procedures required for land use decision making does not make the decision any less a land use decision. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

25.9 Local Government Procedures – Formalities of Decisions. Where a local governing body has not adopted regulations providing for reconsideration of its decisions, the governing body commits no error by denying a request to reconsider a decision, where the request was received after the final written order is entered. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

25.9 Local Government Procedures – Formalities of Decisions. Absent some legal requirement to the contrary, a local government is not bound to assure that its final written decision conforms to its oral decision in all particulars. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

25.9 Local Government Procedures – Formalities of Decisions. LUBA reviews the local government's final written order. That the final written order may not accurately reflect oral comments made by the local decision maker during its deliberations provides no basis for reversal or remand of the challenged decision. *Derry v. Douglas County*, 26 Or LUBA 25 (1993).

25.9 Local Government Procedures – Formalities of Decisions. It is a local government's final written decision that is subject to LUBA's review. That conditions imposed in the local government's final written decision were not discussed in the decision maker's deliberations does not provide a basis for reversal or remand. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

25.9 Local Government Procedures – Formalities of Decisions. In determining the nature and scope of the challenged decision, the language of (1) a prior and related determination, (2) an earlier major partition application pertaining to the subject land, and (3) the challenged decision itself, are instructive. *Woosley v. Marion County*, 24 Or LUBA 231 (1992).

25.9 Local Government Procedures – Formalities of Decisions. Where nothing in the caption, findings or decision itself suggests that the challenged decision approves a lot line adjustment, a lot line adjustment was not approved. *Barker v. City of Cannon Beach*, 24 Or LUBA 221 (1992).

25.9 Local Government Procedures – Formalities of Decisions. Alleged errors in the manner in which the findings of a lower level local decision maker were adopted, are harmless if the final decision was properly adopted by the final decision maker. *Rath v. Hood River County*, 23 Or LUBA 200 (1992).

25.9 Local Government Procedures – Formalities of Decisions. Where a challenged decision defers consideration of certain code mandatory approval standards until a later stage, but fails to provide that such later stage will include the full opportunity for public involvement provided at the initial stage, and where nothing in the local code requires such opportunity to be provided in any subsequent proceedings, the decision to defer consideration of such mandatory standards

constitutes a basis for remand of the challenged decision. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992).

25.9 Local Government Procedures – Formalities of Decisions. There is no prohibition against a local government making a tentative oral decision on a permit application, followed by adoption of a final written decision containing its supporting findings. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992).

25.9 Local Government Procedures – Formalities of Decisions. LUBA reviews the decision maker's final written decision, not statements made during the proceedings leading to adoption of the challenged decision. Such statements are preliminary and subject to change in the final decision. *Toth v. Curry County*, 22 Or LUBA 488 (1991).

25.9 Local Government Procedures – Formalities of Decisions. A statement in the challenged decision that all oral and written information received during the local proceedings are "incorporate[d] by reference" is not sufficiently specific to adopt particular documents in the local record as findings in support of the decision. *Cecil v. City of Jacksonville*, 19 Or LUBA 446 (1990).

25.10 Local Government Procedures – Necessity for Objections to. A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.10 Local Government Procedures – Necessity for Objections to. While the "raise it or waive it" requirement of ORS 197.763(1) and 197.835(3) does not apply to legislative proceedings, where a party has an opportunity to object to a procedural error during a legislative proceeding, the party must do so in order to seek remand based on that error. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

25.10 Local Government Procedures – Necessity for Objections to. A party asserting a procedural error must demonstrate that the procedural error was objected to during the proceedings below, if there was an opportunity to lodge an objection. Accordingly, where a dispute may exist regarding whether petitioners objected to the county's process during the proceedings below, LUBA will allow a motion to take evidence outside the record to consider a document for the limited purpose of allowing petitioners to cite to that document to establish, if the point is disputed in a response brief, that petitioners attempted to lodge objections to the county's process. *Eng v. Wallowa County*, 79 Or LUBA 1024 (2019).

25.10 Local Government Procedures – Necessity for Objections to. Where a county's notice described a proposed project as a bed and breakfast inn and campground, but the county only approved the bed and breakfast inn but not the campground, petitioners had an inadequate opportunity to object to the alleged procedural error because they could not know until the county issued its decision that the final decision would approve something different than the proposal that was noticed. *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

25.10 Local Government Procedures – Necessity for Objections to. ORS 197.830(3) operates to potentially allow a petitioner a delayed period of time to file a LUBA appeal, but it is not a source of procedural requirements that a local government approved development that differs from the development described in the notice of hearing is not procedural error. *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

25.10 Local Government Procedures – Necessity for Objections to. Where a petitioner did not raise the issue in its filed statement of appeal before the hearings officer that street tree planting is required only when a new street is created, a planning commission exceeds its authority by

considering the issue under the local code provisions governing the scope of appeals to the planning commission. *Rockbridge Capital v. City of Eugene*, 75 Or LUBA 364 (2017).

25.10 Local Government Procedures – Necessity for Objections to. A local government's failure to inquire whether any hearing participants wish to submit a written request for a continued hearing, as required by its local procedural rules, does not provide a basis for remand, where the petitioner's representative was present at the hearing, had the opportunity to object to the decision-maker's failure to make the inquiry, but failed to object. *Pliska v. Umatilla County*, 61 Or LUBA 429 (2010).

25.10 Local Government Procedures – Necessity for Objections to. A petitioner's failure to object to untimely disclosure of a site visit and to request the opportunity to rebut the site visit precludes assigning error to that disclosure, where the disclosure was made 10 days prior to the hearing at which the local government adopted the final decision, and petitioner could have entered an objection at any time during those 10 days or during the final hearing, but did not. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

25.10 Local Government Procedures – Necessity for Objections to. Where the petitioner has an opportunity to object to an alleged procedural error in referring a decision to the planning commission, but fails to object, that alleged error cannot be assigned as a reason for reversal or remand. *Nelson v. Curry County*, 47 Or LUBA 196 (2004).

25.10 Local Government Procedures – Necessity for Objections to. Any right that a party may have to rebut new evidence under *Fasano* or ORS 197.763(6)(b) requires that the party contemporaneously assert that right of rebuttal at the time the new evidence is submitted, so that the local government can rule on the merits of the request and allow an appropriate opportunity for rebuttal where such an opportunity is warranted. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

25.10 Local Government Procedures – Necessity for Objections to. A party may not wait until the local government concludes an evidentiary hearing, closes the record, deliberates and adopts its oral decision, and convenes a final hearing to review the written decision, before objecting to an alleged procedural error in failing to respond to that party's non-specific request to continue the evidentiary hearing. Such an objection is untimely. *Doty v. Jackson County*, 43 Or LUBA 34 (2002).

25.10 Local Government Procedures – Necessity for Objections to. Where the applicants were aware that the local government's schedule failed to include time for the submission of written legal arguments as provided for by ORS 197.763(6)(e) and the applicants informed the local government that if they had objections to the process, they would "file" objections with the county counsel, the county could assume that the applicants waived their right to submit final written arguments, when the applicants failed to file objections. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368 (1999).

25.10 Local Government Procedures – Necessity for Objections to. Where a decision maker discloses the existence but not the substance of *ex parte* communications at the beginning of the

public hearing, and despite being given an opportunity to do so petitioner fails to object to the inadequacy of the decision maker's disclosure, petitioner has waived the right to raise the decision maker's inadequate disclosure of *ex parte* communications before LUBA as a basis for reversal or remand of the challenged decision. *Mulford v. Town of Lakeview*, 36 Or LUBA 715 (1999).

25.10 Local Government Procedures – Necessity for Objections to. Where a revised site plan is introduced after the close of the record, and evidence exists that petitioner was aware of the addition but did not object below, that procedural error does not justify reversal or remand by LUBA. *Brown v. City of Portland*, 33 Or LUBA 700 (1997).

25.10 Local Government Procedures – Necessity for Objections to. Where a party has the opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the local government's decision in an appeal to LUBA. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

25.10 Local Government Procedures – Necessity for Objections to. Where a party has the opportunity to object to a procedural error before a local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the local government decision in an appeal to LUBA. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

25.10 Local Government Procedures – Necessity for Objections to. Where members of a local decision making body disclose, at the beginning of the initial evidentiary hearing, that they made site visits to the subject property, and petitioners fail to object to the adequacy of that disclosure, insufficiency of the disclosure cannot be assigned as grounds for reversal or remand. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

25.10 Local Government Procedures – Necessity for Objections to. A petitioner may not assert his own *ex parte* contacts with the decision maker as a basis for reversal or remand, where the contacts were disclosed and petitioner did not object to the adequacy or completeness of the disclosure. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

25.10 Local Government Procedures – Necessity for Objections to. Where (1) a local decision maker makes a procedural error in allowing new evidence to be submitted during an on-the-record review; (2) petitioners object to receipt of that new evidence; and (3) the local decision maker does not provide petitioners with an opportunity to rebut the new evidence; LUBA will remand the challenged decision for the local decision maker to provide the required opportunity for rebuttal. *Tucker v. Douglas County*, 28 Or LUBA 134 (1994).

25.10 Local Government Procedures – Necessity for Objections to. Where a party has the opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of a local government decision in an appeal to LUBA. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

25.10 Local Government Procedures – Necessity for Objections to. Where petitioner had an opportunity during the local proceedings to object to the completeness of a hearings officer's disclosure of *ex parte* contacts, but failed to do so, petitioner's motion for an evidentiary hearing

at LUBA to present evidence concerning those *ex parte* contacts will be denied. *Jones v. Lane County*, 27 Or LUBA 654 (1994).

25.10 Local Government Procedures – Necessity for Objections to. ORS 197.763(1) and 197.835(2) do not supersede LUBA's prior rulings that where a party has an opportunity locally to object to a *procedural* error, at any stage of the local government proceedings, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the local government's decision in an appeal to LUBA. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

25.10 Local Government Procedures – Necessity for Objections to. Where petitioners reasonably relied on a local code provision and hearing notice stating the governing body's review is limited to the evidentiary record before the planning commission, and were unaware that materials not in the planning commission record were placed before the governing body, petitioners do not waive their right to assert this error before LUBA by failing to object to it below. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

25.10 Local Government Procedures – Necessity for Objections to. Where petitioner failed to object to the board of commissioners concerning the county's failure to comply with the procedural requirements of ORS 197.763 in the notice of, and announcement at, a planning commission hearing, petitioner cannot assign those errors as a basis for reversing or remanding the county's decision. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

25.10 Local Government Procedures – Necessity for Objections to. If petitioners were present at a local government meeting when an alleged procedural error occurred, petitioners must enter an objection in order to preserve their right to raise that procedural error in an appeal to LUBA, even where the local evidentiary record had previously been closed and there was no scheduled opportunity for public input at the meeting in question. *Horizon Construction, Inc. v. City of Newberg*, 23 Or LUBA 159 (1992).

25.10 Local Government Procedures – Necessity for Objections to. A petitioner may not assert the occurrence of his own *ex parte* contacts with the decision maker as a basis for reversal or remand, where the contacts were disclosed and petitioner did not object to the adequacy or completeness of the disclosure of such *ex parte* contacts. *Toth v. Curry County*, 22 Or LUBA 488 (1991).

25.10 Local Government Procedures – Necessity for Objections to. If petitioners were present at a local government meeting when an alleged procedural error occurred, petitioners must make their objections known to the decision making body below in order to assign the procedural error as a basis for reversal or remand by LUBA. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

25.10 Local Government Procedures – Necessity for Objections to. Where a party has the opportunity to object to a *procedural* error before the local government, but fails to do so, that error cannot be assigned as a basis for reversal or remand of the local government's decision in an appeal to LUBA. *Torgeson v. City of Canby*, 19 Or LUBA 511 (1990).

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

25.11 Local Government Procedures – Action After Remand. That an alteration to a proposed PAPA is required by LUBA's decision in a prior appeal and reduces the subject acreage does not mean as a matter of law that the proposed PAPA is not "altered to such an extent that the materials submitted no longer reasonably describe the proposed change," thereby requiring notice of the alteration to DLCD pursuant to ORS 197.610(6). *Save TV Butte v. Lane County,* 80 Or LUBA 422 (2019).

25.11 Local Government Procedures – Action After Remand. According to the "law of the case" pursuant to *Beck v. City of Tillamook,* 313 Or 148, 831 P2d 678 (1992), matters conclusively resolved before LUBA cannot be relitigated in subsequent appeals of subsequent decisions on the same matter. However, that principle is not violated where (1) LUBA remands to the county to adopt new findings, based on substantial evidence, and (2) on remand, the county accepts new evidence and adopts new findings, as LUBA directed. Where LUBA's original decision discussed certain requirements to provide guidance and framework on remand, and some of the county's findings are still insufficient on remand does not mean that the county violated the "law of the case." *Richards v. Jefferson County,* 79 Or 171 (2019).

25.11 Local Government Procedures – Action After Remand. On remand, where LUBA instructed the county to resolve whether the project applicant's farm operation qualifies as a "commercial farming operation" for purposes of applying for an accessory farm dwelling for a relative, LUBA established that certain findings and evidence are necessary to establish compliance with OAR 660-033-0130(9). The county's findings fall short of establishing that the applicant's farm operation qualifies as a "commercial farming operation," because it is an undefined term, and it is the county's obligation to attempt to articulate the thresholds that separate a "commercial" from a non-commercial farming operation, and to determine those thresholds in the first instance. Although the county has some discretion to determine the thresholds, that determination will necessarily constitute a mixed question of fact and law, subject to LUBA's review for legal error and evidentiary sufficiency. *Richards v. Jefferson County,* 79 Or 171 (2019).

25.11 Local Government Procedures – Action After Remand. The focus of OAR 660-033-0130(9) and county code that implements it regarding whether the "farm operator * * * continue[s] to play the predominant role in the management and farm use of the farm," is on the farm operator's involvement in farm operations *on the subject property*, not on off-farm businesses that may relate to the farm operation. The commercial farm operator's involvement in off-farm businesses do not help establish any element of OAR 660-033-0130(9). The commercial farm operator's involvement in off-farm businesses are relevant to establishing the elements of OAR 660-033-0130(9) only in so much as the time spent on those businesses and away from the farm operation might undermine the claim that the farm operator will continue to play the "predominant role" in the farm operation and requires assistance in running the farm operation. *Richards v. Jefferson County,* 79 Or 171 (2019).

25.11 Local Government Procedures – Action After Remand. Where LUBA's review of an historic review board decision resulted in LUBA remanding the decision for the historic review board to answer threshold jurisdictional questions, but no issue was presented to LUBA regarding who the decision maker on remand should be, the city council does not err by addressing and answering those threshold jurisdictional questions on remand, instead of allowing the historic review board to answer those questions. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

25.11 Local Government Procedures – Action After Remand. Where local law does not dictate the historic review board must be the decision maker that decides whether it has jurisdiction to proceed with a historic land mark designation proposal after the property owner has refused to consent to the historic designation under ORS 197.772(1), a city council does not err by deciding those jurisdictional questions following a LUBA remand of a historic review board decision that failed to address those jurisdictional questions. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

25.11 Local Government Procedures – Action After Remand. Where a county code provision governing the conduct of proceedings on remand is not limited by text or context to remands of quasi-judicial decisions, a county does not err in applying those provisions to govern the conduct of proceedings on remand of a legislative decision. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

25.11 Local Government Procedures – Action After Remand. ORS 215.050 and 215.060 require the county governing body to approve revisions to the comprehensive plan and to conduct at least one hearing on proposed revisions. A county violates ORS 215.050 and 215.060, where on remand of an initial governing body decision approving plan amendments, the governing body delegates to a hearings officer final decision-making authority and the conduct of the only hearing, and on remand the hearings officer approves new comprehensive plan amendments that the governing body did not consider in the governing body's initial decision leading to the appeal to LUBA. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

25.11 Local Government Procedures – Action After Remand. While a local government may not generally be required to expand the scope of remand to include new issues that could not have been raised during the initial proceedings, where on remand a new issue is raised regarding the continuing jurisdiction of the local government to process the underlying zone change application, the local government has an obligation to address the jurisdictional issue. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

25.11 Local Government Procedures – Action After Remand. On remand from LUBA to address issues regarding compliance with the Transportation Planning Rule (TPR) at OAR 660-012-0060, a hearings officer errs in refusing to consider a new issue raised on remand regarding testimony that access to the approved mining haul road across adjoining property and access point on a county road are no longer available for development purposes, due to intervening changes in ownership of the adjoining land. Such a new issue is within the scope of LUBA's remand, because the locations of the haul road and access point are important predicates for compliance with the TPR. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

25.11 Local Government Procedures – Action After Remand. Where LUBA remands a comprehensive plan amendment to adopt limited, technical changes to the analysis of economic, social, environmental and energy (ESEE) consequences that was adopted to support an exception to Goal 3, the county does not err in limiting the scope of remand to exclude new issues raised on remand regarding new conflicts with agricultural uses that the petitioner argues should be considered in a revised ESEE analysis, where the alleged new conflicts have nothing to do with the limited, technical changes to the ESEE required by LUBA's remand. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

25.11 Local Government Procedures – Action After Remand. While the issues following a LUBA on remand are often fewer and smaller in scope, in order to exhaust or preserve issues for LUBA's review under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 506-07, 79 P3d 382 (2003), local appeals of decisions on remand must still identify the issues for local appeal with sufficient specificity that the local government and other parties have reasonable notice of those aspects of the underlying decision on remand the local appellant wishes to challenge. *Dion v. Baker County*, 72 Or LUBA 307 (2015).

25.11 Local Government Procedures – Action After Remand. When LUBA remands a land use decision, absent some authority to the contrary the decision becomes ineffective, and remains ineffective unless and until the local government takes action on remand to re-adopt the decision or otherwise render the decision or portions of it effective. *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

25.11 Local Government Procedures – Action After Remand. The fact that a city believed it was making a decision on the last day allowed by the ORS 227.181 for a decision after remand does not absolve the city from following the procedures applicable to quasi-judicial hearings, including giving all parties the opportunity to respond to new evidence submitted at the hearing. The city could have rejected the new evidence and avoided the procedural conundrum that it apparently believed it faced or could have left the record open to respond to the new evidence under ORS 197.763(4)(b). *Poe v. City of Warrenton*, 66 Or LUBA 108 (2012).

25.11 Local Government Procedures – Action After Remand. Where a city development code requires a hearing before the planning commission before planned development approval but does not specifically require a second hearing before the planning commission where a planned development approval is appealed to LUBA and remanded, the city need not hold a second hearing before the planning commission where LUBA's remand does not require an additional hearing. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

25.11 Local Government Procedures – Action After Remand. Where petitioners' were allowed to present evidence during the hearings on a decision that is appealed to LUBA and remanded, the city need not allow petitioners a second opportunity to enhance their evidentiary presentation following LUBA's remand where neither the city's regulations nor LUBA's remand require a further evidentiary hearing. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

25.11 Local Government Procedures – Action After Remand. Where on remand of a decision that amends a county zoning ordinance, the county adopts a new ordinance with new amendments, but does not explicitly or implicitly re-adopt the original ordinance, on appeal to LUBA of the new ordinance the petitioner cannot challenge the original ordinance or the findings adopted on remand that are intended to support the original ordinance. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

25.11 Local Government Procedures – Action After Remand. Where the local government on remand from LUBA conducts a single, consolidated proceeding that results in adoption of two ordinances and an order, on appeal of the two ordinances to LUBA the record includes the unappealed order, because the order was placed before the final decision maker during the proceedings on the ordinances. *Hatley v. Umatilla County*, 66 Or LUBA 427 (2012).

25.11 Local Government Procedures – Action After Remand. An order that simply adopts additional findings following a LUBA remand, but does not "change" any acknowledged comprehensive plan or land use regulation, is not a post-acknowledgment plan amendment, and the deadline to appeal the order to LUBA is therefore 21 days from the date the decision became final, pursuant to the first sentence of ORS 197.830(9), not 21 days from the date that notice of the order was mailed. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

25.11 Local Government Procedures – Action After Remand. When a decision to sell public park property is remanded to consider comprehensive plan policies after the local government only considered the public interest standard of ORS 275.330, there is no absolute requirement that the local government hold another public hearing on the ORS 275.330 public interest standard. *Kaye v. Marion County*, 62 Or LUBA 57 (2010).

25.11 Local Government Procedures – Action After Remand. When LUBA remands an ordinance that changes the zoning for property, the ordinance becomes legally ineffective to rezone the property and the property's zoning reverts to its prior zoning. *Turner v. Jackson County*, 62 Or LUBA 199 (2010).

25.11 Local Government Procedures – Action After Remand. Nothing in ORS 197.763(3) requires that the notice of a hearing on remand summarize LUBA's bases for remand, and such bases for remand are not "applicable criteria" that must be listed in the notice of remand hearing. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

25.11 Local Government Procedures – Action After Remand. Where LUBA remands a decision by sustaining one or more assignments of error, it does not necessarily mean that LUBA agreed with every argument or sub-argument the petitioner advanced in the sustained assignments of error, or that on remand the local government must address every argument in the petition for review under those assignments of error. Instead, the local government must address the issues described in the portion of LUBA's opinion remanding the decision. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

25.11 Local Government Procedures – Action After Remand. LUBA will not resolve arguments that a $660 fee to conduct a hearing on remand is inconsistent with ORS 215.422, where

the county notified the petitioner/applicant of the hearing fee but ultimately held the remand hearing without requiring petitioner to pay the fee. Under these circumstances, LUBA's resolution of the issue would be advisory. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

25.11 Local Government Procedures – Action After Remand. Where the Court of Appeals adopts an interpretation of a city plan policy and the city's decision is remanded because the Court of Appeals concludes the city's and LUBA's interpretation of the plan policy in approving an urban growth boundary amendment was erroneous, the city is free following remand to amend the plan policy, and is not bound to reapply the plan policy to the urban growth boundary amendment as it was interpreted by the Court of Appeals. *Hildenbrand v. City of Adair Village*, 58 Or LUBA 43 (2008).

25.11 Local Government Procedures – Action After Remand. The provisions of ORS 197.763(6), dealing with when and how hearings may be continued or the record left open for additional evidence, only apply to the initial evidentiary hearing in a proceeding. Any evidentiary hearing on remand from LUBA is not the initial evidentiary hearing and ORS 197.763(6) does not apply. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

25.11 Local Government Procedures – Action After Remand. If a hearing is not the initial evidentiary hearing as is usually the case on remand, when a party submits new evidence as part of its rebuttal to another's party's evidence, as long as that new evidence is limited to rebutting the other party's evidence the other party has no right to surrebuttal. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

25.11 Local Government Procedures – Action After Remand. Where a petitioner raises an issue and LUBA rejects that issue but remands a permit decision on other grounds, the petitioner may not raise the rejected issue for a second time in the local government's decision on remand. *Save Our Skyline v. City of Bend*, 55 Or LUBA 12 (2007).

25.11 Local Government Procedures – Action After Remand. A local government may limit its proceedings following a remand from LUBA to addressing the issues that led to the remand and may select the procedures it believes are most appropriate, provided those procedures do not improperly exclude any parties who are entitled to participate in those remand proceedings. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

25.11 Local Government Procedures – Action After Remand. A party who otherwise has standing to participate in a city's land use public hearings under the city's land use legislation may not be denied standing to participate in public hearings following a remand from LUBA, simply because he or she failed to participate in the LUBA appeal. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

25.11 Local Government Procedures – Action After Remand. Where a local government erroneously decides that certain parties may not participate regarding certain issues in public hearings following a LUBA remand, but then nevertheless allows those parties to participate fully, the initial error would likely not result in prejudice to the parties' substantial rights. However, where the record in fact supports a conclusion that the parties' testimony on the disputed issues

was not considered, the parties' substantial rights were prejudiced. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

25.11 Local Government Procedures – Action After Remand. While ORS 227.181(1) requires a city to take final action on a permit decision within 90 days of LUBA remand, once the applicant requests that the city proceed with the application on remand, nothing in the statute prohibits an applicant from essentially abandoning a remanded approval decision and instead filing a new or different application. In that circumstance, the city is under no obligation to address issues directed at the prior decision. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

25.11 Local Government Procedures – Action After Remand. Where the petitioner raises a number of issues, some directed at a remanded decision that is not before the city, and others at the application that is before the city, and the city prudently adopts findings addressing all issues raised, the findings that address issues regarding an application that is not before the city are surplusage and not binding on the city or parties, and LUBA will not address challenges to those findings. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

25.11 Local Government Procedures – Action After Remand. There is no requirement that local government decision makers personally read LUBA's opinion remanding a decision before taking action on remand. If the decision makers, or their legal staff or planners, misread a LUBA opinion and thereby make mistakes on remand, it is those mistakes that potentially provide a basis for assignments of error in a subsequent appeal – not the decision maker's failure to personally read LUBA's decision. *Sommer v. Josephine County*, 54 Or LUBA 507 (2007).

25.11 Local Government Procedures – Action After Remand. Where the local government on remand allows the permit applicant an opportunity to rebut the permit opponent's response to the new evidence, it must allow other parties an opportunity to rebut the permit opponent's response; but the local government is not obligated on remand to allow other permit opponents an additional opportunity to enhance their evidentiary presentation. *Rice v. City of Monmouth*, 53 Or LUBA 55 (2006).

25.11 Local Government Procedures – Action After Remand. When on remand a local government conducts an evidentiary hearing regarding a modified application, the local government may not restrict participation in the public hearing to parties to the original LUBA appeal. *Lengkeek v. City of Tangent*, 52 Or LUBA 509 (2006).

25.11 Local Government Procedures – Action After Remand. Where LUBA remands a preliminary subdivision plat approval to the local government to address an issue, the local government may limit the hearing on remand to that issue, and need not address as part of the remand hearing other issues raised by petitioner regarding whether detailed development plans required by the preliminary plat approval are inconsistent with the approved conceptual plans approved. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

25.11 Local Government Procedures – Action After Remand. Under a code provision prohibiting *ex parte* contacts "in connection with any issue involved in the hearing," petitioner fails to demonstrate that communication between staff and the decision maker involving potential

donation of land on the property is an indirect *ex parte* contact with the developer, where the remand hearing is limited to a single issue, and potential donation of land has nothing to do with that remand issue. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

25.11 Local Government Procedures – Action After Remand. Local governments are generally required to provide notice of proceedings on remand to the parties before LUBA, even if those parties would not otherwise be entitled to notice under the code. However, such notice is not necessarily required where, following remand, the local government elects to proceed on what is essentially a new and different application involving the same property, under code procedures that do not require notice. *Sullivan v. Polk County*, 51 Or LUBA 107 (2006).

25.11 Local Government Procedures – Action After Remand. When the local government limits the scope of review on remand to issues raised in the petition for review before LUBA, those issues include arguments made in support of the assignments of errors, not merely the text of the assignments of error themselves. *Dauenhauer v. Jackson County*, 51 Or LUBA 539 (2006).

25.11 Local Government Procedures – Action After Remand. ORS 227.180(1) requires that a local government take action within 90 days of the date LUBA remands a decision or within 90 days of the date of final resolution of judicial review. ORS 227.180(1) does not authorize a local government to take action on a decision before LUBA prior to the effective date of LUBA's order or the date of the Court of Appeals' appellate judgment, if LUBA's decision is appealed to the court. *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005).

25.11 Local Government Procedures – Action After Remand. Under *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647 (1989), absent statutory authority to the contrary, a local government has no jurisdiction to modify a land use decision that is before LUBA or the Court of Appeals. *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005).

25.11 Local Government Procedures – Action After Remand. When an earlier decision was remanded by LUBA based on issues regarding the safety of a proposed road design, and the local government specifically limits the remand proceedings to the issues remanded by LUBA, petitioners may not challenge the proposed road's location under the local government's transportation system plan when that locational issue could have been, but was not raised, in the earlier appeal. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005).

25.11 Local Government Procedures – Action After Remand. Absent some code requirement to the contrary, a local government is not obligated to require a new application when the applicant proposes modifications to a site plan on remand from LUBA, although the local government must offer all parties the opportunity to submit testimony and evidence with respect to the proposed modifications. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

25.11 Local Government Procedures – Action After Remand. Remand is necessary where, on remand from LUBA, the local government approves unspecified modifications to an approved site plan without addressing issues raised on remand regarding whether those modifications are consistent with applicable criteria. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

25.11 Local Government Procedures – Action After Remand. Where LUBA's remand of a county decision does not necessarily require that the county conduct additional evidentiary proceedings to respond to the remand, and (1) petitioner does not advise a county hearings officer that she believes it would be error for the county not to reopen the record to receive evidence that was not presented in the first appeal and (2) it is at least questionable whether county planning staff were responsible for the failure to include that evidence in the record of the first appeal, the hearings officer's decision not to reopen the record on remand is not error. *Bradley v. Washington County*, 47 Or LUBA 11 (2004).

25.11 Local Government Procedures – Action After Remand. When an applicant on remand modifies the application that led to the remanded decision, the local government proceedings on remand represent a continuation of the original application rather than a new application. Therefore, the local government record that led to the LUBA appeal is properly part of the record on remand unless specifically excluded by the local government. *Rutigliano v. Jackson County*, 47 Or LUBA 628 (2004).

25.11 Local Government Procedures – Action After Remand. A petitioner's argument that a city's erroneous notice regarding the date it would reconsider a decision following remand from LUBA provides no basis for reversal or remand, where petitioner's entire argument is based on an erroneous assumption that an evidentiary hearing was required on remand and that the notice the city gave did not comply with ORS 197.763(2). *McFall v. City of Sherwood*, 46 Or LUBA 735 (2004).

25.11 Local Government Procedures – Action After Remand. A local government does not err in failing to provide an evidentiary hearing on remand to accept updated information regarding the current status of petitioner's property, where LUBA's remand did not require the local government to conduct additional evidentiary hearings, and petitioner fails to identify any authority that requires the local government to conduct an additional evidentiary hearing to accept updated information. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

25.11 Local Government Procedures – Action After Remand. That a local government moves for a voluntary remand of a land use decision does not necessarily mean that the remanded decision is substantively flawed. On remand the local government may be able to correct procedural errors or correct defects in its findings and, thereafter, readopt the same substantive decision. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

25.11 Local Government Procedures – Action After Remand. In moving for a voluntary remand, a local government need not confess error and it need not confess error in its proceedings following remand. The local government's obligation in considering a decision following a voluntary remand is to conduct whatever additional proceedings may be necessary to allow it to correct any errors or possible errors there may be in the original decision, so that it can adopt a decision that it can defend in any further appeal. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

25.11 Local Government Procedures – Action After Remand. A city denial of petitioners' request for an evidentiary hearing after remand from LUBA is not error, where (1) petitioners had an opportunity to present evidence and argument during the city's initial proceedings; (2) the city did not apply new approval criteria or consider new evidence in making its decision on remand; and (3) petitioners do not provide a reason why the initial evidentiary proceedings were inadequate to address petitioners' application. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

25.11 Local Government Procedures – Action After Remand. A remand from LUBA for a city to adopt a written decision that identifies the applicable criteria and explains why the city concludes that those criteria have or have not been met does not bind the city to apply *only* those criteria that formed the basis for the city's initial decision to deny the application. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

25.11 Local Government Procedures – Action After Remand. Absent instructions from LUBA or applicable local requirements, a local government is entitled to limit the scope of remand proceedings to correcting the deficiencies that were the basis for LUBA's remand, although it may also choose to expand the scope of remand proceedings beyond the scope of LUBA's remand. *CCCOG v. Columbia County*, 44 Or LUBA 438 (2003).

25.11 Local Government Procedures – Action After Remand. Where LUBA's remand requires the county to resolve an issue regarding three tax lots, but the county on remand accepts evidence on broader issues, the county's error, if any, in confining its final decision to resolving the dispute regarding the three tax lots is harmless, given that the county could have initially chosen to confine the remand proceeding to the basis for LUBA's remand. *CCCOG v. Columbia County*, 44 Or LUBA 438 (2003).

25.11 Local Government Procedures – Action After Remand. A petitioner fails to demonstrate that he was entitled to an evidentiary hearing before the local government following a remand from LUBA under *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), where the arguments petitioner sought to present in that evidentiary hearing on remand were legal arguments rather than an expanded evidentiary presentation. *Dimone v. City of Hillsboro*, 44 Or LUBA 698 (2003).

25.11 Local Government Procedures – Action After Remand. ORS 215.435 requires that a local government take final action on remand from LUBA within 90 days after the applicant requests in writing that the county proceed. Absent a local provision that establishes a deadline or limit that is consistent with that statute, a local government has no authority to terminate proceedings on remand or require that the applicant submit a new application, based on delay in initiating the request to proceed on remand. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

25.11 Local Government Procedures – Action After Remand. A local government is entitled to limit the scope of issues on remand to correcting the deficiencies that were the basis for remand. Where a local government does so, issues that could have been raised during the previous appeal, but were not, may not be raised on remand. *Ploeg v. Tillamook County*, 43 Or LUBA 4 (2002).

25.11 Local Government Procedures – Action After Remand. Even where no specific statutory or local provisions govern limits on presentation of evidence on remand from LUBA, the parties

have a fundamental right during an evidentiary proceeding to present and rebut evidence. An evidentiary proceeding on remand that fails to offer any opportunity to rebut new evidence submitted on remand is inconsistent with *Fasano v. Washington Co. Comm.*, 264 Or 574, 503 P2d 23 (1973). *Crowley v. City of Bandon*, 43 Or LUBA 79 (2002).

25.11 Local Government Procedures – Action After Remand. Where the record demonstrates that the local government did not incorrectly believe it was legally required to limit its scope of review on remand to the two issues that were identified in LUBA's remand, the local government commits no error in limiting its review on remand to the two issues that formed the basis of the remand. The city is entitled to so limit its scope of review on remand if it wishes. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

25.11 Local Government Procedures – Action After Remand. A local government's decision to request that an applicant prepare revised findings to respond to a LUBA remand does not, by itself, obligate the local government to provide a hearing following LUBA's remand. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.11 Local Government Procedures – Action After Remand. Parties that seek to demonstrate that a local government erred by adopting an interpretation of local land use legislation after the opportunity for argument and evidentiary presentations closes must demonstrate (1) that the interpretation was unforeseeable, and (2) that the party can produce new evidence that is different from evidence in the record and is directly responsive to the unanticipated interpretation. *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998). *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.11 Local Government Procedures – Action After Remand. Where LUBA remands a land use decision for inadequate findings, parties have no unqualified right to demand a hearing to present additional argument or evidence under *Morrison v. City of Portland*, 70 Or App 437, 689 P2d 1027 (1984). *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.11 Local Government Procedures – Action After Remand. Where, on remand from LUBA, the local government adopts a procedure that is proposed by the parties and that allows all sides to submit written evidence and written rebuttals, but limits oral testimony at the evidentiary hearing before the local government to summaries and explanations of previous submittals, the procedure is not correctly interpreted to prohibit an oral explanation of previously submitted evidence that includes additional supportive facts in response to the previously submitted written rebuttal. *Terra v. City of Newport*, 40 Or LUBA 286 (2001).

25.11 Local Government Procedures – Action After Remand. The law of the case doctrine does not apply to an appeal of a new application, even if that application is similar to a prior application that resulted in a decision that was remanded by LUBA. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

25.11 Local Government Procedures – Action After Remand. When the record of a final decision made after remand of an earlier decision from LUBA also includes the record from the earlier decision, but portions of the record from the earlier decision no longer exist, photocopies

of the earlier record may be included in the record on remand. If, however, portions of the earlier record are unavailable, re-creations of the earlier record will not be included in the record, if one of the parties objects to the re-creation. *Terra v. City of Newport*, 39 Or LUBA 811 (2001).

25.11 Local Government Procedures – Action After Remand. Where an initial decision denying a rezoning request is remanded by LUBA, a city decision following remand to approve the rezoning request may be required to address issues the city was not required to address in its initial decision. *Anderson v. City of Medford*, 38 Or LUBA 792 (2000).

25.11 Local Government Procedures – Action After Remand. Because a local government's proceedings on remand from LUBA are a continuation of its original proceedings and not a new proceeding, a local government that has sent notice of a proposed post-acknowledgment plan amendment to DLCD as required by ORS 197.610 is not required under the statute or rules implementing the statute to send additional notice of the proposed amendment during the remand proceedings. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291 (2000).

25.11 Local Government Procedures – Action After Remand. Because ORS 227.180(3) protects the participants' right to a decision that is free of undisclosed *ex parte* communications, redressing a violation of the statute on remand requires more than reopening the record to disclose and offer an opportunity to rebut the substance of those communications. Although the city need not repeat the evidentiary proceedings leading up to the initial decision, the city must adopt a new decision approving or denying the application based on the record as a whole, including any evidence submitted in rebuttal. *Opp v. City of Portland*, 38 Or LUBA 251 (2000).

25.11 Local Government Procedures – Action After Remand. A local government decision on an application for land use approval that is made without disclosing or offering an opportunity to rebut an *ex parte* communication must be remanded for a plenary rehearing on the application. *Opp v. City of Portland*, 38 Or LUBA 251 (2000).

25.11 Local Government Procedures – Action After Remand. Petitioners are not precluded from raising arguments on appeal that pertain to assignments of error that were raised, but not finally decided, in a prior appeal to LUBA on the same application. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

25.11 Local Government Procedures – Action After Remand. An issue that could have, but was not, raised in the initial petition for review before LUBA in an appeal that was voluntarily remanded, may not be included in an assignment of error in a later appeal of a decision following remand. *Riggs v. Douglas County*, 37 Or LUBA 432 (1999).

25.11 Local Government Procedures – Action After Remand. Where a local government elects to conduct additional hearings prior to making a decision following remand of a decision by LUBA, all parties to the LUBA appeal that led to the remand are entitled to some form of individualized notice of the proceedings on remand, and a local government's failure to provide notice to one of those parties is procedural error. *DLCD v. Crook County*, 37 Or LUBA 39 (1999).

25.11 Local Government Procedures – Action After Remand. A party's right to appeal a local decision that is adopted following a remand by LUBA does not eliminate prejudice to that party's substantial rights caused by the local government's failure to provide notice of its proceedings on remand. The rights the party has in seeking LUBA review of the decision on remand are much more circumscribed that the rights the party has during a local land use hearing. *DLCD v. Crook County*, 37 Or LUBA 39 (1999).

25.11 Local Government Procedures – Action After Remand. Absent land use regulations that specify a particular procedure when a decision is withdrawn for reconsideration pursuant to OAR 661-010-0021, the procedures that govern depend on what stage in the process the local government returns to on reconsideration. Procedures governing evidentiary hearings are not applicable when the local government does not reopen the evidentiary record during the reconsideration proceedings. *McElroy v. City of Corvallis*, 36 Or LUBA 185 (1999).

25.11 Local Government Procedures – Action After Remand. Where a county code applies the same "stability" standard that is required by ORS 215.284(1)(d) and (2)(d) for nonfarm dwellings to approval of recreational vehicle parks, it is not bound by case law that interprets and applies the statutory standard, where LUBA did not determine in its decision remanding the decision to the county that it must interpret the code standard in the same manner that the statute has been interpreted. *Ray v. Douglas County*, 36 Or LUBA 45 (1999).

25.11 Local Government Procedures – Action After Remand. A local decision maker is entitled to limit its considerations on remand from LUBA to correcting the deficiencies identified in LUBA's remand decision. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68.

25.11 Local Government Procedures – Action After Remand. Where LUBA determined in an earlier appeal of the county's approval of a nonconforming use that the nonconforming use was not established by a prior county decision approving site design review for that use, the law of the case doctrine prohibits the county, on remand, from revisiting the issue decided by LUBA. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

25.11 Local Government Procedures – Action After Remand. The law of the case doctrine does not bar petitioner from arguing that the city's action on remand from LUBA so altered the proposed development that the city must revisit a variance granted in the original decision. *Dodds v. City of West Linn*, 35 Or LUBA 101 (1998).

25.11 Local Government Procedures – Action After Remand. A decision on remand that increases a variance from a maximum lot coverage standard is not inconsistent with the initial variance approval, where the initial decision did not specify the variance allowed from the maximum lot coverage. *Dodds v. City of West Linn*, 35 Or LUBA 101 (1998).

25.11 Local Government Procedures – Action After Remand. Absent local procedures to the contrary, a local government is not required to follow all of the procedures required for the initial decision when the decision is withdrawn for reconsideration following appeal to LUBA under OAR 661-010-0021 and readopted without changes. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

25.11 Local Government Procedures – Action After Remand. On remand, a county may prepare new findings without opening the record if it determines its findings were inadequate. A county may reopen the record to accept additional evidence if it determines there is not substantial evidence in the record upon which findings of approval can be based. *Roberts v. Crook County*, 33 Or LUBA 267 (1997).

25.11 Local Government Procedures – Action After Remand. Even if petitioner was not afforded an opportunity below to present argument and rebuttal on the issue of how the city should proceed on remand, petitioner has not demonstrated prejudice to its substantial rights where it was provided both an adequate opportunity to prepare and submit a case and a full and fair hearing. *Prineville Properties, Inc. v. City of Prineville*, 32 Or LUBA 139 (1996).

25.11 Local Government Procedures – Action After Remand. In some circumstances, issues decided by LUBA and not appealed may not be further considered after remand to the local government. However, when the local government reopens the record on remand, new issues may be raised and may be the basis for a new decision, or grounds for a subsequent appeal. *Prineville Properties, Inc. v. City of Prineville*, 32 Or LUBA 139 (1996).

25.11 Local Government Procedures – Action After Remand. Nothing prohibits a city from weighing existing evidence differently and reaching a different decision on remand. *Prineville Properties, Inc. v. City of Prineville*, 32 Or LUBA 139 (1996).

25.11 Local Government Procedures – Action After Remand. Where, on remand from LUBA, the county corrects an error in its decision, it is not required to follow the procedures that were required during the initial proceeding. *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76 (1996).

25.11 Local Government Procedures – Action After Remand. When a local government limits its remand proceedings to issues that were the basis for LUBA's remand order, issues that were not raised in the first appeal, and are not within the scope of the issues that were the basis for LUBA's remand, cannot be raised in a subsequent appeal to LUBA. *O'Rourke v. Union County*, 31 Or LUBA 174 (1996).

25.11 Local Government Procedures – Action After Remand. Where LUBA remanded a previous appeal because the county did not apply relevant agricultural goal and implementation policies of its comprehensive plan, the county's conclusion on remand that its previous findings were sufficient is not adequate. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

25.11 Local Government Procedures – Action After Remand. A statement in a staff report prepared prior to a hearing on remand that certain criteria need not be considered on remand does not itself broaden the scope of the remand to include consideration of those criteria. *Melton v. City of Cottage Grove*, 30 Or LUBA 331 (1996).

25.11 Local Government Procedures – Action After Remand. When, prior to an appeal to LUBA, a city satisfies the coordination requirement of OAR 660-12-060(3) by consulting with the

county, and the development proposal does not change between LUBA's remand order and a second appeal, the city is not required to consult with the county again during the proceedings on remand. *Melton v. City of Cottage Grove*, 30 Or LUBA 331 (1996).

25.11 Local Government Procedures – Action After Remand. Petitioner was not prejudiced by the city's decision not to accept new evidence on remand, where petitioner made its arguments in the original hearing and the city considered them. *ONRC v. City of Oregon City*, 30 Or LUBA 258 (1995).

25.11 Local Government Procedures – Action After Remand. A local government's violations of the notice provisions of ORS 197.763 in its original proceedings do not permit a petitioner who fails to raise certain issues during proceedings on remand to elude the waiver provisions of ORS 197.835 during a second appeal to LUBA. *Noble v. City of Fairview*, 30 Or LUBA 180 (1995).

25.11 Local Government Procedures – Action After Remand. To the extent parties were not properly apprised of the applicable criteria during the initial hearing, they must be provided the information required by ORS 197.763(3)(b) on remand. *Noble v. City of Fairview*, 30 Or LUBA 180 (1995).

25.11 Local Government Procedures – Action After Remand. When petitioner was apprised by the local government of the applicable criteria, but failed to raise an issue before the local government during proceedings on remand, ORS 197.835(3) precludes petitioner from raising the issue on appeal to LUBA. *Noble v. City of Fairview*, 30 Or LUBA 180 (1995).

25.11 Local Government Procedures – Action After Remand. When LUBA's remand order requires the county to address one code provision, the fact that certain issues raised under that code provision are also addressed by another code provision does not broaden the scope of the remand order to include the latter. *Reeves v. Yamhill County*, 30 Or LUBA 135 (1995).

25.11 Local Government Procedures – Action After Remand. Where the city's findings of compliance with an ambiguous provision are inadequate and unresponsive to the issues raised by petitioners, on remand the city must specifically respond to those issues and explain its conclusions. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

25.11 Local Government Procedures – Action After Remand. Unless required by LUBA's remand order or a local regulation, a local government does not have to repeat on remand the procedures applicable to the initial proceedings. *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147 (1995).

25.11 Local Government Procedures – Action After Remand. Where LUBA remands a decision because the local decision maker failed to adopt findings explaining its determination of compliance with relevant approval standards, and the local decision maker was not required to hold a hearing before making its initial decision, the local decision maker is not required to hold a hearing on remand. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335 (1995).

25.11 Local Government Procedures – Action After Remand. Absent code provisions to the contrary, when a local government decision is remanded by LUBA, the local government is not required to repeat the procedures applicable to the initial proceedings, unless LUBA's remand specifically requires that those procedures be followed. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

25.11 Local Government Procedures – Action After Remand. Where LUBA remands a local government decision because it lacks findings of compliance with relevant approval standards, the local government must, at a minimum, conduct a hearing on remand to allow the parties an opportunity to present argument based on the possible interpretations to be adopted by the local government on remand. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

25.11 Local Government Procedures – Action After Remand. Where petitioners never had an opportunity to participate in the local process utilized for adopting the decision on remand, petitioners had no opportunity to raise issues during the remand proceedings and, therefore, are not limited by "raise it or waive it" rules. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

25.11 Local Government Procedures – Action After Remand. Where a local government is required to adopt a new decision on remand, it must conduct a hearing and provide notice of that hearing, at least for the purpose of allowing argument on the proposal's compliance with the standards to be addressed on remand. *Collins v. Klamath County*, 28 Or LUBA 553 (1995).

25.11 Local Government Procedures – Action After Remand. ORS 197.763(8) applies only to a local government's notice of its initial evidentiary hearing. It does not apply to local hearings conducted after remand by LUBA. *Collins v. Klamath County*, 28 Or LUBA 553 (1995).

25.11 Local Government Procedures – Action After Remand. Unresolved issues, which may be considered in a local government proceeding on remand from LUBA, and raised in a subsequent appeal to LUBA from a local decision on remand, include (1) issues presented in the first appeal that LUBA either sustains or does not consider, and (2) issues that could not have been raised in the first LUBA appeal. *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32 (1994).

25.11 Local Government Procedures – Action After Remand. ORS 197.835(8) applies only where LUBA determines a local government made a land use decision exceeding the local government's discretionary authority under applicable comprehensive plan and land use regulation provisions, not where LUBA determines the local government misconstrued its permissible scope of review on remand from a previous LUBA appeal. *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32 (1994).

25.11 Local Government Procedures – Action After Remand. Neither law of the case nor issue preclusion applies in a LUBA appeal of a land use decision made after a prior remand by LUBA, where the second appeal involves different parties and a new application for a revised project was submitted after remand. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

25.11 Local Government Procedures – Action After Remand. Where the applicant submits a new application following remand by LUBA of a decision approving an earlier application, a local government is under no obligation to include the record of the prior application or to provide explicit notice that parties have to submit evidence from the previous record that they wish the local government to consider in reviewing the new application. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

25.11 Local Government Procedures – Action After Remand. Where a local government limits its remand proceedings to the issues that were the basis for LUBA's remand, issues that were not raised in the first appeal, and are not within the scope of the issues that were the basis for LUBA's remand, cannot be raised in a subsequent appeal to LUBA. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

25.11 Local Government Procedures – Action After Remand. That newly elected members of the local decision making body decided not to participate in local proceedings on remand from LUBA, because they were not members of the decision making body at the time the original local proceedings were conducted and are unfamiliar with the record, provides no basis for reversal or remand of the local government decision on remand. *Rhine v. City of Portland*, 27 Or LUBA 86 (1994).

25.11 Local Government Procedures – Action After Remand. If a local government wishes to exclude the record of the previous local proceeding on the same development application that led to local proceedings after remand by LUBA, it must expressly do so. Otherwise, in an appeal to LUBA from the local government decision on remand, the record of the previous local proceeding will be considered part of the record of the local government decision on remand. *Murphy Citizens Advisory Comm. v. Josephine County*, 27 Or LUBA 651 (1994).

25.11 Local Government Procedures – Action After Remand. Where LUBA remands a local government decision for an interpretation of ambiguous code provisions, and no appeal is taken from LUBA's determination concerning the code's ambiguity, petitioner is barred from arguing before LUBA that the disputed code provision is unambiguous, in an appeal from the local decision on remand. *McGowan v. City of Eugene*, 26 Or LUBA 9 (1993).

25.11 Local Government Procedures – Action After Remand. Under ORS 197.763, absent consideration of a new development application, local proceedings after remand by LUBA are part of a single, continuous land use process. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994).

25.11 Local Government Procedures – Action After Remand. ORS 197.763(6), concerning requests by participants to leave the local evidentiary record open, applies only to the "initial evidentiary hearing" and not to local proceedings after remand by LUBA. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994).

25.11 Local Government Procedures – Action After Remand. It is unclear whether the provisions of ORS 197.763(4) entitling parties to a continuance of a local government quasi-judicial land use hearing if additional evidence is provided in support of the application, applies to

local remand proceedings. Nevertheless, to trigger the requirement of ORS 197.763(4) to continue the hearing, a party must request a continuance. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994).

25.11 Local Government Procedures – Action After Remand. LUBA will not deny a request for voluntary remand of a challenged land use decision, simply because different approval criteria may apply on remand. Petitioners are entitled to obtain review by LUBA to assure a correct decision is rendered, whatever approval criteria may be applicable. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).

25.11 Local Government Procedures – Action After Remand. There is no general legal requirement that petitioners be provided an opportunity to rebut proposed local government findings. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

25.11 Local Government Procedures – Action After Remand. Where LUBA briefs are submitted to a local government during the local proceedings on remand, those briefs do not constitute "new evidence" that petitioners are entitled to rebut during the local proceedings on remand. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

25.11 Local Government Procedures – Action After Remand. Where petitioners argue a city cannot approve an amendment to a PUD development plan on remand from LUBA, because the underlying development plan approval expired *after* LUBA remanded the initial city decision approving the amendment, petitioners did not waive this issue. The issue was not ripe to be raised at the time of the city's initial proceedings on the amendment or during petitioners' first appeal to LUBA. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

25.11 Local Government Procedures – Action After Remand. Where a local government fails to apply, or improperly applies, an applicable approval standard in its initial proceedings, it is not automatically required to repeat on remand from LUBA every procedural step it followed in making its original decision. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

25.11 Local Government Procedures – Action After Remand. Local government proceedings conducted after LUBA remand of the initial local government decision, regarding the same application, are a continuation of the initial local government proceedings. Where a petitioner submitted testimony to the local government at some point during the local proceedings, petitioner "appeared before the local government," as required by ORS 197.830(2)(b). *DLCD v. Klamath County*, 25 Or LUBA 355 (1993).

25.11 Local Government Procedures – Action After Remand. In most circumstances, and in the absence of a local code requirement to the contrary, during proceedings on remand a local government need not repeat the entire process it followed in making the original decision. *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

25.11 Local Government Procedures – Action After Remand. Where (1) the local government's plan and land use regulations were unacknowledged when the original development application was submitted, (2) there has been no proceeding in which the local government

identified the applicable standards after limited acknowledgment and enforcement orders were issued by LCDC, and (3) a prior LUBA opinion specifically required the local government to identify the applicable standards, the requirements of ORS 197.763 must be applied to the local proceedings on remand. *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

25.11 Local Government Procedures – Action After Remand. A local government is required to provide parties with an opportunity to rebut evidence submitted during local proceedings on remand from this Board under either ORS 197.763(4)(b) or *Fasano*. A local government's failure to provide petitioner with such opportunity is a procedural error that prejudices petitioner's substantial rights. *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

25.11 Local Government Procedures – Action After Remand. A local government's failure to comply with procedural requirements of ORS 197.763 on remand from LUBA does not allow a petitioner to raise issues in a second appeal to LUBA that are otherwise barred by the doctrine of waiver articulated in *Mill Creek Glen Protection Assoc. v. Umatilla County*, 88 Or App 522, 527, 746 P2d 728 (1987). *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

25.11 Local Government Procedures – Action After Remand. Where LUBA remands a decision on the basis that the local government failed to identify applicable standards, and ORS 197.763 is applicable to the local proceedings, the local government is required to provide notice identifying the relevant standards, conduct an evidentiary hearing, and allow petitioner to present evidence and argument concerning the applicability and proper interpretation of the identified standards. *Warren v. City of Aurora*, 25 Or LUBA 11 (1993).

25.11 Local Government Procedures – Action After Remand. Reversal of a local government land use decision approving a permit application means the subject application cannot be approved under the applicable criteria as a matter of law, and that a new or amended permit application is required to correct at least one allegation of error sustained in LUBA's final opinion. *Seitz v. City of Ashland*, 24 Or LUBA 311 (1992).

25.11 Local Government Procedures – Action After Remand. While ORS 227.178(3) identifies the criteria that a city must apply to a permit application, it has *no* bearing on whether the city *must*, following reversal or remand of a permit decision by this Board, (1) accept an amended application reviewable against the criteria in effect when the original application was submitted, or (2) require a new application reviewable against the criteria in effect when the new application is submitted. *Seitz v. City of Ashland*, 24 Or LUBA 311 (1992).

25.11 Local Government Procedures – Action After Remand. Following LUBA reversal of a city decision approving a permit application, the choice between whether to allow the permit application to be amended or to require that a new permit application be submitted is within the city's discretion, provided any local code requirements governing that choice are followed. *Seitz v. City of Ashland*, 24 Or LUBA 311 (1992).

25.11 Local Government Procedures – Action After Remand. When a local government decision has been remanded by LUBA, it is within the local government's authority to conduct further proceedings, including holding public hearings and accepting new evidence, to determine

whether the subject application complies with the approval criteria that provided the bases for remand. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

25.11 Local Government Procedures – Action After Remand. On remand from LUBA, referral of modifications in proposed plan amendments to the planning commission for its recommendation is not required, where applicable statutory and code provisions requiring planning commission recommendations on proposed plan amendments do not also require that subsequent modifications made during city council consideration be referred to the planning commission for recommendations. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

25.11 Local Government Procedures – Action After Remand. Where a decision approving a permit application is remanded by LUBA, and the application is thereafter modified to correct the deficiencies identified in LUBA's remand, without changing the nature of the original proposal, the local government does not err by applying on remand approval standards as they existed when the permit application was first submitted. Approval standards, as amended following submittal of the original permit application, need not be applied in such circumstances. ORS 227.178(3). *Wentland v. City of Portland*, 23 Or LUBA 321 (1992).

25.11 Local Government Procedures – Action After Remand. Where a permit application is modified following LUBA's remand of a decision granting approval of the permit, but the modified application does not differ significantly from the original application, the local government does not err by failing to require that a new application be submitted. *Wentland v. City of Portland*, 23 Or LUBA 321 (1992).

25.11 Local Government Procedures – Action After Remand. Following remand of a permit decision by LUBA, a local government does not commit error by conducting a public hearing before the governing body, rather than before the hearings officer, as required under the code for the initial permit decision. Absent code requirements to the contrary, local procedural requirements that apply in reaching an initial decision on a permit application need not be followed during local proceedings following remand unless the remand specifically requires that those procedures be followed. *Wentland v. City of Portland*, 23 Or LUBA 321 (1992).

25.11 Local Government Procedures – Action After Remand. Petitioners' allegation that the local government failed to provide required notice of local proceedings following LUBA's remand of a land use decision provides no basis for remand, where petitioners do not contend they were in any way prejudiced by the alleged failure to provide the required notice of the local proceedings. *Wentland v. City of Portland*, 23 Or LUBA 321 (1992).

25.11 Local Government Procedures – Action After Remand. LUBA will not assume certain city council members' participation in a decision following remand from LUBA is improper, simply because those members abstained from participating in the first decision because they felt they were not sufficiently familiar with the record. *Bartels v. City of Portland*, 23 Or LUBA 182 (1992).

25.11 Local Government Procedures – Action After Remand. Even if a local government erred by failing to provide notice of local hearings following remand from LUBA to persons other than

parties in the LUBA appeal, that failure results in no prejudice to the substantial rights of the parties who did receive notice of the local hearings on remand. *Bartels v. City of Portland*, 23 Or LUBA 182 (1992).

25.11 Local Government Procedures – Action After Remand. A local government may limit its proceedings on remand from LUBA to correcting the deficiencies that led to the remand and, unless the local code so requires, need not repeat the entire process it followed in making the initial decision. *Bartels v. City of Portland*, 23 Or LUBA 182 (1992).

25.11 Local Government Procedures – Action After Remand. Where the applicable code provisions do not require a local government to conduct an evidentiary hearing after remand, the local government did not err simply because it refused to accept new evidence at a remand hearing. *Washington Co. Farm Bureau v. Washington County*, 22 Or LUBA 540 (1992).

25.11 Local Government Procedures – Action After Remand. Where a decision is remanded because LUBA could not determine what standards were applied to deny a permit application, the local government on remand is required to identify the relevant standards and hold an evidentiary hearing to allow petitioner to present evidence and argument concerning the proper interpretation and application of those standards to his application. *Bradbury v. City of Independence*, 22 Or LUBA 783 (1991).

25.11 Local Government Procedures – Action After Remand. The "law of the case" or "waiver" doctrine does not limit a local government's ability to adopt a different decision, or different findings in support of its decision, after its initial decision is remanded by LUBA. *Eckis v. Linn County*, 22 Or LUBA 27 (1991).

25.11 Local Government Procedures – Action After Remand. City councilors who participated in a decision remanded by LUBA are not bound on remand to vote as they did previously. *Strawn v. City of Albany*, 21 Or LUBA 172 (1991).

25.11 Local Government Procedures – Action After Remand. Where LUBA remands a decision in part on the basis that the local government improperly shifted the burden of proof to those opposed to the subject development proposal, the local government cannot limit its consideration on remand to only the specific issues which provided the other bases for LUBA's remand. *Beck v. City of Tillamook*, 20 Or LUBA 178 (1990).

25.11 Local Government Procedures – Action After Remand. On remand from LUBA, a local government is entitled to limit its consideration of a request for land use approval to the issues that were the basis for remand. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

25.11 Local Government Procedures – Action After Remand. Where a local government decision concerning a permit is remanded by LUBA and, following local proceedings on remand, a second decision concerning the permit is appealed to LUBA, the record supporting the prior decision is not included in the record of the second decision where the county fails to either include the prior record in the second record submitted to LUBA or designate the prior record as being part of the record. *Clark v. Jackson County*, 19 Or LUBA 220 (1990).

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

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

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

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

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

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

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

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

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

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

25.12 Local Government Procedures – Other. Under *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 862 P2d 1293 (1993), a prior decision involving an issue may preclude relitigation of the issue if, among other things, the issue was actually litigated and essential to a final decision on the merits. Where in a prior land use decision the hearings officer concluded that a city code provision is facially unconstitutional, but the hearings officer denied the petitioner's application on different grounds, the hearings officer's view regarding facial unconstitutionality is *dicta* and not "essential" to a final decision on the merits, and therefore does not preclude the hearings officer from reconsidering that view in a decision on petitioner's subsequent land use application. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

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

25.12 Local Government Procedures – Other. Where an applicant requests a legal lot verification under the local code procedure for obtaining such verification, the local government

must necessarily inquire into whether the unit of land was lawfully created. That inquiry is not a collateral attack on decision that created the unit of land. *Hogrefe v. Lane County*, 54 Or LUBA 514 (2007).

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

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

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

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

25.12 Local Government Procedures – Other. When a local comprehensive plan provision requires coordination with affected natural resources agencies, the coordination with the affected agencies may be conducted by ODOT when the proposed project involves a multi-jurisdictional transportation project. *1000 Friends of Oregon v. Yamhill County*, 49 Or LUBA 640 (2005).

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

25.12 Local Government Procedures – Other. The Oregon Attorney General interprets ORS 174.130 to require the affirmative votes of a majority of a body that is made of three or more persons to take action, rather than a majority of the members of the body who happen to be present.

However, where a body's enabling legislation includes provisions for a quorum, a majority vote of the quorum is sufficient to take action. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

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

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

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

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

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

25.12 Local Government Procedures – Other. Where the applicants were aware that the local government's schedule failed to include time for the submission of written legal arguments as provided for by ORS 197.763(6)(e) and the applicants informed the local government that if they had objections to the process, they would "file" objections with the county counsel, the county could assume that the applicants waived their right to submit final written arguments, when the applicants failed to file objections. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368 (1999).

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

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

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

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

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

26.1 LUBA Jurisdiction – Generally. Whether emergency access to the subject property is within the scope of an easement requires interpretation of the easement and is a matter of real estate law involving, among other things, a determination of the intent of the parties to the easement. Land use review bodies such as the city council are not particularly competent bodies to render interpretations of ambiguous terms in easements or deeds. Generally, a final and authoritative determination regarding the intent and scope of deeds, easements and similar real estate documents can be obtained only in circuit court, based on application of real estate law. *McNichols v. City of Canby*, 79 Or LUBA 139 (2019).

26.1 LUBA Jurisdiction – Generally. Where an issue arises regarding compliance with an approval criterion that can be resolved only by interpretation of the ambiguous terms of an easement, the most problematic option for a local land use review body is to rely, without more, on its own interpretation of the ambiguous terms of an easement to determine compliance with the approval criterion. A less problematic option would be to impose conditions, at least as an alternative, intended to ensure that the legal uncertainty is resolved prior to final development approvals. The least problematic option is for the local government to interpret the terms of its approval criterion, if it can, to the effect that compliance can be determined regardless of how the ambiguous terms of the easement are interpreted or whether the dispute over the terms of the easement is resolved. *McNichols v. City of Canby*, 79 Or LUBA 139 (2019).

26.1 LUBA Jurisdiction – Generally. LUBA will consider an affidavit from a party's attorney regarding dates and certain actions that occurred related to notice of the local government's decision at issue in the appeal for the limited purpose of resolving disputes regarding LUBA's jurisdiction. *PGE v. City of West Linn*, 79 Or LUBA 213 (2019).

26.1 LUBA Jurisdiction – Generally. A local code amendment adopted to implement provisions of ORS 197.724 is not an "action[] taken under ORS 197.722 to ORS 197.728" so as to place the amendment decision outside of LUBA's scope of review pursuant to ORS 197.726(1). Instead, such an amendment is an action taken under ORS 197.646(1), which requires local governments to amend their land use regulations "to comply with a new requirement in land use statutes." *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

26.1 LUBA Jurisdiction – Generally. When all appeal fees originally charged by the county are refunded and the county has conceded that no appeal fees should have been charged, an opinion issued by LUBA would be in essence an advisory opinion. LUBA typically declines to issue advisory opinions. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 136 (2018).

26.1 LUBA Jurisdiction – Generally. Where the county determined that petitioner had not established a right to construct a Measure 49 dwelling on the subject property, and the county did not apply any county siting standards, the county's decision is not a land use decision under ORS 195.318(1) and, thereby, is not subject to LUBA's jurisdiction. *Vannett Properties, LLC v. Lane County*, 78 Or LUBA 345 (2018).

26.1 LUBA Jurisdiction – Generally. LUBA's jurisdiction over Metro decisions is complicated, because Metro does not have a comprehensive plan, and its ordinances are not "land use regulation[s]." As a result, a Metro decision fits within the ORS 197.015(10)(a)(A) definition of a

"land use decision" only if the decision (1) adopts or amends Metro's Regional Framework Plan; or (2) otherwise concerns the application of the statewide planning goals. *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.1 LUBA Jurisdiction – Generally. To qualify as a "land use decision" as defined at ORS 197.015(10)(a)(A)(i), a Metro Resolution must constitute a "final decision" that concerns the application of the statewide planning goals. However, finality for purposes of ORS 197.015(10)(a) is not solely a matter of whether the decision constitutes a local government's last word on a land use issue. Other important considerations include whether the decision is an exercise of the local government's land use planning authority, and the extent to which the decision is binding on the local government and affected parties. *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.1 LUBA Jurisdiction – Generally. A decision by Metro acting as arbitrator does not constitute a "final decision," where Metro's role as arbitrator was not an exercise of its function as a local government at all, but rather where Metro acted as a chosen arbitrator, a function that could have been performed by a private entity or individual. *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.1 LUBA Jurisdiction – Generally. A Metro arbitration decision subject to an arbitration process devised by Metro that contemplates that the final decision the comprehensive plan designation of an area of land shared by two cities and a county will be determined in the post-acknowledgement plan amendments (PAPA) adopted by the cities and county is not itself a "final" "land use decision." *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.1 LUBA Jurisdiction – Generally. A Metro arbitration decision issued pursuant to a Metro arbitration process to arrive at a solution for the comprehensive plan designation for a disputed area of land jointly owned by two cities and a county, and which contemplates that the final decision regarding the comprehensive plan designation of the area will occur during the post-acknowledgment plan amendments, is not a "zoning" decision for purposes of ORS 268.393(6), which is part of the statute implementing Ballot Measure 56. *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.1 LUBA Jurisdiction – Generally. Where LUBA determines that a Metro resolution is not a "final" decision, the significant impact land use decision test does not apply. The jurisdictional requirement–that a land use decision must be "final"–applies to both the statutory as well as the significant impact test. *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.1 LUBA Jurisdiction – Generally. LUBA will not suspend a proceeding where petitioners have not established that LUBA's resolution of the pending LUBA appeal would likely be rendered moot by a concurrently pending circuit court proceeding. Although a circuit court could ultimately decide, in a future remand proceeding from the Court of Appeals, to grant petitioners full injunctive relief which could potentially be in conflict with, or moot LUBA's ruling, where such an outcome is extremely likely, LUBA will not grant petitioners' motion for stay. LUBA is a creature of statute, and can exercise only those powers granted by the legislature, and according to ORS 197.805 and ORS 197.830(10)(a), LUBA's mandate is that "time is of the essence in reaching final decisions in matters involving land use." *Bishop v. Deschutes County*, 78 Or LUBA 1050 (2018).

26.1 LUBA Jurisdiction – Generally. When a petitioner's appeal is timely filed and the decision concerns the application of a land use regulation, the city's decision to deny a local appeal of a fee waiver does not fall under the ministerial exception and review of the decision is not excepted from LUBA's jurisdiction. *Riverview Abbey Mausoleum Co. v. City of Portland*, 78 Or LUBA 1057 (2018).

26.1 LUBA Jurisdiction – Generally. LUBA will deny petitioners' motion for reconsideration of a motion to stay the proceedings, where petitioners argue for the first time that LUBA should grant a continuance under ORS 197.840(1)(d) and (2), and to suspend the 77-day deadline to resolve an appeal, where LUBA considered petitioners' arguments and responses thereto in the underlying motion to stay the proceedings, and LUBA remains unpersuaded that, to the extent the "ends of justice" would be served by indefinitely suspending the appeal, those ends outweigh the best interest of the public and the parties in meeting the 77-day deadline. *Bishop v. Deschutes County*, 78 Or LUBA 1075 (2018).

26.1 LUBA Jurisdiction – Generally. Where petitioners' counsel attempts to amend a timely filed Notice of Intent to Appeal (NITA), to add additional petitioners who were mistakenly omitted from the original NITA, but the amended NITA is filed after the time limit set forth in ORS 197.830(9) for filing a NITA before LUBA, petitioners' mistaken omission of the petitioners from the original NITA was not merely a "technical violation" of LUBA's rules at OAR 660-010-0015. The additional petitioners listed in the Amended NITA have not established that their NITA was filed within the time limit set forth in ORS 197.830(9), and are therefore not parties to the appeal. *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

26.1 LUBA Jurisdiction – Generally. Petitioner has not demonstrated that a city's decision to remove 35 trees from a 33-acre city park will have a significant qualitative or quantitative impact on present or future land uses. The decision does not alter any of the land uses allowed in the park's zone or any of the present or future land uses in the park, and the trees themselves are not land "uses" in any legally cognizable sense. *Carlson v. City of Brookings*, 77 Or LUBA 497 (2018).

26.1 LUBA Jurisdiction – Generally. Where LUBA issues an interlocutory order approving or denying a motion to intervene, an appeal of LUBA's Final Opinion and Order to the Oregon Court of Appeals would allow challenge to that interlocutory order. Where the contested motion to intervene is briefed and ripe for resolution, delaying the resolution of the motion would unnecessarily prejudice the other parties, and complicate final resolution of the appeal by allowing a person LUBA has determined lacks standing to intervene to file a petition for review. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

26.1 LUBA Jurisdiction – Generally. LUBA may consider documents outside the record, including copies of earlier land use decisions regarding the subject property, that are useful in resolving a jurisdictional challenge to the appeal of a land use compatibility statement (LUCS), even in the absence of a motion to take evidence under OAR 661-010-0045. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

26.1 LUBA Jurisdiction – Generally. The interplay between ORS 197.830(3), allowing an extended 21-day period to appeal certain decisions directly to LUBA, and ORS 197.825(2)(a), requiring a party to exhaust all local appeals available by right, introduces jurisdictional uncertainty in some cases. Where the petitioner prudently requests a local appeal and also files a direct appeal to LUBA, LUBA typically suspends the LUBA proceeding until the local government determines whether a local appeal is available. *Friends of the Lostine v. Wallowa County*, 75 Or LUBA 546 (2017).

26.1 LUBA Jurisdiction – Generally. City comprehensive plan goals, other adopted city plans and sub-plans, Metro Regional Framework and Regional Transportation Plans, and the Oregon Transportation Plan and Oregon Freight Plan are subject to judicial notice under ORS 40.090(4) or (7). However, LUBA will not consider "adjudicative facts" or facts found within judicially cognizable documents that are asserted for an "adjudicative" purpose, *i.e.*, to provide evidentiary support or countervailing evidence with respect to an applicable approval criterion in an adjudicatory setting. *Columbia Pacific v. City of Portland*, 75 Or LUBA 552 (2017).

26.1 LUBA Jurisdiction – Generally. *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, *rev'd and rem'd on other grounds*, 97 Or App 687, 776 P2d 1315 (1989), stands for the proposition that once a LUBA appeal is perfected to challenge a land use decision at LUBA, a local government no longer has jurisdiction to amend the land use decision until LUBA finally resolves the appeal. However, where the decision on appeal is a site plan and conditional use permit to construct a house on a property, a decision while that appeal is pending to amend a sewer improvement district boundary to include that property does not amend the site plan or conditional use permit. *Evans v. City of Bandon*, 74 Or LUBA 418 (2016).

26.1 LUBA Jurisdiction – Generally. Where LUBA concludes that it lacks jurisdiction over an applicant's appeal of an adverse land use compatibility statement, the appeal must either be dismissed or transferred to circuit court if a motion to transfer is filed. LUBA lacks authority to reverse a decision it has no jurisdiction over. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.1 LUBA Jurisdiction – Generally. LUBA has exclusive jurisdiction over a city council decision that amends the city's Goal 5 inventory of historic resources to remove property, notwithstanding that following the city council decision a circuit court decided a mandamus action in the property owner's favor based on the stipulation of the parties that the city council had removed the property from the inventory. Because the circuit court judgment did not determine that the property owner was entitled to removal from the inventory under state law, but simply reflected the parties' stipulation regarding the outcome of the city council's decision, LUBA's review of the city council decision cannot conflict with the circuit court judgment. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

26.1 LUBA Jurisdiction – Generally. A petitioner at LUBA must do more than simply assert that the challenged decision is a land use decision that is subject to LUBA review. *Early v. Jackson County*, 70 Or LUBA 273 (2014).

26.1 LUBA Jurisdiction – Generally. ORS 197.015(10)(b)(A) exempts from the ORS 197.015(10)(a) definition of "land use decision," and from LUBA review, decisions that require no "exercise of policy or legal judgment." Where a county moves to dismiss an appeal, asserting that the ORS 197.015(10)(b)(A) exemption applies, and petitioners offer no understandable response to that jurisdictional argument, petitioners fail to carry their burden to establish that LUBA has jurisdiction. *Early v. Jackson County*, 70 Or LUBA 273 (2014).

26.1 LUBA Jurisdiction – Generally. Under OAR 661-010-0075(11)(b), petitioners have 14 days from the date a party files a motion challenging LUBA's jurisdiction over an appealed decision to file a conditional motion to transfer the appeal to circuit court, in the event LUBA sustains the jurisdictional challenge. Where petitioners do not file a conditional motion to transfer, and LUBA concludes it lacks jurisdiction, it will dismiss the appeal. *Early v. Jackson County*, 70 Or LUBA 273 (2014).

26.1 LUBA Jurisdiction – Generally. Under ORS 34.102(4), LUBA only has the authority to transfer to Circuit Court an appeal of a decision that LUBA concludes is not a land use decision or limited land use decision subject to LUBA's jurisdiction. LUBA lacks authority to transfer to circuit court discrete "issues" raised in an appeal of a land use decision or limited land use decision, while retaining jurisdiction and review authority over the remainder of the decision. *Macfarlane v. Clackamas County*, 70 Or LUBA 497 (2014).

26.1 LUBA Jurisdiction – Generally. Where the decision that is the subject of a LUBA appeal does not exist, LUBA lacks jurisdiction and the appeal will be dismissed. *Brodersen v. City of Ashland*, 68 Or LUBA 159 (2013).

26.1 LUBA Jurisdiction – Generally. Where all parties agree that an appeal should be dismissed, but argue the appeal should be dismissed for different reasons, LUBA need only find that one reason to dismiss is well-founded. *Brodersen v. City of Ashland*, 68 Or LUBA 159 (2013).

26.1 LUBA Jurisdiction – Generally. LUBA has a statutory obligation to ensure that its jurisdiction is appropriately exercised. LUBA must address a jurisdictional challenge presented by a party even if the challenge violates a stipulated case management order signed by the party. *Terra Hydr Inc. v. Metro*, 68 Or LUBA 302 (2013).

26.1 LUBA Jurisdiction – Generally. The legislature did not intend LUBA to exercise jurisdiction to review a decision approving a tax exemption for multiple family housing under ORS 307.600 *et seq.*, as evidenced by the fact that the legislature specifically provided, in ORS 307.631, that denial or termination of a tax exemption for multiple-unit housing is subject to review in circuit court. *Conte v. City of Eugene*, 66 Or LUBA 95 (2012).

26.1 LUBA Jurisdiction – Generally. A decision that approves a property tax exemption for multiple-family housing under ORS 307.600 *et seq.*. is a fiscal decision excluded from LUBA's jurisdiction, notwithstanding that ORS 307.618 requires a finding that the multiple-family housing "is or will be at the time of development" in conformance with applicable land use regulations, because the decision has only incidental impacts on land use and does not approve or deny any proposed development, which will necessarily be subject to a subsequent decision on a building

permit or application for development approval under the applicable land use regulations. *Conte v. City of Eugene*, 66 Or LUBA 95 (2012).

26.1 LUBA Jurisdiction – Generally. Even if all of the assignments of error challenging a decision on remand are barred from relitigation or waived under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), and thus not within LUBA's scope of review, that only means LUBA will affirm the decision, not that the decision on remand is not within LUBA's jurisdiction. *Hatley v. Umatilla County*, 66 Or LUBA 427 (2012).

26.1 LUBA Jurisdiction – Generally. An order that simply adopts additional findings following a LUBA remand, but does not "change" any acknowledged comprehensive plan or land use regulation, is not a post-acknowledgment plan amendment, and the deadline to appeal the order to LUBA is therefore 21 days from the date the decision became final, pursuant to the first sentence of ORS 197.830(9), not 21 days from the date that notice of the order was mailed. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

26.1 LUBA Jurisdiction – Generally. The 21-day period to appeal to LUBA under the second sentence of ORS 197.830(9) commences on the date notice of the decision is mailed to "parties entitled to notice under ORS 197.615." The "notice" referred to in ORS 197.830(9) is the written notice that ORS 197.615(4) requires the local government to mail to participants, not the copy of the final decision that ORS 197.615(1) requires the local government to submit to DLCD. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

26.1 LUBA Jurisdiction – Generally. Where a petitioner participated in the proceedings leading to adoption of a post-acknowledgment plan amendment, and received timely notice of the decision, the deadline to appeal the decision to LUBA is 21 days from the date the notice was mailed to petitioner, not 21 days from the date the local government submits a copy of the decision to DLCD. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

26.1 LUBA Jurisdiction – Generally. Under *ODOT v. City of Oregon City*, 153 Or App 705, 959 P2d 615 (1998), the deadline to appeal a post-acknowledgment plan amendment to LUBA under the second sentence of ORS 197.830(9) is 21 days from the date the local government mails notice of the decision to parties entitled to notice, even for persons who did not participate in the proceedings and thereby become entitled to notice. However, *ODOT* does not suggest that notice failures to some parties tolls the 21-day deadline for a petitioner who did receive notice but failed to appeal the decision to LUBA within the 21-day period. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

26.1 LUBA Jurisdiction – Generally. LUBA may consider whether it has jurisdiction over an appeal on its own motion, and if it is uncertain whether it has jurisdiction, LUBA is obligated to do so without regard to whether the parties raise any jurisdictional question. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

26.1 LUBA Jurisdiction – Generally. Under subsection (3) of ORS 197.825, circuit courts retain jurisdiction "[t]o grant declaratory, injunctive, or mandatory relief in * * * proceedings brought to

enforce the provisions of an adopted comprehensive plan or land use regulations[.]"*Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

26.1 LUBA Jurisdiction – Generally. When a local government takes action to enforce its land use laws, LUBA has exclusive jurisdiction in such circumstances to review any land use decisions a local government may render in enforcing its land use laws, but circuit courts otherwise retain jurisdiction over proceedings that are brought to enforce county land use laws. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

26.1 LUBA Jurisdiction – Generally. Just as LUBA in reviewing land use decisions to determine whether they should be affirmed, remanded or reversed under ORS 197.835 "has no authority to enforce" local land use laws, circuit courts lack jurisdiction to review local government land use decisions when proceedings are brought in circuit court to enforce land use laws. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

26.1 LUBA Jurisdiction – Generally. Where a county has adopted the Oregon Department of Environmental Quality's noise standards as a county land use regulation, a final county decision that applies those noise standards is a "land use decision," as that term is defined at ORS 197.015(10)(a). *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

26.1 LUBA Jurisdiction – Generally. Where LUBA raises a jurisdictional issue on its own motion at oral argument, requests additional briefing from the parties on whether LUBA has jurisdiction over the appeal and, after considering the parties' briefing, ultimately concludes that LUBA lacks jurisdiction, LUBA will dismiss the appeal unless the petitioner has filed a motion to transfer the appeal to circuit court. *Maguire v. Clackamas County*, 64 Or LUBA 288 (2011).

26.1 LUBA Jurisdiction – Generally. Under ORS 197.825(1), LUBA's jurisdiction is limited to review of land use decisions and limited land use decisions. Adjudication of allegations of false swearing under ORS 162.075(1) is not within LUBA's scope of review. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

26.1 LUBA Jurisdiction – Generally. LUBA lacks statutory authority to grant a motion to transfer an appeal to circuit court that is filed after LUBA has issued its final opinion and order dismissing the appeal. *Devereux v. Douglas County*, 64 Or LUBA 466 (2011).

26.1 LUBA Jurisdiction – Generally. Even assuming that OAR 661- 010-0075(11), which provides that LUBA shall dismiss an appeal of a decision that is not reviewable as a land use decision, unless a motion to transfer to circuit court is filed within 14 days of the date any party or LUBA raises the jurisdictional issue, is inconsistent with ORS 34.102(4) or the federal due process clause, LUBA lacks authority to reconsider its final opinion to change the disposition of the appeal, in response to a motion to transfer filed after LUBA issued its final opinion dismissing the appeal. Any error that LUBA may commit in issuing the final opinion can only be corrected by appeal to the Court of Appeals. *Maguire v. Clackamas County*, 64 Or LUBA 478 (2011).

26.1 LUBA Jurisdiction – Generally. LUBA lacks the equitable power of a court to apply the doctrine of laches to dismiss an appeal based on allegations that a petitioner knew from

conversations with a neighbor about the challenged decision long before filing the LUBA appeal. The legislature has comprehensively prescribed in ORS 197.830(3) and other relevant statutes the deadlines to appeal land use decisions to LUBA, including what states of knowledge are relevant in applying those deadlines. *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

26.1 LUBA Jurisdiction – Generally. A decision that amends a land use decision is itself a land use decision. *Mingo v. Morrow County*, 63 Or LUBA 357 (2011).

26.1 LUBA Jurisdiction – Generally. Where there is a reasonable dispute regarding which of two documents or decisions is appealable to LUBA, the notice of intent to appeal identifies both documents, but mistakenly identifies the wrong document as the appealable decision, LUBA will regard that mistake as a technical pleading error, treat the appealable decision as the subject of the notice, and not dismiss an otherwise properly filed appeal. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 538 (2011).

26.1 LUBA Jurisdiction – Generally. Where the notice of intent to appeal mistakenly identifies a planning commission decision as the county's final decision, but it is clear that the petitioner wished to appeal the county's final decision, the governing body's decision on petitioner's local appeal of the planning commission decision, dismissing the appeal based on that mistake would amount to dismissing the appeal based on a technical pleading error. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 538 (2011).

26.1 LUBA Jurisdiction – Generally. LUBA will not dismiss an appeal based on mistaken identification of the county's final decision, where the appeal has proceeded from its beginning and the record was settled under a shared understanding regarding the subject of the appeal, and no party identifies prejudice to any party's substantial rights from the petitioner's error in mis-identifying the appealed decision in the notice of intent to appeal. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 538 (2011).

26.1 LUBA Jurisdiction – Generally. LUBA normally resolves jurisdictional challenges before considering any other arguments on the merits. However, LUBA will consider those other arguments on the merits where petitioner's "jurisdictional" challenge is really an argument for a limited scope of review of a decision that petitioner concedes is a land use decision, and LUBA's resolution of the arguments on the merits makes it unnecessary to resolve petitioner's scope of review arguments. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

26.1 LUBA Jurisdiction – Generally. Decisions that local governments do not believe to be land use decisions and do not process as land use decisions may in fact be land use decisions. *Jacobsen v. City of Winston*, 62 Or LUBA 535 (2010).

26.1 LUBA Jurisdiction – Generally. LUBA may raise the issue of jurisdiction on its own motion and at any time. *Stewart v. City of Salem*, 61 Or LUBA 77 (2010).

26.1 LUBA Jurisdiction – Generally. No statute authorizes LUBA to reconsider a previously issued final opinion. *Boucot v. City of Corvallis*, 61 Or LUBA 459 (2010).

26.1 LUBA Jurisdiction – Generally. Arguments that a permit applicant failed to raise any issue concerning a refund of permit fees in his appeal of the permit denial provide no basis for a motion to dismiss. Waiver of issues for failure to raise those issues in a local proceeding or prior LUBA appeals may affect LUBA's scope of review, but such waiver does not affect LUBA's jurisdiction to review a decision that qualifies as a land use decision. *Sperber v. Coos County*, 61 Or LUBA 477 (2010).

26.1 LUBA Jurisdiction – Generally. A motion to dismiss an appeal because the notice of intent to appeal inadequately described the appealed decision will be denied, where that motion is based on a hyper-technical reading of the notice of intent to appeal and the notice of intent to appeal adequately described the comprehensive plan and zoning map amendment that the petitioner wished to appeal, even though the notice of intent to appeal did not refer to the enacting ordinance by number and erroneously referred to a resolution that adopted supporting findings but did not adopt the appealed amendment. *Just v. Linn County*, 60 Or LUBA 74 (2009).

26.1 LUBA Jurisdiction – Generally. Where a petitioner transmits the petition for review to LUBA in any way other than by first class mail with the United States Postal Service, the petition for review is not "filed" until it is received by LUBA. In that circumstance it is legally irrelevant whether the petitioner acted in good faith in using a carrier other than the United States Postal Service and it is legally irrelevant that the choice to transmit the petition for review by a means other than first class mail resulted in no delay in LUBA receiving the petition for review. *Canfield v. Lane County*, 59 Or LUBA 505 (2009).

26.1 LUBA Jurisdiction – Generally. Whether the OAR 661-010-0030(1) requirement that a LUBA appeal be dismissed if the petition for review is not filed within the 21-day deadline established by that rule is a *jurisdictional* requirement or merely a *compulsory non-jurisdictional* basis for dismissing the appeal, the 10-day rule in OAR 661-010-0065(2) that requires a motion to be filed within 10 days after discovery of a failure to comply with LUBA's rules does not apply to a motion to dismiss based on a petitioner's failure to comply with the deadline established by OAR 661-010-0030(1) for filing the petition for review. *Canfield v. Lane County*, 59 Or LUBA 505 (2009).

26.1 LUBA Jurisdiction – Generally. When a local government dismisses a local appeal of a decision that is a land use decision, LUBA has jurisdiction to review that dismissal even if the dismissal did not require interpretation or the exercise of policy or legal judgment. *Golden v. City of Silverton,* 58 Or LUBA 399 (2009).

26.1 LUBA Jurisdiction – Generally. Under Measure 37, specifically under ORS 197.352(9) (2005), public entity decisions to modify or to waive land use laws in response to Measure 37 claims were not land use decisions and were therefore not reviewable by LUBA. Public entity decisions that were issued following those modification or waiver decisions, which applied modified land use laws or land use laws that were not waived under Measure 37 were land use decisions and were reviewable by LUBA. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.1 LUBA Jurisdiction – Generally. Decisions under Measure 49 are not land use decisions and are not subject to LUBA's jurisdiction. ORS 195.305(7); 195.318(1). *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.1 LUBA Jurisdiction – Generally. Under ORS 195.305(7) local government decisions about the "nature and extent" of just compensation due under Ballot Measure 49 are not land use decisions. However, a local government decision maker's *understanding* that approval of a preliminary plat was a decision about the "nature and extent" of just compensation under Measure 49 has no bearing on whether the decision actually is a decision about the "nature and extent" of just compensation under Measure 49. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.1 LUBA Jurisdiction – Generally. A preliminary subdivision plat approval decision that post-dates a vested rights determination under Measure 49 is a land use decision subject to LUBA's review and is not a decision concerning the "nature and extent of [just] compensation" under Measure 49. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.1 LUBA Jurisdiction – Generally. LUBA has jurisdiction to review decisions that post-date and rely on Ballot Measure 37 waivers, if those decisions apply land use laws that were not waived under Ballot Measure 37. However, in those appeals LUBA's scope of review does not include challenges to the underlying Ballot Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.1 LUBA Jurisdiction – Generally. Decisions under ORS 197.352(8) about whether land use laws should be or can be waived under Ballot Measure 37 are not land use decisions and are not reviewable by LUBA. But where questions arise about the scope of previously issued Ballot Measure 37 waivers in subsequent land use decisions that rely on those Ballot Measure 37 waivers, LUBA's scope of review includes resolving any ambiguities about the scope of a previously issued Ballot Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.1 LUBA Jurisdiction – Generally. In an appeal of a subdivision decision that relies on Ballot Measure 37 waivers and a Ballot Measure 49 vested rights decision, LUBA's scope of review includes resolving questions about the scope of the previously issued Ballot Measure 37 waiver. A decision about the scope of a previously issued Ballot Measure 37 waiver is not a decision about the "nature and extent of [just] compensation" under Measure 49 (ORS 195.305(7)) and is therefore subject to LUBA review. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.1 LUBA Jurisdiction – Generally. LUBA may consider documents that are not in the record, even without a motion to take evidence under OAR 661-010-0045, if a party offers such documents for the limited purpose of determining whether LUBA has jurisdiction over the challenged decision. *Murray v. Multnomah County*, 56 Or LUBA 370 (2008).

26.1 LUBA Jurisdiction – Generally. Designation of tax lots is not a land use decision. *Chaves v. Jackson County*, 56 Or LUBA 643 (2008).

26.1 LUBA Jurisdiction – Generally. LUBA does not have authority to "reopen" or "restart" an appeal in which LUBA has already issued a final opinion and order. The only recourse for a party

that wishes to challenge our final opinion and order is to appeal our decision to the Court of Appeals. *Jacobsen v. Douglas County*, 56 Or LUBA 816 (2008).

26.1 LUBA Jurisdiction – Generally. The filing of a Notice of Intent to Appeal (NITA) is a jurisdictional prerequisite to commencing a LUBA appeal. Where all petitioners withdraw the NITA, the appeal must be dismissed. *Brown v. Jackson County*, 55 Or LUBA 178 (2007).

26.1 LUBA Jurisdiction – Generally. Petitioners' failure to include an adequate jurisdictional statement in their petition for review is not a basis for dismissing their appeal, where their dispute about whether the challenged decision is a land use decision is the central dispute and petitioners' first assignment of error alleges that the appealed decision is a land use decision that is subject to LUBA review. *Zirker v. City of Bend*, 55 Or LUBA 188 (2007).

26.1 LUBA Jurisdiction – Generally. Petitioners' argument that a prior zoning ordinance did not allow a mushroom buying business is moot, where the currently applicable zoning ordinance that replaced the prior zoning ordinance does not allow a mushroom buying business and would apply to any application for a mushroom buying business in the future. *Robson v. City of La Grande*, 54 Or LUBA 10 (2007).

26.1 LUBA Jurisdiction – Generally. Whether the Oregon Department of Environmental Quality properly issued a permit in reliance on a local government land use compatibility statement has no bearing on whether that land use compatibility statement is a land use decision as defined in ORS 197.015(11). *Wolfgram v. Douglas County*, 54 Or LUBA 54 (2007).

26.1 LUBA Jurisdiction – Generally. The fact that procedures for making limited land use decisions are used for making a decision to approve or deny a final partition plat does not convert that decision into a limited land use decision or override the language of ORS 92.100(7) providing that decisions to approve or deny a final partition plat are not limited land use decisions. *Ehle v. City of Salem*, 54 Or LUBA 688 (2007).

26.1 LUBA Jurisdiction – Generally. LUBA's scope of review is not limited to the local government record under ORS 197.835(2)(a) when LUBA is considering whether the decision on appeal is a land use decision that is subject to LUBA review. Making that threshold jurisdictional inquiry does not entail "[r]eview of the decision," within the meaning of ORS 197.835(2)(a). *Home Builders Association v. City of Eugene*, 54 Or LUBA 692 (2007).

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

26.1 LUBA Jurisdiction – Generally. An agreement between a local government and a private party for development of a sports park is not a "development agreement" as defined in ORS 94.504, where it is clear from the language of the agreement that the parties did not intend the agreement to comply with the requirements of ORS 94.504(1)–(8). *Dorall v. Coos County*, 53 Or LUBA 32 (2006).

26.1 LUBA Jurisdiction – Generally. Referral to the Court of Appeals under ORS 34.102(5) is not appropriate or required where LUBA will have jurisdiction to review the county's interlocutory decision denying a motion to dismiss as part of its review of the county's final decision on the application. *Ratzlaff v. Polk County*, 53 Or LUBA 480 (2007).

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

26.1 LUBA Jurisdiction – Generally. Based on *dicta* in *Kalmiopsis Audubon Society v. Curry County*, 131 Or App 308, 884 P2d 894 (1994), it is theoretically possible to appeal a decision that purports to correct a "clerical error" in a final, unappealed decision, as long as the petitioner demonstrates that the correction qualifies as a land use decision and the appeal is narrowly focused on the correction itself, rather than the unappealed decision. *Hoschek v. Tillamook County*, 52 Or LUBA 793 (2006).

26.1 LUBA Jurisdiction – Generally. LUBA has consistently declined to apply the "fiscal exception" to decisions that involve local land use appeal fees or land use application fees, because such decisions implicate core land use concerns regarding access to and citizen participation in land use reviews. *Sommer v. Josephine County*, 52 Or LUBA 806 (2006).

26.1 LUBA Jurisdiction – Generally. The specific motivation of a county for amending its schedule of appeal and application fees is not determinative of whether the "fiscal exception" to LUBA's jurisdiction applies. *Sommer v. Josephine County*, 52 Or LUBA 806 (2006).

26.1 LUBA Jurisdiction – Generally. A decision approving a manufactured home subdivision is a limited land use decision subject to LUBA's jurisdiction. That the decision includes a condition of approval that imposes or references system development charges does not mean that the decision is excluded from LUBA's jurisdiction as a "fiscal" decision under the reasoning in *State Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980). *D & B Home Investments v. City of Donald*, 51 Or LUBA 1 (2006).

26.1 LUBA Jurisdiction – Generally. A quasi-judicial decision approving a tentative subdivision plat does not "implement" a systems development charge within the meaning of ORS 223.314, and therefore fall within an exclusion to LUBA's jurisdiction, simply because the decision imposes a condition of approval that imposes or references system development charges. *D & B Home Investments v. City of Donald*, 51 Or LUBA 1 (2006).

26.1 LUBA Jurisdiction – Generally. Where the local government failed to provide either (1) a "notice of a hearing" required by ORS 197.763 or (2) notice of an "administrative decision" required by ORS 197.195, ORS 197.830(6)(b) provides that the statute of ultimate repose in ORS

197.830(6)(a) does not apply. Failure to provide notice required by other statutes or by local codes do not provide an exception to the three-year statute of ultimate repose. *Kamp v. Washington County,* 51 Or LUBA 670 (2006).

26.1 LUBA Jurisdiction – Generally. Notice of withdrawal of a permit application required by local ordinance is not "notice of a hearing" required by ORS 197.763, and failure to provide such notice of withdrawal does not invoke the exception to the statute of ultimate repose at ORS 197.803(6)(b). *Kamp v. Washington County*, 51 Or LUBA 670 (2006).

26.1 LUBA Jurisdiction – Generally. Failure to provide notice of withdrawal of a permit application required by local ordinance is not a failure to provide the "notice of decision" required by the statutes governing limited land use decisions at ORS 197.195, for purposes of the statute of ultimate repose at ORS 197.830(6), where it is undisputed that the subject property is not within an urban growth boundary and for that reason alone a decision with respect to the application cannot be a limited land use decision. *Kamp v. Washington County*, 51 Or LUBA 670 (2006).

26.1 LUBA Jurisdiction – Generally. The requirements in OAR 661-010-0015(3) that the notice of intent to appeal include a caption identifying the "governing body" as the respondent and that the notice include the name and telephone number of the governing body and its counsel serve important purposes, including notifying the local government responsible for compiling the record and defending the decision before LUBA that its decision has been appealed, but those requirements are not in themselves jurisdictional. *Stoloff v. City of Portland*, 51 Or LUBA 812 (2006).

26.1 LUBA Jurisdiction – Generally. Where pursuant to an intergovernmental agreement a city acts as the final decision maker for a county, compiles the record, and defends the decision before LUBA, the purposes of OAR 661-010-0015(3) are better served by naming the city rather than the county as the respondent. *Stoloff v. City of Portland,* 51 Or LUBA 812 (2006).

26.1 LUBA Jurisdiction – Generally. Failure to satisfy the content requirements for a notice of an intent to appeal is a technical violation of LUBA's rules that does not provide a basis to dismiss the appeal, absent a showing of prejudice to the parties' substantial rights. Where no prejudice is shown, LUBA will allow the notice to be amended to name the correct parties. *Stoloff v. City of Portland*, 51 Or LUBA 812 (2006).

26.1 LUBA Jurisdiction – Generally. LUBA will deny a motion to dismiss, which is based on an argument that there is no "reasonable basis" to appeal the challenged subdivision approval, where no pleadings have yet been filed and the movant fails to demonstrate that the decision is subject to any exception to LUBA's jurisdiction. Even if petitioner is ultimately unable to advance a meritorious challenge to the decision, LUBA would affirm the decision rather than dismiss the appeal. *Frewing v. City of Tigard,* 51 Or LUBA 834 (2006).

26.1 LUBA Jurisdiction – Generally. Statutes relating to development agreements, ORS 94.5084 *et seq.*, are not the exclusive avenue for a local government to adopt development agreements, and the language in ORS 94.508(2) providing that approval or amendment of a development agreement

is a land use decision does not apply to a city's adoption of a development agreement pursuant to its charter authority. *ZRZ Realty Company v. City of Portland*, 49 Or LUBA 309 (2005).

26.1 LUBA Jurisdiction – Generally. An allegation that a local ordinance authorizes actions prohibited under contract with federal government does not fall within LUBA's scope of review. *Roads End Sanitary District v. City of Lincoln City*, 48 Or LUBA 126 (2004).

26.1 LUBA Jurisdiction – Generally. Contrary to *Thede v. Polk County*, 1 Or LUBA 339 (1980), irregularities in signing and approving a final city decision does not mean that the challenged decision is not a "final decision" subject to LUBA's jurisdiction. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 618 (2004).

26.1 LUBA Jurisdiction – Generally. An argument that the assignments of error in the petition for review are directed at decisions not before LUBA is not a basis to dismiss an appeal of a decision otherwise within LUBA's jurisdiction. If that argument is correct, the proper disposition is to reject the assignments of error in the petition for review and affirm the challenged decision, not to dismiss the appeal. Such arguments are more correctly viewed as a scope of review challenge rather than a jurisdictional challenge. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282 (2004).

26.1 LUBA Jurisdiction – Generally. A challenge to LUBA's jurisdiction may be brought at any time, and a city's delay of several months in filing its motion to dismiss provides no basis for LUBA to refuse to consider the city's motion to dismiss. *Dobson v. City of Newport*, 47 Or LUBA 589 (2004).

26.1 LUBA Jurisdiction – Generally. Where a petitioner does not ask any questions of LUBA staff or city staff until the last day to file her notice of intent to appeal under her legal theory and nine days after the notice of intent to appeal was due under the city's legal theory, nothing city or LUBA staff may have said to petitioner could be the cause of her failing to file a timely notice of intent to appeal under the city's legal theory. *Dobson v. City of Newport*, 47 Or LUBA 589 (2004).

26.1 LUBA Jurisdiction – Generally. Although a motion to dismiss may be filed at any time prior to the issuance of a final opinion and order, a party is not entitled to file unlimited motions on the same issue. When a party has had ample time to brief and argue jurisdictional issues, LUBA is not obligated to reconsider earlier orders regarding jurisdiction. *Comrie v. City of Pendleton*, 46 Or LUBA 19 (2003).

26.1 LUBA Jurisdiction – Generally. LUBA does not have the authority to issue a remedial order that requires an applicant to restore property to the condition it was in prior to approval of the challenged application in the event petitioners prevail in their LUBA appeal. *Roberts v. Clatsop County*, 44 Or LUBA 178 (2003).

26.1 LUBA Jurisdiction – Generally. Where the respondent argues that its decision is merely a recommendation to another governing body, and thus not a final decision, and the petitioner fails to respond to that argument, the petitioner has not met his burden of establishing the Board's jurisdiction, and the appeal will be dismissed. *Ziemer v. City of Florence*, 43 OR LUBA 1 (2002).

26.1 LUBA Jurisdiction – Generally. Where the petitioners do not argue that a city decision establishing a local improvement district to fund street improvements is a land use decision, LUBA does not have jurisdiction to review the city's decision. *Hazelnut A Partners v. City of Woodburn*, 42 Or LUBA 474 (2002).

26.1 LUBA Jurisdiction – Generally. Ancillary local government decisions pertaining to the siting of energy generating facilities that might otherwise fall under the definition of land use decisions subject to LUBA's jurisdiction are nevertheless subject to the exclusive jurisdiction of the Oregon Energy Facility Siting Council, with direct review by the Oregon Supreme Court. *Thomas v. City of Turner*, 42 Or LUBA 39 (2002).

26.1 LUBA Jurisdiction – Generally. ORS 197.805 can be read in isolation to suggest that LUBA must apply the "practical effect" limitation on the judicial power described in *Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), as a "sound principle of judicial review." However, read in context with ORS 197.830, it is clear that the legislature did not intend to require that petitioners invoking LUBA's review under ORS 197.830(2) establish that the challenged decision impacts their interests. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 524 (2002).

26.1 LUBA Jurisdiction – Generally. ORS 197.825(2)(b), which states that LUBA's jurisdiction is subject to the statutes governing the Court of Appeals' review of LUBA decisions, simply clarifies that LUBA no longer has jurisdiction over an appeal once a party seeks judicial review of LUBA's final order in that appeal. ORS 197.825(2)(b) does not require that LUBA consider whether the Court of Appeals might lack constitutional authority to review LUBA's final order, or require that LUBA dismiss the appeal if it concludes that such is the case. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 524 (2002).

26.1 LUBA Jurisdiction – Generally. ORS 197.090(2) requires DLCD to obtain approval from LCDC prior to filing an appeal with LUBA, but allows DLCD to obtain approval after the fact if the decision being appealed becomes final less than 15 days before the next LCDC meeting or no meeting is scheduled during the appeal period. However, nothing in the statute indicates that the timing of approval has jurisdictional significance, or that LUBA loses jurisdiction over the appeal if DLCD erroneously obtains after-the-fact approval rather than prior approval. *DLCD v. Douglas County*, 40 Or LUBA 604 (2001).

26.1 LUBA Jurisdiction – Generally. ORS 197.626 provides the Land Conservation and Development Commission with exclusive jurisdiction to review decisions that amend an urban growth boundary (UGB) to include more than 50 acres. However, ORS 197.626 does not deprive LUBA of jurisdiction over a final decision that amends the city's comprehensive plan housing needs inventory but does not amend the UGB or otherwise determine how the city will accommodate the identified housing needs. *DLCD v. City of McMinnville*, 40 Or LUBA 591 (2001).

26.1 LUBA Jurisdiction – Generally. Under ORS 197.644(2) and OAR 660-025-0040, it is possible for the Land Conservation and Development Commission and LUBA to have concurrent

jurisdiction over the same land use decision, albeit each may have exclusive jurisdiction over different issues arising from the decision. *DLCD v. City of McMinnville*, 40 Or LUBA 591 (2001).

26.1 LUBA Jurisdiction – Generally. LUBA has jurisdiction under ORS 197.644(2), ORS 197.825(2)(c) and OAR 660-025-0040(1) over a decision amending a city's comprehensive plan housing inventory, notwithstanding that the city is undergoing periodic review, where the decision was not adopted to implement the city's periodic review work program or any work program tasks. *DLCD v. City of McMinnville*, 40 Or LUBA 591 (2001).

26.1 LUBA Jurisdiction – Generally. Where a city has not responded to petitioner's concerns that a property owner lost his right to continue a nonconforming residential use, petitioner may be able to seek a remedy in circuit court under ORS 197.825(3)(a). However, unless and until the city addresses those concerns in a land use decision, LUBA has no jurisdiction to consider those concerns. *Robson v. City of La Grande,* 40 Or LUBA 250 (2001).

26.1 LUBA Jurisdiction – Generally. Where LUBA has determined in a prior earlier appeal that a conditional use permit has expired, a subsequent appeal challenging a city decision that refuses to revoke the conditional use permit or delete certain conditions of approval in the conditional use permit is moot. *Willhoft v. City of Gold Beach*, 39 Or LUBA 353 (2001).

26.1 LUBA Jurisdiction – Generally. Where a petitioner fails to respond to an apparently meritorious motion to dismiss, petitioner fails to carry his burden to demonstrate that the challenged decision is a land use decision subject to review by LUBA. *Rohrer v. Crook County*, 38 Or LUBA 8 (2000).

26.1 LUBA Jurisdiction – Generally. Where a county enforcement decision does not apply or interpret any land use regulations in deciding that a mobile home set-up permit is the equivalent of a building permit for the purpose of determining whether a permit deadline has been met, the county's decision is not a land use decision subject to LUBA's jurisdiction. *Balk v. Multnomah County,* 38 Or LUBA 1 (2000).

26.1 LUBA Jurisdiction – Generally. Under ORS 197.825(3)(a), a local government may elect to enforce its land use regulations, and if such an enforcement action is filed in circuit court, the court has jurisdiction to consider any land use issues that might arise. *Yost v. Deschutes County*, 37 Or LUBA 653 (2000).

26.1 LUBA Jurisdiction – Generally. A local government decision not to institute action in circuit court to enforce its land use regulations is not itself a land use decision, provided the local government's decision is not rendered pursuant to a local procedure that necessarily leads to a land use decision, as defined by ORS 197.015(10)(a). *Yost v. Deschutes County*, 37 Or LUBA 653 (2000).

26.1 LUBA Jurisdiction – Generally. Where a local government's land use regulations make it clear that staff determinations describing the uses to which property may be put are informal decisions rather than final county decisions, and those decisions are rendered outside formal local government land use procedures for decision making and declaratory rulings, such decisions do

not constitute land use decisions that may be appealed to LUBA. *Yost v. Deschutes County*, 37 Or LUBA 653 (2000).

26.1 LUBA Jurisdiction – Generally. In lieu of judicial review by the Court of Appeals of an order of the Columbia River Gorge Commission regarding any action of a county pursuant to the Columbia River Gorge Scenic Area Act, the county's decision may be appealed to LUBA. Such an appeal must be filed within 21 days after the Columbia River Gorge Commission decision becomes final and LUBA may not consider any issue concerning interpretation or implementation of the Columbia River Gorge Scenic Act. *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580 (2000).

26.1 LUBA Jurisdiction – Generally. An appeal to LUBA of a county decision under the Columbia River Gorge Scenic Act, prior to the date the Columbia River Gorge Commission issues a final decision reviewing the county decision, is premature and will be dismissed. Appellate jurisdiction for review of such a county decision in the first instance lies with the Columbia River Gorge Commission. *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580 (2000).

26.1 LUBA Jurisdiction – Generally. LUBA's dismissal of an appeal at petitioner's request expresses no opinion on the merits of any underlying agreement or any actions taken by the local government that may form the basis for petitioner's decision to request that its appeal be dismissed. *Genstar Land Company Northwest v. City of Sherwood*, 36 Or LUBA 612 (1999).

26.1 LUBA Jurisdiction – Generally. Where the relationship between two decisions is not clear from the parties' memoranda, LUBA will deny a motion to dismiss and defer a ruling on jurisdiction until after the parties' briefs are filed and an opportunity for oral argument is provided. *Columbia Hills Development Co. v. Columbia County*, 35 Or LUBA 737 (1998).

26.1 LUBA Jurisdiction – Generally. An access permit for petitioner's subdivision and an irrevocable consent agreement are neither land use or limited land use decisions, as defined by ORS 197.015(10) and (12), over which LUBA has jurisdiction. *River Estates v. Umatilla County*, 35 Or LUBA 310 (1998).

26.1 LUBA Jurisdiction – Generally. Whether multiple enactments constitute a single decision for purposes of appeal to LUBA depends on the relationship between the enactments. Where a decision on reconsideration reenacts the original decision together with a supplemental enactment that is characterized as an "integral part" of the reconsidered decision, there is a single decision for purposes of appeal of the decision on reconsideration to LUBA. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

26.1 LUBA Jurisdiction – Generally. Where a different, closely related decision is not separately appealed to LUBA, LUBA has no jurisdiction to conduct a consolidated review of the decision that was not appealed as part of its review of the decision that was appealed. *Jebousek v. City of Newport*, 34 Or LUBA 340 (1998).

26.1 LUBA Jurisdiction – Generally. LUBA's jurisdiction is limited to reviewing the land use decision appealed. In reviewing an appealed land use decision, LUBA may not consider whether a code amendment that is applied in the challenged decision was properly adopted, where the decision adopting the code amendment was not appealed. *Femling v. Coos County*, 34 Or LUBA 328 (1998).

26.1 LUBA Jurisdiction – Generally. LUBA does not have jurisdiction to enforce a circuit court injunction requiring that a structure be reduced in size. *Femling v. Coos County*, 34 Or LUBA 328 (1998).

26.1 LUBA Jurisdiction – Generally. The parties to an appeal at LUBA may not by agreement stipulate that LUBA has jurisdiction to review a separate decision that was not appealed to LUBA. *Mountain Gate Homeowners v. Washington County*, 34 Or LUBA 169 (1998).

26.1 LUBA Jurisdiction – Generally. A challenge to LUBA's jurisdiction is not subject to the 10-day requirement of OAR 661-10-065(2), which governs motions that challenge an opposing party's failure to comply with statutes or LUBA's rules. *Adams v. City of Ashland*, 33 Or LUBA 552 (1997).

26.1 LUBA Jurisdiction – Generally. LUBA is obligated as an appellate body to examine its jurisdiction *sua sponte*, regardless of whether the issue is raised by the parties. *Adams v. City of Ashland*, 33 Or LUBA 552 (1997).

26.1 LUBA Jurisdiction – Generally. A county's delay in providing petitioner with notice of decision does not toll the 21-day appeal period set forth in ORS 197.830(8), and under *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625 (1997), LUBA has no jurisdiction over an appeal filed more than 21 days after the county's decision became final. *Michael-Mark v. Yamhill County*, 33 Or LUBA 409 (1997).

26.1 LUBA Jurisdiction – Generally. LUBA will consider appended materials outside the record to the extent they aid in determining whether a local government's action is a land use decision subject to LUBA jurisdiction. *Ceniga v. Clackamas County*, 33 Or LUBA 261 (1997).

26.1 LUBA Jurisdiction – Generally. A challenge to LUBA's jurisdiction is not subject to the 10-day requirement of OAR 661-10-065(2); it may be brought at any time prior to LUBA's issuance of a final opinion and order. *Petersen v. Columbia County*, 33 Or LUBA 253 (1997).

26.1 LUBA Jurisdiction – Generally. With the exception of ORS 197.540, which authorizes LUBA to review a moratorium on land construction or development alleged to have been adopted in violation of the moratorium statute (ORS 197.505 to 197.540), LUBA's jurisdiction is limited by ORS 197.825(1) to the review of any land use decision or limited land use decision of a local government. *Cole v. Lane Transit District*, 33 Or LUBA 201 (1997).

26.1 LUBA Jurisdiction – Generally. Service of copies of the notice of intent to appeal is a jurisdictional requirement under OAR 661-10-015(2); while late service of such notice is a

technical violation that will not result in dismissal, a complete failure to provide such notice defeats LUBA's jurisdiction. *Bruce v. City of Hillsboro*, 32 Or LUBA 382 (1997).

26.1 LUBA Jurisdiction – Generally. Where petitioner's objective is to require the city to apply its comprehensive plan or land use regulations, petitioner's remedy lies in circuit court, not at LUBA. *No Casino Association v. City of Lincoln City*, 32 Or LUBA 154 (1996).

26.1 LUBA Jurisdiction – Generally. The jurisdictional statement required by OAR 660-10-030(2) provides a means for LUBA to determine whether the challenged decision fits within the statutory scope of its jurisdiction. The statement does not limit the issues that may be raised in the body of a petition for review. *Miller v. City of Joseph*, 31 Or LUBA 472 (1996).

26.1 LUBA Jurisdiction – Generally. ORS 258.036, which governs jurisdiction over election contests, does not apply to the election of members to a county citizen planning advisory committee (CPAC). *Boom v. Columbia County*, 31 Or LUBA 318 (1996).

26.1 LUBA Jurisdiction – Generally. LUBA's jurisdiction is governed by the applicable statutes in effect when the notice of intent to appeal was filed. *Torgeson v. Clackamas County*, 31 Or LUBA 554 (1996).

26.1 LUBA Jurisdiction – Generally. A local government cannot confer appeal jurisdiction on LUBA where jurisdiction does not otherwise exist by including in a notice of ordinance adoption a statement that there is an appeal to LUBA. *Mazeski v. Wasco County*, 31 Or LUBA 126 (1996).

26.1 LUBA Jurisdiction – Generally. In deciding jurisdictional challenges, LUBA will consider material attached to the parties' briefs if no party objects. If a party does object, the appropriate means to introduce evidence from outside the record is through a motion for an evidentiary hearing. *Mazeski v. Wasco County*, 31 Or LUBA 126 (1996).

26.1 LUBA Jurisdiction – Generally. Where the local government in a motion to dismiss raises a significant issue regarding LUBA's jurisdiction over a purported land use decision, and petitioner does not respond to the motion or otherwise explain the basis for LUBA's jurisdiction, petitioner has not satisfied its burden of establishing jurisdiction. *Bennett v. Polk County*, 30 Or LUBA 349 (1996).

26.1 LUBA Jurisdiction – Generally. When the 1995 legislature amended ORS 197.835, it did not deprive LUBA of jurisdiction over issues that could be raised at the time the notice of intent to appeal was filed. *Ramsay v. Linn County*, 30 Or LUBA 283 (1996).

26.1 LUBA Jurisdiction – Generally. Because petitioner's notice of intent to appeal was accompanied by a check made out to the wrong agency and the error was not corrected before the expiration of the appeal period, LUBA has no jurisdiction over the appeal. *Ray v. Douglas County*, 30 Or LUBA 238 (1995).

26.1 LUBA Jurisdiction – Generally. LUBA does not retain jurisdiction over a proceeding once it has issued a final opinion and order. *Mazeski v. Wasco County*, 30 Or LUBA 442 (1995).

26.1 LUBA Jurisdiction – Generally. Under OAR 660-25-040(1) and (2), LUBA retains jurisdiction during periodic review over matters that do not involve compliance with the Statewide Planning Goals. *Mazeski v. Wasco County*, 30 Or LUBA 442 (1995).

26.1 LUBA Jurisdiction – Generally. A challenge to LUBA's jurisdiction is not subject to the 10-day requirement of OAR 661-10-065(2), which governs motions that challenge an opposing party's failure to comply with statutes or LUBA's rules. *No Casino Association v. Lincoln City*, 30 Or LUBA 79 (1995).

26.1 LUBA Jurisdiction – Generally. Where petitioners do not respond to a motion to dismiss for lack of jurisdiction, or otherwise establish that actions taken by the county constitute a land use decision, petitioners have not met their burden of establishing LUBA's jurisdiction. *Murphy Cit. Advisory Committee v. Josephine County*, 30 Or LUBA 28 (1995).

26.1 LUBA Jurisdiction – Generally. Even if county actions could otherwise be construed to be land use decisions, where the actions are mandated by a circuit court order in response to a writ of mandamus, they are not land use decisions over which LUBA has jurisdiction. *Murphy Cit. Advisory Committee v. Josephine County*, 30 Or LUBA 28 (1995).

26.1 LUBA Jurisdiction – Generally. The Public Records Law provides that it is enforced by petition to the county district attorney and, if that fails, by instituting an action in circuit court. ORS 192.460. LUBA does not have jurisdiction to review alleged violations of the Public Records Law. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

26.1 LUBA Jurisdiction – Generally. Whether planning commission members comply with a local government's requirements regarding the make-up of its planning commission is not within LUBA's scope of review. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

26.1 LUBA Jurisdiction – Generally. Where the city council conducted a separate proceeding on the question of whether off-street parking use of certain property requires a conditional use permit, petitioners participated in that proceeding, and city council minutes indicate a final, appealable decision interpreting the local code in this regard was made, petitioners cannot challenge that decision in their appeal of the city's subsequent decision on an application for site plan approval for such off-street parking. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

26.1 LUBA Jurisdiction – Generally. Once LUBA has issued a "final order" pursuant to ORS 197.830(14), review jurisdiction rests with the Court of Appeals, and LUBA will dissolve a previously issued stay of a challenged local government decision. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335 (1995).

26.1 LUBA Jurisdiction – Generally. As the party seeking review, a petitioner has the burden of establishing LUBA has jurisdiction. *1000 Friends of Oregon v. Columbia County*, 29 Or LUBA 597 (1995).

26.1 LUBA Jurisdiction – Generally. LUBA does not have the authority to reject an otherwise properly filed appeal on the basis of an equitable defense of laches. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

26.1 LUBA Jurisdiction – Generally. The provisions of ORS 94.5O4 to 94.528 (1993) making the approval or amendment of a "development agreement" a "land use decision," do not apply to agreements that may be titled "Development Agreements," but were executed prior to the effective date of the 1993 statute. *Franklin v. Deschutes County*, 29 Or LUBA 79 (1995).

26.1 LUBA Jurisdiction – Generally. Where the dispute between the parties involves an ethical dispute concerning the application of disciplinary rules of the Oregon State Bar that have no direct bearing on the merits of the decision appealed to LUBA, LUBA will not attempt to resolve such ethical dispute. *Burghardt v. City of Molalla*, 28 Or LUBA 788 (1995).

26.1 LUBA Jurisdiction – Generally. Petitioners generally establish LUBA's jurisdiction in the petition for review. However, if a respondent moves to dismiss the LUBA appeal on the basis that the appealed decision is not a land use decision or that the appeal was not timely filed, petitioner's response to the motion to dismiss must establish that LUBA has jurisdiction. *Bowen v. City of Dunes City*, 28 Or LUBA 324 (1994).

26.1 LUBA Jurisdiction – Generally. A motion challenging LUBA's jurisdiction is not subject to the 10-day filing requirement for motions specified in OAR 661-10-065(2). *Bowen v. City of Dunes City*, 28 Or LUBA 324 (1994).

26.1 LUBA Jurisdiction – Generally. It is petitioner's obligation to establish LUBA's jurisdiction, including that petitioner's notice of intent to appeal was timely filed. *Bowen v. City of Dunes City*, 28 Or LUBA 324 (1994).

26.1 LUBA Jurisdiction – Generally. That an individual member of the board of commissioners may have told a newspaper that he believes certain uses of the subject property are incidental to farm use or otherwise are permitted uses in the EFU zoning district, does not constitute a decision of the board of commissioners. *Bach v. Deschutes County*, 28 Or LUBA 58 (1994).

26.1 LUBA Jurisdiction – Generally. Where a notice of intent to appeal filed at LUBA is later withdrawn, the LUBA appeal must be dismissed. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

26.1 LUBA Jurisdiction – Generally. LUBA's jurisdiction over an appeal is governed by the statutes in effect when the notice of intent to appeal initiating that appeal was filed. *Williams v. Clackamas County*, 27 Or LUBA 602 (1994).

26.1 LUBA Jurisdiction – Generally. A local government decision is a land use decision subject to LUBA's jurisdiction if it meets either (1) the statutory definition in ORS 197.015(10); or (2) the significant impact test established by *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d 996 (1982). *Sahagian v. Columbia County*, 27 Or LUBA 341 (1994).

26.1 LUBA Jurisdiction – Generally. If a land use decision is made in a local government proceeding to enforce its land use regulations, under ORS 197.825(1) LUBA has exclusive jurisdiction for initial review of that land use decision. If no appeal to LUBA is filed, or after any review by LUBA is complete and the local government's decision is affirmed, the local government may then seek to enforce its decision in a circuit court proceeding under ORS 197.825(3)(a). *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

26.1 LUBA Jurisdiction – Generally. LUBA lacks jurisdiction to reopen an appeal, once its final opinion and order in that appeal is issued. *Fechtig v. City of Albany*, 27 Or LUBA 648 (1994).

26.1 LUBA Jurisdiction – Generally. LUBA does not have authority to deny respondent the right to appear and defend its decision in an appeal before LUBA. *Sanchez v. Clatsop County*, 26 Or LUBA 631 (1994).

26.1 LUBA Jurisdiction – Generally. The exclusive forum for enforcement of public meetings laws is circuit court. That public meetings law violations may have occurred during the land use decision making process does not, of itself, provide a basis for reversal or remand. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

26.1 LUBA Jurisdiction – Generally. Where a local government decision determines the effect of a previous decision, LUBA may not review the legal sufficiency of the previous decision. *Rodriguez v. Marion County*, 26 Or LUBA 50 (1993).

26.1 LUBA Jurisdiction – Generally. Judicial review of LUBA decisions is governed solely by ORS 197.850. ORS 197.850 does not authorize LUBA to consider petitions for reconsideration or to stay its final opinions and orders. *DLCD v. Klamath County*, 26 Or LUBA 589 (1993).

26.1 LUBA Jurisdiction – Generally. Petitioner has the obligation to establish LUBA's jurisdiction. Where respondent moves to dismiss an appeal challenging a local government decision ordering compliance with local government land use regulations, alleging the challenged compliance order is not a land use decision, and petitioner fails to respond to the motion, LUBA will dismiss the appeal. *Kezar v. Clackamas County*, 26 Or LUBA 16 (1993).

26.1 LUBA Jurisdiction – Generally. As the party seeking LUBA review, the burden is on petitioner to establish that the challenged decision is a land use decision. Where petitioner fails to identify any comprehensive plan provision as applicable to, or argue that any plan provision is an approval standard for, the challenged decision, LUBA will conclude the challenged decision does not concern the application of a comprehensive plan. *Price v. Clatsop County*, 25 Or LUBA 341 (1993).

26.1 LUBA Jurisdiction – Generally. LUBA has no authority to reconsider or clarify its final opinions and orders. *Caine v. Tillamook County*, 25 Or LUBA 785 (1993).

26.1 LUBA Jurisdiction – Generally. Where a party simply asserts that LUBA lacks jurisdiction over an appeal, but fails to explain why, and it appears to LUBA that it has jurisdiction, LUBA

will assume jurisdiction over the appeal. *A Storage Place v. City of Tualatin*, 25 Or LUBA 202 (1993).

26.1 LUBA Jurisdiction – Generally. Where the planning commission delegated to the city manager authority to grant extensions of PUD overall development plan approval, and neither the planning commission's decision nor the city manager's decision exercising that authority was appealed, LUBA will not consider arguments that the planning commission improperly delegated authority to the city manager in an appeal of a subsequent city decision granting final PUD approval. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

26.1 LUBA Jurisdiction – Generally. LUBA has authority to promulgate rules allowing the filing of cross petitions for review by respondents who have not themselves filed timely notices of intent to appeal. *Reusser v. Washington County*, 24 Or LUBA 652 (1993).

26.1 LUBA Jurisdiction – Generally. That petitioner may be precluded from raising the issues it seeks to raise in a LUBA appeal because those issues were required to have been raised and resolved in an earlier stage of the local land use proceeding, which petitioner did not appeal, would not mean that LUBA would lack jurisdiction to review the challenged decision. Rather, in such circumstances, LUBA would be required to affirm the decision. *DLCD v. Crook County*, 24 Or LUBA 393 (1993).

26.1 LUBA Jurisdiction – Generally. In determining whether it has jurisdiction over an appeal, absent some objection from the parties, LUBA will consider materials from the record of a related LUBA appeal that are attached to parties' briefs, as well as other material in the record of that related appeal. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

26.1 LUBA Jurisdiction – Generally. The timely filing of a notice of intent to appeal is required for LUBA to have jurisdiction. Where the time for filing a notice of intent to appeal runs from the date a petitioner obtained actual knowledge of the decision or knew or should have known of the decision, it is petitioner's burden to establish when the requisite knowledge of the decision was obtained. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

26.1 LUBA Jurisdiction – Generally. A local government decision is a land use decision subject to LUBA's jurisdiction if it meets either (1) the statutory definition in ORS 197.015(10); or (2) the significant impact test. *Curtis Serve N Save v. City of Eugene*, 24 Or LUBA 341 (1992).

26.1 LUBA Jurisdiction – Generally. As the party seeking review by LUBA, petitioner has the burden of establishing that LUBA has jurisdiction. Where a petitioner argues her notice of intent to appeal is timely because it was filed within 21 days after she received actual notice of the challenged decision, the petitioner must support her argument with affidavits, record citations or other evidence. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

26.1 LUBA Jurisdiction – Generally. Where allegations of fact made in petitioner's briefs are critical to establishing LUBA's jurisdiction, respondents dispute those allegations, and petitioner neither provides citations to the record, affidavits or other evidence supporting the allegations nor

files a motion for evidentiary hearing seeking to introduce evidence to support the allegations, LUBA will dismiss the appeal. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

26.1 LUBA Jurisdiction – Generally. That the electorate may have exceeded its authority in adopting land use legislation by initiative, is a question bearing on the merits of an appeal from such a decision, not on LUBA's jurisdiction to review the appealed decision. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 607 (1992).

26.1 LUBA Jurisdiction – Generally. A special district decision is a "land use decision" subject to LUBA review if it meets either (1) the statutory definition in ORS 197.015(10), or (2) the significant impact test. *Keating v. Heceta Water District*, 24 Or LUBA 175 (1992).

26.1 LUBA Jurisdiction – Generally. Where a local planning official refuses to accept petitioner's local appeal of a hearings officer's decision on a permit application, but another local appeal of the same decision is processed, the refusal is either (1) a final land use decision, in which case a NITA must be timely filed with LUBA; or (2) part of the ongoing local proceedings on the subject application, in which case in an appeal of the local government's final decision, LUBA can only consider issues concerning the refusal to accept petitioner's appeal if those issues were raised below. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

26.1 LUBA Jurisdiction – Generally. LUBA has no authority to issue an order clarifying its final opinion. *Alliance for Resp. Land Use v. Deschutes County*, 23 Or LUBA 717 (1992).

26.1 LUBA Jurisdiction – Generally. The land use decision reviewed in an appeal before LUBA is the final written decision, not what individual parties, staff or members of the decision making body may have stated during the course of the proceedings below. *Hess v. City of Portland*, 23 Or LUBA 343 (1992).

26.1 LUBA Jurisdiction – Generally. A notice of intent to appeal identifying one land use decision may not later be amended to include a second decision, where no notice of intent to appeal the second decision was filed within the time required by statute and no filing fee or deposit for costs has been paid to challenge the second decision. *Hood River Sand v. City of Mosier*, 23 Or LUBA 701 (1992).

26.1 LUBA Jurisdiction – Generally. A local government decision is a land use decision if it meets either (1) the statutory definition in ORS 197.015(10); or (2) the significant impact test established by *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d 996 (1982). *Miller v. City of Dayton*, 22 Or LUBA 661 (1992).

26.1 LUBA Jurisdiction – Generally. As the party seeking LUBA review, the burden is on petitioner to establish that the appealed decision is a land use decision. *Miller v. City of Dayton*, 22 Or LUBA 661 (1992).

26.1 LUBA Jurisdiction – Generally. Where LUBA determines an appealed decision is not reviewable as a land use decision, and a request to transfer the appeal to circuit court pursuant to ORS 19.230 was not filed within 10 days after the respondent's brief was due, as required by OAR

661-10-075(10)(b), LUBA will dismiss the appeal. *Miller v. City of Dayton*, 22 Or LUBA 661 (1992).

26.1 LUBA Jurisdiction – Generally. Under ORS 197.830(1), the maintenance of a validly filed notice of intent to appeal is required for LUBA to have jurisdiction over an appeal. *Ramsey v. City of Portland*, 22 Or LUBA 535 (1992).

26.1 LUBA Jurisdiction – Generally. A statutory change in the tribunal with appellate jurisdiction affects the legal rights and obligations of parties arising out of past transactions, and retrospective application of such a change in jurisdictional statutes to pending appeals is not appropriate. *Schultz v. City of Grants Pass*, 22 Or LUBA 457 (1991).

26.1 LUBA Jurisdiction – Generally. Where LUBA lacks jurisdiction over an appeal challenging a decision approving a land division within an urban growth boundary under the jurisdictional statutes existing on the date the notice of intent to appeal is filed, LUBA does not obtain jurisdiction to consider such an appeal when legislation giving LUBA jurisdiction over appeals of such decisions becomes effective while the improperly filed appeal is pending. *Schultz v. City of Grants Pass*, 22 Or LUBA 457 (1991).

26.1 LUBA Jurisdiction – Generally. Failure to include a jurisdictional statement in the petition for review, as required by OAR 661-10-030(3)(c), is a technical violation of LUBA's rules and does not provide a sufficient basis for dismissing the petition for review. However, because petitioner bears the burden of establishing LUBA's jurisdiction, LUBA will require the petition for review to be amended to include a jurisdictional statement. OAR 661-10-030(4). *Dolan v. City of Tigard*, 22 Or LUBA 820 (1991).

26.1 LUBA Jurisdiction – Generally. Where the standards upon which conceptual development approval was based are changed to disallow the use conceptually approved, and later decisions authorizing a building permit and final development approval for the use are adopted on the basis that the prior standards continue to apply, a petitioner is entitled to challenge the later decisions notwithstanding petitioner's failure to challenge the conceptual development approval. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

26.1 LUBA Jurisdiction – Generally. The land use decision reviewed in a LUBA appeal is the final written decision, not what individual parties, staff or members of the decision making body may have stated during the course of the proceedings below. *Gray v. Clatsop County*, 22 Or LUBA 270 (1991).

26.1 LUBA Jurisdiction – Generally. Inconsistencies between a decision made by two service districts and a county comprehensive plan and land use regulations do not make the service districts' decision a decision by the county or a de facto amendment to the county comprehensive plan. *Price v. Arch Cape Service District*, 22 Or LUBA 807 (1991).

26.1 LUBA Jurisdiction – Generally. Whether the challenged decision exceeded the decision maker's jurisdiction is an issue to be resolved in considering the merits of an appeal. For purposes of determining LUBA's jurisdiction, the sole question is whether the challenged decision falls

within the class of decisions over which LUBA has review authority. *Pilling v. LCDC*, 22 Or LUBA 188 (1991).

26.1 LUBA Jurisdiction – Generally. As the party seeking review by LUBA, petitioner has the burden of establishing that LUBA has jurisdiction. *Hamby v. City of Jefferson*, 22 Or LUBA 1 (1991).

26.1 LUBA Jurisdiction – Generally. LUBA does not have authority to take official notice of adjudicative facts, as set out in OEC 201. LUBA's review is limited by ORS 197.830(13)(a) to the record of the proceeding below, except in instances where an evidentiary hearing is authorized by ORS 197.830(13)(b), and where facts outside the record are essential to determining whether LUBA has jurisdiction or whether an appeal is moot. *Blatt v. City of Portland*, 21 Or LUBA 337 (1991).

26.1 LUBA Jurisdiction – Generally. Where petitioners' notice of intent to appeal (1) identifies a decision *applying* the local code, rather than provisions of the local code itself, as the subject of the appeal, and (2) was not filed within 21 days of the adoption of the code provisions, petitioners may not challenge the code provisions in the appeal. *Wickwire v. Clackamas County*, 21 Or LUBA 278 (1991).

26.1 LUBA Jurisdiction – Generally. Where respondent's motion to dismiss for lack of jurisdiction is based solely on the legal nature of the challenged decision, and petitioner does not explain why the local government record would provide any assistance in determining the legal nature of the challenged decision, LUBA will grant respondent's motion to delay filing the record until after the motion to dismiss is resolved. *Goose Hollow Foothills Assoc. v. City of Portland*, 21 Or LUBA 555 (1991).

26.1 LUBA Jurisdiction – Generally. Although a decision rendered in violation of statutory public meeting law requirements may be voided, the circuit court for the county in which the governing body ordinarily meets has jurisdiction, not LUBA. ORS 192.680. *Strawn v. City of Albany*, 21 Or LUBA 172 (1991).

26.1 LUBA Jurisdiction – Generally. Where LUBA lacks jurisdiction, an appeal must either be dismissed or transferred to circuit court pursuant to ORS 19.230. *Sully v. City of Ashland*, 20 Or LUBA 428 (1991).

26.1 LUBA Jurisdiction – Generally. LUBA lacks statutory authority to reconsider its final decisions, and once a final decision is issued the only remedy is an appeal to the Court of Appeals. *Sarti v. City of Lake Oswego*, 20 Or LUBA 562 (1991).

26.1 LUBA Jurisdiction – Generally. Where the Court of Appeals reverses or remands a LUBA decision, the 30-day period specified in ORS 197.850(11) for LUBA to respond commences on the date the appellate court judgment becomes effective. *Byrnes v. City of Hillsboro*, 20 Or LUBA 408 (1991).

26.1 LUBA Jurisdiction – Generally. LUBA's jurisdiction is based on the land use regulations the local government has adopted, not on land use regulations it could have adopted or might yet adopt. *Bartels v. City of Portland*, 20 Or LUBA 303 (1990).

26.1 LUBA Jurisdiction – Generally. Where the notice of intent to appeal identifies as the subject of the appeal a local government decision applying its zoning ordinance to the subject property, not a prior decision rezoning the subject property, and no appeal was filed within 21 days of the prior zone change, LUBA does not have jurisdiction to review the prior zone change. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

26.1 LUBA Jurisdiction – Generally. A local government decision is a land use decision if it meets either (1) the statutory definition in ORS 197.015(10); or (2) the significant impacts test established by *City of Pendleton v. Kerns*, 294 Or 126, 133-134, 653 P2d 996 (1982). *City of Portland v. Multnomah County*, 19 Or LUBA 468 (1990).

26.1 LUBA Jurisdiction – Generally. A challenge to LUBA's jurisdiction may be brought at any time and is not subject to the 10-day requirement of OAR 661-10-065(2). *Elliott v. Lane County*, 18 Or LUBA 871 (1990).

26.1 LUBA Jurisdiction – Generally. Where the parties in an appeal proceeding contend the appeal should be dismissed, LUBA will dismiss the appeal, even though the parties contend the appeal should be dismissed for different reasons. *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 795 (1990).

26.1 LUBA Jurisdiction – Generally. LUBA does not have authority to review the *SCS's* identification of prime farmland for compliance with applicable SCS standards. LUBA simply reviews the *county's* decision for whether the county correctly determined what land the SCS identifies as prime farmland. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

26.2.1 LUBA Jurisdiction – Land Use Decisions: Statutory Test – Generally. A contract between a local government and an engineering firm for the design of three bridges does not concern the application of any land use regulation, and, thus, is not a "land use decision," where the contract authorizes only design work and consulting services, where the contract does not authorize the use or development of land, and where the design and consulting services concern development actions that must be (and in fact were) authorized by other land use decisions. *Van Dyke v. Yamhill County*, 80 Or LUBA 403 (2019).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. When a county code compliance officer determines there is not violation of the County Land Use and Development Ordinance (LUDO) under the holding in *Thomas v. Wasco County,* 284 Or App 17, 392 P3d 741 (2017), *rev den,* 362 Or 666 (2018), it is not a "land use decision" within the meaning of ORS 197.015(10)(a) because it does not constitute the "application" of the LUDO. Accordingly, LUBA lacks jurisdiction over the appeal. *Thomas v. Wasco County,* 78 Or LUBA 312 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where the county determined that petitioner had not established a right to construct a Measure 49 dwelling on the subject property, and the county did not apply any county siting standards, the county's decision is not a land use decision under ORS 195.318(1) and, thereby, is not subject to LUBA's jurisdiction. *Vannett Properties, LLC v. Lane County*, 78 Or LUBA 345 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. LUBA's jurisdiction over Metro decisions is complicated, because Metro does not have a comprehensive plan, and its ordinances are not "land use regulation[s]." As a result, a Metro decision fits within the ORS 197.015(10)(a)(A) definition of a "land use decision" only if the decision (1) adopts or amends Metro's Regional Framework Plan; or (2) otherwise concerns the application of the statewide planning goals. *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. To qualify as a "land use decision" as defined at ORS 197.015(10)(a)(A)(i), a Metro Resolution must constitute a "final decision" that concerns the application of the statewide planning goals. However, finality for purposes of ORS 197.015(10)(a) is not solely a matter of whether the decision constitutes a local government's last word on a land use issue. Other important considerations include whether the decision is an exercise of the local government's land use planning authority, and the extent to which the decision is binding on the local government and affected parties. *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A decision by Metro acting as arbitrator does not constitute a "final decision," where Metro's role as arbitrator was not an exercise of its function as a local government at all, but rather where Metro acted as a chosen arbitrator, a function that could have been performed by a private entity or individual. *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A Metro arbitration decision subject to an arbitration process devised by Metro that contemplates that the final decision the comprehensive plan designation of an area of land shared by two cities and a

county will be determined in the post-acknowledgement plan amendments (PAPA) adopted by the cities and county is not itself a "final" "land use decision." *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A Metro arbitration decision issued pursuant to a Metro arbitration process to arrive at a solution for the comprehensive plan designation for a disputed area of land jointly owned by two cities and a county, and which contemplates that the final decision regarding the comprehensive plan designation of the area will occur during the post-acknowledgment plan amendments, is not a "zoning" decision for purposes of ORS 268.393(6), which is part of the statute implementing Ballot Measure 56. *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where LUBA determines that a Metro resolution is not a "final" decision, the significant impact land use decision test does not apply. The jurisdictional requirement–that a land use decision must be "final"–applies to both the statutory as well as the significant impact test. *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a city adopts an ordinance prohibiting marijuana businesses in the city pursuant to ORS 475B.968(1), the ordinance is not a de facto amendment of the city's land use code provisions governing "agriculture," and therefore is not a "land use" decision. *Caudle v. City of Dunes City*, 77 Or LUBA 230 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a city adopts an ordinance prohibiting marijuana businesses in the city pursuant to ORS 475B.968(1), the city is not required to apply its comprehensive plan provisions or adopt findings addressing those policies. ORS 475B.968 allows the city to enact a prohibition on marijuana businesses and refer that prohibition to the city's electors for approval, and nothing within that broad grant of authority suggests the legislature intended to subject that grant of authority to review for compliance with local governments' comprehensive plans. *Caudle v. City of Dunes City*, 77 Or LUBA 230 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A construction checklist that is signed by an official of the local fire district is not a land use decision where the checklist does not require application of any county land use regulations or comprehensive plan provisions. *Seits v. Yamhill County*, 77 Or LUBA 310 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where petitioner fails to identify any zoning or subdivision regulations that would govern the city's decision whether or not to remove 35 trees from a city park and does not contend the park or trees in the park are inventoried as significant Goal 5 resources or identify any Goal 5 program that would apply to protect the trees at issue, petitioner fails to carry her burden to demonstrate that the challenged decision is a "land use decision" subject to LUBA's jurisdiction. *Carlson v. City of Brookings*, 77 Or LUBA 497 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Petitioner fails to meet her burden to demonstrate that LUBA has subject matter jurisdiction over a city council's decision to remove 35 trees from a city park, where petitioner argues the decision constitutes "logging" because it was motivated at least in part to generate revenue, and "logging" is not authorized under the Public Open Space zone that applies to the park. Simply because a city decides to offset the costs of removing hazardous trees to avoid the cost of treating and maintaining other compromised trees that are not yet hazardous does not convert the tree removal proposal into a logging operation, or otherwise make the decision a "land use decision." *Carlson v. City of Brookings*, 77 Or LUBA 497 (2018).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a building permit is issued without applying any land use regulations, and a prior design review decision either applied or should have applied all applicable land use standards, the building permit is not a land use decision that is appealable to LUBA. *Glenwood 2006, LLC v. City of Beaverton*, 76 Or LUBA 160 (2017).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A historic review board's final decision to suspend and terminate its review of an application for historic landmark designation that would otherwise result in a final decision by the city commission, based solely on an ORS 197.772(1) refusal to consent, is a land use decision that is reviewable by LUBA. *McLoughlin Neighborhood Assoc. v. City of Oregon City*, 76 Or LUBA 180 (2017).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A county resolution that was adopted to implement the statutory road vacation procedures in ORS 368.326 and that includes criteria for the county road official to assess "whether a vacation would be in the public interest" pursuant to ORS 368.326(1)(b), in preparing the report required under ORS 368.326(1), is not a "land use regulation" as defined in ORS 197.015(11) because it was not adopted to implement the county's comprehensive plan or development code. *Neighbors for Smart Growth v. Washington County*, 76 Or LUBA 492 (2017).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A county decision that determines that a proposed road vacation does not "create an access configuration which violates present development standards" requires the county to consider and apply "development standards" contained in the comprehensive plan or development code that govern access, and is therefore a "land use decision" as defined in ORS 197.015(10)(a). *Neighbors for Smart Growth v. Washington County*, 76 Or LUBA 492 (2017).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A determination in an intergovernmental agreement between a city and a county that the city has no land use process established for road improvement projects that are listed in the city's transportation system plan (TSP) or permitted with development requires the city and county to consider and apply the city's land use regulations and the city's TSP in order to reach that conclusion, and the intergovernmental agreement is therefore a "land use decision" within the meaning of ORS 197.015(10)(a). *MGP X Properties, LLC, LLC v. Washington County*, 74 Or LUBA 378 (2016).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A written decision that interprets various provisions of the local code is a "land use decision" as defined in ORS 197.015(10)(a), because the decision concerns the application of the local code procedures for seeking and obtaining an interpretation of the local code and the application of local code provisions that implement ORS 215.203 and ORS 215.283. Such decision is a "final" decision because no right of further local appeal exists. *Gilmour v. Linn County*, 73 Or LUBA 90 (2016).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A resolution adopted by the county board of commissioners that discontinues a planning area advisory committee and directs the county planning staff to amend the county's comprehensive plan and land use regulations to implement the discontinuance is a "land use decision" as described in ORS 197.015(10)(a)(A), because it concerns the application of comprehensive plan and land use regulation provisions that assign a review role to the planning advisory committee. *Jensvold v. Clatsop County*, 73 Or LUBA 417 (2016).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a planning director approves an extension of a site plan review approval by relying on a provision of the code that allows extension of a zoning permit, and another provision of the code that is specific to site plan review approvals does not mention or expressly authorize extensions, a decision to extend the site plan review approval necessarily requires interpretation and the exercise of legal judgment, and therefore does not fall within the exception to LUBA's jurisdiction at ORS 197.015(10)(b)(A). *Devin Oil Co., Inc. v. Morrow County*, 72 Or LUBA 14 (2015).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. LUBA's scope of review under ORS 197.835(9) includes authority to determine whether the decision on review "[i]mproperly construed the applicable law[.]" Where LUBA has jurisdiction to review a land use decision, it also has jurisdiction to review challenges to that decision's construction of "applicable law," even if that "applicable law" is not a statewide planning goal, a comprehensive plan provision or a land use regulation. *Carlsen v. City of Portland*, 39 Or LUBA 93, 98-100, *aff'd in part, remanded in part on other grounds*, 169 Or App 1, 8 P3d 234 (2000). *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. While local laws that do not qualify as land use laws might be so unrelated to land use laws that LUBA's scope of review to consider violations of "applicable law" would not include such laws, a city's business licensing regulations qualify as "applicable law" under ORS 197.835(9)(a)(D), where those business licensing regulations are intertwined with the land use issues in a LUBA appeal. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. The business licensing provisions of a city's municipal code that are not a part of the city's zoning code are not "Land use regulation[s]" as defined in ORS 197.015(11), and therefore a city ordinance that amends the business licensing code provisions is not a "land use decision" within the meaning of ORS 197.015(10)(a), because it is not a decision that "concerns the * * * amendment * * * of * * * a land use regulation[.]" *Oregonians in Action v. City of Lincoln City*, 71 Or LUBA 234 (2015).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A letter from the city announcing that mountain biking is no longer allowed in a natural area is not a land use decision, as defined at ORS 197.015(10)(a), where the letter does not concern the application or amendment of any statewide planning goal, comprehensive plan provision, or land use regulation. *Northwest Trail Alliance v. City of Portland*, 71 Or LUBA 339 (2015).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A letter from the county's counsel to the petitioner that merely confirms that the county has accepted, approved and recorded a final subdivision plat and that the board of commissioners cannot revoke the county's acceptance and recording of the final plat is not a land use decision where the county counsel was not required to and did not apply a comprehensive plan provision or land use regulation in the letter. *Willamette Oaks LLC v. Lane County*, 68 Or LUBA 84 (2013).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. LUBA will not resolve a record objection and require the local government to submit a supplemental record, where the local government has filed a dispositive motion to dismiss, and none of the documents at issue in the record objection have any bearing on the jurisdictional issue. *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Because Metro does not have a comprehensive plan or land use regulations, a Metro decision is a statutory land use decision subject to LUBA's review only if the decision (1) adopts or amends the Metro Regional Framework Plan or one of its components, or (2) otherwise constitutes a Metro decision that concerns the application of the statewide planning goals. *Terra Hydr Inc. v. Metro*, 68 Or LUBA 302 (2013).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. The Metro Council's adoption by resolution of a master plan for a regional park does not constitute the adoption or amendment of a functional plan, where the master plan consists entirely of non-binding recommendations and guidelines to local governments, and nothing in Metro's legislation or elsewhere requires such a master plan to be adopted as a functional plan or amendment to a functional plan. *Terra Hydr Inc. v. Metro*, 68 Or LUBA 302 (2013).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A decision that qualifies as an "appropriate zoning classification decision" under ORS 227.160(2)(b) is subject to LUBA review "in the same manner as a limited land use decision." ORS 227.175(11)(b). Such decisions are subject to LUBA review without regard to whether they might qualify for the general exclusion from LUBA's jurisdiction provided by ORS 197.015(10)(b)(A) for land use decisions that are "made under land use standards that do not require interpretation or the exercise of policy or legal judgment." *Mariposa Townhouses v. City of Medford*, 68 Or LUBA 528 (2013).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A building permit decision that applies an ambiguous land use regulation may qualify as a land use decision and the ORS 197.015(10)(b) exclusions to the statutory definition of "land use decision" for certain ministerial decisions may not apply due to the land use regulation ambiguity. But that does not

necessarily mean that the building permit also qualifies as a statutory "permit," as ORS 227.160(2) defines that term. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A building permit decision that applies an ambiguous land use regulation may qualify as a land use decision and the ORS 197.015(10)(b) exclusions to the statutory definition of "land use decision" for certain ministerial decisions may not apply due to the land use regulation ambiguity. But that does not necessarily mean that the building permit also qualifies as a statutory "permit," as ORS 227.160(2) defines that term. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. ORS 197.015(10)(a) broadly defines the term "land use decision." Subsections (b), (c) and (d) of the statute then set out a number of exceptions for decisions that would otherwise qualify or potentially qualify as land use decisions under subsection (a). *Wetherell v. Douglas County*, 67 Or LUBA 214 (2013).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. ORS 197.015(10)(d) sets out an exception to the statutory definition of "land use decision" for "outdoor mass gatherings," and certain other gatherings. But the ORS 197.015(10)(d) exception includes an internal exception for agri-tourism. The effect of the exception within an exception is to make decisions authorizing agri-tourism "land use decisions" that are reviewable by LUBA. *Wetherell v. Douglas County*, 67 Or LUBA 214 (2013).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. ORS 197.015(10)(d) creates an exception to the ORS 197.015(10)(a) definition of "land use decision" for "[g]athering[s] of fewer than 3,000 persons that [are] not anticipated to continue for more than 120 hours in any three-month period." Because a decision approving one outdoor music festival limited to fewer than 3,000 persons falls with the ORS 197.015(10)(d) exception, the decision is not a land use decision subject to review by LUBA. *Wetherell v. Douglas County*, 67 Or LUBA 214 (2013).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A county's unilateral termination of an intergovernmental agreement that never became effective might not qualify as a land use decision defined at ORS 197.015(10)(a). However, where the parties dispute and the record does not establish whether or not the agreement was effective, LUBA will not dismiss the appeal on that basis. *City of Sandy v. Clackamas County*, 67 Or LUBA 501 (2013).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Whether a contract was properly awarded under the Oregon Public Contracting Code has no bearing on the question of whether the authorization of an amendment to a construction contract is a "land use decision" as defined in ORS 197.015(10)(a)(A). *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 101 (2012).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Under ORS 197.015(10)(b)(H)(i), adopted in 2010, "land use decision" does not include a local government decision that a proposed state agency action is compatible with the local government's

comprehensive plan and land use regulations if (1) the local government has already made a land use decision authorizing a use that encompasses the state agency action, (2) the use is allowed without review, or (3) the use requires a future land use review. As ORS 197.015(10)(b)(H)(i) is worded, LUBA's jurisdiction over a local government compatibility determination turns on whether that determination is correct. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. In order for one of the exclusions for compatibility determination at ORS 197.015(10)(b)(H) to apply, the decision must purport to fall within the exclusion or on its face fall within the exclusion. Arguments that the local government should have made its compatibility determination in a manner that would bring it within a different exclusion, based on findings the local government did not make, are not a basis to apply the different exclusion and thereby conclude that LUBA lacks jurisdiction over the compatibility determination. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A 1980 reasons exception and comprehensive plan and zoning amendment to allow for a waste disposal facility "authorizes" subsequent expansions of that landfill within the rezoned area for purposes of the exclusion to LUBA's jurisdiction at ORS 197.015(10)(b)(H)(i), where the 1980 decision specifically contemplated that the facility would expand incrementally over time, with filled disposal cells capped and reclaimed, while the active landfill operation moves on to new disposal cells. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A petitioner fails to demonstrate that a decision is a "land use decision" under ORS 197.015(10)(a) where the definition of "lot of record" set out in the city's zoning code includes five circumstances or categories under which a unit of land may be considered a "lot of record," determining whether a unit of land is a "lot of record" under most of the five categories does not appear to require the exercise of any discretion at all, and petitioner does not argue that the unit of land falls under the one category that might require the exercise of discretion. *Jacobsen v. City of Winston*, 64 Or LUBA 164 (2011).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. LUBA lacks the equitable power of a court to apply the doctrine of laches to dismiss an appeal based on allegations that a petitioner knew from conversations with a neighbor about the challenged decision long before filing the LUBA appeal. The legislature has comprehensively prescribed in ORS 197.830(3) and other relevant statutes the deadlines to appeal land use decisions to LUBA, including what states of knowledge are relevant in applying those deadlines. *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where one petitioner was an adjoining property owner and entitled to written notice of a permit decision under ORS 215.416, but was not provided the required notice, the deadline for filing an appeal of a decision approving the permit is within 21 days of "actual notice" of the decision, pursuant to ORS 197.830(3)(a). For other petitioners who were not entitled to notice of the decision, the deadline

for filing the appeal is within 21 days of the date the petitioners "knew or should have known" of the decision, pursuant to ORS 197.830(3)(b). *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A decision that amends a land use decision is itself a land use decision. *Mingo v. Morrow County*, 63 Or LUBA 357 (2011).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A zoning information sheet that is a printout of a computer screen and shows that information from an application has been entered into the county's automated permit application tracking system is neither a "decision" nor "final" where there is no indication that the county has taken any action on the application. LUBA lacks jurisdiction to review a zoning information sheet that is neither a decision nor final. *Hardesty v. Jackson County*, 63 Or LUBA 447 (2011).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A county decision that applies no land use laws and only authorizes construction of some walls for uses and a structure that were granted land use approval by prior land use decisions is not a land use decision. *Hardesty v. Jackson County*, 62 Or LUBA 228 (2010).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Planning department staff exercised considerable legal judgment in concluding that it could rely on a prior planning department decision, which authorized ministerial approval of certain uses, to approve a new industrial use, where that prior planning department decision was appealed and never became final. Because the planning department had to apply land use laws to approve the new industrial use and exercised considerable legal judgment in relying on its prior decision to grant that approval, the ORS 197.015(10)(b)(A) exception to the statutory definition of "land use decision" for decisions that do not require the "exercise of * * * legal judgment" does not apply. *Hardesty v. Jackson County*, 62 Or LUBA 228 (2010).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Decisions that local governments do not believe to be land use decisions and do not process as land use decisions may in fact be land use decisions. *Jacobsen v. City of Winston*, 62 Or LUBA 535 (2010).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Under ORS 92.100(7), a city decision that approves or withholds approval of a final subdivision plat is not a land use decision or limited land use decision and is not reviewable by LUBA. *Calvary Construction v. City of Glendale*, 61 Or LUBA 50 (2010).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. LUBA has jurisdiction over "land use decisions" as defined in ORS 197.015(10)(a). In reviewing land use decisions, LUBA's scope of review extends to issues regarding a decision's compliance with federal law. *Foland v. Jackson County*, 61 Or LUBA 264 (2010).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a board of county commissioners' order directs the planning director to move forward with securing needed permits to remove a dam and to remove the dam, and the planning department issues a permit that

is pending on appeal before the county hearings officer, the board of county commissioners' order is not the county's final statutory land use decision and petitioner's LUBA appeal seeking review of the board of county commissioners' order will be dismissed. *Schock v. Jackson County*, 61 Or LUBA 403 (2010).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A staff report that explains that an application was withdrawn by the applicant after a tentative oral decision by a decision maker but before the decision was made final is not itself a land use decision, because it does not concern the goals, comprehensive plan, or any land use regulations. *Larson v. City of Salem*, 60 Or LUBA 411 (2010).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Under ORS 197.825(1), LUBA has exclusive jurisdiction to review "land use decisions," as that term is defined by ORS 197.015(10)(a), unless one of the exclusions set out at ORS 197.015(10)(b) applies. *Dierks v. Jackson County*, 60 Or LUBA 487 (2010).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. LUBA cannot exercise jurisdiction over a decision that is statutorily excluded from the definition of "land use decision" at ORS 197.015(10)(a), even if the decision would otherwise fall within the ambit of a "significant impact" land use decision as described in *City of Pendleton v. Kerns*, 294 Or 127, 653 P2d 992 (1982). *7th Street Station, LLC v. City of Corvallis*, 58 Or LUBA 93 (2008).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. An electrical permit that simply recognizes that the electrical panel that is the subject of the permit will be used to power a refrigeration unit, but does not authorize the refrigeration unit or take any position regarding whether the refrigeration unit is authorized under the local government's land use regulations is not a statutory land use decision. *Hardesty v. Jackson County*, 58 Or LUBA 162 (2009).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. If an electrical permit is "for construction involving a new building, an addition or change in the use of a building," then under OAR 918-001-0045 verification may be required to establish that the "project" is permitted under the local government's land use regulations without "specific land use approval" or that "the project has final land use approval." If any such verifications are actually included as part of an electrical permit decision itself, that may be sufficient to make the electrical permit a land use decision, as ORS 197.015(10)(a) defines that term. *Hardesty v. Jackson County*, 58 Or LUBA 162 (2009).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where the decision on appeal to LUBA is a hearings officer's dismissal of a local appeal, not the building permit that was the subject of the local appeal, and the hearings officer clearly applied discretionary land use regulation standards to dismiss the local appeal, the hearings officer's decision falls within the ORS 197.015(10) definition of "land use decision," and LUBA has jurisdiction to review the hearings officer's decision. *Kuhn v. Deschutes County*, 58 Or LUBA 483 (2009).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. LUBA will deny a motion to dismiss an appeal of a county decision to sell park land, where petitioners locally identified a comprehensive plan policy that could be interpreted to apply to a county decision to sell park land, and the county approves the sale of park land without responding to petitioner's argument that sale of the park land is inconsistent with the cited comprehensive plan policy. *Kaye v. Marion County*, 58 Or LUBA 680 (2009).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where subdivision covenants, conditions and restrictions require that the city approve any changes to the covenants, conditions and restrictions and the city approves changes without applying any land use regulations, the city's decision is not a land use decision. *Rasmussen v. City of Lake Oswego*, 56 Or LUBA 628 (2008).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A local government decision that purports to be a final decision with regard to one aspect of a land use permit application while at the same time remanding the permit application for additional decision making with regard to other aspects of the permit application is not a "final decision," within the meaning of ORS 197.015(11)(a) and therefore is not appealable to LUBA. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. *DLCD v. City of McMinnville*, 40 Or LUBA 591 (2001), recognizes that some complex planning projects such as urban growth boundary amendments may result in adoption of more than one separately appealable land use decision. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. If two resolutions are properly viewed as separate and independent decisions, a petitioner's failure to appeal one of those resolutions would generally be fatal to any challenges to determinations made in the unappealed resolution. However, where the two resolutions are adopted contemporaneously to approve a permit application, the two resolutions purport to resolve different legal issues but only have only minor wording differences and both resolutions are supported by the same findings document, an appeal of either resolution is sufficient to allow petitioners to challenge legal determinations in both resolutions. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Petitioners' failure to include an adequate jurisdictional statement in their petition for review is not a basis for dismissing their appeal, where their dispute about whether the challenged decision is a land use decision is the central dispute and petitioners' first assignment of error alleges that the appealed decision is a land use decision that is subject to LUBA review. *Zirker v. City of Bend*, 55 Or LUBA 188 (2007).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A resolution that adopts a revised franchise agreement between the county and a landfill operator does not constitute a de facto nonconforming use determination subject to LUBA's jurisdiction, where the resolution makes no determination whatsoever about the lawfulness or status of the landfill. *Kamp v. Washington County*, 54 Or LUBA 717 (2007).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A statement in a letter from county counsel to petitioner that purports to be a final and binding county interpretation of a local code provision by a person who has apparent authority to make such a statement is a land use decision under ORS 197.015(11). *Love v. Klamath County*, 54 Or LUBA 747 (2007).

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

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A county's certification in a state agency land use compatibility statement that the activities proposed in the related state agency permit application are consistent with all local land use requirements is necessarily a land use decision, as defined in ORS 197.015(11)(a), if it is a final decision and not subject to any of the exceptions set out at ORS 197.015(11)(b). *Wolfgram v. Douglas County*, 52 Or LUBA 536 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A determination that no local right of appeal exists for a land use compatibility statement concerns at least the application of the local government's local appeal regulations, and thus is a land use decision under ORS 197.015(11). *Hoschek v. Tillamook County*, 52 Or LUBA 793 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A determination that no local right of appeal exists because the appealed decision did not require discretion and is not a "land use decision" requires interpretation and exercise of legal judgment, and thus does not fall within the ministerial exception to LUBA's jurisdiction at ORS 197.015(11)(b)(B). *Hoschek v. Tillamook County*, 52 Or LUBA 793 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A planning commission decision that purports to "correct" a "clerical error" in an earlier subdivision approval by changing the 12 month expiration deadline to a 24 month deadline does not fall within the ministerial exception to LUBA's jurisdiction at ORS 197.015(11)(b)(B), where the planning commission exercised discretion and legal judgment in implicitly determining that it had the authority to "correct" the deadline after its expiration. *Hoschek v. Tillamook County*, 52 Or LUBA 793 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a Metro Committee would be required to apply land use standards to approve a city annexation ordinance on appeal, its decision to deny the annexation ordinance is a land use decision subject to review to LUBA, notwithstanding that the denial was based on non-land use standards. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. When a local government enforces its own land use regulations through its own procedures, those actions may result in land use decisions that can be appealed to LUBA, and ORS 197.825(3)(a) does not divest LUBA of jurisdiction. When a local government decides to pursue enforcement of its local land use regulations in circuit court pursuant to ORS 197.825(3)(a), however, jurisdiction properly lies with the circuit court, and the determination to pursue enforcement in circuit court is not a land use decision. *Johnston v. Marion County*, 51 Or LUBA 250 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. When a local government makes a decision to enforce its regulations or not to enforce its regulations *in circuit court*, that decision of where to contest (or not contest) the land use issues is not a land use decision as defined by ORS 197.015(10). Conversely, when a local government makes a decision to enforce its regulations (or that no violation exists) *at the local level*, that decision may be a land use decision subject to our review, provided it meets the statutory definition of a land use decision. *Johnston v. Marion County*, 51 Or LUBA 250 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A local government's rejection of a local appeal may be a land use decision even if the underlying decision sought to be appealed would not itself be a land use decision. *Wells v. Yamhill County*, 51 Or LUBA 659 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. When a decision is reduced to writing and prepared for the decision maker's signature, the decision is "signed" with a signature stamp rather than an actual signature, and the local government does not contend that someone else issued the decision in the decision maker's name, LUBA will treat the signature stamp as the equivalent of the decision maker's signature. *Wells v. Yamhill County*, 51 Or LUBA 659 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a local government has adopted a generally applicable procedure under which it corrects violations of a variety of local laws by filing actions in circuit court, a local government decision that an existing use of property does not constitute a violation of its zoning ordinance that would justify filing a circuit court action under that procedure is not a land use decision. *Wells v. Yamhill County*, 51 Or LUBA 659 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where the zoning of property is discussed by a local appellate body during proceedings to revoke and reinstate a building permit, but the revocation and reinstatement decisions are not governed by the zoning ordinance or other land use regulations, the mere reference to the zoning ordinance does not mean the decision "concern[ed] the * * * application of [a] land use regulation," within the meaning of ORS 197.015(11)(a). *Barnas v. City of Portland*, 51 Or LUBA 750 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a city decision to reinstate a building permit does not apply any of the land use standards identified at ORS 197.015(11)(a)(A), and the petitioner does not argue that the city should have applied any

such land use standards in addition to the Uniform Building Code provisions that the city applied to reinstate the building permit, petitioner fails to establish that the reinstatement decision is a land use decision subject to LUBA review. *Barnas v. City of Portland*, 51 Or LUBA 750 (2006).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. ORS 223.314 provides a statutory exclusion from the statutory definition of land use decision. But that exclusion only applies to the extent "a plan * * * adopted pursuant to ORS 223.309" is adopted for the limited purpose of supplying the public facility list that is required by ORS 223.309 as a precondition of adopting a systems development charge methodology. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 109 (2005).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. So long as sewerage facilities recommended in a regional sewerage plan cannot be built until the applicable comprehensive plan is amended to recommend those facilities, the regional sewerage plan may be adopted before the comprehensive plan is amended and the decision to adopt that regional sewerage plan to comply with state and federal environmental regulations and the requirements of ORS 223.309 for adoption of a systems development charge methodology is not a land use decision that is reviewable by LUBA. The reviewable land use decision will be adopted when the corresponding comprehensive plan amendments are adopted. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 109 (2005).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Under 2003 statutes, LCDC and LUBA both have jurisdiction to review land use decisions that are adopted in whole or in part to comply with periodic review. LCDC reviews such decisions to ensure, among other things, that the local government's plans and land use regulations are "achieving the statewide planning goals." ORS 197.628(3)(d); OAR 660-025-0070(4). *Century Properties, LLC v. City of Corvallis*, 50 Or LUBA 691 (2005).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. LUBA's scope of review over periodic review land use decisions extends to all legal issues that are properly within LUBA's statutory scope of review, but it does not include review for compliance with statewide planning goals or other questions that are within LCDC's scope of review in periodic review. *Century Properties, LLC v. City of Corvallis*, 50 Or LUBA 691 (2005).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where prior appeals to LUBA and the Court of Appeals concerning a property near the ocean have established that a particular comprehensive plan goal regarding environmentally hazardous areas applies at the time a building permit is issued, a subsequent city decision to issue a building permit for the property is a land use decision. *Jebousek v. City of Newport*, 50 Or LUBA 724 (2005).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A local government ordinance that defines "driveways" in terms of "travel distance" is ambiguous and subject to different interpretations where the endpoint for measuring that travel distance is unclear. Therefore the local government exercises policy or legal judgment in making its interpretation, and a decision that interprets the ambiguous ordinance is not a ministerial decision. *Brodersen v. City of Ashland*, 49 Or LUBA 719 (2005).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Because OAR 734-051-0155(4)(d) requires that access management plans shall be consistent with a city's transportation system plan and because OAR 734-051-0155(4)(k) requires that the access management plan be "adopted into" the city's transportation system plan, the city's adoption of the access management plan "concerns the adoption, amendment or application of * * * [a] comprehensive plan provision" within the meaning of ORS 197.015(10)(a) and, for that reason, is a land use decision subject to LUBA's jurisdiction. *Rhodes v. City of Talent*, 47 Or LUBA 574 (2004).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Under OAR 660-012-0040(4), LUBA does not have jurisdiction to review "timing and financing provisions" in a transportation financing program. However, LUBA does have jurisdiction to review a city decision that determines that a particular facility alternative is consistent with its transportation system plan, notwithstanding that such a decision may be driven in part by timing or financing considerations. *Ramsey v. City of Philomath*, 46 Or LUBA 241 (2004).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A local government decision "concerns" the application of a comprehensive plan provision or land use regulation if (1) the decision maker was required by law to apply its plan or land use regulations as approval standards, but did not, or (2) the decision maker in fact applied plan provisions or land use regulations. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Whether a decision that changes the fee to file local appeals of land use decisions is codified in the zoning ordinance is not dispositive as to LUBA's jurisdiction under either the statutory definition or the fiscal decision exception. The essential questions are whether the challenged appeal fees (1) "concern" the application of a land use regulation and (2) are an integral part of the zoning code provisions governing the processing and review of land use applications. *Friends of Linn County*, 45 Or LUBA 408 (2003).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a local government has failed to amend its land use regulations to implement a land use statute, such as ORS 215.263 that governs partitions in EFU zones, a county decision that directly applies such statutes pursuant to ORS 197.646(3) is a land use decision subject to LUBA's jurisdiction, notwithstanding that the county does not apply a statewide planning goal, comprehensive plan provision or land use regulation. *Perkins v. Umatilla County*, 45 Or LUBA 445 (2003).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A decision that initiates condemnation of property but does not approve development of the property is not a land use decision subject to LUBA review. *Decker v. City of Cornelius,* 45 Or LUBA 539 (2003).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A resolution that initiates condemnation of property is not a statutory land use decision, where petitioner identifies no statewide planning goal, comprehensive plan or land use regulation provision that must be applied in adopting such a resolution. *Decker v. City of Cornelius,* 45 Or LUBA 539 (2003).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. It is not clear whether the ORS 197.015(10)(d) exemption of decisions authorizing certain small, infrequent gatherings from the statutory definition of "land use decision" precludes local governments from applying their land use regulations to decisions concerning such gatherings. *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Assuming that ORS 197.015(10)(d) prohibits local governments from applying its land use regulations to "gatherings of fewer than 3,000 persons that [are] not anticipated to continue for more than 120 hours in any three-month period," the "in any three month period" language limits the statutory prohibition to properties where such gatherings occur no more frequently than once every three months. *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Local government decisions authorizing outdoor mass gatherings as defined at ORS 433.735(1) that will last fewer than 120 hours are not subject to local land use regulations and are not land use decisions subject to LUBA review. *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Local government decisions authorizing the large outdoor gatherings defined at ORS 433.763(1) that will last more than 120 hours are subject to local land use regulations and are land use decisions subject to LUBA review. *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A business that schedules up to 15 social gatherings at an airport is not exempt from county land use regulations under ORS 197.015(10)(d) because even if ORS 197.015(10)(d) prohibits regulation of the small gatherings described in the statute, the prohibition only applies if there is no more than one gathering every three months. *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Even if ORS 197.015(10)(d) does prohibit county regulation of gatherings of fewer than 3,000 persons on a site, it would only do so if those gatherings occurred no more frequently than once every three months on the site. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A decision that changes the appeal fee charged to file a local appeal under a county zoning ordinance "concerns the application of" the zoning ordinance and, for that reason, qualifies as a land use decision under ORS 197.015(10)(a)(A)(iii). *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 270 (2002).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. The combined effect of ORS 197.175(1) and OAR 660-001-0300 and 660-001-0310 is to make all city annexation decisions land use decisions. Either (1) the city's comprehensive plan or land use regulations have criteria that govern the annexation, in which case the annexation decision is a land use decision under ORS 197.015(10)(a)(A)(ii) or (iii), or (2) the comprehensive plan and land use regulations

do not have criteria that govern annexation decisions, in which case under ORS 197.175(1) and OAR 660-001-0310 the statewide planning goals continue to apply directly and make the annexation decision a land use decision under ORS 197.015(10)(a)(A)(i). *Cape v. City of Beaverton*, 43 Or LUBA 301 (2002).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A city's approval of a reimbursement district is a "fiscal ordinance" and therefore not subject to LUBA's jurisdiction, regardless of whether the city applied or should have applied its land use regulations in rendering the decision. *Jesinghaus v. City of Grants Pass*, 42 Or LUBA 477 (2002).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. The fact that a city's approval of a reimbursement district is related to a condition of approval imposed in a previous land use decision does not make the approval of the reimbursement district itself a land use decision subject to LUBA's jurisdiction, absent a showing that the city applied or interpreted the goals, a plan provision or a land use regulation in approving the reimbursement district. *Jesinghaus v. City of Grants Pass*, 42 Or LUBA 477 (2002).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A city decision establishing a local improvement district to fund street improvements that does not involve the application of comprehensive plan policies or land use regulations or result in a "significant impact" on land use is not a land use decision. *Hazelnut A Partners v. City of Woodburn*, 42 Or LUBA 474 (2002).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Two letters from county counsel explaining the county's position that a code deadline to commence subdivision construction applies to a subdivision approval with litigation pending, and stating that the applicants may file an application for extension of the subdivision approval under a particular code provision, do not constitute land use decisions. *Bartell v. Washington County*, 42 Or LUBA 464 (2002).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where applicants unsuccessfully seek a writ of mandamus to compel a county to grant their request for a county extension of time to commence construction of a subdivision, or a county ruling that the deadline was tolled while litigation concerning the subdivision was pending, and the county never responds to the applicants' request in writing, LUBA does not have jurisdiction to review the county's decision until it renders a written decision in response to the applicants' request. *Bartell v. Washington County*, 42 Or LUBA 464 (2002).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A decision that interprets and applies zoning ordinance provisions regarding uses that are listed as conditional uses in an exclusive farm use zone and includes determinations regarding allowed uses on a property does not fall into the exception to the definition of "land use decision" found in ORS 197.015(10)(b)(B), and is a land use decision reviewable by LUBA. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a city has not responded to petitioner's concerns that a property owner lost his right to continue a nonconforming residential use, petitioner may be able to seek a remedy in circuit court under ORS 197.825(3)(a). However, unless and until the city addresses those concerns in a land use decision, LUBA has no jurisdiction to consider those concerns. *Robson v. City of La Grande*, 40 Or LUBA 250 (2001).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. The failure of a petition for review to include the jurisdictional statement required by OAR 661-010-0030(4)(c) provides no basis for dismissal where it is clear that the challenged decision is a land use decision, as defined by ORS 197.015(10), because the decision concerns the adoption of comprehensive plan map and zoning map amendments and applies discretionary comprehensive plan amendment criteria and at least one statewide planning goal. *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. LUBA may consider evidence outside of the local record for the limited purpose of determining whether it has jurisdiction without the necessity of granting motions to take evidence outside of the record. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where petitioner does not establish that the city either applied or was required to apply land use standards when it made a final decision to condemn petitioner's EFU-zoned property for a utility facility, in advance of seeking county land use approval for that facility, the challenged decision is not a land use decision over which LUBA has jurisdiction. *E & R Farm Partnership v. City of Gervais*, 39 Or LUBA 251 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A city has authority under ORS 92.040 and 92.180 to review and approve subdivision plats. Where a city requires an application for a subdivision replat to show revised easements and applies its land use regulations to approve the replat, the city's decision is a land use decision or limited land use decision subject to LUBA's review. *Haber v. City of Gates*, 39 Or LUBA 137 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. In reviewing land use decisions, LUBA's scope of review is not limited to arguments regarding the local government's application of land use regulations or other land use standards; LUBA may also consider arguments that the decision violates applicable non-land use standards. *Carlsen v. City of Portland*, 39 Or LUBA 93 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A letter from a city parks commissioner stating that the city planning department had concluded a conditional use permit is not required for a proposed soccer practice field is not a "land use decision" pursuant to ORS 197.015(10)(a)(A) because it does not purport to apply a land use regulation. However, the letter from the planning department concluding that the proposed use does not require a permit is a final "land use decision" because it does apply a land use regulation and no further local appeal process was available. *Kent v. City of Portland*, 38 Or LUBA 942 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A county's decision finding that a letter from another local government constitutes a memorandum of understanding required under the county's comprehensive plan applies a comprehensive plan provision and is thus a land use decision. *Cedar Mill Creek Corr. Comm. v. Washington County*, 38 Or LUBA 333 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a county's decision regarding compliance with a comprehensive plan provision is made in conjunction with a determination that a condition of approval of a previously granted permit is satisfied, the ancillary decision regarding the condition of approval is subject to LUBA review. *Cedar Mill Creek Corr. Comm. v. Washington County*, 38 Or LUBA 333 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A decision that, by itself, is not a land use decision may nevertheless be reviewable when presented to LUBA as part of a decision that applies comprehensive plan policies or land use regulations. *Cedar Mill Creek Corr. Comm. v. Washington County*, 38 Or LUBA 333 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a petitioner fails to respond to an apparently meritorious motion to dismiss, petitioner fails to carry his burden to demonstrate that the challenged decision is a land use decision subject to review by LUBA. *Rohrer v. Crook County*, 38 Or LUBA 8 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a county enforcement decision does not apply or interpret any land use regulations in deciding that a mobile home set-up permit is the equivalent of a building permit for the purpose of determining whether a permit deadline has been met, the county's decision is not a land use decision subject to LUBA's jurisdiction. *Balk v. Multnomah County*, 38 Or LUBA 1 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. An otherwise clear and objective building permit, as that concept is used in ORS 197.015(10)(b)(B), remains clear and objective even if, as applied in a particular circumstance, it undermines the purpose or policy that it implements. *Tirumali v. City of Portland,* 37 Or LUBA 859 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A calculation mistake made during the course of applying a clear and objective building permit standard does not render a decision applying that standard a land use decision. *Tirumali v. City of Portland*, 37 Or LUBA 859 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A planning director's letter to a third party explaining the basis for approving a building permit is not a land use decision, where the standards used in approving the building permit are clear and objective. *Tirumali v. City of Portland,* 37 Or LUBA 859 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A condition of approval included in a temporary surfacing permit requiring information and reports about trees

proposed for removal under city code sections regulating tree removal does not make the temporary surfacing permit a land use decision, even if the cited code sections are land use regulations, where the condition makes it clear that the temporary surfacing permit does not authorize removal of trees. *Lindsey v. City of Eugene*, 37 Or LUBA 695 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Petitioners have the burden to establish LUBA jurisdiction and, where petitioners do not argue that the challenged decision applied or should have applied any land use standards, LUBA will dismiss the appeal. *Lindsey v. City of Eugene*, 37 Or LUBA 695 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Under ORS 197.825(3)(a), a local government may elect to enforce its land use regulations, and if such an enforcement action is filed in circuit court, the court has jurisdiction to consider any land use issues that might arise. *Yost v. Deschutes County*, 37 Or LUBA 653 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A local government decision not to institute action in circuit court to enforce its land use regulations is not itself a land use decision, provided the local government's decision is not rendered pursuant to a local procedure that necessarily leads to a land use decision, as defined by ORS 197.015(10)(a). *Yost v. Deschutes County*, 37 Or LUBA 653 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a local government's land use regulations make it clear that staff determinations describing the uses to which property may be put are informal decisions rather than final county decisions, and those decisions are rendered outside formal local government land use procedures for decision making and declaratory rulings, such decisions do not constitute land use decisions that may be appealed to LUBA. *Yost v. Deschutes County*, 37 Or LUBA 653 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A city's ordinance that adopts a process to establish revenue reimbursement districts and a resolution that then applies that process to a particular area are not "land use decisions" as defined in ORS 197.015(10)(a)(A). *Baker v. City of Woodburn*, 37 Or LUBA 563 (2000).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A resolution of nonbinding support for the siting of a tribal casino within city limits is not a statutory land use decision because it does not apply comprehensive plan or land use regulations. *Kelley v. City of Cascade Locks*, 37 Or LUBA 80 (1999).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Under LUBA's rules a land use decision must be a written decision. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A city's concurrence in a county's vacation of a right-of-way within city limits pursuant to ORS 368.361(3) is not a final, appealable land use decision. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A decision approving a subdivision pursuant to county comprehensive plan and land use regulations is a land use decision under ORS 197.015(10)(a). That a subdivision approval decision is conditioned on construction of road access for the subdivision does not convert that decision or any part of the decision into the type of transportation facility decision that is excluded from the statutory definition of "land use decision" by ORS 197.015(10)(b)(D). *Warrick v. Josephine County*, 36 Or LUBA 81 (1999).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where the relationship between two decisions is not clear from the parties' memoranda, LUBA will deny a motion to dismiss and defer a ruling on jurisdiction until after the parties' briefs are filed and an opportunity for oral argument is provided. *Columbia Hills Development Co. v. Columbia County*, 35 Or LUBA 737 (1998).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A city decision that a use must comply with applicable building code requirements even if it is properly viewed as a home occupation under the city's land use regulations is not a statutory land use decision subject to LUBA review, because it does not apply a comprehensive plan or land use regulation provision. *Brodka v. City of Eugene*, 35 Or LUBA 695 (1999).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a local government is required to apply required land use provisions but fails to do so, that failure does not exclude the decision from the definition of "land use decision" under ORS 197.015(10)(a). *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. When a local governing body determines that a condition imposed in connection with an earlier land use decision either has or has not been complied with, but does not base its determination on the interpretation and application of land use regulations, the determination is not a land use decision over which LUBA has jurisdiction. *Mar-Dene Corp. v. City of Woodburn*, 33 Or LUBA 245 (1997).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A school district's decision to adjust attendance area boundaries is not a statutory land use decision. *Butts v. Hillsboro School District*, 33 Or LUBA 211 (1997).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where the city explains in its decision to grant a development permit that a conditional use review is not required, a letter from the city planning director written five months later stating that the review is not required is not itself an appealable land use decision, and an appeal five months from the initial decision is not timely. *Northwest Environmental Adv. v. City of Portland*, 33 Or LUBA 45.

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A letter from county counsel refusing to revoke a previously granted building permit is not an appealable land use decision. *Ceniga v. Clackamas County*, 32 Or LUBA 273 (1997).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. The issuance or denial of a building permit can be a land use decision if it involves the application of the Statewide Planning Goals, a comprehensive plan, a zoning ordinance or other ordinance implementing a comprehensive plan. *Friends of Eugene v. City of Eugene*, 32 Or LUBA 161 (1996).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. When a county has made detailed findings explaining why a challenged decision is not a land use decision under its local regulations or, alternatively, why the decision is exempt from review under those regulations, and those findings are not clearly wrong, LUBA will defer to the county's interpretation of its own regulations. *Leathers v. Washington County*, 31 Or LUBA 43 (1996).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A local government's reiteration of a previous land use decision in a notice letter does not create a new appealable decision, and the inclusion of a statement of appeal rights in the notice letter does not convert that notice into a separate land use decision. *Lloyd Dist. Community Assoc. v. City of Portland*, 30 Or LUBA 390 (1996).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Even if a local decision maker had no authority to make a land use decision, LUBA has jurisdiction over an appeal of that decision if it falls within the class of decisions over which LUBA has review authority. *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. In modifying a condition to the earlier approval of a conditional use permit, a county planning director exercised policy judgment in the application of land use regulations, thereby making a statutory land use decision. *Franklin v. Deschutes County*, 30 Or LUBA 33 (1995).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where an improvement agreement signed by a county is limited to implementing a conditional use permit previously approved by the county, and does not modify that conditional use permit, the improvement agreement does not require application of land use standards and does not constitute a "land use decision," as that term is defined by ORS 197.015(10). *Franklin v. Deschutes County*, 29 Or LUBA 79 (1995).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a decision to eliminate conditions of approval requires local review under code zone change standards, the decision is a land use decision, and not a limited land use decision. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. In the absence of an interpretation of the applicability of zone code regulations to the challenged decision, LUBA cannot determine whether a city council decision approving a road improvement is a statutory land use decision. *Carlson v. City of Dines City*, 28 Or LUBA 411 (1994).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A local government order that simply corrects clerical mistakes in an earlier local government order making a land use decision is not itself an appealable land use decision. *Kalmiopsis Audubon Society v. Curry County*, 27 Or LUBA 640 (1994).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. The limited land use decisions described by ORS 197.015(12)(b) fall somewhere between (1) outright permitted uses for which approval involves no discretionary review; and (2) uses allowed subject to application of discretionary approval standards that may require denial of the use altogether (as opposed to discretionary approval standards that only regulate the use's physical characteristics). *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Allegations in a notice of intent to appeal that the challenged decision is a land use decision do not constitute a judicial admission that the challenged decision is a land use decision. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where no land use standards govern a local government decision to allow the applicant to abandon a permit application that led to a permit decision remanded by LUBA and instead to submit a new application governed by amended approval standards, the decision does not, by itself, constitute a land use decision or limited land use decision. *Fechtig v. City of Albany*, 27 Or LUBA 666 (1994).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. A planning department letter stating the local government considers itself bound by a stipulation entered in a prior circuit court proceeding is not a land use decision, separate and apart from the prior stipulation. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where a local government refers to its land use regulations, finds facts and makes a decision that its land use regulations do not apply, its decision is a land use decision. The nature of the legal theory supporting its conclusion that its land use regulations do not apply does not affect whether the decision is properly viewed as a land use decision. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Under the statutory definition of "land use decision," circuit courts do not make land use decisions; local governments, special districts and state agencies do. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. That a stipulation concerning the applicability of a local government's land use regulations to certain property is entered into by the local government and a property owner outside the confines of a land use proceeding and without following the procedures required for land use decision making does not make the decision any less a land use decision. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where the challenged decision simply applies the city's fire code, and petitioner does not argue that the fire code is (1) a land use regulation, (2) a comprehensive plan provision, or (3) a goal provision, the challenged decision is not a statutory land use decision subject to LUBA's jurisdiction. *Curtis Serve N Save v. City of Eugene*, 24 Or LUBA 341 (1992).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Where the challenged decision is a governing body's directive to the county counsel to file a complaint in circuit court to enforce zoning regulations pursuant to ORS 197.825(3)(a), the challenged decision is not one over which LUBA has review authority. *Wygant v. Curry County*, 22 Or LUBA 110 (1991).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Findings addressing land use standards may or may not be required to support a legislative land use decision. However, the absence of such findings has no bearing on whether a decision actually is a land use decision. *Jentzsch v. City of Sherwood*, 20 Or LUBA 575 (1991).

26.2.1 LUBA Jurisdiction – Land Use Decision: Statutory Test – Generally. Final decisions which apply the local government's land use regulations are land use decisions subject to review by LUBA unless one or more of the limitations provided in ORS 197.015(10)(b) and 197.825(2) and (3) apply. *Putnam v. Klamath County*, 19 Or LUBA 616 (1990).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A letter from the director of the Oregon Department of Aviation to petitioners' counsel, stating that, "[o]n October 27, 2011, the [Oregon Aviation Board] approved the [Aurora Airport] Master Plan for submittal to the Federal Aviation Administration" is not a "final decision or determination of a state agency" or a decision "with respect to which the agency [was] required to apply the goals" for purposes of ORS 197.015(10)(a)(B) where, regardless of whether the letter itself is incorrect in stating, as a fact, that the Board adopted the Master Plan in 2011, the letter merely conveys facts about events that have already occurred. *Friends of French Prairie v. ODA*, 80 Or LUBA 524 (2019).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. When a county code compliance officer determines there is not violation of the County Land Use and Development Ordinance (LUDO) under the holding in *Thomas v. Wasco County*, 284 Or App 17, 392 P3d 741 (2017), *rev den*, 362 Or 666 (2018), it is not a "land use decision" within the meaning of ORS 197.015(10)(a) because it does not constitute the "application" of the LUDO. Accordingly, LUBA lacks jurisdiction over the appeal. *Thomas v. Wasco County*, 78 Or LUBA 312 (2018).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. LUBA's jurisdiction over Metro decisions is complicated, because Metro does not have a comprehensive plan, and its ordinances are not "land use regulation[s]." As a result, a Metro decision fits within the ORS 197.015(10)(a)(A) definition of a "land use decision" only if the decision (1) adopts or amends Metro's Regional Framework Plan; or (2) otherwise concerns the application of the statewide planning goals. *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. To qualify as a "land use decision" as defined at ORS 197.015(10)(a)(A)(i), a Metro Resolution must constitute a "final decision" that concerns the application of the statewide planning goals. However, finality for purposes of ORS 197.015(10)(a) is not solely a matter of whether the decision constitutes a local government's last word on a land use issue. Other important considerations include whether the decision is an exercise of the local government's land use planning authority, and the extent to which the decision is binding on the local government and affected parties. *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A decision by Metro acting as arbitrator does not constitute a "final decision," where Metro's role as arbitrator was not an exercise of its function as a local government at all, but rather where Metro acted as a chosen arbitrator, a function that could have been performed by a private entity or individual. *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A Metro arbitration decision subject to an arbitration process devised by Metro that contemplates that the final decision the comprehensive plan designation of an area of land shared by two cities and a county will be determined in the post-acknowledgement plan amendments (PAPA) adopted by the cities and county is not itself a "final" "land use decision." *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A Metro arbitration decision issued pursuant to a Metro arbitration process to arrive at a solution for the comprehensive plan designation for a disputed area of land jointly owned by two cities and a county, and which contemplates that the final decision regarding the comprehensive plan designation of the area will occur during the post-acknowledgment plan amendments, is not a "zoning" decision for purposes of ORS 268.393(6), which is part of the statute implementing Ballot Measure 56. *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where LUBA determines that a Metro resolution is not a "final" decision, the significant impact land use decision test does not apply. The jurisdictional requirement—that a land use decision must be "final"—applies to both the statutory as well as the significant impact test. *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where the last paragraph of a legal lot verification decision states that it is a "preliminary" decision and that the "decision" on whether the property is a legal lot will be made when a development permit is approved, the legal lot verification decision is not a final, binding decision that determines that the property is a lawfully created lot. *Wolcott v. Lane County*, 77 Or LUBA 165 (2018).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. ORS 197.830(6) is a statute of ultimate repose, providing that appeal periods to LUBA may not exceed either a three-year or 10-year period, depending on whether notice of the final decision is required but not provided. However, ORS 197.830(6) cannot be applied to require a county in 2016 to recognize property as a lawfully created parcel pursuant to a 2003 legal lot verification decision, on the theory that the 2003 decision was a "final," unappealed, and now unappealable decision under ORS 197.830(6), where the 2003 decision itself states that it was only a "preliminary" decision. Because only final decisions can be appealed to LUBA, the statute of ultimate repose is inapplicable. *Wolcott v. Lane County*, 77 Or LUBA 165 (2018).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A construction checklist that is signed by an official of the local fire district with the word "temp[orary]" is not a final decision within the meaning of ORS 197.015(10)(a)(A), and is therefore not a "land use decision." *Seits v. Yamhill County*, 77 Or LUBA 310 (2018).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. The minutes of a historic review board's meeting at which it suspended action on an application for historic landmark designation, or a letter by a planner describing the historic review board's decision to suspend action, can be sufficient to constitute a writing, to the extent a writing is a jurisdictional requirement for a final land use decision. *McLoughlin Neighborhood Assoc. v. City of Oregon City*, 76 Or LUBA 180 (2017).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a county's code enforcement procedure requires a code enforcement officer to make a preliminary decision regarding whether there is probable cause to believe there is an ordinance violation, that decision is not a final decision that may be appealed to LUBA. Under the county's code

enforcement procedure, if the code enforcement officer finds there is probable cause, the first step is to seek voluntary compliance and the next step would be for the county to seek declaratory or injunctive relief in circuit court, where the code enforcement officer would have the burden of proof regarding the ordinance violation. If the code enforcement officer finds there is no probable cause, that is not a final decision either, as a petitioner may continue to request that the county take enforcement action, or petitioner may seek declaratory or injunctive relief in circuit court under ORS 197.825(3), where petitioner would have the burden of proof regarding the ordinance violation. *Robson v. Polk County*, 75 Or LUBA 343 (2017).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A county board of commissioners' order authorizing the planning director to enter into a stipulation with a land use applicant is an initiatory or interlocutory step toward a final decision, the stipulation, not a final decision in itself. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. LUBA will dismiss an appeal of a hearings officer's decision approving a post-acknowledgment plan amendment (PAPA) because the decision is not a final decision, notwithstanding that the county code states that the hearings officer's decision on a PAPA is the county's final decision, and the county board of commissioners merely ratifies the hearings officer's decision, where it is reasonably clear that the county commissioners' ratification decision is the county's final decision on the application for purposes of appeal to LUBA. *Setniker v. Polk County*, 74 Or LUBA 134 (2016).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. An intergovernmental agreement (IGA) between a city and a county that establishes a county process and review procedure for a road improvement project located within the city on a county-owned road is a "final" decision, because the IGA may be the city's only decision to rely on the county to process and review the proposed road improvement project, notwithstanding that pursuant to the IGA the county will proceed to adopt subsequent land use decisions. *MGP X Properties, LLC, LLC v. Washington County* 74 Or LUBA 378 (2016).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A comment letter that a city planner provides to a county hearings officer on a land use application before the county, regarding whether a proposed county road project is consistent with city legislation, is not a "final" decision regarding the application of city legislation, and therefore not a land use decision as defined at ORS 197.015(10)(a), even if the intergovernmental agreement that assigns the county land use approval authority over the project is on appeal to the Court of Appeals and potentially could become invalid. *MGP X Properties, LLC v. City of Sherwood*, 74 Or LUBA 476 (2016).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A comment letter from one jurisdiction to a second jurisdiction that has land use approval authority over a pending application is at best an interlocutory decision by the commenting jurisdiction regarding consistency with the commenting jurisdiction's legislation, not a final decision subject to appeal to LUBA, or a final decision subject to transfer to circuit court. *MGP X Properties, LLC v. City of Sherwood*, 74 Or LUBA 476 (2016).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. If opponents of land use approval fail to comply with one or more mandatory requirements for perfecting a local appeal, but the county governing body nevertheless accepts the local appeal and renders a decision on the merits affirming the land use approval, opponents' failure to comply with those mandatory requirements may provide a basis for reversing the governing body's decision, but such failures do not mean opponents' LUBA appeal must be dismissed for failure to exhaust administrative remedies. *Kaplowitz v. Lane County*, 74 Or LUBA 601 (2016).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A written decision that interprets various provisions of the local code is a "land use decision" as defined in ORS 197.015(10)(a), because the decision concerns the application of the local code procedures for seeking and obtaining an interpretation of the local code and the application of local code provisions that implement ORS 215.203 and ORS 215.283. Such decision is a "final" decision because no right of further local appeal exists. *Gilmour v. Linn County*, 73 Or LUBA 90 (2016).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where two county commissioners are disqualified from participating in a decision on a local appeal of a permit approval decision, the final written decision reflecting that action would look somewhat different from a decision on the merits of the local appeal. But the requirement in OAR 661-010-0010(3) that a decision must be reduced to writing before it can become final does not depend on the nature of the decision. *Rogue Advocates v. Josephine County*, 73 Or LUBA 98 (2016).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a petitioner's notice of intent to appeal a decision was filed at LUBA after the board of county commissioners was unable to take action on a local appeal of a planning director's decision that approved a permit application, but before the board of county commissioners reduced its decision to writing, the notice of intent to appeal was filed prematurely. Where the permit applicant files a petition for writ of mandamus more than 14 days after the board of commissioners' hearing at which they failed to take action, and before the board of commissioners approved the minutes of that hearing, the circuit court has exclusive jurisdiction regarding the permit application, and LUBA does not have jurisdiction over the appeal. ORS 215.429(2) and (4). *Rogue Advocates v. Josephine County*, 73 Or LUBA 98 (2016).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. LUBA will tentatively deny a motion to dismiss based on the exclusion at ORS 197.015(10)(b)(H)(iii) for land use compatibility statements (LUCS) that identify local land use reviews, where (1) based on the record and pleadings LUBA cannot tell if the exclusion applies and (2) the appeal of the LUCS decision is consolidated with an appeal of a related land use decision regarding the availability of local appeal of the LUCS decision. Until it is determined whether a local appeal of the LUCS decision was available, and hence whether the LUCS decision was a final decision capable of review by either LUBA or the circuit court, it is premature to resolve the jurisdictional question. *Todd v. Clackamas County*, 73 Or LUBA 369 (2016).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A resolution adopted by the county board of commissioners that discontinues a planning area advisory committee and directs the county planning staff to amend the county's comprehensive plan and

land use regulations to implement the discontinuance is a "final" decision within the meaning of ORS 197.015(10)(a)(A). *Jensvold v. Clatsop County*, 73 Or LUBA 417 (2016).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A letter from the city announcing that mountain biking is no longer allowed in a city-owned natural area is a final decision, absent an indication that the issue of whether mountain biking is allowed in the natural area remains an issue that is under consideration in a pending city management plan process or other land use plan process. *Northwest Trail Alliance v. City of Portland*, 71 Or LUBA 339 (2015).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a city's code does not expressly provide that the city's decisions are "final" for purposes of appeal to LUBA on the date notice is mailed to the parties, but a city code provision directs the planning director to include a statement in the notice of decision that the decision is final and may be appealed to LUBA within 21 days of the date of mailing, LUBA will interpret the code provision as intended to make the city's decisions final on the date of mailing for purposes of OAR 661-010-0010(3), which authorizes local governments to determine the date of finality by local rule or ordinance. *Stevens v. City of Island City*, 71 Or LUBA 373 (2015).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. The Metro Council's adoption by resolution of a master plan for a regional park is not a "final" decision for purposes of ORS 197.015(10)(a), where the master plan consists entirely of non-binding recommendations and guidelines to local governments, and the final, appealable decisions will be subsequent city or county plan and land use regulation amendments, if any, that may be adopted to give effect to the master plan's recommendations or guidelines. *Terra Hydr Inc. v. Metro*, 68 Or LUBA 302 (2013).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. To constitute a "final" decision for purposes of ORS 197.015(10)(a), the decision must actually decide something. Where an adopted master plan is entirely precatory, without any possible land use effects unless and until its recommendations are embodied in other appealable decisions, LUBA's review of that master plan would be entirely advisory. *Terra Hydr Inc. v. Metro*, 68 Or LUBA 302 (2013).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Generally, a decision that merely initiates a legislative proceeding leading to future amendments to a local government's comprehensive plan or land use regulations is not a "final" decision subject to LUBA's jurisdiction. *Terra Hydr Inc. v. Washington County*, 68 Or LUBA 515 (2013).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A county resolution that merely "acknowledges" a Metro master plan, and contemplates that the county will implement the Metro master plan by adopting future comprehensive plan amendments is not a "final" decision subject to LUBA's jurisdiction. *Terra Hydr Inc. v. Washington County*, 68 Or LUBA 515 (2013).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city resolution that "approves" a Metro master plan, and directs staff to implement the master plan by proposing legislative comprehensive plan and land use regulation amendments, is not a "final" decision subject to LUBA's jurisdiction. *Terra Hydr Inc. v. Washington County*, 68 Or LUBA 515 (2013).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city resolution that acknowledges a Metro trail master plan as a "reference document for decision-making purposes," and directs staff to use the master plan as a "guide" for developing the trail proposed in the master plan and already planned and funded by the city, appears to be the city's final decision implementing the master plan, and is therefore a final decision subject to LUBA's jurisdiction. *Terra Hydr Inc. v. Washington County*, 68 Or LUBA 515 (2013).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A significant impact land use decision must be a "final" decision to be subject to LUBA's jurisdiction. *Terra Hydr Inc. v. Washington County*, 68 Or LUBA 515 (2013).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A letter from a city planner that takes the position that a previously approved master plan has expired is not a "final" decision within the meaning of ORS 197.015(10)(a), where no application that seeks approval of a development proposal under the master plan has been submitted and the letter was sent as part of an informal, non-binding, advisory pre-application process. *Kaiser Permanente v. City of Portland*, 67 Or LUBA 111 (2013).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a city consolidates three related applications pursuant to ORS 227.175(2), but suspends processing of two applications and proceeds to issue a decision approving the third application, absent language that defers its finality the decision on the third application is a final decision subject to LUBA's jurisdiction. Consolidation of applications under ORS 227.175(2) is at the request of the applicant, and nothing in the statute prevents a city, with the applicant's consent, making a final decision on one application while separately processing other applications, or renders an otherwise final decision non-final until the city completes separate processing of the other applications. *Save Downtown Canby v. City of Canby*, 67 Or LUBA 385 (2013).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city resolution that generally contains (1) a description of a surface water supply system from its early days to the present, (2) a chronology of various proposals to improve the surface water supply system, and (3) an expression of the city's commitment to maintain and improve the surface water supply facility is not a "final decision" to proceed with the water supply system improvement project, where somewhat contemporaneously with its adoption of the resolution the city adopted a water public facilities plan that includes the surface water improvement project. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 101 (2012).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. An unsigned printout of a local government computer database entry for an encroachment permit is not the

permit itself, and does not represent a final decision of any kind. *Brodersen v. City of Ashland*, 66 Or LUBA 369 (2012).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. An ordinance that deletes text from a county zoning ordinance is a final decision, notwithstanding that the county also adopted a resolution initiating proceedings before the planning commission to recommend future land use regulation amendments to replace the text deleted from the zoning ordinance. *Hatley v. Umatilla County*, 66 Or LUBA 427 (2012).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A zoning information sheet that is a printout of a computer screen and shows that information from an application has been entered into the county's automated permit application tracking system is neither a "decision" nor "final" where there is no indication that the county has taken any action on the application. LUBA lacks jurisdiction to review a zoning information sheet that is neither a decision nor final. *Hardesty v. Jackson County*, 63 Or LUBA 447 (2011).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. LUBA will not grant the local government's motion to dismiss an appeal based on its argument that the challenged decision is not "final" within the meaning of OAR 661-010-0015(1)(a), where the challenged decision appears to be the local government's final determination that the proposed use is a permitted use under its land use regulations. *Jacobsen v. City of Winston*, 62 Or LUBA 535 (2010).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where LUBA concludes that the decision on appeal is not a land use decision or limited land use decision , because it is a fiscal decision, and transfers the decision to circuit court, LUBA need not also consider whether the appealed decision fails to qualify as a land use or limited land use decision for the additional reason that it is not a "final" decision. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a board of county commissioners' order directs the planning director to move forward with securing needed permits to remove a dam and to remove the dam, and the planning department issues a permit that is pending on appeal before the county hearings officer, the board of county commissioners' order is not the county's final statutory land use decision and petitioner's LUBA appeal seeking review of the board of county commissioners' order will be dismissed. *Schock v. Jackson County*, 61 Or LUBA 403 (2010).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A local ordinance that provides that a decision becomes effective 14 days after mailing notice of the decision means that the decision is *effective* at that date. The ordinance does not delay the date the decision becomes *final* for purposes of appeal to LUBA under OAR 661-010-0010(3). *VK Northwest, Inc. v. City of West Linn*, 60 Or LUBA 39 (2009).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Even though the language of a final decision is somewhat misleading in stating that it becomes final at a later

date, a misstatement of fact and law in the decision does not excuse a petitioner from filing a timely notice of intent to appeal. *VK Northwest, Inc. v. City of West Linn*, 60 Or LUBA 39 (2009).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a city building official denies a building permit application based on an interpretation set forth by the city planning director in a previous letter to the applicant, an appeal of the building official's denial is not a collateral attack of the planning director's previous letter or require dismissal under the reasoning in *Lloyd Dist. Community Assoc. v. City of Portland*, 30 Or LUBA 290 (1996), where the building official's decision is the city's final decision on the applicant's building permit applications, the decision is subject to criteria the planning director did not consider in the previous letter, and the building official applies the planning director's interpretation to a specific set of facts that the planning director did not consider. *Noble Built Homes, LLC v. City of Silverton*, 60 Or LUBA 460 (2010).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A governing body's decision to adopt a resolution initiating a legislative comprehensive plan amendment process is the first step in a multi-step proceeding that will likely culminate in a final decision, but that resolution is not itself a final decision subject to LUBA's jurisdiction. Any alleged procedural errors in adopting the resolution may be challenged in an appeal of the local government's final decision, if not rendered harmless or cured by later proceedings. *Setniker v. Polk County*, 58 Or LUBA 87 (2008).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. An erroneous statement in the notice of decision that the decision can be appealed to LUBA does not affect whether the decision is a land use decision or otherwise affect LUBA's jurisdiction. *Setniker v. Polk County*, 58 Or LUBA 87 (2008).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Local laws that only delay the date an ordinance takes effect do not also delay the date an ordinance becomes final for purposes of appeal to LUBA. *Reeves v. City of Wilsonville*, 58 Or LUBA 545 (2009).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A local government decision that purports to be a final decision with regard to one aspect of a land use permit application while at the same time remanding the permit application for additional decision making with regard to other aspects of the permit application is not a "final decision," within the meaning of ORS 197.015(11)(a) and therefore is not appealable to LUBA. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. It does not follow that any decision that is reduced to writing and signed by the necessary decision makers is necessarily a "final decision," within the meaning of ORS 197.015(11)(a). *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a planning commission decision is appealed to the board of county commissioners, the planning commission's decision is not final. *Dunn v. Yamhill County*, 55 Or LUBA 206 (2007).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A local government may not break up a single decision into "final" and "non-final" components so that the decision is appealable in part to LUBA and in part locally; a decision that attempts to do so is not a final decision as to any part and is therefore not a land use decision within the meaning of ORS 197.015(11). *Yun v. City of Portland,* 54 Or LUBA 155 (2007).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city decision to defer making a decision about whether a recently enacted statute operates retroactively to invalidate an annexation ordinance while the property owner's appeal of that annexation ordinance is pending before the Court of Appeals is not a final decision, and, because it is not a final decision, it is not a land use decision subject to review by LUBA. *Leupold & Stevens, Inc. v. City of Beaverton*, 53 Or LUBA 203 (2007).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A property owner's request that a city apply a statute to invalidate a previously enacted annexation ordinance is not an application for a boundary change, which would require that the city adopt a land use decision. *Leupold & Stevens, Inc. v. City of Beaverton*, 53 Or LUBA 203 (2007).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A "land use decision," as that term is defined in ORS 197.015(11)(a)(A), must be a final decision. A county's denial of an applicant's motion to dismiss a local appeal of an administrative approval is an interlocutory decision, not a final decision, and therefore is not an appealable land use decision. *Ratzlaff v. Polk County*, 53 Or LUBA 480 (2007).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Based on *dicta* in *Kalmiopsis Audubon Society v. Curry County*, 131 Or App 308, 884 P2d 894 (1994), it is theoretically possible to appeal a decision that purports to correct a "clerical error" in a final, unappealed decision, as long as the petitioner demonstrates that the correction qualifies as a land use decision and the appeal is narrowly focused on the correction itself, rather than the unappealed decision. *Hoschek v. Tillamook County*, 52 Or LUBA 793 (2006).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where the Metro Code provides that when a necessary party appeals a city boundary change decision to Metro the city boundary change decision is not final until the appeal is resolved, LUBA does not have jurisdiction to review that city boundary change decision while the Metro appeal is pending, because LUBA's review jurisdiction is limited to "final" decisions. *City of Happy Valley v. City of Damascus*, 51 Or LUBA 141 (2006).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A letter from county counsel explaining that previously issued building permits were properly issued and will not be revoked merely repeats a previously issued decision and is not a final land use decision that may be appealed to LUBA. *Johnston v. Marion County,* 51 Or LUBA 250 (2006).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A board of county commissioners order that calls up a hearings officer's decision denying a conditional use

permit application for a *de novo* hearing is an interlocutory order and not a final decision subject to LUBA's jurisdiction. *Gould v. Deschutes County*, 51 Or LUBA 493 (2006).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A board of county commissioners order declining discretionary review of a hearings officer's decision would usually have the effect of making the hearings officer's decision the county's final decision appealable to LUBA. However, where the commissioners decline review because the commissioners have called up the hearings officer's decision for review at a *de novo* hearing at which the petitioner may appear and raise any issues, the order does not have the effect of making the hearings officer's decision the county's final decision, and the order declining petitioner's local appeal is not itself a final decision appealable to LUBA. *Gould v. Deschutes County*, 51 Or LUBA 493 (2006).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a county governing body affirms a planning commission decision denying a building permit to expand an existing noncoforming use but remands to the planning commission for a determination of the type of review required with regard to the nonconforming use, the governing body's decision is not a "final" decision, and LUBA lacks jurisdiction to review it, notwithstanding petitioner's allegation that the governing body's remand was *ultra vires*. *Vanspeybroeck v. Tillamook County*, 51 Or LUBA 546 (2006).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. When a decision is reduced to writing and prepared for the decision maker's signature, the decision is "signed" with a signature stamp rather than an actual signature, and the local government does not contend that someone else issued the decision in the decision maker's name, LUBA will treat the signature stamp as the equivalent of the decision maker's signature. *Wells v. Yamhill County*, 51 Or LUBA 659 (2006).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a city council exercises its authority to review a decision of a hearings officer granting approval of site development review, sensitive lands review and adjustments for a proposed development and, in substance, affirms the hearings officer's decision, its action is a final land use decision and is subject to LUBA's jurisdiction. *Beilke v. City of Tigard*, 51 Or LUBA 837 (2006).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A condition of site plan approval that calls for mediation to develop possible mitigation measures for an asphalt recycling plant does not delay the effective date of the decision where there is no language in the condition that suggests that was the local governments intent and the notice of the decision states that the decision can be appealed to LUBA. *Clearwaters v. Josephine County*, 50 Or LUBA 600 (2005).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Ordinances that adopt comprehensive plan and land use regulation amendments are final decisions that are appealable to LUBA, notwithstanding language in those ordinances that delays their effective date until the Department of Land Conservation and Development completes periodic review and requires the city to adopt a subsequent ordinance, where those ordinances all provide notice that

the decision is appealable to LUBA. *Century Properties, LLC v. City of Corvallis*, 50 Or LUBA 691 (2005).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A resolution adopted pursuant to ORS 222.111(2) to initiate annexation proceedings that sets a date for an election in the area to be annexed, but dispenses with a separate vote within the city to approve the annexation, is not the city's "final" decision regarding the annexation, and for that reason such a resolution is not a land use decision. Following adoption of such a resolution, ORS 222.120(4) requires that the city provide a public hearing and thereafter the city must adopt an ordinance to declare that the territory is annexed provided a majority of voters in the territory to be annexed approve. *City of Happy Valley v. City of Damascus*, 49 Or LUBA 553 (2005).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Whether a local government decision is a "final" decision is primarily governed by the form of the decision and whether all local appeals have been exhausted. That an otherwise final temporary decision may ultimately expire or be replaced by another decision does not mean that the temporary decision is not a final decision subject to appeal to LUBA. *Curl v. City of Bend*, 48 Or LUBA 530 (2005).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Contrary to *Thede v. Polk County*, 1 Or LUBA 339 (1980), irregularities in signing and approving a final city decision does not mean that the challenged decision is not a "final decision" subject to LUBA's jurisdiction. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 618 (2004).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. In construing an initiative, a court attempts to discern the intent of the voters, based foremost on text and context of the initiative itself. While the chief petitioners may have intended that an initiative that preserves the city waterfront for a public park function as a mere straw poll on the future of the waterfront, the text and context of the initiative indicate that the voters intended to establish a binding policy effectively rezoning the city waterfront as a public park. The initiative is therefore a final, non-advisory decision for purposes of LUBA's jurisdiction. *Port of Hood River v. City of Hood River*, 47 Or LUBA 62 (2004).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A county counsel stipulation in a mandamus proceeding that purports to determine the zoning of property is in essence a declaratory ruling interpreting an ambiguous ordinance concerning the zoning of property and is a final determination subject to LUBA's jurisdiction. *Flying J, Inc. v. Marion County*, 47 Or LUBA 637 (2004).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A decision that (1) announces that the local government has reconsidered what is otherwise a final appealable decision, and (2) identifies a future decision on reconsideration as the final appealable decision effectively renders the original decision a tentative, non-final decision that is not within LUBA's jurisdiction. *Grabhorn v. Washington County*, 46 Or LUBA 672 (2004).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A decision to reconsider an earlier decision and reserve final judgment on the merits of that earlier decision is not itself a land use decision subject to LUBA's jurisdiction, where the decision to reconsider does not concern the application of any comprehensive plan provision or land use regulation, and the decision to reconsider is accurately characterized as an interlocutory decision and not a final decision of any kind. *Grabhorn v. Washington County,* 46 Or LUBA 672 (2004).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A resolution that authorizes a city to acquire property is a "final" decision, where the only remaining act that would be required to transfer title to the property is a deed or a circuit court judgment pursuant to ORS 35.325 following an exercise of eminent domain by the city, because such a deed or circuit court judgment would not be land use decisions subject to LUBA review. *Willamette Oaks, LLC v. City of Eugene,* 46 Or LUBA 813 (2004).

26. 2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. To the extent a surveyor's signature on a final partition plat denotes a decision concluding that the partition conforms with applicable land use regulations, for the purposes of an appeal to LUBA, that decision is final when the surveyor signs the final partition plat. *Hammer v. Clackamas County*, 45 Or LUBA 32 (2003).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. If a county governing body errs in rejecting an attempted local appeal of a planning commission decision, LUBA will remand the county governing body's decision so that the county may provide the required local appeal, but LUBA will dismiss an attempted direct appeal of the planning commission decision because the county governing body's decision on remand will be the county final decision that is subject to LUBA review. *Burke v. Crook County*, 45 Or LUBA 516 (2003).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a county governing body determines that it has conflicts that prevent it from considering a local appeal of a planning commission decision, and rejects the appeal without identifying any appealable error on the local appellant's part: (1) the local appellant is not obligated to seek LUBA review of the county governing body's decision; (2) the local appellant has satisfied the statutory requirement that he exhaust local remedies before appealing to LUBA; and (3) the planning commission decision becomes the county's final decision and subject to appeal to LUBA. *Burke v. Crook County*, 45 Or LUBA 516 (2003).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where the respondent argues that its decision is merely a recommendation to another governing body, and thus not a final decision, and the petitioner fails to respond to that argument, the petitioner has not met his burden of establishing the Board's jurisdiction, and the appeal will be dismissed. *Ziemer v. City of Florence*, 43 OR LUBA 1 (2002).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a timely request is filed to locally appeal a decision made without a hearing under ORS 215.416(11) or 227.175(10), the local government must conduct a *de novo* hearing and render a final decision approving or denying the permit application. Where the local government conducts a *de novo*

hearing and renders a final decision, the decision made without a hearing is not and cannot become a final decision, and cannot be appealed to LUBA under ORS 197.830(4) or any other provision of law. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 597 (2002).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a timely request is filed to locally appeal a decision made without a hearing under ORS 215.416(11) or 227.175(10) and a *de novo* hearing is held, but the request is withdrawn and the local appeal dismissed prior to reaching a final decision on the local appeal, the underlying decision made without a hearing becomes the county's final land use decision on the permit application. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 597 (2002).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where the *de novo* hearing provided under ORS 215.416(11) or 227.175(10) is dismissed without reaching a decision on the permit application, the underlying decision made without a hearing becomes the final land use decision on the permit application, as of the date of the order dismissing the local appeal. The underlying decision does not become final retroactively back to the date the local appeal period expired. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 597 (2002).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Two letters from county counsel explaining the county's position that a code deadline to commence subdivision construction applies to a subdivision approval with litigation pending, and stating that the applicants may file an application for extension of the subdivision approval under a particular code provision, do not constitute land use decisions. *Bartell v. Washington County*, 42 Or LUBA 464 (2002).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where applicants unsuccessfully seek a writ of mandamus to compel a county to grant their request for a county extension of time to commence construction of a subdivision, or a county ruling that the deadline was tolled while litigation concerning the subdivision was pending, and the county never responds to the applicants' request in writing, LUBA does not have jurisdiction to review the county's decision until it renders a written decision in response to the applicants' request. *Bartell v. Washington County*, 42 Or LUBA 464 (2002).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A local decision to deny a motion to dismiss filed during a local land use appeal is not a separate final land use decision subject to an appeal to LUBA. *Riddell Farms, Inc. v. Polk County*, 41 Or LUBA 47 (2001).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a board of commissioners declares that it is biased, recuses itself from an appeal of a hearings officer's land use decision, and designates a hearings officer's decision as the county's final decision, the hearings officer's decision may be appealed to LUBA, notwithstanding local code provisions that grant a party a right to a local appeal before the board of commissioners. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. The right to an impartial tribunal will supersede petitioners' right to a local appeal, where denying the local appeal will not deprive petitioners of an opportunity to have a local decision reviewed on the merits. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a planning director's decision to revoke a previously approved appeal fee waiver and reject petitioner's local appeal was final when rendered, and petitioner did not file a timely appeal with LUBA to challenge that decision, petitioner may not challenge the fee waiver revocation and denial of the local appeal in an appeal of a subsequent planning director letter that merely reiterates the earlier decision. *Babbitt v. City of Portland*, 41 Or LUBA 151 (2001).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A decision amending a city's comprehensive plan housing needs inventory and analysis pursuant to ORS 197.296(3) is a *final* decision and therefore a "land use decision" as defined by ORS 197.015(10)(a)(A), notwithstanding that the amended inventory and analysis may require the city to adopt further land use decisions to comply with ORS 197.296(4) and (5). *DLCD v. City of McMinnville*, 40 Or LUBA 591 (2001).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A resolution that directs planning staff to continue a legislative process to develop a plan governing future expansion of the state medical university is not a *final* decision and for that reason is not a land use decision under either the statutory test at ORS 197.015(10) or the significant impact test. *No Tram to OHSU v. City of Portland*, 40 Or LUBA 411 (2001).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A staff letter acknowledging that a hydrogeologic report satisfies the code requirements for a pre-application evidentiary submission, but that does not purport to determine that the evidence is or will be sufficient to show compliance with approval criteria once the application is filed, is not a final land use decision subject to LUBA's jurisdiction. *Harcourt v. Marion County*, 40 Or LUBA 393 (2001).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a local ordinance limits appeals of local land use decisions to "land use decisions" as that term is defined in the local ordinance, a petitioner is not entitled to a local appeal where petitioner fails to demonstrate that the decision he wishes to appeal is a "land use decision" within the city's definition of the term. *Robinson v. City of Silverton*, 40 Or LUBA 159 (2001).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where the first and second steps of a four-step PUD approval process each yield decisions that are not final or binding in any respect, neither the local government's decision granting first-step approval nor its decision granting second-step approval is a final land use decision subject to LUBA's jurisdiction. *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 21 (2001).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where the first step of a three-step planned unit development (PUD) approval process yields a decision that is final and binding in certain respects, the local government's decision granting such approval is

a final land use decision subject to LUBA's jurisdiction. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A local government may not separate an otherwise unitary land use decision into separate components, remand some components for further local proceedings and designate some components as immediately appealable to LUBA. *Besseling v. Douglas County*, 39 Or LUBA 177 (2000).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. LUBA will dismiss an appeal of a component of a local decision for lack of finality where it is clear that the local government has separated an otherwise unitary land use decision into separate components, and remanded some of those components for further local proceedings. *Besseling v. Douglas County*, 39 Or LUBA 177 (2000).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A letter from a city parks commissioner stating that the city planning department had concluded a conditional use permit is not required for a proposed soccer practice field is not a "land use decision" pursuant to ORS 197.015(10)(a)(A) because it does not purport to apply a land use regulation. However, the letter from the planning department concluding that the proposed use does not require a permit is a final "land use decision" because it does apply a land use regulation and no further local appeal process was available. *Kent v. City of Portland*, 38 Or LUBA 942 (2000).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. When a party receives notice of a land use decision by means of a follow-up clarification letter, an appeal of that clarification letter is sufficient to appeal the earlier land use decision, as long as the appeal is filed within the period in which the party could have timely appealed the land use decision. *Kent v. City of Portland*, 38 Or LUBA 942 (2000).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city council decision to hire an appraiser and begin the process of condemning property for waste disposal purposes does not constitute a land use decision because it is not a "final" decision, where it is clear that the decision is neither a final decision to purchase property nor a final decision concerning whether the property may be used for waste disposal under applicable land use standards. *E & R Farm Partnership v. City of Gervais*, 37 Or LUBA 702 (2000).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Objection to LUBA's jurisdiction may be raised at any time and the filing of the record in an appeal does not and could not have the legal effect of establishing that LUBA has jurisdiction. *E & R Farm Partnership v. City of Gervais*, 37 Or LUBA 702 (2000).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A notice of intent to appeal is timely filed where the county code specifies that land use decisions become final when mailed to the parties entitled to notice, and petitioner filed the notice of intent to appeal within 21 days of the date the county mailed the decision. *Warrick v. Josephine County*, 36 Or LUBA 796 (1999).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A local code provision that delays the "effective date" of a decision does not delay the date the local decision becomes "final" for purposes of appeal to LUBA. *Friends of Clean Living v. Polk County,* 36 Or LUBA 544 (1999).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Under LUBA's rules a land use decision must be a written decision. *Friends of Clean Living v. Polk County,* 36 Or LUBA 544 (1999).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Although deficiencies in a hearings officer's notice of hearing may provide a basis for direct appeal of the hearings officer's decision to LUBA under ORS 197.830(3), where a local appeal is filed and the city council makes a decision in the appeal, the hearings officer's decision is not the city's final decision and is not subject to appeal to LUBA under ORS 197.830(3). *Bigley v. City of Portland,* 36 Or LUBA 517 (1999).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. An argument that a party failed to file a timely appeal of a local planning department's decision may, if correct, provide a basis for reversing the land use decision that ultimately resulted from the local appeal; but it would not provide a basis for dismissing the LUBA appeal. *Wood v. Crook County,* 36 Or LUBA 143 (1999).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a regional government endorses expansion of the UGB as the initial step in a three-step process requiring subsequent county approval and consideration under the statewide planning goals followed by final action by the regional government, the regional government's initial endorsement is not a final land use decision subject to LUBA's jurisdiction. *1000 Friends of Oregon v. Metro,* 35 Or LUBA 720 (1999).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city decision requesting that Metro initiate proceedings to amend the urban growth boundary and designated urban reserves is not a "final" decision subject to LUBA review. *Dickert v. City of Wilsonville,* 35 Or LUBA 52 (1998).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A decision is not final until it is reduced to writing and signed by the authorized decision maker. An applicant may withdraw the application prior to the time the decision becomes final, even if an oral decision has already been made. *Witzel v. Harney County,* 34 Or LUBA 433 (1998).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a local appeal of a property line adjustment decision is rejected on the basis that no local appeal is available and petitioner appeals both the property line adjustment decision and the denial of the local appeal but only assigns error to the property line adjustment decision, the property line adjustment decision will be considered the "final" local decision and is subject to review at LUBA. *Goddard v. Jackson County,* 34 Or LUBA 402 (1998).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a local code does not specify a date upon which a decision becomes final, OAR 661-10-010(3) specifies that the decision becomes final on the date it is reduced to writing and signed by the decision maker. *Adams v. City of Ashland*, 33 Or LUBA 552 (1997).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Generally, where a local government approves a street improvement project, and in a later decision awards a contract to build the improvement, the reviewable decision is the initial decision to approve the project. *Knapp v. City of Jacksonville*, 33 Or LUBA 457 (1997).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A decision to proceed with an environmental assessment pursuant to the National Environmental Policy Act as part of a feasibility determination is not a final decision over which LUBA has jurisdiction, because it does not actually approve or deny a land use. *Cole v. Lane Transit District*, 33 Or LUBA 201 (1997).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A "legal lot verification" service provided by the county results in a preliminary, advisory opinion as to whether a lot was legally created. The service does not create a binding final land use decision over which LUBA has jurisdiction. *Davis v. Lane County*, 32 Or LUBA 267 (1997).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. If a DSL finding of compatibility is not based on a final land use decision made by the city, LUBA lacks jurisdiction over the appeal from the finding of compatibility. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A DSL finding of compatibility that relies on the separate opinions of two city planners and the city attorney is not based on a final land use decision made by the city. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Although OAR 660-31-035(1), which governs Class A permits, does not require that an affected local government's compatibility determination either be in writing or be supported by written findings in order to be relied upon by a state agency issuing a permit, the absence of a writing raises the question of whether there actually is a local government determination. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Two factors govern whether a local government's determination of compatibility with its acknowledged plan and regulations, made as part of a state agency approval process, is a "final" decision applying the local government's plan and regulations: (1) the state agency must be required by statute, rule or other authority, to assure that the proposal is compatible with the local government plan and regulations; and (2) the state agency must be authorized by statute, rule or other legal authority to rely on the local government's determination. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a petitioner challenges a county's authority to process an application for a lot line adjustment on the basis that there has never been a legal determination that the property consists of more than one parcel, such a challenge is an impermissible collateral attack on an earlier determination, if such a determination has been made. However, where the record does not reflect that any legal determination has been made, petitioner may challenge the county's authority to proceed with a lot line adjustment on the premise that the property consists of two parcels. *Higgins v. Marion County*, 30 Or LUBA 426 (1996).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. While a local government can make a de facto land use decision without satisfying procedural or substantive requirements for a land use decision, a county does not make a de facto land use decision by merely acquiescing to a property owner's desired characterization of his property. *Higgins v. Marion County*, 30 Or LUBA 426 (1996).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A county minute order that accepts a staff report, but makes no decision to initiate action to consider modification of a condition to an existing permit, is not itself a final decision appealable to LUBA. *Anderson v. Washington County*, 30 Or LUBA 240 (1995).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A notice of intent to appeal to LUBA that designates a corrected decision is timely if filed within the period allowed for appeals of the original (final) decision. *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Notwithstanding the standards in OAR 661-10-010(3) addressing when a decision becomes final, the physical form of the decision is less important than the finality accorded it by the city's codes and procedures and by subsequent actions relying upon it. *No Casino Association v. Lincoln City*, 30 Or LUBA 79 (1995).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. The pursuit of a nonexistent local right of appeal does not suspend the date a land use decision becomes final for purposes of appeal to LUBA. *No Casino Association v. Lincoln City*, 30 Or LUBA 79 (1995).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Under OAR 661-10-010(3), a document containing findings of fact and conclusions of law that is signed by the mayor and attested by the city recorder is a final decision, but if the city has no authority to take the action reflected in the decision, the final decision is not a land use decision. Subsequent adoption with authority is a land use decision appealable to LUBA. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a local government decision to classify petitioner's proposed comprehensive plan amendment as "major" is final, and denies petitioner a *right* he would otherwise have under the local code to have his

proposed amendment reviewed on its merits, the local government's decision is a land use decision as defined in ORS 197.015(10)(a)(A)(iii) and is subject to review by LUBA. *Cone v. City of Eugene*, 29 Or LUBA 133 (1995).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A local government resolution requesting ODOT not to build a particular freeway ramp is a final, reviewable land use decision if (1) the local government's comprehensive plan includes any provision the substance of which applies to such a recommendation, and (2) ODOT may choose to abandon the disputed ramp project without taking any action that *requires* the local government to amend its plan or demonstrate compliance with it. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 541 (1995).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A LUBA appeal must be initiated within 21 days after a local governing body adopts its written order, unless petitioners establish that (1) the local government plan or code grants a right to seek rehearing or reconsideration of the governing body's order; (2) petitioners sought such rehearing or reconsideration; and (3) under local legislation, such a request for rehearing or reconsideration has the effect of preventing the governing body's order from becoming a *final* decision. *Bowen v. City of Dunes City*, 28 Or LUBA 324 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Under either the statutory test or the significant impact test, a "land use decision" must be a *final* decision. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A planning director letter stating certain uses are permitted outright under the local code is not a "final" decision, where that letter is either superseded or qualified by a subsequent planning director letter stating a final determination on whether such uses are permitted outright on the subject property will be made in the building permit process. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A local government's determination of compatibility with its acknowledged comprehensive plan and land use regulations, made as part of a state agency permit approval process, is a "final" decision applying the local plan and regulations if (1) the state agency is required, by statute, rule or other legal authority, to assure the permit is compatible with the local plan and regulations; and (2) the state agency is authorized to rely on the local government's determination of compatibility. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a local government's statements on a state agency permit land use compatibility form identify the code provisions relied on by the local government and explain the basis for the local government's determination that the subject facility is an outright permitted use, the statements constitute written findings which, under OAR 661-31-035(2), entitle a state agency to rely on the local government's compatibility determination. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city's approval of a motion to extend a city street is the city's final decision to pave the street, not the city's subsequent decision to award the contract to pave the street. *Carlson v. City of Dunes City*, 28 Or LUBA 770 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where petitioners presented a discrete land use question concerning the use of certain property for film-making purposes to the board of commissioners at its meeting, but statements made by commission members indicate the commission explicitly did *not* answer the land use question petitioners presented, no land use decision was made. *Bach v. Deschutes County*, 28 Or LUBA 58 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a notice of intent to appeal states the challenged decision is a planning commission recommendation to the governing body, the local government moves to dismiss the appeal on the ground the challenged decision is not final, and petitioner fails to respond to the motion to dismiss, the appeal will be dismissed. *Braun v. City of La Grande*, 27 Or LUBA 581 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city council decision to receive a staff report as information only and not to proceed with a public hearing is not a land use decision. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where certain parties requested that a local government determine whether a particular development complies with all requirements of its land use regulations, a letter by the local government planning director making the requested determination is a final land use decision, even though not issued pursuant to a local process for making binding declaratory rulings. *Hart v. Jefferson County*, 27 Or LUBA 688 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a local government compliance hearings officer order (1) applies the local zoning ordinance to the relevant facts in determining petitioners violated that ordinance, and (2) is the local government's final determination on the issues decided, the order is a "land use decision" subject to review by LUBA. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city resolution asking ODOT not to construct a particular transportation improvement and to spend the funds allocated to that project for other purposes, including development of a transportation master plan for the area, is merely a recommendation to ODOT concerning actions within ODOT's authority, not a "final" land use decision reviewable by LUBA. *Central Eastside Industrial Council v. Portland*, 26 Or LUBA 540 (1994).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a local government makes a decision denying its own application to vacate a street and thereafter, in the same decision, withdraws the pending vacation application, the local government has made a final

land use decision subject to review by LUBA. *Lane v. City of Klamath Falls*, 26 Or LUBA 295 (1993).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Local regulations govern the determination of *when* a local government decision is final for purposes of LUBA review, so long as the local regulations do not conflict with applicable statutes or LUBA's rules. *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A local government decision that makes a binding interpretation of its regulations, without amending or adopting regulation provisions or granting or denying a development application, is a "final" decision, even if other actions are required to give that decision practical effect. *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city resolution initiating a boundary commission proceeding to consider annexation of property pursuant to ORS 199.490 is not a final decision and, for that reason, is not a land use decision as defined by ORS 197.015(10)(a)(A). *Interlachen, Inc. v. City of Fairview*, 25 Or LUBA 618 (1993).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city resolution initiating a boundary commission proceeding under ORS 199.490 to consider annexation of property is not a final land use decision, where the boundary commission is not authorized to rely on comprehensive plan compliance findings in the city resolution and must itself make a determination of plan compliance. *Interlachen, Inc. v. City of Fairview*, 25 Or LUBA 618 (1993).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A letter sent by the planning director to the applicant, four months before a city decision granting PUD final development plan approval, does not constitute a final, appealable city decision with regard to the duration of the subsequent PUD final development plan approval. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Local ordinances governing when a local decision becomes final are effective only to the extent they do not conflict with state statutes. *A Storage Place v. City of Tualatin*, 24 Or LUBA 637 (1993).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. LUBA's rejection of petitioners' arguments that the challenged decision is final, does not mean petitioners' arguments were presented without probable cause to believe they were well-founded. Whether a challenged decision is a "final" decision is, more often than not, far from obvious. *City of North Plains v. Washington County*, 24 Or LUBA 623 (1993).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where local government has a direct role to play in the adoption of local legislation affecting land use, and the local electorate must vote to approve or reject such legislation, the reviewable land use decision

occurs at the time when the governing body determines the legislation complies with applicable land use laws. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 607 (1992).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where an ordinance is adopted by initiative, and the local government has no role to play in determining the ordinance's compliance with applicable land use laws, the reviewable land use decision is made when the election results are certified by the county clerk. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 607 (1992).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Although a city may be limited to an advisory role with regard to requests to rezone property located outside its municipal boundaries, where it adopts an ordinance granting the requested rezoning, the decision is a final decision subject to LUBA review. *Hofmann v. City of Seaside*, 24 Or LUBA 183 (1992).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A county planning director's letter stating he will initiate an application for development approval is not a final land use decision subject to LUBA's review authority. *City of North Plains v. Washington County*, 24 Or LUBA 78 (1992).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a formal declaratory ruling process established in a local government's code is not used, but an application or request for a plan or code interpretation initiates a process which provides the equivalent of a formal declaratory ruling process, including the right to notice and hearing, and that process results in the adoption of a written decision by the highest level local government review authority interpreting the plan or code, the decision is a land use decision subject to LUBA's review authority. *Brogoitti v. Wallowa County*, 23 Or LUBA 247 (1992).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A local code provision that requires the planning commission to conduct a site review of certain proposed developments, but which establishes no separate procedure for site review, does not prevent a city council decision approving a conditional use permit for the proposed development from being a final land use decision appealable to LUBA, even though the planning commission never conducted such site review. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where the challenged decision does not purport to adopt or amend land use regulations, was not issued as a part of a decision approving or denying a permit, and is not the result of any motion of the decision making body, but rather is only a reflection of the impressions of the individual decision makers concerning the validity of a conditional use permit, such decision is not a final decision and, therefore, is not a land use decision within LUBA's jurisdiction. *Weeks v. City of Tillamook*, 22 Or LUBA 667 (1992).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. LUBA reviews the decision maker's final written decision, not statements made during the proceedings

leading to adoption of the challenged decision. Such statements are preliminary and subject to change in the final decision. *Toth v. Curry County*, 22 Or LUBA 488 (1991).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a challenged decision does not purport to adopt or amend land use regulations, was not issued as a part of a decision approving or denying a permit, and is not the result of any motion of the decision making body, but rather is an expression of how various individual decision makers "felt" about the proposal as reflected in the minutes, the challenged decision is an advisory opinion only and is not a final land use decision subject to LUBA's jurisdiction. *Owen Development Group, Inc. v. City of Gearhart*, 22 Or LUBA 418 (1991).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. LUBA's jurisdiction over county decisions applying land use standards extends only to *final* decisions. *Pilling v. LCDC*, 22 Or LUBA 188 (1991).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. When a local government interprets existing comprehensive plan or land use regulation provisions without amending or adopting plan or land use regulation provisions or granting or denying a development permit or other land use approval, such a decision is a *final* decision if it is issued pursuant to an established local process for issuing binding declaratory rulings. *Hollywood Neigh. Assoc. v. City of Portland*, 21 Or LUBA 381 (1991).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. LUBA's review jurisdiction is limited to final decisions, and a recommendation from one governing body to a second governing body concerning an action within the jurisdiction of the second governing body is not a final decision subject to review by LUBA. *Goose Hollow Foothills League Assoc. v. Portland*, 21 Or LUBA 358 (1991).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A local government decision adopting a proposed wetlands conservation plan for subsequent submittal to the director of Division of State Lands is not a final decision. *Blatt v. City of Portland*, 21 Or LUBA 510 (1991).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. An ordinance which adopts a natural resources management plan (NRMP) pursuant to local code provisions is a *final* decision with regard to adoption of a NRMP, even though the NRMP is also a *proposed* wetlands conservation plan and is submitted to the DSL for approval as such. *Blatt v. City of Portland*, 21 Or LUBA 510 (1991).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city ordinance referring a charter amendment to prohibit solid waste incinerators is the city's final decision, not the subsequent vote of the citizens approving the charter amendment. *Jentzsch v. City of Sherwood*, 20 Or LUBA 575 (1991).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a county hearings officer remands an application to the planning director for further action on certain

issues, the hearings officer has not yet made any *final* decision on the application. Only when all county proceedings on the subject application are complete will the county have made its *final* decision on the application. *Tylka v. Clackamas County*, 20 Or LUBA 296 (1990).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where petitioners appeal a letter from the county court's counsel, stating the county court (1) has decided not to conduct any further review of petitioners' local appeal of a planning commission decision, and (2) considers the planning commission decision to be final, that letter constitutes the county's final decision on petitioners' local appeal, and petitioners have not failed to exhaust their administrative remedies. That the county court's decision not to conduct any further review of petitioners' appeal may have been erroneous does not affect LUBA's jurisdiction. *Komning v. Grant County*, 20 Or LUBA 481 (1990).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A city charter provision delaying the effective date of an ordinance does not also delay the date the ordinance becomes a final decision subject to appeal to LUBA. *Club Wholesale v. City of Salem*, 19 Or LUBA 576 (1990).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a timely appeal to the planning commission from the city administrator's decision on petitioners' application was filed, the city administrator's decision was not a *final* decision by the city on petitioners' application. If petitioners withdraw their application before the city makes a final decision on it, any decision made by the city on that application after its withdrawal is not a final land use decision subject to LUBA's jurisdiction. *Torgeson v. City of Canby*, 19 Or LUBA 214 (1990).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. A county order selecting a preferred alternative site for a new bridge and directing staff to file necessary land use applications is not a "statutory test" land use decision, because it is only the expression of the board of commissioners' preliminary preference for the location of a new bridge, not a final decision selecting the site for a new bridge. *McKenzie River Guides Assoc. v. Lane County*, 19 Or LUBA 207 (1990).

26.2.2 LUBA Jurisdiction – Land Use Decision: Statutory Test – Final Decision. Where a county's land development ordinance provides for adoption of resolutions of intent to rezone and makes such resolutions binding commitments that the county will grant rezoning when conditions stated in such resolutions of intent to rezone are met, a resolution of intent to rezone is a final appealable decision. *Headley v. Jackson County*, 19 Or LUBA 109 (1990).

26.2.3 LUBA Jurisdiction – Land Use Decisions: Statutory Test – Local Government/Special District Decision. A contract between a local government and an engineering firm for the design of three bridges does not concern the application of any land use regulation, and, thus, is not a "land use decision," where the contract authorizes only design work and consulting services, where the contract does not authorize the use or development of land, and where the design and consulting services concern development actions that must be (and in fact were) authorized by other land use decisions. *Van Dyke v. Yamhill County*, 80 Or LUBA 403 (2019).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. LUBA's jurisdiction over Metro decisions is complicated, because Metro does not have a comprehensive plan, and its ordinances are not "land use regulation[s]." As a result, a Metro decision fits within the ORS 197.015(10)(a)(A) definition of a "land use decision" only if the decision (1) adopts or amends Metro's Regional Framework Plan; or (2) otherwise concerns the application of the statewide planning goals. *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. To qualify as a "land use decision" as defined at ORS 197.015(10)(a)(A)(i), a Metro Resolution must constitute a "final decision" that concerns the application of the statewide planning goals. However, finality for purposes of ORS 197.015(10)(a) is not solely a matter of whether the decision constitutes a local government's last word on a land use issue. Other important considerations include whether the decision is an exercise of the local government's land use planning authority, and the extent to which the decision is binding on the local government and affected parties. *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. A decision by Metro acting as arbitrator does not constitute a "final decision," where Metro's role as arbitrator was not an exercise of its function as a local government at all, but rather where Metro acted as a chosen arbitrator, a function that could have been performed by a private entity or individual. *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. A Metro arbitration decision subject to an arbitration process devised by Metro that contemplates that the final decision the comprehensive plan designation of an area of land shared by two cities and a county will be determined in the post-acknowledgement plan amendments (PAPA) adopted by the cities and county is not itself a "final" "land use decision." *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. A Metro arbitration decision issued pursuant to a Metro arbitration process to arrive at a solution for the comprehensive plan designation for a disputed area of land jointly owned by two cities and a county, and which contemplates that the final decision regarding the comprehensive plan designation of the area will occur during the post-acknowledgment plan amendments, is not a "zoning" decision for purposes of ORS 268.393(6), which is part of the statute implementing Ballot Measure 56. *Watts v. Metro,* 78 Or LUBA 429 (2018).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. Where LUBA determines that a Metro resolution is not a "final" decision, the significant impact land use decision test does not apply. The jurisdictional requirement–that a land use decision must be "final"–applies to both the statutory as well as the significant impact test. *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. Where a building permit is issued without applying any land use regulations, and a prior design review decision either applied or should have applied all applicable land use standards, the building permit is not a land use decision that is appealable to LUBA. *Glenwood 2006, LLC v. City of Beaverton*, 76 Or LUBA 160 (2017).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. Because Metro does not have a comprehensive plan or land use regulations, a Metro decision is a statutory land use decision subject to LUBA's review only if the decision (1) adopts or amends the Metro Regional Framework Plan or one of its components, or (2) otherwise constitutes a Metro decision that concerns the application of the statewide planning goals. *Terra Hydr Inc. v. Metro*, 68 Or LUBA 302 (2013).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. The Metro Council's adoption by resolution of a master plan for a regional park does not constitute the adoption or amendment of a functional plan, where the master plan consists entirely of non-binding recommendations and guidelines to local governments, and nothing in Metro's legislation or elsewhere requires such a master plan to be adopted as a functional plan or amendment to a functional plan. *Terra Hydr Inc. v. Metro*, 68 Or LUBA 302 (2013).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. A county's certification in a state agency land use compatibility statement that the activities proposed in the related state agency permit application are consistent with all local land use requirements is necessarily a land use decision, as defined in ORS 197.015(11)(a), if it is a final decision and not subject to any of the exceptions set out at ORS 197.015(11)(b). *Wolfgram v. Douglas County*, 52 Or LUBA 536 (2006).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. Where a Metro Committee would be required to apply land use standards to approve a city annexation ordinance on appeal, its decision to deny the annexation ordinance is a land use decision subject to review to LUBA, notwithstanding that the denial was based on non-land use standards. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District. Although a private conservation group's decision to purchase land could not be a land use decision reviewable by LUBA, since under ORS 197.015(10)(a) land use decisions must be governmental decisions, a city's decision to purchase land might be a land use decision if it otherwise qualifies under the definition of land use decision set out at ORS 197.015(10)(a). *Willamette Oaks, LLC v. City of Eugene*, 46 Or LUBA 813 (2004).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. A decision by a parks commission to construct a driving range within a city owned golf course is not a land use decision subject to LUBA review because the decision is not made by a local government or special district. *Davis v. City of Ashland*, 37 Or LUBA 224 (1999).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. A school district's decision to adjust attendance area boundaries is not a statutory land use decision. *Butts v. Hillsboro School District*, 33 Or LUBA 211 (1997).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. A pre-annexation agreement which does not purport to and does not effect approval of a proposed development or annexation of property into the city is not a final land use decision over which LUBA has jurisdiction. *Crist v. City of Beaverton*, 31 Or LUBA 202 (1996).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. ORS 195.020(1) does not give a special district land use planning responsibilities. Rather, it limits a special district's exercise of its land use planning responsibilities if, in fact, the special district has been given such responsibilities by other legal authority. *Churchill v. Neahkahnie Water District*, 29 Or LUBA 354 (1995).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. Where LUBA has affirmed a special district's decision repealing its water allocation program, the district's decision authorizing the provision of domestic water service to property designated and zoned for residential use under an acknowledged county plan and regulations is not a land use decision subject to LUBA review. *Churchill v. Neahkahnie Water District*, 29 Or LUBA 354 (1995).

26.2.3 LUBA Jurisdiction – Land Use Decision: Statutory Test – Local Government/Special District Decision. A special district's *repeal* of a program affecting land use, like its adoption or implementation of such a program, is an "action * * * with respect to programs affecting land use" that must be in accordance with the goals pursuant to ORS 195.020(1) and, therefore, is a land use decision subject to review by LUBA. *Churchill v. Neahkahnie Water District*, 27 Or LUBA 721 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decisions: Statutory Test – Goal, Plan or Land Use Regulation. A contract between a local government and an engineering firm for the design of three bridges does not concern the application of any land use regulation, and, thus, is not a "land use decision," where the contract authorizes only design work and consulting services, where the contract does not authorize the use or development of land, and where the design and consulting services concern development actions that must be (and in fact were) authorized by other land use decisions. *Van Dyke v. Yamhill County*, 80 Or LUBA 403 (2019).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a county suspends operation of a verified nonconforming use based on notice of noncompliance with DEQ rules, and subsequently lifts that suspension based on notice that corrective actions have been taken, the county is not required to apply land use regulations relating to the discontinuation of nonconforming uses where those land use regulations apply only in the context of an application for development of a nonconforming use or a code enforcement proceeding. Because the county is not required to apply land use regulations, lifting the suspension is not a "land use decision" for purposes of ORS 197.015(10)(a)(A) and LUBA therefore lacks jurisdiction under ORS 197.825(1). *Campbell v. Columbia County*, 79 Or LUBA 56 (2019).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. An ordinance that amends a county's comprehensive plan map and zoning maps, in order to implement an earlier decision that adopted findings taking exception to statewide planning goals, is a land use decision as defined at ORS 197.015(10)(a), because it "amends" the county's comprehensive plan and land use regulations, even if the ordinance itself does not adopt the exceptions or otherwise "apply" any statewide planning goals. *Rogue Advocates v. Josephine County*, 72 Or LUBA 475 (2015).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a county adopts an ordinance amending its comprehensive plan map and zoning map, in order to implement an earlier decision that adopted findings taking exceptions to statewide planning goals, it may be that those earlier adopted findings cannot be challenged in the appeal of the ordinance. However, even in that event, that does not mean that LUBA lacks jurisdiction over the ordinance, only that if the petitioner raises no challenges to the ordinance that are within LUBA's scope of review, LUBA will affirm the ordinance. *Rogue Advocates v. Josephine County*, 72 Or LUBA 475 (2015).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A determination that a condition of land use approval has or has not been complied with generally does not result in a land use decision, unless that determination involves the direct application of a comprehensive plan or land use regulation. *Egge v. Lane County*, 70 Or LUBA 1 (2014).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A decision that only determines the amount of the financial penalty a landowner must pay for violating a condition of land use approval is not a land use decision, where the only land use regulation that is directly applied states only that the amount of the fine will be determined by

application of factors set out in a code provision that is itself not a land use regulation. *Egge v. Lane County*, 70 Or LUBA 1 (2014).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. LUBA has exclusive jurisdiction over a city council decision that amends the city's Goal 5 inventory of historic resources to remove property, notwithstanding that following the city council decision a circuit court decided a mandamus action in the property owner's favor based on the stipulation of the parties that the city council had removed the property from the inventory. Because the circuit court judgment did not determine that the property owner was entitled to removal from the inventory under state law, but simply reflected the parties' stipulation regarding the outcome of the city council's decision, LUBA's review of the city council decision cannot conflict with the circuit court judgment. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A letter from the county's counsel to the petitioner that merely confirms that the county has accepted, approved and recorded a final subdivision plat and that the board of commissioners cannot revoke the county's acceptance and recording of the final plat is not a land use decision where the county counsel was not required to and did not apply a comprehensive plan provision or land use regulation in the letter. *Willamette Oaks LLC v. Lane County*, 68 Or LUBA 84 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A building permit decision that does not apply any comprehensive plan and land use regulation is not a statutory "land use decision" defined at ORS 197.015(10)(a), even if the building at issue was initially approved as part of a planned unit development decision that is on remand from LUBA. The remanded decision is not a comprehensive plan or land use regulation for purposes of ORS 197.015(10)(a). *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A decision can be wrong or erroneous, yet not qualify as a statutory "land use decision" defined at ORS 197.015(10)(a). Even if a local government lacked authority to issue a building permit, or otherwise erred in approving that permit, where the petitioner does not establish that any comprehensive plan provision or land use regulation applied to the building permit, the permit is not within LUBA's jurisdiction, and any errors committed in issuing the decision can only be challenged in circuit court. *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Because Metro does not have a comprehensive plan or land use regulations, a Metro decision is a statutory land use decision subject to LUBA's review only if the decision (1) adopts or amends the Metro Regional Framework Plan or one of its components, or (2) otherwise constitutes a Metro decision that concerns the application of the statewide planning goals. *Terra Hydr Inc. v. Metro*, 68 Or LUBA 302 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. The Metro Council's adoption by resolution of a master plan for a regional park does not constitute the adoption or amendment of a functional plan, where the master plan consists entirely of non-binding recommendations and guidelines to local governments, and nothing in Metro's legislation or elsewhere requires such a master plan to be adopted as a functional plan or amendment to a functional plan. *Terra Hydr Inc. v. Metro*, 68 Or LUBA 302 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Local code provisions that regulate tree cutting and park uses that are not included in the city's zoning ordinance are not "land use regulations" as defined in ORS 197.015(12). *Lazarus v. City of Milwaukie*, 67 Or LUBA 226 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Regulations that are codified elsewhere than in a local government's zoning ordinance or similar land use ordinance may nonetheless implement the comprehensive plan and thus constitute "land use regulations" as defined at ORS 197.015(11), if there is a clear connection between the comprehensive plan and the regulation and the inference that the regulation implements the comprehensive plan is unavoidable. *Oregon Aviation Watch v. City of Hillsboro*, 67 Or LUBA 252 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Regulations adopted in 1963 governing aircraft flight operations over a city could not possibly "implement" comprehensive plan policies that were adopted in 1977, and such regulations are therefore not "land use regulations" as defined at ORS 197.015(11). *Oregon Aviation Watch v. City of Hillsboro*, 67 Or LUBA 252 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Regulations proscribing certain aircraft operations over a city are not "clearly connected" to broadly worded comprehensive plan policies that concern environmental protection or the development of a safe transportation system, and such regulations are therefore not "land use regulations" as defined at ORS 197.015(11). *Oregon Aviation Watch v. City of Hillsboro*, 67 Or LUBA 252 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. LUBA may take official notice of a 1984 LCDC acknowledgment order for the purpose of determining whether LCDC reviewed or relied upon a municipal traffic code section to acknowledge the city's comprehensive plan and land use regulations. That the acknowledgement order does not list or refer to the traffic code section suggests that the traffic code section was not submitted to LCDC for acknowledgment, and neither the city nor LCDC understood the code section to implement a comprehensive plan provision or function as a land use regulation. *Oregon Aviation Watch v. City of Hillsboro*, 67 Or LUBA 252 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A comprehensive plan policy requirement that the city "work" with an existing city airport to reduce airport-related incompatibilities with surrounding land uses is not a mandatory applicable approval standard for legislation that deletes superseded code provisions proscribing

certain aircraft flight operations and requiring city council approval of new airports. *Oregon Aviation Watch v. City of Hillsboro*, 67 Or LUBA 252 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a county comprehensive plan relies on an intergovernmental agreement between the county and cities to implement plan policies regarding preservation of green corridors, the county's decision to unilaterally terminate the intergovernmental agreement concerns the application of those comprehensive plan policies, and thus falls within the definition of "land use decision" at ORS 197.015(10)(a). *City of Sandy v. Clackamas County*, 67 Or LUBA 501 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A county's unilateral termination of an intergovernmental agreement that never became effective might not qualify as a land use decision defined at ORS 197.015(10)(a). However, where the parties dispute and the record does not establish whether or not the agreement was effective, LUBA will not dismiss the appeal on that basis. *City of Sandy v. Clackamas County*, 67 Or LUBA 501 (2013).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a city's road vacation regulations are codified in the city's land use code, such regulations are "land use regulations," and a decision that concerns the application of those regulations falls within the definition of "land use decision" at ORS 197.015(10)(a). *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A reasonable attorney could believe that an enforcement decision that determines that parking of tow trucks is authorized by a previously issued home occupation permit concerns the application of the city's home occupation regulations, and is thus a land use decision as defined at ORS 197.015(10)(a), because it is frequently unclear whether in making an enforcement decision regarding an existing permit the decision maker applies, or should have applied, a land use regulation. *Noordhoff v. City of North Bend*, 66 Or LUBA 442 (2012).

26.2.4 Land Use Decision: Statutory Test – Goal, Plan, or Land Use Decision. A decision that simply concludes that a condition of permit approval is satisfied or not satisfied, is violated or not violated, is not a land use decision as defined by ORS 197.015(10)(a), because it concerns only the application of a permit condition of approval, not the application of a land use regulation. *Noordhoff v. City of North Bend*, 65 Or LUBA 420 (2012).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A code enforcement decision that determines the location of the floodplain on property falls within the definition of "land use decision" at ORS 197.015(10)(a), where the decision requires application of floodplain maps adopted as part of the county development code, the maps thus qualify as "land use regulations," and the code enforcement decision therefore concerns the application of a land use regulation. *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Authorizations signed by city and county officials that authorized an applicant to submit on the city's and county's behalf a land use application to construct improvements on city and county owned property are not land use decisions under ORS 197.015(10)(a), where the authorizations do not apply a land use regulation and the city and county were not required to apply a land use regulation in deciding to sign the authorizations. *Willamette Oaks LLC v. Lane County*, 64 Or LUBA 328 (2011).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Under ORS 92.100(7), a city decision that approves or withholds approval of a final subdivision plat is not a land use decision or limited land use decision and is not reviewable by LUBA. *Calvary Construction v. City of Glendale*, 61 Or LUBA 50 (2010).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A letter from the planning staff to a property owner stating that a land use compatibility statement (LUCS) has expired under its own terms does not "concern" the application of a county's code enforcement land use regulations, thereby making the decision a land use decision, when the letter does not enforce any conditions or revoke any permit but merely explains what the owner must do to avoid an enforcement action. *VanGrinsven v. Klamath County*, 60 Or LUBA 299 (2010).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. The mere exercise of authority by planning staff to send a letter informing an owner that a permit has expired is insufficient in itself to make the staff action "concern" the application of a land use regulation and therefore a land use decision. Otherwise, every conceivable action taken by county staff under color of authority of its land use code could constitute a land use decision. *VanGrinsven v. Klamath County*, 60 Or LUBA 299 (2010).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a county's adopted right-of-way encroachment license policy was adopted to address public safety concerns with encroachments, rather than to implement any state or local land use policies, a county decision to grant a right-of-way encroachment license is not a land use decision. *Amussen v. Tillamook County*, 58 Or LUBA 431 (2009).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a county's comprehensive plan, transportation system plan and applicable community plan call for roadway design standards and adopt a skinny-streets standard, but do not address right-of-way encroachments, a decision to grant a right-of-way encroachment license does not apply any of those land use standards and is not a land use decision. *Amussen v. Tillamook County*, 58 Or LUBA 431 (2009).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where the decision on appeal to LUBA is a hearings officer's dismissal of a local appeal, not the building permit that was the subject of the local appeal, and the hearings officer clearly applied discretionary land use regulation standards to dismiss the local appeal, the hearings officer's decision falls within the ORS 197.015(10) definition of "land use decision," and LUBA

has jurisdiction to review the hearings officer's decision. *Kuhn v. Deschutes County*, 58 Or LUBA 483 (2009).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. LUBA will deny a motion to dismiss an appeal of a county decision to sell park land, where petitioners locally identified a comprehensive plan policy that could be interpreted to apply to a county decision to sell park land, and the county approves the sale of park land without responding to petitioner's argument that sale of the park land is inconsistent with the cited comprehensive plan policy. *Kaye v. Marion County*, 58 Or LUBA 680 (2009).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A decision vacating a 30-foot by 100-foot section of public right-of-way is not a statutory land use decision that "concerns" the application of local land use regulations, even if in the course of addressing the statutory "public interest" road vacation standard the county considers the zoning map or zoning regulations that govern the surrounding area. *Bohnenkamp v. Clackamas County*, 56 Or LUBA 17 (2008).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a county adopts a resolution approving an urban renewal plan under ORS 457.105 and in approving the plan finds that the plan conforms to the county's comprehensive plan, the resolution is a land use decision as defined in ORS 197.015(1)(a)(A). *Granada Land Co. v. City of Albany*, 56 Or LUBA 475 (2008).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A letter and memorandum from a county counsel to a county cartography office directing the cartography office to amend the county's tax maps to reflect a judicially ordered partition is not a land use decision because it does not concern the adoption, amendment or application of any goals, comprehensive plan provisions, or land use regulations. *Stricklin v. Clatsop County*, 54 Or LUBA 334 (2007).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A petitioner fails to establish that LUBA has jurisdiction over a franchise agreement entered into between a county and a landfill operator, where the petitioner identifies no comprehensive plan provision or land use regulation that the decision applies or concerns. *Kamp v. Washington County*, 54 Or LUBA 717 (2007).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. LUBA will grant a motion to transfer to circuit court an appeal of an ordinance that establishes a permitting process for closing mobile home parks, where the petitioner alleges but does not substantiate that the decision concerns the application of statewide planning goals, comprehensive plan provisions or land use regulations. *Century Drive Mobile Home Park, LLC v. City of Bend*, 53 Or LUBA 1 (2006).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. An agreement between a local government and a private party for the development and operation of a sports park is not a land use decision as defined in ORS 197.015(11)(a)(A),

where the agreement conditions the private party's future use of the property on compliance with all applicable land use rules and regulations and the local government applied no goals, land use regulations, or comprehensive plan provisions in entering into the agreement. *Dorall v. Coos County*, 53 Or LUBA 32 (2006).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A city council decision to dismiss a local appeal is a land use decision, where the underlying decision revokes a conditional use permit and both the city council proceedings and the underlying revocation decision were subject to procedures set out in the city's zoning ordinance. *Merton v. City of Jefferson*, 53 Or LUBA 559 (2007).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A determination that no local right of appeal exists for a land use compatibility statement concerns at least the application of the local government's local appeal regulations, and thus is a land use decision under ORS 197.015(11). *Hoschek v. Tillamook County*, 52 Or LUBA 793 (2006).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where the zoning of property is discussed by a local appellate body during proceedings to revoke and reinstate a building permit, but the revocation and reinstatement decisions are not governed by the zoning ordinance or other land use regulations, the mere reference to the zoning ordinance does not mean the decision "concern[ed] the * * * application of [a] land use regulation," within the meaning of ORS 197.015(11)(a). *Barnas v. City of Portland*, 51 Or LUBA 750 (2006).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a city decision to reinstate a building permit does not apply any of the land use standards identified at ORS 197.015(11)(a)(A), and the petitioner does not argue that the city should have applied any such land use standards in addition to the Uniform Building Code provisions that the city applied to reinstate the building permit, petitioner fails to establish that the reinstatement decision is a land use decision subject to LUBA review. *Barnas v. City of Portland*, 51 Or LUBA 750 (2006).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. There is no clear connection between the Clean Water Services District's design and construction standards and the county's comprehensive plan, and the standards are therefore not "land use regulations." Therefore, decisions issued pursuant to those standards, such as a sensitive area pre-screening site assessment and the issuance of an erosion control permit, do not concern the adoption, amendment or application of a land use regulation, and are not "land use decisions" pursuant to ORS 197.015(10)(a). *Angius v. Clean Water Services District*, 50 Or LUBA 154 (2005).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Petitioners fail to demonstrate that an improvement agreement specifying how public improvements required by a preliminary plat approval will be financed and constructed is a land use decision or limited land use decision, where petitioners do not establish that the city applied

land use approval criteria or exercised discretion in approving the agreement. *Bellingham v. City of King City*, 50 Or LUBA 683 (2005).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where prior appeals to LUBA and the Court of Appeals concerning a property near the ocean have established that a particular comprehensive plan goal regarding environmentally hazardous areas applies at the time a building permit is issued, a subsequent city decision to issue a building permit for the property is a land use decision. *Jebousek v. City of Newport*, 50 Or LUBA 724 (2005).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a petitioner does not demonstrate that a resolution approving an amendment to a development agreement applies, adopts or amends a land use regulation or comprehensive plan provision, it fails to satisfy its burden to demonstrate that the resolution satisfies the statutory definition of "land use decision." *ZRZ Realty Company v. City of Portland*, 49 Or LUBA 309 (2005).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Land use application fees, like local appeal fees, are an integral part of the zoning code provisions governing the processing and review of land use applications. A decision adopting a schedule of land use application fees pursuant to a local land use regulation is a "land use decision" subject to LUBA's jurisdiction, because it concerns the adoption, amendment or application of a land use regulation, and is not subject to the "fiscal" exception to LUBA's jurisdiction. *Doty v. City of Bandon*, 49 Or LUBA 411 (2005).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A transportation planning document that is intended to demonstrate compliance with federal law and references statewide planning goals, comprehensive plan provisions or land use regulations because its language was taken from a statewide transportation system plan does not *apply* the cited goals, plan provisions or land use regulations and is not a "land use decision" pursuant to ORS 197.015(10). *Friends of Eugene v. Lane Council of Governments*, 49 Or LUBA 672 (2005).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where the county's comprehensive plan contains language applicable to a decision approving formation of a special district, and the county specifically addresses the language in its decision, the decision "concerns" the application of a comprehensive plan provision and is a "land use decision" under ORS 197.015(10)(a)(A)(ii). *Kneeland v. Douglas County*, 48 Or LUBA 347 (2005).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. In issuing a building permit to remodel an existing commercial facility, a city was not required to apply zoning ordinance criteria that govern rezoning decisions and, therefore, those rezoning criteria provide no basis for asserting that the building permit decision qualifies as a land use decision that is subject to LUBA review. *Wetzel v. City of Eugene*, 48 Or LUBA 491 (2005).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. In issuing a building permit to remodel an *existing* commercial facility, a city was not required to apply zoning ordinance development standards that apply to development of large *new* commercial development and, therefore, those zoning ordinance criteria provide no basis for asserting that the building permit decision qualifies as a land use decision that is subject to LUBA review. *Wetzel v. City of Eugene*, 48 Or LUBA 491 (2005).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where LUBA initially denies a motion to dismiss based on a mistaken understanding that discretionary zoning ordinance criteria cited by petitioner apply to an appealed building permit, but respondent and intervenor later demonstrate that the discretionary zoning ordinance criteria cited by petitioner do not apply, LUBA will dismiss the appeal. *Wetzel v. City of Eugene*, 48 Or LUBA 491 (2005).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A county's decision to accept a deed for a road easement is a land use decision, where the county has adopted procedures as part of its subdivision regulations that require the county to apply standards in those regulations and its zoning ordinance in accepting land for use as county roads. *Niederhof v. Deschutes County*, 48 Or LUBA 626 (2004).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. An initiative that establishes a policy to preserve the city waterfront as a public park, effectively prohibits new uses otherwise allowed under the current comprehensive plan and zoning designations, and allows existing uses to continue only as nonconforming uses is a decision that "concerns * * * the application" of the city's land use regulations within the meaning of ORS 197.015(10), and therefore the initiative is a land use decision within LUBA's jurisdiction. *Port of Hood River v. City of Hood River*, 47 Or LUBA 62 (2004).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A local government decision "concerns" the application of a comprehensive plan provision or land use regulation if (1) the decision maker was required by law to apply its plan or land use regulations as approval standards, but did not, or (2) the decision maker in fact applied plan provisions or land use regulations. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a refinement plan policy prohibits "development" of property prior to master plan approval, the code definition of "development" includes excavation and fill, and there is no textual or contextual basis to conclude that "development" for purposes of the policy excludes excavation and fill authorized by a grading permit, then the policy is applicable to a challenged permit authorizing excavation and fill on the property. Because the grading permit "concerns" the application of a comprehensive plan provision, the permit is a land use decision subject to LUBA's jurisdiction. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. That regulations governing grading permits do not expressly require compliance with comprehensive plan policies does not necessarily indicate that specific comprehensive plan

policies cannot apply to grading permits, especially where the grading permit regulations require planning department review for compliance with "any applicable laws." *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A decision that simply removes a contractual impediment to development in an annexation agreement does not in itself approve "development" or otherwise have an actual impact on present or future land uses, and that decision therefore is neither a statutory nor significant impact test land use decision. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Adoption of a decision-making process that allows quasi-judicial application of a county's land use regulations to be nullified by the voters on a case-by-case basis "concerns * * * the application" of the county's land use regulations, within the meaning of ORS 197.015(10)(a), and thus a county initiative adopting that decision-making process is a "land use decision" within LUBA's exclusive jurisdiction. *Sievers v. Hood River County*, 46 Or LUBA 635 (2004).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A decision to reconsider an earlier decision and reserve final judgment on the merits of that earlier decision is not itself a land use decision subject to LUBA's jurisdiction, where the decision to reconsider does not concern the application of any comprehensive plan provision or land use regulation, and the decision to reconsider is accurately characterized as an interlocutory decision and not a final decision of any kind. *Grabhorn v. Washington County*, 46 Or LUBA 672 (2004).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A final city decision to purchase property within the Willamette River Greenway is a land use decision, where the city is required to apply its comprehensive plan provisions that identify the property the city will purchase within the Willamette River Greenway for Willamette River Greenway purposes. *Willamette Oaks, LLC v. City of Eugene*, 46 Or LUBA 813 (2004).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a local government has failed to amend its land use regulations to implement a land use statute, such as ORS 215.263 that governs partitions in EFU zones, a county decision that directly applies such statutes pursuant to ORS 197.646(3) is a land use decision subject to LUBA's jurisdiction, notwithstanding that the county does not apply a statewide planning goal, comprehensive plan provision or land use regulation. *Perkins v. Umatilla County*, 45 Or LUBA 445 (2003).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A resolution that initiates condemnation of property is not a statutory land use decision, where petitioner identifies no statewide planning goal, comprehensive plan or land use regulation provision that must be applied in adopting such a resolution. *Decker v. City of Cornelius*, 45 Or LUBA 539 (2003).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A development permit decision that refers to a prior land use decision but does not apply any land use regulations is not a "land use decision" as that term is defined in ORS 197.015(10)(a)(A) and, therefore, is not a decision subject to LUBA's jurisdiction. *Arlington Heights Neigh. Assn. v. City of Portland*, 45 Or LUBA 559 (2003).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. LUBA has jurisdiction to review a hearings officer decision on reconsideration that determines the location of a zoning boundary, when in the course of making that decision the hearings officer is obliged to address a challenge to the hearings officer's authority to review the matter because the underlying LUBA appeal had been dismissed and the hearings officer concludes that he does have that authority in part because the local zoning code does not prohibit such review. *6710 LLC v. City of Portland*, 43 Or LUBA 177 (2002).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A decision denying a request to reconsider an earlier land use decision is itself a statutory land use decision only if the decision on reconsideration applies one or more statewide planning goals, comprehensive plan provisions, or land use regulations. A decision that summarily denies the reconsideration request without applying any goal, plan provision or land use regulation is not a statutory land use decision. *Wiper v. City of Eugene*, 43 Or LUBA 649 (2002).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a local government adopts a decision following remand from LUBA that applies both land use criteria and non-land use criteria, that decision is a land use decision that may be appealed to LUBA. That all issues concerning the decision's compliance with land use criteria may have been resolved or waived under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), does not mean that a decision that applies land use criteria is not a land use decision. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 560 (2001).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a city's tree preservation ordinance was identified during acknowledgment as an implementing measure to achieve compliance with Statewide Planning Goal 5, a decision that amends the tree preservation ordinance concerns the application of Goal 5 and is therefore a statutory land use decision subject to LUBA's jurisdiction. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 453 (2002).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A planning commission decision to deny a request to reopen a public hearing and reconsider an earlier decision approving a subdivision is a land use decision subject to LUBA's jurisdiction, where the local code allows for reconsideration and the decision maker exercised its authority under the code to deny the request. *Hausam v. City of Salem*, 40 Or LUBA 234 (2001).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A city decision determining that the terms of a development permit condition, as interpreted, have not been satisfied is not a statutory land use decision, where the decision does

not apply or interpret any goal, plan or land use regulation. *Garrard v. City of Newport*, 40 Or LUBA 258 (2001).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A decision amending a city's comprehensive plan housing needs inventory and analysis pursuant to ORS 197.296(3) is a *final* decision and therefore a "land use decision" as defined by ORS 197.015(10)(a)(A), notwithstanding that the amended inventory and analysis may require the city to adopt further land use decisions to comply with ORS 197.296(4) and (5). *DLCD v. City of McMinnville*, 40 Or LUBA 591 (2001).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. ORS 197.626 provides the Land Conservation and Development Commission with exclusive jurisdiction to review decisions that amend an urban growth boundary (UGB) to include more than 50 acres. However, ORS 197.626 does not deprive LUBA of jurisdiction over a final decision that amends the city's comprehensive plan housing needs inventory but does not amend the UGB or otherwise determine how the city will accommodate the identified housing needs. *DLCD v. City of McMinnville*, 40 Or LUBA 591 (2001).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a local government makes it clear that the ordinance it is adopting is not intended to be a land use regulation, LUBA generally does not have jurisdiction to review such an ordinance. However, where the connection between the ordinance and specific comprehensive plan provisions is clear, and the inference that the ordinance implements the comprehensive plan provisions is unavoidable, the ordinance is a land use regulation subject to review by LUBA. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282 (2001).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where petitioner does not establish that the city either applied or was required to apply land use standards when it made a final decision to condemn petitioner's EFU-zoned property for a utility facility, in advance of seeking county land use approval for that facility, the challenged decision is not a land use decision over which LUBA has jurisdiction. *E & R Farm Partnership v. City of Gervais*, 39 Or LUBA 251 (2000).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A decision that does not apply the statewide planning goals, a comprehensive plan provision or a land use regulation, but rather applies a condition of approval in a previously approved land use permit, does not fall within the statutory definition of a "land use decision." *Frevach Land Company v. Multnomah County*, 38 Or LUBA 729 (2000).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A county decision determining that a letter from a city transportation director satisfies a plan design element and a specific development's condition of approval is a land use decision subject to LUBA review. *Cedar Mill Creek Corr. Comm. v. Washington County*, 37 Or LUBA 1011 (2000).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. An annexation decision that includes findings of compliance with local land use standards is a land use decision subject to LUBA review. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. If an annexation decision includes the application of and findings of compliance with local land use regulations, it is a land use decision, notwithstanding that, in the absence of the application of land use standards, a city's discretionary decision to annex property is not a land use decision. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a county's comprehensive plan contains or is required to contain provisions that by their terms apply to a decision vacating a county road within city limits, the county must apply those provisions. If any such provisions apply, the county's road vacation decision is a land use decision subject to LUBA's jurisdiction. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A decision approving a subdivision pursuant to county comprehensive plan and land use regulations is a land use decision under ORS 197.015(10)(a). That a subdivision approval decision is conditioned on construction of road access for the subdivision does not convert that decision or any part of the decision into the type of transportation facility decision that is excluded from the statutory definition of "land use decision" by ORS 197.015(10)(b)(D). *Warrick v. Josephine County*, 36 Or LUBA 81 (1999).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. An informational letter composed by an assistant planner explaining that the city's code does not contain a time limit for early subdivision approval does not involve the application or interpretation of any code provision and is thus not a land use decision under ORS 197.015(10)(b)(A) or a limited land use decision under ORS 197.015(11). *Ward v. City of Medford*, 35 Or LUBA 219 (1998).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Background reports, which typically contain data and information that describe a community's resources and features and address the topics specified in the applicable Statewide Planning Goals, are not the equivalent of comprehensive plans, which set forth the community's long-range objectives and the policies by which it intends to achieve them. *Mount Hood Stewardship Council v. Clackamas County*, 33 Or LUBA 284 (1997).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where petitioner does not demonstrate that a forest management strategy is part of a county's comprehensive plan, petitioner has not carried its burden of showing that the application of the forest management strategy is a land use decision over which LUBA has jurisdiction. *Mount Hood Stewardship Council v. Clackamas County*, 33 Or LUBA 284 (1997).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A decision that parcels may be sold separately constitutes a land use decision subject to LUBA jurisdiction under ORS 197.015(10)(a)(A) when a county follows local land use procedures and applies local land use regulations in making its decision. *Joseph v. Baker County*, 33 Or LUBA 38 (1997).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. The decision to vacate 105 feet of a public road is not a "plan," as that term is used in ORS 197.250. The county's land use "plans, programs, rules or regulations affecting land use" are contained in its acknowledged comprehensive plan and implementing regulations. *Pacific Western Co. v. Lincoln County*, 32 Or LUBA 317 (1997).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. The city's affirmation of the status of an existing use as a nonconforming use requires the application of the city's zoning ordinance and is therefore a land use decision over which LUBA has jurisdiction. *Smith v. City of Phoenix*, 31 Or LUBA 358 (1996).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Notwithstanding the use of the word "ordinance" in ORS 197.105(11), which defines "land use regulation," whether a land use regulation is adopted by resolution or ordinance is unimportant when determining if LUBA has jurisdiction. *Boom v. Columbia County*, 31 Or LUBA 318 (1996).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. In modifying a condition to the earlier approval of a conditional use permit, a county planning director exercised policy judgment in the application of land use regulations, thereby making a statutory land use decision. *Franklin v. Deschutes County*, 30 Or LUBA 33 (1995).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A city decision to assume jurisdiction over and maintenance responsibility for a developed street in the downtown area satisfies the statutory test for a land use decision only if there are provisions in the city plan or land use regulations that establish a standard for making such a decision. *Anderson v. City of Gates*, 29 Or LUBA 321 (1995).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a local government decision to classify petitioner's proposed comprehensive plan amendment as "major" is final, and denies petitioner a *right* he would otherwise have under the local code to have his proposed amendment reviewed on its merits, the local government's decision is a land use decision as defined in ORS 197.015(10)(a)(A)(iii) and is subject to review by LUBA. *Cone v. City of Eugene*, 29 Or LUBA 133 (1995).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A decision concerns the application of a "land use regulation," as defined by ORS 197.015(11), where it concerns the application of a provision of the local government's zoning code, even though the particular zoning code section at issue might not independently satisfy the

statutory definition of land use regulation if not contained within the zoning code. *Hick v. Marion County*, 28 Or LUBA 782 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A local code sewer improvement reimbursement chapter which implements comprehensive plan provisions constitutes a "general ordinance establishing standards for implementing a comprehensive plan" and, therefore, is a "land use regulation" within the meaning of within the meaning of ORS 197.015(11). *The Petrie Company v. City of Tigard*, 28 Or LUBA 535 (1995).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a local government's comprehensive plan and land use regulations have no provisions for the reconsideration or rehearing of governing body decisions, a decision to deny a request for reconsideration does not concern the application of a plan provision or land use regulation and, therefore, is not a land use decision under ORS 197.015(10)(a)(A). *Bowen v. City of Dunes City*, 28 Or LUBA 324 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. That LUBA may consider a statewide planning goal that is implemented by a particular plan or code provision, in determining whether the local government's interpretation of the plan or code provision should be affirmed under ORS 197.829(4), does not make that goal an approval standard for decisions made under an acknowledged plan and land use regulations. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. For a decision to concern the application of a land use regulation, as provided in ORS 197.015(10)(a)(A)(iii), it is not enough that the decision touch on some aspect of a land use regulation; the land use regulation must contain provisions that are standards or criteria for making the challenged decision. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. In the absence of code provisions that regulate onsite sewage treatment facilities separately from the uses they serve, a local government decision to allow construction of an onsite sewage treatment facility to serve a use determined to be an outright permitted use by other local government decisions, is not a decision concerning the application of the local code. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A local government's determination of compatibility with its acknowledged comprehensive plan and land use regulations, made as part of a state agency permit approval process, is a "final" decision applying the local plan and regulations if (1) the state agency is required, by statute, rule or other legal authority, to assure the permit is compatible with the local plan and regulations; and (2) the state agency is authorized to rely on the local government's determination of compatibility. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. After acknowledgment, a city is not required to apply the statewide planning goals to land use decisions that do not amend its acknowledged plan or land use regulations. Therefore, a city decision to provide city sewer and water service to development outside city limits does not concern the application of the statewide planning goals. *Fraser v. City of Joseph*, 28 Or LUBA 217 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. To decide whether a challenged decision is a "land use decision" under ORS 197.015(10)(a)(A)(ii), because it concerns the application of a comprehensive plan, LUBA must determine whether arguably relevant plan provisions cited by the parties are standards or criteria for making the challenged decision. *Fraser v. City of Joseph*, 28 Or LUBA 217 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a challenged city council decision approving the provision of city sewer and water services outside city limits does not interpret arguably relevant comprehensive plan provisions with regard to whether they are approval criteria for the challenged decision, LUBA must remand the decision to the city to adopt such interpretations, before LUBA can determine whether the challenged decision is a land use decision subject to LUBA review. *Fraser v. City of Joseph*, 28 Or LUBA 217 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A special district's *repeal* of a program affecting land use, like its adoption or implementation of such a program, is an "action * * * with respect to programs affecting land use" that must be in accordance with the goals pursuant to ORS 195.020(1) and, therefore, is a land use decision subject to review by LUBA. *Churchill v. Neahkahnie Water District*, 27 Or LUBA 721 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A local government decision approving a building permit is a "land use decision" subject to review by LUBA if it involves the application of the goals, a comprehensive plan or a land use regulation and does not qualify as a ministerial decision under ORS 197.015(10)(b)(A) or (B). *Sullivan v. City of Ashland*, 27 Or LUBA 411 (1994).

226.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A county order that simply restates a decision made in an earlier order and corrects a citation in the earlier order is not a land use decision, because it does not concern the adoption, amendment or application of the goals, local comprehensive plan or local code, or have a significant impact on land use. *Sahagian v. Columbia County*, 27 Or LUBA 341 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a local government planning director has authority to interpret and apply the local zoning and subdivision ordinances, a letter by the planning director stating that a development complies with all requirements of those ordinances is a decision concerning the application of a land use regulation under ORS 197.015(10)(a)(A). *Hart v. Jefferson County*, 27 Or LUBA 688 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. An intergovernmental agreement between a city and a special district relating to city provision of sewage treatment service to the district, which interprets various provisions of the city's comprehensive plan and determines no plan provisions govern the proposal, applies comprehensive plan provisions and, therefore, is a land use decision subject to LUBA review. *DLCD v. City of Donald*, 27 Or LUBA 208 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a local government compliance hearings officer order (1) applies the local zoning ordinance to the relevant facts in determining petitioners violated that ordinance, and (2) is the local government's final determination on the issues decided, the order is a "land use decision" subject to review by LUBA. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A special district decision that finally determines policy questions concerning how the district will provide sewerage service to an area, where that service will occur, and the level of that service, is an exercise of the district's planning duties and responsibilities under ORS 195.020(1) that must comply with the Statewide Planning Goals and is a land use decision subject to LUBA review. *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Under ORS 197.175(1), city decisions to annex unincorporated territory concern the application of the statewide planning goals and, therefore, satisfy the statutory definition of a "land use decision." *Roloff v. City of Milton-Freewater*, 27 Or LUBA 80 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a local government refers to its land use regulations, finds facts and makes a decision that its land use regulations do not apply, its decision is a land use decision. The nature of the legal theory supporting its conclusion that its land use regulations do not apply does not affect whether the decision is properly viewed as a land use decision. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A chief planner's letter rejecting an attempt to file a local appeal of an earlier document explaining how land use regulation provisions are interpreted and applied is a land use decision, if the letter applies land use regulation provisions governing local appeals in concluding that no appeal is available, and there is no further appeal of the chief planner's letter available which must be exhausted. ORS 197.015(10)(a)(A)(iii). *Forest Park Neigh. Assoc. v. City of Portland*, 26 Or LUBA 636 (1994).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where the challenged decision is a local government interpretation of a local land use regulation concerning its applicability to a particular use, and discretion was exercised by the local government in reaching that decision, the challenged decision is a land use decision subject to review exclusively by LUBA. *Kaady v. City of Cannon Beach*, 26 Or LUBA 614 (19/93).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Under the statutory test for a land use decision, the obligation to apply the Statewide Planning Goals, a comprehensive plan provision or a land use regulation must arise from legal requirements contained in statutory, administrative rule or local ordinance provisions. *J.C. Reeves Corp. v. Sherwood Education Dist. 88J*, 26 Or LUBA 220 (1993).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where the challenged decision is an intergovernmental agreement that does not adopt, amend or apply a local government's plan or land use regulations, the challenged decision is not a land use decision as defined by ORS 197.015(10)(a)(A). *Many Rivers Group v. City of Eugene*, 25 Or LUBA 518 (1993).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where the petition for review alleges the challenged decision applies provisions of a local government plan and land use regulations, it is not fatal to LUBA's jurisdiction that the petition for review improperly characterizes the decision as a "land use decision" rather than a "limited land use decision." *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. As the party seeking LUBA review, the burden is on petitioner to establish that the challenged decision is a land use decision. Where petitioner fails to identify any comprehensive plan provision as applicable to, or argue that any plan provision is an approval standard for, the challenged decision, LUBA will conclude the challenged decision does not concern the application of a comprehensive plan. *Price v. Clatsop County*, 25 Or LUBA 341 (1993).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. The use of land for a recreational parachuting center and for parachute landings is a "land use" subject to regulation by local land use ordinances. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where petitioners allege in the petition for review that the challenged decision approves a plan amendment and zone change, that allegation is adequate to establish LUBA's jurisdiction. *Neuharth v. City of Salem*, 25 Or LUBA 267 (1993).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a water district has adopted a water allocation program that significantly limits the development of land in the district otherwise allowable under the applicable acknowledged county comprehensive plan and land use regulations, under ORS 197.185(1) a district decision made under such a program is "an action * * * with respect to a program affecting land use" to which the statewide planning goals apply and, therefore, is a "land use decision." *Olson v. Neahkahnie Water District*, 25 Or LUBA 776 (1993).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A surface mining ordinance that establishes standards implementing comprehensive

plan surface mining policies is a land use regulation, even if portions of that ordinance, read in isolation, do not establish standards for implementing the comprehensive plan. An ordinance amending such a land use regulation is a land use decision subject to LUBA review. *Oregon City Leasing, Inc. v. Columbia County*, 25 Or LUBA 129 (1993).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. As used in the statutes identifying land use decisions subject to LUBA review, "local government decisions" includes decisions adopted through the initiative process. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 607 (1992).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where the challenged decision simply applies the city's fire code, and petitioner does not argue that the fire code is (1) a land use regulation, (2) a comprehensive plan provision, or (3) a goal provision, the challenged decision is not a statutory land use decision subject to LUBA's jurisdiction. *Curtis Serve N Save v. City of Eugene*, 24 Or LUBA 341 (1992).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. In the absence of an adopted district program regulating the approval of water hookups for land use purposes, a water district action to approve an individual water hookup for a use consistent with the applicable acknowledged county plan and land use regulations is *not* an "action with respect to a program affecting land use" under ORS 197.185(1), to which the statewide planning goals apply. *Keating v. Heceta Water District*, 24 Or LUBA 175 (1992).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Allegations that the challenged decision violates a statewide planning goal and the local comprehensive plan and land use regulations are sufficient to constitute an allegation that the challenged decision is a land use decision under the statutory test, even where such allegations are found in the body of the petition for review, rather than in a separate statement of jurisdiction as required by OAR 661-10-030(3)(c). *Adkins v. Heceta Water District*, 23 Or LUBA 207 (1992).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A domestic water supply district's adoption of water hookup standards which will significantly affect development activity is an action with respect to a program affecting land use to which the statewide planning goals apply under ORS 197.185(1) and, therefore, is a land use decision subject to LUBA review. *Adkins v. Heceta Water District*, 23 Or LUBA 207 (1992).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. That three separate governmental units share the same three member board as their governing bodies does not provide a basis for making a decision rendered by two of those governmental units a decision by all three. *Price v. Arch Cape Service District*, 22 Or LUBA 807 (1991).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a county's approval of a permit is mandated by an order of the circuit court issued pursuant to a writ of mandamus under ORS 215.428(7), the county's decision approving the permit is not a "land use decision," as defined in ORS 197.015(10), because the county was

not required to apply its comprehensive plan or land use regulations in adopting that decision. *Gearhard v. Klamath County*, 22 Or LUBA 377 (1991).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where the only determinations that must be made for the approval of a building permit are whether the applicant has certifications concerning septic approval and electrical and plumbing permits, and those determinations do not involve application of the goals, comprehensive plan, or land use regulations, the approval of the building permit is not a land use decision subject to LUBA's jurisdiction. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. The question of whether a hearings officer appointed by the Department of Land Conservation and Development pursuant to an enforcement order acts on behalf of the local government or on behalf of DLCD is governed by the terms of the enforcement order. *Pilling v. LCDC*, 22 Or LUBA 188 (1991).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where the issue on appeal is whether petitioner has a vested right to develop property in a manner inconsistent with current zoning regulations, and the resolution of that issue requires the application of city land use regulations from 1973 to the present, the challenged decision is a land use decision subject to LUBA's jurisdiction. *Terraces Condo Assoc. v. City of Portland*, 22 Or LUBA 151 (1991).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a local government makes a final decision in which it denies an application for a DMV wrecking yard license, in part, on the basis of provisions in its comprehensive plan and land use regulations, the challenged decision "concerns * * * the application of" the city's comprehensive plan and land use regulations within the meaning of ORS 197.015(10)(a)(A) and, consequently, is a land use decision over which LUBA has exclusive review authority. *Bradbury v. City of Independence*, 21 Or LUBA 535 (1991).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where it is not clear whether a city's comprehensive plan and land use regulations already prohibit solid waste incinerators and that question is presented in a separate pending LUBA appeal, LUBA will not assume a city charter amendment which specifically prohibits solid waste incinerators has the legal effect of amending or adopting a plan or land use regulation. *Jentzsch v. City of Sherwood*, 20 Or LUBA 575 (1991).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. The explicit requirement in Goal 11 that local governments provide in their plans for solid waste disposal facilities necessarily requires that Goal 11 be applied to any local government decision to prohibit a particular type of solid waste disposal facility. *Jentzsch v. City of Sherwood*, 20 Or LUBA 575 (1991).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Where a county administrator's decision on whether petitioners have a right to appeal

a planning commission decision to the county board of commissioners required application of provisions of the county zoning ordinance, that decision is a land use decision subject to review by LUBA. *Von Lubken v. Hood River County*, 20 Or LUBA 208 (1990).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. In determining whether a local government decision concerns the application of a comprehensive plan provision or a land use regulation, it is not sufficient that the decision may touch on some aspects of the comprehensive plan or land use regulations, rather the comprehensive plan or regulations must contain provisions intended as standards or criteria for making the decision. *City of Portland v. Multnomah County*, 19 Or LUBA 468 (1990).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. A comprehensive plan policy which simply directs a county to enter into urban area planning agreements with adjacent jurisdictions to coordinate land use planning does not *adopt* such agreements as part of the comprehensive plan. *City of Portland v. Multnomah County*, 19 Or LUBA 468 (1990).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Although ORS 197.825(3)(a) authorizes a local government to initiate proceedings in circuit court to enforce its plan and land use regulations, that statute does not require a county to proceed exclusively in that manner, particularly where the county has adopted a procedure for conducting local proceedings to determine whether its plan and land use regulations are violated. *Putnam v. Klamath County*, 19 Or LUBA 616 (1990).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Urban area planning agreements which have not been adopted by a local government by ordinance or resolution are not "land use regulations," as defined in ORS 197.015(11). *City of Portland v. Multnomah County*, 19 Or LUBA 468 (1990).

26.2.4 LUBA Jurisdiction – Land Use Decision: Statutory Test – Goal, Plan or Land Use Regulation. Under ORS 92.100(1), a board of county commissioners' role in signing a final subdivision plat prior to recording is simply to determine that the plat is in proper form for recording and, therefore, county approval of a final subdivision plat pursuant to ORS 92.100(1) is not a statutory test land use decision. *Elliott v. Lane County*, 18 Or LUBA 871 (1990).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. If an electrical permit is "for construction involving a new building, an addition or change in the use of a building," then under OAR 918-001-0045 verification may be required to establish that the "project" is permitted under the local government's land use regulations without "specific land use approval" or that "the project has final land use approval." If any such verifications are actually included as part of an electrical permit decision itself, that may be sufficient to make the electrical permit a land use decision, as ORS 197.015(10)(a) defines that term. *Hardesty v. Jackson County*, 58 Or LUBA 162 (2009).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. A state agency permit renewal decision that concludes, based on substantial evidence, that the renewed permit does not involve a substantial modification to or intensification of the permitted activity, and thus no land use compatibility statement is required from the affected local government, is not a land use decision subject to LUBA's jurisdiction under ORS 197.015(11)(a)(B), because it is not an agency decision with respect to which the agency is required to apply the goals. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. Under former OAR 660-025-0040(2), LUBA has jurisdiction over issues that do not involve compliance with the statewide planning goals. *Gordon v. Polk County*, 53 Or LUBA 618 (2007).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. LUBA does not have jurisdiction to review a decision by the Department of Land Conservation and Development approving a county periodic review work task. *Colony v. Wallowa County*, 46 Or LUBA 586 (2004).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. Generally, a state agency decision is a land use decision that is reviewable by LUBA if the state agency is required to apply the statewide planning goals to its decision. *Witham Parts and Equipment Co. v. ODOT*, 41 Or LUBA 588 (2002).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. One of the required elements of a state agency coordination program under OAR 660-030-0060(2) and (3) is that the agency identify agency programs that affect land use and must therefore comply with statewide planning goals. *Witham Parts and Equipment Co. v. ODOT*, 41 Or LUBA 588 (2002).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. Although state agencies are required to carry out their programs that affect land use in a manner that is consistent with both the statewide planning goals and acknowledged comprehensive plans, under OAR 660-030-0065, state agencies generally achieve compliance with statewide planning goals by assuring that their actions are compatible with acknowledged comprehensive plans. *Witham Parts and Equipment Co. v. ODOT*, 41 Or LUBA 588 (2002).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. Where ODOT's approved state agency coordination program provides that (1) ODOT Class 3

Project decisions must be consistent with comprehensive plans and statewide planning goals, (2) ODOT will make the requisite comprehensive plan and statewide planning goal determination when it "grants design approval for the project," and (3) ODOT grants design approval for a Class 3 Project in a Revised Environmental Assessment, the Revised Environmental Assessment is reviewable by LUBA as a land use decision. *Witham Parts and Equipment Co. v. ODOT*, 41 Or LUBA 588 (2002).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. If a DSL finding of compatibility is not based on a final land use decision made by the city, LUBA lacks jurisdiction over the appeal from the finding of compatibility. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. A DSL finding of compatibility that relies on the separate opinions of two city planners and the city attorney is not based on a final land use decision made by the city. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. Although OAR 660-31-035(1), which governs Class A permits, does not require that an affected local government's compatibility determination either be in writing or be supported by written findings in order to be relied upon by a state agency issuing a permit, the absence of a writing raises the question of whether there actually is a local government determination. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. Two factors govern whether a local government's determination of compatibility with its acknowledged plan and regulations, made as part of a state agency approval process, is a "final" decision applying the local government's plan and regulations: (1) the state agency must be required by statute, rule or other authority, to assure that the proposal is compatible with the local government plan and regulations; and (2) the state agency must be authorized by statute, rule or other legal authority to rely on the local government's determination. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. Petitioner's sole remedy on appeal from a DSL approval of a fill permit, stated in ORS 196.835, is to request a contested case hearing and, if desired, to appeal to the Court of Appeals from the order issued following the hearing. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. ORS 517.890 provides that appeals of provisional surface mining permits are governed by the provisions of "ORS 183.310 to 183.550 for appeals from orders in contested cases." Therefore, regardless of whether contested case procedures were observed in all respects during DOGAMI proceedings governed by ORS 183.480(2) and 183.482, jurisdiction to review DOGAMI's decision lies with the court of appeals, not LUBA. *Hood River Sand, Gravel & Readi-Mix v. DOGAMI*, 25 Or LUBA 668 (1993).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. Where the court of appeals has jurisdiction for initial review of a state agency land use decision, LUBA does not have jurisdiction to review the decision. ORS 198.825(2)(d). *Interlachen, Inc. v. City of Fairview*, 25 Or LUBA 618 (1993).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. A city resolution initiating a boundary commission proceeding under ORS 199.490 to consider annexation of property is not a final land use decision, where the boundary commission is not authorized to rely on comprehensive plan compliance findings in the city resolution and must itself make a determination of plan compliance. *Interlachen, Inc. v. City of Fairview*, 25 Or LUBA 618 (1993).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. ORS 196.825(6) explicitly provides that Division of State Lands removal-fill permit decisions are contested case orders and that appeals of such orders are to the court of appeals, pursuant to ORS 183.482. LUBA does not have jurisdiction to review state agency contested case orders. ORS 197.825(2)(d). *Stewart v. Division of State Lands*, 25 Or LUBA 565 (1993).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. LUBA does not have authority to invalidate a rule promulgated by LCDC. *DLCD v. Coos County*, 24 Or LUBA 137 (1992).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. LUBA does not have jurisdiction to determine whether an enforcement order exceeds LCDC's statutory authority under ORS 197.320. *Schatz v. City of Jacksonville*, 23 Or LUBA 40 (1992).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. The Court of Appeals has exclusive jurisdiction to review final state agency orders in contested case proceedings. *Pilling v. LCDC*, 22 Or LUBA 188 (1991).

26.2.5 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. The question of whether a hearings officer appointed by the Department of Land Conservation and Development pursuant to an enforcement order acts on behalf of the local government or on behalf of DLCD is governed by the terms of the enforcement order. *Pilling v. LCDC*, 22 Or LUBA 188 (1991).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. To some extent, the ministerial decision exclusion from LUBA's jurisdiction in ORS 197.015(10)(b)(A) is separate and distinct from the building permit exclusion from LUBA's jurisdiction in ORS 197.015(10)(b)(B). *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. The statutory distinction between ORS 197.015(10)(b)(B) and ORS 197.015(10)(b)(A) reflects a recognition that building permits are substantively different from more generic land use decisions and that the legislature intended that LUBA's jurisdiction over building permit decisions would be (1) limited and (2) evaluated under a different standard. *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a city approves a building permit for a temporary mass shelter under the city's Housing Emergency Ordinance because it satisfies the development standards in the city's Central Employment (EX) zone, where the petitioner argues not that the EX zone development standards that the city applied in approving the building permit are not "clear and objective" but, rather, that the city was required but failed to apply other land use standards in approving the building permit, and where LUBA concludes that none of those other land use standards are applicable approval criteria, the city's decision is subject to the building permit exclusion from LUBA's jurisdiction in ORS 197.015(10)(b)(B). *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A building permit decision may fall within the exception to LUBA's jurisdiction at ORS 197.015(10)(b)(B) even if, in making it, the local government applied a land use regulation that uses ambiguous terms, where the ambiguous terms describe the desired results achieved by compliance with unambiguous standards. *Leyden v. City of Eugene*, 80 Or LUBA 41 (2019).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Whether a building permit decision falls within the exception to LUBA's jurisdiction at ORS 197.015(10)(b)(B) turns on the applicable land use standards and not on comments or arguments in the record that led to the decision. Accordingly, that the record contains staff notes showing that staff exercised discretion to indicate that all land use approvals were received does not take a building permit decision out of the exception where the petitioners do not cite any land use standard that required staff to independently verify whether all applicable land use applications had been approved or whether the previously approved uses were subject to additional approval criteria. *Leyden v. City of Eugene*, 80 Or LUBA 41 (2019).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. The determination that an issue was decided, or could have been decided, in prior proceedings relates to LUBA's scope of review and not whether LUBA has jurisdiction to review the challenged decision. Similarly, where a local government approves building permits, an argument that the underlying development requires a conditional use permit confuses the jurisdictional issue with the merits of whether the local government committed error in approving the building permits. *Leyden v. City of Eugene*, 80 Or LUBA 41 (2019).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. That a local government imposed a condition of approval in prior proceedings requiring the applicant to demonstrate compliance with a local off-site parking standard at a later time, that staff initially determined in a subsequent building permit proceeding that compliance was required before building permits could be issued, and that staff later determined in the same proceeding that compliance was not required prior to issuing the building permits do not make the local off-site parking standard applicable to the building permit decision. In addition, even if the condition of approval required compliance at the time of building permit issuance, a dispute over whether a prior condition of approval is satisfied does not give LUBA jurisdiction over a decision that is not otherwise a land use decision. *Leyden v. City of Eugene*, 80 Or LUBA 41 (2019).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – State Agency Decision. A letter from the director of the Oregon Department of Aviation to petitioners' counsel, stating that, "[o]n October 27, 2011, the [Oregon Aviation Board] approved the [Aurora Airport] Master Plan for submittal to the Federal Aviation Administration" is not a "final decision or determination of a state agency" or a decision "with respect to which the agency [was] required to apply the goals" for purposes of ORS 197.015(10)(a)(B) where, regardless of whether the letter itself is incorrect in stating, as a fact, that the Board adopted the Master Plan in 2011, the letter merely conveys facts about events that have already occurred. *Friends of French Prairie v. ODA*, 80 Or LUBA 524 (2019).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. When a petitioner's appeal is timely filed and the decision concerns the application of a land use regulation, the city's decision to deny a local appeal of a fee waiver does not fall under the ministerial exception and review of the decision is not excepted from LUBA's jurisdiction. *Riverview Abbey Mausoleum Co. v. City of Portland*, 78 Or LUBA 1057 (2018).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a county's floodplain development permit standards require the county to evaluate whether proposed structures are authorized by right in the applicable zone, and that evaluation entails some inquiry into the intended use of the structures, if under the circumstances of the case that evaluation requires the exercise of interpretation or legal judgment then the resulting floodplain development permit is a "land use decision" as defined at ORS 197.015(10)(a) subject to LUBA's jurisdiction, and not subject to the exclusion at ORS 197.015(10)(b)(A). *Rogue Advocates v. Jackson County*, 77 Or LUBA 181 (2018).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a decision on a floodplain development permit does not require interpretation or the exercise of legal judgment to determine whether development is authorized by right in the underlying zone, e.g., by reference to a list of uses permitted in the zone, or a previously issued, final decision such as a zoning classification decision or nonconforming use verification, then the decision falls within the exclusion at ORS 197.015(10)(b)(A) and is not a "land use decision" subject to LUBA's jurisdiction. *Rogue Advocates v. Jackson County*, 77 Or LUBA 181 (2018).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. That application of code standards required the exercise of legal judgment for purposes of ORS 197.015(10)(b)(A) means only that a county's decision is not excluded from the definition of "land use decision" at ORS 197.015(10)(a), and hence LUBA's review jurisdiction. That conclusion does not compel the conclusion that the county's decision is also a statutory "permit" as defined at ORS 215.402(4) and thus the type of decision for which there is a statutory obligation to provide notice and an opportunity to request a hearing under RS 215.416 or the county's implementation of that statute. *Reed v. Jackson County*, 77 Or LUBA 527 (2018).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where the county decision at issue in petitioner's appeal merely increased appeal fees for local appeals to account for inflation as mandated by a provision of the county's code, and in approving the code-mandated increase, the county did not "exercise * * * policy or legal judgment," the county's decision falls within the ministerial exception at ORS 197.015(10)(b)(A) and is therefore not a land use decision subject to LUBA's jurisdiction. *Central Oregon Landwatch v. Deschutes County,* 76 Or LUBA 222 (2017).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. LUBA will conclude that a petitioner has not satisfied the burden to establish that LUBA has jurisdiction over an appeal, where the challenged email message from a county commissioner to the petitioner appears to merely reiterate and affirm a decision made more than a year earlier regarding the same request from the petitioner, and the petitioner does not establish that, even if the challenged decision was a new decision, the local government made a decision under land use standards that require interpretation or the exercise of policy or legal judgment. *Forbes v. Linn County,* 76 Or LUBA 315 (2017)

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a decision approving property line adjustments was required to determine if the resulting parcels complied with setback requirements, and the applicable setback required "minimal intrusion into forest areas" the decision required the exercise of "policy or legal judgment" and therefore the exception to the definition of "land use decision" and LUBA's review jurisdiction provided by ORS 197.015(10)(b)(A) does not apply. *Bowerman v. Lane County*, 75 Or LUBA 86 (2017).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. The ORS 197.015(10)(b)(A) exception for decisions "made under land use standards that do not require interpretation or the exercise of legal judgment" could apply to a county decision concerning an Oregon Department of Motor Vehicles business certificate to operate as a motor vehicle dismantler, even if the decision applies standards that require interpretation or the exercise of legal judgment, so long as those "standards" are not "land use standards." *Devlin v. Linn County*, 75 Or LUBA 163 (2017).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. ORS 822.110(1)(a) and ORS 822.140(20(b) simply require a local government to determine if property for a proposed motor vehicle dismantler use is zoned for industrial use. Where it is clear that the property is zoned for industrial use, a local government determination that the property is zoned

for industrial use does not require "interpretation or the exercise of legal judgment," for purposes of determining whether the ORS 197.015(10)(b)(A) exception to the statutory definition of "land use decision" for decisions "made under land use standards that do not require interpretation or the exercise of legal judgment" applies. *Devlin v. Linn County*, 75 Or LUBA 163 (2017).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a land use compatibility statement does not identify the land use to be served by proposed storage of groundwater in two reservoirs, and on appeal the applicant does not identify what land use is served by the groundwater, LUBA cannot resolve the dispute over whether the decision is excluded from LUBA's jurisdiction under ORS 197.015(10)(b)(A), for decisions applying land use regulations that do not require interpretation or the exercise of legal judgment, because it is not clear what land use regulations apply. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where on appeal of a land use compatibility statement (LUCS) concluding that no county land use regulations apply to the proposed storage of groundwater in two reservoirs, the applicant fails to demonstrate that the decision is excluded from LUBA's jurisdiction under ORS 197.015(10)(b)(A) (for decisions applying land use regulations that do not require interpretation or the exercise of legal judgment), by arguing that the county's land use regulations should be interpreted to exempt construction of the two reservoirs from county approval. Even if that argument is correct, that the applicable land use regulations require interpretation defeats application of the exclusion at ORS 197.015(10)(b)(A). *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision does not fall within the ministerial exception at ORS 197.015(10)(b)(A) for decisions that do not require interpretation or the exercise of legal judgment, where the decision required the local government to determine that some arguably applicable standards did not apply to the application and that determination required the exercise of legal judgment. *Agnew v. Josephine County*, 75 Or LUBA 527 (2017).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A city attorney's determination that the city code provides no right of local appeal over a city planner's letter commenting on a pending land use matter is not a decision that is made under standards that require interpretation or the exercise of policy or legal judgment, where it is clear and unambiguous that the city's code provides a right of local appeal only for decisions that, but for the appeal, would be capable of becoming a final city decision, and does not provide a right of appeal over a comment letter, which is not capable of becoming a final decision of any kind. *MGP X Properties, LLC v. City of Sherwood*, 74 Or LUBA 476 (2016).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Because the operative terms of two exclusions to the definition of "land use decision" at ORS 197.015(10)(b)(A) (decision made under standards that do not require interpretation or exercise of discretion) and ORS 197.015(10)(b)(B) (building permit decisions issued under clear and objective standards) overlap significantly, LUBA will address responses couched in the language of ORS 197.015(10)(b)(A), even though the motion to dismiss invokes only ORS 197.015(10)(b)(B). *McCollough v. City of Eugene*, 74 Or LUBA 620 (2016).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a city issues a zoning classification decision concluding that a probation office for residents of an apartment building is an accessory use to the permitted residential use if the office serves only the residents, a building permit approval for the use proposed in the zoning classification decision does not involve standards that require interpretation or the exercise of legal discretion for purposes of the exclusions to LUBA's jurisdiction at ORS 197.015(10)(b)(A) or (B), because all interpretation and exercise of legal judgment regarding the nature of the proposed use was accomplished in the unappealed zoning classification decision. *McCollough v. City of Eugene*, 74 Or LUBA 620 (2016).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a city's code is ambiguous regarding whether site review is required for a proposed apartment building because it proposes "needed housing," a building permit decision approving the apartment building is not issued under clear and objective standards for purposes of the exclusion to LUBA's jurisdiction at ORS 197.015(10)(b)(B). *McCollough v. City of Eugene*, 74 Or LUBA 620 (2016).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A development standard requiring that a site with frontage on two or more streets take access from the lower classification street, unless "physical conditions preclude locating the access connection" requires interpretation or the exercise of legal judgment and is therefore not clear and objective, for purposes of the exclusion to LUBA's jurisdiction at ORS 197.015(10)(b)(B). *McCollough v. City of Eugene*, 74 Or LUBA 620 (2016).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A development standard requiring that buildings be located in 40 percent of the street frontage width, defined to exclude "non-buildable areas as determined by the planning director," requires interpretation or the exercise of legal judgment and is therefore not clear and objective, for purposes of the exclusion to LUBA's jurisdiction at ORS 197.015(10)(b)(B). *McCollough v. City of Eugene*, 74 Or LUBA 620 (2016).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where the undefined code term "frontage" as applied to a cul-de-sac is ambiguous regarding whether the frontage is measured along the curve of the property line or by drawing a straight line across the cul-de-sac from one property border to another border, the standard is not clear and objective, for purposes of the exclusion to LUBA's jurisdiction at ORS 197.015(10)(b)(B). *McCollough v. City of Eugene*, 74 Or LUBA 620 (2016).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. In determining that four applications to adjust the property lines of five properties, four of which are part of a platted subdivision, could be approved as property line adjustments rather than as a replat of a recorded subdivision, the county interpreted its land use regulations and exercised legal judgment, and therefore the challenged decision is not subject to the ministerial exception at ORS 197.015(10)(b)(A). *Balsly v. Benton County*, 73 Or LUBA 287 (2016).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision that only determines the amount of the financial penalty a landowner must pay for violating a condition of land use approval is not a land use decision, where the only land use regulation that is directly applied states only that the amount of the fine will be determined by application of factors set out in a code provision that is itself not a land use regulation. *Egge v. Lane County*, 70 Or LUBA 1 (2014).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision to proceed to issue a floodplain permit for an asphalt batch plant, while an earlier decision that determined the scope of the batch plant that qualified as a nonconforming use was on appeal to LUBA and subject to reversal or remand, required "interpretation or the exercise of policy or legal judgment," so that the exception to LUBA's jurisdiction set out at ORS 197.015(10)(b)(A) does not apply and LUBA has jurisdiction to review the floodplain permit decision on the merits. *Rogue Advocates v. Jackson County*, 70 Or LUBA 163 (2014).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. ORS 197.015(10)(b)(A) exempts from the ORS 197.015(10)(a) definition of "land use decision," and from LUBA review, decisions that require no "exercise of policy or legal judgment." Where a county moves to dismiss an appeal, asserting that the ORS 197.015(10)(b)(A) exemption applies, and petitioners offer no understandable response to that jurisdictional argument, petitioners fail to carry their burden to establish that LUBA has jurisdiction. *Early v. Jackson County*, 70 Or LUBA 273 (2014).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision does not fall within the ministerial exception at ORS 197.015(10)(b)(A) for decisions that do not require interpretation, where the decision required the local government to determine that some arguably applicable standards did not apply to the application and that determination required the exercise of legal judgment. *Del Rio Vineyards LLC v. Jackson County*, 68 Or LUBA 553 (2013).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. An application submittal requirement is not a "land use standard" within the meaning of ORS 197.015(10)(b)(A) where it is not connected to any substantive approval requirement. *Lazarus v. City of Milwaukie*, 67 Or LUBA 226 (2013).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where an apparent ambiguity in the text of a local code is presented by an arguable conflict between two different code provisions and a county decision to approve a farm stand authorized under local legislation that implements ORS 215.213(1)(r) requires the county to resolve that conflict, the exclusion from the statutory definition of "land use decision" at ORS 197.015(10)(b)(A) for a decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment" does not apply, and the farm stand decision is a land use decision. *Keith v. Washington County*, 66 Or LUBA 80 (2012).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Many of the statutory criteria for uses allowed under ORS 215.213(1) and 215.283(1) are not clear and

objective, but the fact that subsection (1) uses may not be subjected to additional local regulations does not necessarily mean that a decision approving such uses cannot be a land use decision. *Keith v. Washington County*, 66 Or LUBA 80 (2012).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Under the inquiry required by *Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000), *rev den*, 331 Or 674, 21 P3d 96 (2001), a building permit does not qualify for either of the exceptions set out in ORS 197.015(10)(b)(A) and (B) if the applicable land use regulations are ambiguous. The applicable land use regulations are ambiguous, if they "can plausibly be interpreted in more than one way." *Richmond Neighbors v. City of Portland*, 66 Or LUBA 464 (2012).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where applicable overlay zone regulations do not specify how they apply to a site that is located partially within the overlay zone and partially outside the overlay zone, and the overlay zones can be applied in more than one plausible way in that circumstance, the overlay zone regulations are ambiguous and a building permit that applies those overlay zone regulations that is appealed to LUBA does not qualify for either of the exceptions to LUBA's review jurisdiction set out at ORS 197.015(10)(b)(A) and (B) for ministerial decisions that do not require interpretation or are subject to clear and objective standards. *Richmond Neighbors v. City of Portland*, 66 Or LUBA 464 (2012).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A planning staff decision to charge the local appeal fee required by a city fee schedule falls within the ORS 197.015(10)(b)(A) exclusion to the definition of "land use decision," for decisions that do not require interpretation or the exercise of policy or legal judgment, where staff had no discretion under city code or elsewhere to do anything but charge the local appeal fee set out in the city fee schedule. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 209 (2012).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A code enforcement decision determining the location of a floodplain on property does not fall within the ministerial exception at ORS 197.015(10)(b)(A) for decisions that do not require interpretation, where the decision relies on a new floodplain delineation rather than the county's adopted floodplain maps, and determining what source of authority the county can use under its code to locate floodplain boundaries in the context of a code enforcement action requires code interpretation. *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Determining whether a proposed building is allowed in the EFU zone under ORS 215.213(1)(e) or 215.283(1)(e) as a building "customarily provided in conjunction with farm use" requires the local government to determine whether the land is currently employed for farm use and whether the proposed building is of the type that is customarily combined with the farm use in question. Because those determinations are not clear and objective, a building permit to approve such a building is not subject to the ORS 197.015(10)(b)(B) exception for "building permits issued under clear and objective standards." *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Some of the ORS 215.705(1) standards to approve a lot of record dwelling, such as the requirement that the parcel be "lawfully created," that the dwelling comply with applicable comprehensive plan provisions, and that the dwelling be consistent with big-game habitat limitations on residential density, require the exercise of policy or legal judgment, and therefore a decision approving or denying a lot of record dwelling under such standards is a land use decision as defined at ORS 197.015(10)(a), and does not fall within the exception for ministerial decisions at ORS 197.015(10)(b)(A). *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Planning department staff exercised considerable legal judgment in concluding that it could rely on a prior planning department decision, which authorized ministerial approval of certain uses, to approve a new industrial use, where that prior planning department decision was appealed and never became final. Because the planning department had to apply land use laws to approve the new industrial use and exercised considerable legal judgment in relying on its prior decision to grant that approval, the ORS 197.015(10)(b)(A) exception to the statutory definition of "land use decision" for decisions that do not require the "exercise of * * * legal judgment" does not apply. *Hardesty v. Jackson County*, 62 Or LUBA 228 (2010).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A permit extension under a standard that requires only a finding that the permit is "current as of January 1, 2010" does not require interpretation or the exercise of policy or legal judgment, and the permit extension is therefore excluded from the definition of "land use decision" under ORS 197.015(10)(b)(A). The requirement that the permit be "current as of January 1, 2010" cannot plausibly be interpreted in more than one way. *Brodersen v. City of Ashland*, 62 Or LUBA 471 (2010).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A permit extension under a standard that allows an "additional 12-month month extension" does not require interpretation, as that phrase can be plausibly read in only one way: to allow an extension for an additional 12 month period from the date the permit would otherwise expire. *Brodersen v. City of Ashland*, 62 Or LUBA 471 (2010).

26.6 LUBA Jurisdiction – Mootness. In the limited circumstance in which an applicant has withdrawn an application that led to a decision that is pending before LUBA, a local government could, consistent with *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, 660, *rev'd on other grounds*, 97 Or App 687, 776 P2d 1315 (1989), adopt a new land use decision that revokes the decision that has been appealed to and is pending before LUBA. That new decision would likely have the effect of rendering the pending appeal of the previous decision moot. *Jacobsen v. Douglas County*, 62 Or LUBA 461 (2010).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. To demonstrate that that a code requirement for a "minimum of 10 feet between buildings" is not clear and objective for purposes of the ORS 197.015(10)(b)(B) exclusion to LUBA's jurisdiction, a petitioner must demonstrate that a key word or phrase in that code provision can be interpreted in more than one way. *621 Company v. City of Eugene*, 61 Or LUBA 1 (2010).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A code requirement for a "minimum of 10 feet between buildings" is not ambiguous with respect to whether the 10-foot setback is measured from building features that have been removed, where the petitioner does not identify any text or context plausibly suggesting that the setback should be measured from previously removed building features. *621 Company v. City of Eugene*, 61 Or LUBA 1 (2010).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A code provision requiring "articulation" of exterior building walls by incorporating certain design features could be ambiguous with respect to whether a metal awning qualifies as an unlisted type of "articulation." However, where the context of that code provision includes language that specifically refers to awnings as one type of "articulation," no ambiguity exists and the articulation standard is clear and objective, for purposes of the ORS 197.015(10)(b)(B) exclusion to LUBA's jurisdiction. *621 Company v. City of Eugene*, 61 Or LUBA 1 (2010).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A building permit decision that denies development authorized under a city's code does not fall within the ministerial exceptions to LUBA's jurisdiction at ORS 197.015(10)(b)(A) or (B), where the decision includes an interpretation of an ambiguous local code provision, to the effect that development restrictions in a prior land use approval under an old version of the city's development code require denial of development that is otherwise permitted outright under the city's current development code. *Noble Built Homes, LLC v. City of Silverton,* 60 Or LUBA 460 (2010).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where issuing a floodplain review permit requires calculating whether the cumulative effect of a proposed development in a designated floodplain increases the base flood elevation more than one foot, and that calculation can require either interpretation or the exercise of legal judgment, a decision to issue the permit is a land use decision. *Johnson v. Jackson County,* 59 Or LUBA 94 (2009).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. When a local government dismisses a local appeal of a decision that is a land use decision, LUBA has jurisdiction to review that dismissal even if the dismissal did not require interpretation or the exercise of policy or legal judgment. *Golden v. City of Silverton,* 58 Or LUBA 399 (2009).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a local government's decision does not involve the exercise of policy or legal judgment, the decision is not a land use decision and LUBA does not have jurisdiction to review it. ORS 197.015(10)(b)(A). *Biggerstaff v. Yamhill County,* 58 Or LUBA 476 (2009).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a local code provision applicable to property line adjustments requires a determination that a parcel was "lawfully created" and as part of that determination, the county must determine whether "the creation of [a] parcel was in accordance with applicable laws in effect at the time,"

it is likely those determinations require the exercise of legal judgment and as such, are land use decisions under ORS 197.015(10). *Davison v. Benton County*, 58 Or LUBA 684 (2009).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Code standards that allow modification of a permit condition of approval where the applicant demonstrates that an "unanticipated circumstance arising from a physical condition or off site" causes a "complication" that "prevents performance of the condition of approval" require interpretation and/or the exercise of legal judgment, and thus decisions under those standards do not fall under the ORS 197.015(11)(b) ministerial exceptions to LUBA's jurisdiction. *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A determination that no local right of appeal exists because the appealed decision did not require discretion and is not a "land use decision" requires interpretation and exercise of legal judgment, and thus does not fall within the ministerial exception to LUBA's jurisdiction at ORS 197.015(11)(b)(B). *Hoschek v. Tillamook County*, 52 Or LUBA 793 (2006).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A planning commission decision that purports to "correct" a "clerical error" in an earlier subdivision approval by changing the 12 month expiration deadline to a 24 month deadline does not fall within the ministerial exception to LUBA's jurisdiction at ORS 197.015(11)(b)(B), where the planning commission exercised discretion and legal judgment in implicitly determining that it had the authority to "correct" the deadline after its expiration. *Hoschek v. Tillamook County*, 52 Or LUBA 793 (2006).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Whether a building permit qualifies for the "clear and objective" standards exception to LUBA's jurisdiction depends on the wording of the standards themselves, not the quality or quantity of the evidence in the record. *Jebousek v. City of Newport*, 51 Or LUBA 93 (2006).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Determining whether "there is reason to believe that a potential geologic hazard does exist" is a discretionary determination, and when that determination is made as part of a decision to issue a building permit, the building permit is a land use decision subject to LUBA review. *Jebousek v. City of Newport*, 51 Or LUBA 93 (2006).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Petitioners fail to demonstrate that an improvement agreement specifying how public improvements required by a preliminary plat approval will be financed and constructed is a land use decision or limited land use decision, where petitioners do not establish that the city applied land use approval criteria or exercised discretion in approving the agreement. *Bellingham v. City of King City*, 50 Or LUBA 683 (2005).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A comprehensive plan goal that requires that a city determine whether "there is a reason to believe that a potential [hazard] does exist" and, if so, to require "a site specific investigation by a

registered geologist or engineer * * * prior to development" is not a clear and objective standard. Where the city is required to apply that plan goal in issuing a building permit, the building permit does not qualify for the ministerial exception to LUBA's review jurisdiction over land use decisions and limited land use decision. *Jebousek v. City of Newport*, 50 Or LUBA 724 (2005).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision under ORS 227.175(1), 227.180(1) and implementing local regulations to increase land use application and local appeal fees does not fall within the ministerial exception to LUBA's jurisdiction, where in doing so the city necessarily makes policy choices whether to charge the maximum allowed under statute or something less, and whether to subsidize some types of applications and appeals, but not others. *Doty v. City of Bandon*, 49 Or LUBA 411 (2005).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A local government ordinance that defines "driveways" in terms of "travel distance" is ambiguous and subject to different interpretations where the endpoint for measuring that travel distance is unclear. Therefore the local government exercises policy or legal judgment in making its interpretation, and a decision that interprets the ambiguous ordinance is not a ministerial decision. *Brodersen v. City of Ashland*, 49 Or LUBA 719 (2005).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where code standards for a lot line adjustment require submission of deeds, a survey drawing, proof that taxes are paid, and verification that the city has accepted any water or sewer line construction, and the petitioner fails to identify anything about those standards that requires interpretation or the exercise of policy or legal judgment, a decision approving a lot line adjustment under those standards is not a "land use decision" as defined at ORS 197.015(10). *Jewett v. City of Bend*, 48 Or LUBA 16 (2004).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision that approves a "property line adjustment" as that term is defined in ORS chapter 92 will usually fall within the ministerial exception to LUBA's jurisdiction. However, determining whether a particular lot configuration in fact qualifies as property line adjustment, as opposed to something else such as a partition or replat, may require interpretation and exercise of legal judgment. If so, the decision does not fall within the ministerial exception, and is subject to LUBA's jurisdiction. *South v. City of Portland*, 48 Or LUBA 555 (2005).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Absent some demonstration that recording a partition plat with the county clerk requires the application of statewide planning goals, comprehensive plan policies or implementing regulations, a county clerk's act of recording a signed partition plat is not a land use decision or a limited land use decision. *Hammer v. Clackamas County*, 45 Or LUBA 32 (2003).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A county counsel stipulation in a mandamus proceeding zoning of property required the exercise of policy or legal judgment because the legal effect of an LCDC order on the property's zoning was not clear. *Flying J, Inc. v. Marion County*, 47 Or LUBA 637 (2004).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A floodplain permit does not fall within the ORS 197.015(10)(b) ministerial exception to the definition of "land use decision," where interpretation is required to determine whether comprehensive plan policies prohibiting "development" on the property prior to master plan approval apply to the floodplain permit and to determine whether the fill approved by the floodplain permit is within the scope of "development" subject to those policies. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Land use regulations that allow "on-site" signs but prohibit "off-site" signs are not clear and objective, as applied to a proposal to construct a sign advertising a business located on a different parcel than the sign, and a building permit decision approving such a sign as a permitted use is not subject to the ORS 197.015(10(b)(B) exception to LUBA's jurisdiction. *Frymark v. Tillamook County*, 45 Or LUBA 486 (2003).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. LUBA has jurisdiction to review a hearings officer decision on reconsideration that determines the location of a zoning boundary, when in the course of making that decision the hearings officer is obliged to address a challenge to the hearings officer's authority to review the matter because the underlying LUBA appeal had been dismissed and the hearings officer concludes that he does have that authority in part because the local zoning code does not prohibit such review. *6710 LLC v. City of Portland*, 43 Or LUBA 177 (2002).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where the question of whether billboards are allowed in the city is not unequivocally answered by the language of the city code and requires interpretation, a city decision denying a billboard application is not subject to the ministerial exception to the statutory definition of "land use decision." *West Coast Media v. City of Gladstone*, 43 Or LUBA 585 (2002).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. LUBA will deny a motion to dismiss based on an argument that the challenged decision is a ministerial decision, where the decision interprets and applies a local land use ordinance adopted to implement a statute and that interpretation requires the exercise of discretion. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A city determination that one of two arguably applicable ordinances applies to a building permit requires the exercise of legal judgment, and is a land use decision subject to LUBA jurisdiction. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Even if an implicit exception for nondiscretionary limited land use decisions can be read into the definition at ORS 197.015(12), final plat approval of a planned unit development may be discretionary. Depending upon the particular circumstances of each preliminary plat approval and attendant conditions, the determination of whether final plat approval should be granted may

involve the exercise of significant factual and legal judgment. *Bauer v. City of Portland*, 38 Or LUBA 715 (2000).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision to extend a previously granted conditional use permit requires the exercise of policy or legal judgment, and therefore does not qualify as a ministerial decision under ORS 197.015(10)(b)(A), where the decision determines that a code "substantial construction" requirement will be met by obtaining all required permits and that the prior permit can be revived and extended after it has become void. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A planning director's decision stating that a proposed driving range is a permitted use and not subject to land use review is a "land use decision" subject to LUBA review because the decision is subject to standards that require the interpretation and the exercise of factual judgment to determine whether, under the ordinance, the driving range is a permitted use. *Davis v. City of Ashland*, 37 Or LUBA 224 (1999).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A planning director's letter determining that a driving range is a permitted use is the decision that triggers the 21-day appeal timeline to LUBA, not the date the developer began construction. *Davis v. City of Ashland*, 37 Or LUBA 224 (1999).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a county makes a land use decision in which it interprets its zoning ordinance and comprehensive plan and, based on that interpretation, issues a separate decision denying a request for a building permit, the second decision does not apply a comprehensive plan or land use regulation and therefore is not a land use decision under ORS 197.015(10)(a). *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision that disposal of sewage effluent by applying it to farm land constitutes a "utility facility necessary for public service" within the meaning of ORS 215.283(1)(d) requires the exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of land use decision provided by ORS 197.015(10)(b)(A) for certain ministerial decisions. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision that disposal of sewage effluent by applying it to farm land constitutes a "farm use" within the meaning of ORS 215.203 requires the exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of "land use decision" provided by ORS 197.015(10)(b)(A) for certain ministerial decisions. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision that a proposal to transport treated effluent to an EFU-zoned parcel and apply that effluent to poplar trees constitutes a "farm use" within the meaning of ORS 215.283(1)(d) requires the

exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of land use decision provided by ORS 197.015(10)(b)(A) for certain ministerial decisions. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where the relationship between two decisions is not clear from the parties' memoranda, LUBA will deny a motion to dismiss and defer a ruling on jurisdiction until after the parties' briefs are filed and an opportunity for oral argument is provided. *Columbia Hills Development Co. v. Columbia County*, 35 Or LUBA 737 (1998).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A property line adjustment decision is a land use decision where complex factual and legal circumstances of the case require the exercise of legal judgment. *Goddard v. Jackson County*, 34 Or LUBA 402 (1998).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where an application for a development permit requires a site plan review, is processed according to "Type III" review procedures and involves discretionary application of policy and legal judgment, the local decision is not a ministerial decision under ORS 197.015(10)(b)(A). *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Generally, where a local government approves a street improvement project, and in a later decision awards a contract to build the improvement, the reviewable decision is the initial decision to approve the project. *Knapp v. City of Jacksonville*, 33 Or LUBA 457 (1997).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. When a comprehensive plan provides for converting two specific sections of a street into a collector street under established standards, there is no additional interpretation or policy judgment required, and the award of a construction contract for the project is not a reviewable decision under ORS 197.015(10)(b)(A). *Knapp v. City of Jacksonville*, 33 Or LUBA 457 (1997).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A grading permit, issued under clear and objective standards, is not a land use decision even if the permit substantively violates a prior unappealed farm management plan. *Ceniga v. Clackamas County*, 33 Or LUBA 261 (1997).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A fill permit issued by the city building division is excluded from the definition of a land use decision under ORS 197.015(10)(b)(A) where it involves the application of clear and objective standards that do not require interpretation or the exercise of policy or legal judgment. *Fechtig v. City of Albany*, 31 Or LUBA 441 (1996).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. When an interpretation of the city's land use regulations and an exercise of legal judgment are required to determine which criteria apply to lot line adjustments, the city's decision does not fall under the

exclusion from LUBA's jurisdiction stated in ORS 197.015(10)(b). *Thompson v. City of St. Helens*, 30 Or LUBA 339 (1996).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A major partition decision is a land use decision under ORS 197.015(10) where a county's major partition regulations provide for the exercise of policy or legal judgment, even when the county applies only minimal judgment to the application. *Sparks v. Tillamook County*, 30 Or LUBA 325 (1996).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. That a county is acting to avoid a breach of contract has no bearing on whether its decision to modify a conditional use permit is a discretionary land use decision. *Franklin v. Deschutes County*, 30 Or LUBA 33 (1995).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A hearings officer's decision to approve a zone change and planned unit development is a land use decision. Therefore, a planning department decision not to accept petitioner's local appeal of that decision is not subject to the ORS 197.015(10)(b)(A) exception to LUBA's jurisdiction for "ministerial" decisions. *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. The exception to LUBA's jurisdiction in ORS 197.015(10)(b) does not apply where applicable local code standards concerning the timely filing of a local appeal require interpretation and the exercise of legal judgment. *Hick v. Marion County*, 28 Or LUBA 782 (1994).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where petitioner's claim is that a building permit violates clear and objective standards, petitioner fails to establish a basis for LUBA's jurisdiction over the appeal. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Petitioner's argument that a decision to approve a building permit is a land use decision because the decision requires the application of a LCDC enforcement order fails where the enforcement order does not establish land use standards for the issuance of building permits. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where conditions of a prior nonforest dwelling approval do not require a determination of compliance with any discretionary land use standard, the fact that a building permit may only be issued after it is determined that such conditions are satisfied provides no basis for LUBA's jurisdiction. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Determining whether the local code allows a proposed wastewater treatment facility as part of, or incidental to, the uses that it serves, or whether it requires the proposed wastewater treatment facility to be regulated as a separate use, requires interpretation and judgment. Therefore, the

exception to LUBA's jurisdiction provided by ORS 197.015(10)(b)(A) does not apply. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a planning director exercises discretion in applying the local code and correctly rejecting an attempted local appeal as untimely filed, the decision to reject the attempted local appeal is a land use decision, and the proper disposition of a LUBA appeal challenging that decision is to affirm the decision rather than to dismiss the LUBA appeal. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. The limited land use decisions described by ORS 197.015(12)(b) fall somewhere between (1) outright permitted uses for which approval involves no discretionary review; and (2) uses allowed subject to application of discretionary approval standards that may require denial of the use altogether (as opposed to discretionary approval standards that only regulate the use's physical characteristics). *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A local government decision approving a building permit is a "land use decision" subject to review by LUBA if it involves the application of the goals, a comprehensive plan or a land use regulation and does not qualify as a ministerial decision under ORS 197.015(10)(b)(A) or (B). *Sullivan v. City of Ashland*, 27 Or LUBA 411 (1994).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A local government decision maker exercises both policy and legal judgment in determining whether the raising of large numbers of pigs in a confined area is a use "similar" to farm uses permitted in an EFU zone. Therefore, such a decision is a land use decision subject to LUBA's jurisdiction. *Derry v. Douglas County*, 26 Or LUBA 25 (1993).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a local government exercised significant legal and factual judgment in determining whether a proposed dwelling will replace an "existing dwelling," the exception established by ORS 197.015(10)(b)(B) does not apply, and the challenged decision is a "land use decision" subject to LUBA's jurisdiction. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A county decision approving a dwelling on a lot or parcel that is a woodlot capable of producing 10,000 dollars or more in average gross annual income, as provided in ORS 215.213(2)(b)(B), is "discretionary" and is a "permit," as defined by ORS 215.402(4). *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where a determination of whether a local appeal document meets jurisdictional requirements of the local code requires interpretation and the exercise of factual judgment, a local government decision to dismiss the local appeal is not excepted from the definition of "land use decision" under ORS 197.015(10)(b)(A). *Breivogel v. Washington County*, 23 Or LUBA 143 (1992).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision approving a building permit is a land use decision subject to LUBA's jurisdiction only if the building permit approval decision involves the application of the goals, comprehensive plan or a land use regulation and does not qualify as a ministerial decision under ORS 197.015(10)(b). *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where the zoning standards under which conceptual development approval was granted are changed to disallow the use conceptually approved, and standards applicable to a second development approval require the proposed use be allowed in the zone, the uncertainty concerning which standards apply to the second application under ORS 215.428(3), makes approval of second application not subject to the exception to LUBA's jurisdiction established by ORS 197.015(10)(b)(A). *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. After 1989 amendments, ORS 197.015(10)(b)(A) and (C) parallel the interpretation of former ORS 197.015(10)(b) expressed in *Doughton v. Douglas County*, 82 Or App 444, 449, 728 P2d 887 (1986), *rev den*, 303 Or 74 (1987). However, the current statutory language may *narrow* the exception for nondiscretionary decisions expressed in *Doughton*, because it does not expressly require the exercise of *significant* judgment. *Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 789 (1991).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Where the local code does not contain a definition of "medical clinic," the exception to LUBA's jurisdiction provided by ORS 197.015(10)(b)(C) does not apply to a decision that a proposed use is a "medical clinic," because there is no single "common knowledge" definition of "medical clinic" which can be applied without interpretation or the exercise of factual and legal judgment. *Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 789 (1991).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A decision is "ministerial" rather than "discretionary" if it does not entail the exercise of any significant legal or factual judgment. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. A city's determination that a medical waste incinerator is similar to other uses allowed in its General Industrial zone involved sufficient discretion to make it a "permit" as defined by statute. That the determination may be correct has no bearing on whether the determination is a permit. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Whether a proposed dwelling (1) is permitted outright in an EFU zone, (2) is "accessory" to an underlying nonconforming use, and (3) complies with ORS 215.296(1), are determinations which require "interpretation or the exercise of factual, policy or legal judgment" within the meaning of ORS 197.015(10)(b)(A) and (C). *Komning v. Grant County*, 20 Or LUBA 481 (1990).

26.2.6 LUBA Jurisdiction – Land Use Decision: Statutory Test – Ministerial Exception. Decisions that would otherwise be subject to LUBA review jurisdiction are exempt if they are "nondiscretionary or minimally discretionary applications of established criteria." *Doughton v. Douglas County*, 82 Or App 444, 728 P2d 887 (1986), *rev den*, 303 Or 74 (1987). *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 651 (1990).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. A statutory change in the tribunal with appellate jurisdiction affects the legal rights and obligations of parties arising out of past transactions, and retrospective application of such a change in jurisdictional statutes to pending appeals is not appropriate. *Schultz v. City of Grants Pass*, 22 Or LUBA 457 (1991).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. Where LUBA lacks jurisdiction over an appeal challenging a decision approving a land division within an urban growth boundary under the jurisdictional statutes existing on the date the notice of intent to appeal is filed, LUBA does not obtain jurisdiction to consider such an appeal when legislation giving LUBA jurisdiction over appeals of such decisions becomes effective while the improperly filed appeal is pending. *Schultz v. City of Grants Pass*, 22 Or LUBA 457 (1991).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. The takings clause of the Fifth Amendment of the United States Constitution is not a "land use standard" within the meaning of former ORS 197.015(10)(b)(B), which provides that the "land use decisions" over which LUBA has review jurisdiction do not include urban land divisions that are "consistent with land use standards." *Schultz v. City of Grants Pass*, 22 Or LUBA 457 (1991).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. A local code provision requiring that partitions comply with "applicable * * * State and Federal Laws," does not make all state and federal statutes and constitutional provisions which are implicated in some way by a particular partition decision "land use standards" within the meaning of former ORS 197.015(10)(b)(B). *Schultz v. City of Grants Pass*, 22 Or LUBA 457 (1991).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. The exception to LUBA's jurisdiction provided by ORS 197.015(10)(b)(B) for urban land divisions does not apply where LUBA determines the challenged decision violates applicable land use standards. *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. Where a decision approving an urban division of land is challenged, LUBA lacks jurisdiction under ORS 197.015(10)(b)(B) only if the decision is consistent with land use standards. Therefore, before LUBA can determine whether it has jurisdiction over such an appeal, it must first determine whether the challenged decision is consistent with land use standards. *Walton v. Clackamas County*, 21 Or LUBA 69 (1991).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. Where governing land use standards are not amended or modified, the circuit court, not LUBA, has jurisdiction to determine whether an urban subdivision or partition decision violates applicable approval standards. *Sully v. City of Ashland*, 20 Or LUBA 428 (1991).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. The exception to LUBA's jurisdiction under ORS 197.015(10)(b)(B) for urban divisions of land is limited to cases which simply apply existing standards. It does not apply where plan or zone changes or variances are also granted as part of the decision. Neither does the exception apply

where, in addition to granting tentative subdivision approval, the local government modifies applicable approval standards through a planned unit development approval. *Bartels v. City of Portland*, 20 Or LUBA 303 (1990).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. Because ORS 197.015(10)(b)(B) is in a subsection of the statute which creates exceptions to LUBA's jurisdiction, LUBA will assume the legislature intended ORS 197.015(10)(b)(B) to be a workable exception, and will not interpret ORS

197.015(10)(b)(B) to require that LUBA conduct a substantive review of urban partition and subdivision decisions to determine whether LUBA has jurisdiction to conduct such a review in the first place. *Southwood Homeowners Assoc. v. City of Philomath*, 20 Or LUBA 279 (1990).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. The exception to LUBA's jurisdiction created by 197.015(10)(b)(B) is confined to urban partition and subdivision decisions which merely apply, rather than modify or amend, applicable land use standards. *Southwood Homeowners Assoc. v. City of Philomath*, 20 Or LUBA 279 (1990).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. ORS 197.015(10)(b)(B) removes from LUBA's review authority any decision approving or denying a subdivision or partition within an acknowledged urban growth boundary, where the challenged decision does not also approve, or is not made in conjunction with, an amendment or modification of a comprehensive plan or land use regulation provision, regardless of whether the decision is made under objective review criteria. *Meadowbrook Development v. City of Seaside*, 20 Or LUBA 18 (1990).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. The exception to LUBA's jurisdiction established by ORS 197.015(10)(b)(B) is limited to decisions concerning subdivisions located within an *acknowledged*, urban growth boundary. *Cecil v. City of Jacksonville*, 19 Or LUBA 446 (1990).

26.2.7 LUBA Jurisdiction – Land Use Decision: Statutory Test – Urban Division Exception. County approval of a partition within an urban growth boundary, without concurrent amendment of the comprehensive plan or land use regulations, is a decision "consistent with land use standards" and, under ORS 197.015(10)(b)(B), is not a "land use decision" subject to LUBA review. *Parmenter v. Wallowa County*, 19 Or LUBA 271 (1990).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. A zone verification is not a statutory land use "permit" as defined at ORS 227.160(2)(b), and the city is not required to provide notice of the decision or opportunity for a local appeal of the decision. However, a zone verification decision is subject to LUBA review and a 21-day appeal period. ORS 227.175(11); ORS 197.830(5)(b). *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. When a hearings officer makes a zone classification decision, such a Zone Verification, the Zone Verification is a final land use decision. Thus, such decisions are appealable to LUBA "in the same manner as a limited land use decision." ORS 227.175(11)(b); ORS 197.830(5). LUBA has exclusive jurisdiction to review land use decisions and limited land use decisions. ORS 197.825. The fact that a zone verification is not a statutory permit removes certain procedural requirements that apply to statutory permits, such as notice and the opportunity for a hearing. However, the fact that a zone verification is not a statutory permit does not mean that a zone verification is not a final land use decision for purposes of LUBA review, including the general prohibition on collateral attack. *Richardi v. City of Eugene*, 78 Or LUBA 299 (2018).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. A limited land use decision may be approved through a notice and comment process, and a local government may provide a right of local appeal. ORS 197.195(5). In such an appeal, the appeal hearing may be based on the existing administrative record or new evidence may be allowed. Should an appeal hearing allow the introduction of new evidence, the hearing is subject to the quasi-judicial hearing procedures set forth in ORS 197.763. In such a situation, a hearings officer may properly consider new evidence and analysis offered by the local government, as well as a petitioner's response, and LUBA's review includes the hearings officer's consideration of that evidence and those issues. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

26.2.8 LUBA Jurisdiction – Limited Land Use Decision: Statutory Test – Limited Land Use Decision. Petitioner has not demonstrated that a city's decision to remove 35 trees from a 33-acre city park will have a significant qualitative or quantitative impact on present or future land uses. The decision does not alter any of the land uses allowed in the park's zone or any of the present or future land uses in the park, and the trees themselves are not land "uses" in any legally cognizable sense. *Carlson v. City of Brookings*, 77 Or LUBA 497 (2018).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. Where respondents respond to petitioner's argument that a proposed development violates comprehensive plan standards by arguing in their response brief that the challenged decision is a "limited land use decision" and the plan policies therefore do not apply under ORS 197.195(1) because the plan policies have not been incorporated into the city's land use regulations, and petitioner does not respond to that argument at oral argument or seek permission to respond in a reply brief, petitioner's assumption that the plan policies apply is inadequate to state a basis for reversal or remand. *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. Where an application for city subdivision approval includes a request for planned unit development approval that allows the property to be divided in ways that the property could not be divided

without planned unit development approval, the decision granting planned unit development subdivision approval is a land use decision, not a limited land use decision. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. A decision approving a manufactured home subdivision is a limited land use decision subject to LUBA's jurisdiction. That the decision includes a condition of approval that imposes or references system development charges does not mean that the decision is excluded from LUBA's jurisdiction as a "fiscal" decision under the reasoning in *State Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980). *D & B Home Investments v. City of Donald*, 51 Or LUBA 1 (2006).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. The definition of "limited land use decision" in ORS 197.015(12)(a) does not distinguish between preliminary and final plat approval. Both types of approval may be final decisions or determinations concerning approval or denial of a subdivision, and thus limited land use decisions subject to LUBA review. *Bauer v. City of Portland*, 38 Or LUBA 715 (2000).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. Even if an implicit exception for nondiscretionary limited land use decisions can be read into the definition at ORS 197.015(12), final plat approval of a planned unit development may be discretionary. Depending upon the particular circumstances of each preliminary plat approval and attendant conditions, the determination of whether final plat approval should be granted may involve the exercise of significant factual and legal judgment. *Bauer v. City of Portland*, 38 Or LUBA 715 (2000).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. Because the city's decision to allow a continuation of an existing conditional use permit is not a limited land use decision under ORS 197.015, a subsequent statement of appeal rights in a notice letter provided by the city is not dispositive of whether petitioner's appeal was timely filed. *Lloyd Dist. Community Assoc. v. City of Portland*, 30 Or LUBA 390 (1996).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. Where a decision to eliminate conditions of approval requires local review under code zone change standards, the decision is a land use decision, and not a limited land use decision. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. The limited land use decisions described by ORS 197.015(12)(b) fall somewhere between (1) outright permitted uses for which approval involves no discretionary review; and (2) uses allowed subject to application of discretionary approval standards that may require denial of the use altogether (as opposed to discretionary approval standards that only regulate the use's physical characteristics). *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. A local government wishing to identify in its plan or land use regulations uses qualifying for approval as limited land use decisions under ORS 197.015(12)(b) must make it clear the

discretionary approval standards applied to such uses may only be applied to regulate the use's physical characteristics and may not be used to deny approval of the use altogether. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. A decision approving a tentative subdivision plat for land within an urban growth boundary is a "limited land use decision." ORS 197.015(12)(a). *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. A city's failure to incorporate comprehensive plan provisions applicable to limited land use decisions into its land use regulations, as required by ORS 197.195(1), means only that applicable plan provisions continue to apply to limited land use decisions. It has no bearing on whether a development proposal meets the ORS 197.015(12) definition of "limited land use decision." *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. A letter by a city planning director concerning the application of code provisions relevant to the validity of tentative plan approvals and approval of final plats, for certain subdivisions within an urban growth boundary, is a limited land use decision. *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. Where no land use standards govern a local government decision to allow the applicant to abandon a permit application that led to a permit decision remanded by LUBA and instead to submit a new application governed by amended approval standards, the decision does not, by itself, constitute a land use decision or limited land use decision. *Fechtig v. City of Albany*, 27 Or LUBA 666 (1994).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. Where the petition for review alleges the challenged decision applies provisions of a local government plan and land use regulations, it is not fatal to LUBA's jurisdiction that the petition for review improperly characterizes the decision as a "land use decision" rather than a "limited land use decision." *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. To constitute a "limited land use decision" under ORS 197.015(12), the challenged local government decision must relate to "a site within an urban growth boundary" (UGB). For purposes of determining whether a challenged decision is a limited land use decision, there is no established UGB until the local government's plan and land use regulations are completely acknowledged. *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision. A decision granting subdivision final plat approval is reviewable by LUBA as a limited land use decision. ORS 197.015(12)(a); 197.825(1). *Warren v. City of Aurora*, 23 Or LUBA 507 (1992).

26.2.9 LUBA Jurisdiction – Land Use Decision: Statutory Test – Transportation Facility Exception. ORS 197.015(10)(b)(D), which excludes from the definition of "land use decision" a local government decision regarding transportation facilities, encompasses technical decisions regarding operation, maintenance, etc., of transportation facilities that are planned and authorized under the plan and zoning code. The exclusion does not encompass decisions that adopt or modify plan or zoning code text regarding transportation facilities. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

26.2.9 LUBA Jurisdiction – Land Use Decision: Statutory Test – Transportation Facility Exception. A city decision concerning a request to place an encroachment within the right-of-way bordering a pedestrian sidewalk is a decision that concerns the "maintenance" and "preservation" of the sidewalk, a city transportation facility, and thus falls within the exclusion to LUBA's jurisdiction at ORS 197.015(10)(b)(D). *Bristol Creek Homes and Development v. City of Portland*, 74 Or LUBA 138 (2016).

26.2.9 LUBA Jurisdiction – Land Use Decision: Statutory Test – Transportation Facility Exception. ORS 197.015(10)(b)(D) excludes from the definition of "land use decision" a decision that determines the maintenance, etc., of a transportation facility that is "otherwise authorized by and consistent with the comprehensive plan and land use regulations." A transportation facility may be "authorized by and consistent with the comprehensive plan and land use regulations" for purposes of ORS 197.015(10)(b)(D) notwithstanding that the facility was previously approved subject to waivers or variances from applicable standards. *Bristol Creek Homes and Development v. City of Portland*, 74 Or LUBA 138 (2016).

26.2.9 LUBA Jurisdiction – Land Use Decision: Statutory Test – Transportation Facility Exception. A decision to place barricades in a city street to restrict vehicular access is a decision related to the "operation" of a transportation facility for purposes of ORS 197.015(10)(b)(D). *7th Street Station, LLC v. City of Corvallis*, 58 Or LUBA 93 (2008).

26.2.9 LUBA Jurisdiction – Land Use Decision: Statutory Test – Transportation Facility Exception. The exception to LUBA's jurisdiction, at ORS 197.015(10)(b)(D), for a decision that "determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility that is otherwise authorized by and consistent with the comprehensive plan and land use regulations" is ambiguous, as it is not clear whether what must be "authorized by and consistent with" the plan and regulations is both the design, construction, operation, etc., and the transportation facility, or only the transportation facility. *7th Street Station, LLC v. City of Corvallis*, 58 Or LUBA 93 (2008).

26.2.9 LUBA Jurisdiction – Land Use Decision: Statutory Test – Transportation Facility Exception. A decision to close a city street to vehicular traffic is subject to the exception to LUBA's jurisdiction, at ORS 197.015(10)(b)(D) for decisions that determine the "operation * * * of a transportation facility that is otherwise authorized by and consistent with" the city's comprehensive plan and regulations, even if the plan and code include no specific authorization for the city to close the street. It is the "transportation facility" that must be authorized by and consistent with the plan and code, not routine decisions regarding how existing streets will operate. *7th Street Station, LLC v. City of Corvallis*, 58 Or LUBA 93 (2008).

26.2.9 LUBA Jurisdiction – Land Use Decision: Statutory Test – Transportation Facility Exception. Once a city has adopted an access management plan (AMP) as part of its transportation system plan (TSP), future city or ODOT actions to implement the projects described in the AMP might qualify as the type of actions that are exempted from LUBA's review jurisdiction by ORS 197.015(10)(b)(D) because those actions are the kinds of actions described in ORS 197.015(10)(b)(D) and they are "authorized by and consistent with" the city's TSP. However, where the city has neither adopted the AMP as part of the TSP or established that the projects described in the AMP are "authorized by and consistent with" the city's TSP, a city decision to approve the AMP is not exempted from LUBA's review jurisdiction by ORS 197.015(10)(b)(D). *Rhodes v. City of Talent*, 47 Or LUBA 574 (2004).

26.2.9 LUBA Jurisdiction – Land Use Decision: Statutory Test – Transportation Facility Exception. Under OAR 660-012-0040(4), LUBA does not have jurisdiction to review "timing and financing provisions" in a transportation financing program. However, LUBA does have jurisdiction to review a city decision that determines that a particular facility alternative is consistent with its transportation system plan, notwithstanding that such a decision may be driven in part by timing or financing considerations. *Ramsey v. City of Philomath*, 46 Or LUBA 241 (2004).

26.2.9 LUBA Jurisdiction – Land Use Decision: Statutory Test – Transportation Facility Exception. Where a city imposes conditions of approval requiring external street improvements as part of a land use decision approving a conditional use permit, the aspects of the decision requiring external street improvements are not subject to the exception to the definition of land use decision at ORS 197.015(10)(b)(D), notwithstanding that if the required improvements were imposed in a separate decision not involving conditional use approval, those improvements might fit within the exception. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

26.2.9 LUBA Jurisdiction – Land Use Decision: Statutory Test – Transportation Facility Exception. Decisions which would otherwise be statutory land use decisions, but which involve the design, construction, operation, maintenance or repair of roads, are exempt from the statutory definition of land use decision and, therefore, not subject to LUBA's jurisdiction. *Leathers v. Washington County*, 31 Or LUBA 43 (1996).

26.2.9 LUBA Jurisdiction – Land Use Decision: Statutory Test – Transportation Facility Exception. Local government decisions granting design review approval for segments of a light rail transit (LRT) line which do not approve final *engineering* design or construction of the LRT facility are not within the exception to the definition of "land use decision" established by ORS 197.015(10)(b)(D). *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. The Land Conservation and Development Commission has adopted OAR 660-031-0026, which identifies state agency permits that must be compatible with local land use regulations, and OAR 660-031-0035, which authorizes state agencies to rely on local land use compatibility statements when issuing such permits. Oregon Liquor Control Commission decisions regarding returnable bottle redemption centers are not listed at OAR 660-031-0026, and therefore a local government planner's checkmark on an OLCC form indicating a redemption center is allowed in the applicable zone is not a land use compatibility statement. *Glenwood 2006, LLC v. City of Beaverton*, 76 Or LUBA 162 (2017).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. To invoke the exclusions to LUBA's jurisdiction at ORS 197.015(10)(b)(H), for certain land use compatibility statements (LUCS) decisions, the proponent must demonstrate that the LUCS decision correctly categorized the proposed land use in a manner that falls within one of three categories. Where the challenged LUCS decision does not identify or categorize the proposed land use at all, LUBA cannot determine if the decision correctly categorizes the proposed land use, and thus determine whether the exclusions at ORS 197.015(10)(b)(H) apply. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. ORS 197.015(10)(b)(H)(iii) excludes from LUBA's jurisdiction a land use compatibility statement (LUCS) that identifies required local land use reviews that the applicant must obtain in order to carry out the proposed activity. However, where a LUCS suggests that the applicant could seek an exception to Statewide Planning Goal 5 in order to eliminate the requirement to obtain a permit to develop within a Goal 5 resource area, the suggestion to obtain a Goal 5 exception does not identify a type of required local land use review for purposes of ORS 197.015(10)(b)(H)(iii). *Todd v. Clackamas County*, 73 Or LUBA 369 (2016).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. The exclusion at ORS 197.015(10)(b)(H)(iii) for land use compatibility statements (LUCS) that identify local land use reviews is not triggered by a suggestion in a LUCS that the applicant avoid the requirement to obtain approval of a revegetation plan required by a subdivision condition of approval, by filing an application to eliminate or modify the subdivision condition of approval. *Todd v. Clackamas County*, 73 Or LUBA 369 (2016).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. The exclusion at ORS 197.015(10)(b)(H)(iii) for land use compatibility statements (LUCS) that identify local land use reviews does not apply where the LUCS not only identifies the required local land use review, but also approves or denies the identified review. However, where the LUCS applicant submitted along with the LUCS request a land use application seeking approval of a re-vegetation plan, but the LUCS decision does not expressly address, approve, or deny the application, LUBA will not presume that the LUCS decision implicitly denied the application. *Todd v. Clackamas County*, 73 Or LUBA 369 (2016).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. LUBA will tentatively deny a motion to dismiss based on the exclusion at ORS

197.015(10)(b)(H)(iii) for land use compatibility statements (LUCS) that identify local land use reviews, where (1) based on the record and pleadings LUBA cannot tell if the exclusion applies and (2) the appeal of the LUCS decision is consolidated with an appeal of a related land use decision regarding the availability of local appeal of the LUCS decision. Until it is determined whether a local appeal of the LUCS decision was available, and hence whether the LUCS decision was a final decision capable of review by either LUBA or the circuit court, it is premature to resolve the jurisdictional question. *Todd v. Clackamas County*, 73 Or LUBA 369 (2016).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. Where LUBA concludes that it lacks jurisdiction over an applicant's appeal of an adverse land use compatibility statement, the appeal must either be dismissed or transferred to circuit court if a motion to transfer is filed. LUBA lacks authority to reverse a decision it has no jurisdiction over. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. A county is not obligated to accept an applicant's characterization of its proposed use and scope of use for purposes of issuing a land use compatibility statement. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. A governing body's code interpretation made in the course of rendering a decision on a request for a land use compatibility statement is subject to the deferential standard of review at ORS 197.829(1). Even without that deferential standard of review, the county correctly concluded that a proposal to store irrigation water in two newly excavated but unapproved reservoirs is not an outright permitted use as the operation of an "existing irrigation system," but rather a use that requires conditional use approval as the "excavation" for "reservoirs" in conjunction with an irrigation system. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. That a decision on a request for a land use compatibility statement (LUCS) involves the exercise of discretion or interpretation of code language to determine whether the proposed use is permitted outright or requires future land use reviews does not mean that the exclusions at ORS 197.015(10)(b)(H) do not apply. Many LUCS decisions that otherwise fall within the exclusions at ORS 197.015(10)(b)(H) require the interpretation of code language, which is often necessary to determine how to correctly categorize the proposed use. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. Where a county land use compatibility statement correctly categorizes a proposed use as one that requires future land use reviews and thus falls within the exclusion from LUBA's jurisdiction at ORS 197.015(10)(b)(H)(iii), a petitioner's argument that the proposed use requires *additional* future land use reviews does not provide a basis for LUBA to determine that it retains jurisdiction over the appeal of the decision. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. ORS 197.015(10)(b)(H) is silent regarding what procedures a local government may

apply to a request for a land use compatibility statement (LUCS). LUBA's conclusion that a LUCS decision is excluded from LUBA's jurisdiction does not mean that the county lacked "land use jurisdiction" to process the LUCS request pursuant to land use procedures that provide for local appeal. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. ORS 197.015(10)(b)(H)(i) excludes from the definition of "land use decision" land use compatibility statements determining that a prior local government land use decision authorized a use that "encompasses" the proposed state agency action. However, that exclusion is not met where the proposed state agency action is to expand the septic system for a nonconforming manufactured dwelling park, and the prior local government decision merely verified a portion of the nonconforming use, but that verification did not authorize or "encompass" the proposed septic expansion. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. ORS 197.015(10)(b)(H)(ii) excludes from the definition of "land use decision" any land use compatibility statements determining that the proposed state agency action is "allowed without review" under local comprehensive plan and regulations. However, that exclusion is not met where the proposed state agency action is to expand the septic system for a nonconforming manufactured dwelling park, and the expansion is accomplished by verifying and altering the scope of the nonconforming use, which necessarily requires discretionary review. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. Under ORS 197.015(10)(b)(H)(i), adopted in 2010, "land use decision" does not include a local government decision that a proposed state agency action is compatible with the local government's comprehensive plan and land use regulations if (1) the local government has already made a land use decision authorizing a use that encompasses the state agency action, (2) the use is allowed without review, or (3) the use requires a future land use review. As ORS 197.015(10)(b)(H)(i) is worded, LUBA's jurisdiction over a local government compatibility determination turns on whether that determination is correct. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. In order for one of the exclusions for compatibility determination at ORS 197.015(10)(b)(H) to apply, the decision must purport to fall within the exclusion or on its face fall within the exclusion. Arguments that the local government should have made its compatibility determination in a manner that would bring it within a different exclusion, based on findings the local government did not make, are not a basis to apply the different exclusion and thereby conclude that LUBA lacks jurisdiction over the compatibility determination. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. A 1980 reasons exception and comprehensive plan and zoning amendment to allow for a waste disposal facility "authorizes" subsequent expansions of that landfill within the rezoned area for purposes of the exclusion to LUBA's jurisdiction at ORS 197.015(10)(b)(H)(i), where the

1980 decision specifically contemplated that the facility would expand incrementally over time, with filled disposal cells capped and reclaimed, while the active landfill operation moves on to new disposal cells. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

26.2.11 LUBA Jurisdiction – Land Use Decision: Statutory Test – Zoning Classification Decisions. A zone verification is not a statutory land use "permit" as defined at ORS 227.160(2)(b), and the city is not required to provide notice of the decision or opportunity for a local appeal of the decision. However, a zone verification decision is subject to LUBA review and a 21-day appeal period. ORS 227.175(11); ORS 197.830(5)(b). *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

26.2.11 LUBA Jurisdiction – Land Use Decision: Statutory Test – Zoning Classification Decisions. When a hearings officer makes a zone classification decision, such a Zone Verification, the Zone Verification is a final land use decision. Thus, such decisions are appealable to LUBA "in the same manner as a limited land use decision." ORS 227.175(11)(b); ORS 197.830(5). LUBA has exclusive jurisdiction to review land use decisions and limited land use decisions. ORS 197.825. The fact that a zone verification is not a statutory permit removes certain procedural requirements that apply to statutory permits, such as notice and the opportunity for a hearing. However, the fact that a zone verification is not a statutory permit does not mean that a zone verification is not a final land use decision for purposes of LUBA review, including the general prohibition on collateral attack. *Richardi v. City of Eugene*, 78 Or LUBA 299 (2018).

26.2.11 LUBA Jurisdiction – Land Use Decision: Statutory Test – Zoning Classification Decisions. Where in evaluating petitioner's zone verification request pursuant to Eugene Code (EC) 9.2741(2), the city failed to consider the ORS 197.312(5) requirement that all accessory dwellings must be allowed "subject to reasonable local regulations relating to siting and design," the proper remedy is for LUBA to remand the decision to the city for the city to consider in the first instance whether EC 9.2741(2) is a "reasonable local regulation[] relating to siting and design" pursuant to ORS 197.312(5). *Kamps-Hughes v. City of Eugene*, 78 Or LUBA 457 (2018).

26.2.11 LUBA Jurisdiction – Land Use Decision: Statutory Test – Zoning Classification Decisions. A zoning classification decision described in ORS 227.160(2)(b) is not limited to "ministerial" decisions that do not require interpretation or the exercise of legal judgment; indeed zoning classification decisions often involve interpretation and the exercise of legal judgment. *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

26.2.11 LUBA Jurisdiction – Land Use Decision: Statutory Test – Zoning Classification Decisions. LUBA will reject an argument that a building permit approval is a "permit" as defined at ORS 227.160(2) (discretionary approval of the development of land), where all arguably discretionary determinations regarding the nature and categorization of the proposed use were previously resolved in an unappealed zoning classification decision, and the building permit decision on appeal simply relied on the zoning classification decision. *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

26.2.11 LUBA Jurisdiction – Land Use Decision: Statutory Test – Zoning Classification Decisions. Where an applicant obtains from the city a zoning classification decision concluding that a specific type of housing development is an allowed use, but noting that if the use is changed to provide services to persons other than residents of the development, the development must be approved as a conditional use, and the applicant thereafter seeks and the city approves building permits based on the same specific housing development proposed in the zoning classification

decision, the city is not required to impose conditions to preclude the applicant from changing the use to one that requires conditional use approval. *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

26.2.11 LUBA Jurisdiction – Land Use Decision: Statutory Test – Zoning Classification Decisions. Where a city issues a zoning classification decision concluding that a probation office for residents of an apartment building is an accessory use to the permitted residential use if the office serves only the residents, a building permit approval for the use proposed in the zoning classification decision does not involve standards that require interpretation or the exercise of legal discretion for purposes of the exclusions to LUBA's jurisdiction at ORS 197.015(10)(b)(A) or (B), because all interpretation and exercise of legal judgment regarding the nature of the proposed use was accomplished in the unappealed zoning classification decision. *McCollough v. City of Eugene*, 74 Or LUBA 620 (2016).

26.2.11 LUBA Jurisdiction – Land Use Decision: Statutory Test – Zoning Classification Decisions. A city's failure to enter a zoning classification decision into a registry as required by ORS 227.175(11)(a) does not make the decision something other than a zoning classification decision. *Mariposa Townhouses v. City of Medford*, 68 Or LUBA 479 (2013).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impacts Test. A contract between a local government and an engineering firm for the design of three bridges does not qualify as a "significant impacts" land use decision where the contract authorizes only design work and consulting services and does not authorize the use or development of land. *Van Dyke v. Yamhill County*, 80 Or LUBA 403 (2019).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impacts Test. LUBA will only exercise its jurisdiction under the judicially created significant impacts test if the petitioner identifies non-land-use standards that apply to the decision and would govern LUBA's review, and that have some relationship to the use of land. *Van Dyke v. Yamhill County*, 80 Or LUBA 403 (2019).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impacts Test. Where LUBA determines that a Metro resolution is not a "final" decision, the significant impact land use decision test does not apply. The jurisdictional requirement—that a land use decision must be "final"—applies to both the statutory as well as the significant impact test. *Watts v. Metro*, 78 Or LUBA 429 (2018).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. When a city adopts an ordinance prohibiting marijuana businesses in the city pursuant to ORS 475B.968(1), the city's decision is not a significant impacts land use decision because any provisions of ORS 475B.968 that arguably could contain what would qualify as standards have no bearing on or relationship to the use of land or to the city's planning and zoning responsibilities. *Caudle v. City of Dunes City*, 77 Or LUBA 230 (2018).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impacts Test. Where the legislature excludes certain decisions from the statutory definition of "land use decision," LUBA has no review authority over such decisions under the significant impact test. Similarly, where no party challenges the statutory authority of the Land Conservation and Development Commission (LCDC) to adopt an administrative rule that excludes a decision extending a permit on farm or forest land from LUBA's jurisdiction, and LUBA applies the rule to conclude that the extension decision is excluded from LUBA's jurisdiction, LUBA will not consider whether the "significant impacts test" is met. *McLaughlin v. Douglas County*, 76 Or LUBA 77 (2017).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. In order to qualify as a "significant impacts" land use decision, the decision must significantly change the land use status quo with respect to present or future uses of land. Where a decision at best simply preserves the land use status quo, the decision is not a significant impacts land use decision. *McLoughlin Neighborhood Association v. City of Oregon City*, 73 Or LUBA 82 (2016).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impacts Test. LUBA will decline to apply the "significant impact" land use decision test to a city's operational or property management decisions that have the effect of restricting public access and use of public lands, when those decisions have little or nothing to do with land use planning or regulation. In order to successfully establish LUBA's jurisdiction under the significant impact test, petitioner must identify statutory or other standards or laws that would govern LUBA's review, and show that such standards have

some bearing on or relationship to the use of land. *Northwest Trail Alliance v. City of Portland*, 71 Or LUBA 339 (2015).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. LUBA will decline to apply the "significant impact" land use decision test to allow the Board to review building permit decisions that merely implement earlier statutory land use decisions, even if the building permit decisions are the proximate step leading to actual construction and other actions affecting land use, and even if some of the earlier statutory land use decisions were remanded by LUBA and still before the local government. Extending the significant impacts test to allow LUBA's review over such building permits would represent an end run around the statutory scheme for reviewing land use decisions. *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. To constitute a "significant impacts" land use decision, the decision must be a "final" decision. The adoption of a master plan that consists entirely of recommendations and guidelines that can have no land use impacts at all until implemented in subsequent land use decisions is not a significant impacts land use decision. *Terra Hydr Inc. v. Metro*, 68 Or LUBA 302 (2013).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A significant impact land use decision must be a "final" decision to be subject to LUBA's jurisdiction. *Terra Hydr Inc. v. Washington County*, 68 Or LUBA 515 (2013).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Repeal of code provisions proscribing certain aircraft operations, such as acrobatics, in the airspace over a city has no significant impacts on present or future uses of land, and is therefore not a significant impact land use decision. *Oregon Aviation Watch v. City of Hillsboro*, 67 Or LUBA 252 (2013).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Repeal of a code provision requiring city council approval of new airports is not a significant impacts land use decision, where the code provision has been entirely superseded by comprehensive planning and zoning governing the approval of new airports within the city. *Oregon Aviation Watch v. City of Hillsboro*, 67 Or LUBA 252 (2013).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where a board of county commissioners' order directs the planning director to move forward with securing needed permits to remove a dam and to remove the dam, and the planning department issues a permit that is pending on appeal before the county hearings officer, the planning department permit will be the county's final land use decision when the local appeal is final and the board of county commissioners' order is not separately appealable as a significant impacts test land use decision. *Schock v. Jackson County*, 61 Or LUBA 403 (2010).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. LUBA cannot exercise jurisdiction over a decision that is statutorily excluded from the definition of "land use decision" at ORS 197.015(10)(a), even if the decision would otherwise fall within the ambit of a "significant impact" land use decision as described in *City of Pendleton v. Kerns*, 294 Or 127, 653 P2d 992 (1982). *7th Street Station, LLC v. City of Corvallis*, 58 Or LUBA 93 (2008).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A decision vacating a 30-foot by 100-foot section of vacant public right-of-way in order to enlarge a single residential lot to the size necessary to construct a single-family dwelling in a developed residential area is not a "significant impacts" land use decision, because there are few or no traffic impacts and the only impact on present or future land uses is to allow a single dwelling consistent with the development on surrounding lots. *Bohnenkamp v. Clackamas County*, 56 Or LUBA 17 (2008).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where an amendment to a development agreement is contingent on future land use approvals, any significant impacts on land uses resulting from the amendment are merely potential and do not satisfy the significant impact test. *ZRZ Realty Company v. City of Portland*, 49 Or LUBA 309 (2005).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A concern that a property line adjustment may facilitate future development of a 33-acre parcel and a 64-acre parcel does not render a decision approving the adjustment a "significant impact" land use decision, where the petitioner fails to demonstrate that the adjustment would allow a different kind or intensity of development, change the land use status quo of the area, or create an actual, qualitatively or quantitatively significant impact on present or future land uses. *Jewett v. City of Bend*, 48 Or LUBA 16 (2004).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A decision that simply removes a contractual impediment to development in an annexation agreement does not in itself approve "development" or otherwise have an actual impact on present or future land uses, and that decision therefore is neither a statutory nor significant impact test land use decision. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A decision creating a local improvement district to finance a sewer system for a long-established subdivision will not have a significant effect on present or future land uses and, therefore, is not a significant impact land use decision. *Lewis v. City of Bend*, 45 Or LUBA 122 (2003).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. The change in ownership of land that may result from a city decision to commence condemnation of property, in and of itself, will have no impact on present or future land use and does not constitute a significant impacts test land use decision. *Decker v. City of Cornelius*, 45 Or LUBA 539 (2003).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A city decision that permits repair of city reservoirs and installation of temporary covers over those reservoirs will not effect a significant change in the land use status quo of the area, and therefore is not a significant impacts land use decision. *Arlington Heights Neigh. Assn. v. City of Portland*, 45 Or LUBA 559 (2003).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A city's approval of a reimbursement district is a "fiscal ordinance" and therefore not subject to LUBA's jurisdiction,

regardless of whether petitioners can demonstrate that the decision satisfies the significant impacts test. *Jesinghaus v. City of Grants Pass*, 42 Or LUBA 477 (2002).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A city decision establishing a local improvement district to fund street improvements that does not involve the application of comprehensive plan policies or land use regulations or result in a "significant impact" on land use is not a land use decision. *Hazelnut A Partners v. City of Woodburn*, 42 Or LUBA 474 (2002).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A resolution that directs planning staff to continue a legislative process to develop a plan governing future expansion of the state medical university is not a *final* decision and for that reason is not a land use decision under either the statutory test at ORS 197.015(10) or the significant impact test. *No Tram to OHSU v. City of Portland*, 40 Or LUBA 411 (2001).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A decision to acquire by eminent domain a 0.01-acre portion of petitioner's property to facilitate a previously authorized transportation improvement does not itself have qualitative or quantitative significant impacts on present or future land uses, and is thus not a "significant impacts" land use decision subject to LUBA's jurisdiction. *Phillips v. City of Hermiston*, 39 Or LUBA 581 (2001).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A decision to vacate approximately one third of a mile of an existing road has an actual, qualitatively or quantitatively significant impact on present or future land use and thus is a significant impact test land use decision, because it alters the existing traffic pattern and access of nearby property owners and sets the stage for further development that will alter the character of surrounding uses. *Mekkers v. Yamhill County*, 38 Or LUBA 928 (2000).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. City legislation that may, when applied, result in an uncompensated taking of property does not, by itself, result in a significant impact on land use. *Baker v. City of Woodburn*, 37 Or LUBA 563 (2000).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. An increase in the cost of development does not necessarily constitute a significant impact on land use. *Baker v. City of Woodburn*, 37 Or LUBA 563 (2000).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A resolution of nonbinding support for the siting of a tribal casino within city limits is not a land use decision under the significant impacts test because, by itself, it does not have an impact, significant or otherwise, on present or future uses of land. *Kelley v. City of Cascade Locks*, 37 Or LUBA 80 (1999).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. The focus of the significant impact test is on impacts to land use, not economic or property interest. Where alleged economic harm from a revocable permit to close streets does not relate to land uses in the area, the

challenged decision is not a significant impact test land use decision. *Hashem v. City of Portland*, 34 Or LUBA 629 (1998).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where identified impacts do not extend to any other nearby property and have only minimal impacts on land uses on the subject property, the significant impact test is not met. *Hashem v. City of Portland*, 34 Or LUBA 629 (1998).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. The impact of a revocable permit to close streets is speculative and, for that reason, is not significant where any actual loss of access caused by a revocable permit would not occur for at least three years, and might not occur then if an existing lease is renewed or if the permit is revoked in the event the lease is not renewed. *Hashem v. City of Portland*, 34 Or LUBA 629 (1998).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where LUBA determines a challenged decision is not a land use decision or limited land use decision and petitioner has filed a conditional motion to transfer as provided by OAR 661-010-0075(11)(c), the appeal will be transferred to circuit court. *Hashem v. City of Portland*, 34 Or LUBA 629 (1998).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. The land use impact of a school district's decision to adjust attendance area boundaries is not so quantitatively or qualitatively significant as to constitute a land use decision, where the identified impacts are either unrelated to land use or involve only increased travel distances to school. *Butts v. Hillsboro School District*, 33 Or LUBA 211 (1997).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. The city's sale of a portion of a city-owned lot which does not involve any public right-of-way and does not alter any existing traffic patterns of nearby property owners with access rights, does not amount to a street vacation that will have a significant impact on present or future land uses in the area. *Thierolf v. City of Ashland*, 32 Or LUBA 182 (1996).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where the city's sale of a portion of a lot to intervenor facilitates a subsequent partition of intervenor's property, the subsequent partition does not transform the lot conveyance into a significant impact land use decision. *Thierolf v. City of Ashland*, 32 Or LUBA 182 (1996).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. The significant impact test does not apply to land use decisions specifically excluded by statute from LUBA's jurisdiction. *Friends of Eugene v. City of Eugene*, 32 Or LUBA 161 (1996).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. When a local decision is statutorily exempt from review, that the decision may significantly impact land uses does not make it a land use decision subject to LUBA's review. *Leathers v. Washington County*, 31 Or LUBA 43 (1996).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where a challenged decision authorizes improvements to a public right-of-way which will significantly alter the long-established character of the area, in that they will change not only the physical attributes of the subject property but also the traffic patterns of the surrounding neighborhoods, these actual impacts are sufficient to make the decision a significant impact test land use decision. *Leathers v. Washington County*, 29 Or LUBA 343 (1995).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where petitioners fail to establish that a city decision assuming jurisdiction over and maintenance responsibility for a developed street in the downtown area will have a significant impact on present or future land uses, the decision does not satisfy the significant impact test for a land use decision. *Anderson v. City of Gates*, 29 Or LUBA 321 (1995).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. To qualify as a significant impact test land use decision, the decision must create an actual, qualitatively or quantitatively significant impact on present or future land uses and the expected impacts must be likely as a result of the decision, and not speculative. *Carlson v. City of Dines City*, 28 Or LUBA 411 (1994).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A decision to pave a 230-foot right-of-way segment is a significant impact test land use decision, because it authorizes paving an area used as a public recreational area and changes the character of that area by opening up a dead-end street and converting the dead-end street into a public thoroughfare. *Carlson v. City of Dines City*, 28 Or LUBA 411 (1994).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. An agreement between a local government and third parties implementing a different local decision to develop an unimproved section of a road, does not concern the adoption, amendment or application of the goals, a land use regulation or a comprehensive plan, and does not of itself have significant impacts on present or future land uses. *Carlson v. City of Dines City*, 28 Or LUBA 411 (1994).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Under either the statutory test or the significant impact test, a "land use decision" must be a *final* decision. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where petitioners do not explain why the installation of sand filter tanks, as part of a proposed new sewage treatment system designed to remedy past problems, will have significant impacts on petitioners' use of their land, petitioners fail to demonstrate that the challenged permit allowing installation of sand filter tanks satisfies the significant impact test. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. As the party seeking review by LUBA, petitioner has the burden of establishing that the challenged decision satisfies the significant impact test for a "land use decision." Petitioner must establish there is (1) a relationship between the decision and the projected impacts, and (2) evidence demonstrating that

the projected impacts are likely to occur as a result of the decision. *Fraser v. City of Joseph*, 28 Or LUBA 217 (1994).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where property outside city limits is planned and zoned for residential use under the acknowledged county plan and regulations, and a prior county decision approves subdivision of the property for residential development, a city decision to provide city sewer and water services to the property, for the approved residential use, does not satisfy the significant impact test. *Fraser v. City of Joseph*, 28 Or LUBA 217 (1994).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A county order that simply restates a decision made in an earlier order and corrects a citation in the earlier order is not a land use decision, because it does not concern the adoption, amendment or application of the goals, local comprehensive plan or local code, or have a significant impact on land use. *Sahagian v. Columbia County*, 27 Or LUBA 341 (1994).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where the challenged decision simply refuses to change school district boundaries, and petitioner does not demonstrate that any of the impacts it alleges will result from the decision are likely to occur, the challenged decision is not a significant impact test land use decision. *J.C. Reeves Corp. v. Sherwood Education Dist. 88J*, 26 Or LUBA 220 (1993).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where the challenged decision is an intergovernmental agreement, the effects of which on land use are speculative only, the decision is not a significant impact test land use decision. *Many Rivers Group v. City of Eugene*, 25 Or LUBA 518 (1993).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where petitioner does not contend a challenged decision is a land use decision under the significant impact test and, based on the parties' submittals, it is not obvious to LUBA that it is, LUBA will conclude the challenged decision does not satisfy the significant impact test for a "land use decision." *Price v. Clatsop County*, 25 Or LUBA 341 (1993).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Absent an explanation from petitioner concerning why a decision that simply determines certain property is in violation of the local government fire code is a significant impact test land use decision, the decision is not a significant impact land use decision. *Curtis Serve N Save v. City of Eugene*, 24 Or LUBA 341 (1992).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A water district decision authorizing the provision of domestic water service to property designated and zoned for residential use by an acknowledged county plan and land use regulations is not a "significant impact test" land use decision. *Keating v. Heceta Water District*, 24 Or LUBA 175 (1992).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. In order to qualify as a significant impact land use decision, the appealed decision must be final. *City of North Plains v. Washington County*, 24 Or LUBA 78 (1992).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. That a city decision to expand a basketball court in a city park might *potentially* cause *some* impact to surrounding mature fir trees or to the historic character of the park, does not demonstrate the decision will cause "a significant impact on present or future land uses in the area," as is required by the significant impact test. *Miller v. City of Dayton*, 22 Or LUBA 661 (1992).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Even if a local government decision does not satisfy the statutory definition of "land use decision," it may nevertheless be a land use decision subject to LUBA review if it will have a "significant impact on present or future land uses in the area." *City of Pendleton v. Kerns*, 294 Or 126, 133-134, 653 P2d 996 (1982). *City of Portland v. Multnomah County*, 19 Or LUBA 468 (1990).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where the formation of a People's Utility District (P.U.D.) is for the purpose of providing water service to the same developed area where water service is currently provided by an existing domestic water supply district distribution system, the only significant effect of the creation of the P.U.D., and its potential acquisition of the assets of the water district, is on the manner in which a city wanting to annex and withdraw from the water district territory in the subject area may obtain ownership of the water distribution facilities in that area, not on the present or future uses of land in the area. *City of Portland v. Multnomah County*, 19 Or LUBA 468 (1990).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. The alternative "significant impact test" for identifying land use decisions subject to LUBA review does not apply to decisions which are specifically excluded from the statutory definition of "land use decision" under ORS 197.015(10)(b). *Parmenter v. Wallowa County*, 19 Or LUBA 271 (1990).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. A county order selecting a preferred alternative site for a new bridge and directing staff to file necessary land use applications could potentially lead to a significant impact on land use, *if* the authorized applications result in county decisions approving construction of a new bridge. However, a decision which has only potential impacts on land use does not satisfy the significant impact test. *McKenzie River Guides Assoc. v. Lane County*, 19 Or LUBA 207 (1990).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. Where a statute specifically excludes certain decisions from the statutory definition of "land use decision" and vests review jurisdiction in another tribunal, LUBA has no review authority over such decisions under the significant impact test. *Oregonians in Action V. LCDC*, 19 Or LUBA 107 (1990).

26.3 LUBA Jurisdiction – Land Use Decision: Significant Impact Test. No purpose would be served by recognizing county approval of a final plat for a subdivision within city limits for recording as a "significant impact" test land use decision, when the same impacts are inherent in

one or more city approvals which are statutory land use decisions. *Elliott v. Lane County*, 18 Or LUBA 871 (1990).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. To some extent, the ministerial decision exclusion from LUBA's jurisdiction in ORS 197.015(10)(b)(A) is separate and distinct from the building permit exclusion from LUBA's jurisdiction in ORS 197.015(10)(b)(B). *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. The statutory distinction between ORS 197.015(10)(b)(B) and ORS 197.015(10)(b)(A) reflects a recognition that building permits are substantively different from more generic land use decisions and that the legislature intended that LUBA's jurisdiction over building permit decisions would be (1) limited and (2) evaluated under a different standard. *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where a city approves a building permit for a temporary mass shelter under the city's Housing Emergency Ordinance because it satisfies the development standards in the city's Central Employment (EX) zone, where the petitioner argues not that the EX zone development standards that the city applied in approving the building permit are not "clear and objective" but, rather, that the city was required but failed to apply other land use standards in approving the building permit, and where LUBA concludes that none of those other land use standards are applicable approval criteria, the city's decision is subject to the building permit exclusion from LUBA's jurisdiction in ORS 197.015(10)(b)(B). *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A city's rejection of petitioner's as-applied challenge of a city's appeal fee during the city's proceeding on intervenor's land use application, and legal challenges to the city's future assessment of actual attorney's fees is not excluded from LUBA's jurisdiction by the "fiscal" exception. However, to the extent petitioner challenges the amount of the actual attorney fees, that challenge is outside the Board's scope of review because that fee dispute arose after the city issued the fee invoice and after the city made a decision on petitioner's underlying appeal, and is therefore a "fiscal" decision. The fact that the local record includes the invoice for the actual attorney fees petitioner was charged for his local appeal does not convert the amount of the fees in that invoice into an issue that is reviewable by LUBA. *Nicita v. City of Oregon City*, 78 Or LUBA 463 (2018).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where a city adopts an ordinance prohibiting marijuana businesses in the city pursuant to ORS 475B.968(1), the ordinance is not a de facto amendment of the city's land use code provisions governing "agriculture," and therefore is not a "land use" decision. *Caudle v. City of Dunes City*, 77 Or LUBA 230 (2018).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where a city adopts an ordinance prohibiting marijuana businesses in the city pursuant to ORS 475B.968(1), the city is not required to apply its comprehensive plan provisions or adopt findings addressing those policies. ORS 475B.968 allows the city to enact a prohibition on marijuana businesses and refer that prohibition to the city's electors for approval, and nothing within that broad grant of authority suggests the legislature intended to subject that grant of authority to review for compliance with local governments' comprehensive plans. *Caudle v. City of Dunes City*, 77 Or LUBA 230 (2018).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Absent a focused challenge to the authority of the Land Conservation and Development Commission's to promulgate OAR 660-033-0140, which provides that a decision to extend a permit for development on farm or forest land is not a "land use decision" as defined in ORS 197.015, LUBA will give effect to the rule. *McLaughlin v. Douglas County*, 76 Or LUBA 77 (2017).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Operation of OAR 660-033-0140, which provides that a decision to extend a permit for development on farm or forest land is not a "land use decision" as defined in ORS 197.015, does not turn on whether the extension criteria require the exercise of discretion. *McLaughlin v. Douglas County*, 76 Or LUBA 77 (2017).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where the legislature excludes certain decisions from the statutory definition of "land use decision," LUBA has no review authority over such decisions under the significant impact test. Similarly, where no party challenges the statutory authority of the Land Conservation and Development Commission (LCDC) to adopt an administrative rule that excludes a decision extending a permit on farm or forest land from LUBA's jurisdiction, and LUBA applies the rule to conclude that the extension decision is excluded from LUBA's jurisdiction, LUBA will not consider whether the "significant impacts test" is met. *McLaughlin v. Douglas County*, 76 Or LUBA 77 (2017).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where the county decision at issue in petitioner's appeal merely increased appeal fees for local appeals to account for inflation as mandated by a provision of the county's code, and in approving the code-mandated increase, the county did not "exercise * * * policy or legal judgment," the county's decision falls within the ministerial exception at ORS 197.015(10)(b)(A) and is therefore not a land use decision subject to LUBA's jurisdiction. *Central Oregon Landwatch v. Deschutes County*, 76 Or LUBA 222 (2017).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where a county's code enforcement procedure requires a code enforcement officer to make a preliminary decision regarding whether there is probable cause to believe there is an ordinance violation, that decision is not a final decision that may be appealed to LUBA. Under the county's code enforcement procedure, if the code enforcement officer finds there is probable cause, the first step is to seek voluntary compliance and the next step would be for the county to seek declaratory or injunctive relief in circuit court, where the code enforcement officer would have the burden of proof regarding the ordinance violation. If the code enforcement officer finds there is no probable cause, that is not a final decision either, as a petitioner may continue to request that the county take enforcement action, or petitioner may seek declaratory or injunctive relief in circuit court under ORS 197.825(3), where petitioner would have the burden of proof regarding the ordinance violation. *Robson v. Polk County*, 75 Or LUBA 343 (2017).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Pursuant to ORS 475B.063(3), LUBA lacks jurisdiction over a decision on a request for a land use compatibility statement (LUCS) that involves a petitioner's proposed land use for a retail marijuana license. *George v. Lincoln County*, 75 Or LUBA 438 (2017).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where LUBA concludes that it lacks jurisdiction over an applicant's appeal of an adverse land use compatibility statement, the appeal must either be dismissed or transferred to circuit court if a motion to transfer is filed. LUBA lacks authority to reverse a decision it has no jurisdiction over. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. That a decision on a request for a land use compatibility statement (LUCS) involves the exercise of discretion or interpretation of code language to determine whether the proposed use is permitted outright or requires future land use reviews does not mean that the exclusions at ORS 197.015(10)(b)(H) do not apply. Many LUCS decisions that otherwise fall within the exclusions at ORS 197.015(10)(b)(H) require the interpretation of code language, which is often necessary to determine how to correctly categorize the proposed use. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where a county makes a single decision to approve an outdoor mass gathering as defined in ORS 433.735, that decision is excluded from LUBA's jurisdiction under ORS 197.015(10)(d), even if the decision authorizes access roads and other development and that authorization, but for being embodied in a decision approving an outdoor mass gathering, arguably might constitute a land use decision. *Thomas v. Wasco County*, 68 Or LUBA 102 (2013).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A decision that qualifies as an "appropriate zoning classification decision" under ORS 227.160(2)(b) is subject to LUBA review "in the same manner as a limited land use decision." ORS 227.175(11)(b). Such decisions are subject to LUBA review without regard to whether they might qualify for the general exclusion from LUBA's jurisdiction provided by ORS 197.015(10)(b)(A) for land use decisions that are "made under land use standards that do not require interpretation or the exercise of policy or legal judgment." *Mariposa Townhouses v. City of Medford*, 68 Or LUBA 528 (2013).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. ORS 197.015(10)(d) sets out an exception to the statutory definition of "land use decision" for "outdoor mass gatherings," and certain other gatherings. But the ORS 197.015(10)(d) exception includes an internal exception for agri-tourism. The effect of the exception within an exception is to make decisions authorizing agri-tourism "land use decisions" that are reviewable by LUBA. *Wetherell v. Douglas County*, 67 Or LUBA 214 (2013).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. ORS 197.015(10)(d) creates an exception to the ORS 197.015(10)(a) definition of "land use decision" for "[g]athering[s] of fewer than 3,000 persons that [are] not anticipated to continue for more than 120 hours in any three-month period." Because a decision approving one outdoor music festival limited to fewer than 3,000 persons falls with the ORS 197.015(10)(d) exception, the decision is not a land use decision subject to review by LUBA. *Wetherell v. Douglas County*, 67 Or LUBA 214 (2013).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. The legislature did not intend LUBA to exercise jurisdiction to review a decision approving a tax exemption for multiple family housing under ORS 307.600 *et seq.*, as evidenced by the fact that the legislature specifically provided, in

ORS 307.631, that denial or termination of a tax exemption for multiple-unit housing is subject to review in circuit court. *Conte v. City of Eugene*, 66 Or LUBA 95 (2012).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A decision that approves a property tax exemption for multiple-family housing under ORS 307.600 *et seq.* is a fiscal decision excluded from LUBA's jurisdiction, notwithstanding that ORS 307.618 requires a finding that the multiple-family housing "is or will be at the time of development" in conformance with applicable land use regulations, because the decision has only incidental impacts on land use and does not approve or deny any proposed development, which will necessarily be subject to a subsequent decision on a building permit or application for development approval under the applicable land use regulations. *Conte v. City of Eugene*, 66 Or LUBA 95 (2012).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Under subsection (3) of ORS 197.825, circuit courts retain jurisdiction "[t]o grant declaratory, injunctive, or mandatory relief in * * * proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations[.]" *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. When a local government takes action to enforce its land use laws, LUBA has exclusive jurisdiction in such circumstances to review any land use decisions a local government may render in enforcing its land use laws, but circuit courts otherwise retain jurisdiction over proceedings that are brought to enforce county land use laws. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Just as LUBA in reviewing land use decisions to determine whether they should be affirmed, remanded or reversed under ORS 197.835 "has no authority to enforce" local land use laws, circuit courts lack jurisdiction to review local government land use decisions when proceedings are brought in circuit court to enforce land use laws. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where a county has adopted the Oregon Department of Environmental Quality's noise standards as a county land use regulation, a final county decision that applies those noise standards is a "land use decision," as that term is defined at ORS 197.015(10)(a). *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A petitioner fails to demonstrate that a decision is a "land use decision" under ORS 197.015(10)(a) where the definition of "lot of record" set out in the city's zoning code includes five circumstances or categories under which a unit of land may be considered a "lot of record," determining whether a unit of land is a "lot of record" under most of the five categories does not appear to require the exercise of any discretion at all, and petitioner does not argue that the unit of land falls under the one category that might require the exercise of discretion. *Jacobsen v. City of Winston*, 64 Or LUBA 164 (2011).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Under ORS 197.015(10)(d) a decision authorizing an outdoor mass gathering as defined at ORS 433.735 is not a land use decision subject to LUBA's jurisdiction, but ORS 433.735 provides both a statutory definition and an authorization for counties to adopt a more expansive definition of outdoor mass gathering, and

it is unclear whether a decision under a county definition is also excluded from LUBA's jurisdiction. Even if a decision under a county definition of outdoor mass gathering is not subject to the ORS 197.015(10)(d) exclusion, however, ORS 433.735(5) provides an independent exclusion, by providing for appeal of a county decision to circuit court under either the statutory or a county definition. *Devereux v. Douglas County*, 64 Or LUBA 191 (2011).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. To the extent there is textual ambiguity regarding whether an outdoor mass gathering under a county definition of that term authorized by ORS 433.735 is also "an outdoor mass gathering as defined in ORS 433.735" and thus excluded from LUBA's jurisdiction under ORS 197.015(10)(d), the legislative history of ORS 197.015(10)(d) indicates that the legislature clearly understood that outdoor mass gatherings under county definitions authorized under ORS 433.735 were outdoor mass gatherings as defined at ORS 433.735. *Devereux v. Douglas County*, 64 Or LUBA 191 (2011).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. OAR 660-033-0140 provides that a decision extending the expiration period for an ORS 215.402 permit decision on farm or forest land is not a "land use decision," and therefore such an extension decision is not within LUBA's jurisdiction. *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Under ORS 215.429(2), once a petition for writ of mandamus is filed under the 120/150-day rule, the circuit court has exclusive jurisdiction over a permit application and any decision rendered on that permit application. Where a permit decision has been appealed to LUBA and withdrawn by the county for reconsideration under 197.830(13)(b), and the permit applicant files a petition for writ of mandamus arguing a violation of the 120/150-day rule, the county loses jurisdiction to reconsider the permit decision and LUBA loses jurisdiction as well. However, LUBA will deny a motion to dismiss the appeal where the county has moved to dismiss the mandamus proceeding, contending that the 120/150-day rule only applies to the county's initial permit decision that was appealed to LUBA and not to a reconsidered decision under 197.830(13)(b). In that circumstance the county and LUBA would again have jurisdiction over the permit application and decision if the mandamus proceeding is dismissed, and LUBA will await a final decision on the county's motion to dismiss before taking final action on the applicant's motion to dismiss. *Columbia Riverkeeper v. Clatsop County*, 63 Or LUBA 547 (2011).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. In *Friends of Lincoln County v. Newport*, 5 Or LUBA 346 (1982), LUBA determined that a city decision to collect a $2,050 appeal and transcript preparation fee to allow a local appeal to proceed was not reviewable as a land use decision because it qualified for the "fiscal decision" exception created by the Court of Appeals in *Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), *rev dismissed*, 291 Or 878, 635 P2d 647 (1981). *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. In *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995), LUBA held the city's land use appeal fees were "an integral part of the zoning code provisions governing the processing and review of land use applications." LUBA has relied on that holding in a number of subsequent appeals to reject jurisdictional challenges to appeals of

local government decisions that adopt or amend application or appeal fee schedules. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. LUBA has relied on *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995), in a number of decisions to reject jurisdictional challenges to appeals that assert "as-applied" challenges to previously adopted land use permit and appeal fee schedules. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A city decision to charge a subdivision applicant the actual cost of processing his subdivision application is not a land use decision that is subject to review by LUBA, where the city's final decision demanding payment of the actual costs was not made as part of its decision on the merits of the subdivision application and instead postdates that decision on the merits by over one year. The city's later decision to demand payment of the actual cost of processing the subdivision application is a "fiscal" decision, and under the reasoning in *Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980), *rev dismissed*, 291 Or 878, 635 P2d 647 (1981), is not a land use decision subject to LUBA review. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Under ORS 197.825(1), LUBA has exclusive jurisdiction to review "land use decisions," as that term is defined by ORS 197.015(10)(a), unless one of the exclusions set out at ORS 197.015(10)(b) applies. *Dierks v. Jackson County*, 60 Or LUBA 487 (2010).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where a development ordinance only requires that the county "consider" a fire district recommendation in ruling on a request to reduce a fire break, and the development ordinance imposes few boundaries on the decision maker's exercise of discretion in making a decision on the request, the exclusion from the statutory definition of "land use decision" at ORS 197.015(10)(b)(A) for a decision "[t]hat is made under land use standards that do not require interpretation or the exercise of policy or legal judgment" does not apply, and the fuel break reduction decision is a land use decision. *Dierks v. Jackson County*, 60 Or LUBA 487 (2010).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Under ORS 197.825(2)(c)(A), LUBA does not have initial jurisdiction to review a decision by a city with a population over 2,500 to amend its urban growth boundary to add more than 50 acres of land where that decision is submitted to the Department of Land Conservation and Development (DLCD) for review under ORS 197.626. LUBA may later acquire jurisdiction over certain matters addressed in the decision if the director of DLCD transfers those matters to LUBA. *Swalley Irrigation District v. City of Bend*, 59 Or LUBA 52 (2009).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where a county adopts an ordinance that amends its comprehensive plan map in conjunction with a city's urban growth boundary (UGB) amendment, and the county's ordinance is submitted in conjunction with the city's UGB amendment to the Department of Land Conservation and Development for review, under ORS 197.825(2)(c)(A), LUBA does not have jurisdiction to review the county's decision. *Swalley Irrigation District v. Deschutes County*, 59 Or LUBA 192 (2009).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A code provision that states that certain duplex and triplex applications qualify for administrative review without public hearings does not eliminate the need for such duplex and triplex applications to comply with substantive approval standards that would otherwise apply. *Zirker v. City of Bend*, 55 Or LUBA 188 (2007).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A county's statement in a state agency land use compatibility certification of facts about a property's zoning and the status of a subdivision of that property falls under the ORS 197.015(11)(b)(A) exception to the definition of land use decision because the compatibility statement did not require interpretation or the exercise of policy or legal judgment. *Wolfgram v. Douglas County*, 54 Or LUBA 54 (2007).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where a county, in response to a Ballot Measure 37 claim, adopts an order that initiates a process to "modify" the existing planning and zoning of a property and later adopts an ordinance that actually changes the plan and zoning map designation for the property, the subsequent ordinance is the county decision that modifies the existing planning and zoning under ORS 197.352(8), and under ORS 197.352(9) such a decision is not a land use decision that LUBA has jurisdiction to review. *DLCD v. Klamath County*, 54 Or LUBA 113 (2007).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. ORS 92.100(7), which provides that a decision approving a final subdivision or partition plat is not a land use decision or limited land use decision, effectively removes such decisions from LUBA's jurisdiction. Nothing in the text or legislative history of ORS 92.100(7) suggests that the exclusion applies only to nondiscretionary final subdivision or partition plat decisions. *Wagon Trail Ranch v. Klamath County*, 54 Or LUBA 654 (2007).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. The fact that procedures for making limited land use decisions are used for making a decision to approve or deny a final partition plat does not convert that decision into a limited land use decision or override the language of ORS 92.100(7) providing that decisions to approve or deny a final partition plat are not limited land use decisions. *Ehle v. City of Salem*, 54 Or LUBA 688 (2007).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. ORS 92.100(7) excludes from LUBA's jurisdiction decisions made by a local government or its designee to approve or deny a final partition plat. *Ehle v. City of Salem*, 54 Or LUBA 688 (2007).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. ORS 223.314 exempts certain plans that are adopted in support of systems development charges from the statutory definition of "land use decision." If that exemption is applied literally and broadly, it would exempt a large number of decisions that would otherwise be subject to the statewide planning goals and would otherwise be land use decisions subject to LUBA review. *Home Builders Association v. City of Eugene*, 54 Or LUBA 692 (2007).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. If a local government wants to adopt one plan to comply with ORS 223.309(1) to establish systems development charges and adopt a

second plan to satisfy any obligations it may have under the statewide planning goals and local land use laws, ORS 223.309(1) and 223.314 effectively authorize such a bifurcated approach. *Home Builders Association v. City of Eugene*, 54 Or LUBA 692 (2007).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A city decision to adopt a public facilities plan under ORS 223.309(1) and to proceed to adopt and implement systems development charges, before the city has separately adopted a second plan to comply with the city's obligations under the statewide planning goals and local land use legislation, does not convert the ORS 223.309(1) public facilities plan into a de facto land use decision. Such an ORS 223.309(1) public facilities plan remains a fiscal plan that under ORS 223.314 is not considered a land use decision and is not reviewable by LUBA. *Home Builders Association v. City of Eugene*, 54 Or LUBA 692 (2007).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. LUBA has consistently declined to apply the "fiscal exception" to decisions that involve local land use appeal fees or land use application fees, because such decisions implicate core land use concerns regarding access to and citizen participation in land use reviews. *Sommer v. Josephine County*, 52 Or LUBA 806 (2006).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. The specific motivation of a county for amending its schedule of appeal and application fees is not determinative of whether the "fiscal exception" to LUBA's jurisdiction applies. *Sommer v. Josephine County*, 52 Or LUBA 806 (2006).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. The ORS 197.015(10)(e) exception to LUBA's jurisdiction for writs of mandamus issued pursuant to ORS 215.429 or 227.179 applies only when the writ is based on an alleged violation of the statutory 120-day deadline for issuing a final decision. A writ of mandamus filed for another reason does not deprive LUBA of jurisdiction over a land use decision approving a manufactured home subdivision, even if the writ involves the same property. *D & B Home Investments v. City of Donald*, 51 Or LUBA 1 (2006).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A quasi-judicial decision approving a tentative subdivision plat does not "implement" a systems development charge within the meaning of ORS 223.314, and therefore fall within an exclusion to LUBA's jurisdiction, simply because the decision imposes a condition of approval that imposes or references system development charges. *D & B Home Investments v. City of Donald*, 51 Or LUBA 1 (2006).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Pursuant to ORS 92.100(7) and ORS 197.015(13), LUBA has no jurisdiction over a decision approving or denying an application for final subdivision plat approval that was submitted after June 16, 2005. *Severson v. Josephine County*, 51 Or LUBA 569 (2006).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. ORS 223.314 provides a statutory exclusion from the statutory definition of land use decision. But that exclusion only applies to the extent "a plan * * * adopted pursuant to ORS 223.309" is adopted for the limited purpose of supplying the public facility list that is required by ORS 223.309 as a precondition of adopting a systems development charge methodology. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 109 (2005).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. So long as sewerage facilities recommended in a regional sewerage plan cannot be built until the applicable comprehensive plan is amended to recommend those facilities, the regional sewerage plan may be adopted before the comprehensive plan is amended and the decision to adopt that regional sewerage plan to comply with state and federal environmental regulations and the requirements of ORS 223.309 for adoption of a systems development charge methodology is not a land use decision that is reviewable by LUBA. The reviewable land use decision will be adopted when the corresponding comprehensive plan amendments are adopted. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 109 (2005).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Goal 14, factors 3 through 7 implicitly require a determination that the sites chosen to be included in an urban growth boundary (UGB) are better than other alternative sites that are also considered for inclusion and rejected. Therefore, a local code provision requiring a demonstration that "the recommended site was better than alternative sites," does not "go further" or require more than the requirements of Goal 14, and assignments of error concerning that local code provision therefore involve "matters" that fall within the Land Conservation and Development Commission's exclusive jurisdiction in periodic review. *City of West Linn v. Metro*, 49 Or LUBA 403 (2005).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Land use application fees, like local appeal fees, are an integral part of the zoning code provisions governing the processing and review of land use applications. A decision adopting a schedule of land use application fees pursuant to a local land use regulation is a "land use decision" subject to LUBA's jurisdiction, because it concerns the adoption, amendment or application of a land use regulation, and is not subject to the "fiscal" exception to LUBA's jurisdiction. *Doty v. City of Bandon*, 49 Or LUBA 411 (2005).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. An allegation that a Metropolitan Service District ordinance that amends a regional plan and the urban growth boundary (UGB) is inconsistent with that regional plan is a Goal 2 consistency issue and therefore is a matter that is within the Land Conservation and Development Commission's exclusive jurisdiction in a pending periodic review proceeding concerning the same ordinance. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. If the Metropolitan Service District's authority to amend a regional plan to mandate certain zoning protections for industrial lands were solely a question of whether the regional plan itself prohibits such mandates, that question would likely be an issue that is exclusively within the Land Conservation and Development Commission's exclusive jurisdiction in a pending periodic review of the amendment. However, where the question of whether the regional plan prohibits such mandates is intertwined with the question of whether other legal authorities prohibit such mandates, and LUBA has jurisdiction to consider whether those other legal authorities prohibit such mandates, LUBA also has jurisdiction to consider whether the regional plan prohibits the mandates. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. There is nothing in the language of ORS 197.025(1) and 268.385(1) that imposes a higher obligation on the Metropolitan Service District in performing its coordination obligation than is imposed under the Goal 2 coordination obligation. Therefore, in performing periodic review of a regional plan amendment, the Land Conservation and Development Commission will resolve the question of whether the Metropolitan Service District properly coordinated its decision, and LUBA does not have jurisdiction to consider that issue in a LUBA appeal of the same regional plan amendment. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A county counsel stipulation in a mandamus proceeding zoning of property required the exercise of policy or legal judgment because the legal effect of an LCDC order on the property's zoning was not clear. *Flying J, Inc. v. Marion County*, 47 Or LUBA 637 (2004).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Whether a decision that changes the fee to file local appeals of land use decisions is codified in the zoning ordinance is not dispositive as to LUBA's jurisdiction under either the statutory definition or the fiscal decision exception. The essential questions are whether the challenged appeal fees (1) "concern" the application of a land use regulation and (2) are an integral part of the zoning code provisions governing the processing and review of land use applications. *Friends of Linn County*, 45 Or LUBA 408 (2003).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. When a land use decision involving appeal fees is bundled together with decisions involving other types of fees that standing alone would not fall within LUBA's jurisdiction, the question of our jurisdiction does not turn on whether the appeal fee is quantitatively a large or small component of the decision viewed as a whole. *Friends of Linn County*, 45 Or LUBA 408 (2003).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Local appeal fees implicate core land use concerns regarding access to and citizen participation in land use reviews. Given the integral role appeal fees play with respect to land use reviews, a decision affecting appeal fees is not subject to the fiscal exception to LUBA's jurisdiction, even where the challenged appeal fee is bundled together with a large number of other fee changes that have nothing to do with land use. *Friends of Linn County*, 45 Or LUBA 408 (2003).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where the challenged decision is adopted to fulfill a periodic review work task, and the issue before LUBA can be framed as either (1) a matter of compliance with a statute, comprehensive plan or land use regulation or (2) a matter of compliance with a statewide planning goal or administrative rule, LUBA has jurisdiction over the issue only if the statutory, plan or code obligation goes beyond or is different from the obligation imposed by the goal or rule. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. An argument that a county comprehensive plan amendment adopted to fulfill a periodic review work task is inconsistent with a city comprehensive plan provision is an issue that is cognizable as a Goal 2 consistency issue,

and thus is an issue that is within LCDC's exclusive jurisdiction. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Findings challenges are necessarily derivative of the underlying criteria the findings address. Where the county code requires adoption of findings supporting legislative decisions, whether jurisdiction to review an adequate findings challenge in a legislative decision adopted to fulfill a periodic review work task lies with LUBA or LCDC depends on whether the findings address goal or rule compliance issues subject to LCDC's exclusive jurisdiction. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

26. 4 LUBA Jurisdiction – Land Use Decision: Exclusions. A local code requirement for findings demonstrating that legislative decisions are "in the public interest and will be of general public benefit" does not implicate any Goal or rule requirements, and thus a challenge that the local government failed to adopt adequate findings addressing that criterion in adopting a decision to fulfill a periodic review work task is subject to LUBA's exclusive jurisdiction. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Under OAR 660-033-0140(5) a forest template dwelling permit is valid for four years and can be extended for two additional years. Although OAR 660-033-0140(3) provides that such an extension of a permit for a forest template dwelling "is not subject to appeal as a land use decision," a county decision that grants a one-year extension of a forest template dwelling two years after it was issued, pursuant to general local legislation that allows permits to be extended, is a land use decision and is reviewable by LUBA. *Butori v. Clatsop County*, 45 Or LUBA 677 (2003).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. The scope of the "fiscal exception" to statewide land use planning standards generally and LUBA's jurisdiction in particular is not well defined, but an amendment to the fee charged to file a local appeal under a zoning ordinance does not qualify as a fiscal exception, notwithstanding that the decision adopting the fee change is not codified as part of the zoning ordinance. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 270 (2002).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. ORS 197.825(2)(b), which states that LUBA's jurisdiction is subject to the statutes governing the Court of Appeals' review of LUBA decisions, simply clarifies that LUBA no longer has jurisdiction over an appeal once a party seeks judicial review of LUBA's final order in that appeal. ORS 197.825(2)(b) does not require that LUBA consider whether the Court of Appeals might lack constitutional authority to review LUBA's final order, or require that LUBA dismiss the appeal if it concludes that such is the case. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 524 (2002).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. In lieu of judicial review by the Court of Appeals of an order of the Columbia River Gorge Commission regarding any action of a county pursuant to the Columbia River Gorge Scenic Area Act, the county's decision may be appealed to LUBA. Such an appeal must be filed within 21 days after the Columbia River Gorge Commission decision becomes final and LUBA may not consider any issue concerning interpretation or

implementation of the Columbia River Gorge Scenic Act. *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580 (2000).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. An appeal to LUBA of a county decision under the Columbia River Gorge Scenic Act, prior to the date the Columbia River Gorge Commission issues a final decision reviewing the county decision, is premature and will be dismissed. Appellate jurisdiction for review of such a county decision in the first instance lies with the Columbia River Gorge Commission. *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580 (2000).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Under *Murphy Citizens Advisory Com. v. Josephine County*, 325 Or 101, 934 P2d 415 (1997), a land use decision otherwise within LUBA's jurisdiction is not removed from LUBA's purview, pursuant to ORS 197.825(3), by a court order that is not a peremptory writ of mandamus. *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. An indication on the notice of adoption furnished to DLCD under ORS 197.610(1) that the Statewide Planning Goals do not apply to a proposed plan or code amendment or a new land use regulation is a ministerial act without independent significance, not a land use decision subject to LUBA's jurisdiction. *Petersen v. Columbia County*, 33 Or LUBA 253 (1997).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. The jurisdictional bar of ORS 197.015(10)(d) applies to both alternative and peremptory writs of mandamus, and excludes a local government decision issued in response to an alternative writ of mandamus from the definition of "land use decision." *Arnold v. Columbia County*, 32 Or LUBA 237 (1996).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where a circuit court issues an order requiring the county to approve four land use applications, and that order is the culmination of a mandamus proceeding, the county's subsequent approvals of the applications are issued "in response to a writ of mandamus" for purposes of the jurisdictional bar of ORS 197.015(10)(d)(B), notwithstanding the fact that the court's order is not itself a writ of mandamus. *Estremado v. Jackson County*, 32 Or LUBA 206 (1996).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. ORS 197.825(2)(c) excludes from LUBA's jurisdiction matters addressed during periodic review by DLCD and LCDC. *Mazeski v. Wasco County*, 31 Or LUBA 126 (1996).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. The Land Use Board of Appeals has no jurisdiction over expedited land division approvals. Jurisdiction for review of expedited land divisions rests instead with the Court of Appeals. *Richey Lane Neigh. Assoc. v. Washington County*, 31 Or LUBA 102 (1996).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. The Oregon Supreme Court has exclusive jurisdiction over decisions that involve the "project" component of the Westside Corridor Project. *Kane v. Tri-County Metro Trans. Dist.*, 31 Or LUBA 41 (1996).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Notwithstanding the 1991 legislature's failure to amend ORS 197.825(c), which states exclusions from LUBA's jurisdiction, to refer to the statutes where the new periodic review process is codified, LUBA reads ORS 197.825(c) as if it were so amended. *Mazeski v. Wasco County*, 30 Or LUBA 442 (1995).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Under ORS 197.644 and ORS 197.825(c), issues arising during periodic review that involve compliance with the goals must be addressed and decided by LCDC, but other issues may be appealed to LUBA. *Mazeski v. Wasco County*, 30 Or LUBA 442 (1995).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Under OAR 660-25-040(1) and (2), LUBA retains jurisdiction during periodic review over matters that do not involve compliance with the Statewide Planning Goals. *Mazeski v. Wasco County*, 30 Or LUBA 442 (1995).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Even if county actions could otherwise be construed to be land use decisions, where the actions are mandated by a circuit court order in response to a writ of mandamus, they are not land use decisions over which LUBA has jurisdiction. *Murphy Cit. Advisory Committee v. Josephine County*, 30 Or LUBA 28 (1995).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Under OAR 661-10-010(3), a document containing findings of fact and conclusions of law that is signed by the mayor and attested by the city recorder is a final decision, but if the city has no authority to take the action reflected in the decision, the final decision is not a land use decision. Subsequent adoption with authority is a land use decision appealable to LUBA. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A zoning code fees chapter which is an integral part of the zoning code provisions governing the processing and review of land use applications is not a purely fiscal ordinance, and its application to a local appeal of a hearings officer's decision on a land use application is not excepted from review by LUBA. *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. A local code chapter which allows a subdivider to recoup part of the costs of installing sewer improvements for a subdivision is purely a fiscal ordinance, and a decision applying such a fiscal ordinance is not a land use decision subject to review by LUBA. *The Petrie Company v. City of Tigard*, 28 Or LUBA 535 (1995).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Local government decisions granting design review approval for segments of a light rail transit line do not adopt or amend a city or county public facility plan and, therefore, are not excluded from being considered "land use decisions" under ORS 197.712(2)(e). *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. ORS 517.890 provides that appeals of provisional surface mining permits are governed by the provisions of "ORS 183.310 to 183.550

for appeals from orders in contested cases." Therefore, regardless of whether contested case procedures were observed in all respects during DOGAMI proceedings governed by ORS 183.480(2) and 183.482, jurisdiction to review DOGAMI's decision lies with the court of appeals, not LUBA. *Hood River Sand, Gravel & Readi-Mix v. DOGAMI*, 25 Or LUBA 668 (1993).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. If a single legislative decision *both approves* plan and land use regulation amendments with regard to some Goal 5 resource sites and *denies* such amendments with regard to other sites, such a legislative decision would not qualify as a decision from which an appeal to this Board is foreclosed under ORS 197.830(2) and 197.620(1). *ODOT v. Klamath County*, 25 Or LUBA 761 (1993).

26.4 LUBA Jurisdiction – Land Use Decision: Exclusions. Where the challenged decision is a governing body's directive to the county counsel to file a complaint in circuit court to enforce zoning regulations pursuant to ORS 197.825(3)(a), the challenged decision is not one over which LUBA has review authority. *Wygant v. Curry County*, 22 Or LUBA 110 (1991).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a petitioner files a local appeal of a decision and the local government rejects the local appeal, the petitioner has exhausted all remedies available by right, within the meaning of ORS 197.825(2)(a). *Hood River Valley Residents' Committee v. Hood River County*, 77 Or LUBA 1 (2018).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a petitioner files a local appeal of a decision and the local government initially accepts the appeal and schedules a hearing, but later cancels the hearing and rejects the local appeal, the petitioner has exhausted all remedies available by right, within the meaning of ORS 197.825(2)(a). *Hood River Valley Residents' Committee v. Hood River County*, 77 Or LUBA 7 (2018).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a county's land development ordinance provides petitioner with the right to appeal its staff decision to a hearings officer, whether the county's provisions for appealing a planning director decision are permissive or mandatory, they are "remedies" that are "available by right" to petitioner, within the meaning of the ORS 197.825(2)(a) requirement that a petitioner exhaust available local remedies, and therefore LUBA lacks jurisdiction if petitioner did not avail herself of the county's procedures for local appeal. *Levy v. Jackson County*, 75 Or LUBA 401 (2017).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A petitioner does not fail to exhaust administrative remedies within the meaning of ORS 197.825(2) by failing to file a local appeal of a decision made under the county's "ministerial review procedures" where the local code provides only the applicant with the right to appeal a decision to deny a permit using those ministerial review procedures. *Agnew v. Josephine County*, 75 Or LUBA 527 (2017).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The interplay between ORS 197.830(3), allowing an extended 21-day period to appeal certain decisions directly to LUBA, and ORS 197.825(2)(a), requiring a party to exhaust all local appeals available by right, introduces jurisdictional uncertainty in some cases. Where the petitioner prudently requests a local appeal and also files a direct appeal to LUBA, LUBA typically suspends the LUBA proceeding until the local government determines whether a local appeal is available. *Friends of the Lostine v. Wallowa County*, 75 Or LUBA 546 (2017).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A remedy that would remove the matter entirely from LUBA's review, such as requesting that a circuit court vacate a judgment related to a county land use decision, is not a remedy available "by right" that a petitioner must exhaust prior to seeking LUBA's review over the related land use decision. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. If opponents of land use approval fail to comply with one or more mandatory requirements for perfecting a local appeal, but the county governing body nevertheless accepts the local appeal and renders a decision on the merits affirming the land use approval, opponents' failure to comply with those mandatory requirements may provide a basis for reversing the governing body's decision, but such failures do not mean opponents' LUBA appeal must be dismissed for failure to exhaust administrative remedies. *Kaplowitz v. Lane County*, 74 Or LUBA 601 (2016).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Generally, where a local appeal is available, that local appeal must be exhausted before filing an appeal with LUBA. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A petitioner is not required to appeal a planning commission decision approving a comprehensive plan map amendment to the city council, where under applicable law a decision by the city council is required in any event to make the comprehensive plan map amendment final and effective. In that circumstance, a petitioner is not required by ORS 197.825(2)(a) to exhaust a remedy that would do no more than require the city council to do what applicable statutes and Goal 2 already require the city council to do. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a cross petition for review challenges the local government's application of a standard to a proposal for needed housing on the basis that the city may not apply the standard because it is not a "clear and objective standard" within the meaning of ORS 197.307(4), the cross petition for review may assign error to the city's application of the standard only if the issue was raised in the applicant's appeal statement appealing the hearings officer's decision to the planning commission, under ORS 197.825(2)(a) and the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51 (2013).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The exhaustion waiver principle articulated in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), is based in part on ORS 197.763, which applies to quasi-judicial land use decisions but does not apply to legislative land use decisions, and in part on the ORS 197.825(2)(a) exhaustion of remedies requirement. Therefore the *Miles* exhaustion waiver principle does not apply in an appeal of a legislative decision where there were no right of local appeal and no remedies to exhaust. *Central Oregon Landwatch v. City of Bend*, 68 Or LUBA 173 (2013).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. ORS 197.825(2)(a) and *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), do not limit the issues before LUBA to those issues specified in the local appeal to the governing body, where the local government's appeal regulations do not require specification or limitation of issues for that type of local appeal, and the governing body allowed and considered all issues raised by any party during the appeal proceeding. *White v. Lane County*, 68 Or LUBA 423 (2013).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a petitioner receives actual notice of a decision issued without a hearing and pursues a local appeal, any right to directly appeal the decision to LUBA pursuant to ORS 197.830(3) may be lost if it turns out no right of local appeal exists and the petitioner delays longer than 21 days from actual notice of the decision to appeal the decision to LUBA. *Brodersen v. City of Ashland*, 66 Or LUBA 369 (2012).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. For the ORS 197.825(2)(a) exhaustion of local remedies requirement to serve its intended purpose, it is the decision rendered at the end of

the local appeal process that must be appealed to LUBA, not the intermediate decision that led to the local appeal. *Jacobsen v. City of Winston*, 63 Or LUBA 405 (2011).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. LUBA will not dismiss an appeal for failure to exhaust the right of local appeal to the governing body, where the petitioner filed a notice of local appeal that mistakenly identified as the subject of appeal the initial planning director's decision rather than the subsequent planning commission's decision, but the governing body and all parties understood the appeal to concern the planning commission's decision and the county in fact provided an appeal of the planning commission decision. *Oberdorfer v. Harney County*, 64 Or LUBA 47 (2011).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The ORS 197.825(2)(a) requirement that a petitioner at LUBA first exhaust available local remedies does not require that a petitioner appeal a local government decision that petitioner agrees with. If another party appeals that decision and the local government ultimately adopts a different decision that petitioner does not agree with, the petitioner may appeal to LUBA. *Families for a Quarry Free Neighborhood v. Lane County*, 64 Or LUBA 297 (2011).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Exhaustion of any available local remedies is a mandatory prerequisite for LUBA to have jurisdiction to review a decision. *Jacobsen v. City of Winston*, 63 Or LUBA 531 (2011).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. If a petitioner seeks a local appeal of a land use decision but terminates that local appeal before it is complete, the petitioner failed to exhaust an available remedy and LUBA must dismiss a direct appeal of the land use decision. *Jacobsen v. City of Winston*, 63 Or LUBA 531 (2011).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. If a local government determines that petitioners abandoned their local appeal of a land use decision, but petitioners are allowed to pursue a local appeal of the abandonment determination, petitioners separate direct appeal of the underlying land use decision to LUBA must be dismissed, because petitioners have not yet exhausted their local appeal as required by ORS 197.825(2)(a). *Jacobsen v. City of Winston*, 63 Or LUBA 531 (2011).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A petitioner does not waive her right to challenge a city's concept plan at LUBA by failing to appeal a Metro order finding that the concept plan complies with regional planning requirements, where Metro never conducted such a compliance review and never issued an order regarding compliance. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where one LUBA petitioner filed a local appeal to the county board of commissioners but a second LUBA petitioner did not file her own local appeal, the second petitioner has nonetheless exhausted local remedies and will not be dismissed from a LUBA appeal of the commissioners' decision. Even if the second petitioner is required to appear at the local appeal hearing in order to satisfy the exhaustion requirement, LUBA will not dismiss that petitioner where the governing body declines to review the underlying

decision and conducts no hearing on the appeal at which the petitioner could have appeared. *Sommer v. Douglas County*, 59 Or LUBA 535 (2009).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), did not overrule or modify *Colwell v. Washington County*, 79 Or App 82, 91, 718 P2d 747 (1986), and similar cases holding that the ORS 197.825(2)(a) exhaustion requirement does not require a petitioner to file a local appeal of a lower body's initial comprehensive plan amendment decision to the governing body, because applicable statutes require the governing body to conduct a hearing on the amendment in any event. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Notwithstanding that a county's code provides that the planning commission's decision on a comprehensive plan amendment is "final" unless a local appeal is filed, under ORS 215.060 the county governing body must hold a public hearing on the plan amendment and take final action, and therefore the planning commission's initial decision on the plan amendment is not "final" in any meaningful sense. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Even where a county's code provides for local appeal as one of three possible paths by which a governing body will review the planning commission's initial decision on a comprehensive plan amendment, because ORS 215.060 requires the governing body to hold a public hearing on a plan amendment at which testimony and issues can be raised, in that circumstance a petitioner before LUBA is not required to file a local appeal and specify issues in a notice of local appeal in order to exhaust administrative remedies or avoid waiver under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a code provides for appeal of a planning commission decision to the governing body, the petitioner must exhaust that local remedy, even if the planning commission decision is part of a larger multi-step review process that will independently require additional proceedings before the governing body. The petitioner cannot instead of filing a local appeal of the planning commission decision wait to challenge that decision during the final proceedings before the governing body. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where intervenor-respondent argues that petitioners failed to exhaust administrative remedies but fails to identify the local administrative remedy that it believes was available, intervenor-respondent's argument is insufficiently developed for review. *Zirker v. City of Bend*, 55 Or LUBA 188 (2007).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where an issue raised before LUBA was not included in the local notice of appeal filed by petitioners, the petitioners have failed to exhaust their remedies under ORS 197.825(2)(a) and are precluded from raising the issue under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The waiver principle in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), applies to require that a petitioner at LUBA have raised an issue in the local notice of appeal, notwithstanding that the issue may have been raised earlier in the local land use proceeding. That waiver principle does not apply where consideration of a local application for land use approval does not include a local right of appeal. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a notice of local appeal appeals related subdivision and planned unit development (PUD) approvals, but refers to "residential subdivision" in challenging the type of residential use allowed under both approvals, the local government errs in concluding that the appeal raises issues only with respect to the subdivision and not the PUD, under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 283 (2003). *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. While it is unusual for a petitioner to have to exhaust an appeal that is available before another unit of local government to challenge an annexation ordinance before appealing that annexation ordinance to LUBA, where applicable law provides that right of appeal and prevents the annexation ordinance from becoming final until that appeal is resolved, petitioner must exhaust that appeal before appealing to LUBA. *City of Happy Valley v. City of Damascus*, 51 Or LUBA 141 (2006).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where petitioners file a LUBA appeal to challenge a decision that petitioners mistakenly believed was a final county decision at the time the notice of intent to appeal was filed, and petitioners later file a local appeal to challenge that same decision, LUBA must dismiss the appeal for failure to first exhaust local remedies. *Doyle v. Coos County*, 49 Or LUBA 397 (2005).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where it is clear that the land use decision that is identified in a notice of intent to appeal is an administrative conditional use permit approval that is also the subject of a local appeal, LUBA must dismiss the appeal and will not interpret that notice of intent to appeal as an appeal of other possible land use decisions. *Doyle v. Coos County*, 49 Or LUBA 397 (2005).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. LUBA will not extend the ORS 197.763(1) "raise it or waive it" requirement to legislative proceedings, and a failure to raise an issue under ORS 197.763 is not correctly characterized as a failure to exhaust administrative remedies. *Roads End Sanitary District v. City of Lincoln City*, 48 Or LUBA 126 (2004).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The logic of the exhaustion requirement at ORS 197.825(2)(a) dictates that, where the local government determines that the petitioner failed to perfect an otherwise available local remedy, LUBA has no jurisdiction over an appeal of the underlying decision. Under such circumstances, petitioner's only recourse is to appeal the decision rejecting the local appeal and demonstrate to LUBA that the local government erred in determining that petitioner failed to perfect the local appeal. *Siuslaw Rod and Gun Club v. City of Florence*, 47 Or LUBA 615 (2004).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. If a county governing body correctly rejects an attempted local appeal as not properly perfected, the planning commission decision that was the subject of the attempted local appeal becomes the county's final decision and a LUBA appeal seeking to directly challenge the planning commission decision will be dismissed for failure to exhaust available local remedies. *Burke v. Crook County*, 45 Or LUBA 516 (2003).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a county governing body determines that it has conflicts that prevent it from considering a local appeal of a planning commission decision, and rejects the appeal without identifying any appealable error on the local appellant's part: (1) the local appellant is not obligated to seek LUBA review of the county governing body's decision; (2) the local appellant has satisfied the statutory requirement that he exhaust local remedies before appealing to LUBA; and (3) the planning commission decision becomes the county's final decision and subject to appeal to LUBA. *Burke v. Crook County*, 45 Or LUBA 516 (2003).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A party attempting to intervene in a LUBA appeal need only have appeared before the local government and file a timely motion to intervene with LUBA. Unlike petitioners before LUBA, there is no requirement that intervenors have exhausted all administrative remedies below. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The purpose of the ORS 197.825(2)(a) exhaustion requirement is to ensure that the final decision is made by the highest local decision-making body before an appeal to LUBA is pursued. That purpose is satisfied notwithstanding that the petitioner did not file her own local appeal and did not obtain a decision from the highest local decision-making body on the merits of the permit application, where the petitioner appeared at the hearing on an appeal filed by another person before the local appeal was withdrawn and dismissed, and the effect of dismissal was to adopt an earlier tentative decision as the local government's final decision on the permit. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 597 (2002).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a land use decision is rendered without a hearing and parties belatedly learn of the decision, ORS 197.830(3) provides a right of direct appeal to LUBA except where petitioners also seek and are granted a local appeal. *Warf v. Coos County*, 42 Or LUBA 84 (2002).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. ORS 197.830(4) comprehensively addresses the situation where a local government makes a permit decision without a hearing pursuant to ORS 215.416(11) or 227.175(10). *Warf v. Coos County*, 42 Or LUBA 84 (2002).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. ORS 197.830(4) applies where a local government is attempting to render a permit decision without a prior hearing pursuant to ORS 215.416(11) or 227.175(10). ORS 197.830(3) applies in all other cases where a local government adopts a decision without providing a hearing, including where the local government mistakenly believes its decision is not a discretionary "permit" decision and for that reason does not provide

the required notice and opportunity for a local appeal. *Warf v. Coos County*, 42 Or LUBA 84 (2002).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a local government cites no legal requirement that a petitioner must have (1) submitted written opposition to a proposed annexation with a request for public hearing and (2) appeared in person at the public meeting where the city council considered the written opposition and hearing request, LUBA will reject the local government's argument that both a written and personal appearance are required to exhaust local administrative remedies. *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A petitioner may not challenge the merits of the underlying decision in an appeal of a local decision maker's determination that there is no local appeal available to challenge that decision. *Robinson v. City of Silverton*, 39 Or LUBA 792 (2001).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A determination that there is no further local appeal under a local government's code is a land use decision that may be challenged at LUBA. *Robinson v. City of Silverton*, 39 Or LUBA 792 (2001).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. LUBA will not dismiss an appeal for failure to exhaust local administrative remedies where the local code provisions regarding appeals are ambiguous and petitioner followed a directive in a planning commission notice of decision that appeals from its decision would be directly to LUBA. *Mountain West Investment v. City of Silverton*, 39 Or LUBA 788 (2001).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where ORS 197.830(4) applies it provides a right to appeal directly to LUBA, within certain time limits, notwithstanding that the deadline for filing a local appeal has expired. In such circumstances, there is no local appeal available to be exhausted pursuant to ORS 197.825(2)(a). *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where the city council is legally obligated to review the planning commission's legislative recommendation to adopt proposed land use regulations, petitioner is not required to perform the redundant task of appealing the planning commission's decision to the city council. *Home Depot, Inc. v. City of Beaverton*, 37 Or LUBA 1020 (2000).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where the notice of a planning commission's legislative recommendation to the city council limited nonapplicant appeal rights to persons who appeared before the planning commission, but the city's violation of ORS 197.610(1) obviates the appearance requirement for petitioner, a local appeal of the planning commission's decision is not "available" to petitioner and petitioner need not exhaust such a local remedy in order to appeal the city council's decision to LUBA. *Home Depot, Inc. v. City of Beaverton*, 37 Or LUBA 1020 (2000).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where the availability of a local appeal is unclear and petitioner first seeks such a local appeal and then files a notice of intent to appeal with LUBA within 21 days after the local appeal is denied, petitioner's appeal to LUBA is timely. *Hal's Construction, Inc. v. Clackamas County*, 37 Or LUBA 981 (1999).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. LUBA will dismiss an appeal if the petitioner files both a local appeal and an appeal with LUBA and the county accepts the local appeal, because the county has made available to petitioner a local remedy that petitioner is required to exhaust before appealing to LUBA. *McKy v. Josephine County*, 36 Or LUBA 769 (1999).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a local government decision gives no hint that a local appeal is available and states that it is the local government's final decision, a petitioner does not fail to exhaust administrative remedies by appealing that decision to LUBA without attempting first to appeal the decision locally. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. An argument that a party failed to file a timely appeal of a local planning department's decision may, if correct, provide a basis for reversing the land use decision that ultimately resulted from the local appeal; but it would not provide a basis for dismissing the LUBA appeal. *Wood v. Crook County*, 36 Or LUBA 143 (1999).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where the county administratively approves development under ORS 215.416(11), but fails to provide an adjacent landowner with either the notice or the opportunity for local appeal required by statute, the time to file an appeal of that approval to LUBA is tolled until the landowner receives actual notice, pursuant to ORS 197.830(3). *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Petitioners have no available administrative remedy to exhaust where petitioners do not receive notice of the planning director's decision in an administrative action, and therefore did not appear at the proceeding by filing the "timely written statement" required to appeal under local ordinance. *Wilbur Residents v. Douglas County*, 33 Or LUBA 761 (1997).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A local appellant exhausts local remedies as required by ORS 197.825(2)(a) by appealing the local decision to the hearings officer, where the board of county commissioners have by standing order declined to hear certain appeals of hearings officer decisions and the notice of decision states it is the county's final decision. *Central Oregon Cellular, Inc. v. Deschutes County*, 33 Or LUBA 345 (1997).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. An amendment to a county's comprehensive plan does not compel an identical amendment to the zoning ordinance, and petitioners are not required to exhaust administrative remedies available to a plan amendment approval in order to appeal a subsequent zone change. *Alliance for Responsible Land Use v. Deschutes County*, 33 Or LUBA 12 (1997).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Because petitioners failed to demonstrate the county's announcement of a higher appeal fee two hours before the deadline for filing a local appeal precluded them from exercising their local appeal rights, they failed to show they exhausted their local administrative remedies, and LUBA must dismiss. *Westall v. Polk County*, 32 Or LUBA 443 (1997).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Deficiencies alleged by petitioners in the notice of proposed action and the notice of decision do not excuse petitioners from exhausting available local remedies as required by ORS 197.825(2)(a) prior to appealing to LUBA. *Walton v. Clackamas County*, 32 Or LUBA 426 (1997).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. If there is no procedure available for the local appeal of a land use decision, it may be appealed directly to LUBA. *No Casino Association v. Lincoln City*, 30 Or LUBA 79 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A petitioner must first pursue local administrative remedies prior to review by LUBA; however, those remedies must be both available and adequate to meet an applicant's needs. *Reeves v. City of Tualatin*, 31 Or LUBA 11 (1996).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The exhaustion requirement of ORS 197.825(2)(a) is satisfied where the petitioner has appealed a decision on his application to the highest decision maker at the local level. *Reeves v. City of Tualatin*, 31 Or LUBA 11 (1996).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. If a city hearings officer issues an amended decision and the amendments are so integrated into the decision that a page-by-page review is required to locate them, petitioners may file a local appeal of the entire amended decision within the period allowed by local ordinance. *Wilmington Neighbors v. City of Bend*, 30 Or LUBA 415 (1996).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Requirement that LUBA must dismiss for lack of jurisdiction if a petitioner fails to exhaust all local remedies applies only when there is an available procedure which, if pursued successfully, would accomplish the petitioner's desired result. *New v. Clackamas County*, 30 Or LUBA 453 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A local government must make clear prior to the commencement of a local appeal period that a local appeal is available or it cannot contend that a petitioner who fails to appeal locally has not exhausted all local remedies. *New v. Clackamas County*, 30 Or LUBA 453 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. When county ordinance is unclear and county decision maker's remarks were self-contradictory and confusing as to whether a local appeal was available, a local appeal was not an available local remedy that petitioner was required to exhaust prior to appealing to LUBA. *New v. Clackamas County*, 30 Or LUBA 453 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The local appeal from an administrative decision provided by ORS 227.175(10) must be exhausted prior to an appeal to LUBA, which

otherwise lacks jurisdiction under ORS 197.825(2)(a). *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Since a local appeal is not available from an ORS 197.825 administrative decision made without authority, a petitioner may appeal the decision directly to LUBA. *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The purpose of ORS 197.825(2)(a) is to assure a local government decision is reviewed by the highest-level local decision-making body that the local code makes available, and a party's failure to exercise a right to a local appeal is grounds for dismissal of that party's appeal to LUBA. *Shaffer v. City of Salem*, 29 Or LUBA 479 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a local appeal is available, the purpose of the exhaustion requirement of ORS 197.825(2)(a) is to assure that the local government decision is reviewed by the highest level local decision making body the local code makes available, before an appeal to LUBA is pursued. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. If a local government fails to provide the notice of a permit decision made without a hearing required by ORS 215.416(11) or 227.175(10), the time for filing a local appeal does not begin to run until an appellant is provided the notice of decision to which he or she is entitled. Because a local appeal is available to such an individual, under ORS 197.825(2)(a) that local appeal must be exhausted before appealing to LUBA. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Although ORS 197.825(2)(a) requires that local appeals be exhausted, the fact that the local code may limit the scope of review of a local appellate body in considering a local appeal does not similarly limit LUBA's scope of review. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where the local code provides petitioner has a right to initiate a minor comprehensive plan amendment, but only the local government can initiate a major plan amendment, and that the local government may refuse to do so for any reason, the process for local government-initiated plan amendments is not an administrative remedy petitioner is required to exhaust before seeking LUBA review of a local government decision that petitioner's proposed plan amendment is a major plan amendment. *Cone v. City of Eugene*, 29 Or LUBA 133 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where ORS 197.830(3) applies, it provides a petitioner with a right to appeal directly to LUBA, within the time limits established by ORS 197.830(3)(a) and (b), notwithstanding that the deadline for filing a local appeal may have expired. In such circumstances, there is no local appeal available to be exhausted pursuant to ORS 197.825(2)(a). *Beveled Edge Machines, Inc. v. City of Dallas*, 28 Or LUBA 790 (1995).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A right to request rehearing or reconsideration by the highest local decision maker is not an "appeal" that a petitioner is obligated

to exhaust before appealing to LUBA, pursuant to ORS 197.825(2)(a). *Bowen v. City of Dunes City*, 28 Or LUBA 324 (1994).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where petitioners were the prevailing parties after the initial local decision on an application, a local appeal of that initial decision was filed by another party, and petitioners participated in the local appeal proceedings, petitioners did not fail to exhaust available local administrative remedies, as required by ORS 197.825(2)(a). *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Absent local code provisions analogous to ORS 197.830(3), where a notice of local hearing in a quasi-judicial land use proceeding fails to adequately describe the action ultimately taken by the local government and the time for filing a local appeal has expired, an adversely affected person's exclusive route of appeal is directly to LUBA. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. If petitioner appeared in the local proceedings, and became entitled to notice of the local government's decision under ORS 227.173(3) or 215.416(10), petitioner cannot appeal that decision directly to LUBA under ORS 197.830(3), but rather must first exhaust any available local administrative remedies, as required by ORS 197.825(2)(a). *Ramsey v. City of Portland*, 28 Or LUBA 763 (1994).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a petitioner seeks to avoid civil penalties by obtaining permit approval for mobile homes located on his property rather than by pursuing an available local appeal of the civil penalties, petitioner may not challenge the civil penalties at LUBA in an appeal of the local government's denial of the requested permits. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where the challenged decision is made by the highest level local decision maker possible and petitioner appeared before that decision maker, the exhaustion requirement of ORS 197.825(2)(a) is met. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. A chief planner's letter rejecting an attempt to file a local appeal of an earlier document explaining how land use regulation provisions are interpreted and applied is a land use decision, if the letter applies land use regulation provisions governing local appeals in concluding that no appeal is available, and there is no further appeal of the chief planner's letter available which must be exhausted. ORS 197.015(10)(a)(A)(iii). *Forest Park Neigh. Assoc. v. City of Portland*, 26 Or LUBA 636 (1994).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where petitioner was the prevailing party after the initial local decision on an application, a local appeal of that initial decision was filed by another party to the proceeding, and petitioner participated in the local appeal proceedings, petitioner did not fail to exhaust his local administrative remedies simply because he did not file the local appeal. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a motion to dismiss is filed on the basis that petitioners failed to exhaust local remedies, but an appeal of a local government decision not to accept petitioners' local appeal of the decision challenged at LUBA is pending below, LUBA cannot determine whether petitioners failed to exhaust local remedies, and will suspend consideration of the motion to dismiss until the local government makes a final decision on whether to accept petitioners' local appeal. *Hart v. Jefferson County*, 25 Or LUBA 773 (1993).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where parties object that petitioner failed to properly perfect its local appeal, but the local government nevertheless allows the local appeal, petitioner satisfies the requirement that it exhaust available administrative remedies, as ORS 197.825(2)(a) requires. Although the local government may have committed reversible error in considering the local appeal, LUBA has jurisdiction to review the local government's final decision. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. That petitioner may be precluded from raising the issues it seeks to raise in a LUBA appeal because those issues were required to have been raised and resolved in an earlier stage of the local land use proceeding, which petitioner did not appeal, would not mean that LUBA would lack jurisdiction to review the challenged decision. Rather, in such circumstances, LUBA would be required to affirm the decision. *DLCD v. Crook County*, 24 Or LUBA 393 (1993).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The requirement of ORS 197.825(2)(a) for exhaustion of administrative remedies is satisfied so long as one petitioner exhausts all available administrative remedies before a land use decision is appealed to LUBA. *Glisan Street Assoc. v. City of Portland*, 24 Or LUBA 600 (1992).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The requirement of ORS 197.825(2)(a) that petitioners exhaust administrative remedies before appealing to LUBA is satisfied if at least one petitioner exhausted all available administrative remedies. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The ORS 197.825(2)(a) requirement that administrative remedies be exhausted before appealing a land use decision to LUBA is satisfied if at least one petitioner exhausts all available administrative remedies. *Goose Hollow Foothills League v. City of Portland*, 24 Or LUBA 69 (1992).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. That a local government is required to provide particular individuals with written notice of a land use decision has no bearing on the requirement that available local administrative remedies be exhausted before appealing to LUBA. *Pautler v. City of Lake Oswego*, 23 Or LUBA 339 (1992).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. The purpose of the exhaustion requirement is to assure that the challenged decision is reviewed by the highest level local decision making body the code makes available, before an appeal to LUBA is pursued. Where petitioners did not initiate the local appeal, but did appear before the governing body, the exhaustion requirement of ORS 197.825(2)(a) is satisfied. *Moody v. Deschutes County*, 22 Or LUBA 567 (1992).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where the local code provides an unqualified right to a local appeal, petitioners must exhaust that local administrative remedy before appealing to LUBA. *Kamppi v. City of Salem*, 21 Or LUBA 498 (1991).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Petitioners are not excused from filing a local appeal on the basis that local government employees asserted that no local appeal of the challenged decision is available. *Kamppi v. City of Salem*, 21 Or LUBA 498 (1991).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a local code requires a determination of compliance with applicable ordinance requirements at the time of subdivision outline plan approval and that the final plat be approved if it is "in substantial conformance with the outline plan," a petitioner may not fail to appeal the decision granting outline plan approval and thereafter, in an appeal of the final plan approval, challenge the subdivision's compliance with plan and code provisions found to be satisfied at the time of outline plan approval. *Sandler v. City of Ashland*, 21 Or LUBA 483 (1991).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. LUBA will not dismiss an appeal for failure to exhaust administrative remedies below, where the available administrative remedies required that a person first appear and the local government rendered the challenged decision without providing a public hearing at which petitioner could have appeared. *Rebmann v. Linn County*, 21 Or LUBA 542 (1991).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where a local code gives "aggrieved parties" the right to appeal a decision, but does not require notice and a hearing prior to making that decision, petitioners were not given an opportunity to become "aggrieved parties" and therefore had no local remedies to exhaust. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

26.5 LUBA Jurisdiction – Exhaustion of Remedies. Where petitioners appeal a letter from the county court's counsel, stating the county court (1) has decided not to conduct any further review of petitioners' local appeal of a planning commission decision, and (2) considers the planning commission decision to be final, that letter constitutes the county's final decision on petitioners' local appeal, and petitioners have not failed to exhaust their administrative remedies. That the county court's decision not to conduct any further review of petitioners' appeal may have been erroneous does not affect LUBA's jurisdiction. *Komning v. Grant County*, 20 Or LUBA 481 (1990).

26.6 LUBA Jurisdiction – Mootness. When all appeal fees originally charged by the county are refunded and the county has conceded that no appeal fees should have been charged, an opinion issued by LUBA would be in essence an advisory opinion. LUBA typically declines to issue advisory opinions. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 136 (2018).

26.6 LUBA Jurisdiction – Mootness. LUBA will not suspend a proceeding where petitioners have not established that LUBA's resolution of the pending LUBA appeal would likely be rendered moot by a concurrently pending circuit court proceeding. Although a circuit court could ultimately decide, in a future remand proceeding from the Court of Appeals, to grant petitioners full injunctive relief which could potentially be in conflict with, or moot LUBA's ruling, where such an outcome is extremely likely, LUBA will not grant petitioners' motion for stay. LUBA is a creature of statute, and can exercise only those powers granted by the legislature, and according to ORS 197.805 and ORS 197.830(10)(a), LUBA's mandate is that "time is of the essence in reaching final decisions in matters involving land use." *Bishop v. Deschutes County*, 78 Or LUBA 1050 (2018).

26.6 LUBA Jurisdiction – Mootness. LUBA will deny petitioners' motion for reconsideration of a motion to stay the proceedings, where petitioners argue for the first time that LUBA should grant a continuance under ORS 197.840(1)(d) and (2), and to suspend the 77-day deadline to resolve an appeal, where LUBA considered petitioners' arguments and responses thereto in the underlying motion to stay the proceedings, and LUBA remains unpersuaded that, to the extent the "ends of justice" would be served by indefinitely suspending the appeal, those ends outweigh the best interest of the public and the parties in meeting the 77-day deadline. *Bishop v. Deschutes County*, 78 Or LUBA 1075 (2018).

26.6 LUBA Jurisdiction – Mootness. LUBA will decline to dismiss an appeal as moot based on extra-record evidence that the factual predicate for four of the assignments of error has been eliminated, where even if the evidence were properly before LUBA, the movant has not established that the changed factual predicate fully resolves the four assignments of error, or otherwise would render LUBA's review of no practical effect. *McNichols v. City of Canby*, 78 Or LUBA 1090 (2018).

26.6 LUBA Jurisdiction – Mootness. An argument that the issue raised in an assignment of error is waived is not a basis to dismiss the appeal as moot. If LUBA agrees with that argument, the appropriate disposition would be to deny the assignment of error and affirm the local government's decision, not to dismiss the appeal as moot. *McNichols v. City of Canby*, 78 Or LUBA 1090 (2018).

26.6 LUBA Jurisdiction – Mootness. A declaration signed by the county planning manager that a land use compatibility decision on appeal to LUBA is no longer "valid" is a sufficient basis for LUBA to conclude that the appeal is moot, notwithstanding the informality of the declaration and the absence of express words of revocation or rescission. *Bishop v. Deschutes County*, 77 Or LUBA 15 (2018).

26.6 LUBA Jurisdiction – Mootness. The "capable of repetition" prong of ORS 14.175 is not satisfied by the hypothetical possibility that in the future the applicant for a land use decision that the applicant has abandoned and the county has declared invalid could file a new application to

obtain a new decision on the same terms or attempt to persuade the county to revive the invalid decision. If ORS 14.175 were that easy to satisfy, it would be nearly impossible for a local government to moot an appeal by revoking or rescinding the decision on appeal. *Bishop v. Deschutes County*, 77 Or LUBA 15 (2018).

26.6 LUBA Jurisdiction – Mootness. Where LUBA dismisses as moot an appeal of a land use decision, LUBA will also dismiss as moot a companion appeal of a decision rejecting the local appeal of the moot decision. *Bishop v. Deschutes County*, 77 Or LUBA 15 (2018).

26.6 LUBA Jurisdiction – Mootness. Where LUBA cannot tell what legal effect, if any, an applicant's decision to "abandon/withdraw" its application for a permit approval has on the resulting permit approval decision that is the subject of a pending LUBA appeal, the appeal is not moot. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

26.6 LUBA Jurisdiction – Mootness. A decision by the electorate to reject an annexation that has been approved by the governing body renders moot a pending LUBA appeal of the land use decision that approved the annexation. *Altamont Homeowners' Association v. City of Happy Valley*, 76 Or LUBA 338 (2017).

26.6 LUBA Jurisdiction – Mootness. Where a challenged local government land use decision has been rescinded by the local government, and the decision rescinding the challenged decision has not been appealed, any decision LUBA might reach on the merits of the challenged decision would be without practical effect, and LUBA will dismiss the appeal as moot. *Altamont Homeowners' Association v. City of Happy Valley*, 76 Or LUBA 338 (2017).

26.6 LUBA Jurisdiction – Mootness. Where a city's voters reject an annexation, that rejection has the legal effect of rescinding the previously adopted city council land use decision approving annexation, and the voters' rejection of the annexation renders any decision LUBA might reach on the merits of the land use decision approving annexation without practical effect, and the appeal is therefore moot. *Altamont Homeowners' Association v. City of Happy Valley*, 76 Or LUBA 338 (2017).

26.6 LUBA Jurisdiction – Mootness. Where intervenor applied for, and received, two consecutive land use compatibility statements (LUCS), and argues it has now abandoned any reliance on the first LUCS decision, and instead has chosen to proceed with development pursuant to the second LUCS decision, the intervenor's current intent does not necessarily render the first LUCS decision ineffective. Unless and until the local government takes action to withdraw, revoke, or supersede the first LUCS decision, it remains as a potential basis for intervenor to proceed with development based on the LUCS as a final and binding county decision, and is therefore not moot. *Bishop v. Deschutes County*, 76 Or LUBA 515 (2017).

26.6 LUBA Jurisdiction – Mootness. Where mootness is at issue, the jurisdictional arguments tend to evolve over the course of the pleadings or can be updated by more recent events. Where intervenor's reply memorandum adds a new argument to its motion to dismiss on the basis of mootness—that the appeals are moot based on a letter the intervenor recently sent to a state agency—and petitioners have responded to that new argument in a motion to strike, LUBA will

consider both the reply memorandum and petitioners' countervailing arguments in resolving the pending motion to dismiss. *Bishop v. Deschutes County*, 76 Or LUBA 515 (2017).

26.6 LUBA Jurisdiction – Mootness. An appeal of a county's decision concluding that a tract consists of three legal lots of record is not mooted by, or a collateral attack upon, the county's subsequent unappealed decision to approve property line adjustments between the lots, where the property line decision was based on the prior lot of record determination and does not provide an independent basis for that determination. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

26.6 LUBA Jurisdiction – Mootness. Petitioner's appeal of a decision approving several property line adjustments is not rendered moot by the applicant's reapplication for approval of the property line adjustments, where the decision on the reapplication is not yet final and the applicant could withdraw that reapplication at any time. *Bowerman v. Lane County*, 74 Or LUBA 644 (2016).

26.6 LUBA Jurisdiction – Mootness. An appeal of a decision granting property line adjustments that was rendered without providing notice and an opportunity for a local appeal is not rendered moot by a reapplication followed by notice and an opportunity for appeal, where petitioner's petition for review is not limited to assigning error to the failure to provide notice and an opportunity for local appeal and also assigns error to the substance of the property line adjustment decision. *Bowerman v. Lane County*, 74 Or LUBA 644 (2016).

26.6 LUBA Jurisdiction – Mootness. Where an application for property line adjustments is appealed to LUBA, while that appeal is pending at LUBA the local government lacks jurisdiction to accept a reapplication for those property line adjustments and render a modified decision on the application. *Bowerman v. Lane County*, 74 Or LUBA 644 (2016).

26.6 LUBA Jurisdiction – Mootness. A local governing body's decision to deny an application to extend a previously approved CUP that was subject to a former version of the local code does not have any effect on a planning director's decision that was made after a different application was filed under a newly enacted version of the local code and does not render an appeal to LUBA of that planning director decision moot. *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 420 (2014).

26.6 LUBA Jurisdiction – Mootness. An appeal challenging a zoning classification decision that a methadone clinic is permitted in a professional office zone is not rendered moot by the commencement of operation of the methadone clinic. One of the possible outcomes of the appeal is a remand such that the methadone clinic would not be permitted to operate in the zone. *Mariposa Townhouses v. City of Medford*, 68 Or LUBA 479 (2013).

26.6 LUBA Jurisdiction – Mootness. LUBA has no authority to issue declaratory rulings regarding the county's "underlying practices" or whether the county's land use regulations comply with state law. *Friends of Douglas County v. Douglas County*, 67 Or LUBA 29 (2013).

26.6 LUBA Jurisdiction – Mootness. An exception to the general prohibition on LUBA deciding moot appeals, for decisions that are "capable of repetition, yet evading review," is not applicable where the applicant withdraws the application, and the local code specifies that a withdrawal of an

application after a decision is made by the county renders the decision "void." In that circumstance, LUBA will dismiss the appeal as moot, because the county's alleged procedural errors in failing to process an application as a statutory permit and to provide notice and an opportunity for public participation are capable of being reviewed in a future appeal of a different decision on a different application. *Friends of Douglas County v. Douglas County*, 67 Or LUBA 29 (2013).

26.6 LUBA Jurisdiction – Mootness. Where a county has issued temporary use permits to authorize a music festival on EFU-zoned land for the past two years, the record strongly suggests the county will be asked to issue additional such permit in the future, and those permits are issued so close to the day of the music festival that there is not time to appeal the temporary use permit to LUBA and receive a decision on the merits, the "capable of repetition yet evading review" exception to the mootness doctrine applies and LUBA has jurisdiction to consider the appeal. *Wetherell v. Douglas County*, 66 Or LUBA 454 (2012).

26.6 LUBA Jurisdiction – Mootness. In its decision in *Yancy v. Shatzer*, 337 Or 345, 359-60, 97 P3d 1161 (2004), the Oregon Supreme Court held that the power granted to the judicial branch under the Oregon Constitution does not permit courts to decide moot cases, even if they are capable of repetition yet evading review. However LUBA is not a judicial branch court and is not similarly limited, and LUBA does apply the generally accepted mootness doctrine exception for moot cases that are capable of repetition yet evading review. *Wetherell v. Douglas County*, 66 Or LUBA 454 (2012).

26.6 LUBA Jurisdiction – Mootness. While a decision to extend an ORS 215.402 permit decision pursuant to discretionary extension standards may also constitute a separate permit decision, the legal effect of such an extension is to extend the expiration date of the underlying permit approval, not to supersede or re-authorize the underlying permit approval. Therefore, the issuance of a permit extension does not moot an appeal of the underlying permit decision to LUBA. *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

26.6 LUBA Jurisdiction – Mootness. A local government cannot moot an otherwise properly filed appeal of an ORS 215.402 permit decision to LUBA by issuing subsequent ministerial approvals, such as building permits, intended to implement the appealed permit decision. *Jones v. Douglas County*, 63 Or LUBA 261 (2011).

26.6 LUBA Jurisdiction – Mootness. An appeal by four property owners that challenges a county decision that finds that noise from a wind generating facility does not violate noise standards with regard to three residences is not rendered moot by the county's finding that the wind generating facility must be modified so that it does not violate the noise standard with regard to a fourth dwelling, where the evidentiary record does not show that the measures that will be taken to meet the noise standard at the fourth dwelling will also be adequate to meet the noise standard at the three dwellings. *Mingo v. Morrow County*, 63 Or LUBA 357 (2011).

26.6 LUBA Jurisdiction – Mootness. Where there is no dispute that an ordinance appealed to LUBA has been repealed, review of the ordinance would have no practical effect, even where a local government adopted other decisions based on the repealed ordinance while it was effective,

and LUBA will dismiss the appeal of the repealed ordinance. *Jacobsen v. City of Winston*, 61 Or LUBA 465 (2010).

26.6 LUBA Jurisdiction – Mootness. Where a city readopts an earlier land use decision that authorized an election on a proposed annexation so that the proposed annexation would be sent to the voters for a second time, petitioners are entitled to challenge that readopted land use decision at LUBA, notwithstanding that an earlier LUBA appeal of the first land use decision was dismissed as moot after the voters rejected the annexation proposal. But where the voters reject the proposed annexation at the second election, before LUBA issues its decision on the merits, the second appeal must also be dismissed as moot. *Kehoe v. City of Oregon City*, 58 Or LUBA 552 (2009).

26.6 LUBA Jurisdiction – Mootness. LUBA's review of a city's extension of an invalidated moratorium would have no practical effect where that extension has expired, and dismissal of the LUBA appeal is the appropriate remedy. *Thunderbird Hotels, LLC v. City of Portland*, 56 Or LUBA 430 (2008).

26.6 LUBA Jurisdiction – Mootness. Even though a zoning compliance letter that authorizes certain uses and allows for permits to be obtained for one year has expired, the decision that those uses are allowed is a land use decision and it does not become moot once the one-year period for acting on that authorization expires and permits have been obtained. *Examilotis v. Coos County*, 55 Or LUBA 675 (2007).

26.6 LUBA Jurisdiction – Mootness. Petitioners' argument that a prior zoning ordinance did not allow a mushroom buying business is moot, where the currently applicable zoning ordinance that replaced the prior zoning ordinance does not allow a mushroom buying business and would apply to any application for a mushroom buying business in the future. *Robson v. City of La Grande*, 54 Or LUBA 10 (2007).

26.6 LUBA Jurisdiction – Mootness. Any assignments of error directed at a decision that LUBA has reversed in a consolidated appeal are moot, and hence LUBA will dismiss as moot an appeal limited to such assignments of error. *Grabhorn v. Washington County*, 50 Or LUBA 344 (2005).

26.6 LUBA Jurisdiction – Mootness. An appeal to LUBA is not moot simply because the local government mails another copy of the challenged decision to the parties, with a "corrected" attachment, during the course of the LUBA appeal, where it is clear that the local government did not intend the re-mailed decision to replace the challenged decision, and the re-mailed decision does not purport to do so. *Grabhorn v. Washington County*, 49 Or LUBA 746 (2005).

26.6 LUBA Jurisdiction – Mootness. The fact that LUBA has in a previous decision remanded plan amendments that petitioners allege prohibit a grading permit on the subject property does not moot an appeal of a grading permit for the property to LUBA, where (1) it is not clear that LUBA's remand rendered the plan amendments ineffective and (2), even if the amendments are ineffective, the unamended plan provisions include similar operative language that arguably prohibits the challenged permit decision. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

26.6 LUBA Jurisdiction – Mootness. LUBA will dismiss as moot appeals of ordinances adopting a city's comprehensive plan and land use regulations, where those ordinances are superseded by county plan and zoning regulations encompassing the same geographic area. *McGreer v. City of Rajneeshpuram*, 46 Or LUBA 607 (2004).

26.6 LUBA Jurisdiction – Mootness. A decision that effectively withdraws or repeals an earlier decision finding that a disputed berm requires a county permit, and that reserves final judgment on that issue to a subsequent decision, moots an appeal of the earlier decision. *Grabhorn v. Washington County*, 46 Or LUBA 672 (2004).

26.6 LUBA Jurisdiction – Mootness. An appeal of a resolution that authorizes a city to acquire property is not moot where the city has acquired only a part of the property that the resolution authorizes the city to purchase. *Willamette Oaks, LLC v. City of Eugene*, 46 Or LUBA 813 (2004).

26.6 LUBA Jurisdiction – Mootness. An appeal of a county decision verifying a nonconforming use is not necessarily moot simply because the subject property is annexed into a city after the appeal to LUBA is filed. Although city annexation means that the county loses jurisdiction over the subject property, annexation does not affect the validity of the county decision, and LUBA's review of the county decision will continue to have a practical effect on the parties. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

26.6 LUBA Jurisdiction – Mootness. Plan amendment and development approvals that are contingent upon voter approval of an annexation are not necessarily mooted by failure of the annexation election, where the plan amendment and development approvals are not contingent upon a specific election, and may yet take effect if there is a successful future annexation referral. *Mason v. City of Corvallis*, 45 Or LUBA 682 (2003).

26.6 LUBA Jurisdiction – Mootness. LUBA will dismiss as moot an appeal of a permit that expired by operation of a local rule during the three-year period when the parties had stipulated to suspend the appeal before LUBA. *Rest Haven Memorial Park v. City of Eugene*, 44 Or LUBA 228 (2003).

26.6 LUBA Jurisdiction – Mootness. Where the challenged permit has expired, LUBA's decision on the merits of an appeal of the permit would have no effect on the rights or obligations of the parties under the permit, and would constitute an advisory opinion. LUBA has no jurisdiction to render advisory opinions. *Rest Haven Memorial Park v. City of Eugene*, 44 Or LUBA 231 (2003).

26.6 LUBA Jurisdiction – Mootness. Findings adopted after a land use decision is appealed to LUBA cannot support that decision, and do not moot the appeal. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 546 (2003).

26.6 LUBA Jurisdiction – Mootness. LUBA will consider documents that are not included in the record in deciding whether an appeal is moot. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000).

26.6 LUBA Jurisdiction – Mootness. Where LUBA has determined in a prior earlier appeal that a conditional use permit has expired, a subsequent appeal challenging a city decision that refuses to revoke the conditional use permit or delete certain conditions of approval in the conditional use permit is moot. *Willhoft v. City of Gold Beach*, 39 Or LUBA 353 (2001).

26.6 LUBA Jurisdiction – Mootness. Where a local government adopts modified findings in support of a land use compatibility statement and the modified findings are appealed to LUBA, an earlier appeal of the land use compatibility statement will be dismissed as moot because review of the earlier decision would have no practical effect. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

26.6 LUBA Jurisdiction – Mootness. Petitioners' appeal of a zone change approval is not rendered moot by a contemporaneous comprehensive plan amendment that redesignates the subject property from "Urban Area Reserve" to "Urban Area." Although a county cannot allow more intensive uses on property than are allowed by the plan, it may impose more restrictive zoning than would be permitted under the plan. *Alliance for Responsible Land Use v. Deschutes County*, 33 Or LUBA 12 (1997).

26.6 LUBA Jurisdiction – Mootness. Issues raised concerning a local government's interpretation of code demolition delay provisions are moot if (1) no stay of the challenged decision was requested from or granted by LUBA, the historic building in question was demolished, and petitioner does not contend it could be restored; or (2) even under petitioner's suggested interpretation of the demolition delay provisions, the demolition delay period has expired. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

26.6 LUBA Jurisdiction – Mootness. Where a code provision is challenged on the basis that it is inconsistent with the requirements of the statute it implements, but the code provision is subsequently amended so that it is consistent with the statute, the challenge to the prior code provision is moot. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

26.6 LUBA Jurisdiction – Mootness. Where the trees that are the subject of the challenged city decision authorizing removal of trees within a city right-of-way have been cut and removed, LUBA review will have no practical effect, and LUBA will dismiss the appeal as moot. *Gettman v. City of Bay City*, 28 Or LUBA 121 (1994).

26.6 LUBA Jurisdiction – Mootness. Where a local government renders a final decision approving an application for land use approval, and that decision is appealed to LUBA, the LUBA appeal is not rendered moot by withdrawal of the application for land use approval, where the local code does not make it clear that withdrawal of the application in such circumstances has any legal effect on the local government's final decision. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

26.6 LUBA Jurisdiction – Mootness. A LUBA appeal of a local government decision applying local code historic landmark and demolition delay provisions is not moot, simply because those provisions involve voluntary efforts to preserve historic resources and do not authorize the local government to prohibit demolition. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

26.6 LUBA Jurisdiction – Mootness. Allegations that a local code provision consolidating commonly owned parcels conflicts with ORS 92.017, which provides that a lawfully created lot or parcel shall remain a discrete lot or parcel, are rendered moot and provide no basis for reversal or remand, where the parcels in question were combined in an approved and recorded plat. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

26.6 LUBA Jurisdiction – Mootness. Where a challenged local government land use decision has been rescinded by the local government, and the decision rescinding the challenged decision has not been appealed, any decision LUBA might reach on the merits of the challenged decision would be without practical effect and LUBA will dismiss the appeal as moot. *Heiller v. Josephine County*, 25 Or LUBA 555 (1993).

26.6 LUBA Jurisdiction – Mootness. In determining whether a land use decision is moot, the question is whether a decision by LUBA on the merits would resolve merely an abstract question and be without practical effect. *Forest Highlands Neigh. Assoc. v. City of Lake Oswego*, 24 Or LUBA 215 (1992).

26.6 LUBA Jurisdiction – Mootness. Where it is not clear from the local code that the applicant's withdrawal of a permit application after the local government makes a decision approving it has any effect on that decision, the withdrawal does not in itself make an appeal of such decision to LUBA moot. *Berg v. Linn County*, 22 Or LUBA 507 (1992).

26.6 LUBA Jurisdiction – Mootness. When LUBA's decision on the merits of an appeal will be without practical effect, LUBA will dismiss the appeal as moot. LUBA does not have authority in these circumstances to remand the challenged decision to the local government with instructions to dismiss the local proceedings as moot. *Barr v. City of Portland*, 22 Or LUBA 504 (1991).

26.6 LUBA Jurisdiction – Mootness. Where it is not clear from the local code that the applicant's withdrawal of a permit application *after* the local government makes a decision approving it has any effect on that decision, the withdrawal does not necessarily make an appeal of such decision to LUBA moot. *Gilson v. City of Portland*, 22 Or LUBA 343 (1991).

26.6 LUBA Jurisdiction – Mootness. LUBA does not have authority to take official notice of adjudicative facts, as set out in OEC 201. LUBA's review is limited by ORS 197.830(13)(a) to the record of the proceeding below, except in instances where an evidentiary hearing is authorized by ORS 197.830(13)(b), and where facts outside the record are essential to determining whether LUBA has jurisdiction or whether an appeal is moot. *Blatt v. City of Portland*, 21 Or LUBA 337 (1991).

26.6 LUBA Jurisdiction – Mootness. Where a subsequent local government decision is substantially identical to a prior decision, is based on the same findings and evidentiary record and does not purport to supersede or rescind the earlier decision, the subsequent decision does not moot an appeal to LUBA challenging the earlier decision. *Tice v. Josephine County*, 21 Or LUBA 550 (1991).

26.6 LUBA Jurisdiction – Mootness. LUBA will dismiss an appeal as moot, where review would have no practical effect. *Davis v. City of Bandon,* 19 Or LUBA 526 (1990).

26.6 LUBA Jurisdiction – Mootness. Where a moratorium challenged at LUBA expires, but the moratorium has been extended by a subsequent moratorium which is the subject of a later LUBA appeal and the subsequent moratorium is also likely to expire before a final decision can be issued in the LUBA appeal challenging that moratorium, LUBA's decision in the appeal challenging the first moratorium may influence the local government's decision to adopt additional moratoria and, therefore, may have practical effect. *Davis v. City of Bandon,* 19 Or LUBA 526 (1990).

26.6 LUBA Jurisdiction – Mootness. The exception to the judicial doctrine of mootness to provide guidance to administrative agencies in cases involving the public welfare has been significantly narrowed by the Oregon Supreme Court. If the only reason for continuing with an appeal challenging an expired moratorium was the public interest in knowing whether the expired moratorium was properly enacted, the appeal would have to be dismissed as moot. *Davis v. City of Bandon*, 19 Or LUBA 526 (1990).

26.6 LUBA Jurisdiction – Mootness. Where a local government adopts successive moratoria with effective dates which guarantee LUBA will be unable to reach the merits of a challenged moratorium before it expires, and petitioner does everything possible to bring the appeal to a conclusion before the challenged moratorium expires and is replaced by another moratorium, the exception to the judicial doctrine of mootness for cases capable of repetition yet evading review is applicable. *Davis v. City of Bandon*, 19 Or LUBA 526 (1990).

26.6 LUBA Jurisdiction – Mootness. Petitioners' appeal of a decision adopting a moratorium is not rendered moot by the expiration of the moratorium, where invalidation of the challenged moratorium may entitle petitioners to have their application for land development approval reviewed under standards in effect when the challenged moratorium was adopted, rather than under subsequently adopted land use regulations. *Davis v. City of Bandon*, 19 Or LUBA 523 (1990).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where a county adopts an ordinance that amends its comprehensive plan map in conjunction with a city's urban growth boundary (UGB) amendment, and the county's ordinance is submitted in conjunction with the city's UGB amendment to the Department of Land Conservation and Development for review, under ORS 197.825(2)(c)(A), LUBA does not have jurisdiction to review the county's decision. *Swalley Irrigation District v. Deschutes County*, 59 Or LUBA 192 (2009).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. ORS 215.780(2) and ORS 197.835(6) and (7) together limit LUBA's scope of review when considering an appeal of a post-acknowledgement plan amendment to impose reduced minimum lot or parcel sizes in an EFU zone pursuant to ORS 215.780(2) to exclude review for statewide planning goal compliance, where the reduced minimum lot or parcel sizes have already been reviewed for compliance with the statewide planning goals by the Land Conservation and Development Commission under ORS 215.780(2) and found to comply with the statewide planning goals. *Thompson v. Umatilla County*, 54 Or LUBA 531 (2007).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Under former OAR 660-025-0040(2), LUBA has jurisdiction over issues that do not involve compliance with the statewide planning goals. *Gordon v. Polk County*, 53 Or LUBA 618 (2007).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Under 2003 statutes, LCDC and LUBA both have jurisdiction to review land use decisions that are adopted in whole or in part to comply with periodic review. LCDC reviews such decisions to ensure, among other things, that the local government's plans and land use regulations are "achieving the statewide planning goals." ORS 197.628(3)(d); OAR 660-025-0070(4). *Century Properties, LLC v. City of Corvallis*, 50 Or LUBA 691 (2005).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. LUBA's scope of review over periodic review land use decisions extends to all legal issues that are properly within LUBA's statutory scope of review, but it does not include review for compliance with statewide planning goals or other questions that are within LCDC's scope of review in periodic review. *Century Properties, LLC v. City of Corvallis*, 50 Or LUBA 691 (2005).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. LUBA's scope of review under ORS 197.835(9) must be read together with and is limited by ORS 197.825(2)(c), which excludes periodic review matters over which LCDC has review authority under ORS 197.628 to 197.650. Under those statutes, a city land use decision could be narrowly tailored to comply with a periodic review work task, and still be reversible by LUBA because it exceeds the city's jurisdiction, is based on an improper construction of a law that LCDC does not consider in periodic review or because the city committed procedural errors in adopting the decision. *Century Properties, LLC v. City of Corvallis*, 50 Or LUBA 691 (2005).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. A Land Conservation and Development Commission (LCDC) periodic review order that merely makes assumptions about a local ordinance, but does not attempt to resolve an ambiguity, is not identical to an issue before LUBA regarding the proper interpretation of that ambiguous ordinance, and issue preclusion does not bar

LUBA's consideration of the interpretive issue. *Flying J. Inc. v. Marion County*, 49 Or LUBA 28 (2005).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. A minor dispute, which was withdrawn before a decision was made, regarding the zoning of 2.2 acres in a Land Conservation and Development Commission (LCDC) periodic review order concerning the rural community designation of a large interchange area is not essential to a final decision on the merits in the order. Therefore, issue preclusion does not bar LUBA's consideration of the issue. *Flying J. Inc. v. Marion County*, 49 Or LUBA 28 (2005).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Goal 14, factors 3 through 7 implicitly require a determination that the sites chosen to be included in an urban growth boundary (UGB) are better than other alternative sites that are also considered for inclusion and rejected. Therefore, a local code provision requiring a demonstration that "the recommended site was better than alternative sites," does not "go further" or require more than the requirements of Goal 14, and assignments of error concerning that local code provision therefore involve "matters" that fall within the Land Conservation and Development Commission's exclusive jurisdiction in periodic review. *City of West Linn v. Metro*, 49 Or LUBA 403 (2005).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. If the Metropolitan Service District's authority to amend a regional plan to mandate certain zoning protections for industrial lands were solely a question of whether the regional plan itself prohibits such mandates, that question would likely be an issue that is exclusively within the Land Conservation and Development Commission's exclusive jurisdiction in a pending periodic review of the amendment. However, where the question of whether the regional plan prohibits such mandates is intertwined with the question of whether other legal authorities prohibit such mandates, and LUBA has jurisdiction to consider whether those other legal authorities prohibit such mandates, LUBA also has jurisdiction to consider whether the regional plan prohibits the mandates. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. There is nothing in the language of ORS 197.025(1) and 268.385(1) that imposes a higher obligation on the Metropolitan Service District in performing its coordination obligation than is imposed under the Goal 2 coordination obligation. Therefore, in performing periodic review of a regional plan amendment, the Land Conservation and Development Commission will resolve the question of whether the Metropolitan Service District properly coordinated its decision, and LUBA does not have jurisdiction to consider that issue in a LUBA appeal of the same regional plan amendment. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. A county counsel stipulation in a mandamus proceeding zoning of property required the exercise of policy or legal judgment because the legal effect of an LCDC order on the property's zoning was not clear. *Flying J, Inc. v. Marion County*, 47 Or LUBA 637 (2004).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Even assuming that a county decision in response to a periodic review work task includes matters within LUBA's scope of review,

LUBA has no jurisdiction to review the county decision where petitioners fail to appeal the county decision to LUBA within the time specified in ORS 197.830(9). *Colony v. Wallowa County*, 46 Or LUBA 586 (2004).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Assignments of error arguing that an ordinance adopted to satisfy a periodic review work task does not comply with Goals 2 and 14 are matters subject to the exclusive jurisdiction of the Land Conservation and Development Commission. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where county comprehensive plan standards for identifying agricultural land implement the Goal 3 definition of agricultural land, and an evidentiary challenge to a finding under the comprehensive plan standards that certain land is agricultural land is inseparable from the question of whether that land is agricultural land under Goal 3, LUBA lacks jurisdiction to address the challenge under the county's comprehensive plan standards. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. The Land Conservation and Development Commission has exclusive jurisdiction to review allegations that a county's proceedings under periodic review failed to comply with Goal 1 and LCDC's rules for conducting periodic review. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. LUBA has exclusive jurisdiction to review allegations that a county's proceedings failed to comply with procedural requirements that are independent of goal or administrative-rule based procedural requirements. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where the challenged decision is adopted to fulfill a periodic review work task, and the issue before LUBA can be framed as either (1) a matter of compliance with a statute, comprehensive plan or land use regulation or (2) a matter of compliance with a statewide planning goal or administrative rule, LUBA has jurisdiction over the issue only if the statutory, plan or code obligation goes beyond or is different from the obligation imposed by the goal or rule. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. An argument that a county comprehensive plan amendment adopted to fulfill a periodic review work task is inconsistent with a city comprehensive plan provision is an issue that is cognizable as a Goal 2 consistency issue, and thus is an issue that is within LCDC's exclusive jurisdiction. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Findings challenges are necessarily derivative of the underlying criteria the findings address. Where the county code requires adoption of findings supporting legislative decisions, whether jurisdiction to review an adequate findings challenge in a legislative decision adopted to fulfill a periodic review work task lies with LUBA or LCDC depends on whether the findings address goal or rule compliance issues subject to LCDC's exclusive jurisdiction. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

26. 7 LUBA Jurisdiction – Effect of LCDC Proceedings. A local code requirement for findings demonstrating that legislative decisions are "in the public interest and will be of general public benefit" does not implicate any Goal or rule requirements, and thus a challenge that the local government failed to adopt adequate findings addressing that criterion in adopting a decision to fulfill a periodic review work task is subject to LUBA's exclusive jurisdiction. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. ORS 197.090(2) requires DLCD to obtain approval from LCDC prior to filing an appeal with LUBA, but allows DLCD to obtain approval after the fact if the decision being appealed becomes final less than 15 days before the next LCDC meeting or no meeting is scheduled during the appeal period. However, nothing in the statute indicates that the timing of approval has jurisdictional significance, or that LUBA loses jurisdiction over the appeal if DLCD erroneously obtains after-the-fact approval rather than prior approval. *DLCD v. Douglas County*, 40 Or LUBA 604 (2001).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Under ORS 197.644(2) and OAR 660-025-0040, it is possible for the Land Conservation and Development Commission and LUBA to have concurrent jurisdiction over the same land use decision, albeit each may have exclusive jurisdiction over different issues arising from the decision. *DLCD v. City of McMinnville*, 40 Or LUBA 591 (2001).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. LUBA has jurisdiction under ORS 197.644(2), ORS 197.825(2)(c) and OAR 660-025-0040(1) over a decision amending a city's comprehensive plan housing inventory, notwithstanding that the city is undergoing periodic review, where the decision was not adopted to implement the city's periodic review work program or any work program tasks. *DLCD v. City of McMinnville*, 40 Or LUBA 591 (2001).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. In reviewing a land use decision, LUBA's scope of review does not include matters over which LCDC has acknowledgment review authority under ORS 197.251. *Citizens Against Irresponsible Growth v. Metro*, 40 Or LUBA 426 (2001).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where a transportation plan has been submitted to LCDC for acknowledgment review and LCDC has conducted that review with regard to Goal 12 and the Transportation Planning Rule (TPR), LUBA does not have authority to thereafter review the regional transportation plan for compliance with the TPR. That limit on LUBA's scope of review is not affected by the fact that the TPR was adopted to implement both Goal 12 and the ORS 197.712(2)(e) obligation concerning public facility plans, where the statutory obligation is not shown to impose transportation planning obligations that are different than those imposed by Goal 12. *Citizens Against Irresponsible Growth v. Metro*, 40 Or LUBA 426 (2001).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. LUBA does not have jurisdiction to review a regional transportation plan to determine whether it is consistent with a regional framework plan consistency requirement, where such consistency is also required by Goal 2 and

LCDC has jurisdiction to review the regional framework plan and regional transportation plan for compliance with Goal 2. *Citizens Against Irresponsible Growth v. Metro*, 40 Or LUBA 426 (2001).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. A regional framework plan requirement for "findings" that a transportation plan is consistent with the regional framework plan is not within LUBA's scope of review where both plans have been submitted to LCDC for acknowledgment review under ORS 197.251. LCDC's review for plan-to-plan consistency under Goal 2 either includes review of the "findings" requirement or renders it legally irrelevant. *Citizens Against Irresponsible Growth v. Metro*, 40 Or LUBA 426 (2001).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where a regional transportation plan that is submitted to LCDC for acknowledgment review under ORS 197.251 is also appealed to LUBA, and the issues raised in the petition for review arguably are within LCDC's jurisdiction under ORS 197.825(2)(c), it is appropriate to suspend the LUBA appeal for 120 days pursuant to ORS 197.840(1) and (4). *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 807 (2001).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Although a decision may qualify as a land use decision subject to LUBA review, ORS 197.825(2)(c) provides that LUBA lacks jurisdiction to consider statewide planning goal compliance issues in conducting that review, where the challenged decision is also subject to review by LCDC under ORS 197.251. *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. LUBA has jurisdiction to resolve goal compliance challenges to quasi-judicial post-acknowledgment plan amendments notwithstanding that those amendments rely on data developed for work program tasks that are undergoing periodic review. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where the petition for review challenging a post-acknowledgment decision raises an issue concerning the propriety of the city relying on documents that were prepared for a pending periodic review, the issue of whether ORS 197.644(2) and OAR 660-025-0040 deprive LUBA of jurisdiction to review the challenged decision is necessarily presented and may be included in a state agency brief submitted under ORS 197.830(7). *Citizens for Florence v. City of Florence*, 34 Or LUBA 793 (1998).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. During periodic review, the existing, acknowledged versions of the county's plan and zoning ordinance continue to apply until they are amended as a result of the acknowledgment of a final decision. Where periodic review is ongoing, the county may amend its plan and zoning map by redesignating and rezoning property to any existing acknowledged designation or zone, as long as the amendment does not violate any statute, rule or statewide planning goal, and LUBA has jurisdiction to review such amendments. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Prior to the submission of a petition for review, if LUBA cannot tell whether petitioners' appeal will include issues that do not relate

to goal compliance, a motion to dismiss for lack of jurisdiction will not be allowed. *Torgeson v. Clackamas County*, 31 Or LUBA 554 (1996).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. LUBA's jurisdiction over appeals of decisions arising out of the periodic review process is limited to matters that do not involve compliance with the goals. *Torgeson v. Clackamas County*, 31 Or LUBA 554 (1996).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where the county converted its periodic review procedures from those established under 1989 statutes to the procedures established by 1991 statutes, and the challenged decisions were "additional work" done by the county as provided for in Oregon Laws 1993, chapter 435, section 1(3), LUBA's jurisdiction over those decisions is governed by the 1991 statute, which grants LCDC exclusive jurisdiction to review completed work program tasks. *Torgeson v. Clackamas County*, 31 Or LUBA 554 (1996).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Under Oregon Laws 1993, chapter 435, section 1, where a county submitted a final periodic review order to DLCD prior to December 31, 1993, and there was no final disposition of the order by that date, the county's final periodic review order was "under review" by DLCD on December 31, 1993. *Torgeson v. Clackamas County*, 31 Or LUBA 554 (1996).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where the notices of intent to appeal a decision adopted by the city as part of a periodic review work program suggest that petitioners intend to raise challenges which are unrelated to goal compliance, LUBA will retain jurisdiction over those issues, and a motion for continuance under ORS 197.840 will be denied. *Lewis v. City of Portland*, 31 Or LUBA 513 (1996).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. LCDC does not have exclusive jurisdiction over all issues arising out of a periodic review work program; under OAR 660-25-040(1), LUBA retains jurisdiction over matters that do not involve compliance with the goals. *Lewis v. City of Portland*, 31 Or LUBA 513 (1996).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Under OAR 660-25-040, while LCDC has exclusive authority to review local government work task decisions for goal compliance, LUBA retains jurisdiction to review land use decisions for issues that do not involve goal compliance. *Bice v. Jackson County*, 30 Or LUBA 439 (1995).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. ORS 197.825(2), which excludes from LUBA's jurisdiction those matters over which LCDC has review authority, does not alter LUBA's continuing jurisdiction over non-goal compliance issues. *Bice v. Jackson County*, 30 Or LUBA 439 (1995).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Petitioner's argument that a decision to approve a building permit is a land use decision because the decision requires the application of a LCDC enforcement order fails where the enforcement order does not establish land use standards for the issuance of building permits. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where, under applicable 1991 statutory provisions, (1) a local government elected to proceed with periodic review under the 1989 statutes that were in effect when its periodic review was initiated, and (2) a comprehensive plan and land use regulation amendment adopted as part of such periodic review is appealed to LUBA, LUBA's review is governed by the statutes in effect in 1989. *Williams v. Clackamas County*, 27 Or LUBA 602 (1994).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Under applicable 1989 statutory provisions, matters subject to periodic review by DLCD were excluded from LUBA's jurisdiction. Under ORS 197.640(3)(1989), where a plan or land use regulation amendment is subject to periodic review, DLCD has review authority over matters concerning the amendment's compliance with the statewide planning goals. *Williams v. Clackamas County*, 27 Or LUBA 602 (1994).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. LUBA does not have jurisdiction to review LCDC acknowledgment orders. ORS 197.825(2)(c). Subject to review by the appellate courts, once an LCDC acknowledgment order is issued, it forecloses an appeal to LUBA on any issue that was raised or could have been raised in the LCDC acknowledgment proceedings concerning goal compliance. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. LUBA no longer has authority to defer its review of appeals challenging decisions submitted for LCDC review under the pre-1991 periodic review process, because Oregon Laws 1993, chapter 435, repeals the statute authorizing LCDC continuation of previously initiated periodic reviews under the pre-1991 periodic review process. *Williams v. Clackamas County*, 26 Or LUBA 612 (19/93).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where the challenged local government decision is submitted to DLCD for periodic review pursuant to ORS 197.640 to 197.650(1989), LUBA only has review authority over those issues raised in the petition for review that are not subject to periodic review. *Williams v. Clackamas County*, 25 Or LUBA 812 (1993).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where it is unclear whether issues other than ones subject to periodic review will be raised in the petition for review, LUBA will not dismiss the appeal on the basis that the challenged decision has been submitted to DLCD for periodic review, but rather will defer its consideration of the challenged decision pending completion of periodic review. *Williams v. Clackamas County*, 25 Or LUBA 812 (1993).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. In periodic review, DLCD is not limited in its goal compliance review of post-acknowledgment plan and land use regulation amendments to particular goal requirements that may have triggered a periodic review factor under ORS 197.640(3) (1989). Therefore, while LUBA has concurrent jurisdiction to review post-acknowledgment plan and land use regulation amendments submitted for periodic review, under ORS 197.825(2)(c) (1989) LUBA's scope of review over such amendments does not include review for goal compliance. *1000 Friends of Oregon v. City of Troutdale*, 23 Or LUBA 219 (1992).

26.7 LUBA Jurisdiction – Effect of LCDC Proceedings. Where periodic review of comprehensive plan and land use regulation amendments is pending before the Department of Land Conservation and Development (DLCD) and those amendments are also appealed to LUBA, ORS 197.840(1)(a) and (4) provide that LUBA may defer its review until DLCD completes periodic review. *1000 Friends of Oregon v. City of Troutdale*, 20 Or LUBA 563 (1991).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. ORS 215.429(2) and ORS 197.015(10)(e)(B) appear to divest LUBA of jurisdiction over local government decisions issued after a petition for a writ of mandamus has been filed. Where a mandamus proceeding regarding a land use application and a LUBA appeal of the local government's decision on the same application are simultaneously pending, LUBA will grant a continuance of the 77-day period for issuance of its final opinion under ORS 197.830(14) until the mandamus proceeding has concluded. Proceeding with the LUBA appeal could result in conflicting decisions, and therefore possibly a "miscarriage of justice" under ORS 197.840(2)(a). *Kine v. Deschutes County*, 79 Or LUBA 1035 (2019).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. It would be inconsistent with sound principles of judicial review, ORS 197.805, for LUBA to resolve a constitutional challenge to the procedure a city uses to approve an annexation, in a direct appeal of the city decision approving the annexation, when the same issue is pending before a circuit court in a writ of mandamus proceeding between the same parties, seeking to compel the city to approve the annexation under a different procedure. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. A circuit court order that requires the two owners of a common tract to enter into an agreement with each other to pay taxes and maintenance costs does not preclude a county from interpreting a partition condition of approval to require one or both tract owners to enter into separate agreements with the county to ensure maintenance of the common tract, or obligate the county to interpret the condition of approval to require the two owners to enter into an agreement with each other. *Kuhn v. Deschutes County*, 74 Or LUBA 190 (2016).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. A remedy that would remove the matter entirely from LUBA's review, such as requesting that a circuit court vacate a judgment related to a county land use decision, is not a remedy available "by right" that a petitioner must exhaust prior to seeking LUBA's review over the related land use decision. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. While a circuit court has exclusive authority to modify a 1976 decree recognizing a vested right to development, where in 2013 the applicant seeks county approval to alter or expand that vested right and the county enters into a stipulation with the applicant approving the proposed alteration or expansion, that the circuit court agrees to modify the 1976 decree to reflect the stipulation does not change the fact that the stipulation itself is an alteration or expansion of a nonconforming use, and hence a land use decision subject to LUBA's exclusive jurisdiction. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. LUBA lacks authority to review a circuit court order or action. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Where a petition for writ of mandamus to compel a decision approving a permit application was filed with the circuit court

before the earliest date on which the county took action to reduce its final decision to writing, the circuit court has exclusive jurisdiction regarding the permit application. *Rogue Advocates v. Josephine County*, 73 Or LUBA 98 (2016).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Where a petitioner's notice of intent to appeal a decision was filed at LUBA after the board of county commissioners was unable to take action on a local appeal of a planning director's decision that approved a permit application, but before the board of county commissioners reduced its decision to writing, the notice of intent to appeal was filed prematurely. Where the permit applicant files a petition for writ of mandamus more than 14 days after the board of commissioners' hearing at which they failed to take action, and before the board of commissioners approved the minutes of that hearing, the circuit court has exclusive jurisdiction regarding the permit application, and LUBA does not have jurisdiction over the appeal. ORS 215.429(2) and (4). *Rogue Advocates v. Josephine County*, 73 Or LUBA 98 (2016).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. A stipulated agreement between a local government and a landowner to resolve a land use dispute can concern the application of land use regulations, and thus constitute a "land use decision" as defined at ORS 197.015(10)(a), even in circumstances where the stipulated agreement is the basis to resolve a related action in circuit court. *Rogue Advocates v. Jackson County*, 73 Or LUBA 382 (2016).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. LUBA has exclusive jurisdiction to review appeals of a land use decision, in order to resolve the parties' arguments regarding whether the decision complies with applicable land use standards. Where a circuit court accepts the stipulated agreement of a county and a property owner to resolve a civil proceeding between the parties, the circuit court does not engage in any kind of review of the stipulation against land use standards, and the circuit court's acceptance of the stipulation does not necessarily mean that the stipulation is not a land use decision subject to LUBA's review. *Rogue Advocates v. Jackson County*, 73 Or LUBA 382 (2016).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. LUBA has exclusive jurisdiction over a city council decision that amends the city's Goal 5 inventory of historic resources to remove property, notwithstanding that following the city council decision a circuit court decided a mandamus action in the property owner's favor based on the stipulation of the parties that the city council had removed the property from the inventory. Because the circuit court judgment did not determine that the property owner was entitled to removal from the inventory under state law, but simply reflected the parties' stipulation regarding the outcome of the city council's decision, LUBA's review of the city council decision cannot conflict with the circuit court judgment. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Under ORS 215.429(2), once a petition for writ of mandamus is filed under the 120/150-day rule, the circuit court has exclusive jurisdiction over a permit application and any decision rendered on that permit application. Where a permit decision has been appealed to LUBA and withdrawn by the county for reconsideration under 197.830(13)(b), and the permit applicant files a petition for writ of mandamus arguing a

violation of the 120/150-day rule, the county loses jurisdiction to reconsider the permit decision and LUBA loses jurisdiction as well. However, LUBA will deny a motion to dismiss the appeal where the county has moved to dismiss the mandamus proceeding, contending that the 120/150-day rule only applies to the county's initial permit decision that was appealed to LUBA and not to a reconsidered decision under 197.830(13)(b). In that circumstance the county and LUBA would again have jurisdiction over the permit application and decision if the mandamus proceeding is dismissed, and LUBA will await a final decision on the county's motion to dismiss before taking final action on the applicant's motion to dismiss. *Columbia Riverkeeper v. Clatsop County*, 63 Or LUBA 547 (2011).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. ORS 227.179(2) provides that upon filing a petition for writ of mandamus, "jurisdiction for all decisions regarding the application * * * shall be with the circuit court." Therefore, after petitioner filed a petition for writ of mandamus in circuit court arguing that the city violated the 120-day requirement of ORS 227.178(1), the circuit court has exclusive jurisdiction over the application, and the city lacks jurisdiction thereafter to issue a decision regarding the application. *Stewart v. City of Salem*, 61 Or LUBA 77 (2010).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Because ORS 227.179(2) divests a city from jurisdiction to issue a decision "regarding the application" after a petition for writ of mandamus is filed, and LUBA's review of the merits of that post-writ decision would also result in a decision "regarding the application," ORS 227.179(2) also divests LUBA of jurisdiction to review the city's post-writ decision. *Stewart v. City of Salem*, 61 Or LUBA 77 (2010).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Where petitioner filed a writ of mandamus action against the city for allegedly failing to issue a permit decision within 120 days of the date the application was complete, and an appeal of the circuit court decision denying the writ is pending before the Court of Appeals, LUBA will suspend petitioner's appeal of the city's post-writ decision denying the permit pending resolution of the Court of Appeals mandamus proceeding, in the interest of judicial economy and consistent with sound principles of judicial review. *Stewart v. City of Salem*, 61 Or LUBA 487 (2010).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. The jurisdiction of the circuit courts to enforce conditions of approval is not relevant where no enforcement action has been brought by the local government to enforce conditions of approval. *Just v. Linn County*, 59 Or LUBA 233 (2009).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. A circuit court decision in an unrelated case under Ballot Measure 37 based on stipulated facts is not binding on the county or LUBA in a later proceeding under a different Ballot Measure 37 claim where the relevant facts are disputed. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

26.8 LUBA Jurisdiction – Statute of Ultimate Repose. When a local government makes a statutory permit decision without providing a hearing as required by ORS 197.763(1), the local government has not provided a required hearing under ORS 197.830(6)(b) and the three-year statute of ultimate repose does not apply. *Michaels v. Douglas County*, 53 Or LUBA 16 (2006).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. The ORS 197.015(10)(e) exception to LUBA's jurisdiction for writs of mandamus issued pursuant to ORS 215.429 or 227.179 applies only when the writ is based on an alleged violation of the statutory 120-day deadline for issuing a final decision. A writ of mandamus filed for another reason does not deprive LUBA of jurisdiction over a land use decision approving a manufactured home subdivision, even if the writ involves the same property. *D & B Home Investments v. City of Donald*, 51 Or LUBA 1 (2006).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. When a local government enforces its own land use regulations through its own procedures, those actions may result in land use decisions that can be appealed to LUBA, and ORS 197.825(3)(a) does not divest LUBA of jurisdiction. When a local government decides to pursue enforcement of its local land use regulations in circuit court pursuant to ORS 197.825(3)(a), however, jurisdiction properly lies with the circuit court, and the determination to pursue enforcement in circuit court is not a land use decision. *Johnston v. Marion County*, 51 Or LUBA 250 (2006).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. When a local government makes a decision to enforce its regulations or not to enforce its regulations *in circuit court*, that decision of where to contest (or not contest) the land use issues is not a land use decision as defined by ORS 197.015(10). Conversely, when a local government makes a decision to enforce its regulations (or that no violation exists) *at the local level*, that decision may be a land use decision subject to our review, provided it meets the statutory definition of a land use decision. *Johnston v. Marion County*, 51 Or LUBA 250 (2006).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Where a local government has adopted a generally applicable procedure under which it corrects violations of a variety of local laws by filing actions in circuit court, a local government decision that an existing use of property does not constitute a violation of its zoning ordinance that would justify filing a circuit court action under that procedure is not a land use decision. *Wells v. Yamhill County*, 51 Or LUBA 659 (2006).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. An interpretation made by county counsel in a stipulated dismissal in a circuit court mandamus proceeding is not entitled to deference under ORS 197.829(1). *Flying J. Inc. v. Marion County*, 49 Or LUBA 28 (2005).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. A county counsel stipulation in a mandamus proceeding zoning of property required the exercise of policy or legal judgment because the legal effect of an LCDC order on the property's zoning was not clear. *Flying J, Inc. v. Marion County*, 47 Or LUBA 637 (2004).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. A county counsel stipulation in a mandamus proceeding that purports to determine the zoning of property is in essence a declaratory ruling interpreting an ambiguous ordinance concerning the zoning of property and is a final determination subject to LUBA's jurisdiction. *Flying J, Inc. v. Marion County*, 47 Or LUBA 637 (2004).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Under ORS 197.825(3)(a), a local government may elect to enforce its land use regulations, and if such an enforcement action is filed in circuit court, the court has jurisdiction to consider any land use issues that might arise. *Yost v. Deschutes County*, 37 Or LUBA 653 (2000).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. A local government decision not to institute action in circuit court to enforce its land use regulations is not itself a land use decision, provided the local government's decision is not rendered pursuant to a local procedure that necessarily leads to a land use decision, as defined by ORS 197.015(10)(a). *Yost v. Deschutes County*, 37 Or LUBA 653 (2000).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Where a local government's land use regulations make it clear that staff determinations describing the uses to which property may be put are informal decisions rather than final county decisions, and those decisions are rendered outside formal local government land use procedures for decision making and declaratory rulings, such decisions do not constitute land use decisions that may be appealed to LUBA. *Yost v. Deschutes County*, 37 Or LUBA 653 (2000).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. LUBA does not have jurisdiction over an appeal from a circuit court decision arising from a local government code enforcement proceeding. *Reeves v. City of Wilsonville*, 35 Or LUBA 253 (1998).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. LUBA does not have jurisdiction to enforce a circuit court injunction requiring that a structure be reduced in size. *Femling v. Coos County*, 34 Or LUBA 328 (1998).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Under *Murphy Citizens Advisory Com. v. Josephine County*, 325 Or 101, 934 P2d 415 (1997), a land use decision otherwise within LUBA's jurisdiction is not removed from LUBA's purview, pursuant to ORS 197.825(3), by a court order that is not a peremptory writ of mandamus. *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. The jurisdictional bar of ORS 197.015(10)(d) applies to both alternative and peremptory writs of mandamus, and excludes a local government decision issued in response to an alternative writ of mandamus from the definition of "land use decision." *Arnold v. Columbia County*, 32 Or LUBA 237 (1996).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Where a circuit court issues an order requiring the county to approve four land use applications, and that order is the culmination of a mandamus proceeding, the county's subsequent approvals of the applications are issued "in response to a writ of mandamus" for purposes of the jurisdictional bar of ORS 197.015(10)(d)(B), notwithstanding the fact that the court's order is not itself a writ of mandamus. *Estremado v. Jackson County*, 32 Or LUBA 206 (1996).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. The existence of a writ of mandamus remedy in circuit court under ORS 227.178(7) for delay in processing an application

does not affect either the city's review of the application or LUBA's jurisdiction if the remedy is not exercised. *Sullivan v. City of Woodburn*, 31 Or LUBA 192 (1996).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. When a petition for writ of mandamus is filed in circuit court pursuant to ORS 227.178(7), the city is divested of any jurisdiction to render a land use decision. When the circuit court issues the writ of mandamus, ordering the city to approve the underlying application, the city's order is not a land use decision over which LUBA has jurisdiction. *Milks v. City of Eugene*, 29 Or LUBA 502 (1995).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Where a mandamus proceeding seeking approval of a permit application under ORS 215.428(7) is pending, it is in the interest of judicial economy and consistent with sound principles governing judicial review, to suspend a LUBA appeal pending the outcome of the circuit court proceeding. *Cascade Pumice, Inc. v. Deschutes County*, 28 Or LUBA 787 (1995).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. If a land use decision is made in a local government proceeding to enforce its land use regulations, under ORS 197.825(1) LUBA has exclusive jurisdiction for initial review of that land use decision. If no appeal to LUBA is filed, or after any review by LUBA is complete and the local government's decision is affirmed, the local government may then seek to enforce its decision in a circuit court proceeding under ORS 197.825(3)(a). *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. Circuit court jurisdiction to grant declaratory relief does not include jurisdiction to make a land use decision in the process of granting declaratory relief. The appropriate local government must render any required land use decisions. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. If a circuit court transfers an appeal to LUBA under ORS 19.230(5), and LUBA's jurisdiction is contested, LUBA must determine whether it has jurisdiction over the challenged decision. If LUBA determines it has jurisdiction, there is no jurisdictional dispute to refer to the court of appeals. *Kaady v. City of Cannon Beach*, 26 Or LUBA 614 (1993).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. After a mandamus proceeding has been initiated pursuant to ORS 215.428(7), a county retains jurisdiction to make a "land use decision" on a pending permit application at any time before the circuit court issues a final judgment in the mandamus proceeding. Although made while circuit court mandamus proceedings are pending, such a "land use decision" is reviewable by LUBA under ORS 197.825(1). *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 507 (1993).

26.8 LUBA Jurisdiction – Effect of Circuit Court Proceedings. A stipulation between county officials and a permit applicant, entered into as part of circuit court mandamus proceedings under ORS 215.428(7), in which the county promises it will subsequently issue the requested permit subject to certain conditions, is not a land use decision subject to LUBA's review. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 507 (1993).

26.9 LUBA Jurisdiction – Statute of Ultimate Repose. Where a hearing was required and provided, ORS 197.830(6)(a) applies, and the appeal period for appealing a PAPA may not exceed three years after the date of the decision. *Dobson v. City of Hines,* 80 Or LUBA 469 (2019).

26.9 LUBA Jurisdiction – Statute of Ultimate Repose. The general 10-year statute of ultimate repose at ORS 12.140 for commencing "actions" does not apply to appeals to LUBA. Proceedings before LUBA are not "actions" for purposes of ORS 12.140, but are proceedings comprehensively governed by ORS chapter 197, including the specific statue of ultimate repose for LUBA appeals at ORS 197.830(6). *Jones v. Douglas County,* 63 Or LUBA 261 (2011).

26.9 LUBA Jurisdiction – Statute of Ultimate Repose. Challenges to the correctness or validity of a previous permit decision that was not appealed amount to an impermissible collateral attack on a final land use decision. Such challenges do not provide a basis for reversal or remand of a later land use decision involving the same property. *Just v. Linn County*, 59 Or LUBA 233 (2009).

26.9 LUBA Jurisdiction – Statute of Ultimate Repose. The ORS 197.830(6) three-year statute of ultimate repose includes an exception to the three-year limit when notice of a hearing is not provided, but it does not include an exception when notice of a hearing is provided but the notice does not adequately describe the local government's final actions. *Salem Golf Club, Inc. v. City of Salem*, 58 Or LUBA 339 (2009).

26.9 LUBA Jurisdiction – Statute of Ultimate Repose. Where the local government failed to provide either (1) a "notice of a hearing" required by ORS 197.763 or (2) notice of an "administrative decision" required by ORS 197.195, ORS 197.830(6)(b) provides that the statute of ultimate repose in ORS 197.830(6)(a) does not apply. Failure to provide notice required by other statutes or by local codes do not provide an exception to the three-year statute of ultimate repose. *Kamp v. Washington County*, 51 Or LUBA 670 (2006).

26.9 LUBA Jurisdiction – Statute of Ultimate Repose. Notice of withdrawal of a permit application required by local ordinance is not "notice of a hearing" required by ORS 197.763, and failure to provide such notice of withdrawal does not invoke the exception to the statute of ultimate repose at ORS 197.803(6)(b). *Kamp v. Washington County*, 51 Or LUBA 670 (2006).

26.9 LUBA Jurisdiction – Statute of Ultimate Repose. Failure to provide notice of withdrawal of a permit application required by local ordinance is not a failure to provide the "notice of decision" required by the statutes governing limited land use decisions at ORS 197.195, for purposes of the statute of ultimate repose at ORS 197.830(6), where it is undisputed that the subject property is not within an urban growth boundary and for that reason alone a decision with respect to the application cannot be a limited land use decision. *Kamp v. Washington County*, 51 Or LUBA 670 (2006).

26.10 LUBA Jurisdiction – Effect of Ballot Measure 37 (ORS 197.352 (2005)). Under Measure 37, specifically under ORS 197.352(9) (2005), public entity decisions to modify or to waive land use laws in response to Measure 37 claims were not land use decisions and were therefore not reviewable by LUBA. Public entity decisions that were issued following those modification or waiver decisions, which applied modified land use laws or land use laws that were not waived under Measure 37 were land use decisions and were reviewable by LUBA. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.10 LUBA Jurisdiction – Effect of Ballot Measure 37 (ORS 197.352 (2005)). LUBA has jurisdiction to review decisions that post-date and rely on Ballot Measure 37 waivers, if those decisions apply land use laws that were not waived under Ballot Measure 37. However, in those appeals LUBA's scope of review does not include challenges to the underlying Ballot Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.10 LUBA Jurisdiction – Effect of Ballot Measure 37 (ORS 197.352 (2005)). Decisions under ORS 197.352(8) about whether land use laws should be or can be waived under Ballot Measure 37 are not land use decisions and are not reviewable by LUBA. But where questions arise about the scope of previously issued Ballot Measure 37 waivers in subsequent land use decisions that rely on those Ballot Measure 37 waivers, LUBA's scope of review includes resolving any ambiguities about the scope of a previously issued Ballot Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.10 LUBA Jurisdiction – Effect of Ballot Measure 37 (ORS 197.352). Where the state specifically waives only Goal 3 and related statutes and administrative rules, an argument that the state should also have waived Goals 7, 11 and 14 is beyond LUBA's scope of review and must be asserted in a different forum. The only question LUBA may decide is which goals and regulations the state actually waived. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

26.10 LUBA Jurisdiction – Effect of Ballot Measure 37 (ORS 197.352). A local government's decision determining that a subdivision application complies with all applicable land use regulations is not a decision under ORS 197.352(9) that is exempt from LUBA's jurisdiction; rather, the decision is a land use decision subject to LUBA's jurisdiction. *Welch v. Yamhill County*, 55 Or LUBA 697 (2007).

26.11 LUBA Jurisdiction – Effect of Ballot Measure 49. Where the county determined that petitioner had not established a right to construct a Measure 49 dwelling on the subject property, and the county did not apply any county siting standards, the county's decision is not a land use decision under ORS 195.318(1) and, thereby, is not subject to LUBA's jurisdiction. *Vannett Properties, LLC v. Lane County*, 78 Or LUBA 345 (2018).

26.11 LUBA Jurisdiction – Effect of Ballot Measure 49. A decision that approves the adjustment of a property line between two existing parcels that were previously created by partition authorized by a Ballot Measure 49 DLCD Final Order is not a decision "under" Section 11 of Measure 49, because the county did not review the property line adjustment application under the authority of Section 11. Rather, it reviewed the application under the county zoning ordinance criteria applicable to property line adjustments. *Friends of Yamhill County v. Yamhill County*, 74 Or LUBA 268 (2016).

26.11 LUBA Jurisdiction – Effect of Ballot Measure 49. Under Section 5(3) of Ballot Measure 49 (2007), a property owner may complete construction of a use that was authorized under a previously issued Ballot Measure 37 (2004) waiver, if the property owner can establish that he or she has a common law vested right to complete construction of a use that was authorized under a Ballot Measure 37 waiver. Under ORS 195.318(1), LUBA would likely not have jurisdiction to review a vested right determination under Subsection 5(3) of Measure 49, however, where the property owner claims to have a vested right based on a previously issued building permit, not a Ballot Measure 37 waiver, LUBA has review jurisdiction over a county decision that the property owner does not have a vested right under the building permit. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

26.11 LUBA Jurisdiction – Effect of Ballot Measure 49. Section 11 of Measure 49 requires local governments to apply both local and statutory standards that govern approvals of subdivisions, partitions and development applications based on Measure 49 homesite approvals, including a statutory requirement to cluster development. A decision that applies the standards set out in Section 11 is a decision "under" Section 11 for purposes of the jurisdictional exclusion in Section 16 of Measure 49, ORS 195.318(1), which provides that a determination "under" sections 5 to 11 of Measure 49 is not a land use decision. *Maguire v. Clackamas County*, 64 Or LUBA 288 (2011).

26.11 LUBA Jurisdiction – Effect of Ballot Measure 49 (ORS 195.300 to 195.336). Under the Court of Appeals' decision in *Pete's Mountain Homeowners Assn. v. Clackamas Cty.*, 227 Or App 140, 204 P3d 802, *rev den*, 346 Or 589, 214 P3d 821 (2009), where an application for subdivision relies on Ballot Measure 37 waivers, those waivers qualify as "standards and criteria" under the ORS 215.427(3)(a) goal-post statute, and the subdivision application is not subject to subsequently enacted standards and criteria. But Ballot Measure 49, which post-dates Ballot Measure 37 and is inconsistent with the ORS 215.427(3)(a) goal-post statute overrides the goal-post statute and limits the Ballot Measure 37 subdivision applicant to one of the three remedies specified in Ballot Measure 49. *Hoffman v. Jefferson County*, 60 Or LUBA 101 (2009).

26.11 LUBA Jurisdiction – Effect of Ballot Measure 49 (ORS 195.300 to 195.336). Decisions under Measure 49 are not land use decisions and are not subject to LUBA's jurisdiction. ORS 195.305(7); 195.318(1). *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.11 LUBA Jurisdiction – Effect of Ballot Measure 49 (ORS 195.300 to 195.336). Under ORS 195.305(7) local government decisions about the "nature and extent" of just compensation due under Ballot Measure 49 are not land use decisions. However, a local government decision maker's *understanding* that approval of a preliminary plat was a decision about the "nature and extent" of just compensation under Measure 49 has no bearing on whether the decision actually is a decision about the "nature and extent" of just compensation under Measure 49. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.11 LUBA Jurisdiction – Effect of Ballot Measure 49 (ORS 195.300 to 195.336). A preliminary subdivision plat approval decision that post-dates a vested rights determination under Measure 49 is a land use decision subject to LUBA's review and is not a decision concerning the "nature and extent of [just] compensation" under Measure 49. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

26.11 LUBA Jurisdiction – Effect of Ballot Measure 49 (ORS 195.300 to 195.336). In an appeal of a subdivision decision that relies on Ballot Measure 37 waivers and a Ballot Measure 49 vested rights decision, LUBA's scope of review includes resolving questions about the scope of the previously issued Ballot Measure 37 waiver. A decision about the scope of a previously issued Ballot Measure 37 waiver is not a decision about the "nature and extent of [just] compensation" under Measure 49 (ORS 195.305(7)) and is therefore subject to LUBA review. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

27.1 LUBA Procedures/Rules – Generally. Where a party does not appear at oral argument, that party's request for rehearing will be denied, and the cause will be deemed submitted without oral argument as to that party pursuant to OAR 661-010-0040(2). *Bohan v. City of Portland*, 80 Or LUBA 263 (2019).

27.1 LUBA Procedures/Rules – Generally. LUBA's docket is busy, and the best practice when seeking to reschedule oral argument is to contact LUBA to first obtain several alternate available oral argument dates and times to propose to the other parties. Otherwise, there is no guarantee that a date that all parties have agreed to will be available, and, in that circumstance, the Board will deny the request to reschedule oral argument. *Underwood v. Clackamas County*, 80 Or LUBA 1031 (2019).

27.1 LUBA Procedures/Rules – Generally. When some arguments presented at oral argument were not included in the petition for review LUBA will not consider those arguments. Given the inherent difficulty in "striking" portions of oral testimony, LUBA will focus its review on the issues framed in the petition for review, the evidence cited in the record, and the portions of the oral argument that discuss those issues and evidence. *Newbrook v. City of Portland*, 78 Or LUBA 73 (2018).

27.1 LUBA Procedures/Rules – Generally. If an exhibit is attached to the petition for review before LUBA, but that exhibit was not a part of the record made available to the local decision maker, LUBA may not consider it in resolving petitioner's assignment of error. ORS 197.835(2)(a). When the petitioner's argument relies on exhibits not in the record, it provides no basis for reversal or remand of the decision. *Newbrook v. City of Portland*, 78 Or LUBA 73 (2018).

27.1 LUBA Procedures/Rules – Generally. When a party raises an issue for the first time at oral argument LUBA will ignore all statements made at oral argument, by any party, that go beyond the issues framed in the briefs and the evidence cited in the record, and will confine its review to the issues framed in the briefs, the evidence cited in the record, and the portions of the oral argument that discuss those issues and evidence. *See* OAR 661-010-0040(1) and ORS 197.835(2)(a). *Conte v. City of Eugene*, 78 Or LUBA 289 (2018).

27.1 LUBA Procedures/Rules – Generally. LUBA will not suspend a proceeding where petitioners have not established that LUBA's resolution of the pending LUBA appeal would likely be rendered moot by a concurrently pending circuit court proceeding. Although a circuit court could ultimately decide, in a future remand proceeding from the Court of Appeals, to grant petitioners full injunctive relief which could potentially be in conflict with, or moot LUBA's ruling, where such an outcome is extremely likely, LUBA will not grant petitioners' motion for stay. LUBA is a creature of statute, and can exercise only those powers granted by the legislature, and according to ORS 197.805 and ORS 197.830(10)(a), LUBA's mandate is that "time is of the essence in reaching final decisions in matters involving land use." *Bishop v. Deschutes County*, 78 Or LUBA 1050 (2018).

27.1 LUBA Procedures/Rules – Generally. Delayed service of a certificate of compliance and a certificate of service to a party is a "technical violation" of LUBA's rules that provides no basis for LUBA to strike the response brief associated with the certificates, absent a showing that the

delayed service prejudiced a party's substantial rights. *Conte v. City of Eugene*, 77 Or LUBA 547 (2018).

27.1 LUBA Procedures/Rules – Generally. While LUBA and other public bodies have a statutory obligation to protect confidential archeological information in the record from public disclosure, LUBA lacks statutory authority to order private parties to the appeal to keep confidential information in their private possession from public disclosure. *Oregon Shores Conservation Coalition v. Coos County*, 75 Or LUBA 534 (2017).

27.1 LUBA Procedures/Rules – Generally. OAR 661-010-0045 permits LUBA to accept extra-record evidence in the case of disputed factual allegations in the parties' briefs, concerning "procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision." Where petitioners argue that LUBA should consider extra-record newspaper clippings under OAR 661-010-0045, but the extra-record evidence appears to not be connected to petitioners' sole procedural claim, LUBA will reject the proffered evidence. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

27.1 LUBA Procedures/Rules – Generally. LUBA does not distinguish between parties who are represented by lawyers and parties that appear on their own behalf, in determining whether the party took the required steps to preserve its right at LUBA to assign procedural error. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

27.1 LUBA Procedures/Rules – Generally. LUBA may extend the deadline for issuing its final opinion and order under ORS 197.840(1)(d) and (2), where an unresolved and threshold legal issue is pending before the circuit court in a challenge to a related city decision, and the outcome of that circuit court action will affect LUBA's resolution of the issues in the appeal before LUBA. *Marion County Fire District #1 v. City of Keizer*, 65 Or LUBA 440 (2012).

27.1 LUBA Procedures/Rules – Generally. LUBA does not consider arguments that are made for the first time at oral argument and are not included in the petition for review. *Freedman v. Lane County*, 64 Or LUBA 309 (2011).

27.1 LUBA Procedures/Rules – Generally. LUBA will not consider at oral argument power point slides or written copies of a party's oral argument, other than copies of materials already in the record. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

27.1 LUBA Procedures/Rules – Generally. Where one party moves to strike portions of another party's oral argument that allegedly raises new issues not presented in the briefs, given the difficulty of resolving disputes about what is a "new" issue and how to "strike" portions of oral argument, LUBA will view the motion as a request that LUBA focus its review on the issues framed in the briefs, the evidence cited in the record, and the portions of oral argument that discuss those issues and evidence. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

27.1 LUBA Procedures/Rules – Generally. When a party informs LUBA the day before oral argument that he wishes to appear by phone, but fails to call into LUBA's hearing room as directed by LUBA staff, LUBA will consider that the party has waived oral argument under OAR 661-010-

0040(2), conduct oral argument without his participation, and deny the party's later-submitted motion to file "written oral argument." *Kane v. City of Beaverton*, 61 Or LUBA 234 (2010).

27.1 LUBA Procedures/Rules – Generally. When a petitioner waits until the rebuttal portion of oral argument to respond to an argument that issues were waived under ORS 197.763(1) and 197.835(3) and provides only a general response that does not include citations to the record, LUBA will rule on the waiver argument as if there had been no response at all. *Boucot v. City of Corvallis*, 60 Or LUBA 57 (2009).

27.1 LUBA Procedures/Rules – Generally. When a dispute arises as to whether new issues were raised at oral argument, rather than submitting a formal motion to strike and response to the motion, the better practice is to briefly object at oral argument or submit a concise written objection. The purpose of the objection is not to convince LUBA that a new issue was raised, but simply to alert LUBA that a party believes a new issue was raised so that the LUBA will focus its attention on the issues presented in the briefs and the oral arguments that discuss the issues raised in the briefs. *NAAVE v. Washington County*, 59 Or LUBA 153 (2009).

27.1 LUBA Procedures/Rules – Generally. Parties may seek advice from LUBA's administrative staff, but parties assume the risk that the advice may be incorrect. Parties themselves are ultimately responsible for complying with LUBA's rules and deadlines. *Waluga Neighborhood Association v. City of Lake Oswego*, 59 Or LUBA 380 (2009).

27.1 LUBA Procedures/Rules – Generally. If a petition for review is delivered to the United States Postal Service and mailed to LUBA via "Priority Mail" it is mailed by "First Class Mail" and therefore filed on the date it was delivered to the United States Postal Service under OAR 661-010-0075(2)(a)(B), where the United States Postal Service defines "First Class Mail" to include "Priority Mail." *Canfield v. Lane County*, 59 Or LUBA 505 (2009).

27.1 LUBA Procedures/Rules – Generally. Whether the OAR 661-010-0030(1) requirement that a LUBA appeal be dismissed if the petition for review is not filed within the 21-day deadline established by that rule is a *jurisdictional* requirement or merely a *compulsory non-jurisdictional* basis for dismissing the appeal, the 10-day rule in OAR 661-010-0065(2) that requires a motion to be filed within 10-days after discovery of a failure to comply with LUBA's rules does not apply to a motion to dismiss based on a petitioner's failure to comply with the deadline established by OAR 661-010-0030(1) for filing the petition for review. *Canfield v. Lane County*, 59 Or LUBA 505 (2009).

27.1 LUBA Procedures/Rules – Generally. LUBA will decline a request to interpret a code provision in the first instance under ORS 197.829(2) and affirm the decision under the proposed interpretation, when the request and proposed interpretation are advanced for the first time at oral argument, and the interpretative issue is a mixed question of law and fact that the city council is in the best position to resolve in the first instance. *Fessler v. City of Fossil*, 55 Or LUBA 1 (2007).

27.1 LUBA Procedures/Rules – Generally. Argument presented in a petitioner's post-oral argument letter is not timely submitted where that argument could have been included in the petitioner's reply brief. *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

27.1 LUBA Procedures/Rules – Generally. Under OAR 661-010-0075(6) corporations, including municipal corporations, must be represented by an attorney in a LUBA appeal. Although LUBA does not require that the local government record of an appealed land use decision be filed by an attorney, any subsequent appearance by a city—after the record is filed—to oppose record objections, oppose any other motions, file motions on the local government's behalf or otherwise appear on behalf of the local government must be through an attorney who is admitted to practice in the State of Oregon. *Robson v. City of La Grande*, 53 Or LUBA 604 (2006).

27.1 LUBA Procedures/Rules – Generally. Inadvertent introduction of new evidence at oral argument, while improper, does not provide a basis for striking the entirety of oral argument; rather, to the extent oral argument includes evidence not in the record, it will be disregarded. *Hecker v. Lane County*, 52 Or LUBA 91 (2006).

27.1 LUBA Procedures/Rules – Generally. An intervenor company's failure to identify itself correctly in its motion to intervene might warrant a motion to require an amended motion to intervene but it does not justify denying the motion to intervene. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

27.1 LUBA Procedures/Rules – Generally. Delaying oral argument in an appeal of a local government's decision following a remand from LUBA is not an authorized sanction for the local government's delay in responding to an order awarding costs to petitioners in the prior appeal that led to the remand. *Rice v. City of Monmouth*, 52 Or LUBA 786 (2006).

27.1 LUBA Procedures/Rules – Generally. Petitioner's late filing of a motion to transfer is a technical violation of OAR 661-010-0075(11)(b) where it is filed approximately five months after the first motion challenging LUBA's jurisdiction, but only 16 days after an amended motion to dismiss is filed, and the motion to transfer could not have been ruled on before LUBA ruled on the jurisdictional challenge in any event. *ZRZ Realty Company v. City of Portland*, 49 Or LUBA 309 (2005).

27.1 LUBA Procedures/Rules – Generally. While LUBA may have general authority to adopt rules allowing for extension of less critical statutory deadlines, it is unlikely that the legislature intended LUBA to have the authority to adopt rules extending more critical deadlines, including the 21-day deadline for filing the motion to intervene. *Grahn v. City of Newberg*, 49 Or LUBA 762 (2005).

27.1 LUBA Procedures/Rules – Generally. Where a party commits multiple violations of LUBA's rules regarding service, whether those violations are "technical violations" that shall not interfere with LUBA's review under OAR 661-01-0005 depends on the cumulative effect of those violations on other parties' substantial rights, rather than the individual effect of each violation. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

27.1 LUBA Procedures/Rules – Generally. Adding highlighting to a copy of a zoning map that is in the record may not technically comply with OAR 661-010-0040(5) regarding demonstrative exhibits at oral argument, but the map will be allowed where there is no prejudice to the opposing

party. A table summarizing the local government's findings and corresponding pages of the appendix to the petition for review where those findings can be located could have and should have been included in the brief, and will not be considered if presented at oral argument. *Emmons v. Lane County*, 48 Or LUBA 457 (2005).

27.1 LUBA Procedures/Rules – Generally. Parties may facilitate LUBA's legal research by providing copies of cases, briefs that were filed in other appeals, or other research materials in their briefs. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

27.1 LUBA Procedures/Rules – Generally. LUBA will not consider a post-oral argument submittal where (1) the Board did not request the submittal, (2) the submittal does not address new case law or arguments that could not have been raised in the briefs, and (3) the submittal is not necessary to resolve assignments of error. *West Side Rural F.P.D v. City of Hood River*, 46 Or LUBA 451 (2004).

27.1 LUBA Procedures/Rules – Generally. A petitioner at LUBA may not cite to evidence supporting petitioners' arguments for the first time during rebuttal at oral argument. Nevertheless, in the absence of a showing that reference to evidence in the record prejudices a party's substantial rights, LUBA will deny a motion to strike that rebuttal. *Laurance v. Douglas County*, 45 Or LUBA 393 (2003).

27.1 LUBA Procedures/Rules – Generally. Where a petition for review is signed by a person who is not an active member of the Oregon State Bar, LUBA will allow the petition for review to be amended so that petitioners may sign the petition for review on their own behalf or an active member of the Oregon State Bar may sign the petition for review. *Roe v. City of Union*, 45 Or LUBA 736 (2003).

27.1 LUBA Procedures/Rules – Generally. Although LUBA may not apply technical pleading requirements that have no statutory basis, that prohibition is not violated by requiring that a petitioner correctly identify the part of the challenged decision that is challenged and the legal theory for that challenge. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

27.1 LUBA Procedures/Rules – Generally. Even though granting a motion for voluntary remand would give a local government a second chance to respond to issues that it failed to respond to in the appealed decision, a motion for voluntary remand will not be denied for that reason alone, because forcing the local government to defend a decision that it does not believe is defensible would not serve the ORS 197.805 goal of quickly reaching finality in land use matters. *Doob v. Josephine County*, 43 Or LUBA 130 (2002).

27.1 LUBA Procedures/Rules – Generally. Denial of a motion for voluntary remand may be warranted if it is shown that a local government is making only half-hearted attempts to respond to relevant issues and then seeking serial voluntary remands to correct those half-hearted attempts. *Doob v. Josephine County*, 43 Or LUBA 130 (2002).

27.1 LUBA Procedures/Rules – Generally. Where two appeals concern the same decision, but the petitioner in one appeal will raise different issues than the petitioner in the other appeal, LUBA

will not consolidate the appeals or suspend the second appeal while the first appeal is suspended for settlement discussions, where LUBA will ultimately have to reach the issues that will be raised in the second appeal in any event and the parties in first appeal agree not to take any action that would moot the second appeal while it is still pending at LUBA. *Doherty v. Morrow County*, 43 Or LUBA 627 (2002).

27.1 LUBA Procedures/Rules – Generally. While reply memoranda are not expressly provided for in LUBA's rules, and LUBA may strike such reply memoranda where they expand on or raise new issues not presented in the original motion, LUBA will not grant a motion to strike a reply memorandum that merely reiterates arguments made in an earlier motion, where granting the motion to strike would delay resolution of the underlying dispute. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 553 (2001).

27.1 LUBA Procedures/Rules – Generally. LUBA will not reschedule oral argument to allow an intervenor to observe oral argument where intervenor's attorney can appear at oral argument as scheduled and rescheduling oral argument would result in a hardship on petitioner and would likely prevent LUBA from issuing its final opinion within the deadline established by ORS 197.830(14). *Farrell v. Jackson County*, 40 Or LUBA 601 (2001).

27.1 LUBA Procedures/Rules – Generally. When LUBA grants a stipulated motion for voluntary remand, LUBA leaves it to the parties to ensure that the procedures they agree to employ on remand are adequate to accommodate the rights of any persons who are entitled to participate in those proceedings on remand. LUBA does not review and approve those procedures in advance. *Boly v. City of Portland*, 40 Or LUBA 537 (2001).

27.1 LUBA Procedures/Rules – Generally. Although parties to a stipulated voluntary remand may be bound by an agreement to limit the issues on remand concerning a disputed parking lot, non-parties are not bound by the stipulation and such non-parties have not waived their right to raise issues under *Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678 (1992), where the notice of hearing that preceded the only local hearing on the remanded decision failed to refer to the parking lot. *Boly v. City of Portland*, 40 Or LUBA 537 (2001).

27.1 LUBA Procedures/Rules – Generally. LUBA's rules do not require that we automatically provide copies of all pleadings and orders that were filed and issued before a party's motion to intervene is received. *Pereira v. Columbia County*, 39 Or LUBA 760 (2001).

27.1 LUBA Procedures/Rules – Generally. Where a brief includes as an appendix two letters that post-date the challenged decision and are not included in the record, LUBA will grant a motion to strike the letters but will not strike the brief in its entirety. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000).

27.1 LUBA Procedures/Rules – Generally. Although LUBA's rules do not expressly authorize the filing of replies to responses to motions, LUBA's practice is to allow such reply memoranda when they are limited to new issues raised in a response memorandum. *Frevach Land Company v. Multnomah County*, 38 Or LUBA 729 (2000).

27.1 LUBA Procedures/Rules – Generally. LUBA may allow a party to submit a memorandum of additional citations of relevant authority with brief summaries. However, the memorandum will not be considered if it contains additional arguments, replies to issues raised in the response brief, or does not allow other parties adequate time to address the additional citations. *Stockwell v. Benton County*, 38 Or LUBA 621 (2000).

27.1 LUBA Procedures/Rules – Generally. While not obligated to do so, LUBA will consider replies and responses to replies to motions where appropriate and where such consideration will not unduly delay the appeal process. *Cedar Mill Creek Corr. Comm. v. Washington County*, 37 Or LUBA 1011 (2000).

27.1 LUBA Procedures/Rules – Generally. LUBA will grant a seven-week delay in oral argument at the request of petitioner and respondent, over the objection of intervenors-respondent, where the parties requesting the delay demonstrate that the local proceedings that will occur during the delay may result in a more expeditious resolution of the issues presented in the petition for review. *Genstar Land Company Northwest v. City of Sherwood*, 36 Or LUBA 765 (1999).

27.1 LUBA Procedures/Rules – Generally. In deciding whether to grant a request for voluntary remand over petitioner's objection, LUBA considers whether (1) all issues presented in the petition for review will be considered on remand and (2) the proceedings on remand will be *capable* of providing the petitioner with everything he would be entitled to from LUBA. In such circumstances, LUBA will grant a motion for voluntary remand over a petitioner's objection unless LUBA concludes that its review to narrow the issues is more important or that the motives for the motion for voluntary remand are improper. *Quest International, Inc. v. City of Silverton*, 36 Or LUBA 259 (1999).

27.1 LUBA Procedures/Rules – Generally. A Board member is not obligated to recuse herself from participating in an appeal, where the party who requests recusal has not shown that the Board member is biased or otherwise disqualified from participating. *Claus v. City of Sherwood*, 35 Or LUBA 758 (1998).

27.1 LUBA Procedures/Rules – Generally. A motion for voluntary remand will be denied where the local government does not propose to address arguments that the challenged decision is prohibited as a matter of law or arguments that the local government improperly shifted the burden of proof. *Murphy Citizens Advisory Comm. v. Josephine County*, 35 Or LUBA 732 (1998).

27.1 LUBA Procedures/Rules – Generally. A motion to strike arguments presented by petitioner for the first time at oral argument will be denied where petitioner's new arguments were presented in response to arguments presented in the respondent's brief. *Goddard v. Jackson County*, 34 Or LUBA 402 (1998).

27.1 LUBA Procedures/Rules – Generally. LUBA allows parties to submit simple demonstrative handouts at oral argument. However, where such a handout is lengthy and complex and reformulates arguments contained in a lengthy petition for review, the handout will not be considered. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

27.1 LUBA Procedures/Rules – Generally. Generally, where the legislature fails to express any intention concerning the retroactivity of a statute, the statute applies only prospectively if the statute will impair existing rights, create new obligations or impose additional duties with respect to past transactions. *Gutoski v. Lane County*, 33 Or LUBA 866 (1997).

27.1 LUBA Procedures/Rules – Generally. Where petitioner fails to demonstrate that its substantial rights have been prejudiced, a motion for voluntary remand filed by the local government one week prior to oral argument will be allowed. *Smith v. Douglas County*, 33 Or LUBA 682 (1997).

27.1 LUBA Procedures/Rules – Generally. LUBA's rules do not permit additional submissions beyond the answer to a record objection or motion, and a party that relies on LUBA's leniency, particularly when that party provides no explanation of why leniency is justified, takes a risk that additional submissions will not be read. *Village Properties, L.P. v. Oregon City*, 33 Or LUBA 206 (1997).

27.1 LUBA Procedures/Rules – Generally. The city's filing of a corrected response to record objections does not justify the filing of supplemental record objections well beyond the deadline for filing record objections. *Village Properties, L.P. v. City of Oregon City*, 32 Or LUBA 475 (1996).

27.1 LUBA Procedures/Rules – Generally. Although LUBA does on occasion refer to the Oregon Rules of Civil Procedure when the Board's rules do not address procedural issues, those rules are not binding on LUBA. *Pfeifer v. City of Silverton*, 32 Or LUBA 463 (1996) (*unpublished* headnote), *rev'd and rem'd on other grounds*, 146 Or App 191, 931 P2d 833 (1997).

27.1 LUBA Procedures/Rules – Generally. Although LUBA's rules do not expressly provide for the filing of reply memoranda in support of motions, LUBA may exercise its discretion to allow the filing of reply memoranda that address new issues raised in response memoranda. *Fechtig v. City of Albany*, 31 Or LUBA 441 (1996).

27.1 LUBA Procedures/Rules – Generally. A party may not assign error in a motion to dismiss. *Young v. Douglas County*, 31 Or LUBA 545 (1996).

27.1 LUBA Procedures/Rules – Generally. When a party makes a colorable claim that it will be substantially prejudiced by LUBA's failure to enforce its rules, LUBA will enforce the rules. *Save Amazon Coalition v. City of Eugene*, 30 Or LUBA 448 (1995).

27.1 LUBA Procedures/Rules – Generally. Motions to dismiss do not suspend the time limits for other events in LUBA's review process, and a combination of factors determines when during the appeal process LUBA decides such motions. *Pilate v. City of Banks*, 30 Or LUBA 433 (1995).

27.1 LUBA Procedures/Rules – Generally. OAR 660-10-025(1)(c) requires the local record submitted to LUBA to include minutes and tape recordings of the proceedings conducted by the governing body, regardless of whether such minutes and tapes were actually placed before the decision maker below. Under OAR 660-10-010(4), "governing body" includes a commission

whose decision would become the local government's final decision if no local appeal were filed. *Champion v. City of Portland*, 28 Or LUBA 742 (1994).

27.1 LUBA Procedures/Rules – Generally. LUBA is not authorized to reject a document filed on behalf of a represented party because the attorney filing the document did not first obtain specific authority from that party to file the document. *Gettman v. City of Bay City*, 28 Or LUBA 121 (1994).

27.1 LUBA Procedures/Rules – Generally. LUBA's administrative rules were amended on June 22, 1994. These amendments apply to any appeal proceeding initiated by a notice of intent to appeal filed after June 30, 1994. *Champion v. City of Portland*, 28 Or LUBA 730 (1994).

27.1 LUBA Procedures/Rules – Generally. Allegations that a local government decision should be reversed for failure to follow local code provisions governing deadlines for holding a public hearing and issuing a final decision are properly presented in the petition for review, not in a motion to reverse. *Sanchez v. Clatsop County*, 27 Or LUBA 713 (1994).

27.1 LUBA Procedures/Rules – Generally. LUBA does not have authority to deny respondent the right to appear and defend its decision in an appeal before LUBA. *Sanchez v. Clatsop County*, 26 Or LUBA 631 (1994).

27.1 LUBA Procedures/Rules – Generally. LUBA no longer has authority to defer its review of appeals challenging decisions submitted for LCDC review under the pre-1991 periodic review process, because Oregon Laws 1993, chapter 435, repeals the statute authorizing LCDC continuation of previously initiated periodic reviews under the pre-1991 periodic review process. *Williams v. Clackamas County*, 26 Or LUBA 612 (1993).

27.1 LUBA Procedures/Rules – Generally. LUBA proceedings are not contested case proceedings governed by ORS 183.482 and the Attorney General's Model Rules of Procedure. *DLCD v. Klamath County*, 26 Or LUBA 589 (1993).

27.1 LUBA Procedures/Rules – Generally. Judicial review of LUBA decisions is governed solely by ORS 197.850. ORS 197.850 does not authorize LUBA to consider petitions for reconsideration or to stay its final opinions and orders. *DLCD v. Klamath County*, 26 Or LUBA 589 (1993).

27.1 LUBA Procedures/Rules – Generally. In considering an applicant's request for voluntary remand of a decision granting development approval, where petitioner objects to the request, LUBA will not infer bad faith or improper motives from the potential economic return the applicant may receive if the proposed development is ultimately approved. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).

27.1 LUBA Procedures/Rules – Generally. Unless the particular circumstances of a case make narrowing the issues on remand clearly more important than allowing a local government's request for a voluntary remand of its decision to address each of the issues raised in the petition for review,

a motion for voluntary remand should be granted. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).

27.1 LUBA Procedures/Rules – Generally. LUBA has no authority to reconsider or clarify its final opinions and orders. *Caine v. Tillamook County*, 25 Or LUBA 785 (1993).

27.1 LUBA Procedures/Rules – Generally. Where a motion to dismiss is filed on the basis that petitioners failed to exhaust local remedies, but an appeal of a local government decision not to accept petitioners' local appeal of the decision challenged at LUBA is pending below, LUBA cannot determine whether petitioners failed to exhaust local remedies, and will suspend consideration of the motion to dismiss until the local government makes a final decision on whether to accept petitioners' local appeal. *Hart v. Jefferson County*, 25 Or LUBA 773 (1993).

27.1 LUBA Procedures/Rules – Generally. LUBA may satisfy the requirement of ORS 197.850(11) that it "respond to the [appellate] court's mandate within 30 days" either by issuing a final opinion and order, or by taking some other appropriate action, such as requesting the submission of additional briefs, memoranda or oral argument, where desirable to aid LUBA in addressing the issues that provide the basis for remand by the appellate court. *Schrock Farms, Inc. v. Linn County*, 24 Or LUBA 649 (1993).

27.1 LUBA Procedures/Rules – Generally. Reversal of a local government land use decision approving a permit application means the subject application cannot be approved under the applicable criteria as a matter of law, and that a new or amended permit application is required to correct at least one allegation of error sustained in LUBA's final opinion. *Seitz v. City of Ashland*, 24 Or LUBA 311 (1992).

27.1 LUBA Procedures/Rules – Generally. Where a local government imposes an improper condition in granting land use approval, but does not rely on the improper condition in finding applicable approval criteria are met, LUBA will reverse the condition and otherwise affirm the decision granting land use approval. *Olson Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991).

27.1 LUBA Procedures/Rules – Generally. ORS 183.450 is not applicable to review proceedings conducted by LUBA. However, under ORS 197.805, LUBA has the authority to take official notice of judicially cognizable law, as provided by Oregon Evidence Code Rule 202. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

27.1 LUBA Procedures/Rules – Generally. Where the Court of Appeals reverses or remands a LUBA decision, the 30-day period specified in ORS 197.850(11) for LUBA to respond commences on the date the appellate court judgment becomes effective. *Byrnes v. City of Hillsboro*, 20 Or LUBA 408 (1991).

27.1 LUBA Procedures/Rules – Generally. Where a city comprehensive plan policy provides that "[d]evelopment intensity will be limited to that allowed under" a particular document, that policy incorporates development intensity limits in the document into the plan, and LUBA will

take official notice of such standards in the document. *Hoffman v. City of Lake Oswego*, 19 Or LUBA 607 (1990).

27.1 LUBA Procedures/Rules – Generally. If it is demonstrated, through citations to the record or to documents of which LUBA may take official notice, that the city adopted a particular document as regulatory standards applicable to the appealed city decision, LUBA may take official notice of that document. *Hoffman v. City of Lake Oswego*, 19 Or LUBA 607 (1990).

27.1 LUBA Procedures/Rules – Generally. LUBA will not accept a memorandum of supplemental argument filed by petitioner 24 days after the conclusion of oral argument, if accepting such a memorandum would delay the issuance of LUBA's final opinion and, therefore, adversely affect other parties' substantial rights to "the speediest practicable review." *East McAndrews Neigh. Assoc. v. City of Medford*, 19 Or LUBA 604 (1990).

27.1 LUBA Procedures/Rules – Generally. Where the parties in an appeal proceeding contend the appeal should be dismissed, LUBA will dismiss the appeal, even though the parties contend the appeal should be dismissed for different reasons. *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 795 (1990).

27.2.1 LUBA Procedures/Rules – Perfecting an Appeal – Generally. Where a notice of intent to appeal identifies two decisions that were adopted on different dates as the subjects of the appeal, but the notice of intent to appeal is timely filed with regard to only one of the identified decisions, the appeal may proceed with regard to the decision for which the notice of intent to appeal was timely filed. *Lifestyle Ventures v. Clackamas County*, 73 Or LUBA 388 (2016).

27.2.1 LUBA Procedures/Rules – Perfecting an Appeal – Generally. An amending order that merely corrects a property description included in a prior annexation order does not replace the prior order and therefore petitioners did not have to appeal the amending order rather than the prior order. *Miner v. Clatsop County*, 46 Or LUBA 467 (2004).

27.2.1 LUBA Procedures/Rules – Perfecting an Appeal – Generally. When (1) the local government's record does not clearly show who was mailed written notice of a land use decision; (2) a petitioner asks the local government who was actually mailed written notice of the decision; and (3) the petitioner serves the notice of intent to appeal on the persons the local government states were mailed written notice of the decision, then petitioner has complied with LUBA's rules and LUBA will not dismiss the appeal. *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653 (2004).

27.2.1 LUBA Procedures/Rules – Perfecting an Appeal – Generally. Where ORS 197.830(4) applies it provides a right to appeal directly to LUBA, within certain time limits, notwithstanding that the deadline for filing a local appeal has expired. In such circumstances, there is no local appeal available to be exhausted pursuant to ORS 197.825(2)(a). *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

27.2.1 LUBA Procedures/Rules – Perfecting an Appeal – Generally. Where the challenged decision is an intergovernmental agreement that must be signed by representatives of both the county and the city, the decision becomes final under OAR 661-010-0010(3) when it bears the signatures of necessary decision makers. The unilateral signing of the agreement by the county commissioners does not render the decision final until the city's authorized representatives supply their signatures. *Sparks v. Polk County and City of Monmouth*, 34 Or LUBA 731 (1998).

27.2.1 LUBA Procedures/Rules – Perfecting an Appeal – Generally. For purposes of OAR 661-10-010, a signature is an essential element for finality of a decision only if another statute, rule or ordinance provides that a signature is necessary. *North Park Annex Bus. Trust v. City of Independence*, 33 Or LUBA 695 (1997).

27.2.1 LUBA Procedures/Rules – Perfecting an Appeal – Generally. Petitioner's failure to serve a timely notice of intent to appeal on other interested and essential parties warrants dismissal of the appeal where a party establishes substantial prejudice from the delay in service. *Winner v. Multnomah County*, 30 Or LUBA 420 (1996).

27.2.1 LUBA Procedures/Rules – Perfecting an Appeal – Generally. Where a local government makes a permit decision without a hearing, pursuant to local procedures implementing ORS 215.416(11) or 227.175(10), the provisions of ORS 197.830(3) allowing a person to appeal a decision to LUBA if the local government does not provide a hearing do not apply, because the

local government did not fail to provide a hearing or the notice of such hearing required by state or local law. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

27.2.1 LUBA Procedures/Rules – Perfecting an Appeal – Generally. Where ORS 197.830(3) applies, it provides a petitioner with a right to appeal directly to LUBA, within the time limits established by ORS 197.830(3)(a) and (b), notwithstanding that the deadline for filing a local appeal may have expired. In such circumstances, there is no local appeal available to be exhausted pursuant to ORS 197.825(2)(a). *Beveled Edge Machines, Inc. v. City of Dallas*, 28 Or LUBA 790 (1995).

27.2.1 LUBA Procedures/Rules – Perfecting an Appeal – Generally. ORS 197.830(3) imposes a requirement that a reasonable person be able to tell from the notice of public hearing that the local government might take the action that the local government ultimately takes. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

27.2.1 LUBA Procedures/Rules – Perfecting an Appeal – Generally. While changes in the proposal described in a notice of public hearing can be of such a degree that the notice "did not reasonably describe the local government's final [decision]," not every change in the proposal described in the notice of public hearing necessarily implicates ORS 197.830(3). *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Pursuant to ORS 197.835(2), LUBA may make its own factual findings as to whether an appeal was timely filed, which is a jurisdictional question. Accordingly, LUBA may consider evidence outside the record for the limited purpose of resolving disputes regarding whether an appeal was timely filed, even in the absence of a motion to take evidence outside the record under OAR 661-010-0045. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A zone verification is subject to LUBA's jurisdiction and a person adversely affected by the decision may appeal the decision to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required." ORS 197.830(5)(b). The city was not obligated to and did not provide notice of the zone verification decision to petitioner. Petitioner was put on inquiry notice of the zone verification decision when the city provided petitioner multiple notices of a subsequent land use application, review, and approval for site review, traffic impact analysis, and adjustment review for the same subject property and development described in the zone verification decision. The city invited petitioner to participate in that subsequent land use action and to review public planning documents at the planning division and online. The appeal was untimely filed and must be dismissed because petitioner failed to make such inquiries and the 21-day appeal period expired before petitioner filed the appeal. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A zone verification is subject to LUBA's jurisdiction and a person adversely affected by the decision may appeal the decision to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required." ORS 197.830(5)(b). The city was not obligated to and did not provide notice of the zone verification decision to petitioner. Petitioner was put on inquiry notice of the zone verification decision when the city provided petitioner multiple notices of a subsequent land use application, review, and approval for site review, traffic impact analysis, and adjustment review for the same subject property and development described in the zone verification decision. The city invited petitioner to participate in that subsequent land use action and to review public planning documents at the planning division and online. The appeal was untimely filed and must be dismissed because petitioner failed to make such inquiries and the 21-day appeal period expired before petitioner filed the appeal. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The timely filing of a notice of intent to appeal is required for LUBA to have jurisdiction. Pursuant to ORS 197.830(3)(b), where the time for filing a notice of intent to appeal runs from the date a petitioner knew or should have known of the decision, and petitioner was in possession of the challenged decision, the 21-day appeal period runs from the date the petitioner received a copy of the decision, not from the date that the petitioner was notified by its attorney, after providing the decision to its attorney, that the decision could be a "land use decision" within the meaning of ORS 197.015(10)(a). *PGE v. City of West Linn*, 79 Or LUBA 213 (2019).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. ORS 197.830(3) operates to potentially allow a petitioner a delayed period of time to file a LUBA

appeal, but it is not a source of procedural requirements that a local government approved development that differs from the development described in the notice of hearing is not procedural error. *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. At one time the 21-day deadline for filing a notice of intent to appeal a statutory permit decision did not begin to run until notice of that decision was mailed to a party who was entitled to mailed notice of the decision. However, *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625 (1997), overruled the Court of Appeals decision that established that rule, and now under OAR 661-010-0010(3) that deadline begins to run when the is reduced to writing and signed and become final, "unless a local rule or ordinance specifies that the decision becomes final at a later date * * *." *McGrew v. Yamhill County*, 75 Or LUBA 247 (2017).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where the text of an order requiring petitioner to file an amended notice of intent to appeal states the order is dated December 15, but the order is date stamped December 16 and was mailed December 16, the order is "dated" December 16, for purposes of calculating the seven-day deadline for filing an amended notice of intent to appeal. *Neighbors for Smart Growth v. Washington County*, 75 Or LUBA 481 (2017).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Under ORS 197.830(3)(b), a petitioner must file an appeal to LUBA within 21 days of the date the petitioner "knew or should have known" of the decision. Where the petitioner gains information indicating that the local government may have made a decision approving development, the petitioner is placed on "inquiry notice," and must make timely inquiries with the local government to discover the decision. If the petitioner makes timely inquiries, the 21-day clock begins running on the date the petitioner obtains a copy of the decision. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where respondent moves to dismiss an appeal, alleging that petitioner failed to serve a copy of the notice of intent to appeal on the county, and after five weeks petitioner has neither advised LUBA that a copy of the notice of intent to appeal has been served on respondent nor filed a written response to the motion to dismiss, LUBA will dismiss the appeal for lack of jurisdiction. *Mann v. Marion County*, 74 Or LUBA 73 (2016).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Filing a notice of intent to appeal (NITA) using an overnight delivery service is not the same as filing the NITA by certified mail, which is the method that OAR 661-010-0015(1) requires in order for a petitioner to rely on the date of mailing as the date of filing of a NITA. *Chapman and Chapman LLC v. Coos County*, 73 Or LUBA 123 (2016).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a notice of intent to appeal is delivered to LUBA by an overnight delivery service more than 21 days from the date the city's decision became final, the appeal is untimely filed, and LUBA will dismiss the appeal. *Chapman and Chapman LLC v. Coos County*, 73 Or LUBA 123 (2016).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a notice of intent to appeal identifies two decisions that were adopted on different dates as the subjects of the appeal, but the notice of intent to appeal is timely filed with regard to only one of the identified decisions, the appeal may proceed with regard to the decision for which the notice of intent to appeal was timely filed. *Lifestyle Ventures v. Clackamas County*, 73 Or LUBA 388 (2016).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a hearing is held, ORS 197.830(3)(b) cannot operate to expand the time for filing an appeal, because ORS 197.830(3)(b) applies only "where no notice is required." The "notice" that is "required" refers to notice of all quasi-judicial hearings under ORS 197.763(2). *Phillips v. City of Happy Valley*, 72 Or LUBA 196 (2015).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Under OAR 661-010-0015(1)(b), the date of mailing the notice of intent to appeal is the date of filing the appeal to LUBA only if the notice of intent to appeal is mailed by certified or registered mail to LUBA's address as published in its rules. Where a petitioner mails the notice of intent to appeal to a different address than published in LUBA's rules, the notice is not "filed" with LUBA until the date LUBA actually receives it. *Bartlett v. City of Portland*, 72 Or LUBA 408 (2015).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. LUBA will dismiss an appeal filed more than 21 days after the date the appealed decision was signed and became final under county code, notwithstanding an erroneous statement in the notice of decision that the decision became final on the date the notice was mailed. *Carver v. Washington County*, 71 Or LUBA 1 (2015).

27.2.2 LUBA Procedure/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The petitioners fail to demonstrate that they are entitled to notice of the hearing required by ORS 197.763(2)(a), and that the city's failure to provide the notice allows petitioners to appeal the decision to LUBA under the alternative deadlines set out at ORS 197.830(3), where petitioners do not demonstrate that they own property within 100 feet of the "property which is the subject of the notice" for purposes of ORS 197.763(2)(a). *Mackenzie v. City of Portland*, 71 Or LUBA 155 (2015).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A notice of intent to appeal filed more than 21 days after the post acknowledgement plan amendment decision was mailed to DLCD under ORS 197.615(1) is untimely, where the petitioner was not entitled to notice of the decision under ORS 197.615(4) because he did not "participate[] in the local government proceedings that led to the decision to adopt" the PAPA or request in writing that he be given notice of the decision to adopt the PAPA. *Clarke v. Coos County*, 68 Or LUBA 261 (2013).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The deadline to appeal a post-acknowledgment plan amendment to LUBA is 21 days from the date notice is mailed to parties entitled to notice under ORS 197.615. A party entitled to notice under

ORS 197.615(4) who receives that notice must appeal within 21 days of the date notice is mailed, and that deadline is not tolled simply because the local government failed to submit a copy of the decision to DLCD as required by ORS 197.615(1). *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A petitioner receives "actual notice" of a decision for purposes of ORS 197.830(3)(a) on the date the local government mails a letter to petitioner informing petitioner of the decision, not on the date that the petitioner obtains a copy of the decision from the local government's files. *Brodersen v. City of Ashland*, 66 Or LUBA 369 (2012).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a petitioner receives actual notice of a decision issued without a hearing and pursues a local appeal, any right to directly appeal the decision to LUBA pursuant to ORS 197.830(3) may be lost if it turns out no right of local appeal exists and the petitioner delays longer than 21 days from actual notice of the decision to appeal the decision to LUBA. *Brodersen v. City of Ashland*, 66 Or LUBA 369 (2012).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. An order that simply adopts additional findings following a LUBA remand, but does not "change" any acknowledged comprehensive plan or land use regulation, is not a post-acknowledgment plan amendment, and the deadline to appeal the order to LUBA is therefore 21 days from the date the decision became final, pursuant to the first sentence of ORS 197.830(9), not 21 days from the date that notice of the order was mailed. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The 21-day period to appeal to LUBA under the second sentence of ORS 197.830(9) commences on the date notice of the decision is mailed to "parties entitled to notice under ORS 197.615." The "notice" referred to in ORS 197.830(9) is the written notice that ORS 197.615(4) requires the local government to mail to participants, not the copy of the final decision that ORS 197.615(1) requires the local government to submit to DLCD. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a petitioner participated in the proceedings leading to adoption of a post-acknowledgment plan amendment, and received timely notice of the decision, the deadline to appeal the decision to LUBA is 21 days from the date the notice was mailed to petitioner, not 21 days from the date the local government submits a copy of the decision to DLCD. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Under *ODOT v. City of Oregon City*, 153 Or App 705, 959 P2d 615 (1998), the deadline to appeal a post-acknowledgment plan amendment to LUBA under the second sentence of ORS 197.830(9) is 21 days from the date the local government mails notice of the decision to parties entitled to notice, even for persons who did not participate in the proceedings and thereby become entitled to notice. However, *ODOT* does not suggest that notice failures to some parties tolls the 21-day deadline for

a petitioner who did receive notice but failed to appeal the decision to LUBA within the 21-day period. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a decision to allow or deny further review of a hearings officer decision is within the unfettered discretion of the board of county commissioners under the county code, and a decision to deny review has the legal effect of making the hearings officer decision the county's final land use decision, the notice of intent to appeal should not have identified the board of county commissioners' appealed decision and instead should have listed the hearings officer decision as the subject of the appeal. However, where the county clearly understood that it was the hearings officer decision that petitioners sought to challenge on the merits and the county submitted a record that was consistent with that understanding, any error on petitioners' part was technical and provides no basis for dismissing the appeal or striking any assignments of error that challenge the hearings officer's decision. *Resources Northwest Inc. v. Clatsop County*, 65 Or LUBA 313 (2012).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A petitioner's affidavit, stating that petitioner first learned of the challenged decision less than 21 days from the date the notice of intent to appeal was filed, is sufficient to demonstrate that the appeal was timely filed for purposes of ORS 197.830(3) within 21 days of the date the petitioner "knew or should have known" of the decision, and mere speculation that petitioner might have known of the decision at an earlier date is insufficient to controvert the affidavit. *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where there is a reasonable dispute regarding which of two documents or decisions is appealable to LUBA, the notice of intent to appeal identifies both documents, but mistakenly identifies the wrong document as the appealable decision, LUBA will regard that mistake as a technical pleading error, treat the appealable decision as the subject of the notice, and not dismiss an otherwise properly filed appeal. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 538 (2011).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where the notice of intent to appeal mistakenly identifies a planning commission decision as the county's final decision, but it is clear that the petitioner wished to appeal the county's final decision, the governing body's decision on petitioner's local appeal of the planning commission decision, dismissing the appeal based on that mistake would amount to dismissing the appeal based on a technical pleading error. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 538 (2011).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. LUBA will not dismiss an appeal based on mistaken identification of the county's final decision, where the appeal has proceeded from its beginning and the record was settled under a shared understanding regarding the subject of the appeal, and no party identifies prejudice to any party's substantial rights from the petitioner's error in mis-identifying the appealed decision in the notice of intent to appeal. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 538 (2011).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A local ordinance that provides that a decision becomes effective 14 days after mailing notice of the

decision means that the decision is *effective* at that date. The ordinance does not delay the date the decision becomes *final* for purposes of appeal to LUBA under OAR 661-010-0010(3). *VK Northwest, Inc. v. City of West Linn*, 60 Or LUBA 39 (2009).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Even though the language of a final decision is somewhat misleading in stating that it becomes final at a later date, a misstatement of fact and law in the decision does not excuse a petitioner from filing a timely notice of intent to appeal. *VK Northwest, Inc. v. City of West Linn*, 60 Or LUBA 39 (2009).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A motion to dismiss an appeal because the notice of intent to appeal inadequately described the appealed decision will be denied, where that motion is based on a hyper-technical reading of the notice of intent to appeal and the notice of intent to appeal adequately described the comprehensive plan and zoning map amendment that the petitioner wished to appeal, even though the notice of intent to appeal did not refer to the enacting ordinance by number and erroneously referred to a resolution that adopted supporting findings but did not adopt the appealed amendment. *Just v. Linn County*, 60 Or LUBA 74 (2009).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. When a notice of intent to appeal (NITA) is filed on behalf of a "corporation or other organization" by a person who is not an active member of the Oregon State Bar and LUBA allows seven days for an attorney to file an amended NITA, failure to file an amended NITA within that time requires dismissal of the appeal. Sending a letter stating that an attorney will represent the corporation or organization is not a sufficient substitute for filing an amended NITA. *Waluga Neighborhood Association v. City of Lake Oswego*, 59 Or LUBA 380 (2009).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a party appeals a decision on a permit and that party was not entitled to notice of the permit, the appeal to LUBA must be filed within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416(11). ORS 197.830(4)(b). Where the appeal is filed approximately 18 months after the expiration of the period for filing a local appeal, the appeal must be dismissed. *Thalman v. Marion County*, 58 Or LUBA 23 (2008).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a petitioner is a neighborhood association, petitioner must be represented by a member of the Oregon State Bar. *Russell Neighborhood Assoc. v. City of Portland*, 58 Or LUBA 397 (2009).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Under ORS 197.830(9) and OAR 661-010-0015(1)(a), the 21-day deadline for filing a notice of intent to appeal began to run either on the date the decision became final or on the date notice of the appealed decision was "mailed to parties entitled to notice under ORS 197.615 * * *." ORS 197.830(3) through (5) provide exceptions to the general 21-day deadline for filing a notice of intent to appeal with LUBA, which is established by ORS 197.830(9). *Reeves v. City of Wilsonville*, 58 Or LUBA 545 (2009).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Procedural errors a city may have committed might provide a basis for reversal or remand, if there is a timely appeal of a land use decision. However, any such procedural errors do not have the legal effect of preventing a land use decision from becoming final or delaying the date of finality. *Reeves v. City of Wilsonville*, 58 Or LUBA 545 (2009).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Local laws that only delay the date an ordinance takes effect do not also delay the date an ordinance becomes final for purposes of appeal to LUBA. *Reeves v. City of Wilsonville*, 58 Or LUBA 545 (2009).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Under OAR 661-010-0015(1)(b), a notice of intent to appeal is filed on the date it is mailed, provided it is mailed by "registered or certified mail." A notice of intent to appeal that is mailed on the last day to timely file the notice of intent to appeal and is received five days later by LUBA is not timely filed, where the notice of intent to appeal was not mailed by "registered or certified mail." *Reeves v. City of Wilsonville*, 58 Or LUBA 545 (2009).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. When a petitioner is placed on inquiry notice that a land use decision or limited land use decision has been made and makes proper inquiries to the local government, a petitioner cannot be faulted when the local government takes the position that no such decision has been made. If a petitioner makes the proper inquiries, the 21-day time limit for filing the NITA begins when a petitioner learns of the decision. *Biggerstaff v. Yamhill County*, 58 Or LUBA 665 (2008).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where applicable law requires that the local government's proposed land use action be accomplished by ordinance, each ordinance the local government adopts with respect to the proposal is a separate "land use decision" for purposes of appeal to LUBA, requiring separate notices of intent to appeal, even if the local government processed the decisions together and issued a single notice of decision. *Woodard v. City of Cottage Grove*, 56 Or LUBA 806 (2008).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Nothing in ORS 197.830(1), (2) or (9) explicitly requires that a notice of intent to appeal filed with LUBA identify only one decision as the subject of the appeal, or explicitly prohibits using a single notice of intent to appeal to challenge multiple decisions. *Woodard v. City of Cottage Grove*, 56 Or LUBA 806 (2008).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Because no statute assigns jurisdictional significance to the filing of an otherwise proper notice of intent to appeal that challenges more than one land use decision, OAR 661-010-0015(1)(c) is not inconsistent with the statutes governing LUBA's review. Accordingly, a notice of intent to appeal that improperly challenges more than one decision may be remedied as provided in OAR 661-010-0015(1)(c) by filing additional notices of intent to appeal and, if so, LUBA retains jurisdiction over each of the individual appeals. *Woodard v. City of Cottage Grove*, 56 Or LUBA 806 (2008).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where LUBA issues an order directing petitioner to file a supplemental certificate of service to establish that the notice of intent to appeal was served on the local government's legal counsel, and petitioner fails to do so within the deadline specified in the order, petitioner's appeal will be dismissed. *Althauser v. Clackamas County*, 55 Or LUBA 656 (2008).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. For the purposes of OAR 661-010-0015(1)(a), a timely filed notice of intent to appeal is sufficient to establish LUBA's jurisdiction despite failing to comply with one or more of the requirements for the content of notice under OAR 661-010-0015(3). *O'Rourke v. Union County*, 54 Or LUBA 758 (2007).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Partial noncompliance with the content requirements of an otherwise timely filed notice of intent to appeal is a technical violation of LUBA's rules that is not jurisdictional and is not a basis to dismiss the appeal, unless shown to prejudice other parties' substantial rights. *O'Rourke v. Union County*, 54 Or LUBA 758 (2007).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Technical violation of LUBA's rules pertaining to the content of a notice of intent to appeal does not require dismissal unless it prejudices the substantial rights of the parties. A party's substantial rights have not been prejudiced where the party was timely served with the original yet technically flawed notice of intent to appeal but was untimely served with the amended notice of intent to appeal. *O'Rourke v. Union County*, 54 Or LUBA 758 (2007).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Petitioners' arguments on the merits of an appeal that are included in their notice of intent to appeal are presented prematurely. Petitioners' arguments on the merits of an appeal are properly presented in their petition for review, after petitioners' record objections are resolved and after LUBA settles the record. *Robson v. City of La Grande*, 53 Or LUBA 604 (2006).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. While it is possible that LUBA might grant a petitioner's request that a notice of intent to appeal be treated as the petition for review, a petitioner may not wait until over two weeks after the deadline for filing the petition for review has expired to make such a request. *Bleu v. Clackamas County*, 52 Or LUBA 606 (2006).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where an individual files a written appearance on behalf of an organization before a local government opposing a permit application, it is the organization that must advise LUBA that the individual was not authorized to make the written appearance on behalf of the organization. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The requirements in OAR 661-010-0015(3) that the notice of intent to appeal include a caption identifying the "governing body" as the respondent and that the notice include the name and

telephone number of the governing body and its counsel serve important purposes, including notifying the local government responsible for compiling the record and defending the decision before LUBA that its decision has been appealed, but those requirements are not in themselves jurisdictional. *Stoloff v. City of Portland*, 51 Or LUBA 812 (2006).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where pursuant to an intergovernmental agreement a city acts as the final decision maker for a county, compiles the record, and defends the decision before LUBA, the purposes of OAR 661-010-0015(3) are better served by naming the city rather than the county as the respondent. *Stoloff v. City of Portland*, 51 Or LUBA 812 (2006).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Failure to satisfy the content requirements for a notice of an intent to appeal is a technical violation of LUBA's rules that does not provide a basis to dismiss the appeal, absent a showing of prejudice to the parties' substantial rights. Where no prejudice is shown, LUBA will allow the notice to be amended to name the correct parties. *Stoloff v. City of Portland*, 51 Or LUBA 812 (2006).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A notice of intent to appeal that is placed in an envelope that is addressed to and mailed certified mail to an address that is not LUBA's is not "filed" with LUBA for purposes of OAR 661-010-0015(1)(b), and therefore cannot be relied upon for the date of filing. *Ford v. Jackson County*, 50 Or LUBA 359 (2005).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a petitioner notices construction activity on property, promptly investigates, discovers a building permit posted on the property, obtains a copy of the building permit and files an appeal with LUBA 14 days after first discovering the building permit posted on the property, the appeal is timely filed under 197.830(3)(b). *Jebousek v. City of Newport*, 50 Or LUBA 724 (2005).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. While *service* of the notice to intent to appeal is jurisdictional under ORS 197.830(9), the *timing* of that service is not. *Friends of the Metolius v. Jefferson County*, 50 Or LUBA 735 (2005).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The statutes governing review of land use decisions are *sui generis*, and caution is appropriate in extrapolating to or from other statutory contexts and the statutes and rules governing LUBA's review. That the Oregon Supreme Court has interpreted statutes and rules governing civil appeals to require that timely service of a notice of appeal is jurisdictional does not lead to the conclusion that LUBA's rules, which do not make timely service jurisdictional, are inconsistent with the statutes governing LUBA's review. *Friends of the Metolius v. Jefferson County*, 50 Or LUBA 735 (2005).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. LUBA's rules require the petitioner to timely serve a copy of the notice of intent to appeal on the respondent, and to certify such service, but do not assign jurisdictional consequences to whether the respondent actually receives the notice. *Friends of the Metolius v. Jefferson County*, 50 Or LUBA 735 (2005).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where it is clear that the land use decision that is identified in a notice of intent to appeal is an administrative conditional use permit approval that is also the subject of a local appeal, LUBA must dismiss the appeal and will not interpret that notice of intent to appeal as an appeal of other possible land use decisions. *Doyle v. Coos County*, 49 Or LUBA 397 (2005).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where petitioner mails a notice of intent to appeal on the twenty-first day after the local decision becomes final by first-class mail with a "certificate of mailing" rather than by certified or registered mail, as provided in OAR 661-010-0015(1), the notice of intent to appeal is "filed" on the date it is received by LUBA, not on the date of mailing. Where LUBA receives such a notice of intent to appeal more than 21 days after the local decision becomes final, the appeal must be dismissed. *McKnight v. City of Portland*, 48 Or LUBA 292 (2004).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Even assuming that a county decision in response to a periodic review work task includes matters within LUBA's scope of review, LUBA has no jurisdiction to review the county decision where petitioners fail to appeal the county decision to LUBA within the time specified in ORS 197.830(9). *Colony v. Wallowa County*, 46 Or LUBA 586 (2004).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. An error in the name of the petitioner is a technical violation of LUBA's rules and may be cured by substituting the name of the real petitioner. *Concerned Citizens v. Malheur County*, 46 Or LUBA 827 (2004).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. When a notice of intent to appeal mistakenly identifies the wrong decision as the subject of the appeal, and that mistake is due to a local government's procedural error with regard to the petitioner, LUBA will treat the petitioner's mistake as a technical pleading error, read the notice to appeal the correct decision, and not dismiss an otherwise properly filed appeal. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Local proceedings on remand from LUBA are not "decisions made without a hearing" within the meaning of ORS 197.830(3) and, therefore, in order to file a notice of intent to appeal that remand decision with LUBA, the notice of intent to appeal must be filed in accordance with ORS 197.830(9). *Friends of Jacksonville v. City of Jacksonville*, 44 Or LUBA 379 (2003).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A city's erroneous statement in its notice of decision that the LUBA appeal deadline fell on a particular date does not have the legal effect of extending the appeal deadline. *Friends of Jacksonville v. City of Jacksonville*, 44 Or LUBA 379 (2003).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Under LUBA's rules, an organization must be represented by an attorney. Where an unrepresented

organization is a named petitioner in an appeal to LUBA, but fails to obtain counsel within the time set by the Board, that party will be dismissed from the appeal. *Ziemer v. City of Florence*, 43 OR LUBA 1 (2002).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A notice of intent to appeal filed within 21 days after the date an earlier tentative decision was made final by a second decision is timely filed under ORS 197.830(9). *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 597 (2002).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Under ORS 197.830(3)(b), where a petitioner does not have knowledge of a land use decision but observes activity or otherwise obtains information reasonably suggesting that a land use decision has been rendered, that petitioner is placed on notice to make inquires regarding the nature of the land use decision. The 21-day appeal deadline begins to run on the date that timely inquiries are made and the decision is discovered or, in the absence of timely inquiries, on the date the petitioner is placed on inquiry notice. *Rogers v. City of Eagle Point*, 42 Or LUBA 607 (2002).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Evidence in the record that petitioners knew an application for a proposed subdivision was pending before the local government is not sufficient to establish, for purposes of ORS 197.830(3), that petitioners knew or should have known that the subdivision application would be approved or that the application included a proposal to develop a lot within *petitioners'* subdivision as an access street for the proposed subdivision. *Rogers v. City of Eagle Point*, 42 Or LUBA 607 (2002).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. In accordance with OAR 661-010-0075(6), LUBA will dismiss an appeal where a corporation's notice of intent to appeal was filed by a person who is not an attorney, and an amended notice of intent to appeal signed by an attorney was not filed within the deadline set by the Board. *Qwest Wireless, L.L.C. v. City of Medford*, 42 Or LUBA 174 (2002).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A notice of intent to appeal that is filed by first class mail 21 days after the appealed decision became final is not timely filed under ORS 197.830(9) and OAR 661-010-0015(1), where the notice of intent to appeal is not actually received by LUBA until 22 days after the appealed decision became final. *Larner v. City of Portland*, 41 Or LUBA 471 (2002).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. LUBA will not dismiss an appeal of a letter that provided notice of an earlier land use decision, provided the notice of intent to appeal adequately identifies the land use decision being appealed, and the notice of intent to appeal is filed within the period allowed by statute for appeal of the land use decision. *Kent v. City of Portland*, 39 Or LUBA 455 (2001).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where the notice of intent to appeal challenges a governing body's decision determining that petitioner has no standing to file a local appeal of a planning director's decision, but the petition for review assigns error only to the planning director's decision, the petition for review provides no basis to

reverse or remand the governing body's decision. *Doob v. Josephine County*, 39 Or LUBA 301 (2001).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Failure to serve a copy of the notice of intent to appeal on the applicant's attorney in a timely manner is a technical violation of LUBA's rules that does not require dismissal unless the substantial rights of the applicant have been prejudiced. *Mountain West Investment v. City of Silverton*, 38 Or LUBA 932 (2000).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Under ORS 197.830(8), the time for appealing an amendment to an acknowledged plan or land use regulation is measured from the time the decision was mailed in accordance with ORS 197.615 and OAR 660-018-0040. Where a party files a notice of intent to appeal within 21 days of the date the decision was mailed in accordance with the statute and rule, the notice of intent to appeal is timely filed. *Craig Realty Group v. City of Woodburn*, 37 Or LUBA 1041 (2000).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. ORS 197.615(1) and OAR 660-018-0040 require that a local government send a copy of an ordinance amending local land use regulations and the findings supporting the ordinance, "accompanied by appropriate forms provided by" DLCD. Failure to submit the appropriate form with the decision and findings tolls the time to file a notice of intent to appeal with LUBA until 21 days after the proper notice is given. *Craig Realty Group v. City of Woodburn*, 37 Or LUBA 1041 (2000).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A planning director's letter determining that a driving range is a permitted use is the decision that triggers the 21-day appeal timeline to LUBA, not the date the developer began construction. *Davis v. City of Ashland*, 37 Or LUBA 224 (1999).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A notice of intent to appeal is timely filed where the county code specifies that land use decisions become final when mailed to the parties entitled to notice, and petitioner filed the notice of intent to appeal within 21 days of the date the county mailed the decision. *Warrick v. Josephine County*, 36 Or LUBA 796 (1999).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The failure to serve all persons required to be named in the notice of intent to appeal as required by OAR 661-010-0015 is a technical violation of LUBA's rules, when intervenor's only alleged prejudice is that the violation prohibits other parties from contributing resources to support his position. A person need not have intervenor status to contribute to the preparation of a brief, financially or otherwise. *Multi/Tech Engineering v. Josephine County*, 36 Or LUBA 774 (1999).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. LUBA will not accept an amended notice of intent to appeal that identifies a different decision than that which is the subject of the original notice of intent to appeal, unless the amended notice is accompanied by the fee and deposit required by OAR 661-010-0015(4). Where LUBA accepts such an amended notice, LUBA will not dismiss the amended notice until petitioner has had an

opportunity to submit the required fee and deposit. *McKy v. Josephine County*, 36 Or LUBA 769 (1999).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Whether petitioner had "actual notice" of the decision under ORS 197.830(3)(a) depends on whether petitioner has received written notice of the decision. That petitioner knew or should have known of the challenged decision more than 21 days before filing the notice of intent to appeal is a dispositive consideration under ORS 197.830(3)(b), but not under ORS 197.830(3)(a). *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. An evidentiary hearing is not warranted to establish that the county orally advised petitioner that the county had approved the challenged application more than 21 days before petitioner filed the notice of intent to appeal, when the relevant issue under ORS 197.830(3)(a) is when the petitioner received actual written notice of the decision. *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. For purposes of starting the ORS 197.830(3)(b) appeal period for appealing a county decision rendered without a hearing, petitioner "knew or should have known" of a decision approving a grading permit authorizing a retaining wall where petitioner knew that the applicant was building a retaining wall and placing fill behind it and that the county had approved a grading permit for the subdivision authorizing 76,000 cubic feet of fill. *Abadi v. Washington County*, 35 Or LUBA 67 (1998).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Whether multiple enactments constitute a single decision for purposes of appeal to LUBA depends on the relationship between the enactments. Where a decision on reconsideration reenacts the original decision together with a supplemental enactment that is characterized as an "integral part" of the reconsidered decision, there is a single decision for purposes of appeal of the decision on reconsideration to LUBA. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The parties to an appeal at LUBA may not by agreement stipulate that LUBA has jurisdiction to review a separate decision that was not appealed to LUBA. *Mountain Gate Homeowners v. Washington County*, 34 Or LUBA 169 (1998).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. An appeal will be dismissed where petitioner failed to "appear" below and therefore lacks standing to appeal to LUBA. In that circumstance, the LUBA appeal will be dismissed notwithstanding the intervention as a petitioner of a party who did appear below, where that intervenor-petitioner did not also file his own timely notice of intent to appeal. *Waters v. Marion County*, 33 Or LUBA 751 (1997).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The timely filing of a technically flawed notice of intent to appeal satisfies LUBA's jurisdictional requirements; and properly serving an amended notice of intent to appeal that corrects the technical

violations in the original notice, although not expressly allowed by LUBA's rules, may avoid dismissal on the ground of prejudice to the substantial rights of the county. *Markham v. Coos County*, 31 Or LUBA 529 (1996).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. LUBA will not grant the county's motion to dismiss based on petitioners' failure to timely serve a notice of intent to appeal on interested parties, when those parties have not moved for dismissal. *Markham v. Coos County*, 31 Or LUBA 529 (1996).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Numerous technical violations of LUBA's rules pertaining to the form and content of a notice of intent to appeal do not require dismissal unless they prejudice the substantial rights of the parties. The inconvenience to the county in having to search its records to identify the subject of the appeal does not amount to prejudice of the county's substantial rights. *Markham v. Coos County*, 31 Or LUBA 529 (1996).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Because of flooding during the week of February 5, 1996, which created de facto "holidays" at various state offices, a notice of intent to appeal delivered to LUBA on the first business day after the flooding will be considered timely under ORS 197.830(8) and OAR 661-10-015(1). *Younger v. Jackson County*, 31 Or LUBA 521 (1996).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The timely filing of a notice of intent to appeal a local decision is jurisdictional, and an untimely filed notice of intent to appeal mandates dismissal of the appeal. *Winner v. Multnomah County*, 30 Or LUBA 420 (1996).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. While timely filing of a notice of intent to appeal is jurisdictional, violations of the requirements for the content and service of a notice of intent to appeal are technical, and warrant dismissal of the appeal only if another party is prejudiced by the violations. *Winner v. Multnomah County*, 30 Or LUBA 420 (1996).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a document submitted as a notice of intent to appeal wholly fails to satisfy the requirements of OAR 661-10-015(1), to the point where LUBA cannot process the appeal and other parties cannot effectively participate, the document does not constitute a notice of intent to appeal. *Winner v. Multnomah County*, 30 Or LUBA 420 (1996).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. If a petitioner's failure to comply with the OAR 661-10-015(3) requirements for the content of the notice of intent to appeal precludes other parties from effectively participating in the appeal, the other parties are per se prejudiced by the violations. *Winner v. Multnomah County*, 30 Or LUBA 420 (1996).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a notice of intent to appeal identifies more than one decision as the subject of the appeal, LUBA will not dismiss the appeal, but rather will require petitioners to submit the appropriate additional filing fees and deposits for costs for each additional decision identified in the notice of intent to appeal, and will treat the proceeding as a consolidated appeal. *McKenzie v. Multnomah County*, 30 Or LUBA 459 (1996).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Until the requirements of ORS 197.615(2)(b) are satisfied, the time for filing a notice of intent to appeal a comprehensive plan amendment does not begin to run. When a final decision has been made, but petitioners have not received the notice to which they are entitled under ORS 197.615(2)(b), their notice of intent to appeal is timely filed. *Barton v. City of Lincoln City*, 29 Or LUBA 612 (1995).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. When a challenged decision is an amendment to an acknowledged comprehensive plan processed under ORS 197.615, the date of mailing, not the date of the final decision, establishes the deadline for filing the notice of intent to appeal under ORS 197.830(8). *Barton v. City of Lincoln City*, 29 Or LUBA 612 (1995).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a local government's notice of decision is not accompanied by a certificate of mailing or service, and the date of mailing is critical to determining whether the notice of intent to appeal was timely filed, LUBA will rely on other evidence, including affidavits, to decide when the notice of decision was mailed. *1000 Friends of Oregon v. Columbia County*, 29 Or LUBA 597 (1995).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. ORS 12.140, a 10-year statute of limitations for initiating civil actions in Oregon courts, does not apply to LUBA's proceedings. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. ORS 197.830(3) applies only where a local government makes a *land use decision* without providing a hearing, and petitioners subsequently attempt to challenge that decision in an appeal to LUBA. Where a local government did not previously make a land use decision concerning the legality of an existing use, petitioner's timely appeal of the local government's new land use decision is not precluded under ORS 197.830(3)(b), because petitioners allegedly knew of the use's existence for several years. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where determining whether a notice of intent to appeal was timely filed under ORS 197.830(3) depends on determining which code notice of hearing provision applied to the local proceeding, and LUBA can infer from the challenged decision which notice provision the local governing body believes governs the local proceeding and agrees with that interpretation, even without the deference required by *Clark*, LUBA is not required to remand the decision for the governing body to make its interpretation explicit. *Orenco Neighborhood v. City of Hillsboro*, 29 Or LUBA 186 (1995).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Failure to serve the notice of intent to appeal on a respondent within the time required by OAR 661-10-015(2) is a technical violation of LUBA's rules, which is not grounds for dismissal unless the substantial rights of parties are prejudiced. Where the notice of intent to appeal was served on respondent, at most, two days later than required by OAR 661-10-015(2), respondent's substantial rights were not prejudiced. *Williams v. City of Philomath*, 29 Or LUBA 563 (1995).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a local government approved a conditional use permit for a nonforest dwelling in 1992, and petitioner's notice of intent to appeal simply identifies the local government's 1994 building permit approval as the appealed decision, petitioner's appeal has the legal effect of appealing only the 1994 building permit decision. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where petitioner was entitled to notice of the hearing on a development proposal and was not given such notice, but was not entitled to notice of the local decision, under ORS 197.830(3)(b), petitioner's notice of intent to appeal the local decision to LUBA is timely so long as it is filed within 21 days after petitioner "knew or should have known" of the local decision. *Beveled Edge Machines, Inc. v. City of Dallas*, 28 Or LUBA 790 (1995).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. It is petitioner's obligation to establish LUBA's jurisdiction, including that petitioner's notice of intent to appeal was timely filed. *Bowen v. City of Dunes City*, 28 Or LUBA 324 (1994).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The failure of a notice of intent to appeal to include "[t]he full title of the decision to be reviewed as it appears on the final decision," as required by OAR 661-10-015(3)(c), provides no basis for summarily affirming the challenged decision where respondent understood which decision was being challenged and submitted the local record supporting the challenged decision. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where the notice of public hearing given by the local government is inadequate, such that it does not "reasonably describe the local government's final [decision]," ORS 197.830(3) potentially provides a person adversely affected by the inadequate notice a right to file an appeal at LUBA long after the local decision is reduced to writing, notice of the decision is given, and the decision otherwise becomes final. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a local hearing is provided, and petitioner appears at that hearing and becomes entitled to notice of the challenged land use decision under ORS 215.416(10) or 227.173(3), the filing of petitioner's notice of intent to appeal is governed by ORS 197.830(2) and (8), *not* ORS 197.830(3). *Ramsey v. City of Portland*, 28 Or LUBA 763 (1994).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where petitioner appeals local government decisions issuing a building permit and denying a request for

a local appeal of the building permit, and petitioner's notice of intent to appeal is filed more than 21 days after petitioner had actual notice of the building permit decision but within 21 days of the decision that there is no right to a local appeal, the notice of intent to appeal is untimely filed with regard to the building permit decision and the only issue to be resolved in the LUBA appeal is whether the local government determination that there is no right to a local appeal of the building permit decision is erroneous. *Mills v. City of Yachats*, 28 Or LUBA 736 (1994).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a notice of intent to appeal filed at LUBA is later withdrawn, the LUBA appeal must be dismissed. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a notice of intent to appeal states the challenged decision is a planning commission recommendation to the governing body, the local government moves to dismiss the appeal on the ground the challenged decision is not final, and petitioner fails to respond to the motion to dismiss, the appeal will be dismissed. *Braun v. City of La Grande*, 27 Or LUBA 581 (1994).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where petitioner files a notice of intent to appeal within 21 days after the decision maker's oral vote to adopt the challenged decision, but before the final written decision was adopted, the notice of intent to appeal is timely filed under OAR 661-10-015(1), and petitioner will be permitted to amend the notice of intent to appeal to identify the correct date the challenged decision became final. *Sanchez v. Clatsop County*, 27 Or LUBA 713 (1994).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where the identity of the decision petitioner seeks to appeal was, or should have been, understood by respondent, and the notice of intent to appeal was timely filed under OAR 661-10-015(1), that petitioner identified respondent's tentative oral decision in the notice of intent to appeal rather than the final written decision is, at most, a technical violation of LUBA's rules and provides no basis for dismissing the appeal. *Fraser v. City of Joseph*, 27 Or LUBA 695 (1994).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Allegations in a notice of intent to appeal that the challenged decision is a land use decision do not constitute a judicial admission that the challenged decision is a land use decision. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where petitioner's notice of intent to appeal identifies the challenged decision as the governing body's decision to dismiss his local appeal, but his petition for review alleges error in the planning commission's decision to approve the subject application, rather than the governing body's decision dismissing his appeal, LUBA will affirm the challenged decision. *Churchill v. Tillamook County*, 26 Or LUBA 22 (1993).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. The appeal deadline provisions of ORS 197.830(3) requiring that a notice of intent to appeal be filed within 21 days after petitioner "knew or should have known or had actual notice of the decision"

apply only where the local government fails to provide a hearing. *DLCD v. Crook County*, 25 Or LUBA 826 (1993).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where, under ORS 197.830(8) and OAR 661-10-015(1), a notice of intent to appeal is due on a legal holiday, the notice of intent to appeal is timely filed if it is filed on the next business day. ORS 187.010(3); OAR 661-10-075(7). *Garrigus v. City of Lincoln City*, 25 Or LUBA 767 (1993).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. After a local government withdraws an appealed decision pursuant to ORS 197.830(12)(b) and files a decision on reconsideration with LUBA, if no amended notice of intent to appeal is filed or original notice of intent to appeal is refiled within 21 days after the decision on reconsideration, then the appeal will be dismissed. *Gregg v. City of Lake Oswego*, 23 Or LUBA 564 (1992).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. A notice of intent to appeal identifying one land use decision may not later be amended to include a second decision, where no notice of intent to appeal the second decision was filed within the time required by statute and no filing fee or deposit for costs has been paid to challenge the second decision. *Hood River Sand v. City of Mosier*, 23 Or LUBA 701 (1992).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. That a notice of intent to appeal (1) fails to include the date the local decision became final, (2) fails to include petitioner's address and telephone number, and (3) incorrectly identifies the city attorney, constitutes a technical violation of LUBA's rules. However, unless technical violations of LUBA's rules affect the substantial rights of a party, they provide no basis for dismissal. *Davenport v. City of Tigard*, 23 Or LUBA 679 (1992).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Under ORS 197.830(8) and 197.615, a notice of intent to appeal a post-acknowledgment plan amendment must be filed at LUBA within 21 days of the date parties who requested notice of the post-acknowledgment plan amendment decision under ORS 199.615(2)(a)(B), were mailed such notice. *Crew v. Deschutes County*, 23 Or LUBA 148 (1992).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a notice of intent to appeal is filed with LUBA more than 21 days after the date the challenged decision became final, under OAR 661-10-015(1) LUBA must dismiss the appeal. *Crew v. Deschutes County*, 23 Or LUBA 148 (1992).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where LUBA receives a check in the amount of the filing fee and deposit for costs required by OAR 661-10-015(4), accompanied by a letter stating petitioner's notice of intent to appeal was mailed separately, and receives the notice of intent to appeal the following day, the date the notice of intent to appeal was received is the date it was "filed." *Pilling v. Crook County*, 23 Or LUBA 51 (1992).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Under OAR 661-10-015(1), so long as a notice of intent to appeal is filed before the expiration of the twenty-first day after the decision becomes final, the notice of intent to appeal is timely filed. *Rabe v. City of Tualatin*, 22 Or LUBA 832 (1992).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Under ORS 197.830(1), the maintenance of a validly filed notice of intent to appeal is required for LUBA to have jurisdiction over an appeal. *Ramsey v. City of Portland*, 22 Or LUBA 535 (1992).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where an organizational petitioner timely files a notice of intent to determine in its representational capacity, it is only necessary to determine whether petitioner also filed the notice of intent to appeal within 21 days of the date it, as an *organization*, is deemed to have actual notice of the challenged decision, if there were a dispute concerning the member's standing upon whom petitioner's representational capacity to bring the appeals and its representational standing depend. *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a notice of intent to appeal identifies more than one decision as the subject of the appeal, LUBA will not dismiss the appeal, but rather will require the petitioners to file an additional filing fee and deposit for costs for each additional decision identified in the notice of intent to appeal, and will treat the proceeding as a consolidated appeal. *Union Gospel Ministries v. City of Portland*, 21 Or LUBA 557 (1991).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Technical defects in a notice of intent to appeal provide no basis for dismissing an appeal, where such defects cause no prejudice to any party's substantial rights. *Tice v. Josephine County*, 21 Or LUBA 550 (1991).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. If the petitioner's notice of intent to appeal is withdrawn, LUBA must dismiss the appeal. *National Advertising Company v. City of Portland*, 20 Or LUBA 79 (1990).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Where a petitioner and respondent have settled the disagreement concerning a land use decision which led to the petitioner's filing of a notice of intent to appeal, it is consistent with the policies of ORS 197.805 favoring timely resolution of land use matters and consistency with sound principles governing judicial review to allow the petitioner to withdraw its notice of intent to appeal. *National Advertising Company v. City of Portland*, 20 Or LUBA 79 (1990).

27.2.2 LUBA Procedures/Rules – Perfecting an Appeal – Notice of Intent to Appeal. Unlike other documents, which are considered filed when mailed to LUBA, a notice of intent to appeal is filed when delivered to or received by LUBA. OAR 661-10-075(2). *Oak Lodge Water District v. Clackamas County*, 18 Or LUBA 643 (1990).

27.2.3 LUBA Procedures/Rules – Perfecting an Appeal – Payment of Fee and Deposit for Costs. LUBA's rules do not allow LUBA to waive fees. LUBA is not a circuit court, and ORS 21.682 does not apply to LUBA. *Dunzer v. Clatsop County*, 76 Or LUBA 393 (2017).

27.2.3 LUBA Procedures/Rules – Perfecting an Appeal – Payment of Fee and Deposit for Costs. Where a petitioner fails to remit the required fees in the time set pursuant to OAR 661-010-0015(1)(c), LUBA must dismiss the appeal. *Dunzer v. Clatsop County*, 76 Or LUBA 393 (2017).

27.2.3 LUBA Procedures/Rules – Perfecting an Appeal – Payment of Fee and Deposit for Costs. LUBA will not accept an amended notice of intent to appeal that identifies a different decision than that which is the subject of the original notice of intent to appeal, unless the amended notice is accompanied by the fee and deposit required by OAR 661-010-0015(4). Where LUBA accepts such an amended notice, LUBA will not dismiss the amended notice until petitioner has had an opportunity to submit the required fee and deposit. *McKy v. Josephine County*, 36 Or LUBA 769 (1999).

27.2.3 LUBA Procedures/Rules – Perfecting an Appeal – Payment of Fee and Deposit for Costs. Where a notice of intent to appeal identifies more than one decision as the subject of the appeal, LUBA will not dismiss the appeal, but rather will require petitioners to submit the appropriate additional filing fees and deposits for costs for each additional decision identified in the notice of intent to appeal, and will treat the proceeding as a consolidated appeal. *McKenzie v. Multnomah County*, 30 Or LUBA 459 (1996).

27.2.3 LUBA Procedures/Rules – Perfecting an Appeal – Payment of Fee and Deposit for Costs. Because petitioner's notice of intent to appeal was accompanied by a check made out to the wrong agency and the error was not corrected before the expiration of the appeal period, LUBA has no jurisdiction over the appeal. *Ray v. Douglas County*, 30 Or LUBA 238 (1995).

27.2.3 LUBA Procedures/Rules – Perfecting an Appeal – Payment of Fee and Deposit for Costs. ORS 197.830(8) and OAR 661-10-015(1) and (4) require that a notice of intent to appeal be accompanied by a filing fee of 50 dollars and a deposit for costs of 150 dollars. LUBA will not refund filing fees or deposits for costs when appeals are consolidated. *Tylka v. Clackamas County*, 23 Or LUBA 715 (1992).

27.2.3 LUBA Procedures/Rules – Perfecting an Appeal – Payment of Fee and Deposit for Costs. A notice of intent to appeal identifying one land use decision may not later be amended to include a second decision, where no notice of intent to appeal the second decision was filed within the time required by statute and no filing fee or deposit for costs has been paid to challenge the second decision. *Hood River Sand v. City of Mosier*, 23 Or LUBA 701 (1992).

27.2.3 LUBA Procedures/Rules – Perfecting an Appeal – Payment of Fee and Deposit for Costs. Where a notice of intent to appeal identifies more than one decision as the subject of the appeal, LUBA will not dismiss the appeal, but rather will require the petitioners to file an additional filing fee and deposit for costs for each additional decision identified in the notice of intent to appeal, and will treat the proceeding as a consolidated appeal. *Union Gospel Ministries v. City of Portland*, 21 Or LUBA 557 (1991).

27.2.3 LUBA Procedures/Rules – Perfecting an Appeal – Payment of Fee and Deposit for Costs. LUBA's rules do not require that the notice of intent to appeal contain a statement that the required filing fee and deposit for costs have been paid. Under OAR 661-10-015(1), LUBA will not accept a notice of intent to appeal for filing, unless it is accompanied by the required filing fee and deposit for costs. *Tice v. Josephine County*, 21 Or LUBA 550 (1991).

27.2.3 LUBA Procedures/Rules – Perfecting an Appeal – Payment of Fee and Deposit for Costs. Where petitioner is the prevailing party in a LUBA appeal, LUBA will return petitioner's 150-dollar deposit for costs and petitioner is entitled to an award of costs, in the amount of the filing fee, to be paid by respondents. *Sokol v. City of Lake Oswego*, 19 Or LUBA 521 (1990).

27.3.1 LUBA Procedures/Rules – Record – Generally. When the county submits pre-decision documentation to DLCD in accordance with ORS 197.610(1) which requires local governments to provide information specified in ORS 197.610(3), including a copy of proposed amendments to DLCD, that material is properly included in the record. Also, when the county submits the post-decisional notice and information required by ORS 197.615(1) and (2), the county must either identify their location in the present record or submit them as part of a supplemental record. Additionally, if DLCD sent the county a substantive response to the information the county sent to DLCD, the response should be included in the record. *VanDyke v. Yamhill County*, 78 Or LUBA 1036 (2018).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where one of the bases for a party's motion to consider evidence outside the record is to resolve disputes over the content of the record pursuant to OAR 661-010-0045(1), such disputes arise and ripen before briefing on the merits, and therefore such motions may be filed prior to the briefing for that purpose. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

27.3.1 LUBA Procedures/Rules – Record – Generally. To succeed in a motion to take evidence outside the record and pursuant to OAR 661-010-0045(1), and (2)(a) and (c), regarding an alleged violation of petitioners' rights under the privileges and immunities clause of the Oregon Constitution, and the equal protection clause of the 14th Amendment to the United States Constitution, the movant must develop a legal theory and a set of factual assertions sufficient to allow LUBA to determine how consideration of the proffered evidence would "affect the outcome of the review proceeding." *Conte v. City of Eugene,* 76 Or LUBA 498 (2017).

27.3.1 LUBA Procedures/Rules – Record – Generally. In a motion to take evidence outside the record pursuant to OAR 661-010-0045(1), and (2)(a) and (c), petitioners' argument—that two city employees violated petitioners' rights under the privileges and immunities clause of the Oregon Constitution, and the equal protection clause of the 14th Amendment to the United States Constitution because the employees engaged in the "unequal" application of the applicable standards in processing two similarly situated planned unit development (PUD) projects—fails to demonstrate that the proffered evidence would concern "procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision" because petitioners do not allege that the final decision maker violated petitioners' constitutional rights. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

27.3.1 LUBA Procedures/Rules – Record – Generally. Under OAR 661-010-0025(1)(a) a local government may clarify its understanding of all the documents a final decision maker adopted as supporting findings, by collecting all those adopted findings together at the beginning of the record. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

27.3.1 LUBA Procedures/Rules – Record – Generally. While LUBA and other public bodies have a statutory obligation to protect confidential archeological information in the record from public disclosure, LUBA lacks statutory authority to order private parties to the appeal to keep confidential information in their private possession from public disclosure. *Oregon Shores Conservation Coalition v. Coos County*, 75 Or LUBA 534 (2017).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will deny a request for a 90-day extension of the deadline to transmit the record, and conclude that granting the requested extension would be inconsistent with the legislative objective that "time is of the essence in reaching final decisions in matters involving land use," given (1) the petitioners' objection to the extension, (2) the probable brevity of the record, and (3) the petitioners' offer to assist the county in preparing the record. *Agnew v. Josephine County*, 75 Or LUBA 556 (2017).

27.3.1 LUBA Procedures/Rules – Record – Generally. A single e-mail to the county discussing the omission of one document from the record is sufficient to satisfy the OAR 661-010-0026(1) obligation to attempt to resolve record objections with the local government's legal counsel prior to filing an objection with LUBA with respect to the identified document, but not with respect to other allegedly omitted documents. *Neil v. Columbia County*, 74 Or LUBA 614 (2016).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will consider a reply to a response to record objections, where the reply is limited to legal arguments raised in the response to the objections, and does not state additional record objections. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 638 (2016).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where a party objects that the record should include a transcript, attaches the transcript to its record objections and the county thereafter submits a copy of the transcript as a supplemental record, and that transcript has formatting errors that complicate use of the transcript but do not render it unusable, LUBA will deny the party's objection that the county should be ordered to submit the transcript a second time without the formatting errors. *Rawson v. Hood River County*, 74 Or LUBA 668 (2016).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA interprets OAR 661-010-0025(2)(a) and 661-010-0025(4)(a)(B) to require that all record documents that are retained by the local government until oral argument must be identified on a list at the end of the table of contents. This requirement applies, even if reduced copies of oversized originals or black and white copies of retained color originals are included and indexed in the record that is transmitted to LUBA. *Fernandez v. City of Portland*, 72 Or LUBA 482 (2015).

27.3.1 LUBA Procedures/Rules – Record – Generally. OAR 661-010-0025(4)(a)(B)(i) provides in part that "[w]here an item listed in the table of contents includes attached exhibits, the exhibits shall be separately listed as an exhibit to the item." As a general rule, OAR 661-010-0025(4)(a)(B)(i) does not require that exhibits to exhibits must be separately listed in the table of contents. *Fernandez v. City of Portland*, 72 Or LUBA 482 (2015).

27.3.1 LUBA Procedures/Rules – Record – Generally. OAR 661-010-0025(4)(a)(B)(i) provides in part that "[w]here an item listed in the table of contents includes attached exhibits, the exhibits shall be separately listed as an exhibit to the item." Where a record table of contents does not separately list the attachments to a document that is included in the record and identified in the table of contents, but the record table of contents includes a specific or general description of all the attachments, any failure to fully comply with OAR 661-010-0025(4)(a)(B)(i) is not a basis for ordering that the table of contents be revised to separately list the attachments. *Fernandez v. City of Portland*, 72 Or LUBA 482 (2015).

27.3.1 LUBA Procedures/Rules – Record – Generally. Including hyperlinks in a document that is submitted for the record in a quasi-judicial land use proceeding is not sufficient, without more, to make the documents that can be accessed via those hyperlinks part of the local government's record. *Fernandez v. City of Portland*, 72 Or LUBA 482 (2015).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where a record is transmitted to LUBA in electronic instead of paper format, and the records exceeds 100 pages, the electronic copy of the record must be in the form of a searchable PDF, so that terms and phrases can be easily located. *Rogue Advocates v. Josephine County*, 71 Or LUBA 409 (2015).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will treat as a belated supplemental record a document attached to the local government's response brief, where there is no dispute that the document was inadvertently omitted from the record transmitted to LUBA, the petition for review assumed the document was in the record, and accepting the belated supplemental record neither prejudices a party's substantial rights nor delays LUBA's review proceeding. *Save Downtown Canby v. City of Canby*, 70 Or LUBA 68 (2014).

27.3.1 LUBA Procedures/Rules – Record – Generally. A supplemental traffic impact analysis is included in the local record where it (1) was submitted to city staff to supplement a land use permit application, (2) was submitted in the same way that many documents in the record were submitted, (3) was available to all parties and city council throughout the proceedings, and (4) is referred to in a number of documents in the record and the findings adopted to support the decision. *Zian Limited Partnership v. City of Tualatin*, 68 Or LUBA 560 (2013).

27.3.1 LUBA Procedures/Rules – Record – Generally. OAR 661-010-0025(1) is not exhaustive in its listing of the contents of the record, because it provides "the record shall include at least the following[.]" *Save Downtown Canby v. City of Canby*, 67 Or LUBA 480 (2013).

27.3.1 LUBA Procedures/Rules – Record – Generally. Paper or media copies of visual presentations by planning staff to the land use decision maker are properly included in the record that is transmitted to LUBA, even if media or paper copies of that visual presentation were not presented for the record below. *Save Downtown Canby v. City of Canby*, 67 Or LUBA 480 (2013).

27.3.1 LUBA Procedures/Rules – Record – Generally. In determining whether a document was placed before a planning director and therefore part of the record of a planning director's land use decision, documents that were placed before the planning director or a designee in one land use proceeding, but were not separately placed before the planning director or a designee in a second, albeit related land use proceeding are not part of the record of the second related proceeding. *Schnitzer Steel Industries, Inc. v. City of Eugene*, 67 Or LUBA 484 (2013)

27.3.1 LUBA Procedures/Rules – Record – Generally. Where three appeals filed by two parties are consolidated together, the local government is required to serve one copy of the record to each of the two petitioners, and is not required to provide two copies to the petitioner who filed two appeals. The number of copies served is based on the parties, not the number of appeals. *STOP, LLC v. City of West Linn*, 67 Or LUBA 494 (2013).

27.3.1 LUBA Procedures/Rules – Record – Generally. Notwithstanding OAR 661-010-0025(1), which requires that all "documents or other written materials" that are placed before the decision maker must be included in the record, a local government's consideration of a land use regulation in adopting a land use decision does not, by itself, require that the land use regulation be included as part of the record that must be submitted in a LUBA appeal, unless there is some reason to believe the local government intended to make a copy of the land use regulation part of the record of the local government's proceedings. However, LUBA routinely takes official notice of comprehensive plans and land use regulations under ORS 40.090(7) and OEC 202(7). *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 452 (2012).

27.3.1 LUBA Procedures/Rules – Record – Generally. A statement in a city council decision that adopts amendments to city septic system regulations that in considering the amendments the city council considered original septic system regulations is not sufficient to incorporate the legislative record of the original septic system regulations as part of the record of the amended septic system regulations. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 452 (2012).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where a local government has already served the petitioners with a copy of the record during a previous LUBA appeal, in an appeal of the local government's decision following LUBA's remand in that first appeal, the local government is not required to serve on petitioners a second copy of the record it compiled in rendering the initial decision. *Sane, Orderly Development, Inc. v. Douglas County*, 63 Or LUBA 578 (2011).

27.3.1 LUBA Procedures/Rules – Record – Generally. Just as a local government errs by refusing to accept relevant evidence, a local government errs if it accepts relevant evidence that is submitted in accordance with local law and then fails to provide that relevant evidence to the local decision maker. *Montgomery v. City of Dunes City*, 60 Or LUBA 274 (2010).

27.3.1 LUBA Procedures/Rules – Record – Generally. The OAR 661-010-0026(2) authorization for precautionary record objections was adopted to encourage collaborative resolution of record problems which can eliminate the possibility that LUBA will erroneously resolve complicated record objections or resolve them in a way that will have unintended consequences or complicates resolution of an appeal on the merits. *Hoffman v. Deschutes County*, 60 Or LUBA 451 (2009).

27.3.1 LUBA Procedures/Rules – Record – Generally. ORS 661-010-0025(1)(b) requires that the record that a local government transmits to LUBA must include "[a]ll written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker." However, where a city's land use code provides that "[t]he record shall contain all testimony and evidence that is submitted to the City, the Planning Commission, and the City Council and not rejected," testimony and evidence that is submitted to city planning staff must be included in the record, even if it was never actually placed before the city council, which was the final decision maker. *Montgomery v. City of Dunes City*, 59 Or LUBA 519 (2009).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where a local government land use code requires that "testimony and evidence" that is transmitted to city planning staff must be included in the record, even if that testimony and evidence was never placed before the ultimate city decision maker, e-mail messages that were sent to planning staff need not be included in the record where the objecting party does not establish that the disputed e-mail messages constitute "testimony and evidence." *Montgomery v. City of Dunes City*, 59 Or LUBA 519 (2009).

27.3.1 LUBA Procedures/Rules – Record – Generally. Local governments that seek additional time to compile and transmit the record to LUBA should contact the other parties and advise LUBA whether any party objects to the requested extension of time. *Catholic Diocese of Baker v. Crook County*, 59 Or LUBA 530 (2009).

27.3.1 LUBA Procedures/Rules – Record – Generally. Local governments that seek additional time to compile and file the record should advise LUBA of the expected length of the record and any other factors that might have some bearing on the reasonableness of the requested extension of time. *Catholic Diocese of Baker v. Crook County*, 59 Or LUBA 530 (2009).

27.3.1 LUBA Procedures/Rules – Record – Generally. Parties that object to requests for extensions of time to compile and transmit the record should provide relevant information that will allow LUBA to determine the reasonableness of their objections. *Catholic Diocese of Baker v. Crook County*, 59 Or LUBA 530 (2009).

27.3.1 LUBA Procedures/Rules – Record – Generally. Parties that object to requests for extensions of time to compile and transmit the record will improve their chances of prevailing if they suggest ways to shorten or simplify the record or offer to assist the local government in compiling and transmitting the record. *Catholic Diocese of Baker v. Crook County*, 59 Or LUBA 530 (2009).

27.3.1 LUBA Procedures/Rules – Record – Generally. A city may decide that the record of its legislative land use proceeding began when notice was given of the hearing before the planning commission, and does not include earlier scoping and prioritizing proceedings, where that decision is consistent with local law. Such a decision is within any implied limits imposed by ORS 197.830(10)(a) and OAR 661-010-0025(1). *Home Builders Association v. City of Eugene*, 58 Or LUBA 688 (2009).

27.3.1 LUBA Procedures/Rules – Record – Generally. Documents that were placed before the city council during a scoping and prioritizing stage that predated the commencement of a city legislative land use proceeding need not be included in the record that is filed with LUBA. *Home Builders Association v. City of Eugene*, 58 Or LUBA 688 (2009).

27.3.1 LUBA Procedures/Rules – Record – Generally. Simply making documents available on a local government's website does not make them part of the record of a legislative land use proceeding. However, where the local government expresses an intent that specified documents that are available on the city's website should be considered by the decision makers and parties to be part of the record, the fact that the city only provides paper copies of selected website documents

to the local decision makers does not mean that the other website documents are not also part of the record. *Graser-Lindsey v. City of Oregon City*, 58 Or LUBA 703 (2009).

27.3.1 LUBA Procedures/Rules – Record – Generally. Notes taken by the recording clerk at a hearing conducted by a hearings officer are not "minutes" of the hearing for purposes of the OAR 661-010-0025(1)(c) requirement to include minutes of the local proceedings in the record. *Ford v. Jackson County*, 54 Or LUBA 434 (2007).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA's scope of review is not limited to the local government record under ORS 197.835(2)(a) when LUBA is considering whether the decision on appeal is a land use decision that is subject to LUBA review. Making that threshold jurisdictional inquiry does not entail "[r]eview of the decision," within the meaning of ORS 197.835(2)(a). *Home Builders Association v. City of Eugene*, 54 Or LUBA 692 (2007).

27.3.1 LUBA Procedures/Rules – Record – Generally. OAR 661-010-0025(2), which allows local governments to "retain any large maps, tapes, or difficult-to-duplicate documents and items until the date of oral argument," attempts to strike a balance between the parties' need to have easy and convenient access to the record to prepare their briefs and the difficult and costly burden a local government may face in making the required number of copies of a record that includes documents that for some reason cannot be duplicated or cannot easily be duplicated using standard office copying equipment. *Walker v. Deschutes County*, 54 Or LUBA 752 (2007).

27.3.1 LUBA Procedures/Rules – Record – Generally. Although OAR 661-010-0025(1)(b) allows a local government to incorporate documents into the record, even though those documents are not physically placed before the local government in a land use proceeding, the local government must actually incorporate such documents. Acknowledging that a party has requested that a document be incorporated as part of the record is not the same thing as granting that request. *Rhinhart v. Umatilla County*, 53 Or LUBA 601 (2006).

27.3.1 LUBA Procedures/Rules – Record – Generally. Proceedings after remand from LUBA are a continuation of the original proceedings. Therefore, if the local government has already served the petitioners with a copy of the record from the previous LUBA appeal, the general rule is that the local government is not required to re-serve the petitioners with another copy of the previous LUBA record. *Foland v. Jackson County*, 53 Or LUBA 629 (2007).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will make an exception to the general rule that a local government does not need to re-serve petitioners with a copy of the previous LUBA record when the local government already served those petitioners a copy of the previous LUBA appeal, when the decision on remand was made more than 10 years after LUBA remanded the local government's decision. *Foland v. Jackson County*, 53 Or LUBA 629 (2007).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where a motion to take evidence is filed regarding an outstanding record objection and the content of the local record, the motion will be denied as moot where the motion and pleadings provide sufficient information to determine the content of the record. *Rickreall Community Water Assoc. v. Polk County*, 52 Or LUBA 772 (2006).

27.3.1 LUBA Procedures/Rules – Record – Generally. Under OAR 661-010-0026(1), before filing a record objection, a party is required to consult with the governing body's legal counsel. Where a party does so and the local government thereafter submits a supplemental record three days after the 14-day deadline for filing record objections expires, the party's failure to file a record objection provides no basis for rejecting the supplemental record. *Jaffer v. City of Monmouth*, 51 Or LUBA 803 (2006).

27.3.1 LUBA Procedures/Rules – Record – Generally. While mere reference to a document in testimony is an insufficient basis to conclude that the referenced document is incorporated into the record, where the decision itself refers to a document in a manner that suggests the document was considered by the decision maker, absent some reason to conclude otherwise the document is part of the record. *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where the challenged decision refers to and requires specific changes to existing storm water management manuals, that is some indication that the decision maker reviewed those manuals, and the burden shifts to the respondent to substantiate its assertion that the manuals were not in fact before the decision maker. *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006).

27.3.1 LUBA Procedures/Rules – Record – Generally. Documents may be incorporated into a land use decision only if the decision maker clearly indicates the intent to do so and adequately identifies the document incorporated. Statements that a stormwater permit includes "best management practices" does not mean that documents described under federal regulations as "best management practices" are incorporated into the permit. *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where the record was mailed to and received by petitioner and LUBA, the deadline for filing the petition for review expires 21 days after the record is received by LUBA, and petitioner's claim that he did not receive a letter from LUBA advising him of the date LUBA received the record does not affect that deadline. *Cunningham v. Josephine County*, 50 Or LUBA 58 (2005).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will not summarily deny record objections based on the objectors' failure to first consult with the local government's counsel under OAR 661-010-0026(1), where although it appeared that one of the objecting parties consciously violated the consultation requirement, it was not clear that another of the objecting parties was aware of the consultation requirement, and the county had already caused a 77-day delay by filing the record late. *Lindsey v. Josephine County*, 50 Or LUBA 756 (2005).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where LUBA can understand a party's presentation and arguments, the local government's failure to provide oversized exhibits for use at oral argument does not prejudice the party's substantial rights. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where the final decision maker dictates that the city will accept additional written submissions only until a prescribed date, and city staff

acts under that dictate to reject a document submitted after the prescribed date, the final decision maker has "rejected" the document, for purposes of determining the content of the record. *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where a local government conducts a single combined hearing on two separate permit applications, documents that clearly relate to only one application are not part of the record of the other application. *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where the evidentiary record has closed and a local appeal to the city council is limited to the evidentiary record that was compiled before the initial local hearings body, an attorney's reference to a deed to "illustrate" his argument to the city council is not sufficient to place the deed before the decision maker, so that it would become part of the city's record under OAR 661-010-0025(1)(b). *Nash v. City of Medford*, (2004).

27.3.1 LUBA Procedures/Rules – Record – Generally. Although the local government record may be necessary to determine whether a city improperly failed to follow applicable procedures in issuing a building permit, the local record may not be needed to determine whether LUBA has jurisdiction to consider an appeal challenging that building permit. Where the local government moves to dismiss the appeal contending that LUBA lacks jurisdiction to review the building permit and petitioner makes no attempt to explain why the record is necessary to determine whether that building permit is a land use decision or limited land use decision, LUBA will not require that the local government file the record until after LUBA rules on the jurisdictional question. *Wetzel v. City of Eugene*, 47 Or LUBA 631 (2004).

27.3.1 LUBA Procedures/Rules – Record – Generally. That LUBA may take judicial notice of an ordinance, comprehensive plan or enactment pursuant to OEC 202(7) does not mean that that item is or should be part of the record. *Wal-Mart Stores, Inc. v. City of Medford*, 47 Or LUBA 650 (2004).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA's rules do not specify whether the copy of the record that local governments are required to file and serve must be paper copies. Where petitioner does not contend that he is unable to access a part of the record that is provided in electronic format only or that the electronic format of part of the record hampers his ability to prepare for the appeal, LUBA will allow a record that is provided, in part, on a compact disk. *Ramsey v. Multnomah County*, 44 Or LUBA 828 (2003).

27. 3.1 LUBA Procedures/Rules – Record – Generally. A city's motion to extend the time for filing the record pending LUBA's resolution of its motion to dismiss for lack of jurisdiction will be denied, where LUBA determines that the city's record is necessary to resolve the jurisdictional question. *Dean v. City of Springfield*, 43 Or LUBA 632 (2002).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where a local government concedes that documents identified by petitioners are properly included in the record, LUBA will require that the city submit a supplemental record to include the documents. Petitioners may not submit a

supplemental record; only the respondent may submit the record in a LUBA appeal. *Tirumali v. City of Portland*, 40 Or LUBA 565 (2001).

27.3.1 LUBA Procedures/Rules – Record – Generally. Mail service of the notice of intent to appeal is complete on deposit in the mail. That the county did not receive the notice does not waive its obligation to file the record with LUBA, particularly when it had actual knowledge that the notice had been filed with LUBA. *Petersen v. Columbia County*, 39 Or LUBA 799 (2001).

27.3.1 LUBA Procedures/Rules – Record – Generally. A lengthy delay in filing the local record with LUBA does not substantially prejudice petitioner's right to the speediest practicable review, where the delay was partially attributable to petitioner's failure to bring the local government's noncompliance to LUBA's attention. *Petersen v. Columbia County*, 39 Or LUBA 799 (2001).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA may consider evidence outside of the local record for the limited purpose of determining whether it has jurisdiction without the necessity of granting motions to take evidence outside of the record. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

27.3.1 LUBA Procedures/Rules – Record – Generally. Under OAR 661-010-0025(4)(b) the record in a LUBA appeal may be incorporated by reference in the record of a subsequent LUBA appeal. However, where this is done, any parties in the subsequent LUBA appeal who did not receive a copy of the record in the first LUBA appeal must be provided a copy of that record. *Waibel v. Crook County*, 39 Or LUBA 749 (2000).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will consider documents that are not included in the record in deciding whether an appeal is moot. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will deny a motion to consider evidence that is not included in the record, where the moving party fails to demonstrate that any of the criteria for granting such a motion under OAR 661-010-0045(1) are met and the evidence the moving party seeks to have included does not render the appeal moot. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

27.3.1 LUBA Procedures/Rules – Record – Generally. A county attorney's decision to forward certain letters from petitioners' attorney to the county attorney to the board of county commissioners is not sufficient to establish either a common practice that all letters to the county attorney are included in the record or a reasonable expectation on the part of petitioners' attorney that such letters would be included in the local record. *Western States v. Multnomah County*, 37 Or LUBA 987 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. Petitioners' attorney's letter to the county's attorney is properly excluded from the record where the letter is not submitted for the record in the manner specified in the notice of hearing, and the letter does not include a request that the letter be included in the record. *Western States v. Multnomah County*, 37 Or LUBA 987 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. A motion to supplement the record filed after the petition for review and respondent's brief have been filed will be denied where it is not clear whether the document to be added to the record was placed before the decision maker, and no "unique circumstances" are identified to warrant supplementing the record at such a late state of the appeal. *Root v. City of Medford*, 36 Or LUBA 778 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will reject a supplemental record submitted after the petition for review has been filed, where the city fails to explain why the material in the supplemental record is properly part of the local record, and fails to establish that any "unique circumstances" exist justifying untimely filing of the supplemental record. *Terra v. City of Newport*, 36 Or LUBA 754 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA will grant a motion to strike documents attached to the petition for review, where those documents are neither part of the record submitted to LUBA nor documents of which LUBA may take official notice. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. In addressing a substantial evidence challenge, where the response brief provides no transcripts or partial transcripts and provides no assistance in locating the portion of the audio tapes in the record where relevant testimony is located, LUBA will not search for testimony on audio tapes. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

27.3.1 LUBA Procedures/Rules – Record – Generally. Under OAR 661-010-0025(2) and (3), a local government is not required to include copies of audiotapes with the record served on petitioner. The local government is only required to make the tapes available to petitioner for copy or transcription at petitioner's expense. *Beaman v. City of Hillsboro*, 34 Or LUBA 779 (1998).

27.3.1 LUBA Procedures/Rules – Record – Generally. A local government is not required to include a verbatim transcript of tape recordings in the record if such a transcript was not actually prepared for the proceedings below. *Beaman v. City of Hillsboro*, 34 Or LUBA 779 (1998).

27.3.1 LUBA Procedures/Rules – Record – Generally. In deciding jurisdictional challenges, LUBA will consider material attached to the parties' briefs if no party objects. If a party does object, the appropriate means to introduce evidence from outside the record is through a motion for an evidentiary hearing. *Mazeski v. Wasco County*, 31 Or LUBA 126 (1996).

27.3.1 LUBA Procedures/Rules – Record – Generally. A request to supplement the local government record made at the time of oral argument is untimely and will be denied. *Lyon v. Linn County*, 28 Or LUBA 402 (1994).

27.3.1 LUBA Procedures/Rules – Record – Generally. The local record must be submitted to LUBA by the local government, rather than by other parties to an appeal. OAR 660-10-025(2). *Jackman v. City of Tillamook*, 28 Or LUBA 749 (1994).

27.3.1 LUBA Procedures/Rules – Record – Generally. A local government may specify the methodology for making documents that are not submitted at the local hearings part of the local record in the local code, or may identify the methodology during the course of the local proceedings. *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725 (1994).

27.3.1 LUBA Procedures/Rules – Record – Generally. If LUBA allows the record to be supplemented after the petition for review is filed, petitioners must be given an opportunity to file a new petition for review. *Salem Golf Club v. City of Salem*, 27 Or LUBA 715 (1994).

27.3.1 LUBA Procedures/Rules – Record – Generally. In determining whether it has jurisdiction over an appeal, absent some objection from the parties, LUBA will consider materials from the record of a related LUBA appeal that are attached to parties' briefs, as well as other material in the record of that related appeal. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

27.3.1 LUBA Procedures/Rules – Record – Generally. The local record consists of those items physically placed before and not specifically rejected by the local decision maker. *Forest Highlands Neigh. Assoc. v. Lake Oswego*, 23 Or LUBA 723 (1992).

27.3.1 LUBA Procedures/Rules – Record – Generally. LUBA's review is limited by ORS 197.830(13)(a) to the record of the proceeding below, except in instances where an evidentiary hearing is authorized by ORS 197.830(13)(b). Therefore, local government enactments of which LUBA takes official notice under OEC 202 do not thereby become part of the local record which may provide evidentiary support for the challenged decision. *Ramsey v. City of Portland*, 23 Or LUBA 291 (1992).

27.3.1 LUBA Procedures/Rules – Record – Generally. Words spoken during the proceedings before the local decision maker are considered part of the local record, even where tapes of the local proceedings are not submitted to LUBA with the local record. Transcripts of the tapes of such local proceedings may be submitted to LUBA by the parties. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where respondent's motion to dismiss for lack of jurisdiction is based solely on the legal nature of the challenged decision, and petitioner does not explain why the local government record would provide any assistance in determining the legal nature of the challenged decision, LUBA will grant respondent's motion to delay filing the record until after the motion to dismiss is resolved. *Goose Hollow Foothills Assoc. v. City of Portland*, 21 Or LUBA 555 (1991).

27.3.1 LUBA Procedures/Rules – Record – Generally. Local governments may list record items which are difficult to duplicate, such as photographs, slides, maps and videotapes, as "exhibits" in the record table of contents and submit them to LUBA at the time of oral argument. Local governments are not required to serve petitioners with a copy of such items. OAR 661-10-025(2),(3) and (4)(a)(B). *Eckis v. Linn County*, 20 Or LUBA 589 (1991).

27.3.1 LUBA Procedures/Rules – Record – Generally. A document appended to a party's petition for review or brief becomes part of the record of LUBA's proceeding. *Wissusik v. Yamhill County,* 20 Or LUBA 246 (1990).

27.3.1 LUBA Procedures/Rules – Record – Generally. Where there is no dispute concerning the authenticity or identity of a document a party believes was improperly excluded from the record by the local government, the parties may stipulate that the document be included in the LUBA record for the limited purpose of reviewing the correctness of the local government's decision to exclude the document from the local government record. Alternatively, the document may be attached to a party's brief, and if any party objects to LUBA's consideration of the document, the party offering the document may move for an evidentiary hearing. *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0025(4)(a)(E) requires that items in the record be arranged in inverse chronological order, unless the Board grants permission for a different organization. Where the record includes three large groupings, within which are a number of sub-groups, and some of the subgroups are not organized in inverse chronological order, to the extent some items are not located in inverse chronological order, but the defects are not material and do not prevent the parties from locating specific items in the record with reasonable effort and the reorganization might well result in a less accessible record than the present organization, LUBA will not require the county to organize the record to strictly comply with the rule. *DLCD v. Douglas County*, 79 Or LUBA 1029 (2019).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where staff in a proceeding on a legislative decision (1) provide to the final decision maker hard copies of selected portions of a document, (2) advise the decision-maker that the full hardcopy version of the document is in, or was previously placed in, the record, and (3) the final decision maker does not thereafter reject or limit the staff offer, a reasonable person would understand that the staff has thereby successfully "placed before" the final decision maker the full hardcopy version of the documents within the meaning of OAR 661-010-0025(1)(b). *DLCD v. Douglas County*, 79 Or LUBA 1029 (2019).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0025(4)(a)(B)(ii) allows the county to retain large maps and other difficult to duplicate items until oral argument, as long as such items are listed at the end of the table of contents. Where large maps displayed during the county's hearings were retained by the county, and the county offers to bring the oversized maps to oral argument, but the county failed to list those maps in the table of contents, the county has failed to prepare an accurate listing of retained items in the table of contents consistent with the rule, and LUBA will order the county to revise the table of contents. *DLCD v. Douglas County*, 79 Or LUBA 1029 (2019).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Arguments that testimony is inadequately or inaccurately reflected in the minutes of the local proceedings may be adequate to justify requiring a local government to prepare a transcript of the proceedings where the objecting party demonstrates with particularity why the defect in the minutes is material. However, where petitioners' argument is merely that it is challenging to identify the testimony in the local government's voluminous record, and therefore LUBA should allow the documents to "resolve disputes regarding the content of the record," and where petitioner states it "is not clear that the document was actually submitted," there is no dispute regarding the content of the record, and petitioners have provided no basis for LUBA to allow the documents to be part of the record pursuant to OAR 661-010-0045(1). *Restore Oregon v. City of Portland*, 79 Or LUBA 1041 (2019).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will sustain petitioners' record objections where the local government's only response is that it could not verify that the documents were part of the record due to the lack of a date, signature and/or addressee, and petitioner provides evidence that petitioners sent the documents in question to all city commissioners in writing on April 4, 2018 by providing an email from one of the petitioners to each of the city commissioners with the documents in question attached, prior to the final decision. *Restore Oregon v. City of Portland*, 79 Or LUBA 1041 (2019).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the document to which petitioners object as having been improperly omitted from the record is an email sent by one of the petitioners to some, but not all, members of the city council, and no evidence in the record indicates that the email was submitted into the record by any of the recipients, the record was not "placed before" the final decision maker pursuant to OAR 661-010-0025(1)(b). *Restore Oregon v. City of Portland*, 79 Or LUBA 1041 (2019).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. When the county submits pre-decision documentation to DLCD in accordance with ORS 197.610(1) which requires local governments to provide information specified in ORS 197.610(3), including a copy of proposed amendments to DLCD, that material is properly included in the record. Also, when the county submits the post-decisional notice and information required by ORS 197.615(1) and (2), the county must either identify their location in the present record or submit them as part of a supplemental record. Additionally, if DLCD sent the county a substantive response to the information the county sent to DLCD, the response should be included in the record. *VanDyke v. Yamhill County*, 78 Or LUBA 1036 (2018).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where petitioner does not assert that the media recordings were "specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker," OAR 661-010-0025(1)(b), petitioner has not met its burden to demonstrate that the city improperly excluded the disputed items from the record. The city is required to transmit a record to LUBA that includes "all materials included as part of the record during the proceedings before the final decision maker." OAR 661-010-0026(2)(a); OAR 661-010-0025(1)(c). In this proceeding, the city council was the final decision maker. Accordingly, neither OAR 661-010-0026(2)(a) or OAR 661-010-0025(1)(c) require the city to include media recordings of the planning commission hearings in the record. *Oster v. City of Silverton*, 78 Or LUBA 1079 (2018).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A media recording of a planning commission hearing that the city council, the final decisionmaker, did not incorporate into the record is not required to be included in the record under OAR 661-010-0025(1)(c). *Oster v. City of Silverton*, 78 Or LUBA 1079 (2018).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. While the city's failure to include media recordings or transcripts of the planning commission hearings may be a basis for an assignment of error in the petition for review, that does not change the fact that the media recordings and transcript are not part of the record. For purposes of identifying the contents of the record required under OAR 661-010-0025, it does not matter whether the decision maker erred in accepting or excluding evidence. *Oster v. City of Silverton*, 78 Or LUBA 1079 (2018).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under OAR 661-010-0025(1), documents that are "placed before, and not rejected by, the final decision maker" are part of the record. No additional action by the local decision maker to formally admit such documents is required. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will not require correction of a record that is organized topically rather than in inverse chronological order by date of document as required by OAR 661-010-0025(4)(a)(E), where the topical organization reflects how the record was presented to the decision-makers below, and provides an equal or better means of accessing and understanding the role of individual documents in the proceedings. *Michaelson v. City of Portland*, 77 Or LUBA 579 (2018).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Audio recordings of preliminary meetings with planning staff that occur prior to the date of application are not part of the record of the decision on the application, unless those recordings are later incorporated into the record or placed before the final decision maker. *Michaelson v. City of Portland*, 77 Or LUBA 579 (2018).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under OAR 661-010-0025(1)(b), documents are properly included in the record at LUBA if they were "placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker." That an updated buildable lands inventory (BLI) was (1) available on the city's website, (2) given to some property owners, and (3) discussed at planning commission and city council meetings is not sufficient to establish that the BLI was "placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker." *Bender v. City of Nehalem*, 77 Or LUBA 592 (2018).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. If an updated buildable lands inventory (BLI) was placed before the final decision maker and was not rejected, the BLI is part of the record under OAR 661-010-0025(1)(b). That the BLI may have erroneously been placed before the final decision maker after the final public hearing was closed may provide a basis for remand but that does not mean the BLI should not be included in the record under OAR 661-010-0025(1)(b). *Bender v. City of Nehalem*, 77 Or LUBA 592 (2018).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Deeds that transferred title for property that is the subject of some but not all of the property line adjustments that are the subject matter of the challenged decision, but that nevertheless post-date the decision, were not "placed before" the planner who approved the property line adjustments within the meaning of OAR 661-010-0025(1)(b), where the deeds were not actually provided to the planner prior to the decision. Simply because other deeds that also post-date the decision were included in the record, possibly erroneously, does not mean the remainder of the post-decision deeds must also be included in the record. *Sarett v. Lane County*, 76 Or LUBA 470 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Absent a motion to take evidence outside the record pursuant to OAR 660-010-0045, LUBA has no basis for considering diagrams that illustrate an entire series of property line adjustments that are the subject matter of the challenged decision, but that nevertheless contain hand-drawn lines, text, and other information which indicate at least some of the notations post-date the decision, and therefore the diagrams could not have been "placed before" the planner who approved the property line adjustments. *Sarett v. Lane County*, 76 Or LUBA 470 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A petitioner's general assertion that all black and white copies of color originals should be replaced with color copies is an insufficient basis to require the local government to further amend the record, absent identification of specific items and some argument that specific black and white copies fail to provide material information present in the color originals. *Crowley v. City of Hood River*, 76 Or LUBA 475 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Although a petitioner's attachment of a self-prepared transcript to portions of an audio recording of the city council meeting illustrates that the local government erroneously characterized petitioner as reaffirming testimony by an advocate in favor of proposed rezoning, petitioner has failed to demonstrate with particularity why the defect in the minutes is material, and therefore failed to establish any reason to delay settling the record to correct immaterial defects in the minutes pursuant to OAR 661-010-0026(3). *Crowley v. City of Hood River*, 76 Or LUBA 475 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Petitioner may not rely upon a project opponent's attempt to incorporate content into the record by reference before the city council because such an attempt is not a sufficient basis to include the referenced material in the record. Pursuant to OAR 661-010-0025(1)(b), only the final decision-maker can "specifically incorporate[]" items into the record by reference. *Crowley v. City of Hood River*, 76 Or LUBA 475 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where petitioner offers some additional deeds and diagrams from a 2017 legal lot verification proceeding, in a challenge to a 2016 application for multiple property line adjustments, LUBA may not consider the additional post-decision deeds and diagrams where the parties agree that the 2016 application approved more than a single property line adjustment, and thus the deeds and diagrams do not offer anything material as to a "disputed factual allegation in the parties' briefs" pursuant to OAR 661-010-0045(1). *Sarett v. Lane County*, 76 Or LUBA 485 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. In a motion to take evidence outside the record filed before the parties have submitted briefs, LUBA considers it axiomatic that a document rejected from the local record is not part of the local record, for purposes of settling the content of the record, even if LUBA later concludes, after briefing on the merits, that the document was erroneously rejected from the local record. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0045(1) provides that LUBA may take evidence to resolve disputes regarding the content of the record. Under OAR 661-010-0045(1), LUBA will grant a motion to take evidence to consider evidence regarding the submission of testimony to the decision-maker, where there is an unresolved dispute regarding whether the decision-maker rejected the proffered testimony. *Oregon Shores Conservation Coalition v. Coos County*, 75 Or LUBA 534 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a party submits confidential information to the local decision-maker and requests that the information be kept confidential, and the decision-maker directs staff to keep the confidential information separate from the public record, the decision-maker has not "rejected" the information from the record, but rather accepted

the information, and granted the request to keep the information confidential. *Oregon Shores Conservation Coalition v. Coos County*, 75 Or LUBA 534 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the petitioner agrees to accept an electronic copy of the record on compact discs pursuant to OAR 661-010-025(2)(a) on the express condition that the electronic copy be searchable, but the first record the local government serves on the petitioner is not searchable, the local government must serve petitioner with a searchable copy of the record on compact discs or the equivalent medium, and cannot fulfill its obligation by simply providing a link to an on-line site that includes a searchable copy of the record. *Oregon Shores Conservation Coalition v. Coos County*, 75 Or LUBA 534 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Providing the parties with a link to an on-line site that includes an electronic copy of the record, along with a supplemental record developed in response to record objections, is a problematic means of serving the record on the parties and resolving record objections, because on-line links are unreliable, and the documents at the end of those links can be modified without notice. *Oregon Shores Conservation Coalition v. Coos County*, 75 Or LUBA 534 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents that are only referred to in testimony but not actually placed before the decision maker are not part of the record. *Loftis v. City of Beaverton*, 75 Or LUBA 558 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A party who gives a PowerPoint presentation in a land use hearing and wants that PowerPoint presentation to be part of the record must place a paper or digital copy of the PowerPoint Presentation before the decision maker. *Neighbors for Smart Growth v. Washington County*, 75 Or LUBA 561 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A video recording of a land use hearing by a community television station is not properly included in the local government record, because the local government did not make the recording and has no control over the television station. *Neighbors for Smart Growth v. Washington County*, 75 Or LUBA 561 (2017).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a party discusses a deed during her testimony below, but fails to submit a copy of the deed to the local government, in the mistaken belief that the deed had already been submitted, the deed was not placed before the final decision maker, and is not part of the local record. *Neil v. Columbia County*, 74 Or LUBA 614 (2016).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will consider an uncontested affidavit that a hearings officer considered only portions of the record of a lot-of-record decision provided by the applicant, and did not consider the entire record, to resolve an objection that the entire record was placed before the hearings officer. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 638 (2016).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Planning staff e-mails with the applicant regarding writing the final decision are not part of the record of a decision by the county

board of commissioners, unless the e-mails are "placed before" the commissioners. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 638 (2016).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A photograph that is shown to but not given to the final decision maker is not "placed before * * * the final decision maker" within the meaning of OAR 661-010-0025(1)(b) and is not properly included in the record that is transmitted to LUBA. *Rawson v. Hood River County*, 74 Or LUBA 668 (2016).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will accept a record organization that consists of the challenged hearings officer's decision with all other documents attached as exhibits to that decision, notwithstanding that the documents within the exhibits are not organized in inverse chronological order as required by OAR 661-010-0025(4)(E), where the record was organized in that way before the hearings officer, and the table of contents lists each document, so locating individual documents requires little effort. *Frewing v. City of Portland*, 73 Or LUBA 392 (2016).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. As a general rule, OAR 661-010-0025(4)(B)(i) does not require that exhibits to exhibits must be separately listed in the table of contents, although an exception to that general rule may be warranted where an exhibit is made up of many unrelated documents. *Pinnacle Alliance Group, LLC v. City of Sisters*, 72 Or LUBA 480 (2015).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA interprets OAR 661-010-0025(2)(a) and 661-010-0025(4)(a)(B) to require that all record documents that are retained by the local government until oral argument must be identified on a list at the end of the table of contents. This requirement applies, even if reduced copies of oversized originals or black and white copies of retained color originals are included and indexed in the record that is transmitted to LUBA. *Fernandez v. City of Portland*, 72 Or LUBA 482 (2015).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0025(4)(a)(B)(i) provides in part that "[w]here an item listed in the table of contents includes attached exhibits, the exhibits shall be separately listed as an exhibit to the item." As a general rule, OAR 661-010-0025(4)(a)(B)(i) does not require that exhibits to exhibits must be separately listed in the table of contents. *Fernandez v. City of Portland*, 72 Or LUBA 482 (2015).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0025(4)(a)(B)(i) provides in part that "[w]here an item listed in the table of contents includes attached exhibits, the exhibits shall be separately listed as an exhibit to the item." Where a record table of contents does not separately list the attachments to a document that is included in the record and identified in the table of contents, but the record table of contents includes a specific or general description of all the attachments, any failure to fully comply with OAR 661-010-0025(4)(a)(B)(i) is not a basis for ordering that the table of contents be revised to separately list the attachments. *Fernandez v. City of Portland*, 72 Or LUBA 482 (2015).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Including hyperlinks in a document that is submitted for the record in a quasi-judicial land use proceeding is not sufficient, without

more, to make the documents that can be accessed via those hyperlinks part of the local government's record. *Fernandez v. City of Portland*, 72 Or LUBA 482 (2015).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where LUBA finds a development agreement is a precondition for the local government's application of special spacing standards to a proposed truck stop and remands the decision, the record in a subsequent appeal of a decision approving the development agreement includes the record of the appeal that led to the original remand, at least in circumstances where LUBA cannot tell whether the prior record will be needed to allow LUBA to review the development agreement. *Space Age Fuel, Inc. v. Umatilla County*, 71 Or LUBA 378 (2015).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the minutes of a city council meeting state that a party read aloud and submitted a letter, and further state that the letter "will be included as part of tonight's record copy," the letter should be included in the record because it was "placed before, and not rejected by" the city council at the city council hearing on an application, within the meaning of OAR 661-010-0025(2). *Harrison v. City of Cannon Beach*, 71 Or LUBA 422 (2015).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under OAR 661-010-0025, the "course of proceedings before the final decision maker" includes any public hearing or public meeting on an application held by the final decision maker, even where the evidentiary record is closed and no public testimony or other evidence is allowed. Although the evidentiary record may be closed, that does not mean that any documents that are generated during the post-evidentiary phase of the local proceedings in order to adopt the final decision and provide required notices of that decision need not be included in the record. *Harrison v. City of Cannon Beach*, 71 Or LUBA 422 (2015).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the local code provides that the final order being appealed is part of the record of an appeal of an administrative decision to the city council, the initial city manager decision on an application is included in the record by operation of law. *Smith v. City of Gearhart*, 70 Or LUBA 519 (2014).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will deny a record objection asserting that a newspaper clipping in the record was not placed before the city council, where the minutes of the city council hearing reflect that a city council member read from the clipping as part of her disclosure of *ex parte* communications, which supports the city's position that the clipping was placed into the record. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will deny an objection that the minutes of a city council hearing are incomplete, because the minutes fail to summarize the oral arguments of petitioner's attorney, where the same arguments are found in writing elsewhere in the record, and petitioner's argument that the defect in the minutes is "material" rests on speculation that petitioner will advance assignments of error to which, petitioner speculates, the respondent might raise waiver challenges. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will require a local government to provide a partial transcript of the city council's deliberations, where the minutes provide no summary at all of the deliberations, and petitioner demonstrates that the defect is material to a key issue in the appeal. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Any error in the record table of contents in describing a city council proceeding as a "hearing" rather than a "meeting" does not warrant a revised table of contents, because how the table of contents describes the proceeding cannot change the nature of that proceeding. *Port of Umatilla v. City of Umatilla,* 70 Or LUBA 527 (2014).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will deny a motion to take evidence to consider an affidavit regarding whether building plans were "placed before" the final decision-maker and thus are part of the local record, where there is no factual dispute that the building plans were not placed before the final decisionmaker, and whether the plans belong in the record depends on a legal argument that the plans were included in the record by operation of law. A motion to take evidence is warranted only where there are disputed factual allegations; a dispute over the legal consequences of undisputed facts is not a basis for LUBA to consider extra-record evidence. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Building plans that are submitted to planning staff as part of an application for site plan review are not necessarily part of the local record transmitted to LUBA, if the building plans are not "placed before" the final decision maker, and no local regulation or other source of law incorporates all documents submitted as part of an application as part of the local record by operation of law. *Port of Umatilla v. City of Umatilla,* 70 Or LUBA 527 (2014).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Items rejected from the local record are properly excluded from the record transmitted to LUBA. Where a local government rejects portions of a document, and includes only a redacted version of the document in the record, the petitioner may attach to the petition for review the unredacted document, in support of any of an assignment of error alleging that the local government erred in rejecting the redacted portions. If no party objects, LUBA will consider the attached document for the limited purpose of resolving that procedural assignment of error. If a party objects, the petitioner may file a motion to take evidence to allow LUBA to consider the unredacted document for that same limited purpose. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a city submits an original five-volume record, and later submits an "amended" nine-volume record and requests that the amended record replace the original record, but the amended record inadvertently omits a number of documents, the simplest solution is for the original record to remain part of the record, and allow parties to cite to the original record to the extent necessary. *Terra Hydr Inc. v. City of Tualatin,* 68 Or LUBA 511 (2013).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Providing an electronic link to a document located on a city's website is an insufficient means to provide a copy of the document

to LUBA and the parties as part of the local record. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 511 (2013).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A supplemental traffic impact analysis is included in the local record where it (1) was submitted to city staff to supplement a land use permit application, (2) was submitted in the same way that many documents in the record were submitted, (3) was available to all parties and city council throughout the proceedings, and (4) is referred to in a number of documents in the record and the findings adopted to support the decision. *Zian Limited Partnership v. City of Tualatin*, 68 Or LUBA 560 (2013).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0025(1) is not exhaustive in its listing of the contents of the record, because it provides "the record shall include at least the following[.]" *Save Downtown Canby v. City of Canby*, 67 Or LUBA 480 (2013).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Paper or media copies of visual presentations by planning staff to the land use decision maker are properly included in the record that is transmitted to LUBA, even if media or paper copies of that visual presentation were not presented for the record below. *Save Downtown Canby v. City of Canby*, 67 Or LUBA 480 (2013).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Unless the local code provides otherwise, permit proceedings generally begin when the application is filed, for purposes of compiling the local record of a land use permit proceeding. Recordings or minutes of city council work sessions conducted prior to submission of the application are not part of the record of the land use permit proceeding. *STOP, LLC v. City of West Linn*, 67 Or LUBA 494 (2013)

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Written notes or documents created by individual city council members and not shared with the city council are not "placed before" the final decision maker for purposes of OAR 661-010-0025, and are not part of the record. *STOP, LLC v. City of West Linn*, 67 Or LUBA 494 (2013)

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The major concern of OAR 661-010-0025(4)(a)(B), which requires that the record table of contents separately list exhibits attached to items, is to avoid listing as a single item large collections of documents spanning numerous pages. The rule is less concerned with documents with one or two short attachments, where such attached documents can be located with reasonable effort. *STOP, LLC v. City of West Linn*, 67 Or LUBA 494 (2013)

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the local government on remand from LUBA conducts a single, consolidated proceeding that results in adoption of two ordinances and an order, on appeal of the two ordinances to LUBA the record includes the unappealed order, because the order was placed before the final decision maker during the proceedings on the ordinances. *Hatley v. Umatilla County*, 66 Or LUBA 427 (2012).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A statement in a staff memorandum to the planning commission that documents are "made a part of the record and are available" on a

city website is insufficient to incorporate the documents into the record. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 445 (2012).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will deny as unnecessary a motion to take evidence to accept a supplemental record that includes a copy of the notice of adoption sent to DLCD, which is required to be included in the record pursuant to OAR 660-010-0025(1)(d). LUBA will accept the untimely filed supplemental record over the petitioner's objection, where the untimely submission does not prejudice any party's substantial rights. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a later version of a staff report is the only version of the staff report that was placed before the local government decision maker, an earlier version of the staff report that was made available to the public prior to the final public hearing need not be included in the record under OAR 661-010-0025(1)(b). In that circumstance, the earlier version of the staff report also need not be included in the record under OAR 661-010-0025(1)(d), which requires that the record in a LUBA appeal include local notices of hearing without regard to whether the notices were actually placed before the decision maker, where the earlier version of the staff report was not included with the notice of hearing and the notice of hearing merely provided information about how to obtain a copy of the earlier version of the staff report. *Heitsch v. City of Salem*, 65 Or LUBA 449 (2012).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Notwithstanding OAR 661-010-0025(1), which requires that all "documents or other written materials" that are placed before the decision maker must be included in the record, a local government's consideration of a land use regulation in adopting a land use decision does not, by itself, require that the land use regulation be included as part of the record that must be submitted in a LUBA appeal, unless there is some reason to believe the local government intended to make a copy of the land use regulation part of the record of the local government's proceedings. However, LUBA routinely takes official notice of comprehensive plans and land use regulations under ORS 40.090(7) and OEC 202(7). *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 452 (2012).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A statement in a city council decision that adopts amendments to city septic system regulations that in considering the amendments the city council considered original septic system regulations is not sufficient to incorporate the legislative record of the original septic system regulations as part of the record of the amended septic system regulations. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 452 (2012).

27.3.2 LUBA Procedures/Rules – Content/Form. OAR 661-010-0025(4)(a)(B) requires that a record table of contents list "each item contained therein" and that "where a listed item includes attached exhibits, its exhibits shall be separately listed." A document that is submitted independently of any other document during the proceedings below is an "item" rather than an "exhibit" for the purposes of OAR 661-010-0025(4)(a)(B). An "exhibit," for the purposes of OAR 661-010-0025(4)(a)(B), is a document that is "attached" to a lead document that is listed as an "item." *Rogue Advocates v. Josephine County*, 65 Or LUBA 479 (2012).

27.3.2 LUBA Procedures/Rules – Content/Form. That items are improperly listed as exhibits and are not organized in inverse chronological order is not sufficient to prejudice any party's substantial rights, where the added minor degree of difficulty in locating unidentified exhibits in the record resulting from a failure to list those exhibits in violation of OAR 661-010-0025(4)(a)(B) does not warrant further delay in the appeal solely to require submission of a revised table of contents. *Rogue Advocates v. Josephine County*, 65 Or LUBA 479 (2012).

27.3.2 LUBA Procedures/Rules – Content/Form. Even if documents were untimely submitted into the record during the proceedings below, and should have been excluded from the record, that does not mean that other untimely submitted documents should also be included. *Rogue Advocates v. Josephine County*, 65 Or LUBA 479 (2012).

27.3.2 LUBA Procedures/Rules – Record –Content/Form. LUBA will sustain an objection that the record fails to include documents and attachments that were submitted by sending an email message and attachments to a planner with a request that the email message and attachments be included in the record, where the record includes other documents that were submitted to the county planner in the same fashion. *Sane, Orderly Development, Inc. v. Douglas County*, 63 Or LUBA 578 (2011).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Deviation from the requirement in OAR 661-010-0025(4) that the record be organized in inverse chronological order is permissible, where placing documents with attachments in the same form and relationship they were presented below results in a more usable and accurate record than one in which the documents and attachments are organized by strict document date. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 484 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A code provision stating that the governing body's "review proceeding" shall be based upon the record of the decision being reviewed is not properly understood to automatically incorporate into the record before the governing body the entire record of a planning commission recommendation on a proposed comprehensive plan amendment, where in context it is clear that "review proceeding" refers to circumstances where the governing body calls up a planning commission decision for review, and does not refer to mandatory review of a planning commission recommendation. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 484 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Local government staff cannot effect the incorporation of an unrelated LUBA appeal record into the local record by simply stating so in the record table of contents, if the unrelated record was not actually included or incorporated in fact or by operation of law into the record below. *Brodersen v. City of Ashland*, 62 Or LUBA 496 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where local government staff brings the record of an unrelated LUBA appeal to the hearing before the planning commission and gives the commissioners packets including a link to the city's website where an electronic copy of the record of that unrelated appeal can be viewed, that is sufficient to demonstrate that the unrelated

record was "placed before" the planning commission. *Brodersen v. City of Ashland*, 62 Or LUBA 496 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Because LUBA does not retain its copy of the record after the appeal is finished, where the record table of contents reflects the incorporation of an old LUBA appeal record into the local record pursuant to OAR 661-010-0025(4)(b), the local government must transmit a copy of that old LUBA appeal record to LUBA as part of local record of the decision on appeal. *Brodersen v. City of Ashland*, 62 Or LUBA 496 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the planning commission conducts a hearing on an appeal of a staff decision, the staff decision is necessarily "placed before" the planning commission and hence part of the record of the planning commission decision. *Brodersen v. City of Ashland*, 62 Or LUBA 496 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Absent an express indication that a local government intended that documents on the local government's website would become part of the record of a land use proceeding, the mere act of making documents available on a website is not sufficient to place the documents before a decision maker, just as making documents in a physical folder in the planning department's central files available to the public is not sufficient to place those documents before the decision maker. *Gunderson, LLC v. City of Portland*, 62 Or LUBA 505 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Even prior to 2010 amendments to OAR 661-010-0025(4), LUBA interpreted the rule to require that the record table of contents separately list attachments or exhibits to documents, where the attachments comprise a large portion of the record and individual documents cannot be located with reasonable effort. Where the table of contents lists four items comprising almost half the 1900-page record, a revised table of contents is necessary to separately list the documents, attachments and exhibits that are part of each item. *Setniker v. Polk County*, 62 Or LUBA 517 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the record includes incorporated copies of prior LUBA records, the record table of contents must reflect the incorporation, and further the local government must physically transmit a copy of the incorporated records to LUBA, either as part of the record on appeal or by bringing the copy of the incorporated record to LUBA at oral argument. *Setniker v. Polk County*, 62 Or LUBA 517 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government establishes that documents were placed before, and not rejected by, the final decision maker during the proceedings before the decision maker, it is irrelevant that the date on the documents pre-dates the date of an application. *Willamette Oaks, LLC v. City of Eugene*, 62 Or LUBA 522 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a party does not submit a document into the record due to an alleged misunderstanding regarding whether the document is already in the record, such misunderstanding might constitute procedural error if the local

government provided misinformation about the content of the record, but it does not provide a basis to conclude that the record must be supplemented to include a document that was not actually submitted into the record. *Citizens Against LNG, Inc. v. Coos County*, 62 Or LUBA 550 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The act of placing a link on the local government's website to a video recording of a hearing not made by the local government, and that is located on a different website not under the local government's control, does not make the video recording part of the local record. *Citizens Against LNG, Inc. v. Coos County*, 62 Or LUBA 550 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. While OAR 661-010-0025(4)(a)(E) mandates that the record in a LUBA appeal be organized in inverse chronological order, LUBA has consistently treated violation of OAR 661-010-0025(4)(a)(E) as a "technical violation" of LUBA's rules, which requires no remedial action as long as the record is organized in a manner that is reasonably usable by the parties and LUBA. Under OAR 661-010-0005 only two rule violations categorically cannot be treated as "technical violations," and OAR 661-010-0025(4)(a)(E) is not one of them. *Burness v. Douglas County*, 61 Or LUBA 530 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. When during the proceedings on remand from LUBA, the local government allows additional argument but no new evidence, and the local government redacts written testimony that it considers new evidence, the unredacted documents are not properly part of the record. *Columbia Riverkeeper v. Clatsop County*, 60 Or LUBA 454 (2009).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. When during the proceedings on remand from LUBA, the local government allows additional argument but no new evidence, the local government is not required to erase oral testimony that contains new evidence from the recordings of meetings submitted to LUBA. OAR 661-010-0025(1)(b) only applies to *written* documents, not oral testimony. *Columbia Riverkeeper v. Clatsop County*, 60 Or LUBA 454 (2009).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where an applicant submits a single narrative to support multiple applications and the planning commission approves each application in a separate decision, but only one decision is appealed to the governing body, the record includes the redacted form of the application narrative that are placed before the final decision maker, not the full narrative that was not placed before the final decision maker. *Kane v. City of Beaverton*, 60 Or LUBA 497 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A local government may retain a difficult-to-duplicate original photograph and submit that original photograph to LUBA at oral argument. LUBA's rules do not require the local government to provide petitioner with a copy of that original photograph at oral argument. *Kane v. City of Beaverton*, 60 Or LUBA 497 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a staff report to the final decision maker or similar document collects together testimony and evidence submitted during lower proceedings and that testimony and evidence is attached to the staff report, the record table

of contents should separately list such attached documents rather than simply list the staff report. *Kane v. City of Beaverton*, 60 Or LUBA 497 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the record table of contents lists as a single item a 70-page collection of miscellaneous documents submitted by the applicant on the same date, and significant effort is required to locate particular documents in that collection, the table of contents must be amended to separately list each document. *Kane v. City of Beaverton*, 60 Or LUBA 497 (2010).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. ORS 661-010-0025(1)(b) requires that the record that a local government transmits to LUBA must include "[a]ll written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker." However, where a city's land use code provides that "[t]he record shall contain all testimony and evidence that is submitted to the City, the Planning Commission, and the City Council and not rejected," testimony and evidence that is submitted to city planning staff must be included in the record, even if it was never actually placed before the city council, which was the final decision maker. *Montgomery v. City of Dunes City*, 59 Or LUBA 519 (2009).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. In a LUBA appeal that challenges a city letter to a subdivision developer that takes the position that (1) streets in a previously approved and platted subdivision have been improperly constructed and do not comply with tentative subdivision plan conditions of approval and (2) building permits will not be issued for lots in the subdivision until existing violations are corrected, the record that is filed with LUBA must include any documents that were actually placed before the city council in making its decision to send the letter. An objection that the record in the appeal of the letter should include documents that were generated during earlier proceedings that led up to tentative and final subdivision approval decisions that were not appealed to LUBA will be denied where there is no claim that the requested additional documents were placed before the city council during the deliberations that led up to the city sending the letter and the city takes the position that they were not placed before the city council during those deliberations. *Calvary Construction, LLC v. City of Glendale*, 59 Or LUBA 539 (2009).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where petitioner and respondent disagree about when a legislative proceeding began, and if petitioner is correct a large number of additional documents must be added to the record, petitioner's record objection will not be rejected simply because petitioner does not specifically identify each of the documents that petitioner believes should be added to the record. *Home Builders Association v. City of Eugene*, 58 Or LUBA 688 (2009).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. ORS 197.830(10), which requires that a respondent transmit to LUBA "the entire record of the proceeding under review," does not require that every document that has any bearing on a legislative proceeding must be included in the record. *Home Builders Association v. City of Eugene*, 58 Or LUBA 688 (2009).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A city may decide that the record of its legislative land use proceeding began when notice was given of the hearing before the planning commission, and does not include earlier scoping and prioritizing proceedings, where that decision is consistent with local law. Such a decision is within any implied limits imposed by ORS 197.830(10)(a) and OAR 661-010-0025(1). *Home Builders Association v. City of Eugene*, 58 Or LUBA 688 (2009).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents that were placed before the city council during a scoping and prioritizing stage that predated the commencement of a city legislative land use proceeding need not be included in the record that is filed with LUBA. *Home Builders Association v. City of Eugene*, 58 Or LUBA 688 (2009).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Simply making documents available on a local government's website does not make them part of the record of a legislative land use proceeding. However, where the local government expresses an intent that specified documents that are available on the city's website should be considered by the decision makers and parties to be part of the record, the fact that the city only provides paper copies of selected website documents to the local decision makers does not mean that the other website documents are not also part of the record. *Graser-Lindsey v. City of Oregon City*, 58 Or LUBA 703 (2009).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where petitioner objects that mailing lists should not be included in the record, but resolving petitioner's record objection would require LUBA to determine whether notice was in fact sent to persons on the mailing lists, LUBA will allow the mailing lists to remain in the record and resolve any issue concerning whether notices were sent to persons on the mailing lists in its decision on the merits. *Graser-Lindsey v. City of Oregon City*, 58 Or LUBA 703 (2009).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the challenged decision discusses an exhibit, but it is not clear whether that discussion is based on (1) review of the exhibit or (2) testimony about the exhibit, and the local government states that the exhibit has long been missing from the city's files and was not before the final decision maker, LUBA will deny an objection based on the omission of the exhibit from the record. *Dahlen v. City of Bend*, 56 Or LUBA 789 (2008).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Because the respondent is the custodian of the record, and petitioner has the ultimate burden of demonstrating that the local record is deficient under OAR 661-010-0026(2), petitioner's mere disagreement with respondent regarding whether a disputed item was submitted to the city during the proceedings below is insufficient to establish that the item was submitted. *Curl v. City of Bend*, 56 Or LUBA 794 (2008).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record must include audio recordings of hearings conducted by the final decision maker leading to the decision under appeal, but audio recordings of a different hearing on a separate land use application leading to a different decision are not part of the record on appeal, even if statements regarding the decision under appeal were made during the hearing on the different application. *Curl v. City of Bend*, 56 Or LUBA 794 (2008).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A statement in petitioner's written testimony that it is accompanied by other documents "submitted to support" the testimony is insufficient to establish that petitioner actually submitted the referenced documents into the record of the decision on appeal, where the written testimony is copied from a document submitted in a different land use matter and the city disputes that the referenced documents were actually submitted into the record of the decision on appeal. *Curl v. City of Bend*, 56 Or LUBA 794 (2008).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0025(4) requires that both the record filed with LUBA and the copy of the record served on the petitioner be "securely fastened on the left side." Where the copy filed with LUBA is organized into five binders but the copy served on petitioner consists of a 3,000-page unbound collection of loose documents, LUBA will order the respondent to provide petitioner with binders or a similar suitable means to fasten together the service copy. *Curl v. City of Bend*, 56 Or LUBA 794 (2008).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under OAR 661-010-0075(6), a county may only appear in a LUBA appeal through an attorney. Where the county attorney advises LUBA that the county will not participate in an appeal, and the county planning department latter provides LUBA with a copy of its letter responding to the petitioner's record objections, LUBA will not treat that letter as the county's response to petitioner's record objections. *SOPIP v. Coos County*, 56 Or LUBA 802 (2008).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A record table of contents that lists thousands of pages of miscellaneous documents spread over several volumes as a single item does not comply with the OAR 661-010-0025(4)(a)(B) requirement that the table of contents list each item contained therein. *Kane v. City of Beaverton*, 55 Or LUBA 669 (2007).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the petitioner and local government simply disagree about whether particular pages were included in a copy of a document that was submitted to the local government for inclusion in the record, absent reason to proceed otherwise, LUBA will generally accept the local government's position, as the custodian of the record. *Curl v. City of Bend*, 55 Or LUBA 719 (2008).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government transmits a 4,457-page record to LUBA in eight three-ring binders but serves a copy of that record on petitioner without similarly placing the record in three-ring binders or otherwise securely fastening the record on the left side as required by OAR 661-010-25(4)(a)(C), LUBA will require that the local government supply record binders to petitioner. *Curl v. City of Bend*, 55 Or LUBA 719 (2008).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents that are on a medium other than plain printer paper, such that they are not easily copied on a standard office black and white copier are properly omitted from the record that is initially transmitted to LUBA and retained by a local government and separately transmitted to LUBA as part of the record at the time set for oral argument under OAR 661-010-0025(2). *Walker v. Deschutes County*, 54 Or LUBA 752 (2007).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents that are oddly shaped or sufficiently large that they cannot be easily reduced and printed on a standard 8-1/2-by-11-inch page by a standard office copier, are properly retained by a local government at the time it initially transmits the record to LUBA and separately transmitted to LUBA as part of the record at the time set for oral argument under OAR 661-010-0025(2). *Walker v. Deschutes County*, 54 Or LUBA 752 (2007).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record submitted by a local government must include color copies or black and white copies of any color documents that are on 8-1/2-by-11-inch pages or on pages that are easily reduced to 8-1/2-by-11-inch pages by standard office copiers. If black and white copies of color originals are included in the record, the color originals must be submitted at the time set for oral argument in accordance with OAR 661-010-0025(2). *Walker v. Deschutes County*, 54 Or LUBA 752 (2007).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0025(1)(c) itself does not require local governments to prepare minutes of proceedings before a hearings officer; instead, the rule simply requires that any minutes that are "required by law" must be included in the record. *Ford v. Jackson County*, 54 Or LUBA 778 (2007).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Although OAR 661-010-0025(1)(b) allows a local government to incorporate documents into the record, even though those documents are not physically placed before the local government in a land use proceeding, the local government must actually incorporate such documents. Acknowledging that a party has requested that a document be incorporated as part of the record is not the same thing as granting that request. *Rhinhart v. Umatilla County*, 53 Or LUBA 601 (2006).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A party's argument that the record should be supplemented with a written summary of the party's conversation with a city planner will be denied where petitioner does not claim that the city was required by law to keep minutes of planning staff conversations regarding zoning confirmation applications or make tape recordings of such conversations. *Jackson v. City of Portland*, 53 Or LUBA 612 (2007).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Meetings in which one city commissioner participated are not "proceedings before the final decision maker," within the meaning of OAR 661-010-0025(1)(b). *Thunderbird Hotels, LLC v. City of Portland*, 53 Or LUBA 625 (2007).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the decision makes clear that reports referred to in the decision were not before the local government during the deliberations that led to the challenged decision, such reports are not properly part of the record. *Thunderbird Hotels, LLC v. City of Portland*, 53 Or LUBA 625 (2007).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the parties agree to include documents in the record of a LUBA appeal that go beyond the minimum requirements of OAR 661-010-0025(1), LUBA has authority to defer to such an agreement. However, LUBA will not

defer to an agreement of the parties to supplement the record of a pending LUBA appeal with the record of a related land use proceeding that is pending before the local government where (1) it is not clear that all parties agree the record should be supplemented in that way, (2) the pending LUBA appeal would have to be suspended for an unspecified period of time, and (3) there is no apparent need for the requested supplemental record. *Wolfgram v. Douglas County*, 52 Or LUBA 767 (2006).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a county encourages parties to submit documents into the record by faxing them to county planning staff, documents submitted in that manner are part of the local record. *Rickreall Community Water Assoc. v. Polk County*, 52 Or LUBA 772 (2006).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record table of contents complies with OAR 661-010-0025(4)(a)(B) if it is specific enough to enable the parties to locate individual documents in the record with reasonable effort. *Rickreall Community Water Assoc. v. Polk County*, 52 Or LUBA 772 (2006).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a plan for prioritizing and funding park facilities is separated from a larger, more comprehensive parks planning effort that was initiated by the city planning commission, and the plan for prioritizing and funding park facilities is thereafter subject to public hearings by the city council without any recommendation from the planning commission and adopted separately from the larger more comprehensive parks planning effort, the record of that plan for prioritizing and funding park facilities need not include any part of the record of the larger more comprehensive parks planning effort. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 788 (2006)

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Materials submitted to the city council during a "citizen comment" portion of a meeting that occurs after the proceedings related to the decision being appealed have ended, and after the city council has deliberated and reached a decision on the appeal, are not "placed before" the decision maker "during the course of the proceedings before the final decision maker," and are not part of the record under OAR 661-010-0025(1)(b). *Sommer v. City of Grants Pass*, 52 Or LUBA 802 (2006).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. While mere reference to a document in testimony is an insufficient basis to conclude that the referenced document is incorporated into the record, where the decision itself refers to a document in a manner that suggests the document was considered by the decision maker, absent some reason to conclude otherwise the document is part of the record. *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the challenged decision refers to and requires specific changes to existing storm water management manuals, that is some indication that the decision maker reviewed those manuals, and the burden shifts to the respondent to substantiate its assertion that the manuals were not in fact before the decision maker. *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents may be incorporated into a land use decision only if the decision maker clearly indicates the intent to do so and adequately identifies the document incorporated. Statements that a stormwater permit includes "best management practices" does not mean that documents described under federal regulations as "best management practices" are incorporated into the permit. *Tualatin Riverkeepers v. ODEQ*, 51 Or LUBA 826 (2006).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Although small supplemental records may not warrant all of the formalities that are normally required of supplemental records under LUBA's rules, even small record supplements must be accomplished in a way that will allow all parties to (1) keep up with what is included in the record and (2) accurately cite to pages in those documents when they file their briefs. *City of Happy Valley v. City of Damascus*, 50 Or LUBA 718 (2005).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a city's notice of hearing specified a date and time for submitting comments before the city's public hearing and an e-mail message was sent after the date specified in the notice and was not actually placed before the decision maker at the noticed hearing, the e-mail message is properly excluded from the record. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The failure of a local government to provide LUBA with the entire local record does not in itself require remand. However, where the record is so inadequate that LUBA cannot adequately review the decision, the local government's failure to provide the whole record may result in remand. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. While OAR 661-010-0025(4)(a)(B) requires that the record table of contents list "each item," it does not explicitly require that attachments to documents be separately identified. *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the final decision maker dictates that the city will accept additional written submissions only until a prescribed date, and city staff acts under that dictate to reject a document submitted after the prescribed date, the final decision maker has "rejected" the document, for purposes of determining the content of the record. *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government conducts a single combined hearing on two separate permit applications, documents that clearly relate to only one application are not part of the record of the other application. *Kane v. City of Beaverton*, 49 Or LUBA 712 (2005).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The requirement in Statewide Planning Goal 1 (Citizen Involvement) that information "necessary to reach policy decisions" be made available to the public does not supercede the attorney/client privilege, and LUBA may not require that the record be supplemented to include information that the city redacts based on the

attorney/client privilege. *Forest Hills Easement Assoc. v. City of Lake Oswego*, 49 Or LUBA 739 (2005).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. E-mails and hand-written marginalia are not "minutes" of "meetings conducted by the final decision maker as required by law," and therefore not part of the record under OAR 661-010-0025(1)(c). *Grabhorn v. Washington County*, 49 Or LUBA 746 (2005).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. E-mails from the final decision maker to other persons are not "placed before" the decision maker, and are therefore not part of the record under OAR 661-010-0025(1)(b). Further, administrative contacts between staff and the decision maker concerning scheduling hearings do not constitute "written testimony" or "other written materials" that must be included in the record. *Grabhorn v. Washington County*, 49 Or LUBA 746 (2005).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The local government record on remand includes the record in the prior appeal that led to remand, unless the prior record is expressly excluded. Even where the issues on remand are narrow, LUBA may require the records from both proceedings in order to understand and resolve challenges to the decision on remand. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 611 (2004).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will not require a local government to digitally enhance an inaudible audio tape to make it audible where the moving party does not explain what such enhancement would involve; a local government must take reasonable steps to make an audiotape audible, but LUBA's rules do not require that the local government go to extraordinary lengths to restore faulty recordings. *Paterson v. City of Bend*, 48 Or LUBA 614 (2004).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government regulation requires the local appellate body to review the record of the decision under appeal and additionally consider any new evidence submitted into the record at the appeal hearing, the record of decision on appeal becomes part of the appellate body's record as a matter of law. *Papadopoulos v. Benton County*, 48 Or LUBA 634 (2004).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the evidentiary record has closed and a local appeal to the city council is limited to the evidentiary record that was compiled before the initial local hearings body, an attorney's reference to a deed to "illustrate" his argument to the city council is not sufficient to place the deed before the decision maker, so that it would become part of the city's record under OAR 661-010-0025(1)(b). *Nash v. City of Medford*, 48 Or LUBA 647 (2004).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will deny a motion to take evidence under OAR 661-010-0045 to resolve disputes regarding the content of the record that concern testimony and documents placed before the board of commissioners in executive session. LUBA lacks authority to compel the local government to include in the record testimony and

documents placed before the governing body in executive session. *Grabhorn v. Washington County*, 48 Or LUBA 657 (2005).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a planning commission specifically rejects proffered evidence and that evidence is neither submitted by parties to the board of county commissioners on appeal nor forwarded to the board of commissioners by county planning staff, that rejected evidence is not included in the record. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 620 (2004).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Notwithstanding a dispute among the parties about whether the county decision maker properly considered certain evidence after the evidentiary phase of the local proceedings concluded, where the decision maker specifically excluded that evidence from the record, that evidence is not properly included in the local record filed with LUBA. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 620 (2004).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0025(1)(c) does not necessarily require local governments to include in the record minutes of every meeting of the final decision maker where a development proposal is mentioned. *Wal-Mart Stores, Inc. v. City of Medford*, 47 Or LUBA 650 (2004).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A petitioner may assign error to a hearings officer's refusal to reopen the local record following a LUBA remand, but where it is undisputed that the photographs that petitioner seeks to have added to the local record were not placed before the hearings officer in his initial deliberations or in his deliberations on remand, those photographs are not part of the local record. *Bradley v. Washington County*, 46 Or LUBA 805 (2004).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. When documents are part of a local government planning file that is physically present and visible at a public hearing, but the local government does nothing to indicate that the documents are meant to be part of the record, then those documents are not properly part of the record. *Naumes Properties, LLC v. City of Central Point*, 45 Or LUBA 708 (2003).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0025(2) requires that a local government file a "certified copy of the record." In cases where the original record includes color photographs or other color documents, it is preferable that the local government include color copies of those pages in the copy of the record that is filed with LUBA. Alternatively, it is appropriate for the local government to file a black and white copy of the record and provide the color originals at oral argument. *Oien v. City of Beaverton*, 45 Or LUBA 722 (2003).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Notices of changes to annexation boundaries that are required to be sent pursuant to ORS 198.730 are properly included in the record in an appeal of that annexation decision to LUBA. *Miner v. Clatsop County*, 45 Or LUBA 748 (2003).

27. 3.2 LUBA Procedures/Rules – Record – Content/Form. As long as LUBA and the parties can identify and locate documents in the record with reasonable effort, LUBA will not require the local government to revise the table of contents to more specifically identify the contents of an exhibit in the record that includes numerous separate documents. *1000 Friends of Oregon v. Clackamas County*, 45 Or LUBA 754 (2003).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where county staff organized the local record into a series of exhibits that were attached to the hearings officer's decision and provided in that form to the final decision maker, LUBA will not require reorganization of the record to more accurately reflect the chronological progress of the proceedings below. *1000 Friends of Oregon v. Clackamas County*, 45 Or LUBA 754 (2003).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA may not consider a written statement that is attached to a petition for review to provide information that is not reflected in the record about what occurred during a local land use proceeding, where petitioner fails to demonstrate that one or more of the grounds for considering extra-record evidence under OAR 661-010-0045(1) applies. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA does not have authority to order that privileged attorney/client communications be made a part of the record in a LUBA appeal. *Dimone v. City of Hillsboro*, 44 Or LUBA 805 (2003).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA does not have authority to order that a city include as part of the record in a LUBA appeal transcripts or minutes that may have been prepared of executive sessions. *Dimone v. City of Hillsboro*, 44 Or LUBA 805 (2003).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the challenged decision is a single ordinance that rezones a number of different properties, the record includes materials placed in front of the final decision maker with respect to any of the properties affected by the decision. That much of the record material may have no bearing on petitioner's property and probably will have no bearing on any issue in the appeal is not a basis to exclude that material from the record. *Manning v. Marion County*, 44 Or LUBA 816 (2003).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Audio tapes of planning commission hearings are included in the record before the final decision maker only if they are placed before the final decision maker, specifically incorporated into the record by the final decision maker or automatically included in the record by operation of local code requirements. *Bruce Packing Company, Inc. v. City of Silverton*, 44 Or LUBA 836 (2003).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Only the final decision maker can "specifically incorporate" documents into the record by reference, within the meaning of OAR 661-010-0025(1). *Bruce Packing Company, Inc. v. City of Silverton*, 44 Or LUBA 836 (2003).

27. 3.2 LUBA Procedures/Rules – Record – Content/Form. Notwithstanding that the final decision maker denying petitioners' application for development is the city attorney, letters to the city attorney in his capacity as legal advisor to the city council regarding a negotiated alternative

to petitioner's application relate to a different matter and are not "placed before" the final decision maker "during the course of the proceedings" before the final decision maker within the meaning of OAR 660-010-0025(1)(a). *West Coast Media v. City of Gladstone*, 43 Or LUBA 585 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA's rules provide that only certain documents that are created after a local decision is reduced to writing, signed, and becomes final for purposes of appeal may be included in the local government's record before LUBA. Those documents include: minutes of the meeting where the challenged decision was adopted, copies of post-acknowledgement plan amendment notice to DLCD, and affidavits of published, posted or mailed notice of the challenged decision. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 612 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Findings adopted by reference as part of a local land use decision are properly included in a local record only if they were created and adopted prior to or at the same time as the land use decision that they support. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 612 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Findings supporting a local land use decision are not part of a city's record if they are created after the local decision was reduced to writing, signed and became final for purposes of a LUBA appeal. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 612 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. That a collection of written comments is not internally organized in inverse chronological order is not a basis to require that the local government reorganize the record, where the collection as a whole appears at the approximate chronological location in the record where it should, and no party demonstrates that any divergence from LUBA's rules prejudices their substantial rights. *Stahl v. Tillamook County*, 43 Or LUBA 623 (2002).

27. 3.2 LUBA Procedures/Rules – Record – Content/Form. Where city procedures for adopting legislative amendments require planning commission review and recommendation before those amendments are considered for adoption by the city council, the record at LUBA must include the planning commission record as well as the record before the city council. *No Tram to OHSU, Inc. v. City of Portland*, 43 Or LUBA 634 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents pertaining to a different decision that is not the subject of a LUBA appeal are not part of the record unless those documents were placed before the decision maker during the local land use proceedings that led to the LUBA appeal. *No Tram to OHSU, Inc. v. City of Portland*, 43 Or LUBA 634 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Absent a reason to conclude otherwise, LUBA will assume that documents that are referred to and quoted in the challenged decision were before the final decision maker in reaching her decision. *Wiper v. City of Eugene*, 43 Or LUBA 649 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. While the purpose of the OAR 661-010-0025(4) requirement that the record be in "inverse chronological order" is better served if the record is organized by date of entry rather than document date, where those principles conflict, failure to do so is only a technical violation of LUBA's rules, absent a showing that a different organization of the record is necessary for the parties' use or LUBA's review. *Wiper v. City of Eugene*, 43 Or LUBA 649 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. As used in OAR 661-010-0025(1)(b), the term "placed before" is a term of art and does not merely describe the act of setting documents in front of the decision maker. Legislative decision making often involves less precisely defined procedures for compiling an evidentiary record than quasi-judicial decision making. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. In an appeal of an environmental assessment prepared as part of a larger state and federal approval process for proposed highway improvements, it is the nature of the environmental assessment process itself and the reasonable expectations of the parties to that process, rather than the conduct of the decision makers, that determines the scope of the record. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record submitted in an appeal of an environmental assessment for a proposed highway interchange properly includes documents that were created or submitted as part of the process to initiate construction of the interchange, where those documents were maintained such that a reasonable person would expect them to be available to the state and federal decision makers who will ultimately approve the interchange project and the documents are in fact available to the final decision makers. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. That local government legal counsel brings a document to a hearing and refers to that document in a colloquy with the decision maker is not sufficient to "place" the document before the decision maker within the meaning of OAR 661-010-0025(1)(b). *Homebuilders Assoc. v. Metro*, 41 Or LUBA 616 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The mere inclusion of a written decision from another planning action in the record of a subsequent land use decision is not sufficient in itself to incorporate the entire planning file from the earlier decision into the record of the later decision. *Yeager v. Benton County*, 41 Or LUBA 604 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0025(1)(d) requires that notices provided throughout "the course of the land use proceeding" be included in the record, including notices from lower tribunals. The rule does not apply to notices from separate planning actions, even if those planning actions are relevant to the challenged decision. *Yeager v. Benton County*, 41 Or LUBA 604 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Written comments are "placed before" the final decision maker within the meaning of OAR 661-010-0025(1)(b) where the notice

of hearing invites written comments and parties to the case submit written comments in the manner set forth in the notice. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 579 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. If a local government wishes to reject an item and thereby exclude that item from the local record, it must make it clear during the proceedings below that it rejects that item. An ambiguous statement from the county chair that the "hearing is limited to correcting the findings based on the existing record and thus the record is closed" is insufficient to clearly reject written comments that were submitted to the county pursuant to the procedure described in the notice of hearing. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 579 (2002).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Nonmaterial omissions in a local government's transcript in the record do not provide a basis to require the local government to submit a more complete transcript, or to substitute a transcript not prepared by the local government. A party may, however, attach a transcript prepared by that party to its own brief. *Terra v. City of Newport*, 39 Or LUBA 811 (2001).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. When the record of a final decision made after remand of an earlier decision from LUBA also includes the record from the earlier decision, but portions of the record from the earlier decision no longer exist, photocopies of the earlier record may be included in the record on remand. If, however, portions of the earlier record are unavailable, re-creations of the earlier record will not be included in the record, if one of the parties objects to the re-creation. *Terra v. City of Newport*, 39 Or LUBA 811 (2001).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under OAR 661-010-0025(4)(b) the record in a LUBA appeal may be incorporated by reference in the record of a subsequent LUBA appeal. However, where this is done, any parties in the subsequent LUBA appeal who did not receive a copy of the record in the first LUBA appeal must be provided a copy of that record. *Waibel v. Crook County*, 39 Or LUBA 749 (2000).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A letter that is addressed to and received by a local decision maker may not be omitted from the record of a variance proceeding because the letter did not specifically include a request that it be included in the local record, where there is no local code requirement that the letter include such a specific request and it is obvious that the letter concerns the requested variance. *Reagan v. City of Oregon City*, 39 Or LUBA 738 (2000).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A procedural objection that is filed after the close of the final local hearing, but before the final decision is adopted and written notice of the decision is given, must be included in the local record, where the city's code allows procedural objections to be filed any time before written notice of the final decision is given. *Reagan v. City of Oregon City*, 39 Or LUBA 738 (2000).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under OAR 661-010-0025(1)(b), evidence that is presented to lower-level local decision making bodies need not be included in the record of the final decision maker unless that evidence is (1) placed before the final decision maker

or (2) incorporated into the record by the final decision maker. *Hubenthal v. City of Woodburn*, 38 Or LUBA 916 (2000).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under OAR 661-010-0025(1)(c), the minutes and tape recordings of lower level local decision makers must be included in the record only if they are incorporated into the record by the final decision maker. *Hubenthal v. City of Woodburn*, 38 Or LUBA 916 (2000).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0025(1)(d) requires that the record include all notices of hearing, whether those hearings were conducted by the final decision maker or by lower-level decision makers. *Hubenthal v. City of Woodburn*, 38 Or LUBA 916 (2000).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-010-0026(3) provides a way to correct the minutes of the proceedings of the final decision maker; it does not provide a way to correct incomplete or inaccurate minutes of meetings of lower-level local decision makers that were actually placed before or incorporated by the final decision maker. *Hubenthal v. City of Woodburn*, 38 Or LUBA 916 (2000).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where documents are placed in the hands of a local government staff person to forward to the local decision maker, pursuant to local procedures, and someone thereafter deletes a portion of the document before it is provided to the local decision maker, the deleted portion has not been "specifically rejected" by the decision maker within the meaning of OAR 661-010-0025(1)(b) and the entire document is properly included in the record. *Dept. of Transportation v. City of Eugene*, 37 Or LUBA 1055 (2000).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under OAR 661-010-025(1)(d), notices of local hearing and affidavits of mailing such notices are to be included in the local record that is filed with LUBA. That a local government may not have committed reversible error by failing to provide a party notice of hearing does not mean the notice of hearing and affidavit of mailing should not be included in the local record. *DLCD v. Douglas County*, 37 Or LUBA 1053 (2000).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government has no established procedures for how documents must be submitted into the record in land use proceedings, the test applied by LUBA is whether the conduct of staff and the decision maker could reasonably lead a party to believe the documents are being included in the record. *Bogan v. Coos County*, 37 Or LUBA 1032 (2000).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A letter sent to the city requesting notice of applications that the city might file to amend land use regulations affecting large format retail uses is not part of the record of the city's decision to adopt such regulations, where the letter was sent to the city eight months before the city filed its application and the letter was never placed before the final decision maker during the course of the proceedings below. *Home Depot, Inc. v. City of Beaverton*, 37 Or LUBA 1020 (2000).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government inadvertently re-uses an audio tape of a hearing before the final decision maker, the local government's failure to maintain a taped record of the proceedings may or may not have some bearing on an assignment of error, but that failure can be addressed in an assignment of error without the physical presence of the re-used audio tape in the record. *Rochlin v. City of Portland*, 37 Or LUBA 1005 (1999).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. In the context of a record objection, LUBA will rely on the parties' representations regarding the existence or nonexistence of disputed documents, without requiring proponents or opponents to submit affidavits in support of their position, absent some substantial reason to question those representations. *Rochlin v. City of Portland*, 37 Or LUBA 1005 (1999).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Minutes of proceedings before the final decision maker that list the persons who testify but contain no summary of the substance of that testimony are incomplete within the meaning of OAR 661-010-0026(3). Where petitioner demonstrates that the omitted summary of testimony is material, LUBA will require that the local government prepare a transcript of relevant portions of the audio tape of those proceedings. *Jackson County Citizens League v. Jackson County*, 37 Or LUBA 1001 (1999).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A county attorney's decision to forward certain letters from petitioners' attorney to the county attorney to the board of county commissioners is not sufficient to establish either a common practice that all letters to the county attorney are included in the record or a reasonable expectation on the part of petitioners' attorney that such letters would be included in the local record. *Western States v. Multnomah County*, 37 Or LUBA 987 (1999).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Petitioners' attorney's letter to the county's attorney is properly excluded from the record where the letter is not submitted for the record in the manner specified in the notice of hearing, and the letter does not include a request that the letter be included in the record. *Western States v. Multnomah County*, 37 Or LUBA 987 (1999).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the bulk of the local government record is made up of attachments to the challenged decision, and the attachments are not arranged chronologically, the local government is not required to include duplicate copies of the decision attachments in the record in chronological order, where the size of the record and the level of detail provided in the record table of contents is such that the attachments can be identified and located with reasonable effort. *Boly v. City of Portland*, 36 Or LUBA 793 (1999).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. City transportation plans and maps consulted by the decision makers are not part of the record unless they were submitted into the record below, although such plans and maps may be legislative enactments of which LUBA may take official notice pursuant to OEC 202. *Volny v. City of Bend*, 36 Or LUBA 760 (1999).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Any tape recordings of meetings conducted by the final decision maker must be included in the record before LUBA, notwithstanding that the statutes governing such meetings do not require that those meetings be tape-recorded. *Volny v. City of Bend*, 36 Or LUBA 760 (1999).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will reject a supplemental record submitted after the petition for review has been filed, where the city fails to explain why the material in the supplemental record is properly part of the local record, and fails to establish that any "unique circumstances" exist justifying untimely filing of the supplemental record. *Terra v. City of Newport*, 36 Or LUBA 754 (1999).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA opinions and local zoning ordinance provisions that were not actually placed before the decision maker during the local proceedings are not properly included in the local record. *North Park Annex Bus. Trust v. City of Independence*, 35 Or LUBA 827 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a county has no adopted procedure for submitting documents prior to permit hearings and (1) a party delivers a document to the county attorney in advance of the hearing, (2) the document includes a request that it be made part of the record and (3) the party verbally requests at the hearing that the document be made part of the record, the party's actions are sufficient to place the document before the decision maker. *Tri-River Investments Co. v. Clatsop County*, 35 Or LUBA 820 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a party prepares and displays maps at a permit hearing, but does not request that the maps be included in the record and removes the maps at the conclusion of the hearing, the maps are not part of the record. *Tri-River Investments Co. v. Clatsop County*, 35 Or LUBA 820 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a county commissioner hands a party copies of newspaper articles and the party does not request that the articles be included in the record and removes the articles at the conclusion of the hearing, the newspaper articles are not part of the record. *Tri-River Investments Co. v. Clatsop County*, 35 Or LUBA 820 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Absent local provisions to the contrary, only the preliminary plat approval, and not the entire record of the preliminary plat approval, is part of a final PUD plan record. *Santiam Properties v. City of Stayton*, 35 Or LUBA 790 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Geotechnical studies are appropriately included in the record where reference to these studies in the final PUD plan approval order indicates that they were considered by the final decision maker. *Santiam Properties v. City of Stayton*, 35 Or LUBA 790 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A code provision requiring that the local record include all materials submitted by any party and reviewed in reaching the "local

decision under review" does not require that documents that were submitted to and considered by staff be included in the local record, where those documents were not placed before the final decision maker. *Hribernick v. City of Gresham*, 35 Or LUBA 751 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Although a transcript prepared by a party *after* the local proceedings are complete is not considered part of the record under OAR 661-010-0026, where a party-prepared transcript of local proceedings is submitted to the local decision maker before the conclusion of the local proceedings, it is considered part of the record unless it is specifically rejected by the local decision maker. *Sequoia Park Condo Assoc. v. City of Beaverton*, 34 Or LUBA 808 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The requirement of OAR 661-010-0025(4) that the record be organized in inverse chronological order is not blindly applied where the result would be to separate documents that were submitted together. Where the organizational purpose of OAR 661-010-0025(4) is better served by organizing the record based on the date documents were received, LUBA will allow the record to organized in that manner. *Sequoia Park Condo Assoc. v. City of Beaverton*, 34 Or LUBA 808 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Statements made concerning a pending land use application during "open microphone" segments of meetings that were not part of the local proceedings are not comments submitted "during the course of the proceedings before the final decision maker" and are not part of the record under OAR 661-010-0025(1)(b). *Sequoia Park Condo Assoc. v. City of Beaverton*, 34 Or LUBA 808 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Although items placed in the city's land use application file are not necessarily part of the record, where the city's practice is to place the complete file before the local decision maker and the city does not dispute that certain documents were placed in the file and placed before the decision maker, LUBA will assume the documents are part of the local record. *Sequoia Park Condo Assoc. v. City of Beaverton*, 34 Or LUBA 808 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where petitioner claims to have witnessed a disputed document being handed to the city recorder and the minutes include a statement that the disputed document is being left with the city, the disputed document is properly included in the record. *Sequoia Park Condo Assoc. v. City of Beaverton*, 34 Or LUBA 808 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Absent local provisions requiring incorporation, or actual incorporation by the final decision maker, the record of a decision by the governing body does not include tapes of planning commission meetings. *Sequoia Park Condo Assoc. v. City of Beaverton*, 34 Or LUBA 808 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Petitioner's undeveloped claim that certain documents "were placed in the record" is insufficient to allege that the documents were placed before the local decision maker and not specifically rejected. *Mintz v. Washington County*, 34 Or LUBA 781 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A request that documents be make part of the local record is not sufficient to make those documents part of the local record unless the documents are actually placed before the decision maker. *Mintz v. Washington County*, 34 Or LUBA 781 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The requirement of OAR 661-010-0025(4) that documents in a local government record be arranged in reverse chronological order is not violated where the reasons for placing the documents out of such order are valid and do not affect the amount of effort needed to use the record. *Mintz v. Washington County*, 34 Or LUBA 781 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under OAR 661-010-0025(2) and (3), a local government is not required to include copies of audiotapes with the record served on petitioner. The local government is only required to make the tapes available to petitioner for copy or transcription at petitioner's expense. *Beaman v. City of Hillsboro*, 34 Or LUBA 779 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A local government is not required to include a verbatim transcript of tape recordings in the record if such a transcript was not actually prepared for the proceedings below. *Beaman v. City of Hillsboro*, 34 Or LUBA 779 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A summary of testimony necessarily omits details of that testimony. An objection to a summary of testimony must explain how the summarized testimony is mischaracterized. *Boyer v. Baker County*, 34 Or LUBA 758 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where petitioner identifies several documents in the record where the decision maker refers to a preliminary grading plan, petitioner satisfies his obligation to demonstrate that the preliminary grading plan was placed before the decision maker, notwithstanding that the preliminary grading plan was not included with the original application. *Abadi v. Washington County*, 34 Or LUBA 753 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Tapes of hearings and meetings before the local decision maker already prepared by the local government are properly part of the record under OAR 661-010-0025(1)(c). However, the local government need not create transcripts if they do not already exist. *Sparks v. Polk County and City of Monmouth*, 34 Or LUBA 731 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the text of a local decision on appeal demonstrates that it was based solely on examining the terms and effective date of a local ordinance and the date on which the local record was closed, petitioner does not establish that the record of an earlier proceeding was placed before the decision maker, making it part of the record of the decision on appeal. *Kinzer v. Washington County*, 34 Or LUBA 717 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA rules do not require that the decision maker insert all drafts of its final decision into the record. *Marshall v. City of Yachats*, 34 Or LUBA 713 (1998).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The appellate record of an appeal at LUBA is not properly part of the *local* record on remand unless the LUBA appellate record was placed before the decision maker during the local proceedings on remand. *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. In resolving objections to the record, LUBA determines only whether items were included in the record below, not whether those items are relevant to an issue raised by petitioner below. *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where petitioner contends a document should have been included in the record and the local government does not explain why the document is not included in the record, LUBA will sustain petitioner's record objection. *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents created after a local government issued the final decision on appeal are not part of the local record. *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record of local proceedings following a remand from LUBA includes the record of local proceedings that led to the remand from LUBA, unless the prior record is expressly excluded from the record during the proceedings on remand. *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Failure to comply with LUBA's rules regarding pagination is a serious defect where the record is long and materials cannot be identified with reasonable effort. *D.S. Parklane Development, Inc. v. Metro*, 33 Or LUBA 848 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The requirement of OAR 661-10-025(4)(a)(E) that documents in the record appear in reverse chronological order allows parties to understand how controversies developed and were resolved. *D.S. Parklane Development, Inc. v. Metro*, 33 Or LUBA 848 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where an exhibit comprises many documents, submitted by the same party but which bear no relation to each other, they should be listed separately in the record's table of contents with separate page numbers. *D.S. Parklane Development, Inc. v. Metro*, 33 Or LUBA 848 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Petitioner's own transcript of local proceeding audio tapes is not part of the local record. However, if petitioner prepares a transcript of all or some of the audio tapes and attaches it to her petition for review in support of arguments made in the petition, LUBA will consider the transcript if no objection is made to the transcript's accuracy or completeness. *D.S. Parklane Development, Inc. v. Metro*, 33 Or LUBA 848 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The minutes of meetings held by a local government decision maker's advisory committees are not included in the record of the local government decision maker's land use decision, unless those minutes are actually placed before the decision maker. *D.S. Parklane Development, Inc. v. Metro*, 33 Or LUBA 848 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A transcript of local proceedings that is prepared and submitted by petitioner, rather than by the respondent local government, cannot be made part of the local record. However, such a transcript may be attached to the petition for review in support of arguments presented therein. *Trademark Construction Inc. v. Marion County*, 33 Or LUBA 842 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will grant a motion to strike evidence attached to a petition for review where the evidence is neither included in the local record nor properly placed before LUBA through an evidentiary hearing. *St. Johns Neighborhood Assn v. City of Portland*, 33 Or LUBA 836 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the planning commission is not authorized by the city council to make a final decision, it is not a "governing body" under OAR 661-10-010(4), and OAR 661-10-025(1)(c) does not require the planning commission minutes be included in the record. However, minutes placed before the city governing body are properly included in the record under OAR 661-10-025(1)(b). *City of Gresham v. City of Wood Village*, 33 Or LUBA 779 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Inaccuracies in the written minutes of a public hearing are material only if the party objecting to the inaccuracies in the record establishes that the statements at issue relate to evidence that will be relevant to issues on appeal. *Winkler v. City of Cottage Grove*, 33 Or LUBA 776 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Without evidence that a disputed item was actually received by the decision maker or a person authorized to receive evidence on the decision maker's behalf, there is no basis for rejecting the city's representation that an item was not received or placed before the decision maker. *Opp v. City of Portland*, 33 Or LUBA 772 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the local governing body makes the final decision and only had before it the minutes of planning commission deliberations, LUBA may not order that the minutes be corrected based on a transcript of the planning commission deliberations that was not available to the governing body. *Carlson v. Benton County*, 33 Or LUBA 767 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-10-025(1)(c) requires that the "minutes * * * of the meetings conducted by the governing body" be included in the record, but does not require that the minutes of planning commission deliberations be included where the planning commission is not authorized to render a final decision and for that reason is not properly considered a "governing body." *Carlson v. Benton County*, 33 Or LUBA 767 (1997)

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA will not infer that a county's finding was intended to be read in a manner that conflicts with the finding's express language. *Koo v. Polk County*, 33 Or LUBA 487 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. ORS 197.835(11)(b) does not allow LUBA to draw inferences from the record that are either conflicting or not clearly evident from the county's findings or the record. Nor does it allow LUBA to disregard or alter the county's findings. *Koo v. Polk County*, 33 Or LUBA 487 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a city's motion to supplement the record with notice of adoption of ordinance will not supplement or complete the challenged decision in any way that is challenged by petitioner, the motion will be denied due to its lack of bearing on the merits of the appeal. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Even if county staff consulted certain files prior to issuance of a contested grading permit, that would not make those files part of the local record. Therefore, petitioner's allegations concerning such consultation provide no basis for an evidentiary hearing to establish that those files are part of the grading permit record on appeal. *Ceniga v. Clackamas County*, 33 Or LUBA 261 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Although a record is always "accepted" upon delivery, in that it is date-stamped and filed by LUBA's staff, it is not fully "accepted" for purposes of OAR 661-10-025(4)(a) as to form or content until it is either received by the Board, when there is no objection, or "settled" by the Board pursuant to OAR 661-10-026(6), when there is some objection. *Mar-Dene Corporation v. City of Woodburn*, 32 Or LUBA 481 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The primary purpose of the specifications set out in OAR 661-10-025(4) for records filed with LUBA is to ensure that the record is usable by the parties and the Board. Where an exhibit in the record contains more than 700 pages unindexed and in no particular order, LUBA will sustain a record objection on the basis that not all documents can be identified and located with reasonable effort. *Mar-Dene Corporation v. City of Woodburn*, 32 Or LUBA 481 (1997).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Although documents specifically rejected by a local government during its proceedings are not part of the local government record, the erroneous rejection of documents may provide a basis for reversal or remand. A party that wishes to challenge in its brief the propriety of the decision to exclude particular documents may request an evidentiary hearing before filing its brief. *Village Properties, L.P. v. City of Oregon City*, 32 Or LUBA 475 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Planning documents not placed before the city decision maker during the local proceedings are not part of the record, but LUBA may take official notice of local government enactments under OEC 202(7). *Downtown Community Assoc. v. City of Portland*, 31 Or LUBA 574 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. While words spoken at a county hearing are part of the record, transcripts not prepared by the county are not properly part of the local record, but may be attached to a party's brief in support of the arguments therein. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the record establishes that the county adopted nine conditions of approval, but inadvertently failed to include those conditions in the record transmitted to LUBA, the county will be allowed to supplement the record with the conditions. *Brown v. Union County*, 31 Or LUBA 551 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The local record includes not only materials submitted to the local decision maker during the public hearing process, but also other materials placed before the local decision maker prior to adoption of the final decision. Whether the local government satisfied statutory or local ordinance requirements in accepting evidence after the local hearings process does not determine whether those documents were made part of the record. *Nicholson/Keever v. Clatsop County*, 31 Or LUBA 535 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Items placed before and made part of the record during the local proceedings are not subject to amendment on appeal to this Board. Local governments may not amend a document in the record in order for it to conform to another document in the record. *Nicholson/Keever v. Clatsop County*, 31 Or LUBA 535 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. In an appeal of a fill and grading permit, materials that were sent to the city planning director but that were not placed before the code analyst who issued the permit are not part of the record. *Friends of Eugene v. City of Eugene*, 31 Or LUBA 532 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. When a disputed videotape is included in the record of the local government, and petitioners do not object to the record as submitted, petitioners' argument that the local government improperly refused to accept the videotape into the record is without merit. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A local government may accept new material into the record after holding a public hearing by accepting it before the record is closed, by reopening the record formally, or by its conduct. However, a local government is not required to accept new material into the record after it has formally closed the record. *Richards-Kreitzberg v. Marion County*, 30 Or LUBA 476 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the county holds a public hearing on remand from LUBA, but does not reopen the record at that hearing, a letter sent from petitioners to the board of commissioners after the hearing and prior to the adoption of the final decision is not part of the record. *Richards-Kreitzberg v. Marion County*, 30 Or LUBA 476 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. That a party believes a document should have been placed into the record does not establish that it is part of the record. Nor does a

representation by staff that a document was entered into the record establish that it was, in fact, entered into the record. *DeShazer v. Columbia County*, 30 Or LUBA 472 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where petitioners requested that the record of proceedings before the planning commission be included in the record before the board of commissioners, that request was discussed at the public hearing before the board and not rejected, and the secretary to the board acknowledged that she would make copies of the requested documents for the board, those documents are properly part of the record. *DeShazer v. Columbia County*, 30 Or LUBA 472 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Whether an item was made an official exhibit by the local decision maker does not determine whether it was placed before and not rejected by the decision maker. *DeShazer v. Columbia County*, 30 Or LUBA 472 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Petitioner's request at a local proceeding that a specific document be adopted as part of the record does not suffice to make that document part of the record if it is not actually placed before the decision maker. *McKenzie v. Multnomah County*, 30 Or LUBA 461 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Items are placed before the local decision maker if (1) they are physically placed before the decision maker prior to the adoption of the final decision; (2) they are submitted to the decision maker through means specified in local regulations or through appropriate means in response to a request by the decision maker for submittal of additional evidence; or (3) local regulations require that the item be placed before the decision maker. *McKenzie v. Multnomah County*, 30 Or LUBA 461 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The existence of a county code section requiring hillside development permits has no bearing on whether a slope hazard map is part of the local record. *McKenzie v. Multnomah County*, 30 Or LUBA 461 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The relevance or probative value of documents has no bearing on whether they are part of the local record. *McKenzie v. Multnomah County*, 30 Or LUBA 461 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Because the record is not limited to materials submitted to the decision maker prior to the close of the final public hearing, but includes all materials placed before the decision maker prior to the adoption of the final decision, petitioner's comments on proposed findings, accepted by the county commissioners after the final public hearing but before the adoption of the final decision, should be included in the record. *Leathers v. Marion County*, 30 Or LUBA 437 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the challenged decision quotes two sentences from a local government order on a different land use application, but does not express any intent to incorporate other portions of that order, only the two sentences are incorporated into the local record as findings, not the remainder of the order. *Rochlin v. City of Portland*, 29 Or LUBA 609 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The relevance or probative value of documents has no bearing on whether they are part of the local record. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Although a decision may incorporate other documents by reference, it cannot incorporate future enactments or the legislative history of those future enactments. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The local record includes only items placed before, and not rejected by, the local decision maker. When documents are prepared after the adoption of the decision on appeal, those documents are not part of the local government record. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A document of which LUBA takes official notice does not thereby become part of the local record which may provide evidentiary support for the challenged decision. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. With the exception of the challenged decision, minutes and tapes of proceedings below, and notices of local government hearings and decisions, an item becomes part of the local record if (1) it is physically placed before (and not rejected by) the decision maker prior to adoption of the final decision; (2) it is submitted to the decision maker through means specified in local regulations or in a request by the decision maker for submittal of additional evidence; or (3) local regulations require that the item be placed before the decision maker. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 601 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The fact that letters concerning a land use application were mailed to local government staff members does not, of itself, mean the letters are part of the local record. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 601 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A document is not part of the local record simply because it is located somewhere in the local government's files. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 601 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under OAR 661-10-025(1)(c), tape recordings of meetings conducted by the governing body must be included in the local government record, if such recordings are made. *Ramsay v. Linn County*, 29 Or LUBA 559 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where audio tapes are part of the record, a local government is not required to demonstrate such tapes are difficult to duplicate, to be able retain them until the date of oral argument under OAR 661-10-025(2). *Ramsay v. Linn County*, 29 Or LUBA 559 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The local government record submitted in a prior LUBA appeal, which led to remand of the challenged decision, is properly included in the local government record submitted to LUBA in a subsequent LUBA appeal of the local government's decision on remand. However, objections to the content of the local government record in the prior appeal, which could have been made in the prior appeal but were not, may not be asserted in the subsequent appeal. *East Lancaster Neigh. Assoc. v. City of Salem*, 29 Or LUBA 554 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the challenged decision is a decision by a local governing body not to accept petitioner's local appeal, under OAR 661-10-025(1)(d) the local government's notice of the planning commission decision that is the subject of petitioner's local appeal is properly included in the record, regardless of whether it was actually placed before the governing body. *Cummings v. Tillamook County*, 29 Or LUBA 550 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Other than the challenged decision itself (OAR 661-10-025(1)(a)), minutes and tapes of the proceedings below (OAR 661-10-025(1)(c)), and notices of local government hearings and decisions (OAR 661-10-025(1)(d)), items are part of the record only if they were placed before, and not rejected by, the local government decision maker (OAR 661-10-025(1)(b)). *Cummings v. Tillamook County*, 29 Or LUBA 550 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A document composed entirely of 8.5 X 11-inch sheets of paper is not a "difficult to duplicate" document that can be retained until oral argument under OAR 661-10-025(2). *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the challenged decision incorporates a particular document by reference, under OAR 661-10-025(1)(a) that document is properly included in the record, because it was adopted as part of the decision. *ONRC v. City of Oregon City*, 29 Or LUBA 547 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local advisory committee's charge was broader than the subject of a challenged legislative decision by the governing body, and the committee performed its work independently of the governing body, the record of meetings between members of the governing body and the advisory committee that occurred prior to the initiation of the legislative proceeding leading to the challenged decision is not part of the record of the governing body's legislative proceeding. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 541 (1995).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the record shows the local government conducted the proceeding leading to the challenged decision modifying an approved PUD as a separate permit proceeding initiated by a separate PUD modification application, under OAR 661-10-025(1)(b), the record includes only those items that were placed before the local decision maker during the course of the proceedings initiated by the modification application. *ONRC v. City of Oregon City*, 28 Or LUBA 775 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Items are placed before the decision maker if (1) they are physically placed before the decision maker prior to the adoption of the final decision; (2) they are submitted to the decision maker through means specified in local regulations or through appropriate means in response to a request by the decision maker for the submittal of evidence; or (3) local regulations require that the item be placed before the decision maker. *ONRC v. City of Oregon City*, 28 Or LUBA 775 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA cannot compel a local government to make minutes or a transcript of an executive session a part of the local record submitted in a LUBA review proceeding. If minutes have been prepared and not disclosed, the remedy is to seek an order from the circuit court that the minutes be made public. *McCrary v. City of Talent*, 28 Or LUBA 773 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Memoranda mailed to all owners of property in the area affected by a proposed legislative rezoning, from the local government planning department or a citizen task force, are not part of the local record if they were not placed before the local decision maker. *Churchill v. Tillamook County*, 28 Or LUBA 755 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. That a compilation of questionnaire responses is in the record does not mean that the individual responses (*i.e.*, the data) from which that compilation was prepared are part of the record, if the individual responses were not themselves placed before the decision maker. *Churchill v. Tillamook County*, 28 Or LUBA 755 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under OAR 661-10-025(4)(a)(B), the record table of contents must list as an exhibit *each* large document or map retained by the local government until the date of oral argument pursuant to OAR 661-10-025(2). *Churchill v. Tillamook County*, 28 Or LUBA 755 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Regardless of whether it was placed before the decision maker, the notice of the challenged decision given by respondent, including a list of persons to whom such notice was provided, is properly part of the record of the local proceedings. *Churchill v. Tillamook County*, 28 Or LUBA 755 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Items "included as part of the record during the course of the governing body's proceeding," as provided in OAR 661-10-025(1)(b), are those items actually placed before, and not specifically rejected by, the local decision maker during the local proceeding. *Champion v. City of Portland*, 28 Or LUBA 742 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 660-10-025(1)(c) requires the local record submitted to LUBA to include minutes and tape recordings of the proceedings conducted by the governing body, regardless of whether such minutes and tapes were actually placed before the decision maker below. Under OAR 660-10-010(4), "governing body" includes a commission whose decision would become the local government's final decision if no local appeal were filed. *Champion v. City of Portland*, 28 Or LUBA 742 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. In the absence of local regulations to the contrary, oversize aerial photographs permanently affixed to the walls of a local government hearing room do not become part of the record simply because they are in the view of the decision maker and are referred to in testimony during a local land use hearing. *Wicks v. City of Reedsport*, 28 Or LUBA 739 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Under amendments to LUBA's rules adopted June 22, 1994, tape recordings of the proceedings of the local government decision maker(s) are required to be included in the local record. A local government may retain such tapes until the time of oral argument before LUBA, but must list such retained tapes as exhibits on the table of contents to the record. *Champion v. City of Portland*, 28 Or LUBA 730 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government designates a particular planner as the person to whom comments on a proposal should be directed, comments so directed are effectively placed before the local government decision maker and are required to be included in the local record. *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. That the author of a letter subsequently abandoned the position it expressed in the letter has no bearing on whether that letter is part of the local record. *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Tapes of meetings conducted by a local government decision maker during the proceedings below are required to be included in the local record. A local government may retain such tapes until the time of oral argument before LUBA, but must list such retained tapes as exhibits on the table of contents to the record. OAR 661-10-025(1)(c), (2), (4)(a)(B) *McNamara v. Union County*, 28 Or LUBA 722 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Neither tape recordings of local proceedings that were not made by the local government as part of its official record of proceedings, nor transcripts made from such unofficial tape recordings, are properly included in the local record. *Carlson v. City of Dunes City*, 28 Or LUBA 719 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government decision maker authorizes the withdrawal of a challenged local government decision for reconsideration, pursuant to ORS 197.830(12)(b), that decision is reflected in the Notice of Withdrawal filed with LUBA, and that notice is part of the local record of the proceedings leading to the local government's decision on reconsideration. *Tylka v. Clackamas County*, 28 Or LUBA 712 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Letters to and from LUBA concerning the filing of a local government decision on reconsideration and refiling of a notice of intent to appeal, pursuant to ORS 197.830(12)(b), postdate the adoption of the challenged decision on reconsideration and, therefore, are not part of the *local* record. They are, however, part of LUBA's record. *Tylka v. Clackamas County*, 28 Or LUBA 712 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Items that were not placed before the local decision maker during the proceedings on the development application leading to the appealed decision, but rather were submitted to the decision maker only at a workshop on general issues concerning the development of an area including the subject property, are not part of the local record. *ONRC v. City of Oregon City*, 27 Or LUBA 726 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where there is no contention local regulations provide that submitting items to the local government's attorney is effective to place those items before the local decision maker, and no contention the disputed letter was sent to the local government's attorney in response to a specific request by the decision maker for additional evidence or argument, a letter sent to the local government's attorney is not part of the record unless that letter was actually placed before the decision maker. *ONRC v. City of Oregon City*, 27 Or LUBA 726 (1996).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record of a challenged local governing body decision includes the record of the planning commission proceeding on the subject application if either (1) the planning commission record was actually placed before the governing body, or (2) local code provisions require that the planning commission record be made part of the record before the governing body as a matter of law. *Salem Golf Club v. City of Salem*, 27 Or LUBA 715 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where documents are prepared or revised after the adoption of the decision appealed to LUBA, the documents or revisions are not part of the local government record. *Jackman v. City of Tillamook*, 27 Or LUBA 704 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. OAR 661-10-025(1)(c) does not require that minutes of a "task force" meeting at which less than a quorum of the members of a local government decision making body participated be included in the record, if no minutes were prepared, because minutes of such a meeting are not "required by law." *Jackman v. City of Tillamook*, 27 Or LUBA 704 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government initially maintains a single consolidated record in conjunction with two related quasi-judicial land use applications, but later bifurcates the local record into separate records, without providing notice to the parties, documents submitted by the parties will be included in the record of both proceedings. *ONRC v. City of Seaside*, 27 Or LUBA 679 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the applicant submits a new application following remand by LUBA of a decision approving an earlier application, a local government is under no obligation to include the record of the prior application or to provide explicit notice that parties have to submit evidence from the previous record that they wish the local government to consider in reviewing the new application. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the challenged decision states the decision maker "adopts" a certain document and "makes it part of" the findings, that

document is incorporated by reference into the findings and, under OAR 661-10-025(1)(a), is part of the local record, as findings. *Bates v. Josephine County*, 27 Or LUBA 673 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a staff report in the record indicates a particular document was submitted to the local planning commission at or prior to its hearing on the subject comprehensive plan and zoning map amendment, and no party contends the record of the planning commission proceedings is not properly included in the record of the challenged decision by the governing body, the document is part of the local record in an appeal to LUBA. *Bates v. Josephine County*, 27 Or LUBA 673 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where planning commission hearings are part of the local government decision making process concerning a proposed comprehensive plan or zoning ordinance amendment, minutes of those proceedings, as required by law, are part of the record of the challenged decision. OAR 661-10-025(1)(c). *Bates v. Josephine County*, 27 Or LUBA 673 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A transcript of local proceedings that was prepared and submitted by petitioner, rather than by the respondent local government, cannot be made part of the local record. However, petitioner may attach the transcript, or relevant portions thereof, to the petition for review, in support of arguments made therein. *Bates v. Josephine County*, 27 Or LUBA 673 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. An objector may not simply assume that all of the attachments to a letter are part of the local record simply because some of the attachments are included in the record. The objector must establish the disputed attachments were actually placed before the local decision maker. *Kaady v. City of Cannon Beach*, 27 Or LUBA 664 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The local record consists of those items placed before, and not rejected by, the local decision maker. Where petitioner contends the applicant asked to withdraw certain documents it submitted to the local decision maker, but does not argue the local decision maker granted that request or otherwise rejected the disputed documents, LUBA has no basis for concluding the documents are erroneously included in the local record. *Murphy Citizens Advisory Comm. v. Josephine County*, 27 Or LUBA 651 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. If a local government wishes to exclude the record of the previous local proceeding on the same development application that led to local proceedings after remand by LUBA, it must expressly do so. Otherwise, in an appeal to LUBA from the local government decision on remand, the record of the previous local proceeding will be considered part of the record of the local government decision on remand. *Murphy Citizens Advisory Comm. v. Josephine County*, 27 Or LUBA 651 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. In the absence of established procedures for formally admitting documents displayed during a local government land use hearing into the record, wetland maps that were displayed during a local hearing and discussed in

the testimony of local government staff are part of the record of the local proceedings. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 645 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local decision maker's order denying rehearing (1) indicates evidence submitted with the request for rehearing was considered only for the limited purpose of determining whether to grant the request for rehearing, and (2) does not amend or add to the original decision, the evidence submitted with the request for rehearing, although in the local record submitted to LUBA, is not part of the evidentiary record supporting the challenged decision. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where an appeal challenges (1) a letter concerning whether an amended version of a local code provision applies to two previously approved subdivisions, and (2) a letter rejecting petitioner's attempt to appeal the first letter locally, references in petitioner's inquiry and in the challenged letters to the two prior subdivision approvals do not, in and of themselves, operate to make the entire record of those subdivision proceedings part of the record of the appeal. *Forest Park Neigh. Assoc. v. City of Portland*, 26 Or LUBA 642 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a video tape was brought to a hearing but due to a mechanical malfunction was not played, and the video tape was neither offered to nor left with the local government decision maker, the tape was not placed before the decision maker and is not part of the local government record. *Sanchez v. Clatsop County*, 26 Or LUBA 631 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The primary purpose of the specifications set out in OAR 661-10-025(4) for records filed with LUBA is to ensure the record is usable by the parties and that all documents in the record can be identified and located with reasonable effort. Arranging the record in chronological order, rather than inverse chronological order as required by OAR 661-10-025(4)(a), has no material bearing on this primary purpose. *Sanchez v. Clatsop County*, 26 Or LUBA 631 (1994).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The local record includes those items placed before, and not specifically rejected by, the local government decision maker. Thus, where a circuit court transfers an appeal to LUBA, the record of the circuit court proceedings is not part of the local record subject to LUBA's review. *Kaady v. City of Cannon Beach*, 26 Or LUBA 614 (19/93).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the challenged decision was made by the local governing body, after a *de novo* review of a planning commission decision, but the record of the planning commission proceedings was not actually placed before the governing body, the planning commission's record is not part of the local record subject to LUBA review. *Matrix Development v. City of Tigard*, 26 Or LUBA 606 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where documents referenced in findings were not placed before the local decision maker, but rather were reviewed by local government staff who communicated the results of such review to the decision maker, the

documents are not part of the local record. *Matrix Development v. City of Tigard*, 26 Or LUBA 606 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Items submitted to the decision maker after the close of the evidentiary hearing are properly included in the record before LUBA, unless the decision maker specifically rejected those items prior to making its final decision. *Matrix Development v. City of Tigard*, 26 Or LUBA 606 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The local record includes items placed before, and not rejected by, the decision maker. Simply referring to a document during the local government proceedings does not make that document part of the record. *Henderson v. Lane County*, 26 Or LUBA 603 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Petitioner's references to telephone conversations between petitioner's employee and city employees, in a letter protesting dismissal of petitioner's local appeal, are insufficient to make transcripts of those conversations part of the local record, where no transcripts of those conversations were actually placed before the local decision maker. *Restaurant Management N.W. v. City of Portland*, 25 Or LUBA 824 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where it is clear from the local record that the local government rejected a letter during the proceedings below, that letter is not part of the local record. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 821 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the local decision maker only considers rejecting particular evidence, but does not actually reject such evidence, that evidence must be included in the local record submitted to LUBA. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 821 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the respondent includes documents in the record and takes the position that those documents were actually placed before the decision maker during the local proceedings, LUBA relies on the objecting party to offer some reason for questioning respondent's position. *McPeek v. Coos County*, 25 Or LUBA 805 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Petitioner's objection that a partial transcript, prepared and submitted by respondent in response to record objections by an intervenor, should be more extensive provides no basis for ordering the local government to provide such an expanded transcript, where petitioner does not explain, as required by OAR 661-10-026(3), why the minutes included in the record are inadequate to provide the desired information. *McPeek v. Coos County*, 25 Or LUBA 805 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the challenged local government decision is not included in the record submitted to LUBA, LUBA must remand the decision. *Lathrop v. Wallowa County*, 25 Or LUBA 693 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. References in documents submitted during an earlier legislative proceeding to a subsequent legislative proceeding do not make the documents submitted during the earlier legislative proceeding part of the record of the subsequent legislative proceeding. *Bicycle Transportation Alliance v. Washington County*, 25 Or LUBA 798 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents originally submitted during one legislative proceeding are properly included in the record of a subsequent legislative proceeding, if they were actually placed before the decision maker during that subsequent legislative proceeding. *Bicycle Transportation Alliance v. Washington County*, 25 Or LUBA 798 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A local government staff memorandum concerning notice provided during a legislative proceeding is not properly included in the record of that proceeding, where the memorandum was created two months after the challenged decision was adopted. However, submission of the memorandum may be allowed in the event of an evidentiary hearing, pursuant to ORS 197.830(13)(b) and OAR 661-10-045, to demonstrate that required notices were given. *Bicycle Transportation Alliance v. Washington County*, 25 Or LUBA 798 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The relevant inquiry in determining whether documents are properly included in the record is whether the documents were actually placed before the local government decision maker during the local proceedings leading to the challenged decision. LUBA does not require a showing that the decision maker actually examined each document placed before it. *Bicycle Transportation Alliance v. Washington County*, 25 Or LUBA 798 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the local proceedings leading to a challenged legislative land use decision included a number of separate proceedings, documents placed before the decision makers during each of those separate proceedings are properly included in the record at LUBA. *Bicycle Transportation Alliance v. Washington County*, 25 Or LUBA 798 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Staff notes that were used in developing a staff recommendation, but that were not themselves placed before the local decision maker, are not part of the local record. *Churchill v. Tillamook County*, 25 Or LUBA 796 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The local record is not limited to materials submitted to the decision maker prior to the close of the public hearing. Items submitted to the local decision maker, and not rejected prior to its adoption of the challenged decision, are part of the local record that must be transmitted to LUBA. *Rochlin v. Multnomah County*, 25 Or LUBA 783 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Absent local regulations that specifically allow submittal of evidence to the local decision maker through incorporation by

reference, a request to incorporate items by reference is not sufficient to make the requested items part of the local record. *Salem Golf Club v. City of Salem*, 25 Or LUBA 768 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government specifically denies a request that it take official notice of certain items and incorporate them into the local record, those items are not part of the local record. *Salem Golf Club v. City of Salem*, 25 Or LUBA 768 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Mailing a document concerning certain property to a local government official, at a time when an appeal of a local decision concerning that property is pending before LUBA, does not, of itself, make that document part of the record of subsequent local proceedings conducted after remand of the appealed decision by LUBA. *DLCD v. Klamath County*, 24 Or LUBA 643 (1993).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. To be part of the local record, documents must be placed before the local decision maker. Simply referring to documents does not place such documents before the local decision maker. *Mannenbach v. City of Dallas*, 24 Or LUBA 618 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. While the spoken word is considered part of the local record, LUBA's rules do not require that a local government submit tapes of its local proceedings. *Mannenbach v. City of Dallas*, 24 Or LUBA 618 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The local government record does not include evidence that is specifically rejected by the local government during the local proceedings. That such evidence may have been erroneously rejected may provide a basis for reversal or remand, but it has no bearing on the contents of the record. *Glisan Street Assoc. v. City of Portland*, 24 Or LUBA 600 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. It is not enough to allege that a document can be found in some file located in the courthouse; the local record consists only of documents actually placed before, and not specifically rejected by, the local government decision maker. *West Amazon Basin Land Owners v. Lane County*, 24 Or LUBA 597 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record includes materials placed before the local decision maker prior to the adoption of a final decision. It is not limited to materials submitted to the local decision maker prior to the close of the public hearing or the making of a tentative decision. *Joines v. Linn County*, 24 Or LUBA 588 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where petitioners simply assumed that a letter sent to a city planner concerning the local proceedings would be placed before the city decision maker, but the letter was not placed before the city decision maker, the letter is not part of the local record. *Terra v. City of Newport*, 24 Or LUBA 579 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The presence of blank spots on an audio tape of a public hearing does not provide a basis for allowing the petitioner in a LUBA

proceeding to attempt to supply the information that should be reflected on the blank portions of the tape, by an affidavit not placed before the local decision maker. *Giesy v. Benton County*, 24 Or LUBA 586 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A party may not fail to object to the record submitted by the local government in a LUBA proceeding and thereafter attach documents to its brief that it believes should be included in the record. *Mercer v. Josephine County*, 23 Or LUBA 608 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. For purposes of determining the composition of the local record of a decision on a permit application, the local proceedings begin when the permit application is submitted. *Forest Highlands Neigh. Assoc. v. Lake Oswego*, 23 Or LUBA 723 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The local record consists of those items physically placed before and not specifically rejected by the local decision maker. *Forest Highlands Neigh. Assoc. v. Lake Oswego,* 23 Or LUBA 723 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where minutes of the local government proceedings demonstrate that a document was specifically rejected by the local government decision maker, the document is not part of the local record. *Mulholland v. City of Roseburg*, 23 Or LUBA 720 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where evidence is submitted to a local government decision maker after the close of the evidentiary hearing, and the decision maker votes not to reopen the record to accept such evidence, that evidence is specifically rejected by the decision maker and, therefore, is not a part of the local record to be submitted to LUBA. *Adler v. City of Portland*, 23 Or LUBA 692 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents specifically rejected by a local government during its proceedings are not part of the local government record. *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 688 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the city charter identifies the City Auditor as custodian of all records of city council proceedings, and petitioners neither cite city regulations recognizing the delivery of documents concerning pending city council proceedings to the offices of the mayor or individual council members as a means of submitting documents for the record, nor claim the city council specifically authorized use of such a procedure, the delivery of documents to the offices of the mayor and city council members does not constitute placing those documents before the city council. *Wilson Park Neigh. Assoc. v. City of Portland,* 23 Or LUBA 688 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the challenged decision states the final local decision maker took "notice" of the record of a lower level decision maker, and the letter of transmittal to the final decision maker states it is transmitting the record from the lower level decision maker, the record before such lower level decision maker was "placed before"

the final decision maker, and must be included in the local record submitted to LUBA. *Veatch v. Wasco County*, 23 Or LUBA 676 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government concedes that certain documents were placed before the local decision maker during the proceeding below, and the parties cite nothing establishing that the local government specifically rejected the documents, the documents are part of the local record. *Heiller v. Josephine County*, 23 Or LUBA 672 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The general rule is that the record compiled at one stage of a local government land use proceeding must actually be placed before the decision maker in subsequent stages of that land use proceeding, if that earlier record is to become part of the record subject to review by LUBA. *Leonard v. Union County*, 23 Or LUBA 664 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where local code provisions require that the record of proceedings before initial decision makers be placed before the final decision maker the record of those earlier proceedings automatically become part of the record subject to review by LUBA, without the necessity of actually placing the record compiled before initial decision makers before the final decision maker. *Leonard v. Union County*, 23 Or LUBA 664 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a participant *requests* that the local decision maker include certain items in the record, but does not actually place those items before the decision maker, that request, at least in the absence of an affirmative response by the decision maker, is no more than a reference to those items in the participant's testimony and does not make those items part of the local record. *Ramsey v. City of Portland*, 22 Or LUBA 845 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Local ordinance provisions which *require* certain items to be placed before the governing body have the effect of making those items part of the record of the governing body's proceedings, irrespective of whether the items were *physically* placed before the governing body. *Schrock Farms, Inc. v. Linn County*, 22 Or LUBA 836 (1992).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. An item is part of the record only if it was actually *placed before* the local decision maker. Whether an item is *relevant* to the decision maker's decision has no bearing on whether that item is in the record. *Adkins v. Heceta Water District*, 22 Or LUBA 826 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Materials placed before the local decision maker are part of the record only if they were submitted during the proceeding leading to the appealed decision. Where a local government conducts two separate proceedings, a quasi-judicial proceeding on an application and a legislative proceeding to consider adoption of a regulation governing such applications, items are not part of the record of the appealed regulation simply because they are part of the record of the application proceeding. *Adkins v. Heceta Water District*, 22 Or LUBA 826 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. To properly be included in the local record submitted to LUBA, items must have been placed before, and not specifically rejected by, the local decision maker. Items specifically rejected by the local decision maker during its proceedings are not part of the local record. *Silani v. Klamath County*, 22 Or LUBA 823 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Petitioners' allegation that the job description of the county appeals secretary should be included in the local record is irrelevant to determining whether it is a part of the local record. Where the disputed job description was not placed before the local decision maker, LUBA will not require that it be included in the local record. *Breivogel v. Washington County*, 22 Or LUBA 813 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. To properly be included in the local record submitted to LUBA, items must have been placed before, and not specifically rejected by, the local decision maker. *Weeks v. Tillamook County*, 22 Or LUBA 810 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the local code does not specifically allow submittal of documents to the local decision maker through incorporation by reference, and the documents in question were not actually placed before the local decision maker during the proceedings below, the documents are not part of the local record. *Schatz v. City of Jacksonville*, 22 Or LUBA 799 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record is not limited to materials submitted to the decision maker prior to the close of the public hearing, but rather includes all materials placed before the decision maker prior to the adoption of the final decision. *Schatz v. City of Jacksonville*, 22 Or LUBA 799 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Video tapes of local proceedings not made by the local government as part of the official record of its proceedings are not properly included in the local government record. *Toth v. Curry County*, 21 Or LUBA 595 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents actually placed before the local decision maker must be included in the local record. That a document placed before the decision maker contains inaccuracies provides no basis for excluding the document from the record. *Gray v. Clatsop County*, 21 Or LUBA 574 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where petitioners do not contend a list naming persons who received individual notice of planning commission or board of commissioners hearings was actually compiled by the county or placed before either body, such a list is not part of the local record. *Gray v. Clatsop County*, 21 Or LUBA 574 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A sketch prepared by a member of the decision making body during its deliberations and referred to in the comments of that member, but not shown to the other members, was not actually placed before the decision making body for inclusion in the record. *Schmaltz v. City of Hood River*, 21 Or LUBA 563 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the local code provides that "legislative actions include a public hearing by the [planning] commission," it requires the record of the public hearing before the planning commission to be placed before the governing body and be made part of the record of the final legislative action. *Union Gospel Ministries v. City of Portland*, 21 Or LUBA 557 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where documents referenced in local government findings were not placed before the local decision maker, but rather were reviewed by local government staff who communicated the results of such review orally to the decision maker, the documents are not part of the local record. However, the work sessions at which such oral communications occurred are part of the local proceedings leading to the appealed decision, and audiotapes of such work sessions are properly part of the record. *Eckis v. Linn County*, 20 Or LUBA 589 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the audiotape of a portion of a local hearing is blank, making preparation of a transcript impossible, LUBA will not grant a motion to supplement the record with the witness' written statement, if that written statement was not placed before the local decision maker during the local proceedings. *Hale v. City of Beaverton*, 20 Or LUBA 584 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the clerk of the council is the official custodian of the record of city council proceedings, it is customary to submit documents to the clerk of the council, and it is not claimed that the council authorized planning staff to receive documents, submitting a document to a planning staff member during a city council hearing does not constitute placing the document before the city council. *Blatt v. City of Portland*, 20 Or LUBA 572 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government conducts the proceeding culminating in the adoption of a corrective program under ORS 197.530 as a separate proceeding, not as a continuation of a proceeding leading to the adoption of a moratorium under ORS 197.520, the record of the decision to adopt a corrective program does not include the record of the decision to adopt a moratorium, unless the moratorium record was placed before the decision maker during the corrective program proceeding. *Schatz v. City of Jacksonville*, 20 Or LUBA 565 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record consists of those materials actually placed before, and not specifically rejected by, the local decision maker during the local proceedings; and is not limited to materials submitted to the local decision maker prior to the close of the public hearing or the making of a tentative decision. *Barr v. City of Portland*, 20 Or LUBA 531 (1991).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Petitioner's delivery of evidence to the county counsel's office is adequate to place those materials before the county decision maker and make them part of the local record subject to LUBA review, where (1) the procedures for submitting evidence at times other than during county hearings are not specified in the county code or regulations and were not identified during the course of the proceedings below, (2) the county

failed to respond to petitioners' previous request for information regarding the proper procedure for submitting evidence, and (3) petitioner had previously submitted evidence to the county counsel's office, and that material was included in the local record. *Wade v. Lane County*, 20 Or LUBA 499 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. References to and reliance on a document by the applicant and city staff in their testimony before the city do not make that document part of the local record if it was not actually placed before the city decision maker. *Hoffman v. City of Lake Oswego*, 19 Or LUBA 607 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A statement in the findings in support of the appealed city decision that a particular document is "incorporated into the record" does not make that document part of the local record if it was not actually placed before the city decision maker. *Hoffman v. City of Lake Oswego*, 19 Or LUBA 607 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA considers the words spoken at the local government hearings to be part of the record, and will permit parties to attach excerpts from transcripts of such hearings to their briefs, notwithstanding that neither tapes nor transcripts of the local government hearings were submitted to LUBA as part of the record. Other parties may contest the accuracy of such transcript excerpts in their opening brief or in a reply brief. *Columbia Steel Castings v. City of Portland*, 19 Or LUBA 338 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a party objects to the local government's failure to include a document in the record filed with LUBA and argues the document was actually placed before the decision maker during the local proceedings, and respondent does not dispute the party's allegations, LUBA will sustain the record objection and require that the record be supplemented to include the document. *Benjamin v. City of Ashland*, 19 Or LUBA 600 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where the record contains equivocal and confusing statements by a local decision maker concerning whether particular evidence was accepted, the local decision maker will not be deemed to have rejected such evidence. *Beck v. City of Tillamook*, 19 Or LUBA 598 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record consists of those materials actually placed before the local decision maker during its proceeding and not specifically rejected by it. *Wissusik v. Yamhill County*, 19 Or LUBA 571 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record is not limited to materials submitted to the local decision maker prior to the close of public hearing. *Wissusik v. Yamhill County*, 19 Or LUBA 571 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a letter is submitted to the local decision maker, but a note is placed on the letter by a representative of the decision maker indicating that the decision maker will not consider it, such letter is rejected by the local decision

maker and, therefore, is not part of the local record. *Wissusik v. Yamhill County*, 19 Or LUBA 571 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government decision concerning a permit is remanded by LUBA and, following local proceedings on remand, a second decision concerning the permit is appealed to LUBA, the record supporting the prior decision is not included in the record of the second decision where the county fails to either include the prior record in the second record submitted to LUBA or designate the prior record as being part of the record. *Clark v. Jackson County*, 19 Or LUBA 220 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents specifically rejected by the local government during its proceedings are not part of the local government record. *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Documents actually placed before the local government decision maker prior to adoption of its final written decision, and not specifically rejected by the decision maker, are properly included in the record, even where the documents are submitted after the close of the evidentiary hearing. *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The minutes of public meetings conducted after the close of the evidentiary hearing in a land use proceeding, at which the local government decision maker deliberated or adopted its written decision, are properly included in the record of the local proceedings. *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. A general statement by the local government decision maker during local proceedings that evidence concerning public need would not be accepted is insufficient to reject documents which address public need and were subsequently submitted during the local proceedings. A local government must identify, with reasonable particularity, the documents it is refusing to include in the record. *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a second moratorium ordinance is adopted following a continuation of the local proceedings that led to the initial moratorium ordinance, the record of the local proceedings of the initial moratorium ordinance is properly included in the record in the local proceedings for the second moratorium ordinance. *Davis v. City of Bandon*, 19 Or LUBA 507 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where findings addressing Statewide Planning Goal 1, adopted in support of challenged ordinances amending the county code, describe citizen involvement and issue prioritization stages of code update proceedings *as part of* the ordinance adoption proceedings, the citizen involvement and issue prioritization proceedings are part of the record of the challenged ordinances, even though they occurred before the proposed ordinances were filed. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 500 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. *Referral* to a document in local government findings does not make the document part of the local government record. Although a document which is *adopted* or *incorporated* by reference as part of local government findings is part of the local government record, *as findings*, it is not part of the evidentiary record on which the local government based its decision, unless the document was actually placed before the local decision maker. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 500 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where city staff was directed at a city council meeting to investigate moratorium requirements, city staff reported back to the city council at a second city council meeting and the city council adopted a moratorium at a third city council meeting, the minutes of the first two city council meetings and documents placed before the city council at those meetings are properly included in the record of the local proceedings leading to the ordinance adopting the moratorium. *Davis v. City of Bandon*, 19 Or LUBA 493 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The local government record consists of those items which are actually placed before the decision maker below, and which are not specifically rejected. However, to reject evidence, and thereby exclude it from the local record, the local government must make it clear that it rejects the evidence. *Bloomer v. Baker County*, 19 Or LUBA 482 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The fact that a local government may have had a basis under its ordinances to refuse to accept evidence does not determine whether such evidence was actually refused. *Bloomer v. Baker County*, 19 Or LUBA 482 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government solicits comments, previously rejected evidence is submitted in response to that solicitation and the local government does not, thereafter, specifically reject such evidence, the previously rejected evidence becomes part of the record. *Bloomer v. Baker County*, 19 Or LUBA 482 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where a local government specifically rejects evidence, but retains possession of that evidence, such evidence is not considered part of the record, overruling *Indian Creek v. City of Lake Oswego*, 14 Or LUBA 519 (1985). *Bloomer v. Baker County*, 19 Or LUBA 482 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. The record of an ancillary proceeding before another agency or governmental body, held for the purpose of making a recommendation to the county, is not part of the record of the county's decision making process if the record of that ancillary proceeding was not placed before the county decision makers. *City of Portland v. Multnomah County*, 18 Or LUBA 911 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where petitioners do not object to the adequacy or completeness of the minutes of local proceedings included in the record and do not attach transcripts to their petition for review, petitioners may not submit partial transcripts of local proceedings for the first time at oral argument. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. LUBA takes official notice of comprehensive plans, land use regulations and other local enactments establishing land use decision approval standards, even where such documents are not included in the record. *Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695 (1990).

27.3.2 LUBA Procedures/Rules – Record – Content/Form. Where documents are prepared or revised after the decision appealed to LUBA was adopted, the documents are not part of the local government record. *Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695 (1990).

27.3.3 LUBA Procedures/Rules – Record – Objections to. An email sent to the local government's attorney 33 minutes prior to the close of business on the day that objections to a 91-page record are due to be filed is not a good faith attempt to resolve the objections before filing the objections for purposes of OAR 661-010-0026(1). *Hunt v. City of The Dalles*, 80 Or LUBA 1033 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will deny a record objection and conclude that the disputed materials are properly excluded from the record where the disputed materials were placed before the final decision-maker as attachments to the notice of local appeal and "rejected by[] the final decision maker" for purposes of OAR 661-010-0025(1)(b). *Oregon Coast Alliance v. City of Bandon*, 80 Or LUBA 1036 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will require a local government to provide a partial transcript of the city council's deliberations where the minutes fail to summarize the deliberations and petitioner demonstrates that the defect is material to a key issue in the appeal. However, where LUBA reviews the meeting minutes and concludes that they adequately summarize the city council's deliberations and accurately reflect the proceeding, LUBA will deny petitioner's record objection. Petitioner may refer to the video recording that is in the record and may attach a verbatim transcript to her petition for review, to the extent that petitioner intends to rely on specific statements that are not reflected in the minutes. *Niederer v. City of Albany*, 79 Or LUBA 1001 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will decide that disputed printed materials were submitted to the record and should be included in the record based on petitioner's specific assertion that she submitted the item to the city recorder, when it is circumstantially supported by the meeting minutes and video recording, and the city offers no specific contradictory evidence that no such materials were in fact handed to the city recorder, and the city does not argue that such submissions should not be included in the record. The city's vague denial is insufficient to overcome petitioner's specific assertion and other evidence. *Niederer v. City of Albany*, 79 Or LUBA 1001 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will deny petitioners' record objections where petitioners only verbally conferred with the county on one occasion in a single phone call in which petitioners did not discuss the specifics of any objections, but simply informed the county there were "too many objections to discuss" and that they intended to file a record objection with LUBA, and made no efforts after filing their record objections to advance resolution of the objections, refusing post-filing of the record objections to attempt to discuss and resolve any specific objections with the county, apparently because petitioners believed that further discussion would "serve no purpose." *Bishop v. Deschutes County*, 79 Or LUBA 1007 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Arguments that testimony is inadequately or inaccurately reflected in the minutes of the local proceedings may be adequate to justify requiring a local government to prepare a transcript of the proceedings where the objecting party demonstrates with particularity why the defect in the minutes is material. However, where petitioners' argument is merely that it is challenging to identify the testimony in the local government's voluminous record, and therefore LUBA should allow the documents to "resolve

disputes regarding the content of the record," and where petitioner states it "is not clear that the document was actually submitted," there is no dispute regarding the content of the record, and petitioners have provided no basis for LUBA to allow the documents to be part of the record pursuant to OAR 661-010-0045(1). *Restore Oregon v. City of Portland*, 79 Or LUBA 1041 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will sustain petitioners' record objections where the local government's only response is that it could not verify that the documents were part of the record due to the lack of a date, signature and/or addressee, and petitioner provides evidence that petitioners sent the documents in question to all city commissioners in writing on April 4, 2018 by providing an email from one of the petitioners to each of the city commissioners with the documents in question attached, prior to the final decision. *Restore Oregon v. City of Portland*, 79 Or LUBA 1041 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where the document to which petitioners object as having been improperly omitted from the record is an email sent by one of the petitioners to some, but not all, members of the city council, and no evidence in the record indicates that the email was submitted into the record by any of the recipients, the record was not "placed before" the final decision maker pursuant to OAR 661-010-0025(1)(b). *Restore Oregon v. City of Portland*, 79 Or LUBA 1041 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a local government states that certain meeting minutes were not placed before the local governing body or otherwise required to be included in the record, LUBA will defer to the local government as the custodian of the record unless the petitioner supplies a sufficient reason to decide otherwise beyond a bare assertion that those minutes were placed before the local governing body and not rejected. *NWDNA v. City of Portland*, 79 Or LUBA 1074 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. An objection that the record table of contents lists specific items which refer to attachments or exhibits, but does not separately list those attachments or exhibits themselves, provides no basis for LUBA to require the local government to revise the table of contents where the petitioner has provided no reason why LUBA should deviate from the general rule that OAR 660-010-0025(4)(a)(B)(i) does not require that exhibits to exhibits be separately listed in the table of contents. *NWDNA v. City of Portland*, 79 Or LUBA 1074 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a petitioner asserts that a document was not and should not have been placed before the decision maker and therefore should not have been included in the local record under OAR 661-010-0025(1)(b), and where the local government states that the document is included in the record because LUBA's rules do not require its exclusion but fails to demonstrate that the document was placed before the decision maker, made part of the record by law, or otherwise made available in a manner indicating it was part of the record, LUBA will exclude the challenged document. *Norman v. Washington County*, 79 Or LUBA 1079 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. While OAR 661-010-0025(1)(d) requires local governments to include in the local record "[n]otices of proposed action, public

hearing and adoption of a final decision," that are "published, posted or mailed during the course of the land use proceeding" regardless of whether they were specifically incorporated into the record by the decision maker, that provision only applies to public notices and not documents labeled as a notice but directed only to the applicant. In addition, staff reports which are not merely referenced in a public notice, but are mailed with the notice itself, are considered part of the notice and are therefore properly part of the record. *Norman v. Washington County*, 79 Or LUBA 1079 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a petitioner files record objections alleging that "items are missing from the record," including documents and correspondence related to the notice of the local government's decision and the petitioner's attempted local appeal as well as documents related to the preliminary project review, but where the petitioner does not specify the omitted items and the basis for the claim that the items are part of the record until filing a reply, LUBA will deny the objections pursuant to OAR 661-010-0026(2). *McCaffree v. City of North Bend*, 79 Or LUBA 1087 (2019).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where the local government's open record period closed on March 14, 2018, and the local government's counsel determined on April 11, 2018, for the first time, that exhibits petitioner had intended to attach to his March 7, 2018, email to the local government had not actually been included as attachments, and therefore the attachments had never actually been received by the local government's final decision maker, LUBA will deny petitioner's record objection that the attachments should have been included in the record. *Watts v. Metro*, 78 Or LUBA 1020 (2018).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioner's record objection arguing that a local government's process leading to the challenged decision was "insufficient to create a record" because the process did not provide an opportunity for public participation, is not a cognizable record objection because it does not identify any specific documents that petitioner believes should or should not have been included in the record, or argue that the record does not otherwise conform with the rules pertaining to record submitted to LUBA. *Watts v. Metro*, 78 Or LUBA 1020 (2018).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a party objects that the county erred in rejecting certain items from the record, or argues that the county committed some procedural error in how it dealt with the disputed documents, such arguments may be the subject of an assignment of error, but they have no bearing on whether the items are part of the record on appeal and are not a proper basis for a record objection. *Neighbors for Smart Growth v. Washington County*, 78 Or LUBA 1026 (2018).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioners' request that the record include the affidavit of mailing confirming that notices and attachments were emailed or mailed to the individuals is without merit, where the county represents that no affidavit was prepared, and argues that none is required under state or county law. *Neighbors for Smart Growth v. Washington County*, 78 Or LUBA 1026 (2018).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioners' record objection fails where petitioners request that all written or electronic communication between petitioners and the county, and all written or electronic communications between petitioners and intervenor from the date of LUBA's final opinion to the date of the board of commissioners' meeting be included in the record because these items are "material to the record," but the county responds that all communication between the county and petitioners was only via county counsel, and were never placed before the board of commissioners. Whether the communications are material to the record is irrelevant; petitioners have not established any of the disputed communication between petitioners and county counsel or petitioners and intervenor were placed before the final decision-maker and are therefore not properly part of the record. *Neighbors for Smart Growth v. Washington County*, 78 Or LUBA 1026 (2018).

27.3.3 LUBA Procedures/Rules – Record – Objections to. When the county submits pre-decision documentation to DLCD in accordance with ORS 197.610(1) which requires local governments to provide information specified in ORS 197.610(3), including a copy of proposed amendments to DLCD, that material is properly included in the record. Also, when the county submits the post-decisional notice and information required by ORS 197.615(1) and (2), the county must either identify their location in the present record or submit them as part of a supplemental record. Additionally, if DLCD sent the county a substantive response to the information the county sent to DLCD, the response should be included in the record. *VanDyke v. Yamhill County*, 78 Or LUBA 1036 (2018).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner does not assert that the media recordings were "specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker," OAR 661-010-0025(1)(b), petitioner has not met its burden to demonstrate that the city improperly excluded the disputed items from the record. The city is required to transmit a record to LUBA that includes "all materials included as part of the record during the proceedings before the final decision maker." OAR 661-010-0026(2)(a); OAR 661-010-0025(1)(c). In this proceeding, the city council was the final decision maker. Accordingly, neither OAR 661-010-0026(2)(a) or OAR 661-010-0025(1)(c) require the city to include media recordings of the planning commission hearings in the record. *Oster v. City of Silverton*, 78 Or LUBA 1079 (2018).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A media recording of a planning commission hearing that the city council, the final decisionmaker, did not incorporate into the record is not required to be included in the record under OAR 661-010-0025(1)(c). *Oster v. City of Silverton*, 78 Or LUBA 1079 (2018).

27.3.3 LUBA Procedures/Rules – Record – Objections to. While the city's failure to include media recordings or transcripts of the planning commission hearings may be a basis for an assignment of error in the petition for review, that does not change the fact that the media recordings and transcript are not part of the record. For purposes of identifying the contents of the record required under OAR 661-010-0025, it does not matter whether the decision maker erred in accepting or excluding evidence. *Oster v. City of Silverton*, 78 Or LUBA 1079 (2018).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Nothing in LUBA's rules authorizes a party to file a series of new or expanded objections to the record after the 14-day period for filing record objections closes. That the local government files a supplemental record does not open the door for any party to file new or expanded objections to the original record. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

27.3.3 LUBA Procedures/Rules – Record – Objections to. In a motion to take evidence outside the record filed before the parties have submitted briefs, LUBA considers it axiomatic that a document rejected from the local record is not part of the local record, for purposes of settling the content of the record, even if LUBA later concludes, after briefing on the merits, that the document was erroneously rejected from the local record. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where the petitioner agrees to accept an electronic copy of the record on compact discs pursuant to OAR 661-010-025(2)(a) on the express condition that the electronic copy be searchable, but the first record the local government serves on the petitioner is not searchable, the local government must serve petitioner with a searchable copy of the record on compact discs or the equivalent medium, and cannot fulfill its obligation by simply providing a link to an on-line site that includes a searchable copy of the record. *Oregon Shores Conservation Coalition v. Coos County*, 75 Or LUBA 534 (2017).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A single e-mail to the county discussing the omission of one document from the record is sufficient to satisfy the OAR 661-010-0026(1) obligation to attempt to resolve record objections with the local government's legal counsel prior to filing an objection with LUBA with respect to the identified document, but not with respect to other allegedly omitted documents. *Neil v. Columbia County*, 74 Or LUBA 614 (2016).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where the petitioner objects to a finding in the decision that recites a statement, on the grounds that the statement was not actually made during the proceedings below, the objection is an argument on the merits that the findings are not supported by substantial evidence, not a cognizable objection to the record. *Neil v. Columbia County*, 74 Or LUBA 614 (2016).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will reject an objection to the accuracy of the minutes, where the minutes accurately reflect a county commissioner's statement that the petitioner has four employees. Whether the statement is true or not does not reflect any deficiency in the minutes. *Neil v. Columbia County*, 74 Or LUBA 614 (2016).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a party withdraws all but one of his initial record objections, and in doing so considerably elaborates upon the unclear and undeveloped initial record objection that he does not withdraw, LUBA will not consider the elaboration. *Nicita v. City of Oregon City*, 74 Or LUBA 633 (2016).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Merely providing hyperlinks to a document that is physically located on the local government's website, as the sole means of accessing recordings that are part of the local record, is not acceptable. However, where the local

government subsequently transmits computer disks that contain the recordings, LUBA will not require that the local government correct defects in some of the hyperlinks. *Nicita v. City of Oregon City*, 74 Or LUBA 633 (2016).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Arguments that a local government incorrectly refused to accept documents for the record and that the local government was not sufficiently clear about which documents it was refusing to accept for the record are properly presented as assignments of error in a petition for review, and are not a basis for a record objection. *Nicita v. City of Oregon City*, 74 Or LUBA 633 (2016).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will consider an uncontested affidavit that a hearings officer considered only portions of the record of a lot-of-record decision provided by the applicant, and did not consider the entire record, to resolve an objection that the entire record was placed before the hearings officer. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 638 (2016).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Planning staff e-mails with the applicant regarding writing the final decision are not part of the record of a decision by the county board of commissioners, unless the e-mails are "placed before" the commissioners. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 638 (2016).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a party objects that the record should include a transcript, attaches the transcript to its record objections and the county thereafter submits a copy of the transcript as a supplemental record, and that transcript has formatting errors that complicate use of the transcript but do not render it unusable, LUBA will deny the party's objection that the county should be ordered to submit the transcript a second time without the formatting errors. *Rawson v. Hood River County*, 74 Or LUBA 668 (2016).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will not consider an additional record objection after an initial record objection is filed. *Martin v. City of Central Point*, 73 Or LUBA 422 (2016).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a party objects to incomplete "searchability" of an electronic record, it is the objecting party's burden to specifically identify which printed words in the record served on them are not searchable, and to demonstrate that any deficiency in searchability significantly affects the usability of the record. *Rogue Advocates v. Josephine County*, 71 Or LUBA 409 (2015).

27.3.3 LUBA Procedures/Rules – Record – Objections to. When an objecting party alleges that documents are missing from the record, and the county responds that such documents were not submitted for the record, a mere assertion that the documents were submitted is insufficient to overcome the county's contrary representation. *Rogue Advocates v. Josephine County*, 71 Or LUBA 409 (2015).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A party's objection that the content of minutes from a county hearing are incomplete or inaccurate must be accompanied by a

description of the differences between the minutes and what a partial transcript of the testimony made from the audio recording of the hearing would show. *Rogue Advocates v. Josephine County*, 71 Or LUBA 409 (2015).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will deny an objection that the minutes of a city council hearing are incomplete, because the minutes fail to summarize the oral arguments of petitioner's attorney, where the same arguments are found in writing elsewhere in the record, and petitioner's argument that the defect in the minutes is "material" rests on speculation that petitioner will advance assignments of error to which, petitioner speculates, the respondent might raise waiver challenges. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will require a local government to provide a partial transcript of the city council's deliberations, where the minutes provide no summary at all of the deliberations, and petitioner demonstrates that the defect is material to a key issue in the appeal. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Any error in the record table of contents in describing a city council proceeding as a "hearing" rather than a "meeting" does not warrant a revised table of contents, because how the table of contents describes the proceeding cannot change the nature of that proceeding. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Building plans that are submitted to planning staff as part of an application for site plan review are not necessarily part of the local record transmitted to LUBA, if the building plans are not "placed before" the final decision maker, and no local regulation or other source of law incorporates all documents submitted as part of an application as part of the local record by operation of law. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Advising a local government's attorney by e-mail in the afternoon of the final day to file record objections that petitioner had record objections to discuss, and thereafter filing record objections, is sufficient to comply with the prior consultation requirement of OAR 661-010-0026(1), where the 5,000+ page digital record was sufficiently complex that the 14 days allowed to review, consult and object to the record easily might not have been a sufficient amount of time to do so. *LO 138, LLC v. City of Lake Oswego*, 70 Or LUBA 538 (2014).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will not resolve a record objection and require the local government to submit a supplemental record, where the local government has filed a dispositive motion to dismiss, and none of the documents at issue in the record objection have any bearing on the jurisdictional issue. *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

27.3.3 LUBA Procedures/Rules – Record – Objections to. It is the objecting party's burden to specifically identify noncompliant portions of the record. Where the petitioner objects that the

record table of contents is deficient in three particulars, and alleges but does not identify other deficiencies, LUBA will not require the local government to comb through a large record to correct unidentified deficiencies. *STOP, LLC v. City of West Linn*, 67 Or LUBA 494 (2013)

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where it is unclear whether a supplemental record fully responds to a petitioners' record objections and in settling the record LUBA expressly provides that petitioners may renew their objection if the supplemental record is inadequate, petitioners may not fail to renew their record objection within the deadline specified by OAR 661-010-0026(2) and then later renew their record objection in the petition for review. *Johnson v. City of Gladstone*, 65 Or LUBA 225 (2012).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioners fail to establish that the minutes of a hearing in the record are "materially defective" where the only alleged defect is the failure to reflect petitioners' request below to keep the record open for additional testimony, but no party disputes that that request was made and no purpose would be served by requiring the local government to prepare a full transcript simply to reflect that request. *Claus v. City of Sherwood*, 61 Or LUBA 505 (2010).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will generally decline to consider new, additional record objections filed after the deadline expires to file objections, unless the objector explains why the new, additional objections could not reasonably have been made prior to the deadline, and even then only if considering the new, additional objections would not unduly delay settlement of the record or complicate the Board's efforts to comply with the 60-day deadline at ORS 197.830(10)(a). *Claus v. City of Sherwood*, 61 Or LUBA 505 (2010).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will consider new additional objections filed one week after the deadline for filing objections, where the delay was caused in part by the city's failure to provide the petitioners with a bound record as required by LUBA's rules, and the delay does not threaten the Board's ability to settle the record within the 60-day deadline at ORS 197.830(10)(a). *Claus v. City of Sherwood*, 61 Or LUBA 505 (2010).

27.3.3 LUBA Procedures/Rules – Record – Objections to. When the local code requires that certain materials that are before the initial decision maker be forwarded to the final decision maker, those materials are considered part of the record by operation of law. However, because the code does not require that everything before the initial decision maker be forwarded to the final decision maker, LUBA will deny a record objection that some documents were not forwarded, where the objector does not identify specific documents that were required to be, but were not, forwarded. *Burness v. Douglas County*, 61 Or LUBA 530 (2010).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The OAR 661-010-0026(2) authorization for precautionary record objections was adopted to encourage collaborative resolution of record problems which can eliminate the possibility that LUBA will erroneously resolve complicated record objections or resolve them in a way that will have unintended consequences or complicates resolution of an appeal on the merits. *Hoffman v. Deschutes County*, 60 Or LUBA 451 (2009).

27.3.3 LUBA Procedures/Rules – Record – Objections to. When a page of the record submitted to LUBA is illegible, the parties disagree about whether the illegible page is a smaller scale version of an oversized site plan or a smaller scale version of a large aerial photo, and the local government cannot confirm which oversized item the illegible document is a smaller scale reproduction of, the local government must provide a supplemental record containing legible copies, including if necessary full-sized copies, of both of the potential documents. *Foland v. Jackson County*, 60 Or LUBA 472 (2010).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A motion to reconsider an order on record objections is not appropriate when the motion: (1) attempts to raise new objections to the record; (2) repeats arguments made in the original objections; or (3) provides new arguments that could have been advanced in the original objections. *Smith v. City of Salem*, 60 Or LUBA 478 (2010).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A motion to reconsider an order on record objections may be appropriate when the motion argues that LUBA's order was based on a significant misunderstanding of the parties' arguments regarding the record and the party seeking reconsideration files a timely request to reconsider that succinctly identifies and clarifies the alleged misunderstanding. *Smith v. City of Salem*, 60 Or LUBA 478 (2010).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a local government land use code requires that "testimony and evidence" that is transmitted to city planning staff must be included in the record, even if that testimony and evidence was never placed before the ultimate city decision maker, e-mail messages that were sent to planning staff need not be included in the record where the objecting party does not establish that the disputed e-mail messages constitute "testimony and evidence." *Montgomery v. City of Dunes City*, 59 Or LUBA 519 (2009).

27.3.3 LUBA Procedures/Rules – Record – Objections to. In a LUBA appeal that challenges a city letter to a subdivision developer that takes the position that (1) streets in a previously approved and platted subdivision have been improperly constructed and do not comply with tentative subdivision plan conditions of approval and (2) building permits will not be issued for lots in the subdivision until existing violations are corrected, the record that is filed with LUBA must include any documents that were actually placed before the city council in making its decision to send the letter. An objection that the record in the appeal of the letter should include documents that were generated during earlier proceedings that led up to tentative and final subdivision approval decisions that were not appealed to LUBA will be denied where there is no claim that the requested additional documents were placed before the city council during the deliberations that led up to the city sending the letter and the city takes the position that they were not placed before the city council during those deliberations. *Calvary Construction, LLC v. City of Glendale*, 59 Or LUBA 539 (2009).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The only material difference between a precautionary record objection and a record objection is that the former is filed to advise LUBA that the objecting party is continuing to work with the governing body's legal counsel to resolve the objections. Both record objections and precautionary record objections must specify the

allegedly omitted item and state the basis for the claim that the item is part of the record. *Home Builders Association v. City of Eugene*, 58 Or LUBA 688 (2009).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner and respondent disagree about when a legislative proceeding began, and if petitioner is correct a large number of additional documents must be added to the record, petitioner's record objection will not be rejected simply because petitioner does not specifically identify each of the documents that petitioner believes should be added to the record. *Home Builders Association v. City of Eugene*, 58 Or LUBA 688 (2009).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner objects that mailing lists should not be included in the record, but resolving petitioner's record objection would require LUBA to determine whether notice was in fact sent to persons on the mailing lists, LUBA will allow the mailing lists to remain in the record and resolve any issue concerning whether notices were sent to persons on the mailing lists in its decision on the merits. *Graser-Lindsey v. City of Oregon City*, 58 Or LUBA 703 (2009).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Because the respondent is the custodian of the record, and petitioner has the ultimate burden of demonstrating that the local record is deficient under OAR 661-010-0026(2), petitioner's mere disagreement with respondent regarding whether a disputed item was submitted to the city during the proceedings below is insufficient to establish that the item was submitted. *Curl v. City of Bend*, 56 Or LUBA 794 (2008).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where approved and draft versions of city council minutes are not organized in inverse chronological order, as required by OAR 661-010-0025(4)(a)(E), LUBA will not require that a city file an amended record to comply with the inverse chronological order requirement where there is no possibility of confusion about what the approved and draft versions are or where they are located in the record. *David v. City of Hillsboro*, 56 Or LUBA 804 (2008).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a petitioner's contacts with the local government regarding record objections, viewed in their totality were not a good faith attempt to resolve record objections under OAR 661-010-0026(2) before filing record objections, LUBA will deny petitioner's record objections. *Sommer v. City of Cave Junction*, 55 Or LUBA 665 (2007).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will decline to summarily reject an objection to the record that states only general, non-specific objections, where the petitioner meets the intent of OAR 660-010-0026 by immediately sending a letter to the local government counsel with specific objections and attempting to resolve those objections. *Kane v. City of Beaverton*, 55 Or LUBA 669 (2007).

27.3.3 LUBA Procedures/Rules – Record – Objections to. It is inconsistent with LUBA's rules to allow a party unlimited time and opportunity to add new and evolving objections to the record after the initial record objection is filed. *Kane v. City of Beaverton*, 55 Or LUBA 669 (2007).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Under OAR 661-010-0026(6), after a record objection is filed, the time limits for all further procedures remain suspended until LUBA issues an order settling the record, even if the local government transmits a supplemental record to the parties that purports to resolve some or all of the record objections. *Welch v. Yamhill County*, 55 Or LUBA 697 (2007).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner and a local government disagree about whether a color or black and white copy of a map was submitted into the record, and petitioner offers proof that she paid for five color copies of the map and provides a plausible explanation for how the local government may have misplaced the color copies, LUBA will require that a color copy of the map be included in the record. *Graser-Lindsey v. City of Oregon City*, 55 Or LUBA 715 (2008).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where the petitioner and local government simply disagree about whether particular pages were included in a copy of a document that was submitted to the local government for inclusion in the record, absent reason to proceed otherwise, LUBA will generally accept the local government's position, as the custodian of the record. *Curl v. City of Bend*, 55 Or LUBA 719 (2008).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a local government transmits a 4,457-page record to LUBA in eight three-ring binders but serves a copy of that record on petitioner without similarly placing the record in three-ring binders or otherwise securely fastening the record on the left side as required by OAR 661-010-25(4)(a)(C), LUBA will require that the local government supply record binders to petitioner. *Curl v. City of Bend*, 55 Or LUBA 719 (2008).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Under OAR 661-010-0025(2) a local government is entitled to retain "tapes" of local hearings at the time it transmits the record and serves a copy of the record on the parties to a LUBA appeal and later provide a single copy of those tapes to LUBA at oral argument. Digital CDs are the functional equivalent of "tapes" and similarly may be retained by the local government until the time set for oral argument. *Curl v. City of Bend*, 55 Or LUBA 719 (2008).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Documents that are on a medium other than plain printer paper, such that they are not easily copied on a standard office black and white copier are properly omitted from the record that is initially transmitted to LUBA and retained by a local government and separately transmitted to LUBA as part of the record at the time set for oral argument under OAR 661-010-0025(2). *Walker v. Deschutes County*, 54 Or LUBA 752 (2007).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Documents that are oddly shaped or sufficiently large that they cannot be easily reduced and printed on a standard 8-1/2-by-11-inch page by a standard office copier, are properly retained by a local government at the time it initially transmits the record to LUBA and separately transmitted to LUBA as part of the record at the time set for oral argument under OAR 661-010-0025(2). *Walker v. Deschutes County*, 54 Or LUBA 752 (2007).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The record submitted by a local government must include color copies or black and white copies of any color documents that are on 8-1/2-by-11-inch pages or on pages that are easily reduced to 8-1/2-by-11-inch pages by standard office copiers. If black and white copies of color originals are included in the record, the color originals must be submitted at the time set for oral argument in accordance with OAR 661-010-0025(2). *Walker v. Deschutes County*, 54 Or LUBA 752 (2007).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Under OAR 661-010-0026(1), before filing a record objection, a party is required to consult with the governing body's legal counsel. Where a party does so and the local government thereafter submits a supplemental record three days after the 14-day deadline for filing record objections expires, the party's failure to file a record objection provides no basis for rejecting the supplemental record. *Jaffer v. City of Monmouth*, 51 Or LUBA 803 (2006).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a petitioner files a record objection without fulfilling his obligation to attempt to resolve record objections pursuant to 661-010-0026(1), and two recent orders by this Board make it clear that petitioner was aware of the requirement, the record objection will be denied, whether or not that failure resulted in substantial prejudice to a party's substantial rights. *Ghena v. Josephine County*, 51 Or LUBA 820 (2006).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will not summarily deny record objections based on the objectors' failure to first consult with the local government's counsel under OAR 661-010-0026(1), where although it appeared that one of the objecting parties consciously violated the consultation requirement, it was not clear that another of the objecting parties was aware of the consultation requirement, and the county had already caused a 77-day delay by filing the record late. *Lindsey v. Josephine County*, 50 Or LUBA 756 (2005).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The requirement in Statewide Planning Goal 1 (Citizen Involvement) that information "necessary to reach policy decisions" be made available to the public does not supercede the attorney/client privilege, and LUBA may not require that the record be supplemented to include information that the city redacts based on the attorney/client privilege. *Forest Hills Easement Assoc. v. City of Lake Oswego*, 49 Or LUBA 739 (2005).

27.3.3 LUBA Procedures/Rules – Record – Objections to. When a local government considers draft findings or minutes during the course of the proceedings but amends the drafts in adopting the final decision and minutes, the draft findings and minutes are still part of the local government's record. *Bemis v. City of Ashland*, 47 Or LUBA 601 (2004).

27.3.3 LUBA Procedures/Rules – Record – Objections to. When an applicant on remand modifies the application that led to the remanded decision, the local government proceedings on remand represent a continuation of the original application rather than a new application. Therefore, the local government record that led to the LUBA appeal is properly part of the record on remand unless specifically excluded by the local government. *Rutigliano v. Jackson County*, 47 Or LUBA 628 (2004).

27.3.3 LUBA Procedures/Rules – Record – Objections to. OAR 661-010-0025(1)(c) does not necessarily require local governments to include in the record minutes of every meeting of the final decision maker where a development proposal is mentioned. *Wal-Mart Stores, Inc. v. City of Medford*, 47 Or LUBA 650 (2004).

27.3.3 LUBA Procedures/Rules – Record – Objections to. When documents are part of a local government planning file that is physically present and visible at a public hearing, but the local government does nothing to indicate that the documents are meant to be part of the record, then those documents are not properly part of the record. *Naumes Properties, LLC v. City of Central Point*, 45 Or LUBA 708 (2003).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where the record that a local government files with LUBA includes black and white copies of color originals, and the city does not indicate that it will provide the color originals at oral argument, parties are free to object to the record. However, such objections should be limited to circumstances where material information is actually lost in the black and white copy. *Oien v. City of Beaverton*, 45 Or LUBA 722 (2003).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA does not have authority to order that privileged attorney/client communications be made a part of the record in a LUBA appeal. *Dimone v. City of Hillsboro*, 44 Or LUBA 805 (2003).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA does not have authority to order that a city include as part of the record in a LUBA appeal transcripts or minutes that may have been prepared of executive sessions. *Dimone v. City of Hillsboro*, 44 Or LUBA 805 (2003).

27.3.3 LUBA Procedures/Rules – Record – Objections to. An objection that a record does not include a city council meeting agenda that identifies petitioners' LUBA appeal as the topic of discussion in an executive session held pursuant to ORS 192.660(1), and minutes from that same meeting that show that the executive session was held, will be sustained where petitioners do not ask that the *contents* of the executive session be included in the record. *Martin v. City of Dunes City*, 44 Or LUBA 840 (2003).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Given the severe consequence that dismissal of an appeal represents, and the ease with which the risk of that consequence can be avoided by filing a record objection or precautionary record objection while record disputes are resolved, a prudent petitioner will always file a record objection or precautionary record objection with any other documents that may be filed to provide notice of the parties' negotiations concerning the content of the record. *Laurance v. Douglas County*, 44 Or LUBA 845 (2003).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Duplication of items properly included in the record does not provide a basis for sustaining a record objection. *Laurance v. Douglas County*, 44 Or LUBA 845 (2003).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Although parties may have additional motivation other than the integrity of the record to file record objections, including delaying the

time for filing the petition for review, that does not mean that the record objection is without merit or was filed for the sole purpose of obtaining more time to file the petition for review. *Roberts v. Clatsop County*, 43 Or LUBA 617 (2002).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A motion requesting summary denial of a record objection because the objecting party failed to make a good faith effort to resolve the record objection prior to filing the record objection will be denied where it is clear that the objecting party worked with the local government to resolve the record objection after the record objection was filed. *Citizens for Resp Area Plng v. City of Wilsonville*, 43 Or LUBA 641 (2002).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A motion requesting that record objections be denied because the objecting party failed to allege the basis for its belief that each disputed item was placed before the decision maker will be denied, where the record objection makes it reasonably clear that the basis for the record objection is the same for all disputed items. *Citizens for Resp Area Plng v. City of Wilsonville*, 43 Or LUBA 641 (2002).

27.3.3 LUBA Procedures/Rules – Record – Objections to. As used in OAR 661-010-0025(1)(b), the term "placed before" is a term of art and does not merely describe the act of setting documents in front of the decision maker. Legislative decision making often involves less precisely defined procedures for compiling an evidentiary record than quasi-judicial decision making. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).

27.3.3 LUBA Procedures/Rules – Record – Objections to. In an appeal of an environmental assessment prepared as part of a larger state and federal approval process for proposed highway improvements, it is the nature of the environmental assessment process itself and the reasonable expectations of the parties to that process, rather than the conduct of the decision makers, that determines the scope of the record. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The record submitted in an appeal of an environmental assessment for a proposed highway interchange properly includes documents that were created or submitted as part of the process to initiate construction of the interchange, where those documents were maintained such that a reasonable person would expect them to be available to the state and federal decision makers who will ultimately approve the interchange project and the documents are in fact available to the final decision makers. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 589 (2002).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The mere inclusion of a written decision from another planning action in the record of a subsequent land use decision is not sufficient in itself to incorporate the entire planning file from the earlier decision into the record of the later decision. *Yeager v. Benton County*, 41 Or LUBA 604 (2002).

27.3.3 LUBA Procedures/Rules – Record – Objections to. OAR 661-010-0025(1)(d) requires that notices provided throughout "the course of the land use proceeding" be included in the record, including notices from lower tribunals. The rule does not apply to notices from separate planning

actions, even if those planning actions are relevant to the challenged decision. *Yeager v. Benton County*, 41 Or LUBA 604 (2002).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where notice to the city council that an action has been taken by the city administrator is required by a local land use regulation, that notice is properly included in the record as a "notice of proposed action [or] final decision mailed * * * during the course of the land use proceeding" within the meaning of OAR 661-010-0025(1)(d). *Thomas v. City of Turner*, 41 Or LUBA 583 (2002).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will not require that documents be included in the record, when the sole argument in support of including the disputed documents in the record is that the documents will provide background or evidentiary justification to support a motion that has yet to be filed. *Thomas v. City of Turner*, 41 Or LUBA 583 (2002).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Record objections that are presented for the first time in the petition for review will be denied as untimely filed. *Cape v. City of Beaverton*, 41 Or LUBA 515 (2002).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The filing of a record objection does not automatically suspend resolution of other motions properly before the Board, or prioritize resolution of record objections over other motions. *No Tram to OHSU v. City of Portland*, 40 Or LUBA 588 (2001).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will deny a motion to consider evidence not in the record where the dispute between the parties concerns the accuracy or validity of a map that is included in the record rather than whether that map is properly included in the record. Challenges to the accuracy or validity of the map must be made during the local proceedings. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000).

27.3.3 LUBA Procedures/Rules – Record – Objections to. OAR 661-010-0026(3) provides a way to correct the minutes of the proceedings of the final decision maker; it does not provide a way to correct incomplete or inaccurate minutes of meetings of lower-level local decision makers that were actually placed before or incorporated by the final decision maker. *Hubenthal v. City of Woodburn*, 38 Or LUBA 916 (2000).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA's administrative rules are established to promote the speediest practicable review of land use decisions and limited land use decisions. A petitioner's objection to technical violations that do not affect the substantial rights of the parties will be denied, when the particular situation would be better served by permitting technical violations of our rules rather than delaying the appeal to correct the violations. *Lange-Luttig v. City of Beaverton*, 38 Or LUBA 909 (2000).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where an objection to the record is made because the county failed to include defective audiotapes of the proceedings before the local decision maker, LUBA will deny the record objection because it serves no purpose to have

defective tapes in the record. The deficiency in record keeping may be assigned as error. *Hal's Construction, Inc. v. Clackamas County*, 37 Or LUBA 1037 (2000).

27.3.3 LUBA Procedures/Rules – Record – Objections to. In the context of a record objection, LUBA will rely on the parties' representations regarding the existence or nonexistence of disputed documents, without requiring proponents or opponents to submit affidavits in support of their position, absent some substantial reason to question those representations. *Rochlin v. City of Portland*, 37 Or LUBA 1005 (1999).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Implicit in OAR 661-010-0025(3) is the requirement that the local government supply petitioner, at his expense, an *audible* copy of the original audio tape of local proceedings. However, where the local government has attempted three times to provide petitioner with an audible copy, and petitioner does not explain what the local government can do to provide a more audible copy, there is no relief that the Board can order. *Rochlin v. City of Portland*, 37 Or LUBA 1005 (1999).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA will sustain a record objection on the grounds that certain items were not placed before the decision maker when the city fails to demonstrate that the items were available in such a way as to put a person with some familiarity with the local land use hearings process on notice that the items were in fact "placed before" the decision maker within the meaning of OAR 661-010-0025(1)(b). *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 994 (1999).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a party objects to the inclusion of certain items in the record because the city did not "place them" before the decision maker, and the local government contends that the items were in the planning files that were brought by city staff to the hearings, but does not demonstrate that the disputed documents were in fact in the staff files and that the actions of the staff are sufficient to show that the files were "placed before" the local decision maker, the items are not part of the record. *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 994 (1999).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where the city alleges that city staff brought disputed documents into a hearing room, and that the documents were available for reference by the decision makers, they are "placed before" the decision maker and are therefore properly part of the record, notwithstanding the lack of a more formal presentation. *Home Depot, Inc. v. City of Portland*, 36 Or LUBA 783 (1999).

27.3.3 LUBA Procedures/Rules – Record – Objections To. LUBA will reject a supplemental record submitted after the petition for review has been filed, where the city fails to explain why the material in the supplemental record is properly part of the local record, and fails to establish that any "unique circumstances" exist justifying untimely filing of the supplemental record. *Terra v. City of Newport*, 36 Or LUBA 754 (1999).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The record in one proceeding does not include the record and hearing officer's decision of a previous conditional use application for a separate but similar use at a different location when the two determinations stem from

independent requests, different parties and the decision maker did not rely on that previous decision in approving the current application. *Buckman Community Assoc. v. City of Portland*, 35 Or LUBA 800 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. OAR 661-010-0025(1)(b) establishes two ways items may be included in the record: items which are "specifically incorporated" and items placed before and not rejected by the final decision maker. *Highlands Condominium Assoc. v. City of Eugene*, 35 Or LUBA 772 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Under OAR 661-010-0026(2), substantial prejudice to a party is not a basis for an objection to the exclusion of an item from a record. *Highlands Condominium Assoc. v. City of Eugene*, 35 Or LUBA 772 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Late filing of a record objection is a technical violation of LUBA rules and will not provide a basis for denying the record objection, absent prejudice to a party's substantial rights. *Schaffer v. City of Turner*, 35 Or LUBA 744 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioner's undeveloped claim that certain documents "were placed in the record" is insufficient to allege that the documents were placed before the local decision maker and not specifically rejected. *Mintz v. Washington County*, 34 Or LUBA 781 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner objects to the adequacy of the minutes included in the record but fails to demonstrate that the minutes are in fact defective or that the defect is material to the appeal, the objection will be denied. *Mintz v. Washington County*, 34 Or LUBA 781 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. LUBA's rules do not allow the filing of additional record objections after the initial record objection is filed. *Mintz v. Washington County*, 34 Or LUBA 781 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. An unsubstantiated assertion that certain documents were placed before the local decision maker is not sufficient where the local government represents that the documents were not placed before the local government or otherwise made part of the record. *Boyer v. Baker County*, 34 Or LUBA 758 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A summary of testimony necessarily omits details of that testimony. An objection to a summary of testimony must explain how the summarized testimony is mischaracterized. *Boyer v. Baker County*, 34 Or LUBA 758 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner identifies several documents in the record where the decision maker refers to a preliminary grading plan, petitioner satisfies his obligation to demonstrate that the preliminary grading plan was placed before the decision maker, notwithstanding that the preliminary grading plan was not included with the original application. *Abadi v. Washington County*, 34 Or LUBA 753 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner demonstrates that the minutes of a meeting before the local governing body were altered to inaccurately reflect what occurred at that meeting, such minutes are inaccurate, and LUBA will order the governing body to prepare a transcript of relevant portions of the audiotape of that meeting. *ODOT v. City of Mosier*, 34 Or LUBA 742 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A record objection filed after the deadline for filing the petition for review does not suspend the deadline for filing the petition for review. *Landwatch Lane County v. Lane County*, 34 Or LUBA 348 (1998).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner contends a document should have been included in the record and the local government does not explain why the document is not included in the record, LUBA will sustain petitioner's record objection. *Murphy Citizens Advisory Committee v. Josephine County*, 33 Or LUBA 882 (1997).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioner fulfills her obligation to attempt to resolve record objections pursuant to OAR 661-10-026 when, after two hours of waiting at the local government's counsel office, she is denied the opportunity to speak with the government's counsel because she lacks her own legal counsel. *D.S. Parklane Development, Inc. v. Metro*, 33 Or LUBA 848 (1997).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The fact that a document is relevant to the challenged decision does not, in itself, mean that the document should be included in the local record. *D.S. Parklane Development, Inc. v. Metro*, 33 Or LUBA 848 (1997).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A good faith attempt to resolve a record objection, as required by OAR 661-10-026(1), should consist of more than a single letter without follow-up. *Casey Jones v. City of Lowell*, 33 Or LUBA 812 (1997).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The obligation to attempt resolution of record objections under OAR 661-10-026(1) is an ongoing obligation that does not cease when one party files a formal record objection or the period for filing objections expires. *Casey Jones v. City of Lowell*, 33 Or LUBA 812 (1997).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where the minutes of the planning commission are included in the record under OAR 661-10-025(1)(b), record objections to those minutes cannot be made pursuant to OAR 661-10-026(2)(c). OAR 661-10-026(2)(c) record objections must be limited to the minutes of the "governing body," as defined in OAR 661-10-010(4). *City of Gresham v. City of Wood Village*, 33 Or LUBA 779 (1997).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The primary purpose of the specifications set out in OAR 661-10-025(4) for records filed with LUBA is to ensure that the record is usable by the parties and the Board. Where an exhibit in the record contains more than 700 pages unindexed and in no particular order, LUBA will sustain a record objection on the basis that not all documents can be identified and located with reasonable effort. *Mar-Dene Corporation v. City of Woodburn*, 32 Or LUBA 481 (1997).

27.3.3 LUBA Procedures/Rules – Record – Objections to. When a hearing audio tape is inadvertently destroyed, the city cannot include it in the record. However, the city's failure to include the tape in the record does not require remand unless LUBA cannot perform its review function as a result. *Village Properties, L.P. v. City of Oregon City*, 32 Or LUBA 475 (1996).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Filing an objection to the record one day after the 10-day period established by OAR 661-10-026(2) is a technical violation of LUBA's rules that will not prevent consideration of the objection unless the local government demonstrates the delay caused prejudice to its substantial rights. *Northwest Environmental Advocates v. City of Portland*, 32 Or LUBA 471 (1996).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a petitioner contends a document missing from the record was widely circulated among "all affected agencies" and "is believed to have been included in the city's record," and the city does not explain why the document was not included in the record, LUBA will sustain petitioner's record objection. *Northwest Environmental Advocates v. City of Portland*, 32 Or LUBA 471 (1996).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The local record includes not only materials submitted to the local decision maker during the public hearing process, but also other materials placed before the local decision maker prior to adoption of the final decision. Whether the local government satisfied statutory or local ordinance requirements in accepting evidence after the local hearings process does not determine whether those documents were made part of the record. *Nicholson/Keever v. Clatsop County*, 31 Or LUBA 535 (1996).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Items placed before and made part of the record during the local proceedings are not subject to amendment on appeal to this Board. Local governments may not amend a document in the record in order for it to conform to another document in the record. *Nicholson/Keever v. Clatsop County*, 31 Or LUBA 535 (1996).

27.3.3 LUBA Procedures/Rules – Record – Objections to. OAR 661-10-026(1) requires parties to attempt to resolve objections prior to filing a record objection with this Board. Lack of adherence to this rule frustrates the timely resolution of all appeals. *Nicholson/Keever v. Clatsop County*, 31 Or LUBA 535 (1996).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Frivolous record objections may result in the dismissal of an appeal if it is shown the objections are without merit and filed solely for the purpose of obtaining additional time to prepare the petition for review. *Pilate v. City of Banks*, 30 Or LUBA 433 (1995).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Even if a party specifically asked, in a letter addressed to a local government planner, that the letter be placed in the record, the party will not prevail on a record objection based solely on its expectation that the planner would actually place the letter before the decision maker. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 601 (1995).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner does not explain why she could not have objected to the omission of a particular item in her initial objection to the record, petitioner may not object to the absence of that item for the first time in an objection to a supplemental record submitted by respondent. *Fraser v. City of Joseph*, 29 Or LUBA 575 (1995).

27.3.3 LUBA Procedures/Rules – Record – Objections to. If a party successfully demonstrates that minutes in the record are inaccurate, and those defects are material to resolution of the appeal, as required by OAR 661-10-026(3), LUBA will require respondent to submit a transcript of the relevant portion of its tape recordings. If that is impossible, because no such tape recordings exist, there is nothing more LUBA can do to require respondent to correct deficiencies in its minutes. *Friends of Neabeack Hill v. City of Philomath*, 29 Or LUBA 557 (1995).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The local government record submitted in a prior LUBA appeal, which led to remand of the challenged decision, is properly included in the local government record submitted to LUBA in a subsequent LUBA appeal of the local government's decision on remand. However, objections to the content of the local government record in the prior appeal, which could have been made in the prior appeal but were not, may not be asserted in the subsequent appeal. *East Lancaster Neigh. Assoc. v. City of Salem*, 29 Or LUBA 554 (1995).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner could have discovered the identity of an "oversized exhibit" named in the record by reviewing the record and consulting with the local government, any objection to the local government's decision to retain the "oversized exhibit" until the time of oral argument must be made in a record objection filed during the time allowed by OAR 661-10-026(2). *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

27.3.3 LUBA Procedures/Rules – Record – Objections to. If a record objection is not supported with evidence that a disputed item was actually received by the decision maker or by a person authorized to receive evidence on the decision maker's behalf, LUBA has no basis for rejecting a representation by respondent that the disputed item was never received and was not placed before the decision maker. *ONRC v. City of Oregon City*, 28 Or LUBA 775 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. An allegation that the decision maker committed error by accepting a disputed item may provide the basis for an assignment of error, but has no bearing on whether the disputed item is properly part of the record. *ONRC v. City of Oregon City*, 28 Or LUBA 775 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. An objection that the local record fails to include a "single file" does not adequately identify the items petitioner believes are not included in the local record submitted by the local government. *McCrary v. City of Talent*, 28 Or LUBA 773 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. OAR 661-10-065(4) simply provides that with the exception of objections to the record and motions for evidentiary hearing, the filing of a motion does not have the legal effect of automatically suspending the deadlines for future

events in a LUBA appeal until the motion is resolved. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 746 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. If an objector does not demonstrate an alleged defect in minutes in the record is material to the resolution of the appeal, as required by OAR 661-10-026(3), LUBA has no basis for requiring respondent to submit a verbatim transcript as part of the record. *Champion v. City of Portland*, 28 Or LUBA 730 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a handwritten document was placed before the local decision maker, and the copy of the handwritten document in the local record is no more illegible than the original document, there is no basis for requiring the local government to prepare a typewritten transcription of the document. *Tylka v. Clackamas County*, 28 Or LUBA 712 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. In resolving objections to the record, LUBA determines only whether the items in question are properly part of the local government record. Parties who wish to submit evidence outside the local government record to LUBA under ORS 197.830(13)(b) must file a motion for evidentiary hearing pursuant to OAR 661-10-045(2). *Tylka v. Clackamas County*, 28 Or LUBA 712 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a local government submits a supplemental record while LUBA is in the process of resolving objections to the original record, a party may not reserve its objections to the supplemental record until after LUBA issues an order resolving the objections to the original record. LUBA's rules require that an objection to a supplemental record be filed no later than 10 days after the objecting party receives the supplemental record. *Tylka v. Clackamas County*, 28 Or LUBA 712 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioner cannot allege for the first time in the petition for review that a document included in the local record was not actually placed before the local decision maker and, consequently, assign the decision maker's reliance on that document as error. *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioners make an undisputed allegation that they were refused permission to present their "case in chief" to the local government decision maker, and the minutes of the local proceedings in the record contain no mention of petitioners' attempts to present their case or of the local government's refusal to hear it, petitioners adequately identify a material defect in the minutes. *Jackman v. City of Tillamook*, 27 Or LUBA 704 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner objects to minutes in the record submitted by a local government, but does not identify any approval standards applicable to the challenged decision to which the testimony at issue is relevant, petitioner fails to explain how the alleged defect in the minutes is material, as required by OAR 661-10-026(3). *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 27 Or LUBA 659 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The local record consists of those items placed before, and not rejected by, the local decision maker. Where petitioner contends the applicant asked to withdraw certain documents it submitted to the local decision maker, but does not argue the local decision maker granted that request or otherwise rejected the disputed documents, LUBA has no basis for concluding the documents are erroneously included in the local record. *Murphy Citizens Advisory Comm. v. Josephine County*, 27 Or LUBA 651 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A party's failure to attempt to resolve its objections with the local government's counsel prior to filing an objection to the record, as required by OAR 661-10-026(1), is a technical violation of LUBA's rules that does not affect LUBA's review, unless another party explains how the failure prejudiced its substantial rights. *Dorgan v. City of Albany*, 26 Or LUBA 621 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The only purpose of an objection to the record is to determine what was included in the local record below, not whether the local government erred in accepting or rejecting evidence. Therefore, LUBA will deny a record objection based on a charge that the local government erred because the disputed items were *not* placed before the local decision maker. *Dorgan v. City of Albany*, 26 Or LUBA 621 (1994).

27.3.3 LUBA Procedures/Rules – Record – Objections to. In resolving objections to the record, LUBA determines only whether the items in question are properly part of the record. Whether the local government erred by accepting the disputed items, and whether any such error provides a basis for reversal or remand of the challenged decision, are independent questions that go to the merits of the appeal. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. In resolving objections to the record, LUBA determines only whether items were included in the record below, not whether those items are relevant to an issue raised by petitioner below. *Matrix Development v. City of Tigard*, 26 Or LUBA 606 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Objections to the adequacy of minutes of local government meetings in the record provide no basis for LUBA to order the local government to prepare and submit a transcript, if the objector does not explain how the alleged defects in the minutes are material to the appeal. *Wissusik v. Yamhill County*. 26 Or LUBA 601 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a party objects that a statement is missing from a transcript of local government audiotapes, but no party has reviewed the tapes and can attest that the statement at issue is discernible on the tapes, the record objection will be denied. *Testa v. Clackamas County*, 26 Or LUBA 596 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The only purpose of an objection to the record is to determine what was included in the local record below, not whether respondent erred in accepting or rejecting evidence, or whether evidence in the record is accurate. *Testa v. Clackamas County*, 26 Or LUBA 596 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Under OAR 661-10-026(3), an objection to the record on the grounds that minutes are incomplete must explain why the defect is material. An objection that minutes are defective because the challenged decision does not correspond to the decision maker's verbal statements does not establish a material defect in the minutes because the challenged decision need not correspond to such verbal statements. *Edwards v. City of Portland*, 25 Or LUBA 809 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. An objection that minutes included in the local record are defective because they do not reflect that the introduction to a public hearing failed to comply with local code requirements and that new evidence was improperly accepted will be denied, where the objecting party fails to explain how the introduction was defective and fails to identify the disputed new evidence. *Edwards v. City of Portland*, 25 Or LUBA 809 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where an objection that certain documents should be included in the local government record could have been made in a party's initial record objection, the objection may not be raised in a second record objection filed by that party after a supplemental record was submitted. *Edwards v. City of Portland*, 25 Or LUBA 809 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The alleged failure of the minutes of a local government's proceedings to specifically identify documents the local government relied upon provides no basis for striking those documents from the record. The function of findings of fact is to identify the evidence relied upon, there is no legal requirement that the minutes perform that function. *McPeek v. Coos County*, 25 Or LUBA 805 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where the respondent includes documents in the record and takes the position that those documents were actually placed before the decision maker during the local proceedings, LUBA relies on the objecting party to offer some reason for questioning respondent's position. *McPeek v. Coos County*, 25 Or LUBA 805 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioner's objection that a partial transcript, prepared and submitted by respondent in response to record objections by an intervenor, should be more extensive provides no basis for ordering the local government to provide such an expanded transcript, where petitioner does not explain, as required by OAR 661-10-026(3), why the minutes included in the record are inadequate to provide the desired information. *McPeek v. Coos County*, 25 Or LUBA 805 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A general objection to the record requesting that speakers in a transcript be identified, because it would be easier to prepare the petition for review, does not provide a sufficient basis to sustain the objection. A request that a particular speaker in a transcript in the record be identified, because that speaker was a decision maker below and his dialogue establishes the existence of impermissible *ex parte* contacts, provides a sufficient basis to sustain that aspect of the record objection. *Derry v. Douglas County*, 25 Or LUBA 790 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioners object that certain items should be included in the local record, but do not contend those items were actually placed before the local decision maker, LUBA will deny the record objection. *Salem Golf Club v. City of Salem*, 25 Or LUBA 768 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A request to supplement the record, made during oral argument, causes prejudice to the substantial rights of the opposing party, and the request will be denied. *Burghardt v. City of Molalla*, 25 Or LUBA 43 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. If an objection to the local record is filed, the time limits for filing the petition for review, respondents' briefs and LUBA's final opinion and order are suspended, regardless of whether the record objection is ultimately sustained or denied. OAR 661-10-026(5). *DLCD v. Klamath County*, 24 Or LUBA 656 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioners object to the adequacy of minutes in the record, and ask that their testimony below be transcribed, but do not identify any approval standards applicable to the challenged decision to which the testimony is relevant, petitioners fail to demonstrate the alleged defect in the minutes is material, and their record objection will be denied. *Neuharth v. City of Salem*, 24 Or LUBA 647 (1993).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Arguments that testimony is inadequately or inaccurately reflected in the minutes of the local proceedings are inadequate to justify requiring that a local government prepare a transcript of the proceedings. The objecting party must demonstrate with particularity why the defects in the minutes are material. *West Amazon Basin Land Owners v. Lane County*, 24 Or LUBA 597 (1992).

27.3.3 LUBA Procedures/Rules – Record – Objections to. The presence of blank spots on an audio tape of a public hearing does not provide a basis for allowing the petitioner in a LUBA proceeding to attempt to supply the information that should be reflected on the blank portions of the tape, by an affidavit not placed before the local decision maker. *Giesy v. Benton County*, 24 Or LUBA 586 (1992).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A party may not fail to object to the record submitted by the local government in a LUBA proceeding and thereafter attach documents to its brief that it believes should be included in the record. *Mercer v. Josephine County*, 23 Or LUBA 608 (1992).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioners do not dispute that a document was placed before the local decision maker, but rather contend they were unaware it had been placed before the decision maker, there is no basis for excluding the document from the local record. *Chauncey v. Multnomah County*, 23 Or LUBA 685 (1992).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner describes with specificity an alleged omission from the transcript and minutes submitted as part of the local record, but does not explain why this alleged omission would affect LUBA's resolution of the

appeal, LUBA will not require the local government to supplement the transcript and minutes. *Heiller v. Josephine County*, 23 Or LUBA 672 (1992).

27.3.3 LUBA Procedures/Rules – Record – Objections to. It is petitioners' burden to establish that disputed items were placed before the local decision maker. Where petitioners object to the record submitted by the local government, but offer no basis for questioning a local government's contention that the disputed items were not placed before the local decision maker, petitioners' record objection will be denied. *Weeks v. City of Tillamook*, 23 Or LUBA 662 (1992).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A party objecting that minutes in the local record are inadequate must demonstrate with particularity both (1) how the minutes are defective, and (2) why the defect is material. Where petitioners argue that the transcript excerpts they seek to make part of the record are relevant to certain issues they wish to raise in their petition for review, but do not explain why these issues are material to LUBA's resolution of the appeal, the objection will be denied. *Yandell v. City of Salem*, 23 Or LUBA 659 (1992).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioners' allegation that the job description of the county appeals secretary should be included in the local record is irrelevant to determining whether it is a part of the local record. Where the disputed job description was not placed before the local decision maker, LUBA will not require that it be included in the local record. *Breivogel v. Washington County*, 22 Or LUBA 813 (1991).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioner's letters to the local government attorney and attempt to contact the local attorney by telephone regarding concerns about the local record, even though accomplished before the local record was filed, are sufficient to satisfy the requirement of OAR 661-10-026(1) that petitioner attempt to resolve record objections with the local government counsel prior to filing a record objection. *Schmaltz v. City of Hood River*, 21 Or LUBA 563 (1991).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Under OAR 661-10-026(3), objectors must demonstrate with particularity both (1) how minutes are defective, and (2) why the defect is material. To demonstrate that defects in minutes are material, objectors must explain why the alleged inaccuracies or omissions impede their ability to prepare their petition for review or brief or affect LUBA's resolution of the appeal. *Schmaltz v. City of Hood River*, 21 Or LUBA 563 (1991).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioners do not explain in their objection to the record why adequate review by LUBA would be prevented by alleged deficiencies in the local government minutes, or how those deficiencies would affect LUBA's resolution of the appeal, petitioners do not demonstrate that the alleged defects are material, and LUBA will not require the local government to prepare a transcript. *Eckis v. Linn County*, 20 Or LUBA 589 (1991).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioners argue that local government minutes fail to reflect statements which demonstrate an improper basis for the planning commission's decision, but the appealed decision was made by the city council after *de*

novo review, petitioners have not demonstrated that the alleged defect in the minutes will affect LUBA's review of the city council's decision and, therefore, is material. *Hale v. City of Beaverton*, 20 Or LUBA 584 (1991).

27.3.3 LUBA Procedures/Rules – Record – Objections to. That the local decision maker considered limiting the scope of its proceeding by excluding certain evidence, provides no basis for an objection to the record where all of the evidence that petitioners sought to present was actually accepted by the decision maker. *Stefan v. Yamhill County*, 20 Or LUBA 524 (1990).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a local government represents that the entire record before the local decision maker was submitted to LUBA, and that representation is not rebutted, LUBA will not require the local government to supplement the record. *Rebmann v. Linn County*, 20 Or LUBA 521 (1990).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Under OAR 661-10-026(3), objectors must demonstrate with particularity both (1) *how* minutes are defective, and (2) *why* the defect is material. To demonstrate that defects in minutes are material, objectors must explain why the alleged inaccuracies or omissions impede their ability to prepare their petition for review or brief or affect LUBA's resolution of the appeal. *Chang v. City of West Linn*, 20 Or LUBA 505 (1990).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where petitioner argues that alleged deficiencies in the minutes may be the basis for assertions by respondents that petitioner is foreclosed from raising certain issues on appeal, but petitioner does not explain how those issues are material (i.e. how they would affect LUBA's resolution of the appeal), LUBA will not require the local government to prepare a transcript of the proceedings below. *Chang v. City of West Linn*, 20 Or LUBA 505 (1990).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioner's detailed descriptions of alleged defects in the minutes in the local record are not sufficient to sustain a record objection, in the absence of an explanation as to how the defects are material. *Interlachen, Inc. v. City of Fairview*, 19 Or LUBA 630 (1990).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A record objection filed four days late, but before the petition for review is due, will suspend the deadline for filing the petition for review where respondent makes no attempt to explain how its substantial rights may have been prejudiced by a delay of four days in filing the record objection. *Benjamin v. City of Ashland*, 19 Or LUBA 600 (1990).

27.3.3 LUBA Procedures/Rules – Record – Objections to. OAR 661-10-026(2) requires that a record objection be filed within 10 days following service of the record on the person filing the record objection. Where a party alleges it never received the copy of the record the local government contends was served on the party by mail, and the party thereafter takes prompt action to obtain a copy of the record and advises respondent by mail that he assumes he will have 10 days from the date he actually received the record to file any objections, a record objection filed within

10 days after the party actually received the record is timely. *Benjamin v. City of Ashland*, 19 Or LUBA 600 (1990).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Where a party objects to the local government's failure to include a document in the record filed with LUBA and argues the document was actually placed before the decision maker during the local proceedings, and respondent does not dispute the party's allegations, LUBA will sustain the record objection and require that the record be supplemented to include the document. *Benjamin v. City of Ashland*, 19 Or LUBA 600 (1990).

27.3.3 LUBA Procedures/Rules – Record – Objections to. A record objection stating that a transcript utilizes too many "inaudible's" is not sufficient to explain with particularity why the transcripts are defective, as required by OAR 661-10-026(3). *Beck v. City of Tillamook*, 19 Or LUBA 598 (1990).

27.3.3 LUBA Procedures/Rules – Record – Objections to. Petitioner's failure to file his record objection until three days after the date required by OAR 661-10-026(2) is a technical violation of LUBA's rules and will not result in rejection of the record objection where the respondent (1) was granted extensions to file the record in the appeal proceeding and related appeal proceedings, and (2) does not allege how it was prejudiced by the late filing of the record objection. *Davis v. City of Bandon*, 19 Or LUBA 507 (1990).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. Where a local government moves to dismiss an appeal after record objections have been filed, LUBA will suspend all deadlines in the appeal, including its own deadline to resolve the record objections, until it rules on the motion to dismiss. *Leyden v. City of Eugene*, 79 Or LUBA 1054 (2019).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. When the county submits pre-decision documentation to DLCD in accordance with ORS 197.610(1) which requires local governments to provide information specified in ORS 197.610(3), including a copy of proposed amendments to DLCD, that material is properly included in the record. Also, when the county submits the post-decisional notice and information required by ORS 197.615(1) and (2), the county must either identify their location in the present record or submit them as part of a supplemental record. Additionally, if DLCD sent the county a substantive response to the information the county sent to DLCD, the response should be included in the record. *VanDyke v. Yamhill County*, 78 Or LUBA 1036 (2018).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. Nothing in LUBA's rules authorizes a party to file a series of new or expanded objections to the record after the 14-day period for filing record objections closes. That the local government files a supplemental record does not open the door for any party to file new or expanded objections to the original record. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. In a motion to take evidence outside the record filed before the parties have submitted briefs, LUBA considers it axiomatic that a document rejected from the local record is not part of the local record, for purposes of settling the content of the record, even if LUBA later concludes, after briefing on the merits, that the document was erroneously rejected from the local record. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. LUBA will treat as a belated supplemental record a document attached to the local government's response brief, where there is no dispute that the document was inadvertently omitted from the record transmitted to LUBA, the petition for review assumed the document was in the record, and accepting the belated supplemental record neither prejudices a party's substantial rights nor delays LUBA's review proceeding. *Save Downtown Canby v. City of Canby*, 70 Or LUBA 68 (2014).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. A motion to reconsider an order on record objections is not appropriate when the motion: (1) attempts to raise new objections to the record; (2) repeats arguments made in the original objections; or (3) provides new arguments that could have been advanced in the original objections. *Smith v. City of Salem*, 60 Or LUBA 478 (2010).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. A motion to reconsider an order on record objections may be appropriate when the motion argues that LUBA's order was based on a significant misunderstanding of the parties' arguments regarding the record and the party seeking reconsideration files a timely request to reconsider that succinctly identifies and clarifies the alleged misunderstanding. *Smith v. City of Salem*, 60 Or LUBA 478 (2010).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. Under OAR 661-010-0026(6), after a record objection is filed, the time limits for all further procedures remain suspended until LUBA issues an order settling the record, even if the local government transmits a supplemental record to the parties that purports to resolve some or all of the record objections. *Welch v. Yamhill County*, 55 Or LUBA 697 (2007).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. LUBA will deny a request to resettle the record and restart the deadline for filing the petition for review that is filed on the date the petition for review is due and that is based on a nonmeritorious argument that notes taken by a recording clerk are "minutes" of the proceeding that must be included in the record. *Ford v. Jackson County*, 54 Or LUBA 434 (2007).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. Under OAR 661-010-0065(4), LUBA may extend the deadline for filing the petition for review on its own motion without the written consent of all parties, where the extension is required to avoid prejudice to one or more party's substantial rights due to LUBA's failure to contemporaneously advise the parties that the record had been received. *Confederated Tribes v. Jefferson County*, 42 Or LUBA 597 (2002).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. Where petitioner's attorney files a record objection, but LUBA fails to send a copy of its order settling the record to petitioner's attorney or otherwise provide notice of the briefing schedule determined in that order, the Board will amend its order settling the record to establish a new briefing schedule. *Wittke v. City of Milwaukie*, 41 Or LUBA 613 (2002).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. A LUBA staff misstatement concerning the correct date the record was settled by an order of the Board does not affect the date the record was settled. Parties who rely on LUBA staff to determine the date the record is settled rather than make that determination themselves by referring to the order on record objections assume the risk of such reliance. *North Park Annex v. City of Independence*, 35 Or LUBA 512 (1999).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. Although a record is always "accepted" upon delivery, in that it is date-stamped and filed by LUBA's staff, it is not fully "accepted" for purposes of OAR 661-10-025(4)(a) as to form or content until it is either received by the Board, when there is no objection, or "settled" by the Board pursuant to OAR 661-10-026(6), when there is some objection. *Mar-Dene Corporation v. City of Woodburn*, 32 Or LUBA 481 (1997).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. Where a local government submits a supplemental record while LUBA is in the process of resolving objections to the original record, a party may not reserve its objections to the supplemental record until after LUBA issues an order resolving the objections to the original record. LUBA's rules require that an objection to a supplemental record be filed no later than 10 days after the objecting party receives the supplemental record. *Tylka v. Clackamas County*, 28 Or LUBA 712 (1994).

27.3.4 LUBA Procedures/Rules – Record – Settling the Record. An allegation that an intervenor failed to appear in the proceedings below cannot be resolved until the content of the record of the proceedings below is known. Therefore, a motion to deny intervention based on a failure to appear below, which is filed prior to the settling of the local record, is not untimely. *Terra v. City of Newport*, 24 Or LUBA 579 (1992).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petitioner fails to satisfy OAR 661-010-0030(4)(d) or to establish that the issues raised in its six assignments of error were raised as required by ORS 197.763(1) and ORS 197.835(3) where the petitioner broadly cites its submittals into the record during the proceedings before the local government. Such a broad citation is not a technical violation where it interferes with the substantial rights of the parties by improperly shifting the burden to the respondents to review over one hundred pages of the record to determine whether the issues raised in six assignments of error in an overlength, 68-page petition for review have been preserved. *H2D2 Properties, LLC v. Deschutes County*, 80 Or LUBA 528 (2019).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will allow an amendment to a petition for review to correct errors or omissions in a petition for review if doing so serves a purpose and will not materially interfere with either respondents' ability to respond to the petition for review or our ability to meet the statutory deadline for our final opinion. Where petitioner attempted to amend his petition for review—by adding allegations to an assignment of error, by adding record and case cites, and by "clarifying and refining text"—23 days after the response briefs were filed and two days before oral argument, and petitioner filed his renewed motion to amend his petition for review on the same date as oral argument, LUBA will deny petitioner's request. To allow such a request would not be fair or promote the speediest practicable review of land use decisions and would materially interfere with respondents' ability to respond to the petition for review. *Nicita v. City of Oregon City*, 78 Or LUBA 1084 (2018).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. When petitioners do not seek relief from any conditions imposed or any aspect of the city's planned unit development (PUD) approval under the general track and LUBA's only option is to affirm, reverse, or remand, the petitioners are asking LUBA to issue what is essentially an advisory opinion regarding the present case. LUBA lacks express statutory or cited judicial authority to issue an advisory opinion on the legal matters presented in the petition and issuing such an advisory opinion would be contrary to one of the express statutory purposes of LUBA's review: that our review should be consistent with "sound principles governing judicial review." ORS 197.805. *Dreyer v. City of Eugene*, 78 Or LUBA 391 (2018).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where petitioners' counsel attempts to amend a timely filed Notice of Intent to Appeal (NITA), to add additional petitioners who were mistakenly omitted from the original NITA, but the amended NITA is filed after the time limit set forth in ORS 197.830(9) for filing a NITA before LUBA, petitioners' mistaken omission of the petitioners from the original NITA was not merely a "technical violation" of LUBA's rules at OAR 660-010-0015. The additional petitioners listed in the Amended NITA have not established that their NITA was filed within the time limit set forth in ORS 197.830(9), and are therefore not parties to the appeal. *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

7.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will deny a motion to submit a partial transcript of a planning commission meeting submitted by a petitioner two days after oral argument. Under LUBA's rules, the time for a petitioner to submit a self-prepared transcript is at the time the petition for review is filed. Submitting a transcript after oral argument

prejudices the other parties' ability to evaluate the accuracy of the transcript. *Conte v. City of Eugene*, 77 Or LUBA 547 (2018).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a 64-page petition for review that includes 14,102 words is filed without first seeking LUBA's permission for an over-length brief, LUBA would normally require that petitioner file an amended petition for review that complies with the OAR 661-010-0030(2)(b) 14,000 word limit for petitions for review. But where the motion to strike or shorten the petition for review is filed concurrently with the response briefs and oral argument has been scheduled, no useful purpose would be served by requiring a shortened petition for review. *Byers Properties, LLC v. Metro*, 77 Or LUBA 557 (2018).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not consider an issue that was not raised in the petition for review and was raised for the first time in a motion that was received by LUBA one day before the statutory deadline for LUBA to issue its final opinion expired. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petitioner's motion to supplement the petition for review, which was filed after oral argument, will be denied. Petitioners have an opportunity to respond to material allegations of fact by respondents that are not supported by the record during rebuttal at oral argument, and LUBA will reject post-oral argument attempts to enhance and expand the arguments in the petition for review. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where an assignment of error itself can be read to allege that a hearings officer committed a particular analytical error in reviewing an application to alter a nonconforming use, but the arguments that are put forth in support of the assignment of error have nothing to do with that arguable analytical error, petitioners fail to adequately state and develop a challenge to the analytical error. In that circumstance, LUBA will limit its review to the arguments petitioners actually present. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will ignore incorporations of assignments of error from other petitions for review that cause the incorporating petition for review to exceed the maximum page limits. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. An attempt by one petitioner to incorporate procedural assignments of error that are presented in a different petition for review would not result in remandable error unless the procedural error prejudiced the substantial rights of the petitioner who filed the petition for review that is attempting incorporation, because a petitioner's assertion of prejudice to another person's substantial rights does not provide a basis for remand. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where an assignment of error can be read to advance a "literal" interpretation argument, but that argument is not clearly

stated and is undeveloped, LUBA will not consider the argument. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Failure to comply with OAR 661-010-0030(4), which requires that the petition for review demonstrate that the issues raised in the assignments of error were preserved during the proceedings below, is not a basis to reject the assignment of error or refuse to consider a reply brief that responds to a waiver challenge, absent a showing that noncompliance with OAR 661-010-0030(4) prejudices other parties' substantial rights or substantially impedes LUBA's review. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where petitioner does not argue the complexity of an appeal warrants a petition for review with more than 50 pages, and LUBA concludes that petitioner easily could have made the arguments presented in support of petitioner's three assignments of error in a petition for review that complies with the OAR 661-010-0030(2)(b) 50-page limit, LUBA will deny petitioner's request to submit a 53 page petition for review. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a petitioner ignores 13 pages of findings in the local government's final decision that attempt to address the issues the petitioner raised on local appeal, and instead challenges only the findings in the underlying decision that was affirmed by the local government's final decision, the petition for review provides no basis to reverse or remand the local government's final decision. *Dion v. Baker County*, 72 Or LUBA 307 (2015).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Including legal arguments in the summary of material facts in a petition for review, and failing to provide record citations in that summary, are violations of LUBA's rules, but such violations do not warrant striking the summary or other remediable action, absent a showing of prejudice to other parties' substantial rights. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where the petition for review includes argument in a section of the petition setting out the standard of review, that violation of LUBA's procedural rules does not warrant striking the argument or other remediable action unless there is prejudice to other parties' substantial rights. Absent such prejudice, the better practice is to briefly note the alleged violation in the corresponding section of the response brief and clarify any disputed points raised by the violation. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not consider arguments in footnotes that set out a different legal theory than presented in the assignment of error. *McCaffree v. Coos County*, 70 Or LUBA 15 (2014).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. An assignment of error fails to comply with OAR 661-010-0030(4)(d) if it does not "demonstrate that the issue * * * was preserved during the proceedings below." *McCaffree v. Coos County*, 70 Or LUBA 15 (2014).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a hearings officer provides two independent bases to approve a private street and a petitioner wishes to challenge both bases, it is improper for the petitioner to challenge one of the bases in a footnote to an assignment of error that challenges the other basis for approving the private street. LUBA generally does not consider arguments in footnotes that set out a different legal theory than that presented in the assignment of error itself. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will grant a motion to strike appendices to the briefs that contain materials that are not included in the record if the materials are offered for their evidentiary value. LUBA will not strike portions of the briefs that rely on or cite to the stricken materials but instead will disregard any allegations of material fact that are not supported by the record. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA's review is limited to the record filed by the local government. ORS 197.835(2). Where exhibits that are attached to the petition for review are not included in the record and appear to be offered for their evidentiary value, LUBA will grant a motion to strike the exhibits and will disregard any allegations of material fact in the petition for review that rely on the exhibits. *Reading v. Douglas County*, 70 Or LUBA 458 (2014).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where confusing arguments to LUBA are nevertheless discernable with reasonable effort, LUBA states its understanding of the argument and considers the argument on its merits. *Greller v. City of Newberg*, 70 Or LUBA 499 (2014).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Items rejected from the local record are properly excluded from the record transmitted to LUBA. Where a local government rejects portions of a document, and includes only a redacted version of the document in the record, the petitioner may attach to the petition for review the unredacted document, in support of any of an assignment of error alleging that the local government erred in rejecting the redacted portions. If no party objects, LUBA will consider the attached document for the limited purpose of resolving that procedural assignment of error. If a party objects, the petitioner may file a motion to take evidence to allow LUBA to consider the unredacted document for that same limited purpose. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will ignore incorporations of assignments of errors in other petitions for review that cause the incorporating petition to exceed the maximum page limits. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. While incorporation of arguments in another brief in a consolidated appeal is a common practice, such incorporation is permissible only if it does not cause the incorporating brief to exceed the 50-page limit in OAR 661-010-0030(2)(b). Even if such an incorporation does not violate OAR 661-010-0030(2)(b), the

incorporation does not allow a person who is party in one appeal to file motions in a consolidated appeal to which the person is not a party. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where the county zoning that applied to recently annexed territory inside a city's urban growth boundary provided that dwellings were allowed only if the property "was designated for residential use by the city," and the city took the position in its brief that the property was not designated for residential use, LUBA will assume that the city is correct where (1) petitioners do not argue in their petition for review that property was designated for residential use and (2) petitioners fail to respond to the city's argument in its brief. *Knaupp v. City of Forest Grove*, 67 Or LUBA 398 (2013).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. OAR 661-010-0030(4)(d) requires that the petition for review "[s]et forth each assignment of error under a separate heading." However, LUBA will consider alleged errors that are not set out under assignments of error to the extent they can be discerned from the petition for review. *Emmert v. Clackamas County*, 65 Or LUBA 1 (2012).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where an assignment of error does not challenge the reasoning that led a county to conclude a post-acknowledgment plan amendment would be necessary to mine a particular mineral, an assignment of error that asks LUBA to remand the decision because the decision maker might change its mind about whether the post acknowledgment plan amendment is necessary, based on LUBA's disposition of another assignment of error, presents no basis for remand. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not consider a petitioner's argument that a vacation decision that was initiated by a city council violates a statutory vacation standard where petitioner omits and fails to address in her petition for review statutory language that suggests the cited statutory standard applies only to vacation decisions that are initiated by petition rather than by city council initiative. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Under OAR 661-010-0050, an intervenor becomes a party to the appeal on the date the motion to intervene is filed. A petitioner seeking to extend the deadline for filing the petition for review pursuant to OAR 661-010-0067(2) must obtain the written consent of the intervenor and all parties, even if LUBA has not yet issued an order granting the motion to intervene. *Danielson Trust v. Jackson County*, 65 Or LUBA 437 (2012).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. The OAR 661-010-0030(4)(d) requirement that petitioners set out each assignment of error separately is important. Setting out concise assignments of error helps all parties and LUBA understand the issues that must be resolved, and the importance of clear assignments of error increases as the issues become more complex and overlap. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not consider an assignment of error that is presented only in a footnote. *Falls v. Marion County*, 61 Or LUBA 39 (2010).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA's rules requires that argument in support of or in opposition to an assignment of error be set forth in the body of the brief, and do not provide for attachment of additional argument in an appendix to a brief, in part to preserve the 50-page brief limit. However, where the brief is 38 pages long and the attached argument is 10 pages, and there is no contention that considering 48 pages of argument in a brief that is otherwise consistent with LUBA's rules prejudices any party's substantial rights, LUBA will not strike the attachment. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where petitioner assigns error under OAR 660-012-0060, arguing that the county inadequately mitigated for the traffic impacts of a proposed destination resort, but petitioner neither assigns error to the county's finding that the destination resort will not "significantly affect" the transportation facilities within the meaning of OAR 660-012-0060 nor challenges the legal reasoning that the county adopted in support of that finding, LUBA will deny the assignment of error. *Eder v. Crook County*, 60 Or LUBA 204 (2009).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petitioner's argument that a county's findings concerning variance criteria are inadequate and not supported by substantial evidence provide no basis for reversal or remand, where the county adopted four pages of single-spaced findings addressing the variance criteria and petitioner offers no explanation for why petitioner believes those findings are inadequate or not supported by substantial evidence. *Lulay v. Linn County*, 60 Or LUBA 432 (2010).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Petitioner's request to file a 55-page petition for review will be denied, where petitioner easily could have included the requested additional argument in a petition for review that complied with LUBA's 50-page limit if petitioner had focused her arguments or written the petition for review more concisely. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a petitioner simply alleges that a decision that amends a comprehensive plan policy is not consistent with the purposes of comprehensive plan growth management policies or Statewide Planning Goal 14 (Urbanization), but petitioner does not identify any comprehensive plan policy purposes or the allegedly inconsistent requirement of Goal 14, petitioner provides no basis for reversal or remand. *Hildenbrand v. City of Adair Village*, 58 Or LUBA 43 (2008).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. The failure of a *pro se* petitioner to sign a petition for review does not necessarily mean that that petitioner has "failed to timely file a petition for review" under OAR 660-010-0030(1), with the consequence that that petitioner must be dismissed from an appeal. *Abeel v. City of Portland*, 58 Or LUBA 247 (2009).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where LUBA sustains an assignment of error and remands a county decision, and the county hearings officer adopts approximately two pages of findings on remand addressing that assignment of error, it is the hearings officer's reasoning in rejecting the assignment of error that is before LUBA in a subsequent appeal. Where a petitioner merely re-alleges the assignment of error and makes no meaningful attempt to challenge the hearings officer's reasoning in rejecting the assignment of error, LUBA will deny the assignment of error. *Kipfer v. Jackson County*, 58 Or LUBA 436 (2009).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Assignments of error that consist of a single sentence alleging error and that include no argument explaining why the local government erred in the manner alleged are undeveloped and do not provide a basis for reversal or remand. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Petitioners' failure to include an adequate jurisdictional statement in their petition for review is not a basis for dismissing their appeal, where their dispute about whether the challenged decision is a land use decision is the central dispute and petitioners' first assignment of error alleges that the appealed decision is a land use decision that is subject to LUBA review. *Zirker v. City of Bend*, 55 Or LUBA 188 (2007).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petitioner may not dismiss his attorney after the petition for review has been filed and the time for filing the petition for review has run and then submit a new or amended petition for review. *Taylor v. City of Canyonville*, 55 Or LUBA 681 (2007).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will deny a request to resettle the record and restart the deadline for filing the petition for review that is filed on the date the petition for review is due and that is based on a nonmeritorious argument that notes taken by a recording clerk are "minutes" of the proceeding that must be included in the record. *Ford v. Jackson County*, 54 Or LUBA 434 (2007).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. When the arguments presented in support of an assignment of error are so poorly stated and developed that the overwhelming majority of the assignment of error cannot reasonably responded to, LUBA will not require respondents to respond to every disjointed argument presented in the assignment of error. *Sommer v. Josephine County*, 54 Or LUBA 507 (2007).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not assume that petitioners meant to rely on an intergovernmental agreement provision that can be read to bar requiring annexation agreements for certain types of development, where petitioners do not cite the intergovernmental agreement provision, there are significant questions regarding whether it would preclude the challenged condition requiring an annexation agreement and petitioners do not address those questions. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Petitioners' arguments on the merits of an appeal that are included in their notice of intent to appeal are presented prematurely. Petitioners' arguments on the merits of an appeal are properly presented in their

petition for review, after petitioners' record objections are resolved and after LUBA settles the record. *Robson v. City of La Grande*, 53 Or LUBA 604 (2006).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. While it is possible that LUBA might grant a petitioner's request that a notice of intent to appeal be treated as the petition for review, a petitioner may not wait until over two weeks after the deadline for filing the petition for review has expired to make such a request. *Bleu v. Clackamas County*, 52 Or LUBA 606 (2006).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a county finds that the comprehensive plan and zoning map designations for a parcel that is subject to Goal 17 can be amended consistently with the county's acknowledged Goal 17 program because that Goal 17 program is unaffected by the amendment, an argument that "this casual dismissal of Goal 17 cannot provide the basis for the rezoning decision" is not sufficiently developed for review. *Holloway v. Clatsop County*, 52 Or LUBA 644 (2006).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. When the local government limits the scope of review on remand to issues raised in the petition for review before LUBA, those issues include arguments made in support of the assignments of errors, not merely the text of the assignments of error themselves. *Dauenhauer v. Jackson County*, 51 Or LUBA 539 (2006).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A three-page letter that includes no statement of standing, no statement of the case, no description of the challenged decision or request for relief, no summary of arguments or material facts, no statement of jurisdiction, and no assignments of error does not satisfy the requirements of OAR 661-010-0030(4) for a petition for review. *Gallagher v. City of Myrtle Point*, 50 Or LUBA 303 (2005).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not allow a petitioner to file an amended petition for review pursuant to OAR 661-010-0030(6), where the original petition for review is so grossly noncompliant with the requirements of OAR 661-010-0030(4) that the amended petition would in effect constitute an entirely different petition for review. *Gallagher v. City of Myrtle Point*, 50 Or LUBA 303 (2005).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will dismiss an appeal for failure to file a timely petition for review, where the petition for review is a three page letter that is so grossly noncompliant with the requirements of OAR 661-010-0030(4) that in effect no petition for review was filed at all. *Gallagher v. City of Myrtle Point*, 50 Or LUBA 303 (2005).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where an assignment of error relies on a comprehensive plan "policy" regarding sanitary sewer service that does not exist, LUBA will not consider whether a proposal violates a comprehensive plan "finding" that may have been the plan provision that petitioner intended to cite, but was not cited by petitioner, where the legal status and meaning of that comprehensive plan finding is not clear. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not consider an interpretive argument that is presented at oral argument but was not included in the petition for review and was not presented to the local government. *Regen v. Lincoln County*, 49 Or LUBA 386 (2005).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Allowing intervenors-petitioner to belatedly sign the signature page of a timely filed petition for review is not tantamount to allowing a late petition for review. Intervenors' failure to sign or join the petition for review prior to its filing is at most a technical violation that does not affect our review, absent prejudice to another party's substantial rights. *Kane v. City of Beaverton*, 49 Or LUBA 512 (2005).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Service of the petition for review by parcel post rather than by first class mail is a violation of OAR 661-010-0075(2)(b)(B). However, unless the slower delivery attributed to parcel post interferes with the respondent's ability to prepare the response brief, or otherwise prejudices other parties' substantial rights, that violation does not provide a basis to dismiss the appeal. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. The date the petition for review is postmarked is not necessarily determinative of the date the petition is "mailed," for purposes of OAR 661-010-0030(1) and 661-010-010-0075(2)(a)(B). *Mason v. City of Corvallis*, 48 Or LUBA 651 (2005).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Depositing the petition for review postage paid in a postal service deposit box on the date it is due is sufficient to "mail" and hence file the petition for review under OAR 661-010-0075(2)(a)(B), even if the petition for review is postmarked the following day, and even if the petition for review is deposited after the last collection time for that deposit box. *Mason v. City of Corvallis*, 48 Or LUBA 651 (2005).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not consider new evidence presented for the first time in an appendix to a petition for review that addresses the stability standard set out at OAR 660-033-0130(4), where the evidence is used to challenge the reasonableness of a county's evidentiary decision regarding the number of new dwellings that could be established within the study area and the new evidence is based on a methodology that was not presented to the county during the local evidentiary proceedings. *Knoche v. Crook County*, 46 Or LUBA 85 (2003).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a petitioner's challenge to a conditional use permit allowing 45 cubic yards of fill in a wetland is based on the mistaken premise that the conditional use permit also authorized many more cubic yards of fill that were not placed in wetlands and the fill placed outside the wetlands did not require a conditional use permit, petitioner's challenge provides no basis for reversal or remand. *Bonnett v. Deschutes County*, 46 Or LUBA 318 (2004).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Petitioners do not sustain their burden of demonstrating that a petition for review was timely filed, where the only evidence

that bears on that question is (1) a postmark dated one day late and (2) an affidavit by petitioners' attorney averring that he arrived at the post office two minutes prior to midnight on the day the petition for review was due, and he was "certain" that he deposited the petition for review with the postal clerk before midnight. *Bollinger v. City of Hood River*, 46 Or LUBA 602 (2004).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Although a petitioner's summary incorporation of arguments from one assignment of error challenging one decision into another assignment of error that challenges a different decision may present some difficulty in considering the merits of those incorporated argument, LUBA will consider the incorporated arguments. *Barton v. City of Lebanon*, 45 Or LUBA 214 (2003).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where petitioners' assignment of error is based on the erroneous assumption that a code standard that prohibits home occupations that are "objectionable due to [emissions]" prohibits *any* discernable emissions, and petitioners do not challenge city findings that the emissions that can be expected from a proposed home occupation will not be objectionable, the assignment of error provides no basis for reversal or remand. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a local government adopts unchallenged findings explaining that a demonstration that a proposed conditional use complies with all relevant zoning ordinance criteria is also sufficient to establish that the conditional use complies with the comprehensive plan, petitioners' challenge at LUBA that the conditional use is inconsistent with particular comprehensive plan provisions that are not specifically addressed in the conditional use decision provides no basis for reversal or remand. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A person who is not an active member of the Oregon State Bar may not sign a petition for review on behalf of individual petitioners. *Roe v. City of Union*, 45 Or LUBA 736 (2003).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a petition for review is signed by a person who is not an active member of the Oregon State Bar, LUBA will allow the petition for review to be amended so that petitioners may sign the petition for review on their own behalf or an active member of the Oregon State Bar may sign the petition for review. *Roe v. City of Union*, 45 Or LUBA 736 (2003).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. The practice of attaching maps from the record to the petition for review, to orient the Board as to the subject property or the relevant zoning, is strongly encouraged. However, the Board will strike maps attached to the parties' briefs that are modified to illustrate a disputed point. *Carver v. City of Salem*, 42 Or LUBA 305 (2002).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. An assignment of error that consists entirely of an incorporated argument from another brief is insufficiently developed for review, where the incorporated argument challenges a different code provision for a number of

different reasons and the Board must speculate why petitioner believes the code provision at issue violates applicable law. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 453 (2002).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. The requirement at OAR 661-010-0030(1) that LUBA dismiss an appeal where the petition for review is not timely filed implements the statutory policy that "time is of the essence" in land use matters. That the statutes governing LUBA's review do not provide for dismissal where the petition is untimely filed does not mean that OAR 661-010-0030(1) is inconsistent with LUBA's governing statutes. *Rookard v. Lane County*, 41 Or LUBA 14 (2001).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Assignments of error that are directed at a decision other than the decision that is the subject of the LUBA appeal provide no basis for reversal or remand. *Robson v. City of La Grande*, 40 Or LUBA 250 (2001).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. The failure of a petition for review to include the jurisdictional statement required by OAR 661-010-0030(4)(c) provides no basis for dismissal where it is clear that the challenged decision is a land use decision, as defined by ORS 197.015(10), because the decision concerns the adoption of comprehensive plan map and zoning map amendments and applies discretionary comprehensive plan amendment criteria and at least one statewide planning goal. *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where the notice of intent to appeal challenges a governing body's decision determining that petitioner has no standing to file a local appeal of a planning director's decision, but the petition for review assigns error only to the planning director's decision, the petition for review provides no basis to reverse or remand the governing body's decision. *Doob v. Josephine County*, 39 Or LUBA 301 (2001).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Petitioner's failure to include citations to the record to support factual allegations in the petition for review does not provide a basis for dismissing the appeal, where the record citations that are provided by petitioner and the other parties provide an adequate understanding of the material facts. *Cox v. Polk County*, 39 Or LUBA 1 (2000).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where an argument is suggested only in the summary of argument required by OAR 661-010-0030(4)(b)(B) and is not included in an assignment of error or in the argument supporting the assignments of error, LUBA will not consider the argument. *Lighthart v. Polk County*, 37 Or LUBA 787 (2000).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a petitioner expresses disagreement with a local government about whether a zoning text amendment violates a comprehensive plan policy, without attempting to demonstrate error in the local government's findings that interpret and apply the comprehensive plan policy, petitioner states no basis for reversal or remand. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petitioner's arguments that a zoning ordinance amendment violates a plan policy discouraging uses that are not water

dependent provides no basis for remand, where the challenged decision raises the maximum building height and does not approve any particular use of the property. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. An argument that a city erred by failing to adopt findings addressing a plan policy that is 22 single-spaced pages long and broken down into many subparts is inadequately developed, where the city adopted findings addressing two parts of the policy and petitioner makes no attempt to explain what other parts of the policy petitioner believes are applicable. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. After the petition for review is filed, petitioner must respond to allegations that issues that are raised in the petition for review were not raised during the local proceedings. If petitioner fails to do so, those issues are waived. However, petitioner is not initially obligated to specify in the petition for review where the issues that are raised in the petition for review were raised below. *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petitioner's failure to specify the relief that is requested in the statement of the case, as required by OAR 661-010-0030(4)(b)(A), does not warrant rejection of the petition for review where the relief requested is stated elsewhere in the brief and is apparent from the arguments presented in the brief. *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not review eight audiotapes in the record, where the party relying on testimony in the tapes provides LUBA no assistance in locating the testimony and does not attach partial transcripts of the testimony to its brief. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a petition for review does not include assignments of error as required by OAR 661-010-0030(4)(d), but LUBA can determine the allegations of error from the argument included in the petition for review, LUBA will consider those allegations of error. *Freedom v. City of Ashland*, 37 Or LUBA 123 (1999).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA's rules require that the petition for review "[s]tate the facts that establish petitioner's standing," but do not require that such allegations of fact appear in any particular form or any particular portion of the petition for review. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Petitioner's failure to cite ORS 215.402 to 215.428 as authority for its position that the challenged decision required notice and an opportunity for a hearing does not require that LUBA reject the assignment of error where (1) it is clear from its brief that respondent was aware that ORS 215.402 to 215.428 require notice and an opportunity for a hearing for land use decisions that constitute "permits" under ORS 215.402(4), and (2) the city argues in its brief that the challenged decision does not constitute a

"permit" decision, within the meaning of ORS 215.402(4). *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where the response brief points out that the petition for review challenges only one of the county's alternative bases for modifying an approval standard, the response brief has not raised a "new matter" within the meaning of OAR 661-010-0039. A reply brief is not a means to assign error to findings that were not challenged in the petition for review, and arguments in the response brief based on such findings are not new matters warranting a reply brief. *Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106 (1999).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a local government's modification of standards applicable to a planned unit development rests on independent alternative grounds, petitioner's demonstration of error in one alternative ground provides no basis to reverse or remand the challenged decision where petitioner fails to challenge the other alternative ground. *Hard Rock Enterprises v. Washington County,* 36 Or LUBA 106 (1999).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petitioner's failure to set out separate assignments of error, as required by OAR 661-010-0030(4)(d), does not justify rejecting the petition for review. However, petitioner's arguments must be sufficiently developed to demonstrate that the local government committed an error that warrants reversal or remand under ORS 197.835. *Claus v. City of Sherwood,* 35 Or LUBA 437 (1999).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where petitioners fail to obtain a stipulation from the county to extend the deadline for filing a petition for review pending resolution of a motion, an appeal will be dismissed if the petition for review is not filed within the deadline established by Board rules. *Berry v. Jackson County*, 35 Or LUBA 137 (1998).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where an allegedly new argument presented by petitioner at oral argument simply reflects a difference in the parties' understanding of the arguments that are contained in the petition for review, LUBA will consider the argument if it is not fundamentally different from the arguments presented in the petition for review. *Nike, Inc. v. City of Beaverton*, 35 Or LUBA 57 (1998).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where the petition for review does not identify the ordinance standard that is allegedly violated or what the ordinance requires, petitioners' argument is not sufficiently developed for LUBA review. *Lodge v. City of West Linn*, 35 Or LUBA 42 (1998).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Petitioner's own transcript of local proceeding audio tapes is not part of the local record. However, if petitioner prepares a transcript of all or some of the audio tapes and attaches it to her petition for review in support of arguments made in the petition, LUBA will consider the transcript if no objection is made to the transcript's accuracy or completeness. *D.S. Parklane Development, Inc. v. Metro,* 33 Or LUBA 848 (1997).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A transcript of local proceedings that is prepared and submitted by petitioner, rather than by the respondent local government, cannot be made part of the local record. However, such a transcript may be attached to the petition for review in support of arguments presented therein. *Trademark Construction Inc. v. Marion County*, 33 Or LUBA 842 (1997).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will grant a motion to strike evidence attached to a petition for review where the evidence is neither included in the local record nor properly placed before LUBA through an evidentiary hearing. *St. Johns Neighborhood Assn v. City of Portland*, 33 Or LUBA 836 (1997).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A 72-page petition for review submitted after our order limiting the petition for review to 75 pages of pica type will not be accepted when it is printed in a 12-point Times typeface, which makes it equivalent in length to about 95 pages in pica type. *City of Gresham v. City of Wood Village*, 33 Or LUBA 801 (1997).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. If a reduced or condensed typeface is used in a brief filed at LUBA, with more than 10 characters to the linear inch and six lines to the vertical inch, the number of pages must be reduced accordingly. No typeface smaller than 12-point may be used in the text of a brief, as opposed to the footnotes, where a 10-point typeface is acceptable. *City of Gresham v. City of Wood Village*, 33 Or LUBA 792 (1997).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A party challenging a local land use decision must provide some particular basis for showing the decision is subject to remand or reversal. It is not LUBA's function to make a petitioner's case. *Purdy v. City of Shady Cove*, 33 Or LUBA 331 (1997).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A party challenging a local land use decision must provide some particularized basis for showing it to be subject to remand or reversal. *Laurence v. Douglas County*, 33 Or LUBA 292 (1997).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a city makes both an initial finding and an alternative finding, and petitioner does not assign error to the initial finding, LUBA will not review the alternative finding. *Hood River Valley Res. Comm. v. City of Hood River*, 33 Or LUBA 233 (1997).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petition for review of 75 pages, which is 50 percent larger than LUBA's rule (OAR 661-10-030(2)(b)) allows, will not be accepted absent the most extreme circumstances. *Sanders v. Yamhill County*, 32 Or LUBA 501 (1997).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where, after the petition for review is filed, the Court of Appeals issues a new decision addressing the application of a statute that is the linchpin of one of petitioner's assignments of error, LUBA will accept a memorandum of additional authorities from petitioner to the extent it interprets the new decision's effect on the present case. *Still v. Marion County*, 32 Or LUBA 40 (1996).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. The jurisdictional statement required by OAR 660-10-030(2) provides a means for LUBA to determine whether the challenged decision fits within the statutory scope of its jurisdiction. The statement does not limit the issues that may be raised in the body of a petition for review. *Miller v. City of Joseph*, 31 Or LUBA 472 (1996).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. In deciding whether to allow a longer petition for review, LUBA places less importance on the size of the record than on whether several types of land use approvals, involving different sets of approval criteria, are being challenged. *Concerned Citizens v. Jackson County*, 31 Or LUBA 562 (1996).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. The page limitation stated in OAR 661-10-030(2)(b) exists to protect the interest of the Board, as well as the parties, in a concise, well-organized petition for review; and although the fact that a motion for a longer petition for review is unopposed is important to a consideration of the interest of the parties, it will not invariably persuade the Board that a longer petition for review is justified. *Concerned Citizens v. Jackson County*, 31 Or LUBA 562 (1996).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA's rules do not allow for a continuance following oral argument to allow a party to supplement the petition for review, respond to issues raised in a response brief, or add evidence to the record. *Peterson v. City of Portland*, 31 Or LUBA 112 (1996).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA usually will not consider arguments made for the first time at oral argument before the Board. *DLCD v. Polk County*, 31 Or LUBA 69 (1996).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petition for review which lacks assignments of error and argument in support thereof does not comply with OAR 661-10-030(3) and provides no basis for reversal or remand. *Borrego v. City of Sheridan*, 30 Or LUBA 65 (1995).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. When the petition for review is not filed within the time established under OAR 661-10-030(1), the appeal will be dismissed and the filing fee and deposit for costs forfeited to the governing body. *Grammon v. City of Cove*, 30 Or LUBA 31 (1995).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. OAR 661-10-067(2) provides that the deadline for filing the petition for review may be extended only with the written consent of all parties. When the parties rely on an oral agreement to extend the petition for review filing deadline, and one party rescinds the oral agreement one day before the petition for review is due to be filed, petitioner's failure to timely file the petition for review requires dismissal of the appeal. *Bongiovanni v. Klamath County*, 29 Or LUBA 351 (1995).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Petitioners may not make a new challenge to the appealed decision in a reply brief, and thereby effectively add an assignment of error to the petition for review. *Shaffer v. City of Salem*, 29 Or LUBA 592 (1995).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where the petition for review includes allegations concerning the content of a tape in the record, and respondents object that petitioner failed to attach a transcript of the relevant portions of the tape to the petition for review, LUBA will allow petitioner to submit a transcript in a reply brief, so long as respondents have adequate time to review the tape and transcript prior to oral argument. *Shaffer v. City of Salem*, 29 Or LUBA 592 (1995).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will disregard references in a petition for review to items which are neither in the record nor subject to official notice. LUBA cannot take official notice of a local government ordinance if it is not provided with a copy of the ordinance. *Craven v. Jackson County*, 29 Or LUBA 125 (1995).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will disregard references in a petition for review to the legislative history of a statute, where such references are supported neither by uncontested verbatim quotes nor by submission of a copy of the legislative history documents referred to. *Craven v. Jackson County*, 29 Or LUBA 125 (1995).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where petitioner alleges the local government's notice of public hearing violates local code requirements, but petitioner fails to provide LUBA with the local code requirements allegedly violated, LUBA will deny the assignment of error. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Arguments that the county should have based its decision on the subject application on statutory provisions, rather than on compliance with local standards, must be presented in a petition for review or cross-petition for review. Such arguments are not properly presented in a respondent's brief. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petition for review which lacks assignments of error and argument in support of the assignments of error and merely expresses disagreement with past governmental actions concerning a property fails to comply with OAR 661-10-030(3). *Scholes v. Jackson County*, 28 Or LUBA 407 (1994).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Petitioners generally establish LUBA's jurisdiction in the petition for review. However, if a respondent moves to dismiss the LUBA appeal on the basis that the appealed decision is not a land use decision or that the appeal was not timely filed, petitioner's response to the motion to dismiss must establish that LUBA has jurisdiction. *Bowen v. City of Dunes City*, 28 Or LUBA 324 (1994).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petitioner at LUBA may not raise an argument for the first time at oral argument or in a post-oral argument memorandum. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Petitioner cannot allege for the first time in the petition for review that a document included in the local record was not actually placed before the local decision maker and, consequently, assign the decision maker's reliance on that document as error. *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. If LUBA allows the record to be supplemented after the petition for review is filed, petitioners must be given an opportunity to file a new petition for review. *Salem Golf Club v. City of Salem*, 27 Or LUBA 715 (1994).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Allegations that a local government decision should be reversed for failure to follow local code provisions governing deadlines for holding a public hearing and issuing a final decision are properly presented in the petition for review, not in a motion to reverse. *Sanchez v. Clatsop County*, 27 Or LUBA 713 (1994).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not consider a motion for reversal that includes arguments not contained in the petition for review, where the motion for reversal is filed three weeks after the deadline for filing the petition for review. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A transcript of local proceedings that was prepared and submitted by petitioner, rather than by the respondent local government, cannot be made part of the local record. However, petitioner may attach the transcript, or relevant portions thereof, to the petition for review, in support of arguments made therein. *Bates v. Josephine County*, 27 Or LUBA 673 (1994).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Although amending a petition for review to add record citations, correct page numbers and edit for clarity might be allowable under OAR 661-10-030(4), such amendments are not warranted where allowing them would delay an appeal for five days. *Davenport v. City of Tigard*, 26 Or LUBA 649 (1994).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Under OAR 661-10-030(4), LUBA may allow the filing of an amended petition for review to cure failures regarding specifications and content requirements for petitions for review, where doing so would neither materially interfere with respondents' ability to respond to the petition for review nor delay issuance of LUBA's final opinion and order. *Zippel v. Josephine County*, 26 Or LUBA 626 (1994).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where petitioner's notice of intent to appeal identifies the challenged decision as the governing body's decision to dismiss his local appeal, but his petition for review alleges error in the planning commission's decision to approve the subject application, rather than the governing body's decision dismissing his appeal, LUBA will affirm the challenged decision. *Churchill v. Tillamook County*, 26 Or LUBA 22 (1993).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a request to amend the petition for review to add an assignment of error is delivered to LUBA two days before the

final opinion and order is due, the request will be denied as untimely. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A petitioner fails to adequately allege error with regard to a particular code section, where that code section is not identified in petitioner's assignment of error and a different code section is cited in the argument supporting the assignment of error. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where the petition for review alleges the challenged decision applies provisions of a local government plan and land use regulations, it is not fatal to LUBA's jurisdiction that the petition for review improperly characterizes the decision as a "land use decision" rather than a "limited land use decision." *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not grant a motion to strike portions of a petition for review which are inaccurate or without factual support. Rather, LUBA will simply disregard such portions of the petition. *Mannenbach v. City of Dallas*, 25 Or LUBA 136 (1993).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. OAR 661-10-075(3) allows both respondents and intervenors-respondent to file cross petitions for review. Cross petitions for review are not limited to the issues raised in petitioners' petition for review; any appropriate issue may be raised. *Reusser v. Washington County*, 24 Or LUBA 652 (1993).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA has authority to promulgate rules allowing the filing of cross petitions for review by respondents who have not themselves filed timely notices of intent to appeal. *Reusser v. Washington County*, 24 Or LUBA 652 (1993).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not dismiss an appeal simply because the petitioner failed to attach the exhibits to the challenged ordinance to the petition for review. *DLCD v. Coos County*, 24 Or LUBA 137 (1992).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not address issues which are raised by petitioners for the first time at oral argument, and are not included in the assignments of error and supporting argument required to be set out in the petition for review. OAR 661-10-030(3)(b). *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where the petition for review does not contain assignments of error set forth under separate headings, as required by OAR 661-10-030(3)(d), LUBA will only consider those arguments set forth in the petition for review which are stated clearly enough to afford respondents an opportunity to respond. *Heiller v. Josephine County*, 23 Or LUBA 551 (1992).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will not grant a motion to file a petition for review in excess of 50 pages simply because (1) several hearings were

held below, (2) the challenged decision applies several local code provisions and is supported by lengthy findings, and (3) petitioners intend to challenge local government interpretations of several statutory and code provisions. *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 718 (1992).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where, on the day the petition for review is due, a petitioner files a brief in excess of 50 pages and a motion for permission to file such brief, the petitioner assumes the risks that its brief will be stricken or that LUBA will not consider the pages in the brief following page 50. *Kaye v. Marion County*, 23 Or LUBA 452 (1992).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A motion to dismiss does not suspend the time for filing the petition for review. The only events that suspend the time for filing a petition for review in a LUBA appeal are the filing of (1) a motion for an evidentiary hearing, (2) a record objection, or (3) a written stipulation signed by all parties for an extension of time to file the petition for review. *Weeks v. City of Tillamook*, 23 Or LUBA 255 (1992).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Allegations that the challenged decision violates a statewide planning goal and the local comprehensive plan and land use regulations are sufficient to constitute an allegation that the challenged decision is a land use decision under the statutory test, even where such allegations are found in the body of the petition for review, rather than in a separate statement of jurisdiction as required by OAR 661-10-030(3)(c). *Adkins v. Heceta Water District*, 23 Or LUBA 207 (1992).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Petitioners must include sufficient argument in the petition for review to explain the basis for their allegations of error. Petitioners may not fail to make a specific challenge to the findings supporting a decision or the evidentiary support for those findings and rely solely on expressions of disagreement with the challenged decision. *Camp v. Josephine County*, 23 Or LUBA 6 (1992).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where a petition for review contains no argument in support of petitioner's assignments of error, the assignments of error will be denied. *Camp v. Josephine County*, 23 Or LUBA 6 (1992).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will consider arguments expressed in the petition for review that are stated clearly enough to afford the other parties an opportunity to respond. *Silani v. Klamath County*, 22 Or LUBA 735 (1992).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Failure to include a jurisdictional statement in the petition for review, as required by OAR 661-10-030(3)(c), is a technical violation of LUBA's rules and does not provide a sufficient basis for dismissing the petition for review. However, because petitioner bears the burden of establishing LUBA's jurisdiction, LUBA will require the petition for review to be amended to include a jurisdictional statement. OAR 661-10-030(4). *Dolan v. City of Tigard*, 22 Or LUBA 820 (1991).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where the petition for review does not contain separate assignments of error, as required by OAR 661-10-030(3)(d), LUBA will consider the arguments expressed in the petition for review, but only to the extent they allege errors clearly enough to afford the other parties an adequate opportunity to respond. *Eckis v. Linn County*, 22 Or LUBA 27 (1991).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA's rules require that petitioners' assignments of error and argument be in the petition for review. LUBA cannot consider an issue raised by petitioner for the first time at oral argument. *Ward v. City of Lake Oswego*, 21 Or LUBA 470 (1991).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. LUBA will deny a motion to amend the petition for review to add an additional assignment of error, where the motion is filed one day before oral argument. If it were granted, LUBA would have to give respondents additional time to present written and oral argument in response to the additional assignment of error, resulting in delay in issuance of LUBA's final opinion. *Hale v. City of Beaverton*, 21 Or LUBA 249 (1991).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. That petitioners' allegations of standing were made in their answer to a motion to dismiss, rather than in the petition for review as required by OAR 661-10-030(3)(a), is a technical violation of LUBA's rules which does not prejudice respondent's substantial rights where respondent had a full opportunity to respond to petitioners' allegations in its response brief. *Schatz v. City of Jacksonville*, 21 Or LUBA 214 (1991).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. No statutory or rule provisions require a petition for review to conform with requirements for pleadings in circuit court proceedings. If a petition for review does not set out facts and legal argument sufficient to persuade LUBA that there is a basis for reversal or remand of the challenged decision, LUBA simply affirms the decision. *Dolan v. City of Tigard*, 20 Or LUBA 411 (1991).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where an affidavit concerning alleged local procedural irregularities is attached to the petition for review, but is neither part of the local record nor the subject of a motion for evidentiary hearing, and other parties dispute the contents of that affidavit, LUBA cannot consider it. *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. A document appended to a party's petition for review or brief becomes part of the record of LUBA's proceeding. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Failure to timely file a petition for review will result in dismissal of the appeal. *Bloomer v. Baker County*, 19 Or LUBA 90 (1990).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where standing is not an issue, an affidavit attached to the petition for review for the sole purpose of establishing petitioner's standing is not subject to a motion to strike. *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990).

27.4.1 LUBA Procedures/Rules – Petition for Review – Generally. Where petitioners do not object to the adequacy or completeness of the minutes of local proceedings included in the record and do not attach transcripts to their petition for review, petitioners may not submit partial transcripts of local proceedings for the first time at oral argument. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Where a cross-petitioner seeks a remedy not available to it by statute, it is an obstacle to LUBA's review of the cross-assignment of error. LUBA lacks authority to affirm in part, and reverse in part a local government's approval of cross-petitioner's project application. ORS 197.835(1). Even assuming that the city erred by applying Willamette Greenway standards to cross-petitioner's housing project application, because they are not "clear and objective," the city's decision approving the development could not be reversed because it is not "prohibited as a matter of law." If LUBA agreed with cross-petitioners, the correct disposition would be remand, except that remand was not requested and would have no effect on the city's decision approving the application. In such a situation, LUBA will consider the request a contingent cross-assignment of error. *Hulme v. City of Eugene,* 79 Or LUBA 218 (2019).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Where LUBA sustains petitioner's assignment of error and remands a local government's decision denying petitioner's application, LUBA will address an intervenor's contingent cross assignments of error in a cross petition for review, where those cross-assignments of error raise issues that might provide additional bases for remanding the decision, in order to correct other alleged errors on remand. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. A "cross assignment of error" that argues that a hearings officer made a correct decision is not an assignment of error and provides no basis for reversal or remand of a decision. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Prior to 2010 amendments to its administrative rules, where an argument in an intervenor-respondent's brief was in substance a cross assignment of error, LUBA treated it as such. *Parkview Terrace Development LLC v. City of Grants Pass,* 71 Or LUBA 381 (2015).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. In 2010 LUBA amended its administrative rules to require that cross assignments of error be included in a cross petition for review and to provide that cross assignments of error may not be included in a response brief, as was the practice before the 2010 rule amendments. *Parkview Terrace Development LLC v. City of Grants Pass*, 71 Or LUBA 381 (2015).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Where an intervenor-respondent generally agrees with the decision on appeal but wishes to challenge an aspect of the decision if the decision is reversed or remanded on the petition for review, OAR 661-010-0030(7) requires that the intervenor-respondent file a cross-petition for review with a contingent assignment of error, within the same deadline that applies to petitions for review. *Parkview Terrace Development LLC v. City of Grants Pass,* 70 Or LUBA 37 (2014).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Before LUBA adopted the current version of OAR 661-010-0030(7), intervenors-respondents could include contingent cross-assignments of error in their response briefs to challenge aspects of the decision on review, in the event the decision had to be remanded or reversed under the petition for review. Now, under

the current version of OAR 661-010-0030(7), such contingent cross assignments of error must be included in a timely filed cross-petition for review. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. A contingent cross-assignment of error in a cross petition for review is one that seeks remand or reversal of the decision only if the decision is remanded in LUBA's initial disposition of the appeal of the decision. Where LUBA denies all of the assignments of error in the appeal and affirms the decision, LUBA need not address a contingent cross-assignment of error that seeks reversal or remand of the decision only if the decision is remanded. *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 420 (2014).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. If an intervenor-respondent wishes to request that LUBA remand a county decision so that the county can apply a different statute than the one the county applied in the appealed decision, that request is not properly presented to LUBA where the intervenor-respondent neither filed a cross petition for review nor raised the issue in a cross assignment of error in the intervenor-respondent's response brief. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Because the cross petition for review is the functional equivalent of a petition for review, OAR 661-010-0030(7) imposes the same filing deadline that applies to petitions for review, and LUBA strictly enforces that filing deadline for cross petitions for review in the same way it strictly enforces that filing deadline for the petition for review. LUBA will grant a motion to strike a cross petition for review that is filed one day late. *Warren v. Josephine County*, 66 Or LUBA 471 (2012).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Under amendments to OAR 661-010-0030(7) and 661-010-0035, which took effect on July 1, 2010, a contingent cross assignment of error must be included in a cross-petition for review rather than in a respondent's brief. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. A cross-assignment of error must assign error to some ruling or omission in the challenged decision and seek reversal or remand based on that alleged error. A cross-assignment of error is not a vehicle to request (1) that LUBA address in the first instance an alternative legal theory under which the application could have been approved, but was not, and (2) that LUBA affirm the challenged decision based on that legal theory. *NAAVE v. Washington County*, 59 Or LUBA 153 (2009).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Where a respondent's brief includes what are in substance cross-assignments of error, even though they are not denominated as such, LUBA will consider those de facto cross-assignments of error, provided they are reasonably recognizable as cross-assignments of error. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. An argument in an intervenor-respondent's brief that the challenged decision must be reversed based on alleged error

is, in essence, an assignment of error or cross-assignment of error. However, LUBA will decline to address such arguments where intervenor-respondent fails to demonstrate that the issues raised under such arguments were raised during the proceedings below. *Krishchenko v. City of Canby*, 52 Or LUBA 290 (2006).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Read in context, the ORS 197.830(2) requirement that a person must file a notice of intent to appeal in order to "petition [LUBA] for review" does not implicitly prohibit parties who have not filed a notice of intent to appeal from filing a cross-petition for review, as provided by OAR 661-010-0030(7). *Horning v. Washington County*, 51 Or LUBA 303 (2006).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. An intervenor-respondent may raise cross assignments of error in the response brief, but LUBA will only address those cross assignments of error if one or more of the petitioner's assignments of error are sustained and the decision is otherwise subject to reversal or remand. *Dauenhauer v. Jackson County*, 51 Or LUBA 539 (2006).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. When an intervenor-respondent raises cross-assignments of error in a response brief rather than assignments of error in a cross petition, LUBA will only address the cross-assignments of error if the challenged decision is reversed or remanded on any of the petitioner's assignments of error. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Because nothing in LUBA's rules prohibits including a cross-assignment of error in the response brief, LUBA rules governing response briefs contemplate inclusion of "other matters" in the response brief, and many cross-assignments of error cannot practicably be advanced except in the response brief, it is consistent with LUBA rules to include a cross-assignment of error in a response brief. *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653 (2004).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. LUBA will not reach the merits of a cross-petition where cross-petitioners have joined in a motion to dismiss an appeal and the appeal must be dismissed because the petition for review was not timely filed. *Ballou v. Douglas County*, 40 Or LUBA 377 (2001).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. New objections to the applicability of an identified approval criterion should be raised in a cross-petition for review, and are not properly presented in a response brief. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Arguments that the county should have based its decision on the subject application on statutory provisions, rather than on compliance with local standards, must be presented in a petition for review or cross-petition for review. Such arguments are not properly presented in a respondent's brief. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. A respondent or intervenor-respondent who wishes to challenge some aspect of an appealed decision must file either a cross-petition for review or a separate appeal. LUBA will not consider assignments of error included in a respondent's brief. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. A respondent or intervenor-respondent wishing to challenge some aspect of a land use decision in a LUBA appeal must either file a timely cross-petition for review or file a separate appeal. Cross assignments of error may not be included in a respondent's brief. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Where a county failed to interpret ORS 215.213(2)(d)(C) as allowing an aggregate processing facility that conducts part of the processing on-site but completes the process of making aggregate into asphalt or Portland cement off-site, and the party wishing to assign the county's interpretive failure as error did not appeal the county's decision to LUBA or file a cross-petition for review, LUBA will not consider the interpretive question. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238 (1993).

27.4.2 LUBA Procedures/Rules – Petition for Review – Cross-Petition. Where an applicant neither files its own appeal of the local governing body's decision granting the requested development approval nor files a cross-petition for review in the LUBA appeal filed by the opponents, the question of whether a local appeal by the opponents should have been dismissed by the governing body is not properly presented to LUBA. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will not consider a supplemental memorandum that is filed to provide a response to a question posed at oral argument where LUBA did not request or order the parties to submit supplemental briefing, even where the opposing parties have not objected or otherwise responded to the supplemental memorandum. LUBA's rules do not permit supplemental briefing in the absence of a request from the Board, and LUBA generally does not allow supplemental briefing, especially after oral argument. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. When a party raises an issue for the first time at oral argument LUBA will ignore all statements made at oral argument, by any party, that go beyond the issues framed in the briefs and the evidence cited in the record, and will confine its review to the issues framed in the briefs, the evidence cited in the record, and the portions of the oral argument that discuss those issues and evidence. *See* OAR 661-010-0040(1) and ORS 197.835(2)(a). *Conte v. City of Eugene,* 78 Or LUBA 289 (2018).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. There is no inherent problem with a respondent summarizing overlapping assignments of error and addressing the summary rather than the assignments of error themselves, so long as the summary accurately describes the assignments of error and so long as the respondent's brief includes adequate responses to the actual assignments of error. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where petitioner and intervenor-petitioner each incorporate by reference the assignments of error in the other petition, and thereby exceed the permissible 14,000-word length of the petition under OAR 661-010-0030(2)(b) (2017), such incorporation does not necessarily cause each petition to violate OAR 661-010-0030(2)(b) (2017). *Columbia Pacific v. City of Portland*, 75 Or LUBA 552 (2017).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. When called upon to determine the applicability or meaning of a statute, LUBA is not limited to the parties' arguments. *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where petitioner does not argue the complexity of an appeal warrants a petition for review with more than 50 pages, and LUBA concludes that petitioner easily could have made the arguments presented in support of petitioner's three assignments of error in a petition for review that complies with the OAR 661-010-0030(2)(b) 50-page limit, LUBA will deny petitioner's request to submit a 53-page petition for review. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Including legal arguments in the summary of material facts in a petition for review, and failing to provide record citations in that summary, are violations of LUBA's rules, but such violations do not warrant striking the summary or other remediable action, absent a showing of prejudice to other parties' substantial rights. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where the petition for review includes argument in a section of the petition setting out the standard of review, that violation of LUBA's

procedural rules does not warrant striking the argument or other remediable action unless there is prejudice to other parties' substantial rights. Absent such prejudice, the better practice is to briefly note the alleged violation in the corresponding section of the response brief and clarify any disputed points raised by the violation. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where a jurisdictional statement in the petition for review attempts to incorporate argument on the merits in different section of the petition for review, and in doing so cites the wrong section of the petition for review, LUBA will nevertheless consider the incorporated argument on the merits, where the argument the petitioners intended to incorporate is obvious and no party was misled by petitioners' error. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where confusing arguments to LUBA are nevertheless discernable with reasonable effort, LUBA states its understanding of the argument and considers the argument on its merits. *Greller v. City of Newberg*, 70 Or LUBA 499 (2014).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. While incorporation of arguments in another brief in a consolidated appeal is a common practice, such incorporation is permissible only if it does not cause the incorporating brief to exceed the 50 page limit in OAR 661-010-0030(2)(b). Even if such an incorporation does not violate OAR 661-010-0030(2)(b), the incorporation does not allow a person who is party in one appeal to file motions in a consolidated appeal to which the person is not a party. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where the county zoning that applied to recently annexed territory inside a city's urban growth boundary provided that dwellings were allowed only if the property "was designated for residential use by the city," and the city took the position in its brief that the property was not designated for residential use, LUBA will assume that the city is correct where (1) petitioners do not argue in their petition for review that property was designated for residential use and (2) petitioners fail to respond to the city's argument in its brief. *Knaupp v. City of Forest Grove*, 67 Or LUBA 398 (2013).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA only has authority to affirm, remand or reverse land use decisions and does not have authority to grant injunctive or mandatory relief. LUBA will deny assignments of error where LUBA lacks authority to grant the relief that is requested under those assignments of error. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where an intervenor moves to intervene only on the side of respondent, but later submits a response brief supporting the position of the respondent on some assignments of error and supporting the position of petitioner on other assignments of error, LUBA will strike the portion of intervenor's response brief that supports petitioner's assignments of error on its own motion. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where an intervenor-respondent attempts to defend a local government's decision by arguing that the local government correctly decided

the matter but should have done so based on a different interpretation of its zoning ordinance that the local government specifically rejected, and intervenor-respondent does not file a cross-petition for review or include a cross assignment of error in its response brief, LUBA will not consider the interpretive question. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA's rules requires that argument in support of or in opposition to an assignment of error be set forth in the body of the brief, and do not provide for attachment of additional argument in an appendix to a brief, in part to preserve the 50-page brief limit. However, where the brief is 38 pages long and the attached argument is 10 pages, and there is no contention that considering 48 pages of argument in a brief that is otherwise consistent with LUBA's rules prejudices any party's substantial rights, LUBA will not strike the attachment. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. When appending portions of regulations or standards to a brief, it is common practice and helpful to LUBA for parties to highlight or underline or otherwise draw attention to pertinent sections, and doing so does not prejudice other parties' substantial rights. *Frewing v. City of Tigard*, 59 Or LUBA 23 (2009).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will consider arguments in a brief filed by an amicus whose participation at LUBA has been denied, where the respondent's brief incorporates the arguments in the amicus brief and the respondent's brief with the incorporated material does not exceed the 50-page limit or otherwise violate any other rule limitation. *Herring v. Lane County*, 54 Or LUBA 417 (2007).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will not assume that petitioners meant to rely on an intergovernmental agreement provision that can be read to bar requiring annexation agreements for certain types of development, where petitioners do not cite the intergovernmental agreement provision, there are significant questions regarding whether it would preclude the challenged condition requiring an annexation agreement and petitioners do not address those questions. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Petitioners' arguments on the merits of an appeal that are included in their notice of intent to appeal are presented prematurely. Petitioners' arguments on the merits of an appeal are properly presented in their petition for review, after petitioners' record objections are resolved and after LUBA settles the record. *Robson v. City of La Grande*, 53 Or LUBA 604 (2006).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. If the argument included in support of an assignment of error clearly alleges that findings are not supported by substantial evidence, the fact that an assignment of error that challenges the adequacy of the city's findings does not expressly include a substantial evidence challenge does not preclude LUBA review of the substantial evidence arguments that follow that assignment of error. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. While LUBA's practice is to allow replies to responses to a motion to dismiss if limited to new issues raised in the response, LUBA will deny

a request to file a reply where the response is exclusively concerned with a jurisdictional issue that LUBA declines to resolve. *Kamp v. Washington County*, 51 Or LUBA 670 (2006).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Allowing intervenors-petitioner to belatedly sign the signature page of a timely filed petition for review is not tantamount to allowing a late petition for review. Intervenors' failure to sign or join the petition for review prior to its filing is at most a technical violation that does not affect our review, absent prejudice to another party's substantial rights. *Kane v. City of Beaverton*, 49 Or LUBA (512).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will strike allegations in a brief accusing opposing party of intentional misrepresentation where there appears to be a factual basis for the opposing party's statement. *Patterson v. City of Independence*, 48 Or LUBA 155 (2004).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. It is consistent with LUBA's rules to advance in a response brief what corresponds to a cross-assignment of error under Oregon Rules of Appellate Procedure 5.57(2), *i.e.*, an argument that, if the relief sought by the petitioner is granted, LUBA should also reverse or remand a related intermediate ruling of the decision maker. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Parties may facilitate LUBA's legal research by providing copies of cases, briefs that were filed in other appeals, or other research materials in their briefs. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will not attempt to resolve a largely hypothetical dispute between a petitioner and a county over the degree of incidental social activity that might be permissible at an existing airport in conjunction with any particular activity that the county must allow under ORS 836.616(2). *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. A motion requesting permission to exceed the 50-page limit on briefs imposed by OAR 661-010-0030(2)(b) will be denied where the motion is filed three days before the brief is due and does not state how many additional pages are requested or indicate whether other parties oppose the motion. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 561 (2001).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where a transcript that is attached to a brief in accordance with OAR 661-010-0030(5) shows that a letter signed by petitioners was read to the local decision maker during the proceedings below and that the local decision maker stated that the letter would be made part of the record, the transcript is sufficient to show that petitioners made a written appearance in accordance with ORS 197.830(2) and have standing at LUBA to appeal the local government's decision. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where a brief includes as an appendix two letters that post-date the challenged decision and are not included in the record, LUBA will grant a motion to strike the letters but will not strike the brief in its entirety. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA may allow a party to submit a memorandum of additional citations of relevant authority with brief summaries. However, the memorandum will not be considered if it contains additional arguments, replies to issues raised in the response brief, or does not allow other parties adequate time to address the additional citations. *Stockwell v. Benton County*, 38 Or LUBA 621 (2000).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. That a brief includes allegations of fact not supported by substantial evidence is not grounds for striking those allegations from the brief. LUBA will, however, disregard allegations of fact that are not supported by the record. *Spiro v. Yamhill County*, 38 Or LUBA 133 (2000).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will not review eight audiotapes in the record, where the party relying on testimony in the tapes provides LUBA no assistance in locating the testimony and does not attach partial transcripts of the testimony to its brief. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. The failure to serve all persons required to be named in the notice of intent to appeal as required by OAR 661-010-0015 is a technical violation of LUBA's rules, when intervenor's only alleged prejudice is that the violation prohibits other parties from contributing resources to support his position. A person need not have intervenor status to contribute to the preparation of a brief, financially or otherwise. *Multi/Tech Engineering v. Josephine County*, 36 Or LUBA 774 (1999).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will grant a motion to strike documents attached to the petition for review, where those documents are neither part of the record submitted to LUBA nor documents of which LUBA may take official notice. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where a brief includes allegations of fact that are not supported by evidence in the record, LUBA will disregard the allegations, but the lack of evidentiary support is not a basis for granting a motion to strike the allegations. *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where an allegedly new argument presented by petitioner at oral argument simply reflects a difference in the parties' understanding of the arguments that are contained in the petition for review, LUBA will consider the argument if it is not fundamentally different from the arguments presented in the petition for review. *Nike, Inc. v. City of Beaverton*, 35 Or LUBA 57 (1998).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Assignments of error in petitions for review filed with LUBA must identify which portions of the challenged land use decision are challenged and why. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. It is the parties' responsibility to identify the evidence in the record that supports their positions. Where parties cite large documents in their entirety, and do not identify where in these documents relevant material is located, LUBA will not search through the documents looking for supporting evidence. *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. Where a decision is challenged on evidentiary grounds, LUBA relies on the parties to provide it with record citations to the supporting or countervailing evidence on which their argument depends. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. It is the practice at LUBA for a party that wishes LUBA to consider a document not in the local record, for one of the purposes listed in ORS 197.830(13)(b) or OAR 661-10-045(1), to attach that document to its brief and explain in its brief why LUBA should consider the document. If another party does not object to LUBA considering the document, the document becomes part of LUBA's record and is considered for the requested purpose. If an objection is made, the party offering the document may file a motion for evidentiary hearing under OAR 661-10-045. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will not grant motions to strike portions of a brief, based on allegations that the disputed portions are inaccurate or without factual support. Rather LUBA will simply disregard inaccurate or unsupported assertions. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. A petitioner fails to adequately allege error with regard to a particular code section, where that code section is not identified in petitioner's assignment of error and a different code section is cited in the argument supporting the assignment of error. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will deny a motion to strike portions of a brief that are alleged to be inaccurate or unsupported by the record. Rather, LUBA will simply disregard inaccurate or unsupported statements. *A Storage Place v. City of Tualatin*, 25 Or LUBA 202 (1993).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. In reviewing an evidentiary challenge, LUBA relies on the parties to identify the evidence in the record that supports their positions. *Todd v. Columbia County*, 24 Or LUBA 289 (1992).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will not consider letters from intervenors-petitioner that "support" the petitioners' petition for review, but do not comply with the requirements of LUBA's rules for an intervenor-petitioner's brief. *Gray v. Clatsop County*, 21 Or LUBA 600 (1991).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. A letter stating an intervenor-petitioner "adopts" another party's petition for review as its own brief can satisfy the requirements of OAR

661-10-050(3)(a) for filing an intervenor-petitioner's brief, if (1) the "adopted" petition for review is properly filed, and (2) the intervenor-petitioner's letter is timely filed and served on the other parties. *Gray v. Clatsop County*, 21 Or LUBA 600 (1991).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. A document appended to a party's petition for review or brief becomes part of the record of LUBA's proceeding. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will not consider a supplemental brief filed after oral argument and 18 days before the final opinion is due, where the supplemental brief was not requested by LUBA and consideration of the arguments presented in the supplemental brief would delay issuance of LUBA's final opinion. *Cecil v. City of Jacksonville*, 19 Or LUBA 621 (1990).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA considers the words spoken at the local government hearings to be part of the record, and will permit parties to attach excerpts from transcripts of such hearings to their briefs, notwithstanding that neither tapes nor transcripts of the local government hearings were submitted to LUBA as part of the record. Other parties may contest the accuracy of such transcript excerpts in their opening brief or in a reply brief. *Columbia Steel Castings v. City of Portland*, 19 Or LUBA 338 (1990).

27.5.1 LUBA Procedures/Rules – Briefs – Generally. LUBA will accept a cross petition for review filed after the deadline established under OAR 661-10-075(3) where the cross petitioner (1) was entitled to but did not receive written notice of the challenged decision, (2) received actual notice of the challenged decision eight days after the petition for review was filed and moved to intervene on the side of respondent five days later, and (3) filed a timely response brief with the cross petition for review included. *Smith v. Clackamas County*, 19 Or LUBA 497 (1990).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Where a city's development code permits only two extensions of tentative subdivision approval, and the city grants a third extension, the city's decision will be reversed where the city does not file a brief and intervenor-respondent concedes the city's interpretation that a third extension is permissible is not sustainable, even under the deferential standard of review required by ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 262, 243 P3d 776 (2010). *Pinnacle Alliance Group LLC v. City of Sisters*, 74 Or LUBA 265 (2016).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. The filing of an amended response brief outside the time permitted for filing the response brief, and without permission from the Board to file an amended brief, is a violation of OAR 661-010-0035(1) and (5). *MGP X Properties, LLC v. Washington County*, 74 Or LUBA 378 (2016).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Where a hearings officer does not take the position that his inability to verify the nature and extent of certain aspects of a prior concrete batch plant makes it impossible to determine whether an application to alter that prior nonconforming concrete batch plant will result in a more intensive use or result in greater adverse impact on the surrounding neighborhood, but intervenor does not file a cross-petition for review to assign error to that aspect of the hearings officer's decision, LUBA will not consider whether that position could provide an independent basis for denying the requested alteration. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Where a local government in defending its decision asserts a legal theory in its response brief, but that legal theory was not adopted by the challenged decision and the challenged decision relied on a different legal theory, LUBA will not consider the legal theory that is asserted for the first time in the response brief. *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Absent a showing of substantial prejudice to the moving party, that a response brief is printed in 12-point font rather than the 14-point font required by OAR 661-010-0030(2)(d) is not a basis to strike the brief, at least where the smaller font size is not used to effectively avoid the page limits imposed under LUBA's rules. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. LUBA will not defer to an interpretation of a zoning ordinance that appears only in a city's reply brief and is inconsistent with an implied interpretation that is included in the city council's decision on appeal. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Where an intervenor-respondent attempts to defend a local government's decision by arguing that the local government correctly decided the matter but should have done so based on a different interpretation of its zoning ordinance that the local government specifically rejected, and intervenor-respondent does not file a cross-petition for review or include a cross assignment of error in its response brief, LUBA will not consider the interpretive question. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. When three appeals have been consolidated and petitioners have filed three separate petitions for review, a respondent's request to file a single 114-page respondent's brief responding to all three petitions for review will be allowed. *Foland v. Jackson County*, 61 Or LUBA 500 (2010).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. A cross-assignment of error must assign error to some ruling or omission in the challenged decision and seek reversal or remand based on that alleged error. A cross-assignment of error is not a vehicle to request (1) that LUBA address in the first instance an alternative legal theory under which the application could have been approved, but was not, and (2) that LUBA affirm the challenged decision based on that legal theory. *NAAVE v. Washington County*, 59 Or LUBA 153 (2009).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Where a respondent's brief includes what are in substance cross-assignments of error, even though they are not denominated as such, LUBA will consider those de facto cross-assignments of error, provided they are reasonably recognizable as cross-assignments of error. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. LUBA will deny petitioners' motion to dismiss an intervenor-respondent's brief that is filed one day late, where (1) the late-filed brief is filed 21 days before oral argument and is only five pages long, (2) the late-filed brief largely supplements the city's timely filed 24-page brief, and (3) petitioners neither allege nor demonstrate that their substantial rights were prejudiced by the late filing. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. An intervenor-respondent may raise cross assignments of error in the response brief, but LUBA will only address those cross assignments of error if one or more of the petitioner's assignments of error are sustained and the decision is otherwise subject to reversal or remand. *Dauenhauer v. Jackson County*, 51 Or LUBA 539 (2006).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. When an intervenor-respondent raises cross-assignments of error in a response brief rather than assignments of error in a cross petition, LUBA will only address the cross-assignments of error if the challenged decision is reversed or remanded on any of the petitioner's assignments of error. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. It is consistent with LUBA's rules to advance in a response brief what corresponds to a cross-assignment of error under Oregon Rules of Appellate Procedure 5.57(2), *i.e.*, an argument that, if the relief sought by the petitioner is granted, LUBA should also reverse or remand a related intermediate ruling of the decision maker. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Because nothing in LUBA's rules prohibits including a cross-assignment of error in the response brief, LUBA rules governing response briefs contemplate inclusion of "other matters" in the response brief, and many cross-

assignments of error cannot practicably be advanced except in the response brief, it is consistent with LUBA rules to include a cross-assignment of error in a response brief. *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653 (2004).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. The principle of affirmative waiver of issues before the local decision maker described in *Newcomer v. Clackamas County*, 92 Or App 174, 758 P2d 369 (1988), does not apply to representations before LUBA, such as a respondent's representation that it would not file a response brief. To the extent a petitioner relies on such a representation to submit an abbreviated petition for review, it does so at its own risk. LUBA. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 799 (2004).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Respondents may not fail to respond to a subassignment of error in their brief and then provide a response for the first time at oral argument. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Where a response brief was filed a week after the brief was due, and petitioners were not made aware that the response brief had been filed until they appeared at oral argument and thus were not prepared to respond to the brief, petitioners' substantial rights were prejudiced, and LUBA will reject the response brief. *Griffin v. Jackson County*, 41 Or LUBA 159 (2001).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. A motion requesting permission to exceed the 50-page limit on briefs imposed by OAR 661-010-0030(2)(b) will be denied where the motion is filed three days before the brief is due and does not state how many additional pages are requested or indicate whether other parties oppose the motion. *Alliance for Responsible Land Use v. Deschutes Cty.*, 40 Or LUBA 561 (2001).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Where a state agency files a brief pursuant to ORS 197.830(7) on the date of the filing of the response brief, respondent will be allowed to file a supplemental response brief addressing the issues raised in the state agency brief. *Bruggere v. Clackamas County*, 36 Or LUBA 799 (1999).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. LUBA will deny respondents' request to file a response brief that exceeds LUBA's page limits, where respondents fail to demonstrate why an adequate response is impossible within the allotted limits, and allowing the request would be inequitable to other respondents who have complied with LUBA's rules. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 754 (1998).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. In addressing a substantial evidence challenge, where the response brief provides no transcripts or partial transcripts and provides no assistance in locating the portion of the audio tapes in the record where relevant testimony is located, LUBA will not search for testimony on audio tapes. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Where a land use decision is challenged on evidentiary grounds, LUBA relies on the parties to direct it to relevant evidence in

the record so that LUBA can determine whether there is substantial evidence in the record to support the challenged decision. *Johns v. City of Lincoln City*, 35 Or LUBA 421 (1999).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. The failure of findings to identify the evidence that supports the findings is not necessarily fatal, so long as the response brief or the briefs filed by other parties direct LUBA's attention to evidence in the record that supports those findings. *Johns v. City of Lincoln City*, 35 Or LUBA 421 (1999).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. New objections to the applicability of an identified approval criterion should be raised in a cross-petition for review, and are not properly presented in a response brief. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Arguments that the county should have based its decision on the subject application on statutory provisions, rather than on compliance with local standards, must be presented in a petition for review or cross-petition for review. Such arguments are not properly presented in a respondent's brief. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. A respondent or intervenor-respondent wishing to challenge some aspect of a land use decision in a LUBA appeal must either file a timely cross-petition for review or file a separate appeal. Cross assignments of error may not be included in a respondent's brief. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. LUBA will not grant a request for an extension of time to file respondents' briefs, over petitioner's objection, if the requested extension would necessitate a delay in oral argument and a delay in issuing LUBA's final opinion and order. *Waugh v. Coos County*, 26 Or LUBA 599 (1993).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Where a motion to intervene and intervenors' response brief were filed six days after respondents' briefs were due and were received by petitioners one week before oral argument, and intervenors' brief does not raise new issues warranting the filing of a reply brief, petitioners' substantial right to prepare and submit their case was not prejudiced by the untimely filing. *Alliance for Resp. Land Use v. Deschutes County*, 23 Or LUBA 476 (1992).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. OAR 661-10-050(3)(b) requires that intervenors-respondent file their brief within the time provided for filing the respondent's brief. Where the time for filing the respondent's brief is extended beyond the 42-day deadline established by OAR 661-10-035, intervenors-respondent are entitled to the same extension under OAR 661-10-050(3)(b). *Rhyne v. Multnomah County*, 23 Or LUBA 703 (1992).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Where intervenors' delay in filing their motion to intervene and brief results in no delay of the appeal and no prejudice to petitioners' substantial rights, the failures to file a timely motion to intervene and brief are technical violations

of LUBA's rules and provide no basis for denying the requested intervention. *Rhyne v. Multnomah County*, 23 Or LUBA 703 (1992).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Failure to file a respondent's brief within the time specified in an order issued by LUBA pursuant to OAR 660-10-026(5) is a technical violation of LUBA's rules which will not interfere with LUBA's review unless the substantial rights of parties are prejudiced. Where petitioners have ample time to review respondent's brief prior to oral argument, their substantial rights are not prejudiced. *Broetje-McLaughlin v. Clackamas County*, 21 Or LUBA 604 (1991).

27.5.2 LUBA Procedures/Rules – Briefs – Respondent's. Where (1) intervenor-respondent's brief is filed 21 days late, (2) petitioners receive the brief less than one full day before oral argument, and (3) providing petitioners an opportunity to submit argument in response to the brief would delay issuance of LUBA's final opinion, the late filing of intervenor's brief is not an excusable technical violation of LUBA's rules. *Knapp v. City of Jacksonville*, 20 Or LUBA 189 (1990).

27.5.3 LUBA Procedures/Rules – Briefs – State Agency. A state agency's participation in an appeal before LUBA pursuant to ORS 197.830(7) and OAR 661-010-0038 is limited to filing a state agency brief. A state agency participating in an appeal under those provisions may not file a motion to strike pleadings or otherwise participate as if it were a party to the proceedings. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

27.5.3 LUBA Procedures/Rules – Briefs – State Agency. "The proceeding" referenced in ORS 197.830(7) is the proceeding at LUBA, not the local proceeding. *Citizens for Florence v. City of Florence*, 34 Or LUBA 793 (1998).

27.5.3 LUBA Procedures/Rules – Briefs – State Agency. Where a state agency demonstrates that a petition for review places its "order, rule, ruling, policy or other action * * * at issue," the state agency is entitled to participate in that LUBA appeal "as if it were a party." *Citizens for Florence v. City of Florence*, 34 Or LUBA 793 (1998).

27.5.3 LUBA Procedures/Rules – Briefs – State Agency. Where a state agency's brief submitted under ORS 197.830(7) presents essentially the same issue that is presented in the petition for review, LUBA will consider the arguments presented in the state agency brief. *Citizens for Florence v. City of Florence*, 34 Or LUBA 793 (1998).

27.5.3 LUBA Procedures/Rules – Briefs – State Agency. Where the petition for review challenging a post-acknowledgment decision raises an issue concerning the propriety of the city relying on documents that were prepared for a pending periodic review, the issue of whether ORS 197.644(2) and OAR 660-025-0040 deprive LUBA of jurisdiction to review the challenged decision is necessarily presented and may be included in a state agency brief submitted under ORS 197.830(7). *Citizens for Florence v. City of Florence*, 34 Or LUBA 793 (1998).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. LUBA will not allow an amicus brief that consists only of the personal recollections of a participant to rulemaking, because such recollections do not constitute probative legislative history and would not significantly aid LUBA's review of an appeal where the meaning of the adopted rule is at issue. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. That an amicus is aligned with the interests of one party and the proposed amicus brief mostly repeats arguments already advanced by one party is not, in itself, a basis to reject amicus participation. *Campers Cove Resort LLC v. Jackson County*, 61 Or LUBA 491 (2010).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. Where the interests and positions asserted by a party and an amicus are not entirely the same and allowing an amicus to participate would require no delay in the appeal, LUBA may allow amicus participation. *Campers Cove Resort LLC v. Jackson County*, 61 Or LUBA 491 (2010).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. Where the arguments that a movant seeks to present are based on matters outside LUBA's scope of review, a party moving to appear as amicus has not established that LUBA's review would be significantly aided by amicus's participation in the appeal. *Biggerstaff v. Yamhill County*, 58 Or LUBA 678 (2009).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. LUBA will consider arguments in a brief filed by an amicus whose participation at LUBA has been denied, where the respondent's brief incorporates the arguments in the amicus brief and the respondent's brief with the incorporated material does not exceed the 50-page limit or otherwise violate any other rule limitation. *Herring v. Lane County*, 54 Or LUBA 417 (2007).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. LUBA will deny a motion to appear and file an amicus brief where the local government files a response brief that responds to assignments of error in the petition for review and the amicus fails to demonstrate that the amicus brief will significantly aid LUBA's review. *Herring v. Lane County*, 54 Or LUBA 772 (2007).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. The deadline for filing a motion to appear as an *amicus* is not a deadline that is rigidly enforced. Filing the motion to appear as *amicus* one day late, when the *amicus* brief was timely filed, does not prejudice other parties' substantial rights. *Nelson v. Curry County*, 48 Or LUBA 178 (2004).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. An *amicus'* assertion that it can knowledgeably discuss the history, legislative intent, and policy behind the approval criteria is sufficient to significantly aid LUBA's review. *Nelson v. Curry County*, 48 Or LUBA 178 (2004).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. LUBA will not remand a land use decision based on a legal argument that is presented in an amicus brief but is not presented by any other party to the appeal. *Concerned Citizens v. Malheur County*, 47 Or LUBA 208 (2004).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. A city's *amicus* brief will significantly aid LUBA's review of relevant issues, where the county's decision affects property within the UGB that was subsequently transferred to the city's planning jurisdiction. *Multi/Tech Engineering v. Josephine County*, 36 Or LUBA 767 (1999).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. A property owner's "specific and narrow interest" in property is not sufficient by itself to show that LUBA's review would be significantly aided by the property owner's participation as an *amicus*. *Cotter v. Clackamas County*, 35 Or LUBA 749 (1998).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. That LUBA will have only the perspective of the petitioner for review is always the case where the local government fails to respond and no party moves to intervene, and is not a valid reason by itself to delay the appeal so that an *amicus* brief may be filed. *Krieger v. Wallowa County*, 35 Or LUBA 742 (1998).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. Under OAR 661-010-0052, the purpose of *amicus* participation is to aid LUBA's review of relevant issues in the appeal. An *amicus* brief must be filed within the time for filing response briefs, and a motion for additional time to file an *amicus* brief to allow an opportunity to respond to arguments in the response briefs will be denied where the motion fails to demonstrate the extension is warranted. *D.S. Parklane Development, Inc. v. Metro*, 34 Or LUBA 790 (1998).

27.5.4 LUBA Procedures/Rules – Briefs – Amicus. LUBA will not grant a motion to file an *amicus* brief where the proposed *amicus* brief raises only an issue that is not raised in the petition for review. *Friends of Bryant Woods v. City of Lake Oswego*, 26 Or LUBA 594 (1993).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. OAR 661-010-0039 was amended in 2010 to require a request to file a reply brief be filed "within seven days of the date the respondent's brief is filed." That amendment created a filing deadline. Accordingly, LUBA will deny a motion to file a reply brief under OAR 661-010-0039 (effective in 2018), where petitioner did not move for an extension of time or obtain the written consent of the parties to file a late reply brief, petitioner filed the request to file its reply brief 48 days after the response briefs were filed and petitioner offered no explanation or justification for such an egregious delay, because the violation is not a mere "technical violation" under OAR 661-010-005. *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 1031 (2018).

27.5.5 Procedures/Rules – Briefs – Reply. While LUBA's rules do not provide for a reply to a response to motions, LUBA's rules also do not prohibit such a reply, and LUBA's practice is to consider such replies to the extent they address new issues raised in the response. *McLaughlin v. Douglas County*, 76 Or LUBA 77 (2017).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. While OAR 660-010-0039 suggests that a request to file a reply brief should be made in a motion that is separate from the reply brief itself, LUBA's rule does not expressly require that the request be made in a separate motion, and where the first paragraph of a petitioner's reply brief is in substance a request to file the reply brief, LUBA will consider that request as the motion. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where mootness is at issue, the jurisdictional arguments tend to evolve over the course of the pleadings or can be updated by more recent events. Where intervenor's reply memorandum adds a new argument to its motion to dismiss on the basis of mootness—that the appeals are moot based on a letter the intervenor recently sent to a state agency—and petitioners have responded to that new argument in a motion to strike, LUBA will consider both the reply memorandum and petitioners' countervailing arguments in resolving the pending motion to dismiss. *Bishop v. Deschutes County*, 76 Or LUBA 515 (2017).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where intervenor applied for, and received, two consecutive land use compatibility statements (LUCS), and argues it has now abandoned any reliance on the first LUCS decision, and instead has chosen to proceed with development pursuant to the second LUCS decision, the intervenor's current intent does not necessarily render the first LUCS decision ineffective. Unless and until the local government takes action to withdraw, revoke, or supersede the first LUCS decision, it remains as a potential basis for intervenor to proceed with development based on the LUCS as a final and binding county decision, and is therefore not moot. *Bishop v. Deschutes County*, 76 Or LUBA 515 (2017).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA routinely allows reply briefs to respond to waiver arguments and a reply brief is the preferable way to respond to waiver arguments so that the issue that is the subject of the waiver argument and the precise places in the record where petitioner believes the issue was raised can be clearly identified. *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will consider a reply to a response to record objections, where the reply is limited to legal arguments raised in the response to the

objections, and does not state additional record objections. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 638 (2016).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Failure to comply with OAR 661-010-0030(4), which requires that the petition for review demonstrate that the issues raised in the assignments of error were preserved during the proceedings below, is not a basis to reject the assignment of error or refuse to consider a reply brief that responds to a waiver challenge, absent a showing that noncompliance with OAR 661-010-0030(4) prejudices other parties' substantial rights or substantially impedes LUBA's review. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where a city asserts for the first time in its response brief that a previously unchallenged finding is an additional basis for denial, such an assertion constitutes a new matter, sufficient to permit a reply brief under OAR 661-010-0039. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where a city asserts for the first time in its response brief that petitioners should have proposed conditions to avoid denial of their application, such an assertion constitutes a new matter, sufficient to permit a reply brief under OAR 661-010-0039. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will deny a motion to strike a reply brief that both objects to the reply brief and responds to the merits of the assertions in the reply brief, without distinguishing between the two. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Under OAR 661-010-0075(8), where a deadline for filing a brief falls on a holiday, the filing must be performed on the next working day. Where the seven-day deadline for filing the reply brief fell on Thanksgiving, and the following day Friday all state offices were closed, including LUBA's, the "next working day" is the following Monday, so a reply brief filed on that Monday was timely filed. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Filing a reply brief on the date of oral argument, six days after the deadline for filing the reply brief, violates OAR 661-010-0039. That violation is not a technical violation of LUBA's rules, because it denies opposing parties a reasonable opportunity to prepare and submit their cases. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will not allow a reply brief that does not respond to a "new matter" raised in the response brief, but merely seeks to provide surrebuttal to arguments raised in the response brief. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351 (2013).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief cannot be used to advance a new challenge to a finding or portion of the decision that was unchallenged in the petition for review.

Where the response brief argues that an assignment of error should be rejected due to failure to challenge some portion of the decision, such as an alternative finding, the reply brief is limited to arguing that it was unnecessary to assign error to the unchallenged finding or that failure to challenge that finding in the petition for review should not affect LUBA's review of the assignment of error at issue. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where a disputed reply brief, a motion to strike and a motion to take evidence all revolve around an issue that is beyond LUBA's scope of review and has no bearing on a basis for reversal or remand of the challenged decision, LUBA will summarily deny the reply brief and motions. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will accept a reply brief that responds to a local government's argument that the petition for review failed to assign error to the local government's failure to provide DLCD with post-adoption notice of the decision as required by ORS 197.610(1). However, to the extent the reply brief includes arguments that purport to advance a new assignment of error or new basis for reversal or remand, LUBA will not consider such arguments. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. The OAR 661-010-0039 seven-day deadline for a petitioner to a reply brief is not measured from the deadline for filing respondent's response brief; it is measured from the date the response brief is actually filed. *Gravatt v. City of Portland*, 62 Or LUBA 382 (2011).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A dispute raised in the response brief over the nature of an assignment of error and LUBA's scope of review over that assignment of error is an appropriate subject for a reply brief. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. When a local government argues in its response brief that a petitioner is precluded from advancing particular assignments of error because the local government ruled below that the issues presented in those assignments of error were not preserved for the local appeal, a petitioner may file a reply brief responding to the potentially "new matter" that the assignments of error are waived, but a petitioner may not use the reply brief as a vehicle to allege that the local government erred in limiting the issues it considered during the local appeal. *Citizens for Responsible Development v. City of The Dalles*, 60 Or LUBA 12 (2009).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. While a reply brief is appropriate to respond to an argument that an assignment of error should be denied because petitioner failed to challenge an alternative finding, the reply must be limited to arguments as to why it was unnecessary to assign error to the alternative findings. The reply brief may not be used to challenge the alternative findings on the merits. *McGovern v. Crook County*, 60 Or LUBA 177 (2009).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. An oral objection at oral argument to a reply brief that was filed more than three weeks earlier is untimely, and will not be considered. *Oh v. City of Gold Beach*, 60 Or LUBA 356 (2010).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Filing a reply brief approximately three weeks after the response briefs were filed and approximately 10 days before oral argument is not a violation of OAR 661-010-0039. *Citizens for Responsible Development v. City of The Dalles*, 59 Or LUBA 369 (2009).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. As long as a reply brief does not merely reiterate or embellish arguments already made in the petition for review's jurisdictional section, a reply brief is warranted to respond to a jurisdictional challenge in the response brief. In addition, a reply is appropriate to respond to an argument that a LUBA decision that petitioner relies upon should be overruled. *Bohnenkamp v. Clackamas County*, 56 Or LUBA 17 (2008).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief is warranted to address waiver arguments in a response brief even if the challenged decision includes findings on waiver and the petition for review includes an extensive discussion of the waiver issue, where the response brief provides additional justifications for the county's waiver findings. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief is warranted where the response brief argues that the county made a potentially dispositive alternative finding that petitioner failed to challenge. While the reply brief cannot assert a new assignment of error or a new challenge to the decision, the reply brief may respond to the issue of whether the identified finding is a dispositive alternative finding and whether petitioner's failure to challenge that finding is fatal on that issue. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will not consider assignments of error that are raised for the first time in a reply brief. *Porter v. Marion County*, 56 Or LUBA 635 (2008).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where respondents argue that issues that are raised in the petition for review were not raised below and for that reason are waived, petitioner should respond to such waiver arguments in a reply brief or in their opening argument at oral argument. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief submitted at oral argument approximately 14 days after the response briefs are filed is not timely filed as required by OAR 661-010-0039 and will not be allowed. *Knapp v. City of Corvallis*, 55 Or LUBA 376 (2007).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief is warranted to reply to an argument in the response brief that some of the petitioner's assignments of error are barred by issue or claim preclusion. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. An argument in a response brief that LUBA should deny assignments of error alleging that findings addressing an approval criterion are inadequate, due to the petitioners' failure to challenge other, allegedly related findings, is a new matter that warrants a reply brief. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the petition for review assigns error to a county's failure to impose conditions of approval based on certain recommendations in a forest plan, an argument in the response brief that the challenged decision implicitly requires compliance with all recommendations in a forest plan is a "new matter" that warrants a reply brief. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. An argument in the response brief that disputes petitioners' interpretation of how two code provisions should be applied is not a "new matter" that warrants a reply brief. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Argument presented in a petitioner's post-oral argument letter is not timely submitted where that argument could have been included in the petitioner's reply brief. *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. An argument that petitioner failed to raise an issue during the local proceedings does not provide a basis to deny petitioner's reply brief, although it may provide a basis to deny the related assignment of error. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief that is filed one day after oral argument and nine days after the response brief is filed is not filed "as soon as possible" after the response brief is filed, pursuant to OAR 661-010-0039. *Jacobsen v. City of Winston*, 51 Or LUBA 602 (2006).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will not consider an argument that is presented for the first time in petitioner's reply brief, where that argument is not presented in response to a new issue raised in the respondent's brief. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where a local code imposes a reduced mitigation obligation as the percentage of all trees on the property with a diameter over 12 inches to be saved increases, a local government does not err is allowing an inventory of trees to be retained and removed to utilize whole numbers when measuring the diameter of trees to be removed and trees to be saved. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will reject, as untimely and prejudicial to the parties' substantial rights, a 15-page reply brief with 39 pages of appendices filed 14 days after the response brief and one day before oral argument. *Kane v. City of Beaverton*, 49 Or LUBA (512).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will not strike a petitioner's reply to a respondent's response to record objections where the reply addresses new issues raised in the response. *Papadopoulos v. Benton County*, 48 Or LUBA 634 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A petitioner may not assert a new basis for reversal or remand in the reply brief, or change the legal theory under which the petitioner seeks

reversal or remand. *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. ORS 197.835(4) does not excuse petitioner's failure to raise issues of compliance with a code approval standard based on the city's failure to list that standard in the notice of hearing, where the staff report and planning commission decision both cite and quote the standard as an applicable approval criterion, and petitioner offers no reason why issues of compliance with that standard could not have been raised before the city. *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where a five-page reply brief is filed eleven days after intervenors' brief and intervenors receive a copy approximately 48 hours before oral argument, intervenors' substantial rights are not prejudiced. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 508 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. When a petition for review alleges a local government committed multiple procedural errors that prejudiced substantial rights and the response brief faults the petition for review for failing to demonstrate that each procedural error prejudiced substantial rights, a reply brief is warranted to respond to that assertion. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief filed 12 days after the response brief was filed, and four days after oral argument, is not filed "as soon as possible" after the filing of the respondent's brief, as required by OAR 661-010-0039. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where a petition for review provides a bare or nominal statement of jurisdiction, a reply brief is generally warranted to respond to a jurisdictional challenge in the response brief, and LUBA's resolution of the jurisdictional challenge is not limited to the specific bases for jurisdiction specified in the petition for review. *Sievers v. Hood River County*, 46 Or LUBA 635 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA's unwillingness to conduct an unaided search of a 40-page reply brief to identify specifically the parts of the reply brief that inappropriately go beyond responding "to new matters raised in the respondent's brief" does not mean that additional legal theories for remand that are presented for the first time in the reply brief ripen into assignments of error or legal theories that are properly presented in a LUBA appeal. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the petition for review assumes that the challenged decision is quasi-judicial in character and the response brief challenges that assumption, and the correct characterization of the challenged decision may affect LUBA's analysis of petitioner's challenge to the adequacy of the county's findings, a reply brief is warranted to respond to the challenge in the response brief. *Manning v. Marion County*, 42 Or LUBA 56 (2002).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief filed immediately prior to oral argument and almost a month after the response brief is filed is not filed "as soon as possible," within the meaning of OAR 661-010-0039, and will not be accepted if the failure to comply with the rule violates the opposing parties' substantial rights. *Troy v. City of Grants Pass*, 41 Or LUBA 112 (2001).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief that is filed immediately prior to oral argument will be rejected when, as a result of the timing of the filing, opposing parties have no time to review the reply brief and prepare a response to it. *Troy v. City of Grants Pass*, 41 Or LUBA 112 (2001).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief is warranted where an assignment of error argues that a code provision was misinterpreted, thus invoking LUBA's review under ORS 197.835(9)(a)(D), and a response brief assumes the merits of that assignment but argues that it should nonetheless fail because petitioner has not made additional allegations of prejudice to petitioner's substantial rights that are relevant only if LUBA reviews the assignment as an alleged procedural error under ORS 197.835(9)(a)(B). *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. OAR 661-010-0039 allows a reply brief if it is filed "as soon as possible" after the response briefs are filed. A reply brief filed and served three working days after the response briefs were filed is timely filed under the rule. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111 (2001).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where petitioner alleges in the petition for review that the decision maker failed to adopt *any* findings addressing the comprehensive plan and the respondent's brief identifies the allegedly missing findings, LUBA will not allow petitioner to file a reply brief expanding the assignment of error to challenge the *adequacy* of those findings. *Hubenthal v. City of Woodburn*, 38 Or LUBA 935 (2000).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Responses warranting a reply brief pursuant to OAR 661-010-0039 tend to be arguments that assignments of error should fail regardless of the merits, based on facts or authority extrinsic to those merits. Arguments in a response brief that a proposed facility is "grandfathered in" and that petitioner is collaterally estopped from raising certain issues by virtue of a prior decision allowing that facility are new matters warranting a reply brief. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Untimely submission of a motion to file a reply brief is not a technical violation of LUBA's rules where the length of the proposed reply brief and the proximity of oral argument is such that respondents do not have adequate time to respond to the motion and prepare to respond to the proposed reply brief at oral argument. A 32-page reply brief filed two days before oral argument violates respondents' substantial rights to the speediest practicable review of the land use decision. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the response brief points out that the petition for review challenges only one of the county's alternative bases for modifying an approval standard, the response brief has not raised a "new matter" within the meaning of OAR 661-010-0039. A reply brief is not a means to assign error to findings that were not challenged in the petition for review, and arguments in the response brief based on such findings are not new matters warranting a reply brief. *Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106 (1999).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. If a reply brief includes positions that go beyond those that are properly included in a reply brief under OAR 661-010-0039, those positions are subject to a motion to strike. Where there is time to raise such objections in a motion to strike before oral argument, it is not appropriate to delay raising such objections until oral argument. *The Friends of Clean Living v. Polk County*, 35 Or LUBA 830 (1999).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A response brief raises "new matters" within the meaning of OAR 661-010-0039 when it argues that assignments of error in the petition for review should fail, regardless of the merits of those assignments, based on facts or authority not involved in those assignments. Where the response brief responds to the merits of an assignment of error, that response is not a "new matter" for purposes of OAR 661-010-0039. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. An argument in the response brief that the Transportation Planning Rule does not require amendments to the city's transportation plan until that plan has been formally adopted is a "new matter" warranting a reply brief pursuant to OAR 661-060-0039. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where a respondent moves for permission to file a supplemental brief but suggests no basis under LUBA's rules for allowing what appears to be additional argument, the motion will be denied. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief is not allowed pursuant to OAR 661-010-0039 where the brief merely embellishes 20 pages of argument regarding jurisdiction and standing in the petition for review, rather than responding to issues raised for the first time in the respondent's brief. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Petitioner's request to submit a reply brief will not be allowed under OAR 661-10-039, where petitioner does not address new issues raised by respondent's brief, and the reply brief simply embellishes arguments already advanced in the petition for review. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. OAR 660-10-039 allows petitioner to file a reply brief when a new matter is raised in the response brief, notwithstanding intervenor-respondent's belief that petitioner should have anticipated that the matter would be raised in the response brief. *Koo v. Polk County*, 33 Or LUBA 487 (1997).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. The timeline imposed by our rules affecting reply briefs is intended less to provide a second opportunity for respondents to research issues already argued in their own brief than to provide a reasonable opportunity for respondents and this Board to review the reply brief. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Petitioner's motion to file a reply brief will be denied under OAR 661-10-039 where the county does not raise a new issue for petitioner to address in the reply brief. *Still v. Marion County*, 32 Or LUBA 40 (1996).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. If the respondent's brief challenges the petitioner's standing and LUBA's jurisdiction, LUBA will allow a reply brief. *Boom v. Columbia County*, 31 Or LUBA 318 (1996).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Failure to file a request to file a reply brief "as soon as possible" after the respondents' brief is filed is a technical violation of LUBA's rules which, under OAR 661-10-005, does not affect LUBA's review unless the substantial rights of the parties are prejudiced. *Shaffer v. City of Salem*, 29 Or LUBA 592 (1995).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. When a contention that LUBA lacks jurisdiction is made for the first time in the respondent's brief, a reply brief concerning the subject of LUBA's jurisdiction is warranted. *Shaffer v. City of Salem*, 29 Or LUBA 592 (1995).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Petitioners may not make a new challenge to the appealed decision in a reply brief, and thereby effectively add an assignment of error to the petition for review. *Shaffer v. City of Salem*, 29 Or LUBA 592 (1995).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the petition for review includes allegations concerning the content of a tape in the record, and respondents object that petitioner failed to attach a transcript of the relevant portions of the tape to the petition for review, LUBA will allow petitioner to submit a transcript in a reply brief, so long as respondents have adequate time to review the tape and transcript prior to oral argument. *Shaffer v. City of Salem*, 29 Or LUBA 592 (1995).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Arguments contained in respondents' briefs, that petitioner failed to exhaust local appeals and is precluded from raising particular issues before this Board, are new matters not contained in the petition for review which warrant the filing of a reply brief. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the respondent's brief contains arguments that petitioner waived certain issues raised in the petition for review, petitioner will be allowed to file a reply brief to respond to those waiver arguments. *Caine v. Tillamook County*, 24 Or LUBA 627 (1993).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Arguments in respondent's brief that petitioner waived issues raised in the petition for review by failing to raise those issues during the local proceedings constitute new matters that petitioners could not have anticipated in the petition for

review, thus warranting the allowance of a reply brief. *Glisan Street Associates v. City of Portland*, 24 Or LUBA 621 (1993).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Under OAR 661-10-039, it is appropriate to grant a motion to file a reply brief to allow petitioner to respond to issues raised in respondents' briefs concerning standing, jurisdiction, and attachment of documents not in the record. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will not reject as untimely a motion to file a reply brief that is filed 17 days after the response briefs were filed, because having to review and prepare to respond to a seven page reply brief received four days before oral argument does not prejudice respondents' substantial rights. OAR 661-10-005. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the respondent's brief includes arguments that code sections relied upon in the petition for review are inapplicable, a motion to file a reply brief will be allowed. *Murray v. Clackamas County*, 22 Or LUBA 247 (1991).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. After the petition for review is filed, respondents may, in their response brief or in a motion to dismiss, identify disputed allegations of fact, and explain why under their version of the facts petitioners lack standing. Petitioners may then request permission to file a reply brief to respond to respondent's legal arguments, move for an evidentiary hearing to present facts establishing standing or do both. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Argument in respondent's brief that the remedy petitioners seek is unclear, or that petitioners failed to object to statutes, and citation in respondent's brief of cases which petitioners believe irrelevant are not new matters which warrant the filing of a reply brief, but rather are matters to which petitioners can adequately respond at oral argument. *Dolan v. City of Tigard*, 20 Or LUBA 411 (1991).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief is unwarranted under OAR 661-10-039, if it simply embellishes arguments advanced in the petition for review. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. OAR 661-10-039 requires petitioners to demonstrate a need for a reply brief. Although it is desirable to have a full explanation of the need for a reply brief in petitioner's motion to file a reply brief, LUBA will also consider oral argument in support of the motion in determining whether the need for a reply brief has been demonstrated. *Knapp v. City of Jacksonville*, 20 Or LUBA 189 (1990).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Excerpts of transcripts of the local government's proceedings below, which are submitted to LUBA for the first time as attachments to respondent's brief, are "new matters raised in the respondent's brief" to which petitioner may respond in a reply brief. OAR 661-10-039. *Columbia Steel Castings v. City of Portland*, 19 Or LUBA 338 (1990).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Although LUBA's rules do not explicitly recognize evaluating jurisdiction as a purpose for considering evidence outside the record under OAR 661-010-0045, in an appeal of a local government approval of a utility public way use permit authorizing installation of telecommunication-related facilities, where the local government alleges that LUBA does not have jurisdiction because of the location of the facilities, LUBA will consider as evidence outside the record (1) a marked version of a portion of the local government's adopted zoning map showing the general location of the facilities and (2) a recorded plat including the subject property. In addition, where the petitioners argue that LUBA has jurisdiction because the challenged decision falls within the scope of the local government's zoning ordinance and telecommunications ordinance, LUBA will consider as evidence outside the record (1) details related to the dimensions and location of the facilities in determining whether a given local land use process is applicable to the facilities and (2) a screenshot related to the definition of small cell facilities in determining whether the facilities installed fall within the class of equipment subject to the zoning ordinance. *Vaccher v. City of Eugene*, 80 Or LUBA 10 (2019).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will decline to dismiss an appeal as moot based on extra-record evidence that the factual predicate for four of the assignments of error has been eliminated, where even if the evidence were properly before LUBA, the movant has not established that the changed factual predicate fully resolves the four assignments of error, or otherwise would render LUBA's review of no practical effect. *McNichols v. City of Canby*, 78 Or LUBA 1090 (2018).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will decline to exercise its discretion to grant petitioners an opportunity on remand from the Court of Appeals to offer additional evidence to establish standing to appeal a land use decision to LUBA under ORS 197.830(3), where petitioners had multiple opportunities in the initial appeal to offer the additional evidence, which was at all times within petitioners' possession, but failed to do so. *Rogue Advocates v. Jackson County*, 75 Or LUBA 174 (2017).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Exercise of LUBA's discretion to allow petitioners an opportunity on remand from the Court of Appeals to offer additional evidence to establish standing to appeal to LUBA would be inconsistent with the legislative policy at ORS 197.805 that time is of the essence in reaching finality in land use matters, because granting the motion would entail a lengthy round of pleadings, discovery, depositions, and resolution of conflicting evidence that would significantly delay reaching finality in the appeal. *Rogue Advocates v. Jackson County*, 75 Or LUBA 174 (2017).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Exercise of LUBA's discretion to allow petitioners an opportunity on remand from the Court of Appeals to offer additional evidence to establish standing to appeal to LUBA would be inconsistent with the legislative policy at ORS 197.805 that LUBA's decisions be made consistent with sound principles of judicial review, because it would depart from the general principle that LUBA's jurisdiction over the appeal must be established prior to LUBA's issuance of its final opinion resolving the merits of an appeal. *Rogue Advocates v. Jackson County*, 75 Or LUBA 174 (2017).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA may consider documents outside the record, including copies of earlier land use decisions regarding the subject property, that are useful in resolving a jurisdictional challenge to the appeal of a land use compatibility statement (LUCS), even in the absence of a motion to take evidence under OAR 661-010-0045. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will deny a motion to take evidence that seeks to provide citations to the record to support arguments on the merits set out in the petition for review, because the motion is similar to an addendum to the petition for review for which no permission to file has been sought or granted, where the petitioners do not demonstrate that their motion satisfies OAR 661-010-0045. *Martin v. City of Central Point*, 74 Or LUBA 312 (2016).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. A motion to consider extra-record evidence under ORS 197.835(2)(b) to establish the bias of a *planning commissioner* in favor of a permit application will be denied where the motion is submitted in an appeal of a *city council* decision regarding a related but different permit application. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a disputed reply brief, a motion to strike and a motion to take evidence all revolve around an issue that is beyond LUBA's scope of review and has no bearing on a basis for reversal or remand of the challenged decision, LUBA will summarily deny the reply brief and motions. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where the local government concedes that *ex parte* contact occurred but there exists a disputed allegation of fact concerning the number of *ex parte* contacts that occurred, when they occurred and the substance of those contacts, LUBA will grant a motion to take evidence not in the record to assist in resolving that disputed factual allegation. *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will deny as unnecessary a motion to take evidence to accept a supplemental record that includes a copy of the notice of adoption sent to DLCD, which is required to be included in the record pursuant to OAR 660-010-0025(1)(d). LUBA will accept the untimely filed supplemental record over the petitioner's objection, where the untimely submission does not prejudice any party's substantial rights. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. While LUBA has held that a motion to take evidence under OAR 661-010-045 is not necessary to consider affidavits or evidence outside the record for the limited purpose of establishing LUBA's *jurisdiction* over the challenged decision, a motion to take evidence is necessary to consider affidavits offered to establish whether LUBA's *scope of review* includes a particular issue. *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. OAR 661-010-0045(1) allows LUBA to consider evidence that is not in the record that is submitted by the local government in a LUBA appeal, "in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record," if resolving those factual disputes could support reversal or remand of the decision. But OAR 661-010-0045(1) does not provide a way for a party to rebut factual conclusions adopted by the local government. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA is not bound to accept as true factual assertions in petitioner's affidavit in the record. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. A hearing to consider extra-record evidence under OAR 661-010-0045 is not necessary to resolve the parties' factual disputes surrounding a city's decision to adopt its final decision at a noon rather than its evening meeting, where a digital recording in the record establishes that parties were orally advised that final action might occur at the noon rather than the evening meeting on a specified date, and that oral notice was sufficient to establish that the city committed no procedural error in acting at its noon meeting. *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a motion to take evidence is filed regarding an outstanding record objection and the content of the local record, the motion will be denied as moot where the motion and pleadings provide sufficient information to determine the content of the record. *Rickreall Community Water Assoc. v. Polk County*, 52 Or LUBA 772 (2006).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will not consider an argument that an annexation is barred by a statute that was adopted and took effect after the annexation was approved, where LUBA would be required to consider extra-record evidence to do so, the local government objects to LUBA's consideration of that extra-record evidence and petitioner does not file a motion requesting an evidentiary hearing at LUBA. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a city permit decision does not include findings addressing applicable criteria that may lead to a requirement for a geological study, remand is appropriate for the city to adopt the required findings. However, LUBA will not grant a motion that requests LUBA to go further and consider extra-record evidence concerning whether the geological study is necessary; that determination is for the city to make in the first instance. *Jebousek v. City of Newport*, 51 Or LUBA 93 (2006).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a party seeks an evidentiary hearing to challenge whether an individual who submitted a letter on behalf of an organization in a local land use permit proceeding was in fact authorized to submit that letter on the organization's behalf, the moving party must provide more than speculation that the individual

was not authorized to appear on behalf of the organization. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where an individual who submits a letter in a local land use permit proceeding in which he represents that the letter is submitted "on behalf of" an organization, but the letter does not expressly state that the individual is "authorized" to make the written appearance for the organization, that failure and a party's speculation that such authorization is "implausible" are not sufficient reasons to authorize an evidentiary hearing to consider extra-record evidence regarding whether the individual was actually authorized to appear on behalf of the organization. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. A petitioner who seeks to present extra-record evidence to LUBA to show that a permit denial was the product of bias or prejudgment, rather than the application of relevant approval standards, must make a substantial showing to establish that there is a reasonable basis to believe that the search for extra-record evidence will lead to evidence of such bias or prejudgment. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Although LUBA's preference and practice is to address motions under OAR 661-010-0045 after the parties have submitted briefs on the merits, where the parties have adequately briefed the legal issues, the factual disputes between the parties are relatively clear, and further briefing will not put the Board in a better position to resolve the motion, LUBA may resolve the motion without requiring the parties to file the petition for review and response brief. *Grabhorn v. Washington County*, 48 Or LUBA 657 (2005).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. When a party submits an affidavit in response to a jurisdictional challenge and the assertions in that affidavit are unchallenged, absent some other reason to question those assertions LUBA will accept them as true for purposes of resolving a jurisdictional issue. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Although it is not essential that disputed factual allegations be disclosed in the parties' briefs in order to grant a motion to take evidence under OAR 661-010-0045, in the absence of the parties' briefs the Board will often lack the context and developed argument necessary to evaluate whether an evidentiary proceeding under OAR 661-010-0045 is warranted. *Pynn v. City of West Linn*, 42 Or LUBA 581 (2002).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will deny as premature a motion to take evidence under OAR 661-010-0045 filed before the parties have submitted the petition for review and response brief, where the moving party fails to demonstrate the necessity of resolving the motion in the absence of the parties' briefs. *Pynn v. City of West Linn*, 42 Or LUBA 581 (2002).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. In demonstrating that a party was entitled to have the evidentiary phase of a local land use proceeding reopened under *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), one of the things a party must show is that the party would submit specific evidence to respond directly to an unanticipated interpretation in the final written land use decision. However, this burden is met at LUBA by identifying the evidence; a party need not move for an evidentiary hearing at LUBA to actually present that evidence to LUBA. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 560 (2001).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. When undisputed evidence in the record establishes that petitioner appeared below, and therefore establishes petitioner's standing before LUBA, the Board will not take evidence outside of the record for purposes of establishing standing before the Court of Appeals, because such evidence will not "affect the outcome" of LUBA's proceedings, within the meaning of OAR 661-010-0045(2). *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 247 (2002).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will deny a motion to consider evidence not in the record where the dispute between the parties concerns the accuracy or validity of a map that is included in the record rather than whether that map is properly included in the record. Challenges to the accuracy or validity of the map must be made during the local proceedings. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. LUBA will deny a motion to consider evidence that is not included in the record, where the moving party fails to demonstrate that any of the criteria for granting such a motion under OAR 661-010-0045(1) are met and the evidence the moving party seeks to have included does not render the appeal moot. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where the county's tape recording equipment failed during the receipt of relevant oral testimony, and where no one disputes the content of that testimony or that it was in fact given, LUBA will deny a motion to take evidence not in the record. In that circumstance LUBA will assume that all parties agree that uncontested testimony was given, and would have been disclosed by the tapes, if they were not defective. *Hal's Construction, Inc. v. Clackamas County*, 37 Or LUBA 1037 (2000).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a party moves for an evidentiary hearing, LUBA concludes that the requirements for an evidentiary hearing at OAR 661-010-0045(2) are met and no party objects, LUBA will accept documents attached to the motion for evidentiary hearing in lieu of a hearing. *Dornan v. Yamhill County*, 34 Or LUBA 747 (1998).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. When the local government decision maker reviews allegations of procedural irregularities and finds, based on substantial evidence, that no such irregularities exist, LUBA is bound by the finding. *Huntzicker v. Washington County*, 29 Or LUBA 587 (1995).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Unless an evidentiary hearing is granted, LUBA's review is limited to the local record. Therefore, if a motion for evidentiary hearing is not filed, LUBA will not consider discussion in a party's brief or oral argument concerning matters not in the local record. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. In resolving objections to the record, LUBA determines only whether the items in question are properly part of the local government record. Parties who wish to submit evidence outside the local government record to LUBA under ORS 197.830(13)(b) must file a motion for evidentiary hearing pursuant to OAR 661-10-045(2). *Tylka v. Clackamas County*, 28 Or LUBA 712 (1994).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where petitioner had an opportunity during the local proceedings to object to the completeness of a hearings officer's disclosure of *ex parte* contacts, but failed to do so, petitioner's motion for an evidentiary hearing at LUBA to present evidence concerning those *ex parte* contacts will be denied. *Jones v. Lane County*, 27 Or LUBA 654 (1994).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where a party's argument is based solely on a document not in the local record, another party objects to LUBA's consideration of that document, and the party making the argument does not move for an evidentiary hearing pursuant to ORS 197.830(13)(b) or offer any other basis on which LUBA might consider the document, LUBA will reject the argument. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where petitioner withdraws its motion for evidentiary hearing, but respondents wish to have an evidentiary hearing, respondents must file their own motion for evidentiary hearing in accordance with OAR 661-10-045. *Louisiana Pacific v. Umatilla County*, 25 Or LUBA 818 (1993).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. It is the practice at LUBA for a party that wishes LUBA to consider a document not in the local record, for one of the purposes listed in ORS 197.830(13)(b) or OAR 661-10-045(1), to attach that document to its brief and explain in its brief why LUBA should consider the document. If another party does not object to LUBA considering the document, the document becomes part of LUBA's record and is considered for the requested purpose. If an objection is made, the party offering the document may file a motion for evidentiary hearing under OAR 661-10-045. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where allegations of fact made in petitioner's briefs are critical to establishing LUBA's jurisdiction, respondents dispute those allegations, and petitioner neither provides citations to the record, affidavits or other evidence supporting the allegations nor files a motion for evidentiary hearing seeking to introduce evidence to support the allegations, LUBA will dismiss the appeal. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where petitioner seeks to establish through an evidentiary hearing that all nonresidential uses allowed outright or conditionally under the existing zone are not economically feasible on the subject property, but has not sought approval of a plan and zone map amendment which would allow residential development of the subject property, petitioner's state constitution taking claim is not ripe for adjudication and petitioner's motion for evidentiary hearing will be denied. *Dority v. Clackamas County*, 23 Or LUBA 384 (1992).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. To enable LUBA to grant a request for an evidentiary hearing, petitioners must establish, by affidavit or otherwise, that the facts to be presented at the evidentiary hearing will affect the outcome of the appeal. *Barber v. Marion County*, 23 Or LUBA 71 (1992).

27.6.1 LUBA Procedures/Rules – Evidentiary Hearings – Generally. Where petitioners assign as error in their petition for review unconstitutionality and procedural irregularities not shown in the record and attach to their motion for evidentiary hearing a document they seek to introduce into the LUBA record in support of their assignment of error, and the other parties do not dispute the identity of this document, LUBA may grant the motion for evidentiary hearing for the limited purpose of including in its record the document attached to petitioners' motion. *Torgeson v. City of Canby*, 19 Or LUBA 511 (1990).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Although LUBA's rules do not explicitly recognize evaluating jurisdiction as a purpose for considering evidence outside the record under OAR 661-010-0045, in an appeal of a local government approval of a utility public way use permit authorizing installation of telecommunication-related facilities, where the local government alleges that LUBA does not have jurisdiction because of the location of the facilities, LUBA will consider as evidence outside the record (1) a marked version of a portion of the local government's adopted zoning map showing the general location of the facilities and (2) a recorded plat including the subject property. In addition, where the petitioners argue that LUBA has jurisdiction because the challenged decision falls within the scope of the local government's zoning ordinance and telecommunications ordinance, LUBA will consider as evidence outside the record (1) details related to the dimensions and location of the facilities in determining whether a given local land use process is applicable to the facilities and (2) a screenshot related to the definition of small cell facilities in determining whether the facilities installed fall within the class of equipment subject to the zoning ordinance. *Vaccher v. City of Eugene*, 80 Or LUBA 10 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. For purposes of taking evidence not in the record under OAR 661-010-0045, a petitioner cannot establish that a person who is not a member of the decision-making body engaged in undisclosed *ex parte* contacts in violation of ORS 227.180(3), and there can be no legally significant or reversible bias on the part of such a person. *Carroll v. City of Malin*, 80 Or LUBA 1001 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. For purposes of taking evidence not in the record under OAR 661-010-0045, where a local government denies an application to rezone property, mere allegations that (1) a decision-maker "habitually engaged in *ex parte* contacts" that they did not then disclose in compliance with ORS 227.180(3), (2) the decision-maker previously moved to rezone a neighboring property, (3) the local government rezoned the neighboring property "by using procedures and requirements that paled in comparison" to those used in evaluating the subject application, and (4) the decision-maker voted against the subject application are insufficient to establish that the decision-maker may have engaged in *ex parte* contacts or been motivated by improper biased. *Carroll v. City of Malin*, 80 Or LUBA 1001 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. For purposes of taking evidence not in the record under OAR 661-010-0045, allegations that a decision-maker is related to (1) individuals who own property close to the subject property and who oppose the application and (2) the city recorder are insufficient to establish that the decision-maker may have engaged in *ex parte* contacts or that the decision-maker's vote denying the application may have been motivated by improper bias. *Carroll v. City of Malin*, 80 Or LUBA 1001 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Pursuant to ORS 197.835(2), LUBA may make its own factual findings as to whether an appeal was timely filed, which is a jurisdictional question. Accordingly, LUBA may consider evidence outside the record for the limited purpose of resolving disputes regarding whether an appeal was timely filed, even in the absence of a motion to take evidence outside the record under OAR 661-010-0045. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will consider an affidavit from a party's attorney regarding dates and certain actions that occurred related to notice of the local government's decision at issue in the appeal for the limited purpose of resolving disputes regarding LUBA's jurisdiction. *PGE v. City of West Linn,* 79 Or LUBA 213 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A party asserting a procedural error must demonstrate that the procedural error was objected to during the proceedings below, if there was an opportunity to lodge an objection. Accordingly, where a dispute may exist regarding whether petitioners objected to the county's process during the proceedings below, LUBA will allow a motion to take evidence outside the record to consider a document for the limited purpose of allowing petitioners to cite to that document to establish, if the point is disputed in a response brief, that petitioners attempted to lodge objections to the county's process. *Eng v. Wallowa County,* 79 Or LUBA 1024 (2019).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Nothing in LUBA's rules requires that returned mail envelopes be included in the record. Returned mail documentation does not fall within the description of "[n]otices of * * * adoption of a final decision * * * mailed during the course of the land use proceeding" at OAR 661-010-0025(1)(d). *Conte v. City of Eugene,* 78 Or LUBA 1001 (2018).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Petitioner failed to establish a basis for LUBA to take evidence under OAR 661-010-0045 where the city responded to petitioner's public records request for a copy of draft design guidelines by explaining that the city's records do not include a copy of the draft guidelines and that the city never adopted the draft guidelines as land use regulations. LUBA will deny petitioner's motion to take evidence where there is no disputed factual allegation in the parties' briefs concerning "procedural irregularities not shown in the record" and petitioner's motion is not directed at evidence of "procedural irregularities," but, instead, is an attempt to rebut the city's response and findings regarding the draft guidelines. *Nicita v. City of Oregon City,* 78 Or 1007 (2018).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. In a dispute over attorney fees charged to petitioner, where the city attempts to introduce evidence explaining the accounting for the actual attorney fees charged, asserting that the new evidence relates to disputed facts concerning "other procedural irregularities not shown in the record" OAR 661-010-0045(1), but does not assert that the city's prior procedures constitute "procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision," or otherwise explain on what grounds the Board can consider new evidence, LUBA will deny a motion to take evidence not in the record as the evidence the city seeks to introduce does not fall within the grounds to take evidence under OAR 661-010-0045. *Nicita v. City of Oregon City,* 78 Or LUBA 1084 (2018).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The movant for a motion to take evidence under OAR 661-010-0045 fails to demonstrate that the motion is warranted based on "procedural irregularities not shown in the record" where the movant fails to

identify any procedure that was violated with respect to the evidence at issue. *Conte v. City of Eugene*, 77 Or LUBA 547 (2018).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. OAR 661-010-0045(1) provides that LUBA may take evidence to resolve disputes regarding the content of the record. Under OAR 661-010-0045(1), LUBA will grant a motion to take evidence to consider evidence regarding the submission of testimony to the decision-maker, where there is an unresolved dispute regarding whether the decision-maker rejected the proffered testimony. *Oregon Shores Conservation Coalition v. Coos County*, 75 Or LUBA 534 (2017).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where the petitioners file a motion to take evidence for LUBA to consider affidavits and other documents to establish that petitioners filed a timely appeal and are adversely affected, along with a reply brief addressing the same jurisdictional issues, petitioners have sufficiently "explain[ed] with particularity" the facts petitioners seek to establish for purposes of OAR 661-010-0045(2)(a). *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence that seeks to provide citations to the record to support arguments on the merits set out in the petition for review, because the motion is similar to an addendum to the petition for review for which no permission to file has been sought or granted, where the petitioners do not demonstrate that their motion satisfies OAR 661-010-0045. *Martin v. City of Central Point*, 74 Or LUBA 312 (2016).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. While LUBA's rule allowing a motion to take evidence not in the record can be invoked to allow LUBA to consider documents outside the record in order to resolve disputes over the content of the record, such a motion is not a basis to strike a land sale contract that is indisputably part of the record on the grounds that the contract is incomplete or is not evidence that the decision maker should have relied upon. *Grimstad v. Deschutes County*, 74 Or LUBA 610 (2016).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Accepting into the local evidentiary record of a land sale contract that is arguably incomplete or suffers from defects is not a "procedural irregularity not shown in the record" that would warrant a motion to take evidence not in the record under OAR 661-010-0045. *Grimstad v. Deschutes County*, 74 Or LUBA 610 (2016).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence under OAR 661-010-0045(1) where there is "no disputed factual allegation not shown in the record" where the local government and all parties agree the movant submitted an email to the planning director, that email was rejected by the planning commission, and that action is shown in the record. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence outside the record, intended to establish that a nonconforming compost facility was operating on the property in 1984 when the property was zoned EFU, where the basis

for the motion to take evidence is an argument that the hearings officer committed a "procedural irregularity" not shown in the record in finding that the date the EFU zone was applied is the relevant date for determining whether the nonconforming use was in existence. If the hearings officer erred in determining the relevant date that contrary zoning was applied, that error might provide a basis for remand, but would not constitute a "procedural irregularity" not shown in the record that would allow the movant to submit new evidence to LUBA intended to establish that the use existed in 1984. *Grabhorn v. Washington County*, 72 Or LUBA 443 (2015).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence to consider an affidavit regarding whether building plans were "placed before" the final decision-maker and thus are part of the local record, where there is no factual dispute that the building plans were not placed before the final decisionmaker, and whether the plans belong in the record depends on a legal argument that the plans were included in the record by operation of law. A motion to take evidence is warranted only where there are disputed factual allegations; a dispute over the legal consequences of undisputed facts is not a basis for LUBA to consider extra-record evidence. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An affidavit indicating that one week after issuing the final decision a decision maker knew that the applicant had agreed to the proposed conditions is an insufficient showing that an *ex parte* contact might have occurred during the hearing to warrant depositions under OAR 661-010-0045, where there is no indication when or how the decision maker acquired that knowledge. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Even assuming that a staff member conveyed to a decision maker during the proceedings below that the applicant had agreed to proposed conditions, that communication is not the kind of communication that requires the decision maker to disclose and offer other parties the opportunity to rebut. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. To constitute an *ex parte* communication that obligates a local government to provide an opportunity for rebuttal, the content of the communication must include something concerning the land use decision at issue that is capable of rebuttal. Where the only content of the alleged communication is that the applicant has agreed to city-proposed conditions, there is simply nothing to rebut or respond to. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion under OAR 661-010-0045 to depose unnamed officials of a regional transit agency, where the depositions are for the purpose of demonstrating that the challenged land use decision is inconsistent with a previous land use decision adopted by the regional transit agency, and that issue has no bearing on whether the land use standards that the city applied or should have applied are "land use standards that do not require interpretation or the exercise of policy or legal judgment" within the ORS 197.015(10)(b)(A) exception to LUBA's jurisdiction. *Lazarus v. City of Milwaukie*, 67 Or LUBA 475 (2013).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence of a city's post-adoption actions to enforce a sign ordinance on appeal, where the petitioner's challenge to the sign ordinance is necessarily a facial challenge, and the petitioner fails to demonstrate that evidence of the city's post-adoption enforcement actions would be relevant or determinative of any facial challenge. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence that a city has applied its sign ordinance by its terms to require that temporary signs be constructed in a "colonial post style," where the petitioner advances a facial challenge to the ordinance itself, and evidence that the city has applied the ordinance by its terms could add nothing to any facial constitutional challenge to the ordinance. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence that a city has applied its sign ordinance in an unequal or discriminatory fashion, where the petitioner fails to demonstrate that the city's actual post-hoc pattern of enforcement is probative to a facial challenge to the sign ordinance itself. *Claus v. City of Sherwood*, 66 Or LUBA 460 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A motion to consider extra-record evidence under ORS 197.835(2)(b) to establish the bias of a *planning commissioner* in favor of a permit application will be denied where the motion is submitted in an appeal of a *city council* decision regarding a related but different permit application. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A petitioner's motion for an evidentiary hearing to establish bias on the part of a planning commissioner will be denied where (1) the decision on review is a city council decision that followed a *de novo* review of a planning commission decision, (2) the only claim of impropriety on the part of the planning commission that might have tainted the record on review was a planning commission majority vote to refuse to consider evidence offered by petitioner, and (3) the allegedly biased planning commissioner voted with the planning commission minority to accept the evidence offered by petitioner. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. OAR 661-010-0045(1) limits LUBA's consideration of extra-record evidence to circumstances where there are "disputed factual allegations" in the parties briefs concerning, among other things, standing. Where there is no dispute in the parties' briefs regarding petitioner's standing to appeal to LUBA, LUBA will deny a motion to take evidence outside the record to consider evidence of a lease that the petitioner asserts may be necessary to establish injury and hence constitutional standing under federal law. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where the local government concedes that *ex parte* contact occurred but there exists a disputed allegation of fact concerning the number of *ex parte* contacts that occurred, when they occurred and the substance

of those contacts, LUBA will grant a motion to take evidence not in the record to assist in resolving that disputed factual allegation. *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence to consider e-mails between the petitioner and the local government to establish that the local government was aware following the proceedings below that it had failed to provide timely notice of hearing and notice of the decision to DLCD, where there is no factual dispute that the local government did not provide the notice of hearing or that the local government failed to provide timely notice of the decision, only a legal dispute as to whether such notices were required and if so the consequences of failure to provide them. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to consider petitioner's affidavit regarding how his testimony to the planning commission would have been different if he had not been misinformed regarding the time limits, where the decision before LUBA is the city council decision conducted after an evidentiary hearing, and petitioner does not explain why any error committed by the planning commission was not cured by the proceedings before the city council. *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Bias on the part of the city council, if proven, may warrant reversal or remand, and is a proper subject for a motion to take evidence. However, to demonstrate that the grounds to take evidence not in the record to demonstrate bias are met, it is not enough to allege that a planning commissioner was biased in some way. *Smith v. City of Shady Cove*, 63 Or LUBA 543 (2011).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. In order to succeed in a motion to take evidence, the motion must include substantial allegations that the decision maker was biased or that there is a reasonable basis to believe the decision maker was biased. *Smith v. City of Shady Cove*, 63 Or LUBA 543 (2011).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where a city imposes a permit appeal fee that is equal to the original permit application fee, and under the city code the appeal fee is treated as a deposit and the city thereafter refunds any portion of the appeal fee that exceeds the actual cost of the permit appeal, LUBA will deny a motion to allow depositions of city planning staff to establish the estimated actual cost of the permit appeal. Under ORS 227.180(1), which allows cities to impose an appeal fee that does not exceed the actual cost of the appeal, the dispositive legal issue is whether the local government can deny a local appeal that is not accompanied by the requisite deposit, and the actual cost of the local appeal is legally irrelevant. *Oregon Coast Alliance v. City of Brookings*, 63 Or LUBA 586 (2011).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. While LUBA has held that a motion to take evidence under OAR 661-010-045 is not necessary to consider affidavits or evidence outside the record for the limited purpose of establishing LUBA's *jurisdiction* over the challenged decision, a motion to take evidence is necessary to consider affidavits offered to

establish whether LUBA's *scope of review* includes a particular issue. *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to consider extra-record evidence of the minutes of an urban renewal agency meeting at which the agency's board of directors, made up of the city council members, considered amendments to a sale agreement between the urban renewal agency and the applicant for a land use application then pending before the city planning commission, where the petitioner fails to demonstrate that the minutes include anything that constitutes evidence of bias or an *ex parte* communication between the applicant and city council members concerning the land use application. *Claus v. City of Sherwood*, 61 Or LUBA 520 (2010).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where the petitioner requests that LUBA consider extra-record evidence in the form of a sign-up sheet that includes the city's rules for hearings, to support allegations that the city failed to abide by those rules, LUBA will take official notice of the city rules because they were adopted by resolution. However, LUBA will deny the motion with respect to extra-record copies of the sign-up sheet that were signed by participants in the proceeding below, where the petitioner fails to demonstrate how LUBA's consideration of the signed sheets would affect the outcome of the review proceeding. *Claus v. City of Sherwood*, 61 Or LUBA 520 (2010).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to consider extra-record evidence in the form of a police report describing an incident between the city economic development manager and one of the petitioners, where petitioners do not explain how the alleged conduct of the city manager, even if true, would provide a basis to reverse or remand the city council decision on appeal. *Claus v. City of Sherwood*, 61 Or LUBA 520 (2010).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. OAR 661-010-0045(1) allows LUBA to consider evidence that is not in the record that is submitted by the local government in a LUBA appeal, "in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record," if resolving those factual disputes could support reversal or remand of the decision. But OAR 661-010-0045(1) does not provide a way for a party to rebut factual conclusions adopted by the local government. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA may consider documents that are not in the record, even without a motion to take evidence under OAR 661-010-0045, if a party offers such documents for the limited purpose of determining whether LUBA has jurisdiction over the challenged decision. *Murray v. Multnomah County*, 56 Or LUBA 370 (2008).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A hearing to consider extra-record evidence under OAR 661-010-0045 is not necessary to resolve the parties' factual disputes surrounding a city's decision to adopt its final decision at a noon rather than its evening meeting, where a digital recording in the record establishes that parties were orally advised that

final action might occur at the noon rather than the evening meeting on a specified date, and that oral notice was sufficient to establish that the city committed no procedural error in acting at its noon meeting. *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. It is unusual and unnecessary to use OAR 661-010-0045 to establish that certain documents do not exist. The more straightforward course is to point out that the documents are not in the record, argue that the decision must be supported by those documents in the record, and assign error accordingly. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688 (2007).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence under OAR 661-010-0045 to establish that certain documents do not exist, where the respondent concedes the documents do not exist and thus there no disputed factual allegation between the parties. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688 (2007).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A respondent's motion to consider a transcript of a phone message left by petitioner's attorney as extra-record evidence under OAR 661-010-0045 will be denied, where petitioner disputes the legal significance of that message but does not dispute the fact that the message was left or the substance of that message. *Siporen v. City of Medford*, 54 Or LUBA 792 (2007).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A petitioner who seeks to present extra-record evidence to LUBA to show that a permit denial was the product of bias or prejudgment, rather than the application of relevant approval standards, must make a substantial showing to establish that there is a reasonable basis to believe that the search for extra-record evidence will lead to evidence of such bias or prejudgment. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA may consider extra-record evidence where there are disputed allegations regarding whether a city took action for the purpose of avoiding the ORS 227.178 requirement that the city take final action on certain permit applications within 120 days. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An ambiguous statement that could be understood to refer to *ex parte* contacts, but could also be understood to refer to contacts that were not *ex parte* contacts might be sufficient to warrant an evidentiary hearing to clarify the meaning of the reference, but is not sufficient to support a conclusion that there were improper undisclosed *ex parte* contacts. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where relevant local legislative history was not included in the local record of a land use decision, OAR 661-010-0045(1) does not authorize LUBA to allow an evidentiary hearing so that a city may provide that legislative history to LUBA to support of its legal interpretive arguments. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A dispute between the parties over the scope and proper interpretation of the term "image" in a city sign code does not warrant consideration of extra-record evidence, where there are no disputed *factual* allegations, and the fact petitioner wishes to establish—that city staff has interpreted the term differently in the past—has no bearing on the issues on appeal. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA may consider evidence that is not included in the local government record that is filed with LUBA in an appeal of a land use decision, where consideration of that evidence is necessary to resolve "procedural irregularities not shown in the record * * * which, if proved, would warrant reversal or remand of the decision." OAR 661-010-0045(1). However, where the only identifiable potential procedural irregularities can be resolved without the extra-record evidence, a motion to consider that extra-record evidence will be denied. *Bradley v. Washington County*, 46 Or LUBA 805 (2004).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Petitioners fail to allege facts that would support LUBA's consideration of evidence not in the record under OAR 661-010-0045, where petitioners merely allege that the disputed evidence was included in a staff file that ante-dated the proceedings that led to the challenged decision, was relied upon by petitioners in making presentations to the local decision makers, and petitioners would have requested that the evidence be submitted into the local record if they were aware that it was not already included in the record. *Citizens Protection Neighborhoods v. City of Salem*, 46 Or LUBA 823 (2004).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. For purposes of establishing standing to appeal to LUBA under ORS 197.830(3), petitioners who reside within sight of a disputed sign are presumptively adversely affected. Exactly how the sign affects petitioners and how many times petitioners have seen it are irrelevant considerations under that presumption, and depositions to resolve those matters are not warranted. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Depositions of two petitioners to inquire into their allegations that they are adversely affected by the challenged decision for purposes of ORS 197.830(3) are not warranted, where the movant fails (1) to specifically controvert those allegations, and (2) to establish that depositions of two petitioners are likely to affect the outcome of LUBA's review proceeding. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Mere speculation that some petitioners may have obtained a copy of the challenged decision more than 21 days prior to filing the notice of intent to appeal, and thus the appeal is untimely under ORS 197.830(3), is insufficient to warrant depositions to inquire into that circumstance. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where it is not clear whether the parties dispute whether a county planning director rejected an attempted local appeal

or whether the local appellants voluntarily retrieved their appeal document, LUBA will not authorize an evidentiary hearing to consider that question. *Burke v. Crook County*, 45 Or LUBA 739 (2003)

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where the record includes no reasonable basis for a local government to assume that two unsigned pages attached to a local appellant's local appeal were not submitted as part of his local appeal, an evidentiary hearing is not warranted to resolve the parties' factual dispute concerning whether the local appellant expressly told the county that the attached pages were part of his local appeal. *Burke v. Crook County*, 45 Or LUBA 739 (2003)

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA may not consider a written statement that is attached to a petition for review to provide information that is not reflected in the record about what occurred during a local land use proceeding, where petitioner fails to demonstrate that one or more of the grounds for considering extra-record evidence under OAR 661-010-0045(1) applies. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will not order a city to produce extra-record evidence of contacts between the city council and its legal counsel during a rezoning proceeding, pursuant to OAR 661-010-0045, to establish that the attorney's actions violate a party's right to due process, where (1) the party's due process argument is based on an allegation that the attorney acted as both legal advisor to the decision maker and as an advocate for the rezoning application, and (2) the city attorney argues that he never served as an advocate for the rezoning application and petitioner does not directly dispute the attorney's argument. *Dimone v. City of Hillsboro*, 44 Or LUBA 805 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary proceeding before LUBA is not a vehicle to belatedly introduce evidence into the record that could have been included in the proponent's evidentiary presentation below. *Meredith v. Lincoln County*, 44 Or LUBA 821 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary proceeding before LUBA is not warranted to consider evidence that the petitioner has installed "light emitting diodes" on an existing sign in order to engage in constitutionally protected speech, where the question of whether petitioner's installation is constitutionally protected speech is a legal conclusion, not an assertion of fact. *Meredith v. Lincoln County*, 44 Or LUBA 821 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA may consider extra-record evidence if the evidence may demonstrate that the local government decision warrants reversal or remand because of one or more of the bases listed in OAR 661-010-0045(1), and there is sufficient reason why the evidence was not submitted during the local proceedings. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where evidence relating to an approved application for a Head Start program might lend support to petitioners' allegation that denial of their subsequent application for a migrant worker Head Start program was

based on improper discrimination, LUBA will grant a motion to take evidence not in the record to compare the two applications. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Newspaper articles reflecting community members' bias against an application for a migrant worker Head Start program are not properly attributable to the decision makers, and LUBA will deny a motion to consider the newspaper articles in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A proposed city comprehensive plan amendment that could have the effect of preventing the establishment of a Head Start program in the proposed amendment area does not demonstrate that the city's denial of an earlier, unrelated application for a migrant worker Head Start program in that area was based on racial prejudice or discrimination, and LUBA will deny a motion to take evidence related to the comprehensive plan amendment in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The fact that an application for a migrant worker Head Start program was hotly debated at the local level does not demonstrate that the decision makers engaged in undisclosed *ex parte* contacts, and LUBA will deny a motion to take evidence relating to the local debate in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The fact that a city approved billboards 20 years ago under a very different regulatory scheme than the current one has little bearing on whether the city violated petitioner's state and federal constitutional rights in denying its application for a billboard under current regulations. Absent a showing of similarity between the old and new regulatory schemes, evidence of prior approvals does not demonstrate that a city acted arbitrarily or extended privileges to others that were denied to petitioners, and consideration of extra-record evidence under OAR 661-010-0045 is not warranted. *West Coast Media v. City of Gladstone*, 43 Or LUBA 659 (2003).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence not in the record under OAR 661-010-0045 where the factual allegations asserted in the motion are not in dispute. Under such circumstances it is more appropriate for the party to assert its allegations in its brief and file a motion to take evidence not in the record if another party disputes those allegations. *Rogers v. City of Eagle Point*, 42 Or LUBA 607 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence not in the record based on an allegation that the petition for review will allege constitutional error and that LUBA must have the proffered extra-record evidence before it in order to resolve such an assignment of error, where the theory of constitutional error as shown in the motion is conclusory and undeveloped and the facts established by the proffered evidence are not in dispute. *Rogers v. City of Eagle Point*, 42 Or LUBA 607 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. It is not necessary for LUBA to grant a motion to consider evidence that is not in the record to recognize a fact that is undisputed and is already reflected in the record. *Hawman v. Umatilla County*, 42 Or LUBA 223 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A motion to consider an affidavit regarding an individual's subjective understanding of a procedure will be denied, where the affidavit is not included in the record and is unnecessary to resolve the legal question presented. *Hawman v. Umatilla County*, 42 Or LUBA 223 (2002).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to take evidence not in the record to consider the affidavits of three county commissioners explaining that they are biased against the applicant and cannot impartially hear a local appeal involving the applicant, where the commissioners' declaration of bias is stated in the challenged decision, the assignment of error directed at the commissioners' bias presents a legal question not dependent on the facts stated in the affidavits, and the proponent fails to demonstrate to LUBA that the affidavits are necessary to resolve that assignment of error. *Hiebenthal v. Polk County*, 41 Or LUBA 573 (2001).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. In demonstrating that a party was entitled to have the evidentiary phase of a local land use proceeding reopened under *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), one of the things a party must show is that the party would submit specific evidence to respond directly to an unanticipated interpretation in the final written land use decision. However, this burden is met at LUBA by identifying the evidence; a party need not move for an evidentiary hearing at LUBA to actually present that evidence to LUBA. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 560 (2001).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Motions to take evidence not in the record regarding prejudgment or bias are treated the same as those alleging *ex parte* contacts and must include substantial allegations that the decision maker was biased, or that there is a reasonable basis to believe that the decision maker was biased. *Space Age Fuels, Inc. v. City of Sherwood*, 40 Or LUBA 577 (2001).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An allegation that a city councilor told a city planning commissioner that he "did not want any new service stations" in the city is not sufficient to establish a reasonable basis to believe that the city councilor was biased, and a motion to take evidence not in the record will be denied. *Space Age Fuels, Inc. v. City of Sherwood*, 40 Or LUBA 577 (2001).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will deny a motion to consider evidence not in the record where the dispute between the parties concerns the accuracy or validity of a map that is included in the record rather than whether that map is properly included in the record. Challenges to the accuracy or validity of the map must be made during the local proceedings. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The Board will accept evidence not included in the record where that evidence is necessary to support a claim of bias in a "clear and unmistakable manner" so as to warrant reversal or remand of the local government's decision pursuant to ORS 197.835(9)(a)(B). *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A petitioner moving to present evidence of *ex parte* contacts or bias must offer some substantial reason to believe that evidence of such *ex parte* contacts or bias can be established and that such *ex parte* contacts or bias would lead to reversal or remand. This burden is not carried where petitioner simply speculates that the decision maker's and a local opponent's membership in an animal rights organization may have led to improper *ex parte* contacts or bias during local proceedings on petitioner's dog kennel. *Tri-River Investment Co. v. Clatsop County*, 36 Or LUBA 743 (1999).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where a local decision maker discloses during a local proceeding that one of the parties is her veterinarian and serves on an animal rights organization with her, petitioner's failure to explore concerns about *ex parte* contacts with that party or possible bias precludes an evidentiary hearing at LUBA to explore such concerns. *Tri-River Investment Co. v. Clatsop County*, 36 Or LUBA 743 (1999).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A motion for evidentiary hearing to present evidence of a development's violation of a master sewer plan will be denied where such evidence has no bearing on any of the assignments of error. *Claus v. City of Sherwood*, 35 Or LUBA 810 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An alleged lack of candor by the city and a developer concerning negotiations to sell a proposed park property for a school provides no basis for an evidentiary hearing under OAR 661-010-0025 where, even if the alleged lack of candor were true, it would have no bearing on the legal issues raised in the petition for review. *Claus v. City of Sherwood*, 35 Or LUBA 810 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing is not warranted to establish that the county orally advised petitioner that the county had approved the challenged application more than 21 days before petitioner filed the notice of intent to appeal, when the relevant issue under ORS 197.830(3)(a) is when the petitioner received actual written notice of the decision. *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Generally, only a local government can commit procedural error within the meaning of OAR 661-010-0045(1). Petitioner's failure to raise an issue below is not a "procedural error" warranting an evidentiary hearing. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 759 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary proceeding under OAR 661-010-0045 is not a vehicle for respondents to provide *post hoc* support for land use decisions or address legal challenges to those decisions on appeal. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 759 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing is not warranted where the letter to be considered would only "substantiate information" that is already in the record. *Abadi v. Washington County*, 35 Or LUBA 729 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The "procedural irregularities" not shown in the local record that may warrant an evidentiary hearing at LUBA can only be committed by the local government that has procedural responsibilities for the land use proceedings. An individual participant cannot commit such "procedural irregularities." *ODOT v. Coos County*, 34 Or LUBA 805 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing is not warranted where adding more recollections concerning the terms of a city council's motion would not add to the conflicting recollections already included in the record and such additional recollections would not be more persuasive evidence of the terms of the motion than the actual conduct of the city council after the vote on the motion. *ODOT v. City of Mosier*, 34 Or LUBA 797 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioner submits testimony that minutes of the local proceedings in the record have been altered, the requirements of OAR 661-010-0045 have been met for LUBA to grant an evidentiary hearing. *ODOT v. City of Mosier*, 34 Or LUBA 770 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing to resolve "disputes regarding attorney fees" pursuant to OAR 661-010-0045(1) is not warranted where the motion for an evidentiary hearing is filed before LUBA has entered its final opinion. *Ackerley Outdoor Advertising v. City of Portland*, 34 Or LUBA 736 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The predicate to LUBA's authority to conduct an evidentiary hearing under ORS 197.835(2)(b) and OAR 661-010-0045(1) is allegations of certain conduct *not shown* in the record. LUBA has no authority to conduct an evidentiary hearing to determine which of two competing versions of facts *in the record* is accurate. *Ackerley Outdoor Advertising v. City of Portland*, 34 Or LUBA 736 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Communication between a local governing body or its staff and its insurance carrier are not *ex parte* contacts requiring disclosure under ORS 227.180(3). *Marshall v. City of Yachats*, 34 Or LUBA 724 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Allegations that the applicant committed fraud and forgery do not provide a basis for an evidentiary hearing under OAR 661-010-0045(1) as a "procedural irregularity" not shown in the record. Only the local government can commit a procedural irregularity within the meaning of OAR 661-010-0045(1). *Marshall v. City of Yachats*, 34 Or LUBA 724 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will consider supplemental affidavits, submitted after oral argument in support of petitioners' standing, where

the parties' arguments did not focus on the theory of standing supported by the affidavits and the facts asserted in the affidavits are not disputed. In that circumstance, an evidentiary hearing is not required for LUBA to consider the affidavits. *Wilbur Residents v. Douglas County*, 34 Or LUBA 634 (1998).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Presenting evidence that petitioner knew a final hearing was scheduled for a certain date would not establish that a petitioner knew that a final decision was actually adopted on that date. *Casey Jones v. City of Lowell*, 33 Or LUBA 845 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Evidentiary hearings provided for by ORS 197.835(2) do not provide a mechnism to add to the local record facts that could have been, but were not, submitted during the course of the local proceeding. *St. Johns Neighborhood Assn v. City of Portland*, 33 Or LUBA 836 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. ORS 197.763(1) requires the proponent of an evidentiary hearing to demonstrate that the reason facts are missing from the record is not due to the proponent's failure to submit information sufficient to afford the local governing body the opportunity to respond. *St. Johns Neighborhood Assn v. City of Portland*, 33 Or LUBA 836 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioner requests an evidentiary hearing but does not attempt to show that it is adversely affected or aggrieved by the operation of the proposed facility approved by the challenged decision, LUBA can conclude that the facts to be presented would not affect the outcome of the appeal and therefore do not merit an evidentiary hearing. *Wilbur Residents v. Douglas County*, 33 Or LUBA 412 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Even if county staff consulted certain files prior to issuance of a contested grading permit, that would not make those files part of the local record. Therefore, petitioner's allegations concerning such consultation provide no basis for an evidentiary hearing to establish that those files are part of the grading permit record on appeal. *Ceniga v. Clackamas County*, 33 Or LUBA 261 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. It is premature, before the record is settled and the petition for review is filed, to take depositions or to hold an evidentiary hearing in order to obtain information that can be used to challenge petitioners' standing. *Newton Creek Citizens Comm. v. City of Roseburg*, 32 Or LUBA 496 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Because OAR 661-10-045(1) limits "disputes regarding the content of the record" to whether certain items were properly included in or excluded from the record, an evidentiary hearing is not the proper means to establish the possible significance of the items, which depends on the arguments made in the parties' briefs. *Village Properties, L.P. v. City of Oregon City*, 32 Or LUBA 491 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing may be requested pursuant to OAR 661-10-045 when evidence outside the record must be

considered to determine what should be included in the record, but an evidentiary hearing cannot be used to add evidence to the record regarding the substantive merits of a case. *Laurance v. Douglas County*, 32 Or LUBA 489 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The deliberate use by a local government of false affidavits of service, if not shown in the record, would be a "procedural irregularity," as that term is used in ORS 197.835(2)(b) and OAR 661-10-045(1), and therefore evidence outside the record showing such deliberate use could justify an evidentiary hearing. However, one wrongly addressed envelope does not cast sufficient doubt on the accuracy of the county's affidavit of service to warrant reversal or remand. *Palmer v. Lane County*, 32 Or LUBA 484 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Unless petitioners allege facts which are disputed by some other party and which, if true, would warrant reversal or remand by demonstrating that the challenged decision is unconstitutional or that the proceedings below were flawed by some procedural irregularity, LUBA is not permitted to conduct an evidentiary hearing, even if doing so might improve our understanding of the case. *Palmer v. Lane County*, 32 Or LUBA 484 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Petitioners may not use an evidentiary hearing as a vehicle to expand their presentation of evidence and testimony below. *Palmer v. Lane County*, 32 Or LUBA 484 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A county commissioner's unexplained reference to a "gap," which might refer to an alleged gap in ownership that could invalidate an access easement to the subject property, is insufficient to create an inference of procedural irregularity sufficient to justify an evidentiary hearing. *Palmer v. Lane County*, 32 Or LUBA 484 (1997).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Although documents specifically rejected by a local government during its proceedings are not part of the local government record, the erroneous rejection of documents may provide a basis for reversal or remand. A party that wishes to challenge in its brief the propriety of the decision to exclude particular documents may request an evidentiary hearing before filing its brief. *Village Properties, L.P. v. City of Oregon City*, 32 Or LUBA 475 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. To establish *ex parte* contacts not shown by the record, a party must request an evidentiary hearing. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A single, unexplained reference to an earlier use in a nonconforming use determination hearing is not a reasonable basis for a belief that an undisclosed *ex parte* contact took place and would not justify granting a motion for an evidentiary hearing. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A motion for evidentiary hearing will be denied where petitioners do not make the requisite threshold showing that there is a reasonable basis to believe that *ex parte* contacts probably took place, and offer no supporting legal authority indicating that such contacts would warrant reversal or remand of the county's decision. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Because communication between a county commissioner and an attorney representing the county regarding a pending conditional use application is not an *ex parte* contact required to be disclosed under ORS 215.422(4), an evidentiary hearing is not warranted to determine if such communication occurred. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing is not the proper forum for resolving issues relating to bias where the moving party does not allege any facts which are actually in dispute. *Dominey v. City of Astoria*, 31 Or LUBA 523 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The purpose of an evidentiary hearing is to determine the underlying facts supporting allegations regarding improper *ex parte* contacts. There is no need for an evidentiary hearing where the facts alleged by the moving party are not in dispute. *Dominey v. City of Astoria*, 31 Or LUBA 523 (1996).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Under OAR 661-10-045, LUBA has authority to order an evidentiary hearing in order to consider disputed facts, not in the record, which would establish a petitioner's standing to appeal. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Under ORS 197.830(13)(b), LUBA may allow an evidentiary hearing if there are disputed allegations of procedural irregularities not shown in the record which, if proved, would warrant reversal or remand. *Huntzicker v. Washington County*, 29 Or LUBA 587 (1995).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioner's motion for evidentiary hearing does not explain how the alleged facts concerning a procedural irregularity below not shown in the record would warrant reversal or remand of the challenged decision, petitioner fails to demonstrate that an evidentiary hearing is warranted. *Pendair Citizens' Committee v. City of Pendleton*, 28 Or LUBA 796 (1995).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The "disputed allegations" that may justify an evidentiary hearing under ORS 197.830(13)(b) are disputed allegations of *fact*. Where the dispute between parties concerns only the legal conclusions or consequences to be drawn from facts in the record, an evidentiary hearing is not warranted. *Jones v. Lane County*, 27 Or LUBA 654 (1994).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. The "disputed allegations" that may justify an evidentiary hearing under ORS 197.830(13)(b) must concern the

matters referenced in ORS 197.830(13)(b) or OAR 661-10-045(1). *Jones v. Lane County*, 27 Or LUBA 654 (1994).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will not grant a motion for evidentiary hearing unless the moving party establishes that it would introduce evidence at such a hearing that could result in reversal or remand of the challenged decision. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioners request an evidentiary hearing for the purpose of submitting evidence of an unrelated local land use decision made during the pendency of the subject LUBA appeal, and petitioners fail to explain how such evidence would affect the outcome of the subject appeal, the motion for evidentiary hearing will be denied. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. A local government staff memorandum concerning notice provided during a legislative proceeding is not properly included in the record of that proceeding, where the memorandum was created two months after the challenged decision was adopted. However, submission of the memorandum may be allowed in the event of an evidentiary hearing, pursuant to ORS 197.830(13)(b) and OAR 661-10-045, to demonstrate that required notices were given. *Bicycle Transportation Alliance v. Washington County*, 25 Or LUBA 798 (1993).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing is unwarranted where the dispute between the parties concerns only the correct legal conclusion to be drawn from undisputed facts. *Davenport v. City of Tigard*, 24 Or LUBA 594 (1992).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. An evidentiary hearing at LUBA will not be allowed to show that many, but not all, conditionally permitted uses listed in the applicable zoning district are economically infeasible, where petitioners do not argue that it would have been futile to apply for approval of the other conditionally permitted uses. Under these circumstances, the evidence petitioners seek to introduce would not establish an unconstitutional "taking." *Larson v. Multnomah County*, 24 Or LUBA 591 (1992).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioners seek an evidentiary hearing concerning alleged procedural errors not shown in the local record, but there are no disputed allegations of fact concerning the alleged errors, there is no basis for an evidentiary hearing. *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 708 (1992).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where the facts petitioners seek to introduce into the record through an evidentiary hearing do not provide a basis for reversal or remand of the challenged decision, an evidentiary hearing is not warranted. ORS 197.830(13)(b). *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 708 (1992).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. ORS 197.830(13)(b) limits LUBA's authority to conduct evidentiary hearings to consider evidence that is not included in the local record. ORS 197.830(13)(b) does not permit LUBA to conduct an evidentiary hearing

to obtain a more complete picture of the local government hearings or the characteristics of the subject property and the area surrounding the property at issue in a LUBA appeal. *Reed v. Benton County,* 23 Or LUBA 681 (1992).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where one of a petitioner organization's members did not receive actual notice of a land use decision more than 21 days prior to the time the notice of intent to appeal was filed, an evidentiary hearing to establish that *other* individual members of the organization or the organization's board of directors had actual notice of the challenged decision more than 21 days before the challenged decision was made, is not warranted. Even if other members received such actual notice, petitioner's notice of intent to appeal in its *representational* capacity would be timely. *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where an organizational petitioner timely files a notice of intent to determine in its representational capacity, it is only necessary to determine whether petitioner also filed the notice of intent to appeal within 21 days of the date it, as an *organization*, is deemed to have actual notice of the challenged decision, if there were a dispute concerning the member's standing upon whom petitioner's representational capacity to bring the appeals and its representational standing depend. *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Under ORS 197.830(13)(b) and OAR 661-10-045(1), allegations of unconstitutionality and procedural irregularities only provide grounds for an evidentiary hearing if the facts the movant desires to present are not in the local record. *Berg v. Linn County*, 21 Or LUBA 622 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where it is alleged a decision maker made statements concerning a previously issued decision, and those statements indicate that the decision maker was biased against the applicant or had undisclosed *ex parte* contacts, an evidentiary hearing at LUBA may be justified to accept evidence concerning the allegations. *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where erroneous plan and code interpretations are not included in a land use decision maker's written decision, they do not constitute a procedural error or irregularity warranting reversal or remand under ORS 197.835(7)(a)(B) or an evidentiary hearing under ORS 197.830(13)(b). *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where petitioners are required to file a notice of intent to appeal within 21 days of receiving actual notice of the challenged decisions and a party gives specific reasons to question petitioners' allegations that they received actual notice of the challenged decisions less than 21 days before the notices of intent to appeal were filed, an evidentiary hearing is warranted and LUBA will allow depositions to explore when petitioners received actual notice of the challenged decisions. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA requires that a party moving for an evidentiary hearing explain with particularity what facts it expects to present in an evidentiary hearing and why those facts will affect the outcome of the appeal. *Citizens Concerned v. City of Sherwood,* 20 Or LUBA 550 (1991).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. LUBA will not order an evidentiary hearing, or depositions to inquire whether a local appeal was timely filed, where the party requesting the evidentiary hearing or depositions fails to supply any basis for concluding that the local appeal notice was untimely filed. *Tarbell v. Jefferson County*, 20 Or LUBA 517 (1990).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. If a petitioner's standing to appeal to LUBA on any basis can be established without the necessity of an evidentiary hearing, LUBA will not conduct an evidentiary hearing to enable the petitioner to establish standing to appeal on a different basis. *Lowrie v. Polk County*, 19 Or LUBA 564 (1990).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Where there is no dispute concerning the authenticity or identity of a document a party believes was improperly excluded from the record by the local government, the parties may stipulate that the document be included in the LUBA record for the limited purpose of reviewing the correctness of the local government's decision to exclude the document from the local government record. Alternatively, the document may be attached to a party's brief, and if any party objects to LUBA's consideration of the document, the party offering the document may move for an evidentiary hearing. *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990).

27.6.2 LUBA Procedures/Rules – Evidentiary Hearings – Grounds for. Petitioners' motion for evidentiary hearing to submit affidavits recounting events outside the proceedings below, which allegedly demonstrate bias against petitioners on the part of the city attorney, will be denied because the city attorney was not the local government decision maker and, therefore, the attorney's motivation is not relevant to determining whether petitioners' rights to a fair hearing were prejudiced. *Torgeson v. City of Canby*, 19 Or LUBA 511 (1990).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Although LUBA's rules do not explicitly recognize evaluating jurisdiction as a purpose for considering evidence outside the record under OAR 661-010-0045, in an appeal of a local government approval of a utility public way use permit authorizing installation of telecommunication-related facilities, where the local government alleges that LUBA does not have jurisdiction because of the location of the facilities, LUBA will consider as evidence outside the record (1) a marked version of a portion of the local government's adopted zoning map showing the general location of the facilities and (2) a recorded plat including the subject property. In addition, where the petitioners argue that LUBA has jurisdiction because the challenged decision falls within the scope of the local government's zoning ordinance and telecommunications ordinance, LUBA will consider as evidence outside the record (1) details related to the dimensions and location of the facilities in determining whether a given local land use process is applicable to the facilities and (2) a screenshot related to the definition of small cell facilities in determining whether the facilities installed fall within the class of equipment subject to the zoning ordinance. *Vaccher v. City of Eugene*, 80 Or LUBA 10 (2019).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where a petitioner argues that the local government erred under ORS 197.307(4) in applying ambiguous standards to an application to develop housing, and where an intervenor offers a traffic impact assessment (TIA) from a prior land use application that is not included in the local record to establish that the petitioner knew the local government would require compliance with the ambiguous standard, LUBA will deny a motion to take the TIA as evidence not in the record where the intervenor fails to explain how the evidence relates to any basis for LUBA to take additional evidence under OAR 661-010-0045(1) and since the facts that the TIA is offered to prove are not critical to the resolution of the appeal, as required under OAR 661-010-0045(2)(a). *Oster v. City of Silverton*, 79 Or LUBA 1058 (2019).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Petitioner failed to establish a basis for LUBA to take evidence under OAR 661-010-0045 where the city responded to petitioner's public records request for a copy of draft design guidelines by explaining that the city's records do not include a copy of the draft guidelines and that the city never adopted the draft guidelines as land use regulations. LUBA will deny petitioner's motion to take evidence where there is no disputed factual allegation in the parties' briefs concerning "procedural irregularities not shown in the record" and petitioner's motion is not directed at evidence of "procedural irregularities," but, instead, is an attempt to rebut the city's response and findings regarding the draft guidelines. *Nicita v. City of Oregon City*, 78 Or 1007 (2018).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. ORS 197.835(2)(b) and OAR 661-01-0045(1) authorize LUBA to consider evidence outside the record where the proponent demonstrates that there are disputed allegations in the parties' briefs regarding the "unconstitutionality of the decision." However, where petitioners do not intend to argue that a city's decision is unconstitutional, but rather that the city erred in failing to comply with its city charter requirement for a vote, based on the city's reliance on a statute that petitioners believe unconstitutionally infringes on the city's charter authority, LUBA will deny petitioners' motion to take evidence because evidence on the constitutionality of a statute is not one of the bases for taking evidence outside the record under ORS 197.835(2)(b) and OAR 661-010-0045(1). *Renken v. City of Oregon City*, 78 Or LUBA 1070 (2018).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Even if a motion to take evidence outside the record under OAR 661-010-0045(1) were otherwise proper, LUBA will deny such motion where petitioners have failed to demonstrate that the issue the proffered evidence goes to was raised with the specificity required by ORS 197.763(1), and even if LUBA viewed petitioners' arguments as one particular "argument" toward the general issue, that issue does not appear to have raised even in a most general way. Because the proffered evidence goes to an issue that is not within the Board's scope of review, petitioners have not established a basis under OAR 661-010-0045(1) to grant the motion to consider the evidence for any purpose, and such motion will be denied. *Renken v. City of Oregon City*, 78 Or LUBA 1070 (2018).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. In a dispute over attorney fees charged to petitioner, where the city attempts to introduce evidence explaining the accounting for the actual attorney fees charged, asserting that the new evidence relates to disputed facts concerning "other procedural irregularities not shown in the record" OAR 661-010-0045(1), but does not assert that the city's prior procedures constitute "procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision," or otherwise explain on what grounds the Board can consider new evidence, LUBA will deny a motion to take evidence not in the record as the evidence the city seeks to introduce does not fall within the grounds to take evidence under OAR 661-010-0045. *Nicita v. City of Oregon City*, 78 Or LUBA 1084 (2018).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. The movant for a motion to take evidence under OAR 661-010-0045 fails to demonstrate that the motion is warranted based on "procedural irregularities not shown in the record" where the movant fails to identify any procedure that was violated with respect to the evidence at issue. *Conte v. City of Eugene*, 77 Or LUBA 547 (2018).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA will reject a motion to take evidence under OAR 661-010-0045 requesting that LUBA consider e-mails between a petitioner and city staff to establish that planned unit developments (PUD) are subject to a post-approval city engineer permit process, where the petitioner identifies no basis under OAR 661-010-0045(1) for LUBA to consider the emails for that purpose and, in any case, whether PUDs are subject to a post-approval city engineer permit process is a question of law, not a disputed fact. *Conte v. City of Eugene*, 77 Or LUBA 547 (2018).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Absent a motion to take evidence outside the record pursuant to OAR 660-010-0045, LUBA has no basis for considering diagrams that illustrate an entire series of property line adjustments that are the subject matter of the challenged decision, but that nevertheless contain hand-drawn lines, text, and other information which indicate at least some of the notations post-date the decision, and therefore the diagrams could not have been "placed before" the planner who approved the property line adjustments. *Sarett v. Lane County*, 76 Or LUBA 470 (2017).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where petitioner offers some additional deeds and diagrams from a 2017 legal lot verification proceeding, in a challenge

to a 2016 application for multiple property line adjustments, LUBA may not consider the additional post-decision deeds and diagrams where the parties agree that the 2016 application approved more than a single property line adjustment, and thus the deeds and diagrams do not offer anything material as to a "disputed factual allegation in the parties' briefs" pursuant to OAR 661-010-0045(1). *Sarett v. Lane County*, 76 Or LUBA 485 (2017).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where the petitioners file a motion to take evidence for LUBA to consider affidavits and other documents to establish that petitioners filed a timely appeal and are adversely affected, along with a reply brief addressing the same jurisdictional issues, petitioners have sufficiently "explain[ed] with particularity" the facts petitioners seek to establish for purposes of OAR 661-010-0045(2)(a). *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. While an unsigned or improperly signed declaration of a petitioner asserting facts that go to standing and whether the petitioner is adversely affected may be less persuasive in the face of conflicting evidence than a properly signed declaration, nothing in LUBA's rules requires that such declarations be signed in any particular manner, in order to be considered for the proffered purpose. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. While LUBA's rule allowing a motion to take evidence not in the record can be invoked to allow LUBA to consider documents outside the record in order to resolve disputes over the content of the record, such a motion is not a basis to strike a land sale contract that is indisputably part of the record on the grounds that the contract is incomplete or is not evidence that the decision maker should have relied upon. *Grimstad v. Deschutes County*, 74 Or LUBA 610 (2016).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Accepting into the local evidentiary record of a land sale contract that is arguably incomplete or suffers from defects is not a "procedural irregularity not shown in the record" that would warrant a motion to take evidence not in the record under OAR 661-010-0045. *Grimstad v. Deschutes County*, 74 Or LUBA 610 (2016).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Items rejected from the local record are properly excluded from the record transmitted to LUBA. Where a local government rejects portions of a document, and includes only a redacted version of the document in the record, the petitioner may attach to the petition for review the unredacted document, in support of any of an assignment of error alleging that the local government erred in rejecting the redacted portions. If no party objects, LUBA will consider the attached document for the limited purpose of resolving that procedural assignment of error. If a party objects, the petitioner may file a motion to take evidence to allow LUBA to consider the unredacted document for that same limited purpose. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. A motion to reconsider a LUBA order is treated as a renewed motion for the same relief sought in the original motion. Because a motion to take evidence outside of the record suspends all other time limits in an appeal,

a motion to reconsider an order denying the motion to take evidence, which is considered a renewed motion to take evidence, also suspends all other time limits. *Stewart v. City of Salem*, 61 Or LUBA 77 (2010).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where the parties' dispute is over the correct interpretation and application of code provisions rather than a factual dispute, there is no basis for a motion requesting LUBA to consider an electronic mail message as extra-record evidence under ORS 197.835(2)(b). A planner's electronic mail message in which the planner expresses opinions about the meaning of those code provisions has no bearing on how that issue of law should be resolved. *Zirker v. City of Bend*, 55 Or LUBA 188 (2007).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA will deny as premature a motion to take evidence regarding alleged *ex parte* contacts that is filed before the record is settled and the briefs filed. *Rickreall Community Water Assoc. v. Polk County*, 52 Or LUBA 772 (2006).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. A party who files a motion for evidentiary hearing seeking evidence to prove that the decision makers, members of the city council, are biased must allege that there is a "reasonable basis" to believe the city council members are biased. Where a moving party alleges that the city as a municipal entity was interested in purchasing the subject property for future development of city buildings, it is relatively clear that any plans the city had were preliminary, and a moving party does not point to any evidence or likelihood of uncovering evidence that the decision makers relied on anything other than the applicable approval criteria in rendering the challenged decision, it fails to demonstrate a "reasonable basis" to believe the decision makers are biased, and a motion for evidentiary hearing will be denied. *Wal-Mart Stores, Inc. v. City of Oregon City*, 49 Or LUBA 729 (2005).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA will deny a motion to take evidence not in the record under OAR 661-010-0045 where the factual allegations asserted in the motion are not in dispute. Under such circumstances it is more appropriate for the party to assert its allegations in its brief and file a motion to take evidence not in the record if another party disputes those allegations. *Rogers v. City of Eagle Point*, 42 Or LUBA 607 (2002).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA will deny a motion to take evidence not in the record based on an allegation that the petition for review will allege constitutional error and that LUBA must have the proffered extra-record evidence before it in order to resolve such an assignment of error, where the theory of constitutional error as shown in the motion is conclusory and undeveloped and the facts established by the proffered evidence are not in dispute. *Rogers v. City of Eagle Point*, 42 Or LUBA 607 (2002).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA will deny a motion to take evidence not in the record to consider the affidavits of three county commissioners explaining that they are biased against the applicant and cannot impartially hear a local appeal involving the applicant, where the commissioners' declaration of bias is stated in the challenged decision, the assignment of error directed at the commissioners' bias presents a legal question not dependent on the facts stated in the affidavits, and the proponent fails to demonstrate to LUBA

that the affidavits are necessary to resolve that assignment of error. *Hiebenthal v. Polk County*, 41 Or LUBA 573 (2001).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. The Board will deny a motion to take evidence of alleged *ex parte* contacts where, in the absence of the parties' briefs, it is not clear that the alleged contacts relate to the local government decision. In most cases, the appropriate posture in which to file a motion for evidentiary hearing is after the briefs have been filed, when the legal arguments and disputed allegations of fact are more clearly identified. *Halvorson Mason Corp. v. City of Depoe Bay*, 38 Or LUBA 949 (2000).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. An evidentiary hearing to establish decision makers' "personal interest" in a proposal due to their ownership of proximate property is not warranted because, even if true, such a "personal interest" could not provide a basis for reversing or remanding the decision. *ODOT v. City of Mosier*, 34 Or LUBA 797 (1998).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA will not order an evidentiary hearing or a deposition from a county planner where petitioner does not explain how such testimony can authoritatively establish whether the county approved the version of a comprehensive plan at issue. *Trademark Construction Inc. v. Marion County*, 33 Or LUBA 842 (1997).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. An evidentiary hearing is not warranted to show a decision maker is a member of an advocacy group that supports transportation projects, where the advocacy group did not take a position on a disputed land use decision that approved a geologic hazard report related to a proposed highway improvement. Such membership would not demonstrate the decision maker's views concerning transportation in general or the particular project, or show that he was biased or prejudged the matter. *Terdina v. Clatsop County*, 33 Or LUBA 830 (1997).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. A motion for evidentiary hearing requesting that a local government and intervenor be ordered to produce all demographic data kept by either party with regard to intervenor's other developments fails to state with particularity what facts will be presented at the hearing and how those facts will affect the outcome of the review proceeding as required by OAR 661-10-045. *St. Johns Neighborhood Assn. v. City of Portland*, 33 Or LUBA 827 (1997).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where a local code prohibits *ex parte* contacts between a decision maker and a "person interested in the outcome of the proceeding," a party moving for an evidentiary hearing to prove such *ex parte* contacts occurred must provide specific reasoning why that person qualifies as such an "interested" party. Merely describing the person as a professional land developer or community leader is not specific enough. *Opp v. City of Portland*, 33 Or LUBA 820 (1997).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where petitioner's motion for evidentiary hearing does not explain how the alleged facts concerning a procedural irregularity below not shown in the record would warrant reversal or remand of the challenged

decision, petitioner fails to demonstrate that an evidentiary hearing is warranted. *Pendair Citizens' Committee v. City of Pendleton*, 28 Or LUBA 796 (1995).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Petitioners cannot raise a new basis for reversing or remanding a challenged decision for the first time in a post oral argument motion for evidentiary hearing unless they demonstrate that they seek to present facts unknown to them at the time the petition for review was filed. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. OAR 661-10-065(4) simply provides that with the exception of objections to the record and motions for evidentiary hearing, the filing of a motion does not have the legal effect of automatically suspending the deadlines for future events in a LUBA appeal until the motion is resolved. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 746 (1994).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Occasional references in a motion for evidentiary hearing to extra-record materials do not satisfy the requirement of OAR 661-10-045(2) that petitioner explain "with particularity the facts the moving party will present at the [evidentiary] hearing" and do not explain how that evidence shows an evidentiary hearing is warranted under OAR 661-10-045(2) and ORS 197.830(13)(b). *Jones v. Lane County*, 27 Or LUBA 654 (1994).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where petitioner withdraws its motion for evidentiary hearing, but respondents wish to have an evidentiary hearing, respondents must file their own motion for evidentiary hearing in accordance with OAR 661-10-045. *Louisiana Pacific v. Umatilla County*, 25 Or LUBA 818 (1993).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Under OAR 661-10-045(2), the movant for evidentiary hearing must establish how the facts to be presented at the proposed evidentiary hearing will affect the outcome of the appeal. *Breivogel v. Washington County*, 22 Or LUBA 847 (1992).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. A movant for an evidentiary hearing must explain, with particularity, what facts it will present at the evidentiary hearing. In addition, the movant must establish how those facts "will affect the outcome of the review proceeding." OAR 661-10-045(2). *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Until the local record is filed with LUBA, a motion for evidentiary hearing is premature. *Berg v. Linn County*, 21 Or LUBA 622 (1991).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. LUBA requires that a party moving for an evidentiary hearing explain with particularity what facts it expects to present in an evidentiary hearing and why those facts will affect the outcome of the appeal. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. After the petition for review is filed, respondents may, in their response brief or in a motion to dismiss, identify disputed allegations of fact, and explain why under their version of the facts petitioners lack standing. Petitioners may then request permission to file a reply brief to respond to respondent's legal arguments, move for an evidentiary hearing to present facts establishing standing or do both. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where a party moves for an evidentiary hearing but fails to clearly identify what facts it wishes to establish through the evidentiary hearing and fails to explain why those facts will affect the outcome of the appeal, the motion for evidentiary hearing will be denied. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

27.6.3 LUBA Procedures/Rules – Evidentiary Hearings – Motion for. Where the petitioner objects that the record should include a letter he sent to the city, and an intervenor unsuccessfully opposes the record objection *solely* on the grounds that the letter was sent after the public hearing was closed, LUBA will not grant intervenor's subsequent requests for an evidentiary hearing and for depositions to consider whether the letter was sent and received as petitioner claimed in his record objection. *Cecil v. City of Jacksonville*, 19 Or LUBA 532 (1990).

27.6.4 LUBA Procedures/Rules – Evidentiary Hearings – Procedures. A motion to take evidence under OAR 661-010-0045 is warranted only for one or more of the limited bases set out in OAR 661-010-0045(1). If granted, the motion allows new evidence to be admitted into LUBA's record only for those limited purposes; such evidence is not admitted into the local evidentiary record and cannot be cited to support or undermine findings of compliance with applicable approval criteria. *Conte v. City of Eugene*, 77 Or LUBA 547 (2018).

27.6.4 LUBA Procedures/Rules – Evidentiary Hearings – Procedures. The Board will deny a motion to take evidence of alleged *ex parte* contacts where, in the absence of the parties' briefs, it is not clear that the alleged contacts relate to the local government decision. In most cases, the appropriate posture in which to file a motion for evidentiary hearing is after the briefs have been filed, when the legal arguments and disputed allegations of fact are more clearly identified. *Halvorson Mason Corp. v. City of Depoe Bay*, 38 Or LUBA 949 (2000).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. An affidavit indicating that one week after issuing the final decision a decision maker knew that the applicant had agreed to the proposed conditions is an insufficient showing that an *ex parte* contact might have occurred during the hearing to warrant depositions under OAR 661-010-0045, where there is no indication when or how the decision maker acquired that knowledge. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. LUBA will deny a motion under OAR 661-010-0045 to depose unnamed officials of a regional transit agency, where the depositions are for the purpose of demonstrating that the challenged land use decision is inconsistent with a previous land use decision adopted by the regional transit agency, and that issue has no bearing on whether the land use standards that the city applied or should have applied are "land use standards that do not require interpretation or the exercise of policy or legal judgment" within the ORS 197.015(10)(b)(A) exception to LUBA's jurisdiction. *Lazarus v. City of Milwaukie*, 67 Or LUBA 475 (2013).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. *In camera* review of a document under Oregon Evidence Code 612 is appropriate only where the witness reads the document to refresh memory and production of the document is necessary in the interests of justice. LUBA will deny a motion for *in camera* review of the redacted portions of a document allegedly used to refresh memory in a deposition, where the movant fails to establish that the deponent in fact read the redacted portions of the document, for purposes of refreshing memory. *Grabhorn v. Washington County*, 49 Or LUBA 746 (2005).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. *In camera* review or production of a document under Oregon Evidence Code 612 is not warranted "in the interests of justice," where the deposition authorized under OAR 661-010-0045 was limited to alleged *ex parte* contacts and bias on the part of the hearings officer, the disputed document was an e-mail to the hearings officer dated a year after the events that were the subject of the deposition, and the movant failed to establish that review or production of the document would yield anything probative about the alleged *ex parte* contacts or bias issues. *Grabhorn v. Washington County*, 49 Or LUBA 746 (2005).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. A deposition of the decision maker to determine the content of *ex parte* contacts is warranted under OAR 661-010-0045, where the record and affidavits submitted by the parties demonstrate that such contacts occurred and may have involved discussion of the merits of the decision, but the record and affidavits do not include information necessary for LUBA to resolve anticipated assignments of error seeking to reverse the decision based on those *ex parte* contacts. *Grabhorn v. Washington County*, 48 Or LUBA 657 (2005).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. For purposes of establishing standing to appeal to LUBA under ORS 197.830(3), petitioners who reside within sight of a disputed sign are presumptively adversely affected. Exactly how the sign affects petitioners and how many times petitioners have seen it are irrelevant considerations under that presumption, and depositions to resolve those matters are not warranted. *Frymark v. Tillamook*

County, 45 Or LUBA 685 (2003).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. Depositions of two petitioners to inquire into their allegations that they are adversely affected by the challenged decision for purposes of ORS 197.830(3) are not warranted, where the movant fails (1) to specifically controvert those allegations, and (2) to establish that depositions of two petitioners are likely to affect the outcome of LUBA's review proceeding. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. Mere speculation that some petitioners may have obtained a copy of the challenged decision more than 21 days prior to filing the notice of intent to appeal, and thus the appeal is untimely under ORS 197.830(3), is insufficient to warrant depositions to inquire into that circumstance. *Frymark v. Tillamook County*, 45 Or LUBA 685 (2003).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. Motions to take evidence not in the record regarding prejudgment or bias are treated the same as those alleging *ex parte* contacts and must include substantial allegations that the decision maker was biased, or that there is a reasonable basis to believe that the decision maker was biased. *Space Age Fuels, Inc. v. City of Sherwood*, 40 Or LUBA 577 (2001).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. An allegation that a city councilor told a city planning commissioner that he "did not want any new service stations" in the city is not sufficient to establish a reasonable basis to believe that the city councilor was biased, and a motion to take evidence not in the record will be denied. *Space Age Fuels, Inc. v. City of Sherwood*, 40 Or LUBA 577 (2001).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. LUBA will not order an evidentiary hearing or a deposition from a county planner where petitioner does not explain how such testimony can authoritatively establish whether the county approved the version of a comprehensive plan at issue. *Trademark Construction Inc. v. Marion County*, 33 Or LUBA 842 (1997).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. It is premature, before the record is settled and the petition for review is filed, to take depositions or to hold an evidentiary hearing in order to obtain information that can be used to challenge petitioners' standing. *Newton Creek Citizens Comm. v. City of Roseburg*, 32 Or LUBA 496 (1997).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. Where a petitioner's deposition discloses she learned the city may have approved certain permits, and thereafter petitioner promptly pursues the matter with the city planning department and obtains copies of the permits, the date she obtained the copies of the permits from the planning department is the date of actual notice of the permits for purposes of computing the deadline for filing a notice of intent to appeal at LUBA. *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. Where petitioners are

required to file a notice of intent to appeal within 21 days of receiving actual notice of the challenged decisions and a party gives specific reasons to question petitioners' allegations that they received actual notice of the challenged decisions less than 21 days before the notices of intent to appeal were filed, an evidentiary hearing is warranted and LUBA will allow depositions to explore when petitioners received actual notice of the challenged decisions. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. LUBA will not order an evidentiary hearing, or depositions to inquire whether a local appeal was timely filed, where the party requesting the evidentiary hearing or depositions fails to supply any basis for concluding that the local appeal notice was untimely filed. *Tarbell v. Jefferson County*, 20 Or LUBA 517 (1990).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. Where petitioners' notice of intent to appeal to LUBA is timely if filed within 21 days after petitioners received actual notice of the appealed decision, but the facts in the record before LUBA are unclear as to when petitioners obtained notice of the decision, LUBA will grant a petition to depose petitioners. *Torgeson v. City of Canby*, 19 Or LUBA 623 (1990).

27.6.5 LUBA Procedures/Rules – Evidentiary Hearings – Depositions. Where the petitioner objects that the record should include a letter he sent to the city, and an intervenor unsuccessfully opposes the record objection *solely* on the grounds that the letter was sent after the public hearing was closed, LUBA will not grant intervenor's subsequent requests for an evidentiary hearing and for depositions to consider whether the letter was sent and received as petitioner claimed in his record objection. *Cecil v. City of Jacksonville*, 19 Or LUBA 532 (1990).

27.7.1 LUBA Procedures/Rules – Parties – Petitioner. Where petitioners' counsel attempts to amend a timely filed Notice of Intent to Appeal (NITA), to add additional petitioners who were mistakenly omitted from the original NITA, but the amended NITA is filed after the time limit set forth in ORS 197.830(9) for filing a NITA before LUBA, petitioners' mistaken omission of the petitioners from the original NITA was not merely a "technical violation" of LUBA's rules at OAR 660-010-0015. The additional petitioners listed in the Amended NITA have not established that their NITA was filed within the time limit set forth in ORS 197.830(9), and are therefore not parties to the appeal. *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

27.7.1 LUBA Procedures/Rules – Parties – Petitioner. Consolidation of appeals does not permit a petitioner who is not a petitioner in both appeals to file a petition for review in the appeal in which he is not a party, and that person's signature on a "Joint Petition for Review" does not make that person a petitioner or other party entitled to file a petition for review in the other appeal. *Willis v. Clackamas County*, 76 Or LUBA 479 (2017).

27.7.1 LUBA Procedures/Rules – Parties – Petitioner. LUBA will decline to treat two separate petitions for review that are signed by the same person as a single petition filed by that person in an appeal to which he is not a party, as inconsistent with OAR 660-010-0030, which contemplates the filing of a single petition for review, rather than multiple petitions for review. *Willis v. Clackamas County*, 76 Or LUBA 479 (2017).

27.7.1 LUBA Procedures/Rules – Parties – Petitioner. The unrepresented lead petitioner in an appeal to LUBA cannot file a motion on behalf of another unrepresented petitioner seeking the other petitioner's withdrawal from the appeal. *Frewing v. City of Portland*, 73 Or LUBA 392 (2016).

27.7.1 LUBA Procedures/Rules – Parties – Petitioner. LUBA's rules do not authorize a person who is a party in one appeal to file a motion in a different, consolidated appeal to which that person is not a party. Consolidation does not change party status. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.7.1 LUBA Procedures/Rules – Parties – Petitioner. The filing of a Notice of Intent to Appeal (NITA) is a jurisdictional prerequisite to commencing a LUBA appeal. Where all petitioners withdraw the NITA, the appeal must be dismissed. *Brown v. Jackson County*, 55 Or LUBA 178 (2007).

27.7.1 LUBA Procedures/Rules – Parties – Petitioner. After the petitioner withdraws from an appeal, any intervenor-petitioner who has not timely filed a separate notice of intent to appeal may not continue the appeal, and the appeal must be dismissed. *Marylhurst Neighborhood Assoc. v. City of West Linn*, 52 Or LUBA 612 (2006).

27.7.1 LUBA Procedures/Rules – Parties – Petitioner. All petitioners who are not represented by an attorney must represent themselves in a LUBA appeal. Neither a lead petitioner nor any other individual petitioner may present arguments or file documents on behalf of other unrepresented petitioners. *Gillette v. Lane County*, 51 Or LUBA 823 (2006).

27.7.1 LUBA Procedures/Rules – Parties – Petitioner. That an intervenor-respondent in one appeal also filed a petition for review challenging aspects of the same decision in a different appeal does not preclude the intervenor-respondent from advancing a cross-assignment of error in the response brief. Land use decisions often have multiple aspects or components, and a party on appeal may seek to overturn one aspect while preserving others. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

27.7.1 LUBA Procedures/Rules – Parties – Petitioner. Under LUBA's rules, an organization must be represented by an attorney. Where an unrepresented organization is a named petitioner in an appeal to LUBA, but fails to obtain counsel within the time set by the Board, that party will be dismissed from the appeal. *Ziemer v. City of Florence*, 43 OR LUBA 1 (2002).

27.7.1 LUBA Procedures/Rules – Parties – Petitioner. LUBA's rules require that the petition for review "[s]tate the facts that establish petitioner's standing," but do not require that such allegations of fact appear in any particular form or any particular portion of the petition for review. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

27.7.2 LUBA Procedures/Rules – Parties – Respondent. If an intervenor-respondent wishes to request that LUBA remand a county decision so that the county can apply a different statute than the one the county applied in the appealed decision, that request is not properly presented to LUBA where the intervenor-respondent neither filed a cross petition for review nor raised the issue in a cross assignment of error in the intervenor-respondent's response brief. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

27.7.2 LUBA Procedures/Rules – Parties – Respondent. Under OAR 661-010-0075(6), a county may only appear in a LUBA appeal through an attorney. Where the county attorney advises LUBA that the county will not participate in an appeal, and the county planning department latter provides LUBA with a copy of its letter responding to the petitioner's record objections, LUBA will not treat that letter as the county's response to petitioner's record objections. *SOPIP v. Coos County*, 56 Or LUBA 802 (2008).

27.7.2 LUBA Procedures/Rules – Parties – Respondent. Under OAR 661-010-0075(6) corporations, including municipal corporations, must be represented by an attorney in a LUBA appeal. Although LUBA does not require that the local government record of an appealed land use decision be filed by an attorney, any subsequent appearance by a city—after the record is filed—to oppose record objections, oppose any other motions, file motions on the local government's behalf or otherwise appear on behalf of the local government must be through an attorney who is admitted to practice in the State of Oregon. *Robson v. City of La Grande*, 53 Or LUBA 604 (2006).

27.7.2 LUBA Procedures/Rules – Parties – Respondent. The principle of affirmative waiver of issues before the local decision maker described in *Newcomer v. Clackamas County*, 92 Or App 174, 758 P2d 369 (1988), does not apply to representations before LUBA, such as a respondent's representation that it would not file a response brief. To the extent a petitioner relies on such a representation to submit an abbreviated petition for review, it does so at its own risk. LUBA. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 799 (2004).

27.7.2 LUBA Procedures/Rules – Parties – Respondent. A county is by statute and rule a party to an appeal of a county land use decision to LUBA, and nothing prohibits a county from indirectly representing the interests of others, such as an applicant who failed to file a timely motion to intervene, in exercising the county's right to defend its decision before LUBA. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 799 (2004).

27.7.2 LUBA Procedures/Rules – Parties – Respondent. Where pursuant to an intergovernmental agreement a county renders a final land use decision based on a recommendation by the city council, the county is the proper respondent, and the city will be dismissed as a respondent, absent a demonstration that the city must remain as a respondent in order to reach an issue regarding the county's decision. *Roberts v. Clatsop County*, 43 Or LUBA 577 (2002).

27.7.2 LUBA Procedures/Rules – Parties – Respondent. LUBA does not have authority to deny respondent the right to appear and defend its decision in an appeal before LUBA. *Sanchez v. Clatsop County*, 26 Or LUBA 631 (1994).

27.7.2 LUBA Procedures/Rules – Parties – Respondent. A motion to intervene on the side of respondent filed 11 days after the petition for review was filed, and 14 days before the respondents' briefs were due, is filed within the time allowed by ORS 197.830(6)(a). *Testa v. Clackamas County*, 29 Or LUBA 577 (1995).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where intervenors' attorney files a notice of withdrawal as attorney, and intervenors file a notice of withdrawal indicating their intent to withdraw their response brief and from the appeal as parties, LUBA will consider intervenors withdrawn from the appeal and will not consider intervenors' response brief. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. LUBA will deny a motion from an applicant who missed the deadline to intervene in an appeal to participate as an amicus because such participation would effectively allow that applicant to participate as an intervenor-respondent and file what is in effect a response brief to the petition for review, without meeting the statutory deadline for intervention and without payment of an intervenor fee as set out in ORS 197.830(7)(a). *VanSickle v. Klamath County*, 77 Or LUBA 588 (2018).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where LUBA issues an interlocutory order approving or denying a motion to intervene, an appeal of LUBA's Final Opinion and Order to the Oregon Court of Appeals would allow challenge to that interlocutory order. Where the contested motion to intervene is briefed and ripe for resolution, delaying the resolution of the motion would unnecessarily prejudice the other parties, and complicate final resolution of the appeal by allowing a person LUBA has determined lacks standing to intervene to file a petition for review. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. ORS 197.830(7)(a) requires that a motion to intervene be filed within 21 days after the notice of intent to appeal is filed. Under OAR 660-010-0015(1)(b), a notice of intent to appeal is filed on the date it is mailed by registered or certified mail or the date it is received by LUBA. But OAR 660-010-0015(1)(b) does not set out two dates of filing, either of which may be relied upon as the date of filing for purposes of computing the deadline for filing a motion to intervene. Rather the rule makes the date of filing the date of mailing, if mailed by registered or certified mail, with the date of filing being the date the notice of intent to appeal is received by LUBA in all other circumstances. *Holmberg v. Deschutes County*, 76 Or LUBA 512 (2017).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where an entity named "Shepherdsfield Ministries" moves to intervene in an appeal to LUBA, but the entity fails to establish that it appeared during the proceedings below under that name, or that it has met the requirements for representational or organizational standing, the entity has not established standing to intervene. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 664 (2016).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where it is undisputed that a corporation named "Shepherdsfield Church" appeared during the proceedings below, but the motion to intervene mistakenly identifies the appearing party as "Shepherdsfield Ministries," LUBA will allow the motion to intervene to be revised to name the correct party as long as the correction does not prejudice the substantial rights of other parties. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 664 (2016).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. The ORS 197.830(7)(a) 21-day deadline for filing a motion to intervene, which is strictly enforced, is a *filing* deadline, not

a *service* deadline. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a local government combines proceedings on two related land use matters, and a party moving to intervene in an appeal of one of the resulting land use decisions testified at the combined hearing, that party has appeared in the proceedings before the decision-maker and has standing to intervene in the appeal, even if the party's testimony did not specifically refer to the decision that was appealed. *Iyer v. Washington County*, 72 Or LUBA 491 (2015).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where an intervenor-respondent generally agrees with the decision on appeal but wishes to challenge an aspect of the decision if the decision is reversed or remanded on the petition for review, OAR 661-010-0030(7) requires that the intervenor-respondent file a cross-petition for review with a contingent assignment of error, within the same deadline that applies to petitions for review. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Before LUBA adopted the current version of OAR 661-010-0030(7), intervenors-respondents could include contingent cross-assignments of error in their response briefs to challenge aspects of the decision on review, in the event the decision had to be remanded or reversed under the petition for review. Now, under the current version of OAR 661-010-0030(7), such contingent cross assignments of error must be included in a timely filed cross-petition for review. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Under OAR 661-010-0050, an intervenor becomes a party to the appeal on the date the motion to intervene is filed. A petitioner seeking to extend the deadline for filing the petition for review pursuant to OAR 661-010-0067(2) must obtain the written consent of the intervenor and all parties, even if LUBA has not yet issued an order granting the motion to intervene. *Danielson Trust v. Jackson County*, 65 Or LUBA 437 (2012).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. ORS 197.830(7)(a) and OAR 661-010-0050(3) do not authorize LUBA to refund a prevailing intervenor's filing fee. *J & G Holdings LLC v. Washington County*, 63 Or LUBA 411 (2011).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where an intervenor moves to intervene only on the side of respondent, but later submits a response brief supporting the position of the respondent on some assignments of error and supporting the position of petitioner on other assignments of error, LUBA will strike the portion of intervenor's response brief that supports petitioner's assignments of error on its own motion. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. LUBA will deny an untimely motion to intervene pursuant to ORS 197.830(7), where the movant was timely served a copy of the notice of intent to appeal with a certificate of filing showing the date the notice was filed. That LUBA staff allegedly misinformed the movant of the date the notice was filed is not a

basis to toll the statutory deadline to intervene at ORS 197.830(7)(a). *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 526 (2010).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. To preserve the legislative intent in requiring participants to the proceedings below to timely intervene in appeals to LUBA, LUBA has generally declined to grant amicus status to interested parties who simply missed the statutory deadline to intervene in the appeal. A significant exception is where the respondent informs LUBA that it does not intend to file a response brief, and absent amicus participation no brief responding to the petition for review would be filed at all, and LUBA would have to resolve the appeal based solely on the petition for review. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 530 (2010).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where the respondent indicates it intends to file a response brief, LUBA will deny a motion to appear as amicus from an interested party who failed to file a timely motion to intervene, absent a demonstration that the respondent's brief will not adequately respond to the petition for review or otherwise that the amicus brief would significantly aid LUBA's review. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 530 (2010).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. When the original applicant would be allowed to intervene in an appeal under ORS 197.830(7)(b)(A) as the "applicant who initiated the action before the local government," the original applicant's successor in interest may also intervene. *Biggerstaff v. Yamhill County*, 58 Or LUBA 665 (2008).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. The filing of a Notice of Intent to Appeal (NITA) is a jurisdictional prerequisite to commencing a LUBA appeal. Where all petitioners withdraw the NITA, the appeal must be dismissed. *Brown v. Jackson County*, 55 Or LUBA 178 (2007).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. An agent or consultant who represented the applicants during the proceedings before the local government but is not a member of the Oregon State Bar cannot represent the applicants before LUBA. *Wetherell v. Douglas County*, 54 Or LUBA 782 (2007).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. An appearance before the local government by an agent or representative of the applicants is not, in itself, an appearance by that agent or representative on his or her own behalf, for purposes of intervening under ORS 197.830(7)(b)(B). *Wetherell v. Douglas County*, 54 Or LUBA 782 (2007).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. ORS 197.830(7)(b)(B) does not specify whether intervention by the "applicant" who "initiated" the application is limited to the property owner or other person in interest, or also includes an agent or hired consultant who files an application on behalf of the property owner or person in interest. *Wetherell v. Douglas County*, 54 Or LUBA 782 (2007).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where the property owners

sign the application as the applicants, but designate their agent as the "applicant," that designation does not mean that the agent is the "applicant who initiated the action before the local government" within the meaning of ORS 197.830(7)(b)(A), and the agent therefore does not have standing to intervene as the applicant under that statute. *Wetherell v. Douglas County*, 54 Or LUBA 782 (2007).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Persons who made an appearance during the local government proceedings that led to a city decision that was remanded by LUBA satisfy the ORS 197.830(7)(b) requirement that a person who moves to intervene in a subsequent LUBA appeal of the city's decision following LUBA's remand must have "appeared." The appearance during the initial local government proceedings is sufficient to satisfy the ORS 197.830(7)(b) appearance requirement, and it does not matter that the local government refused those persons' attempt to appear during the remand proceedings. *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a person attempts but is denied the right to appear during a local government's proceedings that lead to a land use decision, in a subsequent LUBA appeal that attempt to appear is sufficient to satisfy the ORS 197.830(7)(b) appearance requirement, to allow that person to intervene in the LUBA appeal to assign error to the local government's refusal to allow a local appearance. *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where persons appeared during the local government proceedings that led to a LUBA appeal and remand, that local appearance is sufficient to satisfy the ORS 197.830(7)(b) requirement for an appearance to have standing to intervene in a subsequent LUBA appeal challenging the local government's decision following the LUBA remand. For purposes of satisfying the ORS 197.830(7)(b) "appearance" requirement, it does not matter that those persons did not file a brief in the first LUBA appeal. *South Gateway Partners v. City of Medford*, 53 Or LUBA 593 (2006).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A person who is not entitled to notice of the local government's final decision under 197.615(2)(b) is not entitled to be served a copy of the notice of intent to appeal, or intervene in the appeal after the 21-day deadline for intervention has expired. *Herring v. Lane County*, 53 Or LUBA 608 (2007).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. LUBA will assume an applicant's planner has standing to intervene under ORS 197.830(7)(b) on the side of the applicant-petitioner, notwithstanding the planner's failure to allege in his unopposed motion to intervene that he was also an applicant or made an appearance on his own behalf, where there is no dispute that the petitioner has standing and both petitioner and the planner signed the petition for review. *Gillette v. Lane County*, 52 Or LUBA 1 (2006).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. An intervenor company's failure to identify itself correctly in its motion to intervene might warrant a motion to require an amended motion to intervene but it does not justify denying the motion to intervene. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. An applicant below who intervenes in a LUBA appeal is not precluded from participating in the appeal merely because he has sold his interest in the property. *Mazorol v. City of Bend*, 52 Or LUBA 136 (2006).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. After the petitioner withdraws from an appeal, any intervenor-petitioner who has not timely filed a separate notice of intent to appeal may not continue the appeal, and the appeal must be dismissed. *Marylhurst Neighborhood Assoc. v. City of West Linn*, 52 Or LUBA 612 (2006).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Absent failure to serve a copy of the notice of intent to appeal on parties entitled to such notice, or other sufficient reason to excuse a party's failure to comply with the 21-day deadline to intervene in ORS 197.830(7)(c), that statute requires denial of any motion to intervene filed more than 21 days after the notice of intent to appeal is filed. *Grant v. City of Depoe Bay*, 52 Or LUBA 811 (2006).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. While OAR 661-010-0067(3) provides that certain time limits may be extended upon motion of a party, that rule must be interpreted consistently with ORS 197.830(7)(c), which mandates denial of a motion to intervene filed more than 21 days after the notice of intent to appeal is filed. Accordingly, OAR 661-010-0067(3) does not authorize LUBA to grant a motion to extend the time to file the motion to intervene more than 21 days after the notice is filed. *Grant v. City of Depoe Bay*, 52 Or LUBA 811 (2006).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Read in context, the ORS 197.830(2) requirement that a person must file a notice of intent to appeal in order to "petition [LUBA] for review" does not implicitly prohibit parties who have not filed a notice of intent to appeal from filing a cross-petition for review, as provided by OAR 661-010-0030(7). *Horning v. Washington County*, 51 Or LUBA 303 (2006).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. All petitioners who are not represented by an attorney must represent themselves in a LUBA appeal. Neither a lead petitioner nor any other individual petitioner may present arguments or file documents on behalf of other unrepresented petitioners. *Gillette v. Lane County*, 51 Or LUBA 823 (2006).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Intervenor's failure to file a motion to intervene within 21 days of the date the notice of intent to appeal (NITA) was filed does not require denial of the motion where petitioner failed to serve the NITA on intervenor, as required by OAR 661-010-0015(3)(i). *Ford v. Jackson County*, 50 Or LUBA 359 (2005).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. The ORS 197.830(7) "appearance" requirement is not satisfied and a motion to intervene will be denied where movant's request to participate in local hearing after the close of the record is denied, and movant does not argue that participation was erroneously denied. *Anthony v. Josephine County*, 50 Or LUBA 703 (2005).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Status as an intervenor is recognized from the date a motion to intervene is filed. LUBA's general practice is to allow time for other parties to object to the motion to intervene and then rule on the motion, either in an interlocutory order or in the final opinion. *Lindsey v. Josephine County*, 50 Or LUBA 708 (2005).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A *pro se* intervenor may not file a motion on behalf of prospective unrepresented intervenors to seek additional time for filing motions to intervene. *Lindsey v. Josephine County*, 50 Or LUBA 708 (2005).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Failure to object to a motion to intervene until after the intervenor has filed a response brief and shortly before oral argument is prejudicial to the intervenor's substantial rights and not a "technical violation" of LUBA's rules. *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Absent circumstances where delay in filing the motion to intervene is caused by the party objecting to intervention, ORS 197.830(7)(c) mandates that an untimely motion to intervene be denied. That the petitioner failed to object to the motion to intervene until after the intervenor's brief was filed with LUBA is an insufficient basis to allow an untimely motion to intervene. *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a local code provision prevents movant from testifying at a local hearing on his own behalf, presentation of oral testimony as an expert witness for a party to the local hearing does not satisfy the "appearance" requirement sufficient to allow movant to intervene at LUBA. *Doob v. Josephine County*, 49 Or LUBA 724 (2005).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. ORS 197.830(7) not only prescribes a 21-day deadline for filing a motion to intervene with LUBA, but dictates that failure to comply with that deadline shall result in denial of the motion. That the legislature chose to spell out the consequences for untimely filing of a motion to intervene indicates that the legislature wanted that deadline to be rigorously enforced and, by implication, not extended. *Grahn v. City of Newberg*, 49 Or LUBA 762 (2005).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. The principle of affirmative waiver of issues before the local decision maker described in *Newcomer v. Clackamas County*, 92 Or App 174, 758 P2d 369 (1988), does not apply to representations before LUBA, such as a respondent's representation that it would not file a response brief. To the extent a petitioner relies on such a representation to submit an abbreviated petition for review, it does so at its own risk. LUBA. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 799 (2004).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A county is by statute and rule a party to an appeal of a county land use decision to LUBA, and nothing prohibits a county from indirectly representing the interests of others, such as an applicant who failed to file a timely motion to intervene, in exercising the county's right to defend its decision before LUBA. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 799 (2004).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Consolidation of separate appeals under LUBA's rules is a matter of administrative convenience for the parties and the Board, and does not affect the legal relations of the parties to each other or to the matters appealed. Consolidation of two appeals does not permit a person who is a petitioner in one appeal to file a response brief in the other appeal, absent filing a timely motion to intervene on the side of respondent in that other appeal. *Leach v. Lane County*, 45 Or LUBA 733 (2003).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A member of the local governing body who adopted a land use decision is not a person who "appeared" before the local governing body and may not intervene as a party in a LUBA appeal. *Roe v. City of Union*, 45 Or LUBA 736 (2003).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A party attempting to intervene in a LUBA appeal need only have appeared before the local government and file a timely motion to intervene with LUBA. Unlike petitioners before LUBA, there is no requirement that intervenors have exhausted all administrative remedies below. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. LUBA will not deny an otherwise proper motion to intervene simply because the moving party's interests may be represented by other parties. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A motion to intervene filed by an unrepresented organization, stating that the organization will soon be represented by an attorney, will be denied where no attorney appears on behalf of the organization and the organization fails to respond to a challenge to its status as intervenor. *Stahl v. Tillamook County*, 43 Or LUBA 623 (2002).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A technically deficient motion to intervene is sufficient to satisfy the 21-day deadline of ORS 197.830(7)(a) when an acceptable motion to intervene is subsequently filed and there is no prejudice to other parties' substantial rights. *Griffin v. Jackson County*, 40 Or LUBA 584 (2001).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. An amended motion to intervene that attempts to add an intervenor will not be granted as to that additional intervenor, absent some argument that the additional intervenor was prevented from independently intervening in the appeal within the statutory deadline. *Griffin v. Jackson County*, 40 Or LUBA 584 (2001).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Petitioners are entitled to rely on a Board order extending the time to file a petition for review, notwithstanding that the order was issued without the written agreement of all parties, where no party's substantial rights are prejudiced by the extension of time. *Ballou v. Douglas County*, 40 Or LUBA 573 (2001).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. LUBA's rules do not require that we automatically provide copies of all pleadings and orders that were filed and issued

before a party's motion to intervene is received. *Pereira v. Columbia County*, 39 Or LUBA 760 (2001).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a motion to intervene has been filed and served but not yet received by LUBA and the parties, and an order extending the deadline for filing the petition for review is entered based on the mistaken understanding that all parties consent to the extension, the intervening party may thereafter object to the extension and is entitled to have the original deadline for filing the petition for review reestablished, if that can be done without prejudicing petitioner's substantial right to rely on the deadline that was established in the order. *Pereira v. Columbia County*, 39 Or LUBA 760 (2001).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Persons who appeared during local proceedings may intervene in a LUBA appeal on the side of respondent without demonstrating that the appeal will result in any actual damage or harm. *Wynnyk v. Jackson County*, 39 Or LUBA 500 (2001).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. When an intervening party is aware that the record has been filed, but fails to obtain a copy of the record in time to object and does not demonstrate why such a failure justifies a further delay in the appeal, untimely objections to the record will be rejected. *Mountain West Investment v. City of Silverton*, 38 Or LUBA 938 (2000).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Failure to file a notice to intervene within the 21-day period prescribed by ORS 197.830(7) does not require that intervention be denied where the petitioner did not serve the notice of intent to appeal on intervenor until 53 days after the notice was filed with LUBA. *Mountain West Investment v. City of Silverton*, 38 Or LUBA 932 (2000).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where the local government mailed a copy of the decision to the applicant, and petitioners timely served a notice of intent to appeal on the applicant, the fact that the applicant's attorney did not receive a copy of either the decision or the notice of intent to appeal does not allow the applicant to file his motion to intervene beyond the 21-day deadline imposed by ORS 197.830(6). *Slusser v. Polk County*, 37 Or LUBA 1062 (2000).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where proceedings are pending before a lower body, a decision of the governing body to decline review of the lower body's decision in advance of that lower body's decision either (1) is not properly viewed as a separate land use decision, making a separate appearance by intervenors unnecessary, or (2) is so integral to the permit decision, that appearing before the planning commission satisfies the ORS 197.830(6) (1997) appearance requirement. *SBA Towers, Inc. v. Linn County*, 37 Or LUBA 1049 (2000).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. ORS 197.830(6)(b)(A) permits an applicant to intervene in proceedings before LUBA even if the applicant did not appear below, so long as the motion to intervene is filed within 21 days of the date the notice of intent to

appeal is filed. *Dowrie v. Benton County*, 37 Or LUBA 998 (1999).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A motion to extend the deadline for filing a petition for review cannot be granted under OAR 661-010-0067(2) unless *all* parties, including intervenors, consent to the requested extension. *Bauer v. City of Portland*, 37 Or LUBA 489 (2000).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A motion to intervene is not timely filed where the person seeking to intervene files the original motion to intervene with LUBA more than 21 days from the date the notice of intent to appeal is filed, notwithstanding that that person served copies of that motion on the petitioner and the local government within the 21-day period. *Tylka v. Clackamas County*, 36 Or LUBA 801 (1999).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where intervenor's initial request to intervene does not comply with LUBA's rules, but intervenor then files an amended motion to intervene which complies with LUBA's procedural requirements within five days of receiving notice of the technical violations, and a party opposing the intervention fails to show how that delay caused substantial prejudice, LUBA will allow intervenor to appear. *Plotkin v. Washington County*, 36 Or LUBA 378 (1999).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Petitioner's failure to serve a copy of the notice of intent to appeal on the applicant does not toll the 21-day period to intervene under ORS 197.830(6), where the applicant nonetheless received a copy of the notice and did not file a motion to intervene within 21 days of receiving the notice. *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a person moving to intervene did not appear during local proceedings but attempts to excuse the failure to appear based on the local government's failure to provide notice, the person moving to intervene must establish that she had a right to notice. *Columbia Hills Development Co. v. Columbia County*, 35 Or LUBA 737 (1998).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A motion to intervene that is filed by mail within 21 days after the notice of intent to appeal is filed is timely filed under ORS 197.830(6), notwithstanding that the motion to intervene is not received by LUBA until 27 days after the notice of intent to appeal is filed. *Marshall v. City of Yachats*, 35 Or LUBA 82 (1998).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. ORS 197.830(6) requires a person moving to intervene in an appeal at LUBA to have appeared below. There is no statute analogous to ORS 197.830(3) that waives the appearance requirement for potential intervenors where the local government fails to conduct a hearing. *Dornan v. Yamhill County*, 34 Or LUBA 747 (1998).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. 1997 legislative amendments to ORS 197.830(6)(a) require that any person, including the applicant, who seeks to intervene in a LUBA appeal must file a motion to intervene within 21 days of the date the notice

of intent to appeal is filed, notwithstanding exceptions at ORS 197.830(6)(b) that exempt applicants from the appearance requirement. *Wolverton v. Crook County*, 34 Or LUBA 515 (1998).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Amendments to ORS 197.830(6) that shorten the statutory deadline for filing a motion to intervene in a LUBA appeal impair the existing right to participate in an appeal. Thus, the statute applies prospectively in the absence of an expression of legislative intent to the contrary. *Gutoski v. Lane County*, 33 Or LUBA 866 (1997).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. An appeal will be dismissed where petitioner failed to "appear" below and therefore lacks standing to appeal to LUBA. In that circumstance, the LUBA appeal will be dismissed notwithstanding the intervention as a petitioner of a party who did appear below, where that intervenor-petitioner did not also file his own timely notice of intent to appeal. *Waters v. Marion County*, 33 Or LUBA 751 (1997).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Although intervenor did not file a motion to intervene as soon as practicable after the notice of intent to appeal, the motion to intervene will be allowed where petitioners did not object to the delayed briefing schedule or argue that their substantial rights were affected by the delay. *Roberts v. Crook County*, 33 Or LUBA 267 (1997).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Failure to file a motion to intervene on the side of respondent "as soon as practicable after the notice of intent to appeal is filed," as required by OAR 661-10-050(2), is a technical violation of LUBA's rules that does not affect the parties' substantial rights, if intervenors' response brief is timely filed and the appeal is not delayed due to the filing of the motion to intervene. *Testa v. Clackamas County*, 29 Or LUBA 577 (1995).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. It is not necessary for a party who filed a motion to intervene before a decision was withdrawn for reconsideration to refile its motion to intervene, or file a second motion to intervene, if an original notice of intent to appeal is refiled, or an amended notice of intent to appeal is filed, after the decision on reconsideration is filed with LUBA. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. An appearance by a person before a local government on behalf of an artificial entity does not, of itself, constitute an appearance on behalf of each individual member of that entity. *Ramsey v. City of Portland*, 28 Or LUBA 763 (1994).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. If a person moving to intervene in a LUBA appeal does not contend (1) the local government failed to follow statutorily required procedures in making the challenged decision and such failure prevented movant from being able to appear below, or (2) the local government improperly refused to allow movant to appear below, the appearance requirement of ORS 197.830(6)(b) is not obviated. *Ramsey v. City of Portland*, 28 Or LUBA 763 (1994).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a motion to intervene is challenged, the motion will be denied if the movant does not support the motion with an affidavit, record citations or other proof establishing the movant's right to intervene, as required by OAR 661-10-050(2)(b). *Noble v. City of Fairview*, 28 Or LUBA 711 (1994).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Being the owner of the property that is the subject of a LUBA appeal proceeding does not automatically establish that person's standing to intervene. *Noble v. City of Fairview*, 28 Or LUBA 711 (1994).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A respondent or intervenor-respondent wishing to challenge some aspect of a land use decision in a LUBA appeal must either file a timely cross-petition for review or file a separate appeal. Cross assignments of error may not be included in a respondent's brief. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a movant's standing to intervene is challenged and a movant fails to support the motion to intervene "with affidavits, citations to the record or other proof," as required by OAR 661-10-050(2)(b), the motion to intervene will be denied. *Brentmar v. Jackson County*, 26 Or LUBA 651 (1994).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. LUBA's rules require that artificial persons such as special districts appear in LUBA appeals through an attorney. Where a motion to intervene is filed on behalf of a special district by a person who is not an attorney, the motion will be denied. *Sanchez v. Clatsop County*, 26 Or LUBA 631 (1994).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a local government refused to allow a person to appear during the proceedings below, that person has standing to intervene in a LUBA appeal to challenge the local government's determination that he not be allowed to appear. However, if the person does not successfully challenge the local government's refusal to allow an appearance below, his motion to intervene will be denied. *McKenzie v. Multnomah County*, 26 Or LUBA 619 (1993).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. That a person moving to intervene in an appeal at LUBA failed to object to a local government's decision not to allow that person to present testimony is not fatal to that person's assertion of standing to intervene, where two other persons objected below to the local government's decision to limit testimony. *Sorte v. City of Newport*, 25 Or LUBA 828 (1993).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a local government denies a person the right to present testimony on her own behalf, that person "appeared" within the meaning of ORS 197.830(6) and OAR 661-10-050(1), at least for the purpose of challenging the local government's decision to limit testimony. *Sorte v. City of Newport*, 25 Or LUBA 828 (1993).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. An intervenor-respondent's delay in filing a motion to intervene does not prejudice the rights of any party and

provides no basis for denying the motion to intervene, where the appeal proceedings are suspended by a pending motion for evidentiary hearing and the time for filing the respondents' briefs has not yet expired. *Louisiana Pacific v. Umatilla County,* 25 Or LUBA 816 (1993).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. OAR 661-10-075(3) allows both respondents and intervenors-respondent to file cross petitions for review. Cross petitions for review are not limited to the issues raised in petitioners' petition for review; any appropriate issue may be raised. *Reusser v. Washington County,* 24 Or LUBA 652 (1993).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where LUBA has granted a motion to intervene, and LUBA's final decision is subsequently remanded by the appellate courts, the intervenor does not lose its party status in the proceeding before LUBA on remand simply because it did not participate as a party in the appellate court proceedings. *Columbia Steel Castings Co. v. City of Portland,* 24 Or LUBA 640 (1993).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a challenged decision does not purport to amend an acknowledged plan or land use regulation, the requirement of ORS 197.610(1) for notice to DLCD of a proposed post-acknowledgment amendment is not applicable. In such circumstances, a local government's failure to give DLCD the notice required by ORS 197.610(1) does not obviate the appearance requirement of ORS 197.830(6)(b) for intervention by DLCD in an appeal before LUBA. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. The requirement of ORS 197.830(6)(b) that a person wishing to intervene in an appeal at LUBA have appeared during the local government proceedings is obviated where a city fails to observe statutory notice and hearing requirements of ORS 227.173 and 227.175 prior to issuing the challenged decision granting approval for a permit. *Hood River Sand v. City of Mosier*, 24 Or LUBA 604 (1992).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. An allegation that an intervenor failed to appear in the proceedings below cannot be resolved until the content of the record of the proceedings below is known. Therefore, a motion to deny intervention based on a failure to appear below, which is filed prior to the settling of the local record, is not untimely. *Terra v. City of Newport*, 24 Or LUBA 579 (1992).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a motion to intervene and intervenors' response brief were filed six days after respondents' briefs were due and were received by petitioners one week before oral argument, and intervenors' brief does not raise new issues warranting the filing of a reply brief, petitioners' substantial right to prepare and submit their case was not prejudiced by the untimely filing. *Alliance for Resp. Land Use v. Deschutes County,* 23 Or LUBA 476 (1992).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a motion to intervene is filed three months after the notice of intent to appeal, with no explanation for why the motion was not filed earlier, the motion to intervene is not filed "as soon as practicable after the Notice of Intent to Appeal is filed," as required by OAR 661-10-050(2). *Rhyne v. Multnomah*

County, 23 Or LUBA 703 (1992).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. OAR 661-10-050(3)(b) requires that intervenors-respondent file their brief within the time provided for filing the respondent's brief. Where the time for filing the respondent's brief is extended beyond the 42-day deadline established by OAR 661-10-035, intervenors-respondent are entitled to the same extension under OAR 661-10-050(3)(b). *Rhyne v. Multnomah County*, 23 Or LUBA 703 (1992).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where intervenors' delay in filing their motion to intervene and brief results in no delay of the appeal and no prejudice to petitioners' substantial rights, the failures to file a timely motion to intervene and brief are technical violations of LUBA's rules and provide no basis for denying the requested intervention. *Rhyne v. Multnomah County*, 23 Or LUBA 703 (1992).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where a county has never entered into any cooperative agreements with special districts pursuant to ORS 197.185(2), what such a cooperative agreement might contain is entirely speculative and, therefore, the lack of such an agreement between the county and a district does not render inapplicable the ORS 197.830(6)(b)(B) "appearance" requirement for intervention in an appeal of a district decision. *Adkins v. Heceta Water District*, 22 Or LUBA 840 (1992).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. If no petition for review has yet been filed with LUBA, a motion to intervene is not untimely under ORS 197.830(6)(a). *Ramsey v. City of Portland*, 22 Or LUBA 295 (1991).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Filing a motion to intervene within one month of receiving a copy of the notice of intent to appeal and within one week of transmittal of the local record to LUBA complies with the requirement of OAR 661-10-050(2) that a motion to intervene be filed "as soon as is practicable." *Ramsey v. City of Portland*, 22 Or LUBA 295 (1991).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Failure to file a motion to intervene "as soon as is practicable after the Notice of Intent to Appeal is filed," is a technical violation of LUBA's rules and does not affect LUBA's review unless the filing of the motion itself delays the review proceeding or denies the other parties a reasonable time to prepare and submit their cases or a fair hearing. *Ramsey v. City of Portland*, 22 Or LUBA 295 (1991).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Under OAR 661-10-050(1), an intervenor becomes a party to the appeal proceeding before LUBA when the motion to intervene is filed. *Ramsey v. City of Portland*, 22 Or LUBA 295 (1991).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where no local hearings are conducted and no notice of the proceeding is provided, it is not possible to appear before the local decision maker and, consequently, it is unnecessary for a potential intervenor to have "appeared" below, as required by ORS 197.830(6)(b), to have standing to intervene in an appeal to LUBA. *Weeks v. City of Tillamook*, 22 Or LUBA 797 (1991).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. That a person is named as an applicant in both the application and the local government decision is sufficient to establish that person is an "applicant of record" entitled to service of the notice of intent to appeal under ORS 197.730(8) and, therefore, has standing to intervene under ORS 197.830(6)(b)(A). *Broetje-McLaughlin v. Clackamas County*, 21 Or LUBA 606 (1991).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Neither statutes nor LUBA rules establish an exact deadline for filing a motion to intervene. A motion to intervene filed four days after the respondent's brief is filed is not untimely where the movant is an applicant of record who was not served with the notice of intent to appeal as required by ORS 197.830(8). *Broetje-McLaughlin v. Clackamas County*, 21 Or LUBA 606 (1991).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. LUBA will not consider letters from intervenors-petitioner which "support" the petitioners' petition for review, but do not comply with the requirements of LUBA's rules for an intervenor-petitioner's brief. *Gray v. Clatsop County*, 21 Or LUBA 600 (1991).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A letter stating an intervenor-petitioner "adopts" another party's petition for review as its own brief can satisfy the requirements of OAR 661-10-050(3)(a) for filing an intervenor-petitioner's brief, if (1) the "adopted" petition for review is properly filed, and (2) the intervenor-petitioner's letter is timely filed and served on the other parties. *Gray v. Clatsop County*, 21 Or LUBA 600 (1991).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A motion to intervene, filed along with the intervenor-respondent's brief on the last day for filing a respondent's brief, will be allowed where there is no prejudice to petitioner caused by the delay in moving to intervene. *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A department of local government may be recognized as an "applicant" for purposes of acquiring the right to intervene in an appeal proceeding before LUBA under ORS 197.830(6)(b)(A). *Choban v. Washington County*, 20 Or LUBA 508 (1990).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. A motion to intervene in a LUBA proceeding which is filed five months after the notice of intent to appeal was filed is untimely under OAR 661-10-050(2). If the movant's brief is not filed until two days after oral argument, providing the other parties an opportunity to respond to that brief would delay the issuance of LUBA's final opinion. Under these circumstances, the tardy filing of the motion to intervene is not an excusable technical violation of LUBA's rules under OAR 661-10-005. *Beck v. City of Tillamook*, 20 Or LUBA 178 (1990).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Where the movant's participation below was limited to his role as a decision maker, such participation is not sufficient to constitute an appearance before the local government, and LUBA will deny the motion to intervene. *Cecil v. City of Jacksonville*, 19 Or LUBA 446 (1990).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Petitioner's motion to deny intervenor status, filed four days after a LUBA order determining the content of the local record was issued, is timely because, regardless of when a motion to intervene is filed, failure of the movant to participate in the proceedings below cannot be determined until it is known what the local record includes. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 537 (1990).

27.7.3 LUBA Procedures/Rules – Parties – Intervenor/Participant. Even if a motion to intervene is not filed "as soon as is practicable after the Notice of Intent to Appeal is filed," as required by OAR 661-10-050(2), it will be granted if allowing intervention will not affect the briefing schedule or delay issuance of LUBA's final opinion. OAR 661-10-005. *Columbia Steel Castings Co. v. City of Portland*, 19 Or LUBA 479

27.7.4 LUBA Procedures/Rules – Parties – Amicus. LUBA will deny a motion from an applicant who missed the deadline to intervene in an appeal to participate as an amicus because such participation would effectively allow that applicant to participate as an intervenor-respondent and file what is in effect a response brief to the petition for review, without meeting the statutory deadline for intervention and without payment of an intervenor fee as set out in ORS 197.830(7)(a). *VanSickle v. Klamath County*, 77 Or LUBA 588 (2018).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. LUBA will generally not consider new defenses raised solely in an amicus brief. *VanSickle v. Klamath County*, 77 Or LUBA 588 (2018).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. To preserve the legislative intent in requiring timely intervention, LUBA has generally declined to grant amicus participation to interested parties to the proceedings below who simply missed the deadline to intervene, and who argue only that LUBA's review would be aided by their participation because they are interested parties. *Wetherell v. Douglas County*, 77 Or LUBA 597 (2018).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. In circumstances where the respondent has informed LUBA that it does not intend to file a response brief, a movant to appear as amicus must still establish that LUBA's review would be "significantly aided" by the movant's participation as amicus, and that briefing would not be delayed. *Wetherell v. Douglas County*, 77 Or LUBA 597 (2018).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. In a case regarding a proposed solar energy project, LUBA will allow the participation of a trade association as amicus pursuant to OAR 661-010-0052, where the trade association was founded for the purpose of promoting solar energy, and where some of its members are utility scale solar developers. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 488 (2017).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. LUBA will deny a motion to file an amicus brief for an applicant, who failed to file a motion to intervene in an appeal, where participation by proposed amicus would delay the established briefing schedule, require rescheduling oral argument, and require a corresponding extension of the statutory deadline for issuing LUBA's final opinion and order set out in ORS 197.830(14). *KanDu Ranch, LLC v. Jackson County*, 72 Or LUBA 454 (2015).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. To preserve the legislative intent in requiring participants to the proceedings below to timely intervene in appeals to LUBA, LUBA has generally declined to grant amicus status to interested parties who simply missed the statutory deadline to intervene in the appeal. A significant exception is where the respondent informs LUBA that it does not intend to file a response brief, and absent amicus participation no brief responding to the petition for review would be filed at all, and LUBA would have to resolve the appeal based solely on the petition for review. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 530 (2010).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. Where the respondent indicates it intends to file a response brief, LUBA will deny a motion to appear as amicus from an interested party

who failed to file a timely motion to intervene, absent a demonstration that the respondent's brief will not adequately respond to the petition for review or otherwise that the amicus brief would significantly aid LUBA's review. *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 530 (2010).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. Where the sole basis asserted to appear as amicus is the intent to present additional legal arguments in support of a party's assignments of error, but those arguments are not presented by any other party to the appeal, the amicus motion will be denied because LUBA will not remand a decision based on legal arguments not presented by a party to the appeal. *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 705 (2007).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. LUBA has significant discretion under OAR 661-010-0052 in determining when amicus participation will assist the Board's review. LUBA will allow the applicant to appear as amicus, where the applicant filed a response brief and appeared at oral argument, but the motion to intervene was not denied until LUBA's final opinion, due to the petitioner's late objection to the timeliness of the motion to intervene. *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. The fact that a potential *amicus* could have intervened in an appeal, but did not, does not prevent participation as an *amicus*. *Nelson v. Curry County*, 48 Or LUBA 178 (2004).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. The deadline for filing a motion to appear as an *amicus* is not a deadline that is rigidly enforced. Filing the motion to appear as *amicus* one day late, when the *amicus* brief was timely filed, does not prejudice other parties' substantial rights. *Nelson v. Curry County*, 48 Or LUBA 178 (2004).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. An *amicus'* assertion that it can knowledgeably discuss the history, legislative intent, and policy behind the approval criteria is sufficient to significantly aid LUBA's review. *Nelson v. Curry County*, 48 Or LUBA 178 (2004).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. A property owner's "specific and narrow interest" in property is not sufficient by itself to show that LUBA's review would be significantly aided by the property owner's participation as an *amicus*. *Cotter v. Clackamas County*, 35 Or LUBA 749 (1998).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. That LUBA will have only the perspective of the petitioner for review is always the case where the local government fails to respond and no party moves to intervene, and is not a valid reason by itself to delay the appeal so that an *amicus* brief may be filed. *Krieger v. Wallowa County*, 35 Or LUBA 742 (1998).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. LUBA's rules do not provide for the filing of motions or responses to motions by an *amicus*. Accordingly, LUBA will not consider any submissions of an *amicus* other than a brief. *Lewis v. City of Portland*, 31 Or LUBA 513 (1996).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. Except as provided in 197.830(13)(b), LUBA's review is limited to the local government record. A motion to participate as an *amicus* will be denied where the only reason stated for the request is to present expert testimony and other evidence that is not included in the local government record. *Sanchez v. Clatsop County*, 26 Or LUBA 647 (1994).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. OAR 661-10-052(1) does not bar persons or organizations representing a private interest from appearing as an *amicus* in a LUBA appeal proceeding. *Adkins v. Heceta Water District*, 23 Or LUBA 207 (1992).

27.7.4 LUBA Procedures/Rules – Parties – Amicus. OAR 661-10-052, authorizing *amicus* participation in LUBA proceedings, does not result in *amici* becoming *parties* to the appeal. Consequently, OAR 661-10-052 does not allow party status to a person in violation of ORS 197.830. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 781 (1991).

27.7.5 LUBA Procedures/Rules – Parties – Representation. Pursuant to OAR 661-010-0075(6), each individual before LUBA must either appear on his or her own behalf or be represented by an attorney. LUBA's rules do not authorize one unrepresented party to file pleadings, motions and affidavits presenting legal arguments and factual assertions intended to support the standing of another unrepresented party. *Conte v. City of Eugene*, 76 Or LUBA 498 (2017).

27.7.5 LUBA Procedures/Rules – Parties – Representation. The unrepresented lead petitioner in an appeal to LUBA cannot file a motion on behalf of another unrepresented petitioner seeking the other petitioner's withdrawal from the appeal. *Frewing v. City of Portland*, 73 Or LUBA 392 (2016).

27.7.5 LUBA Procedures/Rules – Parties – Representation. OAR 661-010-0075(6), which prohibits representation of a party by someone other than an active member of the Oregon State Bar, is not violated by allowing an out-of-state lawyer to appear in a LUBA proceeding *pro hac vice* to assist local counsel. *STOP, LLC v. City of West Linn*, 67 Or LUBA 490 (2013).

27.7.5 LUBA Procedures/Rules – Parties – Representation. A motion to appear *pro hac vice* before LUBA is governed by Uniform Trial Court Rule (UTCR) 3.170, which requires an applicant that is subject to pending disciplinary proceedings in another state provide a description of the nature and status of any pending proceedings, so that LUBA can resolve disputes regarding whether the appearance is not in the best interest of LUBA or the parties. *STOP, LLC v. City of West Linn*, 67 Or LUBA 490 (2013).

27.7.5 LUBA Procedures/Rules – Parties – Representation. LUBA will deny an opposed motion to appear *pro hac vice* under Uniform Trial Court Rule (UTCR) 3.170, where an applicant who is subject to a pending disciplinary proceeding fails to provide a description of the nature and status of the proceeding, as UTCR 3.170 requires, and only offers to provide that description under a protective order, where allowing a belated attempt to comply with UTCR 3.170 would significantly delay LUBA's review proceeding. *STOP, LLC v. City of West Linn*, 67 Or LUBA 490 (2013).

27.7.5 LUBA Procedures/Rules – Parties – Representation. Under OAR 661-010-0075(2)(b)(A) and 661-010-0075(7), multiple unrepresented petitioners must designate a lead petitioner who will accept service of documents for all petitioners and notify the other unrepresented petitioners of any documents or communications the lead petitioner receives from LUBA or the parties. But each unrepresented petitioner remains responsible for his or her own representation, and the lead petitioner may not take positions for the other unrepresented petitioners. *Warren v. Josephine County*, 65 Or LUBA 485 (2012).

27.7.5 LUBA Procedures/Rules – Parties – Representation. When a notice of intent to appeal (NITA) is filed on behalf of a "corporation or other organization" by a person who is not an active member of the Oregon State Bar and LUBA allows seven days for an attorney to file an amended NITA, failure to file an amended NITA within that time requires dismissal of the appeal. Sending a letter stating that an attorney will represent the corporation or organization is not a sufficient substitute for filing an amended NITA. *Waluga Neighborhood Association v. City of Lake Oswego*, 59 Or LUBA 380 (2009).

27.7.5 LUBA Procedures/Rules – Parties – Representation. A Notice of Intent to Appeal that names a non-attorney as the representative of a petitioner that is a neighborhood association must be amended within the time set forth by LUBA. Where a petitioner does not file an amended Notice of Intent to Appeal within the time set forth in LUBA's letter to petitioner, LUBA will dismiss the appeal. *Russell Neighborhood Assoc. v. City of Portland,* 58 Or LUBA 397 (2009).

27.7.5 LUBA Procedures/Rules – Parties – Representation. Absent authority in LUBA's governing statutes or elsewhere for LUBA to disqualify an attorney and his law firm from representing a party before LUBA, the Board will deny a motion to disqualify the attorney and law firm based on alleged violations of the Oregon Rules of Professional Conduct. *Dahlen v. City of Bend,* 56 Or LUBA 789 (2008).

27.7.5 LUBA Procedures/Rules – Parties – Representation. Under OAR 661-010-0075(6), a county may only appear in a LUBA appeal through an attorney. Where the county attorney advises LUBA that the county will not participate in an appeal, and the county planning department latter provides LUBA with a copy of its letter responding to the petitioner's record objections, LUBA will not treat that letter as the county's response to petitioner's record objections. *SOPIP v. Coos County,* 56 Or LUBA 802 (2008).

27.7.5 LUBA Procedures/Rules – Parties – Representation. All petitioners who are not represented by an attorney must represent themselves in a LUBA appeal. Neither a lead petitioner nor any other individual petitioner may present arguments or file documents on behalf of other unrepresented petitioners. *Gillette v. Lane County,* 51 Or LUBA 823 (2006).

27.7.5 LUBA Procedures/Rules – Parties – Representation. A lead intervenor is designated for service of documents only where two or more unrepresented intervenors join in a single motion to intervene. Where multiple unrepresented intervenors each file their own motion to intervene, there is no lead intervenor. *Lindsey v. Josephine County,* 50 Or LUBA 708 (2005).

27.7.5 LUBA Procedures/Rules – Parties – Representation. A *pro se* intervenor may not file a motion on behalf of prospective unrepresented intervenors to seek additional time for filing motions to intervene. *Lindsey v. Josephine County*, 50 Or LUBA 708 (2005).

27.7.5 LUBA Procedures/Rules – Parties – Representation. Absent state or local requirements to the contrary, individuals may appear on behalf of other individuals or artificial entities in local land use proceedings. *Neighbors 4 Responsible Growth v. Cityof Veneta*, 50 Or LUBA 745 (2005).

27.7.5 LUBA Procedures/Rules – Parties – Representation. Unless some challenge is made and some reason presented to question a person's claim that he or she is appearing on behalf of another person, an allegation to that effect is sufficient, provided the allegation adequately identifies the person he or she is appearing for. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005).

27.7.5 LUBA Procedures/Rules – Parties – Representation. A person's allegation that he is appearing on behalf of a citizen organization's "membership in [the city] and surrounding area" is

not sufficient to constitute an appearance on behalf of individual members of the organization. A more precise delineation of the represented persons is required to identify those persons adequately so that the city or any other party who might have grounds for challenging those appearances could do so. *Neighbors 4 Responsible Growth v. City of Veneta*, 50 Or LUBA 745 (2005).

27.7.5 LUBA Procedures/Rules – Parties – Representation. A person who is not an active member of the Oregon State Bar may not sign a petition for review on behalf of individual petitioners. *Roe v. City of Union*, 45 Or LUBA 736 (2003).

27.7.5 LUBA Procedures/Rules – Parties – Representation. A motion to intervene filed by an unrepresented organization, stating that the organization will soon be represented by an attorney, will be denied where no attorney appears on behalf of the organization and the organization fails to respond to a challenge to its status as intervenor. *Stahl v. Tillamook County*, 43 Or LUBA 623 (2002).

27.7.5 LUBA Procedures/Rules – Parties – Representation. A cost bill filed on behalf of a local government must be filed by the local government's attorney. A cost bill filed on behalf of a local government by someone other than a member of the Oregon State Bar will be denied. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 1018 (2000).

27.7.5 LUBA Procedures/Rules – Parties – Representation. Parties other than individuals may only appear at LUBA through a member of the Oregon State Bar. *Homebuilders Association v. City of Portland*, 37 Or LUBA 991 (1999).

27.7.5 LUBA Procedures/Rules – Parties – Representation. OAR 661-10-075(6) requires a local government to be represented by an attorney in a LUBA appeal. Therefore, a local government's notice of withdrawal of the challenged decision, pursuant to ORS 197.830(12)(b), is properly submitted by the local government's attorney. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

27.7.5 LUBA Procedures/Rules – Parties – Representation. LUBA is not authorized to reject a document filed on behalf of a represented party because the attorney filing the document did not first obtain specific authority from that party to file the document. *Gettman v. City of Bay City*, 28 Or LUBA 121 (1994).

27.7.5 LUBA Procedures/Rules – Parties – Representation. No party to a LUBA proceeding may be represented by someone who is not an attorney. OAR 661-10-075(6). *Gray v. Clatsop County*, 21 Or LUBA 600 (1991).

27.8 LUBA Procedures/Rules – Consolidation. Consolidation of appeals does not permit a petitioner who is not a petitioner in both appeals to file a petition for review in the appeal in which he is not a party, and that person's signature on a "Joint Petition for Review" does not make that person a petitioner or other party entitled to file a petition for review in the other appeal. *Willis v. Clackamas County*, 76 Or LUBA 479 (2017).

27.8 LUBA Procedures/Rules – Consolidation. LUBA will ignore incorporations of assignments of errors in other petitions for review that cause the incorporating petition to exceed the maximum page limits. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

27.8 LUBA Procedures/Rules – Consolidation. LUBA's rules do not authorize a person who is a party in one appeal to file a motion in a different, consolidated appeal to which that person is not a party. Consolidation does not change party status. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.8 LUBA Procedures/Rules – Consolidation. While incorporation of arguments in another brief in a consolidated appeal is a common practice, such incorporation is permissible only if it does not cause the incorporating brief to exceed the 50 page limit in OAR 661-010-0030(2)(b). Even if such an incorporation does not violate OAR 661-010-0030(2)(b), the incorporation does not allow a person who is party in one appeal to file motions in a consolidated appeal to which the person is not a party. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

27.8 LUBA Procedures/Rules – Consolidation. Where LUBA consolidates two closely related decisions, LUBA will not necessarily require the local government to file a single consolidated record, where the two decisions are based on separate applications, were largely processed separately, and the content of the two records differs significantly. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 484 (2010).

27.8 LUBA Procedures/Rules – Consolidation. That two closely related decisions arising out of the same land use proceeding have different records and were filed at different times does not preclude consolidation of separate appeals of each decision, if consolidation would otherwise facilitate LUBA's review. *Treadmill Joint Venture v. City of Eugene*, 62 Or LUBA 538 (2010).

27.8 LUBA Procedures/Rules – Consolidation. Consolidation of two closely related appeals may be appropriate even if one of the two appeals will likely be dismissed, where consolidation would otherwise facilitate LUBA's review of both decisions. *Treadmill Joint Venture v. City of Eugene*, 62 Or LUBA 538 (2010).

27.8 LUBA Procedures/Rules – Consolidation. When three appeals have been consolidated and petitioners have filed three separate petitions for review, a respondent's request to file a single 114-page respondent's brief responding to all three petitions for review will be allowed. *Foland v. Jackson County*, 61 Or LUBA 500 (2010).

27.8 LUBA Procedures/Rules – Consolidation. Where petitioners filed their motion to consolidate appeals one day after oral argument was held in one appeal and after the petition for

review had been filed in the second appeal, consolidation would not facilitate resolution of the appeals and the motion will be denied. *Citizens for Responsible Development v. City of The Dalles*, 59 Or LUBA 369 (2009).

27.8 LUBA Procedures/Rules – Consolidation. Consolidation of separate appeals under LUBA's rules is a matter of administrative convenience for the parties and the Board, and does not affect the legal relations of the parties to each other or to the matters appealed. Consolidation of two appeals does not permit a person who is a petitioner in one appeal to file a response brief in the other appeal, absent filing a timely motion to intervene on the side of respondent in that other appeal. *Leach v. Lane County*, 45 Or LUBA 733 (2003).

27.8 LUBA Procedures/Rules – Consolidation. Where two appeals concern the same decision, but the petitioner in one appeal will raise different issues than the petitioner in the other appeal, LUBA will not consolidate the appeals or suspend the second appeal while the first appeal is suspended for settlement discussions, where LUBA will ultimately have to reach the issues that will be raised in the second appeal in any event and the parties in first appeal agree not to take any action that would moot the second appeal while it is still pending at LUBA. *Doherty v. Morrow County*, 43 Or LUBA 627 (2002).

27.8 LUBA Procedures/Rules – Consolidation. LUBA allows consolidations of appeals where consolidation facilitates review of separately appealed, closely related land use decisions. A motion to consolidate will be denied where it is uncertain whether consolidation will facilitate or complicate LUBA's review of the challenged decision. *Mountain West Investment v. City of Silverton*, 38 Or LUBA 938 (2000).

27.8 LUBA Procedures/Rules – Consolidation. Where a different, closely related decision is not separately appealed to LUBA, LUBA has no jurisdiction to conduct a consolidated review of the decision that was not appealed as part of its review of the decision that was appealed. *Jebousek v. City of Newport*, 34 Or LUBA 340 (1998).

27.8 LUBA Procedures/Rules – Consolidation. ORS 197.830(8) and OAR 661-10-015(1) and (4) require that a notice of intent to appeal be accompanied by a filing fee of 50 dollars and a deposit for costs of 150 dollars. LUBA will not refund filing fees or deposits for costs when appeals are consolidated. *Tylka v. Clackamas County*, 23 Or LUBA 715 (1992).

27.8 LUBA Procedures/Rules – Consolidation. The purpose of LUBA's rule allowing appeals of closely related land use decisions to be consolidated is to facilitate review of such decisions. A motion to consolidate appeals of closely related land use decisions will be denied where it is uncertain whether consolidation will facilitate or complicate LUBA's review of the challenged decisions. *Davenport v. City of Tigard*, 23 Or LUBA 696 (1992).

27.9.1 LUBA Procedures/Rules – Stays – Generally. Where a petitioner moves to stay a decision that rezones property from Open Space/Public to Urban High Density Residential and limits the uses that may be approved on a portion of the property, even if LUBA (1) assumes that the property contains irreplaceable trees and natural resources; (2) assumes that a site plan review application is pending before the city that would allow development of housing on the property, including tree removal; (3) concludes that the petitioner has adequately specified the injury they will suffer and that the injury is one that cannot be compensated adequately in money damages; and (4) assumes that the injury is substantial and unreasonable, LUBA will deny the motion for stay where the decision itself does not allow any development or tree removal and where the petitioner has not established that destruction of any trees is probable, rather than merely threatened or feared, in the absence of a stay. *Crowley v. City of Hood River*, 80 Or LUBA 1008 (2019).

27.9.1 LUBA Procedures/Rules – Stays – Generally. OAR 661-010-0068 does not provide authority for LUBA to stay an appeal that has been filed at LUBA. Rather, OAR 661-010-0068 provides authority for LUBA to grant a stay of the challenged land use decision or limited land use decision during the pendency of the LUBA appeal, if LUBA determines in its discretion that the requirements of the rule are satisfied. *Altamont Homeowners' Association v. City of Happy Valley*, 76 Or LUBA 459 (2017).

27.9.1 LUBA Procedures/Rules – Stays – Generally. A motion for stay must include a statement of facts and reasons for issuing a stay, demonstrating a colorable claim of error and specifying how the movant will suffer irreparable injury if a stay is not granted. *Rogue Advocates v. Josephine County*, 71 Or LUBA 409 (2015).

27.9.1 LUBA Procedures/Rules – Stays – Generally. LUBA does not have the authority to stay a decision that is not the subject of an appeal. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 448 (2012).

27.9.1 LUBA Procedures/Rules – Stays – Generally. The fact a federal agency has issued a special use permit for construction of a project on federal land or that a state agency has issued a permit for work in wetlands does not prevent LUBA from exercising the authority that the legislature has given to LUBA to stay a local government land use decision, or specific portions of a land use decision. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 448 (2012).

27.9.1 LUBA Procedures/Rules – Stays – Generally. LUBA will not grant a motion for expedited briefing on a motion for stay where it appears the motion for stay is not likely to be granted, because the motion for stay does not adequately establish that the challenged decision falls under the ORS 197.015(10) definition of "land use decision" and it appears that the notice of intent to appeal may not have been timely filed. *Nyman v. City of Hillsboro*, 59 Or LUBA 533 (2009).

27.9.1 LUBA Procedures/Rules – Stays – Generally. Allegations that blowing soil from grading activities will disturb neighbors and impede traffic are inadequate to demonstrate that petitioner will suffer irreparable injury if the stay is not granted. Allegations that the same activities will irreparably harm migrating wildlife are unfounded, where the record indicates that the Oregon Department of Fish and Wildlife found that a conditional use permit for a non-farm dwelling

complies with the county's Goal 5 ordinance. *Ott v. Lake County*, 53 Or LUBA 633 (2007).

27.9.1 LUBA Procedures/Rules – Stays – Generally. Where respondents' response to a motion for stay include a motion to dismiss for lack of jurisdiction, petitioners are entitled under LUBA's rules to 14 days to respond in writing to the jurisdictional challenge. However, where the motion for stay is sought to stop excavation and grading that will be completed within a few days and LUBA agrees with respondents that petitioners fail to demonstrate that the excavation and grading will result in irreparable injury, LUBA will issue an order on the motion for stay in advance of petitioners' written response to respondents' jurisdictional challenge. *Jaqua v. City of Springfield*, 45 Or LUBA 713 (2003).

27.9.1 LUBA Procedures/Rules – Stays – Generally. Absent some law to the contrary, appeal to LUBA does not have the effect of staying the appealed permit decision or tolling a one-year expiration period imposed on the permit by local rule. *Rest Haven Memorial Park v. City of Eugene*, 44 Or LUBA 231 (2003).

27.9.1 LUBA Procedures/Rules – Stays – Generally. Demonstration of irreparable injury generally requires a showing that, if a stay is not granted, the decision will authorize destruction or injury of unique historic or natural resources, or other interests that cannot be practicably restored or adequately compensated for once injured or destroyed. *Roberts v. Clatsop County*, 43 Or LUBA 577 (2002).

27.9.1 LUBA Procedures/Rules – Stays – Generally. Petitioners fail to demonstrate that failure to stay proposed development of condominiums on a golf course will cause irreparable injury, where there is undisputed evidence that, if petitioner prevails, any construction can be removed and the site restored to a golf course fairway. *Roberts v. Clatsop County*, 43 Or LUBA 577 (2002).

27.9.1 LUBA Procedures/Rules – Stays – Generally. LUBA lacks statutory authority to render an advisory determination that code amendments adopted in the challenged land use decision are not effective. Whatever authority LUBA has to impact the effectiveness of such amendments, pending issuance of LUBA's final decision on the appeal, can only be exercised in the context of a motion to stay under ORS 197.845. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 553 (2001).

27.9.1 LUBA Procedures/Rules – Stays – Generally. ORS 197.845(3) authorizes an award of attorney fees when a quasi-judicial decision for which a stay has been granted is affirmed by LUBA. However, the attorney fees recoverable under ORS 197.845(3) are limited to attorney fees related to the stay. *Walton v. Clackamas County*, 34 Or LUBA 829 (1998).

27.9.1 LUBA Procedures/Rules – Stays – Generally. ORS 197.845(3) authorizes an award of attorney fees when a quasi-judicial decision for which a stay has been granted is affirmed by LUBA. Where LUBA dismisses the appeal, an award of attorney fees is not authorized by ORS 197.845(3). *Walton v. Clackamas County*, 34 Or LUBA 829 (1998).

27.9.1 LUBA Procedures/Rules – Stays – Generally. LUBA does not have authority to stay a decision that is not the subject of an appeal. LUBA cannot preclude a local government from

making a land use decision, even when the anticipated decision will address issues that arise from a decision that is being challenged before the Board. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 720 (1998).

27.9.1 LUBA Procedures/Rules – Stays – Generally. Once LUBA has issued a "final order" pursuant to ORS 197.830(14), review jurisdiction rests with the Court of Appeals, and LUBA will dissolve a previously issued stay of a challenged local government decision. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335 (1995).

27.9.1 LUBA Procedures/Rules – Stays – Generally. That vacant historic buildings are in poor condition with regard to plumbing, wiring and exterior paint, and are difficult to protect from trespass and vandalism, does not present a sufficient threat to public health and safety for LUBA to exercise its discretion under ORS 197.845(1) to deny an otherwise warranted stay of a challenged decision allowing the historic buildings to be demolished. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 581 (1995).

27.9.1 LUBA Procedures/Rules – Stays – Generally. LUBA will not deny an otherwise meritorious stay of a challenged decision solely because the applicant alleges it will suffer economic harm due to delay, especially where at least some of applicant's damages are self-inflicted, in that applicant made financial commitments dependent on land use approval before obtaining final local government land use approval. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 581 (1995).

27.9.1 LUBA Procedures/Rules – Stays – Generally. Judicial review of LUBA decisions is governed solely by ORS 197.850. ORS 197.850 does not authorize LUBA to consider petitions for reconsideration or to stay its final opinions and orders. *DLCD v. Klamath County*, 26 Or LUBA 589 (1993).

27.9.1 LUBA Procedures/Rules – Stays – Generally. Under ORS 197.845(1) and OAR 661-10-068(1)(c), LUBA is authorized to stay a land use decision pending its review if petitioner demonstrates (1) a colorable claim of error in the decision under review, and (2) that petitioner will suffer irreparable injury if the stay is not granted. *Marson v. Clackamas County*, 22 Or LUBA 804 (1991).

27.9.1 LUBA Procedures/Rules – Stays – Generally. Absent a stay, an appealed local government decision remains valid and effective during review by LUBA and the appellate courts, until a final appellate judgment reversing or remanding the decision is issued. *Blatt v. City of Portland*, 21 Or LUBA 337 (1991).

27.9.1 LUBA Procedures/Rules – Stays – Generally. LUBA is authorized to stay a land use decision pending review, if the petitioner demonstrates (1) a colorable claim of error in the decision under review, and (2) that the petitioner will suffer irreparable injury if the requested stay is not granted. *Wissusik v. Yamhill County*, 19 Or LUBA 561 (1990).

27.9.2 LUBA Procedures/Rules – Stays – Colorable Claim of Error. Arguments that a county hearings officer erred by (1) applying a judicial rule of strict construction in finding an applicant does not have a legal nonconforming asphalt plant, (2) misconstruing ORS 215.130 by failing to consider whether with conditions the asphalt plant would have no greater adverse impacts than the legal, nonconforming concrete plant it replaced, and (3) adopting material findings of fact that are not supported by substantial evidence, are sufficient to satisfy the "colorable claim of error" prong of ORS 197.845(1). *Meyer v. Jackson County*, 72 Or LUBA 462 (2015).

27.9.2 LUBA Procedures/Rules – Stays – Colorable Claim of Error. An argument that a condition of approval limiting noise from a wind energy facility is inconsistent with an administrative rule governing wind energy facilities presents a colorable claim of error, where reasonable attorneys could disagree on what the meaning of the condition. *Mingo v. Morrow County*, 63 Or LUBA 515 (2011).

27.9.2 LUBA Procedures/Rules – Stays – Colorable Claim of Error. A petitioner may rely on arguments made in the petition for review to establish that there is a colorable claim of error. *Examilotis v. Coos County*, 55 Or LUBA 675 (2007).

27.9.2 LUBA Procedures/Rules – Stays – Colorable Claim of Error. An allegation that a tentative plan approval was placed on inactive status, was never removed from inactive status, and that the time period for reactivating an inactive plan has expired is sufficient to demonstrate a colorable claim of error even when the local government treats the tentative plan as if it had never been placed on inactive status. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604 (2004).

27.9.2 LUBA Procedures/Rules – Stays – Colorable Claim of Error. When a petitioner files a petition for review concurrently with a motion for stay, the assignments of error set forth a basis for reversal or remand, and the respondent does not respond to those arguments, the petitioner has demonstrated a colorable claim or error for purposes of a stay. *Roads End Sanitary District v. City of Lincoln City*, 47 Or LUBA 645 (2004).

27.9.2 LUBA Procedures/Rules – Stays – Colorable Claim of Error. Petitioners establish a colorable claim of error for purposes of ORS 197.845(1)(a) where they show that the county's notice of decision did not mention two arguably applicable zoning code provisions, and contend that the county failed to address applicable approval standards. *Hallberg v. Clackamas County*, 31 Or LUBA 577 (1996).

27.9.2 LUBA Procedures/Rules – Stays – Colorable Claim of Error. Petitioner's contention that a local government erred by failing to adopt findings addressing certain comprehensive plan and code provisions demonstrates a colorable claim of error, if petitioner's arguments that these plan and code provisions apply to a local government decision regarding approval of a demolition permit are not devoid of legal merit. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 565 (1995).

27.9.2 LUBA Procedures/Rules – Stays – Colorable Claim of Error. Although ORS 197.845 does not require that LUBA limit the effect of a stay of a quasi-judicial land use decision, LUBA may limit the effect of such a stay to the particular geographic area or particular provisions of the

stayed decision for which colorable claim of error and irreparable harm have been shown. *ONRC v. City of Seaside*, 27 Or LUBA 679 (1994).

27.9.2 LUBA Procedures/Rules – Stays – Colorable Claim of Error. To satisfy the requirement of ORS 197.845(1)(a) that petitioners demonstrate a "colorable claim of error," petitioners do not need to establish that they will prevail on the merits. Rather, the alleged errors must be sufficient, if sustained, to result in reversal or remand of the challenged decision. *Western Pacific Development v. City of Brookings*, 21 Or LUBA 537 (1991).

27.9.2 LUBA Procedures/Rules – Stays – Colorable Claim of Error. To satisfy the requirement of ORS 197.845(1)(a) that petitioners demonstrate a "colorable claim of error," petitioners do not need to establish that they will prevail on the merits. Provided petitioners' arguments are not devoid of legal merit, it is sufficient that the errors alleged, if sustained, would result in reversal or remand of the challenged decision. *Barr v. City of Portland*, 20 Or LUBA 511 (1990).

27.9.2 LUBA Procedures/Rules – Stays – Colorable Claim of Error. To demonstrate a "colorable claim of error," it is unnecessary for petitioners to establish that they will prevail on the merits. Rather, the alleged errors must be sufficient, if sustained, to result in reversal or remand of the challenged decision. *Thurston Hills Neigh. Assoc. v. Springfield*, 19 Or LUBA 591 (1990).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where a petitioner moves to stay a decision that rezones property from Open Space/Public to Urban High Density Residential and limits the uses that may be approved on a portion of the property, even if LUBA (1) assumes that the property contains irreplaceable trees and natural resources; (2) assumes that a site plan review application is pending before the city that would allow development of housing on the property, including tree removal; (3) concludes that the petitioner has adequately specified the injury they will suffer and that the injury is one that cannot be compensated adequately in money damages; and (4) assumes that the injury is substantial and unreasonable, LUBA will deny the motion for stay where the decision itself does not allow any development or tree removal and where the petitioner has not established that destruction of any trees is probable, rather than merely threatened or feared, in the absence of a stay. *Crowley v. City of Hood River*, 80 Or LUBA 1008 (2019).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. LUBA will stay a city decision approving the demolition of historic contributing structures when, without a stay, demolition of the three buildings could begin immediately. A designated historic district is the sum of its parts, including specific historic contributing structures. A designated historic contributing structure is irreplaceable and its destruction is irreversible and causes an injury that cannot be compensated adequately in money damages. *Niederer v. City of Albany*, 79 Or LUBA 1016 (2019).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where a city decision approves demolition of three "historic contributing structures" and a petitioner moves to stay the decision pending a LUBA proceeding, although arguments that the structures are "degenerated into derelicts" and have been categorized as "dangerous buildings" by the police department may go to the merits of the city's decision, they do not bear on LUBA's consideration of whether petitioner will suffer "irreparable injury" under to ORS 197.845(1) and OAR 661-010-0068 and, therefore, whether a stay should be granted. *Niederer v. City of Albany*, 79 Or LUBA 1016 (2019).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. The "irreparable injury to petitioner" prong is difficult to demonstrate. Generally, a stay is appropriate only if the movant demonstrates that the development will "destroy or injure unique historic or natural resources, or other interests that cannot be practicably restored or adequately compensated for once destroyed." *Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002). *Warren v. Washington County*, 78 Or LUBA 1011 (2018).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. In order to satisfy the "irreparable injury" prong of ORS 197.845(1), petitioner must, among other things, adequately specify the claimed irreparable injury to the petitioner. The movant must specify the following five factors: (1) the movant must adequately specify the injury that he or she will suffer; (2) the injury must be one that cannot be compensated adequately in money damages; (3) the injury must be substantial and unreasonable; (4) the conduct the movant seeks to bar must be probable rather than merely threatened or feared; and (5) if the conduct is probable, the resulting injury must be probably rather than merely threatened or feared. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604, 609 (2004). *Warren v. Washington County*, 78 Or LUBA 1011 (2018).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where petitioner alleges the land

use decision at issue would allow for the removal of 70 percent of a mature Douglas Fir grove in petitioner's neighborhood petitioner has failed to satisfy the "irreparable injury prong" of ORS 197.845(1) where petitioner has not established that the Douglas Fir trees proposed for removal are a "unique * * * natural resource[] * * *," or that the wildlife habitat provided by the Douglas Fir trees "cannot be practicably restored[,]" or that removal of the trees is "probably rather than merely threatened or feared," where the decision imposes several conditions of approval that must be satisfied prior to commencing tree removal. *Warren v. Washington County*, 78 Or LUBA 1011 (2018).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Petitioners adequately specify irreparable injury and establish it is an injury that is probable, rather than merely feared, and cannot adequately be compensated by money damages where petitioners establish that if an Ordinance prohibiting marijuana businesses in the RR-5 zone takes effect, some petitioners will be unable to secure renewals of their existing licenses from the Oregon Liquor Control Commission (OLCC), the agency in charge of licensing marijuana businesses operating in the state, based on statements from an employee of the OLCC that the OLCC will refuse to renew OLCC licenses for existing license holders in the county if the license renewal will take effect after the date the challenged Ordinance takes effect unless the renewals are accompanied by a new Land Use Compatibility Statement (LUCS) issued by the county. *Cossins v. Josephine County*, 77 Or LUBA 564 (2018).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. A petitioner fails to demonstrate that a decision allowing removal of significant trees would cause irreparable harm to the petitioner, where the decision protects 59 of 62 significant trees on the site, and the three trees to be removed are hazardous trees. *Dodds v. City of West Linn*, 74 Or LUBA 605 (2016).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Grading and excavation activities are generally reversible, and are not in themselves activities that cause the irreparable harm that is necessary to warrant the stay of a land use decision. *Dodds v. City of West Linn*, 74 Or LUBA 605 (2016).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. A movant fails to establish irreparable injury in the absence of a stay due to 30 days of exposure to dust and particulate matter generated by a mining operation, based on documents that only establish that long-term exposure to pollution and particulate matter can have serious impacts on respiratory health. *Dion v. Baker County*, 72 Or LUBA 449 (2015).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where a county appears to have relied on a hearings officer's decision that petitioner does not have a legal, nonconforming use right to continue operating an asphalt batch plant in imposing daily fines for every continued day of operation, petitioner is entitled to a stay of the hearings officer's nonconforming use decision if petitioner can demonstrate a colorable claim of error and irreparable injury, even though a stay of that hearings officer's nonconforming use decision may have no effect on whether the county imposes the daily fine while the LUBA appeal proceeds. *Meyer v. Jackson County*, 72 Or LUBA 462 (2015).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Petitioner adequately specifies

irreparable injury and establishes it is an injury that cannot adequately be compensated by money damages and is substantial and unreasonable where (1) the fine is $800 per day and would force petitioner to relocate, (2) there is no suitable relocation site, (3) if a suitable relocation site existed it would cost $4,000 to lease, (4) for any periods of time the asphalt plant is shut down it will lose approximately $180,000 in gross revenue per month and (5) if forced to shut down petitioner would lose its employees and longtime customers. Since petitioner has no legal right to operate during the pendency of the LUBA appeal, petitioner would not be entitled to an award of money damages if it prevailed in its appeal of a hearings officer's decision that it does not have a legal nonconforming use right to operate the asphalt batch plant. *Meyer v. Jackson County*, 72 Or LUBA 462 (2015).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where the conduct a petitioner actually seeks to bar through a stay is a county enforcement decision that is not before LUBA, two of the factors LUBA applies in considering stay requests, whether "the conduct petitioner seeks to bar through the stay is probable" and whether "the resulting injury [is] probable rather than merely threatened or feared" arguably are not present. But where there appears to be a causative relationship between the decision that is before LUBA and the decision to commence the enforcement action, it is appropriate to find that those factors are satisfied. *Meyer v. Jackson County*, 72 Or LUBA 462 (2015).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Arguments that a decision to approve a wetland restoration, if not stayed, may have a "potential adverse impact" on petitioners are insufficient to adequately specify a claimed irreparable injury where the record does not include evidence regarding impacts on petitioners. *Hathaway v. Tillamook County*, 71 Or LUBA 417 (2015).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. In appeal of a permit authorizing construction of a parking lot at a ski area, petitioner's contention that initial construction of the parking lot has begun and "petitioner will suffer irreparable harm to his interests" if the stay is not granted is a bare assertion of irreparable harm, it is not the demonstration of irreparable harm that is required by ORS 197.845(1)(b) and OAR 661-010-0068(1)(c). *Navickas v. Jackson County*, 68 Or LUBA 535 (2013).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Arguments that a petitioner is "adversely affected" by the appealed decision, for purposes of standing under ORS 215.416(11)(a)(A) and colorable claim of error for purposes of a stay under ORS 197.845(1)(a) and OAR 661-010-0068(1)(c), are not necessarily sufficient to establish irreparable harm under ORS 197.845(1)(b) and OAR 661-010-0068(1)(c). *Navickas v. Jackson County*, 68 Or LUBA 535 (2013).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. A movant for a stay under ORS 197.845 must demonstrate that "irreparable injury" will occur if the stay is not granted. "Irreparable injury" is an injury "* * * that cannot be practicably restored or adequately compensated for once destroyed." *Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002). A movant for a stay under ORS 197.845(1) has not demonstrated that an injury from cutting of trees is "irreparable" where a revegetation plan requires replanting of trees and restoration of disturbed

riparian areas and the movant does not argue that there is anything special about the trees that would be cut down or that their replacement by younger trees would result in irreparable injury to a protected Goal 5 riparian resource. *Central Oregon Landwatch v. City of Bend*, 66 Or LUBA 448 (2012).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where a claim of irreparable injury is based on the financial cost of complying with a condition of approval, but the movant does not provide any estimate of those costs, the movant has not adequately specified the alleged injury. *Mingo v. Morrow County*, 63 Or LUBA 515 (2011).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where a claim of irreparable injury is based in part on the financial cost of collecting and evaluating noise data required by a disputed condition of approval, but such costs must be occurred even under the movant's understanding of the condition, such costs may not be considered part of the alleged injury for purposes of granting a stay under ORS 197.845(1). *Mingo v. Morrow County*, 63 Or LUBA 515 (2011).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. A movant for a stay under ORS 197.845(1) has not demonstrated that irreparable injury is probable rather than merely threatened or feared, when the alleged injury is based on the movant's speculation that the after a six-month data collection and evaluation period the county will interpret an ambiguous condition of approval differently than the movant does, and under that interpretation require the movant to expend more money on noise reduction measures than the movant believes will be required under the movant's interpretation of the condition. *Mingo v. Morrow County*, 63 Or LUBA 515 (2011).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. The demonstration that must be made to demonstrate adverse affect under ORS 197.830(3) is not the same demonstration that must be made to demonstrate irreparable injury under ORS 197.845(1) to obtain a stay of a land use decision pending appeal at LUBA. The irreparable injury standard is a much more exacting standard. *Zirker v. City of Bend*, 55 Or LUBA 188 (2007).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Noise, dust, and unpleasant sounds and smells from temporary construction activities do not rise to the level of irreparable injury. *Examilotis v. Coos County*, 55 Or LUBA 675 (2007).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. The mere possibility that petitioner may in the future have to move back to a dwelling she owns adjacent to an asphalt batch plant that has aggravated her asthma in the past is insufficient to demonstrate irreparable injury justifying a temporary stay of a decision that allows an expanded batch plant. *O'Rourke v. Union County*, 54 Or LUBA 758 (2007).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Petitioners' allegations that construction traffic during the time that a LUBA appeal was pending would result in irreparable injury are insufficient to warrant a stay of the decision on appeal, where petitioners do not establish how much construction traffic would be generated by construction on the property and the applicant alleges there will only be three to five additional trips twice a day. *Zirker v. City of Bend*,

54 Or LUBA 806 (2007).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. A movant for a stay fails to demonstrate that grading and scraping activity on the property will cause irreparable injury to archeological objects that may be found on the property, where such objects are protected under ORS 358.920(1)(a) and ORS 97.740. *Ott v. Lake County*, 53 Or LUBA 633 (2007).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where two cities have both adopted ordinances annexing the same property and both of those ordinances have been appealed to LUBA, some jurisdictional uncertainty is unavoidable until those appeals are completed. That temporary uncertainty does not amount to a substantial or unreasonable injury that justifies a stay of the annexation ordinance in one of the LUBA appeals. *City of Happy Valley v. City of Damascus*, 50 Or LUBA 711 (2005).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. To demonstrate "irreparable injury" warranting a stay, the movant must demonstrate more than an abstract interest in the public welfare. A perceived threat to the adequacy of the city's industrial lands inventory is not an "injury" to petitioner. *Grahn v. City of Newberg*, 49 Or LUBA 762 (2005).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. A movant for a stay fails to demonstrate that a decision relocating an existing intersection causes irreparable injury, where the movant alleges, without citing to any evidence, that the decision adds substantial new traffic near his residence, but the respondent cites to evidence that the project will remove traffic from the road adjoining the movant's residence, and there will be no net increase in traffic on roads near his residence. *Grahn v. City of Newberg*, 49 Or LUBA 762 (2005).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. The moving party seeking to stay a land use decision during an appeal at LUBA must establish that he will suffer an irreparable injury if the stay is not granted. That injury must be personal to petitioner, and a petitioner must do more than allege that the impacts of a highway project on historic structures located some distance from his property will result in irreparable injury to petitioner. *Rhodes v. City of Talent*, 49 Or LUBA 773 (2005).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Allegations that floodways are dangerous and that a highway crossing to be built as part of a highway improvement project will be dangerous are insufficient to demonstrate that petitioner will suffer an irreparable injury if the decision that allows the highway project is not stayed pending a LUBA appeal of that decision. *Rhodes v. City of Talent*, 49 Or LUBA 773 (2005).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. In an appeal of a decision that allows a highway project that will relocate a sidewalk and impose access restrictions, a party seeking to stay that decision during the LUBA appeal must demonstrate that he will suffer irreparable injury if the stay is not granted. Allegations that the relocated sidewalk will be dangerous to pedestrians and that the access restrictions will cause businesses to fail are inadequate to demonstrate that petitioner will suffer irreparable injury if the stay is not granted. *Rhodes v. City of Talent*, 49 Or LUBA 773 (2005).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Cutting down large trees and altering steep slopes are the kinds of activities that are generally found to constitute irreparable injury. An unexplained assertion from a city planner that new regulations would not have any significant impact on the allowable development is insufficient to reject such a claim of irreparable injury. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604 (2004).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. When trees are marked for cutting, and property has been marked and staked for clearing and grading, a petitioner has demonstrated that the conduct sought to be barred and the resulting injury that would occur absent a stay are probable. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604 (2004).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. The fact that an applicant might not currently plan to exercise all of the development rights granted by the challenged decision is irrelevant to whether a petitioner has demonstrated irreparable injury. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604 (2004).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. A petitioner may not rely upon potential injuries to nonparties as a basis for demonstrating its own irreparable injury. *Roads End Sanitary District v. City of Lincoln City*, 47 Or LUBA 645 (2004).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. An alleged injury that is attributable primarily to petitioner's calculated business decision to crush rock at his quarry in anticipation of winning a state highway contract that ultimately went to his competitor's quarry does not warrant a stay under OAR 197.820(4), where the alleged injury is merely economic and petitioner fails to show any causative link between the county's approval of mining at his competitor's quarry and petitioner's alleged injury in not winning the state contract. *Bryant v. Umatilla County*, 45 Or LUBA 700 (2003).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where respondents' response to a motion for stay include a motion to dismiss for lack of jurisdiction, petitioners are entitled under LUBA's rules to 14 days to respond in writing to the jurisdictional challenge. However, where the motion for stay is sought to stop excavation and grading that will be completed within a few days and LUBA agrees with respondents that petitioners fail to demonstrate that the excavation and grading will result in irreparable injury, LUBA will issue an order on the motion for stay in advance of petitioners' written response to respondents' jurisdictional challenge. *Jaqua v. City of Springfield*, 45 Or LUBA 713 (2003).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. That excavation and grading will continue during LUBA review of appealed decisions that authorize the grading and fill does not result in irreparable harm to petitioners, where petitioners expressly recognize that the "dirt can be put back." *Jaqua v. City of Springfield*, 45 Or LUBA 713 (2003).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Petitioners' allegations that allowing excavation and grading of a site for a proposed hospital in advance of a final city decision on a site plan for the proposed hospital will influence the city's decision on the site plan and thereby

result in irreparable harm to petitioners will be rejected by LUBA as speculative, where it does not appear that any of petitioners' participatory or procedural rights in the master plan review process will be affected by the excavation or grading. *Jaqua v. City of Springfield*, 45 Or LUBA 713 (2003).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Demonstration of irreparable injury generally requires a showing that, if a stay is not granted, the decision will authorize destruction or injury of unique historic or natural resources, or other interests that cannot be practicably restored or adequately compensated for once injured or destroyed. *Roberts v. Clatsop County*, 43 Or LUBA 577 (2002).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Petitioners fail to demonstrate that failure to stay proposed development of condominiums on a golf course will cause irreparable injury, where there is undisputed evidence that, if petitioner prevails, any construction can be removed and the site restored to a golf course fairway. *Roberts v. Clatsop County*, 43 Or LUBA 577 (2002).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. A stay is not warranted where the only injury identified is monetary in nature and the proponent of the stay fails to demonstrate that such injury cannot be compensated adequately in money damages. *Petersen v. Columbia County*, 39 Or LUBA 799 (2001).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where petitioners can establish only that they fear the type and backgrounds of the individuals who may reside in a city-approved adolescent intensive residential treatment facility, such feared injury is not sufficient to establish the irreparable injury necessary to justify a stay under ORS 197.845. *Buckman Community Assoc. v. City of Portland*, 35 Or LUBA 796 (1998).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. A request for a stay of a decision approving removal of sand from a dune will be denied where an existing city permit and weather conditions require that the grading be done between the end of March and the end of April. Petitioner's fear that the grading might nevertheless be done outside the specified 30-day period is merely a "threatened or feared" injury and is not sufficient to show that he will suffer "irreparable injury if the stay is not granted." *Visher v. City of Cannon Beach*, 34 Or LUBA 762 (1998).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Petitioners' allegations that continued construction on a neighboring subdivision will cause lower property values, increased noise and traffic and impaired scenic views are sufficient to demonstrate petitioners will suffer irreparable harm if a stay is not granted. *Hallberg v. Clackamas County*, 31 Or LUBA 577 (1996).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. The fact that the most petitioner can gain if it ultimately prevails in its appeal from a local government decision approving demolition of historic buildings is a 120-day postponement of approval of the demolition permit, does not mean that petitioner will not suffer irreparable harm if a stay of the challenged decision is not granted. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 565 (1995).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Although ORS 197.845 does not require that LUBA limit the effect of a stay of a quasi-judicial land use decision, LUBA may limit the effect of such a stay to the particular geographic area or particular provisions of the stayed decision for which colorable claim of error and irreparable harm have been shown. *ONRC v. City of Seaside*, 27 Or LUBA 679 (1994).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. To demonstrate irreparable injury, petitioner must show that it is probable, rather than merely possible or feared, that the conduct petitioner seeks to prevent during the pendency of the LUBA appeal will result in the injury petitioner alleges it will suffer if a stay of the challenged land use decision is not granted. *Heceta Water District v. Lane County*, 23 Or LUBA 698 (1992).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. In an appeal challenging a decision approving a 130-foot-high communication tower, a stay is not justified to avoid irreparable injury where the tower can be removed if petitioners prevail in their appeal. Visual impacts caused by the tower during the pendency of the LUBA appeal are not sufficient to constitute irreparable injury. *Greenlees v. Yamhill County*, 22 Or LUBA 815 (1991).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. An alleged injury is not substantial and unreasonable where the truck parking permit revoked by the challenged decision expires by its own terms within two months following the date of the challenged decision, and petitioner may thus be required to move her log trucks two months earlier than otherwise would been required if the permit had not been revoked. *Marson v. Clackamas County*, 22 Or LUBA 804 (1991).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. The injury feared is not probable where the alleged injury is the inability to find another location to park nine log trucks, but petitioner does not demonstrate that there is no other place within a comparable distance where nine log trucks could be parked until the expiration of the temporary truck parking permit revoked by the challenged decision. *Marson v. Clackamas County*, 22 Or LUBA 804 (1991).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Petitioner adequately identifies the nature of the injury it believes it will suffer under a challenged moratorium, by alleging that when it is ready to begin development of the subject property, there will be an insufficient number of sewer connections available to it. *Western Pacific Development v. City of Brookings*, 21 Or LUBA 537 (1991).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where the only way in which the harm petitioner identifies could occur is if LUBA *affirmed* the challenged moratorium, such harm would occur under a valid moratorium and, therefore, could not constitute harm that is substantial and unreasonable. *Western Pacific Development v. City of Brookings*, 21 Or LUBA 537 (1991).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Where petitioner alleges that his business reputation and the good will of his business will be irreparably harmed, these are losses which cannot be adequately compensated by money damages. *Barr v. City of Portland*, 20 Or

LUBA 511 (1990).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. An allegation that intense logging activity will cause loss of viewshed, natural vegetation and wildlife habitat; damage to the natural drainage of water; and decline in property values through significant alteration of the character of the neighborhood is an adequate specification of the injury to be suffered if the challenged decision is not stayed. *Thurston Hills Neigh. Assoc. v. Springfield*, 19 Or LUBA 591 (1990).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. An allegation that once large trees are felled, the character of the neighborhood, viewshed, property values, drainageways and wildlife habitat will be irreparably damaged, is sufficient to establish that the feared injury is not compensable in monetary damages. *Thurston Hills Neigh. Assoc. v. Springfield*, 19 Or LUBA 591 (1990).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. An alleged injury to the character of a neighborhood due to nearby logging is substantial and unreasonable because, even if the area does reforest, it will take a long time to reforest to the present level. *Thurston Hills Neigh. Assoc. v. Springfield*, 19 Or LUBA 591 (1990).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. An alleged injury to the character of a neighborhood due to nearby logging is probable where the logging will occur within view of the neighborhood and where the trees to be removed comprise a significant percentage of the existing conifer overstory which provides the neighborhood's viewshed and contributes significantly to the character of the neighborhood. *Thurston Hills Neigh. Assoc. v. Springfield*, 19 Or LUBA 591 (1990).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. In an appeal where petitioner challenges the county's approval of an aggregate extraction operation, petitioner's unsupported allegation that the permit applicant may begin aggregate extraction and processing while the appeal is pending is speculative and inadequate to demonstrate the conduct petitioner seeks to bar is probable. *Keudell v. Union County*, 19 Or LUBA 588 (1990).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. A petitioner's fear that he may suffer in future competition with the permit applicant if the applicant is allowed to begin aggregate extraction in accordance with the challenged decision, in the absence of any causal connection between the feared competitive disadvantage and the challenged approval, is inadequate to establish irreparable injury. *Keudell v. Union County*, 19 Or LUBA 588 (1990).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. To establish petitioner will suffer irreparable injury if a stay is not granted, petitioner must (1) specify the injury he or she will suffer, (2) demonstrate that the injury cannot be compensated in monetary damages, (3) demonstrate that the injury is substantial and unreasonable, and (4) demonstrate that the conduct petitioner seeks to bar, and the resulting injury, are probable. *Wissusik v. Yamhill County*, 19 Or LUBA 561 (1990).

27.9.3 LUBA Procedures/Rules – Stays – Irreparable Injury. Alleged injury is not "substantial and unreasonable" and, therefore, is not irreparable, where the grading and clearing activities

petitioners seek to bar are permissible in the exclusive farm use zone applied to the subject property. *Wissusik v. Yamhill County*, 19 Or LUBA 561 (1990).

27.9.4 LUBA Procedures/Rules – Stays – Procedures. The issuance of LUBA's final opinion and order dissolves any stay of the challenged decision that LUBA previously ordered. Accordingly, LUBA need not consider a motion to reconsider LUBA's previous order granting a stay upon issuance of the final opinion and order. *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

27.9.4 LUBA Procedures/Rules – Stays – Procedures. The issuance of LUBA's final opinion and order dissolves any stay of the challenged decision that LUBA previously ordered. *Reinert v. Clackamas County*, 74 Or LUBA 427 (2016).

27.9.4 LUBA Procedures/Rules – Stays – Procedures. LUBA will not grant a motion for expedited briefing on a motion for stay where it appears the motion for stay is not likely to be granted, because the motion for stay does not adequately establish that the challenged decision falls under the ORS 197.015(10) definition of "land use decision" and it appears that the notice of intent to appeal may not have been timely filed. *Nyman v. City of Hillsboro*, 59 Or LUBA 533 (2009).

27.9.4 LUBA Procedures/Rules – Stays – Procedures. ORS 197.845(2) and OAR 661-10-068(4) both require that for a stay of a *quasi-judicial* land use decision, the amount of the required undertaking shall be 5,000 dollars. LUBA does not have discretion to increase that amount. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 565 (1995).

27.9.4 LUBA Procedures/Rules – Stays – Procedures. Allowing parties responding to a motion for stay only five days to file their responses is not warranted, where the moving party alleges no facts and cites no evidence that the applicant for land use approval plans to take action under the challenged land use decision while the appeal is pending. *ONRC v. City of Seaside*, 27 Or LUBA 662 (1994).

27.9.5 LUBA Procedures/Rules – Stays – Order. The issuance of LUBA's final opinion and order dissolves any stay of the challenged decision that LUBA previously ordered. *Reinert v. Clackamas County*, 74 Or LUBA 427 (2016).

27.9.5 LUBA Procedures/Rules – Stays – Order. Where respondents' response to a motion for stay include a motion to dismiss for lack of jurisdiction, petitioners are entitled under LUBA's rules to 14 days to respond in writing to the jurisdictional challenge. However, where the motion for stay is sought to stop excavation and grading that will be completed within a few days and LUBA agrees with respondents that petitioners fail to demonstrate that the excavation and grading will result in irreparable injury, LUBA will issue an order on the motion for stay in advance of petitioners' written response to respondents' jurisdictional challenge. *Jaqua v. City of Springfield*, 45 Or LUBA 713 (2003).

27.9.5 LUBA Procedures/Rules – Stays – Order. Although ORS 197.845 does not require that LUBA limit the effect of a stay of a quasi-judicial land use decision, LUBA may limit the effect of such a stay to the particular geographic area or particular provisions of the stayed decision for which colorable claim of error and irreparable harm have been shown. *ONRC v. City of Seaside*, 27 Or LUBA 679 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the undisputed evidence in the record is that a local government *mailed* notice to petitioner as required by ORS 197.763(2)(a)(A), petitioner is not entitled to rely on ORS 197.830(3) to file a delayed appeal, even accepting as true a petitioner's statement that they failed to *receive* the notice. *Dobson v. City of Hines*, 80 Or LUBA 469 (2019).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. An appeal of a similar use determination made without a hearing is timely under ORS 197.830(3)(b) where nothing in the notice of a related conditional use permit proceeding suggested that the earlier similar use determination had been made or invited review of the land use file that would have revealed the earlier similar use determination. *Jones v. Clackamas County*, 80 Or LUBA 1041 (2019).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Pursuant to ORS 197.835(2), LUBA may make its own factual findings as to whether an appeal was timely filed, which is a jurisdictional question. Accordingly, LUBA may consider evidence outside the record for the limited purpose of resolving disputes regarding whether an appeal was timely filed, even in the absence of a motion to take evidence outside the record under OAR 661-010-0045. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A zone verification is subject to LUBA's jurisdiction and a person adversely affected by the decision may appeal the decision to LUBA "[w]ithin 21 days of the date a person knew or should have known of the decision where no notice is required." ORS 197.830(5)(b). The city was not obligated to and did not provide notice of the zone verification decision to petitioner. Petitioner was put on inquiry notice of the zone verification decision when the city provided petitioner multiple notices of a subsequent land use application, review, and approval for site review, traffic impact analysis, and adjustment review for the same subject property and development described in the zone verification decision. The city invited petitioner to participate in that subsequent land use action and to review public planning documents at the planning division and online. The appeal was untimely filed and must be dismissed because petitioner failed to make such inquiries and the 21-day appeal period expired before petitioner filed the appeal. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(3) operates to potentially allow a petitioner a delayed period of time to file a LUBA appeal, but it is not a source of procedural requirements that a local government approved development that differs from the development described in the notice of hearing is not procedural error. *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where petitioners' counsel attempts to amend a timely filed Notice of Intent to Appeal (NITA), to add additional petitioners who were mistakenly omitted from the original NITA, but the amended NITA is filed after the time limit set forth in ORS 197.830(9) for filing a NITA before LUBA, petitioners' mistaken omission of the petitioners from the original NITA was not merely a "technical violation" of LUBA's rules at OAR 660-010-0015. The additional petitioners listed in

the Amended NITA have not established that their NITA was filed within the time limit set forth in ORS 197.830(9), and are therefore not parties to the appeal. *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. OAR 661-010-0010(3) provides that an appealed decision becomes "final" when it is reduced to writing and signed by the final decision maker(s), "unless a local rule or ordinance specifies that the decision becomes final at a later date." Where the county code provides that a decision shall not become "final" until the decision is signed by the final decision makers, "and mailed as required by Article 33," and no provision of Article 33 actually requires mailing of the decision, the decision became "final" on the date that it was reduced to writing and signed. *Terrell v. Josephine County*, 77 Or LUBA 470 (2018).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. At one time the 21-day deadline for filing a notice of intent to appeal a statutory permit decision did not begin to run until notice of that decision was mailed to a party who was entitled to mailed notice of the decision. However, *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625 (1997), overruled the Court of Appeals decision that established that rule, and now under OAR 661-010-0010(3) that deadline begins to run when the is reduced to writing and signed and become final, "unless a local rule or ordinance specifies that the decision becomes final at a later date * * *." *McGrew v. Yamhill County*, 75 Or LUBA 247 (2017).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. In *Aleali v. City of Sherwood*, 262 Or App 59, 325 P3d 747 (2014), the Court of Appeals held that the "local government makes a land use decision without providing a hearing" prong of ORS 197.830(3), which suspends the 21-day deadline for filing a notice of intent to appeal until a petitioner receives actual notice of the decision, includes (1) cases where a local government held no hearing at all, and also (2) cases where the local government held a hearing but failed to provide the petitioner a notice of hearing that the petitioner was entitled to under state (as opposed to local) law. *Phillips v. City of Corvallis*, 75 Or LUBA 315 (2017).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. One prong of ORS 197.830(3) suspends the 21-day deadline for filing a notice of intent to appeal, where "the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions." To take advantage of the delayed deadline for filing a notice of intent to appeal under ORS 197.830(3)(b), which allows petitioner to file the notice of intent to appeal within 21 days of the date petitioner "knew or should have known of the decision," petitioner must establish that she was entitled to the defective notice of hearing under state (as opposed to local) law. *Phillips v. City of Corvallis*, 75 Or LUBA 315 (2017).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(3)(b), the deadline for a petitioner to file a notice of intent to appeal expires 21 days after petitioner "knew or should have known of the decision." As LUBA explained in *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002), if a petitioner does not have knowledge of the decision but obtains information that puts the petitioner on inquiry notice of the decision and thereafter

makes timely inquiries and discovers the decision, the 21-day appeal period begins on the date the decision is discovered. *Phillips v. City of Corvallis*, 75 Or LUBA 315 (2017).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a petitioner was put on inquiry notice in June that a subdivision approval decision issued the prior year included a condition that required off-site sidewalk improvements, but petitioner delayed six months until December to request a copy of the decision, that is not a "timely" inquiry under *Rogers v. City of Eagle Point*, 42 Or LUBA 607, 616 (2002). *Phillips v. City of Corvallis*, 75 Or LUBA 315 (2017).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a notice of intent to appeal is sent to LUBA by certified mail before the ORS 197.830(9) 21-day filing deadline expires, but the notice of intent to appeal is mailed to one of LUBA's old addresses rather than its current address and is returned to petitioner by the post office, and petitioner then mails the notice of intent to appeal to LUBA a second time by certified mail after the 21-day deadline has expired, the date of the second mailing is the date of "filing" under OAR 661-010-0015(b), and the appeal must be dismissed as untimely filed. *Shepherd v. Yamhill County*, 75 Or LUBA 361 (2017).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the text of an order requiring petitioner to file an amended notice of intent to appeal states the order is dated December 15, but the order is date stamped December 16 and was mailed December 16, the order is "dated" December 16, for purposes of calculating the seven-day deadline for filing an amended notice of intent to appeal. *Neighbors for Smart Growth v. Washington County*, 75 Or LUBA 481 (2017).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(3)(b), a petitioner must file an appeal to LUBA within 21 days of the date the petitioner "knew or should have known" of the decision. Where the petitioner gains information indicating that the local government may have made a decision approving development, the petitioner is placed on "inquiry notice," and must make timely inquiries with the local government to discover the decision. If the petitioner makes timely inquiries, the 21-day clock begins running on the date the petitioner obtains a copy of the decision. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Filing a notice of intent to appeal (NITA) using an overnight delivery service is not the same as filing the NITA by certified mail, which is the method that OAR 661-010-0015(1) requires in order for a petitioner to rely on the date of mailing as the date of filing of a NITA. *Chapman and Chapman LLC v. Coos County*, 73 Or LUBA 123 (2016).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a notice of intent to appeal is delivered to LUBA by an overnight delivery service more than 21 days from the date the city's decision became final, the appeal is untimely filed, and LUBA will dismiss the appeal. *Chapman and Chapman LLC v. Coos County*, 73 Or LUBA 123 (2016).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a notice of intent to appeal identifies two decisions that were adopted on different dates as the subjects of the appeal, but the notice of intent to appeal is timely filed with regard to only one of the identified decisions, the appeal may proceed with regard to the decision for which the notice of intent to appeal was timely filed. *Lifestyle Ventures v. Clackamas County*, 73 Or LUBA 388 (2016).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a hearing is held, ORS 197.830(3)(b) cannot operate to expand the time for filing an appeal, because ORS 197.830(3)(b) applies only "where no notice is required." The "notice" that is "required" refers to notice of all quasi-judicial hearings under ORS 197.763(2). *Phillips v. City of Happy Valley*, 72 Or LUBA 196 (2015).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A city's error in the notice of the decision that stated an incorrect appeal deadline for appealing the decision to LUBA does not toll the deadline for filing the NITA under ORS 197.830(9), which requires that the "notice of intent to appeal (NITA) a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." *Stone Age Republic, LLC v. City of Grants Pass*, 72 Or LUBA 420 (2015).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a local government provides written prehearing notice to petitioner and in fact holds a hearing on a proposal to annex and rezone property, the part of ORS 197.830(3) that delays the deadline for filing a notice of intent to appeal a decision that is rendered "without providing a hearing" until 21 days after a petitioner receives actual or constructive notice does not apply. *Phillips v. City of Happy Valley*, 71 Or LUBA 5 (2015).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a city's prehearing notice identifies the 10 properties to be annexed and rezoned, and identifies the city zoning to be applied to the 10 properties, and then after the hearing the city adopts an ordinance that annexes and applies the same zoning identified in the prehearing notice, the city does not make "a decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final action," within the meaning of ORS 197.830(3). In that circumstance, the 21-day deadline specified in ORS 197.830(9) for filing the notice of intent to appeal applies, not the delayed ORS 197.830(3) deadline. *Phillips v. City of Happy Valley*, 71 Or LUBA 5 (2015).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. While failures to comply with the notice requirements set out at ORS 197.763(3) could also be sufficient to constitute a failure to "reasonably describe the local government's final actions," within the meaning of ORS 197.830(3), it does not necessarily follow that any failure to comply with ORS 197.763(3) results in a failure to "reasonably describe the local government's final action." The inquiries under those two statutes are not the same. *Phillips v. City of Happy Valley*, 71 Or LUBA 5 (2015).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Identifying existing county zoning and proposed new city zoning to be applied to the annexed property using

abbreviated references and acronyms for the zoning districts does not mean the city gave notice that "did not reasonably describe the local government's final actions," within the meaning of ORS 197.830(3). A reasonable person would be put on inquiry notice by such a notice and would not assume no substantive change was proposed through the annexation and rezoning. *Phillips v. City of Happy Valley*, 71 Or LUBA 5 (2015).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A city's failure to provide a notice of hearing that is required only by local law will not operate under ORS 197.830(3) to toll the 21 day appeal period set out in the first sentence of ORS 197.830(9). To the extent *Leonard v. Union County*, 24 Or LUBA 362 (1992), holds to the contrary, it is overruled. *Aleali v. City of Sherwood*, 68 Or LUBA 153 (2013).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a petitioner does not claim that he owns property within 100 feet of the property that was the subject of the notice of a hearing, or that the city failed to provide petitioner with notice he was entitled to receive under ORS 197.763(2)(a), the petitioner is not entitled to rely on ORS 197.830(3), and his notice of intent to appeal filed later than 21 days after the decision becomes final is not timely filed. *Aleali v. City of Sherwood*, 68 Or LUBA 153 (2013).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(4)(c) provides an alternative appeal deadline for a person who received notice of the decision where the local government makes a decision on an application for a "permit" without a hearing pursuant to ORS 227.175(10)(c) "if the mailed notice of the decision did not reasonably describe the nature of the decision." *Lekas v. City of Portland*, 68 Or LUBA 501 (2013).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Mailed notice of a decision on a permit made without a hearing pursuant to ORS 227.175(10)(c) reasonably describes the nature of the decision, where the city's notices of the proposal and the decision describe an adjustment for a reduced side yard setback for a new garage, and the city's final decision approved exactly that. In that circumstance a petitioner is not entitled to take advantage of the alternative appeal deadline under ORS 197.830(4)(c). *Lekas v. City of Portland*, 68 Or LUBA 501 (2013).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(3)(b) provides an alternative appeal deadline for decisions made without a hearing and requires a petitioner to file a notice of intent to appeal the decision "within 21 days of the date petitioners knew or should have known of the decision." Where the record demonstrates that a petitioner knew of a decision made without a hearing more than 21 days before he filed the notice of intent to appeal, the notice of intent to appeal is not timely filed and LUBA lacks jurisdiction over the appeal. *Lekas v. City of Portland*, 68 Or LUBA 501 (2013).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a local government has rendered a permit decision without recognizing that its decision was a permit decision and without providing notice of that decision as required by ORS 215.416(11), ORS 197.830(3)(a) applies, and the "actual notice" that the statute requires is provided only when the local government provides the written notice of the decision that is required by law or a copy of

the decision itself. *Keith v. Washington County*, 66 Or LUBA 80 (2012).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(3) tolls the 21-day appeal deadline in ORS 197.830(9) for persons who are misled by the differences between the proposal described in the notice of hearing and the proposal as approved, and due to that misleading notice failed to appear at the hearing and become entitled to the notice of decision. If a petitioner did not view the notice of hearing, then the petitioner could not have been misled by the notice. *Brodersen v. City of Ashland*, 62 Or LUBA 471 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Applying the "notice of hearing did not reasonably describe the proposal" language in ORS 197.830(3) to a *legislative* decision is problematic, because generally no individual notice is required, and the only notice of hearing required for a legislative decision is the notice provided to the Department of Land Conservation and Development and any general publication notices in local newspapers. *Brodersen v. City of Ashland*, 62 Or LUBA 471 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The "notice of hearing did not reasonably describe" the proposal language in ORS 197.830(3) focuses on the difference between the final action and the proposal described in the notice of hearing, not on differences between the final action and the proposal itself as it may be modified during the proceedings below. *Brodersen v. City of Ashland*, 62 Or LUBA 471 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. That an intermediate draft of a proposed ordinance posted on the city's website differed from the city's final ordinance as adopted is not sufficient to toll the 21-day deadline to appeal the final ordinance under ORS 197.830(3), where the notice of hearing for the original draft of the proposed ordinance reasonably described the final ordinance. *Brodersen v. City of Ashland*, 62 Or LUBA 471 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. When a local government is processing a post-acknowledgement plan amendment pursuant to ORS 197.610 to 197.625 and a person requests in writing that he or she be provided notice of the decision, the deadline for appealing that decision to LUBA begins to run when that person is provided notice of the decision. *Jacobsen v. City of Winston*, 62 Or LUBA 493 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(4), in order for a petitioner to file an appeal outside of the 21-day deadline provided in ORS 197.830(9), the petitioner must demonstrate that (1) the mailed notice of the decision did not reasonably describe the nature of the decision, and (2) that petitioner filed the appeal within 21 days of receiving actual notice of the nature of the decision. *Wright v. Marion County*, 62 Or LUBA 542 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the relevant approval criteria for a variance to allow a 120-foot-tall wind turbine require evaluation of the adverse effects of the variance on the neighborhood and neighboring residences, a reasonably accurate description of the location of the proposed turbine is an integral part of the "nature of the decision" under ORS 197.830(4). Where the notice of decision describes the wind turbine as being

located "near the center of [a 35-acre] property" but the decision approves the location of the wind turbine near the property line 190 feet from petitioners' residence, the notice of the decision does not reasonably describe the nature of the decision. *Wright v. Marion County*, 62 Or LUBA 542 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Like ORS 197.830(3)(a), the ORS 197.830(4)(c) 21-day deadline begins to run upon "actual notice," rather than on the date the petitioners "should have known of the decision," as provided in ORS 197.830(3)(b). *Wright v. Marion County*, 62 Or LUBA 542 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where LUBA concludes that the decision on appeal is not a land use decision or limited land use decision, because it is a fiscal decision, and transfer's the decision to circuit court, LUBA need not also determine whether petitioner's notice of intent to appeal was filed within the 21-day deadline established by OAR 661-010-0015(1). Whether the appeal was timely filed will be for the circuit court to decide, and the only relevant question regarding the timeliness of the appeal will be whether the appeal was filed within the 60 days allowed by ORS 34.030. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Except in certain circumstances specified in ORS 197.830, the 21-day deadline for filing an appeal at LUBA is set out at ORS 197.830(9). *Turner v. Jackson County*, 61 Or LUBA 467 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The 21-day deadline established by ORS 197.830(9) begins to run when a land use decision is final or when notice of the decision is mailed or submitted to parties that are entitled to notice of a post-acknowledgment land use decision under ORS 197.615. ORS 197.830(3) delays the running of that 21-day deadline in two circumstances: (1) where a land use decision is made without a hearing and (2) where a notice of hearing does "not reasonably describe the local government's final action." *Turner v. Jackson County*, 61 Or LUBA 467 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Even if an appeal was timely filed under ORS 197.830(3), ORS 197.830(6)(a) imposes a three-year statute of ultimate repose. *Turner v. Jackson County*, 61 Or LUBA 467 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. An ordinance that adopts new comprehensive plan and zoning maps for an entire county is a legislative decision rather than a quasi-judicial decision, even if that ordinance also changes the zoning on a single parcel. *Turner v. Jackson County*, 61 Or LUBA 467 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.620 simply displaces the ORS 197.830(2) requirement that a petitioner at LUBA must have "[a]ppeared" before the body that adopted a land use decision in cases that concern post-acknowledgment land use regulation or comprehensive plan amendments. ORS 197.620(1) substitutes a requirement that a petitioner must have "participated either orally or in writing" to have standing to appeal a post-acknowledgment comprehensive plan or land use regulation

amendment to LUBA for the generally applicable ORS 197.830(2) *appearance* requirement that applies to other kinds of land use decisions. ORS 197.620(2) authorizes a petitioner to appeal such post-acknowledgment land use decisions without participating or making an appearance in the proceedings that lead to decisions, where the notice that precedes the hearings on those decisions was deficient. *Turner v. Jackson County*, 61 Or LUBA 467 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Neither ORS 197.620(1) nor 197.620(2) obviates the requirement that a petitioner must file a notice of intent to appeal or that the notice of intent to appeal be *timely* filed in accordance with the applicable requirements of ORS 197.830(3), (6) and (9). *Turner v. Jackson County*, 61 Or LUBA 467 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A notice of hearing that states that a proposed land use is a "mixed-use development" planned unit development with 82 residential dwelling units and includes a map that shows the proposed buildings and provides additional details is sufficient to "reasonably describe the local government's final actions," within the meaning of ORS 197.830(3), where the approved development is a mixed residential and commercial use. *Duenweg v. City of Medford*, 60 Or LUBA 1 (2009).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The failure of a notice of hearing for a mixed-use residential and commercial PUD to specifically mention that the PUD housing will be occupied by the families of recovering addicts and senior citizen mentors for those families does not result in a notice of hearing that does "not reasonably describe the local government's final actions," within the meaning of ORS 197.830(3). *Duenweg v. City of Medford*, 60 Or LUBA 1 (2009).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a petitioner was not entitled to receive written notice of a hearing on a mixed-use planned unit development and did not see the published notice of hearing, he could not have been misled by the notice of hearing. The deadline for filing the petition for review expired 21 days after the decision became final under ORS 197.830(9) and ORS 197.830(3) does not operate to delay the deadline for filing a petition for review to 21 days after petitioner knew or should have known of the decision. *Duenweg v. City of Medford*, 60 Or LUBA 1 (2009).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A local ordinance that provides that a decision becomes effective 14 days after mailing notice of the decision means that the decision is *effective* at that date. The ordinance does not delay the date the decision becomes *final* for purposes of appeal to LUBA under OAR 661-010-0010(3). *VK Northwest, Inc. v. City of West Linn*, 60 Or LUBA 39 (2009).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Even though the language of a final decision is somewhat misleading in stating that it becomes final at a later date, a misstatement of fact and law in the decision does not excuse a petitioner from filing a timely notice of intent to appeal. *VK Northwest, Inc. v. City of West Linn*, 60 Or LUBA 39 (2009).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a

petitioner is only entitled to notice of a hearing under local provisions, and is not entitled to such notice under state statutes, under *Orenco Neighborhood v. City of Hillsboro*, 135 Or App 428, 899 P2d 720 (1995), any failure to provide notice of a hearing does not toll the 21-day appeal deadline under ORS 197.830(9), pursuant to ORS 197.830(3). *Plaid Pantries, Inc. v. City of Tigard*, 60 Or LUBA 441 (2010).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. In order to appeal to LUBA under the "different notice/final action" language of ORS 197.830(3), the nature or scope of the proposed use as described in the notice of proposed action must differ to such a degree from the final action that the notice does not "reasonably describe" the final action. Where there is no difference between the nature and scope of the property line adjustment described in the notice of hearing and the property line adjustment described in the notice of decision, ORS 197.830(3) does not apply. *Ebar v. Harney County*, 59 Or LUBA 201 (2009).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The "different notice/final action" provisions of ORS 197.830(3) generally apply to persons who are misled by a deviation in substance between the notice of proposed action and the final action, and because of that deviation do not appear at the hearing and thereby become entitled to timely notice of the decision and hence notice of the opportunity to appeal the decision to LUBA. *Ebar v. Harney County*, 59 Or LUBA 201 (2009).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. In general, NITAs must be filed within 21 days of the challenged decision becoming final, unless one of the exceptions to the 21-day requirement set forth in ORS 197.830(9) applies. *Thalman v. Marion County*, 58 Or LUBA 23 (2008).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Even if petitioners are correct that ODOT failed to provide notice of an amended road widening project as required by ODOT's rules, failure to provide notice under ODOT's rules does not provide an exception to the 21-day deadline for filing the notice of intent to appeal. When the challenged decision is not a comprehensive plan or land use regulation amendment, the provisions of ORS 197.610 to 197.625 starting the clock for the 21-day deadline upon notice of the decision being mailed do not apply. *Hereditary Chief Wilbur Slockish v. ODOT*, 58 Or LUBA 83 (2008).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(9) and OAR 661-010-0015(1)(a), the 21-day deadline for filing a notice of intent to appeal began to run either on the date the decision became final or on the date notice of the appealed decision was "mailed to parties entitled to notice under ORS 197.615 * * *." ORS 197.830(3) through (5) provide exceptions to the general 21-day deadline for filing a notice of intent to appeal with LUBA, which is established by ORS 197.830(9). *Reeves v. City of Wilsonville*, 58 Or LUBA 545 (2009).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Local laws that only delay the date an ordinance takes effect do not also delay the date an ordinance becomes final for purposes of appeal to LUBA. *Reeves v. City of Wilsonville*, 58 Or LUBA 545 (2009).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Procedural errors a city may have committed might provide a basis for reversal or remand, if there is a timely appeal of a land use decision. However, any such procedural errors do not have the legal effect of preventing a land use decision from becoming final or delaying the date of finality. *Reeves v. City of Wilsonville*, 58 Or LUBA 545 (2009).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under OAR 661-010-0015(1)(b), a notice of intent to appeal is filed on the date it is mailed, provided it is mailed by "registered or certified mail." A notice of intent to appeal that is mailed on the last day to timely file the notice of intent to appeal and is received five days later by LUBA is not timely filed, where the notice of intent to appeal was not mailed by "registered or certified mail." *Reeves v. City of Wilsonville*, 58 Or LUBA 545 (2009).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. When a petitioner is placed on inquiry notice that a land use decision or limited land use decision has been made and makes proper inquiries to the local government, a petitioner cannot be faulted when the local government takes the position that no such decision has been made. If a petitioner makes the proper inquiries, the 21-day time limit for filing the NITA begins when a petitioner learns of the decision. *Biggerstaff v. Yamhill County*, 58 Or LUBA 665 (2008).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A notice of hearing does not "reasonably describe the final action" for purposes of tolling the appeal period under ORS 197.830(3) when the parties are misled by the deviation between the notice of the proposed action and the substance of the decision. *Pacific Cascade Resources v. Columbia County*, 55 Or LUBA 216 (2007).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A notice of hearing stating that the county will consider an application to renew a mining permit subject to approval criteria listed in the notice is a fair description of the final action for purposes of ORS 197.830(3), where the final action approves the application to renew a mining permit under the listed criteria. *Pacific Cascade Resources v. Columbia County*, 55 Or LUBA 216 (2007).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. That a notice of hearing does not list the conditions of approval the county might decide to impose or indicate that the county might impose conditions of approval does not mean that the notice fails to "reasonably describe the final action" for purposes of ORS 197.830(3), particularly where petitioner knew or should have known that the county intended to impose conditions of approval on petitioner's application. *Pacific Cascade Resources v. Columbia County*, 55 Or LUBA 216 (2007).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. An amended notice of intent to appeal that corrects all deficiencies under OAR 661-010-0015(3) does not have to be filed within the 21 day deadline of OAR 661-010-0015(1)(a) in order to establish LUBA's jurisdiction, provided that the original notice of intent to appeal was timely filed. *O'Rourke v. Union County*, 54 Or LUBA 758 (2007).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Partial

noncompliance with the content requirements of an otherwise timely filed notice of intent to appeal is a technical violation of LUBA's rules that is not jurisdictional and is not a basis to dismiss the appeal, unless shown to prejudice other parties' substantial rights. *O'Rourke v. Union County*, 54 Or LUBA 758 (2007).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. An ambiguous finding that is included in a 23-page findings document supporting a subdivision approval decision is not sufficient to provide actual or constructive notice of a prior county decision that approved a land use compatibility statement concerning grading related to that subdivision. *Wolfgram v. Douglas County*, 52 Or LUBA 536 (2006).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(3) and 197.620(2) are similarly worded and impose the same legal standard. Under those statutes there are certain legal consequences where the notice of hearing is inadequate to describe the local government's ultimate decision. *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Any questions that may be raised regarding how a local government chooses to go about applying the approval criteria that are listed in a notice of hearing to the proposal described in the notice implicate the merits of this appeal; those questions do not implicate the adequacy of the city's notice under ORS 197.620(2) and 197.830(3). *Ettro v. City of Warrenton*, 52 Or LUBA 567 (2006).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where petitioners fail to establish that any statute obligates a county to provide petitioners notice of a building permit decision that modifies a condition of partition approval, the "knew or should have known" standard at ORS 197.830(3)(b) applies rather than the "actual notice" standard at ORS 197.830(3)(a), in determining whether an appeal is timely filed under that statute. *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The 21-day deadline to file an appeal under ORS 197.830(3)(b) begins on the date petitioners knew or should have known of the "decision," *i.e.*, that the local government had approved development on the subject property. It is not necessary that petitioners know the particular detail of the proposed development that offends them, such as its exact location on the property, before the 21-day deadline begins running. *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the petitioners are provided written notice of an application for a proposed height variance for an already approved dwelling, the petitioners are placed on at least "inquiry notice" that the county has previously approved a dwelling on the subject property. Given that information, it is incumbent on petitioners to make timely inquiries to discover the decision that approved the dwelling, such as investigating the planning file, and failure to make such inquiries within 21 days of being placed on inquiry notice means that the deadline to appeal the decision to LUBA under ORS 197.830(3)(b) begins on the date of inquiry notice. *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. An appeal that is filed four to five weeks after the petitioners learned that the local government had approved the challenged decision is untimely filed under ORS 197.830(3)(b). *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where nothing in a conditional use permit proceeding concerning development of three lots in an existing subdivision is sufficient to put petitioner on notice of the existence of an earlier decision approving reconfiguration of those three lots, petitioner knew or should have known of the challenged reconfiguration decision only when her consultant informed her of the existence of that decision. *Borton v. Coos County*, 51 Or LUBA 478 (2006).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A petitioner who asserts that the deadline for filing a notice of intent to appeal is governed by ORS 197.830(3)(b) must demonstrate that he or she is "adversely affected" by the appealed land use decision and that the notice of intent to appeal was filed within 21 days after the petitioner first "knew or should have known of the [challenged] decision." LUBA will reject a petitioner's argument that ORS 197.830(3)(b) applies, where the petitioner fails to make either of those demonstrations. *Clearwaters v. Josephine County*, 50 Or LUBA 600 (2005).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The statutory deadline for filing a notice of intent to appeal under ORS 197.830(9) depends on the nature of the decision the local government adopted, not the nature of the decision the local government should have adopted. Whether the 21-day deadline for filing a notice of intent to appeal is governed by the first or second sentence of ORS 197.830(9) depends on whether the local government's decision was a post-acknowledgment plan or land use regulation amendment "processed pursuant to ORS 197.610 to 197.625." *Clearwaters v. Josephine County*, 50 Or LUBA 600 (2005).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where it appears that the relevant statute requires that the 21-day deadline to file a notice of intent to appeal should be measured from the date the decision was reduced to writing and signed, the notice of intent to appeal was filed more than 21 days after that date, and petitioners offer no reason to believe the 21-day deadline should be measured from some other date, LUBA will grant the local government's motion to dismiss. *Barry v. Josephine County*, 50 Or LUBA 680 (2005).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a petitioner notices construction activity on property, promptly investigates, discovers a building permit posted on the property, obtains a copy of the building permit and files an appeal with LUBA 14 days after first discovering the building permit posted on the property, the appeal is timely filed under 197.830(3)(b). *Jebousek v. City of Newport*, 50 Or LUBA 724 (2005).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where one of four applications seeks site plan approval but the other three applications concern post-acknowledgment plan or land use regulation amendments and the local government issues a single decision in response to those four applications, the second sentence of ORS 197.830(9) rather than the first sentence of ORS 197.830(9) applies. Under the second sentence of ORS 197.830(9), the

21-day deadline for filing a notice of intent to appeal begins to run on the date the local government mails notice "to parties entitled to notice under ORS 197.615." *Lindsey v. Josephine County*, 50 Or LUBA 741 (2005).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where ORS 197.830(3) applies, it generally provides the filing deadline to LUBA only for decisions made without providing a hearing. However, in two circumstances ORS 197.830(3) can provide the LUBA filing deadline notwithstanding that the local government held a hearing: (1) where the decision differs from the proposal described in the notice of proposed action to such a degree that the notice did not reasonably describe the final action, and (2) where the local government fails to provide notice of hearing to a person entitled to such notice, and due to that failure the person does not appear at the hearing and become entitled to notice of the decision. *Cutsforth v. City of Albany*, 48 Or LUBA 304 (2004).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where no statute or code provision entitles the petitioner to notice of hearing for a proposed legislative decision, the petitioner may not file a belated appeal to LUBA pursuant to ORS 197.830(3), under the theory described in *Leonard v. City of Hillsboro*, 24 Or LUBA 362 (1992), which depends on entitlement to notice of the hearing. *Cutsforth v. City of Albany*, 48 Or LUBA 304 (2004).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the local government conducts a hearing at which the petitioners appear, the local government has "provid[ed] a hearing" for purposes of ORS 197.830(3), and therefore ORS 197.830(9) rather than ORS 197.830(3) provides the deadline for filing an appeal of the decision to LUBA. *Cutsforth v. City of Albany*, 48 Or LUBA 304 (2004).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Even assuming that a local government's failure to provide notice of the decision to petitioners who appeared at the hearing and became entitled to notice of the decision might provide a basis for untimely appeal to LUBA under the reasoning in *Flowers v. Klamath County*, 98 Or App 384, 780 P2d 227 (1989), the causative element inherent in *Flowers* is not met where the decision was signed and became final at the hearing, the petitioners offer no reason why they did not or could not know that the city had adopted the decision, final as of the date of the hearing, and the petitioners do not allege that the delay in filing the appeal was caused by the city's failure to provide notice of the decision. *Cutsforth v. City of Albany*, 48 Or LUBA 304 (2004).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A mistake in a city notice of decision regarding the number of days the notice recipient has to file an appeal with LUBA will not extend the statutory deadline for filing an appeal with LUBA. However, where a city does not clearly state that its notice of a post-acknowledgment land use regulation amendment is a "courtesy notice," rather than notice the city is required to send under ORS 197.615(2), the notice recipient is entitled to 21 days from the date the post-acknowledgment plan amendment notice is provided to file an appeal with LUBA under ORS 197.830(9). *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Notwithstanding

that under OAR 661-010-0015 a notice of intent to appeal is deemed filed with LUBA on the date it is mailed by registered or certified mail, LUBA is not at liberty to read a similar provision into notices of intent to appeal decisions on reconsideration under OAR 661-010-0021(5). Notices under OAR 661-010-0021(5) are filed on the date they are delivered to or received by LUBA. *West Coast Media v. City of Tigard*, 45 Or LUBA 703 (2003).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Untimely filing of a notice of intent to appeal a decision on reconsideration under OAR 661-010-0021(5) is a technical violation of LUBA's rules and does not affect LUBA's review, absent prejudice to the substantial rights of the parties. *West Coast Media v. City of Tigard*, 45 Or LUBA 703 (2003).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Land use decisions appealed to LUBA pursuant to ORS 197.830(3) or (4) are not subject to the ORS 197.825(2)(a) exhaustion of remedies requirement absent circumstances where the local government voluntarily grants a local appeal, while decisions appealed pursuant to ORS 197.830(9) are subject to the exhaustion of remedies requirement. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a local government conducts a hearing but fails to provide notice of the decision to a petitioner who appeared at the hearing, that failure of process does not obviate the requirement that the petitioner exhaust all administrative remedies below before appealing to LUBA. In such circumstances, the local government must accept a properly filed local appeal from the petitioner and cannot reject that local appeal on the basis of an imperfection that is caused by the local government's own procedural error. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. When a notice of intent to appeal mistakenly identifies the wrong decision as the subject of the appeal, and that mistake is due to a local government's procedural error with regard to the petitioner, LUBA will treat the petitioner's mistake as a technical pleading error, read the notice to appeal the correct decision, and not dismiss an otherwise properly filed appeal. *Comrie v. City of Pendleton*, 45 Or LUBA 758 (2003).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A notice of intent to appeal filed within 21 days after the date an earlier tentative decision was made final by a second decision is timely filed under ORS 197.830(9). *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 597 (2002).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(3)(b), where a petitioner does not have knowledge of a land use decision but observes activity or otherwise obtains information reasonably suggesting that a land use decision has been rendered, that petitioner is placed on notice to make inquires regarding the nature of the land use decision. The 21-day appeal deadline begins to run on the date that timely inquiries are made and the decision is discovered or, in the absence of timely inquiries, on the date the petitioner is placed on inquiry notice. *Rogers v. City of Eagle Point*, 42 Or LUBA 607 (2002).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Evidence in the record that petitioners knew an application for a proposed subdivision was pending before the local government is not sufficient to establish, for purposes of ORS 197.830(3), that petitioners knew or should have known that the subdivision application would be approved or that the application included a proposal to develop a lot within *petitioners'* subdivision as an access street for the proposed subdivision. *Rogers v. City of Eagle Point*, 42 Or LUBA 607 (2002).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where at least one local hearing is provided, ORS 197.830(9) establishes a deadline of 21 days after the decision becomes final or 21 days after notice of the decision is mailed for appealing a land use decision to LUBA. Where no local hearing is provided, ORS 197.830(3) and (4) provide the deadlines for appealing land use decisions to LUBA. *Warf v. Coos County*, 42 Or LUBA 84 (2002).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(4) comprehensively addresses the situation where a local government makes a permit decision without a hearing pursuant to ORS 215.416(11) or 227.175(10). *Warf v. Coos County*, 42 Or LUBA 84 (2002).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A notice of intent to appeal that is filed by first class mail 21 days after the appealed decision became final is not timely filed under ORS 197.830(9) and OAR 661-010-0015(1), where the notice of intent to appeal is not actually received by LUBA until 22 days after the appealed decision became final. *Larner v. City of Portland*, 41 Or LUBA 471 (2002).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a planning director's decision to revoke a previously approved appeal fee waiver and reject petitioner's local appeal was final when rendered, and petitioner did not file a timely appeal with LUBA to challenge that decision, petitioner may not challenge the fee waiver revocation and denial of the local appeal in an appeal of a subsequent planning director letter that merely reiterates the earlier decision. *Babbitt v. City of Portland*, 41 Or LUBA 151 (2001).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. That petitioners signed a petition to the local governing body expressing concern regarding the height of a dwelling is not sufficient to demonstrate knowledge of a building permit to construct that dwelling or the interpretation concerning the proper method of measuring building height contained in that building permit, for purposes of beginning the 21-day deadline for appealing the building permit to LUBA under ORS 197.830(3). *Tirumali v. City of Portland*, 40 Or LUBA 565 (2001).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A 1995 decision *denying* a request for a variance to build a house that exceeds zoning height limits by 6.5 feet does not constitute a decision *approving* construction of a house that is 6.5 feet shorter. An appeal challenging a subsequent building permit that approves construction of a house that is reduced in height is not a collateral attack on the 1995 variance decision and will not be dismissed as untimely filed. *Tirumali v. City of Portland*, 40 Or LUBA 565 (2001).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Any procedural

error by a local government in failing to provide written notice of a proposed annexation decision to persons other than petitioner resulted in no prejudice to petitioner's substantial rights, and therefore provides no basis for reversal or remand of the annexation decision, where petitioner learned of the proposal and made a written appearance opposing the proposal. *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a local government fails to recognize that it is rendering a permit decision without providing a hearing or the opportunity for a local appeal as required by ORS 215.416(11) or 227.175(10), ORS 197.830(4) provides the applicable deadline for filing an appeal with LUBA. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The "actual notice" standard of ORS 197.830(4)(a) is identical to the "actual notice" standard of ORS 197.830(3)(a). A petitioner receives "actual notice" of a decision when the petitioner is: (1) provided a copy of the decision; (2) provided written notice of the decision; or (3) circumstances exist that are sufficient to inform the petitioner of both the existence and substance of the decision. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The brief mention in a staff report that an application was "approved in principle" is not sufficient to provide a petitioner with "actual notice" of a final, appealable land use decision pursuant to ORS 197.830(4)(a). *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where ORS 197.830(4) applies it provides a right to appeal directly to LUBA, within certain time limits, notwithstanding that the deadline for filing a local appeal has expired. In such circumstances, there is no local appeal available to be exhausted pursuant to ORS 197.825(2)(a). *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. LUBA will not dismiss an appeal of a letter that provided notice of an earlier land use decision, provided the notice of intent to appeal adequately identifies the land use decision being appealed, and the notice of intent to appeal is filed within the period allowed by statute for appeal of the land use decision. *Kent v. City of Portland*, 39 Or LUBA 455 (2001).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. When a party receives notice of a land use decision by means of a follow-up clarification letter, an appeal of that clarification letter is sufficient to appeal the earlier land use decision, as long as the appeal is filed within the period in which the party could have timely appealed the land use decision. *Kent v. City of Portland*, 38 Or LUBA 942 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The "actual notice" requirement of ORS 197.830(5) does not necessarily require receipt of a limited land use decision. "Actual notice" is achieved when a person is informed of both the existence and substance of the decision. *Robinson v. City of Silverton*, 38 Or LUBA 785 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A party is "adversely affected," for purposes of ORS 197.830(5), only if the party demonstrates that the decision impinges on that party's use and enjoyment of its property, or otherwise detracts from interests personal to the party. *Mountain West Investment v. City of Silverton,* 38 Or LUBA 400 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where petitioner alleges only that it is the applicant's business competitor and that the applicant appeared in opposition to the siting of petitioner's facility, petitioner has failed to demonstrate how the city's decision to approve the site design for the applicant's facility impinges on petitioner's use and enjoyment of *its* property or otherwise adversely affects petitioner. *Mountain West Investment v. City of Silverton,* 38 Or LUBA 400 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. LUBA will dismiss an appeal as untimely filed where the notice of intent to appeal was filed more than 21 days after the local decision became final and petitioner fails to demonstrate how it qualifies for an exception to the 21-day filing deadline provided in ORS 197.830(5). *Mountain West Investment v. City of Silverton*, 38 Or LUBA 400 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Amendments to the statutory deadline for filing a notice of intent to appeal do not apply retroactively to land use decisions that were adopted and became final before the amended statute became effective, where the amending legislation does not indicate a legislative intent that the amendment should apply retroactively. *Willhoft v. City of Gold Beach,* 38 Or LUBA 375 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(3)(a) (1997) applies, and a notice of intent to appeal must be filed with LUBA within 21 days after a petitioner receives "actual notice" of a decision, where (1) the city mistakenly fails to realize it should be proceeding under ORS 227.175(10)(a) (1997); (2) the city therefore fails to provide notice to persons who are entitled to receive notice of the decision under ORS 227.175(10)(a) (1997); and (3) no local appeal is available that must be exhausted before appealing to LUBA. *Willhoft v. City of Gold Beach,* 38 Or LUBA 375 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The "or should have known of the decision" language in ORS 197.830(3)(b) (1997) explicitly imposes an objective "discovery rule," and may have the effect of starting the 21-day appeal period *before* a petitioner receives written notice of or a copy of a decision. *Willhoft v. City of Gold Beach,* 38 Or LUBA 375 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(3)(a) (1997), a petitioner receives "actual notice" of the decision when the petitioner is provided (1) a copy of the decision; (2) written notice of the decision; or (3) information that is equivalent to written notice or a copy of the decision. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the events a petitioner observed were not sufficient, in and of themselves, to provide "actual notice" of a land use decision more than 21 days before petitioner filed his notice of intent to appeal, the notice of intent to appeal is timely filed under the "actual notice" standard of ORS 197.830(3)(a). That those events may have been sufficient to obligate petitioner to make inquires with the city if the deadline for filing the notice of intent to appeal were governed by the "knew or should have known of the decision" standard in ORS 197.830(3)(b) is irrelevant. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(8), the time for appealing an amendment to an acknowledged plan or land use regulation is measured from the time the decision was mailed in accordance with ORS 197.615 and OAR 660-018-0040. Where a party files a notice of intent to appeal within 21 days of the date the decision was mailed in accordance with the statute and rule, the notice of intent to appeal is timely filed. *Craig Realty Group v. City of Woodburn,* 37 Or LUBA 1041 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.615(1) and OAR 660-018-0040 require that a local government send a copy of an ordinance amending local land use regulations and the findings supporting the ordinance, "accompanied by appropriate forms provided by" DLCD. Failure to submit the appropriate form with the decision and findings tolls the time to file a notice of intent to appeal with LUBA until 21 days after the proper notice is given. *Craig Realty Group v. City of Woodburn,* 37 Or LUBA 1041 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the availability of a local appeal is unclear and petitioner first seeks such a local appeal and then files a notice of intent to appeal with LUBA within 21 days after the local appeal is denied, petitioner's appeal to LUBA is timely. *Hal's Construction, Inc. v. Clackamas County*, 37 Or LUBA 981 (1999).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(3) authorizes the filing of a notice of intent to appeal after the 21-day deadline specified by ORS 197.830(8) where the approved proposal differs in some significant way from the proposal that is described in the notice of hearing, such that the notice "did not reasonably describe the local government's final action." A multifaceted zoo conditional use master plan with a permanent parking lot does not so differ from a multifaceted zoo conditional use master plan with a temporary parking lot that the notice of hearing "did not reasonably describe the local government's final action." *Bigley v. City of Portland*, 37 Or LUBA 544 (2000).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A notice of intent to appeal is timely filed where the county code specifies that land use decisions become final when mailed to the parties entitled to notice, and petitioner filed the notice of intent to appeal within 21 days of the date the county mailed the decision. *Warrick v. Josephine County*, 36 Or LUBA 796 (1999).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where petitioner fails to file a notice of intent to appeal within 21 days after the decision becomes final, the appeal

will be dismissed, notwithstanding petitioner's allegation that she did not receive her mailed copy of the challenged decision until after the appeal period had expired. *Roberts v. Clackamas County*, 36 Or LUBA 170 (1999).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the county administratively approves development under ORS 215.416(11), but fails to provide an adjacent landowner with either the notice or the opportunity for local appeal required by statute, the time to file an appeal of that approval to LUBA is tolled until the landowner receives actual notice, pursuant to ORS 197.830(3). *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A local government's notice of a post-acknowledgment decision is not sufficient to start the 21-day appeal period in ORS 197.830(8) where the post-acknowledgment decision is not yet final. *Schaffer v. City of Turner*, 35 Or LUBA 744 (1998).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. For purposes of starting the ORS 197.830(3)(b) appeal period for appealing a county decision rendered without a hearing, petitioner "knew or should have known" of a decision approving a grading permit authorizing a retaining wall where petitioner knew that the applicant was building a retaining wall and placing fill behind it and that the county had approved a grading permit for the subdivision authorizing 76,000 cubic feet of fill. *Abadi v. Washington County*, 35 Or LUBA 67 (1998).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Even if no one requests notice of a post-acknowledgment plan amendment decision under ORS 197.615(2), the local government is required to mail notice of the decision to DLCD, thus there is always a mailing requirement under ORS 197.615 from which the period for appealing post-acknowledgment plan amendments is measured. *City of Hillsboro v. Metro*, 34 Or LUBA 775 (1998).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The appeal period provided in the second sentence of ORS 197.830(8) applies to any person with standing to appeal, and not only to the person or persons who are entitled to notice under ORS 197.615. *City of Hillsboro v. Metro*, 34 Or LUBA 775 (1998).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the challenged decision is an intergovernmental agreement that must be signed by representatives of both the county and the city, the decision becomes final under OAR 661-010-0010(3) when it bears the signatures of necessary decision makers. The unilateral signing of the agreement by the county commissioners does not render the decision final until the city's authorized representatives supply their signatures. *Sparks v. Polk County and City of Monmouth*, 34 Or LUBA 731 (1998).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Whether notice of decision is "required" under ORS 197.830(3) is determined by the procedure the local government followed, not by the procedure the local government should have followed. *Fechtig v. City of Albany*, 34 Or LUBA 561 (1998).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS

197.830 a notice of intent to appeal (NITA) must be filed with LUBA within 21 days after the decision being appealed became final. Where petitioner files a NITA 20 days after notice of the decision was mailed, but 22 days after the decision became final, petitioner's NITA is not timely filed, and LUBA does not have jurisdiction to hear the appeal. *Dalton v. City of West Linn*, 34 Or LUBA 438 (1998).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where persons receive notice of a nonfarm dwelling application and upon investigation discover that a property line adjustment was approved for the property without a hearing several months earlier, and petitioners file a notice of intent to appeal the property line adjustment decision within 18 days of actual notice of the property line adjustment decision, the notice of intent to appeal is timely filed. *Goddard v. Jackson County*, 34 Or LUBA 402 (1998).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The statutory appeal period under ORS 197.830(8), which provides that the 21-day deadline to appeal to LUBA does not begin until required notice of the decision is given, applies notwithstanding the failure of a local government to correctly process a comprehensive plan or land use regulation amendment under ORS 197.610 to 197.625, and, accordingly, to provide the notice of decision as required by ORS 197.615. *ODOT v. City of Oregon City*, 34 Or LUBA 57 (1998).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. When amendments to a county's comprehensive plan are processed according to post-acknowledgment procedures, the second sentence of ORS 197.830(8) governs, and appeals may be filed within 21 days of the date the decision is mailed, rather than the date the decision becomes final. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A plan and land use regulation amendment processed pursuant to post-acknowledgment procedures may be appealed within 21 days of the date the decision is mailed, as provided in ORS 197.830(8), notwithstanding a local government's failure to comply with all required post-acknowledgment procedures. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under OAR 661-10-010(3), a local decision becomes final on the date it is reduced to writing and signed by a decision maker, unless local legislation provides that the decision becomes final at a later date. Therefore, the 21-day time limit for filing a notice of intent to appeal to LUBA begins on the date the decision is reduced to writing and signed, not the date of the session at which the local government orally made the decision. *Brown v. City of Portland*, 33 Or LUBA 700 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Consistent with *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625 (1997), appeals to LUBA must be filed within 21 days of the date the decision becomes final, not a later date such as that of mailing or receipt of notice of the decision. *North Park Annex Bus. Trust v. City of Independence*, 33 Or LUBA 695 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A notice of intent

to appeal to LUBA must be filed within 21 days of the date the decision becomes final, and misleading or outdated information regarding appeals to LUBA provided in a local government's notice of final decision does not affect that deadline. *Elinski v. City of Lincoln City*, 33 Or LUBA 670 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a local code does not specify a date upon which a decision becomes final, OAR 661-10-010(3) specifies that the decision becomes final on the date it is reduced to writing and signed by the decision maker. *Adams v. City of Ashland*, 33 Or LUBA 552 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The 21-day time limit provided in ORS 197.830(8) for a petitioner to appeal a local land use decision to LUBA begins on the date the decision becomes "final," not the date the decision becomes "effective" under the local code. *DeBates v. Yamhill County*, 33 Or LUBA 526 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. If local ordinance does not define when a decision becomes final, it becomes final under OAR 661-10-010(3) when it is reduced to writing and bears the necessary signatures of the decision makers, regardless of the date notice of the decision is sent or erroneous information provided in that notice. *DeBates v. Yamhill County*, 33 Or LUBA 526 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A county's delay in providing petitioner with notice of decision does not toll the 21-day appeal period set forth in ORS 197.830(8), and under *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625 (1997), LUBA has no jurisdiction over an appeal filed more than 21 days after the county's decision became final. *Michael-Mark v. Yamhill County*, 33 Or LUBA 409 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the county's first notice to petitioner was faulty and was not received before the initial local hearing, but a second notice that complied with ORS 197.763(8) was sent before subsequent local hearings, a petitioner is not denied his right to a hearing and is not excused from his obligation to file a timely notice of intent to appeal with LUBA. *Epling v.Washington County*, 33 Or LUBA 392 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.610 to ORS 197.625, only state notice requirements must be followed to avoid tolling, under ORS 197.830(3), the 21-day appeal period provided in ORS 197.830(8). *Petersen v. Columbia County*, 33 Or LUBA 253 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the city explains in its decision to grant a development permit that a conditional use review is not required, a letter from the city planning director written five months later stating that the review is not required is not itself an appealable land use decision, and an appeal five months from the initial decision is not timely. *Northwest Environmental Adv. v. City of Portland*, 33 Or LUBA 45 (1997).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A decision

becomes final for purposes of an appeal to LUBA when the prescribed written notice of decision is mailed or personally delivered to the party seeking to appeal. *J.C Reeves Corp. v. Washington County,* 32 Or LUBA 263 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under OAR 610-10-015(1)(b), a notice of intent to appeal mailed to LUBA within the 21-day time limit, but received by LUBA after the 21-day time limit has expired, is not timely filed. *J.C Reeves Corp. v. Washington County*, 32 Or LUBA 263 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(b), which allows appeals "within 21 days of the date a person knew or should have known of the decision where no notice is required," does not apply where city and county provide properly noticed hearings of proceedings to amend local zoning ordinances. *Waite v. City of La Grande,* 31 Or LUBA 77 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The timely filing of a technically flawed notice of intent to appeal satisfies LUBA's jurisdictional requirements; and properly serving an amended notice of intent to appeal that corrects the technical violations in the original notice, although not expressly allowed by LUBA's rules, may avoid dismissal on the ground of prejudice to the substantial rights of the county. *Markham v. Coos County*, 31 Or LUBA 529 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. In determining whether a notice of intent to appeal is timely, LUBA will consider all evidence pertaining to when notice of the challenged decision was mailed to petitioner, including the metered date on the envelope used by the local government. *1000 Friends of Oregon v. Columbia County*, 31 Or LUBA 47 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Because of flooding during the week of February 5, 1996, which created de facto "holidays" at various state offices, a notice of intent to appeal delivered to LUBA on the first business day after the flooding will be considered timely under ORS 197.830(8) and OAR 661-10-015(1). *Younger v. Jackson County,* 31 Or LUBA 521 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Filing a petition for review prematurely is a technical violation of LUBA's rules which will not result in dismissal unless the moving party shows prejudice to its substantial rights. *Cox v. Yamhill County,* 30 Or LUBA 479 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. In determining when a document has been mailed for purposes of determining the timeliness of a notice of intent to appeal, LUBA will rely on the most persuasive evidence available. *DLCD v. Yamhill County*, 30 Or LUBA 465 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Because the city's decision to allow a continuation of an existing conditional use permit is not a limited land use

decision under ORS 197.015, a subsequent statement of appeal rights in a notice letter provided by the city is not dispositive of whether petitioner's appeal was timely filed. *Lloyd Dist. Community Assoc. v. City of Portland*, 30 Or LUBA 390 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A local government's reiteration of a previous land use decision in a notice letter does not create a new appealable decision, and the inclusion of a statement of appeal rights in the notice letter does not convert that notice into a separate land use decision. *Lloyd Dist. Community Assoc. v. City of Portland*, 30 Or LUBA 390 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where petitioners received notice of the city's earlier decision, and did not appeal that decision, a statement of appeal rights in a subsequent notice letter provided by the city cannot extend the deadline for appealing the previous final land use decision. *Lloyd Dist. Community Assoc. v. City of Portland*, 30 Or LUBA 390 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(8), the date for computing when an appeal period begins to run is the date the decision becomes final, not the date the notice of decision is received by petitioner. *Lloyd Dist. Community Assoc. v. City of Portland*, 30 Or LUBA 390 (1996).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A notice of intent to appeal to LUBA that designates a corrected decision is timely if filed within the period allowed for appeals of the original (final) decision. *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The pursuit of a nonexistent local right of appeal does not suspend the date a land use decision becomes final for purposes of appeal to LUBA. *No Casino Association v. City of Lincoln City*, 30 Or LUBA 79 (1995).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. When a party is entitled to notice of a post-acknowledgment plan or land use regulation amendment under ORS 197.615(2)(a)(A) and (B), ORS 197.830(8) provides that the local government decision becomes final as to that party on the date the notice of the decision is mailed, rather than on the date the notice of the decision is received. *1000 Friends of Oregon v. Columbia County*, 29 Or LUBA 597 (1995).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 12.140, a 10-year statute of limitations for initiating civil actions in Oregon courts, does not apply to LUBA's proceedings. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(3) applies only where a local government makes a *land use decision* without providing a hearing, and petitioners subsequently attempt to challenge that decision in an appeal to LUBA. Where a local government did not previously make a land use decision concerning the legality of an existing use,

petitioner's timely appeal of the local government's new land use decision is not precluded under ORS 197.830(3)(b), because petitioners allegedly knew of the use's existence for several years. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where petitioner was entitled to notice of the hearing on a development proposal and was not given such notice, but was not entitled to notice of the local decision, under ORS 197.830(3)(b), petitioner's notice of intent to appeal the local decision to LUBA is timely so long as it is filed within 21 days after petitioner "knew or should have known" of the local decision. *Beveled Edge Machines, Inc. v. City of Dallas*, 28 Or LUBA 790 (1995).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where ORS 197.830(3) applies, it provides a petitioner with a right to appeal directly to LUBA, within the time limits established by ORS 197.830(3)(a) and (b), notwithstanding that the deadline for filing a local appeal may have expired. In such circumstances, there is no local appeal available to be exhausted pursuant to ORS 197.825(2)(a). *Beveled Edge Machines, Inc. v. City of Dallas*, 28 Or LUBA 790 (1995).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A LUBA appeal must be initiated within 21 days after a local governing body adopts its written order, unless petitioners establish that (1) the local government plan or code grants a right to seek rehearing or reconsideration of the governing body's order; (2) petitioners sought such rehearing or reconsideration; and (3) under local legislation, such a request for rehearing or reconsideration has the effect of preventing the governing body's order from becoming a *final* decision. *Bowen v. City of Dunes City*, 28 Or LUBA 324 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the notice of public hearing given by the local government is inadequate, such that it does not "reasonably describe the local government's final [decision]," ORS 197.830(3) potentially provides a person adversely affected by the inadequate notice a right to file an appeal at LUBA long after the local decision is reduced to writing, notice of the decision is given, and the decision otherwise becomes final. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(3) imposes a requirement that a reasonable person be able to tell from the notice of public hearing that the local government might take the action that the local government ultimately takes. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A notice of local hearing that includes a map showing all three tax lots included in a proposal is adequate to "reasonably describe the local governments final [decision]," within the meaning of ORS 197.830(3), notwithstanding the failure of the notice to list each tax lot's address and the attachment of other maps to the notice which show only a portion of the property. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Absent local code

provisions analogous to ORS 197.830(3), where a notice of local hearing in a quasi-judicial land use proceeding fails to adequately describe the action ultimately taken by the local government and the time for filing a local appeal has expired, an adversely affected person's exclusive route of appeal is directly to LUBA. *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The time for appealing a local government land use decision is not extended simply because the local government issues a subsequent order correcting clerical errors in the land use decision. *Kalmiopsis Audubon Society v. Curry County*, 27 Or LUBA 640 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where petitioner files a notice of intent to appeal within 21 days after the decision maker's oral vote to adopt the challenged decision, but before the final written decision was adopted, the notice of intent to appeal is timely filed under OAR 661-10-015(1), and petitioner will be permitted to amend the notice of intent to appeal to identify the correct date the challenged decision became final. *Sanchez v. Clatsop County*, 27 Or LUBA 713 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A notice of intent to appeal filed after respondent adopted a tentative oral decision, but before that decision was reduced to writing and became final, is filed "on or before the 21st day after the date the decision sought to be reviewed became final" and, therefore, is timely filed under OAR 661-10-015(1). *Fraser v. City of Joseph*, 27 Or LUBA 695 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The 21 day period provided by ORS 197.830(8) for appealing a limited land use decision to LUBA does not begin to run until a petitioner has been given the explanation of appeal rights to which it is entitled under ORS 197.195(3)(c)(H). *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(3), the 21 day period to appeal a decision to LUBA is measured from the date the petitioner actually receives notice of the decision, rather than from the date the decision became final and the notice was mailed. *Fechtig v. City of Albany*, 27 Or LUBA 666 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. If a "permit" decision is erroneously is processed as a limited land use decision, without a public hearing or an opportunity to request a hearing through a local appeal, then the challenged decision is a "land use decision" made without providing a hearing, and the deadline for filing a notice of intent to appeal with LUBA is governed by ORS 197.830(3). *Fechtig v. City of Albany*, 27 Or LUBA 666 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Decisions concerning development of property applying the elements of equitable estoppel require the exercise of factual and legal judgment and, therefore, are permits. Where a local government fails to provide a local public hearing or opportunity for appeal of such a permit decision, the deadline for filing a notice of intent to appeal the decision to LUBA is governed by ORS 197.830(3). *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The three-year statute of ultimate repose provided by ORS 197.830(5)(a) does not apply "[i]f notice of a hearing or an administrative decision pursuant to ORS 197.763, 197.195, 215.416(11) or 227.175(10) is required but has not been provided." *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where ORS 227.173(3) requires a city to give written notice of its final decision to petitioner, the 21-day period provided by ORS 197.830(8) for filing a notice of intent to appeal to LUBA cannot expire before petitioner receives the notice to which she is entitled. Where such required written notice is not given, a notice of intent to appeal filed after a city planner orally informs petitioner that the city considers certain city council minutes to be its final decision is timely filed. *Noble v. City of Fairview*, 27 Or LUBA 649 (1994).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The appeal deadline provisions of ORS 197.830(3) requiring that a notice of intent to appeal be filed within 21 days after petitioner "knew or should have known or had actual notice of the decision" apply only where the local government fails to provide a hearing. *DLCD v. Crook County*, 25 Or LUBA 826 (1993).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a local hearing is provided and a party is entitled to written notice of the decision under ORS 215.416(10), ORS 197.830(8) rather than ORS 197.830(3) establishes the deadline for filing a notice of intent to appeal. Under ORS 197.830(8), a notice of intent to appeal must be filed within 21 days after a decision becomes final. *DLCD v. Crook County,* 25 Or LUBA 826 (1993).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(8) and 215.416(10), a decision becomes final for purposes of appealing to LUBA "only after the required written notice of the decision is mailed or personally delivered to the party seeking to appeal." *League of Women Voters v. Coos County*, 82 Or App 673, 729 P2d 588 (1986). *DLCD v. Crook County,* 25 Or LUBA 826 (1993).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. If a notice of intent to appeal a post-acknowledgment zone change is filed more than 21 days after petitioner was given the notice of decision it is entitled to under ORS 197.615, the appeal must be dismissed. *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A county planner's misstatement to petitioner concerning when the county's decision would become final does not alter the time period for filing a notice of intent to appeal the county's decision to LUBA under ORS 197.830(8). *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where, under ORS 197.830(8) and OAR 661-10-015(1), a notice of intent to appeal is due on a legal holiday, the notice of intent to appeal is timely filed if it is filed on the next business day. ORS 187.010(3); OAR 661-10-075(7). *Garrigus v. City of Lincoln City*, 25 Or LUBA 767 (1993).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the challenged decision approves a "permit," and the petitioner was entitled to written notice of the decision under ORS 227.173(3), the petitioner has 21 days from the date the notice was mailed to him to appeal the challenged decision to LUBA. *A Storage Place v. City of Tualatin*, 24 Or LUBA 637 (1993).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A local government's failure to provide a person with a required individual written notice of hearing is not sufficient, by itself, to entitle that person to be given individual written notice of the decision or to toll the 21 day deadline for filing a notice of intent to appeal with LUBA until individual written notice of the decision is provided. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(3), where a local government renders a decision without providing a hearing, an appeal to LUBA must be filed within 21 days of actual notice of the decision, where notice of the decision is required, or within 21 days of the date a person knew or should have known of the decision, where no notice of the decision is required. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The timely filing of a notice of intent to appeal is required for LUBA to have jurisdiction. Where the time for filing a notice of intent to appeal runs from the date a petitioner obtained actual knowledge of the decision or knew or should have known of the decision, it is petitioner's burden to establish when the requisite knowledge of the decision was obtained. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a person participated in the legislative proceedings that led to the challenged decision and also participated in a related land use proceeding where the challenged decision was discussed, that person knew or should have known of the challenged decision as early as the date the discussion of the challenged decision occurred. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. That a local government may have provided inadequate notice of a post-acknowledgment plan and land use regulation amendment to the Department of Land Conservation and Development (DLCD) will not excuse a person's failure to file a notice of intent to appeal that decision with LUBA within 21 days after the decision became final, where the person was not entitled to receive notice of the challenged decision from DLCD. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The 21-day period for filing a notice of intent to appeal established by ORS 197.830(8) begins to run only after the party seeking to appeal is given notice of the local government decision to which he is entitled by statute. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. ORS 197.830(8) tolls the running of the time for filing a notice of intent to appeal a post-acknowledgment comprehensive plan or land use regulation amendment for a petitioner who did not receive notice

to which *that petitioner* is entitled under ORS 197.615. It does not toll the time for the filing of *all* notices of intent to appeal post-acknowledgment amendments simply because DLCD, or any other person entitled to notice under ORS 197.615, was not given such notice. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Even if petitioner were entitled under state statute to notice of local government hearings on comprehensive plan and land use regulation amendments and goal exceptions, and the local government failed to provide that notice, petitioner's notice of intent to appeal would only be timely if it was filed within 21 days after petitioner received actual notice of the challenged decision. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. As the party seeking review by LUBA, petitioner has the burden of establishing that LUBA has jurisdiction. Where a petitioner argues her notice of intent to appeal is timely because it was filed within 21 days after she received actual notice of the challenged decision, the petitioner must support her argument with affidavits, record citations or other evidence. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(8) and 197.615, a notice of intent to appeal a post-acknowledgment plan amendment must be filed at LUBA within 21 days of the date parties who requested notice of the post-acknowledgment plan amendment decision under ORS 199.615(2)(a)(B), were mailed such notice. *Crew v. Deschutes County*, 23 Or LUBA 148 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(8), OAR 661-10-015(1) and 661-10-075(2)(a), an appeal must be dismissed if the notice of intent to appeal is not delivered to or received by LUBA on or before the 21st day after the decision sought to be reviewed became final. *Pilling v. Crook County*, 23 Or LUBA 51 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under OAR 661-10-015(1), so long as a notice of intent to appeal is filed before the expiration of the 21st day after the decision becomes final, the notice of intent to appeal is timely filed. *Rabe v. City of Tualatin*, 22 Or LUBA 832 (1992).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a city approves a permit without providing the public hearing or notice of decision and opportunity for a local appeal required by ORS 227.175(3) and (10), a notice of intent to appeal at LUBA is timely filed if it is filed within 21 days after petitioners received actual notice of the permit decision. *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a petitioner's deposition discloses she learned the city may have approved certain permits, and thereafter petitioner promptly pursues the matter with the city planning department and obtains copies of the permits, the date she obtained the copies of the permits from the planning department is the date of actual notice of the permits for purposes of computing the deadline for filing a notice

of intent to appeal at LUBA. *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. The principles applicable to determining whether an organization has representational standing to appeal a decision to LUBA are also applicable to determining whether an organizational petitioner acting in its representational capacity is deemed to have *actual notice* for purposes of calculating the time for filing the notice of intent to appeal under ORS 197.830(3). *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where one of a petitioner organization's members did not receive actual notice of a land use decision more than 21 days prior to the time the notice of intent to appeal was filed, an evidentiary hearing to establish that *other* individual members of the organization or the organization's board of directors had actual notice of the challenged decision more than 21 days before the challenged decision was made, is not warranted. Even if other members received such actual notice, petitioner's notice of intent to appeal in its *representational* capacity would be timely. *Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611 (1991).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Under ORS 197.830(3), a petitioner must file a notice of intent to appeal challenging a local government land use decision rendered without a hearing, within 21 days of "actual notice" or "the date a person knew or should have known of the decision," depending on whether notice was required or not. *Rebmann v. Linn County*, 21 Or LUBA 542 (1991).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Allegations that petitioners and petitioners' former attorney were sent a copy of the challenged decision by uncertified mail more than 21 days before the notice of intent to appeal was filed are insufficient to establish that petitioners had actual notice or knew or should have known of the decision more than 21 days before filing the notice of intent to appeal. *Rebmann v. Linn County*, 21 Or LUBA 542 (1991).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a local government fails to provide the statutorily required written notice of decision to a party entitled to receive such notice, the 21 day deadline for filing an appeal with LUBA does not begin to run until the required written notice of decision is provided. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where there is no local appeal available and a local government fails to provide the notice of hearing or hearing required by ORS 227.175(3) and (5) or 215.416(3) and (5) before making a decision on a permit, such permit decisions may be appealed to LUBA within 21 days after a person receives actual notice of the permit decision. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. If the notice of hearing required by ORS 227.175(5) fails to indicate the possibility of the final action actually taken by the city, a petitioner's notice of intent to appeal to LUBA is timely if filed within 21 days

after petitioner received actual notice of the decision. *Torgeson v. City of Canby*, 19 Or LUBA 623 (1990).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where a county finds applicable approval standards are or can be met and grants first stage PUD approval, but includes a condition that (1) final grading and drainage plans be submitted later, and (2) approval of such plans follow a procedure that does not provide notice or an opportunity for further public involvement, the proper way to challenge the county's decision to proceed in such a manner is to appeal the first stage PUD approval decision. Parties may not fail to challenge that decision and appeal the subsequent approval of the final grading and drainage plans, arguing that such approvals are permits subject to the notice and hearing requirements of ORS 215.416, and that their failure to "appear" or file an appeal of such approvals within 21 days is excused because of the county's failure to observe such notice and hearing requirements. *J.P. Finley & Son v. Washington County*, 19 Or LUBA 263 (1990).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. Where the petitioner was never provided the written notice to which it was entitled under ORS 227.173(3), the 21-day period for the petitioner to appeal to LUBA did not expire. *Harvard Medical Park, Ltd. v. City of Roseburg*, 19 Or LUBA 555 (1990).

27.10.1 LUBA Procedures/Rules – Time Limits – Notice of Intent to Appeal. A notice of intent to appeal mailed to LUBA within the 21 day appeal period, but received by LUBA after the 21-day appeal period expires, is not timely filed. *Oak Lodge Water District v. Clackamas County*, 18 Or LUBA 643 (1990).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. Under OAR 661-010-0067 written consent to extend the deadline for filing record objections also constitutes written consent to extend the deadline for filing the petition for review. But where a motion to extend the deadline to file record objections is not consented to by all parties, granting the motion would not also extend the deadline for filing the petition for review, which would create the possibility that the record might be supplemented after the petition for review is filed and necessitate delaying the appeal to allow petitioner to file an amended petition for review. *WKN Chopin LLC v. Umatilla County*, 65 Or LUBA 457 (2012).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. Under OAR 661-010-0067(2), where all parties consent in writing to extend the deadline for filing record objections, the deadline for filing the petition for review is automatically extended for the same number of days unless the parties expressly provide otherwise. *WKN Chopin LLC v. Umatilla County*, 65 Or LUBA 459 (2012).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. The filing of a record objection suspends the briefing schedule, even if the objection was filed three days late, and LUBA will consider the untimely objections, absent a showing that the untimely filing prejudiced a party's substantial rights to a speedy review. *JCK Enterprises, LLC v. City of Cottage Grove*, 63 Or LUBA 582 (2011).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. The late filing of a record objection by intervenor-respondent does not prejudice the petitioner's substantial rights to speedy review, where settling the record must be delayed in any event due to the filing of an amended record prompted by the petitioner's earlier record objections. *JCK Enterprises, LLC v. City of Cottage Grove*, 63 Or LUBA 582 (2011).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. Although parties may have additional motivation other than the integrity of the record to file record objections, including delaying the time for filing the petition for review, that does not mean that the record objection is without merit or was filed for the sole purpose of obtaining more time to file the petition for review. *Roberts v. Clatsop County*, 43 Or LUBA 617 (2002).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. Record objections that are presented for the first time in the petition for review will be denied as untimely filed. *Cape v. City of Beaverton*, 41 Or LUBA 515 (2002).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. A motion to supplement the record filed after the petition for review and respondent's brief have been filed will be denied where it is not clear whether the document to be added to the record was placed before the decision maker, and no "unique circumstances" are identified to warrant supplementing the record at such a late state of the appeal. *Root v. City of Medford*, 36 Or LUBA 778 (1999).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. Late filing of a record objection is a technical violation of LUBA rules and will not provide a basis for denying the record objection, absent prejudice to a party's substantial rights. *Schaffer v. City of Turner*, 35 Or LUBA

744 (1998).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. Filing an objection to the record one day after the 10-day period established by OAR 661-10-026(2) is a technical violation of LUBA's rules that will not prevent consideration of the objection unless the local government demonstrates the delay caused prejudice to its substantial rights. *Northwest Environmental Advocates v. City of Portland*, 32 Or LUBA 471 (1996).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. Failure to file a record objection within the time required by LUBA rules may provide a basis for denying the record objection or for providing an abbreviated deadline for filing the petition for review after the record objection is resolved. However, even an untimely record objection suspends the deadline for filing the petition for review until the record objection is resolved. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. The filing of an objection to the local record suspends the time for filing a petition for review, even if the objection is not timely filed. Failure to file a record objection in a timely manner may provide a basis for denying the record objection or setting an abbreviated time for filing the petition for review, but does not provide a basis for dismissing the appeal. *Cole v. Columbia County*, 27 Or LUBA 701 (1994).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. OAR 661-10-026(2) requires that objections to the record be filed within 10 days after the record is served on the party making the objection. *Churchill v. Tillamook County*, 25 Or LUBA 786 (1993).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. Filing an objection to the record two days after the date required by OAR 661-10-026(2), and within 10 days after the date petitioner received the record, is a technical violation of LUBA's rules that does not affect LUBA's review of the challenged decision. *Churchill v. Tillamook County*, 25 Or LUBA 786 (1993).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. Where the copy of the record initially served on petitioner was lost in the mail, LUBA will grant an extension of time for petitioner to file objections to the record. *Gray v. Clatsop County*, 21 Or LUBA 583 (1991).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. A record objection filed four days late, but before the petition for review is due, will suspend the deadline for filing the petition for review where respondent makes no attempt to explain how its substantial rights may have been prejudiced by a delay of four days in filing the record objection. *Benjamin v. City of Ashland*, 19 Or LUBA 600 (1990).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. OAR 661-10-026(2) requires that a record objection be filed within 10 days following service of the record on the person filing the record objection. Where a party alleges it never received the copy of the record the local government contends was served on the party by mail, and the party thereafter takes prompt action to obtain a copy of the record and advises respondent by mail that he assumes he

will have 10 days from the date he actually received the record to file any objections, a record objection filed within 10 days after the party actually received the record is timely. *Benjamin v. City of Ashland*, 19 Or LUBA 600 (1990).

27.10.2 LUBA Procedures/Rules – Time Limits – Record Objections. Petitioner's failure to file his record objection until three days after the date required by OAR 661-10-026(2) is a technical violation of LUBA's rules and will not result in rejection of the record objection where the respondent (1) was granted extensions to file the record in the appeal proceeding and related appeal proceedings, and (2) does not allege how it was prejudiced by the late filing of the record objection. *Davis v. City of Bandon*, 19 Or LUBA 507 (1990).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Under ORS 197.830(11) and OAR 661-010-0030(1), where a petition for review is not filed within the time established by a stipulated extension of the deadline for such filing, and where the petitioner does not obtain written consent to extend the deadline further, LUBA will dismiss the appeal. *Becker v. Jackson County*, 79 Or LUBA 348 (2019).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. LUBA will allow an amendment to a petition for review to correct errors or omissions in a petition for review if doing so serves a purpose and will not materially interfere with either respondents' ability to respond to the petition for review or our ability to meet the statutory deadline for our final opinion. Where petitioner attempted to amend his petition for review—by adding allegations to an assignment of error, by adding record and case cites, and by "clarifying and refining text"—23 days after the response briefs were filed and two days before oral argument, and petitioner filed his renewed motion to amend his petition for review on the same date as oral argument, LUBA will deny petitioner's request. To allow such a request would not be fair or promote the speediest practicable review of land use decisions and would materially interfere with respondents' ability to respond to the petition for review. *Nicita v. City of Oregon City*, 78 Or LUBA 1084 (2018).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Because the cross petition for review is the functional equivalent of a petition for review, OAR 661-010-0030(7) imposes the same filing deadline that applies to petitions for review, and LUBA strictly enforces that filing deadline for cross petitions for review in the same way it strictly enforces that filing deadline for the petition for review. LUBA will grant a motion to strike a cross petition for review that is filed one day late. *Warren v. Josephine County*, 66 Or LUBA 471 (2012).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Under OAR 661-010-0067 written consent to extend the deadline for filing record objections also constitutes written consent to extend the deadline for filing the petition for review. But where a motion to extend the deadline to file record objections is not consented to by all parties, granting the motion would not also extend the deadline for filing the petition for review, which would create the possibility that the record might be supplemented after the petition for review is filed and necessitate delaying the appeal to allow petitioner to file an amended petition for review. *WKN Chopin LLC v. Umatilla County*, 65 Or LUBA 457 (2012).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Under OAR 661-010-0067(2), where all parties consent in writing to extend the deadline for filing record objections, the deadline for filing the petition for review is automatically extended for the same number of days unless the parties expressly provide otherwise. *WKN Chopin LLC v. Umatilla County*, 65 Or LUBA 459 (2012).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. If a petition for review is delivered to the United States Postal Service and mailed to LUBA via "Priority Mail" it is mailed by "First Class Mail" and therefore filed on the date it was delivered to the United States Postal Service under OAR 661-010-0075(2)(a)(B), where the United States Postal Service defines "First Class Mail" to include "Priority Mail." *Canfield v. Lane County*, 59 Or LUBA 505 (2009).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where a petitioner transmits the petition for review to LUBA in any way other than by first class mail with the United States Postal Service, the petition for review is not "filed" until it is received by LUBA. In that circumstance it is legally irrelevant whether the petitioner acted in good faith in using a carrier other than the United States Postal Service and it is legally irrelevant that the choice to transmit the petition for review by a means other than first class mail resulted in no delay in LUBA receiving the petition for review. *Canfield v. Lane County*, 59 Or LUBA 505 (2009).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Whether the OAR 661-010-0030(1) requirement that a LUBA appeal be dismissed if the petition for review is not filed within the 21-day deadline established by that rule is a *jurisdictional* requirement or merely a *compulsory non-jurisdictional* basis for dismissing the appeal, the 10-day rule in OAR 661-010-0065(2) that requires a motion to be filed within 10 days after discovery of a failure to comply with LUBA's rules does not apply to a motion to dismiss based on a petitioner's failure to comply with the deadline established by OAR 661-010-0030(1) for filing the petition for review. *Canfield v. Lane County*, 59 Or LUBA 505 (2009).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. The failure of a pro se petitioner to sign a petition for review does not necessarily mean that that petitioner has "failed to timely file a petition for review" under OAR 660-010-0030(1), with the consequence that that petitioner must be dismissed from an appeal. *Abeel v. City of Portland*, 58 Or LUBA 247 (2009).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Under OAR 661-010-0075(2)(a), a petition for review is filed with LUBA on the date it is mailed "by first class mail with the United States Postal Service." If the petition for review is filed with LUBA in any other manner, the petition for review is filed on the date it is delivered to LUBA. A petition for review that is delivered to a Postal Annex store before the filing deadline expires and is thereafter delivered to LUBA by United Parcel Service on a date after the filing deadline expires is not timely filed and the appeal must be dismissed. *Lund v. City of Mosier*, 58 Or LUBA 344 (2009).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where a petition for review was not filed within the time required by LUBA's rules, and no written consent to extend the time for filing the petition for review under OAR-661-010-0067(2) was obtained, ORS 197.830(11) and OAR 661-010-0030(1) require that the appeal be dismissed. *Verizon Wireless, LLC v. Clackamas County*, 56 Or LUBA 660 (2008).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. A petitioner may not dismiss his attorney after the petition for review has been filed and the time for filing the petition for review has run and then submit a new or amended petition for review. *Taylor v. City of Canyonville*, 55 Or LUBA 681 (2007).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where the petition for review has already been filed, a petitioner may not supplement the arguments presented therein, and LUBA will deny a motion to file a revised petition for review. *Knapp v. City of Corvallis*, 55 Or LUBA 683 (2007).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where a petitioner has decided to seek voluntary dismissal of the appeal, to avoid delay and prejudice to other parties the petitioner should file an unequivocal motion for dismissal as soon as reasonably possible. That obligation is not met where the petitioner files an equivocal motion to dismiss on the date the petition is due, based on information that petitioner was long aware of, and that is accompanied by a nonmeritorious motion to resettle the record and restart the deadline for filing the petition for review. Under such circumstances, LUBA will dismiss the appeal for failure to file the petition for review, not based petitioner's motion to dismiss. *Ford v. Jackson County*, 54 Or LUBA 434 (2007).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. When a local government provides a corrected cover page for the record, the corrected cover page is not a supplemental record and does not restart the 21-day deadline for filing the petition for review. *Santiam Water Control District v. City of Stayton*, 54 Or LUBA 549 (2007).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where it is undisputed that petitioner received the record, even though petitioner may not have received the letter that LUBA sent to petitioner advising him that LUBA had received the record, that does not excuse petitioner's failure to file a petition for review before the deadline expires. *Anantha v. City of Portland*, 54 Or LUBA 727 (2007).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where petitioner received a copy of the record that was filed with LUBA, he cannot reasonably claim that he was unaware that he was obligated to file his petition for review within the deadline established by ORS 661-010-0030(1). That petitioner may not have received the letter that LUBA sent to petitioner advising him that LUBA had received the record does not excuse petitioner's failure to timely file a petition for review. *Bleu v. Clackamas County*, 52 Or LUBA 606 (2006).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. While it is possible that LUBA might grant a petitioner's request that a notice of intent to appeal be treated as the petition for review, a petitioner may not wait until over two weeks after the deadline for filing the petition for review has expired to make such a request. *Bleu v. Clackamas County*, 52 Or LUBA 606 (2006).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Petitioner's presumption that the parties had an implicit agreement to extend the deadline for filing the petition for review pending settlement discussions does not excuse petitioner's failure to obtain and file a stipulation to that effect. Where respondent refuses to stipulate to an extension of the deadline for filing the petition for review after it has expired, LUBA will dismiss the appeal. *Byrtus v. City of Brookings*, 51 Or LUBA 556 (2006).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where the record was mailed to and received by petitioner and LUBA, the deadline for filing the petition for review expires 21 days after the record is received by LUBA, and petitioner's claim that he did not receive a letter from LUBA advising him of the date LUBA received the record does not affect that deadline. *Cunningham v. Josephine County*, 50 Or LUBA 58 (2005).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. OAR 661-010-0067(2) requires that a motion for extension of time to file a petition for review be denied where the motion is not consented to in writing by all parties, there is no indication that intervenors ever had plans or have plans to consent to extend the deadline, and no petition for review is filed within the 21-day deadline for filing a petition for review, pursuant to OAR 661-010-0030(1). *ODOT v. City of Phoenix*, 50 Or LUBA 548 (2005).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where there is no dispute that both the local government record and LUBA's letter acknowledging receipt of the record and identifying the deadline for filing the petition for review were mailed to the address that was specified by the lead petitioner, but the petition for review was not filed before that deadline expired, and petitioner did not obtain written consent to extend the time for filing the petition for review under OAR 661-010-0067(2), ORS 197.830(11) and OAR 661-010-0030(1) require that LUBA dismiss the appeal. That there may have been delays in forwarding documents from lead petitioner's Oregon address to his California address does not excuse failure to timely file the petition for review. *Hawk v. Josephine County*, 49 Or LUBA 451 (2005).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Allowing intervenors-petitioner to belatedly sign the signature page of a timely filed petition for review is not tantamount to allowing a late petition for review. Intervenors' failure to sign or join the petition for review prior to its filing is at most a technical violation that does not affect our review, absent prejudice to another party's substantial rights. *Kane v. City of Beaverton*, 49 Or LUBA 512 (2005).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where petitioners failed to file a petition for review on or before the deadline for filing the petition for review and petitioners were unable to secure the local government's agreement to suspend the deadline, the appeal must be dismissed. That petitioners were *pro se* petitioners and did not understand the LUBA appeal process does not excuse their failure to file a timely petition for review. *Davis v. Wasco County*, 48 Or LUBA 454 (2005).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. The date the petition for review is postmarked is not necessarily determinative of the date the petition is "mailed," for purposes of OAR 661-010-0030(1) and 661-010-010-0075(2)(a)(B). *Mason v. City of Corvallis*, 48 Or LUBA 651 (2005).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Depositing the petition for review postage paid in a postal service deposit box on the date it is due is sufficient to "mail" and hence file the petition for review under OAR 661-010-0075(2)(a)(B), even if the petition for review is postmarked the following day, and even if the petition for review is deposited after the last collection time for that deposit box. *Mason v. City of Corvallis*, 48 Or LUBA 651 (2005).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Petitioners do not sustain their burden of demonstrating that a petition for review was timely filed, where the only evidence that bears on that question is (1) a postmark dated one day late and (2) an affidavit by petitioners' attorney averring that he arrived at the post office two minutes prior to midnight on

the day the petition for review was due, and he was "certain" that he deposited the petition for review with the postal clerk before midnight. *Bollinger v. City of Hood River*, 46 Or LUBA 602 (2004).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Given the severe consequence that dismissal of an appeal represents, and the ease with which the risk of that consequence can be avoided by filing a record objection or precautionary record objection while record disputes are resolved, a prudent petitioner will always file a record objection or precautionary record objection with any other documents that may be filed to provide notice of the parties' negotiations concerning the content of the record. *Laurance v. Douglas County*, 44 Or LUBA 845 (2003).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. If a petition for review is filed with LUBA in any way other than by "first class mail with the United States Postal Service," OAR 661-010-0075(a)(A) applies and the date of filing is the date the petition for review is actually delivered to LUBA. *Doob v. Josephine County*, 43 Or LUBA 473 (2003).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Under OAR 661-010-0065(4), LUBA may extend the deadline for filing the petition for review on its own motion without the written consent of all parties, where the extension is required to avoid prejudice to one or more party's substantial rights due to LUBA's failure to contemporaneously advise the parties that the record had been received. *Confederated Tribes v. Jefferson County*, 42 Or LUBA 597 (2002).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. The deadline for filing the petition for review is strictly enforced, even where irregularities occur in providing petitioner with notice of the deadline for filing the petition for review. *Allen v. Grant County*, 41 Or LUBA 21 (2001).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Even assuming that petitioner failed to receive LUBA's order notifying petitioner of the deadline for filing the petition for review, and that lack of actual or imputed knowledge of that deadline might excuse failure to file the petition on or before the deadline, petitioner has an obligation to act promptly and request appropriate relief once he learns of the deadline, to avoid prejudice to other parties' substantial rights. An unjustified 21-day delay in filing for such relief prejudices other parties' substantial rights and is a sufficient basis to deny the requested relief. *Allen v. Grant County*, 41 Or LUBA 21 (2001).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. The requirement at OAR 661-010-0030(1) that LUBA dismiss an appeal where the petition for review is not timely filed implements the statutory policy that "time is of the essence" in land use matters. That the statutes governing LUBA's review do not provide for dismissal where the petition is untimely filed does not mean that OAR 661-010-0030(1) is inconsistent with LUBA's governing statutes. *Rookard v. Lane County*, 41 Or LUBA 14 (2001).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Petitioners are entitled

to rely on a Board order extending the time to file a petition for review, notwithstanding that the order was issued without the written agreement of all parties, where no party's substantial rights are prejudiced by the extension of time. *Ballou v. Douglas County*, 40 Or LUBA 573 (2001).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. An untimely filed petition for review requires dismissal of the appeal where petitioners rely on a motion to extend the time for filing the petition for review to avoid the deadline, but the motion is not signed by all the parties and petitioners are aware that all of the parties have not consented to the extension of time. *Ballou v. Douglas County*, 40 Or LUBA 377 (2001).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Petitioners do not have the right to rely on a Board order extending the time for filing a petition for review, where not all of the parties have stipulated to the extension of time and petitioners unreasonably believed that some of the intervenors were represented by a single attorney who had consented to the extension of time on behalf of only one intervenor. *Ballou v. Douglas County*, 40 Or LUBA 377 (2001).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Failure to file the petition for review within 21 days of LUBA's receipt of the record is not excused by the fact that LUBA's letter to the parties acknowledging receipt of the record failed to specify the date the record was received, where petitioner knew or should have known from service of the record and other information that the 21-day period to file the petition for review had commenced. *Bybee v. City of Salem*, 40 Or LUBA 187 (2001).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where a motion to intervene has been filed and served but not yet received by LUBA and the parties, and an order extending the deadline for filing the petition for review is entered based on the mistaken understanding that all parties consent to the extension, the intervening party may thereafter object to the extension and is entitled to have the original deadline for filing the petition for review reestablished, if that can be done without prejudicing petitioner's substantial right to rely on the deadline that was established in the order. *Pereira v. Columbia County*, 39 Or LUBA 760 (2001).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Although OAR 661-010-0067(2) authorizes LUBA to suspend the deadline for filing the petition for review to allow time to rule on a motion to dismiss, the filing of a motion to dismiss or a memorandum opposing a motion to dismiss does not automatically suspend the deadline for filing the petition for review. *Wynnyk v. Jackson County*, 39 Or LUBA 500 (2001).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. A motion to extend the deadline for filing a petition for review cannot be granted under OAR 661-010-0067(2) unless *all* parties, including intervenors, consent to the requested extension. *Bauer v. City of Portland*, 37 Or LUBA 489 (2000).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Possible confusion about whether LUBA granted an initial request to extend the deadline for filing the petition for review is irrelevant, where petitioners fail to submit a petition for review within the extended deadline that was requested in the initial request. *Root v. Crook County*, 37 Or LUBA 257 (1999).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. OAR 661-010-0030 requires that the petition for review be filed within 21 days after the record is filed or settled. That deadline is not violated where petitioner in a consolidated appeal files its petition prior to the date the consolidated record is settled rather than waiting until after the consolidated record is filed. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Any request to extend the deadline for filing the petition for review under OAR 661-010-0067(2) must be signed by all parties, including intervenors-respondent. *Genstar Land Company v. City of Sherwood*, 35 Or LUBA 832 (1999).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where the petition for review is filed more than 21 days after the date the record is settled, the appeal will be dismissed. *North Park Annex v. City of Independence,* 35 Or LUBA 512 (1999).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. A record objection filed after the deadline for filing the petition for review does not suspend the deadline for filing the petition for review. *Landwatch Lane County v. Lane County*, 34 Or LUBA 348 (1998).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. An appeal at LUBA will be dismissed where a petition for review is filed after the deadline established by OAR 661-010-0030(1), unless petitioner obtains the written consent of all parties to extend the filing deadline. *Landwatch Lane County v. Lane County*, 34 Or LUBA 348 (1998).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where the city serves a copy of the record on petitioner via delivery on her doorstep, pursuant to petitioner's agreement with the city, the city's failure to serve the record on petitioner personally or to a person at petitioner's house does not violate OAR 661-010-0075(2)(b) or toll the date on which the petition for review is due. *Peebles v. City of Wilsonville,* 34 Or LUBA 235 (1998).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. When the petition for review is not filed within the time established under OAR 661-10-030(1), the appeal will be dismissed and the filing fee and deposit for costs forfeited to the governing body. *Grammon v. City of Cove*, 30 Or LUBA 31 (1995).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. The requirement that a petitioner file a petition for review within 21 days after the record is settled will be strictly enforced, and failure to comply will result in dismissal of the appeal. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532 (1995).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Although LUBA's rules distinguish between transmittal of the record, which is accomplished by actual delivery to LUBA, and service of the record on a petitioner, the rules do not distinguish between service in person or by first-class mail, under OAR 661-10-075(2)(b)(B), in determining when a copy of the record is served on a petitioner, as required by OAR 661-10-025. *Terrace Lakes Homeowners Assoc. v. City*

of Salem, 29 Or LUBA 532 (1995).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where petitioner neither files a petition for review within the time provided by LUBA's rules nor obtains an extension of time to file the petition for review, LUBA will dismiss the appeal. *Reames v. Deschutes County*, 28 Or LUBA 335 (1994).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where a petitioner obtains the written consent of all parties to extend the deadline for filing the petition for review, filing the written agreement one day after the petition for review was due constitutes a technical violation of OAR 661-10-067(4) and does not prevent LUBA from granting an extension of time to file the petition for review under OAR 661-10-067(2). *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 746 (1994).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Failure to file a record objection within the time required by LUBA rules may provide a basis for denying the record objection or for providing an abbreviated deadline for filing the petition for review after the record objection is resolved. However, even an untimely record objection suspends the deadline for filing the petition for review until the record objection is resolved. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. The filing of an objection to the local record suspends the time for filing a petition for review, even if the objection is not timely filed. Failure to file a record objection in a timely manner may provide a basis for denying the record objection or setting an abbreviated time for filing the petition for review, but does not provide a basis for dismissing the appeal. *Cole v. Columbia County*, 27 Or LUBA 701 (1994).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. LUBA will not consider a motion for reversal that includes arguments not contained in the petition for review, where the motion for reversal is filed three weeks after the deadline for filing the petition for review. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where the petitioner neither files a petition for review within the time required by LUBA's rules, nor obtains an extension of time for filing the petition for review, LUBA will dismiss the appeal. ORS 197.830(10); OAR 661-10-030(1). *Fleming v. Marion County*, 27 Or LUBA 78 (1994).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. A motion to stay LUBA proceedings that is not signed by all parties is not the equivalent of a written stipulation by all parties for an extension of time to file the petition for review and, therefore, filing such a motion to stay LUBA proceedings does not suspend the time for filing a petition for review. *Hackett v. Multnomah County*, 26 Or LUBA 551 (1994).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. If a petition for review is not filed within the time required under LUBA's rules, ORS 197.830(10) and OAR 661-10-

030(1) require LUBA to dismiss the appeal. *Hackett v. Multnomah County*, 26 Or LUBA 551 (1994).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Under OAR 661-10-067(2), LUBA may not extend the deadline for filing a petition for review, unless all parties consent to the extension. *Zippel v. Josephine County*, 26 Or LUBA 626 (1994).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where petitioners neither filed a petition for review within the time required by LUBA's rules, nor obtained an extension of time for filing the petition for review, LUBA will dismiss the appeal under ORS 197.830(10) and OAR 661-10-030(1). *Vominh v. City of Portland*, 26 Or LUBA 58 (1993).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where a request to amend the petition for review to add an assignment of error is delivered to LUBA two days before the final opinion and order is due, the request will be denied as untimely. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where petitioners neither file a petition for review within the time provided by LUBA's rules nor obtain an extension of time to file the petition for review, LUBA will dismiss the appeal. *Fleming v. Marion County*, 25 Or LUBA 96 (1993).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. If an objection to the local record is filed, the time limits for filing the petition for review, respondents' briefs and LUBA's final opinion and order are suspended, regardless of whether the record objection is ultimately sustained or denied. OAR 661-10-026(5). *DLCD v. Klamath County*, 24 Or LUBA 656 (1993).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where the petitioner has neither filed a petition for review within the time required by LUBA's rules, nor obtained an extension of time for filing the petition for review, ORS 197.830(10) and OAR 661-10-030(1) require LUBA to dismiss the appeal. *Compass Corporation v. City of Lake Oswego*, 23 Or LUBA 593 (1992).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. The untimely filing of a petition for review is not a technical violation of LUBA's rules. *Weeks v. City of Tillamook*, 23 Or LUBA 255 (1992).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. A motion to dismiss does not suspend the time for filing the petition for review. The only events that suspend the time for filing a petition for review in a LUBA appeal are the filing of (1) a motion for an evidentiary hearing, (2) a record objection, or (3) a written stipulation signed by all parties for an extension of time to file the petition for review. *Weeks v. City of Tillamook*, 23 Or LUBA 255 (1992).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where petitioners neither file a petition for review within the time required by LUBA's rules, nor obtain an extension

of time to file the petition for review pursuant to LUBA's rules, ORS 197.830(10) and OAR 661-10-030(1) require dismissal of the appeal. *Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 636 (1992).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where all parties acknowledge an oral agreement to extend the time for filing the petition for review was reached prior to the date the petition for review was required to be filed, that a stipulated motion for extension of time to file the petition for review was filed one day after the day the petition for review was otherwise due is a technical violation of LUBA's rules and will not result in dismissal of the appeal. *Rabe v. City of Tualatin*, 22 Or LUBA 832 (1992).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. If petitioner's motion for extension of time to file the petition for review does not satisfy the requirement of OAR 661-10-067(2) for the written consent of all parties, and the petition for review was not filed within 21 days after the date the Board received the record, the appeal must be dismissed. OAR 661-10-030(1). *Ramsey v. City of Portland*, 22 Or LUBA 535 (1992).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Under LUBA's rules, if petitioner's motion for extension of time to file the petition for review does not satisfy the requirement of OAR 661-10-067(2) for the written consent of all parties, and a petition for review is not filed within 21 days after the date LUBA received the local record, the appeal must be dismissed. *Ramsey v. City of Portland*, 22 Or LUBA 295 (1991).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. The provision of OAR 661-10-067(2) allowing extensions of time for filing the petition for review only where all parties to the appeal consent to such extension does not exceed LUBA's statutory authority. *Ramsey v. City of Portland*, 22 Or LUBA 295 (1991).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where a petitioner neither files a petition for review within the time required by LUBA rules, nor obtains an extension of time for filing the petition for review, ORS 197.830(8) and (10) and OAR 661-10-030(1) require that LUBA grant respondent's motion to dismiss and request for award of petitioner's filing fee and deposit for costs. *Keister v. Clackamas County*, 21 Or LUBA 212 (1991).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Under ORS 197.830(10) and OAR 661-10-030(1), in the absence of an agreement between the parties to extend the time for filing the petition for review, the consequence of failing to file a timely petition for review is dismissal of the appeal and award of petitioner's filing fee and deposit for costs to respondent. *Burghardt v. City of Molalla*, 20 Or LUBA 431 (1991).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Where a petitioner neither files a petition for review within the time required by LUBA rules, nor obtains an extension of time for filing the petition for review, ORS 197.830(8) and (10) and OAR 661-10-030(1) require that LUBA grant respondent's motion to dismiss and request for award of petitioner's filing fee and deposit for costs. *McCauley v. Jackson County*, Or 20 Or LUBA 176 (1990).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. A record objection filed four days late, but before the petition for review is due, will suspend the deadline for filing the petition for review where respondent makes no attempt to explain how its substantial rights may have been prejudiced by a delay of four days in filing the record objection. *Benjamin v. City of Ashland*, 19 Or LUBA 600 (1990).

27.10.3 LUBA Procedures/Rules – Time Limits – Petition for Review. Filing a motion to consolidate does not extend the time for filing a petition for review. *Bloomer v. Baker County*, 19 Or LUBA 90 (1990).

27.10.4 LUBA Procedures/Rules – Time Limits – Final Opinion. LUBA will suspend proceedings on an appeal pursuant to ORS 197.840(1)(d) and (2) where the legal issues on appeal are identical to the issues presented in a case pending before the Court of Appeals, and the Court's decision is likely to be dispositive in the pending appeal before LUBA. *DLCD v. Clackamas County*, 77 Or LUBA 584 (2018).

27.10.4 LUBA Procedures/Rules – Time Limits – Final Opinion. ORS 197.840(1)(b) and (d) allow LUBA to delay issuing a final opinion under certain circumstances. Those statutory bases for delaying or suspending LUBA's review are consistent with ORS 197.805, which provides not only that "time is of the essence" in reaching finality in matters involving land use, but also that LUBA's review must be made "consistently with sound principles of judicial review." *Kamp v. Washington County*, 50 Or LUBA 761 (2005).

27.10.4 LUBA Procedures/Rules – Time Limits – Final Opinion. LUBA will grant a motion to suspend its review of one decision under ORS 197.840(1)(b) until the Court of Appeals completes its review of a different decision, where the two decisions are related and the issue squarely before the Court is the status and nature of the decision before LUBA. *Kamp v. Washington County*, 50 Or LUBA 761 (2005).

27.10.4 LUBA Procedures/Rules – Time Limits – Final Opinion. LUBA's rules do not allow for a continuance following oral argument to allow a party to supplement the petition for review, respond to issues raised in a response brief, or add evidence to the record. *Peterson v. City of Portland*, 31 Or LUBA 112 (1996).

27.10.4 LUBA Procedures/Rules – Time Limits – Final Opinion. Where the Court of Appeals remands LUBA's decision, ORS 197.850(11) requires LUBA to respond to the court's mandate within 30 days. Therefore, LUBA will not grant a party's motion to stay its proceedings on remand over another party's objections. *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994).

27.10.4 LUBA Procedures/Rules – Time Limits – Final Opinion. If an objection to the local record is filed, the time limits for filing the petition for review, respondents' briefs and LUBA's final opinion and order are suspended, regardless of whether the record objection is ultimately sustained or denied. OAR 661-10-026(5). *DLCD v. Klamath County*, 24 Or LUBA 656 (1993).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. ORS 197.830(7)(a) requires that a motion to intervene be filed within 21 days after the notice of intent to appeal is filed. Under OAR 660-010-0015(1)(b), a notice of intent to appeal is filed on the date it is mailed by registered or certified mail or the date it is received by LUBA. But OAR 660-010-0015(1)(b) does not set out two dates of filing, either of which may be relied upon as the date of filing for purposes of computing the deadline for filing a motion to intervene. Rather the rule makes the date of filing the date of mailing, if mailed by registered or certified mail, with the date of filing being the date the notice of intent to appeal is received by LUBA in all other circumstances. *Holmberg v. Deschutes County*, 76 Or LUBA 512 (2017).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. The filing of an amended response brief outside the time permitted for filing the response brief, and without permission from the Board to file an amended brief, is a violation of OAR 661-010-0035(1) and (5). *MGP X Properties, LLC v. Washington County*, 74 Or LUBA 378 (2016).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Under OAR 661-010-0075(8), where a deadline for filing a brief falls on a holiday, the filing must be performed on the next working day. Where the seven-day deadline for filing the reply brief fell on Thanksgiving, and the following day Friday all state offices were closed, including LUBA's, the "next working day" is the following Monday, so a reply brief filed on that Monday was timely filed. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Because the cross petition for review is the functional equivalent of a petition for review, OAR 661-010-0030(7) imposes the same filing deadline that applies to petitions for review, and LUBA strictly enforces that filing deadline for cross petitions for review in the same way it strictly enforces that filing deadline for the petition for review. LUBA will grant a motion to strike a cross petition for review that is filed one day late. *Warren v. Josephine County*, 66 Or LUBA 471 (2012).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. An oral objection at oral argument to a reply brief that was filed more than three weeks earlier is untimely, and will not be considered. *Oh v. City of Gold Beach*, 60 Or LUBA 356 (2010).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Intervenor's failure to file a motion to intervene within 21 days of the date the notice of intent to appeal (NITA) was filed does not require denial of the motion where petitioner failed to serve the NITA on intervenor, as required by OAR 661-010-0015(3)(i). *Ford v. Jackson County*, 50 Or LUBA 359 (2005).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. The deadline for filing a motion to appear as an *amicus* is not a deadline that is rigidly enforced. Filing the motion to appear as amicus one day late, when the amicus brief was timely filed, does not prejudice other parties' substantial rights. *Nelson v. Curry County*, 48 Or LUBA 178 (2004).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Although a motion to dismiss may be filed at any time prior to the issuance of a final opinion and order, a party is not entitled to file unlimited motions on the same issue. When a party has had ample time to brief and

argue jurisdictional issues, LUBA is not obligated to reconsider earlier orders regarding jurisdiction. *Comrie v. City of Pendleton*, 46 Or LUBA 19 (2003).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. A technically deficient motion to intervene is sufficient to satisfy the 21-day deadline of ORS 197.830(7)(a) when an acceptable motion to intervene is subsequently filed and there is no prejudice to other parties' substantial rights. *Griffin v. Jackson County*, 40 Or LUBA 584 (2001).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Although OAR 661-010-0067(2) authorizes LUBA to suspend the deadline for filing the petition for review to allow time to rule on a motion to dismiss, the filing of a motion to dismiss or a memorandum opposing a motion to dismiss does not automatically suspend the deadline for filing the petition for review. *Wynnyk v. Jackson County*, 39 Or LUBA 500 (2001).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Failure to file a notice to intervene within the 21-day period prescribed by ORS 197.830(7) does not require that intervention be denied where the petitioner did not serve the notice of intent to appeal on intervenor until 53 days after the notice was filed with LUBA. *Mountain West Investment v. City of Silverton*, 38 Or LUBA 932 (2000).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Where the local government mailed a copy of the decision to the applicant, and petitioners timely served a notice of intent to appeal on the applicant, the fact that the applicant's attorney did not receive a copy of either the decision or the notice of intent to appeal does not allow the applicant to file his motion to intervene beyond the 21-day deadline imposed by ORS 197.830(6). *Slusser v. Polk County*, 37 Or LUBA 1062 (2000).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. A motion to intervene is not timely filed where the person seeking to intervene files the original motion to intervene with LUBA more than 21 days from the date the notice of intent to appeal is filed, notwithstanding that that person served copies of that motion on the petitioner and the local government within the 21-day period. *Tylka v. Clackamas County*, 36 Or LUBA 801 (1999).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Untimely submission of a motion to file a reply brief is not a technical violation of LUBA's rules where the length of the proposed reply brief and the proximity of oral argument is such that respondents do not have adequate time to respond to the motion and prepare to respond to the proposed reply brief at oral argument. A 32-page reply brief filed two days before oral argument violates respondents' substantial rights to the speediest practicable review of the land use decision. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Petitioner's failure to serve a copy of the notice of intent to appeal on the applicant does not toll the 21-day period to intervene under ORS 197.830(6), where the applicant nonetheless received a copy of the notice and did not file a motion to intervene within 21 days of receiving the notice. *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. A motion to intervene that is filed by mail within 21 days after the notice of intent to appeal is filed is timely filed under ORS 197.830(6), notwithstanding that the motion to intervene is not received by LUBA until 27 days after the notice of intent to appeal is filed. *Marshall v. City of Yachats*, 35 Or LUBA 82 (1998).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Amendments to ORS 197.830(6) that shorten the statutory deadline for filing a motion to intervene in a LUBA appeal impair the existing right to participate in an appeal. Thus, the statute applies prospectively in the absence of an expression of legislative intent to the contrary. *Gutoski v. Lane County*, 33 Or LUBA 866 (1997).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. A challenge to LUBA's jurisdiction is not subject to the 10-day requirement of OAR 661-10-065(2), which governs motions that challenge an opposing party's failure to comply with statutes or LUBA's rules. *Adams v. City of Ashland*, 33 Or LUBA 552 (1997).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. A challenge to LUBA's jurisdiction is not subject to the 10-day requirement of OAR 661-10-065(2); it may be brought at any time prior to LUBA's issuance of a final opinion and order. *Petersen v. Columbia County*, 33 Or LUBA 253 (1997).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. The timeline imposed by our rules affecting reply briefs is intended less to provide a second opportunity for respondents to research issues already argued in their own brief than to provide a reasonable opportunity for respondents and this Board to review the reply brief. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Under OAR 661-10-067, time limits for documents other than the notice of intent to appeal and petition for review may be extended upon written consent of all parties, LUBA's motion, or the motion of a party. *Save Amazon Coalition v. City of Eugene*, 30 Or LUBA 448 (1995).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. LUBA normally considers several factors in determining whether to accept a late petition for attorney fees and damages: (1) length of delay; (2) validity of the explanation of lateness; and (3) presence or absence of prejudice. *Save Amazon Coalition v. City of Eugene*, 30 Or LUBA 448 (1995).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. A motion challenging LUBA's jurisdiction is not subject to the 10-day filing requirement for motions specified in OAR 661-10-065(2). *Bowen v. City of Dunes City*, 28 Or LUBA 324 (1994).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. If an objection to the local record is filed, the time limits for filing the petition for review, respondents' briefs and LUBA's final opinion and order are suspended, regardless of whether the record objection is ultimately

sustained or denied. OAR 661-10-026(5). *DLCD v. Klamath County*, 24 Or LUBA 656 (1993).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Neither statutes nor LUBA rules establish an exact deadline for filing a motion to intervene. A motion to intervene filed four days after the respondent's brief is filed is not untimely where the movant is an applicant of record who was not served with the notice of intent to appeal as required by ORS 197.830(8). *Broetje-McLaughlin v. Clackamas County*, 21 Or LUBA 606 (1991).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. A motion to intervene, filed along with the intervenor-respondent's brief on the last day for filing a respondent's brief, will be allowed where there is no prejudice to petitioner caused by the delay in moving to intervene. *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. LUBA considers filing a cost bill two days later than required by OAR 661-10-075(1)(a) to be a technical violation of its rules which will not interfere with LUBA's consideration of the cost bill unless the parties' substantial rights are prejudiced. *Schatz v. City of Jacksonville*, 21 Or LUBA 569 (1991).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Where (1) intervenor-respondent's brief is filed 21 days late, (2) petitioners receive the brief less than one full day before oral argument, and (3) providing petitioners an opportunity to submit argument in response to the brief would delay issuance of LUBA's final opinion, the late filing of intervenor's brief is not an excusable technical violation of LUBA's rules. *Knapp v. City of Jacksonville*, 20 Or LUBA 189 (1990).

27.10.5 LUBA Procedures/Rules – Time Limits – Other Documents. Petitioner's motion to deny intervenor status, filed four days after a LUBA order determining the content of the local record was issued, is timely because, regardless of when a motion to intervene is filed, failure of the movant to participate in the proceedings below cannot be determined until it is known what the local record includes. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 537 (1990).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. LUBA will exercise its discretion and find that attending a previously scheduled family vacation is a reasonable basis for rescheduling oral argument, particularly where the objecting party gives no specific reason for why they are not able to agree to any alternative date. *Lundeen v. City of Waldport*, 80 Or LUBA 1029 (2019).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Under ORS 197.830(11) and OAR 661-010-0030(1), where a petition for review is not filed within the time established by a stipulated extension of the deadline for such filing, and where the petitioner does not obtain written consent to extend the deadline further, LUBA will dismiss the appeal. *Becker v. Jackson County*, 79 Or LUBA 348 (2019).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. OAR 661-010-0039 was amended in 2010 to require a request to file a reply brief be filed "within seven days of the date the respondent's brief is filed." That amendment created a filing deadline. Accordingly, LUBA will deny a motion to file a reply brief under OAR 661-010-0039 (effective in 2018), where petitioner did not move for an extension of time or obtain the written consent of the parties to file a late reply brief, petitioner filed the request to file its reply brief 48 days after the response briefs were filed and petitioner offered no explanation or justification for such an egregious delay, because the violation is not a mere "technical violation" under OAR 661-010-005. *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 1031 (2018).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Under OAR 661-010-0050, an intervenor becomes a party to the appeal on the date the motion to intervene is filed. A petitioner seeking to extend the deadline for filing the petition for review pursuant to OAR 661-010-0067(2) must obtain the written consent of the intervenor and all parties, even if LUBA has not yet issued an order granting the motion to intervene. *Danielson Trust v. Jackson County*, 65 Or LUBA 437 (2012).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. A motion to reconsider a LUBA order is treated as a renewed motion for the same relief sought in the original motion. Because a motion to take evidence outside of the record suspends all other time limits in an appeal, a motion to reconsider an order denying the motion to take evidence, which is considered a renewed motion to take evidence, also suspends all other time limits. *Stewart v. City of Salem*, 61 Or LUBA 77 (2010).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. While OAR 661-010-0067(3) provides that certain time limits may be extended upon motion of a party, that rule must be interpreted consistently with ORS 197.830(7)(c), which mandates denial of a motion to intervene filed more than 21 days after the notice of intent to appeal is filed. Accordingly, OAR 661-010-0067(3) does not authorize LUBA to grant a motion to extend the time to file the motion to intervene more than 21 days after the notice is filed. *Grant v. City of Depoe Bay*, 52 Or LUBA 811 (2006).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. OAR 661-010-0067(2) requires that a motion for extension of time to file a petition for review be denied where the motion is not

consented to in writing by all parties, there is no indication that intervenors ever had plans or have plans to consent to extend the deadline, and no petition for review is filed within the 21-day deadline for filing a petition for review, pursuant to OAR 661-010-0030(1). *ODOT v. City of Phoenix*, 50 Or LUBA 548 (2005).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Under OAR 661-010-0067(5), a stipulated agreement to extend one deadline also automatically extends any contemporaneous and subsequent deadlines. *Grahn v. City of Newberg*, 49 Or LUBA 762 (2005).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. ORS 197.830(7) not only prescribes a 21-day deadline for filing a motion to intervene with LUBA, but dictates that failure to comply with that deadline shall result in denial of the motion. That the legislature chose to spell out the consequences for untimely filing of a motion to intervene indicates that the legislature wanted that deadline to be rigorously enforced and, by implication, not extended. *Grahn v. City of Newberg*, 49 Or LUBA 762 (2005).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. While LUBA may have general authority to adopt rules allowing for extension of less critical statutory deadlines, it is unlikely that the legislature intended LUBA to have the authority to adopt rules extending more critical deadlines, including the 21-day deadline for filing the motion to intervene. *Grahn v. City of Newberg*, 49 Or LUBA 762 (2005).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Under OAR 661-010-0065(4), LUBA may extend the deadline for filing the petition for review on its own motion without the written consent of all parties, where the extension is required to avoid prejudice to one or more party's substantial rights due to LUBA's failure to contemporaneously advise the parties that the record had been received. *Confederated Tribes v. Jefferson County*, 42 Or LUBA 597 (2002).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. The filing of a record objection does not automatically suspend resolution of other motions properly before the Board, or prioritize resolution of record objections over other motions. *No Tram to OHSU v. City of Portland*, 40 Or LUBA 588 (2001).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. LUBA will deny a motion to extend the time to file a response to a motion to dismiss until LUBA rules on a pending record objection, absent a showing that resolving the record objection is necessary to resolve the motion to dismiss. *No Tram to OHSU v. City of Portland*, 40 Or LUBA 588 (2001).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Petitioners are entitled to rely on a Board order extending the time to file a petition for review, notwithstanding that the order was issued without the written agreement of all parties, where no party's substantial rights are prejudiced by the extension of time. *Ballou v. Douglas County*, 40 Or LUBA 573 (2001).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Where LUBA provided timely notice of the date and time of oral argument to the county counsel and was not notified of any substitution of counsel, and the county's new attorney did not make inquiries with LUBA or the

county counsel regarding the scheduling of oral argument and did not appeal at oral argument, LUBA will not schedule a second oral argument. *Dudek v. Umatilla County*, 40 Or LUBA 416 (2001).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. An untimely filed petition for review requires dismissal of the appeal where petitioners rely on a motion to extend the time for filing the petition for review to avoid the deadline, but the motion is not signed by all the parties and petitioners are aware that all of the parties have not consented to the extension of time. *Ballou v. Douglas County*, 40 Or LUBA 377 (2001).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Petitioners do not have the right to rely on a Board order extending the time for filing a petition for review, where not all of the parties have stipulated to the extension of time and petitioners unreasonably believed that some of the intervenors were represented by a single attorney who had consented to the extension of time on behalf of only one intervenor. *Ballou v. Douglas County*, 40 Or LUBA 377 (2001).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Where a motion to intervene has been filed and served but not yet received by LUBA and the parties, and an order extending the deadline for filing the petition for review is entered based on the mistaken understanding that all parties consent to the extension, the intervening party may thereafter object to the extension and is entitled to have the original deadline for filing the petition for review reestablished, if that can be done without prejudicing petitioner's substantial right to rely on the deadline that was established in the order. *Pereira v. Columbia County*, 39 Or LUBA 760 (2001).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Where petitioners fail to obtain a stipulation from the county to extend the deadline for filing a petition for review pending resolution of a motion, an appeal will be dismissed if the petition for review is not filed within the deadline established by Board rules. *Berry v. Jackson County*, 35 Or LUBA 137 (1998).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Under OAR 661-10-067, time limits for documents other than the notice of intent to appeal and petition for review may be extended upon written consent of all parties, LUBA's motion, or the motion of a party. *Save Amazon Coalition v. City of Eugene*, 30 Or LUBA 448 (1995).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. LUBA normally considers several factors in determining whether to accept a late petition for attorney fees and damages: (1) length of delay; (2) validity of the explanation of lateness; and (3) presence or absence of prejudice. *Save Amazon Coalition v. City of Eugene*, 30 Or LUBA 448 (1995).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. OAR 661-10-065(4) simply provides that with the exception of objections to the record and motions for evidentiary hearing, the filing of a motion does not have the legal effect of automatically suspending the deadlines for future events in a LUBA appeal until the motion is resolved. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 746 (1994).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Where a petitioner obtains the

written consent of all parties to extend the deadline for filing the petition for review, filing the written agreement one day after the petition for review was due constitutes a technical violation of OAR 661-10-067(4) and does not prevent LUBA from granting an extension of time to file the petition for review under OAR 661-10-067(2). *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 746 (1994).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. A motion to stay LUBA proceedings that is not signed by all parties is not the equivalent of a written stipulation by all parties for an extension of time to file the petition for review and, therefore, filing such a motion to stay LUBA proceedings does not suspend the time for filing a petition for review. *Hackett v. Multnomah County*, 26 Or LUBA 551 (1994).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Under OAR 661-10-067(2), LUBA may not extend the deadline for filing a petition for review, unless all parties consent to the extension. *Zippel v. Josephine County*, 26 Or LUBA 626 (1994).

request for an extension of time to file respondents' briefs, over petitioner's objection, if the requested extension would necessitate a delay in oral argument and a delay in issuing LUBA's final opinion and order. *Waugh v. Coos County*, 26 Or LUBA 599 (1993).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Where parties object, a delay of five weeks or more in a LUBA proceeding is inconsistent with the legislative policy that "time is of the essence" in reaching final decisions in appeals to LUBA, and a request for such an extension will be denied. *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 708 (1992).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Where all parties acknowledge an oral agreement to extend the time for filing the petition for review was reached prior to the date the petition for review was required to be filed, that a stipulated motion for extension of time to file the petition for review was filed one day after the day the petition for review was otherwise due is a technical violation of LUBA's rules and will not result in dismissal of the appeal. *Rabe v. City of Tualatin*, 22 Or LUBA 832 (1992).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. If petitioner's motion for extension of time to file the petition for review does not satisfy the requirement of OAR 661-10-067(2) for the written consent of all parties, and the petition for review was not filed within 21 days after the date the Board received the record, the appeal must be dismissed. OAR 661-10-030(1). *Ramsey v. City of Portland*, 22 Or LUBA 535 (1992).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Under LUBA's rules, if petitioner's motion for extension of time to file the petition for review does not satisfy the requirement of OAR 661-10-067(2) for the written consent of all parties, and a petition for review is not filed within 21 days after the date LUBA received the local record, the appeal must be dismissed. *Ramsey v. City of Portland*, 22 Or LUBA 295 (1991).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. The provision of OAR 661-10-067(2) allowing extensions of time for filing the petition for review only where all parties to the

appeal consent to such extension does not exceed LUBA's statutory authority. *Ramsey v. City of Portland*, 22 Or LUBA 295 (1991).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Where the copy of the record initially served on petitioner was lost in the mail, LUBA will grant an extension of time for petitioner to file objections to the record. *Gray v. Clatsop County*, 21 Or LUBA 583 (1991).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. Petitioner's failure to file her motion for an extension of time to file record objections until three days after the record objections were due is a technical violation of LUBA's rules which will not interfere with LUBA's review unless the substantial rights of other parties are affected. *Gray v. Clatsop County*, 21 Or LUBA 583 (1991).

27.10.6 LUBA Procedures/Rules – Time Limits – Extensions. LUBA will not grant a party's motion to continue an appeal proceeding pending the completion of other state agency or appellate court review proceedings, over the objections of other parties, where it cannot be determined when the other proceedings will be completed. *Blatt v. City of Portland*, 21 Or LUBA 510 (1991).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. OAR 661-010-0039 was amended in 2010 to require a request to file a reply brief be filed "within seven days of the date the respondent's brief is filed." That amendment created a filing deadline. Accordingly, LUBA will deny a motion to file a reply brief under OAR 661-010-0039 (effective in 2018), where petitioner did not move for an extension of time or obtain the written consent of the parties to file a late reply brief, petitioner filed the request to file its reply brief 48 days after the response briefs were filed and petitioner offered no explanation or justification for such an egregious delay, because the violation is not a mere "technical violation" under OAR 661-010-005. *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 1031 (2018).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. ORS 197.830(7)(a) requires that a motion to intervene be filed within 21 days after the notice of intent to appeal is filed. Under OAR 660-010-0015(1)(b), a notice of intent to appeal is filed on the date it is mailed by registered or certified mail or the date it is received by LUBA. But OAR 660-010-0015(1)(b) does not set out two dates of filing, either of which may be relied upon as the date of filing for purposes of computing the deadline for filing a motion to intervene. Rather the rule makes the date of filing the date of mailing, if mailed by registered or certified mail, with the date of filing being the date the notice of intent to appeal is received by LUBA in all other circumstances. *Holmberg v. Deschutes County*, 76 Or LUBA 512 (2017).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. LUBA will not consider an issue that was not raised in the petition for review and was raised for the first time in a motion that was received by LUBA one day before the statutory deadline for LUBA to issue its final opinion expired. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. LUBA will deny an untimely motion to intervene pursuant to ORS 197.830(7), where the movant was timely served a copy of the notice of intent to appeal with a certificate of filing showing the date the notice was filed. That LUBA staff allegedly misinformed the movant of the date the notice was filed is not a basis to toll the statutory deadline to intervene at ORS 197.830(7)(a). *Central Oregon Landwatch v. Jefferson County*, 62 Or LUBA 526 (2010).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Failure to contemporaneously serve a motion for attorney fees and cost bill on other parties as required by OAR 661-010-0075(2)(b) deprives those parties of the opportunity to respond to the motion, and prejudices their substantial rights. Because belated service and briefing on the motion would further delay reaching finality in the appeal, the movant's failure of service is not a "technical violation" under OAR 661-010-0005, and LUBA will not consider the motion. *Swails v. Clackamas County*, 61 Or LUBA 503 (2010).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. When a notice of intent to appeal (NITA) is filed on behalf of a "corporation or other organization" by a person who is not an active member of the Oregon State Bar and LUBA allows seven days for an attorney to file an amended NITA, failure to file an amended NITA within that time requires dismissal of the appeal. Sending a letter stating that an attorney will represent the corporation or organization is not a

sufficient substitute for filing an amended NITA. *Waluga Neighborhood Association v. City of Lake Oswego*, 59 Or LUBA 380 (2009).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. If a petition for review is delivered to the United States Postal Service and mailed to LUBA via "Priority Mail" it is mailed by "First Class Mail" and therefore filed on the date it was delivered to the United States Postal Service under OAR 661-010-0075(2)(a)(B), where the United States Postal Service defines "First Class Mail" to include "Priority Mail." *Canfield v. Lane County*, 59 Or LUBA 505 (2009).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Under OAR 661-010-0075(2)(a), a petition for review is filed with LUBA on the date it is mailed "by first class mail with the United States Postal Service." If the petition for review is filed with LUBA in any other manner, the petition for review is filed on the date it is delivered to LUBA. A petition for review that is delivered to a Postal Annex store before the filing deadline expires and is thereafter delivered to LUBA by United Parcel Service on a date after the filing deadline expires is not timely filed and the appeal must be dismissed. *Lund v. City of Mosier*, 58 Or LUBA 344 (2009).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where a petition for review was not filed within the time required by LUBA's rules, and no written consent to extend the time for filing the petition for review under OAR-661-010-0067(2) was obtained, ORS 197.830(11) and OAR 661-010-0030(1) require that the appeal be dismissed. *Verizon Wireless, LLC v. Clackamas County*, 56 Or LUBA 660 (2008).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where a petitioner has decided to seek voluntary dismissal of the appeal, to avoid delay and prejudice to other parties the petitioner should file an unequivocal motion for dismissal as soon as reasonably possible. That obligation is not met where the petitioner files an equivocal motion to dismiss on the date the petition is due, based on information that petitioner was long aware of, and that is accompanied by a nonmeritorious motion to resettle the record and restart the deadline for filing the petition for review. Under such circumstances, LUBA will dismiss the appeal for failure to file the petition for review, not based petitioner's motion to dismiss. *Ford v. Jackson County*, 54 Or LUBA 434 (2007).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. LUBA will deny petitioners' motion to dismiss an intervenor-respondent's brief that is filed one day late, where (1) the late-filed brief is filed 21 days before oral argument and is only five pages long, (2) the late-filed brief largely supplements the city's timely filed 24-page brief, and (3) petitioners neither allege nor demonstrate that their substantial rights were prejudiced by the late filing. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. OAR 661-010-0067(2) requires that a motion for extension of time to file a petition for review be denied where the motion is not consented to in writing by all parties, there is no indication that intervenors ever had plans or have plans to consent to extend the deadline, and no petition for review is filed within the 21-day deadline for filing a petition for review, pursuant to OAR 661-010-0030(1). *ODOT v. City of Phoenix*, 50 Or LUBA 548 (2005).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Failure to object to a motion to intervene until after the intervenor has filed a response brief and shortly before oral argument is prejudicial to the intervenor's substantial rights and not a "technical violation" of LUBA's rules. *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Absent circumstances where delay in filing the motion to intervene is caused by the party objecting to intervention, ORS 197.830(7)(c) mandates that an untimely motion to intervene be denied. That the petitioner failed to object to the motion to intervene until after the intervenor's brief was filed with LUBA is an insufficient basis to allow an untimely motion to intervene. *Rose v. City of Corvallis*, 49 Or LUBA 260 (2005).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. ORS 197.830(7) not only prescribes a 21-day deadline for filing a motion to intervene with LUBA, but dictates that failure to comply with that deadline shall result in denial of the motion. That the legislature chose to spell out the consequences for untimely filing of a motion to intervene indicates that the legislature wanted that deadline to be rigorously enforced and, by implication, not extended. *Grahn v. City of Newberg*, 49 Or LUBA 762 (2005).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Petitioners do not sustain their burden of demonstrating that a petition for review was timely filed, where the only evidence that bears on that question is (1) a postmark dated one day late and (2) an affidavit by petitioners' attorney averring that he arrived at the post office two minutes prior to midnight on the day the petition for review was due, and he was "certain" that he deposited the petition for review with the postal clerk before midnight. *Bollinger v. City of Hood River*, 46 Or LUBA 602 (2004).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Given the severe consequence that dismissal of an appeal represents, and the ease with which the risk of that consequence can be avoided by filing a record objection or precautionary record objection while record disputes are resolved, a prudent petitioner will always file a record objection or precautionary record objection with any other documents that may be filed to provide notice of the parties' negotiations concerning the content of the record. *Laurance v. Douglas County*, 44 Or LUBA 845 (2003).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where a response brief was filed a week after the brief was due, and petitioners were not made aware that the response brief had been filed until they appeared at oral argument and thus were not prepared to respond to the brief, petitioners' substantial rights were prejudiced, and LUBA will reject the response brief. *Griffin v. Jackson County*, 41 Or LUBA 159 (2001).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. The deadline for filing the petition for review is strictly enforced, even where irregularities occur in providing petitioner with notice of the deadline for filing the petition for review. *Allen v. Grant County*, 41 Or LUBA 21 (2001).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Even assuming that petitioner failed to receive LUBA's order notifying petitioner of the deadline for filing the petition for review, and that lack of actual or imputed knowledge of that deadline might excuse failure to file the petition on or before the deadline, petitioner has an obligation to act promptly and request appropriate relief once he learns of the deadline, to avoid prejudice to other parties' substantial rights. An unjustified 21-day delay in filing for such relief prejudices other parties' substantial rights and is a sufficient basis to deny the requested relief. *Allen v. Grant County*, 41 Or LUBA 21 (2001).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. An untimely filed petition for review requires dismissal of the appeal where petitioners rely on a motion to extend the time for filing the petition for review to avoid the deadline, but the motion is not signed by all the parties and petitioners are aware that all of the parties have not consented to the extension of time. *Ballou v. Douglas County*, 40 Or LUBA 377 (2001).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Petitioners do not have the right to rely on a Board order extending the time for filing a petition for review, where not all of the parties have stipulated to the extension of time and petitioners unreasonably believed that some of the intervenors were represented by a single attorney who had consented to the extension of time on behalf of only one intervenor. *Ballou v. Douglas County*, 40 Or LUBA 377 (2001).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Failure to file the petition for review within 21 days of LUBA's receipt of the record is not excused by the fact that LUBA's letter to the parties acknowledging receipt of the record failed to specify the date the record was received, where petitioner knew or should have known from service of the record and other information that the 21-day period to file the petition for review had commenced. *Bybee v. City of Salem*, 40 Or LUBA 187 (2001).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. LUBA will not strike a late-filed respondent's brief, where the brief is filed 24 days before oral argument and the Board and parties will therefore have adequate time before oral argument to read the brief and prepare for oral argument. *Willhoft v. City of Gold Beach*, 39 Or LUBA 743 (2000).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Although OAR 661-010-0067(2) authorizes LUBA to suspend the deadline for filing the petition for review to allow time to rule on a motion to dismiss, the filing of a motion to dismiss or a memorandum opposing a motion to dismiss does not automatically suspend the deadline for filing the petition for review. *Wynnyk v. Jackson County*, 39 Or LUBA 500 (2001).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where the local government mailed a copy of the decision to the applicant, and petitioners timely served a notice of intent to appeal on the applicant, the fact that the applicant's attorney did not receive a copy of either the decision or the notice of intent to appeal does not allow the applicant to file his motion to intervene beyond the 21-day deadline imposed by ORS 197.830(6). *Slusser v. Polk County*, 37 Or LUBA 1062 (2000).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Untimely submission of a motion to file a reply brief is not a technical violation of LUBA's rules where the length of the proposed reply brief and the proximity of oral argument is such that respondents do not have adequate time to respond to the motion and prepare to respond to the proposed reply brief at oral argument. A 32-page reply brief filed two days before oral argument violates respondents' substantial rights to the speediest practicable review of the land use decision. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. A LUBA staff misstatement concerning the correct date the record was settled by an order of the Board does not affect the date the record was settled. Parties who rely on LUBA staff to determine the date the record is settled rather than make that determination themselves by referring to the order on record objections assume the risk of such reliance. *North Park Annex v. City of Independence*, 35 Or LUBA 512 (1999).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where the petition for review is filed more than 21 days after the date the record is settled, the appeal will be dismissed. *North Park Annex v. City of Independence*, 35 Or LUBA 512 (1999).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where petitioner fails to demonstrate that its substantial rights have been prejudiced, a motion for voluntary remand filed by the local government one week prior to oral argument will be allowed. *Smith v. Douglas County*, 33 Or LUBA 682 (1997).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. When a party makes a colorable claim that it will be substantially prejudiced by LUBA's failure to enforce its rules, LUBA will enforce the rules. *Save Amazon Coalition v. City of Eugene*, 30 Or LUBA 448 (1995).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. The requirement that a petitioner file a petition for review 21 days after the record is settled will be strictly enforced, and failure to comply will result in dismissal of the appeal. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532 (1995).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Failure to file a request to file a reply brief "as soon as possible" after the respondents' brief is filed is a technical violation of LUBA's rules which, under OAR 661-10-005, does not affect LUBA's review unless the substantial rights of the parties are prejudiced. *Shaffer v. City of Salem*, 29 Or LUBA 592 (1995).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where a petitioner obtains the written consent of all parties to extend the deadline for filing the petition for review, filing the written agreement one day after the petition for review was due constitutes a technical violation of OAR 661-10-067(4) and does not prevent LUBA from granting an extension of time to file the petition for review under OAR 661-10-067(2). *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 746 (1994).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. The filing of an objection to the local record suspends the time for filing a petition for review, even if the objection is not timely filed. Failure to file a record objection in a timely manner may provide a basis for denying the record objection or setting an abbreviated time for filing the petition for review, but does not provide a basis for dismissing the appeal. *Cole v. Columbia County*, 27 Or LUBA 701 (1994).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. LUBA will not consider a motion for reversal that includes arguments not contained in the petition for review, where the motion for reversal is filed three weeks after the deadline for filing the petition for review. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. If a petition for review is not filed within the time required under LUBA's rules, ORS 197.830(10) and OAR 661-10-030(1) require LUBA to dismiss the appeal. *Hackett v. Multnomah County*, 26 Or LUBA 551 (1994).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. An intervenor-respondent's delay in filing a motion to intervene does not prejudice the rights of any party and provides no basis for denying the motion to intervene, where the appeal proceedings are suspended by a pending motion for evidentiary hearing and the time for filing the respondents' briefs has not yet expired. *Louisiana Pacific v. Umatilla County*, 25 Or LUBA 816 (1993).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. If a notice of intent to appeal a post-acknowledgment zone change is filed more than 21 days after petitioner was given the notice of decision it is entitled to under ORS 197.615, the appeal must be dismissed. *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Filing an objection to the record two days after the date required by OAR 661-10-026(2), and within 10 days after the date petitioner received the record, is a technical violation of LUBA's rules that does not affect LUBA's review of the challenged decision. *Churchill v. Tillamook County*, 25 Or LUBA 786 (1993).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where the petitioner has neither filed a petition for review within the time required by LUBA's rules, nor obtained an extension of time for filing the petition for review, ORS 197.830(10) and OAR 661-10-030(1) require LUBA to dismiss the appeal. *Compass Corporation v. City of Lake Oswego*, 23 Or LUBA 593 (1992).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where a motion to intervene is filed three months after the notice of intent to appeal, with no explanation for why the motion was not filed earlier, the motion to intervene is not filed "as soon as practicable after the Notice of Intent to Appeal is filed," as required by OAR 661-10-050(2). *Rhyne v. Multnomah County*, 23 Or LUBA 703 (1992).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where intervenors' delay in filing their motion to intervene and brief results in no delay of the appeal and no prejudice to

petitioners' substantial rights, the failures to file a timely motion to intervene and brief are technical violations of LUBA's rules and provide no basis for denying the requested intervention. *Rhyne v. Multnomah County*, 23 Or LUBA 703 (1992).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. The untimely filing of a petition for review is not a technical violation of LUBA's rules. *Weeks v. City of Tillamook*, 23 Or LUBA 255 (1992).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where a notice of intent to appeal is filed with LUBA more than 21 days after the date the challenged decision became final, under OAR 661-10-015(1) LUBA must dismiss the appeal. *Crew v. Deschutes County*, 23 Or LUBA 148 (1992).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Under ORS 197.830(8), OAR 661-10-015(1) and 661-10-075(2)(a), an appeal must be dismissed if the notice of intent to appeal is not delivered to or received by LUBA on or before the twenty-first day after the decision sought to be reviewed became final. *Pilling v. Crook County*, 23 Or LUBA 51 (1992).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where petitioners neither file a petition for review within the time required by LUBA's rules, nor obtain an extension of time to file the petition for review pursuant to LUBA's rules, ORS 197.830(10) and OAR 661-10-030(1) require dismissal of the appeal. *Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 636 (1992).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. If petitioner's motion for extension of time to file the petition for review does not satisfy the requirement of OAR 661-10-067(2) for the written consent of all parties, and the petition for review was not filed within 21 days after the date the Board received the record, the appeal must be dismissed. OAR 661-10-030(1). *Ramsey v. City of Portland*, 22 Or LUBA 535 (1992).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Under LUBA's rules, if petitioner's motion for extension of time to file the petition for review does not satisfy the requirement of OAR 661-10-067(2) for the written consent of all parties, and a petition for review is not filed within 21 days after the date LUBA received the local record, the appeal must be dismissed. *Ramsey v. City of Portland*, 22 Or LUBA 295 (1991).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Failure to file a respondent's brief within the time specified in an order issued by LUBA pursuant to OAR 660-10-026(5) is a technical violation of LUBA's rules which will not interfere with LUBA's review unless the substantial rights of parties are prejudiced. Where petitioners have ample time to review respondent's brief prior to oral argument, their substantial rights are not prejudiced. *Broetje-McLaughlin v. Clackamas County*, 21 Or LUBA 604 (1991).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Petitioner's failure to file her motion for an extension of time to file record objections until three days after the record objections were due is a technical violation of LUBA's rules which will not interfere with LUBA's

review unless the substantial rights of other parties are affected. *Gray v. Clatsop County*, 21 Or LUBA 583 (1991).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. The statutory requirement to serve the notice of intent to appeal on an applicant of record is jurisdictional. However, failure to serve the notice of intent to appeal on an applicant of record within the time established by OAR 661-10-015(2) is a technical violation of LUBA's rules which is not grounds for dismissing an appeal unless the substantial rights of parties are prejudiced. *Broetje-McLaughlin v. Clackamas County*, 21 Or LUBA 606 (1991).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Under ORS 197.830(10) and OAR 661-10-030(1), in the absence of an agreement between the parties to extend the time for filing the petition for review, the consequence of failing to file a timely petition for review is dismissal of the appeal and award of petitioner's filing fee and deposit for costs to respondent. *Burghardt v. City of Molalla*, 20 Or LUBA 431 (1991).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. A motion to intervene in a LUBA proceeding which is filed five months after the notice of intent to appeal was filed is untimely under OAR 661-10-050(2). If the movant's brief is not filed until two days after oral argument, providing the other parties an opportunity to respond to that brief would delay the issuance of LUBA's final opinion. Under these circumstances, the tardy filing of the motion to intervene is not an excusable technical violation of LUBA's rules under OAR 661-10-005. *Beck v. City of Tillamook*, 20 Or LUBA 178 (1990).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Failure to timely file a petition for review will result in dismissal of the appeal. *Bloomer v. Baker County*, 19 Or LUBA 90 (1990).

27.10.7 LUBA Procedures/Rules – Time Limits – Failure to Comply. Where petitioner's cost bill is filed 38 days after LUBA's final opinion and order was issued, without a request for an extension of time or an explanation as to why the cost bill could not have been filed in accord with OAR 661-10-075(1)(a), the cost bill is untimely and will be denied. *1000 Friends of Oregon v. Marion County*, 18 Or LUBA 906 (1990).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Where respondent moves to dismiss an appeal, alleging that petitioner failed to serve a copy of the notice of intent to appeal on the county, and after five weeks petitioner has neither advised LUBA that a copy of the notice of intent to appeal has been served on respondent nor filed a written response to the motion to dismiss, LUBA will dismiss the appeal for lack of jurisdiction. *Mann v. Marion County*, 74 Or LUBA 73 (2016).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Where LUBA issues an order directing petitioner to file a supplemental certificate of service to establish that the notice of intent to appeal was served on the local government's legal counsel, and petitioner fails to do so within the deadline specified in the order, petitioner's appeal will be dismissed. *Althauser v. Clackamas County*, 55 Or LUBA 656 (2008).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Belated service of the notice of intent to appeal is a non-jurisdictional violation of LUBA's rules that will not interfere with LUBA's review absent a showing of prejudice to a party's substantial rights. *Frewing v. City of Tigard*, 51 Or LUBA 834 (2006).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. While *service* of the notice to intent to appeal is jurisdictional under ORS 197.830(9), the *timing* of that service is not. *Friends of the Metolius v. Jefferson County*, 50 Or LUBA 735 (2005).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. The statutes governing review of land use decisions are *sui generis*, and caution is appropriate in extrapolating to or from other statutory contexts and the statutes and rules governing LUBA's review. That the Oregon Supreme Court has interpreted statutes and rules governing civil appeals to require that timely service of a notice of appeal is jurisdictional does not lead to the conclusion that LUBA's rules, which do not make timely service jurisdictional, are inconsistent with the statutes governing LUBA's review. *Friends of the Metolius v. Jefferson County*, 50 Or LUBA 735 (2005).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. LUBA's rules require the petitioner to timely serve a copy of the notice of intent to appeal on the respondent, and to certify such service, but do not assign jurisdictional consequences to whether the respondent actually receives the notice. *Friends of the Metolius v. Jefferson County*, 50 Or LUBA 735 (2005).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Where petitioner mails a notice of intent to appeal on the twenty-first day after the local decision becomes final by first-class mail with a "certificate of mailing" rather than by certified or registered mail, as provided in OAR 661-010-0015(1), the notice of intent to appeal is "filed" on the date it is received by LUBA, not on the date of mailing. Where LUBA receives such a notice of intent to appeal more than 21 days after the local decision becomes final, the appeal must be dismissed. *McKnight v. City of Portland*, 48 Or LUBA 292 (2004).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. When (1) the local government's record does not clearly show who was mailed written notice of a land use decision; (2) a petitioner asks the local government who was actually mailed written notice of the decision;

and (3) the petitioner serves the notice of intent to appeal on the persons the local government states were mailed written notice of the decision, then petitioner has complied with LUBA's rules and LUBA will not dismiss the appeal. *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653 (2004).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Mail service of the notice of intent to appeal is complete on deposit in the mail. That the county did not receive the notice does not waive its obligation to file the record with LUBA, particularly when it had actual knowledge that the notice had been filed with LUBA. *Petersen v. Columbia County*, 39 Or LUBA 799 (2001).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Failure to serve a copy of the notice of intent to appeal on the applicant's attorney in a timely manner is a technical violation of LUBA's rules that does not require dismissal unless the substantial rights of the applicant have been prejudiced. *Mountain West Investment v. City of Silverton*, 38 Or LUBA 932 (2000).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Petitioner's failure to serve a copy of the notice of intent to appeal on the applicant does not toll the 21-day period to intervene under ORS 197.830(6), where the applicant nonetheless received a copy of the notice and did not file a motion to intervene within 21 days of receiving the notice. *Bowlin v. Grant County*, 35 Or LUBA 776 (1998).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Service of copies of the notice of intent to appeal is a jurisdictional requirement under OAR 661-10-015(2); while late service of such notice is a technical violation that will not result in dismissal, a complete failure to provide such notice defeats LUBA's jurisdiction. *Bruce v. City of Hillsboro*, 32 Or LUBA 382 (1997).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. The length of the notice list is irrelevant to petitioner's obligation to comply with the service of notice requirements. *Bruce v. City of Hillsboro*, 32 Or LUBA 382 (1997).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Under OAR 610-10-015(1)(b), a notice of intent to appeal mailed to LUBA within the 21-day time limit, but received by LUBA after the 21-day time limit has expired, is not timely filed. *J.C Reeves Corp. v. Washington County*, 32 Or LUBA 263 (1996).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. LUBA will not grant the county's motion to dismiss based on petitioners' failure to timely serve a notice of intent to appeal on interested parties, when those parties have not moved for dismissal. *Markham v. Coos County*, 31 Or LUBA 529 (1996).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Petitioner's failure to serve a timely notice of intent to appeal on other interested and essential parties warrants dismissal

of the appeal where a party establishes substantial prejudice from the delay in service. *Winner v. Multnomah County*, 30 Or LUBA 420 (1996).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Failure to serve the notice of intent to appeal on a respondent within the time required by OAR 661-10-015(2) is a technical violation of LUBA's rules, which is not grounds for dismissal unless the substantial rights of parties are prejudiced. Where the notice of intent to appeal was served on respondent, at most, two days later than required by OAR 661-10-015(2), respondent's substantial rights were not prejudiced. *Williams v. City of Philomath*, 29 Or LUBA 563 (1995).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Under OAR 661-10-075(2)(c)(B), a notice of intent to appeal is timely served if it is mailed on the same date it is filed with LUBA. *Davenport v. City of Tigard*, 23 Or LUBA 679 (1992).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. That a person is named as an applicant in both the application and the local government decision is sufficient to establish that person is an "applicant of record" entitled to service of the notice of intent to appeal under ORS 197.730(8) and, therefore, has standing to intervene under ORS 197.830(6)(b)(A). *Broetje-McLaughlin v. Clackamas County*, 21 Or LUBA 606 (1991).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. The statutory requirement to serve the notice of intent to appeal on an applicant of record is jurisdictional. However, failure to serve the notice of intent to appeal on an applicant of record within the time established by OAR 661-10-015(2) is a technical violation of LUBA's rules which is not grounds for dismissing an appeal unless the substantial rights of parties are prejudiced. *Broetje-McLaughlin v. Clackamas County*, 21 Or LUBA 606 (1991).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Failure to timely serve a copy of the notice of intent to appeal on other parties and to include proof of service of the notice of intent to appeal when the notice of intent to appeal is filed are technical violations of LUBA's rules, which will result in dismissal only where a party's substantial rights are prejudiced. *Tice v. Josephine County*, 21 Or LUBA 550 (1991).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Failure to timely serve a copy of the notice of intent to appeal on other parties is a technical violation of LUBA's rules, which will result in dismissal only where a party's substantial rights are prejudiced. *Rebmann v. Linn County*, 21 Or LUBA 542 (1991).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Under OAR 661-10-005, failure to serve the notice of intent to appeal on respondent within the time required by OAR 661-10-015(2) is a technical violation of LUBA's rules which is not grounds for dismissal unless the substantial rights of parties are prejudiced. *Schellenberg v. Polk County*, 21 Or LUBA 507 (1991).

27.11.1 LUBA Procedures/Rules – Service – Notice of Intent to Appeal. Respondent's right to "the speediest practicable review" is not materially affected by service of the notice of intent to

appeal eight days later than required by OAR 661-10-015(2). *Schellenberg v. Polk County*, 21 Or LUBA 507 (1991).

27.11.2 LUBA Procedures/Rules – Service – Intervention/ Participation. The ORS 197.830(7)(a) 21-day deadline for filing a motion to intervene, which is strictly enforced, is a *filing* deadline, not a *service* deadline. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

27.11.2 LUBA Procedures/Rules – Service – Intervention/ Participation. OAR 661-010-0050(2)(e) requires that the moving party who files a motion to intervene must contemporaneously serve a copy of the motion to intervene on all parties. Where the moving party fails to contemporaneously serve a copy of a motion to intervene, and that failure does not result in prejudice to any party's substantial rights, the moving party will be given a chance to correct the service error before the moving party is dismissed from the appeal. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

27.11.2 LUBA Procedures/Rules – Service – Intervention/ Participation. Intervenor's failure to file a motion to intervene within 21 days of the date the notice of intent to appeal (NITA) was filed does not require denial of the motion where petitioner failed to serve the NITA on intervenor, as required by OAR 661-010-0015(3)(i). *Ford v. Jackson County*, 50 Or LUBA 359 (2005).

27.11.3 LUBA Procedures/Rules – Service – Record and Objections. When an intervening party is aware that the record has been filed, but fails to obtain a copy of the record in time to object and does not demonstrate why such a failure justifies a further delay in the appeal, untimely objections to the record will be rejected. *Mountain West Investment v. City of Silverton*, 38 Or LUBA 938 (2000).

27.11.3 LUBA Procedures/Rules – Service – Record and Objections. Where the city serves a copy of the record on petitioner via delivery on her doorstep, pursuant to petitioner's agreement with the city, the city's failure to serve the record on petitioner personally or to a person at petitioner's house does not violate OAR 661-010-0075(2)(b) or toll the date on which the petition for review is due. *Peebles v. City of Wilsonville*, 34 Or LUBA 235 (1998).

27.11.3 LUBA Procedures/Rules – Service – Record and Objections. Although LUBA's rules distinguish between transmittal of the record, which is accomplished by actual delivery to LUBA, and service of the record on a petitioner, the rules do not distinguish between service in person or by first-class mail, under OAR 661-10-075(2)(b)(B), in determining when a copy of the record is served on a petitioner, as required by OAR 661-10-025. *Terrace Lakes Homeowners Assoc. v. City of Salem*, 29 Or LUBA 532 (1995).

27.11.3 LUBA Procedures/Rules – Service – Record and Objections. Petitioner's not serving a record objection on respondent until five days after it was filed with LUBA is a technical violation of LUBA's rules and, since respondent filed a timely response to the record objection, respondent's substantial rights were not prejudiced by the rule violation. *Schmaltz v. City of Hood River*, 21 Or LUBA 563 (1991).

27.11.4 LUBA Procedures/Rules – Service – Other Documents. Delayed service of a certificate of compliance and a certificate of service to a party is a "technical violation" of LUBA's rules that provides no basis for LUBA to strike the response brief associated with the certificates, absent a showing that the delayed service prejudiced a party's substantial rights. *Conte v. City of Eugene*, 77 Or LUBA 547 (2018).

27.11.4 LUBA Procedures/Rules – Service – Other Documents. Filing a motion to stay with LUBA is accomplished either by delivery to the Board or by mailing it to the Board by first class mail; a copy of a motion sent as an e-mail attachment is not sufficient to file a motion. *Rogue Advocates v. Josephine County*, 71 Or LUBA 409 (2015).

27.11.4 LUBA Procedures/Rules – Service – Other Documents. Failure to contemporaneously serve a motion for attorney fees and cost bill on other parties as required by OAR 661-010-0075(2)(b) deprives those parties of the opportunity to respond to the motion, and prejudices their substantial rights. Because belated service and briefing on the motion would further delay reaching finality in the appeal, the movant's failure of service is not a "technical violation" under OAR 661-010-0005, and LUBA will not consider the motion. *Swails v. Clackamas County*, 61 Or LUBA 503 (2010).

27.11.4 LUBA Procedures/Rules – Service – Other Documents. Service of the petition for review by parcel post rather than by first class mail is a violation of OAR 661-010-0075(2)(b)(B). However, unless the slower delivery attributed to parcel post interferes with the respondent's ability to prepare the response brief, or otherwise prejudices other parties' substantial rights, that violation does not provide a basis to dismiss the appeal. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

27.11.4 LUBA Procedures/Rules – Service – Other Documents. Where LUBA provided timely notice of the date and time of oral argument to the county counsel and was not notified of any substitution of counsel, and the county's new attorney did not make inquiries with LUBA or the county counsel regarding the scheduling of oral argument and did not appeal at oral argument, LUBA will not schedule a second oral argument. *Dudek v. Umatilla County*, 40 Or LUBA 416 (2001).

27.11.4 LUBA Procedures/Rules – Service – Other Documents. Untimely service of the petition for review is not a basis to dismiss the appeal, absent prejudice to a party's substantial rights. *Allen v. Grant County*, 39 Or LUBA 735 (2000).

27.11.5 LUBA Procedures/Rules – Service – Failure to Comply. Delayed service of a certificate of compliance and a certificate of service to a party is a "technical violation" of LUBA's rules that provides no basis for LUBA to strike the response brief associated with the certificates, absent a showing that the delayed service prejudiced a party's substantial rights. *Conte v. City of Eugene*, 77 Or LUBA 547 (2018).

27.11.5 LUBA Procedures/Rules – Service – Failure to Comply. Where LUBA issues an order directing petitioner to file a supplemental certificate of service to establish that the notice of intent to appeal was served on the local government's legal counsel, and petitioner fails to do so within the deadline specified in the order, petitioner's appeal will be dismissed. *Althauser v. Clackamas County,* 55 Or LUBA 656 (2008).

27.11.5 LUBA Procedures/Rules – Service – Failure to Comply. Where a party commits multiple violations of LUBA's rules regarding service, whether those violations are "technical violations" that shall not interfere with LUBA's review under OAR 661-01-0005 depends on the cumulative effect of those violations on other parties' substantial rights, rather than the individual effect of each violation. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

27. 11.5 LUBA Procedures/Rules – Service – Failure to Comply. Untimely service of the petition for review is not a basis to dismiss the appeal, absent prejudice to a party's substantial rights. *Allen v. Grant County*, 39 Or LUBA 735 (2000).

27.11.5 LUBA Procedures/Rules – Service – Failure to Comply. Failure to (1) serve a party with a copy of a certificate of service filed with LUBA, or (2) include a certificate of filing in the service copy of a document filed with LUBA is, at most, a technical violation of OAR 661-10-075(2)(c)(A) or 661-10-075(2)(c)(C), respectively, and will not interfere with LUBA's review unless parties' substantial rights are prejudiced. *Gilson v. City of Portland*, 21 Or LUBA 598 (1991).

27.11.5 LUBA Procedures/Rules – Service – Failure to Comply. Failure to timely serve a copy of the notice of intent to appeal on other parties and to include proof of service of the notice of intent to appeal when the notice of intent to appeal is filed are technical violations of LUBA's rules, which will result in dismissal only where a party's substantial rights are prejudiced. *Tice v. Josephine County*, 21 Or LUBA 550 (1991).

27.11.5 LUBA Procedures/Rules – Service – Failure to Comply. Failure to timely serve a copy of the notice of intent to appeal on other parties is a technical violation of LUBA's rules, which will result in dismissal only where a party's substantial rights are prejudiced. *Rebmann v. Linn County*, 21 Or LUBA 542 (1991).

27.11.5 LUBA Procedures/Rules – Service – Failure to Comply. Under OAR 661-10-005, failure to serve the notice of intent to appeal on respondent within the time required by OAR 661-10-015(2) is a technical violation of LUBA's rules which is not grounds for dismissal unless the substantial rights of parties are prejudiced. *Schellenberg v. Polk County*, 21 Or LUBA 507 (1991).

27.11.5 LUBA Procedures/Rules – Service – Failure to Comply. Respondent's right to "the speediest practicable review" is not materially affected by service of the notice of intent to appeal eight days later than required by OAR 661-10-015(2). *Schellenberg v. Polk County*, 21 Or LUBA 507 (1991).

27.11.5 LUBA Procedures/Rules – Service – Failure to Comply. Failure to timely serve a cost bill or petition for attorney fees is a technical violation of LUBA's rules, and a motion to strike such a cost bill or petition for attorney fees will be granted only if the moving party's substantial rights are prejudiced by the untimely service. *Knapp v. City of Jacksonville*, 20 Or LUBA 535 (1991).

27.11.5 LUBA Procedures/Rules – Service – Failure to Comply. A two week delay in LUBA's resolution of a cost bill or petition for attorney fees' due to the prevailing party's failure to comply with LUBA's requirements for service of such documents on other parties, does not constitute prejudice to the other parties' substantial right to the "speediest practicable review." *Knapp v. City of Jacksonville*, 20 Or LUBA 535 (1991).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. To be a prevailing party where the local government rescinds its decision on reconsideration after the applicant withdraws the application, the petitioner must demonstrate that the local government adopted a decision on reconsideration in accord with petitioner's position. A petitioner is not a prevailing party under that test where the appealed decision is rescinded because the applicant withdrew its application after filing a different application for the same development, and the petitioner fails to demonstrate that the new application was prompted by perceived vulnerabilities in the first decision. *Oregon Coast Alliance v. Curry County,* 71 Or LUBA 406 (2015).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. LUBA's rules allow for a prevailing local government to recover the cost of providing petitioner and LUBA with copies of the record, but do not provide for a prevailing intervenor-respondent to recover the cost of the copy of the record that the local government provided to intervenor. *Kukaska v. Linn County,* 70 Or LUBA 495 (2014).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. LUBA's administrative rules do not authorize a prevailing party to recover the cost of preparing a transcript of a city council hearing. *Stewart v. City of Salem,* 62 Or LUBA 465 (2010).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. There may be rare circumstances where a sustained cross-assignment of error has such a disproportionate impact upon the remand proceeding that it calls into question whether the petitioner is the prevailing party. When the sustained cross-assignment of error merely serves to clear up alleged errors in the wording of conditions of approval, that does not mean the petitioner is no longer the prevailing party. *Curl v. City of Bend,* 59 Or LUBA 513 (2009).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. Petitioner is considered the prevailing party even though all of his assignments of error were denied, where LUBA sustains one of intervenor-petitioner's assignments of error and remands the local government's decision. *Sommer v. Josephine County,* 50 Or LUBA 721 (2005).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. So long as one of petitioner's assignments of error is sustained in whole or in part and results in reversal or remand of an appealed decision, petitioner is the prevailing party and entitled to recover the filing fee as costs under OAR 661-010-0075(1)(b)(A). *Save Our Skyline v. City of Bend,* 48 Or LUBA 643 (2004).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. A petitioner may be deemed the "prevailing party" for purposes of an award of costs, notwithstanding that the appeal was dismissed, only where petitioner establishes that the appeal played some causative role in the local government action that mooted or otherwise justified dismissal of the appeal. *1000 Friends of Oregon v. Deschutes County,* 44 Or LUBA 1 (2003).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. Where it is not clear that petitioner's appeal prompted repeal of the challenged ordinance, and it is more probable that repeal was prompted by a Supreme Court decision that invalidated the ballot measure the ordinance was intended to implement, petitioner fails to establish the requisite causation between its appeal and

repeal of the ordinance in order to be deemed the "prevailing party" for purposes of obtaining an award of costs. *1000 Friends of Oregon v. Deschutes County*, 44 Or LUBA 1 (2003)..

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. Where a party appeals an adverse decision by LUBA, the Court of Appeals overturns LUBA's decision, and the Court of Appeals' decision is not subsequently appealed, that party is the prevailing party for purposes of awarding costs. *Hausam v. City of Salem*, 42 Or LUBA 587 (2002).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. In order for a petitioner to be deemed the prevailing party when a LUBA appeal is dismissed, the petitioner must establish that the petitioner's appeal played some causative role in the local government action that mooted or otherwise justified dismissal of the appeal. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 600 (2002).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. Where a local government adopts three separate decisions, but the second and third decisions simply readopt the earlier decisions with additional findings and the appeal of the third decision results in remand, petitioner is properly viewed as the prevailing party in all three appeals, notwithstanding that the first two appeals are dismissed as moot. *Friends of Clean Living v. Polk County*, 37 Or LUBA 979 (1999).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. Under ORCP 54A(3), where petitioner voluntarily dismisses an appeal, and no circumstances indicate otherwise, intervenor-respondent is the prevailing party. *Pfeifer v. City of Silverton*, 33 Or LUBA 869 (1997).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. Respondent is not considered the prevailing party when a LUBA appeal is dismissed because the challenged ordinance was rejected by the voters in a referendum election. *Potter v. City of Astoria*, 29 Or LUBA 590 (1995).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. A petitioner need not prevail on all of its assignments of error to be considered the "prevailing party" under OAR 661-10-075(1)(b). LUBA considers a petitioner to be the prevailing party if the challenged decision is reversed or remanded. *Churchill v. Tillamook County*, 29 Or LUBA 572 (1995).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. Where a petitioner moves to dismiss its appeal or withdraws its notice of intent to appeal before the deadline for filing the petition for review has passed, respondent is not entitled to award of petitioner's filing fees and deposits for costs pursuant to ORS 197.830(8) and OAR 661-10-075(1)(c). However, as the prevailing party, respondent may be awarded the costs of copying the record. OAR 661-10-075(1)(b)(B). *Claremont Limited Partnership v. Washington County*, 28 Or LUBA 785 (1995).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. Although respondent is generally viewed as the prevailing party when an appeal at LUBA is dismissed, where the appeal is dismissed after petitioner's appeal results in the local government withdrawing its decision for reconsideration and adopting a new decision, petitioner is the prevailing party. *Sewco Investments, Inc. v. Clackamas County*, 27 Or LUBA 678 (1994).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. Petitioner is the prevailing party for purposes of awarding costs under OAR 661-10-075(1)(b)(A), where petitioner prevails on two of six assignments of error and LUBA remands the challenged decision. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 624 (1994).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. Where petitioner withdraws his notice of intent to appeal *before* the deadline for filing the petition for review has passed, respondent is not entitled to award of petitioner's filing fees and deposit for costs pursuant to ORS 197.830(8) and OAR 661-10-075(1)(c). However, as the prevailing party, respondent may be awarded the costs of copying the record. OAR 661-10-075(1)(b)(B). *Olson v. Neahkahnie Water District*, 25 Or LUBA 792 (1993).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. OAR 661-10-075(1)(b) authorizes LUBA to award the costs of preparing the local record to a prevailing "governing body," but does not authorize an award costs to a prevailing intervenor-respondent. *City of North Plains v. Washington County*, 24 Or LUBA 623 (1993).

27.12.1 LUBA Procedures/Rules – Costs – Prevailing Party. While LUBA's rules do not expressly provide for return of petitioner's deposit for costs where petitioner is the prevailing party, it is LUBA's practice to return petitioner's deposit for costs under these circumstances. *Tice v. Josephine County*, 21 Or LUBA 596 (1991).

27.12.2 LUBA Procedures/Rules – Costs – Amount. Where the local government is the prevailing party, it is entitled to recover as costs the "copying costs for the required number of copies of the record," in an amount not to exceed the $150 deposit for costs. The required number of copies is two: one for petitioner and one for LUBA. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 1018 (2000).

27.12.2 LUBA Procedures/Rules – Costs – Amount. Under OAR 661-010-0025(3), a local government may require that parties, other than the petitioner, who request a copy of the record in a LUBA appeal pay the cost of copying the record. However, the local government may not include the cost of providing such additional copies of the record to parties other than the petitioner in its cost bill. *Friends of Yamhill County v. Yamhill County*, 35 Or LUBA 825 (1998).

27.12.2 LUBA Procedures/Rules – Costs – Amount. When respondent is awarded costs of copying the record, the amount of the award is based on the per page copying rate specified in OAR 661-10-075(1)(b)(C), but cannot exceed the amount of petitioner's deposit for costs. Respondent is not required to submit proof of actual copying costs. *Jones v. Lane County*, 29 Or LUBA 573 (1995).

27.12.2 LUBA Procedures/Rules – Costs – Amount. OAR 661-10-075(1)(b)(A) allows petitioners, as the prevailing parties, to recover the cost of their LUBA filing fee. It does not allow prevailing petitioners to recover their costs for local appeals, postage or photocopying. *Mazeski v. Wasco County*, 26 Or LUBA 629 (1994).

27.12.2 LUBA Procedures/Rules – Costs – Amount. OAR 661-10-075(1)(b)(A) does not allow petitioners, as the prevailing parties, to recover costs for postage, photocopying, transcribing tapes or publications. *Gray v. Clatsop County*, 22 Or LUBA 818 (1991).

27.12.2 LUBA Procedures/Rules – Costs – Amount. Under OAR 661-10-075(1)(b)(B), a local government which is the prevailing party in a LUBA appeal is entitled to award of the copying costs for the *required* number of copies of the record, which includes the copies of the record provided to the Board and to petitioner. *Schmaltz v. City of Hood River*, 22 Or LUBA 803 (1991).

27.12.2 LUBA Procedures/Rules – Costs – Amount. The *required* number of copies of the record, for which a prevailing respondent is entitled to award of its copying costs, is the number of copies which OAR 661-10-025(2) and (3) requires to be provided to LUBA and to petitioners. *Pinkham v. Clatsop County*, 21 Or LUBA 247 (1991).

27.12.2 LUBA Procedures/Rules – Costs – Amount. Where petitioner is the prevailing party in a LUBA appeal, LUBA will return petitioner's 150-dollar deposit for costs and petitioner is entitled to an award of costs, in the amount of the filing fee, to be paid by respondents. *Sokol v. City of Lake Oswego*, 19 Or LUBA 521 (1990).

27.12.2 LUBA Procedures/Rules – Costs – Amount. Under OAR 660-10-075(1)(b)(A) petitioners, as prevailing parties, are not entitled to recover as costs amounts spent on supplies, postage, telephone expenses and copies. *Stefan v. Yamhill County*, 19 Or LUBA 496 (1990).

27.12.2 LUBA Procedures/Rules – Costs – Amount. Under OAR 661-10-075(1)(b)(B), a local government which is the prevailing party in a LUBA proceeding is entitled to recover from petitioner the copying costs for the *required* number of copies of the record, which includes the copies provided to the Board and to petitioner. *Craven v. Jackson County*, 18 Or LUBA 909 (1990).

27.12.2 LUBA Procedures/Rules – Costs – Amount. Although a local government may require that parties other than petitioner who request a copy of the record reimburse the county directly for the reasonable costs of copying the record, a local government may not properly include such copying costs, or other costs not allowed by OAR 661-10-075(1)(b)(B), in its cost bill. *Craven v. Jackson County*, 18 Or LUBA 909 (1990).

27.12.2 LUBA Procedures/Rules – Costs – Amount. OAR 661-10-075(1)(b)(A) does not allow petitioner, as the prevailing party, to recover costs for postage, photocopying, telephone calls or secretarial services. *Gray v. Clatsop County*, 18 Or LUBA 907 (1990).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. Where an appeal is voluntarily dismissed on petitioner's motion, whether that dismissal results in forfeiture of the fee and deposit for costs under OAR 661-010-0075(1)(c) depends on whether the motion to dismiss is filed before or after the deadline for filing the petition for review. *Sommer v. Josephine County*, 52 Or LUBA 783 (2006).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. Where the petitioner requests voluntary dismissal of the appeal one day after the petition for review is due, LUBA will award the filing fee and deposit for costs to respondent under OAR 661-010-0075(1)(c), notwithstanding that LUBA's order dismissing the appeal was based on petitioner's request rather than petitioner's failure to file the petition for review. *Sommer v. Josephine County*, 52 Or LUBA 783 (2006).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. OAR 661-010-0075(1)(c) provides for an award of the filing fee where the local record has been filed and an appeal is dismissed because a petitioner fails to file a petition for review on time. It does not apply where the record has been filed but the petition for review has not, and the appeal is dismissed based on the parties' stipulated dismissal dated one day after the deadline for filing the petition for review. *Younger v. City of Oregon City*, 48 Or LUBA 641 (2004).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. Where a petitioner moves to withdraw the notice of intent to appeal and LUBA dismisses the appeal before the deadline for filing the petition for review expires, the petitioner does not fail to file a timely petition for review and the prevailing respondent is not entitled to an enhanced award of costs under OAR 660-010-0075(1)(c). *Holtzman v. Jefferson County*, 47 Or LUBA 618 (2004).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. Where a petitioner moves to dismiss its appeal or withdraws its notice of intent to appeal before the deadline for filing the petition for review has passed, respondent is not entitled to award of petitioner's filing fees and deposits for costs pursuant to ORS 197.830(8) and OAR 661-10-075(1)(c). However, as the prevailing party, respondent may be awarded the costs of copying the record. OAR 661-10-075(1)(b)(B). *Claremont Limited Partnership v. Washington County*, 28 Or LUBA 785 (1995).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. Where petitioner withdraws his notice of intent to appeal *before* the deadline for filing the petition for review has passed, respondent is not entitled to award of petitioner's filing fees and deposit for costs pursuant to ORS 197.830(8) and OAR 661-10-075(1)(c). However, as the prevailing party, respondent may be awarded the costs of copying the record. OAR 661-10-075(1)(b)(B). *Olson v. Neahkahnie Water District*, 25 Or LUBA 792 (1993).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. Where the local record has been filed, and petitioner does not file a petition for review within the time required by LUBA rules, ORS 197.830(8) and OAR 661-10-030(1) and 661-10-075(1)(c) require that LUBA grant respondent's request for award of petitioner's filing fee and deposit for costs. *Ekerson v. City of Milwaukie*, 24 Or LUBA 206 (1992).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. Where petitioners filed a motion to withdraw their appeal, and the appeal was dismissed, *before* the date the petition for review became due, petitioners did not fail to file their petition for review within the time required by LUBA's rules, and respondent is not entitled to award of petitioners' filing fee and deposit for costs pursuant to ORS 197.830(8) and OAR 661-10-075(1)(c). *Simonson v. Marion County*, 23 Or LUBA 706 (1992).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. Where a petitioner neither files a petition for review within the time required by LUBA rules, nor obtains an extension of time for filing the petition for review, ORS 197.830(8) and (10) and OAR 661-10-030(1) require that LUBA grant respondent's motion to dismiss and request for award of petitioner's filing fee and deposit for costs. *Keister v. Clackamas County*, 21 Or LUBA 212 (1991).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. The forfeiture of petitioner's filing fee and deposit for costs required by ORS 197.830(8) and OAR 661-10-075(1)(c) when a petition for review is not filed within the time required by LUBA's rules, does not apply where the parties agree to dismiss an appeal prior to the date the petition for review is due. *Smith v. Yamhill County*, 21 Or LUBA 533 (1991).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. Under ORS 197.830(10) and OAR 661-10-030(1), in the absence of an agreement between the parties to extend the time for filing the petition for review, the consequence of failing to file a timely petition for review is dismissal of the appeal and award of petitioner's filing fee and deposit for costs to respondent. *Burghardt v. City of Molalla*, 20 Or LUBA 431 (1991).

27.12.3 LUBA Procedures/Rules – Costs – Petition for Review Not Filed. Where a petitioner neither files a petition for review within the time required by LUBA rules, nor obtains an extension of time for filing the petition for review, ORS 197.830(8) and (10) and OAR 661-10-030(1) require that LUBA grant respondent's motion to dismiss and request for award of petitioner's filing fee and deposit for costs. *McCauley v. Jackson County*, Or 20 Or LUBA 176 (1990).

27.12.4 LUBA Procedures/Rules – Costs – Generally. Where the petitioner prevails in at least one assignment of error that results in the challenged decision being reversed or remanded based on that sustained assignment of error, LUBA considers the petitioner the prevailing party and entitled to an award of the filing fee from respondents The fact that the petitioner did not prevail on a majority of assignments of error is immaterial. *Curl v. City of Bend*, 59 Or LUBA 513 (2009).

27.12.4 LUBA Procedures/Rules – Costs – Generally. There may be rare circumstances where a sustained cross-assignment of error has such a disproportionate impact upon the remand proceeding that it calls into question whether the petitioner is the prevailing party. When the sustained cross-assignment of error merely serves to clear up alleged errors in the wording of conditions of approval, that does not mean the petitioner is no longer the prevailing party. *Curl v. City of Bend*, 59 Or LUBA 513 (2009).

27.12.4 LUBA Procedures/Rules – Costs – Generally. Delaying oral argument in an appeal of a local government's decision following a remand from LUBA is not an authorized sanction for the local government's delay in responding to an order awarding costs to petitioners in the prior appeal that led to the remand. *Rice v. City of Monmouth*, 52 Or LUBA 786 (2006).

27.12.4 LUBA Procedures/Rules – Costs – Generally. Where there is uncertainty regarding which of two city council decisions denying local appeals of a hearings officer decision had the effect of making the hearings officer's decision final, and petitioners appeal both of those city council decisions to LUBA and no party moves to dismiss either of those appeals, the prevailing petitioners are entitled to recover both filing fees as costs under OAR 661-010-0075(1)(b)(A). *Save Our Skyline v. City of Bend*, 48 Or LUBA 643 (2004).

27.12.4 LUBA Procedures/Rules – Costs – Generally. Where a petitioner moves to withdraw the notice of intent to appeal and LUBA dismisses the appeal before the deadline for filing the petition for review expires, the petitioner does not fail to file a timely petition for review and the prevailing respondent is not entitled to an enhanced award of costs under OAR 660-010-0075(1)(c). *Holtzman v. Jefferson County*, 47 Or LUBA 618 (2004).

27.12.4 LUBA Procedures/Rules – Costs – Generally. Costs will not be awarded to a local government for preparing a local record, where the parties stipulate to dismiss the appeal prior to the city's filing of the record at LUBA. *Citizens for Resp Area Plng v. City of Wilsonville*, 44 Or LUBA 819 (2003).

27.12.4 LUBA Procedures/Rules – Costs – Generally. The scope of reimbursable copying costs allowed by OAR 661-010-0075(1)(b) to a prevailing local government is limited to the cost of copying "pages" of the record, and does not include the costs of copying audio tapes. *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 563 (2001).

27.12.4 LUBA Procedures/Rules – Costs – Generally. A cost bill filed on behalf of a local government must be filed by the local government's attorney. A cost bill filed on behalf of a local government by someone other than a member of the Oregon State Bar will be denied. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 1018 (2000).

27.12.4 LUBA Procedures/Rules – Costs – Generally. LUBA considers filing a cost bill eight days later than required by OAR 661-10-075(1)(a) to be a technical violation of its rules that will not interfere with LUBA's consideration of the cost bill unless a party's substantial rights are prejudiced. *Jones v. Lane County*, 29 Or LUBA 573 (1995).

27.12.4 LUBA Procedures/Rules – Costs – Generally. It is LUBA's practice to return to petitioner any portion of petitioner's deposit for costs that is not awarded to respondent. It is not necessary for petitioner to request refund of the unused portion of its deposit for costs. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 794 (1993).

27.12.4 LUBA Procedures/Rules – Costs – Generally. Although LUBA's rules authorize award of a petitioner's filing fee to *respondent* in certain circumstances (OAR 661-10-075(1)(c)), they do not provide for return of a filing fee to petitioner. *Totman v. City of Grants Pass*, 24 Or LUBA 46 (1992).

27.12.4 LUBA Procedures/Rules – Costs – Generally. LUBA considers filing a cost bill two days later than required by OAR 661-10-075(1)(a) to be a technical violation of its rules which will not interfere with LUBA's consideration of the cost bill unless the parties' substantial rights are prejudiced. *Schatz v. City of Jacksonville*, 21 Or LUBA 569 (1991).

27.12.4 LUBA Procedures/Rules – Costs – Generally. Where petitioner's cost bill is filed 38 days after LUBA's final opinion and order was issued, without a request for an extension of time or an explanation as to why the cost bill could not have been filed in accord with OAR 661-10-075(1)(a), the cost bill is untimely and will be denied. *1000 Friends of Oregon v. Marion County*, 18 Or LUBA 906 (1990).

27.13 LUBA Procedures/Rules – Attorney Fees. Where the circumstances under which a local code provision applies are not clearly articulated in that provision or specified in any other local code provision, LUBA cannot say that an argument that the governing body misinterpreted that provision is one that "no reasonable lawyer would conclude * * * possessed legal merit" for purposes of awarding attorney fees under ORS 197.830(15)(b), even where the governing body's interpretation was required to be affirmed under ORS 197.829(1). *Vannatta v. City of St. Helens*, 80 Or LUBA 1018 (2019).

27.13 LUBA Procedures/Rules – Attorney Fees. For purposes of awarding attorney fees under ORS 197.835(10), fees related to petitioner's prosecution of the LUBA appeal generally start with the final local government decision and include legal work past the date of LUBA's final decision, such as preparing a cost bill and motion for attorney fees. *MJAI Oregon 5, LLC v. Linn County*, 80 Or LUBA 1021 (2019).

27.13 LUBA Procedures/Rules – Attorney Fees. Where an appeal involves novel legal issues, including the complex interface of state and county marijuana regulations with land use law, 108.9 hours is a reasonable amount of time to have spent pursuing an appeal before LUBA. *MJAI Oregon 5, LLC v. Linn County*, 80 Or LUBA 1021 (2019).

27.13 LUBA Procedures/Rules – Attorney Fees. Where the Oregon State Bar Economic Survey describes the average hourly rate for land use attorneys as $398 where petitioner's attorneys practice and $278 where the local government is located; where petitioner's attorney's law firm has a partner hourly rate of $475, an associate hourly rate of $240 to $295, and a paralegal hourly rate of $150; and where petitioner's counsel charged an average hourly rate of $272.66 over the entire LUBA appeal period, LUBA will conclude that those hourly rates are reasonable. *MJAI Oregon 5, LLC v. Linn County*, 80 Or LUBA 1021 (2019).

27.13 LUBA Procedures/Rules – Attorney Fees. Because the law regarding the application of RLUIPA's Equal Terms provision to particular local zoning provisions is unsettled, and because conflicts exist between decisions from courts in the various federal circuits that have applied the Equal Terms provision to specific local zoning ordinances, it will be a rare occurrence where a party challenging a local government decision regarding RLUIPA will "present[] a position without probable cause to believe the position was well-founded in law" for purposes of awarding attorney fees under ORS 197.830(15)(b). *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 1026 (2019).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a local code provision states that certain fire safety guidelines are "suggested" but that the local government may require them when it finds that "such measures are necessary to protect public safety," an argument that the provision gives the local government discretion to require those measures without such a finding will not support an award of attorney fees because LUBA cannot say that no reasonable lawyer would have advanced that interpretation. *Blu Dutch LLC v. Jackson County*, 79 Or LUBA 1068 (2019).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a local code provision states that "a Fire Safety Inspection * * * shall occur prior to *the issuance of building permits*," an argument that the provision does not prohibit the local government from requiring such an inspection prior to

development approval will not support an award of attorney fees because LUBA cannot say that no reasonable lawyer would have advanced that interpretation, particularly where LUBA notes that the provision "is not a model of clarity." *Blu Dutch LLC v. Jackson County*, 79 Or LUBA 1068 (2019).

27.13 LUBA Procedures/Rules – Attorney Fees. Petitioner's argument that the county hearings officer's failure to adopt findings of compliance with a county code provision (Washington County Development Code (CDC 421-7.8)) is not a position presented "without probable cause" sufficient to entitle an award of attorney fees against a non-prevailing party, where LUBA agreed with petitioner that the hearings officer's failure to adopt any findings explicitly addressing CDC 421-7.8 would warrant remand, unless, as occurred here, other findings with respect to other standards (CDC 422) in the hearings officer's decision were sufficient to address the substantive standards set forth in CDC 421-7.8, and therefore the hearings officer's failure to adopt findings addressing CDC 421-7.8 was harmless error. *McAndrew v. Washington County*, 78 Or LUBA 1094 (2018).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a statute requires a local government to find that the land upon which a proposed motor vehicle dismantling business is to be located is "zoned for industrial use," and petitioner argues the county must also find that the business possesses a conditional use permit because the business is a conditional use in the city's industrial zone, LUBA will reject the argument because the statute only requires a finding that the land upon which the proposed business is to be located is "zoned for industrial use." However, that argument is not frivolous and was presented with "probable cause to believe the position was well-founded in law," within the meaning of ORS 197.830(15)(b). *Devlin v. Linn County*, 77 Or LUBA 559 (2018).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a statute requires a local government to find that the land upon which a proposed motor vehicle dismantling business is to be located is "zoned for industrial use," and petitioner argues the land upon which the proposed business is not zoned for industrial use because the business is encroaching on petitioner's exclusive farm use zoned property, LUBA will reject the argument where there is pending circuit court litigation between the parties that will resolve the parties' encroachment dispute. However, that argument is not frivolous and was presented with "probable cause to believe the position was well-founded in law," within the meaning of ORS 197.830(15)(b). *Devlin v. Linn County*, 77 Or LUBA 559 (2018).

27.13 LUBA Procedures/Rules – Attorney Fees. The party seeking an award of attorney fees under the probable cause standard must clear a relatively high hurdle, and that hurdle is not met by simply showing that LUBA denied all of a party's objections to the record and/or attempts to introduce evidence not in the record for the Board to consider, because record objections and motions to take evidence are not part of the "entire presentation" described in *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). A party's "presentation" includes a party's arguments on the merits of an appeal and on jurisdictional issues that may arise. *Martin v. City of Central Point*, 76 Or LUBA 463 (2017).

27.13 LUBA Procedures/Rules – Attorney Fees. A prevailing party who did not incur any actual legal fees is not entitled to seek an award of attorney fees under ORS 197.830(15)(b). *Grimstad v. Deschutes County*, 76 Or LUBA 467 (2017).

27.13 Procedures/Rules – Attorney Fees. ORS 197.830(3) provides a remedy in the form of tolling of the appeal period when, after a hearing is held, the use that is approved by a land use decision differs to such a degree from the proposal described in the notice of hearing that a petitioner could have been misled by the notice of hearing regarding the nature of the proposal. A novel legal argument regarding the types or extent of deviation from a proposal described in a notice of hearing that could have misled a person was presented with "probable cause to believe the position was well-founded in law" within the meaning of ORS 197.830(15)(b), and LUBA will not award attorney fees even if LUBA rejected the argument. *Oral Hull Foundation v. Clackamas County*, 76 Or LUBA 523 (2017).

27.13 LUBA Procedures/Rules – Attorney Fees. Where one of petitioner's assignments of error challenges a city's dismissal of petitioner's local appeal for failure to pay the appeal fee and argues that the city erred in dismissing his appeal on that basis because nothing in the city's code makes payment of an appeal fee jurisdictional, that argument meets the low probable cause standard that requires the prevailing party to demonstrate that *every* argument made by the nonprevailing party lacked probable cause, and LUBA will deny a motion for attorney fees from the city. *Dang v. City of Rockaway Beach*, 75 Or LUBA 485 (2017).

27.13 LUBA Procedures/Rules – Attorney Fees. Attorney fees are not warranted against a city for defending its decision to impose exactions on proposed development under the theory that the development represented a "modification" of a planned unit development, warranting imposition of new conditions, where the applicant himself identified the application as one for a "modification," and complex factual and legal circumstances supported the reasonableness of the city's position that the proposed development required a modification of the planned unit development. *Tokarski v. City of Salem*, 75 Or LUBA 489 (2017).

27.13 LUBA Procedures/Rules – Attorney Fees. LUBA will not address arguments that attorney fees should be awarded against a city under ORS 197.835(10)(a) and ORS 197.796(5), where the motion for attorney fees invokes those statutes only with respect to two assignments of error that LUBA did not reach in its final opinion, and that the Court of Appeals did not review in its decision affirming LUBA's final opinion. *Tokarski v. City of Salem*, 75 Or LUBA 489 (2017).

27.13 LUBA Procedures/Rules – Attorney Fees. Where the issue of whether a county erred by removing property from its Goal 5 inventory of Deer General Winter Range was clearly resolved against petitioner in a prior appeal, petitioner's attempt to revive that issue in a subsequent appeal is barred under the holding in *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), and constitutes a position presented "without probable cause to believe the position was well-founded in law * * *" under ORS 197.830(15)(b). *Wood v. Crook County*, 75 Or LUBA 494 (2017).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a petitioner both presents a position on the merits that meets the "probable cause to believe the position was well-founded in law" standard in ORS 197.830(15)(b), and in response to an argument that the position on the merits is barred under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), presents a "probable cause"

argument that the position is not barred by *Beck*, LUBA will deny a motion for an award of attorney fees under ORS 197.830(15)(b). *Wood v. Crook County*, 75 Or LUBA 494 (2017).

27.13 LUBA Procedures/Rules – Attorney Fees. Attorney fees are not warranted under ORS 197.830(15)(b) against a petitioner whose only "position" presented was that a precautionary LUBA appeal should be suspended and not be dismissed until it became clear whether the local government would provide a local appeal, where the planning commission had scheduled a hearing to consider petitioner's request for a local appeal, but provided no notice or confirmation that the planning commission had in fact accepted the local appeal and would voluntarily provide a local appeal. *Friends of the Lostine v. Wallowa County*, 75 Or LUBA 546 (2017).

27.13 LUBA Procedures/Rules – Attorney Fees. ORS 197.835(10)(b) is phrased in mandatory terms, and requires that if LUBA reverses a local government decision to deny an application and orders the local government to approve the application under ORS 197.835(10)(a), LUBA must award attorney fees to the applicant against the city. *Walter v. City of Eugene*, 74 Or LUBA 671 (2016).

27.13 LUBA Procedures/Rules – Attorney Fees. While LUBA independently reviews attorney fee statements for reasonableness, the failure of an opposing party to contest such statements is at least some indication that the attorney fees sought are reasonable. *Walter v. City of Eugene*, 74 Or LUBA 671 (2016).

27.13 LUBA Procedures/Rules – Attorney Fees. In a case where LUBA rejected a petitioner's argument that a proposed clubhouse adjacent to a golf course exceeds the ambiguous "design capacity" limits in OAR 660-033-0130(2)(a), LUBA will deny a motion for attorney fees where, given the ambiguity inherent in the administrative rule, LUBA is unable to say that no reasonable lawyer would present the argument that petitioner presented. *Oregon Coast Alliance v. Curry County*, 73 Or LUBA 396 (2016).

27.13 LUBA Procedures/Rules – Attorney Fees. A motion for attorney fees was properly served on the opposing party by "first class mail" under OAR 661-010-0075(2)(b)(B) when it was served by certified mail, because certified mail is a type of first class mail. *Oregonians in Action v. City of Lincoln City*, 72 Or LUBA 457 (2015).

27.13 LUBA Procedures/Rules – Attorney Fees. Although LUBA rejected a petitioner's argument that an ordinance that created limits on vacation rental use of single family second homes would exacerbate an identified shortage of residential land to meet the need for single family second homes, LUBA will deny a motion for attorney fees where, given the complexity of the existing vacation rental dwelling regulatory program and the changes to it, LUBA could not say that no reasonable lawyer would present the argument that petitioners presented. *Oregonians in Action v. City of Lincoln City*, 72 Or LUBA 457 (2015).

27.13 LUBA Procedures/Rules – Attorney Fees. LUBA's 2010 rule amendments to require that cross assignments of error be included in a cross petition for review were adopted to address a relatively complicated area of LUBA practice where intervenors who support the decision identify errors that, if corrected, might support the decision. An intervenor's failure in a 2014 appeal to

know about the rule change and present his argument as a cross-assignment of error is not the kind of mistake that no reasonable lawyer would make and that failure does not warrant an award of attorney fees. *Parkview Terrace Development LLC v. City of Grants Pass*, 71 Or LUBA 381 (2015).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a city has PUD regulations that expressly permit commercial and industrial PUDs to be terminated but no PUD regulations that expressly permit residential PUDs to be terminated, an argument that the city may not permit the owner of an approved and partially constructed PUD to revoke the PUD approval for the undeveloped portion of the PUD by writing a letter to the planning department requesting such termination is not an argument that is so devoid of merit that it warrants an award of attorney fees under ORS 197.830(15)(b). *Parkview Terrace Development LLC v. City of Grants Pass*, 71 Or LUBA 381 (2015).

27.13 LUBA Procedures/Rules – Attorney Fees. Where neither the respondent nor the intervenor-respondent file a response brief, and intervenor-respondent files only a motion to dismiss, LUBA limits its review of petitioners' motion for attorney fees to the parties' jurisdictional arguments. Where the motion to dismiss is filed after the petition for review is filed, the jurisdictional question is initially framed by the petition for review. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a jurisdictional statement in the petition for review attempts to incorporate argument on the merits in different section of the petition for review, and in doing so cites the wrong section of the petition for review, LUBA will nevertheless consider the incorporated argument on the merits, where the argument the petitioners intended to incorporate is obvious and no party was misled by petitioners' error. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

27.13 LUBA Procedures/Rules – Attorney Fees. Following the principles articulated in *Spencer Creek Neighbors v. Lane County*, 152 Or App 1, 952 P2d 90 (1998), and *Fechtig v. City of Albany*, 150 Or App 10, 946 P2d 280 (1997), if any one of an intervenor-respondent's arguments in response to petitioners' four jurisdictional arguments meets the probable cause standard in ORS 197.830(15)(b), petitioner's request for an award of attorney fees must be denied. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

27.13 LUBA Procedures/Rules – Attorney Fees. Where petitioners argue that issuing a floodplain permit pursuant to a stipulated order required the exercise of policy or legal judgment, making the ORS 197.015(10)(b)(A) exception to the statutory definition of "land use decision" inapplicable, an intervenor-respondent's response to that argument satisfies the probable cause standard in ORS 197.830(15)(b), where intervenor points out the stipulated order clearly identifies improvements that must be relocated from the floodplain, improvements that must be removed altogether, and improvements that may remain where they are. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

27.13 LUBA Procedures/Rules – Attorney Fees. Where petitioners cite a code section that expressly requires a Type 2 (discretionary) procedure where a floodplain permit "no-rise

certification" will be required, to argue in their petition for review jurisdictional statement that the ORS 197.015(10)(b)(A) ministerial exception to the statutory definition of "land use decision" does not apply, and intervenor then moves to dismiss based on a closely related code section that authorizes a Type 1 (nondiscretionary) procedure in some circumstances, but that closely related code section also expressly requires a Type 2 procedure where a "no-rise certification" will be required, that jurisdictional argument does not satisfy the probable cause standard in ORS 197.830(15)(b). In that circumstance, where the decision findings and a condition of approval expressly require a "no-rise certification," a reasonable lawyer would not move to dismiss and fail to address the code's "no-rise certification" language. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

27.13 LUBA Procedures/Rules – Attorney Fees. Under ORS 197.830(15)(b), a prevailing party may be awarded attorney fees against any other party that presented a position "without probable cause to believe the position was well-founded in law or factually supported information." The probable cause standard requires the prevailing party to demonstrate that *every* argument made by the nonprevailing party lacked probable cause, and that standard is not met where the nonprevailing party made several arguments that not only met the low probable cause threshold, but LUBA agreed with the non-prevailing party on that argument. *Stevens v. City of Island City*, 71 Or LUBA 430 (2015).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a local government, as a nonprevailing party, files the local record but does not file or join in a brief or other document at LUBA defending its decision, the local government does not present a position in the LUBA appeal and no award of attorney fees against the local government is possible under ORS 197.830(15)(b). *Stevens v. City of Island City*, 71 Or LUBA 430 (2015).

27.13 LUBA Procedures/Rules – Attorney Fees. Although LUBA rejected petitioner's argument that the zoning ordinance imposed a mandatory maximum density standard on subdivisions in a particular zoning district, based on petitioner's failure to challenge the city council's reliance on the text of the alleged maximum density standard, where petitioner makes a strong contextual argument based on zoning sub-districts that do impose maximum density standards, LUBA will conclude the argument is "open to doubt, or subject to rational, reasonable or honest discussion," and not subject to an award of attorney fees. *Greller v. City of Newberg*, 70 Or LUBA 499 (2014).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a prevailing party seeking attorney fees makes a *prima facie* case that the petitioner's single argument presented was "lacking in probable cause," and the petitioner does not respond to the motion for attorney's fees, LUBA will award attorney's fees to the prevailing party. *Clarke v. Coos County*, 68 Or LUBA 550 (2013).

27.13 LUBA Procedures/Rules – Attorney Fees. Under ORS 197.830(15)(b), the requested attorney fees must be reasonable. While LUBA independently reviews attorney fee statements for reasonableness, the failure of an opposing party to contest such statements is at least some indication that the attorney fees sought are reasonable. *Clarke v. Coos County*, 68 Or LUBA 550 (2013).

27.13 LUBA Procedures/Rules – Attorney Fees. A reasonable attorney could believe that an enforcement decision that determines that parking of tow trucks is authorized by a previously issued home occupation permit concerns the application of the city's home occupation regulations, and is thus a land use decision as defined at ORS 197.015(10)(a), because it is frequently unclear whether in making an enforcement decision regarding an existing permit the decision maker applies, or should have applied, a land use regulation. *Noordhoff v. City of North Bend*, 66 Or LUBA 442 (2012).

27.13 LUBA Procedures/Rules – Attorney Fees. A petitioner's arguments that a city relied too heavily on an access road's excess capacity and failed to give appropriate weight to the demands that might be placed on the access road by the future development allowed under existing zoning are not sufficient to demonstrate error in a city decision that grants a waiver of setback, right-of-way dedication and right-of-way improvement standards for development of a triplex under a criterion that requires that the waiver is "not inconsistent with the general purpose of ensuring adequate public facilities," where the decision cites a number of reasons why the city did not believe the setback and right-of-way dedication and right-of-way improvement were necessary. However, petitioner's arguments were not "without probable cause to believe the position was well-founded in law or on factually supported information," within the meaning of ORS 197.830(15)(b), and therefore LUBA will deny a motion for an award of attorney fees against petitioner. *Zirker v. City of Bend*, 65 Or LUBA 445 (2012).

27.13 LUBA Procedures/Rules – Attorney Fees. For purposes of attorney fees under the "probable cause" standard in ORS 197.830(15)(b), no reasonable attorney would argue on appeal that a decision that reduces minimum residential density in a proposed five-lot subdivision violates a code provision that expressly authorizes reducing minimum residential density, without presenting some challenge to findings that address the code provision and conclude that reducing the density complies with the code provision. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. For purposes of attorney fees under the "probable cause" standard in ORS 197.830(15)(b), a reasonable attorney could argue that a Metro code provision mandating a minimum residential density is violated by a decision that approves less than the minimum density, where the Metro code provision directly applies on its face to city subdivision decisions, but is no longer applicable due to the effect of other Metro code provisions and the city's implementation of the Metro minimum residential density requirement. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a petitioner relies on arguments presented in an assignment of error to avoid attorney fees under ORS 197.830(15)(b), it is not sufficient to assert a "probable cause" argument on the merits of that assignment of error if the argument on the merits was waived. In that circumstance, to avoid attorney fees, the petitioner must also have presented a "probable cause" argument regarding the waiver challenge. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. A petitioner fails to present a "probable cause" argument in response to a waiver challenge under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), to an assignment of error, where the petitioner makes no response to the *Miles*

waiver challenge and it is clear from the record that the issue raised in the assignment of error was not identified in the local notice of appeal. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. Where an assignment of error is subject to two separate and independent waiver challenges, one under ORS 197.763(1) and another under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), to avoid attorney fees under ORS 197.830(15)(b) the petitioner must make "probable cause" responses to both waiver challenges, in addition to a probable cause argument on the merits of the assignment of error. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. Only legal expenses necessarily related to the appeal of a challenged decision to LUBA are recoverable under ORS 197.835(10)(b); any legal expenses incurred prior to a tentative oral decision to deny an application are not recoverable. *Stewart v. City of Salem*, 63 Or LUBA 555 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. Legal expenses to prepare for an appeal to LUBA that are incurred between the date of a tentative oral decision to deny an application and the final written decision denying the application are recoverable under ORS 197.835(10)(b). *Stewart v. City of Salem*, 63 Or LUBA 555 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. ORS 197.830(15)(b) implicitly allows recovery of the "reasonable value" of attorney services, and a local government against whom attorney fees are sought under that statute is free to argue that some portion of the requested fees are unreasonable or excessive. *Stewart v. City of Salem*, 63 Or LUBA 555 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. A petitioner may recover attorney fees under ORS 197.830(15)(b) for the time his attorney spent traveling to Salem for oral argument and for attending oral argument, even if petitioner delivered oral argument *pro se* while the attorney sat in the audience. *Stewart v. City of Salem*, 63 Or LUBA 555 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. ORS 197.830(15)(b) permits recovery only of attorney fees, and does not mention or allow recovery of other expenses, costs or disbursements. *Stewart v. City of Salem*, 63 Or LUBA 555 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. In determining whether an award of attorney fees is warranted under ORS 197.830(15)(b) against a party who presented a position without probable cause to believe the position was well-founded in law or on factually supported information, the scope of the probable cause analysis is not limited to those issues or assignments of error that LUBA actually addressed in its opinion. *McGovern v. Crook County*, 63 Or LUBA 561 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. Under *Zeitoun v. Yamhill County*, 61 Or LUBA 515 (2010), where LUBA does not reach the merits of an assignment of error that a petitioner relies upon to satisfy the ORS 197.830(15)(b) probable cause test for attorney fees, and instead LUBA disposes of the assignment of error based on a waiver challenge, the petitioner must show that at

least one of the petitioner's positions regarding the waiver issue also meet the probable cause test. *McGovern v. Crook County*, 63 Or LUBA 561 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. Where two separate and independent types of waiver challenges are directed at an assignment of error that a petitioner relies upon to avoid an award of attorney fees under ORS 197.830(15)(b), the petitioner must demonstrate that at least one probable cause argument was made with respect to both types of waiver challenges. *McGovern v. Crook County*, 63 Or LUBA 561 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. Arguments that new evidence submitted on remand regarding a 2000 decision allows petitioner to raise issues regarding that 2000 decision, even if no issues were raised regarding the 2000 decision during the initial appeal to LUBA, are sufficient to surpass the probable cause threshold for attorney fees under ORS 197.830(15)(b), where a reasonable attorney could argue, based on the new evidence submitted on remand, that an issue regarding the character and legality of the 2000 decision could not have been raised, or knowingly waived, during the first appeal. *McGovern v. Crook County*, 63 Or LUBA 561 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a front yard setback reduction standard requires that views of the ocean "will not be obstructed any more" by the portion of the building that would thereby be allowed to protrude into the front yard, and that portion of the building would only result in *de minimis* obstruction of limited oblique views through small side yards, a local government is within its interpretive discretion under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), in finding that the "will not be obstructed any more" standard is met. However, petitioner's argument to the contrary was presented with "probable cause to believe the position was well-founded in law or on factually supported information," and is not subject to an award of attorney fees under ORS 197.830(15)(b). *Burton v. City of Cannon Beach*, 63 Or LUBA 591 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. In order for a party at LUBA to recover attorney fees under any statute authorizing an award of attorney fees, that party must be "represented" by an attorney before LUBA. *Stewart v. City of Salem*, 62 Or LUBA 465 (2010).

27.13 LUBA Procedures/Rules – Attorney Fees. Recoverable attorney fees at LUBA are limited to efforts spent representing a party before LUBA, and not other matters that may fall within an attorney/client relationship. *Stewart v. City of Salem*, 62 Or LUBA 465 (2010).

27.13 LUBA Procedures/Rules – Attorney Fees. No statute authorizing recovery of attorney fees incurred before LUBA also authorizes LUBA to award attorney fees incurred before the Court of Appeals on appeal of a LUBA decision. *Stewart v. City of Salem*, 62 Or LUBA 465 (2010).

27.13 LUBA Procedures/Rules – Attorney Fees. Attorney fees under ORS 197.830(15)(b) are not warranted where the petitioner argued that the county was required under its code to provide for continuation of existing streets in adjoining subdivisions and reasonable persons could disagree, based on the plat of the adjoining subdivision that showed a street apparently stubbed to the common property line, whether the code provision required that street to be continued into the proposed subdivision. *Burness v. Douglas County*, 62 Or LUBA 555 (2011).

27.13 LUBA Procedures/Rules – Attorney Fees. A petitioner's argument that the city's notice of hearing "did not reasonably describe the local government's final action" within the meaning of ORS 197.830(3) was not so lacking in merit as to justify an award of attorney fees under ORS 197.830(15)(b), where the city's notice did not provide a great deal of detail about the precise mixed-use nature of the proposal, and petitioner raised a fair question about whether the map attached to the notice was adequate to elaborate on the precise nature of the proposal. *Duenweg v. City of Medford*, 61 Or LUBA 495 (2010).

27.13 LUBA Procedures/Rules – Attorney Fees. Under ORS 197.830, where a local government's notice of hearing is deficient a petitioner may be able to file a delayed LUBA appeal. A petitioner's failure to establish he was "misled" by the city's posted or published notice does not merit an award of attorney fees under ORS 197.830(15)(b), where the LUBA decision that established that a person in petitioner's circumstances must establish that he was misled to be eligible to file a delayed notice of intent to appeal under ORS 197.830(3) was not issued until shortly before LUBA dismissed petitioner's LUBA appeal as untimely filed. *Duenweg v. City of Medford*, 61 Or LUBA 495 (2010).

27.13 LUBA Procedures/Rules – Attorney Fees. LUBA will deny a motion for attorney fees under ORS 197.830(15(b), where the party against whom attorney fees is sought did not file a brief, and the movant fails to identify any "position" the party presented in the appeal. *Swails v. Clackamas County*, 61 Or LUBA 503 (2010).

27.13 LUBA Procedures/Rules – Attorney Fees. Under ORS 197.830(15)(b) LUBA is to award attorney fees against a party it "presented a position without probable cause to believe the position was well-founded in law or on factually supported information." If a petitioner wishes to rely on arguments he made on the merits of an issue, and LUBA found that petitioner waived that issue under ORS 197.825(2)(a) and *Miles v. City of Florence*, 190 Or App 500, 506-507, 79 P3d 382 (2003), by failing to raise the issue during the local hearing and his local notice of appeal, petitioner may only rely on his arguments on the merits if he also had probable cause to believe his arguments in response to the county's waiver argument were well founded. *Zeitoun v. Yamhill County*, 61 Or LUBA 515 (2010).

27.13 LUBA Procedures/Rules – Attorney Fees. Where LUBA concludes that a petitioner had probable cause to believe his responses to a county's claims that he waived an issue by failing to raise the issue during the local hearing and in his local notice of appeal were well founded, even though LUBA ultimately concluded the issue was waived, petitioner may rely on his arguments on the merits of the issue in responding to a motion for attorney fees. *Zeitoun v. Yamhill County*, 61 Or LUBA 515 (2010).

27.13 LUBA Procedures/Rules – Attorney Fees. Although LUBA and the Court of Appeals disagreed with intervenor that the holding in *Citizens for Responsibility v. Lane County*, 207 Or App 500, 142 P3d 486 (2006), a case involving firearms training facilities, should be extended to apply to dwellings on forest land that were not lawfully established, the argument that the same reasoning should apply to dwellings on forest land was not unreasonable and an award of attorney fees is not warranted. *Friends of Yamhill County v. Yamhill County*, 60 Or LUBA 493 (2010).

27.13 LUBA Procedures/Rules – Attorney Fees. When a challenged decision does not make it clear that the local government relied on its general planning and zoning authority to authorize residential through-the-fence (TTF) airport uses, rather than state statutes that explicitly authorize only commercial and industrial TTF programs, a petitioner satisfies the ORS 197.830(15)(b) probable cause standard by arguing that the decision improperly relied on the state statutes for authority in approving the residential TTF use. *Port of St. Helens v. City of Scappoose*, 59 Or LUBA 516 (2009).

27.13 LUBA Procedures/Rules – Attorney Fees. When a notice of intent to appeal (NITA) is filed more than 21 days after a local government's final decision and the petitioner relies on ORS 197.610 to 197.625 to argue that the NITA was timely filed because he did not receive notice of the decision pursuant to the statute, if the petitioner makes no reasonable attempt to show why the decision is a post-acknowledgment plan amendment subject to the statute or even if the statute did apply why he did not receive notice of the decision, then an award of attorney fees is warranted. *Sommer v. City of Cave Junction*, 58 Or LUBA 671 (2008).

27.13 LUBA Procedures/Rules – Attorney Fees. When a party prevails on at least one assignment of error an award of attorney fees is not warranted, even if its arguments on the other assignments of error were without merit. *Waluga Neighborhood Association v. City of Lake Oswego*, 58 Or LUBA 675 (2008).

27.13 LUBA Procedures/Rules – Attorney Fees. The fact that a prevailing party is a neighborhood association has no bearing on whether an award of attorney fees is warranted. A neighborhood association must make the same demonstration as any other party to obtain an award of attorney fees. *Waluga Neighborhood Association v. City of Lake Oswego*, 58 Or LUBA 675 (2008).

27.13 LUBA Procedures/Rules – Attorney Fees. There was "probable cause to believe [a] position was well-founded" under ORS 197.830(15)(b) where one of the non-prevailing party's arguments in the appeal was based on actions by city planning staff that led the non-prevailing party to believe that a local appeal of a response to their letter to the planning staff was available to them. *Ortman v. City of Forest Grove*, 56 Or LUBA 813 (2008).

27.13 LUBA Procedures/Rules – Attorney Fees. In determining whether to grant a motion for attorney fees, there is no different standard for attorneys and non-attorneys; rather, LUBA evaluates whether *any* reasonable lawyer would conclude that *any* of the positions taken by the party on appeal possesses legal merit. *Sommer v. City of Cave Junction*, 56 Or LUBA 818 (2008).

27.13 LUBA Procedures/Rules – Attorney Fees. Nothing in the text of ORS 197.830(15)(b) or LUBA's rules prevents a prevailing party that is a governing body from being awarded attorney fees. *Sommer v. City of Cave Junction*, 56 Or LUBA 818 (2008).

27.13 LUBA Procedures/Rules – Attorney Fees. While it is close question, an argument that an amended franchise agreement between the county and a non-conforming landfill is a land use decision subject to LUBA's jurisdiction, because the agreement is a de facto nonconforming use

verification or a de facto authorization to expand or alter the landfill, is an argument that a reasonable lawyer could advance. Accordingly, that argument is sufficient to avoid attorney fees under the ORS 197.835(15)(b) "probable cause" standard. *Kamp v. Washington County*, 55 Or LUBA 711 (2007).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a petitioner makes a *prima facie* case that a city's position was "lacking in probable cause," and the city does not respond to the motion for attorneys fees, the motion for attorney fees will be granted. *7th Street Station LLC v. City of Corvallis*, 55 Or LUBA 732 (2008).

27.13 LUBA Procedures/Rules – Attorney Fees. Even though petitioners' argument that a local comprehensive plan policy required broad evaluation of cumulative impacts of a development was rejected, petitioners' argument was "subject to reasonable, rational, or honest discussion" such that no award of attorneys fees was warranted. *Wolfgram v. Douglas County*, 54 Or LUBA 775 (2007).

27.13 LUBA Procedures/Rules – Attorney Fees. An award of attorney fees is not warranted against a party who, faced with the possibility that a concession agreement that was not appealed would later be immune to challenge in the absence of an appeal to LUBA, appealed the decision and argued that the decision had the effect of authorizing a conditional use. *Dorall v. Coos County*, 53 Or LUBA 622 (2007).

27.13 LUBA Procedures/Rules – Attorney Fees. When a petitioner submits a letter as the petition for review that is so grossly deficient that it is not even recognized as a petition for review, and that letter provides no basis for reversal or remand of the challenged decision, an award of attorney fees under ORS 197.830(15)(b) is warranted. *Gallagher v. City of Myrtle Point*, 50 Or LUBA 769 (2005).

27.13 LUBA Procedures/Rules – Attorney Fees. There is no bright line that separates significant impact land use decisions from those whose impacts are not sufficient to meet the test. Where a petitioner argues that a lot line adjustment constitutes a significant impact land use decision because the decision would violate covenants, conditions, and restrictions for the property that prevent abandonment of a golf course, LUBA will not award attorney fees when a petitioner is unable to link the significant impacts directly to the challenged decision. *Jewett v. City of Bend*, 48 Or LUBA 631 (2004).

27.13 LUBA Procedures/Rules – Attorney Fees. When a case is dismissed on jurisdictional grounds, the arguments presented on that issue determine whether attorney fees will be awarded. When an appeal is decided on the merits, whether attorney fees are awarded is determined by the arguments made in the assignments of error and the responses to those assignments of error. *Cape v. City of Beaverton*, 47 Or LUBA 625 (2004).

27.13 LUBA Procedures/Rules – Attorney Fees. When annexations are specifically listed in the definition of a "minor boundary change" and are not listed in the definition of a "major boundary change," no reasonable attorney would argue that annexations are a "major boundary change." *Cape v. City of Beaverton*, 47 Or LUBA 625 (2004).

27.13 LUBA Procedures/Rules – Attorney Fees. When a prior decision specifically rejects a party's argument made to LUBA, no reasonable attorney would repeat that argument without acknowledging the prior decision, providing some argument as to why the prior decision was wrong or should be overturned, or providing any other explanation or rationale for the argument. *Cape v. City of Beaverton*, 47 Or LUBA 625 (2004).

27.13 LUBA Procedures/Rules – Attorney Fees. An assertion that petitioner resided within the 250-foot notice area is based on factually supported information, where petitioner examined maps and physically measured the distance between her house and the subject property. The fact that more detailed or better-scaled maps not available to petitioner showed the contrary does not demonstrate that petitioner's factual assertion was not well-founded. *Brinker v. Tillamook County*, 44 Or LUBA 832 (2003).

27.13 LUBA Procedures/Rules – Attorney Fees. A transfer to circuit court is a statutory alternative to dismissal where LUBA concludes that the appealed decision is not a land use decision, and a transfer is therefore properly treated as a dismissal of the appeal for purposes of determining who is the prevailing party. *Maxwell v. City of Happy Valley*, 44 Or LUBA 852 (2003).

27.13 LUBA Procedures/Rules – Attorney Fees. The scope of the exception to LUBA's jurisdiction for decisions that are "fiscal" in nature is sufficiently ill-defined that LUBA's transfer of a precautionary appeal of a decision that establishes a reimbursement district to circuit court does not warrant an award of attorney fees against petitioner. *Maxwell v. City of Happy Valley*, 44 Or LUBA 852 (2003).

27.13 LUBA Procedures/Rules – Attorney Fees. Filing a motion for voluntary remand does not "present a position" that may potentially justify an award of attorney fees pursuant to ORS 197.830(15)(b) and OAR 661-010-0075(1)(e). To the extent a motion for voluntary remand may be viewed as a "position," it is essentially is a concession of error. *Rogers v. City of Eagle Point*, 43 Or LUBA 592 (2002).

27.13 LUBA Procedures/Rules – Attorney Fees. Oregon Rules of Civil Procedure 17, which allows sanctions for frivolous pleadings, is not applicable to proceedings before LUBA. ORS 197.830(15)(b) and OAR 661-010-0075(1)(e) provide the only standards for sanctioning frivolous positions presented to LUBA. Under those provisions, LUBA may not award attorney fees based on allegations that the local government acted in "bad faith" in failing to file a motion for voluntary remand earlier in the LUBA proceeding. *Rogers v. City of Eagle Point*, 43 Or LUBA 592 (2002).

27.13 LUBA Procedures/Rules – Attorney Fees. An award of attorney fees is not warranted against a party whose only "position" was an unsuccessful motion to take evidence under OAR 661-010-0045 filed prior to the parties' briefs, where LUBA concludes that a reasonable lawyer would have filed the motion, notwithstanding LUBA's general practice to deny such motions as premature until the parties' briefs have been filed. *Pynn v. City of West Linn*, 42 Or LUBA 602 (2002).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a city zoning map correction procedure permits administrative corrections to current city zoning maps to make them consistent with the originally adopted zoning map or legal description upon which the original zoning was based, a city commits legal error by finding that the existing zoning map may be corrected to be consistent with an intermediate zoning map that is not included in the record before LUBA. An award of attorney fees under OAR 661-010-0075(1)(e)(A) and ORS 197.830(15)(b) is warranted, where the city argues that such findings are adequate and supported by substantial evidence. *6710 LLC v. City of Portland*, 41 Or LUBA 608 (2002).

27.13 LUBA Procedures/Rules – Attorney Fees. Where no attempt is made to justify the hourly rate used in a motion for attorney fees, and the requested hourly rate is significantly higher than the relevant hourly rates shown in an Oregon State Bar Economic Survey for the community for attorneys with the same number of years of experience, LUBA will reduce the requested attorney fees to reflect the hourly rate shown in the Oregon State Bar Economic Survey. *6710 LLC v. City of Portland*, 41 Or LUBA 608 (2002).

27.13 LUBA Procedures/Rules – Attorney Fees. Filing a notice of intent to appeal does not present the position that a challenged decision is a final land use decision, for purposes of an award of attorney fees pursuant to OAR 661-010-0075(1)(e)(A) and ORS 197.830(15)(b), when the appeal is filed for precautionary purposes and the petitioners do not oppose the motion to dismiss. *Harcourt v. Marion County*, 40 Or LUBA 610 (2001).

27.13 LUBA Procedures/Rules – Attorney Fees. LUBA will award attorney fees pursuant to ORS 197.830(15)(b) where petitioner fails to articulate a legal basis for reversal or remand. *Schaffer v. City of Turner*, 37 Or LUBA 1066 (2000).

27.13 LUBA Procedures/Rules – Attorney Fees. LUBA will apply the factors provided in ORS 20.075 for guidance in exercising its discretion to determine whether the amount of attorney fees requested under ORS 197.830(15)(b) is reasonable. *Schaffer v. City of Turner*, 37 Or LUBA 1066 (2000).

27.13 LUBA Procedures/Rules – Attorney Fees. Consistent with the legislative policies for timely resolution of land use disputes, and encouragement of alternative dispute resolution, LUBA will not consider attorney fees incurred in mediation or in pursuit of settlement in determining an award of reasonable attorney fees under ORS 197.830(15)(b). *Schaffer v. City of Turner*, 37 Or LUBA 1066 (2000).

27.13 LUBA Procedures/Rules – Attorney Fees. Where petitioner files nothing more than a notice of intent to appeal, petitioner has not presented a position, for purposes of an award of attorney fees under ORS 197.830(14)(b). *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580 (2000).

27.13 LUBA Procedures/Rules – Attorney Fees. ORS 197.835(10)(a)(A) mandates that LUBA reverse a land use decision where a "local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]" If a decision is reversed under ORS 197.835(10)(a)(A), ORS 197.835(10)(b) requires that LUBA

award attorney fees to the applicant. However, those statutes do not apply to a land use decision that is reversed because it is outside the discretion allowed under an LCDC administrative rule. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

27.13 LUBA Procedures/Rules – Attorney Fees. A local government's land use decision does not a present a "position" to the Board for the purpose of determining whether or not an award of attorney fees against the local government is required under ORS 197.830(14)(b). *Wolverton v. Crook County*, 36 Or LUBA 757 (1999).

27.13 LUBA Procedures/Rules – Attorney Fees. A nonprevailing party that presents arguments for the extension of principles of LUBA case law does not present a position without probable cause to believe the position is well-founded in law. *Abadi v. Washington County*, 36 Or LUBA 748 (1999).

27.13 LUBA Procedures/Rules – Attorney Fees. Respondent's attempt to distinguish petitioners' case from well-settled legal principles does not necessarily mean that such approach was void of any rational, reasonable or honest discussion meriting the recovery of attorney fees under OAR 661-010-0075(1)(e)(A) and ORS 197.830(14)(b). *Witzel v. Harney County*, 35 Or LUBA 806 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. A prevailing party that moves for an award of attorney fees has the responsibility to not only allege any necessary facts to support its motion, but also to establish why, as a legal matter, it is statutorily entitled to relief. *Gutoski v. Lane County*, 35 Or LUBA 803 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. LUBA will not supply the legal arguments or analysis that establish that no reasonable lawyer could conclude that any of the legal points asserted on appeal possessed legal merit. *Gutoski v. Lane County*, 35 Or LUBA 803 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. A prevailing party's bald assertion that any challenge to a local government's decision reviewed under the "clearly wrong" standard is one that no reasonable lawyer could conclude possessed legal merit is itself clearly wrong. *Gutoski v. Lane County*, 35 Or LUBA 803 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. A petitioner does not "present a position" in a notice of intent to appeal, within the meaning of ORS 197.830(14)(b), for purposes of an award of attorney fees. *Dornan v. Yamhill County*, 35 Or LUBA 786 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. Positions presented during the local proceedings that lead to a decision that is later appealed to LUBA are not positions presented to LUBA, for purposes of an award of attorney fees under ORS 197.830(14)(b). *Dornan v. Yamhill County*, 35 Or LUBA 786 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. Arguments presented in a petition for attorney fees by the prevailing party at LUBA cannot, under ORS 197.830(14)(b), provide a basis for an

award of attorney fees to the nonprevailing party in the appeal. *Dornan v. Yamhill County*, 35 Or LUBA 786 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. A local government that simply files the local record and does not file or join in a brief or other document at LUBA defending its decision does not present a position "as a litigant" and cannot be required to pay attorney fees under ORS 197.830(14)(b). *Hearne v. Baker County*, 35 Or LUBA 768 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. The city presented a position to LUBA for purposes of ORS 197.830(14)(b), where the city submitted a memorandum on jurisdiction, even though the city did not write a response brief, appear in the appeal, or participate in oral argument. *Lewelling Neighborhood Dist. v. City of Milwaukie*, 35 Or LUBA 764 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. ORS 197.845(3) authorizes an award of attorney fees when a quasi-judicial decision for which a stay has been granted is affirmed by LUBA. However, the attorney fees recoverable under ORS 197.845(3) are limited to attorney fees related to the stay. *Walton v. Clackamas County*, 34 Or LUBA 829 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. ORS 197.845(3) authorizes an award of attorney fees when a quasi-judicial decision for which a stay has been granted is affirmed by LUBA. Where LUBA dismisses the appeal, an award of attorney fees is not authorized by ORS 197.845(3). *Walton v. Clackamas County*, 34 Or LUBA 829 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. Where an appeal is dismissed for failure to exhaust remedies, but involves a complex interaction of the notice provisions of ORS 197.195 (governing notice of limited land use decisions), the tolling provisions of ORS 197.830(4) and the exhaustion requirement of ORS 197.825(2)(a), the question of LUBA's jurisdiction over the appeal was open to doubt and reasonable discussion, and no attorney fees are warranted under ORS 197.830(14)(b). *Walton v. Clackamas County*, 34 Or LUBA 829 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. Where LUBA dismisses an appeal prior to consideration of the merits of the appeal, LUBA will consider the arguments presented by petitioners in opposition to the motion to dismiss in deciding whether an award of attorney fees is warranted. *Bruce v. City of Hillsboro*, 34 Or LUBA 820 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. Where LUBA issues an order requiring that the notice of intent to appeal be served on all persons entitled to service of the notice under OAR 661-010-0015 and petitioners fail to do so, arguing instead that they should be able to rely on an erroneous statement by the city concerning the persons entitled to notice, petitioners present a position that is not "open to doubt, or debatable, or subject to rational, reasonable or honest discussion," and an award of attorney fees is warranted. *Bruce v. City of Hillsboro*, 34 Or LUBA 820 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. An evidentiary hearing to resolve "disputes regarding attorney fees" pursuant to OAR 661-010-0045(1) is not warranted where the motion for

an evidentiary hearing is filed before LUBA has entered its final opinion. *Ackerley Outdoor Advertising v. City of Portland*, 34 Or LUBA 736 (1998).

27.13 LUBA Procedures/Rules – Attorney Fees. The fact that the petitioner was attempting to purchase the property at issue in a LUBA appeal does not compel a conclusion that the appeal was brought without probable cause to believe it was well-founded. *Pfeifer v. City of Silverton*, 33 Or LUBA 869 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. Under ORCP 54A(3), where petitioner voluntarily dismisses an appeal, and no circumstances indicate otherwise, intervenor-respondent is the prevailing party. *Pfeifer v. City of Silverton*, 33 Or LUBA 869 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. Attorney fees will not be awarded under ORS 197.830(14)(b) where LUBA's final opinion determined it was not "clear" that previously adopted comprehensive plan amendments rendered a decision to construct a bridge and related improvements the nondiscretionary culmination of the plan amendments. *Knapp v. City of Jacksonville*, 33 Or LUBA 834 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. A petitioner's failure to prevail on every assignment of error does not preclude an award of attorney fees against a local government that advances a non-meritorious defense to one or more assignments of error. *Spencer Creek Neighbors v. Lane County*, 33 Or LUBA 824 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. LUBA will award attorney fees where it determines that none of the arguments raised in response to a sustained assignment of error are "open to doubt, or subject to rational, reasonable, or honest discussion." *Spencer Creek Neighbors v. Lane County*, 33 Or LUBA 824 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. Applying ORS 197.830(14)(b) and *Contreras v. City of Philomath*, 32 Or LUBA 465 (1996), an award of attorney fees is appropriate against a petitioner who does not present any issues that challenge the local government's final decision or the findings supporting that decision. *Young v. City of Sandy*, 33 Or LUBA 817 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. Although ORS 197.830(14)(b) makes an award of attorney fees mandatory where LUBA finds that an appeal is not supported by probable cause, LUBA is afforded the discretion to determine what amount of attorney fees is "reasonable" under the specific facts of the case. *Young v. City of Sandy*, 33 Or LUBA 817 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. The probable cause standard stated in ORS 197.830(14)(b) creates a low threshold. *Brown v. City of Ontario*, 33 Or LUBA 803 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. ORS 197.830(14)(b) will not be applied to punish LUBA appellants who vigorously pursue all reasonable legal arguments just because, when viewed with the benefit of hindsight, those arguments do not entitle them to prevail. *Brown v. City of Ontario*, 33 Or LUBA 803 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. The context of ORS 197.830(14)(b) indicates that the statute was not intended to require an award of attorney fees where any single assertion set forth in a petition for review is not supported by probable cause. *Fechtig v. City of Albany*, 33 Or LUBA 796 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. Where LUBA determines that at least one of petitioner's arguments is sufficiently well-founded to avoid an award of attorney fees, the Board will not apply the ORS 197.830(14)(b) standard to all other assignments of error in search of an argument that does not meet that standard. *Fechtig v. City of Albany*, 33 Or LUBA 796 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. An award of attorney fees is not appropriate where petitioner raised issues that were subject to reasonable discussion, and LUBA cannot say that no reasonable lawyer would find petitioner's arguments were meritless. *Fraley v. Deschutes County*, 33 Or LUBA 790 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. In determining whether an award of attorney fees is required, LUBA will not consider whether a party is represented by an attorney but only whether there is "no objective legal basis for the appeal," *i.e.*, whether *any* reasonable lawyer would conclude that *any* of the positions taken by the party on appeal possesses legal merit. *Squires v. City of Portland*, 33 Or LUBA 783 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. In order to recover attorney fees under ORS 197.830(14)(b), the prevailing party must present LUBA with a signed and detailed statement of the amount of attorney fees which minutely itemizes or particularizes the services rendered and the time devoted to the services. *Squires v. City of Portland*, 33 Or LUBA 783 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a county moves for voluntary remand before it presents any position before LUBA in the form of a response brief or otherwise, there is no basis on which to make a determination under ORS 197.830(14)(b) regarding an award of attorney fees. *Eppich v. Clackamas County*, 33 Or LUBA 774 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. LUBA's disposition of an appeal by memorandum opinion does not necessarily indicate that a petitioner's position was presented without probable cause to believe it was well founded. *Arnold v. Columbia County*, 33 Or LUBA 766 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. Petitioner did not have probable cause to believe that a "preannexation agreement" entered into by the city and intervenor was an appealable final land use decision; accordingly, an award of attorney fees is required under ORS 197.830(14)(b). *Crist v. City of Beaverton*, 32 Or LUBA 495 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. Under ORS 197.830(14)(b), LUBA must make an award of attorney fees to a prevailing party if it determines that no reasonable lawyer would conclude that any of the legal points asserted on appeal possessed legal merit. In making this determination, LUBA will consider whether any of the issues raised on appeal were open to doubt,

or subject to rational, reasonable or honest discussion. *Contreras v. City of Philomath*, 32 Or LUBA 465 (1996).

27.13 LUBA Procedures/Rules – Attorney Fees. An award of attorney fees to intervenor is appropriate under ORS 197.830(14)(b) where petitioners' appeal to LUBA purported to challenge actions by the city that could not even arguably be depicted as land use decisions subject to LUBA jurisdiction. *Contreras v. City of Philomath*, 32 Or LUBA 465 (1996).

27.13 LUBA Procedures/Rules – Attorney Fees. Under ORS 197.830(14)(b), LUBA is required to award reasonable attorney fees to a prevailing party upon a finding that another party presented a position without probable cause to believe the position was well-founded in law or on factually supported information. *Pfeifer v. City of Silverton*, 32 Or LUBA 463 (1996).

27.13 LUBA Procedures/Rules – Attorney Fees. Where petitioner voluntarily dismisses his appeal, intervenors are not entitled to an award of attorney fees because neither party is the "prevailing party" for purposes of ORS 197.830(14)(b). *Pfeifer v. City of Silverton*, 32 Or LUBA 463 (1996), *rev'd and rem'd*, 146 Or App 191, 931 P2d 833 (1997).

27.13 LUBA Procedures/Rules – Attorney Fees. If a petition for attorney fees is included in a party's brief, the signed and detailed statement justifying the amount of the fees must be filed after the issuance of LUBA's opinion, and the opposing party may have 10 days to respond. *Cox v. Yamhill County*, 31 Or LUBA 270 (1996).

27.13 LUBA Procedures/Rules – Attorney Fees. Before LUBA will consider a petition for attorney fees, the petition must be supported by a statement of the amount requested, supported by sufficient detail to justify the award. *Cox v. Yamhill County*, 31 Or LUBA 270 (1996).

27.13 LUBA Procedures/Rules – Attorney Fees. Although OAR 661-10-075(1)(a) states that petitions for attorney fees must be filed within 14 days after LUBA's final order is issued, LUBA will allow a petition for attorney fees in the parties' briefs. *Cox v. Yamhill County*, 31 Or LUBA 270 (1996).

27.13 LUBA Procedures/Rules – Attorney Fees. ORS 197.845(3) requires an award of attorney fees and damages when LUBA affirms a quasi-judicial land use decision or limited land use decision for which a stay was granted. *Save Amazon Coalition v. City of Eugene*, 30 Or LUBA 448 (1995).

27.13 LUBA Procedures/Rules – Attorney Fees. LUBA normally considers several factors in determining whether to accept a late petition for attorney fees and damages: (1) length of delay; (2) validity of the explanation of lateness; and (3) presence or absence of prejudice. *Save Amazon Coalition v. City of Eugene*, 30 Or LUBA 448 (1995).

27.13 LUBA Procedures/Rules – Attorney Fees. Where LUBA's final opinion and order remands the challenged decision for further proceedings, rather than reversing the decision and ordering the local government to approve petitioners' application, LUBA is not authorized to

award attorney fees to petitioners under ORS 197.835(8). *Spathas v. City of Portland*, 29 Or LUBA 579 (1995).

27.13 LUBA Procedures/Rules – Attorney Fees. Where petitioner does not allege in its petition for attorney fees that the local government lacked probable cause to believe its positions in an appeal were well-founded or that those positions were presented primarily for a purpose other than to secure appropriate action by LUBA, the petition for attorney fees will be denied. ORS 197.830(15)(b); OAR 661-10-075(1)(d)(A). *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 624 (1994).

27.13 LUBA Procedures/Rules – Attorney Fees. Although positions taken by a party in an appeal before LUBA may be the basis for an award of attorney fees under ORS 197.830(15)(b), positions taken during local proceedings or in the challenged land use decision itself may not be the basis for an award of attorney fees by LUBA. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).

27.13 LUBA Procedures/Rules – Attorney Fees. Where LUBA determines a local government decision is precluded by a prior circuit court judgment, LUBA will not conclude the local government presented argument to the contrary "without probable cause to believe the position was well-founded," where application of the principles of claim preclusion to the challenged decision is somewhat uncertain. In such circumstances LUBA will not award attorney fees pursuant to ORS 197.830(15)(b). *Joines v. Linn County*, 25 Or LUBA 759 (1993).

27.13 LUBA Procedures/Rules – Attorney Fees. In order to award attorney fees under ORS 197.830(15)(b), LUBA must find that the petitioner presented a position (1) without probable cause to believe it was well-founded, *and* (2) primarily for a purpose other than securing appropriate action by LUBA. *City of North Plains v. Washington County*, 24 Or LUBA 623 (1993).

27.13 LUBA Procedures/Rules – Attorney Fees. The presentation of a losing argument before LUBA, of itself, does not satisfy the requirement of ORS 197.830(15)(b) that a party have presented a position "without probable cause to believe the position was well-founded." The fact that a party's attorney may have unsuccessfully presented contrary positions in other cases concerning somewhat related questions is also not enough to establish that the requirement of ORS 197.830(15)(b) is met. *City of North Plains v. Washington County*, 24 Or LUBA 623 (1993).

27.13 LUBA Procedures/Rules – Attorney Fees. LUBA's rejection of petitioners' arguments that the challenged decision is final, does not mean petitioners' arguments were presented without probable cause to believe they were well-founded. Whether a challenged decision is a "final" decision is, more often than not, far from obvious. *City of North Plains v. Washington County*, 24 Or LUBA 623 (1993).

27.13 LUBA Procedures/Rules – Attorney Fees. Where the prevailing party does not allege or argue that the opposing party "presented a position * * * primarily for a purpose other than to secure appropriate action by [LUBA]," LUBA will deny the prevailing party's petition for award of attorney fees pursuant to ORS 197.830(15)(b). *Miller v. City of Dayton*, 24 Or LUBA 616 (1992).

27.13 LUBA Procedures/Rules – Attorney Fees. ORS 197.835(8) only applies where LUBA reverses a local government's denial of a development application and orders that the development be approved. Where the challenged decision is simply a request for an interpretation of a local government's ordinances, and there is no development application for LUBA to order approved, a petition for attorney fees will be denied. *Harmony House, Inc. v. City of Salem*, 23 Or LUBA 683 (1992).

27.13 LUBA Procedures/Rules – Attorney Fees. An award of attorney fees against a local government pursuant to ORS 197.830(15)(b) is not justified simply because the local government presented a position on appeal which lacked legal foundation, or may have engaged in an improper course of conduct during the proceedings below. *Bradbury v. City of Independence*, 23 Or LUBA 670 (1992).

27.13 LUBA Procedures/Rules – Attorney Fees. Even if the positions presented in petitioner's petition for review were not well-founded, that does not necessarily mean they were presented "primarily for a purpose other than to secure appropriate action by the board," as required for the award of attorney fees under ORS 197.830(15)(b). *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 830 (1992).

27.13 LUBA Procedures/Rules – Attorney Fees. Petitioner's desire to defer pursuing its appeal before LUBA, because of the possibility that the outcome of its action in federal court would make it unnecessary to seek additional remedies through the LUBA appeal, does not indicate the LUBA appeal was brought for an improper purpose, as required for the award of attorney fees under ORS 197.830(15)(b). *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 830 (1992).

27.13 LUBA Procedures/Rules – Attorney Fees. A party's presentation of a losing argument before LUBA, standing alone, does not satisfy the requirement of ORS 197.830(15)(b) that a party have presented a position "without probable cause to believe the position was well-founded." *Schatz v. City of Jacksonville*, 21 Or LUBA 571 (1991).

27.13 LUBA Procedures/Rules – Attorney Fees. In order to award attorney fees under ORS 197.830(15)(b), LUBA must determine that the parties against whom the award is requested presented a position without probable cause to believe it was well-founded, and primarily for a purpose other than securing appropriate action by LUBA. *Knapp v. City of Jacksonville*, 20 Or LUBA 535 (1991).

27.13 LUBA Procedures/Rules – Attorney Fees. Petitioners' request for *reversal* of the appealed decision was presented with probable cause to believe it was well-founded where any of petitioners' challenges to the appealed decision (1) was presented with probable cause to believe it was well-founded, and (2) if upheld, would allow LUBA to *reverse* the appealed decision. *Knapp v. City of Jacksonville*, 20 Or LUBA 535 (1991).

27.13 LUBA Procedures/Rules – Attorney Fees. Where a county adopted additional standards, addressing annual gross farm income and crop density and acreage, for determining whether a proposed dwelling is "in conjunction with farm use," the county's argument to LUBA that its

standards eliminate discretion from the determination of whether a dwelling is "in conjunction with farm use," although incorrect, was not presented without probable cause to believe the position was well-founded and, therefore, an award of attorney fees is not warranted. *McKay Creek Valley Assoc. v. Washington County*, 20 Or LUBA 494 (1990).

27.13 LUBA Procedures/Rules – Attorney Fees. Petitioner's challenge to nonessential findings is not sufficient to justify a finding by LUBA pursuant to ORS 197.830(15)(b) that petitioner's "position was presented without probable cause to believe the position was well-founded." *Griffith v. City of Milwaukie*, 19 Or LUBA 614 (1990).

27.13 LUBA Procedures/Rules – Attorney Fees. For attorney fees to be awarded under ORS 197.830(15)(b), LUBA must find both that the losing party lacked probable cause to believe its position was well founded and that its position was presented primarily for a purpose other than to secure appropriate action by LUBA. *Bradbury v. City of Independence*, 19 Or LUBA 584 (1990).

27.14 LUBA Procedures/Rules – Official Notice. In an appeal of a local government approval of a utility public way use permit authorizing installation of telecommunication-related facilities, LUBA will take official notice of portions of the local government's department of public works manual under ORS 40.090(7) where the manual was adopted by a local administrative order, as authorized by the local code, and where it is a reflection of rights derived from the local code authorizing the applicant to seek a permit to place the facilities in the right-of-way. *Vaccher v. City of Eugene*, 80 Or LUBA 10 (2019).

27.14 LUBA Procedures/Rules – Official Notice. LUBA will not take official notice of adjudicative facts contained within an officially noticed document, regardless of whether those facts may be established through reference to sources whose accuracy may not reasonably be questioned. *Shaff v. City of Medford*, 79 Or LUBA 317 (2019).

27.14 LUBA Procedures/Rules – Official Notice. Under ORS 40.090(2), while LUBA may take official notice of a report prepared by the United States Center for Disease Control as a public or private official act of the legislative, executive, or judicial department of the United States, it may not consider such a report to establish adjudicative facts not in the record. *Shaff v. City of Medford*, 79 Or LUBA 317 (2019).

27.14 LUBA Procedures/Rules – Official Notice. Under ORS 40.090(2), while LUBA may take official notice of a manual prepared by the Oregon Department of Transportation as an official act of a state agency, it may not consider such a manual to establish adjudicative facts not in the record. *Shaff v. City of Medford*, 79 Or LUBA 317 (2019).

27.14 LUBA Procedures/Rules – Official Notice. LUBA will not take official notice of a memorandum that is addressed to the local governing body and which bears a note indicating that it was prepared for the local governing body's consideration during a relevant proceeding, where the proponent of such official notice has not established that the memorandum is part of the local government comprehensive plan under ORS 40.090(7) and where, if the memorandum actually were before the local governing body in the proceeding, it would have been included in the record under OAR 661-010-0025(1)(b). *Shaff v. City of Medford*, 79 Or LUBA 317 (2019).

27.14 LUBA Procedures/Rules – Official Notice. Because the general standards for admissibility of evidence, including evidentiary thresholds for relevance and probative value, do not apply to LUBA proceedings, arguments that an ordinance updating the local code is not relevant to LUBA's disposition of the appeal and that a DLCD notice of adoption regarding that ordinance is not probative provide no basis for denying a motion to take official notice of those documents as public law under ORS 40.090(7) and (2). *Oster v. City of Silverton*, 79 Or LUBA 1058 (2019).

27.14 LUBA Procedures/Rules – Official Notice. A Housing Strategy document that a city council accepts as guidance for staff is not an enactment or source of law that is subject to official notice under ORS 40.090(7). *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

27.14 LUBA Procedures/Rules – Official Notice. Aerial photographs and modified printouts of zoning maps generated from an electronic database, submitted in order to support a disputed

question of fact, are not official enactments of a city or a source of law that is subject to official notice under ORS 40.090(7). *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

27.14 LUBA Procedures/Rules – Official Notice. Although local legislative history is generally not subject to official notice by LUBA and cannot be considered on appeal if it is not included in the local record, where the legislative history is contemporary commentary that was adopted by the city council when it adopted the legislation, LUBA will consider the commentary. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

27.14 LUBA Procedures/Rules – Official Notice. Although LUBA may take official notice of commentary that was adopted with an ordinance, where that ordinance does not enact or amend the ambiguous zoning ordinance language at issue, it is of no significance in resolving the ambiguity. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

27.14 LUBA Procedures/Rules – Official Notice. LUBA may take official notice of a county legal lot verification decision involving the same property at issue in an appeal of a county decision approving property line adjustments, for the limited purpose of resolving a dispute regarding LUBA's scope of review over the county decision approving property line adjustments. *Sarett v. Lane County*, 76 Or LUBA 308 (2017).

27.14 LUBA Procedures/Rules – Official Notice. LUBA will not take official notice of a memorandum from the assistant director of the Oregon Department of Energy (DOE) to a staff person at the Oregon Department of Land Conservation and Development (DLCD) explaining the current opinion of the DOE, because such memorandum is not an "official act" of a state executive department pursuant to ORS 40.090(2). *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 488 (2017).

27.14 LUBA Procedures/Rules – Official Notice. A petition for review filed in a previous appeal to LUBA that results in remand is not subject to official notice under Oregon Evidence Code (OEC) 202(7) in a subsequent LUBA appeal because it is not an "ordinance, comprehensive plan or enactment of" the city. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

27.14 LUBA Procedures/Rules – Official Notice. LUBA may take official notice of local government enactments, but LUBA does not have authority to take official notice of local legislative history or adjudicative facts. *Martin v. City of Central Point*, 73 Or LUBA 422 (2016).

27.14 LUBA Procedures/Rules – Official Notice. ORS 40.090(7) and Oregon Evidence Code 202(7) authorize official notice of city ordinances. Where a copy of an ordinance that is included in the record does not include the land use findings that were adopted to support the ordinance, but those findings were adopted as an appendix to the ordinance, LUBA will take official notice of the ordinance findings. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

27.14 LUBA Procedures/Rules – Official Notice. LUBA will deny a motion to take official notice of a newspaper article, where the moving party cites no authority that would permit LUBA to take official notice of the newspaper article. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

27.14 LUBA Procedures/Rules – Official Notice. LUBA may take official notice under Oregon Evidence Code 202(2) of a Program Level Biological Assessment prepared by the Federal Emergency Management Agency (FEMA). *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

27.14 LUBA Procedures/Rules – Official Notice. Under Oregon Evidence Code 202(7) LUBA may take official notice of "[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state," as well as findings and maps incorporated by reference into the ordinance if those findings and maps are provided to LUBA. *Root v. Klamath County*, 63 Or LUBA 230 (2011).

27.14 LUBA Procedures/Rules – Official Notice. LUBA's authority to take official notice of a local government's ordinance does not extend to notice of evidence, if notice of that evidence is requested to resolve factual disputes, because LUBA's review is limited to the evidentiary record. *Root v. Klamath County*, 63 Or LUBA 230 (2011).

27.14 LUBA Procedures/Rules – Official Notice. Under OEC 202(7) and ORS 40.090(7), LUBA may take official notice of a city "ordinance, comprehensive plan, or enactment." Where a party asks that LUBA take official notice of minutes that show the city accepted an ad hoc committee report and the report itself, even assuming the minutes and ad hoc committee report constitute city enactments, LUBA will deny that request where the party asks LUBA to take official notice of those documents for their evidentiary value. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

27.14 LUBA Procedures/Rules – Official Notice. Where a party asks LUBA to take official notice of documents that appear to be drafts of early versions of Goal 4 (Forest Lands), suggested text revisions, and minutes of Land Conservation and Development Commission meetings where Goal 4 revisions were considered, but the party does not attempt to authenticate those documents, LUBA will nevertheless take official notice of those documents where opposing parties offer no reason to believe the documents are not what they appear to be. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

27.14 LUBA Procedures/Rules – Official Notice. LUBA will not take official notice of what appears to be a Department of Land Conservation and Development internal memorandum discussing the history, interpretation and proper application of Goal 4, as legislative history of the adoption and amendment of Goal 4 and the Goal 4 administrative rule, where the party asking LUBA to take official notice does not establish that the memorandum was part of any Land Conservation and Development Commission deliberations concerning the adoption of or amendments to Goal 4 or the Goal 4 administrative rule. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

27.14 LUBA Procedures/Rules – Official Notice. Under Oregon Evidence Code (OEC) 202(2), LUBA may take official notice of a Remand Order issued by the Land Conservation and Development Department. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 211 (2010).

27.14 LUBA Procedures/Rules – Official Notice. Where the petitioner requests that LUBA consider extra-record evidence in the form of a sign-up sheet that includes the city's rules for hearings, to support allegations that the city failed to abide by those rules, LUBA will take official notice of the city rules because they were adopted by resolution. However, LUBA will deny the motion with respect to extra-record copies of the sign-up sheet that were signed by participants in the proceeding below, where the petitioner fails to demonstrate how LUBA's consideration of the signed sheets would affect the outcome of the review proceeding. *Claus v. City of Sherwood*, 61 Or LUBA 520 (2010).

27.14 LUBA Procedures/Rules – Official Notice. LUBA will take official notice of the decisional law and official acts of federal agencies, including a Federal Aviation Administration (FAA) Airport Compliance Handbook and documents from an FAA enforcement proceeding. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

27.14 LUBA Procedures/Rules – Official Notice. LUBA will take official notice under OEC 202(2) of an Oregon Water Resources Department Order that modifies a water rights permit, because it is the official act of a state executive agency that establishes the law that governs access to and distribution of groundwater. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

27.14 LUBA Procedures/Rules – Official Notice. LUBA may not take official notice of facts within documents that are otherwise subject to notice under Oregon Evidence Code 202, if notice of those facts is requested for an adjudicative purpose, that is, to provide evidentiary support or countervailing evidence with respect to an approval criterion at issue in the challenged decision. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688 (2007).

27.14 LUBA Procedures/Rules – Official Notice. Municipal wastewater permits issued by the Oregon Department of Environmental Quality are "official acts" of an executive agency and thus potentially subject to official notice under Oregon Evidence Code 202(2). *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688 (2007).

27.14 LUBA Procedures/Rules – Official Notice. LUBA will not take official notice of an Oregon Department of Justice order denying a public records request, where the only reason the movant requests that LUBA consider the order is to establish an adjudicative fact, that is, that certain documents that the movant believes must exist in order to support the challenged decision in fact do not exist. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688 (2007).

27.14 LUBA Procedures/Rules – Official Notice. Because the legislative commentary to Oregon Evidence Code 202(2) indicates that the scope of "official acts" subject to official notice is not limited to generally applicable laws, rules and regulations, non-binding guidelines for issuing permits adopted by the Oregon Department of Environmental Quality are subject to official notice. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 688 (2007).

27.14 LUBA Procedures/Rules – Official Notice. An intergovernmental agreement that is an official enactment of the city and county and that acts to define the substantive law that applies to

land use applications within an urban growth area is subject to official notice under Oregon Evidence Code 202(7). *Stoloff v. City of Portland*, 51 Or LUBA 812 (2006).

27.14 LUBA Procedures/Rules – Official Notice. LUBA may take official notice of city annexation resolutions in order to recognize the applicable law, but LUBA does not have authority to take notice of the facts contained in those resolutions regarding the number of people annexed into the city. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100 (2005).

27.14 LUBA Procedures/Rules – Official Notice. That LUBA may take judicial notice of an ordinance, comprehensive plan or enactment pursuant to OEC 202(7) does not mean that that item is or should be part of the record. *Wal-Mart Stores, Inc. v. City of Medford*, 47 Or LUBA 650 (2004).

27.14 LUBA Procedures/Rules – Official Notice. Where the party requesting that LUBA take official notice of a planning map fails to establish that the map is the kind of "enactment" that is subject to official notice, LUBA will not take official notice. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

27.14 LUBA Procedures/Rules – Official Notice. Federal census population figures and other data and petitioner's analysis of that data, offered to support petitioner's interpretation of an administrative rule, are not law that may be judicially recognized under Oregon Evidence Code 202, or material that may be considered in interpreting a statute or rule under the methodology described in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

27.14 LUBA Procedures/Rules – Official Notice. The Board will not reject an untimely and potentially prejudicial request at oral argument to take judicial notice of city legislation, where opposing parties had seven days after oral argument to respond to the request, did not request additional time, and no party demonstrated that the untimely request prejudiced the parties' substantial rights or the Board's ability to comply with its statutory deadlines. *Pearl District Neigh. Assoc. v. City of Portland*, 40 Or LUBA 436 (2001).

27.14 LUBA Procedures/Rules – Official Notice. LUBA may take official notice of an LCDC continuance order. *DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000).

27.14 LUBA Procedures/Rules – Official Notice. A letter sent by intervenor's attorney to the circuit court on a matter related to a decision subject to LUBA's review is not judicially cognizable law of which LUBA can take official notice pursuant to OEC 202. *Wilbur Residents v. Douglas County*, 37 Or LUBA 156 (1999).

27.14 LUBA Procedures/Rules – Official Notice. City transportation plans and maps consulted by the decision makers are not part of the record unless they were submitted into the record below, although such plans and maps may be legislative enactments of which LUBA may take official notice pursuant to OEC 202. *Volny v. City of Bend*, 36 Or LUBA 760 (1999).

27.14 LUBA Procedures/Rules – Official Notice. LUBA will grant a motion to strike documents attached to the petition for review, where those documents are neither part of the record submitted to LUBA nor documents of which LUBA may take official notice. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

27.14 LUBA Procedures/Rules – Official Notice. Soil tables produced by federal agencies are not official acts or enactments and thus judicially cognizable law subject to official notice, but rather are compilations of data beyond LUBA's authority to recognize outside the record under OEC 202. *DLCD v. Crook County*, 34 Or LUBA 243 (1998).

27.14 LUBA Procedures/Rules – Official Notice. Planning documents not placed before the city decision maker during the local proceedings are not part of the record, but LUBA may take official notice of local government enactments under OEC 202(7). *Downtown Community Assoc. v. City of Portland*, 31 Or LUBA 574 (1996).

27.14 LUBA Procedures/Rules – Official Notice. A local government decision on a quasi-judicial land use application is not an "ordinance, comprehensive plan or enactment" and, therefore, is not subject to official notice under OEC 202(7). *Rochlin v. City of Portland*, 29 Or LUBA 609 (1995).

27.14 LUBA Procedures/Rules – Official Notice. Under OEC 202, LUBA may take official notice of local government enactments. However, LUBA has no authority to take official notice of adjudicative facts or local legislative history. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).

27.14 LUBA Procedures/Rules – Official Notice. A document of which LUBA takes official notice does not thereby become part of the local record which may provide evidentiary support for the challenged decision. *Home Builders Assoc. v. City of Wilsonville*, 29 Or LUBA 604 (1995).

27.14 LUBA Procedures/Rules – Official Notice. LUBA will disregard references in a petition for review to items which are neither in the record nor subject to official notice. LUBA cannot take official notice of a local government ordinance if it is not provided with a copy of the ordinance. *Craven v. Jackson County*, 29 Or LUBA 125 (1995).

27.14 LUBA Procedures/Rules – Official Notice. LUBA will disregard references in a petition for review to the legislative history of a statute, where such references are supported neither by uncontested verbatim quotes nor by submission of a copy of the legislative history documents referred to. *Craven v. Jackson County*, 29 Or LUBA 125 (1995).

27.14 LUBA Procedures/Rules – Official Notice. Where a local government has adopted, by resolution or ordinance, certain portions of a technical document, only the adopted portions of the technical document are local government enactments of which LUBA may take official notice. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 541 (1995).

27.14 LUBA Procedures/Rules – Official Notice. A complaint filed by a county in a circuit court does not constitute a local government enactment of which LUBA may take official notice as

judicially cognizable law, as set out in OEC Rule 202(7). *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

27.14 LUBA Procedures/Rules – Official Notice. LUBA routinely takes official notice of local government comprehensive plans and land use regulations which establish standards applicable to appealed decisions. *McNamara v. Union County*, 28 Or LUBA 722 (1994).

27.14 LUBA Procedures/Rules – Official Notice. LUBA may take official notice of local government comprehensive plans and land use regulations under Oregon Evidence Code (OEC) Rule 202. *Jackman v. City of Tillamook*, 27 Or LUBA 704 (1994).

27.14 LUBA Procedures/Rules – Official Notice. Although LUBA is authorized to take official notice of judicially cognizable law, as set out in OEC Rule 202, LUBA does not have authority to take official notice of adjudicative facts. *ODOT v. Clackamas County*, 27 Or LUBA 141 (1994).

27.14 LUBA Procedures/Rules – Official Notice. LUBA is authorized to take official notice of judicially cognizable law, as set out in OEC Rule 202. However, a decision by a local government hearings officer on a quasi-judicial land use application is not a city or county "ordinance, comprehensive plan or enactment," subject to official notice under OEC Rule 202(7). *Testa v. Clackamas County*, 26 Or LUBA 604 (1993).

27.14 LUBA Procedures/Rules – Official Notice. LUBA may take official notice of decisions of the Oregon Supreme Court. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 821 (1993).

27.14 LUBA Procedures/Rules – Official Notice. LUBA does not have authority to take official notice of adjudicative facts. *Fleck v. Marion County*, 25 Or LUBA 745 (1993).

27.14 LUBA Procedures/Rules – Official Notice. LCDC enforcement orders are judicially cognizable law of which LUBA may take official notice. *DLCD v. Klamath County*, 24 Or LUBA 643 (1993).

27.14 LUBA Procedures/Rules – Official Notice. LUBA's review is limited by ORS 197.830(13)(a) to the record of the proceeding below, except in instances where an evidentiary hearing is authorized by ORS 197.830(13)(b). Therefore, local government enactments of which LUBA takes official notice under OEC 202 do not thereby become part of the local record which may provide evidentiary support for the challenged decision. *Ramsey v. City of Portland*, 23 Or LUBA 291 (1992).

27.14 LUBA Procedures/Rules – Official Notice. LUBA may take official notice of state legislative or administrative history to aid in interpretation of state statutes or administrative rules. However, where such documents are not part of the local record, statements of fact in the documents cannot constitute evidentiary support for the challenged decision. *Adkins v. Heceta Water District*, 23 Or LUBA 207 (1992).

27.14 LUBA Procedures/Rules – Official Notice. LUBA lacks authority to take official notice of adjudicative facts. *Murray v. Clackamas County*, 22 Or LUBA 247 (1991).

27.14 LUBA Procedures/Rules – Official Notice. Pursuant to the legislative policy of ORS 197.805 that LUBA's decisions be made consistently with sound principles governing judicial review, LUBA has authority to take official notice of judicially cognizable law, as defined in OEC 202. OEC 202(4) authorizes LUBA to take official notice of state regulations. *Blatt v. City of Portland*, 21 Or LUBA 337 (1991).

27.14 LUBA Procedures/Rules – Official Notice. LUBA does not have authority to take official notice of adjudicative facts, as set out in OEC 201. LUBA's review is limited by ORS 197.830(13)(a) to the record of the proceeding below, except in instances where an evidentiary hearing is authorized by ORS 197.830(13)(b), and where facts outside the record are essential to determining whether LUBA has jurisdiction or whether an appeal is moot. *Blatt v. City of Portland*, 21 Or LUBA 337 (1991).

27.14 LUBA Procedures/Rules – Official Notice. Findings of fact incorporated by reference into a local government moratorium ordinance are part of the judicially cognizable law of which LUBA is authorized to take official notice. Oregon Evidence Code Rule 202(7). *Schatz v. City of Jacksonville*, 21 Or LUBA 214 (1991).

27.14 LUBA Procedures/Rules – Official Notice. LUBA cannot take official notice of local legislative history. Therefore, because LUBA's review is confined to the record of the local proceeding, LUBA cannot consider local legislative history if it is not in the record. *19th Street Project v. City of The Dalles*, 20 Or LUBA 440 (1991).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Transfer to circuit court is not appropriate where LUBA concludes that one of the issues to be decided in an appeal is not within LUBA's scope of review. LUBA cannot transfer a discrete "issue" to circuit court, rather, LUBA can only transfer to circuit court a *decision* that LUBA concludes is not a "land use decision." ORS 34.102(4). *Nicita v. City of Oregon City*, 78 Or LUBA 463 (2018).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Transfer to circuit court is not appropriate where LUBA concludes that it lacks jurisdiction because petitioner has failed to establish that it is adversely affected by the decision under ORS 197.830(3). *MGP X Properties, LLC v. Washington County*, 74 Or LUBA 378 (2016).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. LUBA will reject an argument that a party was required to file a motion to transfer earlier than 14 days after an opposing party filed a motion to dismiss for lack of jurisdiction because the opposing party had consistently questioned jurisdiction during the proceedings below. OAR 661-010-0075(b) imposes the 14-day deadline from the date that LUBA's jurisdiction is challenged in the proceedings before LUBA. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. ORS 34.102 allows an appeal filed with LUBA to be transferred to circuit court and treated as a writ of review if the notice of intent to appeal to LUBA was filed with LUBA within the 60-day deadline for filing a writ of review, measured from the date of the challenged decision, and appears to assign to the circuit court the responsibility for determining whether the notice was filed within the 60-day deadline. Accordingly, where a motion to transfer is filed and LUBA has determined that the appealed decision is not reviewable as a land use decision, LUBA will transfer the appeal to circuit court without resolving arguments that the notice was not filed within the 60-day deadline. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. A determination that a condition of land use approval has or has not been complied with generally does not result in a land use decision, unless that determination involves the direct application of a comprehensive plan or land use regulation. *Egge v. Lane County*, 70 Or LUBA 1 (2014).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Under OAR 661-010-0075(11)(b), petitioners have 14 days from the date a party files a motion challenging LUBA's jurisdiction over an appealed decision to file a conditional motion to transfer the appeal to circuit court, in the event LUBA sustains the jurisdictional challenge. Where petitioners do not file a conditional motion to transfer, and LUBA concludes it lacks jurisdiction, it will dismiss the appeal. *Early v. Jackson County*, 70 Or LUBA 273 (2014).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Under ORS 34.102(4), LUBA only has the authority to transfer to Circuit Court an appeal of a decision that LUBA concludes is not a land use decision or limited land use decision subject to LUBA's jurisdiction. LUBA lacks authority to transfer to circuit court discrete "issues" raised in an appeal of a land use decision or limited land use decision, while retaining jurisdiction and review authority over the remainder of the decision. *Macfarlane v. Clackamas County*, 70 Or LUBA 497 (2014).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Under ORS 34.102(4) and OAR 661-010-0075(11)(c), LUBA will grant a contingent motion to transfer an appeal of a decision that withholds final plat approval to circuit court, notwithstanding the local government's argument that the decision is not a quasi-judicial decision and for that reason is not reviewable by the circuit court under ORS 34.102(2). Whether the decision qualifies as a quasi-judicial decision is a question for the circuit court to answer. *Calvary Construction v. City of Glendale*, 61 Or LUBA 50 (2010).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Where LUBA concludes that the decision on appeal is not a land use decision or limited land use decision because it is a fiscal decision, and transfers the decision to circuit court, LUBA need not also consider whether the appealed decision fails to qualify as a land use or limited land use decision for the additional reason that it is not a "final" decision. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Where LUBA concludes that the decision on appeal is not a land use decision or limited land use decision, because it is a fiscal decision, and transfer's the decision to circuit court, LUBA need not also determine whether petitioner's notice of intent to appeal was filed within the 21-day deadline established by OAR 661-010-0015(1). Whether the appeal was timely filed will be for the circuit court to decide, and the only relevant question regarding the timeliness of the appeal will be whether the appeal was filed within the 60 days allowed by ORS 34.030. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. LUBA lacks authority to grant a motion to transfer an appeal to circuit court once the Board has issued a final opinion and order dismissing that appeal. *Ehle v. City of Salem*, 55 Or LUBA 685 (2007).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. LUBA will grant a motion to transfer to circuit court an appeal of an ordinance that establishes a permitting process for closing mobile home parks, where the petitioner alleges but does not substantiate that the decision concerns the application of statewide planning goals, comprehensive plan provisions or land use regulations. *Century Drive Mobile Home Park, LLC v. City of Bend*, 53 Or LUBA 1 (2006).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. A motion to transfer to circuit court in the event LUBA concludes the challenged decision is not a land use decision or limited land use decision will be denied when the appeal is dismissed as untimely. *Mazorol v. City of Bend*, 52 Or LUBA 136 (2006).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Under OAR 661-010-0075(11)(b), a precautionary motion to transfer a LUBA appeal to circuit court may be filed when a motion is filed that challenges LUBA's jurisdiction. If such a precautionary motion to transfer is filed, and LUBA determines it does not have jurisdiction, LUBA will transfer the appeal to circuit court. But if no such precautionary motion to transfer is filed within 10 days after the motion challenging LUBA's jurisdiction is filed, and LUBA later determines that it does not have jurisdiction, LUBA will dismiss the appeal. *Barnas v. City of Portland*, 51 Or LUBA 750 (2006).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Petitioner's late filing of a motion to transfer is a technical violation of OAR 661-010-0075(11)(b) where it is filed approximately five months after the first motion challenging LUBA's jurisdiction, but only 16 days after an amended motion to dismiss is filed, and the motion to transfer could not have been ruled on before LUBA ruled on the jurisdictional challenge in any event. *ZRZ Realty Company v. City of Portland*, 49 Or LUBA 309 (2005).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. A motion to transfer to circuit court will be granted where LUBA determines it lacks jurisdiction over a final decision or determination that is contingent on future land use approvals and does not make any land use determinations or apply the goals or local land use regulations or comprehensive plan. *ZRZ Realty Company v. City of Portland*, 49 Or LUBA 309 (2005).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Because circuit court jurisdiction under the writ of review statutes does not include jurisdiction over non-final decisions or decisions rendered moot by other decisions, dismissal rather than transfer to circuit court is the appropriate disposition where LUBA concludes that the appealed decisions are either moot or are not final decisions. *Grabhorn v. Washington County*, 46 Or LUBA 672 (2004).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. LUBA may only transfer an appeal to circuit court under ORS 34.102(4) and OAR 661-010-0075(11), where the decision being appealed is not a land use or limited land use decision and therefore not subject to LUBA's exclusive jurisdiction. LUBA lacks authority to transfer discrete issues raised in an appeal, while retaining jurisdiction over other issues or aspects of the appeal. *Rookard v. Lane County*, 41 Or LUBA 14 (2001).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. A request to transfer an appeal to circuit court under OAR 661-010-0075(11) is timely when filed within 10 days of the date a party or LUBA raises an issue regarding whether LUBA has jurisdiction over the appeal. An objection that the petition for review fails to establish LUBA's jurisdiction is insufficient to state a cognizable jurisdictional challenge that would trigger the 10-day deadline in OAR 661-010-0075(11). *Garrard v. City of Newport*, 40 Or LUBA 258 (2001).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Where LUBA determines that it lacks jurisdiction to review a county decision because initial review jurisdiction over an appeal lies with the Columbia River Gorge Commission, a motion to transfer the appeal to the circuit court pursuant to OAR 661-010-0075(11) and ORS 19.230 will be denied, because no purpose would be served by transferring the appeal to circuit court. *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580 (2000).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. A late filing of a motion to transfer to circuit court is a technical violation of LUBA's rules, where the filing is one day late, and the opponents do not demonstrate that the late filing prejudiced the substantial rights of one or more of the opposing parties. *Baker v. City of Woodburn*, 37 Or LUBA 563 (2000).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Where LUBA determines a challenged decision is not a land use decision or limited land use decision and petitioner has filed a conditional motion to transfer as provided by OAR 661-010-0075(11)(c), the appeal will be transferred to circuit court. *Hashem v. City of Portland*, 34 Or LUBA 629 (1998).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Where LUBA lacks jurisdiction over the challenged decision because it is not a "land use decision," and petitioners do not file a motion pursuant to OAR 661-10-075(11), requesting that LUBA transfer the appeal to circuit court, LUBA will dismiss the appeal. *Franklin v. Deschutes County*, 29 Or LUBA 79 (1995).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. LUBA will deny a motion to suspend an appeal proceeding until a writ of review proceeding challenging a related decision can be transferred to LUBA from circuit court, if petitioner objects to the delay and there is no indication that a motion to transfer has been submitted to the circuit court. *Poddar v. City of Cannon Beach*, 26 Or LUBA 592 (1993).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Where no request to transfer an appealed decision to circuit court is filed at LUBA within 10 days after the date the respondents' briefs are due, as required by OAR 661-10-075(10)(b), LUBA will dismiss an appeal of a challenged decision over which it lacks jurisdiction. *Many Rivers Group v. City of Eugene*, 25 Or LUBA 518 (1993).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Where LUBA determines the challenged decision is not a land use decision or a limited land use decision, it will transfer the appeal to the circuit court. *Curtis Serve N Save v. City of Eugene*, 24 Or LUBA 341 (1992).

27.15 LUBA Procedures/Rules – Transfers to Circuit Court. Where LUBA determines an appealed decision is not reviewable as a land use decision, and a request to transfer the appeal to circuit court pursuant to ORS 19.230 was not filed within 10 days after the respondent's brief was due, as required by OAR 661-10-075(10)(b), LUBA will dismiss the appeal. *Miller v. City of Dayton*, 22 Or LUBA 661 (1992).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. While the county has an unqualified right to timely withdraw its decision for reconsideration under ORS 197.830(13)(b), that provision also requires the county to affirm, modify, or reverse its decision "within such time as the board may allow." LUBA's rules provide that a local government's decision on reconsideration "shall be filed with the Board within 90 days after the filing of the notice of withdrawal or within such other time as the Board may allow." OAR 661-010-0020(1). Accordingly, where a local government requests 180 days to reconsider its decision on reconsideration, LUBA will treat the local government's notice of withdrawal as including a motion to extend the time for filing the county's decision on reconsideration. *Deschutes County Farm v. Deschutes County*, 79 Or LUBA 1049 (2019).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. The legislature has granted LUBA broad authority to manage the proceedings before it. Accordingly, where a local government files a notice to withdraw its decision for reconsideration under ORS 197.830(13)(b) after the petition for review was filed but prior to the deadline of the filing of the respondent's brief, and the local government's explanation for withdrawing its decision demonstrates it is attempting to eliminate confusion, clarify findings, change its decision, narrow disputed issues, or eliminate the need for appeal, LUBA will grant the local government's request for an extension of time to provide a copy of the decision on reconsideration. *Deschutes County Farm v. Deschutes County*, 79 Or LUBA 1049 (2019).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. OAR 661-010-0021(1) provides that a "copy of the decision on reconsideration shall be filed with the Board within 90 days after the filing of the notice of withdrawal or within such other time as the Board may allow." This rule explicitly contemplates that LUBA may modify the deadline for the local government to file a copy of the decision on reconsideration, including allowing the local government a time period longer than 90 days. *McDougal v. Lane County*, 78 Or LUBA 1016 (2018).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Neither ORS 197.830(13)(b) nor OAR 661-010-0021 dictate the scope of the issues that must be addressed when a local government withdraws a decision for reconsideration after it has been appealed to LUBA. The statute and rule also do not dictate how a local government must address offers of additional evidence at a reconsideration hearing. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. In *Dexter Lost Valley Community Assn. v. Lane County*, 255 Or App 701, 300 P3d 1243 (2013), the Court of Appeals rejected the distinction that LUBA previously drew between motions for voluntary remand that are opposed by one or more parties and the unilateral right a respondent has to withdraw a decision for reconsideration under ORS 197.830(13)(b). Under LUBA's current rules all parties must join in a motion for voluntary remand. Where one or more parties oppose a local government's request to be allowed to reconsider a decision that has been appealed to LUBA, ORS 197.830(13)(b) is now the sole authority for LUBA to allow such reconsideration. *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 523 (2017).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Where a county's request to be allowed to reconsider a post-acknowledgement plan amendment is styled a motion for voluntary

remand but is filed before the response brief was filed, LUBA will treat the motion to reconsider the decision under ORS 197.830(13)(b). Under ORS 197.830(13)(b), a motion to reconsider a post-acknowledgment plan amendment that is filed before the response brief is filed is timely filed. *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 523 (2017).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Where a county withdraws an appealed decision for reconsideration pursuant to OAR 661-010-0021(1), and a new decision is adopted to repeal the appealed decision and petitioner does not refile its notice of intent to appeal or file an amended notice of intent to appeal, LUBA will dismiss the appeal. In that circumstance, where petitioner thereafter files a cost bill seeking an a award of costs to recover its filing fee and no party objects to the cost bill, LUBA will assume that petitioner is the prevailing party, even if petitioner fails to allege the appeal played a causative role in the decision on reconsideration to repeal the appealed decision. *Friends of Yamhill County v. Yamhill County*, 73 Or LUBA 367 (2016).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. LUBA's supervisory role over land use decisions that have been withdrawn for reconsideration under OAR 661-010-0021 includes taking action to reactivate the appeal if the local government fails to take timely action on the reconsideration. LUBA's supervisory role does not extend to issuing interlocutory orders regarding the propriety of actions taken by the local government following withdrawal of the decision or regarding the need to disclose *ex parte* contacts or consider challenges to the impartiality of individual decision makers. *Columbia Riverkeeper v. Clatsop County*, 68 Or LUBA 524 (2013).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Under ORS 197.830(13)(b) a local government has a unilateral right to withdraw a decision on appeal to LUBA for reconsideration, provided the local government's request for withdrawal is filed "prior to the date set for filing the record." Where LUBA grants an uncontested request to extend the deadline for filing the record, the extended deadline for filing the record becomes the "date set for filing the record," within the meaning of ORS 197.830(13)(b). *Columbia Riverkeeper v. Clatsop County*, 63 Or LUBA 509 (2011).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. LUBA will deny a city's voluntary motion to remand where the petition for review has not yet been filed and motion does not explicitly state that the city will address all of petitioner's issues regarding the appealed decision. *Jacobsen v. City of Winston*, 61 Or LUBA 536 (2010).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. LUBA will grant a motion for voluntary remand over a petitioner's objections where the appeal concerns both a property line adjustment and a conditional use permit and although it appears the property line adjustment might be subject to reversal, it is not clear whether the property line adjustment is essential to the conditional use permit approval. *Fenn v. Douglas County*, 56 Or LUBA 261 (2008).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. LUBA will grant a motion for voluntary remand of a property line adjustment decision over a petitioner's objections where the statutes governing property line adjustments recently changed and although the property line

adjustment decision appears to violate the statutes that were in effect when the decision was rendered, it is unclear whether the property line adjustment would be barred by the amended statutes. *Fenn v. Douglas County*, 56 Or LUBA 261 (2008).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Opponents of land use approval have no legal right to comment on the findings that a city adopts to support its decision to grant land use approval, and opponents similarly have no legal right to comment on amended findings that a city adopts after it withdraws a decision following an appeal to LUBA under 197.830(13)(b). *Loprinzi's Gym v. City of Portland*, 56 Or LUBA 358 (2008).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Where a local government's motion for voluntary remand does not make clear that it will address all of the allegations of error set forth in the petition for review, the local government does not provide a sufficient basis for LUBA to grant the motion over a party's objections. *Examilotis v. Coos County*, 55 Or LUBA 708 (2007).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Notwithstanding that under OAR 661-010-0015 a notice of intent to appeal is deemed filed with LUBA on the date it is mailed by registered or certified mail, LUBA is not at liberty to read a similar provision into notices of intent to appeal decisions on reconsideration under OAR 661-010-0021(5). Notices under OAR 661-010-0021(5) are filed on the date they are delivered to or received by LUBA. *West Coast Media v. City of Tigard*, 45 Or LUBA 703 (2003).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Untimely filing of a notice of intent to appeal a decision on reconsideration under OAR 661-010-0021(5) is a technical violation of LUBA's rules and does not affect LUBA's review, absent prejudice to the substantial rights of the parties. *West Coast Media v. City of Tigard*, 45 Or LUBA 703 (2003).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Even though granting a motion for voluntary remand would give a local government a second chance to respond to issues that it failed to respond to in the appealed decision, a motion for voluntary remand will not be denied for that reason alone, because forcing the local government to defend a decision that it does not believe is defensible would not serve the ORS 197.805 goal of quickly reaching finality in land use matters. *Doob v. Josephine County*, 43 Or LUBA 130 (2002).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Denial of a motion for voluntary remand may be warranted if it is shown that a local government is making only half-hearted attempts to respond to relevant issues and then seeking serial voluntary remands to correct those half-hearted attempts. *Doob v. Josephine County*, 43 Or LUBA 130 (2002).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Where a land use decision has been withdrawn for reconsideration under OAR 661-010-0021, but LUBA later determines that the LUBA appeal was not timely filed and for that reason dismisses the appeal, LUBA will not address arguments about the possible consequences of that dismissal on the local proceedings to reconsider the withdrawn decision. *Larner v. City of Portland*, 41 Or LUBA 471 (2002).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. A notice of intent to appeal a decision on reconsideration that duplicates the initial notice of intent to appeal is sufficient to challenge the substance of the decision on reconsideration, where no one argues that the decision on reconsideration is materially different from the initial decision. *Piltz v. City of Portland*, 41 Or LUBA 461 (2002).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. A notice of withdrawal of a decision for reconsideration under OAR 661-010-0021(1) and ORS 197.830(12)(b) must be filed on or before the date the record is due. A notice of withdrawal filed after that date will be denied. *Bates v. City of Cascade Locks*, 37 Or LUBA 993 (1999).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Where a county gives adequate assurances that it will comprehensively review petitioner's assignments of error, LUBA will grant a motion for voluntary remand and will not assume the motion for voluntary remand is motivated by delay or other improper reasons simply because there has been a lengthy course of litigation in the matter. *Murphy Citizens Advisory Committee v. Josephine Co.*, 35 Or LUBA 117 (1998).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Where a local government moves for voluntary remand of its decision after the record and petition for review have been submitted to the Board, LUBA will allow the motion when the voluntary remand is more likely to result in a thorough and expeditious resolution of the land use matter than would a review by the Board. *Deal v. City of Hermiston*, 34 Or LUBA 767 (1998).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. The burden is on the local government seeking voluntary remand to show that the remand is more likely to bring about a thorough and expeditious resolution of the land use matter than would LUBA review. *Deal v. City of Hermiston*, 34 Or LUBA 767 (1998).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Whether multiple enactments constitute a single decision for purposes of appeal to LUBA depends on the relationship between the enactments. Where a decision on reconsideration reenacts the original decision together with a supplemental enactment that is characterized as an "integral part" of the reconsidered decision, there is a single decision for purposes of appeal of the decision on reconsideration to LUBA. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. OAR 661-10-021, which allows a local government to withdraw a limited land use decision for reconsideration, does not impose an obligation on the parties to make or waive additional objections after the 14-day period for comment allowed under ORS 197.195(3)(c)(A). *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. It is not necessary for a party who filed a motion to intervene before a decision was withdrawn for reconsideration to refile its motion to intervene, or file a second motion to intervene, if an original notice of intent to appeal is refiled, or an amended notice of intent to appeal is filed, after the decision on reconsideration is filed with LUBA. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Under OAR 661-10-021, a local government has a unilateral right to withdraw a decision for reconsideration if the notice of withdrawal is filed on or before the date the record is due. A motion for voluntary remand may be filed after the record is filed and, if granted by LUBA, is not governed by the provisions of OAR 661-10-021, including the 90-day deadline specified in that rule for decisions on reconsideration. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. OAR 661-10-075(6) requires a local government to be represented by an attorney in a LUBA appeal. Therefore, a local government's notice of withdrawal of the challenged decision, pursuant to ORS 197.830(12)(b), is properly submitted by the local government's attorney. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Neither ORS 197.830(12) nor OAR 661-10-021 establishes any requirements regarding the nature of the local government proceedings conducted after withdrawal. However, the local government must follow any applicable requirements its own land use regulations impose for making a new final decision. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Where a local government decision maker authorizes the withdrawal of a challenged local government decision for reconsideration, pursuant to ORS 197.830(12)(b), that decision is reflected in the Notice of Withdrawal filed with LUBA, and that notice is part of the local record of the proceedings leading to the local government's decision on reconsideration. *Tylka v. Clackamas County*, 28 Or LUBA 712 (1994).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Letters to and from LUBA concerning the filing of a local government decision on reconsideration and refiling of a notice of intent to appeal, pursuant to ORS 197.830(12)(b), postdate the adoption of the challenged decision on reconsideration and, therefore, are not part of the *local* record. They are, however, part of LUBA's record. *Tylka v. Clackamas County*, 28 Or LUBA 712 (1994).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. While ORS 197.830(12)(b) grants a local government the unilateral power to withdraw an appealed decision for reconsideration before the date the record is due, it does not eliminate the discretion LUBA has under ORS 197.835 and 197.805 to grant a motion for voluntary remand after the record is filed, in accordance with sound principles of judicial review. *Mazeski v. Wasco County*, 27 Or LUBA 45 (1994).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Where a local government withdraws a challenged decision for reconsideration pursuant to ORS 197.830(12)(b) and OAR 661-10-021(1), OAR 661-10-021(3) requires that the *decision* on reconsideration itself, not simply notice of the decision, be filed with LUBA and served on the parties to the LUBA appeal. *Home Builders Association v. City of Portland*, 26 Or LUBA 653 (1994).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Neither ORS 197.830(12)(b) nor OAR 661-10-021 prescribes the scope of a local government's reconsideration of a decision that is withdrawn following the filing of a notice of intent to appeal. Therefore, the scope of

reconsideration may be determined by the local government that withdraws its decision. *ONRC v. City of Seaside*, 26 Or LUBA 645 (1994).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Where a local government withdraws a challenged land use decision for reconsideration pursuant to ORS 197.830(12)(b) and OAR 661-10-021 and thereafter adopts a decision on reconsideration, and petitioner does not refile the original notice of intent to appeal or file an amended notice of intent to appeal within the time provided in OAR 661-10-021(5)(a), the appeal will be dismissed. *Matrix Development v. City of Tigard*, 25 Or LUBA 557 (1993).

27.16 LUBA Procedures/Rules – Withdrawal of Decision. Under ORS 197.830(12)(b) and OAR 661-10-021(1), LUBA cannot refuse to allow a local government to withdraw a challenged decision for reconsideration, so long as the local government files a notice of withdrawal on or before the date the record is due. *Fraser v. Wallowa County*, 25 Or LUBA 788 (1993).

27.17 LUBA Procedures/Rules – Mediation. Where two appeals concern the same decision, but the petitioner in one appeal will raise different issues than the petitioner in the other appeal, LUBA will not consolidate the appeals or suspend the second appeal while the first appeal is suspended for settlement discussions, where LUBA will ultimately have to reach the issues that will be raised in the second appeal in any event and the parties in first appeal agree not to take any action that would moot the second appeal while it is still pending at LUBA. *Doherty v. Morrow County*, 43 Or LUBA 627 (2002).

27.17 LUBA Procedures/Rules – Mediation. When LUBA grants a stipulated motion for voluntary remand, LUBA leaves it to the parties to ensure that the procedures they agree to employ on remand are adequate to accommodate the rights of any persons who are entitled to participate in those proceedings on remand. LUBA does not review and approve those procedures in advance. *Boly v. City of Portland*, 40 Or LUBA 537 (2001).

27.17 LUBA Procedures/Rules – Mediation. Although parties to a stipulated voluntary remand may be bound by an agreement to limit the issues on remand concerning a disputed parking lot, non-parties are not bound by the stipulation and such non-parties have not waived their right to raise issues under *Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678 (1992), where the notice of hearing that preceded the only local hearing on the remanded decision failed to refer to the parking lot. *Boly v. City of Portland*, 40 Or LUBA 537 (2001).

27.17 LUBA Procedures/Rules – Mediation. A county governing body's decision to enter a settlement agreement that includes an agreement that the governing body will adopt certain ordinances does not render the public hearings that are subsequently held prior to adopting such ordinances something other than the kind of public hearing required by ORS 215.060, where the county counsel advised the governing body that it was free not to adopt the settlement ordinances and a transcript of the local proceedings shows the governing body did not believe it was legally bound to adopt the settlement ordinances without modification. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

27.17 LUBA Procedures/Rules – Mediation. Potential parties in a LUBA appeal can reasonably foresee that the appeal may lead to the challenged decision being affirmed, reversed or remanded, as a result of a decision on the merits or a stipulation by the parties. But such potential parties cannot reasonably foresee that the parties in a LUBA appeal will stipulate that LUBA should order the local government to adopt an amended decision. *Waibel v. Crook County*, 39 Or LUBA 749 (2000).

27.17 LUBA Procedures/Rules – Mediation. Under ORS 197.860, private litigants at LUBA may stipulate that a challenged decision should be remanded and replaced with a different decision. However, persons who were not parties in the initial appeal who participate in the proceedings on remand may appeal the amended decision to LUBA. *Waibel v. Crook County*, 39 Or LUBA 749 (2000).

27.17 LUBA Procedures/Rules – Mediation. Under ORS 197.860, parties may reach a mediated settlement in a LUBA appeal and request that LUBA order the local government to adopt a particular amended decision. However, in issuing such an order, LUBA does not review the

amended decision on the merits and persons who appeal the amended decision to LUBA may raise any issues on appeal that they did not waive by failing to participate in the initial LUBA appeal. *Waibel v. Crook County*, 39 Or LUBA 749 (2000).

27.17 LUBA Procedures/Rules – Mediation. A motion requesting a stay for mediation does not suspend the deadline for filing the petition for review, where respondent does not join in the motion and does not agree to enter mediation. *Wynnyk v. Jackson County*, 39 Or LUBA 500 (2001).

27.17 LUBA Procedures/Rules – Mediation. Under ORS 197.860 all parties, including intervenors-respondent, must stipulate that an appeal be suspended to allow the parties to enter mediation. Where intervenors-respondent do not stipulate that the appeal should be suspended to allow mediation, the appeal will not be suspended. *Genstar Land Company v. City of Sherwood*, 35 Or LUBA 832 (1999).

27.17 LUBA Procedures/Rules – Mediation. ORS 197.860 allows LUBA to stay an appeal proceeding for mediation only if all parties stipulate to such a stay. *Tylka v. Clackamas County*, 27 Or LUBA 699 (1994).

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

28.1 LUBA Scope of Review – Generally. Statements made by three city councilors in a public hearing two weeks before the city council's final vote to adopt the challenged decision and findings do not provide a basis to reverse or remand the city's decision. *Watts v. City of Tualatin,* 80 Or LUBA 339 (2019).

28.1 LUBA Scope of Review – Generally. A petitioner's challenge to a county's amendments to its comprehensive plan that expand the allowable locations in the county that could be the subject of an application to change the plan designation to rural commercial and rural industrial, that argue that the county's adopted and acknowledged rural commercial and rural industrial zones impermissibly allow urban uses in contravention of Goal 14 are an impermissible collateral attack on an acknowledged land use regulation where no provisions of the county's code were amended by the challenged decision. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

28.1 LUBA Scope of Review – Generally. A local code amendment adopted to implement provisions of ORS 197.724 is not an "action[] taken under ORS 197.722 to ORS 197.728" so as to place the amendment decision outside of LUBA's scope of review pursuant to ORS 197.726(1). Instead, such an amendment is an action taken under ORS 197.646(1), which requires local governments to amend their land use regulations "to comply with a new requirement in land use statutes." *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

28.1 LUBA Scope of Review – Generally. When a party raises an issue for the first time at oral argument LUBA will ignore all statements made at oral argument, by any party, that go beyond the issues framed in the briefs and the evidence cited in the record, and will confine its review to the issues framed in the briefs, the evidence cited in the record, and the portions of the oral argument that discuss those issues and evidence. *See* OAR 661-010-0040(1) and ORS 197.835(2)(a). *Conte v. City of Eugene,* 78 Or LUBA 289 (2018).

28.1 LUBA Scope of Review – Generally. LUBA will affirm a city governing body's code interpretation where a prohibition on adjustment "[t]o allow an increase in density in the [low density residential] RL zone" does not specify what denominator should be used to determine whether a proposed adjustment increases the density in the RL zone, or explain how "density in the RL zone" is measured, and the city used as the denominator the gross acreage of a subdivision as a whole, rather than the acreage of individual properties. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

28.1 LUBA Scope of Review – Generally. The city's comprehensive plan housing goal, Goal 10, and its policies and implementing measures, provide further contextual support for the city's interpretation of its code regarding a prohibition on lot size adjustment "[t]o allow an increase in density in the [low density residential] RL zone" by using as the denominator the gross acreage of

a subdivision as a whole, rather than the acreage of individual properties. One of the Goal 10 housing goals is to "[p]romote the efficient use of vacant land by encouraging infill development which is sensitive to existing neighborhoods, and by encouraging new development which achieves the density allowed by the comprehensive plan." The city's interpretation is consistent with Goal 10 and the policies and implementing measures because it interprets "density" and "acre" to allow new infill development of vacant land to achieve a density that is allowed by the comprehensive plan. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

28.1 LUBA Scope of Review – Generally. Where petitioners argue the city's ordinance adopting legislative text amendments to the city's zoning ordinances is inconsistent with applicable city comprehensive plan and subordinate plans, but where the city adopted findings addressing most of the cited comprehensive plan goals and policies, petitioners must do more than simply disagree with the city's conclusions. Given the generally worded language of most of the goals and policies at issue, and the leeway a governing body has in balancing and weighing consistency of a zoning text amendment with a variety of competing policy objectives, petitioners must demonstrate that the city council failed to meaningfully consider a reasonably specific and pertinent comprehensive goal or policy to state a basis for remand or reversal. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

28.1 LUBA Scope of Review – Generally. LUBA will decline to consider citations to projections and estimates regarding future demand for fossil fuels in the Oregon Freight Plan where the projections and estimates are citied to resolve an evidentiary challenge, and such "adjudicatory facts" are not cognizable within a document that is itself subject to judicial notice. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

28.1 LUBA Scope of Review – Generally. LUBA will review a decision that amends a local government's comprehensive plan pursuant to ORS 197.835(6), for compliance with the statewide planning goals. In addition, ORS 197.835(9)(a)(C) and (D) provide that LUBA shall reverse or remand a land use decision if LUBA finds that the local government "[m]ade a decision not supported by substantial evidence in the whole record;" or "[i]mproperly construed the applicable law." Finally, pursuant to *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002), although a local government is not required to adopt findings supporting a legislative decision, the record on appeal must be sufficient to demonstrate that "required considerations were indeed considered." *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

28.1 LUBA Scope of Review – Generally. Where a party submits a brief that does not defend the decision on appeal, but rather makes a limited concession in the brief regarding all assignments of error in the petition for review and asks "that LUBA not address any of the substantive issues presented in the petition for review," LUBA will deny the request. That request would in effect be the equivalent of granting a voluntary remand after the record and petition for review had been filed, contrary to the Court of Appeals' holding in *Dexter Lost Valley Community Assn. v. Lane County*, 255 Or App 701, 706-08, 300 P3d 1243 (2013). *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

28.1 LUBA Scope of Review – Generally. Where no brief is filed in a LUBA appeal in support of the decision on appeal, there is a risk that LUBA will not recognize potentially meritorious

arguments in response to the legal challenges. Where LUBA is reasonably confident how legal issues should be resolved, it will resolve them; but where LUBA is not reasonably confident how legal issues should be resolved, and the decision's findings are inadequate, LUBA will remand for additional findings even where petitioner does not explicitly challenge the adequacy of the findings. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

28.1 LUBA Scope of Review – Generally. A petitioner does not waive his right to assign procedural error at LUBA by failing to object to the procedural error below, where the alleged procedural error occurred after the close of the evidentiary record, and the city council meeting to adopt the final decision did not include an opportunity for parties to lodge procedural objections. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

28.1 LUBA Scope of Review – Generally. LUBA may take official notice of a county legal lot verification decision involving the same property at issue in an appeal of a county decision approving property line adjustments, for the limited purpose of resolving a dispute regarding LUBA's scope of review over the county decision approving property line adjustments. *Sarett v. Lane County*, 76 Or LUBA 308 (2017).

28.1 LUBA Scope of Review – Generally. An appeal of a 2014 decision approving seven property line adjustments is not a "collateral attack" on a subsequent and unappealed 2017 decision verifying four of the seven properties adjusted as lawfully created lots, where the 2017 decision did not purport to approve the configuration or boundaries adjusted in the 2014 decision, but simply determined that four of the parcels at issue were lawfully created. *Sarett v. Lane County*, 76 Or LUBA 308 (2017).

28.1 LUBA Scope of Review – Generally. Petitioner's allegations that applicants for quasi-judicial land use approval purchased property from the city and helped elect the mayor and city councilors falls far short of demonstrating disqualifying bias under *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973). *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

28.1 LUBA Scope of Review – Generally. In evaluating a bias challenge, LUBA is to limit its consideration to the quasi-judicial matter where the bias challenge is raised and may not consider actions by the decision maker that are unrelated to that matter. *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 341 P3d 790 (2014). *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

28.1 LUBA Scope of Review – Generally. It would be inconsistent with sound principles of judicial review, ORS 197.805, for LUBA to resolve a constitutional challenge to the procedure a city uses to approve an annexation, in a direct appeal of the city decision approving the annexation, when the same issue is pending before a circuit court in a writ of mandamus proceeding between the same parties, seeking to compel the city to approve the annexation under a different procedure. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

28.1 LUBA Scope of Review – Generally. LUBA will not consider an issue that was not raised in the petition for review and was raised for the first time in a motion that was received by LUBA

one day before the statutory deadline for LUBA to issue its final opinion expired. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

28.1 LUBA Scope of Review – Generally. LUBA will decline to render an advisory interpretation of ORS 215.441, which extends certain protections to a "church or other nonresidential place of worship" in county zones allowing such uses, where LUBA concludes that the applicable Wildlife Area (WA) overlay zone does not allow churches at all, and thus there is no need to resolve the parties' dispute regarding whether locating a proposed church within an existing dwelling results in a "nonresidential place of worship." *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

28.1 LUBA Scope of Review – Generally. LUBA need not address assignments of error alleging that a condition of approval requiring an applicant seeking a four-lot subdivision to construct a road violates the needed housing statutes or the Takings Clause of the U.S. Constitution, where LUBA has already concluded on sub-statutory and sub-constitutional grounds that the city erred in imposing the condition. *Tokarski v. City of Salem*, 74 Or LUBA 124 (2016).

28.1 LUBA Scope of Review – Generally. LUBA will not resolve assignments of error challenging an alternative theory of approval, vested rights, that the parties argued about below, but which the final decision maker did not consider. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

28.1 LUBA Scope of Review – Generally. LUBA will deny an assignment of error that challenges a decision made several years prior to the appealed decision as an impermissible collateral attack on the previous unappealed decision. *Martin v. City of Central Point*, 74 Or LUBA 312 (2016).

28.1 LUBA Scope of Review – Generally. When called upon to determine the applicability or meaning of a statute, LUBA is not limited to the parties' arguments. *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

28.1 LUBA Scope of Review – Generally. Challenges to a hearings officer's conclusions regarding provisions of the local building code are within LUBA's scope of review, even though the local building code provisions are not "land use regulations." ORS 197.835(9)(a)(D) expressly authorizes LUBA to reverse or remand a decision where the local government "[i]mproperly construed the applicable law," and the applicable law is not limited to land use regulations. *Gross v. Jackson County*, 74 Or LUBA 563 (2016).

28.1 LUBA Scope of Review – Generally. LUBA will not consider the parties' arguments about whether a city erred by faulting an applicant for referring to proposed open space as a park, where the accuracy of the applicant's description of the open space was not a basis for the city's denial of the permit application. *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016).

28.1 LUBA Scope of Review – Generally. Where LUBA denies a motion to dismiss, because the notice of intent to appeal was timely filed with regard to one of the two decisions identified in the notice of intent to appeal, but the petition for review has not yet been filed, any disagreement

between the parties about LUBA's scope of review concerning the petition for review is premature. *Lifestyle Ventures v. Clackamas County*, 73 Or LUBA 388 (2016).

28.1 LUBA Scope of Review – Generally. Where a decision that rezoned property specifically authorized development of the rezoned property in advance of adoption of a concept plan for the area, in an appeal of a subsequent decision approving development of the property, LUBA's scope of review does not permit review of an argument that the concept plan must be adopted before development may be approved for the rezoned property. Raising a legal issue in the development approval decision that was resolved in the rezoning decision constitutes an improper collateral attack on the rezoning decision. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

28.1 LUBA Scope of Review – Generally. LUBA's scope of review under ORS 197.835(9) includes authority to determine whether the decision on review "[i]mproperly construed the applicable law[.]" Where LUBA has jurisdiction to review a land use decision, it also has jurisdiction to review challenges to that decision's construction of "applicable law," even if that "applicable law" is not a statewide planning goal, a comprehensive plan provision or a land use regulation. *Carlsen v. City of Portland*, 39 Or LUBA 93, 98-100, *aff'd in part and rem'd in part on other grounds*, 169 Or App 1, 8 P3d 234 (2000). *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

28.1 LUBA Scope of Review – Generally. While local laws that do not qualify as land use laws might be so unrelated to land use laws that LUBA's scope of review to consider violations of "applicable law" would not include such laws, a city's business licensing regulations qualify as "applicable law" under ORS 197.835(9)(a)(D), where those business licensing regulations are intertwined with the land use issues in a LUBA appeal. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

28.1 LUBA Scope of Review – Generally. Where a petitioner ignores 13 pages of findings in the local government's final decision that attempt to address the issues the petitioner raised on local appeal, and instead challenges only the findings in the underlying decision that was affirmed by the local government's final decision, the petition for review provides no basis to reverse or remand the local government's final decision. *Dion v. Baker County*, 72 Or LUBA 307 (2015).

28.1 LUBA Scope of Review – Generally. LUBA does not distinguish between parties who are represented by lawyers and parties that appear on their own behalf, in determining whether the party took the required steps to preserve its right at LUBA to assign procedural error. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

28.1 LUBA Scope of Review – Generally. LUBA may consider a challenge that a decision approving a conditional use permit is inconsistent with a resolution that bars extension of sewer outside a sewer district, even if the resolution is not itself a land use regulation, where the resolution qualifies as "applicable law," and is therefore within LUBA's scope of review. ORS 197.835(9)(a)(D). *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

28.1 LUBA Scope of Review – Generally. Where a city ordinance adopts a new zoning district but does not apply the zoning district to any property, arguments challenging possible impacts of

applying the new zoning district are premature, and such arguments must await a city decision that actually applies the new zoning district to some property in the city. *Oregonians in Action v. City of Lincoln City*, 71 Or LUBA 234 (2015).

28.1 LUBA Scope of Review – Generally. An assignment of error that challenges a local government's modification of a condition of approval imposed in a prior decision, on the basis that the original condition of approval proposed dredging or filling that would trigger application of a comprehensive plan policy, is an impermissible collateral attack on the prior decision and provides no basis for reversal or remand. *McCaffree v. Coos County*, 70 Or LUBA 15 (2014).

28.1 LUBA Scope of Review – Generally. LUBA will not entertain arguments based on equitable estoppel unless the proponent first provides a sufficient basis to conclude that the legislature granted LUBA the authority to reverse or remand a land use decision based on equitable doctrines. *Macfarlane v. Clackamas County*, 70 Or LUBA 126 (2014).

28.1 LUBA Scope of Review – Generally. In an appeal of a decision modifying a permit approval, a petitioner's arguments that prior unappealed decisions extending that permit approval were wrongly decided are viewed as collateral attacks on decisions that were not before the local government in processing the modification, and are not before LUBA on appeal of that modification decision. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

28.1 LUBA Scope of Review – Generally. Even if prior permit extension decisions are not land use decisions that could have been appealed to LUBA, they are nonetheless final decisions to extend the permit, not intermediate or interlocutory decisions that can be challenged in an appeal of a subsequent decision modifying the permit. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

28.1 LUBA Scope of Review – Generally. In considering whether the proposed modifications to a previously approved conditional use comply with conditional use approval criteria, if legal issues raised in the modification proceedings are relevant issues regarding approval standards that could not have been raised when the original proposal was approved, the local government is required to address those issues. Conversely, if the arguably relevant issues raised in the modification proceedings could have been fully raised when the original proposal was approved, those legal issues are not a product of the modification and the local government is not required to consider those issues. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

28.1 LUBA Scope of Review – Generally. Where a previously approved conditional use is being modified to eliminate one part of the previously approved use, and conditions of that previous approval are to be modified or eliminated, where the original condition was imposed solely to ensure the part of the conditional use that is to be eliminated is consistent with relevant approval standards, no explanation is required to eliminate such conditions of approval. However, where it is not clear whether the original condition of approval was imposed at least in part to ensure that part of the conditional use that is to be retained is consistent with one or more relevant approval standards, and an issue is raised concerning whether the proposed modification or elimination of the condition would cause the modified conditional use to violate one or more applicable approval standards, the local government is obligated to explain why the condition can be eliminated or

modified without causing the modified conditional use to no longer comply with relevant approval standards. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

28.1 LUBA Scope of Review – Generally. A hearings officer properly declines to address issues regarding the prior rezoning of the area in which the subject property is located, where the issues are not relevant to any of the approval criteria that apply to the current development review proposal or the variance, which post-date that rezoning decision by several years. *Vesper Park v. Washington County*, 68 Or LUBA 106 (2013).

28.1 LUBA Scope of Review – Generally. LUBA will deny an assignment of error that challenges the county's decision that Goal 5 does not apply to a proposed post-acknowledgement plan amendment to amend the county's map of lands eligible for a destination resort because the county failed to compare the location of "other inventoried Goal 5 resources" to the properties proposed to be included on the map where petitioners do not identify any inventoried Goal 5 resource that proposed plan amendment "would affect" under OAR 660-023-0250(3). *Root v. Klamath County*, 68 Or LUBA 124 (2013).

28.1 LUBA Scope of Review – Generally. LUBA will strike documents attached to the petition for review that are offered as "context" for interpreting an administrative rule adopted in 1990, where the documents are not subject to official notice, long post-date the 1990 administrative rule, and could not provide "context" for interpreting the rule. *Fritch v. Clackamas County*, 68 Or LUBA 184 (2013).

28.1 LUBA Scope of Review – Generally. Where a city adopts a new transportation system plan (TSP) that includes a general alignment for a new regional trail but expressly does not authorize a specific alignment, the TSP cannot be challenged based on the adverse impacts of a specific alignment. However, the TSP can be challenged based on legal challenges to the regional trail that do not depend on a specific alignment. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

28.1 LUBA Scope of Review – Generally. Where the decision on appeal is a land use decision, LUBA has jurisdiction under ORS 197.835(9)(a)(D) to review the decision for compliance with "applicable law." "Applicable law" is not limited to land use regulations. *Beaumont-Wilshire Neighbors v. City of Portland*, 68 Or LUBA 393 (2013).

28.1 LUBA Scope of Review – Generally. Whether LUBA should include certain kinds of non-land use laws in reviewing land use decisions is somewhat unsettled. But where LUBA has previously reviewed city decisions for compliance with the city's storm water management manual, LUBA will consider the storm water management manual requirements as "applicable law," and within LUBA's scope of review under ORS 197.835(9)(a)(D). *Beaumont-Wilshire Neighbors v. City of Portland*, 68 Or LUBA 393 (2013).

28.1 LUBA Scope of Review – Generally. OAR 660-033-0140 provides that certain permits on agricultural and forest land are void after two years if the use is not initiated within that time period. Where the county development code includes language that is nearly identical to much of the

language in OAR 660-033-0140, it is reasonable to conclude the code was adopted to implement OAR 660-033-0140. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

28.1 LUBA Scope of Review – Generally. Where a county makes it sufficiently clear that it adopted its similarly worded version of OAR 660-033-0140 to apply in all county zones, including those that apply to agricultural and forest lands, the county code version of OAR 660-033-0140 applies in place of OAR 660-033-0140 on agricultural and forest lands after the county code version of OAR 660-033-0140 is acknowledged. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

28.1 LUBA Scope of Review – Generally. Where contract consents to annexation have been executed and recorded and there is nothing on the face of the contract consents that calls their validity into question, LUBA does not have authority under ORS 197.835 to consider the contract consent parties' claims that the contract consents were invalidly coerced or that those contract consents have been unilaterally revoked. Claims that the contract consents are invalid or have been revoked must be pursued in circuit court. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

28.1 LUBA Scope of Review – Generally. If an intervenor-respondent wishes to request that LUBA remand a county decision so that the county can apply a different statute than the one the county applied in the appealed decision, that request is not properly presented to LUBA where the intervenor-respondent neither filed a cross petition for review nor raised the issue in a cross assignment of error in the intervenor-respondent's response brief. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

28.1 LUBA Scope of Review – Generally. Where on remand of a decision that amends a county zoning ordinance, the county adopts a new ordinance with new amendments, but does not explicitly or implicitly re-adopt the original ordinance, on appeal to LUBA of the new ordinance the petitioner cannot challenge the original ordinance or the findings adopted on remand that are intended to support the original ordinance. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

28.1 LUBA Scope of Review – Generally. LUBA has statutory authority only to dismiss, affirm, reverse or remand a land use decision, and probably lacks statutory or inherent authority to "vacate" a previously issued final opinion and order on remand from the Court of Appeals, based solely upon the parties' stipulation. *Conte v. City of Eugene*, 66 Or LUBA 479 (2012).

28.1 LUBA Scope of Review – Generally. Where on remand from the Court of Appeals the parties stipulate to "vacate" LUBA's original final opinion and order and "reinstate" the underlying local government decision, the parties' intent can be given effect consistent with LUBA's dispositional authority by issuing a final opinion and order that either dismisses the appeal or affirms the local government decision. *Conte v. City of Eugene*, 66 Or LUBA 479 (2012).

28.1 LUBA Scope of Review – Generally. LUBA only has authority to affirm, remand or reverse land use decisions and does not have authority to grant injunctive or mandatory relief. LUBA will deny assignments of error where LUBA lacks authority to grant the relief that is requested under those assignments of error. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

28.1 LUBA Scope of Review – Generally. It is the local government that determines—either explicitly or implicitly—whether the party with the burden of proof has carried his or her burden of proof. A local government decision must conclude that the governing criteria are satisfied—presumably because the party with the burden of proof carried his or her burden. Once that decision is made, it is subject to LUBA review to determine whether the local government's decision is supported by substantial evidence. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

28.1 LUBA Scope of Review – Generally. Where a disputed reply brief, a motion to strike and a motion to take evidence all revolve around an issue that is beyond LUBA's scope of review and has no bearing on a basis for reversal or remand of the challenged decision, LUBA will summarily deny the reply brief and motions. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

28.1 LUBA Scope of Review – Generally. A petitioner's argument that a yet-to-be-developed voluntary, educational septic system maintenance program will not improve upon the city's existing mandatory, regulatory septic system maintenance program is premature. It would be improper for LUBA to speculate about what that voluntary, educational program would look like before the new program is developed and adopted. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

28.1 LUBA Scope of Review – Generally. The validity of a conservation easement acquired by the city from the applicant's predecessor-in-interest as a condition of partition approval cannot be challenged in the context of a subsequent decision that relies on the easement to deny an application for development within the easement. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

28.1 LUBA Scope of Review – Generally. When an issue has been decided in a prior proceeding, the prior decision on that issue may preclude relitigation of the issue in a subsequent proceeding if the five requirements set out at *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 104, 862 P2d 1293 (1993) are met. Those requirements are: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.1 LUBA Scope of Review – Generally. In two decisions LUBA has concluded that issue preclusion does not apply in the land use context, based on the fifth factor in *Nelson v. Emerald People's Utility Dist.* However, the Court of Appeals reserved its opinion on that issue in *Lawrence v. Clackamas County*, 180 Or App 495, 504, 43 P3d 1192 (2002). *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.1 LUBA Scope of Review – Generally. Because only one sustainable basis for denying a permit application is required, LUBA need not address additional assignments of error after sustaining one basis for denial. Where additional assignments of error are relatively

straightforward and can be resolved within the statutory deadline for issuing LUBA's decision, LUBA may resolve those additional assignments of error where they would provide additional independent bases for sustaining the decision. However, where those additional assignments of error present close and difficult questions of law, and may require LUBA to consider issues that the parties have not briefed, LUBA will not decide such assignments of error. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

28.1 LUBA Scope of Review – Generally. LUBA sometimes chooses to reject an issue on the merits rather than on the basis of a waiver challenge, where the merits of the issue are straightforward, quicker to resolve than the waiver challenge, and result in denial of the assignment of error. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

28.1 LUBA Scope of Review – Generally. Where LUBA resolves an issue adversely to a party but remands a land use decision for other reasons that party may not fail to appeal LUBA's decision and then raise that same issue in an appeal of the local government's decision following LUBA's remand. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

28.1 LUBA Scope of Review – Generally. Where a county's decision that land is not suitable for commercial forest use misapplies the test that LUBA determined must be applied in an earlier appeal, but the county also properly applies and adequately explains why the land does not qualify as suitable for commercial forest uses under the correct test, the county's misapplication of the test does not provide a basis for reversal or remand. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

28.1 LUBA Scope of Review – Generally. LUBA normally resolves jurisdictional challenges before considering any other arguments on the merits. However, LUBA will consider those other arguments on the merits where petitioner's "jurisdictional" challenge is really an argument for a limited scope of review of a decision that petitioner concedes is a land use decision, and LUBA's resolution of the arguments on the merits makes it unnecessary to resolve petitioner's scope of review arguments. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

28.1 LUBA Scope of Review – Generally. Where an assignment of error and the argument in support of that assignment of error does not specifically mention a transportation system plan policy that requires a public hearing before selecting a roadway alignment, the issue of whether that policy has been violated is adequately stated for LUBA review where the petitioner does include an argument that a public hearing is required and was not provided and in the petition for review cites to pages in the record where another party specifically cites the transportation system plan policy. *Reeves v. City of Wilsonville*, 62 Or LUBA 142 (2010).

28.1 LUBA Scope of Review – Generally. Where an assignment of error challenges a finding that the land use decision maker did not rely on in adopting the decision on appeal, LUBA need not address the assignment of error. However, where the issue presented by that assignment of error is fully briefed, all parties wish LUBA to decide the issue and the issue is sure to arise again, LUBA may address and resolve the issue. *Kuhn v. Deschutes County*, 62 Or LUBA 165 (2010).

28.1 LUBA Scope of Review – Generally. While LUBA has held that a motion to take evidence under OAR 661-010-045 is not necessary to consider affidavits or evidence outside the record for

the limited purpose of establishing LUBA's *jurisdiction* over the challenged decision, a motion to take evidence is necessary to consider affidavits offered to establish whether LUBA's *scope of review* includes a particular issue. *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

28.1 LUBA Scope of Review – Generally. LUBA has jurisdiction over "land use decisions" as defined in ORS 197.015(10)(a). In reviewing land use decisions, LUBA's scope of review extends to issues regarding a decision's compliance with federal law. *Foland v. Jackson County*, 61 Or LUBA 264 (2010).

28.1 LUBA Scope of Review – Generally. LUBA does not have the authority to apply the doctrine of severance to sever unconstitutional provisions from an ordinance and thereby affirm the ordinance on appeal. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

28.1 LUBA Scope of Review – Generally. No statute authorizes LUBA to reconsider a previously issued final opinion. *Boucot v. City of Corvallis*, 61 Or LUBA 459 (2010).

28.1 LUBA Scope of Review – Generally. Arguments that a permit applicant failed to raise any issue concerning a refund of permit fees in his appeal of the permit denial provide no basis for a motion to dismiss. Waiver of issues for failure to raise those issues in a local proceeding or prior LUBA appeals may affect LUBA's scope of review, but such waiver does not affect LUBA's jurisdiction to review a decision that qualifies as a land use decision. *Sperber v. Coos County*, 61 Or LUBA 477 (2010).

28.1 LUBA Scope of Review – Generally. LUBA does not consider arguments that are presented for the first time at oral argument. *Hardesty v. Jackson County*, 58 Or LUBA 162 (2009).

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

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

28.1 LUBA Scope of Review – Generally. Where a petitioner appeals a street vacation decision to LUBA, but does not appeal zone change or site plan review decisions that preceded the street vacation decision, petitioner may not assert legal errors in the decisions that were not appealed as

a basis for reversing the decision that was appealed. *Olson v. City of Springfield*, 56 Or LUBA 229 (2008).

28.1 LUBA Scope of Review – Generally. Where a petitioner appeals a street vacation decision that was approved by applying newly adopted street vacation standards, but petitioner does not appeal the ordinance that adopted the new street vacation standards, petitioner may not challenge the legal propriety of amending the street vacation standards. *Olson v. City of Springfield*, 56 Or LUBA 229 (2008).

28.1 LUBA Scope of Review – Generally. LUBA is not bound to accept as true factual assertions in petitioner's affidavit in the record. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

28.1 LUBA Scope of Review – Generally. When no response brief is filed, LUBA will nevertheless address a petitioner's assignments of error on the merits, and summary reversal or remand is not appropriate. *Tennant v. Polk County*, 56 Or LUBA 455 (2008).

28.1 LUBA Scope of Review – Generally. When a decision is appealed to LUBA and withdrawn by the city for reconsideration, and a decision is made on reconsideration, any alleged errors made in the original decision that was withdrawn for reconsideration do not provide a basis for reversal or remand of the decision on reconsideration. *Bullock v. City of Ashland*, 56 Or LUBA 677 (2008).

28.1 LUBA Scope of Review – Generally. If two resolutions are properly viewed as separate and independent decisions, a petitioner's failure to appeal one of those resolutions would generally be fatal to any challenges to determinations made in the unappealed resolution. However, where the two resolutions are adopted contemporaneously to approve a permit application, the two resolutions purport to resolve different legal issues but only have only minor wording differences and both resolutions are supported by the same findings document, an appeal of either resolution is sufficient to allow petitioners to challenge legal determinations in both resolutions. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

28.1 LUBA Scope of Review – Generally. LUBA will not affirm a local government's decision based on a vested rights theory where the county did not address or adopt that theory in its decision. *Dunn v. Yamhill County*, 55 Or LUBA 206 (2007).

28.1 LUBA Scope of Review – Generally. LUBA has authority to interpret ORS 197.352, or any other statute, as may be necessary in the context of reviewing a land use decision that is subject to LUBA's jurisdiction. *Welch v. Yamhill County*, 55 Or LUBA 697 (2007).

28.1 LUBA Scope of Review – Generally. LUBA's scope of review includes review of a final land use decision and review of any interlocutory decisions that are a necessary part of the final land use decision. *Meadow Neighborhood Assoc. v. Washington County*, 54 Or LUBA 124 (2007).

28.1 LUBA Scope of Review – Generally. In reviewing a challenge to a moratorium, LUBA's scope of review is limited to determining whether the moratorium was adopted in violation of ORS 197.505 to 197.530. *Thunderbird Hotels, LLC v. City of Portland*, 54 Or LUBA 487 (2007).

28.1 LUBA Scope of Review – Generally. LUBA's scope of review is established by statute, and the parties in a LUBA appeal may not expand that scope of review simply by making arguments that exceed LUBA's scope of review, even if no party objects to such arguments. *Thompson v. Umatilla County*, 54 Or LUBA 531 (2007).

28.1 LUBA Scope of Review – Generally. ORS 215.780(2) and ORS 197.835(6) and (7) together limit LUBA's scope of review when considering an appeal of a post-acknowledgement plan amendment to impose reduced minimum lot or parcel sizes in an EFU zone pursuant to ORS 215.780(2) to exclude review for statewide planning goal compliance, where the reduced minimum lot or parcel sizes have already been reviewed for compliance with the statewide planning goals by the Land Conservation and Development Commission under ORS 215.780(2) and found to comply with the statewide planning goals. *Thompson v. Umatilla County*, 54 Or LUBA 531 (2007).

28.1 LUBA Scope of Review – Generally. LUBA's scope of review is not limited to the local government record under ORS 197.835(2)(a) when LUBA is considering whether the decision on appeal is a land use decision that is subject to LUBA review. Making that threshold jurisdictional inquiry does not entail "[r]eview of the decision," within the meaning of ORS 197.835(2)(a). *Home Builders Association v. City of Eugene*, 54 Or LUBA 692 (2007).

28.1 LUBA Scope of Review – Generally. LUBA is not precluded from reviewing a confidential communication from the city attorney to the city council, where a member of the city council provided a copy of the communication to petitioner and thereby waived the privilege that might otherwise preclude LUBA consideration of the communication. *Home Builders Association v. City of Eugene*, 54 Or LUBA 692 (2007).

28.1 LUBA Scope of Review – Generally. Where petitioners cite a broadcast tower approval criterion that encourages collocation but refer to their undeveloped argument concerning that criterion as "contextual backdrop," LUBA will consider that argument as contextual backdrop rather than an argument that might justify reversal or remand. *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

28.1 LUBA Scope of Review – Generally. Where petitioners are aware of two prior city decisions that extended the effective date of a preliminary public facility improvement agreement and do not appeal those prior decisions, petitioners cannot collaterally attack those decision in an appeal of a subsequent decision that relies on those prior unappealed decisions. *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006).

28.1 LUBA Scope of Review – Generally. LUBA will not consider an intervenor-respondent's argument that petitioner's challenge to a lot depth variance should be rejected because the lot depth variance the city approved was unnecessary under applicable zoning regulations, where the city did not consider that issue below. *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006).

28.1 LUBA Scope of Review – Generally. If the argument included in support of an assignment of error clearly alleges that findings are not supported by substantial evidence, the fact that an assignment of error that challenges the adequacy of the city's findings does not expressly include

a substantial evidence challenge does not preclude LUBA review of the substantial evidence arguments that follow that assignment of error. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

28.1 LUBA Scope of Review – Generally. Petitioners must do more than argue that a county erroneously relied on a noise study that assumed that the DEQ standards for existing noise sources apply; petitioners must identify which new noise source standards they believe apply and why. *Lindsey v. Josephine County*, 51 Or LUBA 383 (2006).

28.1 LUBA Scope of Review – Generally. Where the issues of whether a regional sewerage plan was properly adopted and whether its adoption is a land use decision were not before the circuit court in writ of review proceeding, issue preclusion does not apply and petitioners are not foreclosed from arguing to LUBA that the decision to adopt the plan is a land use decision and that it violates Goal 11 and the Goal 11 administrative rule. *Home Builders Assoc. v. City of Springfield*, 50 Or LUBA 109 (2005).

28.1 LUBA Scope of Review – Generally. In an appeal of a land use decision that applies an acknowledged comprehensive plan policy a petitioner may not challenge the validity of the acknowledged comprehensive plan policy. *Sommer v. Josephine County*, 49 Or LUBA 134 (2005).

28.1 LUBA Scope of Review – Generally. LUBA will not consider an interpretive argument that is presented at oral argument but was not included in the petition for review and was not presented to the local government. *Regen v. Lincoln County*, 49 Or LUBA 386 (2005).

28.1 LUBA Scope of Review – Generally. Arguments that an "island" annexation under ORS 222.750 must be remanded because the record does not include consents necessary to establish the validity of previous annexations that rendered the subject area an "island" are essentially collateral attacks on annexation decisions not before the Board, and therefore do not provide a basis for reversing or remanding the challenged island annexation. *Kane v. City of Beaverton*, 49 Or LUBA (512).

28.1 LUBA Scope of Review – Generally. Arguments that the city erred in proceeding with an annexation election prior to determining whether the proposed annexation complied with applicable land use standards do not provide a basis for reversal or remand of the post-election decision, where the decision to proceed in that order was made in a pre-election decision that was appealed to LUBA but dismissed as untimely. Such arguments are essentially a collateral attack on a decision not before LUBA. *Cutsforth v. City of Albany*, 49 Or LUBA 559 (2005).

28.1 LUBA Scope of Review – Generally. LUBA will not review an assignment of error alleging that a county improperly retained part of the petitioner's local appeal fee, where the county's alleged actions in retaining the fee postdate the challenged decision before LUBA and are embodied in a different decision that is not before LUBA. *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004).

28.1 LUBA Scope of Review – Generally. Where it is undisputed that a city has adopted a Wetlands Resource Plan that has been acknowledged by LCDC, the acknowledged Wetlands

Resource Plan and implementing regulations apply in reviewing an application for subdivision approval and neither Goal 5 nor its implementing regulations apply directly. *Doob v. City of Grants Pass*, 48 Or LUBA 245 (2004).

28.1 LUBA Scope of Review – Generally. An assertion in a local notice of appeal that the planning commission erroneously interpreted the comprehensive plan to require preservation of an overlay zoning on the subject property is sufficient to raise an issue, under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), regarding whether the overlay zone had expired. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

28.1 LUBA Scope of Review – Generally. An argument that the assignments of error in the petition for review are directed at decisions not before LUBA is not a basis to dismiss an appeal of a decision otherwise within LUBA's jurisdiction. If that argument is correct, the proper disposition is to reject the assignments of error in the petition for review and affirm the challenged decision, not to dismiss the appeal. Such arguments are more correctly viewed as a scope of review challenge rather than a jurisdictional challenge. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282 (2004).

28.1 LUBA Scope of Review – Generally. Assignments of error that are in substance a collateral attack on determinations made in an earlier unchallenged decision do not provide a basis to reverse or remand the challenged decision. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282 (2004).

28.1 LUBA Scope of Review – Generally. Where a city decision must be remanded in any event and resolving an assignment of error would require LUBA to determine whether a disputed city decision "rezoned" property within the meaning of ORS 227.186(9)(b), LUBA will not decide that assignment of error where (1) the statute is ambiguous, (2) LUBA has not interpreted the statute before, (3) the parties provide no legislative history and the statutory deadline for issuing LUBA's opinion has already expired, and (4) the city might provide the notice on remand making the allegation of error moot. *Rhodes v. City of Talent*, 47 Or LUBA 574 (2004).

28.1 LUBA Scope of Review – Generally. Issue preclusion does not apply where the party asserting issue preclusion does not demonstrate that the required elements for issue preclusion are present and it appears that the legal conclusion in the prior land use decision that forms the basis for the party's issue preclusion argument was not essential to the prior land use decision. *DeBoer v. Jackson County*, 46 Or LUBA 24 (2003).

28.1 LUBA Scope of Review – Generally. Where a 2003 permit to construct a parking deck does not purport to allow construction of a dwelling that was the subject of a 2001 permit, petitioners may not challenge the 2001 permit approval for the dwelling in an appeal of the 2003 permit decision. *Shoemaker v. Tillamook County*, 46 Or LUBA 433 (2004).

28.1 LUBA Scope of Review – Generally. Where a notice of intent to appeal identifies a planning department's decision to approve a permit without a hearing as the appealed decision, but does not identify a subsequent hearings officer's decision dismissing a local appeal of that planning

department decision, LUBA may not consider assignments of error directed at the hearings officer's decision. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 511 (2003).

28.1 LUBA Scope of Review – Generally. An applicant who threatened a mandamus proceeding below to compel the county to approve its application did not benefit by gaining a time advantage where the county took 1,045 days to render its decision in its initial proceedings and 614 days in its proceedings on remand, and the applicant is therefore not judicially estopped from asserting a position before LUBA that may differ from the position it asserted below in support of the threatened mandamus proceeding. *Rutigliano v. Jackson County*, 42 Or LUBA 565 (2002).

28.1 LUBA Scope of Review – Generally. LUBA may review a challenge to findings that an applicable criterion is satisfied even though the findings were made in a planning commission recommendation to the board of county commissioners, where it is clear that the criterion must be satisfied in order to approve an application and the board of county commissioners approves the application. *Doty v. Coos County*, 42 Or LUBA 103 (2002).

28.1 LUBA Scope of Review – Generally. LUBA will not review petitioner's interpretational challenges to several alternative interpretations of an approval criterion, where the local government finds, and LUBA affirms, that the criterion is satisfied even if it is interpreted in the manner that petitioner argues it should be interpreted. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

28.1 LUBA Scope of Review – Generally. Where a planning director's decision to revoke a previously approved appeal fee waiver and reject petitioner's local appeal was final when rendered, and petitioner did not file a timely appeal with LUBA to challenge that decision, petitioner may not challenge the fee waiver revocation and denial of the local appeal in an appeal of a subsequent planning director letter that merely reiterates the earlier decision. *Babbitt v. City of Portland*, 41 Or LUBA 151 (2001).

28.1 LUBA Scope of Review – Generally. In reviewing a land use decision, LUBA's scope of review does not include matters over which LCDC has acknowledgment review authority under ORS 197.251. *Citizens Against Irresponsible Growth v. Metro*, 40 Or LUBA 426 (2001).

28.1 LUBA Scope of Review – Generally. Where a transportation plan has been submitted to LCDC for acknowledgment review and LCDC has conducted that review with regard to Goal 12 and the Transportation Planning Rule (TPR), LUBA does not have authority to thereafter review the regional transportation plan for compliance with the TPR. That limit on LUBA's scope of review is not affected by the fact that the TPR was adopted to implement both Goal 12 and the ORS 197.712(2)(e) obligation concerning public facility plans, where the statutory obligation is not shown to impose transportation planning obligations that are different than those imposed by Goal 12. *Citizens Against Irresponsible Growth v. Metro*, 40 Or LUBA 426 (2001).

28.1 LUBA Scope of Review – Generally. LUBA does not have jurisdiction to review a regional transportation plan to determine whether it is consistent with a regional framework plan consistency requirement, where such consistency is also required by Goal 2 and LCDC has

jurisdiction to review the regional framework plan and regional transportation plan for compliance with Goal 2. *Citizens Against Irresponsible Growth v. Metro*, 40 Or LUBA 426 (2001).

28.1 LUBA Scope of Review – Generally. A regional framework plan requirement for "findings" that a transportation plan is consistent with the regional framework plan is not within LUBA's scope of review where both plans have been submitted to LCDC for acknowledgment review under ORS 197.251. LCDC's review for plan-to-plan consistency under Goal 2 either includes review of the "findings" requirement or renders it legally irrelevant. *Citizens Against Irresponsible Growth v. Metro*, 40 Or LUBA 426 (2001).

28.1 LUBA Scope of Review – Generally. Where a city planner expresses an opinion in a transmittal letter, but the city council decision that is transmitted with the letter clearly does not express that opinion, the expression of opinion is not reviewable by LUBA in an appeal of the city council's decision. *Robson v. City of La Grande*, 40 Or LUBA 250 (2001).

28.1 LUBA Scope of Review – Generally. The law of the case doctrine, as articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), does not preclude a county from relying on newly acquired evidence to address a remanded legal issue. A party is not precluded from updating its evidence on remand, nor is the county precluded from reaching a new or different conclusion based on that evidence. *DLCD v. Klamath County*, 40 Or LUBA 221 (2001).

28.1 LUBA Scope of Review – Generally. When a city imposes a condition on development approval and relies on that condition in both its initial approval and its reapproval after withdrawing the decision for reconsideration, a petitioner's failure to raise issues regarding the condition during the evidentiary proceedings on reconsideration precludes petitioner from challenging the adequacy or validity of the condition in a subsequent LUBA appeal of the decision on reconsideration. *DLCD v. City of Warrenton*, 40 Or LUBA 88 (2001).

28.1 LUBA Scope of Review – Generally. The law of the case doctrine does not apply to an appeal of a new application, even if that application is similar to a prior application that resulted in a decision that was remanded by LUBA. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

28.1 LUBA Scope of Review – Generally. A petitioner may not challenge the merits of the underlying decision in an appeal of a local decision maker's determination that there is no local appeal available to challenge that decision. *Robinson v. City of Silverton*, 39 Or LUBA 792 (2001).

28.1 LUBA Scope of Review – Generally. LUBA will dismiss an appeal of a component of a local decision for lack of finality where it is clear that the local government has separated an otherwise unitary land use decision into separate components, and remanded some of those components for further local proceedings. *Besseling v. Douglas County*, 39 Or LUBA 177 (2000).

28.1 LUBA Scope of Review – Generally. LUBA will deny a motion to consider evidence that is not included in the record, where the moving party fails to demonstrate that any of the criteria for granting such a motion under OAR 661-010-0045(1) are met and the evidence the moving party seeks to have included does not render the appeal moot. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

28.1 LUBA Scope of Review – Generally. Challenges that are directed at a previously approved preliminary plat for a planned unit development in an appeal of final plat approval are an impermissible collateral attack on the prior decision. *Bauer v. City of Portland*, 38 Or LUBA 715 (2000).

28.1 LUBA Scope of Review – Generally. Interpretations that allow a local government to adopt decisions that violate applicable state statute are not deference under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000).

28.1 LUBA Scope of Review – Generally. A city's interpretation of a "no adverse effect" standard to permit some adverse impacts on adjacent properties, so long as the impacts do not affect the uses on those properties, is not clearly wrong. *Kane v. City of Beaverton*, 38 Or LUBA 183 (2000).

28.1 LUBA Scope of Review – Generally. A petitioner does not waive any rights to present argument in a subsequent LUBA appeal by failing to appeal a prior LUBA decision and assign error to conclusions in that prior LUBA decision, where the conclusions were *dictum* and would not have provided a basis for appeal. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

28.1 LUBA Scope of Review – Generally. Petitioner does not waive its right to argue at oral argument that a prior LUBA decision was wrongly decided, notwithstanding that petitioner was aware of the prior decision and did not present argument concerning that decision in its petition for review, where respondent argues in its response brief in response to an assignment of error that the prior LUBA decision is controlling. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

28.1 LUBA Scope of Review – Generally. In considering whether a farm management plan has been substantially complied with, a county is not required to consider issues that could have been presented in a prior, unappealed decision that authorized a property line adjustment for the two parcels that were the subject of the farm management plan. *Rochlin v. Multnomah County*, 37 Or LUBA 237 (1999).

28.1 LUBA Scope of Review – Generally. LUBA has jurisdiction to review a statutory challenge to a plan amendment even though the statutory challenge was not raised in a LUBA appeal when the plan was originally adopted, where the statutory question presented when the plan was first adopted is different from the statutory question presented by the plan amendment decision. *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

28.1 LUBA Scope of Review – Generally. LUBA does not have statutory authority to dismiss an appeal of a land use decision *and* direct that particular actions be taken by the city following such dismissal. *Genstar Land Company Northwest v. City of Sherwood*, 36 Or LUBA 787 (1999).

28.1 LUBA Scope of Review – Generally. Where parties stipulate that LUBA may dismiss an appeal or a petitioner withdraws the notice of intent to appeal, LUBA's decision dismissing the

appeal expresses no position on the legal effect of actions that may have been taken or may yet be taken pursuant to an agreement entered into by parties to the appeal. *Genstar Land Company Northwest v. City of Sherwood*, 36 Or LUBA 787 (1999).

28.1 LUBA Scope of Review – Generally. LUBA's dismissal of an appeal at petitioner's request expresses no opinion on the merits of any underlying agreement or any actions taken by the local government that may form the basis for petitioner's decision to request that its appeal be dismissed. *Genstar Land Company Northwest v. City of Sherwood*, 36 Or LUBA 612 (1999).

28.1 LUBA Scope of Review – Generally. The law of the case doctrine does not bar petitioners from raising issues that were resolved or could have been raised in a prior decision approving the challenged land use proposal, where the challenged decision revisits, on a *de novo* basis, certain issues resolved in a prior decision, and the issues raised in the present appeal all pertain to matters that the challenged decision revisited. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

28.1 LUBA Scope of Review – Generally. LUBA will not consider arguments that a city erred in approving a modified PUD Master Plan, where the LUBA appeal challenges a preliminary plat decision that is subject to the previously approved PUD Master Plan and petitioner does not appeal a separate city decision that modifies the PUD Master Plan. *Claus v. City of Sherwood*, 35 Or LUBA 437 (1999).

28.1 LUBA Scope of Review – Generally. Petitioner may not prevail on a LUBA appeal unless his assignments of error are sufficiently developed to allow review and provide some legal basis for remand or reversal. *Schaffer v. City of Turner*, 35 Or LUBA 350 (1998).

28.1 LUBA Scope of Review – Generally. When the only decision appealed is a decision changing the required sequence of PUD phases, and the assignments of error provide no basis for reversing or remanding that decision, the decision will be affirmed. LUBA will reject assignments of error that challenge other related decisions that were not appealed. *Claus v. City of Sherwood*, 35 Or LUBA 120 (1998).

28.1 LUBA Scope of Review – Generally. Where a county gives adequate assurances that it will comprehensively review petitioner's assignments of error, LUBA will grant a motion for voluntary remand and will not assume the motion for voluntary remand is motivated by delay or other improper reasons simply because there has been a lengthy course of litigation in the matter. *Murphy Citizens Advisory Committee v. Josephine Co.*, 35 Or LUBA 117 (1998).

28.1 LUBA Scope of Review – Generally. LUBA does not evaluate common law rights of access, unless those rights of access are incorporated into a local land use standard. *Applegate Estates v. City of Klamath Falls*, 35 Or LUBA 112 (1998).

28.1 LUBA Scope of Review – Generally. Where the petition for review challenging a post-acknowledgment decision raises an issue concerning the propriety of the city relying on documents that were prepared for a pending periodic review, the issue of whether ORS 197.644(2) and OAR 660-025-0040 deprive LUBA of jurisdiction to review the challenged decision is necessarily

presented and may be included in a state agency brief submitted under ORS 197.830(7). *Citizens for Florence v. City of Florence*, 34 Or LUBA 793 (1998).

28.1 LUBA Scope of Review – Generally. Where a local government denies petitioner's local appeal as being not timely filed, LUBA review of that decision is limited to the rejection of the local appeal and does not extend to the merits of the underlying land use decision. *Confederated Tribes v. Jefferson County*, 34 Or LUBA 565 (1998).

28.1 LUBA Scope of Review – Generally. LUBA's jurisdiction is limited to reviewing the land use decision appealed. In reviewing an appealed land use decision, LUBA may not consider whether a code amendment that is applied in the challenged decision was properly adopted, where the decision adopting the code amendment was not appealed. *Femling v. Coos County*, 34 Or LUBA 328 (1998).

28.1 LUBA Scope of Review – Generally. LUBA's scope of review is not precluded or affected when petitioner assigns error to a plan amendment but fails to assign error to a corresponding zone change. Under ORS 197.175(2)(b) and 197.835(7)(b), zoning ordinances must conform to and comply with the local government's comprehensive plan, therefore a remand on the basis of error respecting the plan amendment would necessarily invalidate the corresponding zone change. *Geaney v. Coos County*, 34 Or LUBA 189 (1998).

28.1 LUBA Scope of Review – Generally. LUBA is not required to defer to an interpretation by a hearings officer. Thus, the proper standard of review is not whether the hearings officer's interpretation is contrary to the ordinance's express terms or policy, but rather whether that interpretation is reasonable and correct. *Tylka v. Clackamas County*, 34 Or LUBA 14 (1998).

28.1 LUBA Scope of Review – Generally. Where LUBA cannot tell which of several conceivable interpretations of a local ordinance the city intended, the implied interpretation is not adequate for review. *Bradbury v. City of Bandon*, 33 Or LUBA 664 (1997).

28.1 LUBA Scope of Review – Generally. In determining whether a previous local decision vacated lot lines, LUBA considers only what the record establishes the county did in that previous decision, not what the county should have done. *Koo v. Polk County*, 33 Or LUBA 487 (1997).

28.1 LUBA Scope of Review – Generally. A decision maker's finding that a petitioner has not raised an issue below with sufficient statements and evidence to enable the decision maker to respond does not compel LUBA to reach the same conclusion. *Arnett v. City of Lake Oswego*, 33 Or LUBA 384 (1997).

28.1 LUBA Scope of Review – Generally. The standard applied under ORS 197.829 to LUBA's review of a city council's interpretation of its charter is whether such interpretation was reasonable and correct. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

28.1 LUBA Scope of Review – Generally. In complying with the city's demand that it file an application for a conditional use permit in order to continue its operation, petitioner accepted the validity of that demand for the purposes of the proceeding on its application, and LUBA therefore

cannot review the decision to require a conditional use permit. *Recovery House VI v. City of Eugene*, 33 Or LUBA 327 (1997).

28.1 LUBA Scope of Review – Generally. ORS 197.540 grants LUBA review authority over any moratorium, including any extension of a moratorium under ORS 197.530(2), and LUBA may invalidate any improperly extended moratorium. *Manning v. City of St. Paul*, 33 Or LUBA 193 (1997).

28.1 LUBA Scope of Review – Generally. LUBA's authority to review and invalidate an improperly extended moratorium does not include authority to invalidate the initial adoption of a moratorium, where initial adoption was not appealed to LUBA within 21 days after the initial adoption became final. *Manning v. City of St. Paul*, 33 Or LUBA 193 (1997).

28.1 LUBA Scope of Review – Generally. LUBA cannot employ the rules of statutory construction to interpret plan and code provisions even when it does so only as a means to establish a baseline from which to determine whether a local government interpretation is "clearly wrong" or "beyond a colorable defense." *Downtown Community Assoc. v. City of Portland*, 33 Or LUBA 140 (1997).

28.1 LUBA Scope of Review – Generally. LUBA will defer under ORS 197.829(1) to a local government's interpretation of conditional use permit criteria even when that interpretation is at odds with LUBA's own interpretation of identical statutory criteria governing an application for a nonfarm dwelling. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

28.1 LUBA Scope of Review – Generally. Where petitioners contend that a condition impermissibly defers compliance with local criteria, but fail to identify the approval criteria to which the condition relates and fail to provide any argument supporting their position, petitioners' allegation is insufficiently developed for LUBA review. *Just v. Linn County*, 32 Or LUBA 325 (1997).

28.1 LUBA Scope of Review – Generally. Since the rule of deference to a local government's interpretation of its plan and land use regulations, which is codified in ORS 197.829(1), does not apply to our review of local government decisions not made by the governing body, the exceptions to the rule, set forth in ORS 197.829(1)(a) to (d), also do not apply. *ODOT v. Clackamas County*, 32 Or LUBA 118 (1996).

28.1 LUBA Scope of Review – Generally. Comments made by city council members during the course of their deliberations that are not reflected in the county's final written findings are not relevant in determining whether the county complied with ORS 227.173(2). *Miller v. City of Joseph*, 31 Or LUBA 472 (1996).

28.1 LUBA Scope of Review – Generally. Only actions undertaken by the city prior to the date of the final decision being appealed are relevant to LUBA's review. Assignments of error that relate to actions undertaken by the city after the date of its final decision will be denied. *Tucker v. City of Adair Village*, 31 Or LUBA 382 (1996).

28.1 LUBA Scope of Review – Generally. LUBA's scope of review is limited by ORS 197.835 to a review of the decision made by the county. LUBA does not have statutory authority to issue advisory opinions. *Brugh v. Coos County*, 31 Or LUBA 158 (1996).

28.1 LUBA Scope of Review – Generally. LUBA usually will not consider arguments made for the first time at oral argument before the Board. *DLCD v. Polk County*, 31 Or LUBA 69 (1996).

28.1 LUBA Scope of Review – Generally. When a county has made detailed findings explaining why a challenged decision is not a land use decision under its local regulations or, alternatively, why the decision is exempt from review under those regulations, and those findings are not clearly wrong, LUBA will defer to the county's interpretation of its own regulations. *Leathers v. Washington County*, 31 Or LUBA 43 (1996).

28.1 LUBA Scope of Review – Generally. Although knowing the applicable standard of review is useful to any party to an appeal to LUBA, a petitioner need not specify the correct standard of review in the petition for review in order to obtain a decision on the merits. *Huntzicker v. Washington County*, 30 Or LUBA 397 (1996).

28.1 LUBA Scope of Review – Generally. While ORS 197.829(2) allows LUBA to interpret local land use regulations in the absence of interpretations by the local government, LUBA need not search the record, or make interpretations or draw conclusions that are not clearly evident. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

28.1 LUBA Scope of Review – Generally. While LUBA need not piece together evidence which could explain a city's conclusion, it must consider evidence identified by intervenor-respondent in its brief that support the city's findings that an applicable standard has been met. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

28.1 LUBA Scope of Review – Generally. When a local governing body determines that policies contained in its comprehensive plan are inapplicable to its decision, LUBA's review is limited to whether the governing body's interpretation of the policies and its subsequent determination of their inapplicability satisfies ORS 197.829(1). *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147 (1995).

28.1 LUBA Scope of Review – Generally. In an appeal of a decision approving a 100-lot PUD on land zoned R-1 and subject to a Goal 5 designation, LUBA will not review a challenge to the city's earlier decision to zone the site for residential development rather than open space. Petitioners cannot collaterally attack the city's decision by arguing that residential development is inconsistent with the Goal 5 designation. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46 (1995).

28.1 LUBA Scope of Review – Generally. Petitioners cannot, in a subsequent proceeding, collaterally attack conditions imposed in an earlier, unappealed, decision. *Wakeman v. Jackson County*, 29 Or LUBA 521 (1995).

28.1 LUBA Scope of Review – Generally. Although LUBA may not itself order a local government to refund a fee charged for a local appeal, local fee payment issues are part of the land use appeals structure, capable of violating applicable legal standards and providing a basis for remand. *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

28.1 LUBA Scope of Review – Generally. Petitioners' contention that the county inappropriately zoned their property at the time the comprehensive plan was adopted is not relevant to petitioners' appeal of the county's denial of a comprehensive plan map amendment and zone change. *Sandgren v. Clackamas County*, 29 Or LUBA 454 (1995).

28.1 LUBA Scope of Review – Generally. Where the city council conducted a separate proceeding on the question of whether off-street parking use of certain property requires a conditional use permit, petitioners participated in that proceeding, and city council minutes indicate a final, appealable decision interpreting the local code in this regard was made, petitioners cannot challenge that decision in their appeal of the city's subsequent decision on an application for site plan approval for such off-street parking. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

28.1 LUBA Scope of Review – Generally. Because LUBA's review is limited to the record of an appealed decision, LUBA cannot rely on a determination in another case that a proposed golf course is not a commercial use to support a determination, in the case on appeal, that a proposed golf driving range is not a commercial use. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

28.1 LUBA Scope of Review – Generally. LUBA's review of a local government decision applying its code mineral and aggregate resources chapter for compliance with ORS 215.283 does not extend to a review of the code chapter for compliance with ORS 215.283 in respects unrelated to the challenged decision. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

28.1 LUBA Scope of Review – Generally. LUBA does not have the authority to reject an otherwise properly filed appeal on the basis of an equitable defense of laches. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

28.1 LUBA Scope of Review – Generally. Unless an evidentiary hearing is granted, LUBA's review is limited to the local record. Therefore, if a motion for evidentiary hearing is not filed, LUBA will not consider discussion in a party's brief or oral argument concerning matters not in the local record. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

28.1 LUBA Scope of Review – Generally. The submittal of a land use permit application leads to *one* local review process, including any local appeals, and culminates in *one* final local land use decision appealable to LUBA. Any relevant issues concerning the acceptance, processing and approval or denial of such application may be raised in an appeal to LUBA, subject to the requirements of ORS 197.763(1) and 197.835(2) that such issues have been raised below. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

28.1 LUBA Scope of Review – Generally. Although ORS 197.825(2)(a) requires that local appeals be exhausted, the fact that the local code may limit the scope of review of a local appellate

body in considering a local appeal does not similarly limit LUBA's scope of review. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

28.1 LUBA Scope of Review – Generally. Where petitioner appeals a decision by a local governing body not to accept petitioner's appeal of a planning commission decision, LUBA's scope of review is limited to whether the governing body correctly decided not to accept petitioner's local appeal. LUBA will not review the merits of the planning commission decision. *Cummings v. Tillamook County*, 29 Or LUBA 550 (1995).

28.1 LUBA Scope of Review – Generally. LUBA is required to defer to a local governing body's interpretation of any enactment which the governing body of that jurisdiction adopted, regardless of whether the governing body of another jurisdiction also adopted the same enactment. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

28.1 LUBA Scope of Review – Generally. Where the challenged decision was adopted by a decision maker other than the local governing body, and the decision fails to contain an interpretation of relevant code provisions, LUBA may interpret the local code. *Beveled Edge Machines, Inc. v. City of Dallas*, 28 Or LUBA 790 (1995).

28.1 LUBA Scope of Review – Generally. Where the dispute between the parties involves an ethical dispute concerning the application of disciplinary rules of the Oregon State Bar that have no direct bearing on the merits of the decision appealed to LUBA, LUBA will not attempt to resolve such ethical dispute. *Burghardt v. City of Molalla*, 28 Or LUBA 788 (1995).

28.1 LUBA Scope of Review – Generally. In reviewing a decision adopted by a local governing body, LUBA must review the governing body's interpretation of local code provisions and may not interpret the local code in the first instance, unless there is "no possible rational dispute" regarding the correct interpretation. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

28.1 LUBA Scope of Review – Generally. Determining whether an advisory body, which submitted a recommendation to the local decision maker in a land use proceeding, violated provisions of the Public Meetings Law in the manner its meetings were held is beyond LUBA's scope of review. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

28.1 LUBA Scope of Review – Generally. For ORS 197.829(4) to apply to LUBA's review of a governing body's interpretation of its own code, the connection between the local code provision and the statewide planning goal it is arguably designed to implement must be a close one. ORS 197.829(4) was not adopted to allow LUBA to reconsider the propriety of the original acknowledgment of comprehensive plans and land use regulations. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

28.1 LUBA Scope of Review – Generally. Where the challenged decision was made by the hearings officer and petitioners contend a zoning district purpose statement is a mandatory standard applicable to proposed development, LUBA may determine, in the first instance, whether the provision is an approval applicable to the proposal. *Ellison v. Clackamas County*, 28 Or LUBA 521 (1995).

28.1 LUBA Scope of Review – Generally. A respondent or intervenor-respondent who wishes to challenge some aspect of an appealed decision must file either a cross-petition for review or a separate appeal. LUBA will not consider assignments of error included in a respondent's brief. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

28.1 LUBA Scope of Review – Generally. A petitioner at LUBA may not raise an argument for the first time at oral argument or in a post-oral argument memorandum. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

28.1 LUBA Scope of Review – Generally. Where petitioner appeals local government decisions issuing a building permit and denying a request for a local appeal of the building permit, and petitioner's notice of intent to appeal is filed more than 21 days after petitioner had actual notice of the building permit decision but within 21 days of the decision that there is no right to a local appeal, the notice of intent to appeal is untimely filed with regard to the building permit decision and the only issue to be resolved in the LUBA appeal is whether the local government determination that there is no right to a local appeal of the building permit decision is erroneous. *Mills v. City of Yachats*, 28 Or LUBA 736 (1994).

28.1 LUBA Scope of Review – Generally. LUBA is not authorized to remand a challenged decision to a local government for the local government to conduct evidentiary hearings, without first resolving the assignments of error raised by a petitioner. ORS 197.835(9)(a). *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

28.1 LUBA Scope of Review – Generally. Under ORS 197.829, LUBA is required to defer to a local governing body's interpretation of its own enactment, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

28.1 LUBA Scope of Review – Generally. ORS 197.829(4) was not adopted to allow LUBA to reconsider the propriety of the original acknowledgment of comprehensive plans and land use regulations. Identification of an allegedly incorrect *interpretation* of such acknowledged comprehensive plan or land use regulation provisions is a condition precedent for invoking review under ORS 197.829(4). *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

28.1 LUBA Scope of Review – Generally. A planning director's decision that a development has satisfied the requirements of local ordinances is inadequate for review if it does not identify which provisions of the ordinances it addresses, does not set out the facts relied on, and does not relate the facts to the ordinance provisions addressed. *Hart v. Jefferson County*, 27 Or LUBA 612 (1994).

28.1 LUBA Scope of Review – Generally. In an appeal to LUBA from one local government decision, petitioners may not collaterally attack an earlier, separate local government decision that was not appealed. *Sahagian v. Columbia County*, 27 Or LUBA 341 (1994).

28.1 LUBA Scope of Review – Generally. Statements by individual decision makers made early in the local proceedings, that granting adjustments to code requirements would have a negative impact on the neighborhood, do not show the decision makers ignored applicable criteria in later adopting a final written decision granting the adjustment. It is the final written decision that is subject to LUBA review. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

28.1 LUBA Scope of Review – Generally. In an appeal of a local government decision granting an adjustment, LUBA's scope of review does not include challenges to the adequacy of rules of procedure for granting adjustments previously adopted by the local government in a separate unappealed decision. *Edwards v. City of Portland,* 27 Or LUBA 262 (1994).

28.1 LUBA Scope of Review – Generally. Neither law of the case nor issue preclusion applies in a LUBA appeal of a land use decision made after a prior remand by LUBA, where the second appeal involves different parties and a new application for a revised project was submitted after remand. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

28.1 LUBA Scope of Review – Generally. Where a party's argument is based solely on a document not in the local record, another party objects to LUBA's consideration of that document, and the party making the argument does not move for an evidentiary hearing pursuant to ORS 197.830(13)(b) or offer any other basis on which LUBA might consider the document, LUBA will reject the argument. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

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

28.1 LUBA Scope of Review – Generally. ORS 197.829(1), (2) and (3) essentially codify the standard of review imposed by *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). ORS 197.829(4) limits or qualifies the *Clark* standard of review in certain circumstances. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

28.1 LUBA Scope of Review – Generally. Except as provided in 197.830(13)(b), LUBA's review is limited to the local government record. A motion to participate as an amicus will be denied where the only reason stated for the request is to present expert testimony and other evidence that is not included in the local government record. *Sanchez v. Clatsop County*, 26 Or LUBA 647 (1994).

28.1 LUBA Scope of Review – Generally. LUBA may not expand its review beyond the evidentiary record submitted by the local government simply because the evidence outside the local government record is relevant. *Waugh v. Coos County,* 26 Or LUBA 300 (1993).

28.1 LUBA Scope of Review – Generally. LUBA's review is limited to what is approved by the challenged decision. LUBA will not review the legal sufficiency of a development permit that the challenged decision does not purport to approve. *Hixson v. Josephine County*, 26 Or LUBA 159 (1993).

28.1 LUBA Scope of Review – Generally. LUBA may not reweigh evidence or substitute its judgment for that of a local government concerning a proposal's compliance with applicable standards. *Hixson v. Josephine County*, 26 Or LUBA 159 (1993).

28.1 LUBA Scope of Review – Generally. LUBA's scope of review is determined by ORS 197.835 and 197.763(1). That local government regulations may allow or require the local governing body's scope of review to be narrowed during local appeals does not similarly narrow LUBA's scope of review. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

28.1 LUBA Scope of Review – Generally. Where a prior local government land use decision was not appealed, neither the merits of the prior decision nor any errors that allegedly occurred in the proceedings leading to that decision, are before LUBA in an appeal of a subsequent local government land use decision. *Perry v. Yamhill County*, 26 Or LUBA 73 (1993).

28.1 LUBA Scope of Review – Generally. LUBA will not grant a motion to file an amicus brief where the proposed amicus brief raises only an issue that is not raised in the petition for review. *Friends of Bryant Woods v. City of Lake Oswego*, 26 Or LUBA 594 (1993).

28.1 LUBA Scope of Review – Generally. LUBA reviews the local government's final written order. That the final written order may not accurately reflect oral comments made by the local decision maker during its deliberations provides no basis for reversal or remand of the challenged decision. *Derry v. Douglas County*, 26 Or LUBA 25 (1993).

28.1 LUBA Scope of Review – Generally. It is the practice at LUBA for a party that wishes LUBA to consider a document not in the local record, for one of the purposes listed in ORS 197.830(13)(b) or OAR 661-10-045(1), to attach that document to its brief and explain in its brief why LUBA should consider the document. If another party does not object to LUBA considering the document, the document becomes part of LUBA's record and is considered for the requested purpose. If an objection is made, the party offering the document may file a motion for evidentiary hearing under OAR 661-10-045. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

28.1 LUBA Scope of Review – Generally. While a local government has authority to regulate the conduct of local proceedings, including the conduct of local appeals, it may not limit LUBA's review authority in ways not authorized by statute. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

28.1 LUBA Scope of Review – Generally. LUBA will not deny a request for voluntary remand of a challenged land use decision, simply because different approval criteria may apply on remand. Petitioners are entitled to obtain review by LUBA to assure a correct decision is rendered, whatever approval criteria may be applicable. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).

28.1 LUBA Scope of Review – Generally. Whether LUBA has authority to reverse a local government decision denying land use approval and order the local government to grant land use

approval, based on the doctrine of equitable estoppel, is unclear. *Pesznecker v. City of Portland*, 25 Or LUBA 463 (1993).

28.1 LUBA Scope of Review – Generally. While local governments are free to adopt code provisions governing local proceedings, such local requirements do not limit LUBA's scope of review. *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411 (1993).

28.1 LUBA Scope of Review – Generally. Where the challenged decision does not approve a plan amendment or zone change, and the local government's plan and land use regulations are acknowledged, the Statewide Planning Goals do not apply directly to the proposal. *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411 (1993).

28.1 LUBA Scope of Review – Generally. LUBA is not bound by legal precedents established by circuit court decisions in unrelated cases. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

28.1 LUBA Scope of Review – Generally. Where a county failed to interpret ORS 215.213(2)(d)(C) as allowing an aggregate processing facility that conducts part of the processing on-site but completes the process of making aggregate into asphalt or Portland cement off-site, and the party wishing to assign the county's interpretive failure as error did not appeal the county's decision to LUBA or file a cross-petition for review, LUBA will not consider the interpretive question. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238 (1993).

28.1 LUBA Scope of Review – Generally. Where an applicant neither files its own appeal of the local governing body's decision granting the requested development approval nor files a cross-petition for review in the LUBA appeal filed by the opponents, the question of whether a local appeal by the opponents should have been dismissed by the governing body is not properly presented to LUBA. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

28.1 LUBA Scope of Review – Generally. Where the planning commission delegated to the city manager authority to grant extensions of PUD overall development plan approval, and neither the planning commission's decision nor the city manager's decision exercising that authority was appealed, LUBA will not consider arguments that the planning commission improperly delegated authority to the city manager in an appeal of a subsequent city decision granting final PUD approval. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

28.1 LUBA Scope of Review – Generally. Where the challenged decision characterizes an alleged nonconforming use as a "reprographics, blueprint and printing business," and petitioner does not challenge that characterization in his petition for review, petitioner may not challenge the characterization for the first time in post oral argument memoranda. *Rhine v. City of Portland*, 24 Or LUBA 557 (1993).

28.1 LUBA Scope of Review – Generally. LUBA does not apply land use decision making approval criteria in the first instance. It is the local government's responsibility to consider the evidentiary record, identify the applicable standards, make the decision in the first instance and

explain the basis for its decision in its findings. *ODOT v. City of Waldport*, 24 Or LUBA 344 (1992).

28.1 LUBA Scope of Review – Generally. In determining the nature and scope of the challenged decision, the language of (1) a prior and related determination, (2) an earlier major partition application pertaining to the subject land, and (3) the challenged decision itself, are instructive. *Woosley v. Marion County*, 24 Or LUBA 231 (1992).

28.1 LUBA Scope of Review – Generally. Where nothing in the caption, findings or decision itself suggests that the challenged decision approves a lot line adjustment, a lot line adjustment was not approved. *Barker v. City of Cannon Beach*, 24 Or LUBA 221 (1992).

28.1 LUBA Scope of Review – Generally. LUBA reviews the final written decision of the local government decision making body, not statements that may have been made during the local proceedings by individual decision makers. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

28.1 LUBA Scope of Review – Generally. Where LUBA remands a local government decision, and the local government makes a new decision after remand, petitioners may not contend in an appeal to LUBA challenging the new local government decision, that the original local government decision should have been *reversed* rather than remanded. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

28.1 LUBA Scope of Review – Generally. LUBA will not address issues which are raised by petitioners for the first time at oral argument, and are not included in the assignments of error and supporting argument required to be set out in the petition for review. OAR 661-10-030(3)(b). *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

28.1 LUBA Scope of Review – Generally. Where the petition for review does not contain assignments of error set forth under separate headings, as required by OAR 661-10-030(3)(d), LUBA will only consider those arguments set forth in the petition for review which are stated clearly enough to afford respondents an opportunity to respond. *Heiller v. Josephine County*, 23 Or LUBA 551 (1992).

28.1 LUBA Scope of Review – Generally. In reviewing local government decisions, LUBA's role as an appellate tribunal is to review the local government's explanation of why it believes its decision satisfies relevant approval standards. LUBA's function is not to identify the relevant approval standards or to interpret relevant code and plan language in the first instance. *Warren v. City of Aurora*, 23 Or LUBA 507 (1992).

28.1 LUBA Scope of Review – Generally. The subject of LUBA's review is the local government's final written decision, not statements made during the proceedings leading to adoption of a challenged land use decision. *Horizon Construction, Inc. v. City of Newberg*, 23 Or LUBA 159 (1992).

28.1 LUBA Scope of Review – Generally. In order to establish estoppel, petitioners must show (1) the local government made a false representation with knowledge of the facts, (2) petitioner was ignorant of the truth, (3) the local government intended that petitioner act upon the false representation, and (4) petitioner in fact acted upon the false representation. That a local government planner stated his opinion that an application is approvable is not adequate to establish estoppel. *Schoppert v. Clackamas County*, 23 Or LUBA 138 (1992).

28.1 LUBA Scope of Review – Generally. LUBA will consider arguments expressed in the petition for review that are stated clearly enough to afford the other parties an opportunity to respond. *Silani v. Klamath County*, 22 Or LUBA 735 (1992).

28.1 LUBA Scope of Review – Generally. LUBA reviews the decision maker's final written decision, not statements made during the proceedings leading to adoption of the challenged decision. Such statements are preliminary and subject to change in the final decision. *Toth v. Curry County*, 22 Or LUBA 488 (1991).

28.1 LUBA Scope of Review – Generally. That a previously approved zone change included a condition providing that if a conditional use permit for a mobile home park on the subject property is not obtained, the property would revert to its previous zoning, does not make the merits of the previous rezoning decision subject to LUBA's review in an appeal of the local government decision approving the conditional use permit. *Burghardt v. City of Molalla*, 22 Or LUBA 369 (1991).

28.1 LUBA Scope of Review – Generally. In reviewing a local government decision concerning a nonconforming use, LUBA may consider a letter which was not submitted to the decision maker during the local proceedings leading to adoption of the *initial* decision, but was submitted to and considered by the decision maker during *reconsideration* proceedings. *Warner v. Clackamas County*, 22 Or LUBA 220 (1991).

28.1 LUBA Scope of Review – Generally. Where findings are inadequate to allow review of a local government's decision, LUBA will remand the decision. *Seger v. City of Portland*, 22 Or LUBA 162 (1991).

28.1 LUBA Scope of Review – Generally. Where a local code requires a determination of compliance with applicable ordinance requirements at the time of subdivision outline plan approval and that the final plat be approved if it is "in substantial conformance with the outline plan," a petitioner may not fail to appeal the decision granting outline plan approval and thereafter, in an appeal of the final plan approval, challenge the subdivision's compliance with plan and code provisions found to be satisfied at the time of outline plan approval. *Sandler v. City of Ashland*, 21 Or LUBA 483 (1991).

28.1 LUBA Scope of Review – Generally. LUBA's rules require that petitioners' assignments of error and argument be in the petition for review. LUBA cannot consider an issue raised by petitioner for the first time at oral argument. *Ward v. City of Lake Oswego*, 21 Or LUBA 470 (1991).

28.1 LUBA Scope of Review – Generally. In reviewing a moratorium decision, LUBA's scope of review is limited to determining whether the moratorium complies with the requirements of ORS 197.505 to 197.530. *Western Pacific Development v. City of Brookings*, 21 Or LUBA 445 (1991).

28.1 LUBA Scope of Review – Generally. The reviewable land use decision in an appeal before LUBA is the local government's final written decision, not what individual parties, staff or members of the decision making body may have stated from time to time during the course of local government proceedings. *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

28.1 LUBA Scope of Review – Generally. The subject of LUBA's review is the final written decision adopted by the local government, not oral comments made by individual local decision makers. *Hale v. City of Beaverton*, 21 Or LUBA 249 (1991).

28.1 LUBA Scope of Review – Generally. In reviewing a local government decision adopting a moratorium, LUBA's scope of review is limited to determining whether the moratorium was adopted in violation of ORS 197.505 to 197.530. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

28.1 LUBA Scope of Review – Generally. Neither a local government's adoption of prior moratoria nor the intent of individual residents testifying in support of the challenged moratorium provides a basis for finding the challenged moratorium was adopted in violation of ORS 197.505 to 197.530. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

28.1 LUBA Scope of Review – Generally. LUBA cannot take official notice of local legislative history. Therefore, because LUBA's review is confined to the record of the local proceeding, LUBA cannot consider local legislative history if it is not in the record. *19th Street Project v. City of The Dalles*, 20 Or LUBA 440 (1991).

28.1 LUBA Scope of Review – Generally. No statutory or rule provisions require a petition for review to conform with requirements for pleadings in circuit court proceedings. If a petition for review does not set out facts and legal argument sufficient to persuade LUBA that there is a basis for reversal or remand of the challenged decision, LUBA simply affirms the decision. *Dolan v. City of Tigard*, 20 Or LUBA 411 (1991).

28.1 LUBA Scope of Review – Generally. LUBA reviews a local government's final written decision. The oral comments of individual members of the local decision making body are not relevant to LUBA's review, and do not provide a basis for reversal or remand of the challenged decision. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

28.1 LUBA Scope of Review – Generally. If petitioners believe the assessor has not properly considered the restrictions the county's timber zone puts on their property, their remedy is with the county board of equalization. Petitioners cannot claim in an appeal to LUBA that the assessment of their property over the years constituted a "false representation," such that the county is estopped from denying their application for a nonforest dwelling. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

28.1 LUBA Scope of Review – Generally. Under ORS 197.540, which limits LUBA's scope of review in appeals of moratoria, LUBA reviews a moratorium based on the record made during the local proceedings, and invalidates the moratorium if the local government failed to adopt findings, supported by substantial evidence, demonstrating that the relevant standards in ORS 197.520(2) and (3) are satisfied. *Davis v. City of Bandon*, 19 Or LUBA 327 (1990).

28.1 LUBA Scope of Review – Generally. While the ORS 197.520(3) "compelling need" standard for adoption of a moratorium "not based on a shortage of key facilities" is stringent, the proper focus of LUBA's review is on the requirements of the statute, particularly the findings required by ORS 197.520(3)(a) through (e). *Davis v. City of Bandon*, 19 Or LUBA 327 (1990).

28.1 LUBA Scope of Review – Generally. LUBA will consider legislative or administrative history materials, when such materials are necessary to its interpretation of statutes, administrative rules or ordinances, regardless of whether the materials are in the record of the proceedings below. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

28.1 LUBA Scope of Review – Generally. It is within LUBA's authority to take official notice of Department of Land Conservation and Development official publications as "public * * * official acts of the * * * executive * * * department of this state." ORS 40.090(2). *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

28.1 LUBA Scope of Review – Generally. A petitioner may not quote large sections of a local government's comprehensive plan, fail to attack the findings adopted by the local government and expect that LUBA will supply legal argument showing why the quoted plan provisions may be violated. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

28.1 LUBA Scope of Review – Generally. Where a county previously approved use of 145 acres for a golf course, the county is not bound by *res judicata* or collateral estoppel to approve use of an additional 55 acres for that golf course where the issues, property and parties are not the same. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

28.2 LUBA Scope of Review – Denials. Where a local code provision allows a reduced setback where "the required setback would prohibit the placement of the residential structure on the parcel due to topography," and where the decision-maker denied a reduced setback in part because they concluded that there was a buildable area within the setback envelope that did not contain steep slopes, even if LUBA agrees with the petitioners that credible evidence weighs overwhelmingly in favor of a finding that the entire setback envelope contains steep slopes, LUBA must affirm the denial where the petitioners fail to challenge the decision-maker's further conclusion that steep slopes do not prohibit development but, instead, require further assessment, and where the petitioners did not provide any expert assessment that the entire setback envelope was unbuildable due to steep slopes. *Velasquez v. Jackson County*, 80 Or LUBA 1 (2019).

28.2 LUBA Scope of Review – Denials. Where LUBA concludes that a local government's conclusion that an application did not meet an applicable approval criterion was a valid basis for denial, although any error committed with respect to alternative or independent bases for denial would generally not provide a basis for reversal or remand, remand is nonetheless required where LUBA also concludes that the local government failed to address a threshold argument from the applicant that, if correct, would prevent the local government from applying criteria that would prohibit approval of the application. *M & T Partners, Inc. v. City of Salem*, 80 Or LUBA 221 (2019).

28.2 LUBA Scope of Review – Denials. Local governments are not required to condition approvals rather than deny noncompliant applications. *H2D2 Properties, LLC v. Deschutes County*, 80 Or LUBA 528 (2019).

28.2 LUBA Scope of Review – Denials. LUBA need not address a petitioner's challenges to a county's alternative basis for denial, that the subject property is designated as undevelopable "open space," where LUBA has affirmed the county's primary basis for denial, that the subject property is designated as undevelopable "common area." Where LUBA has affirmed one basis for denial, any error committed with respect to alternative or independent bases would not provide a basis for reversal or remand. *Kine v. Deschutes County*, 75 Or LUBA 407 (2017).

28.2 LUBA Scope of Review – Denials. Where LUBA affirms a local decision-maker's interpretation and conclusion regarding the applicability of a comprehensive plan policy, no purpose would be served by addressing other challenges to alternative bases for local government's decision to deny the application. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

28.2 LUBA Scope of Review – Denials. Where LUBA has affirmed a local government's primary interpretation of a comprehensive plan policy, supporting the local government's decision to deny the application, LUBA need not resolve challenges to independent, alternative interpretations supporting denial. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

28.2 LUBA Scope of Review – Denials. A decision by the city that it will not approve any road that is located in the conceptual location approved in a previously approved conceptual development plan, and that is also shown in the city's adopted transportation systems plan and the adopted area refinement plan for the city, would not be a land use decision that is "in compliance

with the acknowledged plan and land use regulations." ORS 197.175(2)(d). *GPA 1 LLC v. City of Corvallis*, 74 Or LUBA 527 (2016).

28.2 LUBA Scope of Review – Denials. Where a road is proposed in the conceptual location approved in a previously approved conceptual development plan, and is also shown in the city's adopted transportation systems plan and the adopted area refinement plan for the city, the city has a heightened obligation under *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978), to either (1) approve the proposed alignment that is consistent with the planned and approved location, or (2) make it very clear which of five other alternative proposed alignments the city will accept. *GPA 1 LLC v. City of Corvallis*, 74 Or LUBA 527 (2016).

28.2 LUBA Scope of Review – Denials. LUBA typically affirms a decision denying an application for land use approval as long as there is one valid basis for denial, notwithstanding other invalid bases for denial. However, LUBA will remand a county governing body's decision that reverses a planning commission approval of a conditional use, where the only valid basis for denial is a correctable findings and evidentiary deficiency, and the governing body's choice to reverse the planning commission decision rather than remand was based on the governing body's erroneous conclusion that the proposed conditional use is prohibited as a matter of law. In that circumstance, LUBA will remand the decision for the governing body to consider whether the planning commission decision should be remanded rather than reversed. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

28.2 LUBA Scope of Review – Denials. In denying an application for land use approval based on a finding that the application does not comply with applicable criteria, the local government's findings must be sufficient to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application will be approved. *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387, 394 (2008). *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

28.2 LUBA Scope of Review – Denials. Although it is only necessary for one assignment of error to be sustained to uphold a denial of a permit application, LUBA will review other assignments of error if they are capable of arising again if a solution to the first assignment is found on remand. *Wilson v. Washington County*, 63 Or LUBA 314 (2011).

28.2 LUBA Scope of Review – Denials. Because only one sustainable basis for denying a permit application is required, LUBA need not address additional assignments of error after sustaining one basis for denial. Where additional assignments of error are relatively straightforward and can be resolved within the statutory deadline for issuing LUBA's decision, LUBA may resolve those additional assignments of error where they would provide additional independent bases for sustaining the decision. However, where those additional assignments of error present close and difficult questions of law, and may require LUBA to consider issues that the parties have not briefed, LUBA will not decide such assignments of error. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

28.2 LUBA Scope of Review – Denials. In general, to successfully overcome a denial of a permit on evidentiary grounds, a petitioner must demonstrate that the burden of proof was met as a matter of law. *Adams v. Jackson County*, 54 Or LUBA 103 (2007).

28.2 LUBA Scope of Review – Denials. To support a denial decision, the local government need only establish the existence of one adequate basis for denial. Once LUBA has rejected all assignments of error directed at one of several alternative bases for denial, LUBA will not reach other assignments of error, absent a showing that resolving such assignments of error in petitioner's favor would provide a basis for reversal or remand. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256 (2004).

28.2 LUBA Scope of Review – Denials. To successfully challenge a permit denial decision on evidentiary grounds, a petitioner must demonstrate that it met its burden of proof as a matter of law. That is a particularly difficult burden where the relevant approval standard is subjective. *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680 (2004).

28.2 LUBA Scope of Review – Denials. Where a local government finds that a zoning map amendment applicant failed to demonstrate that the request was consistent with a number of applicable criteria, and on appeal to LUBA the applicant fails to challenge the city's findings concerning two of those applicable criteria, the city's decision must be affirmed. *Doman v. City of Woodburn*, 45 Or LUBA 158 (2003).

28.2 LUBA Scope of Review – Denials. Remand is necessary where the hearings officer cites a nonexistent requirement for "substantial and compelling findings," and appears to apply that standard in determining that the applicant does not satisfy the stability standard. *Elliott v. Jackson County*, 43 Or LUBA 426 (2003).

28.2 LUBA Scope of Review – Denials. LUBA must affirm a decision denying a permit to site a dog kennel prohibited on high-value farmland, where petitioner fails to challenge the county's alternative finding that the subject property is high-value farmland because it is predominantly composed of a combination of two high-value soils. *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195 (1999).

28.2 LUBA Scope of Review – Denials. A petitioner challenging a city's denial of its land use application on evidentiary grounds bears the burden of demonstrating that only evidence supporting the application can be believed and that, as a matter of law, such evidence establishes compliance with each of the applicable criteria. *Wiley Mtn., Inc. v. City of Albany*, 36 Or LUBA 449 (1999).

28.2 LUBA Scope of Review – Denials. A county's finding that a proposed nonforest dwelling is inconsistent with forest uses is inadequate where the finding is so conclusory that it fails to inform the applicant either what steps are necessary to obtain approval or that it is unlikely that the application can be approved. *Eddings v. Columbia County*, 36 Or LUBA 159 (1999).

28.2 LUBA Scope of Review – Denials. A local government need only adopt one sustainable basis to deny a request for permit approval. Where petitioner fails to challenge all of the city's

bases for denial, the decision must be affirmed. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

28.2 LUBA Scope of Review – Denials. In challenging a decision denying a permit on evidentiary grounds, it is not sufficient to show the evidence would also have supported approval of the permit. The evidence must show that petitioner sustained his burden of proof as a matter of law. *Lee v. City of Oregon City*, 34 Or LUBA 691 (1998).

28.2 LUBA Scope of Review – Denials. Where a local government denies a permit application following remand from the Court of Appeals and specifies more than one basis for the denial, in reviewing a subsequent appeal of the denial on remand LUBA need only review and sustain one of the bases for denial. *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

28.2 LUBA Scope of Review – Denials. Where a hearings officer's interpretation that the county's street frontage requirement mandates street frontages be on a public road or street is contrary to the plain language of the county's zoning ordinance, a denial of a partition based solely on that interpretation will be reversed. *Miller v. Clackamas County*, 31 Or LUBA 104 (1996).

28.2 LUBA Scope of Review – Denials. Even though a city's denial of a land use application need only include findings adequate to demonstrate that one applicable criterion is not satisfied, before the city can reach such a conclusion it must first explain the applicable criteria, state the facts the city relied upon in reaching the decision and justify the decision based upon the criteria and facts. *Boehm v. City of Shady Cove*, 31 Or LUBA 85 (1996).

28.2 LUBA Scope of Review – Denials. While findings of noncompliance with applicable criteria need not be exhaustive, they must at least either inform the applicant of the standards the application does not meet or of the steps necessary to satisfy the standards. *Boehm v. City of Shady Cove*, 31 Or LUBA 85 (1996).

28.2 LUBA Scope of Review – Denials. Where the challenged decision denies an application, the local government need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. To challenge a denial on evidentiary grounds, petitioner must demonstrate compliance with all applicable criteria as a matter of law. *Gionet v. City of Tualatin*, 30 Or LUBA 96 (1995).

28.2 LUBA Scope of Review – Denials. To support denial of a land use permit, a local government need only establish the existence of one adequate basis for denial. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632 (1995).

28.2 LUBA Scope of Review – Denials. Where the challenged decision denying development approval fails to inform the applicant of the steps it must take to gain approval of its application or, alternatively, of the standards the application does not meet, the decision must be remanded. *Ellis v. City of Bend*, 28 Or LUBA 332 (1994).

28.2 LUBA Scope of Review – Denials. Where the challenged decision is one to deny proposed development, LUBA must sustain the decision if there are adequate findings, supported by

substantial evidence in the record, determining that one applicable standard is not met. *Newsome v. Clackamas County*, 27 Or LUBA 578 (1994).

28.2 LUBA Scope of Review – Denials. Where an approval standard for partitioning timber zoned property into nonresource parcels requires that the subject property be "generally unsuitable land for the production of farm or forest products," and petitioner does not challenge a county determination that the subject property is generally suitable for *farm use*, that determination provides an independent basis for affirming the county's decision to deny the partition. *Newsome v. Clackamas County*, 27 Or LUBA 578 (1994).

28.2 LUBA Scope of Review – Denials. Only one sustainable basis for a decision to deny a conditional use permit is required. Where such a sustainable basis for denial exists, LUBA does not consider challenges to other unrelated aspects of the decision. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

28.2 LUBA Scope of Review – Denials. Only one sustainable basis for a decision to deny a request for land use approval is required. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

28.2 LUBA Scope of Review – Denials. To support a denial, a local government need only establish the existence of one adequate basis for denial. *Kangas v. City of Oregon City*, 26 Or LUBA 177 (1993).

28.2 LUBA Scope of Review – Denials. It is the applicant's burden to establish compliance with each relevant approval standard. Consequently, where the applicant fails to establish compliance with a single approval standard, a decision denying an application will be affirmed. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

28.2 LUBA Scope of Review – Denials. For LUBA to sustain a challenged decision to deny proposed development, the local government need only adopt findings supported by substantial evidence that the proposal fails to meet one applicable standard. *Oregon Raptor Center v. City of Salem*, 25 Or LUBA 401 (1993).

28.2 LUBA Scope of Review – Denials. For LUBA to sustain a local government's denial decision, LUBA must find that the local government adopted findings supported by substantial evidence, demonstrating that one or more applicable standards are not met. *Decuman v. Clackamas County*, 25 Or LUBA 152 (1993).

28.2 LUBA Scope of Review – Denials. In order to overturn, on evidentiary grounds, a local government determination that an applicable approval criterion is not met, it is not sufficient for petitioners to show there is substantial evidence in the record to support their position. Rather, petitioners must demonstrate they sustained their burden of proof of compliance with applicable criteria, as a matter of law. *Thomas v. City of Rockaway Beach*, 24 Or LUBA 532 (1993).

28.2 LUBA Scope of Review – Denials. Where the challenged decision is one to deny proposed development, the local government need only adopt findings, supported by substantial evidence,

demonstrating that at least one standard is not satisfied. *Stockwell v. Clackamas County*, 24 Or LUBA 358 (1992).

28.2 LUBA Scope of Review – Denials. To overturn on evidentiary grounds a local government's determination that an applicable approval criterion is not met, petitioners must demonstrate they sustained their burden of proof of compliance with applicable criteria, as a matter of law. *Stockwell v. Clackamas County*, 24 Or LUBA 358 (1992).

28.2 LUBA Scope of Review – Denials. To overturn a local government determination that an applicable approval criterion is not met, on evidentiary grounds, petitioners must demonstrate that they sustained their burden to establish compliance with the applicable criterion as a matter of law. *Chauncey v. Multnomah County*, 23 Or LUBA 599 (1992).

28.2 LUBA Scope of Review – Denials. It is the applicant's burden to establish compliance with each relevant approval standard. Consequently, where the applicant fails to establish compliance with a single approval standard, a decision denying an application must be affirmed. *West v. Clackamas County*, 23 Or LUBA 558 (1992).

28.2 LUBA Scope of Review – Denials. LUBA must sustain a local government decision to deny a proposed plan or code amendment, if the decision demonstrates that one or more applicable standards are not met. *Hess v. City of Portland*, 23 Or LUBA 343 (1992).

28.2 LUBA Scope of Review – Denials. It is the applicant's burden to establish compliance with each applicable approval standard, and a local government may not approve a proposal unless each approval standard is met. LUBA will sustain a decision denying land use approval, if such a decision demonstrates that one or more approval standards are not met. *Seger v. City of Portland*, 23 Or LUBA 334 (1992).

28.2 LUBA Scope of Review – Denials. For LUBA to overturn a local government's denial decision, petitioners must establish that the proposed development meets all applicable standards as a matter of law. *Rath v. Hood River County*, 23 Or LUBA 200 (1992).

28.2 LUBA Scope of Review – Denials. Where there is conflicting believable evidence in the record, LUBA cannot say a reasonable decision maker could only believe the evidence relied upon by petitioner, and will reject a challenge to the evidentiary support for a decision denying development approval. *Joyce v. Multnomah County*, 23 Or LUBA 116 (1992).

28.2 LUBA Scope of Review – Denials. To overturn on evidentiary grounds a local government's determination that an applicable approval criterion is not met, it is not sufficient for petitioners to show that there is substantial evidence in the record to support their position. Rather, the "evidence must be such that a reasonable trier of fact could only say petitioners' evidence should be believed." *Barber v. Marion County*, 23 Or LUBA 71 (1992).

28.2 LUBA Scope of Review – Denials. Where evidence in the record establishes that with adequate drainage a parcel could be put to farm use, petitioner has not established as a matter of

law that the proposed nonfarm use is located on land "generally unsuitable" for farm use. *Barber v. Marion County*, 23 Or LUBA 71 (1992).

28.2 LUBA Scope of Review – Denials. Where a petitioner challenges a local government's decision to deny his application, the petitioner must establish compliance with all relevant standards as a matter of law. Where reasonable people could draw inferences from evidence cited in the record to support either the local government's or the petitioner's position, LUBA may not conclude as a matter of law that all relevant standards are met. *Coyner v. City of Portland*, 23 Or LUBA 79 (1992).

28.2 LUBA Scope of Review – Denials. A local government's denial of a development application will be sustained if the local government's determination that any one approval standard is not satisfied is sustained. *Goffic v. Jackson County*, 23 Or LUBA 1 (1992).

28.2 LUBA Scope of Review – Denials. In order to overturn, on evidentiary grounds, a local government determination that an applicable approval criterion is not met, it is not sufficient for petitioners to show there is substantial evidence in the record to support their position. Petitioners must demonstrate they sustained their burden of proof of compliance with the criterion as a matter of law. *Kane v. City of The Dalles*, 22 Or LUBA 608 (1992).

28.2 LUBA Scope of Review – Denials. In order to overturn, on evidentiary grounds, a local government's determination that an applicable approval criterion is not met, it is not sufficient for petitioner to show there is substantial evidence in the record to support his position. Rather, the evidence must be such that a reasonable trier of fact could only say that petitioner's evidence should be believed. *Samoilov v. Clackamas County*, 22 Or LUBA 446 (1991).

28.2 LUBA Scope of Review – Denials. A local government's denial of a land development application will be sustained if the local government's determination that any *one* approval standard is not satisfied is sustained. *Patton v. Clackamas County*, 22 Or LUBA 415 (1991).

28.2 LUBA Scope of Review – Denials. In challenging on evidentiary grounds a local government's determination that applicable approval standards are not met, petitioner must demonstrate that the applicant carried his burden of demonstrating compliance with those standards as a matter of law. *Patton v. Clackamas County*, 22 Or LUBA 415 (1991).

28.2 LUBA Scope of Review – Denials. In challenging a determination of noncompliance with an approval standard on evidentiary grounds, petitioners bear a heavy burden. The evidence must be such that a reasonable trier of fact could only say petitioners' evidence should be believed. *Wickwire v. Clackamas County*, 21 Or LUBA 278 (1991).

28.2 LUBA Scope of Review – Denials. LUBA may reverse or remand a county's determination that an applicant failed to carry his burden to demonstrate compliance with statewide planning goal exception criteria only where it is demonstrated the exception requirements are met as a matter of law. *Carsey v. Deschutes County*, 21 Or LUBA 118 (1991).

28.2 LUBA Scope of Review – Denials. Where LUBA upholds one or more bases for a county's decision denying a request for land use approval, findings concerning an additional basis for denying approval provide no basis for reversal or remand, even if such findings are erroneous. *Carsey v. Deschutes County*, 21 Or LUBA 118 (1991).

28.2 LUBA Scope of Review – Denials. In order to overturn on evidentiary grounds a local government's determination that an applicable approval criterion is not met, petitioner must demonstrate that he sustained his burden of proof of compliance with applicable criteria as a matter of law. *Walton v. Clackamas County*, 21 Or LUBA 69 (1991).

28.2 LUBA Scope of Review – Denials. A local government's denial of a land use development application will be sustained if the local government's determination that any one approval criterion is not satisfied is sustained. *McCaw Communications, Inc. v. Polk County*, 20 Or LUBA 456 (1991).

28.2 LUBA Scope of Review – Denials. In denying an application, the local government need only adopt findings demonstrating that one or more of the applicable approval standards are not met. *West v. Clackamas County*, 20 Or LUBA 433 (1991).

28.2 LUBA Scope of Review – Denials. To overturn on evidentiary grounds a local government's determination that an applicable approval standard is not met, it is not enough for a petitioner to show that there is substantial evidence in the record to support his position. Rather, the evidence must be such that a reasonable trier of fact could only say the petitioner's evidence should be believed. *West v. Clackamas County*, 20 Or LUBA 433 (1991).

28.2 LUBA Scope of Review – Denials. Where a development denial decision is based on determinations of noncompliance with more than one applicable approval standard, LUBA will affirm the denial if petitioner does not successfully challenge *every* determination of noncompliance. *Adams v. Jackson County*, 20 Or LUBA 398 (1991).

28.2 LUBA Scope of Review – Denials. If findings in support of a denial of quasi-judicial land use approval adequately explain a sufficient basis for denial, they will be upheld. *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

28.2 LUBA Scope of Review – Denials. In challenging a denial on evidentiary grounds, petitioner must show the evidence is such that a reasonable decision maker could *only* say petitioner's evidence should be believed. *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

28.2 LUBA Scope of Review – Denials. In order to overturn a county determination that a nonconforming use does not exist on evidentiary grounds, it is not sufficient for petitioner to show there is substantial evidence in the record to support its position, rather the evidence must be such that a reasonable trier of fact could only say petitioner's evidence should be believed. *J and D Fertilizers v. Clackamas County*, 20 Or LUBA 44 (1990).

28.2 LUBA Scope of Review – Denials. Where the city did not base its decision to deny land use approval on anticipated traffic impacts, a challenge to the city's findings concerning traffic impacts

provides no basis for reversal or remand. *J.K. Land Corporation v. City of Gresham*, 19 Or LUBA 66 (1990).

28.2 LUBA Scope of Review – Denials. Where the county denies a proposed use because it violates a particular plan provision on two different bases, petitioner does not state grounds on which LUBA may grant relief if petitioner challenges only one basis for the county's denial. *Garre v. Clackamas County*, 18 Or LUBA 877 (1990).

28.3 LUBA Scope of Review – Goal Exceptions. In determining whether to take a reasons exception under ORS 197.732(2)(c), where a local government finds that there is a public need to provide certain residents, many of whom are of limited financial means and mobility, with close access to the proposed uses, the local government does not err in concluding that "[a]reas that do not require a new exception cannot reasonably accommodate the use" under ORS 197.732(2)(c)(B) because the proposed location is the only location that is accessible to the residents. *VanSickle v. Klamath County*, 80 Or LUBA 241 (2019).

28.3 LUBA Scope of Review – Goal Exceptions. Where a petitioner argues a Geographic Information System map in the record suggests that a portion of the Willamette River Greenway included in a city's Goal 15 exception is located outside the city limits, but within county limits, and therefore the county is also required to join in or approve its own Goal 15 exception, petitioner fails to allege a basis for remand or reversal because as a matter of law the official Willamette River Greenway overlay zone boundary is the boundary mapped by the Oregon Department of Transportation, which confirms the greenway overlay zone is entirely within city limits. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

28.3 LUBA Scope of Review – Goal Exceptions. OAR 660-004-0022(6), which provides the standards for approving an exception to Goal 15, allows adverse effect on habitat as long as the adverse effect is not "significant." An argument that challenges a local government's findings that with mitigation, impacts to riparian habitat from a proposed new bridge project will not be significant because the need for mitigation at all demonstrates that the bridge will have a "significant adverse effect" on riparian values provides no basis for reversal or remand. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

28.3 LUBA Scope of Review – Goal Exceptions. An ordinance that amends a county's comprehensive plan map and zoning maps, in order to implement an earlier decision that adopted findings taking exception to statewide planning goals, is a land use decision as defined at ORS 197.015(10)(a), because it "amends" the county's comprehensive plan and land use regulations, even if the ordinance itself does not adopt the exceptions or otherwise "apply" any statewide planning goals. *Rogue Advocates v. Josephine County*, 72 Or LUBA 475 (2015).

28.3 LUBA Scope of Review – Goal Exceptions. Where a county adopts an ordinance amending its comprehensive plan map and zoning map, in order to implement an earlier decision that adopted findings taking exceptions to statewide planning goals, it may be that those earlier adopted findings cannot be challenged in the appeal of the ordinance. However, even in that event, that does not mean that LUBA lacks jurisdiction over the ordinance, only that if the petitioner raises no challenges to the ordinance that are within LUBA's scope of review, LUBA will affirm the ordinance. *Rogue Advocates v. Josephine County*, 72 Or LUBA 475 (2015).

28.3 LUBA Scope of Review – Goal Exceptions. In reviewing a county's decision that property is irrevocably committed to nonresource uses, LUBA is not required to give any deference to the county's explanation for why it believes the facts demonstrate compliance with the legal standards for a committed exception. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

28.3 LUBA Scope of Review – Goal Exceptions. ORS 197.732(6), which applies to LUBA's and LCDC's review of goal exception decisions, does not require LUBA to perform a comprehensive and independent evaluation of a proposed goal exception, but is satisfied by a reasoned opinion. *Laurence v. Douglas County*, 33 Or LUBA 292 (1997).

28.3 LUBA Scope of Review – Goal Exceptions. Even where a local government's findings supporting an "irrevocably committed" goal exception address all factors made relevant under OAR 660-04-028, and are supported by substantial evidence in the record, it is still LUBA's responsibility to determine whether the findings demonstrate compliance with the standard of ORS 197.732(1)(b) that "existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable." *1000 Friends of Oregon v. Columbia County*, 27 Or LUBA 474 (1994).

28.3 LUBA Scope of Review – Goal Exceptions. OAR 660-04-022(1) states reasons adequate to justify a goal exception "include but are not limited to" those set out in that section. Where OAR 660-04-022(1) applies, in the absence of some explanation in the decision or argument in the local government's brief that it intended to justify its goal exception on some other basis, LUBA will assume the local government's findings are intended to satisfy OAR 660-04-022(1)(a) to (c). *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

28.3 LUBA Scope of Review – Goal Exceptions. Under ORS 197.732(6)(b), LUBA is authorized to determine whether a local government's findings and reasons satisfy the standards of ORS 197.732(1). *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

28.3 LUBA Scope of Review – Goal Exceptions. Where a county does not adopt a goal exception as part of its comprehensive plan, the exception is not valid. *Schrock Farms, Inc. v. Linn County*, 24 Or LUBA 58 (1992).

28.3 LUBA Scope of Review – Goal Exceptions. Statutory, goal and administrative rule provisions require that the findings and reasons justifying a goal exception be adopted as part of the comprehensive plan. Failure to include such findings and reasons in the plan is sufficient grounds for reversal or remand of the decision. *Caine v. Tillamook County*, 22 Or LUBA 687 (1992).

28.3 LUBA Scope of Review – Goal Exceptions. LUBA will not reverse or remand on evidentiary grounds a local government decision that the "irrevocable commitment" goal exception standard is not met, unless petitioner establishes, as a matter of law, that the *only* reasonable conclusion which can be reached based on the evidence in the whole record is that the "irrevocable commitment" standard is satisfied. *Chambers v. Clackamas County*, 19 Or LUBA 355 (1990).

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

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where a significant resource overlay zone provision requires that (1) resource sites not be altered or impacted to a degree that destroys their significance, (2) the proposed development not result in the loss of habitat for threatened or endangered species, (3) all feasible alternatives to the development that would not result in a substantial adverse impact on identified resource values be considered and rejected, (4) the development be sited on the property in such a manner that minimizes adverse impacts on identified resources, and (5) documentation be provided regarding requirements for state or federal permits or licenses and that appropriate resource management agencies have reviewed the development proposal against their plans, policies, and programs, the local government does not err in concluding that that provision applies at the development stage rather than the PAPA stage. *VanSickle v. Klamath County*, 80 Or LUBA 241 (2019).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. That an alteration to a proposed PAPA is required by LUBA's decision in a prior appeal and reduces the subject acreage does not mean as a matter of law that the proposed PAPA is not "altered to such an extent that the materials submitted no longer reasonably describe the proposed change," thereby requiring notice of the alteration to DLCD pursuant to ORS 197.610(6). *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Under ORS 197.610(6), if a proposed PAPA is altered to such an extent that the notice submitted to DLCD under ORS 197.610(1) and (3) no longer reasonably describes it, the local government must submit notice of the alterations to DLCD at least 10 days before the final evidentiary hearing, which DLCD thereafter provides to the public. The larger statutory scheme at ORS 197.610 to 197.625 is intended to expand notice and participatory options for DLCD and a broader audience that may not receive local notice. A local government's errors under ORS 197.610(6) require remand where they are of a kind or degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function. *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where notice under ORS 197.610(6) is sent to DLCD 17 days *after* the final evidentiary hearing occurred and describes the "date of first evidentiary hearing" and the "date of final hearing" but does not identify the date of the "final evidentiary hearing," where there is a disparity between the text of the notice and the text of an ordinance included with the notice regarding the subject acreage, and where the notice is sent during a time when the record is left open only for evidence that is responsive to evidence that was submitted earlier, the totality of the errors in the submission of the notice and in the notice

itself are of a kind and degree that make it doubtful that the ORS 197.610 to 197.625 process performed its function, and remand is required. *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Petitioners fail to establish that the city erred in concluding that rezoning a property to neighborhood commercial is consistent with Statewide Planning Goal 5 when the rezoning the subject property constitutes a PAPA for purposes of applying Goal 5, which provides that local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource by allowing new uses that "could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list." The city's PAPA is a very limited one, that in relevant part simply applies the zones implementing the city's comprehensive plan designations that the acknowledged comprehensive plan has already designated for the corresponding uses. Because the challenged PAPA simply implements that acknowledged plan designation choice with the exercise of little or no discretion, the PAPA does not authorize any "new uses" for purposes of OAR 660-023-0250(3) and Goal 5. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where a local code provision, which is acknowledged to comply with Goal 5, allows the construction of a reservoir for surface mining in conjunction with an irrigation district, but requires that sites proposed for that use be added to the local government's inventory of non-significant mineral sites through a post-acknowledgment plan amendment (PAPA), such a PAPA does not allow "new uses that could be conflicting uses" with a Goal 5 resource, and therefore does not require further analysis under Goal 5, where the construction of a reservoir is otherwise allowed for a recreation-oriented facility without a PAPA. *Bishop v. Deschutes County*, 79 Or LUBA 380 (2019).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. A Metro arbitration decision subject to an arbitration process devised by Metro that contemplates that the final decision the comprehensive plan designation of an area of land shared by two cities and a county will be determined in the post-acknowledgement plan amendments (PAPA) adopted by the cities and county is not itself a "final" "land use decision." *Watts v. Metro*, 78 Or LUBA 429 (2018).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. A Metro arbitration decision issued pursuant to a Metro arbitration process to arrive at a solution for the comprehensive plan designation for a disputed area of land jointly owned by two cities and a county, and which contemplates that the final decision regarding the comprehensive plan designation of the area will occur during the post-acknowledgment plan amendments, is not a "zoning" decision for purposes of ORS 268.393(6), which is part of the statute implementing Ballot Measure 56. *Watts v. Metro*, 78 Or LUBA 429 (2018).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. LUBA will dismiss an appeal of a hearings officer's decision approving a post-acknowledgment plan amendment (PAPA) because the decision is not a final decision, notwithstanding that the county code states that the hearings officer's decision on a PAPA is the county's final decision, and the county board of commissioners merely ratifies the hearings officer's decision, where it is reasonably clear that the

county commissioners' ratification decision is the county's final decision on the application for purposes of appeal to LUBA. *Setniker v. Polk County*, 74 Or LUBA 134 (2016).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. A reference in an ordinance to a city's engineering design manual is not sufficient to incorporate the manual into the city's acknowledged plan and land use regulations. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Goal 2 is not violated by adopting a plan amendment that references unacknowledged land use regulations. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. That a county's comprehensive plan was acknowledged in the 1990s to comply with Goal 4 does not shield the county from the obligation, at ORS 197.646(1) and (3), to apply subsequently adopted amendments to Goal 4 or the Goal 4 rule until the county incorporates those amendments into its comprehensive plan. Because the Goal 4 rule was amended in 2008 and 2011 to provide a prioritized list of data sources a county must consider when determining whether land is forest land subject to Goal 4, the county cannot simply apply its acknowledged comprehensive plan standards for identifying forest land, but must also apply the amended Goal 4 rule, until the county incorporates those rule amendments into its comprehensive plan. *Rogue Advocates v. Josephine County*, 66 Or LUBA 45 (2012).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Because OAR 660-006-0010 provides a set of prioritized, mandatory sources of data and a prescribed alternative method that must be used to determine whether land is forest land subject to Goal 4, the applicability of OAR 660-006-0010 cannot be avoided by concluding, based on different data or different methodology, that land is not forest land subject to Goal 4. *Rogue Advocates v. Josephine County*, 66 Or LUBA 45 (2012).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. An order that simply adopts additional findings following a LUBA remand, but does not "change" any acknowledged comprehensive plan or land use regulation, is not a post-acknowledgment plan amendment, and the deadline to appeal the order to LUBA is therefore 21 days from the date the decision became final, pursuant to the first sentence of ORS 197.830(9), not 21 days from the date that notice of the order was mailed. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. The 21-day period to appeal to LUBA under the second sentence of ORS 197.830(9) commences on the date notice of the decision is mailed to "parties entitled to notice under ORS 197.615." The "notice" referred to in ORS 197.830(9) is the written notice that ORS 197.615(4) requires the local government to mail to participants, not the copy of the final decision that ORS 197.615(1) requires the local government to submit to DLCD. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where a petitioner participated in the proceedings leading to adoption of a post-acknowledgment plan amendment,

and received timely notice of the decision, the deadline to appeal the decision to LUBA is 21 days from the date the notice was mailed to petitioner, not 21 days from the date the local government submits a copy of the decision to DLCD. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Under *ODOT v. City of Oregon City*, 153 Or App 705, 959 P2d 615 (1998), the deadline to appeal a post-acknowledgment plan amendment to LUBA under the second sentence of ORS 197.830(9) is 21 days from the date the local government mails notice of the decision to parties entitled to notice, even for persons who did not participate in the proceedings and thereby become entitled to notice. However, *ODOT* does not suggest that notice failures to some parties tolls the 21-day deadline for a petitioner who did receive notice but failed to appeal the decision to LUBA within the 21-day period. *Hatley v. Umatilla County*, 66 Or LUBA 433 (2012).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Failure to assign error to the county's primary finding, pursuant to ORS 197.835(7), that the text amendment is consistent with "specific policies" in the county's comprehensive plan that are the basis for the amendment, makes it unnecessary to address the petitioner's challenge to the county's alternative findings that the amendment is consistent with the statewide planning goals. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. A local government's failure to provide notice to the Department of Land Conservation and Development of a proposed amendment to the zoning map requires remand. *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277 (2007).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. LUBA's scope of review over periodic review land use decisions extends to all legal issues that are properly within LUBA's statutory scope of review, but it does not include review for compliance with statewide planning goals or other questions that are within LCDC's scope of review in periodic review. *Century Properties, LLC v. City of Corvallis*, 50 Or LUBA 691 (2005).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. LUBA's scope of review under ORS 197.835(9) must be read together with and is limited by ORS 197.825(2)(c), which excludes periodic review matters over which LCDC has review authority under ORS 197.628 to 197.650. Under those statutes, a city land use decision could be narrowly tailored to comply with a periodic review work task, and still be reversible by LUBA because it exceeds the city's jurisdiction, is based on an improper construction of a law that LCDC does not consider in periodic review or because the city committed procedural errors in adopting the decision. *Century Properties, LLC v. City of Corvallis*, 50 Or LUBA 691 (2005).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. It is not within LUBA's scope of review to address whether existing code design review standards comply with the ORS 197.307(3)(b) requirement for "clear and objective" approval standards, in the context of a post-acknowledgment plan amendment that rezones property to allow uses that will be subject to approval under the existing design review standards, where the challenged decision does not

amend the design review standards or attempt to bring any part of the city's code into compliance with ORS 197.307(3)(b). *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Assignments of error arguing that an ordinance adopted to satisfy a periodic review work task does not comply with Goals 2 and 14 are matters subject to the exclusive jurisdiction of the Land Conservation and Development Commission. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where county comprehensive plan standards for identifying agricultural land implement the Goal 3 definition of agricultural land, and an evidentiary challenge to a finding under the comprehensive plan standards that certain land is agricultural land is inseparable from the question of whether that land is agricultural land under Goal 3, LUBA lacks jurisdiction to address the challenge under the county's comprehensive plan standards. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. The Land Conservation and Development Commission has exclusive jurisdiction to review allegations that a county's proceedings under periodic review failed to comply with Goal 1 and LCDC's rules for conducting periodic review. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. LUBA has exclusive jurisdiction to review allegations that a county's proceedings failed to comply with procedural requirements that are independent of goal or administrative-rule based procedural requirements. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where the challenged decision is adopted to fulfill a periodic review work task, and the issue before LUBA can be framed as either (1) a matter of compliance with a statute, comprehensive plan or land use regulation or (2) a matter of compliance with a statewide planning goal or administrative rule, LUBA has jurisdiction over the issue only if the statutory, plan or code obligation goes beyond or is different from the obligation imposed by the goal or rule. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. An argument that a county comprehensive plan amendment adopted to fulfill a periodic review work task is inconsistent with a city comprehensive plan provision is an issue that is cognizable as a Goal 2 consistency issue, and thus is an issue that is within LCDC's exclusive jurisdiction. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Findings challenges are necessarily derivative of the underlying criteria the findings address. Where the county code requires adoption of findings supporting legislative decisions, whether jurisdiction to review an adequate findings challenge in a legislative decision adopted to fulfill a periodic review work task lies with LUBA or LCDC depends on whether the findings address goal or rule compliance issues subject to LCDC's exclusive jurisdiction. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. A local code requirement for findings demonstrating that legislative decisions are "in the public interest and will be of general public benefit" does not implicate any Goal or rule requirements, and thus a challenge that the local government failed to adopt adequate findings addressing that criterion in adopting a decision to fulfill a periodic review work task is subject to LUBA's exclusive jurisdiction. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that does not include the "text" of the proposed amendment as defined by OAR 660-018-0020(2) is inadequate to perform the notice function required by ORS 197.610(1). *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that includes the text of the proposed amendment as that term is defined in OAR 660-018-0020(2), but was submitted approximately 23 days prior to the city's initial evidentiary hearing is adequate to perform the notice function required by ORS 197.610(1). *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where a city has a process requiring that proposed amendments to a comprehensive plan and zoning code be subject to hearing and review by the planning commission and proposed design review guidelines be subject to hearing and review by the design commission, a notice of proposed amendment regarding the matters before the planning commission is not sufficient to apprise DLCD or others who receive notice pursuant to ORS 197.610(2) of the design review proceedings. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that erroneously states that the initial evidentiary hearing had been held and does not indicate whether further opportunities to provide evidence are available is not adequate to satisfy ORS 197.610(1), which requires that notice of proposed post-acknowledgement land use amendments be submitted to DLCD at least 45 days prior to the initial evidentiary proceedings on those amendments. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Not every violation of the requirement at ORS 197.610(1) and its implementing rule that a local government provide notice of proposed post-acknowledgment plan amendments to the Department of Land Conservation and Development (DLCD) more than 45 days before the initial public hearing is a substantive error that must result in remand. Failure to specify all of the proposed zone changes on the form provided to DLCD is, at most, procedural error that does not warrant remand absent a demonstration of prejudice to petitioner's substantial rights. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. A post-acknowledgment amendment to an ordinance implementing Goal 5 must be remanded, where the city failed to provide the notice to DLCD required by ORS 197.610(1) and 197.615(1). *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 453 (2002).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. LCDC's 1985 acknowledgement of a county's rural residential zone has the legal effect of establishing that the rural residential zoning district *may* be applied consistent with Goal 14 to rural lands outside a UGB. However, the 1985 acknowledgment does not have the legal effect of establishing that *all* future applications of the zoning district to particular properties, no matter what the circumstances, will necessarily comply with Goal 14. *DLCD v. Klamath County*, 40 Or LUBA 221 (2001).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. A finding that Goal 14 is satisfied because the provision of community sewer or water systems would be economically infeasible does not establish that such systems will not be constructed, where it is possible that an application for clustered residential development may make such community services economically feasible and the county did not adopt conditions of approval or other mechanisms to prohibit the establishment of community sewer or water systems. *DLCD v. Klamath County*, 40 Or LUBA 221 (2001).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. The deadline for filing a notice of intent to appeal for decisions adopted pursuant to ORS 197.610 through 197.625 is 21 days from the date notice is mailed to DLCD and to parties entitled to notice under ORS 197.615. *DeBell v. Douglas County*, 39 Or LUBA 695 (2001).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. An appeal that challenges a legislative decision that is final more than 21 days after the notice of legislative decision is mailed to parties entitled to notice pursuant to ORS 197.615 will be dismissed as untimely filed. *DeBell v. Douglas County*, 39 Or LUBA 695 (2001).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. LUBA has no jurisdiction to review provisions of an acknowledged comprehensive plan for compliance with the Transportation Planning Rule, where those plan provisions are not amended by the challenged decision and are not affected by the challenged decision in a way that affects their compliance with the statewide planning goals. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where petitioners' arguments are directed at unamended provisions of an acknowledged comprehensive plan rather than the comprehensive plan amendments adopted by the challenged decision, petitioners present no basis for reversal or remand. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. During periodic review, the existing, acknowledged versions of the county's plan and zoning ordinance continue to apply until they are amended as a result of the acknowledgment of a final decision. Where periodic review is ongoing, the county may amend its plan and zoning map by redesignating and rezoning

property to any existing acknowledged designation or zone, as long as the amendment does not violate any statute, rule or statewide planning goal, and LUBA has jurisdiction to review such amendments. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. In approving comprehensive plan and zoning map amendments, the county's findings must demonstrate that Goal 14 is satisfied without reliance on past practices or on plan and code provisions that are subject to revision during periodic review. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where the county's decision to apply overlay zoning directly implements plan policies that were previously determined to comply with the statewide planning goals, and the policies are sufficiently specific to provide the basis for case-by-case evaluation of development applications, ORS 197.835(7)(b) does not require the local government to apply the goals independently to the decision. *Cuddeback v. City of Eugene*, 32 Or LUBA 418 (1997).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where challenged post-acknowledgment comprehensive plan and land use regulation amendments do not directly affect a local government's acknowledged Goal 5 inventory, and petitioner does not identify any inventoried Goal 5 resources allegedly affected by the challenged amendments, petitioner provides no basis for reversal or remand. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. When LUBA reviews a post-acknowledgment comprehensive plan or land use regulation amendment for compliance with Goal 8, the relevant concern is whether the amendment has direct or secondary effects on "recreation areas, facilities and opportunities" inventoried and designated by the acknowledged plan to meet the local government's recreational needs. Goal 8 does not require that there will be no adverse effects on any recreational activity occurring in the vicinity of the proposed amendment. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where a post-acknowledgment code amendment adds a certain type of use to the uses allowed in a particular zone, comprehensive plan provisions which do not refer to that type of use and could be consistent with a number of different code amendments are not "specific" policies providing the basis for the code amendment, as referred to in ORS 197.835(5)(b). *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where, under applicable 1991 statutory provisions, (1) a local government elected to proceed with periodic review under the 1989 statutes that were in effect when its periodic review was initiated, and (2) a comprehensive plan and land use regulation amendment adopted as part of such periodic review is appealed to LUBA, LUBA's review is governed by the statutes in effect in 1989. *Williams v. Clackamas County*, 27 Or LUBA 602 (1994).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Under applicable 1989 statutory provisions, matters subject to periodic review by DLCD were excluded from LUBA's

jurisdiction. Under ORS 197.640(3)(1989), where a plan or land use regulation amendment is subject to periodic review, DLCD has review authority over matters concerning the amendment's compliance with the statewide planning goals. *Williams v. Clackamas County*, 27 Or LUBA 602 (1994).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Comprehensive plan amendments must comply with the Statewide Planning Goals. ORS 197.175(2)(a). Where a challenged comprehensive plan amendment does not address Goal 9 (Economic Development), and Goal 9 appears to be relevant to the challenged decision, LUBA will remand the decision. *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583 (1994).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where post-acknowledgment legislative land use regulation amendments make portions of a county's acknowledged program for wetlands protection inapplicable to rural wetlands, the county must demonstrate, either in the decision or through argument and citations to the record in its brief, that with regard to rural wetlands, the amendments result in a program that complies with Goal 5 and the Goal 5 rule. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where property is the subject of a concurrent comprehensive plan map amendment and zone change, the zone change is made under an unacknowledged plan amendment and must comply with those statewide planning goals applicable to the unacknowledged plan amendment. ORS 197.175(2)(e) and 197.625(3)(b). *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Any amendment to an acknowledged land use regulation must comply with all applicable statewide planning goals, if the comprehensive plan "does not contain specific policies or other provisions which provide the basis for the regulation." ORS 197.835(5)(b). *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. If a local government does not provide notice to DLCD of a post-acknowledgment comprehensive plan or land use regulation amendment, as required by ORS 197.610 and 197.615, it improperly construes substantive provisions of applicable law and, under ORS 197.835(7)(a)(D), the challenged post-acknowledgment amendment decision must be remanded. *Oregon City Leasing, Inc. v. Columbia County*, 26 Or LUBA 203 (1993).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. The post-acknowledgment amendment notice requirements of ORS 197.610(1) and 197.615(1) are procedural in nature. Local government failure to follow these requirements provides a basis for reversal or remand only if such error prejudiced petitioner's rights to an adequate opportunity to prepare and submit its case and a full and fair hearing before the local government. *Oregon City Leasing, Inc. v. Columbia County*, 25 Or LUBA 129 (1993).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. After acknowledgment, unless a challenged local government land use decision is an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation, LUBA has no authority to reverse or remand the decision for failure to comply with the statewide planning goals. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. If a single legislative decision *both approves* plan and land use regulation amendments with regard to some Goal 5 resource sites and *denies* such amendments with regard to other sites, such a legislative decision would not qualify as a decision from which an appeal to this Board is foreclosed under ORS 197.830(2) and 197.620(1). *ODOT v. Klamath County*, 25 Or LUBA 761 (1993).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. If a challenged permit decision misconstrues an acknowledged land use regulation, that provides a basis for reversing or remanding the decision under ORS 197.835(6) and (7)(a)(D). It does not mean the challenged decision is a land use regulation amendment. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Under ORS 197.835(5)(b), an amendment to a local government land use regulation is subject to reversal or remand for failure to comply with the Statewide Planning Goals, unless the comprehensive plan contains "specific policies * * * which provide the basis for" the amended regulation. *Ramsey v. City of Portland*, 23 Or LUBA 291 (1992).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. In periodic review, DLCD is not limited in its goal compliance review of post-acknowledgment plan and land use regulation amendments to particular goal requirements that may have triggered a periodic review factor under ORS 197.640(3) (1989). Therefore, while LUBA has concurrent jurisdiction to review post-acknowledgment plan and land use regulation amendments submitted for periodic review, under ORS 197.825(2)(c) (1989) LUBA's scope of review over such amendments does not include review for goal compliance. *1000 Friends of Oregon v. City of Troutdale*, 23 Or LUBA 219 (1992).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Amendments to acknowledged comprehensive plans and land use regulations are reviewable by LUBA for compliance with the statewide planning goals. *Gray v. Clatsop County*, 22 Or LUBA 270 (1991).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Amendments of acknowledged comprehensive plans and land use regulations must be consistent with controlling provisions of the acknowledged comprehensive plan. *DLCD v. Polk County*, 21 Or LUBA 463 (1991).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Where an acknowledged land use regulation previously authorized a particular use, but is amended to adopt new approval standards for the use, LUBA has authority to review the new approval standards for compliance with the Statewide Planning Goals. *McKay Creek Valley Assoc. v. Washington County*, 19 Or LUBA 421 (1990).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. LUBA has authority to review any amendment to an acknowledged comprehensive plan for compliance with the goals. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Whether a comprehensive plan amendment complies with a particular goal in certain instances may be determined by the acknowledgment of a plan or land use regulation provision controlling such an amendment, if the amendment cannot be invalidated without holding, in all but name, that the acknowledged plan or land use regulation provision is also invalid. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

28.4 LUBA Scope of Review – Post-acknowledgment Amendments. Statutory requirements do not become inapplicable after acknowledgment of local government plans and land use regulations. LUBA has authority to review an amendment to an acknowledged plan and zoning map to determine whether it complies with the destination resort statute. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

28.5 LUBA Scope of Review – Legislative Decisions. Where local code amendments allow accessory uses and structures in an EFU zone, arguments that (1) the amendments improperly exempt such structures from a local code requirement that steps be taken to minimize adverse impacts on farm and forest uses and (2) the provisions governing such uses are inconsistent with ORS 215.213(3)(b) provide no basis for reversal or remand where the amended code is comparable to the prior code and where the petitioner does not develop any argument explaining why the amendments are substantive instead of technical. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

28.5 LUBA Scope of Review – Legislative Decisions. Provisions of a challenged ordinance that refer to or rely on provisions of a prior ordinance that LUBA remanded are invalid, even where the prior ordinance contained a severability clause purporting to allow unchallenged aspects of the prior ordinance to take effect after LUBA's remand. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

28.5 LUBA Scope of Review – Legislative Decisions. Where a local government legislatively decreases the height limit in one part of a historic district and increases the height limit in another part of the historic district, findings that focus on the importance of creating incentives for development of vacant parcels in the historic district, determine that the new height limits are lower than those outside the historic district, and conclude that "the issue of consistency [is] best left to the Landmarks Commission who remain charged with reviewing future development proposals" are not adequate to explain how the new height limits comply with a comprehensive plan policy that requires the local government to "preserv[e] and complement[] historic resources." *Restore Oregon v. City of Portland*, 80 Or LUBA 158 (2019).

28.5 LUBA Scope of Review – Legislative Decisions. While the "raise it or waive it" requirement of ORS 197.763(1) and 197.835(3) does not apply to legislative proceedings, where a party has an opportunity to object to a procedural error during a legislative proceeding, the party must do so in order to seek remand based on that error. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

28.5 LUBA Scope of Review – Legislative Decisions. A proposed land use that requires a conditional land use permit must be processed under quasi-judicial, rather than legislative, procedures where the applicable county code provision specifies that conditional uses in the exclusive farm use zone are subject to conditional use criteria and "shall be reviewed" according to the county's quasi-judicial review procedures. Further, according to *Strawberry Hill 4-Wheelers v. Board of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979), the Oregon Supreme Court established a three-factor test to determine whether a land use matter is quasi-judicial or legislative, and where all three factors indicate that the county's action is quasi-judicial in nature, the county also erred in processing the application under its legislative rather than its quasi-judicial procedures. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

28.5 LUBA Scope of Review – Legislative Decisions. Principles of preservation that would govern a quasi-judicial decision, *e.g.*, the "raise it or waive it" requirements of ORS 197.763(1), do not apply to an appeal of a legislative decision. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

28.5 LUBA Scope of Review – Legislative Decisions. A city's findings addressing future regional demand for fossil fuels, the key support for city's prohibition on any expansion of existing fossil fuel terminals, is not supported by an "adequate factual base," as required by Statewide Planning Goal 2, where city ignored uncontradicted projections of moderate growth in demand for fossil fuels, and instead relied on unsupported speculation that demand will actually plateau or decline. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

28.5 LUBA Scope of Review – Legislative Decisions. LUBA will review a decision that amends a local government's comprehensive plan pursuant to ORS 197.835(6), for compliance with the statewide planning goals. In addition, ORS 197.835(9)(a)(C) and (D) provide that LUBA shall reverse or remand a land use decision if LUBA finds that the local government "[m]ade a decision not supported by substantial evidence in the whole record;" or "[i]mproperly construed the applicable law." Finally, pursuant to *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002), although a local government is not required to adopt findings supporting a legislative decision, the record on appeal must be sufficient to demonstrate that "required considerations were indeed considered." *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

28.5 LUBA Scope of Review – Legislative Decisions. A city's process in adopting amendments to a subarea plan to approve a proposal to construct a new bridge does not violate Goal 2 where the city provided opportunities for review and comment on the proposed plan amendments by the public, and provided notice to neighborhood associations of the plan amendment proceedings, despite a very compressed period of time for public input regarding a fairly complex proposal. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

28.5 LUBA Scope of Review – Legislative Decisions. City comprehensive plan goals, other adopted city plans and sub-plans, Metro Regional Framework and Regional Transportation Plans, and the Oregon Transportation Plan and Oregon Freight Plan are subject to judicial notice under ORS 40.090(4) or (7). However, LUBA will not consider "adjudicative facts" or facts found within judicially cognizable documents that are asserted for an "adjudicative" purpose, *i.e.*, to provide evidentiary support or countervailing evidence with respect to an applicable approval criterion in an adjudicatory setting. *Columbia Pacific v. City of Portland*, 75 Or LUBA 552 (2017).

28.5 LUBA Scope of Review – Legislative Decisions. The law of the case doctrine is not applicable in appeals of legislative land use decisions. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

28.5 LUBA Scope of Review – Legislative Decisions. In order to successfully challenge a legislative decision, a petitioner must demonstrate that the challenged provisions are facially inconsistent with applicable law and are incapable of being applied consistently with controlling law. *Hatley v. Umatilla County*, 68 Or LUBA 264 (2013).

28.5 LUBA Scope of Review – Legislative Decisions. Where a city adopts a new transportation system plan (TSP) that includes a general alignment for a new regional trail but expressly does not authorize a specific alignment, the TSP cannot be challenged based on the adverse impacts of a specific alignment. However, the TSP can be challenged based on legal challenges to the regional

trail that do not depend on a specific alignment. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

28.5 LUBA Scope of Review – Legislative Decisions. Findings supporting a legislative decision that amends the Oregon Highway Plan to provide a process for modifying mobility standards need not address issues raised below regarding whether future decisions approving higher mobility standards will cause increased congestion of specific transportation facilities and increase pollution contrary to Goal 6, where Goal 6 will apply directly to any future decisions approving higher mobility standards for specific transportation facilities, and such issues cannot be meaningfully addressed in a legislative decision adopting general amendments to the Oregon Highway Plan. *Setniker v. ODOT*, 66 Or LUBA 54 (2012).

28.5 LUBA Scope of Review – Legislative Decisions. The absence of findings addressing whether an ordinance adopted on remand is consistent with applicable comprehensive plan policies is not a basis for reversal or remand, where the ordinance merely deletes text from the original ordinance subject to remand, on remand the county adopted findings concluding that the original ordinance is consistent with the plan policies, and the petitioner identifies nothing in the deletions accomplished by the remand ordinance that might cause the county to reach a different conclusion with respect to the remand ordinance. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

28.5 LUBA Scope of Review – Legislative Decisions. A comprehensive plan policy requiring that the county consider proximity to residential uses and seasonal wind directions when making land use decisions relative to industrial or other uses likely to pose a threat to air quality does not apply to a legislative text amendment that simply adds landfill expansions to the list of uses potentially allowed in the EFU zone. Such a policy is directed at specific development proposals with a limited geographic focus, not legislative text amendments affecting large areas of the county. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

28.5 LUBA Scope of Review – Legislative Decisions. LUBA does not have the authority to apply the doctrine of severance to sever unconstitutional provisions from an ordinance and thereby affirm the ordinance on appeal. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

28.5 LUBA Scope of Review – Legislative Decisions. Even where no authority requires findings in support of a legislative decision, there must be enough in the way of findings or accessible material in the record to show that applicable criteria were applied and required considerations considered. Where the record of the legislative rezoning decision includes no findings or accessible material supporting the local government's view that the Transportation Planning Rule (TPR) does not apply to the decision, the local government can avoid remand only if it demonstrates in its response brief, as a matter of law, that the TPR does not apply to the rezoning decision and is not a required consideration. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

28.5 LUBA Scope of Review – Legislative Decisions. The obligation to adopt findings under OAR 660-007-0060(2), part of the Metropolitan Housing Rule, is triggered only by plan and land use regulation amendments that are either intended to comply with the construction and density mix standards in the rule or that impact local government provisions complying with those standards. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

28.5 LUBA Scope of Review – Legislative Decisions. A legislative decision that establishes a floor area ratio (FAR) standard for residential housing does not trigger application of the construction and density mix standards in OAR chapter 660, division 7, where the petitioner fails to demonstrate that the FAR standard affects the city's obligation to provide for an overall density of eight or more dwelling units per acre. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

28.5 LUBA Scope of Review – Legislative Decisions. Absent a focused challenge from petitioners, staff reports analyzing proposed floor area ratio (FAR) standards for residential development and concluding that the FAR standards would have no impact on future residential construction and development are sufficient to demonstrate that the FAR standards are consistent with Goal 10. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

28.5 LUBA Scope of Review – Legislative Decisions. LUBA will reject an argument that a legislative decision must be remanded to adopt findings addressing whether a proposed land use regulation is consistent with applicable comprehensive plan policies, where the petitioner identifies no local obligation to adopt findings, and the local government cites to a staff report that concludes the regulation is consistent with applicable plan policies. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

28.5 LUBA Scope of Review – Legislative Decisions. Where a petitioner appeals a legislative decision (1) that adopts a new zone potentially applicable to a number of properties but (2) does not actually apply that new zone to any property, the only challenges LUBA can meaningfully review are facial challenges to the new zone, that is, arguments that the new zone is facially inconsistent with controlling legal standards. LUBA cannot meaningfully review hypothetical challenges that anticipate future decisions to apply the new zone to particular property. *Okray v. City of Cottage Grove*, 47 Or LUBA 297 (2004).

28.5 LUBA Scope of Review – Legislative Decisions. Where a decision includes discrete determinations that, viewed in isolation, would constitute quasi-judicial decisions, whether the decision is viewed as legislative or quasi-judicial depends on the character of the whole decision. The entire decision will either be legislative or quasi-judicial, not a hybrid of both. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

28.5 LUBA Scope of Review – Legislative Decisions. Assuming, without deciding, that it is reversible error to combine a unitary legislative proceeding with a geographically and otherwise unrelated site-specific proposal, a city decision that applies a height bonus to a particular property that is within a 535-acre study area subject to a number of legislative plan and land use regulation amendments is not geographically or otherwise unrelated to the legislative proceeding. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

28.5 LUBA Scope of Review – Legislative Decisions. Although all legislative decisions need not be supported by findings when the local government can supply argument and citation to the record in its brief to demonstrate compliance with the applicable criteria, such arguments must be based

on evidence contained in the record rather than created out of whole cloth. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304 (2004).

28.5 LUBA Scope of Review – Legislative Decisions. A decision to annex property owned by more than 60 property owners and encompassing more than 125 acres is not directed at a "closely circumscribed factual situation" or "a relatively small number of persons," and thus is not subject to notice requirements and hearing procedures prescribed by ORS 197.763 for a quasi-judicial land use decision. *Miner v. Clatsop County*, 46 Or LUBA 467 (2004).

28.5 LUBA Scope of Review – Legislative Decisions. Even absent a specific legal requirement that a legislative decision be supported by findings, remand may be necessary if LUBA and the appellate courts cannot perform their review function without the missing findings to determine whether applicable decision making criteria are satisfied. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

28.5 LUBA Scope of Review – Legislative Decisions. Where a county's legislative decision changes the comprehensive plan designation for a property from Industrial to Primary Agriculture, and the record does not reflect that the county considered other potentially suitable designations or explained why other potentially suitable designations should not be applied, the decision and record are insufficient to demonstrate that applicable criteria were considered. *Manning v. Marion County*, 42 Or LUBA 56 (2002).

28.5 LUBA Scope of Review – Legislative Decisions. A county decision to amend a property description of a significant aggregate site in its comprehensive plan to mirror the property description contained in its mineral sites inventory, along with other, unrelated policy and housekeeping amendments, is a legislative, and not a quasi-judicial, decision. *DeBell v. Douglas County*, 39 Or LUBA 695 (2001).

28.5 LUBA Scope of Review – Legislative Decisions. The highly deferential standard of review stated in ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), is expressly limited to *interpretations* by local governments of comprehensive plan and land use regulations. It does not apply to *enactments* by local governments of comprehensive plan and land use regulations. *Downtown Community Assoc. v. City of Portland*, 32 Or LUBA 1 (1996).

28.5 LUBA Scope of Review – Legislative Decisions. There is no statutory or administrative law requirement that *all* legislative land use decisions be supported by findings. However, where a challenged legislative land use decision was made by the local governing body and the apparently applicable legal standards at issue on appeal are local comprehensive plan provisions, the interpretation of those provisions must initially be made by the governing body in its decision. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 429 (1995).

28.5 LUBA Scope of Review – Legislative Decisions. The absence of findings in support of a legislative decision is not in itself a basis for reversal or remand. It is possible for respondents to defend against a challenge to a legislative decision through argument in their briefs and citations to plan provisions, code provisions and evidence in the record. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

28.5 LUBA Scope of Review – Legislative Decisions. Where a legislative comprehensive plan amendment adopts policies arguably relevant to OAR 660-12-060, either the decision must be supported by findings addressing OAR 660-12-060 or respondents must demonstrate, through arguments in their briefs and citation to provisions of the local government's plan and regulations or the record that the challenged policies comply with OAR 660-12-060. *Opus Development Corp. v. City of Eugene,* 28 Or LUBA 670 (1995).

28.5 LUBA Scope of Review – Legislative Decisions. There is no statutory or administrative law requirement that *all* legislative decisions be supported by findings. However, where there is a local code provision requiring that findings be adopted in support of legislative decisions, the absence of such findings, or the adoption of purely conclusory findings, can provide a basis for reversal or remand. *Foster v. Coos County*, 28 Or LUBA 609 (1995).

28.5 LUBA Scope of Review – Legislative Decisions. That a legislative land use decision is not supported by findings is not, in itself, a basis for reversal or remand, because no applicable legal standard requires that *all* legislative land use decisions be supported by findings. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. With regard to providing an explanation of the basis for a challenged legislative decision, the Goal 2 "adequate factual base" requirement will be satisfied if the decision is supported by either (1) findings demonstrating compliance with applicable legal standards, or (2) argument and citations to facts in the record, in respondents' briefs, adequate to demonstrate compliance with applicable legal standards. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. Where petitioners contend legislative land use regulation amendments are inconsistent with certain arguably relevant comprehensive plan provisions, and those plan provisions are not interpreted in the challenged decision, LUBA must remand the challenged decision for the local government to adopt the necessary plan interpretations as part of its decision. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. Statewide Planning Goal 2 requires that comprehensive plan and land use regulation amendments have an adequate factual base, regardless of whether they are legislative or quasi-judicial in nature. *Rea v. City of Seaside*, 27 Or LUBA 443 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. Statewide Planning Goal 2 requires that planning decisions and actions have an adequate factual base, regardless of the legislative or quasi-judicial nature of the decision. The Goal 2 requirement for an adequate factual base is equivalent to the requirement for substantial evidence in the whole record. *1000 Friends of Oregon v. City of North Plains,* 27 Or LUBA 372 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. There is no legal requirement that a local government adopt findings to support a legislative land use decision. However, where the local

government does not adopt findings explaining why a challenged legislative decision complies with applicable approval criteria, LUBA relies upon the responding parties to provide argument and citations to the record to assist the resolution of petitioners' allegations. *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. There is no legal requirement that local governments adopt findings in support of legislative land use decisions. Where a local government does not adopt findings explaining why a challenged legislative land use decision complies with applicable approval criteria, LUBA relies on the responding parties to provide argument and citations to the record to assist in the resolution of petitioners' allegations. *Andrews v. City of Brookings*, 27 Or LUBA 39 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. For LUBA review of a legislative land use decision, either the legislative land use decision must be accompanied by findings addressing relevant legal standards or the local government must explain in its brief how the challenged legislative decision complies with applicable legal standards. *McInnis v. City of Portland*, 27 Or LUBA 1 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. Although nothing requires that all legislative land use decisions be supported by findings, in order for LUBA to perform its review function, it is necessary either that legislative land use decisions be accompanied by findings demonstrating compliance with relevant legal standards or that respondent explain in its brief how the challenged legislative decision complies with applicable legal standards. *Rea v. City of Seaside*, 26 Or LUBA 444 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. No statute or appellate court case requires that all legislative land use decisions be supported by findings. Absent allegations by petitioner that a legislative decision violates particular legal standards, a local government's failure to adopt findings in support of that legislative decision addressing the statewide planning goals and local comprehensive plan is not, of itself, a basis for reversal or remand of the decision. *Oregon City Leasing, Inc. v. Columbia County*, 25 Or LUBA 129 (1993).

28.5 LUBA Scope of Review – Legislative Decisions. ORS 215.130(1) indicates the legislature contemplated that legislative land use decisions could be adopted by the electorate. However, nothing exempts legislative land use decisions from the procedural and substantive requirements applicable to the enactment of legislation affecting land use. Therefore, a decision adopted by the electorate is subject to the requirements governing legislative land use decisions. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

28.5 LUBA Scope of Review – Legislative Decisions. While nothing requires that all legislative land use decisions be supported by findings, in order for LUBA to perform its review function, it is necessary either that legislative land use decisions be accompanied by findings of compliance with relevant legal standards or that respondents explain in their briefs how the legislative decision complies with applicable legal standards. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

28.5 LUBA Scope of Review – Legislative Decisions. There is no statutory requirement that legislative decisions be supported by substantial evidence. *Riverbend Landfill Company v. Yamhill County,* 24 Or LUBA 466 (1993).

28.5 LUBA Scope of Review – Legislative Decisions. That the electorate may have exceeded its authority in adopting land use legislation by initiative, is a question bearing on the merits of an appeal from such a decision, not on LUBA's jurisdiction to review the appealed decision. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 607 (1992).

28.5 LUBA Scope of Review – Legislative Decisions. ORS 197.835(7)(a)(C) does not require a legislative land use decision to be supported by substantial evidence. Where petitioners cite no independent basis for a requirement that the challenged legislative land use decision be supported by substantial evidence, petitioners provide no basis for reversal or remand. *Cope v. City of Cannon Beach,* 23 Or LUBA 233 (1992).

28.5 LUBA Scope of Review – Legislative Decisions. ORS 197.835(7)(a)(C) does not impose a substantive requirement that legislative land use decisions be supported by substantial evidence in the whole record. *Alexiou v. Curry County*, 22 Or LUBA 639 (1992).

28.5 LUBA Scope of Review – Legislative Decisions. Although not required by statute, findings in support of legislative amendments to a comprehensive plan may be required to permit LUBA to determine whether the plan, as amended, complies with the statewide planning goals. *Von Lubken v. Hood River County*, 22 Or LUBA 307 (1991).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a county's Goal 5 ESEE analysis and program make a decision to fully allow uses that conflict with inventoried wildlife habitat, and the county zones the property to fully allow those conflicting uses, the county is not required to remove the property from its wildlife habitat inventory. But where the county does remove the property from its wildlife habitat inventory and LUBA rejects all challenges to the Goal 5 ESEE analysis and program and remands on a different issue, in a subsequent appeal of the county's decision on remand a petitioner may not assign error to the county's removal of the property from its wildlife habitat inventory because that is a resolved issue under *Beck v. Tillamook County*, 313 Or 148, 153, 831 P2d 678 (1992). *Wood v. Crook County*, 74 Or LUBA 278 (2016).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where LUBA remands a decision and identifies two courses of action the local government may take to resolve the issue that led to remand, and the local government selects one of those course of action on remand, in a subsequent appeal a petitioner may not assign error based on an issue that is outside the scope of the chosen course of action. *Wood v. Crook County*, 74 Or LUBA 278 (2016).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. The law of the case doctrine is not applicable in appeals of legislative land use decisions. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. The "law of the case" doctrine described in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), does not apply to bar consideration of an issue raised on appeal of a decision on remand, if the issue is substantially the same as an issue raised in an unresolved assignment of error in the appeal of the original decision. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where the applicant for a vested right determination argued below that it had not lost its vested right and argued for an interpretation of the vested rights standard that would result in a conclusion that the vested right had not been discontinued, on appeal to LUBA the applicant has not waived the ability to challenge the interpretation the local government adopted to support its conclusion that the vested right had been discontinued, even if the applicant's specific arguments against that interpretation were not raised below. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. The holding in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), precludes a petitioner at LUBA from arguing that in adopting a decision after remand from LUBA, the local government erred in amending the location of the coastal shorelands boundary on the acknowledged comprehensive plan map without processing the decision as a post-acknowledgement plan amendment (PAPA) pursuant to the requirements in ORS 197.610, where the issue could have been, but was not, raised during the appeal of the local government's initial decision approving a tentative master plan and subdivision. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where on remand from LUBA a county addresses the remand issues by adopting different ordinances at different times for each separate remand issue, a challenge to a setback adjustment provision adopted in one remand ordinance is not waived under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), by the petitioner's failure to raise that challenge in an earlier appeal of a different remand ordinance that did not adopt the setback adjustment provision. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Under the reasoning in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), a petitioner is precluded from raising issues in a subsequent appeal of a decision made after a voluntary remand. The law of the case doctrine is not dependent on whether LUBA reached a decision on the merits in the prior appeal; rather, the doctrine precludes issues from being raised piecemeal throughout the course of appellate review. *Poto v. Linn County*, 67 Or LUBA 162 (2013).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), to preserve an issue on appeal, the issue must be raised at all stages in the appeal proceedings where it can be raised, and failure to raise the issue during the first appeal proceedings precludes LUBA's review of that issue. The *Beck* waiver doctrine is not limited to issues actually raised and resolved in the initial appeal proceedings. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. The waiver doctrine articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), applies both to legislative and quasi-judicial land use decisions. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Even if all of the assignments of error challenging a decision on remand are barred from relitigation or waived under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), and thus not within LUBA's scope of review, that only means LUBA will affirm the decision, not that the decision on remand is not within LUBA's jurisdiction. *Hatley v. Umatilla County*, 66 Or LUBA 427 (2012).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), precludes a petitioner from challenging the terms of a condition imposed on remand that is identical to a condition imposed in the original decision, whose terms were not challenged in the initial appeal to LUBA. That the identical terms were embodied in a nominally "new" condition does not allow the petitioner to advance challenges to the decision on remand that could have been, but were not, advanced in the initial appeal. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where on remand a county relies for the first time on signalization of an intersection to ensure compliance with the Transportation Planning Rule, the issue of whether the county could rely on signalization could not have been raised in the initial appeal, and is not waived under *Beck v. City*

of Tillamook, 313 Or 148, 153, 831 P2d 678 (2002). *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. The law of the case doctrine in *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (2002), operates even against persons who did not, but could have, participated in the first appeal, and precludes such persons from raising issues that could have been raised in the first appeal, but were not raised. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), a party at LUBA fails to preserve an issue for review if, in a prior stage of a *single proceeding*, that issue is decided adversely to the party or that issue could have been raised and was not raised. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Arguments that a permit applicant failed to raise any issue concerning a refund of permit fees in his appeal of the permit denial provide no basis for a motion to dismiss. Waiver of issues for failure to raise those issues in a local proceeding or prior LUBA appeals may affect LUBA's scope of review, but such waiver does not affect LUBA's jurisdiction to review a decision that qualifies as a land use decision. *Sperber v. Coos County*, 61 Or LUBA 477 (2010).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a county does not appear to defend its decision and LUBA concludes in an unappealed decision that the county lacks authority under its development code to condition final partition plat approval on the applicant first executing an agreement and providing financial guarantees to construct roads within the partition, the county may not in its decision on remand again impose that condition of approval and include a belated interpretation of its development code to assert such authority. Under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), a county is bound in its proceedings on remand by all issues that were resolved against the county in LUBA's first decision. *Sperber v. Coos County*, 60 Or LUBA 44 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. When a local code provision prevents persons who were not "parties" during the initial proceedings from participating on remand from LUBA, a person who failed to challenge his classification as a "witness" rather than a "party" in the initial proceeding is precluded from raising a challenge to that classification in a subsequent LUBA appeal. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Because the issue of the adequacy of the findings addressing the seven factors of OAR 660-033-0020(1)(a)(B) was not raised in the initial appeal, and was not one of the issues on remand, the issue cannot be raised for the first time in a challenge to the county's decision on remand. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. When a petitioner did not challenge the legality of a 2000 boundary line adjustment (BLA) in disputing when a parcel was lawfully created, that petitioner may not challenge the legality of that 2000 BLA in a subsequent LUBA appeal after LUBA remanded the decision to the county for other reasons. *McGovern v. Crook County*, 60 Or LUBA 177 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a city approved a tri-plex without notice or hearings and the dispute in a prior LUBA appeal of that decision was whether any discretionary approval criteria applied to the decision, petitioners did not waive their right to argue in an appeal of the decision that followed notice and a hearing that the tri-plex violates a particular setback requirement, even though it might have been theoretically possible for petitioners to comb through the development code and locate that criterion in the earlier appeal. *Zirker v. City of Bend*, 59 Or LUBA 1 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a subdivision approval decision is appealed to LUBA and remanded, and the same subdivision is approved a second time following remand and appealed a second time to LUBA, those appeals are two phases of the same case, and issues that LUBA decided in its first decision may not be the subject of assignments of error in the appeal of the second subdivision decision. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Petitioners do not waive their right to argue that a second subdivision approval decision that relies on Ballot Measure 37 waivers and post-dated Ballot Measure 49 was precluded by Ballot Measure 49 by failing to make that argument in their appeal of an earlier subdivision decision that predated Ballot Measure 49. The subject of that earlier appeal was the county's pre-Ballot Measure 49 subdivision approval decision, not the county's post-Ballot Measure 49 subdivision approval decision. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. An issue may be waived so that it cannot be raised in a second appeal regarding the same land use application where the issue is "plainly cognizable." The possibility that a county might adopt a second decision approving a subdivision based on Ballot Measure 37 waivers after Ballot Measure 49 takes effect was not plainly cognizable in a LUBA appeal of an earlier subdivision that pre-dated Ballot Measure 49. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where no issue was raised during the initial proceedings or initial appeal to LUBA regarding whether a property could be used as a "woodlot" and thus be put to "farm use" for purposes of ORS 215.203(2), that issue cannot be raised for the first time on appeal of the decision on remand, pursuant to *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992). *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a petitioner raises an issue and LUBA rejects that issue but remands a permit decision on

other grounds, the petitioner may not raise the rejected issue for a second time in the local government's decision on remand. *Save Our Skyline v. City of Bend*, 55 Or LUBA 12 (2007).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. The issue of whether logging activities prior to the application should be considered part of proposed "grading activities" is waived, where that issue could have been but was not raised in the initial LUBA appeal of the preliminary grading permit. That LUBA remanded the grading permit decision to identify evidence regarding the feasibility of complying with final grading permit standards does not open the door to raise new issues that could have been but were not raised in the initial appeal. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Issues that could have been raised but were not raised during a prior LUBA appeal cannot be raised in appeal of the decision on remand, under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Issues that could have been, but were not, raised in the first appeal to LUBA are waived in any appeal of the decision on remand under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). Findings adopted on remand explaining why proposed development is allowed in a public facility zone do not open the door to allow a petitioner to raise issues regarding whether the development is consistent with Statewide Planning Goal 17 (Coastal Shorelands). *Moreland v. City of Depoe Bay*, 50 Or LUBA 44 (2005).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. When an earlier decision was remanded by LUBA based on issues regarding the safety of a proposed road design, and the local government specifically limits the remand proceedings to the issues remanded by LUBA, petitioners may not challenge the proposed road's location under the local government's transportation system plan when that locational issue could have been, but was not raised, in the earlier appeal. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. It would be inconsistent with the legislative policies that "time is of the essence in reaching final decisions in matters involving land use and that those decisions [should] be made consistently with sound principles governing judicial review" to allow a petitioner to fail to raise a constitutional challenge to an applicable statute in an initial LUBA appeal and, following LUBA's remand on other grounds, allow that petitioner to raise the constitutional challenge in a second LUBA appeal challenging the local government's decision on remand. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a city does not seek appellate court review of LUBA's initial decision that the city's actions to secure consents to annexation are subject to heightened scrutiny, it may not argue in a subsequent appeal of its decision on remand that its actions to secure consents to annexation are subject only to a requirement that there be a rational basis for the city's actions. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Under the *Beck v. City of Tillamook* waiver principle, issues that have been conclusively resolved at a prior point in a single continuous land use proceeding are not reviewable for a second time by LUBA or an appellate court at a later point in that proceeding. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Generally, issues that were conclusively resolved in a final discretionary land use decision, or that could have been but were not raised and resolved in that earlier proceeding, cannot be raised to challenge a subsequent application for permits necessary to carry out the earlier final decision. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a final discretionary permit approval resolved issues regarding how "lot area" is determined for purposes of calculating the number of parking spaces for proposed development, those issues cannot be revisited and applied as a basis to deny a subsequent parking lot application that is consistent with the earlier final discretionary decision. Such a denial is an impermissible collateral attack on the earlier decision. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where the court of appeals remands a city decision because the city failed to establish in its initial decision that its finding concerning a need for commercial land was (1) supported by substantial evidence, or (2) not critical to its initial decision, and the city finds on remand that the finding was not critical to its decision and readopts its decision, petitioners are entitled to challenge the adequacy of the remaining findings to support the city's rezoning decision even if the adequacy of those findings were not challenged in the first appeal. *Dimone v. City of Hillsboro*, 44 Or LUBA 698 (2003).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where LUBA finds in its first decision that it is not clear what road construction standards apply or what those standards require in considering alternative alignments under OAR 660-012-0065(5)(a), a petitioner did not waive its right to argue in a second appeal that *no* road standards apply to one of the considered alignments. *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 476 (2002).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Although parties to a stipulated voluntary remand may be bound by an agreement to limit the issues on remand concerning a disputed parking lot, non-parties are not bound by the stipulation and such non-parties have not waived their right to raise issues under *Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678 (1992), where the notice of hearing that preceded the only local hearing on the remanded decision failed to refer to the parking lot. *Boly v. City of Portland*, 40 Or LUBA 537 (2001).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. When a city imposes a condition on development approval and relies on that condition in both its

initial approval and its reapproval after withdrawing the decision for reconsideration, a petitioner's failure to raise issues regarding the condition during the evidentiary proceedings on reconsideration precludes petitioner from challenging the adequacy or validity of the condition in a subsequent LUBA appeal of the decision on reconsideration. *DLCD v. City of Warrenton*, 40 Or LUBA 88 (2001).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. The law of the case doctrine does not apply to an appeal of a new application, even if that application is similar to a prior application that resulted in a decision that was remanded by LUBA. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. A petitioner must do more than merely raise an issue concerning Goal 14 to raise an issue concerning compliance with local provisions that implement Goal 14. Failure to raise an issue concerning the local provisions below precludes a petitioner from raising an issue concerning those local provisions for the first time on appeal. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Potential parties in a LUBA appeal can reasonably foresee that the appeal may lead to the challenged decision being affirmed, reversed or remanded, as a result of a decision on the merits or a stipulation by the parties. But such potential parties cannot reasonably foresee that the parties in a LUBA appeal will stipulate that LUBA should order the local government to adopt an amended decision. *Waibel v. Crook County*, 39 Or LUBA 749 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Under ORS 197.860, parties may reach a mediated settlement in a LUBA appeal and request that LUBA order the local government to adopt a particular amended decision. However, in issuing such an order, LUBA does not review the amended decision on the merits and persons who appeal the amended decision to LUBA may raise any issues on appeal that they did not waive by failing to participate in the initial LUBA appeal. *Waibel v. Crook County*, 39 Or LUBA 749 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where an issue is resolved in a prior appeal, a petitioner in a subsequent appeal of a city's decision on remand may not raise that issue again. *Schwerdt v. City of Corvallis*, 38 Or LUBA 174 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Petitioners are not precluded from raising arguments on appeal that pertain to assignments of error that were raised, but not finally decided, in a prior appeal to LUBA on the same application. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. An argument that could have been presented in a prior LUBA appeal that led to remand, but was not, is waived in a subsequent LUBA appeal of the local government's decision on remand. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a county finds in its initial decision that the soils on a property are less productive than the same types of soils on adjoining properties due to slope and soil wetness, and no party challenges that finding, the county need not consider that issue in making a decision on remand from LUBA of its initial decision. *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. An issue that could have, but was not, raised in the initial petition for review before LUBA in an appeal that was voluntarily remanded, may not be included in an assignment of error in a later appeal of a decision following remand. *Riggs v. Douglas County*, 37 Or LUBA 432 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. LUBA has jurisdiction to review a statutory challenge to a plan amendment even though the statutory challenge was not raised in a LUBA appeal when the plan was originally adopted, where the statutory question presented when the plan was first adopted is different from the statutory question presented by the plan amendment decision. *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where petitioner could have but did not challenge coordinated city population projections in its initial appeal before LUBA, petitioner waives the right to challenge those projections in its appeal of the decision on remand. *DLCD v. Douglas County*, 37 Or LUBA 129 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. The law of the case doctrine does not bar petitioners from raising issues that were resolved or could have been raised in a prior decision approving the challenged land use proposal, where the challenged decision revisits, on a *de novo* basis, certain issues resolved in a prior decision, and the issues raised in the present appeal all pertain to matters that the challenged decision revisited. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Petitioners may not raise issues concerning a landscaping approval standard in an appeal to LUBA following remand of an earlier city decision by LUBA, where LUBA's remand was based on a more general "adverse impact" standard. Petitioners waived their right to raise issues under the landscaping standard by failing to raise any issue regarding that standard in the first LUBA appeal. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Principles of *res judicata* do not prohibit petitioner from raising issues before LUBA regarding the nonconforming use status of a proposed dog kennel, even if those issues could have been raised in an earlier, unappealed county decision approving site design review for the kennel, because the nonconforming use status of the proposed use was not at issue during the site design review proceedings. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. The law of the case doctrine does not bar petitioner from arguing that the city's action on remand

from LUBA so altered the proposed development that the city must revisit a variance granted in the original decision. *Dodds v. City of West Linn*, 35 Or LUBA 101 (1998).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. A local government's decision following remand from LUBA that a modified site plan complies with conditions of approval that were imposed by its initial decision that led to the first LUBA appeal raises new issues that petitioners may challenge in a subsequent LUBA appeal challenging the local decision on remand. *Winkler v. City of Cottage Grove*, 33 Or LUBA 543 (1997).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where an issue raised by petitioners regarding the county's decision to include intervenor's site in its Goal 5 inventory was decided in a prior LUBA appeal of the same decision, that issue cannot be raised again. *O'Rourke v. Union County*, 31 Or LUBA 174 (1996).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. When a local government limits its remand proceedings to issues that were the basis for LUBA's remand order, issues that were not raised in the first appeal, and are not within the scope of the issues that were the basis for LUBA's remand, cannot be raised in a subsequent appeal to LUBA. *O'Rourke v. Union County*, 31 Or LUBA 174 (1996).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Law of the case only applies where an issue has been resolved in an earlier appeal. The county cannot rely on petitioners' failure to assign error under Goal 3 in a previous appeal to conclude that LUBA has made a de facto determination that the county's findings establish compliance with its own agricultural lands goal. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. The doctrine of waiver does not apply to issues that were the basis of a LUBA remand, but rather only to issues that were decided adversely to petitioners or that petitioners failed to raise in the prior LUBA appeal. *Collins v. Klamath County*, 28 Or LUBA 553 (1995).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a local government's decision is remanded, but the local government's failure to adopt findings defining certain relevant terms in its land use regulation is not the basis for the remand, petitioners may not raise the local government's failure to adopt such definitional findings in a second appeal to LUBA challenging the local governments decision on remand. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Unresolved issues, which may be considered in a local government proceeding on remand from LUBA, and raised in a subsequent appeal to LUBA from a local decision on remand, include (1) issues presented in the first appeal that LUBA either sustains or does not consider, and (2) issues that could not have been raised in the first LUBA appeal. *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where petitioner did not appeal a previous LUBA decision concerning a related matter to the court of appeals, petitioner may not collaterally attack that previous LUBA decision in a subsequent appeal to LUBA. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. In a second appeal to LUBA, challenging a local government decision made on remand after a first LUBA appeal, petitioner cannot raise arguments which were not, but could have been, made in the first LUBA appeal. *Laine v. City of Rockaway Beach*. 27 Or LUBA 493 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where petitioner failed to raise an issue concerning compliance with DEQ noise standards in his first appeal of a decision approving an auto repair home occupation permit, he may not raise that issue in an appeal of the local government's decision following remand. *Wuester v. Clackamas County*, 27 Or LUBA 314 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Neither law of the case nor issue preclusion applies in a LUBA appeal of a land use decision made after a prior remand by LUBA, where the second appeal involves different parties and a new application for a revised project was submitted after remand. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where petitioner failed to raise the issue of compliance with a particular comprehensive plan provision in its first appeal to LUBA, and failure to comply with that plan provision was not a basis for LUBA's remand of the local government's first decision, petitioner may not raise that issue for the first time in a subsequent appeal to LUBA from the local government decision adopted after remand. *ODOT v. Clackamas County*, 27 Or LUBA 141 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where petitioners seek to challenge a local government interpretation that a code standard is satisfied because the number of a certain type of uses in an area is "not unusual," petitioners did not waive their argument by failing to raise it in a previous appeal to LUBA, where the previous decision simply noted there is "nothing unusual" about the concentration of the use in the area, but did not express the challenged interpretation. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a local government limits its remand proceedings to the issues that were the basis for LUBA's remand, issues that were not raised in the first appeal, and are not within the scope of the issues that were the basis for LUBA's remand, cannot be raised in a subsequent appeal to LUBA. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where LUBA remands a local government decision for an interpretation of ambiguous code provisions, and no appeal is taken from LUBA's determination concerning the code's ambiguity,

petitioner is barred from arguing before LUBA that the disputed code provision is unambiguous, in an appeal from the local decision on remand. *McGowan v. City of Eugene*, 26 Or LUBA 9 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where LUBA, in its final opinion and order, rejects an argument made by petitioners and petitioners do not appeal LUBA's decision, under the doctrine of waiver, LUBA cannot consider that issue in a subsequent appeal from the local government's decision on remand. However, LUBA may review issues that could not have been raised in the prior appeal. *Simmons v. Marion County*, 25 Or LUBA 647 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where petitioners' arguments in a LUBA petition for review challenging a local government's decision on remand after a prior LUBA appeal either were raised or could have been raised during the prior LUBA proceedings, such arguments may not be raised in the LUBA appeal after remand. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where petitioners argue a city cannot approve an amendment to a PUD development plan on remand from LUBA, because the underlying development plan approval expired *after* LUBA remanded the initial city decision approving the amendment, petitioners did not waive this issue. The issue was not ripe to be raised at the time of the city's initial proceedings on the amendment or during petitioners' first appeal to LUBA. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where LUBA's decision on petitioners' first appeal found the local government erred by failing to interpret and apply certain code provisions to the subject application, and petitioners did not appeal that LUBA decision, petitioners have waived the argument that a separate application is required to give the local government jurisdiction to apply the code provisions in question. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a petitioner mentions an issue in passing in its petition for review, but does not specifically assign the issue as error, LUBA does not address that issue in its final opinion and order remanding the challenged decision, and petitioner does not seek judicial review of LUBA's decision, petitioner cannot assign that issue as error in a subsequent appeal to LUBA from the local government decision on remand. *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. A local government's failure to comply with procedural requirements of ORS 197.763 on remand from LUBA does not allow a petitioner to raise issues in a second appeal to LUBA that are otherwise barred by the doctrine of waiver articulated in *Mill Creek Glen Protection Assoc. v. Umatilla County*, 88 Or App 522, 527, 746 P2d 728 (1987). *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where a local government made determinations regarding the application of certain code provisions to a proposed use in its initial decision on a permit application, and that decision is remanded by LUBA for other unrelated reasons, compliance of the proposed use with those code provisions is an old, resolved issue that cannot be raised in an appeal of a new decision made by the local government after remand. *Tylka v. Clackamas County*, 24 Or LUBA 296 (1992).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where LUBA determines that a code section is not an applicable approval criterion but remands a land use decision on other grounds, a petitioner may not fail to appeal LUBA's decision and then reassert the applicability of the code section in a subsequent LUBA appeal of the decision on remand. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. The "law of the case" or "waiver" doctrine does not limit a local government's ability to adopt a different decision, or different findings in support of its decision, after its initial decision is remanded by LUBA. *Eckis v. Linn County*, 22 Or LUBA 27 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner fails to satisfy OAR 661-010-0030(4)(d) or to establish that the issues raised in its six assignments of error were raised as required by ORS 197.763(1) and ORS 197.835(3) where the petitioner broadly cites its submittals into the record during the proceedings before the local government. Such a broad citation is not a technical violation where it interferes with the substantial rights of the parties by improperly shifting the burden to the respondents to review over one hundred pages of the record to determine whether the issues raised in six assignments of error in an overlength, 68-page petition for review have been preserved. *H2D2 Properties, LLC v. Deschutes County*, 80 Or LUBA 528 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner is not required to anticipate erroneous findings or interpretations in a final decision in order to challenge them at LUBA. Where petitioner raised an issue before the city council regarding fees and argued that the local appeal was invalid because of an allegedly invalid fee waiver decision, petitioner could not have anticipated the city's decision along with its attendant findings and interpretations, until the city issued its final decision. Accordingly, petitioner did not have the opportunity to raise specific challenges to the city's decision regarding the fee waiver during the local proceeding and therefore may raise them for the first time on appeal to LUBA. *Riverview Abbey Mausoleum Company v. City of Portland*, 79 Or LUBA 38 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.835(4)(a), where a staff report confirms that the subject property is in an overlay district where "development is allowed to have limited lengths of steeper grades," but where the applicable approval criteria for that overlay district are not cited in any notices sent or staff reports prepared by the local government, a petitioner may raise the argument that the local government erred in failing to adopt findings regarding compliance with those criteria for the first time on appeal to LUBA. *Roten v. City of Turner*, 79 Or LUBA 124 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and

therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. While the "raise it or waive it" requirement of ORS 197.763(1) and 197.835(3) does not apply to legislative proceedings, where a party has an opportunity to object to a procedural error during a legislative proceeding, the party must do so in order to seek remand based on that error. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioner argues the county committed a procedural error that prejudiced his substantial rights when the board of county commissioners failed to consider a written statement that petitioner submitted to the board of commissioners at the hearing, but petitioner does not establish that the board of county commissioners actually failed to consider petitioner's written statement, and petitioner failed to object to the alleged procedural error below, petitioner has not established that the county committed a procedural error or violated an applicable legal standard. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A party asserting a procedural error must demonstrate that the procedural error was objected to during the proceedings below, if there was an opportunity to lodge an objection. Accordingly, where a dispute may exist regarding whether petitioners objected to the county's process during the proceedings below, LUBA will allow a motion to take evidence outside the record to consider a document for the limited purpose of allowing petitioners to cite to that document to establish, if the point is disputed in a response brief, that petitioners attempted to lodge objections to the county's process. *Eng v. Wallowa County*, 79 Or LUBA 1024 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA will reject a county's interpretation of its code—that a code provision which sets forth approval criteria regarding an application for a variance to the minimum lot size requirements within the county's urban growth area may not apply to the county's decision because it only applies to decisions made by the county's planning director but not to decisions made by the planning commission or board of county commissioners—that was made for the first time in its response brief, because that interpretation is not reflected in the decision and is therefore not an interpretation by the local government. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Relying upon a local government staff report's citation to local code provisions is insufficient to "raise" an "issue" for purposes of bringing an appeal before LUBA under those code provisions pursuant to ORS 197.763(1) and 197.835(3) because no party to the proceedings below would understand from the staff report that an "issue" had been "raise[d]" regarding compliance with those code provisions. *McAndrew v. Washington County*, 78 Or LUBA 21 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA's review of limited land use decisions is limited to issues raised before the local government, unless (1) the local government did not satisfy the procedural requirements of ORS 197.195, or (2) the limited land use decision adopted differs significantly from the proposal described in the local notice of proposed action. *Kamps-Hughes v. City of Eugene*, 78 Or LUBA 457 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument that the issue raised in an assignment of error is waived is not a basis to dismiss the appeal as moot. If LUBA agrees with that argument, the appropriate disposition would be to deny the assignment of error and affirm the local government's decision, not to dismiss the appeal as moot. *McNichols v. City of Canby*, 78 Or LUBA 1090 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A city might be obligated to reopen the evidentiary record to accept relevant local legislative history in interpreting local law in an on-the-record hearing, but where petitioner never took the position that it had relevant legislative history to offer and at LUBA merely suggested that such legislative history might exist, the city did not err by limiting its remand proceedings to the evidentiary record that was submitted to LUBA in the appeal that led to remand. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The issue that proposed dwellings do not qualify for historic preservation incentives on the merits is a different issue than whether the proposed dwellings are even eligible for consideration for an award of historic preservation incentives. And raising the first issue does not give fair notice to decision makers regarding a need to address the second issue. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Arguments that a city erred by failing to adopt findings that address particular spacing and orientation guidelines provide no basis for remand, where petitioners failed to raise any issue concerning those guidelines before the close of the evidentiary record and failed to identify those guidelines in their local notice of appeal. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner does not waive his right to assign procedural error at LUBA by failing to object to the procedural error below, where the alleged procedural error occurred after the close of the evidentiary record, and the city council meeting to adopt the final decision did not include an

opportunity for parties to lodge procedural objections. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The issue of whether a county erred in adopting a reasons exception to Statewide Planning Goal 3 under both the catch-all provision at OAR 660-004-0022(1) and the specific provisions for rural industrial use at OAR 660-004-0022(3) was adequately raised below for purposes of ORS 197.763(1), where a participant argued below that the county cannot adopt exceptions under both provisions but must choose one or the other. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The issue of whether a proposed solar facility qualifies as "industrial development" for purposes of standards at OAR 660-004-0022(3) for adopting a reasons exception for industrial uses was sufficiently raised below, where a party expressed uncertainty whether the proposed facility qualifies as an industrial use, the decision-maker recognized that a potential issue had been raised, and the decision-maker adopted responsive findings concluding that the use is an industrial use. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where during the hearing a party objects that a city councilor disclosed the existence, but not the substance, of *ex parte* communications, the objection is sufficient under ORS 197.763(1) to raise an issue regarding the adequacy of the disclosure. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner fails to raise an issue with the specificity that is required by ORS 197.763(1) when the arguments in the cited record pages merely allege without developed explanation that the subject parcel was created by partition in 1980 as a sub-standard size parcel in the FF-20 zone, and therefore may not raise the issue that the post-partition zoning of the property to a zone that requires a 20-acre minimum parcel size means that the one-acre parcels approved by the county in 1980 were not lawfully created. *Landwatch Lane County v. Lane County*, 75 Or LUBA 151 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.835(4), where a local government fails to list an applicable permit approval standard in its notice of hearing, a petitioner is generally entitled to raise issues for the first time at LUBA based on the standard omitted from the notice. But under the last sentence of ORS 197.835(4), LUBA may refuse to allow a petitioner to raise a new issue in that circumstance, where LUBA finds the omitted standard was discussed during the local proceedings and petitioner could have raised issues concerning that standard during the local proceedings. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A general assertion before the city that an applicant failed to demonstrate that a proposed subdivision complies with Title I of the Metro Urban Growth Management Functional Plan is sufficient to preserve the right to raise an issue at LUBA regarding the "Housing Capacity" section of Title I,

because that is the only substantive section of Title I. But that general assertion might be insufficient if Title I was a lengthy, multi-section Title. *Housing Land Advocates v. City of Happy Valley*, 75 Or LUBA 227 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner's right to raise an issue concerning an applicable approval criterion that is not listed in the prehearing notice required by ORS 197.763(3) is a qualified right under ORS 197.835(4), and LUBA may refuse to consider that issue if LUBA finds that notwithstanding the notice failure "the issues could have been raised before the local government[.]" *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner does not raise an issue clearly, and at one point in the local proceedings takes the opposite position concerning that issue that petitioner takes in its brief at LUBA, the petitioner did not adequately preserve the issue for LUBA review. *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a city adopts findings that express four different reasons why the city concluded a "change in the neighborhood" criterion for rezoning was met, and petitioner fails to challenge all of those reasons, petitioner fails to demonstrate a basis for remand under the "change in the neighborhood" criterion. *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument that a city should demand more of an applicant than "just minimally" complying with rezoning standards is not sufficient to preserve a right to argue that the proposed rezoning violates those rezoning standards. *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A city's error in failing to provide petitioner with a copy of a land use application, when requested, does not result in prejudice to petitioner's substantial rights where petitioner had access to the copy of the application at the planning department throughout the city planning commission's and city council's proceedings and after the city provided petitioner a copy of the application seven days before the city council hearing, petitioner made no request for additional time to present his arguments. *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner argues that an issue was raised during two planning commission meetings, but provides only a general cite to the minutes and DVD recordings of the meetings, without a more specific record cite the petitioner has failed to establish that the issue was raised during the proceedings below. *Neil v. Columbia County*, 74 Or LUBA 442 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. General expressions of concern that traffic from additional rural residential development would degrade the quality of a rural residential neighborhood are insufficient under ORS 197.763(1) to raise issues regarding consistency with comprehensive plan policies that promote rural residential

neighborhoods, absent specific citation to such policies during the proceedings below. *Neil v. Columbia County*, 74 Or LUBA 442 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A general argument raised below that the applicant to expand a destination resort failed to provide a comprehensive wildlife management plan does not provide fair notice of specific issues raised on appeal regarding noncompliance with code standards that require "no net loss" of wildlife resources and imposition of a conservation easement. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner is not required to anticipate that a city will adopt allegedly erroneous interpretations and object to those interpretations to preserve a right to assign error at LUBA based on those allegedly erroneous interpretations. And assuming a city is legally required to impose a specific condition of approval, a petitioner is not required to anticipate a city will fail to impose the condition of approval in its final written decision and object to that failure during the proceedings that lead to that written decision. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the challenged decision annexed both a parcel and a portion of a county road, and the notice of public hearing that the city provided described the application for annexation as including only the parcel and did not reference in any way the portion of the county road that was annexed, the notice of public hearing did not reasonably describe the city's final action, and ORS 197.835(4)(b) allows petitioner to raise new issues. *Altamont Homeowners' Assoc., Inc. v. City of Happy Valley*, 73 Or LUBA 126 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Because ORS 197.835(3) limits LUBA's review to issues raised before the "local hearings body," issues raised only to a local appeal body that did not conduct a hearing are insufficient to demonstrate that the issues were raised before the local hearings body for purposes of ORS 197.835(3). *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the applicant for a vested right determination argued below that it had not lost its vested right and argued for an interpretation of the vested rights standard that would result in a conclusion that the vested right had not been discontinued, on appeal to LUBA the applicant has not waived the ability to challenge the interpretation the local government adopted to support its conclusion that the vested right had been discontinued, even if the applicant's specific arguments against that interpretation were not raised below. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where an applicant submits a supplemental burden of proof just prior to a hearing on remand, to clarify that a proposed mine would operate year round rather than only during a four month period as had been previously understood by LUBA and the other parties, and that supplemental burden of proof is not made available to the parties until the beginning of the hearing on remand, those

opposing parties cannot be expected to discover the longer proposed operating time and object to the modification prior to the close of hearing on remand. *Central Oregon Landwatch v. Deschutes County,* 72 Or LUBA 45 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the applicant's supplemental burden of proof clarifying that a proposed mine will operate year round rather than only four months a year, as was previously understood, was submitted too late on remand to allow opponents time to object prior to the close of the hearing on remand, but the record was held open for 12 days after the hearing at opponents' request and they fail to raise any issue regarding the change to a year round operation, they may not raise that issue at LUBA. *Central Oregon Landwatch v. Deschutes County,* 72 Or LUBA 45 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Explanations contained in staff reports and at planning commission and city council hearings that the city processed applications for a zone change, planned development and variance according to a consolidated procedure under the city's code and that the city council would make the final decision on all three applications are not sufficient to raise an "issue" within the meaning of ORS 197.763(1) that the city exceeded its jurisdiction under the city's code when it consolidated the three applications, and the issue is waived. *Harrison v. City of Cannon Beach,* 72 Or LUBA 182 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(1) requires that issues that "may be the basis for an appeal to the Land Use Board of Appeals" must be raised locally to preserve them for review at LUBA. ORS 197.835(3) limits LUBA review to preserved issues. But the issues addressed by those statutes are limited to issues that "may be the basis for an appeal to" LUBA and those statutes do not apply to limit the defenses a local government may raise in defending its decision at LUBA in responding to preserved issues that are raised by petitioners at LUBA. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters,* 72 Or LUBA 200 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where as part of final written argument the applicant submits five letters from experts that include new evidence, a general objection that the five letters include new evidence is sufficient to preserve that objection before LUBA. Because expert testimony almost always includes new professional opinion, even if limited to commenting on other evidence already in the record, an opponent need not specify which portions of the expert testimony the opponent believes constitutes new evidence, in order to satisfy the "raise it or waive it" requirement of ORS 197.763(1). *Rogue Advocates v. Josephine County,* 72 Or LUBA 275 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. OAR 660-023-0180(7) requires that a local government conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses within the impact area of a Goal 5 resource. Where a petitioner raised general issues of compliance with OAR 660-023-0180(7) during the proceedings below, but in its findings the county declined to conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses, on appeal to LUBA the petitioner may challenge the county's finding that it need not conduct an ESEE analysis. The

petitioner is not required to anticipate that the county will adopt findings concluding that no ESEE analysis is required. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioner was not given required written notice of hearing but learned of the hearing and appeared at the hearing and participated, he may not assign error to the failure to give notice where he had an opportunity to object to the notice failure and did not do so. That failure to object constitutes a waiver of the issue under ORS 197.763(1) and a failure preserve the right to assign procedural error. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner argues below that the proposal is not consistent with the comprehensive plan for reasons that are relevant considerations under several applicable comprehensive plan policies, the petitioner may challenge the adequacy of the findings that were ultimately adopted to establish consistency with those plan policies, even if the petitioner failed to cite the plan policies specifically. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The petitioner failed to raise the issue below that the upland portion of a creek should be included within the coastal shoreland boundary as a riparian resource, where the only arguments made below regarding the creek concerned flooding and the only arguments regarding the shoreland boundary and riparian resources did not concern the creek. *Oregon Coast Alliance v. City of Brookings*, 71 Or LUBA 14 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under the law of the case principle articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), the parties in a LUBA appeal of a decision following LUBA's remand of an earlier decision may not revisit legal issues that were resolved by LUBA in the prior appeal. Where the board of county commissioners could have reviewed the first decision and resolved interpretive issues differently than the hearings officer did in the first decision, but did not do so prior to the first LUBA appeal, the board of commissioners may not revisit resolved interpretive issues in the decision following remand and is not entitled to the deferential standard of review required by ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), in the second appeal. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. As a general proposition, a board of commissioners is free to interpret its land use regulations. But a hearings officer would not be free to interpret county land use regulations differently than LUBA did following a LUBA remand of the hearings officer's initial decision, and the board of commissioners is also not free to do so in a local appeal of the hearings officer's decision following LUBA's remand. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A hearings officer's decision on a property owner's request for an interpretation as to whether approving a floating home development in a zone that allows such development requires an exception to Goal 14 is a quasi-judicial decision rather than a legislative decision. Consequently,

the "raise it or waive it" provisions of ORS 197.763(1) apply. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The issue of whether repeal and re-adoption of the county's land use ordinances had the effect of *eliminating* the acknowledged status of the readopted ordinances was not raised with the specificity required by ORS 197.763(1), where during the proceedings below the petitioner made the very different argument that repeal and re-adoption did not have the effect of *acknowledging* one of readopted land use ordinances. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under OAR 661-010-0030(4)(d), a party must demonstrate that an issue raised in an assignment of error was preserved during the proceedings below. Although failure to demonstrate such might be viewed as a "technical violation" under OAR 661-010-0005, and need not interfere with LUBA's review proceeding so long as preservation of the issue is addressed elsewhere in the petition for review, a reply brief, or at oral argument, but a complete failure to address preservation of an issue amounts to an effective waiver of that issue. *Mackenzie v. City of Portland*, 71 Or LUBA 155 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Once a party has withdrawn a local appeal it has "affirmatively waived" the issues presented in that local appeal, and a *different* party may not subsequently advance such affirmatively waived issues before LUBA absent a demonstration that the party incorporated or asserted the affirmatively waived issues below in a manner that informed the local government and parties that the issues remain live issues that need to be addressed. *Mackenzie v. City of Portland*, 71 Or LUBA 155 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Because it is common for a multi-phased tentative subdivision approval to include conditions of approval that apply only to certain phases of development, it is incumbent on a petitioner to raise at the local proceeding any issues involving a legal standard that requires either (1) independent approval of a particular phase of development or (2) the conditioning of construction of an earlier phase of development on fulfillment of conditions applicable to a subsequent phase. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Code procedures and submittal requirements for a pre-application conference are not "applicable criteria" for purposes of ORS 197.835(4)(a), which allows a petitioner to raise new issues regarding applicable approval criteria that a local government omits from the notice of hearing, and the local government's failure to list pre-application conference code provisions in the notice of hearing does not allow a petitioner to avoid the raise it or waive it requirements of ORS 197.763(1). *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 215.416(11)(a)(D) and (E) do not provide authority for LUBA to consider issues that were not raised prior to the close of the initial evidentiary hearing. ORS 215.416(11)(a)(D) operate at

the initial de novo evidentiary hearing to allow all issues to be raised, not after that evidentiary hearing to allow issues not raised at the de novo hearing to be raised at LUBA. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. In circumstances where the local government makes a decision without holding a hearing, ORS 197.835(3) does not apply to limit the issues that LUBA may consider in an appeal of that decision. *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 420 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government adopts findings that a specific issue has been waived, on appeal to LUBA a petitioner cannot assign error to the merits of the issue without first successfully challenging the finding that the issue was waived. *Dion v. Baker County*, 70 Or LUBA 438 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the petitioner argued below only that comprehensive plan transportation policies require construction of bike lines on streets adjoining proposed development, but on appeal to LUBA argues instead that the city's code should be interpreted to require construction of bike lanes, the issue of whether the city's code requires construction of bike lanes was not raised below in a manner that allowed the city and applicant to respond, and the issue is waived. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.835(3) does not apply to limit the issues that LUBA may consider when the challenged decision is issued by the local government without holding a hearing, because there was no local "hearings body" within the meaning of ORS 197.835(3) to raise an issue before, and no "land use hearing[]" within the meaning of ORS 197.763(1) to which the procedures in ORS 197.763 would apply. *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 512 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA will deny an objection that the minutes of a city council hearing are incomplete, because the minutes fail to summarize the oral arguments of petitioner's attorney, where the same arguments are found in writing elsewhere in the record, and petitioner's argument that the defect in the minutes is "material" rests on speculation that petitioner will advance assignments of error to which, petitioner speculates, the respondent might raise waiver challenges. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Raising a general transportation issue under a local zoning change approval criterion that addresses a number of concerns, without citing the transportation planning rule (TPR) or any of the substantive requirements of the TPR, is not sufficient to preserve a technical TPR argument for review at LUBA. *Savage v. City of Astoria*, 68 Or LUBA 225 (2013).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where planning staff initially takes a position that a zoning amendment proposal does not comply with an applicable approval standard, but later changes its position and takes the position that the

proposal complies with the approval standard, the planning staff's initial position may be sufficient to preserve the issue of whether the proposal complies with the applicable approval standard for LUBA review. But where planning staff takes the position that a proposed zone change complies with the transportation planning rule (TPR) and never changes its position regarding the TPR, the staff position is not sufficient to preserve an issue of TPR compliance for LUBA review. *Savage v. City of Astoria*, 68 Or LUBA 225 (2013).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(3)(b) requires a local government's notice of quasi-judicial land use hearing "[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue." The transportation planning rule (TPR) is not part of a local government's "ordinance" or "plan" and a local government's failure to list the TPR in its notice of hearing does not excuse petitioner's failure to preserve her issue concerning the TPR for LUBA review by raising it before the local government. *Savage v. City of Astoria*, 68 Or LUBA 225 (2013).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The technical support for level of service figures in a traffic impact study (TIS) is a critical part of the TIC and the fact that the draft TIS does not include that technical support in the TIS appendix might require remand so that the final TIS with the technical support appendix could be added to the record. However, where no issue was raised before the local government concerning the missing technical support appendix, the issue is waived. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument that a fee imposed on development is actually a "franchise fee" and therefore subject to a 20-year term is a different issue than an argument that the city has no legal authority to require the developer to pay the fee and therefore cannot consider the fee as a "benefit" for purposes of an approval criterion requiring that the development be consistent with the overall needs of the community. Raising the first issue did not give the city and applicant fair notice of the second issue, and therefore the second issue is waived under ORS 197.763(1). *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument below that the challenged ordinance should be conditioned to require rededication of vacated rights-of-way as proposed by the applicant is sufficient to raise the issue of whether a condition requiring rededication is necessary to ensure that the rights-of-way are rededicated. *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the planning staff reports to the planning commission and to the city council both took the position that a comprehensive plan right-of-way vacation policy established criteria that must be applied in granting a proposed right-of-way vacation, the staff reports were sufficient to raise the issue of whether the city council was obligated to at least adopt findings addressing the comprehensive plan right-of-way vacation policy and petitioner was not required to separately raise that issue to preserve the issue for appeal to LUBA. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner waives an assignment of error arguing that the hearings officer committed procedural error in accepting new evidence after the close of the evidentiary record, where the petitioner could have objected to the alleged error in the appeal of the hearings officer's decision to the planning commission, but did not. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. To preserve an issue under the particular terms of a superseded ordinance governing nonconforming uses, it is insufficient to make general arguments that the right to expand the nonconforming use had been lost through abandonment or discontinuance. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner adequately raises the issue of whether a vested right to construct an expansion of a nonconforming use was lost through discontinuance based on common law and local code provisions, notwithstanding that most of petitioner's arguments below were based on a statute that applies only to counties, where the petitioner's discontinuance argument was not limited to the statute, and the applicant understood petitioner to be raising discontinuance under other authorities and responded to the issue. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. To raise an issue of constitutional violation with sufficient specificity for purposes of ORS 197.763(1), at a minimum the constitutional provision at issue must be cited or the substance of the constitutional provision argued to the decision maker. A claim for relief from setbacks required under a wetland protection zone is not sufficient to put the decision maker on notice that the petitioner believes that denial of relief would violate the federal Takings Clause. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A city's findings that a 40-foot right-of-way is sufficient to accommodate a 14-foot one-way travel surface and two 11-foot shoulders for on-street parking are sufficient to satisfy a criterion that a setback reduction will not "create traffic hazard," where opponents failed to argue below that wider than normal vehicles might not be able to park on the eleven-foot shoulders without extending onto the 14-foot travel surface. *Burton v. City of Cannon Beach*, 63 Or LUBA 300 (2011).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. To preserve an argument challenging the adequacy or evidentiary support of findings made pursuant to an approval standard, a party must demonstrate that the issue of compliance with that standard was raised below with the specificity required under ORS 197.763(1). *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A general statement of concern that a proposed campground would cause "interactions between livestock and people" is insufficient under ORS 197.763(1) to raise the issue of compliance with

a local code analogue to the ORS 215.296(1) that requires a finding that the proposed use will not force a significant change in or significantly increase the cost of accepted farm practices on surrounding lands devoted to farm use. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Local planning staff are considered "participants" in an ORS 197.763 hearing and can in some circumstances raise issues for purposes of ORS 197.763(1). Where planning staff raise an issue below regarding whether the subject parcel was legally created for purposes of an applicable approval criterion and propose a resolution, and that resolution is adopted in the county's final decision, parties may challenge the county's resolution of the issue, even if no party other than staff raised that issue below. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.835(4)(a), a party may raise "new issues" to LUBA if the notice of hearing under ORS 197.763(3) failed to list an applicable approval criterion that the local government applied in making its land use decision. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner notes a code provision below requiring that subdivisions comply with lot size and dimensions requirements, but does not argue that including internal roads in the calculation of lot size violates the five-acre minimum lot size, the issue of how internal roads affect calculation of lot size is not raised with the specificity required by ORS 197.763(1) and is waived. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument raised below that the application fails to address a general code section that includes a sub-section requiring that private roads be vested in a homeowner's association is insufficient to raise with the specificity required by ORS 197.763(1) the issue of whether proposed private roads located on easements must have the underlying fee vested in the homeowner's association. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. When a respondent argues that an issue raised in an assignment of error was not raised below and the petitioner does not respond to the argument or identify in the record where the issue was raised, LUBA will not search the record on the petitioner's behalf, and will deny the assignment of error. *Brockman v. Columbia County*, 62 Or LUBA 394 (2011).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The issue of compliance with a local procedural rule requiring the local government to offer participants the opportunity to request a continuance of a hearing that is not the initial evidentiary hearing was not raised below with sufficient specificity, where the petitioner did not cite the local rule to the decision maker, but instead requested a continuance only under ORS 197.763(6), which applies only to the initial evidentiary hearing. *Pliska v. Umatilla County*, 61 Or LUBA 429 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Arguments that a permit applicant failed to raise any issue concerning a refund of permit fees in

his appeal of the permit denial provide no basis for a motion to dismiss. Waiver of issues for failure to raise those issues in a local proceeding or prior LUBA appeals may affect LUBA's scope of review, but such waiver does not affect LUBA's jurisdiction to review a decision that qualifies as a land use decision. *Sperber v. Coos County*, 61 Or LUBA 477 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a permit applicant claims in his appeal of a county permit decision on the merits that he is entitled to a refund of his permit application fees under ORS 215.427(8) based on the county's failure to take timely action in his application for permit approval, and LUBA rejects that claim, the permit applicant's appeal of a subsequent county decision that denies his request for a refund of his permit application fee under the statue is not precluded where LUBA concluded in petitioner's appeal of the permit on the merits that the challenged initial permit decision took no position regarding whether petitioner was entitled to a refund of his permit application fee under ORS 215.427(8). *Sperber v. Coos County*, 61 Or LUBA 477 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. When a local government argues in its response brief that a petitioner is precluded from advancing particular assignments of error because the local government ruled below that the issues presented in those assignments of error were not preserved for the local appeal, a petitioner may file a reply brief responding to the potentially "new matter" that the assignments of error are waived, but a petitioner may not use the reply brief as a vehicle to allege that the local government erred in limiting the issues it considered during the local appeal. *Citizens for Responsible Development v. City of The Dalles,* 60 Or LUBA 12 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the petitioner submits written testimony that the proposal is inconsistent with Goal 16, an argument that presumes Goal 16 is applicable, and the planning commission responds to that testimony with a finding that Goal 16 is inapplicable, the issue of whether Goal 16 is applicable has been sufficiently raised for purposes of ORS 197.763(1) and 197.835(3). The petitioner is not required to anticipate how the local government will respond in its findings to issues raised below. *Sommer v. Douglas County*, 60 Or LUBA 32 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. When a petitioner waits until the rebuttal portion of oral argument to respond to an argument that issues were waived under ORS 197.763(1) and 197.835(3) and provides only a general response that does not include citations to the record, LUBA will rule on the waiver argument as if there had been no response at all. *Boucot v. City of Corvallis*, 60 Or LUBA 57 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where an issue arises whether a petitioner waived his right to raise an issue at LUBA regarding whether a county erroneously found that land is not "other lands" that are suitable for farm use considering the factors set out at OAR 660-033-0020(1)(a)(B), a petitioner may not respond that the applicant raised that issue by addressing those factors below. The only issue raised by the applicant was whether the land *does not qualify* as such lands; the applicant did not raise the issue of whether the land *does qualify* as such other land. *Just v. Linn County*, 60 Or LUBA 74 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government's findings rely heavily on particular factors set out in OAR 660-033-0020(1)(a)(B) to conclude that land does not qualify as "other lands" that are suitable for farm use under OAR 660-033-0020(1)(a)(B), and petitioner waived his right to challenge the findings concerning those particular factors because petitioner raised no issue below concerning those particular factors, LUBA will deny an assignment of error that challenges the adequacy of the county's OAR 660-033-0020(1)(a)(B) findings. *Just v. Linn County*, 60 Or LUBA 74 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner is not precluded by *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), and ORS 197.825(2) from raising issues at LUBA merely because he failed to list local appeal issues in the proper location on a local appeal form, when the local code does not specify that such failure is a jurisdictional defect or results in a waiver of the right to raise those issues at LUBA. *Zeitoun v. Yamhill County*, 60 Or LUBA 111 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. When the issue raised in the petition for review is whether existing ponds could eliminate or reduce the need for a water system that is listed in an expert study on the costs of farming, merely raising the issue that the ponds could meet some of the livestock watering needs is not sufficient to give fair notice to the county and thus the issue may not be raised at LUBA for the first time. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government makes an explicit finding that a particular issue has been waived or is otherwise not properly before the local government, but as a precaution adopts alternative findings addressing the merits of the issue, a petitioner cannot invoke LUBA's review authority to challenge the alternative findings on the merits unless the petitioner assigns error to the explicit finding that the issue was waived or otherwise not properly before the local government, and demonstrates that the finding is erroneous. *McGovern v. Crook County*, 60 Or LUBA 177 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. When the state administrative rules applicable to a comprehensive plan amendment are amended during the local proceedings, raising the issue of compliance with the old administrative rules is not sufficient under ORS 197.763(1) and ORS 197.835(3) to raise the issue of whether the application complies with the new provisions of the amended rules. *Walker v. Josephine County*, 60 Or LUBA 186 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Although ORS 197.835(4) provides an exception to the "raise it or waive it" rule, it only allows a petitioner to raise new issues based upon applicable criteria that were omitted from the notice. A local provision that tentative approval will expire if not completed and the ORS 227.178(5) limit on the number of days an applicant may extend the deadline for a local government to make a final decision on an application are not "applicable criteria." Therefore, a petitioner may not raise issues concerning the statutes and local provision for the first time at LUBA, even though they were not listed in the notice. *Oh v. City of Gold Beach*, 60 Or LUBA 356 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Testimony that the applicant has not shown why a parcel formerly part of a larger ranch cannot be used in conjunction with adjacent and nearby farm properties is sufficient to raise the issue of compliance with OAR 660-033-0030(3), notwithstanding that the petitioner failed to cite the rule. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a city denies a partition application based on a code provision that was not listed as an approval standard in the notice of hearing and not discussed until late in the hearing, the petitioner's failure to raise issues below regarding application of that code provision does not preclude petitioner from challenging denial under that code provision before LUBA. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a county adopts both irrevocably committed and physically developed exceptions to the statewide planning goals, but the only issues raised below were directed at the physically developed exceptions, ORS 197.763(1) precludes the petitioner from challenging the irrevocably committed exceptions for the first time at LUBA. *Landwatch Lane County v. Lane County*, 56 Or LUBA 408 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. While the distinction between "issues" and "arguments" is somewhat imprecise, where a petitioner raises an issue regarding the alleged adequacy of public facilities to satisfy annexation approval standards, raising that issue is not sufficient to also raise an issue regarding the adequacy of the application to meet permit application information requirements. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the issue petitioners raised a city concerned the adequacy of public facilities to serve an annexed area when it urbanized, petitioners may not raise an issue for the first time at LUBA concerning whether existing public services are adequate to serve the limited level of development that will be permitted prior to the time the annexed property is planned and zoned for urban development. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioners' arguments to LUBA that a local government failed to give notice of its annexation decision within the deadlines specified by statute and by a regional government provide no basis for reversal or remand, where petitioners raised no issue below concerning the adequacy of the notice and petitioners do not allege that the claimed late notice prejudiced petitioners' substantial rights. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner raises issues regarding compliance with code sidewalk provisions, ORS 197.763(1) does not require the petitioner to anticipate that the city would respond to those issues by "overriding" those code provisions based on recommendations in a transportation study, in

order to challenge the city's reliance on the transportation study. *Soares v. City of Corvallis*, 56 Or LUBA 551 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioners adequately raise the issue of compliance with an approval criterion governing groundwater impacts where they argued below that the proposed development should be denied due to groundwater impacts and in response to those arguments the county identifies the approval criterion as applicable and adopts findings addressing it. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A statement in the staff report that the subject property is located within a "woodland transition" area and therefore does not require an exception to Goal 4 to rezone it for non-forest use raises no cognizable "issue" under ORS 197.763(1) that the property's elevation and location within the watershed actually places it in a "principal forest land environment" subject to Goal 4. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A county counsel's memorandum answering a staff question regarding whether the comprehensive plan rural residential designation requires an exception to Goal 4 notwithstanding that the land is not protected by Goal 4 is insufficient to raise the issue of whether a Goal 4 exception is required by other, unrelated comprehensive plan provisions. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where planning staff recognize an ambiguity in an approval standard, and request and receive a written interpretation from the local government's legal counsel, an issue has been raised regarding the meaning of that approval standard and arguments challenging the local government's view of that standard are not waived under ORS 197.763(1). *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Arguments that the county road is inadequate are insufficient to raise with sufficient specificity an argument that the road cannot be improved without amending the county's transportation system plan. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument that a party is a "permit holder" and thus entitled to initiate a declaratory ruling request under one subsection of the city's code is insufficient to also raise the issue that the party is a "property owner" entitled to initiate a declaratory ruling under a different subsection of the code. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where respondents argue that issues that are raised in the petition for review were not raised below and for that reason are waived, petitioner should respond to such waiver arguments in a reply brief

or in their opening argument at oral argument. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government objects that a petitioner at LUBA waived an issue by failing to raise that issue before the local government, and the petitioner does not identify where the issue was raised below, either in a reply brief or at oral argument, LUBA will sustain the objection and find that the issue was waived. *Citizens Against Annexation v. City of Florence*, 55 Or LUBA 407 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Unless a petitioner at LUBA raised some issue before the local government concerning whether a proposed rezoning complies with rezoning criteria, that petitioner may not challenge the adequacy of the local government's findings in support of the rezoning decision in an appeal at LUBA. *Citizens Against Annexation v. City of Florence*, 55 Or LUBA 407 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The date that a land use decision becomes final for purposes of appeal to LUBA and the date that a land use decision becomes effective need not be the same. *Citizens Against Annexation v. City of Florence*, 55 Or LUBA 407 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the Oregon Department of Transportation (ODOT) recommends that conditions of approval be imposed requiring the improvements identified in a traffic impact analysis, and the city's decision states that it will impose the conditions but in fact does not, the petitioner may assign error to the city's failure to impose the conditions, notwithstanding that the petitioner raised no issues below regarding the improvements or the conditions, because ODOT adequately raised the issue. *Nygaard v. City of Warrenton*, 55 Or LUBA 648 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A letter from city transportation staff stating that a traffic study and an agreement about timing and cost responsibilities for transferring a private road to the city must be in place prior to city acceptance of the dedication is not sufficient to raise issues regarding the adequacy of a 2004 traffic study of the road. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A hearings officer errs in concluding that an issue was first raised in a letter that was submitted at a stage of the local proceedings where new issues could not be raised, where the same issue was fairly raised earlier in the local proceedings, albeit less clearly and less precisely than in the later letter. *Meadow Neighborhood Assoc. v. Washington County*, 54 Or LUBA 124 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A member of the decision making body is not a "participant before the local hearings body" for purposes of the raise it or waive it rule at ORS 197.763(1), and questions asked by a city councilor during deliberations regarding application of a floor-area ratio (FAR) standard do not permit

petitioners to raise issues regarding the FAR standard for the first time at LUBA. *Fleming v. City of Albany*, 54 Or LUBA 168 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A staff statement that staff had reached agreement with the applicant with respect to a particular method of demonstrating compliance with a code floor-area ratio (FAR) standard is insufficient to "raise" an issue regarding that method or allow petitioners to challenge it before LUBA, where the statement was presented as a resolved, agreed-upon issue, and no participant questioned that agreement or raised any issue regarding how FAR should be calculated. *Fleming v. City of Albany*, 54 Or LUBA 168 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(1) requires a party to have raised an *issue* regarding a proposal's compliance with an approval criterion with sufficient specificity to afford other parties the opportunity to respond. But ORS 197.763(1) does not require a party to raise the precise *argument* below that they assert on appeal to LUBA. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A local government errs in finding that an appeal of a denial of a sign permit involves only a "request for interpretation" rather than a "permit" to which the provisions of ORS 227.175(10) applied to require a *de novo* hearing that is not limited to issues raised by the appellant in an appeal statement. *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner is not required to have personally raised an issue below in order to preserve the right to raise that issue at LUBA, provided the issue was raised by someone else below. Where a local government argues the issue was waived, however, the petitioner must identify where in the record the issue was raised by someone else in order to raise the issue at LUBA. *Santiam Water Control District v. City of Stayton*, 54 Or LUBA 561 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A local government is not required to list statutory or administrative rule criteria in the notice of a quasi-judicial land use hearing required by ORS 197.763(3)(b). *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA will consider the issues that a petitioner raises on appeal where no party argues that petitioner waived those issues by failing to raise them below, even if it is not clear that petitioner raised those issues below. *Ettro v. City of Warrenton*, 53 Or LUBA 485 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The waiver principle in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), applies to require that a petitioner at LUBA have raised an issue in the local notice of appeal, notwithstanding that the issue may have been raised earlier in the local land use proceeding. That waiver principle does not apply where consideration of a local application for land use approval does not include a local right of appeal. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument in an intervenor-respondent's brief that the challenged decision must be reversed based on alleged error is, in essence, an assignment of error or cross-assignment of error. However, LUBA will decline to address such arguments where intervenor-respondent fails to demonstrate that the issues raised under such arguments were raised during the proceedings below. *Krishchenko v. City of Canby*, 52 Or LUBA 290 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the issue raised at LUBA is the adequacy of a city's findings to address specific planning requirements of LCDC's Goal 9 rule, but no party mentioned the Goal 9 rule or otherwise raised any issues regarding the substantive requirements of the Goal 9 rule, that issue was waived and may not be raised for the first time at LUBA. *Cornelius First v. City of Cornelius*, 52 Or LUBA 486 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. When a respondent argues that an issue raised in an assignment of error was not raised below and the petitioner does not respond to the argument or identify in the record where the issue was raised, LUBA will not search the record on the petitioner's behalf and will deny the assignment of error. *Williamson v. City of Salem*, 52 Or LUBA 615 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a notice of local appeal appeals related subdivision and planned unit development (PUD) approvals, but refers to "residential subdivision" in challenging the type of residential use allowed under both approvals, the local government errs in concluding that the appeal raises issues only with respect to the subdivision and not the PUD, under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 283 (2003). *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where an intervenor-respondent accurately describes the issue that forms the basis for a petitioner's assignment of error and argues that the issue was not raised below, and petitioner's only answer to the waiver argument is not responsive to that argument and petitioner does not identify where the issue was raised below, the issue is waived under ORS 197.763(1) and 197.835(3). *Holloway v. Clatsop County*, 52 Or LUBA 644 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner may not fail to assign error to a finding that certain issues were not preserved and are not within the hearings officer's scope of review, and instead on appeal to LUBA, simply assign error with respect to the same issues that the hearings officer found were not preserved. *Franzke v. Tigard*, 52 Or LUBA 761 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners arguments during the city's local proceedings were all directed a preliminary public facility agreement and whether that agreement had expired making preliminary subdivision plan approval impossible, petitioners may not argue for the first time in their appeal to LUBA that

the final public facility agreement is a requirement of preliminary subdivision plan approval. *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where no statute or other authority provides otherwise, a code provision that limits local appeal issues to those issues raised in the notice of local appeal also limits the issues that can be raised before LUBA. *Ray v. Josephine County*, 51 Or LUBA 443 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.835(4)(a) allows a petitioner to raise new issues before LUBA, notwithstanding petitioner's failure to raise those issues below, but only new issues that relate to applicable criteria omitted from notices required under ORS 197.195 or 197.763. *Ray v. Josephine County*, 51 Or LUBA 443 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioner bears the burden of establishing that an issue was raised during the local proceedings, and where a respondent argues that petitioner failed to raise an issue during the local proceedings, petitioner may not merely state, without citation to the record, that she recalls raising the issue. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a city's notice preceding annexation makes no mention that the annexation will result in repeal of all county comprehensive plan and land use regulations that apply to the annexed property, the notice does not reasonably describe the final action and petitioners may raise issues that were not raised during the local proceedings before the city. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A letter from the Oregon Department of Transportation agreeing with county staff's proposal to require the applicant to provide a bond to pay for needed transportation improvements does not raise any issue regarding whether the affected intersection can be made "adequate in a timely manner." *City of Damascus v. Clackamas County*, 50 Or LUBA 514 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. To comply with ORS 197.763(3)(b), a notice of hearing must identify the applicable approval criteria by code number or similar means of identification sufficient to direct the recipient to the actual code or plan provisions that the city deems to be approval criteria. Reference to a code provision that itself merely requires "conformance with the comprehensive plan" is insufficient to provide effective notice of any comprehensive plan provisions. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The city's failure to list certain plan policies as approval criteria in the notice of hearing does not allow petitioner to raise new issues regarding those plan policies under ORS 197.835(4)(a), where two staff reports and a planning commission decision address the plan policies as approval criteria

and petitioner is given ample constructive notice that the city believed the policies to be approval criteria. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner wishes to raise an issue concerning an approval criterion that was not listed in the notice of local hearing, the final sentence in ORS 197.835(4)(a) requires that LUBA consider whether, notwithstanding the local government's failure to list the criteria that give rise to an issue a petitioner seeks to raise for the first time at LUBA, the petitioner nevertheless could have raised that issue and, for that reason, should not be allowed to raise the issue at LUBA. *Burke v. Crook County*, 48 Or LUBA 23 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where approval criteria are not listed in the notice of local hearing, but those approval criteria are expressly referenced in approval criteria that were listed in the notice, and those references are stated in terms that seem to say the referenced criteria operate as approval criteria, petitioner should have raised an issue concerning the referenced approval criteria below, and under the final sentence of ORS 197.835(4)(a), LUBA will not allow petitioner to raise that issue for the first time at LUBA. *Burke v. Crook County*, 48 Or LUBA 23 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA will not extend the ORS 197.763(1) "raise it or waive it" requirement to legislative proceedings, and a failure to raise an issue under ORS 197.763 is not correctly characterized as a failure to exhaust administrative remedies. *Roads End Sanitary District v. City of Lincoln City*, 48 Or LUBA 126 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A party may affirmatively waive an issue by specifically agreeing below that the issue is waived or by expressly abandoning the issue. However, a statement by an application opponent that she is "not opposed to protection of personal property" and a discussion of alternatives is neither a specific agreement that the proposed walls are allowed in the applicable zone, nor an express abandonment of that issue. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An issue regarding compliance with an approval criterion is waived if not raised below, unless the petitioner demonstrates that the local government failed to list the criterion in the notice of hearing under ORS 197.835(4). However, LUBA will not address an issue under ORS 197.835(4) where the petitioner fails to explain why the notice of hearing is defective. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An assertion in a local notice of appeal that the planning commission erroneously interpreted the comprehensive plan to require preservation of an overlay zoning on the subject property is sufficient to raise an issue, under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), regarding whether the overlay zone had expired. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.763(1), an objection that a traffic impact analysis is not necessary to demonstrate compliance with a code provision governing the "orderly extension of key urban facilities" is insufficient to raise the issue of whether transportation facilities are "key urban facilities." *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Language in a subarea plan that allows submittal of master plan application with fewer than all of the owners of affected property and requires a particular planning focus for property not controlled by the applicant is a mandatory approval criterion that must be listed in the hearing notice because the city could deny or require modification of the application based on that language. *Lowery v. City of Keizer*, 48 Or LUBA 568 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where language in master plan that is a mandatory approval criterion was not listed in the hearing notice, no criterion listed in the notice reasonably would have led petitioners to that language, and petitioners otherwise could not have anticipated the issue because the city's final decision was the first notice petitioners had that the master plan language applied, petitioners did not waive the issue by failing to raise it at the local level. *Lowery v. City of Keizer*, 48 Or LUBA 568 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.835(4) does not excuse petitioner's failure to raise issues of compliance with a code approval standard based on the city's failure to list that standard in the notice of hearing, where the staff report and planning commission decision both cite and quote the standard as an applicable approval criterion, and petitioner offers no reason why issues of compliance with that standard could not have been raised before the city. *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Testimony that the city's tree cutting ordinance will ensure that any tree removal that occurs under a proposed conditional use permit modification will be consistent with the tree cutting ordinance falls far short of alerting the city that petitioners believe that the tree cutting ordinance will protect adjoining property from windthrow and runoff to the same extent as the original permit. *Wiper v. City of Eugene*, 47 Or LUBA 21 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Testimony criticizing the city's determination that commercial zoning regulations apply to a proposed highway project in a commercially zoned area that borders on or includes a small portion of residentially zoned land is insufficient to raise an issue as to whether the highway project is a prohibited use in the residential zone. *Comrie v. City of Pendleton*, 47 Or LUBA 38 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A city's alleged misinterpretation of a code provision does not provide a basis for reversal or remand, where the only significance petitioner attaches to the misinterpretation relates to an issue that was not raised below and is therefore beyond LUBA's review. *Comrie v. City of Pendleton*, 47 Or LUBA 38 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioner testified in opposition to a fish channel associated with a proposed mining expansion, but failed to raise any issue below regarding whether (1) the fish channel is a permitted accessory use or (2) the fish channel is itself a mining activity prohibited in the applicable zone, those issues are waived. *Wynn v. Polk County*, 47 Or LUBA 73 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Although a petitioner waived its right to challenge a decision for failure to apply Goal 12 (Transportation) or the Transportation Planning Rule, LUBA will consider the legal arguments that the petitioner presents under that assignment of error when LUBA considers petitioner's arguments concerning nearly identically worded county code transportation standards under a different assignment of error. *Concerned Citizens v. Malheur County*, 47 Or LUBA 208 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under the *Beck v. City of Tillamook* waiver principle, issues that have been conclusively resolved at a prior point in a single continuous land use proceeding are not reviewable for a second time by LUBA or an appellate court at a later point in that proceeding. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioner filed a local appeal statement that raised issues that were accompanied by statements sufficient to enable a reasonable decision maker to understand the nature of those issues, those issues are not waived. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 508 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner may not argue at LUBA that a county erred by applying a 25-foot setback rather than a setback that is derived from an individualized multi-factor site investigation, where both planning staff and petitioner discussed the adequacy of the 25-foot buffer and petitioner did not argue before the county that the setback must be based on an individualized site investigation. *Willhite v. Clackamas County*, 46 Or LUBA 340 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. In applying a standard that requires that development within 100 feet of a wetland minimize wildlife impacts, a county commits no error in finding that it is uncertain whether there are wetlands present and imposing a condition of approval that the subdivision applicant prepare a wetlands study and demonstrate that the standard is satisfied in a subsequent quasi-judicial administrative review before final plat approval. *Willhite v. Clackamas County*, 46 Or LUBA 340 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument that unspecified land use regulations and siting standards must be complied with prior to approving a church on EFU-zoned lands is insufficient to apprise the decision maker that petitioner believes that the county must consider an exception to the administrative rule prohibition on churches on high-value farmland before considering whether that prohibition is inconsistent with federal law. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a tie vote of a committee at the conclusion of a *de novo* appeal of a permit decision under ORS 227.175(10)(a)(A) and (D) occurs after the evidentiary hearing is closed and after the public portion of the local appeal has concluded, and the committee relies on a committee rule to deny the local appeal based on the tie vote, the local appellant did not have an opportunity to object to the rule and may challenge the rule at LUBA. Under ORS 197.763(1) and 197.835(3), that local appellant is not required to anticipate that the final vote might be a tie, and enter a precautionary objection, to preserve its right to challenge the committee rule at LUBA. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Before the "raise it or waive it" provisions now codified at ORS 197.763(1) and 197.835(3) were adopted, LUBA required that a petitioner who asserts procedural error at LUBA must have raised the procedural error below. While the obligation to object locally to procedural errors overlaps with ORS 197.763(1) and 197.835(3), it exists independently and may require that a petitioner enter an objection after the close of the final evidentiary hearing. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. That a committee entertained questions from the public during its deliberations after the close of its final evidentiary hearing does not mean the committee would have allowed a legal challenge to its reliance on a committee rule, or that it would have reconsidered its decision to rely on that rule to deny a local appeal. A petitioner's failure to object to the rule at that stage does not mean the issue is waived in a subsequent LUBA appeal. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.763(1), 197.835(3) and ORS 197.825(2), failure to raise an issue in a notice of local appeal of a permit decision means that issue may not be raised in a LUBA appeal of that permit decision. *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *McKeown v. City of Eugene*, 46 Or LUBA 494 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 227.175(10)(a)(E)(ii), which was adopted in response to the Court of Appeals' decision in *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997), and specifically provides that a *de novo* appeal of a permit decision under 227.175(10)(a) may not be limited to issues raised in the local notice of appeal, does not apply to appeals of limited land use decisions. *McKeown v. City of Eugene*, 46 Or LUBA 494 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument that a county must verify the existence of alleged nonconforming uses, with specific reference to the location of certain structures within a setback, in the course of approving a site plan to expand an existing tourist facility, is insufficient to raise issues regarding (1) the alleged need to follow a separate procedure for verifying nonconforming uses and (2) alleged

nonconforming commercial activities on the property. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a party fails to raise any issue during local proceedings regarding a subdivision applicant's proposal not to include removal of dead or dying trees in computing the applicant's mitigation obligation under a tree removal ordinance, that issue is waived and may not be raised at LUBA. The city arborist's isolated comment that it might not be appropriate to omit dead or dying trees in computing the mitigation obligation is not sufficient to preserve the issue for appeal. *Miller v. City of Tigard*, 46 Or LUBA 536 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a party is present at a rezoning hearing where a county commissioner discloses that he and a county planner made a site visit to the subject property, and that party testifies after the disclosure without objecting to the site visit, the planner's attendance at the site visit or the adequacy of the county commissioner's disclosure of the site visit, that party waives his right to assign error based on the site visit in an appeal at LUBA. *Mattson v. Clackamas County*, 46 Or LUBA 552 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a city fails to provide petitioner the notice of hearing required by ORS 197.763(3), it cannot argue that a petitioner waived his right to argue that an annexation decision violates the city's comprehensive plan by failing to raise that issue during the local proceedings. *Morsman v. City of Madras*, 45 Or LUBA 16 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. In order to preserve the right before LUBA to challenge the adequacy of findings addressing an approval criterion and the supporting evidence, a petitioner must demonstrate that the proposal's compliance with that criterion was raised below accompanied by statements or evidence sufficient to afford other parties an adequate opportunity to respond. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Arguments made during the local proceedings that a proposed mining operation is not compatible with residential and school related uses located in a nearby city are not sufficient to raise an issue with respect to compatibility of the mining operation with other existing and allowed uses within the farm and forest zone in which the mining operation will be located. *Laurance v. Douglas County*, 45 Or LUBA 393 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioners waive their opportunity to raise issues regarding compliance with city comprehensive plan policies, where petitioners were put on notice during the local proceedings that the city may impose right-of-way requirements that may implicate those policies and petitioners did not identify a conflict with the right-of-way requirements and the comprehensive plan policies as an issue that the city must address. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Opponents' argument below that a proposed plant nursery should be viewed as a "commercial activity in conjunction with farm use" is not properly limited to an argument that a "retail" plant nursery should be viewed in that manner, and the opponents do not waive their right to argue in an appeal to LUBA that a wholesale nursery should be viewed as a "commercial activity in conjunction with farm use." *Lorenz v. Deschutes County*, 45 Or LUBA 635 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioners may not assign error to a city's failure to adopt findings that address particular statutes, statewide planning goals, comprehensive plan policies or ordinance criteria, where petitioners fail to demonstrate that they raised any issue during the local proceedings concerning those statutes, goals, policies or criteria. *Durham v. City of Philomath*, 45 Or LUBA 648 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The Oregon Department of Transportation's (ODOT's) general observation during local proceedings that it did not believe the city had adequately addressed the requirements of OAR 660-012-0060, which was followed up with specific concerns that the city addressed to ODOT's satisfaction, is not sufficient to allow a petitioner at LUBA to raise for the first time on appeal specific issues other than the specific concerns identified by ODOT. *Thomas v. City of Veneta*, 44 Or LUBA 5 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where an applicant identifies groundwater as a "discharge" to be considered as a conflict pursuant to OAR 660-023-0180(4)(b)(A), that applicant may not argue on appeal to LUBA that (1) groundwater is not a "discharge" within the meaning of that rule; or (2) that the impact of mining on groundwater may only be considered under OAR 660-023-0180(4)(b)(D) if the mining site is located within a critical groundwater area and is designated as such on the county's Goal 5 inventory of significant Goal 5 sites. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A staff report suggesting that "future development" may require review of traffic impacts from multiple access onto city streets from a large site is insufficient to raise an issue that a proposed parking lot that uses two existing access points from the site to city streets violates a city standard limiting each site to one access point. *Bagnell v. City of Corvallis*, 44 Or LUBA 284 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A party's contention that an alternative setback must either satisfy Goal 18 or an exception must be taken to that goal is not sufficient to raise an issue regarding whether application of an alternative oceanside setback criterion requires that the city first find the standard oceanside setback is "further from the westerly property line than is required for the protection of the Foredune Management Area." *Slepack v. City of Manzanita*, 44 Or LUBA 301 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioner's evidentiary challenge to a city's conclusion that an applicable criterion is satisfied provides no basis for reversal or remand, where the challenge is based on petitioner's interpretation

of what the criterion requires, and that interpretation was not presented during the local proceedings. *Slepack v. City of Manzanita*, 44 Or LUBA 301 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where six criteria are clearly identified as applicable permit approval criteria but a planning commission decision fails to address five of those criteria, and petitioner does not identify the planning commission's failure to adopt findings addressing all six criteria in its local appeal to the city council and does not raise any issue concerning the planning commission's failure to adopt such findings prior to the close of the final evidentiary hearing before the city council, the issue of the city's failure to adopt findings addressing all six criteria is waived under ORS 197.763(1) and 197.835(3). *Miles v. City of Florence*, 44 Or LUBA 411 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a city council specifically asks a local appellant to identify a legal basis for overturning a planning commission decision approving an industrial subdivision and the local appellate fails to do so, the local appellant may not thereafter appeal the decision to LUBA and for the first time argue that the subdivision approval violates specific local code, administrative rule and statutory requirements. *Baida v. City of Medford*, 44 Or LUBA 473 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. To the extent a local code requirement can be read to preclude petitioners from raising issues before LUBA that were raised before the local government prior to the close of the record following the final evidentiary hearing, such preclusion is inconsistent with ORS 197.763(1). petitioner's appeal is sufficient to allege prejudice to petitioner's substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where an applicant elects to proceed exclusively under one theory for approval and indicates that it chooses not to proceed on an alternative theory, the applicant has affirmatively waived any issue regarding the alternative theory, and cannot argue to LUBA that the local government should have approved the application under that theory. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A statement that a party assumes for the sake of argument that a proposed mining area is subject to a Goal 5 rule governing lands that consist of more than 35 percent soils classified as Class I or II is insufficient to raise, with the required specificity, an issue regarding whether the proportion of Class I or II soils may be less than 35 percent, and therefore that the rule does not apply to the proposed mining area. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The raise it or waive it provisions of ORS 197.763(1) apply only where the local government provides a hearing at which issues may be raised. Where the county did not provide a hearing where petitioners could raise issues, petitioners may raise issues before LUBA in the first instance. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 511 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. While ORS 197.835(4) operates as a limited defense to a waiver challenge under ORS 197.763(1) and 197.835(3), it does not obviate the requirement that a party given the opportunity to object to a procedural error below must do so in order to seek reversal or remand based on that error. *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385 (2002).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Local appeal provisions that require an appellant to specify issues in its notice of appeal to the city council have a preclusive effect on subsequent review only where the council recognizes and imposes that effect. Where the governing body appears to view petitioners' failure to specify an issue in the notice of appeal as giving the governing body the option to address or reject the issue, and the issue is then addressed, LUBA will not presume that the governing body assigned preclusive effect to petitioners' violation of the issue-specification provision. *Pearl District Neigh. Assoc. v. City of Portland,* 40 Or LUBA 436 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument that a county fails to comply with a requirement that a community center be operated primarily *by* the residents of the local rural community is waived where (1) the only argument below dealt with whether the community center would be operated primarily *for* the residents of the local rural community; and (2) no one at the local level challenged the applicant's reliance on city employees to staff a major use within the community center. *Hendrix v. Benton County*, 40 Or LUBA 362 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The purpose of the ORS 197.763(1) "raise it or waive it" requirement is to prevent unfair surprise. Neither the applicant nor the county should be surprised at petitioner's contention before LUBA that certain local code provisions govern the county's decision, where the application itself addresses those provisions as applicable criteria and proposes findings of compliance with those criteria. *Central Klamath County CAT v. Klamath County,* 40 Or LUBA 129 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a permit application identifies ORS 215.275 as a criterion applicable to the county's decision approving a cellular communications tower on EFU-zoned land and proposes findings of compliance with the statute, the issue of compliance with the statute was raised below and the county's failure to address the statute can be assigned as error, notwithstanding petitioners' failure to raise that issue below. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.835(3), LUBA's scope of review includes issues raised below "by any participant." An applicant's written assertions that local code provisions are applicable approval criteria suffice to raise an issue regarding the local government's failure to address such criteria, notwithstanding that opponents to the application did not raise that issue below. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Although a petitioner need not raise the precise argument during local proceedings that the petitioner attempts to raise at LUBA, the petitioner must have raised the issue below. Although the distinction between "issues" and "arguments" is imprecise, what is required is fair notice to parties and decision makers so that a reasonable person would know that the issue must be addressed. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The predicate to application of the "raise it or waive it" principle in ORS 197.835(3) is a local proceeding pursuant to ORS 197.195 or 197.763. That principle does not apply to proceedings to vacate county roads under ORS 368.346. *Mekkers v. Yamhill County*, 39 Or LUBA 367 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a city determines that revisions to easements within a previously approved subdivision require a replat, verbal testimony and a letter submitted by the applicants' attorney noting that the applicants will comply with the city's determination but consider a replat unnecessary under the statutes cited by the city are sufficient to preserve the issue for appeal to LUBA, notwithstanding that the applicants did not expressly submit the disputed replat application under protest. *Haber v. City of Gates*, 39 Or LUBA 137 (2000).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Testimony that approving aggregate extraction would compromise an inventoried Goal 5 groundwater resource in the area is sufficient to raise an issue regarding compliance with local provisions designed to protect the county's inventoried Goal 5 resources, notwithstanding that the testimony does not specifically cite those provisions. *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. After the petition for review is filed, petitioner must respond to allegations that issues that are raised in the petition for review were not raised during the local proceedings. If petitioner fails to do so, those issues are waived. However, petitioner is not initially obligated to specify in the petition for review where the issues that are raised in the petition for review were raised below. *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioners' argument during local proceedings that OAR 660-023-0180 does not prohibit a county from applying its land use regulations to a proposed mining operation is not sufficient to raise an issue that LCDC's adoption of OAR 660-023-0180 is inconsistent with other statutory requirements. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local decision maker discloses during a local proceeding that one of the parties is her veterinarian and serves on an animal rights organization with her, petitioner's failure to explore concerns about *ex parte* contacts with that party or possible bias precludes an evidentiary hearing at LUBA to explore such concerns. *Tri-River Investment Co. v. Clatsop County*, 36 Or LUBA 743 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A notice of hearing that fails to describe any proposed uses that could be authorized by a decision to amend the zoning of property from residential to industrial is "different from the proposal described in the notice to such a degree" that the notice does not "reasonably describe the local government's final action" and thus petitioner may raise new issues pursuant to ORS 197.835(4)(b) notwithstanding petitioner's failure to raise those issues during the proceedings below. *Mulford v. Town of Lakeview*, 36 Or LUBA 715 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioner may raise new issues before LUBA regarding plan provisions that were not considered by the county where the notice of hearing did not list any applicable comprehensive plan provisions. Petitioner is not obligated by ORS 197.835(4)(a) to comb through the entire comprehensive plan looking for applicable provisions omitted from the notice, in order to avoid a finding that issues regarding applicable plan provisions could have been raised below. *City of Newberg v. Yamhill County*, 36 Or LUBA 473 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A letter from an ODOT employee regarding negotiations between ODOT and the county does not constitute an affirmative waiver of issues related to minimum street width standards under OAR 660-012-0045(7), where it is unclear what was resolved between the parties and whether the county implemented the parties' resolution. Even if petitioner ODOT had waived that issue, such waiver would not apply to petitioner DLCD. *Dept. of Transportation v. Douglas County*, 36 Or LUBA 131 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioners' argument at LUBA that using agricultural land for a golf course buffer violates the ORS 215.296(1) prohibition against forcing a significant change in farm practices on surrounding lands devoted to farm use was waived, where petitioners' arguments during the local proceedings concerning the proposed buffers were not sufficient for the decision maker to understand and respond to that issue. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(3)(b) only requires that the notice of hearing list the applicable criteria from the local government's ordinance and comprehensive plan. The failure of the notice to list applicable statutory provisions is not a violation of ORS 197.763(3), and does not excuse petitioner from the obligation to raise the issue of compliance with those statutes during the local proceedings. *Van Dyke v. Yamhill County*, 35 Or LUBA 676 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the record shows petitioner knew or should have known of the existence and potential applicability of criteria in the county ordinance and comprehensive plan that were omitted from the notice of hearing, LUBA will conclude pursuant to ORS 197.835(4)(a) that petitioner could have raised the applicability of those criteria during the local proceedings below, and thus petitioner cannot raise new issues before LUBA regarding those criteria. *Van Dyke v. Yamhill County*, 35 Or LUBA 676 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner would not likely have noticed an arguably relevant plan provision where the plan provision was located in a different section of the plan from the plan provisions identified as relevant by the local government in their notice of hearing. Petitioner is therefore not barred by ORS 197.835(4)(a) from raising an issue concerning compliance with the plan provision. *Visher v. City of Cannon Beach*, 35 Or LUBA 74 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.835(3) does not require a petitioner to raise issues concerning a condition of approval, where the condition of approval first appeared in the final decision. *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioner adequately raised the issue of whether a street would continue to function as a local street, failure to specify the TPR or comprehensive plan provision that required that the street continue to function as a local street does not result in waiver of the issue. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.835(3) and 197.763 require that petitioners at LUBA have raised the issues they wish to raise at LUBA during the local proceeding. However, this statutory restriction does not apply to individual arguments regarding those issues. *DLCD v. Tillamook County*, 34 Or LUBA 586 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioner did not specifically raise the issue of compliance with the Fair Housing Act (FHA) in the proceedings below, statements that his clients are disabled and that the property needs to be identified for emergency response services are not sufficient under ORS 197.763 to raise an issue that denial of the requested variance would constitute a failure to make a "reasonable accommodation" under the FHA. *Andrusko v. Clackamas County*, 34 Or LUBA 493 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A decision maker's reference to the Fair Housing Act in a context that is unrelated to the issue that petitioner seeks to raise on appeal does not demonstrate that the issue was raised in the local proceedings with the specificity required by ORS 197.763. *Andrusko v. Clackamas County*, 34 Or LUBA 493 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioner only provides a bare reference to "equal protection" as a constitutional claim, that is not sufficient to afford the local government and the opposing parties an adequate opportunity to respond to the issue pursuant to ORS 197.763(1). *Yontz v. Multnomah County*, 34 Or LUBA 367 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner at LUBA challenges an interpretation that first appeared in the challenged

decision, petitioner need not have raised an issue concerning that interpretation during the local proceedings. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where LUBA remands a decision to a local government to adopt an interpretation of its plan and petitioner participates in those proceedings on remand but fails to raise any issue about the city council's authority to interpret the plan without referring the matter to the planning commission, petitioner waives her right to raise that issue in a subsequent appeal of the city council's decision on remand to LUBA. *Jebousek v. City of Newport*, 34 Or LUBA 340 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Comments during local proceedings expressing opinions about low-income residents do not adequately raise issues concerning unlawful segregation, violation of the Fair Housing Act or violation of the equal protection clause for purposes of preserving the right to raise those issues on appeal to LUBA. *St. Johns Neighborhood v. City of Portland*, 34 Or LUBA 46 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(1) requires the proponent of an evidentiary hearing to demonstrate that the reason facts are missing from the record is not due to the proponent's failure to submit information sufficient to afford the local governing body the opportunity to respond. *St. Johns Neighborhood Assn v. City of Portland*, 33 Or LUBA 836 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where an issue is adequately raised below, ORS 197.763 does not limit particular arguments related to that issue on appeal. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.763(1) and ORS 197.835(3), all petitioner must do is raise the issue before the final evidentiary hearing record is closed to enable petitioner to raise an issue before LUBA. *Central Bethany Dev. Co. v. Washington County*, 33 Or LUBA 463 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner failing to respond to a local government's request to make his general objections more detailed fails to afford the city an opportunity to respond, may not make those objections more detailed for the first time at LUBA and waives the right to appeal based on those objections. *Arnett v. City of Lake Oswego*, 33 Or LUBA 384 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A decision maker's finding that a petitioner has not raised an issue below with sufficient statements and evidence to enable the decision maker to respond does not compel LUBA to reach the same conclusion. . *Arnett v. City of Lake Oswego*, 33 Or LUBA 384 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a city fails to list a code criterion on a notice of hearing but the criterion precedes and is on the same page as one that was listed, and both pertain to variances, ORS 197.835(4)(b) makes it appropriate for LUBA to refuse to allow a petitioner to raise issues related to the unlisted criterion,

particularly when the petitioner does not contend it was unaware of the existence of the unlisted criterion. *Tandem Development Corp. v. City of Hillsboro*, 33 Or LUBA 335 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioner's general references to issues during local proceedings on remand from LUBA are sufficient to avoid waiver on those issues in a subsequent LUBA appeal, where petitioner raised those issues with specificity during the initial local proceeding, the LUBA remand decision was based on them, and the county's findings on remand discussed them in detail. *DLCD v. Curry County*, 33 Or LUBA 313 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Although a local government may narrow its own scope of review in local appeals, it cannot narrow LUBA's scope of review over issues raised at any time below. *Laurence v. Douglas County*, 33 Or LUBA 292 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.835(4)(a), petitioners may raise new issues before LUBA if the city failed to follow applicable local procedures as required by ORS 197.195(3)(a). If the local code requires a public hearing as an applicable procedure, the city's failure to follow that procedure would allow petitioners to raise the issue before LUBA. *Venable v. City of Albany*, 33 Or LUBA 1 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the city's application form requests a written narrative, but petitioner does not identify an applicable legal standard or criterion that requires its submission, petitioner may not raise new issues as a result of the city's failure to include such a criterion on the notice of hearings. *Design Home Construction v. City of Silverton*, 32 Or LUBA 452 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners contend a decision fails to address an applicable approval criterion that was not identified in the local government's hearing notice as required by ORS 197.763(3)(b), and respondents contend petitioners cannot raise this issue because they failed to raise it below, LUBA must decide whether the provision in question establishes an approval criterion for the subject application, in which case petitioners may raise the new issue before LUBA pursuant to ORS 197.835(4)(b). *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. If a notice of hearing does not mention a potentially applicable code provision and the participants below were therefore unaware of its existence or possible applicability, petitioners may raise new issues associated with that provision before LUBA. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The 1995 amendment to ORS 197.763(1) adds a requirement that issues not only be raised, but also be *accompanied by statements or evidence* sufficient to afford the local decision maker an opportunity to respond. What is "sufficient" still depends upon whether the governing body,

planning commission, hearings body or hearings officer, and the parties are afforded an adequate opportunity to respond to each issue. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where defining the relevant area is an essential, stated component of the stability standard for nonfarm dwellings, petitioner must object below to the area selected by the county in order to avoid waiving the objection on appeal. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioners' general statement in the local proceedings that the proposed use was inappropriate for the area did not sufficiently raise the issue of whether the definition of a solid waste disposal site could include a yard waste composting facility. Under ORS 197.835(3), petitioners waived their right to raise that issue before LUBA. *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76 (1996).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a party contends petitioners have waived their right to raise a certain issue on appeal by failing to raise it below, and petitioners neither cite to the local record where that issue was raised, nor establish a violation of ORS 197.763(3)(b) related to the issue they wish to raise, petitioners have waived their right to raise the issue. *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 (1996).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA does not have authority to review a variance request that was never considered by the city council. *Main Auto Body v. City of Salem*, 30 Or LUBA 194 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. When a petitioner was explicitly provided the opportunity to raise certain issues regarding compliance with the local zoning ordinance before the city, but did not do so, ORS 197.835(3) precludes her from doing so for the first time on appeal. *Noble v. City of Fairview*, 30 Or LUBA 180 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioners' general references during the local proceedings to the density and appropriate zoning of the site were not sufficiently specific to put the governing body on notice that petitioners objected to the applicability and validity of an urban fringe management agreement between the city and the county. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a party contends petitioners have waived certain issues, and petitioners neither cite to the local record where those issues were raised nor establish they may raise new issues under ORS 197.835(2)(a) or (b), petitioners have waived their right to raise those issues on appeal. *Wakeman v. Jackson County*, 29 Or LUBA 521 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. When the notice of an evidentiary hearing on a local appeal is so vague that petitioners cannot

understand the proposal under review, and when the decision on the local appeal is substantially different from the administrative decision being appealed, under ORS 197.835(2)(b) petitioners may raise new issues for the first time before LUBA. *Collier v. Marion County*, 29 Or LUBA 462 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a party contends petitioner has waived certain issues, and petitioner neither cites where in the local record those issues were raised nor contends it may raise new issues under ORS 197.835(2)(a) or (b), those issues have been waived. *Pend-Air Citizen's Comm. v. City of Pendleton*, 29 Or LUBA 362 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. If the local government did not hold a land use hearing, subject to the requirements of ORS 197.763, before making the challenged decision, petitioners cannot waive the right to raise issues for the first time on appeal to LUBA, because they were not provided the forum in which to raise such issues at the local level. *Leathers v. Washington County*, 29 Or LUBA 343 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. There is no meaningful difference between ORS 197.195(3)(c)(B) and 197.763(1) "raise it or waive it" requirements. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners could have raised an issue prior to the close of the evidentiary hearing before the local governing body, but failed to do so, that petitioners were precluded from raising the issue during the earlier evidentiary hearing before the planning commission does not mean petitioners can raise the issue for the first time before LUBA. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Local government failure to list any applicable comprehensive plan or ordinance criterion in the written and oral notices required by ORS 197.763(3)(b) and (5)(a) constitutes a violation of ORS 197.763 which allows parties to raise new issues before LUBA, regardless of whether the new issues relate to the omitted criterion. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where respondent contends petitioner has waived issues concerning compliance with certain legal standards, and petitioner neither cites places in the local record where compliance with those legal standards was discussed, or their operative terms were cited, nor contends she may raise new issues under ORS 197.835(2)(a) or (b), the issues have been waived. *Cox v. Yamhill County*, 29 Or LUBA 263 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Even though petitioner did not raise the issue of compliance with a particular approval criterion below, the issue was not waived if it was raised sufficiently by other parties to the local proceedings. *Mitchell v. City of Medford*, 29 Or LUBA 158 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where, during the local proceedings, no party referred to the Equal Privileges and Immunities Clause of Article I, section 20, of the Oregon Constitution, or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by name, article and section or amendment number, or their operative terms, petitioner is precluded from raising violation of these constitutional provisions as an issue in an appeal to LUBA. ORS 197.763(1); 197.835(2). *Craven v. Jackson County,* 29 Or LUBA 125 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. If issues were not raised during the local government proceedings, under ORS 197.763(1) and 197.835(2), petitioner may not raise in an appeal to LUBA the local government's failure to address those issues in its findings. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Because a local code enforcement proceeding does not involve an "application" or an "applicant" in the sense those terms are used in ORS 197.763, the "raise it or waive it" provisions of ORS 197.763 and 197.835(2) do not apply to such proceedings. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(1), 197.830(10) and 197.835(2) do not limit the issues which may be raised before LUBA in an appeal of a local government legislative land use decision. *Opus Development Corp. v. City of Eugene,* 28 Or LUBA 670 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. If respondents fail to claim or demonstrate that *all* petitioners affirmatively waived an issue, the principle of affirmative waiver does not apply. *Opus Development Corp. v. City of Eugene,* 28 Or LUBA 670 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners never had an opportunity to participate in the local process utilized for adopting the decision on remand, petitioners had no opportunity to raise issues during the remand proceedings and, therefore, are not limited by "raise it or waive it" rules. *Friends of the Metolius v. Jefferson County,* 28 Or LUBA 591 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the local government's notice of its first evidentiary hearing before the planning commission failed to list the applicable standards, as required by ORS 197.763(3)(b), petitioners may raise issues at LUBA even though such issues may not have been raised during the local proceedings. However, this procedural error provides no basis for reversal or remand of the decision where petitioners fail to establish the error caused prejudice to their substantial rights. *Shapiro v. City of Talent,* 28 Or LUBA 542 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where during the local proceedings petitioners affirmatively waived their right to request a

continuance, petitioners cannot raise the local government's failure to provide such a continuance as a basis for reversal or remand in an appeal to LUBA. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An applicant that cites certain statutes during local proceedings, and states that those statutes do not affect the burden of proof, waives its right to argue in an appeal at LUBA that those statutes preempt local standards. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government fails to list a single applicable approval criterion in its notice of initial evidentiary hearing, issues may be raised at LUBA even though they were not raised during the local proceedings. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the challenged decision includes a determination that a nonconforming use of the subject property exists, but the notice of hearing indicated the only issue to be addressed was an expansion of an existing nonconforming use, the notice of hearing failed to adequately describe the nature of the application, as required by ORS 197.763(3)(a), and failed to reasonably describe the county's final action under ORS 197.835(2)(b). Either of these deficiencies means petitioners may raise issues before LUBA regardless of whether they were raised below. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under the "raise it or waive it" statute, LUBA's review is limited to arguments raised during the local proceedings only where the local government complies with the requirements of ORS 197.763. *Neuman v. City of Albany*, 28 Or LUBA 337 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Although a local government is free to adopt local code provisions narrowing the scope of review in local appeal proceedings, such local code provisions do not have the legal effect of limiting LUBA's scope of review. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA's review of limited land use decisions is limited to issues raised before the local government, unless (1) the local government did not satisfy the procedural requirements of ORS 197.195, or (2) the limited land use decision adopted differs significantly from the proposal described in the local notice of proposed action. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where, during local comprehensive plan map amendment and zone change proceedings, petitioner advised the local government that Statewide Planning Goal 5 requires an analysis regarding only a nearby aggregate operation, petitioner affirmatively waived any Goal 5 issues unrelated to the nearby aggregate operation. *DLCD v. Curry County*, 28 Or LUBA 205 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Prior to the filing of the petition for review, LUBA cannot tell whether all issues a petitioner potentially may raise in the petition for review are barred by the "raise it or waive it" provisions of ORS 197.763 and 197.835(2). *Scholes v. Jackson County*, 28 Or LUBA 728 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.830(10) and 197.835(2), LUBA's review of both land use decisions and limited land use decisions is limited to issues raised below, unless (1) the local government did not satisfy the procedural requirements of ORS 197.763 or ORS 197.195, or (2) the land use decision or limited land use decision adopted differs significantly from what was described in the local government's notice. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the relevant local government notices did not list the applicable approval criteria, as required by both ORS 197.763(3)(b) and 197.195(3)(c)(C), then regardless of whether the challenged decision is a land use decision or limited land use decision, issues may be raised before LUBA irrespective of whether they were raised during the proceedings below. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(1) does not require petitioners to raise with specificity, prior to the close of the evidentiary hearing, issues regarding aspects of a condition of approval that were not imposed until the governing body adopted the local government's final decision. *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a party is entitled to and requests a continuance under ORS 197.763(4), and the local government decision maker does not respond to the request or grant a continuance prior to the close of the evidentiary hearing portion of a quasi-judicial land use proceeding, the party does not waive its right to allege failure to grant the continuance as error in a LUBA appeal by failing to repeat the continuance request at subsequent local government meetings held to adopt a final written decision. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government mistakenly believes it is adopting a limited land use decision, and for that reason fails to follow the notice and hearing requirements of ORS 197.763, no issues petitioner wishes to raise at LUBA were waived because they were not raised below. ORS 197.835(2)(a). *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA applies statutory waiver requirements to limited land use decisions the same way it applies them to land use decisions. LUBA's review of limited land use decisions is limited to issues raised below unless (1) the local government did not satisfy the procedural requirements of ORS 197.195, or (2) the limited land use decision adopted differs significantly from that described in the local notice of proposed action. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The ORS 197.195(3)(c)(B) provision that only issues raised "with sufficient specificity" below may be raised before LUBA in an appeal of a limited land use decision requires only that an issue be raised sufficiently to afford the local government and other parties an opportunity to respond. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where respondents argue petitioners may not raise an issue in their petition for review because they failed to raise the issue below, and petitioners make no attempt to identify where in the record the issue was raised, LUBA will not consider the issue. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners questioned how much of the subject property was utilized for rock quarrying purposes and how much rock was quarried during the relevant period of time, during local proceedings to determine whether a rock quarry qualifies as a nonconforming use, this is adequate to enable a reasonable decision maker to understand issues were raised concerning the size and scope of quarrying activities and the adequacy of the evidence relating to those issues. *Mazeski v. City of Mosier*, 27 Or LUBA 100 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. If a party contends an issue petitioners seek to raise before LUBA in an appeal challenging a limited land use decision was not raised during the local proceedings, and petitioners neither identify where in the record the issues were raised below nor claim the local government failed to follow the procedures required by ORS 197.195, petitioners may not raise the issue for the first time before LUBA. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where respondents argue in their briefs that issues raised in a petition for review are waived under ORS 197.835(2) because they were not raised below, a petitioner may point out where in the record such issues were raised, or assert any defenses that may be available under ORS 197.835(2)(a) or (b) in response to the waiver argument, either at oral argument or in a reply brief. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(5)(a) requires that a statement listing the applicable substantive criteria from the local government comprehensive plan and code be made at the beginning of a quasi-judicial land use hearing. Where such a statement is not made, or other requirements of ORS 197.763 are not met, petitioners may raise new issues in an appeal to LUBA. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.763, so long as issues are sufficiently raised locally to give the local government and other parties an opportunity to respond, those issues may be raised at LUBA. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a party contends that issues petitioners seek to raise before LUBA were not raised during the local proceedings, and petitioners neither identify where in the record the issues were raised below nor claim the local government failed to follow the procedures required by ORS 197.763, petitioners may not raise the issues for the first time before LUBA. *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where an applicant specifically agreed during local proceedings that the local government could impose certain conditions of approval, the applicant may not later challenge those conditions of approval in an appeal of the local government's decision at LUBA. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(7) does not preclude a local government from reopening an evidentiary record for limited purposes after it has been closed. It simply provides that if the record is reopened, new issues may be raised in an appeal to LUBA with regard to the evidence accepted after the record is reopened. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners allege that a procedural error occurred *after* the close of the record following the final local government evidentiary hearing on an application, it is not possible for petitioners to raise the error below "as provided by ORS 197.763" and, therefore, ORS 197.835(2) does not preclude petitioners from raising the issue before LUBA. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(1) and 197.835(2) do not supersede LUBA's prior rulings that where a party has an opportunity locally to object to a *procedural* error, at any stage of the local government proceedings, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the local government's decision in an appeal to LUBA. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners reasonably relied on a local code provision and hearing notice stating the governing body's review is limited to the evidentiary record before the planning commission, and were unaware that materials not in the planning commission record were placed before the governing body, petitioners do not waive their right to assert this error before LUBA by failing to object to it below. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Local government failure to comply with ORS 197.763(3) notice of hearing requirements (1) means that under ORS 197.835(2)(a), LUBA may consider issues that were not raised below; and (2) is a procedural error which, under ORS 197.835(7)(a)(B), provides a basis for reversal or remand of the challenged decision only if such error prejudices petitioners' substantial rights. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. In order to preserve the right to challenge at LUBA the adequacy of the adopted findings to address a relevant criterion, or the evidentiary support for such findings, a petitioner must challenge the proposal's compliance with that criterion during the local proceedings. However, the particular findings ultimately adopted or evidence ultimately relied on by the decision maker need not be anticipated and specifically challenged during the local proceedings. *Lucier v. City of Medford,* 26 Or LUBA 213 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners contend that under ORS 197.835(2)(a), they may raise new issues before LUBA because the local government failed to comply with ORS 197.763, and petitioners allege specific respects in which the local government failed to follow the procedural requirements of ORS 197.763, the local government or other respondents must demonstrate that the local government complied with the relevant requirements of ORS 197.763. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the local government's notice of hearing did not include the list of applicable criteria or the explanation of the rights to request a continuance and to keep the record open that are required by ORS 197.763(3)(b) and (j), petitioners may raise issues in their appeal to LUBA irrespective of whether they were raised during the proceedings below. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Once a local government identifies the relevant approval standards in a local quasi-judicial land use proceeding, a party may not fail to argue certain identified standards are advisory rather than mandatory, and later in an appeal to LUBA claim it could not have anticipated the local government would apply one or more of the identified standards to deny the party's request for land use approval. *Eskandarian v. City of Portland,* 26 Or LUBA 98 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner may challenge a local government's interpretation of its regulations without having raised an issue during the local proceedings concerning that interpretation, where the interpretation first appears in findings prepared and adopted after the final local evidentiary hearing. *Eskandarian v. City of Portland*, 26 Or LUBA 98 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where testimony below does not refer to ORS 215.296 by its statutory citation, title or any recognized abbreviation for either, and does not employ any of the operative terms of the statute, a reasonable local decision maker would not have understood that compliance with ORS 215.296 was raised below, and petitioner may not raise this issue before LUBA. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Because ORS 197.835(2) states that issues raised before LUBA "shall be limited to those raised

by *any participant* before the local hearings body," as long as a particular issue was raised below by *some* participant, petitioners may raise that issue before LUBA. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where ORS 197.763 was not in effect at the time the subject application was submitted to the local government, LUBA's scope of review is not limited to issues raised during the local proceedings. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. While a local government has authority to regulate the conduct of local proceedings, including the conduct of local appeals, it may not limit LUBA's review authority in ways not authorized by statute. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under the "raise it or waive it" provisions of ORS 197.763 and ORS 197.835(2), a local government's failure to list a single relevant criterion means petitioner need not have raised an issue locally as a prerequisite for raising that issue before LUBA, even where the issue pertains to plan or land use regulation criteria that were listed in the notice required by ORS 197.763(3)(b). *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA's scope of review is limited by ORS 197.835(2) and 197.763(1) to issues raised during the local government proceedings, only where the local government complies with the requirements of ORS 197.763. *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA will not consider allegations that a "similar use" ruling should have been sought below, where the local government alleges no issue was raised below concerning the necessity for such a "similar use" ruling and petitioner provides no citations to the record showing the issue was raised below. *Cooley v. Deschutes County*, 25 Or LUBA 350 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a letter submitted below makes several statements arguing that a proposed dwelling is not "necessary for" forest use of the subject property, but mentions only in passing the "accessory to" portion of the local government "necessary for and accessory to a permitted forest use" standard, the "accessory to" issue was not raised specifically enough to give respondents a reasonable opportunity to respond and, therefore, is waived. *DLCD v. Coos County*, 25 Or LUBA 158 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners referred several times during local proceedings to a nonconforming parking lot as having only 22 spaces, petitioners did not waive their right to challenge a city decision approving changes in the nonconforming parking lot to allow 32 spaces. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Local government provisions narrowing the scope of review during local appeals do not similarly narrow LUBA's scope of review under ORS 197.763(1) and 197.835(2). *Davenport v. City of Tigard*, 25 Or LUBA 67 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners contend a decision fails to address an applicable approval criterion that was *not* identified in the local government's hearing notice as required by ORS 197.763(3)(b), and respondents contend petitioners cannot raise this issue because they failed to raise it below, LUBA must decide whether the provision in question establishes an approval criterion for the subject application, in which case petitioners may raise the new issue before LUBA pursuant to ORS 197.835(2)(a). *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Because a constitutional taking claim is not dependent upon a local government's adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the characterization of an alleged nonconforming use is the primary issue during the local proceedings, to preserve for eventual appeal to LUBA the issue of whether the alleged nonconforming use includes sales of equipment, a petitioner must do more than state in passing during the local proceedings that he maintained equipment he had a right to sell. *Rhine v. City of Portland*, 24 Or LUBA 557 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners could not reasonably have known a local government would adopt a particular interpretation of local ordinances, petitioners are not required by ORS 197.835(2) and 197.763(1) to have challenged the interpretation during the local proceedings below in order to challenge the interpretation before LUBA. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Because a constitutional taking claim is not dependent upon a local government's adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. While a local government is not *obliged* to respond to a taking claim raised during the local proceedings, the local government should, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should at least have the opportunity, if

possible, to adopt an interpretation that is constitutional. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government fails to adopt any findings addressing apparently applicable statewide planning goal, administrative rule and comprehensive plan criteria, the local government may not avoid a remand by arguing petitioner failed to preserve its ability to raise the issue of compliance with those provisions by not raising the issue with sufficient specificity during the local proceedings. In such circumstances, it is the failure to adopt findings that necessitates remand. *ODOT v. City of Waldport*, 24 Or LUBA 344 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the petition for review has not yet been filed, LUBA will not, in ruling on a motion to dismiss, determine whether issues that may be raised in the petition for review were waived under ORS 197.763(1) and 197.835(2). *Glisan Street Assoc. v. City of Portland*, 24 Or LUBA 600 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local planning official refuses to accept petitioner's local appeal of a hearings officer's decision on a permit application, but another local appeal of the same decision is processed, the refusal is either (1) a final land use decision, in which case a NITA must be timely filed with LUBA; or (2) part of the ongoing local proceedings on the subject application, in which case in an appeal of the local government's final decision, LUBA can only consider issues concerning the refusal to accept petitioner's appeal if those issues were raised below. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.830(10) and 197.835(2) do not limit the issues which may be raised before LUBA in an appeal of a local government legislative land use decision. *DLCD v. Columbia County*, 24 Or LUBA 32 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where respondents contend petitioners did not raise an issue in the local proceedings, and petitioners cite nothing in the record establishing they raised the disputed issue in the local proceedings, petitioners may not raise that issue for the first time in an appeal to LUBA. *Larson v. Wallowa County*, 23 Or LUBA 527 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the local government fails to identify the relevant plan and land use regulation standards in the notice of hearing, a petitioner is free to raise noncompliance with those standards in an appeal to LUBA, even though compliance with such standards was not raised as an issue below. *Ruff v. Harney County*, 23 Or LUBA 521 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An issue is waived if it is not sufficiently raised below to enable a reasonable decision maker to understand the nature of the issue. Where no party below ever referred to OAR 660-12-060 by its

title, rule number or by any recognized abbreviation of either, a reasonable local decision maker would not have understood that the applicability of OAR 660-12-060 had been raised as an issue. *ODOT v. Clackamas County*, 23 Or LUBA 370 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the local code contains separate sections imposing an identical standard on decisions approving farm dwellings on existing parcels and decisions approving partitions creating new farm parcels, a petitioner who raised an issue concerning compliance with that standard during local proceedings does not waive its right to raise that issue in an appeal at LUBA simply because petitioner cited the wrong code section. *DLCD v. Yamhill County*, 23 Or LUBA 361 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government's notice of hearing does not comply with ORS 197.763(3)(b) because it fails to identify an applicable statewide planning goal as an approval criterion, petitioners may raise the local government's failure either to comply with or to adopt an exception from that goal as an issue in a LUBA appeal proceeding. *Murray v. Marion County*, 23 Or LUBA 269 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.763(1) and 197.835(2), if a party does not raise issues concerning a local government's authority or jurisdiction to render the challenged decision during the local proceedings, LUBA lacks authority to review such issues. *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government contends an issue was not raised below, and the petitioner fails to cite any portions of the record which he contends demonstrate that he raised the issue during the local proceedings, under ORS 197.763(1) and 197.835(2) that issue may not be raised in an appeal to LUBA. *Coyner v. City of Portland*, 23 Or LUBA 79 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner failed to raise below any issue concerning a local government's obligation to coordinate its decision with other jurisdictions under ORS 92.044(1)(c), petitioner may not raise the issue for the first time in an appeal to LUBA. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners had the opportunity to object to alleged procedural errors in the local proceeding in an appeal to the governing body, but did not do so, they may not assign the alleged procedural errors as a basis for reversal or remand by LUBA. *Simmons v. Marion County*, 22 Or LUBA 759 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a party alleges petitioners failed to raise an issue during the local proceedings, and petitioners neither contend they raised the issue below nor claim the local government failed to follow the procedures required by ORS 197.763, petitioner may not raise the issue for the first

time at LUBA. ORS 197.763(1); 197.835(2). *Broetje-McLaughlin v. Clackamas County*, 22 Or LUBA 198 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioners cannot raise the issue of whether the subject proposal constitutes a "new structure" prohibited by the local code, when testimony below did not cite the relevant code provision, use its operative terms or otherwise afford the other parties an opportunity to respond to this issue. *Broetje-McLaughlin v. Clackamas County*, 22 Or LUBA 198 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government contends issues were not raised during the local proceedings, and petitioner fails to provide record citations establishing that the disputed issues were raised below, LUBA will not review the disputed issues. *Cummins v. Washington County*, 22 Or LUBA 129 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The issue of whether the local government must consider impacts of all uses potentially allowed by a plan and zone map amendment was adequately raised during local proceedings pursuant to ORS 197.763(1), where petitioners informed the local government that they believed any use allowable under the proposed plan and zone designations could occur on the subject site, notwithstanding petitioners' failure to explain below what they believed the legal consequences of this theory to be. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Read together, ORS 197.763(1) and 197.835(2) provide a two-step analysis for determining whether an issue is raised locally for purposes of an appeal on that issue to LUBA. First, issues must be raised "no later than the close of the record at or following the final evidentiary hearing on the proposal before the local government." Second, issues need only be raised before *one* of the local decision makers listed in ORS 197.763(1) sufficiently to enable the parties and the decision maker to respond to the issue. *Tice v. Josephine County*, 21 Or LUBA 371 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Expressions of general concerns about street system safety during local proceedings are not adequate to raise issues concerning compliance with local code standards governing right-of-way and street pavement widths with "sufficient specificity so as to afford the governing body * * * and the parties an adequate opportunity to respond to each issue." ORS 197.763(1). *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local code standard which petitioners allege is violated by the challenged decision was not identified as an applicable standard in the local government's notices of hearing, as required by ORS 197.763(3)(b), petitioners may raise the issue of compliance with that local code standard in a LUBA appeal, even though they did not raise the issue during the local proceedings. ORS 197.835(2)(a). *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(1) does not require that arguments *identical* to those in the petition for review have been presented during local proceedings, but rather that the arguments presented in the local proceedings sufficiently raise the issue sought to be raised in the petition for review, so that the local government and other parties had a chance to respond to that issue in the local proceedings. *Hale v. City of Beaverton*, 21 Or LUBA 249 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a party alleges petitioner failed to raise an issue during local proceedings, and petitioner neither contends he raised the issue below nor claims the local government failed to follow the procedures required by ORS 197.763, petitioner may not raise the issue for the first time at LUBA. ORS 197.763(1); 197.835(2). *Wethers v. City of Portland*, 21 Or LUBA 78 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a particular interpretation of certain code provisions was advanced in the applicant's proposed findings, but was not discussed during the local proceedings, and was not adopted by the local government prior to the challenged decision, petitioners could not reasonably have known the local government would adopt the disputed interpretation and, therefore, are not required by ORS 197.763(1) to have challenged that interpretation below in order to challenge it before LUBA. *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The purpose of the "raise it or waive it" requirement of ORS 197.763(1) is to prevent the unfair surprise that would result if a petitioner did not raise issues locally and then raised those issues for the first time at LUBA. However, ORS 197.763(1) does not require that petitioners have presented precisely the same arguments during local proceedings that they present at LUBA. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners used the operative term contained in a code criterion in their testimony, and the local government understood that the code criterion applied and adopted findings addressing that criterion, petitioners did not waive their right to raise the issue of compliance with that criterion at LUBA by failing to cite the code criterion specifically by number *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners fail to cite anything in the local proceedings which shows that an issue was raised concerning compliance with a particular code criterion, petitioners may not argue for the first time at LUBA that the challenged decision violated that criterion. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government's notice of hearing, rather than listing applicable approval criteria, states the applicable criteria "are attached to this notice," but the record does not include any such attachment, LUBA will conclude the notice does not comply with the requirement of ORS

197.763(3)(b) to list applicable criteria and will review issues raised by petitioners regardless of whether they were raised below. *Thormahlen v. City of Ashland*, 20 Or LUBA 218 (1990).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government's notice of hearing did not comply with ORS 197.763(3)(b), in that it failed to identify an approval criterion relevant to the proposed development, petitioners may raise the local government's failure to require compliance with that approval criterion as an issue in a LUBA appeal proceeding. ORS 197.835(2)(a). *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763 and 197.835(2) represent a quid pro quo, whereby local governments are required to give broader and more detailed notice of quasi-judicial land use hearings and make staff reports available in advance of such hearings, in exchange for participants being required to raise an issue during the local proceedings in order to be able to raise that issue before LUBA. *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7 (1990).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner did not raise an issue during local proceedings and does not contend the notice given by the local government fails to comply with the notice requirements of ORS 197.763 or 197.835(2)(b) or that the other procedural requirements of ORS 197.763 were not observed, the issue is waived and not within LUBA's scope of review. ORS 197.835(2). *Keudell v. Union County*, 19 Or LUBA 394 (1990).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where on remand a city accepts new evidence and adopts new findings regarding a planned unit development (PUD) approval standard, the issue of whether the new findings conflict with re-adopted but unchanged findings addressing other standards was not, and could not have been, resolved in the appeal of the city's initial PUD approval, and thus the "law of the case" principle under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), does not preclude a petitioner from raising that issue on appeal of the remand decision. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. A petitioner may challenge new findings adopted on remand, but is precluded by the "law of the case" principle in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), from challenging long-settled interpretations of approval standards that are embodied in unchanged, re-adopted findings from the initial proceeding. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. A county decision interpreting a condition of approval to be satisfied by an agreement between the county and only one of two owners of a common tract is not a "collateral attack" on a prior LUBA decision, in which LUBA assumed, but did not decide, that the same condition of approval would be satisfied by an agreement between the two current owners of the common tract. *Kuhn v. Deschutes County*, 74 Or LUBA 190 (2016).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. The "law of the case" doctrine described in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), does not apply to bar consideration of an issue raised on appeal of a decision on remand, if the issue is substantially the same as an issue raised in an unresolved assignment of error in the appeal of the original decision. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Issue preclusion bars relitigation of an issue in subsequent proceedings when the issue has been determined by a valid and final determination in a prior proceeding, but issue preclusion only applies if all of the five requirements set out in *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993) are met. Those five factors are as follows: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Widgi Creek Homeowners Association v. Deschutes County*, 71 Or LUBA 321 (2015).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. In an appeal of a decision modifying a permit approval, a petitioner's arguments that prior unappealed decisions extending that permit approval were wrongly decided are viewed as collateral attacks on decisions that were not before the local government in processing the

modification, and are not before LUBA on appeal of that modification decision. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Even if prior permit extension decisions are not land use decisions that could have been appealed to LUBA, they are nonetheless final decisions to extend the permit, not intermediate or interlocutory decisions that can be challenged in an appeal of a subsequent decision modifying the permit. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where the only issue that was resolved in an initial LUBA appeal was whether the record included any evidence concerning whether the effluent to be generated by a proposal would be residential strength, and the applicant thereafter collects evidence concerning the effluent from one of the two sources that were discussed in the first LUBA appeal, LUBA will reject the applicant's contention that parties are estopped from arguing in the second appeal that the applicant's evidence from one source is inadequate and that evidence from the other source is required. *Teen Challenge v. Lane County*, 67 Or LUBA 300 (2013).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), to preserve an issue on appeal, the issue must be raised at all stages in the appeal proceedings where it can be raised, and failure to raise the issue during the first appeal proceedings precludes LUBA's review of that issue. The *Beck* waiver doctrine is not limited to issues actually raised and resolved in the initial appeal proceedings. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. The waiver doctrine articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), applies both to legislative and quasi-judicial land use decisions. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Even if all of the assignments of error challenging a decision on remand are barred from relitigation or waived under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), and thus not within LUBA's scope of review, that only means LUBA will affirm the decision, not that the decision on remand is not within LUBA's jurisdiction. *Hatley v. Umatilla County*, 66 Or LUBA 427 (2012).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where in its initial decision the county applies the old Goal 5 rule at OAR chapter 660, division 016, instead of the new Goal 5 rule, and no issue was raised about that position in the first appeal to LUBA, the county is arguably constrained on appeal of its decision on remand from arguing that the old Goal 5 rule does not apply and instead the new Goal 5 rule applies. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), a party at LUBA fails

to preserve an issue for review if, in a prior stage of a *single proceeding*, that issue is decided adversely to the party or that issue could have been raised and was not raised. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. When an issue has been decided in a prior proceeding, the prior decision on that issue may preclude relitigation of the issue in a subsequent proceeding if the five requirements set out at *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 104, 862 P2d 1293 (1993), are met. Those requirements are: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. In two decisions LUBA has concluded that issue preclusion does not apply in the land use context, based on the fifth factor in *Nelson v. Emerald People's Utility Dist.* However, the Court of Appeals reserved its opinion on that issue in *Lawrence v. Clackamas County*, 180 Or App 495, 504, 43 P3d 1192 (2002). *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Under the second of the five factors that must be present for there to be issue preclusion in an administrative proceedings under *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 104, 862 P2d 1293 (1993), an issue must have been "actually litigated and * * * essential to a final decision on the merits in the prior proceeding." Where a 2003 conditional use permit merely imposed a condition of approval that the home occupation authorized by that permit must be operated in compliance with county limits on home occupations, whether the approved home occupation in fact complied with county and statutory limits on home occupations was not "actually litigated" and for that reason issues regarding whether an expanded home occupation under a 2010 conditional use permit complies with county and statutory limits on home occupations are not precluded by issue preclusion. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Under the first of the five factors that must be present for there to be issue preclusion in an administrative proceedings under *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 104, 862 P2d 1293 (1993), the issue in the two proceedings must be "identical." Where a 2003 conditional use permit authorizes a home occupation that hosts weddings and other events on EFU-zoned property, and a 2010 conditional use permit authorize the home occupation to host additional events on different days, the issues raised by the 2003 and 2010 CUP are not identical and issue preclusion does not operate to bar a petitioner from raising issues in an appeal of the 2010 conditional use permit simply because those issues may be similar to issues that could have been raised in the 2003 conditional use permit proceeding. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where a local government denies an application based on one approval criterion, and LUBA remands the decision in part for the local government to consider whether additional approval standards apply, it is possible that in determining that additional approval standards apply the local government could identify additional bases for denial under the additional criteria, even if such additional bases for denial were not cited in the original decision. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where LUBA affirms a county's decision that a proposed church will require a reasons exception and, in dicta, rejects the applicant's claim under the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), that dicta does not preclude the applicant from challenging the county's subsequent denial of the applicant's request for a reasons exception as being inconsistent with the RLUIPA equal terms provision. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. While a local government may expand the scope of its remand proceedings to include issues in addition to those that formed the basis for remand, it cannot revisit issues that were conclusively resolved on appeal. Where an unappealed LUBA decision concludes that a code provision does not apply to the proposed development, on remand the hearings officer errs in denying the application based on a new theory as to why the code provision applies. *Curtain v. Jackson County*, 56 Or LUBA 649 (2008).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. An unappealed LUBA decision holding that a county cannot deny a proposed cell tower for noncompliance with county site design standards necessarily resolves the issue of whether the county can apply the site design standards at all, even in approving the tower. *Seeberger v. Yamhill County*, 56 Or LUBA 656 (2008).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. An applicant's failure to appeal a partition approval does not bar that applicant from later filing an application to modify a condition of partition approval, based on changed factual circumstances. *Krishchenko v. City of Canby*, 52 Or LUBA 290 (2006).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where a petitioner's broad interpretation of a code provision requiring protection of trees was rejected in an earlier LUBA appeal and petitioner's challenge to the adequacy of a proposal for cutting and saving trees was rejected in that earlier appeal, those issues are resolved and may not be raised again in a subsequent appeal of the local government's decision on remand. However, where some trees that were to be saved in the prior proposal are now to be removed and some trees that were to be cut in the proposal are now to be saved, the issue of the adequacy of the new proposal was not resolved in the prior appeal and may be raised in the second appeal to LUBA. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where LUBA determines that a city acts within its interpretive discretion in interpreting a code provision that requires that 20 percent of a development site be landscaped to allow open space to be left in its natural state to count toward the 20 percent landscaping requirement, that interpretation may not be challenged in a subsequent appeal of a modified version of the proposal that led to the first appeal. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. A Land Conservation and Development Commission (LCDC) periodic review order that merely makes assumptions about a local ordinance, but does not attempt to resolve an ambiguity, is not identical to an issue before LUBA regarding the proper interpretation of that ambiguous ordinance, and issue preclusion does not bar LUBA's consideration of the interpretive issue. *Flying J. Inc. v. Marion County*, 49 Or LUBA 28 (2005).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. A minor dispute, which was withdrawn before a decision was made, regarding the zoning of 2.2 acres in a Land Conservation and Development Commission (LCDC) periodic review order concerning the rural community designation of a large interchange area is not essential to a final decision on the merits in the order. Therefore, issue preclusion does not bar LUBA's consideration of the issue. *Flying J. Inc. v. Marion County*, 49 Or LUBA 28 (2005).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. When an earlier decision was remanded by LUBA based on issues regarding the safety of a proposed road design, and the local government specifically limits the remand proceedings to the issues remanded by LUBA, petitioners may not challenge the proposed road's location under the local government's transportation system plan when that locational issue could have been, but was not raised, in the earlier appeal. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where LUBA affirms a county's findings that it may authorize repairs and replacements to existing structures without reviewing the nonconforming use status of those structures, but remands the decision for other reasons, on remand petitioners cannot raise issues regarding the nonconforming use status of structures that were resolved in LUBA's prior decision. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Under the *Beck v. City of Tillamook* waiver principle, issues that have been conclusively resolved at a prior point in a single continuous land use proceeding are not reviewable for a second time by LUBA or an appellate court at a later point in that proceeding. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. When LUBA remands a decision, the issues before the local government include any new issues that are presented as a result of the remand, but any old issues that were conclusively resolved in earlier proceedings are not before the local government. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where the question of whether a property qualifies as agricultural land, so that it cannot be considered for a comprehensive plan Rural Use map designation, is governed by the same legal standard that governed a prior local government finding in an earlier decision on the same application that the subject property does not qualify as agricultural land subject to Goal 3, the same issue is presented. If that issue was conclusively resolved in the earlier decision, a different resolution of that issue in the later decision is barred by the *Beck v. City of Tillamook* waiver principle. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where the question of whether a property qualifies as forest land so that it may not be considered for a comprehensive plan Rural Use map designation is not governed by the same legal standard that governed the county's finding in a prior decision on the same application that the subject property does not qualify as forest land subject to Goal 4, the same issue is not presented. Therefore, even if the Goal 4 issue was conclusively resolved in the earlier decision, a different decision concerning whether the property qualifies as forest land in the second decision is not barred by the *Beck v. City of Tillamook* waiver principle. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where the issue of whether a property qualified as agricultural land under Goal 3 or forest land under Goal 4 in a local government's first decision on an application was legally irrelevant, that issue was not dispositively resolved in the first decision and a local government's different conclusion about whether land qualifies as agricultural land or forest land in a second decision on the same application is not barred by the *Beck v. City of Tillamook* waiver principle. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Generally, issues that were conclusively resolved in a final discretionary land use decision, or that could have been but were not raised and resolved in that earlier proceeding, cannot be raised to challenge a subsequent application for permits necessary to carry out the earlier final decision. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where a final discretionary permit approval resolved issues regarding how "lot area" is determined for purposes of calculating the number of parking spaces for proposed development, those issues cannot be revisited and applied as a basis to deny a subsequent parking lot application that is consistent with the earlier final discretionary decision. Such a denial is an impermissible collateral attack on the earlier decision. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. The issue that proposed dwellings do not qualify for historic preservation incentives on the merits is a different issue than whether the proposed dwellings are even eligible for consideration for an award of historic preservation incentives. And raising the first issue does not give fair notice to decision makers regarding a need to address the second issue. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Arguments that a city erred by failing to adopt findings that address particular spacing and orientation guidelines provide no basis for remand, where petitioners failed to raise any issue concerning those guidelines before the close of the evidentiary record and failed to identify those guidelines in their local notice of appeal. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Where a petitioner appeals two local decisions to the planning commission, but the planning commission decision addresses only one decision, and on appeal of the planning commission decision to the governing body, the petitioner fails to specify any issues regarding the second decision, the petitioner's failure to do so means that all issues regarding the second decision are beyond LUBA's scope of review under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), *rev den* 336 Or 615, 90 P3d 626 (2004), a petitioner must specify the issues it wishes to raise in a local notice of appeal to preserve those issues for an appeal to LUBA if land use regulations require that a notice of local appeal set out the issues on appeal. If the relevant local land use regulations do not impose that requirement, the *Miles* requirement to specify issues to preserve them for review at LUBA does not apply. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. The exhaustion/waiver principle articulated in *Miles v. City of Florence*, 190 Or App 500 (2003), requires the petitioner to identify issues in the local appeal to the local appeal body, regardless of whether the appeal body conducts a hearing or whether the local appeal proceeding is on the record or *de novo*. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Where the local appeal statement raises no issues regarding whether a particular zoning diagram should be considered in determining whether proposed zoning is consistent with the comprehensive plan map, the issue is waived under the exhaustion/waiver principle articulated in *Miles v. City of Florence*, 190 Or App 500 (2003). *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. An issue that was raised in a timely filed local appeal is not waived under the exhaustion/waiver principle of *Miles v. City of Florence*, 190 Or App 500 (2003), notwithstanding that the decision-maker

approved a version of the local appeal statement in which that issue was redacted, where the decision-maker also accepted a revised version that included the issue, with the apparent intent of recognizing that the issue had been preserved. *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Where a local appeal statement states issues only in general terms, such as the appealed decision failed to address all applicable standards, requiring the local appeal body and other parties to speculate which standards the appellant believes were not addressed, the local appeal has failed to exhaust or preserve any issues for purposes of appeal to LUBA, under *Miles v. City of Florence*, 190 Or App 500, 506-07, 79 P3d 382 (2003). *Dion v. Baker County*, 72 Or LUBA 307 (2015).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. While the issues following a LUBA on remand are often fewer and smaller in scope, in order to exhaust or preserve issues for LUBA's review under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 506-07, 79 P3d 382 (2003), local appeals of decisions on remand must still identify the issues for local appeal with sufficient specificity that the local government and other parties have reasonable notice of those aspects of the underlying decision on remand the local appellant wishes to challenge. *Dion v. Baker County*, 72 Or LUBA 307 (2015).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. A petitioner does not waive her right to assign error to a hearings officer's conclusion that a structure qualifies as a nonconforming use, and the hearings officer's approval of an alteration of that nonconforming use, where the applicant did not apply for verification of a nonconforming use or an alteration of a nonconforming use and the notices of hearing did not identify the county's nonconforming use regulations as applicable criteria for the decision. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Where an "Article" of the community development code includes 373 single spaced pages of land use regulations made up of 44 separate sections devoted to a variety of topics, a notice of hearing that identifies that article of the community development code as an applicable standard is not sufficient, under ORS 197.763(3), to provide notice of an eight-page section of that article devoted to nonconforming uses. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Where a cross petition for review challenges the local government's application of a standard to a proposal for needed housing on the basis that the city may not apply the standard because it is not a "clear and objective standard" within the meaning of ORS 197.307(4), the cross petition for review may assign error to the city's application of the standard only if the issue was raised in the applicant's appeal statement appealing the hearings officer's decision to the planning commission, under ORS 197.825(2)(a) and the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51 (2013).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. ORS 197.825(2)(a) and *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), do not limit the

issues before LUBA to those issues specified in the local appeal to the governing body, where the local government's appeal regulations do not require specification or limitation of issues for that type of local appeal, and the governing body allowed and considered all issues raised by any party during the appeal proceeding. *White v. Lane County*, 68 Or LUBA 423 (2013).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. To preserve the issue of whether the statewide planning goals apply to a rezoning decision and thus whether notice of hearing must be provided to DLCD under ORS 197.610, the issue must be raised during the proceedings below to avoid waiver under ORS 197.763(1) and, additionally, specified in the local notice of appeal to avoid waiver under the exhaustion/waiver principle in *Miles v. City of Florence*, 190 Or App 500 (2003). *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. On appeal of a planning commission decision, the issue of the city's failure to impose a condition is waived under the reasoning in *Miles v. City of Florence*, 190 Or App 500 (2003), where the underlying hearings official's decision also failed to impose the disputed condition, and petitioner did not specify that failure as a ground for appeal in the local notice of appeal to the planning commission. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. The principle of exhaustion/waiver set out in *Miles v. v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), does not require a party that *prevailed* before the planning commission to appeal the planning commission decision to the governing body, in order to preserve or exhaust issues that the planning commission did not address and could not have been raised in the opposing party's local appeal of the planning commission decision. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Where the local notice of appeal fails to identify any issue regarding whether a proposed farm relative dwelling is "necessary," that issue cannot be raised on appeal to LUBA, pursuant to ORS 197.825(2)(a) and *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. The main purpose of the exhaustion/waiver doctrine articulated in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003) is to ensure that the final decision maker has the initial opportunity to address issues that may become the basis for appeal to LUBA. *Miles* is not concerned that findings are adopted addressing approval criteria, and the fact that the final decision includes a finding of compliance with an approval criterion is not sufficient to allow the petitioner to raise the issue of compliance with that criterion to LUBA, if that issue was not identified in the local notice of appeal. *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. A statement in the local notice of appeal that the planning commission "has not followed the law" is insufficient to identify any particular issue for purposes of the exhaustion/waiver doctrine

articulated in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Even assuming LUBA has authority to reject an otherwise meritorious exhaustion/waiver challenge based on the argument that the county is equitably estopped from asserting exhaustion/waiver due to alleged erroneous advice from county planning staff in accepting the local notice of appeal, the argument fails where based on petitioners' affidavits the best that can be said with confidence is that there was mutual misunderstanding and miscommunication regarding the sufficiency of the local notice of appeal and what issues petitioners wished to raise therein. *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. A petitioner is not precluded by *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), and ORS 197.825(2) from raising issues at LUBA merely because he failed to list local appeal issues in the proper location on a local appeal form, when the local code does not specify that such failure is a jurisdictional defect or results in a waiver of the right to raise those issues at LUBA. *Zeitoun v. Yamhill County*, 60 Or LUBA 111 (2009).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Issues raised before LUBA are waived under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 283 (2003), where a county code requires that the local notice of appeal specify the grounds for appeal, and the local notice of appeal makes no mention of the issues that petitioner wishes to raise before LUBA. *Sommer v. Douglas County*, 60 Or LUBA 32 (2009).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. An assertion in the local notice of appeal that the proposal is inconsistent with Goals 16 and 17, with reference to the appellant's written testimony on those issues that was submitted to the planning commission, is sufficient to inform the governing body and other participants of the specific grounds the appellant wishes to raise on appeal, and avoid waiver of those issues under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 283 (2003). *Sommer v. Douglas County*, 60 Or LUBA 32 (2009).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. When a petitioner was required to raise local appeal issues below pursuant to *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), raising the issue that approval of a nonfarm dwelling would significantly increase the cost of farming practices is not sufficient to raise any issue concerning impacts on the stability of the overall land use pattern, and the petitioner may not raise the stability standard at LUBA. *Zeitoun v. Yamhill County*, 60 Or LUBA 111 (2009).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Raising in the local notice of appeal the issue of compliance with OAR 660-012-0065(3)(a) and (b) regarding transportation improvements that are allowed or conditionally allowed under certain statutes or rules is not sufficient to raise the issue of compliance with 660-012-0065(3)(o) regarding other transportation facilities, services, or improvements that serve local travel needs.

Therefore, the issue may not be raised at LUBA. *Sepulvado v. Douglas County*, 60 Or LUBA 364 (2010).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Where a local code requires a notice of review to contain "the specific grounds relied on in the petition request for review," and petitioners challenged a planning commission decision on the grounds that the county failed to identify other available industrially zoned properties throughout the county, petitioners may not on appeal to LUBA challenge the decision on different grounds that the county did not properly identify available industrially zoned lands within the specific rural community in which the applicant proposes the plan amendment. *Miles v. City of Florence*, 190 Or App 500, 506-507, 79 P3d 382 (2003). *Kinnett v. Douglas County*, 59 Or LUBA 293 (2009).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), did not overrule or modify *Colwell v. Washington County*, 79 Or App 82, 91, 718 P2d 747 (1986), and similar cases holding that the ORS 197.825(2)(a) exhaustion requirement does not require a petitioner to file a local appeal of a lower body's initial comprehensive plan amendment decision to the governing body, because applicable statutes require the governing body to conduct a hearing on the amendment in any event. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Notwithstanding that a county's code provides that the planning commission's decision on a comprehensive plan amendment is "final" unless a local appeal is filed, under ORS 215.060 the county governing body must hold a public hearing on the plan amendment and take final action, and therefore the planning commission's initial decision on the plan amendment is not "final" in any meaningful sense. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Even where a county's code provides for local appeal as one of three possible paths by which a governing body will review the planning commission's initial decision on a comprehensive plan amendment, because ORS 215.060 requires the governing body to hold a public hearing on a plan amendment at which testimony and issues can be raised, in that circumstance a petitioner before LUBA is not required to file a local appeal and specify issues in a notice of local appeal in order to exhaust administrative remedies or avoid waiver under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal. Even if the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 283 (2003), extends to the proceedings on remand and requires the petitioner to raise below on remand the issues that are presented to LUBA on remand, that requirement is satisfied where the issues before LUBA are the same issues in the first appeal and on remand the petitioner submitted a letter to the city renewing the arguments made in the first appeal. *Coquille Citizens for Resp. Growth v. City of Coquille*, 55 Or LUBA 155 (2007).

28.7 LUBA Scope of Review – After Remand by Court. Where the Court of Appeals determines that LUBA's decision was "unlawful in substance" pursuant to ORS 197.850(9)(a) because LUBA affirmed the city's interpretation of Goal 8, Policy 1, and according to the court, the city's interpretation of Goal 8, Policy 1 is not affirmable under ORS 197.829(1) because the city's interpretation does not "plausibly account for the text and context of the policy," the appropriate disposition according to OAR 661-010-0071(2)(d) is for LUBA to remand the decision to the city for further proceedings, specifically for the city to adopt a sustainable interpretation of Goal 8, Policy 1, and apply that policy, as interpreted to the application before it. *Crowley v. City of Hood River*, 79 Or LUBA 77 (2019).

28.7 LUBA Scope of Review – After Remand by Court. When the Court of Appeals remands a LUBA decision that affirmed a local government decision requiring a condition of approval that petitioner argued constituted an unconstitutional exaction of property prohibited by the Fifth and Fourteenth Amendments to the U.S. Constitution, because the Court of Appeals agreed with petitioner that the dedication is unconstitutional unless the hearings officer finds that the impacts of the proposed development would substantially impede the governmental interest advanced by the city's standards which the conditions of approval were imposed to meet, LUBA will remand that portion of the decision to the hearings officer for reconsideration where the hearings officer adopted no findings on that point. *Hill v. City of Portland*, 78 Or LUBA 334 (2018).

28.7 LUBA Scope of Review – After Remand by Court. Where a petitioner's challenge to a hearings officer's finding that a mitigation plan submitted in support of a request for approval of a destination resort is specific enough for review relies almost entirely on reasoning that LUBA adopted in remanding a prior county decision, and that LUBA reasoning was effectively rejected or qualified by the Court of Appeals in an appeal of LUBA's first decision, petitioner's challenge to the hearings officer's finding in the second appeal provides no basis for reversal or remand. *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326 (2016).

28.7 LUBA Scope of Review – After Remand by Court. LUBA has statutory authority only to dismiss, affirm, reverse or remand a land use decision, and probably lacks statutory or inherent authority to "vacate" a previously issued final opinion and order on remand from the Court of Appeals, based solely upon the parties' stipulation. *Conte v. City of Eugene*, 66 Or LUBA 479 (2012).

28.7 LUBA Scope of Review – After Remand by Court. Where on remand from the Court of Appeals the parties stipulate to "vacate" LUBA's original final opinion and order and "reinstate" the underlying local government decision, the parties' intent can be given effect consistent with LUBA's dispositional authority by issuing a final opinion and order that either dismisses the appeal or affirms the local government decision. *Conte v. City of Eugene*, 66 Or LUBA 479 (2012).

28.7 LUBA Scope of Review – After Remand by Court. Where the Court of Appeals remands a decision to LUBA to address the proper application of the Transportation Planning Rule (TPR), at OAR 660-012-0060, and on remand to LUBA the parties dispute the meaning of a TPR provision, LUBA need not resolve that dispute when during the pendency of the appeal the TPR is amended to delete the disputed TPR provision, and the TPR as amended will govern the local proceedings on remand from LUBA. *Setniker v. Polk County*, 65 Or LUBA 49 (2012).

28.7 LUBA Scope of Review – After Remand by Court. When the Court of Appeals reverses and remands a LUBA decision that affirmed a local government decision, but the Court leaves open the possibility that the offending ordinance could be amended to address the problems identified by the court, LUBA will remand rather than reverse the local government's decision. *Friends of Eugene v. City of Eugene*, 48 Or LUBA 608 (2005).

28.7 LUBA Scope of Review – After Remand by Court. When the Court of Appeals affirms LUBA's final opinion but does not decide all issues presented in the appeal, LUBA is not precluded from reconsidering issues that are not addressed by the Court of Appeals. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

28.7 LUBA Scope of Review – After Remand by Court. Where the Court of Appeals directs LUBA to consider on remand an assignment of error directed at the local government's application of a policy that is not a land use regulation or otherwise a land use standard, LUBA will consider the policy to be "applicable law" for purposes of LUBA's scope of review under ORS 197.835(9)(a)(D). *Carlsen v. City of Portland*, 39 Or LUBA 93 (2000).

28.7 LUBA Scope of Review – After Remand by Court. On remand from the Court of Appeals, petitioners may not advance bases for reversal or remand before LUBA beyond those stated in the original petition for review. *Carlsen v. City of Portland*, 39 Or LUBA 93 (2000).

28.7 LUBA Scope of Review – After Remand by Court. Where an issue is resolved in a prior appeal, a petitioner in a subsequent appeal of a city's decision on remand may not raise that issue again. *Schwerdt v. City of Corvallis*, 38 Or LUBA 174 (2000).

28.7 LUBA Scope of Review – After Remand by Court. A petitioner does not waive any rights to present argument in a subsequent LUBA appeal by failing to appeal a prior LUBA decision and assign error to conclusions in that prior LUBA decision, where the conclusions were *dictum* and would not have provided a basis for appeal. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

28.7 LUBA Scope of Review – After Remand by Court. A county is not barred by law of the case from taking a position in its decision on remand that is inconsistent with a position it took in its initial decision, where the county also adopted the inconsistent position in an alternative finding in its original decision. *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

28.7 LUBA Scope of Review – After Remand by Court. Where a decision is withdrawn for reconsideration following appeal to LUBA and a new ordinance is adopted without following the applicable local adoption procedures, such a procedural error provides no basis for reversal or remand where petitioner was given an opportunity for meaningful participation and there was no prejudice to petitioner's substantial rights. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

28.7 LUBA Scope of Review – After Remand by Court. Where a local government denies a permit application following remand from the Court of Appeals and specifies more than one basis

for the denial, in reviewing a subsequent appeal of the denial on remand LUBA need only review and sustain one of the bases for denial. *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA concludes that a local government's conclusion that an application did not meet an applicable approval criterion was a valid basis for denial, although any error committed with respect to alternative or independent bases for denial would generally not provide a basis for reversal or remand, remand is nonetheless required where LUBA also concludes that the local government failed to address a threshold argument from the applicant that, if correct, would prevent the local government from applying criteria that would prohibit approval of the application. *M & T Partners, Inc. v. City of Salem*, 80 Or LUBA 221 (2019).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Local governments are not required to condition approvals rather than deny noncompliant applications. *H2D2 Properties, LLC v. Deschutes County*, 80 Or LUBA 528 (2019).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where an argument is derivative of other arguments made by the petitioner, the derivative argument provides no independent basis for reversal or remand. *Underwood v. Clackamas County*, 80 Or LUBA 542 (2019).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where an applicant proposes to vacate an existing right-of-way and construct a replacement, and where approval criteria require that the vacation "not create an access configuration which violates present development standards," arguments that the proposed replacement (1) is adjacent to a private street which is in noncompliance with development standards requiring curbs and sidewalks, a planter strip with trees, and on-street parking, or (2) connects to an existing sidewalk and crosses an existing driveway which are in noncompliance with development standards regulating their width and the length, provide no basis for reversal or remand because neither the vacation nor the proposed replacement cause or create the noncompliance. Similarly, arguments that the proposed replacement violates development standards regulating fencing and requiring that certain pedestrian connections be identified by more than striping alone provide no basis for reversal or remand because those standards have nothing to do with access configurations. *Neighbors for Smart Growth v. Washington County*, 79 Or LUBA 1 (2019).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Remand is necessary where petitioners argue that a boundary line adjustment application is governed by a county ordinance addressing the "Sale or Transfer of Land to an Adjacent Owner * * *," under the section on nonconforming uses that apply to "Designated Resource Areas," where the subject parcels are designated for agricultural and forest uses and are zoned exclusive farm use – grazing (FG) and where respondents filed no response brief. Because there is no local interpretation of the applicability of the ordinance, LUBA will remand the decision for the county to interpret the ordinance in the first instance. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Remand, rather than reversal, is the appropriate remedy when the board of county commissioners did not address an argument or adopt findings in response to the argument on appeal. *Rogue Advocates v. Josephine County*, 78 Or LUBA 38 (2018).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. While remand of a local government decision approving a permit means that the permit decision is no longer "effective," that does not necessarily mean the permit application is no longer "approved" by the local government. Remand of a decision can occur for any number of reasons having little to do with the substance of an approval. *Conte v. City of Eugene,* 78 Or LUBA 289 (2018).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA sustains petitioner's assignment of error and remands a local government's decision denying petitioner's application, LUBA will address an intervenor's contingent cross assignments of error in a cross petition for review, where those cross-assignments of error raise issues that might provide additional bases for remanding the decision, in order to correct other alleged errors on remand. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A petitioner's argument that an application to modify a site plan to replace a previously approved produce stand with a coffee kiosk cannot be processed as a modification, but instead requires a new site plan application, does not provide a basis for remand, where the local government adopted findings rejecting that argument, and the petitioner does not challenge those findings. *Aboud v. City of Stayton*, 77 Or LUBA 300 (2018).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA's review of an historic review board decision resulted in LUBA remanding the decision for the historic review board to answer threshold jurisdictional questions, but no issue was presented to LUBA regarding who the decision maker on remand should be, the city council does not err by addressing and answering those threshold jurisdictional questions on remand, instead of allowing the historic review board to answer those questions. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioners seek reversal or remand of the city's decision pursuant to OAR 661-010-0071, and LUBA's decision agrees with petitioners that the city's decision improperly construed the municipal code and was not supported by substantial evidence in the record, but it is possible on remand that the petitioner's proposal could demonstrate compliance with the municipal code without significant changes to the proposed development, remand is the appropriate remedy. *McMonagle v. City of Ashland,* 76 Or LUBA 1 (2017).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a comprehensive plan policy requires the city to provide information to allow public participation in land use proceedings, and the city does not respond to a request for information for over a month, that delay is not a basis for remand where petitioner's request was broad, did not express any urgency and did not say the request was submitted with regard to any particular proceeding. In that circumstance, the city's delay in responding and its requirement that petitioner submit a public records request to more clearly identify the scope of the request was not error. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioner's allegations that applicants for quasi-judicial land use approval purchased property from the city and helped elect the mayor and city councilors falls far short of demonstrating disqualifying bias under *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973). *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In evaluating a bias challenge, LUBA is to limit its consideration to the quasi-judicial matter where the bias challenge is raised and may not consider actions by the decision maker that are unrelated to that matter. *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 341 P3d 790 (2014). *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In considering whether new comprehensive plan and zoning map designations are consistent with statewide planning goal, comprehensive plan and code requirements of adequate and safe transportation facilities, a city does not err by concluding the new designations will have no impact on those facilities because the new designations include a condition that development under the new designations be suspended as soon as it generates the same traffic impact that would be generated under the existing acknowledge comprehensive plan and zoning map designations. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where the local code contains separate standards for on-site versus off-site storm water quality management, and an applicant relies solely on on-site management to satisfy code provisions regarding storm water quality and does not propose any off-site management, it is clear by implication that the applicant did not believe that the standards governing off-site storm water quality management applied. Nonetheless, when the hearings officer apparently believed that the applicant proposed off-site management, the issue of whether off-site storm water quality management standards applied was "raised in the record" before the hearings officer. *Rockbridge Capital v. City of Eugene*, 75 Or LUBA 364 (2017).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA has affirmed a local government's primary interpretation of a comprehensive plan policy, supporting the local government's decision to deny the application, LUBA need not resolve challenges to independent, alternative interpretations supporting denial. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA has no express statutory authority to summarily reverse or remand a decision without reviewing the merits of the appeal, absent the written stipulation of all parties. *Conte v. City of Eugene*, 75 Or LUBA 532 (2017).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA will not affirm a hearings officer's decision based on a legal theory that application of a rural industrial zone to rural property does not require an exception to Goal 14, where the hearings officer did not

adopt that theory and instead approved an exception to Goal 14 to apply the rural industrial zone. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA need not determine whether a city council erred by approving a dwelling because the dwelling's prior DEQ septic system permit has expired and a septic system does not qualify as a "required public facility" under the code, where a sewer improvement district boundary was expanded to include the dwelling thus allowing the dwelling to be connected to the public sewer system, the expansion decision was not challenged, and the city council changed its decision following a LUBA remand of its initial decision to require that the dwelling connect to the public sewer system. *Evans v. City of Bandon*, 74 Or LUBA 418 (2016).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. When called upon to determine the applicability or meaning of a statute, LUBA is not limited to the parties' arguments. *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a hearings officer does not take the position that his inability to verify the nature and extent of certain aspects of a prior concrete batch plant makes it impossible to determine whether an application to alter that prior nonconforming concrete batch plant will result in a more intensive use or result in greater adverse impact on the surrounding neighborhood, but intervenor does not file a cross-petition for review to assign error to that aspect of the hearings officer's decision, LUBA will not consider whether that position could provide an independent basis for denying the requested alteration. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioners concede that a hearings officer was not legally obligated to develop conditions of approval that would make an application for alteration of a nonconforming use approvable, and petitioners proposed no conditions of approval themselves that would have permitted the hearings officer to approve the alteration, petitioners fail to demonstrate error in the hearings officer's decision. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a hearings officer concludes that an application for nonconforming use verification does not include a request to approve alterations to the nonconforming use, but the hearings officer also observes that future applications for alterations are unlikely to be approved under the county code standards that apply to alterations, the observation is dicta, and not a basis for reversal or remand. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In some circumstances a local government may have to provide some interpretation or findings explaining its understanding of a subjective standard such as a requirement to adopt buffers that "ensure compatibility" between urban and rural agricultural uses. However, in the context of a legislative proceeding to adopt regulations for such buffers there is no inherent obligation to adopt an interpretation of the standard, and the failure to adopt an interpretation is not in itself a basis for

reversal or remand. *Forest Park Neighborhood Assoc. v. Washington County,* 73 Or LUBA 193 (2016).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A county finding that wind turbines are a conditional use in a commercial zone is not reversible error, even though wind turbines are not listed as a conditional use in the zone, where the balance of the decision clearly demonstrates the county in fact utilized its authority to approve uses that are similar to listed permitted and conditional uses in the zone to approve the wind turbines. *Burgermeister v. Tillamook County,* 73 Or LUBA 291 (2016).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where an assignment of error can be read to advance a "literal" interpretation argument, but that argument is not clearly stated and is undeveloped, LUBA will not consider the argument. *Burgermeister v. Tillamook County,* 73 Or LUBA 291 (2016).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a decision that rezoned property specifically authorized development of the rezoned property in advance of adoption of a concept plan for the area, in an appeal of a subsequent decision approving development of the property, LUBA's scope of review does not permit review of an argument that the concept plan must be adopted before development may be approved for the rezoned property. Raising a legal issue in the development approval decision that was resolved in the rezoning decision constitutes an improper collateral attack on the rezoning decision. *Graser-Lindsey v. City of Oregon City,* 72 Or LUBA 25 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An assignment of error that argues that the county erred in failing to impose the same conditions of approval that it imposed more than five years earlier in a decision approving the same proposal that has since become void provides no basis for reversal or remand of the decision, where the petitioner does not identify any requirement in the county code or state law or regulation that obligates the county to carry over previously imposed conditions of approval simply because they were imposed five years earlier. *Devin Oil Co., Inc. v. Morrow County*, 72 Or LUBA 240 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a city council adopts alternative interpretations of a disputed standard that allows building height increases, and approves a proposed building height increase under both interpretations, the city's decision must be affirmed where the petitioner at LUBA only assigns error to one of the city council's interpretations. *Preserve the Pearl, LLC v. City of Portland*, 72 Or LUBA 261 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An assignment of error that assigns error to a county's finding that land does not qualify as "wildlife habitat" as that term is defined at OAR 660-023-0110(1)(b) provides no basis for reversal or remand, where the challenged decision only takes the position that the subject property is poor quality wildlife habitat in justifying a decision under OAR 660-023-0050(c) to fully allow uses that conflict with the poor quality wildlife habitat. *ODFW v. Crook County,* 72 Or LUBA 316 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A city council's occasional erroneous reference to a "Definition of Village Character" as a "purpose statement" is not a basis for remand, where it is clear that the city council simply refused to interpret the definition as a mandatory permit approval standard that required the city to compare proposed development with existing development to determine if the proposed development is "small scale." *LO 138 LLC v. City of Lake Oswego,* 71 Or LUBA 195 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where respondents respond to petitioner's argument that a proposed development violates comprehensive plan standards by arguing in their response brief that the challenged decision is a "limited land use decision" and the plan policies therefore do not apply under ORS 197.195(1) because the plan policies have not been incorporated into the city's land use regulations, and petitioner does not respond to that argument at oral argument or seek permission to respond in a reply brief, petitioner's assumption that the plan policies apply is inadequate to state a basis for reversal or remand. *LO 138 LLC v. City of Lake Oswego,* 71 Or LUBA 195 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. That a local government may have erroneously found that a natural gas pipeline is not a water-related use provides no basis for reversal or remand, where the county does not rely on that finding in denying the application for permit approval for the pipeline. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Absent any developed argument as to why a facility used to board horses is an "agricultural building" as defined in Chapter 4 of the Uniform Building Code and is not a "stable" as defined in the county's zoning and development ordinance, LUBA will affirm the county's conclusion that the building is a stable and not an agricultural building. *Stavrum v. Clackamas County,* 71 Or LUBA 290 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. No statute or local code provision prohibits a party from submitting an application for a conditional use permit to settle an ongoing enforcement matter and subsequently arguing during the proceedings on the application that the proposed use is not a conditional use, but rather is a permitted use in the zone. *Stavrum v. Clackamas County,* 71 Or LUBA 290 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Issue preclusion bars relitigation of an issue in subsequent proceedings when the issue has been determined by a valid and final determination in a prior proceeding, but issue preclusion only applies if all of the five requirements set out in *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993), are met. Those five factors are as follows: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Widgi Creek Homeowners Association v. Deschutes County,* 71 Or LUBA 321 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In a variety of contexts both the Court of Appeals and LUBA have held that decisions rendered in early stages of a multi-stage approval process can be final (appealable) land use decisions. In such cases, issues that could have been raised, but were not raised in early stages, and issues that were raised and resolved adversely to a petitioner in early stage decisions that were not appealed, generally may not be raised by that petitioner in appeals of a later stage decision. In rejecting arguments in appeals of subsequent stage land use decisions that in reality are a belated challenge to earlier stage land use decision, LUBA has sometimes referred to those arguments as a "collateral attack" on those earlier stage land use decisions. *Widgi Creek Homeowners Association v. Deschutes County*, 71 Or LUBA 321 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A challenge to a decision that grants tentative subdivision plan approval for a 24-lot subdivision is not a collateral attack on prior decisions that (1) granted site plan approval for a 42-unit condominium project, or (2) approved a 26-lot subdivision, because the proposed 24-lot subdivision is not a subsequent phase of a multi-phase process but rather an application for a new development proposal. *Widgi Creek Homeowners Association v. Deschutes County*, 71 Or LUBA 321 (2015).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA will affirm a local government's conclusion that an application to modify a condition of approval imposed in a prior decision does not propose dredging or filling, where no ground disturbing activity of any kind is proposed that differs from the ground disturbing activity approved in the prior decision. *McCaffree v. Coos County*, 70 Or LUBA 15 (2014).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA will not entertain arguments based on equitable estoppel unless the proponent first provides a sufficient basis to conclude that the legislature granted LUBA the authority to reverse or remand a land use decision based on equitable doctrines. *Macfarlane v. Clackamas County*, 70 Or LUBA 126 (2014).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Even if application requirements have not been satisfied, that failure does not provide a basis for reversal or remand of the decision where the alleged failure to comply with the application requirements has not resulted in noncompliance with any approval standards. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a petitioner's entire argument is that the location of a drywell and a sedimentation manhole are shown in opposite locations on the approved plan and a later operation and maintenance plan are reversed and the locations shown on the operation and maintenance plan appear to be an inadvertent labeling error, the cited plan differences provide no basis for remand. *Beaumont-Wilshire Neighbors v. City of Portland*, 68 Or LUBA 393 (2013).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a local government adopts one approach over another for achieving overlapping and generally worded planning goals, LUBA will rarely be in a position to second guess the local government's choice. *Stevens v. Clackamas County*, 68 Or LUBA 490 (2013).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An assignment of error that challenges a local government's rejection of a legal theory that petitioner does not assert on appeal would normally provide no basis for remand, even though the challenge is meritorious. However, where the local government in rejecting that legal theory decides a legal issue that is properly decided by a circuit court rather than the county, LUBA will sustain the assignment of error. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 43 (2013).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A notice of decision's characterization of a decision as legislative when it is actually a quasi-judicial decision does not, in itself, warrant remand so long as the relevant criteria were applied and there were no procedural errors that prejudiced petitioner's substantial rights. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a county code requires that bias challenges be filed at least 48 hours before the public hearing on a quasi-judicial matter, and there is no reason why the challenge could not have been filed before or during that hearing, petitioner's challenge filed three days before board of commissioners meeting where the board approved the written decision and findings comes too late. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where contract consents to annexation have been executed and recorded and there is nothing on the face of the contract consents that calls their validity into question, LUBA does not have authority under ORS 197.835 to consider the contract consent parties' claims that the contract consents were invalidly coerced or that those contract consents have been unilaterally revoked. Claims that the contract consents are invalid or have been revoked must be pursued in circuit court. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Notwithstanding that a city erroneously determined that a particular section of the development code exempted a permit applicant from development code buffer requirements, where another section of the development code cited by the petitioner clearly does exempt the permit applicant from the buffer requirements, LUBA will affirm the city's decision. ORS 197.835(11)(b). *Nielsen v. City of Gresham*, 66 Or LUBA 24 (2012).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where the county land use regulations at issue are 38 pages long and the city land use regulations at issue are 69 pages long, a petitioner's undeveloped argument that the city regulations that will apply to the uses authorized by the zoning district the city applied to property will not "most closely approximate" the county zoning it replaced, when compared to another city zone, is not sufficiently developed for review and will be rejected for that reason. *Mintz v. City of Beaverton*, 66 Or LUBA 118 (2012).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. That a city may have posted an inaccurate copy of its comprehensive plan on its website during permit proceedings

does not provide a basis for remand of the decision that followed those permit proceedings. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where an assignment of error does not challenge the reasoning that led a county to conclude a post-acknowledgment plan amendment would be necessary to mine a particular mineral, an assignment of error that asks LUBA to remand the decision because the decision maker might change its mind about whether the post acknowledgment plan amendment is necessary, based on LUBA's disposition of another assignment of error, presents no basis for remand. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA will not consider a petitioner's argument that a vacation decision that was initiated by a city council violates a statutory vacation standard where petitioner omits and fails to address in her petition for review statutory language that suggests the cited statutory standard applies only to vacation decisions that are initiated by petition rather than by city council initiative. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. ORS 215.030, which provides that no more than two voting members of a county planning commission can be principally engaged in real estate sales or development, does not specify that a planning commission decision is invalid or subject to reversal or remand because the planning commission membership violates the statute. ORS 215.030 is silent regarding the consequences and potential remedies for violation of the membership requirement. *O'Brien v. Lincoln County*, 65 Or LUBA 286 (2012).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where the decision before LUBA is a governing body decision based on the recommendation of a planning commission, that the planning commission membership may have violated the requirements of ORS 215.030 limiting the number of members principally engaged in real estate sales or development does not provide a basis to reverse or remand the governing body's decision. *O'Brien v. Lincoln County*, 65 Or LUBA 286 (2012).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In a county code enforcement proceeding before a hearings officer, petitioner's complaints that a county code enforcement officer improperly interfered with pending civil litigation between petitioner and his neighbor and improperly contacted the Oregon Department of Fish and Wildlife regarding the county hearings officer's decision in the code enforcement proceeding after the hearings officer's decision was entered provide no basis for reversing or remanding the hearings officer's decision. The alleged improprieties by the county code enforcement officer may be actionable in a different forum, but they provide no basis for remanding the county hearings officer's decision. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. The exclusive remedy for an alleged failure by a county code enforcement officer to produce requested public records is to petition the county district attorney for relief under ORS 192.460. Where the disputed

photographs and the substance of the disputed field notes were made part of the record before a hearings officer in a land use code enforcement proceeding and petitioner was permitted to submit contrary evidence and cross examine the code enforcement officer in the hearing before the hearings officer, there was no prejudice to petitioner's substantial rights and no basis for remand. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a hearings officer's order appears to require that a property owner submit a plan to the Oregon Department of Fish and Wildlife to replant a significant area of petitioner's property with native vegetation and the factual and legal basis for that requirement is not apparent in the hearings officer's decision, the decision must be remanded so that the hearings officer may explain the factual and legal basis for the order. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a city's stated rationale for its 20-year employment projections in its economic opportunities analysis is the OAR 660-024-0040(9)(a) safe harbor, the city may not adopt an alternative legal rationale for the 20-year employment projections for the first time in its brief at LUBA. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a county's decision that land is not suitable for commercial forest use misapplies the test that LUBA determined must be applied in an earlier appeal, but the county also properly applies and adequately explains why the land does not qualify as suitable for commercial forest uses under the correct test, the county's misapplication of the test does not provide a basis for reversal or remand. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A hearing official's failure to require that the applicant for a group care home show exactly where the proposed home would be located within a proposed 7,700-square-foot footprint, how large the home would be and what it would look like provides no basis for reversal or remand, where the applicable approval standard only requires that the home not have significant adverse impacts, and the hearing official explains that the potential number of residents and other operational characteristics of the home are known and the impacts of the home are more likely to be attributable to the operational characteristics than the design, size and location of the home. *Phillips v. Lane County*, 62 Or LUBA 92 (2010).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An Oregon Department of Transportation (ODOT) decision to adopt an interchange area management plan that calls for closure of a particular access without the additional formal review that is called for in an intergovernmental agreement between ODOT and a city may constitute a violation of the intergovernmental agreement, but it does not provide a basis for reversing or remanding ODOT's decision to adopt the an interchange area management plan. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Under common law a property owner has a right of access to public thoroughfares. However, that common law

right of access does not extend to a right to access of a particular type or at a particular location. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Absent permit approval criteria requiring otherwise, a petitioner cannot challenge an earlier unappealed decision extending a permit approval for 18 months, in the context of an appeal of a later decision modifying the permit. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Even assuming LUBA has authority to reject an otherwise meritorious exhaustion/waiver challenge based on the argument that the county is equitably estopped from asserting exhaustion/waiver due to alleged erroneous advice from county planning staff in accepting the local notice of appeal, the argument fails where based on petitioners' affidavits the best that can be said with confidence is that there was mutual misunderstanding and miscommunication regarding the sufficiency of the local notice of appeal and what issues petitioners wished to raise therein. *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a petitioner fails to challenge all the reasons a hearings officer gives for finding that a proposed wind turbine facility will not force a significant change in or significantly increase the cost of accepted farm practices on nearby farms, petitioner's challenge to the adequacy of one of the reasons the hearings officer gave provides no basis for reversal or remand. *Falls v. Marion County*, 61 Or LUBA 39 (2010).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA will not consider an assignment of error that is presented only in a footnote. *Falls v. Marion County*, 61 Or LUBA 39 (2010).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a local government's reasoning is difficult to follow and based on LUBA's understanding of that reasoning the local government should have required measures to screen mining from surrounding uses but failed to do so, remand is appropriate so that the local government can clarify its reasoning or require screening. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a petitioner does not challenge a hearings officer's finding that petitioner's use of his property for a wedding event required review and county approval under one code provision, and petitioner does not allege his wedding event received county review and approval, petitioner's arguments that the use could have been approved under a different code provision provide no basis for reversal or remand. *Reed v. Jackson County*, 61 Or LUBA 253 (2010).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In considering an application for a three-parcel partition, the failure of an existing intersection that is not adjacent to the property to satisfy local zoning ordinance standards that apply to the design and construction of a new road or intersection does not provide a basis for the county to deny an application for a

partition, where no new roads or intersections are proposed as part of the partition. *Pelz v. Clackamas County*, 59 Or LUBA 219 (2009).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Under OAR 661-010-0073, LUBA will reverse a decision where "[t]he decision violates provision of applicable law and is prohibited as a matter of law." However, where a decision *was* prohibited as a matter of law on the date it was rendered, but *is* no longer prohibited as a matter of law on the date of LUBA's decision, remand rather than reversal is appropriate. *Remington Ranch, LLC v. Crook County*, 59 Or LUBA 361 (2009).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA remands a decision by sustaining one or more assignments of error, it does not necessarily mean that LUBA agreed with every argument or sub-argument the petitioner advanced in the sustained assignments of error, or that on remand the local government must address every argument in the petition for review under those assignments of error. Instead, the local government must address the issues described in the portion of LUBA's opinion remanding the decision. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a city does not rely on the ORS 836.640 through 836.642 "through the fence" pilot program to adopt an Airport Related zoning district that authorizes airpark residential development with through the fence access to an airport, arguments that ORS 836.640 through 836.642 do not authorize the kind of through the fence access that is permitted in the city's new Airport Related zoning district provide no basis for reversal or remand. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A city's legislative decision to adopt a new Airport Related zoning district without applying the new zoning district to any property is not reversible where petitioner fails to demonstrate that the zone could in no circumstances be applied to property in the future without violating applicable legal standards. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An argument that a county erred by changing a proposed zoning ordinance text amendment approximately a month before the change was adopted provides no basis for reversal or remand where a detailed explanation of the proposed change was provided shortly after the change was introduced, many written comments were received and one of the petitioners submitted detailed comments opposing the proposed change. *Carver v. Deschutes County*, 58 Or LUBA 323 (2009).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a petitioner argues that a comprehensive plan amendment is inconsistent with a comprehensive plan policy, but the cited comprehensive plan policy has been repealed, petitioner provides no basis for reversal or remand. *Carver v. Deschutes County*, 58 Or LUBA 323 (2009).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In challenging a local government's finding that a permit applicant failed to carry its burden to demonstrate the

application complies with applicable approval criteria, a petitioner must assign error to all the local government's bases for that finding. If a petitioner fails to assign error to any independent basis for denying a permit application, the decision must be affirmed. *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where arguments in support of an assignment of error are not sufficiently developed to demonstrate error, LUBA will summarily reject those arguments. *Kipfer v. Jackson County*, 58 Or LUBA 436 (2009).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA sustains an assignment of error and remands a county decision, and the county hearings officer adopts approximately two pages of findings on remand addressing that assignment of error, it is the hearings officer's reasoning in rejecting the assignment of error that is before LUBA in a subsequent appeal. Where a petitioner merely re-alleges the assignment of error and makes no meaningful attempt to challenge the hearings officer's reasoning in rejecting the assignment of error, LUBA will deny the assignment of error. *Kipfer v. Jackson County*, 58 Or LUBA 436 (2009).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Assignments of error that consist of a single sentence alleging error and that include no argument explaining why the local government erred in the manner alleged are undeveloped and do not provide a basis for reversal or remand. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An argument that is insufficiently developed for review provides no basis for reversal or remand of a land use decision. *Hermanson v. Lane County*, 56 Or LUBA 433 (2008).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Arguments that are directed at a concept plan that is in the process of being adopted provide no basis for reversal or remand of separate annexation decision. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA determines that three county findings regarding the significance of an aggregate site are not supported by substantial evidence, are inadequately explained, or fail to appreciate the significance of certain evidence in the record, remand is required where LUBA cannot assume the findings were minor or unimportant parts of the county's ultimate decision that the applicant failed to demonstrate that the aggregate site qualifies as "significant," under OAR 660-023-0180(3). *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where it is undisputed that an application meets all other approval criteria, and the only basis for the county's second denial of the application is a code provision that the county is precluded from applying, LUBA will reverse rather than remand the decision. *Curtain v. Jackson County*, 56 Or LUBA 649 (2008).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a city's decision explains how its zoning ordinance assigns floor area ratios to properties and that the past, present or future use of property does not affect a property's assigned floor area ratio, a petitioner's argument that property that will shortly be developed as a park should not have any floor area ratio provides no basis for reversal or remand. *Trinkaus v. City of Portland,* 56 Or LUBA 771 (2008).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An isolated statement by a design review commission member that an application is "a poster-child for floor-area transfer" is not sufficient to show he prejudged an application for permit approval. And even if it was, it would provide no basis for reversal or remand where (1) the design review commissioner did not participate in the decision on the permit, and (2) the decision on appeal to LUBA is a city council decision that affirmed the design review commission decision and there is no basis for imputing any prejudgment by the design review commissioner to the city council. *Trinkaus v. City of Portland,* 56 Or LUBA 771 (2008).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA sustains an assignment of error because the county's approval of the subdivision application is "prohibited as a matter of law," reversal rather than remand is the appropriate disposition. *Dunn v. Yamhill County,* 55 Or LUBA 206 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA's rules do not authorize LUBA to affirm a decision in part and reverse or remand that decision in part. *7th Street Station LLC v. City of Corvallis,* 55 Or LUBA 321 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A local code provision that allows the city and county to consider amendments to a UGB using "the latest Annual Development Report * * * as a guide" does not require the city and county to prepare such a report, and an assignment of error based on the failure to prepare such a report provides no basis for reversal or remand. *Sommer v. City of Grants Pass,* 55 Or LUBA 400 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a petitioner's only challenge to the decisions being appealed is based on an argument that the decisions fail to satisfy criteria that are not applicable to the challenged decisions, petitioner's challenge provides no basis for reversal or remand. *Sommer v. City of Cave Junction,* 55 Or LUBA 423 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A hearings officer's conclusion that a deed had the effect of aggregating separate lots within a subdivision was correct given the totality of the circumstances surrounding the execution of the deed, including a condition of approval in a previous decision requiring aggregation of the lots and the absence of any statute or other applicable law governing lot aggregation. *McKeel v. Multnomah County,* 55 Or LUBA 608 (2008).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In a LUBA appeal, petitioners' challenges to local government decisions other than the decision that is the

subject of the appeal provide no basis for reversal or remand. *Robson v. City of La Grande*, 54 Or LUBA 10 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An equipment shed may or may not be allowed as part of a utility, where the zoning ordinance defines a "building," in part, as a "structure" and allows utilities in all zones but prohibits such utilities from including a "building." Because the zoning ordinance distinguishes between "structures" and "accessory structures," the issue becomes whether the equipment shed qualifies as an "accessory structure" and whether the prohibition is limited to "structures" and does not extend to "accessory structures." *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A county's interpretation of a local code provision as allowing the construction and use of a motorcycle track without review is incorrect where that provision requires site plan review for development of land, the code defines "development" broadly to include making a physical change in the land, and evidence in the record indicates that a bulldozer was used to develop a large portion of the land with a track and jumps. *Love v. Klamath County*, 54 Or LUBA 410 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A county does not commit error in approving a reduced minimum lot or parcel size in a portion of its exclusive farm use zone simply because it did not require the applicant to supply an accurate map of the affected area, where the record includes an accurate metes and bounds description of the affected area and an assessors map that shows the affected tax lots. *Thompson v. Umatilla County*, 54 Or LUBA 531 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a local government finds that there is a lack of evidence that vacant buildable lands inside an urban growth boundary are available for development, the local government impermissibly avoids the burden placed on it by Goal 14 and the applicable administrative rules to demonstrate that additional land is needed inside the urban growth boundary for urban development. *Hildenbrand v. City of Adair Village*, 54 Or LUBA 734 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a petitioner challenges a city council's findings concerning a screening and buffering criterion, but fails to challenge a finding that the city council adopted by reference, and that finding addresses and finds that the proposal complies with that criterion, LUBA will deny the assignment of error. *Ettro v. City of Warrenton*, 53 Or LUBA 485 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A party who assigns error to the city's failure to find that the lot sizes in a proposed subdivision are compatible with the lot sizes of adjacent properties must establish that such a finding is legally required. Where a party does not explain why the statutes, local code provisions, and comprehensive plan provisions that the party cites apply or have any bearing on the disputed decision, the assignment of error fails to state a basis for reversal or remand. *Douglas v. City of Salem*, 53 Or LUBA 567 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a city's alternative theory for affirming a decision does not appear in the city's findings, LUBA will remand the decision. *Douglas v. City of Salem*, 53 Or LUBA 567 (2007).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA does not have authority to declare a city permit decision "moot, void or invalid" simply because the applicant corporation failed to renew its corporate registration on time. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA will reject a petitioner's argument that a city adjustment committee erred by failing to find that the zoning of a property reverted to its prior zoning because a rezoning condition of approval was violated, where petitioner fails to cite any authority to contradict the city's position that the adjustment committee lacks authority to question the zoning shown on the city's official zoning map. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioners' arguments under an assignment of error largely ignore the three-part rationale set out in a city's findings concerning the approval criteria at issue under that assignment of error, and petitioners instead erroneously characterize a city agency's "suggestion" as an essential basis for the agency's support for the requested adjustment, petitioners' assignment of error will be denied. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Arguments that the planning commission erred in denying a variance request based on concerns regarding traffic levels do not provide a basis to reverse or remand the challenged decision, where the challenged decision is the city council's, and the city council did not deny the variance based on traffic levels. *Krishchenko v. City of Canby*, 52 Or LUBA 290 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioners may not ignore a hearings officer's findings that particular adjustment/variance criteria do not apply in a particular circumstance and then argue only to LUBA that the proposal violates those adjustment/variance criteria. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioners' assignment of error challenging a hearings officer's decision to consider whether the adjustment/variance criteria that had been applied from the beginning during the local proceedings were the correct adjustment/variance criteria will be denied, where petitioners fail to assign error to the hearings officer's explanation for why he reconsidered whether those criteria were the correct criteria to apply and petitioners make no effort to argue that the hearings officer's explanation is faulty in some way. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A petitioner may not fail to assign error to a finding that certain issues were not preserved and are not within the hearings officer's scope of review, and instead on appeal to LUBA, simply assign error with

respect to the same issues that the hearings officer found were not preserved. *Franzke v. Tigard*, 52 Or LUBA 761 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioners appeal a planning commission decision that grants variances and subdivision approval both to LUBA and to the city council, but petitioners do not appeal the city's subsequent decision that there is no right of local appeal to appeal the planning commission decision to the city council, petitioners may not challenge the city's decision that there is no right of local appeal in their LUBA appeal of the planning commission decision. The LUBA appeal is limited to the planning commission decision. *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where all parties believed that a two-variance subdivision proposal was before the planning commission, the planning commission voted to approve the two-variance subdivision, but the planning commission's final written decision approved a prior, withdrawn three-variance subdivision proposal with a slightly different lot configuration, remand is required so that the city can adopt a written decision that approves the two-variance subdivision that the planning commission intended to approve. *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. That a proposal was called an expansion of an existing site at the beginning of local deliberation and was later referred to as a new mining site, in and of itself, provides no basis for reversal or remand. *Lindsey v. Josephine County*, 51 Or LUBA 383 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioners must do more than argue that a county erroneously relied on a noise study that assumed that the DEQ standards for existing noise sources apply; petitioners must identify which new noise source standards they believe apply and why. *Lindsey v. Josephine County*, 51 Or LUBA 383 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner appeals the city council's determination that a local appeal of a planning commission decision was untimely filed, petitioner's allegation that members of the planning commission are biased does not provide a basis for reversal or remand. *Jacobsen v. City of Winston*, 51 Or LUBA 602 (2006).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In an appeal of a land use decision that applies an acknowledged comprehensive plan policy a petitioner may not challenge the validity of the acknowledged comprehensive plan policy. *Sommer v. Josephine County*, 49 Or LUBA 134 (2005).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A county's error in finding that ORS 215.253 imposes an absolute bar on adopting and applying local land use regulations to farm uses provides no basis for remand of land use decision approving a feedlot, where petitioners identify no existing, applicable local land use regulations that apply to county approval of a feedlot. *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107 (2004).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A petitioner's expression of disagreement with the substance of a new design review ordinance is, in and of itself, insufficient to provide a basis for reversal or remand. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Arguments that (1) the notice that preceded the public hearings on a post-acknowledgment land use regulation amendment did not separately list every proposed change, and (2) the local government made additional modifications to the proposed amendments after the final evidentiary hearing provide no basis for remand, where the petitioner cites no legal authority that the notice of hearing must specifically list every proposed change or that the proposed amendments may not be modified following the final evidentiary hearing. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a petitioner's challenge to a conditional use permit allowing 45 cubic yards of fill in a wetland is based on the mistaken premise that the conditional use permit also authorized many more cubic yards of fill that were not placed in wetlands and the fill placed outside the wetlands did not require a conditional use permit, petitioner's challenge provides no basis for reversal or remand. *Bonnett v. Deschutes County*, 46 Or LUBA 318 (2004).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An assignment of error that is based on a mistaken assumption about the reason why a local appellant's appeal was rejected provides no independent basis for remand. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An adjoining property owner who faces loss of his only current access in the future and assigns error to a city council's decision not to require a subdivision applicant to provide access presents no basis for reversal or remand, where the city council interprets a local code provision that requires subdivision applicants to provide access to adjoining properties not to apply where the adjoining properties currently have access and the property owner fails to demonstrate how the city council's interpretation is erroneous under ORS 197.829(1). *McFall v. City of Sherwood*, 46 Or LUBA 735 (2004).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A city may not approve a modification to a site plan for one property that has the effect of altering the approved site plan of a second property, unless the owner of the second property agrees to the modification. *Farrer v. City of Grants Pass*, 45 Or LUBA 117 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Administrative rules promulgated by the Environmental Quality Commission (EQC) that set out the policies the EQC will apply when considering capital funding requests do not constitute applicable approval standards that a city must apply when considering an annexation request. *Just v. City of Lebanon*, 45 Or LUBA 162 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Unless the requirements of a periodic review remand order are embodied in a city's comprehensive plan or other applicable regulations, an allegation that a proposed comprehensive plan amendment and zone change are inconsistent with that periodic review remand order is not a basis for reversal or remand. *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Even if a city erroneously applied its zoning ordinance standards for lots or parcels to an applicant's request for a lot line adjustment, that error provides no basis for reversal or remand where the city's decision to deny the lot line adjustment request was not based on those standards. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a city's interpretation that a broadcast radio tower may be allowed in a residential zoning district as a "private utility" and a "utility substation and related facilities" includes a number of erroneous interpretations of the city's zoning ordinance, but LUBA identifies a potentially sustainable interpretation of relevant zoning ordinance terms that would appear to permit approval of the radio tower, remand is nevertheless required where there are reasons why the city might not agree with LUBA's interpretation. *Citizens for Env. Resp. Dev. v. City of Beaverton*, 45 Or LUBA 378 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a county's findings adequately explain its conclusion that a buffer is not necessary to protect adjoining properties from impacts from a hunting preserve, an adjoining property owner's disagreement with that conclusion provides no basis for reversal or remand of the county's decision. *Underhill v. Wasco County*, 45 Or LUBA 566 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. That a county may have required hunting preserve buffers in other decisions that approve hunting preserves does not necessarily mean that the county errs in not requiring a hunting preserve buffer in an appealed decision, where there may have been factual differences or different evidence in the proceedings that led to the appealed decision that explain the different results. *Underhill v. Wasco County*, 45 Or LUBA 566 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An assignment of error that challenges a county's failure to apply code criteria governing zoning map amendments provides no basis for reversal or remand where the assignment of error contends the zoning code criteria should have been applied to a comprehensive plan map amendment. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A city commits no error in denying a request for a fence height variance based on the application as submitted, without taking into account changes to the fence that the applicant stated he was willing to make, where the applicant was invited to submit an amended application and declined to do so. *Finkle v. City of Portland*, 44 Or LUBA 484 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA will not attempt to resolve a largely hypothetical dispute between a petitioner and a county over the degree of incidental social activity that might be permissible at an existing airport in conjunction with any particular activity that the county must allow under ORS 836.616(2). *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. An assignment of error challenging the evidentiary support for an alleged finding that a private bridge is not available to serve a proposed residential development provides no basis for remand where the decision is not based on the alleged finding and petitioner fails to challenge the findings that the city did make in support of its decision. *Oregon Diverse Industries v. City of Jacksonville*, 43 Or LUBA 135 (2002).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA finds that a local government correctly determined that a particular conditional use approval criterion applies, but LUBA disagrees with the local government's reasons for concluding that the criterion applies, the local government's erroneous reasons for correctly concluding that the criterion applies provide no basis for reversal or remand. *Dundas v. Lincoln County*, 43 Or LUBA 407 (2002).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In determining that an applicant failed to carry his burden to demonstrate that a proposed home occupation would be carried out inside a building and in a manner that would not unreasonably interfere with other uses, the county did not err by considering existing and past conditions on the property. *Hick v. Marion County*, 43 Or LUBA 483 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where the response brief does not respond to the merits of the petitioners' assignments of error, and LUBA cannot resolve those merits absent some assistance from the respondent, LUBA will remand the decision to the county to address petitioner's assignments of error. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 511 (2003).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioner's argument that the county failed to address negative impacts resulting from a UGB expansion provides no basis for reversal or remand where petitioner fails to allege below that negative impacts existed. *Friends of Linn County v. Linn County*, 41 Or LUBA 342 (2002).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A city council finding that corrects a local appellant's citation to a city code provision provides no basis for reversal or remand where the correction has no effect on the city council's disposition of the merits of the local appellant's challenge. *Sattler v. City of Beaverton*, 41 Or LUBA 295 (2002).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A petitioner's challenge to a finding because it is more responsive to one code criterion than to another provides no basis for reversal or remand where the city's findings as a whole show that both criteria have been met. *Sattler v. City of Beaverton*, 41 Or LUBA 295 (2002).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A decision to revoke a permit is similar to a denial in that only one basis for revocation, supported by substantial evidence, is necessary to support a city's decision. A petitioner's challenge to only one of three bases for a city's decision to revoke a permit does not provide a basis for reversal or remand. *Howard v. City of Madras*, 41 Or LUBA 122 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Any error that may have been committed by failing to provide a proposed comprehensive plan amendment to DLCD 45 days before the first evidentiary hearing was corrected on remand by offering to provide the proposal to DLCD more than 45 days before the evidentiary hearing on remand, where there is no contention that DLCD failed to receive the proposal or failed to provide notice of the proposal in accordance with ORS 197.610(1) and DLCD advises the county that it does not oppose the proposal. *Donnell v. Union County*, 40 Or LUBA 455 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Assignments of error that are directed at a decision other than the decision that is the subject of the LUBA appeal provide no basis for reversal or remand. *Robson v. City of La Grande*, 40 Or LUBA 250 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a city planner expresses an opinion in a transmittal letter, but the city council decision that is transmitted with the letter clearly does not express that opinion, the expression of opinion is not reviewable by LUBA in an appeal of the city council's decision. *Robson v. City of La Grande*, 40 Or LUBA 250 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A lengthy delay in filing the local record with LUBA does not substantially prejudice petitioner's right to the speediest practicable review, where the delay was partially attributable to petitioner's failure to bring the local government's noncompliance to LUBA's attention. *Petersen v. Columbia County*, 39 Or LUBA 799 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A county is not estopped from denying an expansion of a nonconforming use because it required improvements to a shop building to satisfy building code requirements, where petitioner does not demonstrate how the county's actions concerning the building permit translate into approval of the expanded uses within the structure. *Hal's Construction, Inc. v. Clackamas County*, 39 Or LUBA 616 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. While a development may have to eventually comply with federal laws, such as the Endangered Species Act, unless local approval criteria or federal law provisions require that the local decision that approves the development also demonstrate compliance with federal law, the decision need not do so. *McNern v. City of Corvallis*, 39 Or LUBA 591 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. When petitioner disagrees with a local government's interpretation of its own ordinance but fails to acknowledge

or challenge that interpretation, petitioner establishes no basis for determining that the interpretation is clearly wrong. *McNern v. City of Corvallis*, 39 Or LUBA 591 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a city adopts findings addressing issues raised by petitioner during local proceedings, petitioner presents no basis for reversal or remand by repeating those issues at LUBA without challenging the findings the city adopted to address those issues. *Adams v. City of Medford*, 39 Or LUBA 464 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a city's finding that a zoning map amendment will not significantly affect transportation facilities is based on a lengthy transportation impact study, and petitioner attacks that finding based on other evidence of questionable relevance without developing any arguments challenging the transportation impact study, petitioner provides no basis for reversal or remand. *Adams v. City of Medford*, 39 Or LUBA 464 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA will not consider assignments of error challenging a city's findings of compliance with the wrong approval criteria, where the decision must be remanded in any event for the city to apply the correct approval criteria and the issues presented in the assignments of error may not arise on remand. *Willhoft v. City of Gold Beach*, 39 Or LUBA 353 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where the notice of intent to appeal challenges a governing body's decision determining that petitioner has no standing to file a local appeal of a planning director's decision, but the petition for review assigns error only to the planning director's decision, the petition for review provides no basis to reverse or remand the governing body's decision. *Doob v. Josephine County*, 39 Or LUBA 301 (2001).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner challenges a variance condition on the basis that it improperly delegates approval of a retaining wall to the public works director, but petitioner fails to demonstrate how the condition of approval implicates any of the variance approval standards, petitioner's argument concerning the condition provides no basis for remand. *Bates v. City of Cascade Locks*, 38 Or LUBA 349 (2000).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Unless a local code *requires* the governing body to remand a decision to the planning commission if it finds that the decision is unsupported by findings, the governing body's decision to modify the planning commission's decision rather than remand it provides no basis for reversal or remand. *Dutchuk v. City of Prineville*, 38 Or LUBA 323 (2000).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where the local government's findings fail to quantify the impacts of the proposed development with sufficient particularity to justify the exactions it imposed, remand is appropriate, because on remand the city may be able to adopt findings to justify some or all of the exactions it imposed. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a petitioner expresses disagreement with a local government about whether a zoning text amendment violates a comprehensive plan policy, without attempting to demonstrate error in the local government's findings that interpret and apply the comprehensive plan policy, petitioner states no basis for reversal or remand. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Imposition of an ineffective condition as part of a comprehensive plan map amendment may result in remand where the condition is necessary to ensure compliance with a relevant approval criterion. However, such an ineffective condition does not provide a basis for reversal or remand where it is not shown that the condition is necessary to ensure compliance with plan map amendment approval criteria. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In considering whether a farm management plan has been substantially complied with, a county is not required to consider issues that could have been presented in a prior, unappealed decision that authorized a property line adjustment for the two parcels that were the subject of the farm management plan. *Rochlin v. Multnomah County*, 37 Or LUBA 237 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. When the scope of a "planning action," as that term is used in the city's code, is uncertain and subject to multiple interpretations, LUBA will remand to allow the city to decide the scope in the first instance. *Davis v. City of Ashland*, 37 Or LUBA 224 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA will remand rather than reverse a decision approving partitions in conjunction with a nonfarm dwelling, notwithstanding that the resulting partitions violate the minimum parcel size at ORS 215.780(1), where the decision expressly preserves an issue regarding whether the county's 20-acre minimum parcel size was adopted under one of the exceptions to ORS 215.780(1), and thus LUBA cannot determine whether the approval is prohibited as a matter of law. *Alliance for Responsible Land Use v. Deschutes Co.*, 37 Or LUBA 215 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioners do not establish that a land use regulation standard is violated as it is interpreted by the city council, petitioners establish no basis for reversal or remand. *Freedom v. City of Ashland*, 37 Or LUBA 123 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. ORS 197.835(10)(a)(A) mandates that LUBA reverse a land use decision where a "local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]" If a decision is reversed under ORS 197.835(10)(a)(A), ORS 197.835(10)(b) requires that LUBA award attorney fees to the applicant. However, those statutes do not apply to a land use decision that is reversed because it is outside the discretion allowed under an LCDC administrative rule. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA does not have statutory authority to dismiss an appeal of a land use decision *and* direct that particular actions be taken by the city following such dismissal. *Genstar Land Company Northwest v. City of Sherwood*, 36 Or LUBA 787 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where parties stipulate that LUBA may dismiss an appeal or a petitioner withdraws the notice of intent to appeal, LUBA's decision dismissing the appeal expresses no position on the legal effect of actions that may have been taken or may yet be taken pursuant to an agreement entered into by parties to the appeal. *Genstar Land Company Northwest v. City of Sherwood*, 36 Or LUBA 787 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In deciding whether to grant a request for voluntary remand over petitioner's objection, LUBA considers whether (1) all issues presented in the petition for review will be considered on remand and (2) the proceedings on remand will be *capable* of providing the petitioner with everything he would be entitled to from LUBA. In such circumstances, LUBA will grant a motion for voluntary remand over a petitioner's objection unless LUBA concludes that its review to narrow the issues is more important or that the motives for the motion for voluntary remand are improper. *Quest International, Inc. v. City of Silverton*, 36 Or LUBA 259 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioner's assignment of error will not be rejected solely because petitioner failed to challenge alternative findings that state law might preempt the county regulations at issue in the assignment of error, where the hearings officer's alternative finding does not clearly conclude that state law preempts. *Neels v. Clackamas County*, 36 Or LUBA 54 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a hearings officer's findings are inadequate to explain why a proposed use that qualifies as a permitted use as a "household" does not also fall within the definition of a "nursing home," which is only allowed as a conditional use, a remand would normally be required. However, where the facts are not disputed, and LUBA is presented with a straightforward question of law, it may consider whether the proposed use falls within the definition of "nursing home." *Neels v. Clackamas County*, 36 Or LUBA 54 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A motion for voluntary remand will be denied where the local government does not propose to address arguments that the challenged decision is prohibited as a matter of law or arguments that the local government improperly shifted the burden of proof. *Murphy Citizens Advisory Comm. v. Josephine County*, 35 Or LUBA 732 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In determining whether to reverse or remand a land use decision, the question is whether it is the land use decision or the land use proposal that is defective. *Angius v. Washington County*, 35 Or LUBA 462 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA concludes on review that a local decision approving a proposed subdivision cannot be corrected

unless the subdivision is first revised by modifying the original application or submitting a new application, reversal rather than remand is appropriate. *Angius v. Washington County*, 35 Or LUBA 462 (1999).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA does not duplicate the role of a local hearings officer. Where the evidence is conflicting such that a reasonable decision maker could reach different conclusions based on that evidence, the choice of which evidence to believe and which conclusion to reach is for the hearings officer. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner fails to assign error to detailed findings explaining why certain acknowledged comprehensive plan provisions constitute "specific policies" that, under ORS 197.835(7)(b), make it unnecessary for the city to demonstrate compliance with statewide planning goals when amending city land use regulations to implement those policies, LUBA will reject an assignment of error alleging the city erred by failing to demonstrate that the new and amended land use regulations comply with the statewide planning goals. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. When the only decision appealed is a decision changing the required sequence of PUD phases, and the assignments of error provide no basis for reversing or remanding that decision, the decision will be affirmed. LUBA will reject assignments of error that challenge other related decisions that were not appealed. *Claus v. City of Sherwood*, 35 Or LUBA 120 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a county gives adequate assurances that it will comprehensively review petitioner's assignments of error, LUBA will grant a motion for voluntary remand and will not assume the motion for voluntary remand is motivated by delay or other improper reasons simply because there has been a lengthy course of litigation in the matter. *Murphy Citizens Advisory Committee v. Josephine Co.*, 35 Or LUBA 117 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where the petition for review does not identify the ordinance standard that is allegedly violated or what the ordinance requires, petitioners' argument is not sufficiently developed for LUBA review. *Lodge v. City of West Linn*, 35 Or LUBA 42 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner alleges a decision violates an ambiguous land use regulation provision, LUBA must first determine whether the decision includes a reviewable interpretation that is entitled to deference under ORS 197.829(1). *Botham v. Union County*, 34 Or LUBA 648 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA is only required to defer to a local government's express or implied interpretation where the interpretation is adequate for review. *Botham v. Union County*, 34 Or LUBA 648 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where an interpretation cannot be implied by the way the code was applied and cannot be implied to resolve an irreconcilable conflict between code provisions, the decision lacks an implied interpretation. *Botham v. Union County*, 34 Or LUBA 648 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where there is no express or implied interpretation of an ambiguous local code provision, LUBA may interpret the code in the first instance. *Botham v. Union County*, 34 Or LUBA 648 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where the purpose of an ambiguous code provision is not clear and the provision is subject to more than one sustainable interpretation, it is appropriate for LUBA to remand the decision to the local government to interpret its land use regulation in the first instance. *Botham v. Union County*, 34 Or LUBA 648 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner fails to articulate in what respects a local government's findings are inadequate or lacking in evidentiary support, LUBA will not establish petitioner's legal justification. *Larvik v. City of La Grande*, 34 Or LUBA 467 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner contends that findings are inadequate and not supported by substantial evidence, but fails to identify any particular criterion and only expresses disagreement with the city's evaluation of the evidence, petitioner provides no basis for reversal or remand. *Kelley v. City of Cascade Locks*, 34 Or LUBA 374 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A county is not bound by "issue" or "claim" preclusion to a prior finding of noncompliance with an approval criterion in a prior land use proceeding. *Femling v. Coos County*, 34 Or LUBA 328 (1998).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner appeals a decision granting a conditional use permit that petitioner applied for, but does not assign error to any aspect of the decision other than to contend the conditional use permit should not have been required in the first place, petitioner states no basis for reversal or remand. *Recovery House VI v. City of Eugene*, 33 Or LUBA 327 (1997).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A county's decision is subject to remand when the county may be able to correct the defects in its decision. Reversal is appropriate only when the decision is erroneous as a matter of law. *Roberts v. Crook County*, 33 Or LUBA 267 (1997).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Only actions undertaken by the city prior to the date of the final decision being appealed are relevant to LUBA's review. Assignments of error that relate to actions undertaken by the city after the date of its final decision will be denied. *Tucker v. City of Adair Village*, 31 Or LUBA 382 (1996).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a county has never made a decision to partition a parcel, the county's approval of a lot line adjustment, which is premised on the assumption that a partition has occurred, must be reversed. *Higgins v. Marion County*, 30 Or LUBA 426 (1996).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioners fail to develop an argument sufficient for LUBA's review when they dispute a conclusion of compliance with relevant approval standards by summarily incorporating arguments from other assignments of error. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. When petitioners raise concerns about compliance with "applicable standards," but do not specify in their brief what standards or approval criteria are at risk of being violated, petitioners' argument is insufficiently developed to provide a basis for reversal or remand. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Whether LUBA has the authority to reverse a local government decision based on the doctrine of equitable estoppel is unclear. *Sparks v. City of Bandon*, 30 Or LUBA 69 (1995).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Because LUBA's review is limited to the record of an appealed decision, LUBA cannot rely on a determination in another case that a proposed golf course is not a commercial use to support a determination, in the case on appeal, that a proposed golf driving range is not a commercial use. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioners provide no basis for reversal or remand of the challenged decision where they fail to establish the proposed development violates any legal standard. *Nalette v. City of Klamath Falls*, 28 Or LUBA 709 (1995).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner simply asserts the challenged decision ignores her solar access rights, and the challenged decision contains detailed findings on local solar access requirements, petitioner provides no basis for reversal or remand of the challenged decision. *Sullivan v. City of Ashland*, 28 Or LUBA 699 (1995).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioners cannot raise a new basis for reversing or remanding a challenged decision for the first time in a post oral argument motion for evidentiary hearing unless they demonstrate that they seek to present facts unknown to them at the time the petition for review was filed. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a proposed transportation facility includes open space and pedestrian and bicycle facilities to satisfy comprehensive plan policies implementing Goal 8, petitioner's speculation that those facilities

might be eliminated in the future in favor of more traffic lanes provides no basis for reversal or remand. Such changes would require a plan amendment and a demonstration that the altered facility complies with the plan policies. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In the absence of an interpretation of the applicability of zone code regulations to the challenged decision, LUBA cannot determine whether a city council decision approving a road improvement is a statutory land use decision. *Carlson v. City of Dines City*, 28 Or LUBA 411 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA is not authorized to remand a challenged decision to a local government for the local government to conduct evidentiary hearings, without first resolving the assignments of error raised by a petitioner. ORS 197.835(9)(a). *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioner cannot allege for the first time in the petition for review that a document included in the local record was not actually placed before the local decision maker and, consequently, assign the decision maker's reliance on that document as error. *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A petitioner's allegations that an existing fill violates the civil law rule limiting the right of an upland owner to artificially alter discharge of surface waters onto adjoining properties may provide a basis for a cause of action for interference with petitioner's property rights, but does not provide a basis for reversal or remand of a local government decision approving a permit for the fill. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner does not contend a challenged decision is inconsistent with an applicable plan policy, but rather that the decision is unnecessary to implement that policy, petitioner's argument provides no basis for reversal or remand. *Rea v. City of Seaside*, 27 Or LUBA 443 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. That a local government's final written order may not accurately reflect oral comments made by the local decision maker during its deliberations provides no basis for reversal or remand of a challenged decision. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Although the substance of particular objections by neighbors may lead to a conclusion that one or more local code adjustment criteria are violated, the *fact* that one or more neighbors object has no legal significance. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioners repeat the same arguments that were rejected in a prior LUBA appeal, and make no effort to explain why those arguments ought to be sustained in a second LUBA appeal, the arguments will be rejected. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA will reject an assignment of error where petitioners fail to adequately identify the issues they believe the local government failed to respond to and fail to challenge findings which address the general area of concern identified by petitioners. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. That newly elected members of the local decision making body decided not to participate in local proceedings on remand from LUBA, because they were not members of the decision making body at the time the original local proceedings were conducted and are unfamiliar with the record, provides no basis for reversal or remand of the local government decision on remand. *Rhine v. City of Portland*, 27 Or LUBA 86 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioners do not demonstrate that the issue raised in an assignment of error is relevant to compliance with any legal standard applicable to the challenged decision, LUBA will deny the assignment of error. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. A petitioner's assignment of error will be rejected where it simply alleges code violations, without supplying any supporting argument, or alleges inconsistent findings and lack of substantial evidence, without identifying the challenged findings. *Draganowski v. Curry County*, 26 Or LUBA 420 (1994).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA determines a condition of approval was erroneously imposed, but rejects all other assignments of error, a remand rather than reversal nevertheless is required, if LUBA is unable to determine whether the local government relied on the erroneous condition of approval in concluding that all applicable approval criteria are met. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. The exclusive forum for enforcement of public meetings laws is circuit court. That public meetings law violations may have occurred during the land use decision making process does not, of itself, provide a basis for reversal or remand. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. That a proposed partition of land within a PUD may violate private covenants, conditions and restrictions, provides no basis for reversal or remand of a challenged land use decision. *Long v. Marion County*, 26 Or LUBA 132 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner fails to cite any applicable law violated by the challenged decision, petitioner's assignment of error provides no basis for reversal or remand. *Long v. Marion County*, 26 Or LUBA 132 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA reviews the local government's final written order. That the final written order may not accurately reflect

oral comments made by the local decision maker during its deliberations provides no basis for reversal or remand of the challenged decision. *Derry v. Douglas County*, 26 Or LUBA 25 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner's notice of intent to appeal identifies the challenged decision as the governing body's decision to dismiss his local appeal, but his petition for review alleges error in the planning commission's decision to approve the subject application, rather than the governing body's decision dismissing his appeal, LUBA will affirm the challenged decision. *Churchill v. Tillamook County*, 26 Or LUBA 22 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioners fail to identify any applicable standard arguably limiting the validity of a local government's initial PUD development plan approval to a particular period of time, the local government's failure to address the issue of whether the PUD development plan expired does not provide a basis for reversal or remand. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA can grant relief only if petitioners demonstrate that an applicable legal standard is violated by the challenged decision. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioner's assignment of error expresses no more than disagreement with the local government's decision, such disagreement provides no basis for reversal or remand of the challenged decision. *Neuharth v. City of Salem*, 25 Or LUBA 267 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where parties object that petitioner failed to properly perfect its local appeal, but the local government nevertheless allows the local appeal, petitioner satisfies the requirement that it exhaust available administrative remedies, as ORS 197.825(2)(a) requires. Although the local government may have committed reversible error in considering the local appeal, LUBA has jurisdiction to review the local government's final decision. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. After acknowledgment, unless a challenged local government land use decision is an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation, LUBA has no authority to reverse or remand the decision for failure to comply with the statewide planning goals. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. It is a local government's final written decision that is subject to LUBA's review. That conditions imposed in the local government's final written decision were not discussed in the decision maker's deliberations does not provide a basis for reversal or remand. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA does not apply land use decision making approval criteria in the first instance. It is the local government's

responsibility to consider the evidentiary record, identify the applicable standards, make the decision in the first instance and explain the basis for its decision in its findings. *ODOT v. City of Waldport*, 24 Or LUBA 344 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Reversal of a local government land use decision approving a permit application means the subject application cannot be approved under the applicable criteria as a matter of law, and that a new or amended permit application is required to correct at least one allegation of error sustained in LUBA's final opinion. *Seitz v. City of Ashland*, 24 Or LUBA 311 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. The local government record does not include evidence that is specifically rejected by the local government during the local proceedings. That such evidence may have been erroneously rejected may provide a basis for reversal or remand, but it has no bearing on the contents of the record. *Glisan Street Assoc. v. City of Portland*, 24 Or LUBA 600 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA reviews the final written decision of the local government decision making body, not statements that may have been made during the local proceedings by individual decision makers. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. General expressions of disagreement with a land use decision provide no basis for reversal or remand. *Reed v. Benton County*, 23 Or LUBA 486 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In reviewing local government decisions, LUBA's role as an appellate tribunal is to review the local government's explanation of why it believes its decision satisfies relevant approval standards. LUBA's function is not to identify the relevant approval standards or to interpret relevant code and plan language in the first instance. *Warren v. City of Aurora*, 23 Or LUBA 507 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA reviews challenged land use decisions for compliance with applicable approval standards, not for consistency with prior local government decisions. *Sterling Mine Properties v. Jackson County*, 23 Or LUBA 18 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioners must include sufficient argument in the petition for review to explain the basis for their allegations of error. Petitioners may not fail to make a specific challenge to the findings supporting a decision or the evidentiary support for those findings and rely solely on expressions of disagreement with the challenged decision. *Camp v. Josephine County*, 23 Or LUBA 6 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a petition for review contains no argument in support of petitioner's assignments of error, the assignments of error will be denied. *Camp v. Josephine County*, 23 Or LUBA 6 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Expressions of disagreement with a local government's decision, which are unrelated to the local government's findings or the legal standards applicable to a request for land use approval, are inadequate to constitute a basis for reversal or remand. *Simmons v. Marion County*, 22 Or LUBA 759 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioners fail to identify any applicable legal standard which they contend is violated by an alleged defect in the local government's decision, LUBA cannot grant relief. *Schellenberg v. Polk County*, 22 Or LUBA 673 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. It is petitioners' responsibility to develop their legal argument sufficiently to establish a basis for reversal or remand. *Kane v. City of The Dalles*, 22 Or LUBA 608 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where petitioners are afforded a *de novo* evidentiary hearing before a hearings officer, and where petitioners had an adequate opportunity to explain to the hearings officer why the planning department decision appealed from was wrong, that the planning department decision may have been based on erroneous assumptions provides no basis for reversal or remand of the hearings officer's decision. *Ralston v. Clackamas County*, 22 Or LUBA 573 (1992).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. When LUBA's decision on the merits of an appeal will be without practical effect, LUBA will dismiss the appeal as moot. LUBA does not have authority in these circumstances to remand the challenged decision to the local government with instructions to dismiss the local proceedings as moot. *Barr v. City of Portland*, 22 Or LUBA 504 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. That the governing body made a decision different from the recommendation of the hearings officer, and adopted findings inconsistent with those adopted by the hearings officer, is not in itself a basis for reversal or remand of the governing body's decision. *Brandt v. Marion County*, 22 Or LUBA 473 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In establishing actual bias or prejudgment on the part of a local government decision maker, the burden is on petitioner to show the decision maker was biased or prejudged the application and did not reach its decision by applying applicable standards based on the evidence and argument presented. *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 452 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. That the initial administrative decision maker was not impartial would be insufficient grounds to reverse or remand a challenged decision, where petitioner was afforded a *de novo* review of the administrative decision, including a public hearing, by a hearings officer. *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 452 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where there are oral statements during local proceedings suggesting confusion about who has the burden of proof in a local appeal, but there is nothing in the written decision to suggest the local government made an erroneous allocation of the burden of proof, LUBA will not assume the burden of proof was erroneously assigned to the opponents of the application. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioners' argument that the city failed to submit a sludge management plan to DEQ provides no basis for reversal or remand of the challenged decision, where petitioners cite no approval standard requiring the submission of a sludge management plan to DEQ and do not explain how a sludge management plan is relevant to compliance with applicable code provisions. *Sitsler v. City of Mill City*, 22 Or LUBA 125 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. While the requirement that local governments carrying out public land development projects grant land use approvals to themselves presents inherent appearance of bias problems, such appearance problems, in and of themselves, present no basis for reversal or remand. *Holladay Investors, Ltd. v. City of Portland*, 22 Or LUBA 90 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA's review is limited to the local government's written final decision and does not include review of statements made by individual members of the local government's decision making body during local proceedings. *Holladay Investors, Ltd. v. City of Portland*, 22 Or LUBA 90 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Petitioner's argument that an approved residential care facility is really a correctional facility provides no basis for remand where (1) the code definition of residential care facility appears to be broad enough to include correctional facilities, (2) the local government found the proposal satisfies the code definition of residential care facility, and (3) petitioner does not challenge the local government's findings. *Wentland v. City of Portland*, 22 Or LUBA 15 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a local government imposes an improper condition in granting land use approval, but does not rely on the improper condition in finding applicable approval criteria are met, LUBA will reverse the condition and otherwise affirm the decision granting land use approval. *Olson Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Without a showing by petitioner that an applicable legal criterion has been violated, LUBA cannot grant relief. *Reynolds v. Clackamas County*, 21 Or LUBA 412 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. If a challenged plan and zone map amendment was adopted in compliance with the applicable criteria, it cannot be considered arbitrary and, therefore, is not invalid "spot zoning." Where petitioners fail to show

an applicable standard is violated by the city's decision, no basis for reversal or remand is established. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Erroneous expressions of plan or code interpretation by the decision maker, whether expressed before or after the decision is reduced to writing and becomes final, provide no basis for reversal, if such erroneous expressions are not included in the written decision or findings supporting the written decision. *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Without a showing that an applicable approval criterion has been violated by the local government's decision, LUBA cannot grant relief. *Hale v. City of Beaverton*, 21 Or LUBA 249 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where LUBA cannot determine from the local record on what basis the proposed use *was* approved by the local government, or on what basis the proposed use *could* be approved by the local government under the applicable zoning district, LUBA cannot say the local government's decision approving the proposed use is prohibited as a matter of law and, therefore, will remand the challenged decision. OAR 661-10-07192)(b). *McKay Creek Valley Assoc. v. Washington County*, 21 Or LUBA 66 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where the local record indicates a petitioner was not allowed to speak at a hearing because his testimony would include new evidence, the acceptance of which would indisputably have been improper, and petitioners do not claim that his testimony would *not* have included new evidence, petitioners fail to identify a basis upon which LUBA may grant relief. *White v. City of Oregon City*, 20 Or LUBA 470 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Unless petitioners demonstrate that an applicable legal criterion or standard has been violated by the appealed decision, LUBA cannot grant relief. *19th Street Project v. City of The Dalles*, 20 Or LUBA 440 (1991).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where a governing body erroneously construed the legal effect of its failure to reach the merits in a *de novo* review, LUBA will remand rather than reverse, to allow an abstaining member of the governing body to consider whether abstention is required and to allow an absent governing body member an opportunity to participate so that a decision on the merits may be reached. *Strawn v. City of Albany*, 20 Or LUBA 344 (1990).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. In order to establish bias on the part of the decision maker, petitioner must show that the decision maker either has a personal stake in the outcome of the proceeding or has prejudged the matter. LUBA will not infer the existence of bias on the part of a decision maker. *Kittleson v. Lane County*, 20 Or LUBA 286 (1990).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. LUBA reviews a local government's final written decision. The oral comments of individual members of the local decision making body are not relevant to LUBA's review, and do not provide a basis for reversal or remand of the challenged decision. *Neuenschwander v. City of Ashland,* 20 Or LUBA 144 (1990).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Expressions of disagreement with a local government's decision, which are unrelated to the local government's findings or the legal standards applicable to a request for land use approval, are inadequate to constitute a basis for reversal or remand. *McCarty v. City of Portland,* 20 Or LUBA 86 (1990).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Without a showing that an applicable legal criterion or standard has been violated by the county's decision, LUBA cannot grant relief. *Weist v. Jackson County*, 18 Or LUBA 627 (1990).

28.8.1 LUBA Scope of Review – Grounds for Reversal/Remand – Generally. Where the record shows the *ex parte* contacts alleged by petitioner were disclosed during local hearings, such *ex parte* contacts provide no basis for reversal or remand. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. Pursuant to ORS 197.835(2), LUBA may make its own factual findings as to whether an appeal was timely filed, which is a jurisdictional question. Accordingly, LUBA may consider evidence outside the record for the limited purpose of resolving disputes regarding whether an appeal was timely filed, even in the absence of a motion to take evidence outside the record under OAR 661-010-0045. *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. Remand, rather than reversal, is the appropriate remedy when the board of county commissioners did not address an argument or adopt findings in response to the argument on appeal. *Rogue Advocates v. Josephine County*, 78 Or LUBA 38 (2018).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. Where a provision of the local code prohibits the filing of a new application for at least one year after an application is denied and the local government denies an application, a local government exceeds its authority in accepting and approving a new application within one year of the original denial. *Hood River Valley Residents' Committee v. Hood River County*, 77 Or LUBA 1 (2018).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647 (1989), holds that a local government lacks jurisdiction to modify a decision that is currently on appeal to LUBA or the Court of Appeals. However, *Standard Insurance Co.* does not prohibit a local government from *commencing* local proceedings to modify a condition of approval of a decision that is on appeal to LUBA, as long as the final decision adopting the modification is issued after all appeals of the original decision have been concluded. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. Where nothing in the county's code supports a claim that payment of a local appeal fee is a jurisdictional requirement, failure to pay the appeal fee is not grounds for dismissal of the appeal at the local level. *Ratzlaff v. Polk County*, 56 Or LUBA 740 (2008).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. LUBA has jurisdiction to review land use decisions and limited land use decisions, and the fact that there may not be reviewable issues merely limits the Board's scope of review; it does not eliminate the Board's jurisdiction over the appeal. *Papst v. Clackamas County*, 53 Or LUBA 344 (2007).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. Regional plan provisions that limit regional planning to a designated region are not violated or improperly amended by non-regulatory expressions of interest in a city parks, recreation and open space plan concerning parks outside the region and city in the county, where the city's plan makes it clear that the county's plan is the controlling planning document for such parks. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. Where petitioners fail to establish that any statute obligates a county to provide petitioners notice of a building permit decision that modifies a condition of partition approval, the "knew or should have

known" standard at ORS 197.830(3)(b) applies rather than the "actual notice" standard at ORS 197.830(3)(a), in determining whether an appeal is timely filed under that statute. *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. The 21-day deadline to file an appeal under ORS 197.830(3)(b) begins on the date petitioners knew or should have known of the "decision," *i.e.*, that the local government had approved development on the subject property. It is not necessary that petitioners know the particular detail of the proposed development that offends them, such as its exact location on the property, before the 21-day deadline begins running. *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. Where the petitioners are provided written notice of an application for a proposed height variance for an already approved dwelling, the petitioners are placed on at least "inquiry notice" that the county has previously approved a dwelling on the subject property. Given that information, it is incumbent on petitioners to make timely inquiries to discover the decision that approved the dwelling, such as investigating the planning file, and failure to make such inquiries within 21 days of being placed on inquiry notice means that the deadline to appeal the decision to LUBA under ORS 197.830(3)(b) begins on the date of inquiry notice. *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. An appeal that is filed four to five weeks after the petitioners learned that the local government had approved the challenged decision is untimely filed under ORS 197.830(3)(b). *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. A local government exceeds its jurisdiction where it issues a decision on a withdrawn application. Accordingly, OAR 661-010-0071(1)(a) compels reversal of the decision. Early LUBA cases indicating that dismissal of the appeal is the appropriate disposition in such circumstances are overruled. *Grabhorn v. Washington County*, 50 Or LUBA 344 (2005).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. Where a LUBA decision that remands a city resolution is on appeal to the Court of Appeals, the city lacks jurisdiction to amend that resolution. But the city has jurisdiction to adopt a comprehensive plan amendment that LUBA found the city should have adopted at the time it adopted the resolution. *Rhodes v. City of Talent*, 50 Or LUBA 415 (2005).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. Concern about the potential for conversion of industrially planned and zoned lands to commercial and office uses is a legitimate area of metropolitan concern within the jurisdiction of the Metropolitan Service District. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. A county has authority or jurisdiction to deny a permit application on its merits, where the permit applicant fails to demonstrate he was authorized to submit the permit application but the code

limitations on who can submit permit applications do not impose a "jurisdictional" requirement. *Base Enterprises, Inc. v. Clackamas County*, 38 Or LUBA 614 (2000).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. Metro may adopt a functional plan with site-specific requirements without necessarily exceeding its authority under ORS 268.030(3) to "provide for those aspects of land use planning having metropolitan significance." *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. A combined application for a plan map amendment, zone change and annexation request does not convert a local government's recommendation regarding the annexation request into a binding decision where the local government lacks decisional authority over annexation requests. *Copper Basin, Inc. v. Umatilla County*, 37 Or LUBA 147 (1999).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. A county hearings officer is not legally bound to defer to a board of county commissioners' determination that a particular site is necessary for a proposed utility facility, where the board of county commissioners adopted its determination in its capacity as the governing body of a service district. *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. Where a challenged local government decision finds the subject property is entirely within the local government's boundaries, and those findings are supported by substantial evidence in the record, the local government did not exceed its jurisdiction in approving the subject development application. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. That the electorate may have exceeded its authority in adopting land use legislation by initiative, is a question bearing on the merits of an appeal from such a decision, not on LUBA's jurisdiction to review the appealed decision. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 607 (1992).

28.8.2 LUBA Scope of Review – Grounds for Reversal/Remand – Lack of Jurisdiction. A city ordinance rezoning property located outside the city's municipal boundaries exceeds the city's jurisdiction and must be reversed. *Hofmann v. City of Seaside*, 24 Or LUBA 183 (1992).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Petitioner fails to establish a basis for reversal or remand under Article I, section 20, of the Oregon Constitution where there is no evidence that other city-approved applications for a zone change to residential are factually identical to his application. *Carroll v. City of Malin*, 80 Or LUBA 298 (2019).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. When the Court of Appeals remands a LUBA decision that affirmed a local government decision requiring a condition of approval that petitioner argued constituted an unconstitutional exaction of property prohibited by the Fifth and Fourteenth Amendments to the U.S. Constitution, because the Court of Appeals agreed with petitioner that the dedication is unconstitutional unless the hearings officer finds that the impacts of the proposed development would substantially impede the governmental interest advanced by the city's standards which the conditions of approval were imposed to meet, LUBA will remand that portion of the decision to the hearings officer for reconsideration where the hearings officer adopted no findings on that point. *Hill v. City of Portland*, 78 Or LUBA 334 (2018).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Where a city code provides that a property owner must, as a condition of permit or partition approval, either provide the improvements or pay into an improvement fund if a street adjoining property without direct access to the street does not have standard full-width improvements, and petitioner argues that the code provision is not applicable to his proposed property partition, LUBA will sustain, in part, petitioner's challenge upon remand from the Court of Appeals, where the arguments on appeal have evolved and it is apparent that remand is necessary for the hearings officer to adopt findings regarding LUBA's underlying conclusion that the hearings officer was correct in concluding that the condition requiring a waiver of remonstrance against a street or stormwater facility improvement was justified under *Clark v. City of Albany*, 31 Or LUBA 375, 380, *aff'd*, 144 Or App 192, 924 P2d 877 (1966), and did not constitute a taking. *Hill v. City of Portland*, 78 Or LUBA 334 (2018).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. While the county presumably has a legitimate governmental interest in preserving wildlife migration corridors, under RLUIPA, 42 USC § 2000cc *et seq.*, the county cannot treat religious assemblies in the wildlife area (WA) Overlay zone on less favorable terms than non-religious assemblies with similar impacts on wildlife. Accordingly, the board of county commissioners correctly concluded that the express exclusion of churches in the county code from the WA overlay zone, while allowing nonreligious assemblies and institutions as conditional uses, violates the so-called Equal Terms provision of RLUIPA because churches are not treated equally. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 516 (2018).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Where the county found that county code provisions, which expressly exclude churches in the wildlife area (WA) Overlay zone, while allowing nonreligious assemblies and institutions as conditional uses, violate the Equal Terms provision of RLUIPA, 42 USC § 2000cc *et seq.*, under the Article VI of the United States Constitution, the Supremacy Clause, a county would almost certainly lack authority to deny applications for a proposed church located on property within the WA overlay

zone, based on nonconformance with local or state regulations that the county had concluded cannot be applied to the proposed use consistently with RLUIPA. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 516 (2018).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Where LUBA concludes a county provision violates the so-called Equal Terms provision of RLUIPA, 42 USC § 2000cc *et seq.*, which focuses on protecting religious assembly from unequal treatment, petitioner's argument that intervenors' religious use of their dwelling does not qualify as a "church," and therefore that ORS 215.441 does not apply to authorize activities customarily associated with the practice of the religious activity, does not provide a basis for us to remand the decision. Even if intervenors' religious use of their dwelling and property does not constitute a "church" for purposes of ORS 215.441 or ORS 215.283(1)(a), that has no bearing on whether the county is obligated, under the Equal Terms provision, to treat religious assemblies and institutions no less favorably than secular assemblies and institutions. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 516 (2018).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. ORS 197.835(2)(b) and OAR 661-01-0045(1) authorize LUBA to consider evidence outside the record where the proponent demonstrates that there are disputed allegations in the parties' briefs regarding the "unconstitutionality of the decision." However, where petitioners do not intend to argue that a city's decision is unconstitutional, but rather that the city erred in failing to comply with its city charter requirement for a vote, based on the city's reliance on a statute that petitioners believe unconstitutionally infringes on the city's charter authority, LUBA will deny petitioners' motion to take evidence because evidence on the constitutionality of a statute is not one of the bases for taking evidence outside the record under ORS 197.835(2)(b) and OAR 661-010-0045(1). *Renken v. City of West Linn*, 78 Or LUBA 1070 (2018).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. No unconstitutional exaction of private property occurs when a city requires an applicant to improve to the width, grade and materials standards designated by the city engineer a newly created pathway that was approved and required as part of a previously approved partition of the property. Such a requirement does not run afoul of *Koontz v. St. Johns Water Management District*, 570 US 595, 133 S Ct 2586, 186 L Ed 2d 697 (2013), because requiring the pathway to be improved makes it usable by the occupants of the dwellings on the newly created parcels and by the public. *Locke v. City of Portland*, 76 Or LUBA 423 (2017).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. LUBA need not address assignments of error alleging that a condition of approval requiring an applicant seeking a four-lot subdivision to construct a road violates the needed housing statutes or the Takings Clause of the U.S. Constitution, where LUBA has already concluded on sub-statutory and sub-constitutional grounds that the city erred in imposing the condition. *Tokarski v. City of Salem*, 74 Or LUBA 124 (2016).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. ORS 475B.340(2) and ORS 475.500(2) allow local governments to adopt "reasonable regulations" on marijuana production, processing, and sales. Absent any argument that establishes a protected First

Amendment interest in marijuana production, cases that address the reasonableness of restrictions on protected First Amendment activity have no relevance to interpreting the phrase "reasonable regulation" used in ORS 475B.340(2) and ORS 475.500(2). *Diesel v. Jackson County*, 74 Or LUBA 286 (2016).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Where constitutional limitations placed on the city by the Fifth Amendment to the U.S. Constitution do not allow the city to require dedication of more than one-half of a new street that is required by the local code to total 45 feet in width, a petitioner fails to demonstrate that that local code provision or any other authority allows the city to require dedication of more than one-half of the required street. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. A street connection study that reflects a portion of a possible hammerhead turnaround on property adjacent to a proposed PUD is not a taking of the property without just compensation under the Fifth Amendment to the U.S. Constitution, where the street connection study does not require any adjacent property to be dedicated or the possible hammerhead turnaround to ever be built. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Standing to appeal a post-acknowledgment plan amendment to LUBA is governed by ORS 197.620(1), which requires only that the petitioner participate in the proceedings below. No statute governing LUBA requires that petitioners who wish to advance a facial constitutional challenge to an ordinance at LUBA must first demonstrate that the ordinance injures their legally protected interests. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. To advance a facial challenge under the Takings Clause of the Oregon Constitution to an ordinance that allegedly requires an uncompensated physical invasion of private property and acquisition of a property easement, a petitioner need not demonstrate that the mere enactment of the ordinance effects a physical invasion or acquisition of property. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. LUBA does not have the authority to apply the doctrine of severance to sever unconstitutional provisions from an ordinance and thereby affirm the ordinance on appeal. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Regional plan amendments that will require a city to amend its zoning ordinance to include specific provisions to protect industrial land from being converted to office and commercial use do not violate a city's constitutional home rule authority. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Because Congress intended the Religious Land Use and Institutionalized Persons Act (RLUIPA) to subject land use regulations to at least the same level of scrutiny as would apply under the Free

Exercise Clause of the U.S. Constitution, analysis of whether an administrative rule prohibition on churches on high-value farmland violates RLUIPA is also dispositive of the same claim under the Free Exercise Clause. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Prohibiting uses that are inconsistent with agriculture on high-value farmland, such as churches, while allowing agricultural-supportive structures and uses on high-value farmland, such as barns, wineries and farm stands, is rationally related to the policy of preserving high-value farmland for agricultural use, and neither treats religious assemblies on unequal terms with nonreligious assemblies nor discriminates against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Prohibiting establishment of new uses on high-value farmland, such as churches or golf courses, while allowing expansion of existing churches or golf courses on high-value farmland does not treat religious assemblies on unequal terms with nonreligious assemblies or discriminate against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. The Religious Land Use and Institutionalized Persons Act (RLUIPA) does not require local governments to provide for churches in all zones within its jurisdiction, or prohibit local governments from excluding churches from some zoning districts. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Whether a zoning prohibition on churches imposes a "substantial burden" on religious exercise under the Religious Land Use and Institutionalized Persons Act (RLUIPA) depends on whether the jurisdiction's zoning scheme as a whole fails to provide adequate opportunity to site a church within the jurisdiction. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. The actual financial circumstances of a religious assembly, its financial ability to acquire land zoned for a church, and the existence of market-based constraints that apply equally to religious and non-religious land users, have no bearing on whether exclusion of churches in some zones within a jurisdiction imposes a "substantial burden" on religious exercise under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Evidence that a church is unable to acquire land with desired characteristics at a desirable price within an urban growth boundary is insufficient as a matter of law to demonstrate that an administrative rule prohibiting churches on high-value farmland owned by the church imposes a "substantial burden" on the church's free exercise rights, under the Religious Land Use and

Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. A city commits no error in proceeding with a decision on an application for a subdivision, and does not violate a subdivision opponent's due process rights, where a quiet title action is pending to resolve an ownership dispute between the opponent and the subdivision applicant, but the applicant is the record fee owner of the property. *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. That conditional use permit applicants for approval of a bed and breakfast home occupation may not have been aware that the conditional use permit would be conditioned on the applicants terminating a special events business that the county concluded was not allowed in the county's EFU zone does not violate the applicants' rights to due process where they were allowed: (1) to challenge the administrative decision in a quasi-judicial hearing before a hearings officer, (2) to appeal the hearings officer's decision to the board of county commissioners, (3) to appeal that decision to LUBA, and (4) would be entitled to seek judicial review of LUBA's decision. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. A conditional use permit condition of approval that the applicants terminate a special events business that was operated as part of a permitted bed and breakfast inn does not unconstitutionally impose an overbroad or vague limit on the bed and breakfast owners' constitutionally protected religious activity and speech. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Because a letter from city planning director and county memorandum setting out circumstances surrounding a compromise is not sufficient to establish an agreement between the parties establishing rights and obligations, the Contracts Clause, Article I, section 21, of the Oregon Constitution, is not applicable. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Even if immunity provisions of ORS 467.131 and 467.133 violate the remedies clause, Article I, section 10, of the Oregon Constitution, that infirmity does not implicate the limited preemption provisions of ORS 467.136 or the total preemption provisions of ORS 166.170 through 166.176. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. When finding a statute unconstitutional would not provide an independent basis for reversal or remand, LUBA will not consider the constitutionality of the statute. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Where, during the local proceedings, no party referred to the Equal Privileges and Immunities Clause of Article I, section 20, of the Oregon Constitution, or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by name, article and section or amendment number,

or their operative terms, petitioner is precluded from raising violation of these constitutional provisions as an issue in an appeal to LUBA. ORS 197.763(1); 197.835(2). *Craven v. Jackson County*, 29 Or LUBA 125 (1995).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Petitioner's claim that his business was treated differently from another business, in violation of Article I, section 20, of the Oregon Constitution, because the other business was granted an "exemption" from a restrictive ordinance requirement, provides no basis for reversal or remand of the challenged decision where the decision does not purport to grant an "exemption" to any business. *Kaady v. City of Cannon Beach*, 26 Or LUBA 424 (1994).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. LUBA will not consider claims of constitutional violations that are not supported by legal argument. *Poddar v. City of Cannon Beach*, 26 Or LUBA 429 (1994).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Federal preemption of local authority to regulate is not presumed. Rather it is necessary to determine whether preemption was the "clear and manifest purpose of Congress." *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Nothing in the federal regulatory scheme relating to the regulation of parachute jumping purports to foreclose state and local land use regulation of the ground based impacts of parachuting. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Because a constitutional taking claim is not dependent upon a local government's adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. The choice between achieving the public purpose of encouraging forest uses by police power regulation or eminent domain lies with the county, absent some showing that the police power regulation selected by the county is in fact a public conservation easement for which compensation must be paid. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Because a constitutional taking claim is not dependent upon a local government's adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Where a petitioner alleges a land use decision results in a taking under Article I, section 18, of the Oregon Constitution, but relies entirely on arguments advanced in support of allegations that the decision constitutes a taking under the Fifth Amendment of the U.S. Constitution, LUBA will limit its review to petitioner's federal taking claim. *Nelson v. Benton County*, 23 Or LUBA 392 (1992).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Where the maximum penalty for each separate violation of an ordinance is 500 dollars, and there is no possibility of imprisonment for violating the ordinance, the penalties provided by the ordinance are civil, not criminal, in nature. Therefore, a vagueness challenge based solely on the constitutional vagueness analysis applied where criminal sanctions are possible, provides no basis for reversal or remand of such ordinance. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Because a local government is not required to consider whether denying a request for land use approval would constitute an unconstitutional taking of private property without just compensation, a local government's findings on such constitutional issues provide no basis for reversal or remand. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Unlike a local government, LUBA is specifically required by statute to consider arguments that a local government decision is unconstitutional and to reverse or remand an unconstitutional decision. Therefore, procedural errors a local government may have committed in considering constitutional issues during local proceedings are harmless errors. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. In view of the Oregon Supreme Court's explicit reservation of judgment concerning whether it will look to U.S. Supreme Court Fifth Amendment "takings" jurisprudence to further develop the appropriate tests to be applied in considering Article I, section 18, takings claims under the Oregon Constitution, LUBA will not do so. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Petitioners must seek relief from application of a velocity flooding overlay designation to the subject property through the variance process provided in the local government's flood damage prevention ordinance, before they may obtain LUBA review of any constitutional "taking" claims. *Alexiou v. Curry County*, 22 Or LUBA 639 (1992).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Undeveloped claims of unconstitutionality provide an insufficient basis for LUBA to reverse or remand a challenged decision. *Cummins v. Washington County*, 22 Or LUBA 129 (1991).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Personal bias sufficiently strong to disqualify a public official must be clearly demonstrated. A petitioner has the burden of demonstrating that the public official was incapable of making a

decision based on the evidence and argument before him. *Schmaltz v. City of Hood River*, 22 Or LUBA 115 (1991).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. If a challenged plan and zone map amendment was adopted in compliance with the applicable criteria, it cannot be considered arbitrary and, therefore, is not invalid "spot zoning." Where petitioners fail to show an applicable standard is violated by the city's decision, no basis for reversal or remand is established. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Different treatment under the law does not necessarily amount to a violation of constitutional rights to equal protection under the Fourteenth Amendment to the U.S. Constitution or equal privileges and immunities under Article I, section 20, of the Oregon Constitution. Where petitioners fail to explain why the different treatment amounts to a violation of those constitutional provisions, petitioners' constitutional challenges will be rejected. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. Petitioner's claim that the city erroneously refused to provide a transcript of proceedings before a hearings officer for his appeal of the hearings officer's decision to the city council will be denied where petitioner (1) identifies no code section requiring the city to provide a transcript, and (2) fails to develop an argument in support of his contention that due process requires that a transcript be provided. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality. When alleging that their rights to due process under the 14th Amendment to the U.S. Constitution were violated because of bias by the local decision maker, petitioners must show that the local decision maker was incapable of making a decision on the basis of the evidence and argument before it. *Eckis v. Linn County*, 19 Or LUBA 15 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government's erroneous statement in the findings that it was not required to consider the petitioner's testimony does not establish that the local government committed procedural error where other findings establish that the local government did consider that testimony. *ODOT v. Grant County*, 80 Or LUBA 192 (2019).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where "new evidence" enters the record during a non-evidentiary remand proceeding but plays no role in the decision, such procedural error provides no basis for reversal or remand pursuant to ORS 197.835(9)(a)(B) because it could not possibly have "prejudiced the substantial rights of the petitioner." *Neighbors for Smart Growth v. Washington County*, 79 Or LUBA 1 (2019).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a county approves a "forest template dwelling" under ORS 215.750(1)(c), arguments that the county relied on units of land that were unlawfully created through partition approval, rather than subdivision approval, provide no basis for reversal or remand since any procedural error the county committed in approving the land division cannot be collaterally attacked in an appeal of a subsequent decision that depends on the prior approval. *Landwatch Lane County v. Lane County*, 79 Or LUBA 65 (2019).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the county planning director processed a similar use determination under the county's Type II review to determine whether an electrical transmission line is allowed in a particular zone, the board of county commissioners reviewed the director's similar use determination in a consolidated appeal under a Type III process, and petitioners argue that the county erred by not providing an intermediate decision by a decisionmaker other than the county governing body, that alleged procedural error provides no basis for reversal or remand because that alleged error does not prejudice petitioner's substantial rights. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a county determines an electrical transmission line is a "similar use" authorized in a particular zone pursuant to the county's "similar use determination" process, which allows a similar use "[w]here a proposed use is not specifically identified by [the code], or [the code] is unclear as to whether the use is allowed in a particular zone," petitioners' argument that the county may make a similar use determination only if the proposed use is not specifically identified anywhere in the county's code is without merit. A similar use determination is not necessary or appropriate where the use is specifically permitted or prohibited in the subject zone. In adopting the similar use determination process, the county contemplated instances where a use is specifically identified as an allowed use in some zones but not specifically identified as an allowed use in the subject zone. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners argue that the county made inadequate findings that a proposed electrical transmission project is consistent with general use priorities for estuary zones because the county did not address certain code provisions addressing estuary zones, LUBA is not required to remand the decision to

the county for it to interpret its local code provisions in the first instance; LUBA may make its own determination of whether the local government decision is correct. ORS 197.829(2). Where the county determined that the code provision in question is a general priority statement, which does not constitute mandatory approval criteria, LUBA will uphold the county's decision where the provision provides an inclusive list of general use priorities for estuarine resources and value, and where, in the alternative, the county addressed those impacts to the estuarine resources and values in other applicable parts of the county's code. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. While the "raise it or waive it" requirement of ORS 197.763(1) and 197.835(3) does not apply to legislative proceedings, where a party has an opportunity to object to a procedural error during a legislative proceeding, the party must do so in order to seek remand based on that error. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A party asserting a procedural error must demonstrate that the procedural error was objected to during the proceedings below, if there was an opportunity to lodge an objection. Accordingly, where a dispute may exist regarding whether petitioners objected to the county's process during the proceedings below, LUBA will allow a motion to take evidence outside the record to consider a document for the limited purpose of allowing petitioners to cite to that document to establish, if the point is disputed in a response brief, that petitioners attempted to lodge objections to the county's process. *Eng v. Wallowa County*, 79 Or LUBA 1024 (2019).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Remand is necessary where petitioners argue that a boundary line adjustment application is governed by a county ordinance addressing the "Sale or Transfer of Land to an Adjacent Owner * * *," under the section on nonconforming uses that apply to "Designated Resource Areas," where the subject parcels are designated for agricultural and forest uses and are zoned exclusive farm use – grazing (FG) and where respondents filed no response brief. Because there is no local interpretation of the applicability of the ordinance, LUBA will remand the decision for the county to interpret the ordinance in the first instance. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA will remand a decision by the county planning department approving conversion of a portion of an existing church into a "parsonage," a term which is undefined by state or local law, but which includes a kitchen, bedroom, and bathroom for the use by the church's pastor, where the county's decision fails to identify any land use standards that apply to the proposed use, and did not provide notice or an opportunity for a hearing or otherwise follow the procedures in ORS 215.416(11) without apparent explanation, and LUBA determines that the application for the proposed parsonage is an application for a "permit" as defined in ORS 215.402(4). *Wetherell v. Douglas County*, 78 Or LUBA 33 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Although it is not clear a proposed "parsonage," which is a portion of a church to include a

bedroom, kitchen and bathroom for use by the church's pastor, must be evaluated and approved or denied under the criteria that apply to a nonfarm dwelling under the county's land use ordinance implementing ORS 215.284, those land use standards require the exercise of discretion in approving the development of land. Further, it is possible, even probable, that any application for a proposed residential use associated with a church must be evaluated under the standards at ORS 215.441, and accordingly the county must process such an application according to its procedures that apply to permits. *Wetherell v. Douglas County*, 78 Or LUBA 33 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a county's notice described a proposed project as a bed and breakfast inn and campground, but the county only approved the bed and breakfast inn but not the campground, petitioners had an inadequate opportunity to object to the alleged procedural error because they could not know until the county issued its decision that the final decision would approve something different than the proposal that was noticed. *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. ORS 197.830(3) operates to potentially allow a petitioner a delayed period of time to file a LUBA appeal, but it is not a source of procedural requirements that a local government approved development that differs from the development described in the notice of hearing is not procedural error. *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A proposed land use that requires a conditional land use permit must be processed under quasi-judicial, rather than legislative, procedures where the applicable county code provision specifies that conditional uses in the exclusive farm use zone are subject to conditional use criteria and "shall be reviewed" according to the county's quasi-judicial review procedures. Further, according to *Strawberry Hill 4-Wheelers v. Board of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979), the Oregon Supreme Court established a three-factor test to determine whether a land use matter is quasi-judicial or legislative, and where all three factors indicate that the county's action is quasi-judicial in nature, the county also erred in processing the application under its legislative rather than its quasi-judicial procedures. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A criterion that requires a county to determine whether a proposed short term rental home occupation will not "unreasonably interfere" with other uses permitted in the zone requires the exercise of discretion, and a decision applying that criterion is a decision on a permit as defined in ORS 215.402(4). A county errs in failing to process the short term rental home occupation application according to the procedures for permits in the local code. *Hood River Valley Residents' Committee v. Hood River County*, 77 Or LUBA 7 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. It is not sufficient for petitioners to simply point out that the sound study that was prepared to develop a Statewide Planning Goal 5 program to protect an aggregate resource site does not measure noise in precisely the manner required by the Oregon Department of Environmental Quality (DEQ) rules, without any attempt to show that any deviations from required sound measuring locations could have the effect of allowing noise levels that violate DEQ standards. Where the applicant's

expert took the position that the selected sound measuring locations did not have the effect of inflating the ambient noise level or otherwise rendering those sound measurements inaccurate, at least some effort to challenge the expert's position is required to show the deviations may have led to inaccurate sound readings for purposes of determining if DEQ noise standards will be met. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Remand for new proceedings to allow the petitioner to present new evidence to respond to an allegedly new, unanticipated interpretation of an approval standard is not warranted under *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), where the allegedly new interpretation is consistent with the position for which the petitioner argued and presented supporting evidence during the initial proceedings below. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a county code limits administrative review to applications that do not require interpretation or the exercise of policy or legal judgment, and requires quasi-judicial review with notice to nearby property owners for all other applications, the county commits procedural error that is prejudicial to property owners within the notice area by administratively processing without notice an application for a floodplain development permit that requires the exercise of legal judgment. *Rogue Advocates v. Jackson County*, 77 Or LUBA 181 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a county failed to provide petitioners adequate Ballot Measure 56 (codified at ORS 215.503) notice of a proposed ordinance that proposed to limit the size of, or in some cases prohibit entirely, a use – the growing of cannabis – that was previously allowed in the applicable zone, causing some petitioners to only be able to participate at the final hearing before the board of county commissioners on the proposed ordinance by submitting written comments prior to the record closing, such last-minute participation at the last of many hearings is not "an adequate opportunity to prepare and submit their case and a full and fair hearing" and therefore "prejudiced the substantial rights" of the petitioners. ORS 197.835(9)(a)(B). *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A petitioner's argument that the city erred in processing the application as a minor rather than major site plan modification does not provide a basis for remand, where the city adopted findings that the only difference between a major and minor modification is procedural, and the petitioner does not argue that the procedures the city provided, including a hearing that petitioner attended, prejudiced petitioner's substantial rights. *Aboud v. City of Stayton*, 77 Or LUBA 300 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where local law does not dictate the historic review board must be the decision maker that decides whether it has jurisdiction to proceed with a historic land mark designation proposal after the property owner has refused to consent to the historic designation under ORS 197.772(1), a city council does not err by deciding those jurisdictional questions following a LUBA remand of a historic review board decision that failed to address those jurisdictional questions. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city might be obligated to reopen the evidentiary record to accept relevant local legislative history in interpreting local law in an on-the-record hearing, but where petitioner never took the position that it had relevant legislative history to offer and at LUBA merely suggested that such legislative history might exist, the city did not err by limiting its remand proceedings to the evidentiary record that was submitted to LUBA in the appeal that led to remand. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Dictionary definitions consulted to resolve legislation ambiguity are not properly viewed as "evidence," and may be submitted and considered at an on-the-record hearing. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A printout of the results of a Google Search that includes links to both dictionary definitions and to evidentiary materials is properly viewed as new evidence, and a local government does not err by refusing to accept the printout at an on-the-record hearing. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a city council erroneously rejected a letter that was submitted to the city council by someone other than petitioners—because the city council mistakenly believed that person had not appeared during a prior proceeding before the city's historic review board, but petitioners had no reason to believe the person had made the required appearance before the historic review board—the petitioners' failure to object does not preclude petitioners from assigning procedural error to the city council's rejection of the letter. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a city council's consideration of an appeal of a historic review board's decision is on the record, the city council's erroneous rejection of a letter submitted by a person other than petitioners in a subsequent LUBA appeal does not prejudice petitioners' substantial rights where the city council would not have considered any new evidence in the letter and petitioners themselves could have made any legal arguments that were included in the letter. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners take the position that historic review and site plan review approval standards are so incompatible that site plan review entirely displaces historic review, but the city council's interpretation of its code that both reviews are possible and that historic review may be completed before site plan review is plausible, LUBA must defer to the city council's interpretation. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city council's uneven enforcement of time limits on oral presentations to give permit opponents more time than they were entitled to provides no basis for remand where petitioner was given as much

time as he wanted for rebuttal and petitioner did not object to the enforcement of time limits until after the public hearing closed. A petitioner's belated general complaint during the city council's deliberations after the evidentiary phase of the proceeding had closed that opponents were given more time to argue was inadequate and untimely. *Gu v. City of Bandon*, 77 Or LUBA 535 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Just as the non-prevailing party in a quasi-judicial land use proceeding has no right to object to or rebut a proposed written final decision and supporting findings that are prepared by the prevailing party in a quasi-judicial land use proceeding, the non-prevailing party has no right to participate in that process and no right to notice that the prevailing party is working with planning staff to prepare a proposed final decision and supporting findings for the local decision maker to adopt. *Rawson v. Hood River County*, 77 Or LUBA 571 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Speculation by the non-prevailing party in a quasi-judicial land use proceeding that there may have been *ex parte* contact between the prevailing party's attorney and the local governing body which may have resulted in bias, based solely on the fact that prevailing party's attorney prepared drafts of the decision and findings as well as the final decision and findings that the local governing body adopted falls considerably short of establishing a substantial reason to believe that the prevailing party's attorney had *ex parte* contacts with the local governing body. *Rawson v. Hood River County*, 77 Or LUBA 571 (2018).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner alleges a local government failed to meet its obligations under ORS 227.186 to provide notice of a comprehensive plan amendment, a zone change, or a change in a land use regulation that may affect the permissible uses of property to be mailed to the owner of each lot or parcel that the ordinance proposes to rezone or that would be affected by a change in the permissible uses of the property, petitioner fails to allege a basis for reversal or remand when petitioner fails to allege the "procedural error" prejudiced petitioner's "substantial rights." *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A petitioner does not waive his right to assign procedural error at LUBA by failing to object to the procedural error below, where the alleged procedural error occurred after the close of the evidentiary record, and the city council meeting to adopt the final decision did not include an opportunity for parties to lodge procedural objections. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA will remand a decision approving seven property line adjustments based on procedural error where the respondent does not dispute that the county failed to provide the notice and hearing required under the county's code for applications that propose multiple property line adjustments. *Sarett v. Lane County*, 76 Or LUBA 308 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A county does not err in failing to process an application to vacate a public easement as a

modification of a condition of approval for the subdivision in which the easement is located, where the easement was not required as a condition of subdivision approval, but instead stemmed from a private agreement between the developer and others. *Neighbors for Smart Growth v. Washington County*, 76 Or LUBA 319 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Even if the petitioner is correct that an application to vacate a public easement is a "development permit" because it eliminates a "right of access," and therefore that the county erred in failing to process the application under procedures that govern a "development permit," the error is a procedural error, and warrants remand only if the petitioner establishes that the procedural error prejudiced the petitioner's substantial rights. Where the vacation procedures the county followed provided for a public hearing at which the petitioner attended and presented evidence, the petitioner has not established that remand is warranted to follow a different procedure that would simply duplicate the hearing that the petitioner has already received. *Neighbors for Smart Growth v. Washington County*, 76 Or LUBA 319 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city is obligated to allow a party to submit new evidence if (1) a party reasonably relies on its notice of hearing to believe that he or she is entitled to submit new evidence at that hearing, and (2) denying the party the right to submit new evidence could prejudice that party's substantial rights. However, where the notice of hearing is not clear that testimony before the city commission may include *new* evidence, the notice references a code requirement that the city commission will be limited to the planning commission evidentiary record, and more than one planning staff report made it clear that the city commission consideration would be limited to the planning commission's evidentiary record, the city commission does not err by rejecting new evidence that was not presented to the planning commission. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where LUBA sustains an assignment of error that a city councilor failed to disclose *ex parte* communications, but the city councilor is no longer on the city council, and the decision must be remanded for other reasons which will require a new decision adopted by a new city council, LUBA will decline to expand the scope of remand to require the former councilor to disclose the substance of the *ex parte* communications. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Even if a local government errs in failing to place a letter from the applicant to the city attorney into the public record of the application, the procedural error does not prejudice the petitioner's substantial right or provide a basis for remand under ORS 197.835(9)(a)(B), where the letter was never placed in front of or relied upon by the final decision maker, and the letter includes no arguments or evidence intended to demonstrate compliance with approval criteria. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city may err in introducing a copy of the application into the record after the close of the evidentiary record before the city council, the final decision maker. However, the procedural error does not

provide a basis for remand under ORS 197.835(9)(a)(B) where the petitioner does not demonstrate that the procedural error played a role in the final decision, or otherwise prejudiced the petitioner's substantial rights. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. While it might constitute procedural error for a local government to accept new evidence late in the proceedings without providing other parties a reasonable opportunity to respond to that new evidence, no error occurs where the alleged new evidence was introduced early in the final hearing, and the petitioner had an opportunity to respond to that evidence during the hearing. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Under ORS 197.763(6)(b) or (c), where a party requests in writing the opportunity to respond to new evidence submitted at a continued hearing or during an open record period, any such opportunity is limited to responses to new evidence submitted during the continued hearing or the first open record period. A hearings officer is not compelled by ORS 197.763(6)(b) or (c) to allow a party to submit, during a second open record period, responses to evidence submitted during the initial evidentiary hearing. *Landwatch Lane County v. Lane County*, 75 Or LUBA 302 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A hearings officer does not violate "due process" or commit procedural error in (1) rejecting new evidence from opponents at a time in the proceedings when the opponents had no right to submit any evidence or responses at all, but (2) accepting new evidence from the applicant in the applicant's final evidentiary submittal that arguably exceeded the scope of permissible responsive evidence, and providing opponents an opportunity to respond to that new evidence, given the different circumstances governing the two evidentiary submissions. *Landwatch Lane County v. Lane County*, 75 Or LUBA 302 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Testimony that consists of argument by the applicant that takes the position that evidence already in the record supports a determination that the local government's code requirements are satisfied or can be met through conditions of approval is not new "evidence," as defined by ORS 197.763(9)(a), and the planning commission does not err in accepting and considering that testimony. *Rockbridge Capital v. City of Eugene*, 75 Or LUBA 364 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A planning commission staff report that summarized past interpretations of an applicable local code provision is not new "evidence," as defined by ORS 197.763(9)(a), but rather something closer to citation to authority. Even if some of the challenged statements qualify as "facts, documents, data or other information[]" pursuant to ORS 197.763(9)(a), a procedural error has not occurred where planning staff appears to have offered them to demonstrate the city does not have authority to apply the code provision to the application, and not to demonstrate compliance or noncompliance with the standards applicable to the application. *Rockbridge Capital v. City of Eugene*, 75 Or LUBA 364 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a hearings officer denies an application on multiple grounds, it may be prudent and appropriate for governing body, when affirming one basis for denial, to address all other bases for denial. However, absent authority that requires the governing body to address all issues raised on local appeal, or to address and resolve all bases for denial, the governing body commits no error in failing to address all bases for denial identified in the hearings officer's decision. *Kine v. Deschutes County*, 75 Or LUBA 407 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. While ORS 215.422(4) exempts communication between staff and decision-makers from the scope of *ex parte* contacts that must be disclosed under that statute, nonetheless, a county can commit procedural error if a staff communication to a decision-maker includes new evidence outside the record that is relied upon to approve or deny the application. However, a petitioner must offer more than speculation that staff communications with a local decision-maker included new evidence outside the record to establish procedural error requiring remand. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the city code requires a "Type III" procedure for a land division that includes four or more lots, but defines "lots" to exclude "tracts," the city correctly rejects arguments that a division that creates three lots and two open space tracts must be processed under the "Type III" procedure. *Frewing v. City of Portland*, 74 Or LUBA 59 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA will reject arguments that a hearings officer committed procedural error in not returning a subdivision application to the neighborhood association for additional review based on minor changes that staff requested to the subdivision plat, where the petitioner identifies nothing in the city code that requires additional review by the neighborhood association when the subdivision plat is amended during the proceedings before the hearings officer. *Frewing v. City of Portland*, 74 Or LUBA 59 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the Metro Code requires that a city give Metro notice 35 days before the first hearing on a comprehensive plan or land use regulation amendment, and a city fails to do so, but that hearing was continued twice and Metro was given notice more than 35 days before the continued hearing, any error was not prejudicial. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local government arguably erred by refusing to accept certain evidence, but the local government also takes the position that the evidence is irrelevant, and a petitioner at LUBA assigns error only to the local government's refusal to accept the evidence without also challenging the local government's finding that the evidence is irrelevant, any error the county may have made in refusing to accept the evidence is harmless. *Wood v. Crook County*, 74 Or LUBA 278 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city's notices of a remand hearing that do not specifically reference one of many issues to be addressed

during the hearing do not amount to procedural error, particularly where petitioners allege prejudice to the substantial rights of "the public" and not to "the petitioner," which ORS 197.835(9)(a)(B) requires petitioners to establish. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city's notices of a remand hearing that do not specifically reference one of many issues to be addressed during the hearing do not amount to procedural error, particularly where petitioners allege prejudice to the substantial rights of "the public" and not to "the petitioner," which ORS 197.835(9)(a)(B) requires petitioners to establish. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Arguments that a local government incorrectly refused to accept documents for the record and that the local government was not sufficiently clear about which documents it was refusing to accept for the record are properly presented as assignments of error in a petition for review, and are not a basis for a record objection. *Nicita v. City of Oregon City*, 74 Or LUBA 633 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A hearings officer's error in identifying 1984 instead of 1962 as the date a composting operation became nonconforming did not prejudice the applicant's substantial rights to present evidence regarding the lawful existence of the use prior to the date the use became nonconforming. Any remand to correct the erroneous citation to 1984 would focus on the correct date of nonconformity, 1962, and the applicant had a full opportunity to present evidence that the operation lawfully existed in 1962. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Under ORS 197.763(6)(a) through (c), prior to the conclusion of the initial evidentiary hearing any party may request an opportunity to present additional evidence. In that event, the hearing body must either continue the hearing or leave the record open to receive the additional evidence, and failure to do so is a procedural error. However, where the party making the request appeals and is given a de novo hearing before the local appellate body at which it is allowed to submit additional evidence, the hearings body's error did not result in prejudice to the party's substantial rights and therefore provides no basis for LUBA to remand. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA's conclusion that a planning commission's procedural error in failing to grant the continuance or open record period dictated by ORS 197.763(6)(a) through (c) provides no basis for reversal or remand, where the city council took corrective action to avoid prejudice to petitioner's substantial rights, does not improperly insert missing text into a development code that duplicates ORS 197.763(6)(a) through (c). *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA will deny an assignment of error that the local government committed a procedural error in failing

to provide material submitted after the record closed to the final decision maker, where nothing in the local code or any other statute or rule requires the local government to provide to the final decision maker a document that was submitted after the evidentiary record closed. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Parties opposing an application for a permit do not have the right to surrebuttal of rebuttal evidence submitted by an applicant during the rebuttal period. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. An attempt by one petitioner to incorporate procedural assignments of error that are presented in a different petition for review would not result in remandable error unless the procedural error prejudiced the substantial rights of the petitioner who filed the petition for review that is attempting incorporation, because a petitioner's assertion of prejudice to another person's substantial rights does not provide a basis for remand. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A hearings officer commits a procedural error that prejudices a party's substantial rights to a full and fair hearing when he fails to consider, during proceedings on remand from LUBA, relevant evidence that was a part of the record of the previous decision because it was not cited in the manner that was preferred by the hearings officer, where that preference was not clearly communicated to any parties to the proceeding. *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Without clear instructions during the remand proceedings that a hearings officer would not consider evidence that was not presented by a specific citation method, failing to consider that evidence is a procedural error that prejudices a party's substantial rights. *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A hearings officer improperly shifts the burden of proof to opponents of a mine to prove that the source of dust that is alleged to have a "significant impact" on adjacent farms emanates from a haul road that provides access to the mine, where the findings do not explain why the evidence that was submitted by the mine operator demonstrates that the source of the dust is not the haul road. *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A hearings officer improperly shifts the burden of proof to opponents of a mine to show that source of dust depicted in photographs of the mining area is from mining activities. It is the applicant's burden of proof to show that either the source of the dust depicted in the photographs is not from the mining activities, or that it can minimize or has minimized the dust from those activities so that the hearings officer can conclude that the mining activities do not significantly contribute to the cumulative dust problem in the protected viewshed. *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301 (2016).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city commits procedural error that prejudiced the applicants' substantial rights when it failed to provide the applicants with a reasonable opportunity to respond to new evidence regarding compliance with tree preservation requirements that was submitted one day prior to the city's denial of the application for failure to demonstrate compliance with those requirements, based on the new evidence. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Remand rather than reversal is the appropriate disposition when LUBA sustains an assignment of error to correct the city's procedural error in failing to provide petitioners with an opportunity to propose conditions in response to new evidence. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A mistaken reference to prior review and decision by the city's design review board, when in fact the city's planning commission actually conducted the prior review, is not reversible procedural error within the meaning of ORS 197.835(9)(a)(B), where the petitioner fails to establish that the mistake in the notice caused the petitioner to fail to prepare for and submit his case to the city council in person, and the evidence in the record demonstrates that previous commitments caused the petitioner to fail to attend the city council hearing in person. *Harrison v. City of Cannon Beach*, 72 Or LUBA 182 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A party seeking remand based on claims that new evidence was submitted after the close of the evidentiary record must, on appeal to LUBA, adequately identify the new evidence, explain why it constitutes new evidence, and offer some substantial reason to believe that the evidence had some effect on the final decision. Where on appeal to LUBA the petitioners identify statements in expert letters submitted as part of final written argument that the final decision-maker cited and relied upon, that burden is met. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where planning staff enter a letter including new evidence into the record just prior to the governing board entering into deliberations, the possibility that the petitioner might have raised a "point of order" objecting to the letter does not demonstrate that the petitioner had a reasonable opportunity to object to the procedural error, but failed to, because at that point in the proceeding there was no formal opportunity for participants to speak, present testimony or raise objections. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A petitioner adequately demonstrates that the final decision-makers relied upon the contents of a letter from a natural gas company regarding safety issues that was improperly received after the close of the evidentiary record, notwithstanding that the findings do not cite or expressly rely on the letter, where the minutes of the proceeding indicate that the decision-makers discussed the letter and appeared to rely on it to conclude that there were no natural gas safety issues. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A county's failure to give written notice to a party is not rendered harmless error simply because the governing body is given discretion under the code not to allow that party to participate at the hearing. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a party would have had at least 10 days to prepare for a hearing, giving that party the right to share 30 minutes with two other persons to present evidence at the end of the hearing is not sufficient to avoid prejudice to the party's substantial rights. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Although it is not a statutory requirement, LUBA requires that a party who wishes to assign procedural error at LUBA must have entered an objection to the procedural error before the local government, if the party was given an opportunity to object. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Remand would almost certainly be required if a party who was entitled to written notice of a hearing was not given written notice and did not attend the hearing. But where that party learns of the hearing, attends the hearing, and was given an opportunity to object to the county's failure to give the required written notice of hearing and failed to object, that party may not assert the procedural error as a basis for remand at LUBA. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner was not given required written notice of hearing but learned of the hearing and appeared at the hearing and participated, he may not assign error to the failure to give notice where he had an opportunity to object to the notice failure and did not do so. That failure to object constitutes a waiver of the issue under ORS 197.763(1) and a failure preserve the right to assign procedural error. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. After determining that a proposal to remove 500,000 cubic yards of rock constituted mining and that mining was not listed as an allowable use in the applicable zoning district, a city does not commit reversible or remandable error by then proceeding to consider whether the proposal could be allowed under development code standards that allow approval of unlisted uses. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Under ORS 197.835(9)(a)(B), LUBA may reverse or remand for procedural error only if the petitioner demonstrates that the error prejudiced the substantial rights of the petitioner in the appeal before LUBA rather than the substantial rights of a different petitioner in a separate appeal before LUBA that is consolidated with petitioner's appeal. *Mackenzie v. City of Portland*, 71 Or LUBA 155 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A petitioner fails to establish the requisite prejudice to her substantial rights necessary to sustain a procedural assignment of error regarding the way the city processes her appeal when she appeals a city administrator's decision, the city grants her an appeal hearing, and she presents evidence to support her appeal at the appeal hearing. *Smith v. City of Gearhart*, 71 Or LUBA 184 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city's failure to provide a party who is entitled to notice under the city's code with notice of (1) a hearings officer's decision and (2) an appeal hearing on another party's appeal of the hearings officer's decision prejudices the party's right to participate in the planning commission appeal hearing and remand is required. *Oakleigh-McClure Neighbors v. City of Eugene*, 71 Or LUBA 317 (2015).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A hearings officer's decision to recognize an existing structure as a nonconforming structure and to approve a new school use of that structure as an alteration of a nonconforming use, where there was no prior notice that the local government's nonconforming use regulations would be applied, constitutes a procedural error that prejudiced petitioner's substantial rights. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a county code requires that the application be deemed denied on a tie vote, unless the planning commission members present at the hearing vote to reschedule the deliberation, but the planning commission does not vote to reschedule the deliberation until a subsequent hearing which does not include all of the same members present at the initial hearing, the planning commission may have committed procedural error. However, absent code language to the contrary, that procedural error does not deprive the planning commission of jurisdiction or authority to conduct a second vote on the application. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. If a planning commission's vote to reschedule deliberations and conduct a new vote after a tie vote that would otherwise result in denial constitutes procedural error, that error is a basis for remand under ORS 197.835(9)(a)(B) only if the error prejudices the substantial rights of the petitioner. The substantial rights referenced in ORS 197.835(9)(a)(B) include an adequate opportunity to prepare and submit evidence, and a full and fair hearing, but do not include a right to a specific outcome. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The remedy for correcting a planning commission error in accepting new evidence in an on the record appeal is not to remand the decision to allow an evidentiary free for all in the form of new rebuttal evidence to the improperly accepted evidence, but to remand the decision for the planning commission to make its decision without relying on *any* new evidence. *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51 (2013).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. City council statements that a proposed plan and zoning map amendment to allow higher density would be "a partial answer to global warming" and generate "affordable housing" and expressions of

confidence that a good outcome could be negotiated between opponents and the applicant in design review provide no basis for reversal or remand even though they may have no bearing on whether applicable approval criteria are satisfied. Generally LUBA review is limited to the final, written decision and does not extend to comments that may be made during the proceeding that lead to that final written decision. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Failure of a city council to vote on a valid challenge to the impartiality of a city council member, as required by city code, prejudices the substantial rights of the challenger, regardless of whether the vote would result in the disqualification of the city council member or whether the member's alleged bias influenced other decision makers. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local government accepts opponent evidence that goes beyond the stated scope of a seven-day open record period, but grants the applicant final argument and evidentiary rebuttal, the applicant's substantial rights are not prejudiced and the local government's error in accepting the opponent evidence does not provide a basis for remand. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a county code requires that bias challenges be filed at least 48 hours before the public hearing on a quasi-judicial matter, and there is no reason why the challenge could not have been filed before or during that hearing, petitioner's challenge filed three days before board of commissioners meeting where the board approved the written decision and findings comes too late. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a quasi-judicial land use decision maker fails to disclose any *ex parte* contacts, a petitioner does not waive its right to assign error to that failure at LUBA by failing to object below to the failure to disclose *ex parte* contacts. *Wal-Mart Stores, Inc. v. City of Hood River*, 67 Or LUBA 332 (2013).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Failure to make a staff report available during the entire minimum period required by ORS 197.763(4)(b) is not a basis for remand, where petitioners had the opportunity during the subsequent hearing to adequately respond to any issues raised or evidence presented in the staff report. *Poe v. City of Warrenton*, 66 Or LUBA 108 (2012).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The fact that a city believed it was making a decision on the last day allowed by the ORS 227.181 for a decision after remand does not absolve the city from following the procedures applicable to quasi-judicial hearings, including giving all parties the opportunity to respond to new evidence submitted at the hearing. The city could have rejected the new evidence and avoided the procedural conundrum that it apparently believed it faced or could have left the record open to respond to the new evidence under ORS 197.763(4)(b). *Poe v. City of Warrenton*, 66 Or LUBA 108 (2012).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Parties to a land use proceeding have the right to review and respond to substantive changes in the application that occur during the proceedings. If such a change occurs after the close of the record or hearing, the local government may be required to re-open the record to allow other parties a reasonable opportunity to submit responsive testimony and evidence. Failure to do so can be procedural error and a basis for remand, if the petitioners demonstrate the error prejudiced their substantial rights. *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Remand is warranted, where a city's procedural error in rejecting the petitioner's request to submit evidence to respond to a substantive change in the application after the close of the record prejudiced the petitioner's substantial rights to respond to the changed application. *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. ORS 197.763 sets out the minimum procedures the county is required to follow in the conduct of quasi-judicial land use hearings under ORS Chapter 215, and ORS 197.763 does not require that the county provide an applicant with prior copies or notice of the evidence that the county submits at the initial evidentiary hearing on a permit application. *Emmert v. Clackamas County*, 65 Or LUBA 1 (2012).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where *ex parte* contacts were disclosed and a petitioner was given the opportunity to object to the adequacy of the disclosure but failed to do so, LUBA will deny an assignment of error that argues that the disclosures were inadequate to explain the substance of the contacts. *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The failure by a member of the decision making body to disclose *ex parte* contacts that occurred after the hearing at which the decision making body initially voted to deny an application and before the next meeting at which the decision making body adopted the order denying the application violates ORS 227.180(3). *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The remedy for violation of ORS 227.180 is not to require an entire rehearing on an application. An adequate remedy is a remand to the city that allows interested persons the opportunity to prepare and present evidence and argument in response to the substance of the *ex parte* contact. *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A hearings officer's existing contractual relationship as an independent part time hearings officer for a local government who is an applicant for a permit from a different jurisdiction, and his participation as an independent hearings officer for the decision-making jurisdiction does not create an appearance that he was biased in the proceedings on the applications. *Newell v. Clackamas County*, 65 Or LUBA 384 (2012).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA will not infer bias based on an argument that a hearings officer's decision did not modify any conditions of approval that the county's planning staff suggested or add any additional conditions. *Newell v. Clackamas County*, 65 Or LUBA 384 (2012).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where local law does not require adherence to the notice and hearing or notice and local appeal procedures that apply to statutory permits, a local government does not err by adhering to those statutory notice and hearing or notice and local appeal procedures when it discovers that the decision it is being asked to adopt may qualify as a statutory permit. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the planning commission makes an oral decision on an application but fails to reduce that oral decision to writing as required by the local code, and petitioner appeals the planning commission's oral decision to the city council, the planning commission's failure to reduce its oral decision to writing is not error that prejudices the petitioner's substantial rights where the city council holds a de novo evidentiary hearing on the application at which petitioner presented evidence and testimony regarding the application. *Poe v. City of Warrenton*, 63 Or LUBA 20 (2011).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Whether a criterion that was not listed in the notice of hearing is an "applicable" criterion or not, there is no procedural error that would warrant reversal or remand where petitioner were given an opportunity to present argument on the criterion. *Siegert v. Crook County*, 63 Or LUBA 379 (2011).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. In a county code enforcement proceeding before a hearings officer, petitioner's complaints that a county code enforcement officer improperly interfered with pending civil litigation between petitioner and his neighbor and improperly contacted the Oregon Department of Fish and Wildlife regarding the county hearings officer's decision in the code enforcement proceeding after the hearings officer's decision was entered provide no basis for reversing or remanding the hearings officer's decision. The alleged improprieties by the county code enforcement officer may be actionable in a different forum, but they provide no basis for remanding the county hearings officer's decision. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The exclusive remedy for an alleged failure by a county code enforcement officer to produce requested public records is to petition the county district attorney for relief under ORS 192.460. Where the disputed photographs and the substance of the disputed field notes were made part of the record before a hearings officer in a land use code enforcement proceeding and petitioner was permitted to submit contrary evidence and cross examine the code enforcement officer in the hearing before the hearings officer, there was no prejudice to petitioner's substantial rights and no basis for remand. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The procedure a city is bound to follow in its land use public hearings is dictated in part by the notice of hearing that it gives. Where the notice of hearing represents that written evidence may be submitted for the first time at the hearing and makes no mention of the city council's general rules and guidelines that state written evidence may not be considered if not submitted at least 10 days before the public hearing, it is error for the city to rely on the general rules and guidelines to refuse to accept written testimony that is submitted for the first time at the public hearing. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city's erroneous refusal to accept a two-page letter at a public hearing results in no prejudice and provides no basis for reversal or remand where the author of the letter was given sufficient time to read the letter into the record. A city's erroneous refusal to accept a 10-page letter at a public hearing results in prejudice and provides a basis for reversal or remand, where the author was given only 10 minutes to testify orally and when the 10 minutes expired was told to "wrap it up" before the author had time to read the entire letter. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Limiting a party to 10 minutes for oral testimony in a quasi-judicial land use hearing before a design review board, while allowing unlimited written testimony, and limiting an appeal of the design review board to the city council to an on-the-record review does not violate the party's right to due process. *Reeves v. City of Wilsonville*, 62 Or LUBA 142 (2010).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city's failure to provide adequate notice that it had recharacterized the application from an application to modify an existing permit to an application for a new permit might constitute procedural error, but that error does not prejudice the petitioner's substantial rights, where the recharacterization was in response to petitioner's arguments, the applicable criteria are the same whether it is a modification or new application, and petitioner had ample opportunity to submit evidence and argument after it became clear that the city was treating the application as one for a new permit. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. It is harmless error to rely on new evidence that is accepted after the close of the record regarding water quality impacts of a proposed alteration to a nonconforming use, where the hearings officer also denied the proposed alteration based on fire safety impacts, and the petitioner/applicant does not challenge that basis for denial. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A county's alleged failure to process a permit application under "Type II" procedures, which provide for a *de novo* hearing on appeal of an administrative decision, does not provide a basis for remand, where the county initially processed the application under "Type I" procedures that provide for a hearing limited to the issues raised in the appeal petition, but in fact the county provided a *de novo* hearing on the appeal not limited to the issues raised in the appeal petition. *Jensen Properties v. Washington County*, 61 Or LUBA 155 (2010).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A county's failure to include in its decision notice of a right to appeal to LUBA, as required by ORS 215.416(13), results in no prejudice to petitioner and provides no basis for remand, where petitioner files a timely appeal of the decision with LUBA. *Reed v. Jackson County*, 61 Or LUBA 253 (2010).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the comprehensive plan and land use regulation standards that a county relies on in its decision to deny an application for partition approval were not identified in the notice of hearing, in the planning staff report or in the hearing, the applicant's substantial rights were prejudiced by the county's error in failing to provide notice of relevant approval standards and remand is required. *MEK Properties, LLC v. Coos County*, 61 Or LUBA 360 (2010).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government's failure to inquire whether any hearing participants wish to submit a written request for a continued hearing, as required by its local procedural rules, does not provide a basis for remand, where the petitioner's representative was present at the hearing, had the opportunity to object to the decision-maker's failure to make the inquiry, but failed to object. *Pliska v. Umatilla County*, 61 Or LUBA 429 (2010).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Under *Young v. Crook County*, 224 Or App 1, 197 P3d 48 (2008), in an "as applied" challenge of the appeal fee the county charged petitioners to appeal a planning commission decision that approved a destination resort, petitioners have the burden to establish a *prima facie* case that the appeal fee violates ORS 215.422(1)(c) by exceeding the average cost of such appeals. A county governing body errs by refusing to reopen the record to allow petitioners to supplement the evidentiary record of that local appeal with the planning staff memo that the county relied on in adopting the appeal fee schedule. Petitioners are not required to anticipate that the planning commission decision will be unfavorable and make an anticipatory and potentially unnecessary evidentiary showing regarding the appeal fee before the planning commission. *Eder v. Crook County*, 60 Or LUBA 204 (2009).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Just as a local government errs by refusing to accept relevant evidence, a local government errs if it accepts relevant evidence that is submitted in accordance with local law and then fails to provide that relevant evidence to the local decision maker. *Montgomery v. City of Dunes City*, 60 Or LUBA 274 (2010).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the applicable process for review of an application requires notice and an opportunity for a hearing, the local government fails to provide such notice and provides no opportunity for a hearing, and those failures prejudice a party's substantial rights, including the right to participate in the decision, those failures constitute a procedural error that provides a basis for remand. *Johnson v. Jackson County*, 59 Or LUBA 94 (2009).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. ORS 197.835(4) allows a petitioner at LUBA to raise issues that were not raised below and that a petitioner would otherwise be precluded from raising under ORS 197.763(1) regarding applicable criteria that were omitted from the notice. A mere allegation that the notice omitted applicable criteria does not, in itself, provide a basis to reverse or remand a decision absent an allegation that the failure to list all applicable criteria in the notice resulted in prejudice to the petitioner's substantial rights. *Knapp v. City of Corvallis*, 59 Or LUBA 285 (2009).

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

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Procedural errors a city may have committed might provide a basis for reversal or remand, if there is a timely appeal of a land use decision. However, any such procedural errors do not have the legal effect of preventing a land use decision from becoming final or delaying the date of finality. *Reeves v. City of Wilsonville*, 58 Or LUBA 545 (2009).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. ORS 197.830(5) gives additional appeal rights to parties where a local government makes a decision that is different from the proposal described in the notice. That statute does not require notice of a change to an application. *Welch v. Yamhill County*, 56 Or LUBA 166 (2008).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. When local approval criteria are amended after an application is filed and the local ordinance requires that the notice state the applicable criteria, it is not a procedural error for the local government to list the older approval criteria that are applicable to the application rather than the amended approval criteria that are not applicable. *Painter v. City of Redmond*, 56 Or LUBA 264 (2008).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. There is no prejudice to a party's substantial rights when a notice of a hearing does not list the applicable criteria if the staff report that was available before the hearing lists the applicable criteria, the party was aware of the applicable criteria, and the party had an adequate opportunity to address the applicable criteria. *Painter v. City of Redmond*, 56 Or LUBA 264 (2008).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Opponents of land use approval have no legal right to comment on the findings that a city adopts to support its decision to grant land use approval, and opponents similarly have no legal right to comment on amended findings that a city adopts after it withdraws a decision following an appeal to LUBA under 197.830(13)(b). *Loprinzi's Gym v. City of Portland*, 56 Or LUBA 358 (2008).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Petitioners' arguments to LUBA that a local government failed to give notice of its annexation decision within the deadlines specified by statute and by a regional government provide no basis for reversal or remand, where petitioners raised no issue below concerning the adequacy of the notice and petitioners do not allege that the claimed late notice prejudiced petitioners' substantial rights. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where nothing in the county's code supports a claim that payment of a local appeal fee is a jurisdictional requirement, failure to pay the appeal fee is not grounds for dismissal of the appeal at the local level. *Ratzlaff v. Polk County*, 56 Or LUBA 740 (2008).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Even if a local government's decision to hold an *ad hoc* hearing before an application for permit approval was filed constituted procedural error, that error would not provide a basis for reversal or remand where petitioner was allowed to participate in the *ad hoc* hearing and made no attempt to show how that *ad hoc* hearing prejudiced his substantial rights. *Trinkaus v. City of Portland*, 56 Or LUBA 771 (2008).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The substantial rights that parties in a land use proceeding have under ORS 197.835(9)(a)(B) are the rights to prepare and submit their case and to a full and fair hearing. Those rights are not preserved by allowing another party to testify and assuming that other parties would have nothing to add to that testimony. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local government erroneously decides that certain parties may not participate regarding certain issues in public hearings following a LUBA remand, but then nevertheless allows those parties to participate fully, the initial error would likely not result in prejudice to the parties' substantial rights. However, where the record in fact supports a conclusion that the parties' testimony on the disputed issues was not considered, the parties' substantial rights were prejudiced. *Siporen v. City of Medford*, 55 Or LUBA 29 (2007).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a hearings officer's authority to issue a declaratory ruling has not been properly invoked, the hearings officer has no authority to issue the ruling, and the erroneous exercise of that authority is not accurately characterized as a mere procedural error that may be overlooked absent a demonstration of prejudice to the petitioner's substantial rights. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where evidence was introduced at a city council hearing by the mayor and a city councilor, but that evidence was not directed at any approval criterion and the city did not deny the application on any grounds that were based on or related to the improperly generated evidence, their actions did not demonstrate that they were incapable of making a decision based on the evidence before them. *Taylor v. City of Canyonville*, 55 Or LUBA 658 (2008).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the purpose of a zoning code requirement that a permit application be initiated in one of six specified ways is to ensure that the current property owner or purchaser of the affected property knows about and agrees with the application, and the record establishes that the current property owner agrees with the application, the county's procedural error in allowing the permit application to be initiated in other than one of the six ways specified in the zoning code could not prejudice a permit opponent's rights and provides no basis for reversal or remand. *Womble v. Wasco County*, 54 Or LUBA 68 (2007).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A county's procedural error in providing a permit opponent notice of a planning commission decision on the permit rather than a copy of the permit decision itself could result in prejudice to the opponent's substantial rights, where it prevented the opponent from being able to file a timely appeal to the board of county commissioners. However, where the opponent was nevertheless able to file a timely local appeal, there was no prejudice to the opponent's substantial rights, and the county's failure provides no basis for reversal or remand at LUBA. *Womble v. Wasco County*, 54 Or LUBA 68 (2007).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city's argument that all of petitioner's assignments of error should be denied for failure to argue that the alleged errors prejudiced petitioner's substantial rights will be rejected where non-procedural errors need not prejudice a petitioner's substantial rights and petitioner's assignments of error allege substantive rather than procedural errors. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. That a conditional use permit application is deemed complete under ORS 227.178 does not necessarily mean that the application is supported by substantial evidence that demonstrates compliance with all applicable approval criteria. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government errs in accepting new information into the record after the public hearing on a matter is closed without allowing other parties an adequate opportunity to respond to the new evidence. *Gunzel v. City of Silverton*, 53 Or LUBA 174 (2006).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A county does not err by interpreting a development code compatibility standard for the first time in its written decision, where the interpretation was not beyond the range of interpretations that could reasonably have been anticipated during the evidentiary phase of the county's proceedings, and petitioners do not demonstrate (1) that there is specific evidence that they could present that differs in substance from the evidence that they already submitted or (2) that the new evidence is directly responsive to the county's interpretation. *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998). *Clark v. Coos County*, 53 Or LUBA 325 (2007).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Although local governments frequently attempt to advise permit applicants regarding the scope and nature of evidence that will be required to demonstrate that a proposal complies with applicable land use approval criteria, it is not the local government's burden to accurately predict in advance all of the evidence that may ultimately be needed to obtain approval of a land use application. *Gillette v. Lane County*, 52 Or LUBA 1 (2006).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A hearings officer's refusal to leave the record open to allow the petitioners to respond to alleged "new evidence" that was submitted during the final evidentiary hearing is not a basis to reverse or remand the decision, where petitioners fail to establish that in fact "new evidence" was submitted or that there is anything to rebut under the hearings officer's unchallenged interpretation of the applicable code provision. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a hearings officer reopens the evidentiary record to allow parties to present arguments and evidence concerning whether a different adjustment/variance criterion than had been applied before should be applied to an application for an adjustment/variance, and petitioners do not argue that the hearings officer's actions failed to provide petitioners with an adequate opportunity to present their arguments on the merits concerning which adjustment/variance criterion should apply, petitioners fail to demonstrate that the hearings officer's action resulted in prejudice to their substantial rights or that any substantive error on the hearings officer's part was not harmless error. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Given the Department of Land Conservation and Development Commission's (DLCD's) critical role in the plan amendment review process, complete failure to provide notice of post-acknowledgment plan amendments to DLCD may be a "substantive" error that obviates the requirement to show that the procedural error prejudiced the petitioner's substantial rights. However, it does not follow that failure to provide other types of notice to other parties in other contexts is also a "substantive" error obviating the ORS 197.835(9) requirement that the petitioner show prejudice. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. In making limited land use decisions, it is error for local governments to consider evidence submitted after the close of the comment period. By requesting and accepting a mini traffic study from the applicant that the decision maker relied upon after the close of the comment period, without giving petitioners an opportunity to review and respond to the study, the local government violates petitioners' substantial rights. *Delk v. City of Salem*, 51 Or LUBA 123 (2006).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. In order to prevail on a claim of procedural error, a petitioner must do more than allege his substantial rights were prejudiced; he must also identify the procedure that was allegedly violated. *Stoloff v. City of Portland*, 51 Or LUBA 560 (2006).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where an applicant submits a traffic impact analysis on the day the last public hearing closes, and an opponent thereafter asks the city planning department to provide him with a copy of all the applicant's traffic materials within the 7-day period the record remained open for opponents to submit additional evidence, the city's failure to provide the opponent with a copy of the traffic impact analysis is a procedural error that prejudiced the opponents' substantial rights. *Jaffer v. City of Monmouth*, 51 Or LUBA 633 (2006).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. When new evidence is submitted after the close of the comment period during limited land use proceedings, as with land use decisions, the local government must either (1) reopen the record to allow participants an opportunity to respond to the new evidence or (2) reject the new evidence as untimely. *Wal-Mart Stores, Inc. v. City of Oregon City*, 50 Or LUBA 87 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Failure to post notice of a hearing as required under the local government's code is not a basis for reversal or remand, where the petitioner nonetheless knew of the hearing and attended. *Gordon v. Polk County*, 50 Or LUBA 502 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The time to reject or accept new evidence that is submitted after the close of the evidentiary record is before the decision maker deliberates and reaches a tentative decision. A local government cannot accept such untimely evidence, reach a tentative decision based on the entire record, and then adopt a final written decision that belatedly rejects or purports not to rely on the evidence. *Ploeg v. Tillamook County*, 50 Or LUBA 608 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city's failure to make a staff report available 15 days prior to a hearing as required by the local code prejudices a petitioner's substantial rights where the staff report is made available only 7 days before the hearing and the application is particularly complex. *Hammons v. City of Happy Valley*, 49 Or LUBA 38 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The failure of a local government to provide LUBA with the entire local record does not in itself require remand. However, where the record is so inadequate that LUBA cannot adequately review the decision, the local government's failure to provide the whole record may result in remand. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where LUBA can understand a party's presentation and arguments, the local government's failure to provide oversized exhibits for use at oral argument does not prejudice the party's substantial rights. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city may not accept a revised planned unit development plan the day before an appeal without

providing the local parties an opportunity to review and respond to the revised plan. *Baker v. City of Garibaldi*, 49 Or LUBA 437 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Although a city may not take procedural short-cuts that it knows or reasonably should know will prejudice one or more party's substantial rights and thereby provide a reasonably certain basis for an appeal to and remand by LUBA, ORS 197.835(10)(a)(B) or ORS 227.178 do not prohibit a city from expediting its local review process to meet the 120-day deadline, provided that expedited process does not require one or more parties to sacrifice their substantial right to fully and fairly present their position on the merits of the application. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The ORS 227.178(1) requirement that a city render a final decision on a permit application within 120 days is not satisfied by a *pro forma* denial. To comply with ORS 227.178(1) and comply with the ORS 197.835(10)(a)(B) requirement that the city not take action to avoid the requirements of ORS 227.178, the city's decision must be a *real* decision that is made in good faith, in the sense that the decision is supported by findings and is based on an evidentiary record that the city could reasonably believe are adequate to allow that decision to be defended in the event of an appeal to LUBA. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Neither the text of ORS 197.835(10)(a)(B) nor contextual statutes dictate that *any* deviation by a city from its procedures to render a timely final decision within the 120-day deadline imposed by ORS 227.178(1) necessarily constitutes an "action [taken] to avoid the requirements of ORS * * * 227.178," within the meaning of ORS 197.835(10)(a)(B). *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The actions taken to avoid the requirements of ORS 227.178, which may provide a basis for reversal by LUBA under ORS 197.835(10)(a)(B), are not limited to a city's final action. Actions the city takes before adopting its final decision may also violate the statute. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Petitioners are in no position to fault the city for accepting new evidence during a non-evidentiary hearing, where petitioners were the only persons who testified and were the persons who submitted the new evidence. That the city accepted petitioners' evidence did not convert the hearing into an evidentiary hearing, or require the city to renotice the hearing and provide additional opportunities to present evidence. *Patterson v. City of Independence*, 49 Or LUBA 589 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A petitioner's failure to object to untimely disclosure of a site visit and to request the opportunity to rebut the site visit precludes assigning error to that disclosure, where the disclosure was made 10 days prior to the hearing at which the local government adopted the final decision, and petitioner

could have entered an objection at any time during those 10 days or during the final hearing, but did not. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where statutory notice of hearing requirements are not jurisdictional, failure to comply with those statutory requirements is reviewed under ORS 197.835(9)(a)(B), which establishes LUBA's scope of review for procedural errors. *Kneeland v. Douglas County*, 48 Or LUBA 347 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a notice for the required second hearing on formation of a special district corrects certain errors in the notice of the first hearing, any defects in the first notice are cured. *Kneeland v. Douglas County*, 48 Or LUBA 347 (2005).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where applicable criteria require that the applicant and city identify the intended use and evaluate its impacts, a city errs when, in a combined role as applicant and decision-maker, it substantially changes a "intended use" of property proposed for rezoning after the close of the evidentiary hearing without providing the petitioner an opportunity to present argument and evidence with respect to the new intended use. *Nielson v. City of Stayton*, 47 Or LUBA 52 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A citizen participation requirement for appointment of a three-person citizens' advisory committee when considering major land use regulation amendments is a procedural requirement. A petitioner who wishes to assign error to the local government's failure to appoint such a committee must have objected to that failure during the proceedings below. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. An ambiguous statement that could be understood to refer to *ex parte* contacts, but could also be understood to refer to contacts that were not *ex parte* contacts might be sufficient to warrant an evidentiary hearing to clarify the meaning of the reference, but is not sufficient to support a conclusion that there were improper undisclosed *ex parte* contacts. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA is unable to perform its review function and remand is required where the county rejects, without any explanation, evidence that is arguably relevant to an applicable criterion. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. ORS 215.422(4), which excludes certain contacts between planning staff and the local decision maker from the definition of *ex parte* contacts, does not authorize a decision maker to rely on evidence provided by planning staff that it specifically refuses to include in the record, after the close of the record, without providing an opportunity for rebuttal. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Assuming, without deciding, that it is reversible error to combine a unitary legislative proceeding with a geographically and otherwise unrelated site-specific proposal, a city decision that applies a height bonus to a particular property that is within a 535-acre study area subject to a number of legislative plan and land use regulation amendments is not geographically or otherwise unrelated to the legislative proceeding. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Any prejudice to petitioners' substantial rights that might have resulted from late filing of a staff report and late evidentiary submissions prior to a final hearing was avoided by providing petitioners an opportunity to submit additional evidence and testimony after that hearing. *McCulloh v. City of Jacksonville*, 46 Or LUBA 267 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. When neither the notice, nor the staff report, nor the local government's public discussion, nor the decision ever mentions the applicable criteria, a local government commits procedural errors that prejudice a petitioner's substantial rights. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Before the "raise it or waive it" provisions now codified at ORS 197.763(1) and 197.835(3) were adopted, LUBA required that a petitioner who asserts procedural error at LUBA must have raised the procedural error below. While the obligation to object locally to procedural errors overlaps with ORS 197.763(1) and 197.835(3), it exists independently and may require that a petitioner enter an objection after the close of the final evidentiary hearing. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. That a committee entertained questions from the public during its deliberations after the close of its final evidentiary hearing does not mean the committee would have allowed a legal challenge to its reliance on a committee rule, or that it would have reconsidered its decision to rely on that rule to deny a local appeal. A petitioner's failure to object to the rule at that stage does not mean the issue is waived in a subsequent LUBA appeal. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city does not err in approving a subdivision applicant's tree protection plan with a condition that the applicant provide the city arborist with construction documents so that the arborist can determine whether additional trees must be removed. While that condition could be viewed as an improper deferral of a finding concerning the adequacy of the tree protection plan, it does not do so where the condition does not specify that the tree protection plan may be revised without additional public hearings and the condition simply creates a more structured approach for computing the mitigation that would be required in any event without the condition. *Miller v. City of Tigard*, 46 Or LUBA 536 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a party is present at a rezoning hearing where a county commissioner discloses that he and a county planner made a site visit to the subject property, and that party testifies after the disclosure without objecting to the site visit, the planner's attendance at the site visit or the adequacy of the county commissioner's disclosure of the site visit, that party waives his right to assign error based on the site visit in an appeal at LUBA. *Mattson v. Clackamas County*, 46 Or LUBA 552 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A petitioner's argument that a city's erroneous notice regarding the date it would reconsider a decision following remand from LUBA provides no basis for reversal or remand, where petitioner's entire argument is based on an erroneous assumption that an evidentiary hearing was required on remand and that the notice the city gave did not comply with ORS 197.763(2). *McFall v. City of Sherwood*, 46 Or LUBA 735 (2004).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government does not err in failing to provide an evidentiary hearing on remand to accept updated information regarding the current status of petitioner's property, where LUBA's remand did not require the local government to conduct additional evidentiary hearings, and petitioner fails to identify any authority that requires the local government to conduct an additional evidentiary hearing to accept updated information. *Manning v. Marion County*, 45 Or LUBA 1 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city commits no error by processing a lot line adjustment as a quasi-judicial land use matter before the planning commission rather than as a ministerial matter before the planning department, where the lot line adjustment decision requires that the city exercise significant legal and factual judgment. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Petitioners do not have a right to rebut recitations of fact in adopted findings, and such findings do not constitute "evidence," although if adopted findings of fact that are not supported by the record, that lack of evidentiary support may be a basis for reversal or remand under ORS 197.835(9)(a)(C). *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. An assignment of error that alleges that petitioners' substantial rights were prejudiced by a city's failure to provide notice of an applicable approval criterion provides no basis for reversal or remand, where (1) the record shows that the criterion was identified at a public hearing as being applicable; (2) petitioners had an opportunity to respond to the assertion that the criterion was applicable; and (3) petitioners' attorney responded to the assertion by contending that the criterion was not applicable. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. If a county rejects evidence that was submitted after the close of the record, and does not consider that evidence in making its decision, the county's refusal to permit rebuttal of that late submittal does not provide a basis for reversal or remand. *Sheppard v. Clackamas County*, 45 Or LUBA 507 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where it is clear that a decision maker considered evidence that was submitted after the close of the record, and that the decision maker may have relied on that evidence in making its decision, the decision maker errs in refusing to allow rebuttal to that evidence, notwithstanding a statement in the final decision document that the disputed evidence was rejected. *Sheppard v. Clackamas County*, 45 Or LUBA 507 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Providing only 22 days' notice of hearing to DLCD of a post-acknowledgment plan amendment, rather than the full 45 days' notice required by ORS 196.610(1), is not reversible error, where both petitioner and DLCD participated in the proceedings, and there is no attempt to demonstrate that short notice prevented any other person that might rely on the notice from participating in the local government's proceedings. *Bryant v. Umatilla County*, 45 Or LUBA 653 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Alleged statements made by a decision maker at a social function that the decision maker would listen to the evidence and testimony regarding an application for a plan amendment and zone change, but would nevertheless vote to approve the application are not sufficient to establish prejudgment bias where the accuracy of those statements were disputed and the decision maker stated that he had considered the testimony and evidence and was prepared to make a decision based on that testimony and evidence. *Roberts v. Clatsop County*, 44 Or LUBA 178 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The absence of required information or analysis in an application is not necessarily viewed as a procedural error, and may be a basis for reversal or remand even without a showing of prejudice to petitioner's substantial rights, where the information or analysis is necessary to determine compliance with approval criteria. *Bauer v. City of Portland*, 44 Or LUBA 210 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city commits no error in proceeding with a decision on an application for a subdivision, and does not violate a subdivision opponent's due process rights, where a quiet title action is pending to resolve an ownership dispute between the opponent and the subdivision applicant, but the applicant is the record fee owner of the property. *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A petitioner's substantial rights include the right to a final written decision by the final decision maker on petitioner's local appeal. An allegation that the city council failed to adopt a final written decision on petitioner's appeal is sufficient to allege prejudice to petitioner's substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A petitioner fails to demonstrate that he was entitled to an evidentiary hearing before the local government following a remand from LUBA under *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), where the arguments petitioner sought to present in that evidentiary hearing on

remand were legal arguments rather than an expanded evidentiary presentation. *Dimone v. City of Hillsboro*, 44 Or LUBA 698 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. That certain documents may not have been provided to the planning commission provides no basis for remand, where the planning commission decision was appealed to the city governing body, the governing body adopted the city's final decision and there is no contention that the disputed documents were provided to the city governing body. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Petitioners fail to establish that they are entitled to a new evidentiary hearing to respond to an interpretation setting an unanticipated evidentiary standard, where petitioners do not describe what additional evidence responsive to the unanticipated interpretation they would produce, or how that evidence differs in substance from evidence already in the record. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA will not remand a decision based on an allegation that the decision maker failed to follow the consultation and coordination requirements of OAR 340-252-0060, where the record makes clear that all parties required by the rule to be consulted were aware of and actively participated in the process leading to the challenged decision, and any failure to follow the procedures set out by the rule was attributable to someone other than the decision maker. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. While ORS 197.835(4) operates as a limited defense to a waiver challenge under ORS 197.763(1) and 197.835(3), it does not obviate the requirement that a party given the opportunity to object to a procedural error below must do so in order to seek reversal or remand based on that error. *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Failure to complete a conditional use application on city forms created for that purpose will not result in reversal or remand absent some argument from petitioners that the lack of a formal application prejudiced their substantial rights. *Monogios and Co. v. City of Pendleton,* 42 Or LUBA 291 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local government departs from the procedures for continuing a hearing set out in ORS 197.763(6)(a) to (c), the revised procedures must be clearly communicated to all parties and, preferably, reduced to writing. *Hawman v. Umatilla County*, 42 Or LUBA 223 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the circumstances under which oral testimony would be allowed at a continued hearing are not clearly defined, and petitioners allege that they were prejudiced by being denied an opportunity to present oral testimony at the continued hearing based on the ambiguity of the procedures, remand

is appropriate to ensure that petitioners receive an opportunity to present that oral testimony. *Hawman v. Umatilla County*, 42 Or LUBA 223 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Decision maker bias in a land use matter must be deduced from the totality of the circumstances. Where a decision maker is a member of a church congregation and the church is an applicant for a land use permit, the decision maker's church membership does not, in itself, require the decision maker's recusal for bias. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a land use decision maker is a member of a church congregation and the church has applied for a land use permit, and the decision maker has expressed concern regarding the impact proposed conditions of approval would have on church operations but nevertheless declares that she is able to render a decision regarding the church's application based on the facts and law before her, that decision maker has not impermissibly prejudged the application. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a land use decision maker is a member of a church congregation and the church has applied for a land use permit, and the decision maker has (1) testified as an individual in favor of the application prior to his election to the decision making body; and (2) stated that he did not believe he had to be objective regarding the application and would support the application "all the way to the Supreme Court," the decision maker has impermissibly prejudged the church's application and, absent some need for his participation in order to reach a decision, recusal is required. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government's failure to comply with the notice requirements of OAR 660-018-0040(1) provides DLCD and other parties subject to notice under ORS 197.615 an opportunity to appeal the county's decision beyond the deadline established in ORS 197.830. It does not provide an independent ground for reversal or remand, in the absence of an argument that the failure to comply with the standard prejudiced petitioner's substantial rights. *Doty v. Coos County*, 42 Or LUBA 103 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a city provides notice that it will provide a hearing to comment on a proposed expedited annexation if a hearing is requested, and petitioner requested a hearing, the city errs in approving the expedited annexation without providing the requested hearing. *Cape v. City of Beaverton*, 41 Or LUBA 515 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Notwithstanding a city's procedural error in failing to provide a hearing on a proposed expedited annexation, petitioner's substantial rights were not thereby violated where petitioner was nevertheless allowed to appear before the city council and present his comments before the city council approved the expedited annexation. *Cape v. City of Beaverton*, 41 Or LUBA 515 (2002).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city council's failure to adopt required findings explaining why it allowed a partial *de novo* appeal hearing, rather than an on-the-record review, provides no basis for reversal or remand where petitioner does not show that the city council's failure to adopt the required findings prejudiced his substantial rights. *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. An allegation that a city mischaracterized its decision as a limited land use decision does not itself provide a basis for reversal or remand, absent a further allegation that the city failed to follow the procedures applicable to the decision and that petitioners' substantial rights were prejudiced by that failure. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Whatever prejudice to petitioners' substantial rights might have occurred before the initial decision maker, when the city arguably failed to provide petitioners an adequate opportunity to comment before the planning commission on whether a proposed design complied with applicable criteria, was cured by providing petitioners an opportunity to present testimony directed at applicable criteria in a subsequent appeal to the city council. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where new evidence is improperly submitted as part of an applicant's final legal arguments, but that evidence has no bearing on the relevant approval criteria, the error in accepting the new evidence results in no prejudice to other parties' substantial rights and provides no basis for reversal or remand. *Farrell v. Jackson County*, 41 Or LUBA 1 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Any error that may have been committed by failing to provide a proposed comprehensive plan amendment to DLCD 45 days before the first evidentiary hearing was corrected on remand by offering to provide the proposal to DLCD more than 45 days before the evidentiary hearing on remand, where there is no contention that DLCD failed to receive the proposal or failed to provide notice of the proposal in accordance with ORS 197.610(1) and DLCD advises the county that it does not oppose the proposal. *Donnell v. Union County*, 40 Or LUBA 455 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where an applicant's final legal rebuttal under ORS 197.763(6)(e) is not limited to legal arguments and includes factual assertions, but petitioner fails to demonstrate that the factual assertions concerned a legally relevant issue, such factual assertions provide no basis for reversal or remand. *Donnell v. Union County*, 40 Or LUBA 455 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Even if evidence is improperly accepted by the local government, remand is not appropriate where petitioners fail to demonstrate that the improperly accepted evidence is potentially relevant to an approval criterion. Evidence regarding development of a neighborhood plan, ownership patterns in the neighborhood, and whether a proposed hotel can meet height limitations is not potentially relevant to a criterion that requires a proposed hotel to be consistent with regard to "building size,

height, color, material and form" with other structures in the neighborhood. *Terra v. City of Newport*, 40 Or LUBA 286 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. That petitioner was mailed notice of a hearing only 10 days prior to the hearing is not reversible error. The fact that petitioner was not available to receive the given notice does not demonstrate substantial prejudice. *Hausam v. City of Salem*, 40 Or LUBA 234 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner knew or should have known of the county's procedural error in omitting local code criteria from the notice of hearing, but failed to object to that procedural error and request appropriate relief, the county's procedural error provides no basis to seek remand of the county's decision. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Any procedural error by a local government in failing to provide written notice of a proposed annexation decision to persons other than petitioner resulted in no prejudice to petitioner's substantial rights, and therefore provides no basis for reversal or remand of the annexation decision, where petitioner learned of the proposal and made a written appearance opposing the proposal. *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Reference to "a portion of Sunset Highway" in a notice of proposed annexation decision is likely insufficient to provide reasonable notice of the decision under applicable code and statutory requirements. However, where a petitioner nevertheless was able to determine the nature and scope of the proposal and submit written opposition to the proposal, the petitioner may not successfully assert possible injury to other persons' substantial rights as a basis for reversal or remand. *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Petitioner does not demonstrate an actual conflict of interest, as that term is defined in ORS 244.020, on the part of two decision makers who own homes in a PUD where uses allowed on commonly held property are subject to a land use appeal. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city councilor has prejudged an application and must recuse himself from participating in a decision on the application where the councilor, prior to the time a land use matter came before the city council, actively opposed an application, and sent correspondence to the other city councilors in which he advocated in opposition to the application, stating that the law and evidence point to denial of the application. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The bias of one decision maker may warrant reversal or remand of a land use decision pursuant to ORS 197.835(9)(a)(B), where participation of that decision maker prevented petitioner from receiving

a full and fair hearing, one of petitioner's substantial rights. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A county's error in providing notice of a planning commission hearing to property owners within 500 feet of the subject property, rather than to those within 750 feet of the subject property as required by local legislation, is a procedural error and provides no basis for reversal or remand unless petitioner's substantial rights are violated by the error. Where petitioner received notice of the planning commission hearing and the proper notice was given prior to a subsequent hearing by the board of county commissioners, there was no prejudice to petitioner's substantial rights. *Donnell v. Union County*, 39 Or LUBA 419 (2001).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Failure to provide proper notice pursuant to ORS 197.763(3) is a procedural error and does not provide a basis for reversal or remand unless the error prejudices a party's substantial rights. *Lange-Luttig v. City of Beaverton*, 39 Or LUBA 80 (2000).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners appeared below and testified about the uses that would be authorized by a conditional use permit, petitioners may not claim that their substantial rights were prejudiced by a local government's failure to specifically identify all proposed uses in the notice of the hearing. *Lange-Luttig v. City of Beaverton*, 39 Or LUBA 80 (2000).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A lack of supporting information in an application does not provide a basis for reversal or remand when the missing information is not necessary to determine compliance with a specific approval standard. *Roth v. Jackson County*, 38 Or LUBA 894 (2000).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Absent a state or local provision to the contrary, once the local record is closed to new evidence the local government is not compelled to reopen the record to accept new evidence, no matter how relevant that evidence is to the local government's decision. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city does not violate an applicant's right to due process by denying its request to cross-examine witnesses, where the local code provides no right of cross-examination and the applicant fails to explain why an alternative process offered by the city in place of cross-examination would be insufficient to protect the applicant's right to due process. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city's failure to provide notice that it considered a particular comprehensive plan goal to be an approval criterion is a procedural error, and where that failure denies the applicant an opportunity to present argument and evidence concerning that plan goal, the procedural error prejudices the applicant's substantial rights. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Failure to list applicable criteria in a pre-hearing notice in violation of ORS 197.763(3)(a) allows petitioner to raise issues at LUBA relating to the omitted criteria without having raised those issues before the local government. However, failure to list applicable criteria does not, in itself, provide a basis for reversal or remand. *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner fails to allege that it was entitled to written notice of hearing under Ballot Measure 56, a local government's failure to provide written notice of hearing under Ballot Measure 56 did not prejudice petitioner's substantial rights and provides no basis for reversal or remand. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A condition of approval that is suggested by the applicant after the close of the evidentiary hearing in a quasi-judicial land use proceeding is not "new evidence," within the meaning of ORS 197.763(6)(e), and there is no legal requirement that parties be given a right to rebut such a proposed condition of approval. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where LUBA remands a decision for additional proceedings requiring that the current members of the county board of commissioners review the record compiled before the previous board, such remand cures the procedural error, if any, resulting from the fact that, due to an intervening election, only one of the three commissioners who signed the final written order attended the evidentiary hearings and participated in the oral vote on the merits of the application. *Greer v. Josephine County*, 37 Or LUBA 261 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a county lacks decisional authority over annexation requests, it exceeds its jurisdiction in denying an annexation that is part of a combined application for a plan map amendment and zone change over which the county has co-adoption authority. *Copper Basin, Inc. v. Umatilla County*, 37 Or LUBA 147 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local government elects to conduct additional hearings prior to making a decision following remand of a decision by LUBA, all parties to the LUBA appeal that led to the remand are entitled to some form of individualized notice of the proceedings on remand, and a local government's failure to provide notice to one of those parties is procedural error. *DLCD v. Crook County*, 37 Or LUBA 39 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A party's right to appeal a local decision that is adopted following a remand by LUBA does not eliminate prejudice to that party's substantial rights caused by the local government's failure to provide notice of its proceedings on remand. The rights the party has in seeking LUBA review of

the decision on remand are much more circumscribed that the rights the party has during a local land use hearing. *DLCD v. Crook County*, 37 Or LUBA 39 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a decision maker discloses the existence but not the substance of *ex parte* communications at the beginning of the public hearing, and despite being given an opportunity to do so petitioner fails to object to the inadequacy of the decision maker's disclosure, petitioner has waived the right to raise the decision maker's inadequate disclosure of *ex parte* communications before LUBA as a basis for reversal or remand of the challenged decision. *Mulford v. Town of Lakeview*, 36 Or LUBA 715 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city commits procedural error where it fails to identify the relevant approval criteria in its notice of hearing or in its oral statement at the beginning of the hearing on a conditional use request. The city also commits procedural error where the staff report that identifies the relevant approval criteria is not made available seven days before the hearing and the report is only provided to the city council at the hearing. Where these errors contribute to confusion about the nature of the use for which approval is requested and the city's legal theory for approving the request, petitioners' substantial rights are prejudiced by the city's procedural errors and remand is required. *Latta v. City of Joseph*, 36 Or LUBA 708 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where LUBA rejects as a matter of law a county's erroneous interpretation of its comprehensive plan as imposing a 2.3-acre minimum residential density, procedural errors the county may have committed in considering evidence outside the record in reaching that erroneous interpretation provide no additional basis for remand. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Failure to observe statutory notice and hearing requirements prior to making a permit decision will result in remand by LUBA where petitioner's substantial rights were prejudiced because petitioner was entirely prevented from participating in the decision making process. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Failure to observe statutory notice and hearing requirements prior to making a permit decision will result in remand by LUBA, where petitioner's substantial rights were prejudiced because petitioner was entirely prevented from participating in the decision making process. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city's procedural error in failing to send notice of a hearing at which zone changes affecting petitioner's property would be considered does not prejudice petitioner's substantial rights, where petitioner nonetheless participated in the hearing and the city continued the hearing to allow petitioner an adequate time to prepare. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A county's failure to explain in its notice of hearing that all evidence and the staff report would be available for review seven days before the hearing provides no basis for reversal or remand, where petitioner did not object to the adequacy of the notice, does not claim he was surprised by anything in the staff report and does not explain how his substantial rights were violated by the inadequate notice. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the county's notice of hearing failed to include notice of the procedures to be followed at the hearing, but petitioner did not object below to the inadequate notice and does not explain how his substantial rights were violated by the defective notice, the notice defect provides no basis for reversal or remand. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A petitioner does not waive his right to object to the county's failure to list the applicable criteria governing permit revocation in the notice of hearing by failing to object below, where it was not clear until the end of the hearing what criteria would be applied or that the decision makers intended to revoke petitioner's permit. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner was provided a local appeal and hearing before the county governing body, the failure of the planning commission to give notice before its hearing of the criteria that it intended to apply or that it intended to revoke petitioner's permit provides no basis for reversal or remand, where petitioner does not explain why the appeal to the governing body was inadequate to avoid any prejudice to his substantial rights. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a decision is withdrawn for reconsideration following appeal to LUBA and a new ordinance is adopted without following the applicable local adoption procedures, such a procedural error provides no basis for reversal or remand where petitioner was given an opportunity for meaningful participation and there was no prejudice to petitioner's substantial rights. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Consideration of a legislative action more than once within a 12-month period despite a code requirement that such actions be considered only once in a 12-month period provides no basis for reversal or remand, where all parties were given a full opportunity to participate in the proceedings and there was no prejudice to a party's substantial rights. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local government decision maker commits a procedural error by failing to require a transcript of the proceedings below, but petitioner fails to demonstrate that failure prejudiced his substantial rights, the procedural error provides no basis for remand. *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city council's procedural error in failing to require preparation of a transcript of proceedings on remand before the planning commission cannot have any bearing on whether the challenged decision is supported by substantial evidence, where the proceedings on remand were on the record. *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Procedural errors before a lower-level local decision maker provide no basis for reversal or remand at LUBA where the errors are cured by *de novo* review by a higher-level local decision maker. *Rouse v. Tillamook County*, 34 Or LUBA 530 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Even if a local government's notice is not sufficiently specific to identify all approval criteria, petitioner fails to establish any prejudice to its substantial rights when the approval criteria are identified in a staff report and petitioner was in fact made aware of and addressed the criteria in the proceedings below. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the notice of a hearing fails to list all of the criteria required for approval of an application, that procedural error does not prejudice petitioners' substantial rights where all of the applicable criteria were raised and addressed at the public hearing. *Turrell v. Harney County*, 34 Or LUBA 423 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. If the city committed a procedural error by approving final subdivision and PUD plans without providing a hearing or opportunity for local appeal, such error provides no basis for remand where the petitioner at LUBA was allowed to submit 65 pages of comments to the city prior to its decision. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the comprehensive plan requires that the planning commission forward findings and a report to the city council for consideration with a proposed plan amendment, the planning commission commits a procedural error by not forwarding the required findings and report. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A planning commission's error in not forwarding findings and a report to the city council with a proposed legislative plan amendment provides no basis for remand where petitioner does not specify any arguments he was prevented from making due to the error. Alleged inability to "bolster" petitioner's arguments is not sufficient to demonstrate petitioner's substantial rights were prejudiced. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The city's failure to provide any notice of the hearing at which the challenged ordinance was adopted was procedural error that prejudiced petitioners' substantial rights to participate in the process,

notwithstanding that petitioners had participated in earlier proceedings leading to the challenged decision. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The local government may be required to reopen the evidentiary hearing where the local government (1) changes to a significant degree an established interpretation of an approval standard; (2) the change makes relevant a different type of evidence that was irrelevant under the old interpretation; and (3) the party seeking to submit evidence responsive to the new interpretation identifies what evidence not already in the record it seeks to submit. *Gutoski v. Lane County*, 34 Or LUBA 219 (1998).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a revised site plan is introduced after the close of the record, and evidence exists that petitioner was aware of the addition but did not object below, that procedural error does not justify reversal or remand by LUBA. *Brown v. City of Portland*, 33 Or LUBA 700 (1997).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. If a local government determines an *ex parte* contact that is prohibited by local code occurred during local proceedings, other parties must be allowed the opportunity to rebut the substance of the *ex parte* contact. *Opp v. City of Portland*, 33 Or LUBA 654 (1997).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. There is no legal requirement that decision makers disclose the substance of their site observations and provide an opportunity for rebuttal where the decision is legislative rather than quasi-judicial. *Valerio v. Union County*, 33 Or LUBA 604 (1997).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A county errs in not requiring a scaled drawing of a proposed dwelling as required by local code, where the drawing is necessary to determine that the proposed dwelling complies with applicable height and roof pitch standards, and the missing information is not otherwise in the record. *Pekarek v. Wallowa County*, 33 Or LUBA 225 (1997).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city's error in converting an appeal of a quasi-judicial decision into a *de novo* legislative proceeding is substantive rather than procedural, and its decision is prohibited as a matter of law. *Anderson v. City of Shady Cove*, 33 Or LUBA 173 (1997).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. To demonstrate prejudice to substantial rights as a result of a procedural error, a petitioner must explain with some specificity what would have been different or more complete had the correct procedures been followed. LUBA requires more than general assertions that the petitioner's case would have been better presented had there been no procedural violations below. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a continuance required by ORS 197.753(4)(b) to allow opponents to respond to new evidence was

not granted before the city and county planning commissions made their recommendation to the city council and county commissioners, a procedural error occurred, but that error is no basis for remand when the opponents submitted a detailed rebuttal during the year-long interim between the date of the recommendation and the decision of the governing bodies, who considered additional evidence and testimony as part of a de novo review of the applications. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners do not explain how the city's failure to conduct a public hearing (if one was required under local code) prejudiced their substantial rights, there is no basis for reversal or remand pursuant to ORS 197.828(2)(d). *Venable v. City of Albany*, 33 Or LUBA 1 (1997).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. When a hearing audio tape is inadvertently destroyed, the city cannot include it in the record. However, the city's failure to include the tape in the record does not require remand unless LUBA cannot perform its review function as a result. *Village Properties, L.P. v. City of Oregon City*, 32 Or LUBA 475 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners are qualified participants in a local appeal, but are denied the opportunity to respond to issues raised in the local appeal, their substantial rights are prejudiced and the challenged decision must be remanded. *Spencer Creek Neighbors v. Lane County*, 32 Or LUBA 349 (1997).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The city's failure to provide petitioner with the notice of hearing to which she was entitled under ORS 197.763(2) effectively denied petitioner the right to participate in the hearings process and to present evidence, thereby violating her substantial rights. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a party has the opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the local government's decision in an appeal to LUBA. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Because the county's violation of ORS 215.422 is not a procedural error, petitioner is not required to show that his substantial rights were prejudiced by the county's error in order to obtain a remand. *Brown v. Union County*, 32 Or LUBA 168 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Even if petitioner was not afforded an opportunity below to present argument and rebuttal on the issue of how the city should proceed on remand, petitioner has not demonstrated prejudice to its substantial rights where it was provided both an adequate opportunity to prepare and submit a case and a full and fair hearing. *Prineville Properties, Inc. v. City of Prineville*, 32 Or LUBA 139 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Although the county's refusal to permit a party below to participate in a hearing on remand prejudiced that party's substantial rights, ORS 197.835(9)(a)(B) permits remand only where the failure to satisfy applicable procedural requirements prejudiced the substantial rights of the *petitioner*. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the proceedings on remand were limited to argument and the petitioner was allowed to present argument, the county's improper refusal to allow another party to present argument did not prejudice the substantial rights of the petitioner. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The county's failure to provide adequate notice of a proposed goal exception under ORS 197.732(5) is a procedural error that will not result in reversal or remand where the record demonstrates that petitioners' substantial rights were not prejudiced. *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The city's violation of the notice requirements of ORS 197.763(3) does not justify reversal or remand absent a showing by petitioners that their substantial rights were prejudiced as a result of the improper notice. *Tucker v. City of Adair Village*, 31 Or LUBA 382 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA reviews the final decision made by the county board of commissioners, not the decision of the planning commission. A procedural violation by the planning commission is not ground for reversal or remand unless petitioner establishes that the board of commissioners did not correct the violation. *Simonds v. Hood River County*, 31 Or LUBA 305 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The requirement of ORS 197.763(4)(b) that a staff report be available seven days prior to a land use hearing is a procedural requirement; under ORS 197.835(9)(c), its violation is ground for reversal or remand only if petitioner demonstrates that his substantial rights were prejudiced. *Simonds v. Hood River County*, 31 Or LUBA 305 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Statements by city staff at a local appeal hearing regarding evidence already in the record do not give petitioner a right to rebuttal. *Thornton v. City of St. Helens*, 31 Or LUBA 287 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the county allows the applicants to provide a requisite septic system evaluation after the final hearing, and petitioners are provided seven days to respond, petitioners' procedural rights are not violated. *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A memorandum from planning staff to the city council concerning interpretation of the city code is

not evidence. Therefore, that petitioners had no opportunity to rebut the substance of staff's memorandum at a continued hearing provides no basis for reversal or remand of the challenged decision. *Sullivan v. City of Woodburn*, 31 Or LUBA 192 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Under ORS 197.763(6)(b), oral evidence submitted at a continued hearing provides no basis for a request that the record be left open for a response. Therefore, that petitioners had no opportunity to rebut the substance of testimony given at a continued hearing provides no basis for reversal or remand of the challenged decision. *Sullivan v. City of Woodburn*, 31 Or LUBA 192 (1996).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA may reverse or remand a local decision based on a local government's failure to comply with applicable notice requirements only if the defect prejudices a petitioner's substantial rights. *Thomas v. Wasco County*, 30 Or LUBA 142 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The existence of procedural error resulting from defects in a notice of final decision fails to establish prejudice to substantial rights in the absence of a causal relationship between the defects and petitioner's failure to participate in the process. *Thomas v. Wasco County*, 30 Or LUBA 142 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner's failure to file a timely local appeal resulted from his absence during the appeal period, and not from the failure of the notice of decision to include required findings of fact, the necessary relationship between the procedural defects and petitioner's substantial rights was not established. *Thomas v. Wasco County*, 30 Or LUBA 142 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Under ORS 12.270, a boundary alteration, initiated and purported to be effective, is conclusively presumed effective one year after the purported effective date, notwithstanding procedural defects in adoption. *Carlson v. City of Dunes City*, 30 Or LUBA 129 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A procedural error is grounds for remand or reversal only when a party establishes the violation prejudices its substantial rights. LUBA will not search the record to find evidence to support the alleged procedural error. *Wakeman v. Jackson County*, 29 Or LUBA 521 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners contend a local government's notice of hearing on a conditional use permit application did not comply with the requirement of ORS 197.763(3)(a) to explain the nature of the application and the uses that could be authorized, but do not contend their substantial rights were prejudiced by the alleged error, petitioners provide no basis for reversal or remand. ORS 197.835(7)(a)(B). *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government's failure to comply with the requirements of ORS 197.763(3)(h) and (i) that its notice

of hearing state the staff report and applicant's materials are available for inspection and that copies will be provided at reasonable cost is a procedural error, and does not provide a basis for reversal or remand unless petitioners explain how their substantial rights were prejudiced by the error. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners do not move for an evidentiary hearing, and the only undisputed fact alleged by petitioners is that a petitioner was required to pay 14 dollars for the local government's 14-page staff report, petitioners fail to establish the local government's failure to provide a copy of the staff report at a reasonable cost, as required by ORS 197.763(3)(i), violated petitioners' substantial rights. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the challenged decision is that of the governing body, made on appeal from a planning commission decision, allegations of procedural error in the manner in which the planning commission adopted its order and findings do not provide a basis for reversal or remand. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners are denied the opportunity to rebut evidence that is potentially relevant to applicable approval standards in a quasi-judicial land use proceeding, their substantial rights are prejudiced and the challenged decision must be remanded. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Under ORS 197.835(7)(a)(B), LUBA may reverse or remand a challenged decision because the decision maker failed to follow applicable procedural requirements, including notice requirements, only if that failure prejudiced the substantial rights of the *petitioner*. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners allege the planning commission denied them an opportunity to submit evidence relevant to a proposed comprehensive plan amendment, but petitioners were able to submit the evidence during a *de novo* hearing on the proposed plan amendment before the governing body, the alleged error in the planning commission proceedings was cured by the governing body's *de novo* review. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government's failure to provide notice that it was considering a floodplain permit application was a procedural error which prejudiced petitioners' substantial rights because the error deprived petitioners of an adequate opportunity to address floodplain issues relevant to local floodplain permit requirements. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. When the local government decision maker reviews allegations of procedural irregularities and finds,

based on substantial evidence, that no such irregularities exist, LUBA is bound by the finding. *Huntzicker v. Washington County*, 29 Or LUBA 587 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local governing body improperly accepts potentially relevant new evidence while conducting an on-the-record review of a lower level decision maker's decision, and does not provide petitioners an opportunity to rebut that new evidence, petitioners' substantial rights are prejudiced, and the local government's decision must be remanded. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government's failure to provide notice of its hearings to persons other than petitioners is a procedural error that does not prejudice petitioners' substantial rights if petitioners received notice of the local government hearings and participated in them. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners were allowed to submit evidence to the planning commission, and do not identify any additional evidence they tried to submit which was refused by the governing body, any error by the governing body in conducting its hearing "on the record" did not prejudice petitioners' substantial rights. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a party has the opportunity to object to a procedural error before a local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the local government decision in an appeal to LUBA. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Petitioner's argument that it was denied a meaningful opportunity to rebut evidence presented at a local government hearing does not provide a basis for remand, if petitioner does not identify any evidence relevant to applicable approval standards that was submitted at the hearing and which petitioner was denied an opportunity to rebut. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner submits detailed argument to the local government regarding the applicability of a particular code provision and whether that code provision is satisfied by the subject application, the local government's failure to list that code provision as an applicable criterion in the notice of its initial evidentiary hearing, as required by ORS 197.763(3)(b), did not prejudice petitioner's substantial rights. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners do not argue the challenged decision violates any criterion which they failed to raise below because that criterion was not listed in the local government's notice of initial hearing or proposed action, as required by ORS 197.763(3)(b) or ORS 197.195(3)(c)(C), petitioners fail to

show their substantial rights were prejudiced by the error and establish no basis for reversal or remand. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where members of a local decision making body disclose, at the beginning of the initial evidentiary hearing, that they made site visits to the subject property, and petitioners fail to object to the adequacy of that disclosure, insufficiency of the disclosure cannot be assigned as grounds for reversal or remand. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the local governing body is the final decision maker, after a *de novo* review of a planning commission decision, failure of members of the planning commission to disclose the substance of observations made during a site visit provides no basis for reversal or remand. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The improper exclusion of evidence relevant to an arguably applicable approval standard is a prejudicial procedural error, where LUBA is unable to determine the improperly excluded evidence could not have affected the decision reached. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the local governing body improperly accepts new evidence while conducting an on-the-record review of a lower level decision maker's decision, and does not provide petitioners an opportunity to rebut that new evidence, petitioners' substantial rights are prejudiced. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local governing body is authorized to limit issues on appeal to issues raised before the planning commission but the local government failed to keep an adequate record of the planning commission proceedings, and LUBA cannot determine whether the governing body correctly limited its review to two particular issues, LUBA will remand the governing body's decision. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner submitted evidence and argument to the city council during its *de novo* review of a decision of the city landmarks commission, even if procedural errors were made in the proceeding before the landmarks commission, petitioner's substantial rights were not prejudiced. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. To obtain reversal or remand of a decision because information required by the local code is missing from the application, petitioner must explain why the missing information is necessary to determine compliance of the proposed development with applicable approval standards, and the missing information must not be found elsewhere in the record. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the local government's notice of its first evidentiary hearing before the planning commission failed to list the applicable standards, as required by ORS 197.763(3)(b), petitioners may raise issues at LUBA even though such issues may not have been raised during the local proceedings. However, this procedural error provides no basis for reversal or remand of the decision where petitioners fail to establish the error caused prejudice to their substantial rights. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Even if a local government committed a procedural error in following legislative rather quasi-judicial procedures, if the only claimed prejudice to petitioner's substantial rights is inadequate time to prepare its case and LUBA concludes the local government provided petitioner ample time to prepare its case, there is no basis for reversal or remand. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A code provision prohibiting a hearings officer from taking "notice of any communications * * * or other materials prepared in connection with the particular case unless the parties are afforded an opportunity to contest the material" gives parties a substantial right to an opportunity to rebut materials submitted during a hearings officer's proceeding. Therefore, violation of such a code provision provides a basis for reversal or remand by LUBA. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the local decision maker conducted a site view, but failed to place on the record the substance of its site observations and failed to provide the parties any opportunity to rebut the evidence obtained from the site view, the decision maker committed procedural errors that prejudiced petitioners' substantial rights. *McNamara v. Union County*, 28 Or LUBA 396 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Because petitioners do not have a right to seek a referendum on a quasi-judicial land use decision, a local government error in adopting such a decision as an emergency ordinance provides no basis for reversal or remand. *Neuman v. City of Albany*, 28 Or LUBA 337 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. ORS 215.416(5) and 197.763(3)(b) require a county to identify applicable approval standards in its notices of hearing. Where petitioner's right to participate in the local proceedings is impaired by the county's failure to identify relevant standards, the challenged decision must be remanded. *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A petitioner may not assert his own *ex parte* contacts with the decision maker as a basis for reversal or remand, where the contacts were disclosed and petitioner did not object to the adequacy or completeness of the disclosure. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where (1) a local decision maker makes a procedural error in allowing new evidence to be submitted during an on-the-record review; (2) petitioners object to receipt of that new evidence; and (3) the local decision maker does not provide petitioners with an opportunity to rebut the new evidence; LUBA will remand the challenged decision for the local decision maker to provide the required opportunity for rebuttal. *Tucker v. Douglas County*, 28 Or LUBA 134 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a party has the opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of a local government decision in an appeal to LUBA. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner had notice that the applicant revised his subdivision proposal to include cluster housing, and had an opportunity to present and rebut evidence regarding the proposed cluster housing in a *de novo* evidentiary hearing before the city council, petitioner's substantial rights were not prejudiced simply because the cluster housing proposal was not referred to the hearings officer for hearing. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. If the applicant presented new *evidence* relevant to the applicable approval standards during the rebuttal period of the local government hearing, and petitioner was denied an opportunity to rebut that evidence, petitioner's substantial rights were prejudiced. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the record shows petitioner was aware of the applicable approval criteria in the comprehensive plan and participated effectively in the local hearing, a local government's failure to comply with the requirements of ORS 197.763(3)(b) and (j), regarding listing applicable criteria from the plan and explaining hearing procedures in its notice of hearing, does not prejudice petitioner's substantial rights or provide a basis for reversal or remand. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Although a local governing body may be authorized to conduct a *de novo* review of a development application, its refusal to allow petitioner to submit the planning commission decision and staff report on the subject application into the record as relevant evidence prejudices petitioner's substantial right to submit evidence. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. In order for a petitioner to obtain reversal or remand of a decision because information required by the local code is missing from the application, petitioner must explain why the missing information is necessary to determine compliance of the proposed development with applicable approval standards, and the missing information must not be found elsewhere in the record. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government's failure to follow the notice and hearing requirements of ORS 197.763 provides no basis for reversal or remand, where petitioner neither assigns that failure as error nor explains how his substantial rights were prejudiced by that failure. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a decision maker improperly refuses to allow relevant testimony, and it is not clear whether the decision maker's later allowance of expanded oral and written testimony rendered the initial error harmless, the decision will be remanded. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government adjustment committee's failure to adopt written rules of procedure is a procedural error and provides a basis for reversal or remand only if petitioners' substantial rights are violated. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners presented evidence and argument concerning the necessity for a solar height adjustment and argued the relevant standards were not met, the city's procedural error in not providing notice that it would consider approval of the solar height adjustment did not prejudice petitioners' substantial rights and provides no basis for reversal or remand. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government's failure to make available all evidence in support of a quasi-judicial land use application at the time the notice of hearing is provided, as required by ORS 197.763(4)(a), is a procedural error. However, if such evidence is made available prior to or at the hearing and the hearing record is left open for seven days to allow time for additional written testimony from the parties, petitioners' substantial rights are not violated. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner alleges that he was not provided with written notice of a city manager's letter, in violation of ORS 197.763(2), but petitioner learned of the city manager's letter and appealed it to the city council, petitioner alleges only procedural error, for which prejudice must be shown for LUBA to reverse or remand the challenged city council decision. *Poddar v. City of Cannon Beach*, 26 Or LUBA 429 (1994).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Conditioning approval of a farm dwelling on the applicant obtaining a zoning permit with the board of county commissioners acting as initial decision maker on the zoning permit rather than the planning director is at most a procedural error, which provides a basis for reversal or remand only if petitioner's substantial rights are violated. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. ORS 197.763(1) and 197.835(2) do not supersede LUBA's prior rulings that where a party has an opportunity locally to object to a *procedural* error, at any stage of the local government proceedings, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the local government's decision in an appeal to LUBA. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners are denied the opportunity to rebut evidence that is relevant to applicable approval standards in a quasi-judicial land use proceeding, their substantial rights are prejudiced and the challenged decision must be remanded. ORS 197.835(7)(a)(B). *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Local government failure to comply with ORS 197.763(3) notice of hearing requirements (1) means that under ORS 197.835(2)(a), LUBA may consider issues that were not raised below; and (2) is a procedural error which, under ORS 197.835(7)(a)(B), provides a basis for reversal or remand of the challenged decision only if such error prejudices petitioners' substantial rights. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. That a person moving to intervene in an appeal at LUBA failed to object to a local government's decision not to allow that person to present testimony is not fatal to that person's assertion of standing to intervene, where two other persons objected below to the local government's decision to limit testimony. *Sorte v. City of Newport*, 25 Or LUBA 828 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The failure to initiate a timely local rehearing process is *not* a procedural defect which LUBA may overlook if no prejudice is shown. *Rochlin v. Multnomah County*, 25 Or LUBA 637 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. That a public hearing may have been conducted erroneously, is at most a procedural error which does not prejudice petitioners' substantial rights to an adequate opportunity to be heard, to prepare and submit their case, and to a full and fair hearing. *McInnis v. City of Portland*, 25 Or LUBA 376 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. In the absence of a local code requirement to the contrary, a local government is not required to allow parties to rebut staff summaries of evidence in the record. *McInnis v. City of Portland*, 25 Or LUBA 376 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local government's staff briefs an absentee decision maker concerning matters in the record and does not impermissibly advocate denial of the application, but rather simply provides administrative support to the decision maker, the fact that petitioners had no opportunity to rebut

the substance of that staff briefing provides no basis for reversal or remand of the challenged decision. *McInnis v. City of Portland*, 25 Or LUBA 376 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner failed to object to the board of commissioners concerning the county's failure to comply with the procedural requirements of ORS 197.763 in the notice of, and announcement at, a planning commission hearing, petitioner cannot assign those errors as a basis for reversing or remanding the county's decision. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. In order for a petitioner to obtain reversal or remand by LUBA of a challenged decision because information required by the local code is missing from the subject land development application, petitioner must argue that the missing information is not found elsewhere in the record and explain why the missing information is necessary to determine compliance of the proposed development with applicable approval standards. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government is required to provide parties with an opportunity to rebut evidence submitted during local proceedings on remand from this Board under either ORS 197.763(4)(b) or *Fasano*. A local government's failure to provide petitioner with such opportunity is a procedural error that prejudices petitioner's substantial rights. *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Even though a city may have committed error in accepting evidence concerning traffic impacts, if the issue of traffic impacts was not properly before the city, such a procedural error would provide no basis for reversal or remand. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA will not look past the written decision to determine whether local government decision makers were influenced by improperly accepted evidence, where the written decision takes the position that the issue to which the disputed evidence relates was not subject to review and that determination concerning the local scope of review is not dependent on the disputed evidence. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. In LUBA's review of alleged procedural errors, the substantial rights referred to in ORS 197.828(2)(d) concerning limited land use decisions are the same rights referred to in ORS 197.835(7)(a)(B) concerning land use decisions. *Mannenbach v. City of Dallas*, 25 Or LUBA 136 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The post-acknowledgment amendment notice requirements of ORS 197.610(1) and 197.615(1) are procedural in nature. Local government failure to follow these requirements provides a basis for

reversal or remand only if such error prejudiced petitioner's rights to an adequate opportunity to prepare and submit its case and a full and fair hearing before the local government. *Oregon City Leasing, Inc. v. Columbia County*, 25 Or LUBA 129 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Petitioners' allegations that various procedural errors occurred below provide no basis for reversal or remand, unless petitioners establish how such errors prejudiced their substantial rights. *Burghardt v. City of Molalla*, 25 Or LUBA 43 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Under ORS 197.828(2)(d), in determining whether remand is appropriate where a local government commits procedural error, LUBA must determine whether the substantial rights of the parties were prejudiced by the error. The substantial rights of parties include the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing. *Warren v. City of Aurora*, 25 Or LUBA 11 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Even though a local code requirement for publication of notice 10 days prior to hearing is mandatory, it is a procedural requirement, and any error in failing to provide the required notice provides a basis for reversal or remand only if petitioner's substantial rights were prejudiced by the error. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the petitioner is a neighborhood association that did not come into existence until after the local government committed an alleged procedural error, and petitioner and its members participated in hearings held after the alleged procedural error, the error did not prejudice petitioner's substantial rights and provides no basis for reversal or remand. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. While a showing of prejudice to substantial rights is generally required in order to secure a remand for procedural error, no such showing is required to secure a remand where the procedural requirements of ORS 215.060 are not followed. *West Amazon Basin Landowners v. Lane County*, 24 Or LUBA 508 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. That a local governing body ultimately adopts an interpretation of an applicable code standard that is different from that adopted by the hearings officer, and declines to reopen the evidentiary record, does not provide a basis for reversal or remand where (1) there was no "established" local interpretation of the code standard, (2) the governing body's interpretation does not make relevant any new type of evidence, and (3) petitioner does not identify any evidence it wishes to submit if the evidentiary hearing is reopened. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. In rendering a decision on a permit, a city is required to hold at least one public hearing or provide

notice of the decision and an opportunity for an appeal. A city's failure to do so requires that the decision be remanded. *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA will only reverse or remand a challenged decision on procedural grounds where the error causes prejudice to petitioner's substantial rights. A local government's failure to list certain DEQ rules in the notice of hearing does not prejudice petitioner's substantial rights, where petitioner was provided an opportunity to respond to those DEQ rules during the local proceedings. *Stockwell v. Clackamas County*, 24 Or LUBA 358 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local government advised petitioners of the substance of an applicable requirement, but failed to identify the ordinance that is the source of the requirement, this is a procedural error which does not prejudice petitioners' substantial rights. *Woosley v. Marion County*, 24 Or LUBA 231 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a hearings officer improperly conducted a site visit without providing prior notice and an opportunity for rebuttal, a governing body decision that relies on findings of the hearings officer based on that improper site visit is subject to reversal or remand. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government decision maker is entitled to consult with its attorney regarding evidence submitted during the evidentiary phase of the local proceeding and interpretive issues. Parties have no right to rebut the substance of a local government attorney's advice to the local government decision maker. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the local code requires that the decision maker give an oral statement at the beginning of a local hearing to the effect that any party may request that the record remain open for a period of seven days, and where such oral statement is not given, petitioners' substantial right to submit their case is thereby prejudiced and this error provides a basis for remanding the challenged decision. *Adler v. City of Portland*, 24 Or LUBA 1 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners identify no provision of state statute or local ordinance requiring parties to a quasi-judicial land use proceeding to serve documents they submit to the local government on other parties, another party's failure to serve such documents on petitioners does not violate petitioners' *Fasano* right to rebut evidence. *Chauncey v. Multnomah County*, 23 Or LUBA 599 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where some of the notices preceding local government quasi-judicial hearings on a land use application failed to identify applicable approval criteria, but the notice of the first hearing identified the applicable approval criteria and the record shows all parties were aware of the applicable criteria, the notice errors are at most procedural errors which did not prejudice the parties' substantial

rights. Such errors provide no basis for reversal or remand. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Rejection of relevant evidence by a local decision maker is, at most, a procedural error. Where a planning commission improperly rejected relevant evidence offered by petitioner, but the governing body conducted a *de novo* evidentiary hearing and petitioner did not attempt to submit the evidence to the governing body, petitioner's substantial right to submit evidence was not prejudiced. *Heiller v. Josephine County*, 23 Or LUBA 551 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Poor quality tape recordings of local land use proceedings provide no basis for reversal or remand where petitioner fails to demonstrate that any properly submitted evidence was not considered by the local decision makers. *Reed v. Benton County*, 23 Or LUBA 486 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. That a hearings officer committed procedural error by conducting a site visit without providing prior notice to the parties, disclosing his observations and providing an opportunity to rebut such observations, does not prejudice petitioners' substantial rights where the final decision on the subject application was made by the governing body, after a *de novo* review. *Wilson Park Neigh. Assoc. v. City of Portland*, 23 Or LUBA 708 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. LUBA may only reverse or remand a land use decision on the basis of procedural error, if the error causes prejudice to the petitioner's substantial rights. *Seger v. City of Portland*, 23 Or LUBA 334 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Petitioners' allegation that the local government failed to provide required notice of local proceedings following LUBA's remand of a land use decision provides no basis for remand, where petitioners do not contend they were in any way prejudiced by the alleged failure to provide the required notice of the local proceedings. *Wentland v. City of Portland*, 23 Or LUBA 321 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Alleged errors in the manner in which the findings of a lower level local decision maker were adopted, are harmless if the final decision was properly adopted by the final decision maker. *Rath v. Hood River County*, 23 Or LUBA 200 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Even if a local government erred by failing to provide notice of local hearings following remand from LUBA to persons other than parties in the LUBA appeal, that failure results in no prejudice to the substantial rights of the parties who did receive notice of the local hearings on remand. *Bartels v. City of Portland*, 23 Or LUBA 182 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Delay in disclosing an *ex parte* contact until after the close of the public hearing, and failure to make an announcement of the right to rebut the substance of the *ex parte* communication, as required by

ORS 227.180(3)(b), are at most procedural errors. *Horizon Construction, Inc. v. City of Newberg*, 23 Or LUBA 159 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. If petitioners were present at a local government meeting when an alleged procedural error occurred, petitioners must enter an objection in order to preserve their right to raise that procedural error in an appeal to LUBA, even where the local evidentiary record had previously been closed and there was no scheduled opportunity for public input at the meeting in question. *Horizon Construction, Inc. v. City of Newberg*, 23 Or LUBA 159 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local government improperly rejected relevant evidence during its proceeding below, LUBA must remand the challenged decision. *Silani v. Klamath County*, 22 Or LUBA 735 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The failure of local notices of hearing to summarize the issues involved in a proposed goal exception, as required by ORS 197.732(5), constitutes procedural error and does not provide a basis for reversal or remand of the challenged decision in the absence of prejudice to petitioner's substantial rights. *Caine v. Tillamook County*, 22 Or LUBA 687 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Local government failure to comply with ORS 197.763(3) notice of hearing requirements (1) is a procedural error, which will result in reversal or remand of the challenged decision only if such error prejudices petitioner's substantial rights; and (2) under ORS 197.835(2)(a), allows LUBA to consider issues that were not raised below. *Caine v. Tillamook County*, 22 Or LUBA 687 (1992).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Although under ORS 215.422(3) it may be error for a hearings officer to fail to disclose prior contacts with the planning department, it is a procedural error. LUBA may not reverse or remand on the basis of procedural error unless such error prejudices petitioner's substantial rights. Petitioner's substantial rights are not prejudiced by such error where petitioner was aware of and had an opportunity to respond to the substance of the contacts with the planning department. *Marson v. Clackamas County*, 22 Or LUBA 497 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A petitioner may not assert the occurrence of his own *ex parte* contacts with the decision maker as a basis for reversal or remand, where the contacts were disclosed and petitioner did not object to the adequacy or completeness of the disclosure of such *ex parte* contacts. *Toth v. Curry County*, 22 Or LUBA 488 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government's failure to follow the procedures specified in the local code for the adoption of legislative code amendments is an error of procedure. Where the error does not prevent petitioner from fully participating in such code amendment proceedings, petitioner does not demonstrate that the alleged error caused prejudice to his substantial rights, and such error provides no basis for reversal or remand. *Smith v. City of Portland*, 22 Or LUBA 485 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city permit decision rendered without providing the public hearing or notice of decision and opportunity for local appeal required by ORS 227.175(3) and (10) must be remanded so that the city may comply with the statutory requirements. *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where an application for a conditional use permit for a mobile home park includes neither a site plan nor other specific information required under the local code, and the site plan and specific information are relevant to determining compliance with applicable approval criteria, their omission is not a harmless procedural error. *Burghardt v. City of Molalla*, 22 Or LUBA 369 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where substantive approval standards are the same, a local government error in characterizing a plan map amendment as legislative, rather than quasi-judicial, is procedural in nature and warrants reversal or remand only if petitioners demonstrate their substantial rights were prejudiced because of failure to provide the procedural safeguards required in a quasi-judicial proceeding. *Gray v. Clatsop County*, 22 Or LUBA 270 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where an application for a residential care facility does not include a vicinity map showing the proposed site in relation to public transportation systems, as required by the local code, but information concerning the location of public transportation is found elsewhere in the record, the failure to include such vicinity map in the application is a procedural error which does not prejudice petitioner's substantial rights. *Murray v. Clackamas County*, 22 Or LUBA 247 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. ORS 197.763(3)(b) and (5)(a) require a local government to identify the standards it believes to be applicable to an application for quasi-judicial land use approval prior to conducting hearings on the application. LUBA is required to reverse or remand a local government's decision if it failed to follow applicable procedures in a manner that prejudiced petitioner's substantial rights, which include "rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." *Bradbury v. City of Independence*, 22 Or LUBA 783 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A local government's failure to identify approval standards applicable to a permit application may prejudice petitioner's substantial rights to prepare and submit his case. *Bradbury v. City of Independence*, 22 Or LUBA 783 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Although the party initiating a challenged zoning ordinance amendment was not clearly identified on the application and notices of local public hearings as required by the local code, such procedural errors provide no basis for reversal or remand where petitioners' substantial rights were not prejudiced. *Parmenter v. Wallowa County*, 21 Or LUBA 490 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. If petitioners were present at a local government meeting when an alleged procedural error occurred, petitioners must make their objections known to the decision making body below in order to assign the procedural error as a basis for reversal or remand by LUBA. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a county orally voted to grant land use approval with conditions, but later learned one of the conditions was based on an erroneous factual assumption and could not be complied with, and the county thereafter denied the application, the county did not commit procedural error and the petitioner's substantial rights were not violated. Petitioner's substantial rights do not include a right to a particular decision on his request for land use approval. *Carsey v. Deschutes County*, 21 Or LUBA 118 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The failure of a local government to identify its general procedures for the conduct of hearings in its notice of hearing, as required by ORS 197.763(3)(j), is a procedural error, for which LUBA is empowered to reverse or remand the challenged decision only if such error "prejudiced the substantial rights of the petitioner." ORS 197.835(7)(a)(B). *Stefan v. Yamhill County*, 21 Or LUBA 18 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a local government failed to identify its 15-minute time limitation on the presentation of oral testimony and argument in its notice of hearing, but allowed additional time at the hearing for the presentation of petitioners' oral argument and a continuance of the hearing, petitioners' substantial rights were not prejudiced. *Stefan v. Yamhill County*, 21 Or LUBA 18 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. An uncontroverted allegation that a party was provided *no opportunity* to rebut evidence placed before the decision maker through *ex parte* contacts and site observations is sufficient to demonstrate prejudice to that party's substantial rights. *Angel v. City of Portland*, 21 Or LUBA 1 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners failed to take advantage of an opportunity to rebut evidence presented in proceedings below, they did not establish how the local decision maker's alleged procedural error in admitting such evidence caused harm to their substantial rights. ORS 197.835(7)(a)(B). *White v. City of Oregon City*, 20 Or LUBA 470 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the local code vests total discretion to refuse to reconsider a decision with the local decision maker, it is not error for the decision maker to refuse to reconsider a disputed decision. *West v. Clackamas County*, 20 Or LUBA 433 (1991).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The requirements of ORS 197.763(4)(b) and the local code that staff reports be available a certain number of days prior to land use hearings are procedural requirements; their violation is grounds

for reversal or remand of the local government's decision only if petitioner demonstrates prejudice to its substantial rights. ORS 197.835(7)(a)(B). *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Petitioner fails to establish that its substantial rights were prejudiced by a late staff report, where petitioner does not identify ways in which its written and oral responses at the local hearing would have been different or more complete if the staff report had been available earlier. *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Generally, the failure to send notice of hearing to parties other than petitioner would not prejudice the substantial rights of petitioner, so long as petitioner received proper notice. *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the record demonstrates that petitioner was fully aware of the criteria applicable to its land use application prior to the local hearing, local failure to comply with the requirement of ORS 197.763(3)(b) that notice of hearing list applicable plan and code approval criteria did not prejudice petitioner's substantial rights. ORS 197.835(7)(a)(B). *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Under ORS 197.763(3)(j), a local government is required to provide in its notice of hearing a general explanation regarding the right under ORS 197.763(6) to request that the record of the initial evidentiary hearing remain open. A local government's failure to provide such notice is a procedural error which, if it prejudiced the parties' substantial rights, would require reversal or remand of the challenged decision. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioners allege the local government violated the procedural requirements of ORS 197.763, but do not contend that violation is a basis for reversal or remand of the challenged decision, and respondents do not argue that petitioners are precluded from raising any issue raised in the petition for review, LUBA need not determine whether the local government committed a procedural error. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where the local code requires physical constraints review to be conducted simultaneously with site review, and approval of a physical constraints review permit requires application of substantive criteria which could result in denial of the proposed development, the city's failure to require a proposed development to obtain a required physical constraints review permit at the time of site review approval is not a mere procedural error. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. It is not error for a governing body to provide a lower local tribunal with a memorandum in the nature of

a declaratory ruling interpreting certain code provisions while an application to which those code provisions apply is pending before the lower tribunal. Even if it were a procedural error, there would be no prejudice if petitioners had an adequate opportunity in a local appeal to address the interpretation and applicability of the code provisions in question before the governing body. *Hoffman v. City of Lake Oswego*, 20 Or LUBA 64 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A hearings officer's acceptance of evidence submitted after the deadline established by local code provides no basis for reversal or remand where petitioner did not request a continuance, and petitioner fails to explain how he was prejudiced by the hearings officer's action. *Reed v. Lane County*, 19 Or LUBA 276 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. The planning commission's error in failing to consider the propriety of a commissioner's participation in the decision on the subject application, where the issue was raised before the commission, is procedural and, therefore, petitioner must establish the error caused prejudice to his substantial rights. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. If the governing body holds a *de novo* hearing on an appeal of the planning commission's decision on the subject application, such hearing cures any prejudice due to a planning commissioner's allegedly improper participation in the planning commission proceedings. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. A city's failure to adopt ordinances specifying the city council's scope of review in appeals of planning commission decisions and providing procedures for hearings on such appeals, as required by ORS 227.170, is a procedural error. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where petitioner was not given notice of the city council's *de novo* scope of review in appeals of planning commission decisions, but the city council continued its hearing to provide an opportunity for parties to submit evidence, petitioner's substantial rights were not prejudiced by the procedural error. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where there is no dispute concerning the authenticity or identity of a document a party believes was improperly excluded from the record by the local government, the parties may stipulate that the document be included in the LUBA record for the limited purpose of reviewing the correctness of the local government's decision to exclude the document from the local government record. Alternatively, the document may be attached to a party's brief, and if any party objects to LUBA's consideration of the document, the party offering the document may move for an evidentiary hearing. *Von Lubken v. Hood River County*, 19 Or LUBA 548 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a party has the opportunity to object to a *procedural* error before the local government, but fails to

do so, that error cannot be assigned as a basis for reversal or remand of the local government's decision in an appeal to LUBA. *Torgeson v. City of Canby*, 19 Or LUBA 511 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. In order to obtain reversal or remand of a city decision due to a procedural error, petitioners must demonstrate that their substantial rights were prejudiced. ORS 197.835(7)(a)(B). Where the alleged procedural error is participation by a planning commissioner, in violation of a city ordinance, petitioners must demonstrate that the commissioner's participation denied them a fair hearing. *Torgeson v. City of Canby*, 19 Or LUBA 511 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a city is not required under its code to allow surrebuttal if rebuttal is limited to nonevidentiary testimony and evidence already in the local record, parties asserting city denial of surrebuttal as reversible error must show that the rebuttal included new evidence and that denial of an opportunity to rebut such evidence prejudices their substantial rights. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

28.8.4 LUBA Scope of Review – Grounds for Reversal/Remand – Procedural Errors. Where a mayor's *ex parte* contacts were completely disclosed, although late in the deliberations and after an incomplete disclosure earlier in the proceedings, and the mayor invited challenges and inquiries, the remedial purpose of ORS 227.180(3) is nevertheless served. Where petitioners did not object to the timing and manner of the disclosure, and do not show their substantial rights were violated, there is no basis for remand. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A demonstration that proposed "agri-tourism or other commercial events or activities" are "necessary to support" an approved commercial activity in conjunction with farm use under ORS 215.283(2)(a), such as a brewery, is not sufficient to demonstrate that the events are "necessary to support" an "existing commercial farm use of the tract," such as the growing of filberts, for purposes of ORS 215.283(4)(d)(A), even where revenue from the brewery "supplements" revenue from the growing of filberts. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In order to add land to a UGB, there must be a demonstrated need for land under the first Goal 14 need factor. Goal 14 prohibits a city from amending its UGB if the UGB has adequate capacity to satisfy the city's urban land needs for the next 20 years, and a city decision that approves a UGB amendment where the undisputed evidence in the record was that the city's UGB has adequate capacity to satisfy the city's urban land needs for the next 20 years must be reversed as prohibited by law. *DLCD v. City of Klamath Falls*, 80 Or LUBA 180 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. To the extent that LUBA's holding in *Perry v. Yamhill County*, 26 Or LUBA 73, 80, *aff'd*, 125 Or App 588, 865 P2d 1344 (1993), that the reasoning in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), extends to a local government's interpretation of a prior land use decision, was correct, it was superseded by ORS 197.829(1), which requires LUBA to affirm "a local government's interpretation of its comprehensive plan and land use regulations" but does not require LUBA to affirm a local government's interpretation of a prior land use decision, findings adopted in support thereof, or conditions of approval attached thereto, which LUBA reviews under ORS 197.835(9)(a)(D) to determine whether the local government "[i]mproperly construed the applicable law." *M & T Partners, Inc. v. City of Salem*, 80 Or LUBA 221 (2019).

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

28.8.5 LUBA Scope of Review – Noncompliance with Applicable Law. Where a significant resource overlay zone provision requires that (1) resource sites not be altered or impacted to a degree that destroys their significance, (2) the proposed development not result in the loss of habitat for threatened or endangered species, (3) all feasible alternatives to the development that would not result in a substantial adverse impact on identified resource values be considered and rejected, (4) the development be sited on the property in such a manner that minimizes adverse impacts on identified resources, and (5) documentation be provided regarding requirements for

state or federal permits or licenses and that appropriate resource management agencies have reviewed the development proposal against their plans, policies, and programs, the local government does not err in concluding that that provision applies at the development stage rather than the PAPA stage. *VanSickle v. Klamath County*, 80 Or LUBA 241 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In the context of an application to change the comprehensive plan designation of property to Rural Residential Exception Area, where a comprehensive plan provision provides that "any new Rural Residential Exception Areas need to be justified through initiating a non-resource plan amendment and zone change by demonstrating that the property does not meet the definition of agricultural * * * land," a county correctly determines that an applicant satisfies that provision by producing copies of the county's adopted and acknowledged agricultural lands inventories, which do not include the property. Even where an opponent submits an NRCS soils map into the record, which the opponent argues shows the property's soils constitute agricultural lands, where the NRCS website that the opponent used to prepare the soils map includes a disclaimer regarding the large scale of mapping, stating that "[e]nlargement of maps beyond the scale of mapping can cause misunderstanding of the detail of mapping and accuracy of soil line placement," a reasonable decision-maker would rely on the inventories to conclude that the property is not agricultural land, and a reasonable decision-maker could determine that the NRCS soils map is less credible than the inventories. *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 252 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local code provision requires that a minimum of 250 square feet of "outdoor area" be provided for each residential lot and specifically states that the outdoor area may include "decking" and a "covered patio," as long as that covered patio is not "fully enclosed," the local government does not err by concluding that a covered deck that is attached to the dwelling, but not enclosed, can satisfy the minimum outdoor area requirement. *Bohan v. City of Portland*, 80 Or LUBA 263 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Arguments that a city decision approving a partition affects "livability of [an] existing house" and that the city ignored "impact on the neighborhood" provide no basis for reversal or remand where none of the criteria applicable to land divisions require the city to consider "privacy or livability" in determining whether to approve the land division. *Bohan v. City of Portland*, 80 Or LUBA 263 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a design guideline for a historic district in a city requires that exterior alterations and additions to historic resources "be designed to be compatible primarily with the original resource, secondarily with adjacent properties, and finally * * * with the rest of the District," where the city council interprets the term "compatible" as not requiring uniformity, and where the petitioner has not demonstrated that that interpretation is inconsistent with the express language, purpose, or underlying policy that provides the basis for that design guideline, LUBA will uphold the city council's conclusion that two proposed new buildings meet the design guideline because they are similar to a historic resource on the same property, to adjacent

properties, and to the historic district with respect to some design elements, even where they are dissimilar to adjacent properties with respect to other design elements. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a county code provision allows "[p]arks, playgrounds, [and] community centers" in the Rural Residential (RR) zone, where the county code does not include a definition of "park," and where the board of county commissioners county relies upon the dictionary definition of "park" and the types of park uses recognized nationally and found in a nearby city park and in other county parks to conclude that the provision allows (1) year-round use of a portion of RR-zoned property for day camps, retreats, and environmental education programming for a maximum of 100 persons and a weeklong overnight camp serving youth, and (2) the use of another portion of the property "for small social gatherings of its members and guests of up to 500 persons in size for picnics, weddings, and memorials during the months of April through October weather permitting," LUBA will affirm the board of county commissioners' interpretation of the provision, even if a different interpretation might be better. *Klein v. Lane County*, 80 Or LUBA 287 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a county code provision allows "campgrounds" in the Rural Residential (RR) zone but not "youth camps," and where the board of county commissioners relies on the definition of "youth camp" elsewhere in the code to conclude that a "youth camp" must be a permanent use, LUBA will affirm the board of county commissioners' interpretation of the provision to allow a weeklong youth overnight camp in the RR zone where the petitioners do not identify any provision of any statute or administrative rule with which the county's interpretation is inconsistent or establish that the county's interpretation is inconsistent with the express language of the county code or the underlying purpose of the RR zone. *Klein v. Lane County*, 80 Or LUBA 287 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A condition of approval requiring an applicant that has applied to site a solar facility in an area currently used for growing Christmas trees to offer a fire safety training course to the local fire district is inadequate to establish that "[t]he proposed use will not * * * significantly increase risks to fire suppression personnel" for purposes of OAR 660-006-0025(5)(b) and local code provisions implementing that rule. *Chang v. Clackamas County*, 80 Or LUBA 321 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local code provision generally prohibits development and grading in "areas of land movement," LUBA will affirm a hearings officer's interpretation of that provision to prohibit development and grading in "an area where a land slide or some other earth movement has already occurred—not an area where such activity *could* occur." *Chang v. Clackamas County*, 80 Or LUBA 321 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government errs by finding that compliance with a local code provision prohibiting diversion of storm water into areas with steep slopes and "areas of land movement,

slump or earth flow, and mud or debris flow" is satisfied by compliance with a separate local code provision requiring development to provide "[p]ositive drainage and adequate conveyance of surface water * * * from roofs, footings, foundations, and other impervious or near-impervious surfaces to an appropriate discharge point." *Chang v. Clackamas County*, 80 Or LUBA 321 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. That an alteration to a proposed PAPA is required by LUBA's decision in a prior appeal and reduces the subject acreage does not mean as a matter of law that the proposed PAPA is not "altered to such an extent that the materials submitted no longer reasonably describe the proposed change," thereby requiring notice of the alteration to DLCD pursuant to ORS 197.610(6). *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Under ORS 197.610(6), if a proposed PAPA is altered to such an extent that the notice submitted to DLCD under ORS 197.610(1) and (3) no longer reasonably describes it, the local government must submit notice of the alterations to DLCD at least 10 days before the final evidentiary hearing, which DLCD thereafter provides to the public. The larger statutory scheme at ORS 197.610 to 197.625 is intended to expand notice and participatory options for DLCD and a broader audience that may not receive local notice. A local government's errors under ORS 197.610(6) require remand where they are of a kind or degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function. *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where notice under ORS 197.610(6) is sent to DLCD 17 days *after* the final evidentiary hearing occurred and describes the "date of first evidentiary hearing" and the "date of final hearing" but does not identify the date of the "final evidentiary hearing," where there is a disparity between the text of the notice and the text of an ordinance included with the notice regarding the subject acreage, and where the notice is sent during a time when the record is left open only for evidence that is responsive to evidence that was submitted earlier, the totality of the errors in the submission of the notice and in the notice itself are of a kind and degree that make it doubtful that the ORS 197.610 to 197.625 process performed its function, and remand is required. *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The planning commission's conclusion that the subject properties are subject to "site review requirements" is not supported by anything in the text of the Old Code, Ordinance 20224, or the New Code. *Simons Investment Properties, LLC v. City of Eugene*, 80 Or LUBA 458 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In the context of an application to construct a 94-unit apartment complex, where a local code provision defines "net density" to mean "the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development, such as common open space or recreation facilities," while a maintenance building and internal parking circulation areas are properly included in the net density calculation, a leasing office

should be excluded from the acreage used to calculate net density. *Hulme v. City of Eugene*, 80 Or LUBA 488 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local code provision allows "interim access" to an arterial via private street, the time limit applicable to the interim access may be determined by the occurrence of an event, such as when alternative access becomes available, rather than a specific date. *Norman v. Washington County*, 80 Or LUBA 500 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a city's interpretation of its former version of a city code requirement that required that an appeal request include either the appeal fee or a fee waiver that had been approved by the planning director prior to the appeal deadline, and LUBA affirmed the city's interpretation, but the city code has since been amended and the city's code no longer requires a fee waiver be approved prior to the appeal deadline, and instead allows a local appellant to submit a fee waiver request and appeal request together, the city is not bound by its prior code, nor its interpretation of its prior code, and prior LUBA case law applying prior city code is no longer controlling. *Riverview Abbey Mausoleum Company v. City of Portland*, 79 Or LUBA 38 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the Court of Appeals determines that LUBA's decision was "unlawful in substance" pursuant to ORS 197.850(9)(a) because LUBA affirmed the city's interpretation of Goal 8, Policy 1, and according to the court, the city's interpretation of Goal 8, Policy 1 is not affirmable under ORS 197.829(1) because the city's interpretation does not "plausibly account for the text and context of the policy," the appropriate disposition according to OAR 661-010-0071(2)(d) is for LUBA to remand the decision to the city for further proceedings, specifically for the city to adopt a sustainable interpretation of Goal 8, Policy 1, and apply that policy, as interpreted to the application before it. *Crowley v. City of Hood River*, 79 Or LUBA 77 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a city's code lists a number of "factors" to be considered in approving an annexation, including "[a]dequacy and availability of public facilities and services to service potential development," but the city's code does not require that the city identify how infrastructure will be paid for, or by whom, as part of an annexation decision, and the city's findings suggest the city's capital improvement program (CIP) will be amended prior to development to list the new water main as a public facility, although the city does not intend to rely upon the CIP as a source of funding or authority for the new water main, petitioners have not established a CIP amendment must be required as a condition of approval or that the city otherwise erred in assigning a positive value to this factor in approving the proposed annexation. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a city rezones a portion of a property designated mixed use corridor (MUC) on the city's comprehensive plan, from FU-10 (future urban 10-acre) to NC (neighborhood commercial), and petitioners argue that the NC zone is inconsistent with the city's comprehensive plan which directs the city to "[f]ocus transit-oriented, higher intensity, mixed-use development

along selected transit corridors," because the subject property is not near a transit corridor, petitioners' premise—that the MUC plan designation is used only where the city intends to promote transit-oriented development along transit corridors—is incorrect. The MUC plan designation is implemented by four commercial zoning districts: one of which is the NC zone, which is not a transit-oriented zone, and is clearly not intended to be placed along transit corridors. Therefore, the city's decision to rezone its property to NC is not inconsistent with the property's MUC comprehensive plan designation. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Petitioners fail to establish that the city erred in concluding that rezoning a property to neighborhood commercial is consistent with Statewide Planning Goal 5 when the rezoning the subject property constitutes a PAPA for purposes of applying Goal 5, which provides that local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource by allowing new uses that "could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list." The city's PAPA is a very limited one, that in relevant part simply applies the zones implementing the city's comprehensive plan designations that the acknowledged comprehensive plan has already designated for the corresponding uses. Because the challenged PAPA simply implements that acknowledged plan designation choice with the exercise of little or no discretion, the PAPA does not authorize any "new uses" for purposes of OAR 660-023-0250(3) and Goal 5. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a parcel is lawfully created, but later divided unlawfully under ORS 215.750(1)(a), a county may rely on the parcel as it existed prior to the unlawful division in determining whether a unit of land qualifies for a forest template dwelling on January 1, 2003. Under ORS 92.017, such parcel "remain[s] discrete" unless it is "further divided, as provided by law." *Landwatch Lane County v. Lane County*, 79 Or LUBA 111 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local ordinance prohibits development within a floodway without a permit and provides an exemption for agricultural uses under which "temporary, removable structures should be allowed during drier months if their removal can be assured by late fall," but where the ordinance does not contain an express requirement that the structures be moved to or stored on the subject property, a hearings officer errs in deciding that such an exemption cannot be applied simply because the record does not include any evidence that the subject property contains a usable storage area outside the floodplain. *Armstrong v. Jackson County*, 79 Or LUBA 161 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a code provision states that the "provisions of this code shall be interpreted as minimum requirements. When this code imposes a greater restriction than is required by other provisions of law * * * the provisions of this code shall control," and petitioners argue that the city erred in applying the least restrictive, rather than the most restrictive interpretation of the city's code requirement that minimum lot size be determined by "slope," by allowing project applicants to measure slope after grading, rather than before grading, to maximize their potential

minimum developable lot size, but petitioners do not identify what other provision of law imposes a lesser restriction as regards to minimum lot size that the city should have applied, petitioners have not provided a basis for reversal or remand. *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Even if a local government's interpretation of its code were less plausible than petitioners' preferred interpretation, the "existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible' under the *Siporen* [*v. City of Medford*, 349 Or 247, 243 P3d 776 (2010)] standard." *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012). *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the city code defines "net density" to mean "the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development," and excludes public and private streets, the city did not err in including in the net density acreage calculation parking drives designed primarily to provide vehicular circulation to parking spaces in the apartment complex for resident and visitor parking and a leasing office and maintenance building. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a cross-petitioner seeks a remedy not available to it by statute, it is an obstacle to LUBA's review of the cross-assignment of error. LUBA lacks authority to affirm in part, and reverse in part a local government's approval of cross-petitioner's project application. ORS 197.835(1). Even assuming that the city erred by applying Willamette Greenway standards to cross-petitioner's housing project application, because they are not "clear and objective," the city's decision approving the development could not be reversed because it is not "prohibited as a matter of law." If LUBA agreed with cross-petitioners, the correct disposition would be remand, except that remand was not requested and would have no effect on the city's decision approving the application. In such a situation, LUBA will consider the request a contingent cross-assignment of error. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Goal 15 guidelines and county code requirements that require to "the greatest possible degree, necessary and adequate public access will be provided along the Willamette River by appropriate legal means," can be met where the city finds that current public access along the river provided by a public riverfront path is adequate, and the city does not err in construing the provision as requiring access only "along" the river instead of "to" the river. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county's comprehensive plan is a working document that must be updated to reflect existing conditions and future planning obligations. Where nothing in the statewide planning goals or the county's comprehensive plan prohibits amendments to expand areas in the county to which certain plan designations may be applied, provided those areas meet all applicable

statutory and rule requirements, such amendments do not provide grounds for remand or reversal. Counties have wide latitude to adopt and revise their comprehensive plans and zoning ordinances; amendments to the comprehensive plan need only comply with the statewide planning goals. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Goal 14 prohibits urban uses on rural lands. Where a county's text amendments to its comprehensive plan do not allow any urban uses on rural land, but merely expand the allowable locations in the county that could be the subject of an application to change the plan designation to rural industrial, and the text amendments require the applicant to demonstrate that the proposed use for which the rural industrial plan designation change is consistent with all statewide planning goals, including Goal 14, a petitioner's arguments that the amendments violate Goal 14 do not provide a basis for reversal or remand. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city council's interpretation of a local code provision which provides that, "[i]n the event of a tie [vote by the city council], the [planning commission's] decision which is the subject of appeal * * * shall stand," as not limiting the number of times that the city council may vote on a matter is not inconsistent with the express language of that provision and therefore affirmable under ORS 197.829(1)(a). *Vannatta v. City of St. Helens*, 79 Or LUBA 271 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government gives only one reason for denying an application, where LUBA concludes that that reason was based on inapplicable criteria, where the local government does not identify any applicable standards on appeal to LUBA that would require further review, and where the applicant does not challenge the conditions of approval that the local government would have otherwise imposed, LUBA will reverse the local government's decision pursuant to ORS 197.835(10)(a). *Oster v. City of Silverton*, 79 Or LUBA 447 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government gives only one reason for denying an application, where LUBA concludes that that reason was based on inapplicable criteria, where the local government does not identify any applicable standards on appeal to LUBA that would require further review, and where the applicant does not challenge the conditions of approval that the local government would have otherwise imposed, LUBA will reverse the local government's decision pursuant to ORS 197.835(10)(a). *Oster v. City of Silverton*, 79 Or LUBA 447 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the county approves an amendment to a planned development approval for a resort, golf course and aerial challenge course, and petitioner argues the county improperly construed the applicable provisions of the county's code, but petitioner has not ultimately challenged the board of county commissioners' interpretation, or otherwise explained why LUBA is not required to affirm that interpretation under ORS 197.829(1), petitioner has provided no basis for reversal or remand. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioner argues the county committed a procedural error that prejudiced his substantial rights when the board of county commissioners failed to consider a written statement that petitioner submitted to the board of commissioners at the hearing, but petitioner does not establish that the board of county commissioners actually failed to consider petitioner's written statement, and petitioner failed to object to the alleged procedural error below, petitioner has not established that the county committed a procedural error or violated an applicable legal standard. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a county's development ordinance provides that the county shall not approve a minor partition unless the proposal complies with the county's zoning ordinance that specifies that minimum parcel size for all new parcels in designated big game habitat "shall be 160 acres or larger if required by the underlying zone," the zoning ordinance does not provide any exceptions to the minimum parcel size requirement, and there is no dispute that the subject property is located within designated big game habitat, "considerations" such as existence of a farm dwelling, other structures, and intense farm use do not provide a legally sufficient basis for deviating from the minimum parcel size requirement, and such a partition is prohibited as a matter of law. *ODFW v. Lake County*, 78 Or 53 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Petitioners did not demonstrate that the county hearings officer erred where local county standards apply to development in "areas designated as floodways [as found on Federal Emergency Management Agency (FEMA) maps] or by methods described" elsewhere in the code, and the county hearings officer determined that because the development was not located within the "floodway," those standards did not apply. This is so, even where petitioners argue the FEMA maps are inaccurate and another section of code authorizes the county floodplain administrator to determine where the floodway is currently located based on "actual field conditions," but the county administrator has chosen not to exercise the authority granted in that section. *Meyer v. Jackson County*, 78 Or LUBA 150 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the county hearings officer agreed that the proposed project involved "the alteration of a watercourse" and that therefore standards applied which required the project applicant to show that the development "will not diminish the carrying capacity of a watercourse" by submitting "certification by an Oregon registered professional engineer," that in the engineer's opinion the watercourse "will not be diminished," the applicant has met those requirements by submitting the certification by a licensed engineer, even though another section of the county's code requires the applicant to "submit technical data" and a "Conditional Letter of Map Revision" from FEMA "when an alteration of a watercourse results in the expansion, relocation or elimination of the special flood hazard area [SFHA]" because the engineer certified that the project has not resulted in the expansion, relocation or elimination of the SFHA. *Meyer v. Jackson County*, 78 Or LUBA 150 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Petitioner's argument that a proposed detached accessory structure for an "art

studio" is not a permissible "accessory" structure allowed in the Impacted Forest Lands (F-2) zone provides no basis for reversal or remand where petitioner cites to no local code, state statute or administrative rule governing forest lands, suggesting limitations on accessory structures to a primary dwelling that is otherwise allowed on forest lands under state law. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A petitioner's argument that locating an art studio several hundred feet from an existing dwelling on forest land instead of adjacent to the dwelling and within the dwelling's existing fire breaks does not provide a basis for reversal or remand, where the petitioner does not identify any rule or other requirement that an accessory structure be clustered with the existing dwelling. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will reject petitioner's argument that a proposed "art studio" is in reality an "accessory dwelling" in the forest zone in violation of state and local law where the county hearings officer imposed several conditions intended to ensure that the proposed "art studio" would not be used as an "accessory dwelling," and petitioner's speculation that the applicant might violate one or more conditions of approval provides no basis for reversal or remand. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A hearings officer's finding that land in the forest zone upon which development is proposed is "flat" is not supported by substantial evidence where the finding is supported only by the applicant's assertion that the relevant slope is "less than 3" percent, but the record includes two topographic maps that appear to show that the slope exceeds 10 percent, which if so triggers additional fire safety requirements. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Although the county concedes it erred in denying a plan amendment and zone change application based on the belief that the subject property was, at the time the county made its decision, within a designated urban reserve area, when the LCDC's urban reserve designation regarding the subject property had not actually become final at the time in question, LUBA will not remand the decision if the county's decision identifies at least one valid basis for denial that is affirmed on appeal. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a county's comprehensive plan policy provides that "areas" may be designated rural commercial when the areas (1) have a "historical commitment" to commercial uses, or (2) the "areas" are "located within an Unincorporated Community" and have "direct access to a road of at least collector classification," petitioner has not demonstrated that the county commissioners' findings regarding the meaning of "area" are inadequate or that the county's reliance on a previous interpretation as authority for interpreting the term "areas" as used in rezoning criteria to refer only to the property being considered for rezoning, and not also to include the surrounding area, was in error where petitioner cites to no contextual differences suggesting

that the term "areas" should be interpreted differently than the same term used in similar rezoning standards, or authority suggesting the county has an obligation to adopt specific findings regarding the parties' alternative interpretations. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will uphold a county's interpretation of its own comprehensive plan policy regarding when a property may be designated rural commercial where the county evaluated the historic uses of the subject property and concluded that those uses did not demonstrate a "historical commitment to commercial uses," after concluding that (1) temporary commercial uses, (2) incidental or accessory commercial uses to permitted residential or farm uses on the property, and (3) the current unlawful commercial uses on the property were not sufficient to demonstrate "historical commitment" of the property to commercial use, where the county chose to focus on "commitment" which the county understood to require an inquiry into the nature of the historic uses on the property and a determination of whether commercial uses have constrained the scope of the uses on the property such that going forward only commercial uses are feasible, rather than defining commitment in terms of years of commercial use. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county's decision is "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances," pursuant to ORS 197.835(10)(a)(A), where petitioner's application for marijuana production meets a county's clear and objective standards for marijuana production on EFU-zoned land, no evidence was submitted that contradicted petitioner's assertion that it could and would meet the county's marijuana production standards, and the county relied upon factors and considerations in denying petitioner's application that are not contained in the applicable approval criteria. Accordingly, the proper disposition of the county's denial is reversal with an order instructing the county to grant approval of the application. *MJAI Oregon 5, LLC v. Linn County,* 78 Or LUBA 366 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where in evaluating petitioner's zone verification request pursuant to Eugene Code (EC) 9.2741(2), the city failed to consider the ORS 197.312(5) requirement that all accessory dwellings must be allowed "subject to reasonable local regulations relating to siting and design," the proper remedy is for LUBA to remand the decision to the city for the city to consider in the first instance whether EC 9.2741(2) is a "reasonable local regulation[] relating to siting and design" pursuant to ORS 197.312(5). *Kamps-Hughes v. City of Eugene,* 78 Or LUBA 457 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioner argues that the city erred by failing to apply a national historic trail master plan and national historic trail district guidelines to applicant's proposed project, presenting evidence that the city "effectively" adopted the master plan by "endorsing" it during planning commission meetings over the years, the city's "endorsement" does not amount to "adoption" of the plan and guidelines, nor does "incorporation by reference" transform an "ancillary" document into mandatory approval criteria. *Nicita v. City of Oregon City*, 78 Or LUBA 463 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A hearings officer's interpretation is inadequate for review before LUBA where the hearings officer finds that that a proposed bed and breakfast inn designed for occupancy by an employee caretaker and up to eight non-resident guests qualifies as a "bed and breakfast inn," without explaining how a caretaker occupancy is consistent with the county code which defines a bed and breakfast inn as an "owner-occupied" "single-family dwelling unit." *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county hearings officer errs in denying a forest template dwelling application on the sole basis that petitioner had not provided a fire safety inspection, where the applicable ordinance provision entitled "Wildfire Safety Requirements" requires "[o]ther measures as recommended by the fire agency commenting on the application or the County Fire Safety Inspector," and no fire agency recommended any measures or a fire inspection in any submitted comments. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A hearings officer correctly interprets ORS 215.740(3) in concluding that the minimum acreage requirement that applies to an application for a forest template dwelling is the minimum acreage for the applicant's tracts located in western Oregon where the forest template dwelling is proposed to be located, rather than the non-contiguous parcel located in an adjacent county designated as eastern Oregon. ORS 215.740 allows an owner seeking a dwelling on a tract that is located in western Oregon to rely on non-contiguous land in another adjacent county to meet the minimum acreage requirements; it does not require that the minimum acreage requirements for the non-contiguous county be the applicable standard. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. That a county's amended Transportation System Plan (TSP) includes language recommending that the county acquire property to develop a transportation facility does not mean that whatever land use permits are required to actually construct the facility under the local code or state law are thereby waived. The county could choose to approve whatever land use permits are required under law at the same time it approves an amendment to its TSP, but the latter is not a substitute for the former, or vice versa. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A project applicant is not required to file and win a quiet title action in circuit court as a condition precedent to filing the application simply because another party disputes the applicant's title to the property on which the proposed development is to occur. When a party disputes the applicant's title under a legal theory that can only be resolved in circuit court, neither the county nor LUBA is in a position to resolve the legal dispute over whether the applicant/deed owner's title is good. For that reason, the county is also not obligated to adopt findings resolving the title dispute. In circumstances where consent or lack of ownership has a bearing on an approval criteria, we have held that the decision maker may be required to impose conditions to ensure that the required consent is obtained prior to construction. However, where ownership of the subject

property is not an approval criterion, we have never held that the applicant has the obligation to quiet title in the subject property where some doubt is raised during the proceedings below as to the legality of that title, or that the decision maker is obliged to adopt findings addressing the likelihood that the applicant will prevail in a quiet title action. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. It is not sufficient for petitioners to simply point out that the sound study that was prepared to develop a Statewide Planning Goal 5 program to protect an aggregate resource site does not measure noise in precisely the manner required by the Oregon Department of Environmental Quality (DEQ) rules, without any attempt to show that any deviations from required sound measuring locations could have the effect of allowing noise levels that violate DEQ standards. Where the applicant's expert took the position that the selected sound measuring locations did not have the effect of inflating the ambient noise level or otherwise rendering those sound measurements inaccurate, at least some effort to challenge the expert's position is required to show the deviations may have led to inaccurate sound readings for purposes of determining if DEQ noise standards will be met. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The OAR 660-023-0180(1)(b) requirement to minimize conflicts does not require an absolute guarantee that a proposed mining operation will never violate Oregon Department of Environmental Quality (DEQ) standards. A local government does not err by finding that DEQ noise standards will be met, based on the applicant's sound study, and by imposing a condition of approval that mining be monitored for noise in the future and any changes in mining be made in the future to fully comply with DEQ noise standards, without requiring that mining cease until the mine fully complies with DEQ noise standards. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. OAR 340-225-0040 and OAR 340-225-0050 modeling requirements to determine whether a proposed mining operation will comply with ambient air quality and new source air particulate standards are not mere procedural requirements an applicant is free to ignore. The applicant and local government must either perform the required modeling or demonstrate that the modeling is unnecessary to demonstrate the proposed mining will comply with the air particulate standards. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Although a city code requires that the city's zoning map, the Metro Plan map and Metro Refinement Plan maps must be consistent, a city does not err by amending its zoning map and the Metro Plan map without adopting a conforming amendment to the Metro Refinement Plan map, where another code section provides that amendments to the Metro Plan map result in automatic conforming changes to the Metro Refinement Plan map by operation of law. *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city commission's interpretation of a city manager's general authority to

exercise "supervision over all city property" to be broad enough to include authority for the city manager to refuse to consent to a proposed historic landmark designation for city-owned property is not reversible under ORS 197.835(9)(a)(D) ("[i]mproperly construed the applicable law"). *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The ORS 197.772(2) right to refuse to consent to historic designation of property, which is given to "property owners," is not limited to owners of private property. A city may refuse to consent to historic designation of city-owned property, where a neighborhood organization files an application to designate that city-owned property as an historic landmark. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The Goal 5 rule, at OAR chapter 660, division 023, includes a "standard" process for inventorying, evaluating and protecting natural resources, at OAR 660-023-0030 through -050, that includes rules for evaluating the ESEE consequences for allowing, limiting, or prohibiting uses that conflict with a natural resource site. The Goal 5 rule also includes "special" standards and procedures for specific types of Goal 5 resources, including those that govern aggregate mineral resources, at OAR 660-023-0180. According to OAR 660-023-0020(1), sometimes both the standard process and a special process apply; sometimes the special process supersedes the standard process in whole, or in part, and in case of conflict the specific process controls. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. OAR 660-023-0180(5)(a) requires the local government to identify conflicts with existing and approved uses located within a determined "impact area" limited in size to 1,500 feet from the boundaries of the mining area, unless factual information indicates "significant potential conflicts" beyond 1,500 feet. After deciding to allow mining under OAR 660-023-0180(5), the county must also go on to consider whether to allow, limit, or prevent new or future conflicting uses within the impact area pursuant to OAR 660-023-0180(7). For this limited inquiry, the county must conduct the analysis pursuant to the standard ESEE process in OAR 660-023-0040 and -0050. OAR 660-023-0040(3) requires local governments to "determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource," which means that unlike the impact area determined under OAR 660-023-0180(5)(a), the impact area determined under OAR 660-023-0040(3) is not initially limited to 1,500 feet and the geographic extent of the impact area is determined by evaluating whether "allowed uses could adversely affect the identified resource," rather than evaluating whether there is factual information indicating "significant potential conflicts" beyond an initial 1,500 feet. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Petitioners have not established that a county's failure to determine an impact area for purposes of OAR 660-023-0180(7) pursuant to the standard ESEE process at OAR 660-023-0040(3) is more than harmless error, where it is not clear that an impact area determined under OAR 660-023-0040(3) would be larger or different than the one the county established under OAR

660-023-0180(5)(a), petitioners have not identified any new conflicting uses within a more expansive impact area that could adversely impact the mining site and that therefore should have been limited or prevented based on the arguably more sensitive OAR 660-023-0040(3) test, compared to the "significant potential conflict" test that the county employed under OAR 660-023-0180(5)(a), and because the applicant is the only party that could possibly be harmed by employing a potentially smaller impact area as determined under OAR 660-023-0180(5)(a), and the applicant is not challenging that potentially smaller impact area but rather is actively defending it on appeal. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In the context of a post-acknowledgment plan amendment to inventory a significant aggregate site and allow mining of that site under Goal 5, if the local government concludes based on its ESEE analysis that new conflicting uses should be allowed within the impact area under the existing comprehensive plan and land use regulations, the local government's program to achieve the goal in that regard may consist of simply relying on its acknowledged comprehensive plan and land use regulations to protect the resource site from new conflicting uses pursuant to OAR 660-023-0040(2)(a). *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The city planning commission improperly construed the plain language of a code section that requires that the "front lot line" of a corner lot "must" be considered the narrower street frontage "except when [city staff] determine[] topographical or access problems make such a designation impractical" when it relied on the historical site plan and orientation of the existing house on the corner lot to designate the front lot line, because those considerations are not "topographical or access problems." *McMonagle v. City of Ashland*, 76 Or LUBA 1 (2017).

28.8.5 28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a municipal code requires that the "front lot line" of a corner lot "must" be considered the narrower street frontage "except when [city staff] determine[] topographical or access problems make such a designation impractical," the city's decision was not supported by substantial evidence in the record pursuant to ORS 197.835(9)(a)(C) when it determined that the lack of sidewalks on the narrower frontage, and the absence of a door on the side of the house facing the narrower frontage were "access problems" that made designating the narrower street frontage the front lot line "impractical." *McMonagle v. City of Ashland*, 76 Or LUBA 1 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners seek reversal or remand of the city's decision pursuant to OAR 661-010-0071, and LUBA's decision agrees with petitioners that the city's decision improperly construed the municipal code and was not supported by substantial evidence in the record, but it is possible on remand that the petitioner's proposal could demonstrate compliance with the municipal code without significant changes to the proposed development, remand is the appropriate remedy. *McMonagle v. City of Ashland*, 76 Or LUBA 1 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A site suitability characteristic that property must be 22 acres in size to allow

development of a "Lifestyle Center" is not appropriate under Goal 14 and OAR 660-024-0060(5), where the city fails to explain why a general subregional need for between 27 and 37.9 acres of land for commercial development must be satisfied by the "Lifestyle Center" proposed by the UGB amendment applicant on a single 22-acre site. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Goal 14 and OAR 660-024-0060(5) do not permit use of a site suitability characteristic to reject alternative sites if those sites cannot be developed at a cost that is commensurate with the cost of developing a Lifestyle Center on a site owned by the UGB amendment applicant or simply because those alternative sites face development constraints. The correct inquiry is whether alternative sites "cannot reasonably * * * accommodate[]" the identified need. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Whether property is "available for purchase" is not a valid site suitability characteristic to be used to eliminate alternative sites that are already within the Urban Growth Boundary (UGB) from consideration, when determining whether a UGB amendment is necessary to add land to the UGB. Requiring sites to be currently available for purchase sets too low a threshold, impermissibly narrows the statutory, goal and rule alternatives analysis, and is not authorized pursuant to Goal 14 and OAR 660-024-0060(5). *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city improperly rejected alternative sites already within the Urban Growth Boundary (UGB) pursuant to the Goal 14 and OAR 660-024-0060(5) alternatives analysis for determining whether a UGB amendment is necessary, when it rejected some sites because they were not already zoned commercial but the site the city ultimately selected was also not currently zoned commercial. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Although OAR 660-024-0060(5) grants authority to local governments to consider "proximity" as a required alternative site characteristic when considering alternative sites under Goal 14 and OAR 660-024-0060(5) for a potential amendment to the Urban Growth Boundary (UGB), a city may not divide the city into four subregions and eliminate any requirement to consider alternative sites inside or outside the UGB for meeting identified subregional needs simply because those alternative sites are not located within the subregion. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city council does not err by failing to impose a condition requiring that a hotel be reduced in height to address potential land use conflicts, where the city council finds a shorter hotel is not needed to avoid potential land use conflicts. Whether a hotel of the height proposed will present land use conflicts with neighboring properties is a subjective determination, and where LUBA concludes the record establishes the city council's decision not to impose a condition was

within its discretion, LUBA will deny an assignment of error that challenges the city council's failure to impose the condition. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A condition of approval that allows an applicant to pipe a portion of a creek required to extend sanitary sewer lines under a creek "only if it can demonstrate the necessity of doing so with a licensed engineering analysis as the only feasible means to connect wastewater service in this location" in order to locate Controlled Income Rent housing units, common areas, and infrastructure on property violates ORS 197.307(6)(2001)'s prohibition against applying special conditions that are not "clear and objective" to needed housing. *Wiper v. City of Eugene*, 75 Or LUBA 109 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A County Court's interpretation of a comprehensive plan residential density standard that limits residential density in deer winter range to one dwelling unit per 160 acres to only consider nonfarm dwellings when computing density is not affirmable under ORS 197.829(1)(a) and *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010), where there is no textual support in the wildlife density standard itself for only counting nonfarm dwellings in computing density and the comprehensive plan policies the density limit was adopted to implement also do not support distinguishing between farm and nonfarm dwellings in computing density. *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 186 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city council's decision to amend its zoning ordinance to treat transient occupancy vacation rental use of residences differently from the use of the same residences as second homes, long-term rentals or domiciles is not inconsistent with comprehensive plan policy to "preserve and maintain the predominately residential character of [the city] through appropriate zoning and land use development regulations," as the city interprets the policy. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A comprehensive plan policy to "maintain present residential density levels in established neighborhoods" has nothing to do with the number of days a residence is occupied. Therefore, a zoning ordinance amendment that favors year-round domicile and long-term rental use of residences, as opposed to short term vacation rental use, does not violate the residential density policy. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA need not address assignments of error alleging that a condition of approval requiring an applicant seeking a four-lot subdivision to construct a road violates the needed housing statutes or the Takings Clause of the U.S. Constitution, where LUBA has already concluded on sub-statutory and sub-constitutional grounds that the city erred in imposing the condition. *Tokarski v. City of Salem*, 74 Or LUBA 124 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a city's development code permits only two extensions of tentative

subdivision approval, and the city grants a third extension, the city's decision will be reversed where the city does not file a brief and intervenor-respondent concedes the city's interpretation that a third extension is permissible is not sustainable, even under the deferential standard of review required by ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 262, 243 P3d 776 (2010). *Pinnacle Alliance Group LLC v. City of Sisters*, 74 Or LUBA 265 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will remand rather than reverse a county decision that erroneously concludes that a 2005 permit is still valid to authorize issuance of building permits for what is now a nonconforming use, where the applicant originally filed for a vested rights determination, and planning staff originally evaluated the application as one for alteration of a nonconforming use, but those theories were not addressed in the county's final decision. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will deny an assignment of error that argues that an application fails to comply with provisions of a neighboring city's municipal code where the provisions of the neighboring city's code do not apply to the application. *Martin v. City of Central Point*, 74 Or LUBA 312 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the issue is whether a statute and corresponding code provision that both authorize agricultural buildings and prohibit their conversion to other uses was in effect when a horse barn/arena was constructed in 2000, and the statute and corresponding code provision were first enacted in 2014, LUBA will conclude that the statutory and code authorization and prohibition do not apply to the horse barn/arena. *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will affirm a hearings officer's interpretation of a code provision that prohibits the filing of an application within two years that is "substantially similar" to an application that the county denied as requiring a high degree of similarity. Under the rules of interpretation, LUBA will affirm the hearings officer's conclusion that an application to develop a 62-lot subdivision on land zoned R 10 is not substantially similar to a previously denied application to develop a 72-lot subdivision on land zoned R 10, where the new subdivision proposes approximately 15 percent fewer lots, an increase in average lot size of approximately 20 percent, a decrease of approximately 100 daily trips, an increase in on-street parking, and wider streets. *Reinert v. Clackamas County*, 74 Or LUBA 427 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will affirm a hearings officer's interpretation of a code provision that requires the county to (1) incorporate tree preservation into a development plan "wherever feasible," and (2) balance the preservation of natural features with the needs of development provided such balancing shall not require a reduction in the number of lots or dwelling units that would otherwise be permitted, to not require additional trees beyond the 90 of 423 that were proposed to be preserved where preservation of the additional trees would require a reduction in

the number of lots or dwelling units that would otherwise be permitted. *Reinert v. Clackamas County*, 74 Or LUBA 427 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city's plan designation as Employment and Industrial for 308 acres of land that is added to Metro's urban growth boundary is "derived from and generally consistent with" the original ordinance adding the area to the UGB, even though the original ordinance designated more than 308 acres of land as Employment and Industrial, where the original ordinance is later amended by a new Metro ordinance that decreases the amount of land designated Employment and Industrial, pursuant to a Metro Code provision that allows Metro to amend the regional plan designations from time to time based on revised employment forecasts. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioner's assignment of error in an appeal of a county decision denying his request that the county reconsider a previously denied application for verification of a nonconforming use is directed at the merits of the original decision that denied his application for verification of a nonconforming use, rather than the merits of the subsequent county decision that denied petitioner's request to reconsider the same application that had earlier been denied, the assignment of error provides no basis for reversal or remand where the decision whether to reconsider the original decision is governed by different criteria than the original denial decision. *Kartavykh v. Clackamas County*, 74 Or LUBA 518 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a development code permits an applicant to resubmit the same application for verification of a nonconforming use less than two years after it was denied if the denial decision was based on a material mistake of fact, a hearings officer does not misconstrue the code in concluding that a denial decision that is based on conflicting evidence is not the same thing as a decision that is based on a material mistake of fact. *Kartavykh v. Clackamas County*, 74 Or LUBA 518 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Arguments that a local government incorrectly refused to accept documents for the record and that the local government was not sufficiently clear about which documents it was refusing to accept for the record are properly presented as assignments of error in a petition for review, and are not a basis for a record objection. *Nicita v. City of Oregon City*, 74 Or LUBA 633 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. It is likely that the Court of Appeals would not require that a land use hearings officer ruling on a request to alter a nonconforming use must apply the legal principle stated in *Parks v. Tillamook Co. Comm./Spliid*, 11 Or App 177, 196-97, 501 P2d 85 (1972), that nonconforming uses are disfavored and subject to strict scrutiny under state law. However, where it does not appear that the *Parks* principle played any role in the hearings officer's decision, the hearings officer's citation to *Parks* provides no basis for reversal or remand. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where an assignment of error itself can be read to allege that a hearings officer committed a particular analytical error in reviewing an application to alter a nonconforming use, but the arguments that are put forth in support of the assignment of error have nothing to do with that arguable analytical error, petitioners fail to adequately state and develop a challenge to the analytical error. In that circumstance, LUBA will limit its review to the arguments petitioners actually present. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. ORS 215.203(2)(a) provides that "farm use" includes the "preparation" of "products or by-products raised on * * * land for human or animal use[.]" A straw pressing operation that compresses straw that is initially baled in the field after it is cut such that the bales are easier to transport to their eventual end use as feed but that does not change the straw in any way or change the fact that it is ready for use as feed after it is baled and remains ready for use as feed after it is compressed is "preparation" of the straw within the meaning of ORS 215.203(2)(a). *Gilmour v. Linn County*, 73 Or LUBA 90 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where an assignment of error challenges an interpretation that the decision on appeal does not adopt, the assignment of error does not establish a basis for reversal or remand. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Notwithstanding statements that a hearings officer considered all documents in the record, where a hearings officer expressly declines to consider a proposed zoning diagram under the erroneous assumption that the diagram is not based on the adopted comprehensive plan map, remand is necessary for the hearings officer to consider the proposed diagram free of that mistaken assumption. *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government correctly construes a local code provision as not requiring an existing street that provides access to a proposed planned unit development to be upgraded to meet the standards in the local code for streets that are dedicated to the public as part of a development approval, where the text of the provision and context provided by other provisions supports that construction. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where one of seven factors that the comprehensive plan describes as "guid[ing] the determination of the most appropriate zone" guides the county to consider "[a]vailability of transit" and provides that "land within walking distance (approximately one-quarter mile) of a transit stop should be zoned for smaller lots," a hearings officer errs in concluding that land within approximately one-quarter mile of a transit stop is not within "walking distance" because sidewalks are not present. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the comprehensive plan sets out seven factors that "guide the determination of the most appropriate zone," a hearings officer errs in weighing some of the factors as less important than other factors without any support for that weighting in the express language of the factors or other parts of the comprehensive plan. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where one of seven factors that the comprehensive plan describes as "guid[ing] the determination of the most appropriate zone" guides the county to consider "proximity to jobs, shopping, and cultural activities" and guides that areas in proximity to jobs, shopping and cultural activities should be considered for smaller lots, a hearings officer errs in concluding that land that is proximate to jobs and shopping should not be zoned for smaller lots based on the hearings officer's negative assumptions about the quality of the jobs and shopping. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where one of seven factors that the comprehensive plan describes as "guid[ing] the determination of the most appropriate zone" guides that areas that have historically developed on large lots should "remain zoned consistent with the existing development pattern," and the hearings officer interprets the "existing development pattern" to be synonymous with the existing zoning, remand is required in order for the hearings officer to explain why a change from 10,000-square-foot lots to 8,500-square-foot lots in an area with some 8,500-square-foot lots is not "consistent with the existing development pattern." *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the comprehensive plan sets out seven factors that "guide the determination of the most appropriate zone," and the factors are not competing policies and do not work at cross purposes, a hearings officer errs in weighting some of the factors as less important than other factors without any support for that weighting in the express language of the factors or other parts of the comprehensive plan. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will deny an assignment of error that argues that a city is precluded from requiring review of the siting of an arterial street for compliance with applicable standards and criteria in the city's code merely because the city has previously accepted a dedication of the right-of-way for the arterial street, where the city code provisions that petitioner relies on do not provide that dedicated rights-of-way are exempted from land use review, but merely set out the procedure for and effect of a dedication. *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Language in a right-of-way dedication that grants the city a right-of-way for "road, pedestrian, drainage, and utility purposes, on, over, across, under, along, and within" the land described tends to support a conclusion that the interest conveyed is in the nature of an

easement or right to use the property for those purposes and not a fee interest. Accordingly, the city is not the "owner" for purposes of a city code section that requires an "owner" of property to join in or file the application for development approval. *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the relevant code sections explain that a conceptual development plan provides general concepts for development on a site, and a detailed development plan provides the specifics for development on a site and is required following or simultaneously with approval of a conceptual development plan, an applicant for development of a road that is approved in a conceptual development plan is required to obtain approval of a detailed development plan for the road. *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339 (2016).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the city code requires that a development's sewer facilities must be consistent with the sewer master plan and the sewer master plan calls for an upgraded 15-inch sewer line in a street that adjoins the development, city findings that explain a temporary cross-basin connection to provide sewer service to the development is acceptable because sewer flows from the development are inadequate to result in a properly functioning 15-inch sewer line, and the development approval is conditioned on the development connecting to the adjacent 15-inch sewer line when it becomes available in the future, are adequate to explain why the temporary cross-basin connection is not inconsistent with the code and sewer master plan. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA's scope of review under ORS 197.835(9) includes authority to determine whether the decision on review "[i]mproperly construed the applicable law[.]" Where LUBA has jurisdiction to review a land use decision, it also has jurisdiction to review challenges to that decision's construction of "applicable law," even if that "applicable law" is not a statewide planning goal, a comprehensive plan provision or a land use regulation. *Carlsen v. City of Portland*, 39 Or LUBA 93, 98-100, *aff'd in part, remanded in part on other grounds*, 169 Or App 1, 8 P3d 234 (2000). *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. While local laws that do not qualify as land use laws might be so unrelated to land use laws that LUBA's scope of review to consider violations of "applicable law" would not include such laws, a city's business licensing regulations qualify as "applicable law" under ORS 197.835(9)(a)(D), where those business licensing regulations are intertwined with the land use issues in a LUBA appeal. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will affirm a city council's conclusion that a retaining wall is a "foundation" as that term is defined in the city's land use regulations, where the evidence in the record supports a conclusion that the retaining wall provides primary support for a parking lot by

transmitting the loads imposed by the parking lot to the earth. *Knapp v. City of Jacksonville*, 72 Or LUBA 299 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA may consider a challenge that a decision approving a conditional use permit is inconsistent with a resolution that bars extension of sewer outside a sewer district, even if the resolution is not itself a land use regulation, where the resolution qualifies as "applicable law," and is therefore within LUBA's scope of review. ORS 197.835(9)(a)(D). *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a city council's findings appear to find that public sewer is a required public facility that is not available to property that is proposed for development, and the city council nevertheless approves development that will be served by an individual septic system without explaining why that action is consistent with a zoning standard that requires that all required public facilities have capacity and are available or can be made available to the development, remand is required. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a zoning ordinance requires a hydrology report and there is nothing in the record that is denominated as a hydrology report, LUBA will reject an argument that the decision should be remanded due to the lack of a hydrology report, where there is a geological/geotechnical report that appears to address the concerns that are identified in the zoning code requirement for a hydrology report. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A code requirement for a finding that it is "safe to build" need not be interpreted to require that there is absolutely no risk associated with development. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the zoning ordinance does not require that the city require implementation of all of a geology report's recommendations, a city's failure to impose a geology report's recommended prudent course of action as a condition of approval is not a basis for reversal or remand. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A hearings officer is not required to interpret and apply a county code provision that is similar, but not identical, to a different county code provision that was at issue in a thirteen-year-old board of county commissioner's decision that applied to a different application and property in the same way that the board of commissioners previously applied the different code provision. *Head v. Lane County*, 72 Or LUBA 411 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA's review of planning commission interpretations is governed by ORS 197.835(9)(a)(D), rather than by ORS 197.829(1). And under ORS 197.835(9)(a)(D), LUBA must

determine whether the planning commission "[i]mproperly construed the applicable law," "without according the deference required by *Clark*[*v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992)]." *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. After determining that a proposal to remove 500,000 cubic yards of rock constituted mining and that mining was not listed as an allowable use in the applicable zoning district, a city does not commit reversible or remandable error by then proceeding to consider whether the proposal could be allowed under development code standards that allow approval of unlisted uses. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a hearings officer's findings appear to substitute a common law nuisance standard for the applicable code standard, but the hearings officer never applies the identified common law nuisance standard, LUBA will view the findings as surplusage rather than an improper attempt to substitute an inapplicable standard for the applicable standard. *Morton v. Clackamas County*, 70 Or LUBA 7 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government errs in denying an application for approval of a "residential" development for failure to comply with an approval standard that applies to "commercial, institutional and office park uses." *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where LUBA concludes that applicable local nonconforming use law might not regulate a change from one conforming use to another conforming use in a nonconforming structure, but no party challenges a hearings officer's conclusion that local nonconforming use law does regulate such a change of use, LUBA will consider petitioner's challenge to the adequacy of the hearings officer's findings that an existing structure qualifies as a nonconforming use and that the proposal may be approved as an alteration of a nonconforming use. However, LUBA will not preclude the hearings officer from considering on remand whether the nonconforming use regulations apply in that circumstance. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. When faced with a highly subjective criterion that requires the city to identify and balance the advantages and disadvantages of a comprehensive plan amendment, a petitioner must do more than point to disagreement with the outcome of that balancing in order to successfully challenge the city's decision. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where no provision of the city's code or comprehensive plan or any other law requires the city to base its decision on data provided by a local traffic study, and the Institution of Traffic Engineers (ITE) Manual describes the circumstances in which a local traffic study may be needed to validate the ITE trip generation rates in hortatory, rather than mandatory terms (the

analyst "should" collect local data and establish a local rate"), the local government does not improperly construe the applicable law in failing to require a local traffic study to validate the trip generation estimates in the ITE Manual. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Neither a biological assessment nor 44 CFR § 60.3(a)(2), which requires local governments that participate in the National Flood Insurance Program ensure that all necessary federal permits are obtained prior to issuance of a floodplain development permit, require the city to consider whether the proposal complies with the Endangered Species Act where the biological assessment does not impose mandatory obligations on the city, and where no floodplain development permit is sought. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A conclusion that some historic types and levels of industrial uses of the property are part of the rural character of the area does not mean that the existing or proposed types and levels of industrial uses allowed under the Rural Industrial designation are consistent with the rural character of the area. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A hearings officer errs in concluding that a 1994 decision to rezone property also approved use of a road where nothing in the 1994 decision indicates that the county approved the use of the road, the decision did not approve any uses of the property and the road is located off of the property that was the subject of the 1994 rezoning decision, on property that was subject to different zoning and land use approval requirements. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A hearings officer errs in concluding that a 1997 decision approving a site plan for aggregate extraction approved use of a road located on property that was not included on the site plan, where nothing in the language of the decision supports that conclusion. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. An ordinance that contains language in its preface section that suggests that it is intended to be prospective is not retroactive, and the local government may not rely on the ordinance to revive and extend a void conditional use permit that expired by operation of law. *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 420 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. An argument that a decision fails to comply with a Goal guideline provides no basis for reversal or remand. Guidelines to statewide planning goals are advisory and do not constitute mandatory standards that must be applied in making land use decisions subject to the goals. *Reading v. Douglas County*, 70 Or LUBA 458 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A hearings officer errs in reading a code provision to include the word "tower"

where the code provision as it was adopted by ordinance does not include the word "tower." It is not within the hearings officer's authority to correct even an unintentional omission of language by "insert[ing] what has been omitted[.]" ORS 174.010. *Weston Kia v. City of Gresham*, 70 Or LUBA 483 (2014).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A plan amendment that designates 33 acres for high-density residential development is not inconsistent with a plan policy requiring a minimum of 28 acres of high-density residential, including seven acres to provide public open space, notwithstanding the failure to specifically designate seven acres for open space, where the 33 designated acres can supply the required seven acres of open space. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county ordinance requiring setbacks for wind turbines from rural residences, UGBs and unincorporated communities is not preempted by state statutes and administrative rules that regulate energy development and siting, where the state statutes and rules do not evidence the legislature's express or implied intent to preempt the field of energy regulation, development and siting. *Hatley v. Umatilla County*, 68 Or LUBA 264 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county ordinance requiring setbacks for wind turbines from rural residences, UGBs and unincorporated communities is not preempted by state statutes and administrative rules that regulate energy development and siting, where the state statutes and rules explicitly recognize and provide a role for local comprehensive plan and land use regulations in demonstrating that an energy facility complies with the statewide planning goals. *Hatley v. Umatilla County*, 68 Or LUBA 264 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where identifying the intersections that must be included and studied in a transportation impact analysis is governing by the local government's code, and under the code an intersection should have been included and studied, a city decision that the intersection need not be studied because it was not identified at an earlier scoping stage is error. *Oregon Coast Alliance v. City of Newport*, 68 Or LUBA 318 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local code definition of "lot" as an "area of land owned by or under the lawful control and in the lawful possession of one distinct ownership" does not have the legal effect of aggregating adjacent, separately owned areas of land. *Mackenzie v. Multnomah County*, 68 Or LUBA 327 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will affirm as correct a hearings officer's interpretation that a local code provision that requires aggregation of contiguous parcels in common ownership for development of a "Lot of Record" in a particular zoning district is not self-effecting. Such a code provision does not have the effect of aggregating contiguous parcels in common ownership merely because the

parcels were, for three years, included in the particular zoning district, where no development was proposed or completed during the three-year period when the property was included in the zoning district. *Mackenzie v. Multnomah County*, 68 Or LUBA 327 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will affirm as correct a hearings officer's conclusion that a prior dwelling approval for one property did not aggregate adjacent contiguous parcels in common ownership, where nothing in the local code criteria that applied to the prior dwelling approval required aggregation in order to obtain a development permit, and the dwelling approval was not conditioned on aggregation of the parcels. *Mackenzie v. Multnomah County*, 68 Or LUBA 327 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. City council statements that a proposed plan and zoning map amendment to allow higher density would be "a partial answer to global warming" and generate "affordable housing" and expressions of confidence that a good outcome could be negotiated between opponents and the applicant in design review provide no basis for reversal or remand even though they may have no bearing on whether applicable approval criteria are satisfied. Generally LUBA review is limited to the final, written decision and does not extend to comments that may be made during the proceeding that lead to that final written decision. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will not interpret a definition of "multi-dwelling structure" to preclude construction of a building that straddles a lot line, where the definition is written to distinguish "multi-dwelling structures" from attached dwellings which must be located on their own lot. *Beaumont-Wilshire Neighbors v. City of Portland*, 68 Or LUBA 393 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county does not err in generally identifying the extent of the surrounding neighborhood for purposes of determining whether a proposed conditional use airport will have minimal impacts on the surrounding neighborhood, where the decision makes reasonably clear that the county considered impacts from the proposed airport on other residential properties from noise generated from the proposed airport and from the risk of air crash on take off or landing crashes, and the petitioner does not point to any property or area that the county failed to consider as part of the "surrounding neighborhood." *Yih v. Linn County*, 68 Or LUBA 412 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. ORS 197.829(1)(d) effectively obligates a local government to interpret an ambiguous code provision if possible in a manner not contrary to the applicable statewide planning goals and administrative rules, not only where the code provision directly implements a goal or rule protecting resource lands, but also where the code provision is a general provision applicable to all zones, including resource zones, and is not intended to implement any particular goal or rule. *White v. Lane County*, 68 Or LUBA 423 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where LUBA determines that a local governing body's interpretation of particular requirements of its comprehensive plan is inconsistent with the express language of the comprehensive plan requirements, it is unnecessary for LUBA to also consider whether the interpretation is inconsistent with the purpose and underlying policy of the comprehensive plan requirements. *Friends of the Hood River Waterfront v. City of Hood River*, 68 Or LUBA 459 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The fact that some changes to uses allowed in a zoning district that are adopted by a legislative land use regulation amendment could also have been accomplished through a quasi-judicial rezoning decision does not provide a basis for recharacterizing a legislative land use decision as a quasi-judicial land use decision. *Stevens v. Clackamas County*, 68 Or LUBA 490 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government errs in construing a previous decision that deferred finding compliance with an applicable approval criterion to final planned unit development stage to restrict the local government's obligation to determine whether the applicable criterion that was deferred is satisfied by only considering whether the information required by a condition of approval was submitted, where the previous decision makes clear that the local government completely deferred making a determination of compliance with the applicable criterion to the final PUD stage. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 33 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the applicable land use regulations do not require that the owner of the property that is the subject of a permit application sign the application or join in the application, a local government errs by denying the application on the basis that the property owner opposes the permit application. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 43 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government errs in finding that a previously approved variance is no longer legally effective, based on a finding that (1) the sign that was approved "can never exist" and (2) the facts that existed at the time of the variance was approved no longer exist, where the findings do not explain why a sign with the characteristics of the sign that was originally approved "can never exist,' or why the change in facts has the legal effect of making the variance legally ineffective. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 43 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where there is nothing in the applicable land use regulations that requires the applicant for a sign permit pursuant to a previously approved variance to demonstrate that it is not possible to construct a conforming sign, the local government errs in denying the sign permit based on the applicant's failure to demonstrate it is not possible to construct a conforming sign instead. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 43 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will not consider whether a county has authority to approve conditional zoning where the applicant modified its proposal making conditional zoning unnecessary before the board of commissioners could make a decision about whether the county had such authority. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. State law that generally makes EFSC the sole authority to determine what constitutes the "applicable substantive criteria" when EFSC evaluates an application for a wind power generation facility preempts a county code provision that purports to dictate the county code requirements that will be included in the "applicable substantive criteria" applied in EFSC proceedings. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. ORS 197.829(1)(d) authorizes LUBA to reject an interpretation of a land use regulation that implements a statute, land use goal or rule, if the interpretation is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. ORS 197.829(1)(d) is not a vehicle to require LUBA to reject an interpretation of a land use regulation that does not implement any statute, land use goal or rule, even if the interpretation may be inconsistent with federal laws that the land use regulation implements. *Protect Grand Island Farms v. Yamhill County*, 67 Or LUBA 278 (2013).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city decision's characterization of "townhouses" as single family dwellings, even if incorrect, provides no basis for reversal or remand where petitioners fail to establish that the city's characterization has some bearing on an applicable approval standard. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Despite a reasonably strong textual and contextual argument in support of a different interpretation, a city's interpretation of the phrase "facilities operating at 1,000 watts [Effective Radiated Power] ERP or less " that ERP should be calculated by channel and not by antenna is not inconsistent with the express language of the city's regulation or with the purpose of the regulation, and is required to be affirmed, where the meaning of the key term used in the provision at issue, "facility," is not clear, is not defined in the code, and the dictionary definition of the word is not particularly helpful in discerning the intent of the city in enacting the provision. ORS 197.829(1)(a). *Hill v. City of Portland*, 66 Or LUBA 250 (2012).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the Court of Appeals remands a decision to LUBA to address the proper application of the Transportation Planning Rule (TPR), at OAR 660-012-0060, and on remand to LUBA the parties dispute the meaning of a TPR provision, LUBA need not resolve that dispute when during the pendency of the appeal the TPR is amended to delete the disputed TPR provision, and the TPR as amended will govern the local proceedings on remand from LUBA. *Setniker v. Polk County*, 65 Or LUBA 49 (2012).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. There may be limits on a county's discretion to allow land use violations to continue without challenge, but where a petitioner cites no authority that a county committed legal error by deciding not to revoke a wind turbine operator's conditional use permit or take other action to correct a land use violation, petitioner fails to establish a basis for reversal or remand of the decision. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where DEQ has determined that for budgetary reasons it will no longer enforce its noise regulations, counties are free to enforce those noise standards if they wish, but they are not required to do so. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the city code makes the planning commission the city's final decision maker, but limits the planning commission's review on appeal to errors committed by the hearings officer, the planning commission lacks authority to consider legal challenges to the city's appeal fee. In that circumstance, LUBA lacks authority to reverse or remand the planning commission decision to the planning commission based on a legal challenge to the city's local appeal fee. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Because the legislature in adopting ORS 197.829(1) both codified and modified the holding in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), the legislature may have intended ORS 197.829(1) to be a comprehensive statement of the circumstances under which the *Clark* deferential standard of review is applied to a governing body's local code interpretations, and did not intend LUBA to extend the reasoning in *Clark* to circumstances not covered by the statute, such as a governing body's interpretation of the text of a prior land use decision adopted by the planning commission. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In order to allow effective review of an as-applied appeal fee challenge in circumstances where, due to local regulations, the delegated local final decision maker does not have authority to accept new evidence or to consider appeal fee challenges, the local final decision maker must allow the fee challenger to submit argument and evidence into the record so that LUBA can perform its review function. *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2011).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The validity of a conservation easement acquired by the city from the applicant's predecessor-in-interest as a condition of partition approval cannot be challenged in the context of a subsequent decision that relies on the easement to deny an application for development within the easement. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a breeding kennel arguably qualifies as animal husbandry, and animal husbandry is a farm use, a local government interpretation that the breeding kennel qualifies as a

farm use is not inconsistent with the express language, purpose and policy of the land use regulation. *Siegert v. Crook County*, 63 Or LUBA 379 (2011).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The doctrine of judicial estoppel is invoked in some circumstances to preclude a litigant from asserting a position in a judicial proceeding that is inconsistent with a position the litigant successfully asserted in a different judicial proceeding. Even if judicial estoppel could apply in a LUBA appeal, it would not apply so broadly as to prevent a local government from correcting an earlier erroneous interpretation of its land use regulations. *Jacobsen v. City of Winston*, 63 Or LUBA 405 (2011).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where free-standing signs are expressly prohibited by the applicable underlying zoning district, an unconstitutional content-based exemption in the sign regulations that would otherwise apply to allow free-standing signs in that zoning district provides no basis for allowing free-standing signs in that zoning district. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where sign regulations partially exempt regulated signs from underlying zoning requirements, including setback requirements, but the sign regulations are unconstitutional in their entirety due to a separate content-based exemption in the sign regulations, proposed signs must be denied if they violate setback requirements in the underlying zone because the exemption from those setback requirements is ineffective if the sign regulations are unconstitutional in their entirety. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where PUD modifications are subject to "the applicable criteria used for the initial approval," a city hearings officer errs in concluding that only the criteria that are specifically mentioned in the initial approval decision apply. Just because criteria are not specifically mentioned in the initial approval decision findings does not mean the unmentioned criteria were not "used" in granting the initial approval. *Athletic Club of Bend v. City of Bend*, 63 Or LUBA 467 (2011).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. An Oregon Department of Transportation (ODOT) decision to adopt an interchange area management plan that calls for closure of a particular access without the additional formal review that is called for in an intergovernmental agreement between ODOT and a city may constitute a violation of the intergovernmental agreement, but it does not provide a basis for reversing or remanding ODOT's decision to adopt the an interchange area management plan. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Under common law a property owner has a right of access to public thoroughfares. However, that common law right of access does not extend to a right to access of a

particular type or at a particular location. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a petitioner fails to challenge all the reasons a hearings officer gives for finding that a proposed wind turbine facility will not force a significant change in or significantly increase the cost of accepted farm practices on nearby farms, petitioner's challenge to the adequacy of one of the reasons the hearings officer gave provides no basis for reversal or remand. *Falls v. Marion County*, 61 Or LUBA 39 (2010).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners assign error to a local government construction of applicable local land use law, the question for LUBA is whether the local government's interpretation must be sustained under ORS 197.829(1), not whether petitioners' interpretation is sustainable or a better interpretation than the local government's interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Under ORS 197.829(1), *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), a local government's interpretation and LUBA's review of that interpretation are guided by the principles articulated in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). Where the local government's interpretation finds almost no support in the relevant text of the land use regulation and comprehensive plan, LUBA will not defer to that interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a petitioner simply alleges that a decision that amends a comprehensive plan policy is not consistent with the purposes of comprehensive plan growth management policies or Statewide Planning Goal 14 (Urbanization), but petitioner does not identify any comprehensive plan policy purposes or the allegedly inconsistent requirement of Goal 14, petitioner provides no basis for reversal or remand. *Hildenbrand v. City of Adair Village*, 58 Or LUBA 43 (2008).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the Court of Appeals adopts an interpretation of a city plan policy and the city's decision is remanded because the Court of Appeals concludes the city's and LUBA's interpretation of the plan policy in approving an urban growth boundary amendment was erroneous, the city is free following remand to amend the plan policy, and is not bound to reapply the plan policy to the urban growth boundary amendment as it was interpreted by the Court of Appeals. *Hildenbrand v. City of Adair Village*, 58 Or LUBA 43 (2008).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where it is not clear whether a county believes a prior county decision delineated the boundaries of a resort unincorporated community, but petitioners do not allege that the appealed county decision that adopts a large scale map that precisely delineated the resort unincorporated community boundaries violates the OAR 660-022-0020 standards that govern such

delineations, petitioners provide no basis for reversal or remand. *Friends of the Metolius v. Jefferson County*, 58 Or LUBA 284 (2009).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A division of land that creates an EFU-zoned parcel that is smaller than the 80-acre minimum set forth in ORS 215.780(1) violates that statute, and the land division is prohibited as a matter of law. *Jouvenat v. Douglas County*, 58 Or LUBA 378 (2009).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Reversal is warranted under ORS 197.835(10)(a)(B) where a city denies a partition application based on a code provision that is not an approval standard and that does not authorize denial of the application, and where no other code provision cited by the city provides a basis for denial. Denial under such circumstances is "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where LUBA reverses a denial under ORS 197.835(10)(a) and orders the local government to approve the "application," the application includes any (1) applicant-proposed conditions of approval and (2) conditions imposed in an initial decision that the applicant has not objected to or attempted to appeal to the final decision maker. However, the "application" does not include conditions of approval that the applicant objected to or attempted to appeal to the final decision maker. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a county adopted a comprehensive plan policy that called for a 160-acre minimum lot size to protect big game winter range, but subsequently amended its zoning ordinance to provide for an 80-acre minimum lot size in the same area, that inconsistency created a plan/zoning ordinance conflict. If the county wishes to eliminate the inconsistency in favor of the 80-acre minimum lot size, it must demonstrate that the 80-acre minimum lot size leaves the county's Goal 5 program to protect big game winter range consistent with Goal 5. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a city applies a street vacation criterion that requires the city to find "a greater public benefit would be obtained from the vacation than from retaining the right-of-way in its present status" and finds the required benefit would be realized by the new secure parking area that would be constructed in the vacated right-of-way adjacent to a new Justice Center, remand is not required simply because petitioner would have applied that "greater public benefit" criterion differently and retained the right-of-way for transportation purposes. With such a subjective standard, different reasonable persons could easily reach different conclusions about the public benefit to be derived from the proposed street vacation. *Olson v. City of Springfield*, 56 Or LUBA 229 (2008).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. While it may be incorrect to refer to a 43-lot subdivision with many two-acre

lots as "rural," simply because it is located outside an urban growth boundary, a county commits no error in referring to the subdivision as rural in applying a subdivision approval criterion that requires a finding that the subdivision "will not create urban-farm conflicts," where the county did not rely entirely on that characterization in applying the urban-farm conflicts standard. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A zoning regulation that neither authorizes nor prohibits road construction in exclusive farm use zones provides no basis for reversal or remand of a decision that approves a subdivision of exclusive farm use zoned land, pursuant to Ballot Measure 37 waivers, where that subdivision will require the construction of some roads. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the hearings officer's sole basis for denying an application was his erroneous conclusion that the applicant failed to demonstrate compliance with a provision of the county's land development ordinance that did not apply to the proposed development, but the petitioner does not explain why the decision warrants reversal rather than remand, LUBA will remand the decision. *Curtain v. Jackson County*, 55 Or LUBA 79 (2007).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where LUBA sustains an assignment of error because the county's approval of the subdivision application is "prohibited as a matter of law," reversal rather than remand is the appropriate disposition. *Dunn v. Yamhill County*, 55 Or LUBA 206 (2007).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will reject a hearings officer's interpretation of local declaratory ruling provisions to permit the planning director to "initiate" a declaratory ruling application by joining an application improperly filed by a third party, where the text and context of the declaratory ruling provisions state that the planning director may only "initiate" an application by "filing an application" accompanied by the required information. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local code requires the applicant for a declaratory ruling to carry the initial and ultimate burden of proof and persuasion regarding the question submitted, a hearings officer errs in allowing the applicant to simply demonstrate that there is an interpretative dispute and leave it to third parties to take positions on that dispute and provide the only information to resolve that dispute. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. ORS 92.017, which provides that a lawfully created lot remains a discrete lot until the lot lines are vacated, does not assist petitioner where LUBA concludes that lot lines were vacated as provided by law. *McKeel v. Multnomah County*, 55 Or LUBA 608 (2008).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A hearings officer does not err in approving development notwithstanding that the applicant failed to comply with a code requirement to determine levels of service based on existing intersection signal timing, where the code contemplates that the city may vary from the strict letter of the code to address unusual situations, based on expert recommendations, and the hearings officer agreed with the applicant's experts that due to ongoing transportation construction in the area it would serve no purpose to consider existing signal timing. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Although a city may deny a conditional use permit application on the basis that there is not substantial evidence to support findings that all applicable approval criteria are met, a city may not simply deny a conditional use permit application that has already been deemed complete under ORS 227.178(2) for failure to provide requested information. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. If a city gives notice that additional information is required in support of a conditional use permit application, but nevertheless continues to review and make a decision on that application despite the permit applicant's failure to provide the requested additional information, the local government may not simply cite that failure to provide the requested information as the basis for denying the permit application. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will not defer to a local government's interpretation of the phrase "necessary for and accessory to" forest management as meaning "convenient and efficient" to forest management, where such an interpretation is contrary to the plain meaning of the word "necessary," the express language of the provision at issue, and other language in the provision. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government's failure to provide notice to the Department of Land Conservation and Development of a proposed amendment to the zoning map requires remand. *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277 (2007).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Petitioners may not ignore a hearings officer's findings that particular adjustment/variance criteria do not apply in a particular circumstance and then argue only to LUBA that the proposal violates those adjustment/variance criteria. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Petitioners' assignment of error challenging a hearings officer's decision to consider whether the adjustment/variance criteria that had been applied from the beginning during the local proceedings were the correct adjustment/variance criteria will be denied, where

petitioners fail to assign error to the hearings officer's explanation for why he reconsidered whether those criteria were the correct criteria to apply and petitioners make no effort to argue that the hearings officer's explanation is faulty in some way. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a zoning ordinance requires a "site specific investigation by a registered geologist or engineer," and the local government finds that a preliminary site evaluation prepared by a geologist was sufficient to constitute the required site specific investigation, a petitioner's objection that the preliminary site evaluation is insufficient will be rejected, where petitioner fails to challenge the city's findings that explain why the city viewed the preliminary site evaluation as sufficient. *Jebousek v. City of Newport*, 52 Or LUBA 435 (2006).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A hearings official does not improperly substitute state agency permit approval criteria for a local subdivision drainage criterion, where she denies subdivision approval based on a finding that the applicant failed to demonstrate that proposed drywells that would be needed for adequate drainage could be approved by the Oregon Department of Environmental Quality or that there were alternative methods of drainage if the drywells could not be approved. *Weiskind v. City of Eugene*, 52 Or LUBA 753 (2006).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will not consider an argument that an annexation is barred by a statute that was adopted and took effect after the annexation was approved, where LUBA would be required to consider extra-record evidence to do so, the local government objects to LUBA's consideration of that extra-record evidence and petitioner does not file a motion requesting an evidentiary hearing at LUBA. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. ORS 268.354(1), which provides that in addition to other statutory requirements "boundary changes within a metropolitan service district are subject to the requirements established by the district," is an adequate statutory grant of authority to allow the district to adopt legislation that delays the effective date of an annexation ordinance while the annexation ordinance is on appeal to the district. *City of Happy Valley v. City of Damascus*, 51 Or LUBA 141 (2006).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a review criterion that applies to a city boundary change on review by Metro unambiguously requires that the boundary change must be consistent with agreements between the city and other necessary parties, a memorandum of understanding to which the city is not a party could not provide a basis for Metro to deny the annexation ordinance under that review criterion. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Reversal, not remand, is the appropriate remedy where a challenged property line adjustment purports to reconfigure the lot lines of three adjacent lots of an existing subdivision

to create two lots out of the pre-existing three lots, and the reconfiguration cannot be achieved through a single property line adjustment or through serial adjustments. *Borton v. Coos County*, 51 Or LUBA 478 (2006).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will reject a petitioner's argument that a tree plan does not adequately protect trees, simply because the tree plan recognizes that during the development process trees slated for removal in the tree plan may be saved, where the local code merely requires that an applicant for development approval prepare a tree plan and states that "[p]rotection [of trees] is preferred over removal wherever possible." *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a petitioner shows that a county's findings are inadequate, but the quality of the evidentiary record and the findings that could reasonably be adopted based on that record are disputed, remand is the appropriate remedy where (1) petitioner does not show that a county's decision is "outside the range of discretion allowed the [county] under its comprehensive plan and implementing ordinances," which would require reversal of the county's decision and an order to approve the permit under ORS 197.835(10)(a) or (2) that the county's decision to deny the permit "violates a provision of applicable law and is prohibited as a matter of law," which would justify a decision by LUBA to reverse the county court's decision under OAR 661-010-0073(1)(c). *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will decline to interpret a local provision in the first instance under ORS 197.829(2), where the provision is subject to several potential interpretations, some of which, if adopted, would require reversing the decision. In such circumstances, remand is appropriate to allow the governing body to interpret the provision in the first instance. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will not resolve a petitioner's challenge to a county's interpretation of a comprehensive plan policy where, under the facts found by the county and affirmed by LUBA, the plan policy would be applied the same way under either petitioner's or the county's interpretation. Under such circumstances, the interpretative dispute between the parties is merely hypothetical, and the alleged misinterpretation provides no basis for reversal or remand. *Doob v. Josephine County*, 48 Or LUBA 227 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Code language that prohibits a city from requiring design changes that are "materially different from customary development in the area" is not properly interpreted to mandate that the city impose a roof height that is customary within the area, or prohibit the city from approving a roof height that is not customary. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Regional plan amendments that will require a city to amend its zoning ordinance

to include specific provisions to protect industrial land from being converted to office and commercial use do not violate a city's constitutional home rule authority. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Concern about the potential for conversion of industrially planned and zoned lands to commercial and office uses is a legitimate area of metropolitan concern within the jurisdiction of the Metropolitan Service District. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a zoning ordinance requires preparation of a management plan to protect wildlife resources when siting a house in a significant wildlife habitat area and the local government approves the dwelling without the required management plan, remand is required, notwithstanding that there may be documents in the record from which the required management plan could be developed. *Burton v. Polk County*, 48 Or LUBA 440 (2005).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. While it might be error for a local government to rely on findings demonstrating compliance with a less rigorous "balancing" standard to demonstrate compliance with a more rigorous "no adverse impact" standard, the reverse is not necessarily true: the local government may be able to rely on findings of compliance with the more rigorous standard to demonstrate compliance with a less rigorous standard. *Cadwell v. Union County*, 48 Or LUBA 500 (2005).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will reverse rather than remand a decision approving a property line adjustment, where the decision erroneously approves something other than a property line adjustment, and the decision and respondent offer no theory as to how the city could lawfully do what the decision purports to do. *South v. City of Portland*, 48 Or LUBA 555 (2005).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A code provision that authorizes continuation of existing uses that are unlawful or in violation of applicable land use laws is inconsistent with such laws. *Okray v. City of Cottage Grove*, 47 Or LUBA 297 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a city cites no authority for the city engineer to agree to reduce the speed limit for a proposed road rather than requiring that the road be constructed to city standards for vertical sag curves, LUBA will remand the city's decision. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county's approval of a five-acre-lot subdivision inside the UGB with a condition requiring that the applicant record CC&Rs that effectively prohibit further subdivision of those five-acre lots violates ORS 197.752. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. It is not within LUBA's scope of review to address whether existing code design review standards comply with the ORS 197.307(3)(b) requirement for "clear and objective" approval standards, in the context of a post-acknowledgment plan amendment that rezones property to allow uses that will be subject to approval under the existing design review standards, where the challenged decision does not amend the design review standards or attempt to bring any part of the city's code into compliance with ORS 197.307(3)(b). *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where two pages of legal argument are attached to a local appellant's jurisdictional statement of the grounds for local appeal, and the county refuses to consider those two pages simply because they are unsigned and include a non-appellant's fax header, the county commits error. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where local appellants (1) sign a local appeal form, (2) indicate "see attached" in the part of the appeal form where the grounds for the local appeal are to be specified, and (3) attach two pages that identify alleged legal errors in the decision, it is error for the county to refuse to consider the attached pages simply because there is no signature at the bottom of those pages and the pages include the fax header of a non-appellant. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will not assume a county rejected a local appeal, where petitioner and the county dispute whether the county rejected petitioner's attempted local appeal or whether petitioner voluntarily withdrew his local appeal to correct identified deficiencies and later failed to refile the local appeal, and the record does not establish that the county rejected the local appeal. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a county's local appeal form invites five local appellants to utilize a single local appeal form and attach documents in support of the appeal to that local appeal form, the county may not impose additional signature and express incorporation requirements that are not reflected in the form to limit the right of individual local appellants to rely on attached documents to support their local appeal. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. For the purposes of ORS 197.830(3), a notice of hearing that explains that a county is considering the annexation of property to a sewer district adequately describes the proposed action to be taken by the county, even if the area described in the notice is later amended to delete one parcel. *Miner v. Clatsop County*, 46 Or LUBA 467 (2004).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local code provision expressly requires that a proposed subdivision must "conform to" the comprehensive plan, the local government errs in interpreting the code to

preclude the possibility that there are any comprehensive plan provisions that might apply directly to the subdivision proposal. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where LUBA concludes that relevant local code provisions make the comprehensive plan requirements potentially applicable to an application for subdivision approval and that a particular comprehensive plan provision applies and is not merely aspirational, and the local government approved the subdivision without addressing the comprehensive plan provision, the subdivision approval decision must be remanded. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government has adopted no local highway design safety standards, it commits no error by applying American Association of State Highway and Transportation Official standards to reject a subdivision opponent's intersection site distance concerns, notwithstanding that it has not adopted those standards and may have been laboring under the incorrect assumption that it had adopted those standards. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a city code provision requires that a design review decision maker consider impacts on neighboring land values, and the code also grants discretion to the decision maker to modify a proposed site design to better conform to code standards, a city errs in failing to consider proposed modifications to a site design to minimize impacts to neighboring land values. *Freeland v. City of Bend*, 45 Or LUBA 125 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners' assignment of error is based on the erroneous assumption that a code standard that prohibits home occupations that are "objectionable due to [emissions]" prohibits *any* discernable emissions, and petitioners do not challenge city findings that the emissions that can be expected from a proposed home occupation will not be objectionable, the assignment of error provides no basis for reversal or remand. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government adopts unchallenged findings explaining that a demonstration that a proposed conditional use complies with all relevant zoning ordinance criteria is also sufficient to establish that the conditional use complies with the comprehensive plan, petitioners' challenge at LUBA that the conditional use is inconsistent with particular comprehensive plan provisions that are not specifically addressed in the conditional use decision provides no basis for reversal or remand. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. OAR 660-023-0180 establishes a comprehensive regulatory scheme for reviewing mining applications. A county errs when it denies an application for mining in part

because it does not comply with local approval criteria that are unrelated to OAR 660-023-0180. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county may not approve a nonfarm dwelling on a parcel created after January 1, 1993, under ORS 215.284(2)(c), which requires that the parcel on which a nonfarm dwelling is to be located be created prior to January 1, 1993, in order to remedy what it perceives to be an injustice. *Harris v. Jefferson County*, 44 Or LUBA 205 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A decision that approves a nonfarm dwelling on EFU land notwithstanding that the application does not comply with the applicable criteria set out at ORS 215.284(2)(c) will be reversed. *Harris v. Jefferson County*, 44 Or LUBA 205 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county did not err in determining that for the purposes of tallying the number of parcels within a 160-acre template, "parcels" are not limited to those units of land created by partitioning, and include other units of land that qualify as "parcels" under the county's definition of the term. *Testa v. Clackamas County*, 44 Or LUBA 402 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that does not include the "text" of the proposed amendment as defined by OAR 660-018-0020(2) is inadequate to perform the notice function required by ORS 197.610(1). *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that includes the text of the proposed amendment as that term is defined in OAR 660-018-0020(2), but was submitted approximately 23 days prior to the city's initial evidentiary hearing is adequate to perform the notice function required by ORS 197.610(1). *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a city has a process requiring that proposed amendments to a comprehensive plan and zoning code be subject to hearing and review by the planning commission and proposed design review guidelines be subject to hearing and review by the design commission, a notice of proposed amendment regarding the matters before the planning commission is not sufficient to apprise DLCD or others who receive notice pursuant to ORS 197.610(2) of the design review proceedings. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that erroneously states that the

initial evidentiary hearing had been held and does not indicate whether further opportunities to provide evidence are available is not adequate to satisfy ORS 197.610(1), which requires that notice of proposed post-acknowledgement land use amendments be submitted to DLCD at least 45 days prior to the initial evidentiary proceedings on those amendments. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Petitioners may not argue that a city's decision to deny its application was for the purpose of avoiding the 120-day decision deadline set out at ORS 227.178, when the challenged decision was rendered five days after that deadline. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will reverse rather than remand a decision, where the local government has twice denied development based solely on code interpretations that LUBA found to be clearly erroneous, and there is little likelihood that remand could result in a sustainable denial. *Church v. Grant County*, 43 Or LUBA 291 (2002).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Pursuant to ORS 197.830(3), a city decision maker must disclose all *ex parte* contacts at the first opportunity and must inform participants of their right to rebut the substance of the disclosure. However, a city's failure to inform a petitioner of his right to rebut the substance of an *ex parte* disclosure will not result in reversal or remand where (1) the disclosure of the *ex parte* contact was promptly made; (2) petitioner had more than one opportunity to object to the adequacy and the content of the disclosure; and (3) no party appears to dispute the facts alleged in the disclosure. *DLCD v. City of Gold Beach*, 43 Or LUBA 319 (2002).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA may not overlook the fact that a new land use regulation is facially noncompliant with a Metro standard that the regulation is intended to implement, simply because the regulation requires compliance with unspecified standards of a sewerage agency that allegedly comply with the Metro standard. Even if the sewerage agency standards comply with the Metro standard, it is questionable whether the city may adopt noncompliant regulations and rely on a separate local government or agency to ensure compliance with the Metro standard. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will not remand a decision based on an allegation that the decision maker failed to follow the consultation and coordination requirements of OAR 340-252-0060, where the record makes clear that all parties required by the rule to be consulted were aware of and actively participated in the process leading to the challenged decision, and any failure to follow the procedures set out by the rule was attributable to someone other than the decision maker. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. OAR 660-004-0000(2) does not, as a matter of law, impose a requirement that

an applicant for an exception to Goal 3 to permit a single-family dwelling on a 10-acre parcel first exhaust all other potential avenues to obtain approval for that single-family dwelling. *DLCD v. Yamhill County*, 42 Or LUBA 126 (2002).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a code criterion can be interpreted to impermissibly shift the burden of proof from an applicant to an appellant in a local land use appeal, but it is reasonably clear that the county did not apply the code criterion to shift the burden in that manner, petitioner's assignment of error that the county improperly shifted the burden of proof will be denied. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where it is not apparent that a county adopted one or more conditions of approval to address the impacts described in ORS 215.296(1), petitioner's argument that the county's conditions of approval are not "clear and objective," as is required by ORS 215.296(2), provides no basis for reversal or remand. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A post-acknowledgment amendment to an ordinance implementing Goal 5 must be remanded, where the city failed to provide the notice to DLCD required by ORS 197.610(1) and 197.615(1). *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 453 (2002).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A decision that only partially complies with a set of legal requirements that do not allow for partial compliance may be remanded on that basis. *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city council's decision to allow the prevailing party to draft proposed findings in support of a decision to rezone property provides no basis for reversal or remand. *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A zoning ordinance provision that expresses a preference for nonstructural over structural solutions to erosion and flooding problems does not apply to an application for recreational vehicle park expansion that proposes erosion or flooding measures, at least where the proposal does not make structural erosion or flood control measures likely or inevitable. *Willhoft v. City of Gold Beach*, 41 Or LUBA 130 (2001).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Any error that may have been committed by failing to provide a proposed comprehensive plan amendment to DLCD 45 days before the first evidentiary hearing was corrected on remand by offering to provide the proposal to DLCD more than 45 days before the evidentiary hearing on remand, where there is no contention that DLCD failed to receive the proposal or failed to provide notice of the proposal in accordance with ORS 197.610(1) and DLCD

advises the county that it does not oppose the proposal. *Donnell v. Union County*, 40 Or LUBA 455 (2001).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Although rezoning a 1.94-acre parcel from residential to commercial may not violate comprehensive plan policies that require an adequate supply of urban land to meet urban needs and support of transportation systems by locating housing near work and shopping areas, a local government errs in finding that those polices are irrelevant. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. While a development may have to eventually comply with federal laws, such as the Endangered Species Act, unless local approval criteria or federal law provisions require that the local decision that approves the development also demonstrate compliance with federal law, the decision need not do so. *McNern v. City of Corvallis*, 39 Or LUBA 591 (2001).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Any error in failing to comply with code provisions for amending the Metro UGB is harmless, where the pertinent code provisions are not based on statute, goal or rule; the provisions have been superseded by new standards that would apply on remand; and it is undisputed that the decision does not violate the new standards. *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 539 (2001).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local ordinance that institutes a process to remove property from a Goal 5 historic resources inventory but fails to include a method to determine whether the historic designation was "imposed" on the property, within the meaning of ORS 197.772(3), is inconsistent with that statute. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government may not apply only local code provisions to an application to remove property from a historic resources inventory, where the local code provisions are inconsistent with statutory provisions permitting removal of certain properties from a historic resources inventory. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. After a city has approved a permit application, the city may not apply code provisions to require that development occur within a particular time frame when the permit was initially approved without the application of those code provisions, and the city's past practice did not include the imposition of the development deadlines contained in those code provisions. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 193 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In reviewing land use decisions, LUBA's scope of review is not limited to arguments regarding the local government's application of land use regulations or other land use

standards; LUBA may also consider arguments that the decision violates applicable non-land use standards. *Carlsen v. City of Portland*, 39 Or LUBA 93 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the Court of Appeals directs LUBA to consider on remand an assignment of error directed at the local government's application of a policy that is not a land use regulation or otherwise a land use standard, LUBA will consider the policy to be "applicable law" for purposes of LUBA's scope of review under ORS 197.835(9)(a)(D). *Carlsen v. City of Portland*, 39 Or LUBA 93 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city does not err by failing to apply comprehensive plan annexation policies in reviewing an application for annexation, where those policies were adopted after the application for annexation was submitted and became complete. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. An access road to a winery is an accessory use to the winery. When the zoning for the location of the proposed access road does not allow wineries, the access road cannot be established as an accessory use on that part of the property. *Roth v. Jackson County*, 38 Or LUBA 894 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. As long as the expansion of the public use airport continues to serve the same class of airplanes pursuant to OAR 660-012-0065, the expansion is considered to be consistent with Goals 3, 4, 11, and 14, and an exception to those goals is not required. *Lentz v. Lane County*, 38 Or LUBA 669 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the city's code requires that connections to the city sewer be made within 90 days after receiving official notice to do so, a local government's decision to extend the deadline for compliance does not provide a basis for reversal or remand in the absence of a showing that the required official notice was given, or that the extension of the compliance deadline is otherwise prohibited. *Reynolds v. City of Sweet Home*, 38 Or LUBA 507 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. DEQ administrative rules do not require that restroom facilities be connected to a public sewer system. In the absence of such a requirement, the use of portable toilets rather than plumbed restrooms does not require the revocation of a conditional use permit for an RV park. *Reynolds v. City of Sweet Home*, 38 Or LUBA 507 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city's interpretation of its code to allow for modifications of conditions of approval is not "clearly wrong" where the code allows for modification of a conditional use and the city interprets the modification provision to allow for amendments to conditions where the use continues to meet the purpose of the conditional use provisions, or the permit holder has

established a valid basis for extending the time period for compliance. *Reynolds v. City of Sweet Home*, 38 Or LUBA 507 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Petitioner fails to establish error in approving a subdivision without environmental review required for development in an environmental zone, where the applicant proposes no development in an environmental zone and the only impact on an off-site environmental zone is the release of storm water at predevelopment rates. *Bauer v. City of Portland*, 38 Or LUBA 432 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Failure to list applicable criteria in a pre-hearing notice in violation of ORS 197.763(3)(a) allows petitioner to raise issues at LUBA relating to the omitted criteria without having raised those issues before the local government. However, failure to list applicable criteria does not, in itself, provide a basis for reversal or remand. *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A neighborhood association's failure to provide specific notice to a permit applicant that the neighborhood association was going to consider appealing the applicant's permit approval at its regular meeting does not violate ORS 192.640(1) of the Public Meeting Law, where the permit approval was issued on the same day as the regular meeting, and the statute specifically authorizes consideration of principal subjects that are not included in the notice of public meeting. *St. Johns Neighborhood Assoc. v. City of Portland*, 38 Or LUBA 275 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A land use decision maker commits no error by failing to require that an applicant for approval of a transmission tower justify the proposed height of the tower, where the relevant statutes impose different approval criteria depending on the height of the tower but do not require that the proposed tower height be justified. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a county approves aggregate mining in an airport overlay zone under a standard that allows water impoundments that do not significantly increase bird strike hazards, but the county does not address another local standard that appears to flatly prohibit such impoundments, LUBA will remand the decision to the county to resolve the apparent conflict between the two standards. *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a zoning ordinance standard requires consideration of residential appearance and function of an "area" in approving a bed and breakfast facility, and a hearings officer's selection of a two-block area for analysis is based on assumed walking distance to cars parked off-site and is no less plausible than petitioner's rationale for selecting a larger area for analysis, the hearings officer does not misconstrue the applicable law. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A petitioner's arguments that a zoning ordinance amendment violates a plan policy discouraging uses that are not water dependent provides no basis for remand, where the challenged decision raises the maximum building height and does not approve any particular use of the property. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. An argument that a city erred by failing to adopt findings addressing a plan policy that is 22 single-spaced pages long and broken down into many subparts is inadequately developed, where the city adopted findings addressing two parts of the policy and petitioner makes no attempt to explain what other parts of the policy petitioner believes are applicable. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where LUBA finds that an administrative rule provision is valid, and the appealed decision approves an application solely on the basis that the administrative rule is invalid, the appealed decision must be reversed. *Bruggere v. Clackamas County*, 37 Or LUBA 571 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the city council's review of a planning commission decision is limited to whether the lower decision is supported by substantial evidence, and petitioner argues that the city council exceeded its review authority by reweighing the evidence, LUBA will deny the assignment of error where it concludes that the city council understood and applied the substantial evidence standard correctly. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472 (2000).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Imposition of an ineffective condition as part of a comprehensive plan map amendment may result in remand where the condition is necessary to ensure compliance with a relevant approval criterion. However, such an ineffective condition does not provide a basis for reversal or remand where it is not shown that the condition is necessary to ensure compliance with plan map amendment approval criteria. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a decision maker discloses *ex parte* contacts at the beginning of the local proceedings, petitioners must request clarification of the *ex parte* contacts or otherwise object to the adequacy of the disclosure during the local proceedings. Because petitioner failed to object below, petitioner's assignment of error does not provide a basis for reversal or remand. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the statute authorizing counties to permit home occupations is amended to remove the limitation that the home occupation be conducted entirely within a dwelling or accessory building, but the county's home occupation ordinance still reflects the former statute, the county is not required to apply its home occupation ordinance consistently with the stricter

requirements of the former statute and case law interpreting that statute. *Greer v. Josephine County*, 37 Or LUBA 261 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will not conclude that the statutory definition of high-value soils excludes soil complexes in which listed soils form the predominant part, where petitioner fails to establish a sufficient basis to form that conclusion. *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Metro may adopt a functional plan with site-specific requirements without necessarily exceeding its authority under ORS 268.030(3) to "provide for those aspects of land use planning having metropolitan significance." *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where LUBA rejects as a matter of law a county's erroneous interpretation of its comprehensive plan as imposing a 2.3-acre minimum residential density, procedural errors the county may have committed in considering evidence outside the record in reaching that erroneous interpretation provide no additional basis for remand. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government is not estopped from following the appeal procedure that is required by its code where it is unclear whether county staff (1) made any false statements to the applicant concerning appeal procedures, (2) were aware that any of their representations were incorrect, or (3) intended that the applicant take any action based on such representations; and the applicant does not identify how she was induced to act differently by the county's representations. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will reverse a land use decision only where the decision is prohibited as a matter of law. *Wood v. Crook County*, 36 Or LUBA 143 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government's modification of standards applicable to a planned unit development rests on independent alternative grounds, petitioner's demonstration of error in one alternative ground provides no basis to reverse or remand the challenged decision where petitioner fails to challenge the other alternative ground. *Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a hearings officer's findings are inadequate to explain why a proposed use that qualifies as a permitted use as a "household" does not also fall within the definition of a "nursing home," which is only allowed as a conditional use, a remand would normally be required. However, where the facts are not disputed, and LUBA is presented with a straightforward question

of law, it may consider whether the proposed use falls within the definition of "nursing home." *Neels v. Clackamas County*, 36 Or LUBA 54 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a county code applies the same "stability" standard that is required by ORS 215.284(1)(d) and (2)(d) for nonfarm dwellings to approval of recreational vehicle parks, it is not bound by case law that interprets and applies the statutory standard, where LUBA did not determine in its decision remanding the decision to the county that it must interpret the code standard in the same manner that the statute has been interpreted. *Ray v. Douglas County*, 36 Or LUBA 45 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county code "stability" standard that does not implement the statutory nonfarm use "stability" standard is not subject to case law interpreting the statutory "stability" standard, but such a code "stability" standard necessarily connotes a temporal period and a scope of causative impact for analysis. However, a county's interpretation of the local "stability" standard as focusing on short-term effects and direct impacts rather than long-term and cumulative impacts is not clearly wrong and therefore must be affirmed by LUBA. *Ray v. Douglas County*, 36 Or LUBA 45 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a plan policy provides that the purpose of a rural industrial zone is to allow industrial uses in close proximity to the resources upon which they rely, but it is not clear how that policy applies and the list of allowed uses in the rural industrial zone does not appear to be consistent with the policy, LUBA will remand the decision so that the local government can interpret the plan policy in the first instance. *James v. Josephine County*, 35 Or LUBA 493 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In determining whether to reverse or remand a land use decision, the question is whether it is the land use decision or the land use proposal that is defective. *Angius v. Washington County*, 35 Or LUBA 462 (1999).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A hearings officer's determination that an EFU-zoned property is not necessary to provide a proposed public service is not inconsistent with a drainage master plan and does not constitute an impermissible collateral attack on the drainage master plan, where the drainage master plan was not adopted in accordance with post-acknowledgment procedures and only identifies the site as a "preferred" site. *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city does not err in regulating conditional uses differently from uses permitted outright even if a particular conditional use is similar to a use permitted outright. *Williamson v. City of Arlington*, 35 Or LUBA 90 (1998).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Although Oregon Laws 1997, chapter 859 (HB 2605) repeals two sections of the legislation that directed DLCD to adopt the Airport Planning Rule (APR), the 1997 legislation does not completely supersede the APR or DLCD's authority to adopt rules regarding airport planning. *Northwest Aggregates Co. v. City of Scappoose*, 35 Or LUBA 30 (1998).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city cannot find it is feasible to comply with all approval criteria based on a site plan for only four of the total 15 lots and defer submission of a complete site plan, and the record does not clearly support a determination of compliance with the approval criteria where the complete site plan is not included in the record. *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government may approve a partition and defer determination of an applicable approval criterion, provided the subsequent approval process provides the same notice and opportunity for public input as the original proceeding and the approval criteria are not so dependent on each other that they must be applied together. *Sunningdale-Case Heights Assoc. v. Washington Co.*, 34 Or LUBA 549 (1998).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. While petitioners may raise issues concerning compliance with approval criteria that are not identified in the local notice of hearing, petitioners must supply some explanation why they believe a "purpose statement" should be viewed as an approval criterion; petitioners may not simply assume that it is a criterion. *Rouse v. Tillamook County*, 34 Or LUBA 530 (1998).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Because a county's interpretation of its code to allow deferral of compliance with an approval criterion to a later stage with no opportunity for public hearing is contrary to ORS 197.763(2) and 215.416, LUBA owes that interpretation no deference under ORS 197.829(1). *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government misapplies the applicable law by prohibiting seasonal farmworker housing that is permitted by statute, LUBA will remand and not reverse where the statute permits the local government to condition and even deny an application for seasonal farmworker housing, and thus the result is not prohibited as a matter of law. *Shadrin v. Clackamas County*, 34 Or LUBA 154 (1998).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), does not establish procedural requirements independent of those required by state statute or local ordinance. *St. Johns Neighborhood v. City of Portland*, 34 Or LUBA 46 (1998).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. ORS 197.835(10)(a)(B), which allows LUBA to reverse a local government's decision and order development approval when denial of the application was for the purpose of

avoiding the 120-day limit of ORS 215.428, does not apply to good faith denials on the merits of the application, whether timely or untimely. *Miller v. Multnomah County*, 33 Or LUBA 644 (1997).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In adopting land use regulations, including emergency and temporary land use regulations, a city is bound by the substantive and procedural requirements established by ORS 197.610 and Statewide Planning Goals 1 and 2. These statutory and Goal requirements must be followed notwithstanding contrary city charter provisions. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city's error in converting an appeal of a quasi-judicial decision into a *de novo* legislative proceeding is substantive rather than procedural, and its decision is prohibited as a matter of law. *Anderson v. City of Shady Cove*, 33 Or LUBA 173 (1997).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The word "shall," used in a regulation, expresses what is mandatory. A local government interpretation to the contrary is indefensible and will not be affirmed by LUBA. *DLCD v. Tillamook County*, 33 Or LUBA 163 (1997).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Mandatory code requirements cannot be subverted by a local government interpretation. *DLCD v. Tillamook County*, 33 Or LUBA 163 (1997).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a condition of approval requires that the developer shall provide a "turnaround" at the end of a platted street, and the existence of the turnaround will bring the street within the definition of a cul-de-sac under local code, the city's tentative plat approval must be remanded where it does not satisfy the applicable local criteria for a cul-de-sac. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the city's comprehensive plan expressly requires that new subdivisions shall have sidewalks, the city may not use the variance procedures of its subdivision ordinance in order to grant an exception to the comprehensive plan sidewalk requirement. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the county's interpretation of a local ordinance allows dog kennels that were in existence in 1986 to be established as permitted uses without a showing of compliance with the ORS 215.296 farm impact standards, the county's interpretation violates ORS 215.283(2). *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the county's interpretation of a local ordinance regarding nonconforming

uses allows an abandoned nonconforming dog kennel use to be reinstated, that interpretation violates OAR 660-33-120, which prohibits new kennels on high-value farmland. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will defer to the county governing body's interpretation of a plan policy as being applicable when development approval is sought rather than when the plan map is amended. *Helvetia Community Assoc. v. Washington County*, 31 Or LUBA 446 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Petitioner's conjecture regarding one hypothetical development scenario does not provide a basis for a determination that the city's decision does not conform to the applicable criteria. *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Statements made by individual decision makers during local government hearings that express erroneous interpretations of law or legally improper reasons for adopting a land use decision provide no basis for reversal or remand unless such statements are adopted in the final written decision or findings supporting the written decision. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Local governing body may not determine an appeal to be moot and reinstate an earlier, rescinded decision, based on petitioner's collateral challenge to the authority of the planning director to rescind that earlier decision, when the rescission decision was not timely appealed. *Petterson v. Klamath County*, 31 Or LUBA 402 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Application of a local zoning ordinance to allow a nonconforming use that has been interrupted or abandoned to be resumed, violates ORS 215.130(7) and must be reversed. *Moore v. Coos County*, 31 Or LUBA 347 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The city's failure to address aspirational criteria stated in the city's comprehensive plan does not provide a basis for reversal or remand. *Stewart v. City of Brookings*, 31 LUBA 325 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioner does not establish that alleged inadequacies in the findings relate to any applicable approval criteria, petitioner has provided no basis for reversal or remand. *Stewart v. City of Brookings*, 31 LUBA 325 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. If a county recognizes a citizens planning advisory committee (CPAC) chosen in violation of election procedures previously adopted by resolution and incorporated by reference

in its comprehensive plan, it ignores a substantive violation of its plan and land use regulations, and the CPAC is a nullity. *Boom v. Columbia County*, 31 Or LUBA 318 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a comprehensive plan policy is couched in mandatory terms, but does not state an approval standard, the county's failure to address that policy in its decision is not error. *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a hearings officer's interpretation that the county's street frontage requirement mandates street frontages be on a public road or street is contrary to the plain language of the county's zoning ordinance, a denial of a partition based solely on that interpretation will be reversed. *Miller v. Clackamas County*, 31 Or LUBA 104 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. If the local government's interpretation of its own code regarding the scope of a proposed partition contravenes the express language of the code, LUBA will not defer to that interpretation. *Tognoli v. Crook County*, 30 Or LUBA 272 (1996).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the inapplicability of a local code provision is clear on its face, or petitioner's challenge to its applicability is so untenable as to obviate the need for the local government's authoritative interpretation, a remand for such purpose is unnecessary. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Although LUBA may not itself order a local government to refund a fee charged for a local appeal, local fee payment issues are part of the land use appeals structure, capable of violating applicable legal standards and providing a basis for remand. *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners fail to identify any applicable legal standard allegedly violated by the county's decision, petitioners have supplied no basis for reversal or remand of the challenged decision. *Collier v. Marion County*, 29 Or LUBA 462 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. If a code provision simply provides the decision maker "may require" an applicant to submit a traffic capacity analysis, but petitioners identify no legal standard arguably requiring such an analysis in the instant case or establishing standards for local government decisions on whether to require such an analysis, the local government's failure to require such an analysis does not provide a basis for reversal or remand. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Although LUBA owes no deference to a hearings officer's interpretation of a

local enactment, LUBA may remand a challenged decision in cases where the interpretation at issue is not explained in the findings or differs from an earlier interpretation, in order to give the hearings officer an opportunity to interpret the local enactment in the first instance. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. ORS 197.829 governs this Board's scope of review in reviewing local government governing bodies' interpretations of local enactments. ORS 197.829(4) has nothing to do with whether a particular statutory provision applies directly as an approval standard for a local government land use decision. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. When reviewing a local governing body's decision, LUBA cannot interpret local enactments in the first instance. Where petitioners challenge a local governing body's decision on the basis of failure to comply with certain arguably applicable comprehensive plan and code provisions, and the challenged decision contains neither an interpretation of the applicability of the plan and code provisions, nor a determination of whether they are satisfied, the challenged decision must be remanded. *McCrary v. City of Talent*, 29 Or LUBA 110 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government does not identify specific provisions in its comprehensive plan which it contends provide the basis for challenged land use regulation amendments, under ORS 197.835(5)(b), LUBA is required to reverse or remand the land use regulation amendments if they do not comply with applicable provisions of the Statewide Planning Goals. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where respondents do not identify specific provisions in the applicable comprehensive plan, which they contend provide the basis for challenged zone changes, under ORS 197.825(5)(b) LUBA is required to reverse or remand the zone changes if they do not comply with applicable provisions of the Statewide Planning Goals or their implementing rules. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioner alleges the local government's notice of public hearing violates local code requirements, but petitioner fails to provide LUBA with the local code requirements allegedly violated, LUBA will deny the assignment of error. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. There can be no possible rational dispute that an adjustment changing the number of parking spaces required for a proposed development does not violate a code prohibition against adjustments that are "exception[s] to the procedural steps of a procedure or to change assigned procedures." *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In reviewing a decision adopted by the local governing body, LUBA must review the governing body's interpretation of local code provisions and may not interpret the local code in the first instance, unless there is "no possible rational dispute" regarding the correct interpretation of the local code. *Foster v. Coos County*, 28 Or LUBA 609 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA is not required to defer to a hearing's officer's interpretation of the local code under ORS 197.829 or *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992). Rather, LUBA's review of a hearings officer's interpretation is to determine whether the interpretation is reasonable and correct. *Ellison v. Clackamas County*, 28 Or LUBA 521 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the record demonstrates that two city council members had numerous *ex parte* contacts with the applicant and failed to disclose those contacts and provide an opportunity for rebuttal, as required by ORS 227.180(3), remand is required. *Smith v. City of Phoenix*, 28 Or LUBA 517 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The "public need" standard formerly imposed on quasi-judicial zone changes under *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), does not apply to comprehensive plan amendments, unless the applicable comprehensive plan or land use regulations impose such a "public need" standard. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the challenged decision is adopted by the governing body, LUBA may not interpret the applicability of arguably applicable comprehensive plan policies. Rather, the governing body must interpret the applicability of such plan policies in the first instance. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the local government determined comprehensive plan objectives are mandatory approval standards in a recently appealed local decision, it may not later determine that plan objectives are mere guidelines and not mandatory approval standards in a different decision appealed to LUBA, in the absence of some explanation for the disparity. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the local code simply provides the planning director may reject an application concerning a property where a violation of local or state law is found to exist, but does not require that the planning director do so, petitioner's allegations concerning improper or fraudulent past actions by the local government concerning the property fail to provide a basis for reversal or remand. *Scholes v. Jackson County*, 28 Or LUBA 407 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Read together, ORS 215.263(7) and ORS 215.284(2)(c) prohibit the further division of an EFU-zoned parcel created before January 1, 1993, on which a nonfarm dwelling has already been approved. Therefore, a county decision approving division of such a parcel is erroneous as a matter of law and must be reversed. *Harrell v. Baker County*, 28 Or LUBA 260 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a challenged decision was not adopted by the governing body of the local government, LUBA owes no deference to the interpretations of local enactments expressed in that decision. *Pickrell v. City of Portland*, 28 Or LUBA 103 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Assignments of error that contend disputed conditions of approval either exceed a local government's authority under, or improperly construe, applicable law, if sustained, provide a basis for reversal or remand of a challenged decision, regardless of whether the challenged decision is a land use decision or limited land use decision. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government does not exceed its authority under a code section authorizing it to control "the nature and scale of development" by prohibiting development of two lots, as configured in a proposed seven-lot subdivision. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a challenged decision determines certain comprehensive plan policies are mandatory approval standards applicable to the proposed action, but LUBA cannot determine from the decision what the local government believes those policies require, the decision must be remanded for the local government to interpret the policies. *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where comprehensive plan and zoning map amendments simply change the designation and zone of a county park to ones that allow parks as a conditional use, the amendments are not inherently inconsistent with an existing dedication of the subject property for public use as a park. Therefore, that the amendments may not comply with statutory requirements for vacation of such a dedication provides no basis for reversal or remand. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a challenged decision adopts a new plan policy stating the city will allow a particular commercial-designated area to be developed "to serve both neighborhood commercial needs and as a community commercial center," but declines to change a plan policy that commercial development of the area should be at an intensity consistent with General Office or Neighborhood Commercial zoning, LUBA will remand the decision for the city to interpret the

relevant plan and code provisions in the first instance. *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. When LUBA reviews land use decisions for compliance with relevant approval standards, it does not matter whether the challenged decision is consistent with prior decisions, so long as the decision correctly interprets and applies the applicable standard. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a challenged decision incorrectly concludes arguments based on an arguably applicable comprehensive plan provision are precluded by the acknowledgment of an earlier decision, and does not interpret that plan provision, LUBA must remand the decision for the local government to interpret the plan provision in the first instance. *Rea v. City of Seaside*, 27 Or LUBA 443 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA lacks authority to interpret local comprehensive plan provisions in the first instance. Where certain comprehensive plan policies are arguably applicable to a development application and the challenged decision approving or denying that application does not include an interpretation of those policies, LUBA must remand the decision so the local government can interpret and apply its plan policies. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the applicability of local comprehensive plan or land use regulation provisions is ambiguous, the local government is entitled to considerable deference in determining their applicability. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government interpretation of its comprehensive plan and zoning code, that approval of a school at a particular site requires compliance with a plan policy concerning schools, is not so wrong as to be reversible under ORS 197.829, notwithstanding that the relevant zoning district lists schools as a permitted use at the subject site. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners contend a land use regulation amendment fails to comply with the statewide planning goals and implementing rules, and respondents fail to identify specific provisions in the local comprehensive plan that provide the basis for the challenged amendment, LUBA will assume no such provisions exist, and under ORS 197.835(5)(b) LUBA has authority to reverse or remand the land use regulation amendment if it does not comply with the statewide planning goals or implementing rules. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Statements by individual decision makers made early in the local proceedings,

that granting adjustments to code requirements would have a negative impact on the neighborhood, do not show the decision makers ignored applicable criteria in later adopting a final written decision granting the adjustment. It is the final written decision that is subject to LUBA review. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Petitioners' allegations that an applicant cannot simultaneously seek the benefit of two separate local code provisions allowing deviations from code height and setback requirements provide no basis for reversal or remand, where nothing in the code precludes seeking approval under both provisions. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a city has a population of less than 2,500 people, the city's comprehensive plan and land use regulations do not implement the "needed housing" provisions of either ORS 197.307(6) or Goal 10 and, therefore, the city's interpretation of its plan and land use regulations is not subject to reversal or remand on the basis of inconsistency with statutory and goal standards relating to "needed housing." *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government denies an application based on noncompliance with certain comprehensive plan housing policies, petitioners' argument that other plan housing policies should also be applied provides no basis for reversal or remand, where petitioners fail to establish how the local government's failure to apply the other policies undermines its decision to deny the application based on the policies it did apply. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners contend the challenged decision does not demonstrate compliance with an applicable comprehensive plan policy, but fail to explain how the findings adopted by the local government addressing that policy are inadequate, LUBA will reject their contention. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. If petitioners contend the challenged decision fails to demonstrate compliance with certain local comprehensive plan and code provisions that are not addressed in the challenged decision, and those provisions are capable of being interpreted as approval standards under the permissive scope of review standard of ORS 197.829, LUBA must remand the decision to the local government to interpret and apply the plan and code provisions in the first instance. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. It is questionable whether a local government could ever be equitably estopped from requiring compliance with applicable comprehensive plan and land use regulation requirements. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Even if misstatement of material fact can provide a basis for equitable estoppel against a local government requiring compliance with applicable comprehensive plan and land use regulation requirements, an erroneous legal conclusion cannot provide a basis for such an equitable estoppel. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. After *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), it is not clear whether general rules of statutory construction are relevant in LUBA review of local government interpretations of their own comprehensive plans and land use regulations. Even if they are, general rules of statutory construction are not absolute. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will defer to local government decisions giving different interpretations to the same language appearing in different sections of its code, where there are related code provisions that provide some justification for the different construction of such identical code language. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government operates within its interpretive discretion under ORS 197.829 when it interprets a code requirement that a proposed conditional use "fully accords with all applicable standards of the County and State Laws or regulations" to be satisfied, where the applicant demonstrates during the local proceedings that there are "no unusual circumstances or conditions which would prevent [subsequent] issuance of required regulatory approvals." *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA is not required to remand a decision for a local government interpretation of its code, where the interpretive issue raised by petitioner is so untenable that LUBA can reject it without an authoritative determination by the local decision maker. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government interpretation of its sign ordinance that regardless of whether a sign is an awning, fascia or other sign type, it is subject to certain measurement requirements, is not contrary to the express words, policy or context of the ordinance, and LUBA will defer to it. *Heath Northwest, Inc. v. City of Portland*, 26 Or LUBA 535 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Under ORS 197.829, it is unclear whether LUBA is to defer to a local government interpretation of a prior local government decision or whether LUBA is required to determine whether the local government interpretation is reasonable and correct. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Allegations that the local decision maker failed to disclose *ex parte* contacts, as required by ORS 215.422(3), provide no basis for reversal or remand where there is no admission by the decision maker or other evidence, either in the record or offered through a motion for evidentiary hearing pursuant to ORS 197.830(13)(b), that an *ex parte* contact occurred. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Allegations that a local code provision consolidating commonly owned parcels conflicts with ORS 92.017, which provides that a lawfully created lot or parcel shall remain a discrete lot or parcel, are rendered moot and provide no basis for reversal or remand, where the parcels in question were combined in an approved and recorded plat. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA may not interpret a local government's enactments, in the first instance, to determine what constitutes the local approval standards for, and how those standards apply to, a challenged decision. Rather, LUBA is required to review the local government's interpretation of its own enactments. *Rea v. City of Seaside*, 26 Or LUBA 444 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the local code makes filing a transcript of the initial local hearing an essential part of perfecting a local appeal, and contains no provision providing procedures or standards for granting an extension of time to file such transcript, LUBA will affirm a local government's decision to dismiss a local appeal because the transcript was not filed within the required time. *Bjerk v. Deschutes County*, 26 Or LUBA 439 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A petitioner's assignment of error will be rejected where it simply alleges code violations, without supplying any supporting argument, or alleges inconsistent findings and lack of substantial evidence, without identifying the challenged findings. *Draganowski v. Curry County*, 26 Or LUBA 420 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners contend the challenged decision does not demonstrate compliance with an applicable approval standard, and the decision does not interpret the standard sufficiently for LUBA to review that interpretation and consider petitioners' arguments, LUBA will remand the decision to the local government. *Bottum v. Union County*, 26 Or LUBA 407 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Failure to determine the cumulative impacts of a proposal provides no basis for reversal or remand of a decision unless petitioner establishes that some legal standard requires a determination of cumulative impacts. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In the absence of a legal requirement that a local government determine an applicant's intent with regard to a development proposal, a local government has no obligation to determine such intent or to examine an applicant's prior history of compliance with land use or other regulations. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioner fails to identify applicable legal standards regarding wetlands or explain why the proposal violates such applicable legal standards, petitioner supplies no basis for reversal or remand of the challenged decision. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. 1993 Oregon Laws, chapter 792, section 43, codifies *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), with the exception that LUBA is not required to defer to a local government's interpretation of its regulations if that interpretation is contrary to a state statute, statewide planning goal or administrative rule which the regulations implement. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Under Oregon Laws 1993, chapter 792, section 43(4), LUBA is not required to affirm a local government's interpretation of its own code provision if that interpretation is "contrary to a state statute, land use goal or [administrative] rule that the [code provision] implements." *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county may not amend its transportation plan in ways which conflict with the Oregon Bicycle Bill requirements set out at ORS 366.514(1), even though those statutory requirements would apply in any event. *Bicycle Transportation Alliance v. Washington Co.*, 26 Or LUBA 265 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will reject an assignment of error alleging a local government transportation plan conflicts with Oregon Bicycle Bill requirements concerning provision of bicycle trails, where petitioner fails to show any of the 27 roadway designations included in the transportation plan are incapable of accommodating some form of bicycle trail where ORS 366.514(1) requires that bicycle trails be provided. *Bicycle Transportation Alliance v. Washington Co.*, 26 Or LUBA 265 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. If a local government does not provide notice to DLCD of a post-acknowledgment comprehensive plan or land use regulation amendment, as required by ORS 197.610 and 197.615, it improperly construes substantive provisions of applicable law and, under ORS 197.835(7)(a)(D), the challenged post-acknowledgment amendment decision must be remanded. *Oregon City Leasing, Inc. v. Columbia County*, 26 Or LUBA 203 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA cannot interpret a local government's ordinances in the first instance, but rather must review the local government's interpretation of its ordinances. Consequently, the failure of the local government to make the initial interpretation of local ordinance provisions is a basis for remand. *Friends of Bryant Woods Park v. Lake Oswego,* 26 Or LUBA 185 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners contend the local government may not rely on particular plan provisions in denying a plan map amendment, but the local government did not rely upon those provisions in denying the requested plan map amendment, petitioners' challenge provides no basis for reversal or remand. *Ericsson v. Washington County,* 26 Or LUBA 169 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners contend certain information required by the local code "prior to the approval of subdivisions" must be in the record at the time of tentative plat approval, and the challenged tentative plat approval decision does not interpret the local code with regard to *at what stage* of the subdivision approval process the required information must be submitted to the county, LUBA must remand the decision for the local government to interpret its code in the first instance. *Cummings v. Tillamook County,* 26 OR LUBA 139 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a question of proper interpretation of a comprehensive plan provision is raised during local proceedings, the interpretation required for LUBA review of the decision on appeal must be provided in the decision. The local government may not supply the interpretation in its brief on appeal. *Eskandarian v. City of Portland,* 26 Or LUBA 98 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Under ORS 197.835(7)(a)(D) and *Clark v. Jackson County,* 313 Or 508, 836 P2d 710 (1992), LUBA must defer to a local government's interpretation of "applicable law" adopted by the local government, regardless of whether that applicable law is a zoning ordinance or conditions of approval imposed by a prior quasi-judicial order. *Perry v. Yamhill County,* 26 Or LUBA 73 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local decision erroneously concludes a previous local decision did not grant conditional use approval for a nonfarm dwelling where (1) the previous decision states it approves a nonfarm dwelling, and (2) the local government treated the previous application as requesting nonfarm dwelling approval. *Rodriguez v. Marion County,* 26 Or LUBA 50 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government decision determines the effect of a previous decision, LUBA may not review the legal sufficiency of the previous decision. *Rodriguez v. Marion County*, 26 Or LUBA 50 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a member of a decision making body fails to disclose an *ex parte* contact

until after the evidentiary record is closed, ORS 227.180(3) is violated, and LUBA must remand the decision. *Derry v. Douglas County*, 26 Or LUBA 25 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Use of comprehensive plan forestland division standards as an aide in determining whether a property includes sufficient forestland to be designated in the comprehensive plan for forest uses under Goal 4 is not an improper use of the forestland division standards. *Westfair Associates Partnership v. Lane County*, 25 Or LUBA 729 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioner argues the local government erred by approving a conditional use permit without the consent of all owners of the subject property, but identifies no plan, code or other legal standard requiring that such consent be obtained, LUBA cannot grant relief. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The proper interpretation of state statutes is a question of law for LUBA to decide, and is not subject to the limitations that *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) places on LUBA's review of interpretations of local enactments. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a city decision maker receives an *ex parte* contact, failure to follow the procedures required by ORS 227.180(3) constitutes a basis for remand by LUBA, regardless of whether the party seeking remand objected during the proceedings below. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Findings supporting approval of a PUD that determine there are solutions available to various landslide, drainage and related problems affecting the subject property, and that those solutions are possible, likely and reasonably certain to succeed, are adequate to establish that the local government did not improperly defer compliance with relevant PUD standards. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the challenged decision includes contradictory findings regarding compliance with an applicable local code approval standard, LUBA cannot interpret the standard itself, but rather must remand the decision to the local government to interpret the standard in the first instance. *Larson v. Wallowa County*, 25 Or LUBA 537 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. That an existing garage violates lot line setback requirements provides no basis for denial of a requested subdivision of the adjoining property to be served by a private roadway running along the lot line in front of the existing garage. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Arguments that a proposed subdivision roadway alignment violates a Fire Bureau policy provides no basis for reversal or remand of the subdivision approval decision, where the Fire Bureau policy is not a mandatory subdivision approval standard. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The fact that a challenged local government decision does not include an interpretation of a particular local code provision, alleged to be applicable by petitioners, does not provide a basis for reversal or remand if the code provision in question is *not* ambiguous or susceptible to different sustainable interpretations. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the local code defines "traveler's accommodations" to include an establishment rented to travelers for a fee, on a daily or weekly basis, and the local government interprets that code definition as not excluding cabins that are occupied by owners for less than 36 days per year, such an interpretation is not clearly contrary to the local code, and LUBA will defer to it. *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA is required to defer to a local government's interpretation of its own ordinances, so long as the proffered interpretation is not clearly wrong. *Oregon Raptor Center v. City of Salem*, 25 Or LUBA 401 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Petitioners' contention that the local government erred in finding the statewide planning goals do not apply to the challenged decision provides no basis for reversal or remand where the challenged decision also adopts alternative findings addressing the goals, and petitioners do not challenge the adequacy of those findings. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 283 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A local government's failure to establish compliance with aspirational plan provisions which "encourage" and provide guidance about what a local government should do, is not a basis for LUBA to reverse or remand a challenged decision. *Neuharth v. City of Salem*, 25 Or LUBA 267 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. ORS 197.279(2) establishes the procedures required for adoption of a wetland conservation plan. A local government's failure to adopt a wetland conservation plan, provides no basis for reversal or remand of a challenged decision, because local governments are not required to adopt such plans. *Clarke v. City of Hillsboro*, 25 Or LUBA 195 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Although ORS 92.010 to 92.190 do not specifically envision a subdivision

approval process that combines approval of a subdivision and a lot line adjustment, neither do those statutes prohibit such a process. Absent such a prohibition, a local government commits no error in following such a combined process. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA is required to defer to a local government's interpretation of its own ordinances, unless that interpretation is contrary to the express words, policy or context of the local enactment. LUBA may not interpret a local government's ordinances in the first instance, but rather must review the local government's interpretation of its ordinances. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a relevant ordinance provision is capable of more than one meaning, the challenged decision does not expressly interpret the ordinance provision, and LUBA cannot infer the local government's interpretation from the decision, LUBA must remand the decision for the local government to interpret the provision in the first instance. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government determines that a recreational cattle roping use was lawfully established on the date restrictive zoning was applied, because it constituted a farm use allowed outright by the subject zone, LUBA will defer to that interpretation so long as it is not clearly contrary to the express words, policy or context of the ordinance. *Smith v. Lane County*, 25 Or LUBA 1 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the term "vacant" in a local government's code is undefined, but the code states that undefined terms have their "normal dictionary meaning," the local government may adopt one of the available ordinary dictionary definitions of the term "vacant," and LUBA will defer to that definition of the term so long as it is not clearly contrary to the context of the code provision in which the term "vacant" is found. *Rhine v. City of Portland*, 24 Or LUBA 557 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will reject a petitioner's contention that a comprehensive plan map amendment does not comply with a plan policy requiring preservation of water quality, where the petitioner fails to challenge findings addressing that plan policy and argues only that a specific development proposal, which is not the subject of the challenged decision, does not comply with that plan policy. *Trumper v. Washington County*, 24 Or LUBA 552 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA may not interpret a local government's ordinances in the first instance, but rather must review a local government's interpretation of its ordinances, and the local government interpretation must be adequate for LUBA's review. *Leabo v. Marion County*, 24 Or LUBA 495 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. If a local government has interpreted the local code in the challenged decision, LUBA must defer to that interpretation unless it is clearly contrary to the enacted language or the apparent purpose or policy of the provision. *Leabo v. Marion County*, 24 Or LUBA 495 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA lacks authority to invalidate LCDC administrative rules. *Reeves v. Washington County*, 24 Or LUBA 483 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where LUBA must determine whether an ambiguous code provision (*i.e.*, one that is capable of more than one sustainable interpretation) is applicable to a challenged decision, and the challenged decision does not contain a reviewable interpretation of that provision, LUBA must remand the decision for the local government to interpret the provision in the first instance. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners contend a local government erred in failing to apply a code provision to the challenged decision, and the decision contains no interpretation of that code provision, but the code language unambiguously establishes that the provision in question is not applicable to the challenged decision, LUBA is not required to remand the decision so the local government can interpret its code in the first instance. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In reviewing a local government's interpretation of its own ordinance, the question LUBA must resolve is not whether the local government interpretation is "right," but rather whether it is "clearly wrong." *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. If a challenged permit decision misconstrues an acknowledged land use regulation, that provides a basis for reversing or remanding the decision under ORS 197.835(6) and (7)(a)(D). It does not mean the challenged decision is a land use regulation amendment. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), the question for LUBA to resolve is not whether a local government interpretation of its own code is "right," but rather whether it is "clearly wrong." *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA may not interpret a local code in the first instance, but rather must review a local government's interpretation of its code. However, a local government interpretation of its code must be adequate for LUBA's review and may not consist of a mere conclusory statement. *DLCD v. Crook County*, 24 Or LUBA 393 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In rendering a decision on a permit, a city is required to hold at least one public hearing or provide notice of the decision and an opportunity for an appeal. A city's failure to do so requires that the decision be remanded. *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. In the absence of a statutory policy pertaining to forestlands that, like the statutory policy concerning EFU land, requires the preservation of forestland in large blocks, LUBA cannot require that a local government interpret and apply its nonforest use "generally unsuitable" land approval standard in the same manner as the similarly worded statutory standard pertaining to nonfarm uses on EFU land. *DLCD v. Coos County*, 24 Or LUBA 349 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local code requires a proposed nonforest dwelling site to be on land generally unsuitable for forest uses, that standard can be interpreted to mean either that the proposed nonforest dwelling site itself, or that the entire forest parcel, must be generally unsuitable for forest uses. LUBA will defer to the local government's choice between those permissible interpretations. *DLCD v. Coos County*, 24 Or LUBA 349 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners do not explain why specific provisions of a comprehensive plan designation or zoning district applied to forestlands are inconsistent with Goal 4 or the Goal 4 rule, petitioners provide no basis for reversal or remand. *Gonzalez v. Lane County*, 24 Or LUBA 251 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local code requires that one of several considerations must be "achieved" to approve a setback reduction request, and there are adequate findings that one of those considerations is achieved, it provides no basis for reversal or remand that other considerations may not also be achieved. *Barker v. City of Cannon Beach*, 24 Or LUBA 221 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners fail to cite any applicable standard prohibiting the cutting of trees in a comprehensive plan "Distinctive Natural Area," their assertion that cutting trees is inconsistent with the subject parcels' Distinctive Natural Area designation provides no basis for reversal or remand of the challenged decision. *Forest Highlands Neigh. Assoc. v. City of Lake Oswego*, 24 Or LUBA 215 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will defer to a local government's interpretation of its code so long as the proffered interpretation is not "clearly contrary to the enacted language," or "inconsistent with express language of the ordinance or its apparent purpose or policy." An interpretation of a local code provision to require that in order to be recognized as separately developable, a parcel must

have been in separate ownership on a particular date, is not "clearly contrary" to the terms of, or "inconsistent with the express language" or "apparent purpose or policy" of, the code provision. *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. It is the local government which, in the first instance, should interpret its own enactments. Where a local government has not interpreted and applied applicable provisions of its code, and it is not clear how those code provisions apply to the subject application, LUBA will remand the challenged decision so that the local government may do so. *Gage v. City of Portland*, 24 Or LUBA 47 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the record establishes that a proposed street will have the characteristics of both a local street and minor collector street, the question of the proper street designation is debatable, and the choice of which designation to apply is within the local government's discretion. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government neither adopts findings demonstrating compliance with a permit approval standard, nor finds it is feasible to comply with that standard, but instead defers the required determination of compliance with that standard to a later stage of the approval process where only the applicant has a right to notice and to participation and to appeal the decision, the decision must be remanded. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Under ORS 197.835(5)(b), an amendment to a local government land use regulation is subject to reversal or remand for failure to comply with the Statewide Planning Goals, unless the comprehensive plan contains "specific policies * * * which provide the basis for" the amended regulation. *Ramsey v. City of Portland*, 23 Or LUBA 291 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where, under the correct interpretation of an approval standard and the undisputed relevant facts in the record, the subject application *cannot* satisfy the approval standard, LUBA will reverse a challenged local government decision approving the application. *McKay Creek Valley Assoc. v. Washington County*, 23 Or LUBA 85 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. To the extent an LCDC enforcement order establishes "applicable law" for a land use decision, LUBA is authorized to determine whether the land use decision properly interprets and applies that law. *Schatz v. City of Jacksonville*, 23 Or LUBA 40 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The prohibition in ORS 271.725(1) against condemnation of conservation easements does not bar a local government from achieving, through its plan and land use regulations, some of the same objectives that it could achieve through conservation easements. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Absent zoning ordinance provisions to the contrary, a PUD preliminary master plan approval is a "development permit" and where the zoning ordinance requires that an environmental assessment "be filed prior to the issuance of any development permit," it is error to approve a PUD preliminary master plan prior to the filing of the required environmental assessment. *Gerl v. City of Lincoln City*, 22 Or LUBA 512 (1992).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A city permit decision rendered without providing the public hearing or notice of decision and opportunity for local appeal required by ORS 227.175(3) and (10) must be remanded so that the city may comply with the statutory requirements. *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government erroneously failed to apply a somewhat ambiguous code provision to the challenged decision, LUBA will remand the decision for the local government to interpret and apply its code provision in the first instance. *J.C. Reeves Corp. v. Clackamas County*, 22 Or LUBA 360 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government erroneously concluded the proposed use is not subject to regulation under its code and, therefore, did not interpret or apply applicable code provisions, LUBA must remand the challenged decision to the local government, so it can interpret its own code in the first instance. *Tylka v. Clackamas County*, 22 Or LUBA 166 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. That a nonconforming use is inconsistent with comprehensive plan provisions that did not exist or apply on the date the use became nonconforming provides no basis for reversal or remand, because ORS 215.130(5) provides the use may continue notwithstanding such inconsistency. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Erroneous expressions of plan or code interpretation by the decision maker, whether expressed before or after the decision is reduced to writing and becomes final, provide no basis for reversal, if such erroneous expressions are not included in the written decision or findings supporting the written decision. *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where erroneous plan and code interpretations are not included in a land use decision maker's written decision, they do not constitute a procedural error or irregularity warranting reversal or remand under ORS 197.835(7)(a)(B) or an evidentiary hearing under ORS 197.830(13)(b). *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government approves a conditional use permit for a use that LUBA determines is allowed by neither the local code nor applicable statutes, the decision must be reversed. *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. LUBA will not conclude that a hearings officer, in reviewing a request for conditional use approval, improperly relied on prior land use violations by the applicant to refuse to consider approval with conditions, unless such refusal is clearly stated in the decision. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where the local government failed to interpret and apply a local approval standard to a permit application, and LUBA is unable to determine, as a matter of law, the correct application of the approval standard, LUBA will remand the appealed decision so the local government can interpret and apply the approval standard in the first instance. *Lung v. Marion County*, 21 Or LUBA 302 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government finds that otherwise applicable street width standards need not be satisfied in a proposed subdivision under a local code provision allowing narrower roads where consistent with "a plan for the neighborhood," and petitioners do not challenge that finding, petitioners' arguments that the subdivision violates street width requirements must be rejected. *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Allegations of violation of federal requirements governing National Environmental Policy Act requirements provide no basis for reversal or remand of a decision governed exclusively by state law. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where an applicable approval criterion only requires that the challenged decision *identify* certain adverse impacts and *consider* mitigation measures that could be imposed at subsequent approval stages, the local government is not required to *adopt* mitigation measures as part of the challenged decision. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where petitioners contend that under ORS 215.428(3), the county erred by applying standards adopted after their permit application was initially filed, petitioners claim the county "improperly construed the applicable law." ORS 197.835(7)(a)(D). *McCaw Communications, Inc. v. Polk County*, 20 Or LUBA 456 (1991).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Comprehensive plan policies which contain aspirational language regarding goals to be implemented through the adoption of land use regulations are not mandatory approval criteria for individual permit applications and, therefore, it is unnecessary for LUBA to determine

whether a decision approving a permit complies with such plan policies. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Absent an argument specifically challenging a local government's findings that a plan amendment and zone change will allow only a rural level of development on the subject rural land, LUBA has no basis to conclude that the county erred in determining its decision complies with Goal 14. *DLCD v. Klamath County*, 19 Or LUBA 459 (1990).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. Where a local government uses a two-stage approval process and determines whether a proposed zoning map amendment complies with applicable goal, plan and land use regulations in the first stage, petitioners may not fail to appeal the first stage approval decision and later assert goal, plan and land use regulation violations in a challenge of the local government's decision granting approval of the second stage. *Headley v. Jackson County*, 19 Or LUBA 109 (1990).

28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. The meaning of local legislation is a question of law which must be decided by LUBA on appeal. *Beck v. City of Tillamook*, 18 Or LUBA 587 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government adopts a post-acknowledgment plan amendment creating a new zone that allows 20-acre lots, an argument that DEQ rules indicate that properties of 10 or more acres in size are generally able to support on-site wastewater systems is not sufficient to establish compliance with Goal 11 with respect to wastewater where those rules appear for the first time in the response brief, where there are no findings or evidence in the record addressing wastewater, and where there is no evidence in the record that the rule is accurate within the portion of the local government's jurisdiction at issue. Similarly, references to the proximity of the majority of candidate lands to fire districts, to evidence that more demand for funds would not be created in one of the districts, to 10 years of data indicating that less than two percent of fires resulted from residential structures, and to local fire protection standards with which future development would be required to comply are not sufficient to establish compliance with Goal 11 with respect to fire protection where there is no analysis of the likelihood of increased fire as more residences are potentially introduced into the area or discussion of the capacity of the existing fire service organizations to provide more service. *DLCD v. Douglas County*, 80 Or LUBA 98 (2019).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government legislatively decreases the height limit in one part of a historic district and increases the height limit in another part of the historic district, findings that focus on the importance of creating incentives for development of vacant parcels in the historic district, determine that the new height limits are lower than those outside the historic district, and conclude that "the issue of consistency [is] best left to the Landmarks Commission who remain charged with reviewing future development proposals" are not adequate to explain how the new height limits comply with a comprehensive plan policy that requires the local government to "preserv[e] and complement[] historic resources." *Restore Oregon v. City of Portland*, 80 Or LUBA 158 (2019).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. While applying pesticides and herbicides in a manner that causes overspray or drift onto adjoining properties is not an accepted farm practice for purposes of the farm impacts test at ORS 215.296(1), where the labels for some pesticides and herbicides effectively require a setback from certain sensitive uses regardless of whether drift or overspray occurs, a county will likely have to make specific factual findings about the specific setbacks required by particular chemicals on particular farming operations on surrounding farmlands, based on application methods, and whether the operation of each setback would force a significant change in farm practices. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A condition of approval requiring that an applicant construct a proposed fence between a proposed trail and adjoining farms; specifying only that the proposed fence must be "capable of preventing dogs and people from entering adjacent farm fields"; punting all determinations regarding fence design, materials, construction, etc. to a subsequent master planning process that offers no opportunity for a public hearing or other public input; and allowing adjacent landowners to opt out of installing a fence on their property line is inadequate where the county relies on the proposed fence to address a wide variety of different potential impacts, which might require different fence designs, materials, construction techniques, and maintenance routines in order to ensure that the trail will not cause significant impacts on farm practices for purposes of the farm impacts test at

ORS 215.296(1). Such a condition is also not clear and objective for purposes of ORS 215.296(2). *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local code provision requires a finding that "[t]he proposed use is appropriate, considering the adequacy of public facilities and services existing or planned for the area affected by the use," and where the record includes undisputed expert testimony that fire and emergency access are inadequate unless a proposed trail and its bridges are built to certain standards, it is insufficient for the local government to state, without any supporting evidence, that it is "feasible" to design the trail and bridges to provide adequate fire and emergency access and then punt all determinations regarding trail and bridge design to a subsequent master planning process. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an applicant proposes a planned development, and where a local code provision requires the local government to "seek to determine that the development * * * will not create a drainage or pollution problem outside the planned area," the local government errs by not adopting findings determining whether the construction of a road extension that is proposed as part of and that would provide access to the planned development will create a drainage or pollution problem outside the planned area. *Lundeen v. City of Waldport*, 80 Or LUBA 450 (2019).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings are inadequate to explain how a proposed adjustment to the minimum lot size to allow a duplex on a corner lot will not "allow an increase in density in the [applicable] zone" under a local code provision where the findings merely conclude that the adjustment "does not result in an increase in density associated with the proposed use of the development site." *Hunt v. City of the Dalles*, 79 Or LUBA 265 (2019).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county determines that a property qualifies for a forest template dwelling under ORS 215.750 because at least three dwellings existed on surrounding lots or parcels on January 1, 1993, based on a statement of the applicant, a recollection of the prior owner of one of the surrounding dwellings, an email from a contractor who worked on one of the surrounding dwellings, and a statement by the tax assessor that its records showed a dwelling in place on January 1, 1993, but where LUBA concludes that the county erred in accepting the email, where LUBA cannot determine whether the county would have reached the same conclusion without the email, and where the county's findings failed to address evidence that the tax rolls indicate existence of the dwelling as of July 1993 rather than January 1993, LUBA will remand for the county to adopt adequate findings. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Absent a legal definition for how the center point of a property must be established for purposes of determining whether it qualifies for a forest template dwelling under ORS 215.750, a county errs by not explaining the basis for its conclusion that its chosen method is the most appropriate and by not addressing opponents' arguments challenging that method. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county determines that a property qualifies for a forest template dwelling under ORS 215.750 because at least three dwellings existed on surrounding lots or parcels on January 1, 1993, based on a statement of the applicant, a recollection of the prior owner of one of the surrounding dwellings, an email from a contractor who worked on one of the surrounding dwellings, and a statement by the tax assessor that its records showed a dwelling in place on January 1, 1993, but where LUBA concludes that the county erred in accepting the email, where LUBA cannot determine whether the county would have reached the same conclusion without the email, and where the county's findings failed to address evidence that the tax rolls indicate existence of the dwelling as of July 1993 rather than January 1993, LUBA will remand for the county to adopt adequate findings. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

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28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the county approves an amendment to a planned development approval for a resort, golf course and aerial challenge course, and petitioner argues the county improperly construed the applicable provisions of the county's code, but petitioner has not ultimately challenged the board of county commissioners' interpretation, or otherwise explained why LUBA is not required to affirm that interpretation under ORS 197.829(1), petitioner has provided no basis for reversal or remand. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioner argues the county committed a procedural error that prejudiced his substantial rights when the board of county commissioners failed to consider a written statement that petitioner submitted to the board of commissioners at the hearing, but petitioner does not establish that the board of county commissioners actually failed to consider petitioner's written statement, and petitioner failed to object to the alleged procedural error below, petitioner has not established that the county committed a procedural error or violated an applicable legal standard. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county's comprehensive plan policy provides that "areas" may be designated rural commercial when the areas (1) have a "historical commitment" to commercial uses, or (2) the "areas" are "located within an Unincorporated Community" and have "direct access to a road of at least collector classification," petitioner has not demonstrated that the county commissioners' findings regarding the meaning of "area" are inadequate or that the county's reliance on a previous interpretation as authority for interpreting the term "areas" as used in rezoning criteria to refer only to the property being considered for rezoning, and not also to include the surrounding area, was in error where petitioner cites to no contextual differences suggesting that the term "areas" should be

interpreted differently than the same term used in similar rezoning standards, or authority suggesting the county has an obligation to adopt specific findings regarding the parties' alternative interpretations. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will uphold a county's interpretation of its own comprehensive plan policy regarding when a property may be designated rural commercial where the county evaluated the historic uses of the subject property and concluded that those uses did not demonstrate a "historical commitment to commercial uses," after concluding that (1) temporary commercial uses, (2) incidental or accessory commercial uses to permitted residential or farm uses on the property, and (3) the current unlawful commercial uses on the property were not sufficient to demonstrate "historical commitment" of the property to commercial use, where the county chose to focus on "commitment" which the county understood to require an inquiry into the nature of the historic uses on the property and a determination of whether commercial uses have constrained the scope of the uses on the property such that going forward only commercial uses are feasible, rather than defining commitment in terms of years of commercial use. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the city code initially requires the city to choose from low density residential (LDR), medium density residential (MDR) and high density residential (HDR) plan map designations based on which designation's criteria "clearly apply or predominate," it does not necessarily follow that the LDR criteria could not predominate simply because three of the four MDR criteria are met and five of the six HDR criteria are met, because the criteria for the three map designations are not mutually exclusive and most or all of the LDR criteria appear to be met. *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where every residential plan map designation criterion is written so that it applies to an "area," and the term "area" is not defined and application of the criteria can produce dramatically different results depending on the meaning of "area," remand is required for the decision maker to explain its interpretation of the term "area." *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the city code initially requires the city to choose from low density residential, medium density residential and high density residential plan map designations based on which designation's criteria "clearly appl[y]" or "predominate," that determination is sufficiently ambiguous and subjective that remand is required whether the decision maker does not explain its understanding of what it means to "clearly appl[y]" or "predominate." *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where two of three different residential plan map designation criteria require proximity to a "transit transfer station," but the code does not define the term "transit transfer station," and the decision applies those criteria without adopting interpretive findings to explain the decision

maker's understanding of the meaning of the term "transit transfer station," remand is required. *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A hearings officer's failure to expressly interpret ambiguous code language is not, by itself, a basis for remand, where the hearings officer's decision primarily addressed a different issue raised by petitioner and LUBA agrees with the interpretation of that code language that is included in the county's response brief. *Brannon v. Multnomah County*, 77 Or LUBA 275 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a hearings officer's interpretive findings in support of his conclusion that a front setback and height standard qualify as "site-related development standards" are inadequate, LUBA will nevertheless affirm the hearings officer's decision where the hearings officer's decision is (1) consistent with prior hearings officer decisions, (2) consistent with prior city council decision, (3) consistent with relevant purpose statements, and (4) consistent with the relevant legislative history. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A hearings officer's findings cannot be faulted for failing to address the impacts of a modification (variance) on petitioner's nearby residence, where the findings expressly address those impacts and the relationship between the proposed structure and petitioner's residence and point out that the proposed structure is downslope and offset from petitioner's residence. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A hearings officer's failure to adopt findings that address potential impacts of a proposed building on one nearby dwelling in granting a maximum height modification (variance) is not a basis for remand, where the "on balance" nature of the modification (variance) approval standard does not necessarily require individual findings for every nearby residence, a public walkway between that dwelling and the proposed dwelling reduces any legitimate expectation of privacy, and the topography and scale of the proposed building is such that where the two structures adjoin each other they will be of similar height. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A local governing body commits no error in requesting that a prevailing party prepare written findings for it to adopt. And the governing body commits no error in adopting written findings that deviate from statements made at the final evidentiary hearing, and it is those written findings and not the oral statements that are subject to LUBA review on the merits. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings of fact and law are the decision; they are not evidence. A local governing body commits no error in adopting new findings following a LUBA remand for inadequate findings, without reopening the evidentiary record. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. In applying a vacation rental dwelling (VRD) standard that prohibits a VRD that would alter the character of the surrounding area so as to substantially limit permitted uses in the zoning district, the size of the residence, in and of itself, is largely irrelevant where a house of any size is permitted outright in the zone so long as it is occupied by the owner or leased on a long-term basis. Remand is required where the findings denying the VRD focus almost exclusively on the size of the dwelling rather than the proposed VRD use. *Gu v. City of Bandon*, 77 Or LUBA 535 (2018).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will remand a legislative text amendment prohibiting new fossil fuel export terminals when nothing in the city's decision or the record explains how the amendment is consistent with the city's comprehensive plan policy requiring the city to "support multimodal freight transportation improvements to provide competitive regional access to global markets." *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city adopts a legislative text amendment prohibiting expansion of existing fossil fuel terminals without considering consistency with a subarea plan policy objective to "foster a business and policy environment that promotes continued private and public sector investments in infrastructure, facilities, equipment and jobs," LUBA will remand the decision to the city to consider whether prohibiting expansion of fossil fuel terminals is consistent with the objective. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is necessary where a city adopts a legislative text amendment prohibiting expansion of existing fossil fuel terminals, without addressing consistency with a subarea plan policy objective to "maintain, protect and enhance private transportation investments" in the subarea, "including rail and marine terminals, to ensure continued viability as a major center for the import and export of industrial products in the State of Oregon." *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. In granting design review approval, whether the use for which design review approval is a permitted use in the applicable zoning district is a relevant issue, and when that issue is raised and the city fails to address that issue in its findings, remand is required for the city to adopt findings addressing the issue. *Glenwood 2006, LLC v. City of Beaverton*, 76 Or LUBA 162 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an applicant for a historic landmark designation advances three arguments why a property owner may not refuse to consent under ORS 197.722(1) and thereby terminate consideration of the application, the historic review board errs by terminating consideration of the application without adopting findings that respond to those arguments. *McLoughlin Neighborhood Assoc. v. City of Oregon City*, Or LUBA 180 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city council has clear authority under a development code to impose conditions of

approval to address potential land use conflicts and traffic congestion, and the city council appears to fail to impose conditions requested by project opponents because it was advised by county staff that it lacked authority to impose such conditions of approval, remand is required to the city council to consider imposition of any conditions of approval that it finds are warranted to mitigate any such potential land use conflicts or traffic congestion. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a code "principle" is worded as alternative actions an applicant "should" take, and some of the "standards" that follow that "principle" are clearly worded as mandatory, while others are clearly worded as non-mandatory considerations, where the challenged decision does not address the disputed "principle," remand is required for the city council to determine if the disputed "principles" are mandatory and, if so, to ensure one of the mandatory alternatives is satisfied. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the hearings officer did not determine whether property is "buildable land" as defined in ORS 197.295, and the Buildable Lands Inventory (BLI) adopted by Metro that identifies lands on the BLI is not in the record of the proceeding before the county and does not provide an obvious answer to the question of whether all or part of the property is on the BLI, LUBA will remand the decision for further findings on the buildable land issue. *Warren v. Washington County*, 76 Or LUBA 295 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is necessary where a county vacates a public easement based in part on the applicant's proposal to provide a replacement public easement, but the findings do not address issues raised below regarding the safety of the replacement easement. Even though the vacation criteria do not require a replacement easement or evaluation of the safety of a replacement easement, the proposed replacement easement was an essential justification for vacating the existing easement, and the county therefore must address issues raised below regarding its safety and suitability. *Neighbors for Smart Growth v. Washington County*, 76 Or LUBA 319 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county's ESEE analysis relies on an inflated estimate of the number of acres of big game habitat added to its Goal 5 inventory and greater existing residential densities in an area to justify allowing significantly increased residential densities on big game habitat in that area, remand is required for a better explanation of the county's rationale for increasing those residential densities. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where state agencies took the position before the county that two different county EFU zones were equally valuable for big game habitat, and without explanation the county amended its comprehensive plan Goal 5 protection program to allow significantly increased residential densities in one of those zones, remand is required for an explanation of the county's rationale. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A 2,000-acre study area may be appropriate for calculating residential density for purposes of a density standard applied in inventoried big game habitat. But where the adequacy of that study area is questioned, and the county simply relies on an overbroad reading of a LUBA decision in an appeal of a prior quasi-judicial decision, remand is required. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where parties raise legitimate questions about how a study area will be used to calculate residential density and the local government fails to address those questions when it adopts the amendments governing use of the study area, the study area does not comply with the OAR 660-023-0050(1) requirement for "specific standards," or the OAR 660-023-0050(2) requirement for "clear and objective" standards. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county repeals an existing comprehensive plan policy to protect upland game bird habitat, without any explanation for doing so, remand is required. *Central Oregon Landwatch v. Crook County*, 76 Or LUBA 396 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is necessary where a code provision allows a property line adjustment as long as the adjustment does not result in an unbuildable parcel being made buildable, but the record includes no evidence regarding whether the adjusted parcel had one or more buildable sites prior to the adjustment, and the findings on that point are conclusory and not supported by substantial evidence. *Lowell v. Jackson County*, 75 Or LUBA 251 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where LUBA remands a county's decision adopting an ordinance so that the county can provide the published notice of the board of county commissioners' hearing that ORS 215.060 requires, considering petitioners' arguments directed at the ordinance would be inconsistent with sound principles of judicial review when a different ordinance may be adopted as a result of LUBA's remand. *Oregon Coast Alliance v. Clatsop County*, 75 Or LUBA 277 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A findings and evidentiary challenge to a county's decision that wind turbines will not be so noisy as to violate a "substantial impact on the neighborhood" standard will be rejected, where the county found that the wind turbines would be no noisier than a "refrigerator," an "average home," a "quiet bedroom," or a "quiet library," and petitioner makes no specific challenge to those findings or their evidentiary support. *Burgermeister v. Tillamook County*, 75 Or LUBA 350 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner challenges the adequacy of a county's findings that a small wind turbine is of the same general character as "communication towers, utility substations and transmission lines," arguing that the findings do not address the wind turbines' moving propellers, which the other uses do not have, but the findings in fact do address the moving propellers and provide a reason why the county did not believe that difference makes the wind turbines of a different "general

character," LUBA will reject petitioner's findings challenge. *Burgermeister v. Tillamook County*, 75 Or LUBA 350 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A city is not required to adopt findings addressing Goal 8 when adopting a zoning ordinance amendment to prohibit and strictly regulate transient occupancy vacation rentals where the city's comprehensive plan includes no indication that the city relied on transient occupancy vacation rental dwellings to meet its Goal 8 "recreational facilities" obligations under Goal 8. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where comprehensive plan policy requires the city to protect "residential neighborhoods," and a residential neighborhood has been historically been made up of year-round domiciles, long-term rentals, second homes and transient occupancy vacation rentals, a city is not required to adopt findings to define "residential neighborhoods," to adopt an zoning ordinance amendment to strictly regulate transient occupancy vacation rental dwellings, where the findings explain the motivation for the new restrictions is the dramatic increase in transient occupancy vacation rentals with internet-based marketing. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A petitioner's findings challenge that replacing short-term vacation rental use with long-term rental and use of residences as domiciles will increase the annual loading on septic systems challenges a finding the city did not make, where the city's finding is addressing summer month loading and petitioner is addressing annual loading. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A city council's findings that identify the adverse impacts of a significant increase in the use of residences as vacation rental dwellings adequately identifies a "public need" in order to justify amendments to the city's zoning ordinances which prohibit and severely restrict vacation rental dwelling use. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. In adopting an exception to Goal 14 based on commitment to urban levels of development, a county must do more than address all the factors set out at OAR 660-014-0030(3) and adopt findings of fact. OAR 660-014-0030(4) requires "a statement of reason explaining why the facts found support the conclusion that the land in question is committed to urban uses and urban level development rather than a rural level of development." Where that explanation for why the facts the county found support a conclusion that the property is committed to urban use is entirely missing, LUBA will sustain the challenge to the Goal 14 exception. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a hearings officer finds that the only evidence on a key legal issue regarding required mitigation for the impacts of a destination resort was presented by permit opponents, but the record makes it clear that the applicant also submitted conflicting evidence on that legal issue, remand is required. *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will remand a decision concluding that a unit of land is a legal lot of record based on a county building permit for a dwelling on an adjoining unit of land, where the findings fail to explain or establish how a building permit approval can create a discrete unit of land, much less a legal lot of record. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is necessary where a code provision requires that development with multiple access points take access from the lower classification street, unless "physical conditions preclude" taking access from the lower classification street, and the city approves the development with access to a higher classification street without any evidence or explanation in the record demonstrating the code provision is complied with or that the exception applies. *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is necessary where a code standard requires that a percentage of the "frontage" be occupied by buildings, but the city approved development with 50 feet of frontage occupied by no buildings without any explanation in the record or decision why the standard is met. *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is required where a city approves development based on a calculation of a lot's frontage along a cul-de-sac with the frontage measured in a straight line across the cul-de-sac, instead of along the property line, without any explanation in the record or decision for why measuring the frontage in that manner is consistent with code definition of frontage: the portion of the lot abutting a street. *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Imprecision in a hearings officer's findings regarding the distance between a proposed asphalt batch plant and a greenway and trail and neighboring mobile home park provides no basis for reversal or remand, where there is evidence in the record showing those proximities and the imprecision in the findings do not establish that the hearings officer was under any misapprehension about how close the asphalt batch plant would be to the mobile home park or greenway and trail. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A finding that efforts over the last 100 years to address landslide danger to water reservoirs have been "Herculean," is an expression of opinion, rather than a necessary finding of fact, and need not be supported by substantial evidence. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is necessary where a hearings officer determines that a proposed zone change is consistent with a comprehensive plan map that is not property-specific by matching a single survey line with a road depicted on the plan map, but fails to consider other matchups between survey lines and features on the map that might provide a more accurate alignment of the zoning boundary with the

comprehensive plan map, absent an explanation for why the additional survey lines matchups are unreliable. *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. An ordinance that amends the width and features of a buffer area between urban and rural lands is properly viewed as a legislative rather than quasi-judicial decision, where the ordinance was adopted as part of a legislative process that was not bound to result in a decision, the modified buffer affects over 135 acres of land that stretch over one mile in length, and the amendments potentially affect hundreds of property owners. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where one of seven factors that the comprehensive plan describes as "guid[ing] the determination of the most appropriate zone" guides that areas that have historically developed on large lots should "remain zoned consistent with the existing development pattern," and the hearings officer interprets the "existing development pattern" to be synonymous with the existing zoning, remand is required in order for the hearings officer to explain why a change from 10,000-square-foot lots to 8,500-square-foot lots in an area with some 8,500-square-foot lots is not "consistent with the existing development pattern." *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where findings identify an applicable conditional use standard that requires that conditional uses must not impair permitted uses on surrounding property, but the decision includes no findings of fact or findings explaining why the decision maker believed proposed wind turbines satisfied that standard, remand is required for adequate findings. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Under ORS 197.835(11)(b), LUBA may overlook inadequate findings where the evidence makes a finding of compliance with the criteria obvious or inevitable. But ORS 197.835(11)(b) generally will not apply where the criteria are subjective and does not apply in a case where an applicant for approval of wind turbines relies on one kind of evidence, opponents rely heavily on a different kind of evidence, and the decision makes no attempt to identify which evidence the decision maker found persuasive or why. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a relevant issue is adequately raised in a land use proceeding, the findings supporting the final decision must address the issue and where the findings do not do so, remand is required. *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. ORS 197.835(11)(b) authorizes LUBA to overlook "defective" findings regarding a relevant legal standard, if a party can identify evidence that "clearly supports" a decision that the standard is met. But where the legal standard requires completion of a condition within a "reasonable time," there are no findings addressing the "reasonable time" standard, and the evidence falls far short of clearly

supporting a decision that a 10-year delay in completing the condition was a "reasonable time," ORS 197.835(11)(b) does not apply. *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an ordinance that modified access spacing standards was conditioned so that it would not become effective until a development agreement for construction of roadway improvements specified in the ordinance was executed, execution of a development agreement for improvements that vary significantly from the improvements called for in the ordinance is not sufficient to make the ordinance effective. *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local code provision provides that minimum lot width may be reduced if "[o]n balance, the proposed lots will have dimensions that are consistent with the purpose of this section," it is remandable error where the local code provides for nine purposes to be considered, but the decision maker considers only some of the nine purposes, and concludes without explanation, that "on balance, the applicant has not demonstrated that the proposal is consistent with the purpose of the lot dimension regulations." In this context, such findings are inadequate because an "on balance" determination requires the city to adopt findings explaining how it balances the different purposes. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local code provision regulating minimum lot size requires a determination of whether a proposal is consistent with purposes of the code section, and an applicable code section is intended to ensure that "[e]ach lot has enough room for a reasonably-sized attached or detached house[,]" a finding that the applicants have not demonstrated that "each parcel has enough room for a reasonably sized detached house[,]" is conclusory, because it fails to explain what constitutes a "reasonably-sized" house. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand rather than reversal is the appropriate disposition when LUBA sustains an assignment of error to correct the city's procedural error in failing to provide petitioners with an opportunity to propose conditions in response to new evidence. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the applicant for a temporary use permit raised an issue concerning whether its vendors would qualify for a blanket exemption from temporary business license fees, and in its brief the city takes the position that the city intended to reject the applicant's position, but in its decision the city did not address the issue, remand is required for responsive findings. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county identifies three related reasons why introduction of inconsistent uses in an area is justified, but the petitioner challenges the findings and evidentiary support for only one reason, the failure to challenge the remaining two reasons is not a basis to reject petitioner's challenge, where

the three reasons are not stated as independent alternatives, and the challenged reason appears to underpins the other two reasons. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is necessary where a county fails to address whether a comprehensive plan policy requiring the county to ensure that incompatible uses are not established "adjacent" to historic sites is violated by a proposal to run heavy trucks close to, but not across, a historic bridge, based on testimony that the truck traffic would make it unsafe for tourists and school groups to park and visit the bridge. Because there is no local interpretation of what "adjacent" means, and remand is required for other reasons, LUBA will remand the decision for the county to interpret the plan policy in the first instance, rather than interpret the plan policy on its own. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. OAR 660-023-0040(1) provides that an ESEE analysis "should enable reviewers to gain a clear understanding of the conflicts and the consequences to be expected" when developing a program to protect Goal 5 resources. A challenge to this "clear understanding" requirement that challenges the summary of the ESEE analysis rather than the adopted ESEE analysis itself provides no basis for reversal or remand, where the ESEE analysis identifies conflicts and consequences and identifies possible mitigation measures. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. OAR 660-023-0040(5)(b) requires that when allowing conflicting uses fully the local government must show why measures to protect the resource to some extent should not be provided. Where a local government adopts a lengthy discussion regarding the extremely poor quality of a site for wildlife habitat and how wildlife that may be attracted to the site pose a serious risk of danger to airplanes landing and taking off from the airport, the decision adequately explains why the site should not be protected to some extent for wildlife habitat under Goal 5. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city council's findings appear to find that public sewer is a required public facility that is not available to property that is proposed for development, and the city council nevertheless approves development that will be served by an individual septic system without explaining why that action is consistent with a zoning standard that requires that all required public facilities have capacity and are available or can be made available to the development, remand is required. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A board of county commissioners does not err in failing to address a petitioner's argument that is inconsistent with a thirteen-year-old board of commissioners' interpretation of a different LC provision. *Head v. Lane County*, 72 Or LUBA 411 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner argues below that the proposal is not consistent with the comprehensive plan for reasons that are relevant considerations under several applicable comprehensive plan policies,

the petitioner may challenge the adequacy of the findings that were ultimately adopted to establish consistency with those plan policies, even if the petitioner failed to cite the plan policies specifically. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A finding of compliance with a zone change standard requiring consistency with a comprehensive plan policy requiring that higher density residential uses be sited "near employment" is inadequate, where the finding does not address proximity to employment at all, other than state that the property is adjacent to a small convenience commercial node. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A finding of consistency with a comprehensive plan policy requiring that higher density residential use be sited in locations with "good access" to arterials is inadequate, where the finding states only that the site is located near an arterial, but without attempting to evaluate whether the site has or will in fact have good access to the arterial. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A finding of consistency with a comprehensive plan policy requiring that residential densities maintain a proper relationship between public facilities and services and population distribution is inadequate, where the finding merely recites that proposed higher density residential development will comply with the density requirements in the code, but without explaining how density will maintain the proper relationship between public facilities and population distribution. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A finding of consistency with a comprehensive plan provision requiring that future development shall respect the character of the existing area is inadequate, where the finding simply states that the general character of the area is "residential," without evaluating whether placing higher density residential development in the middle of an area zoned and developed with low density residential development is consistent with respecting the character of the existing area. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a zone change standard requires a finding that adequate transportation networks to support the use are presently provided or planned to be provided concurrently with development of the property, a finding that this standard is met because future development will be subject to subdivision and site design review is inadequate to establish that the subject site has required secondary access or that such access is planned to be provided concurrently with development of the property. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A petitioner fails to establish that findings that a zone change is justified based on evidence of change in the community, where the findings identify two changes in the community that justify the zone change, but the petitioner challenges only the adequacy and evidentiary support for the findings regarding one of the identified changes. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government adopts alternative findings to address disjunctive statutory requirements for annexation, any inconsistency between the alternative findings is not a basis for remand. *Oregon Coast Alliance v. City of Brookings*, 71 Or LUBA 14 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will reject a petitioner's challenges to a local government's conclusion that evidence of mere intent and capability to provide training or issue certifications is sufficient to demonstrate that the facility qualifies as a "firearms training facility" under ORS 197.770, where the petitioner does not acknowledge or challenge the local government's alternative findings that the facility had in fact provided training and issued certification sufficient to demonstrate that the facility qualifies as a "firearms training facility." *H.T. Rea Farming Corp. v. Umatilla County*, 71 Or LUBA 125 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a zoning ordinance is deeply ambiguous regarding whether a previously approved resort master plan continues to have regulatory effect after a new Resort Community Zone is applied to the property, with parts of the ordinance, its supporting findings and the comprehensive plan supporting opposite conclusions, it is appropriate for LUBA to remand for the hearings officer to first address all of the conflicting language. *Widgi Creek Homeowners Association v. Deschutes County*, 71 Or LUBA 321 (2015).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where conditional use approval requires a finding of compliance with a three-pronged standard that "the proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties," and the decision maker only addresses the "precludes" prong in granting approval, remand is required to address the other two prongs. *Morton v. Clackamas County*, 70 Or LUBA 7 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. An assignment of error challenging a local government's modification of a previously imposed condition of approval must be denied where there is an unchallenged finding that the condition was not imposed to ensure compliance with any applicable approval criterion. *McCaffree v. Coos County*, 70 Or LUBA 15 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a governing body adopts findings that were prepared by others, those findings become the findings of the governing body, and it does not matter who prepared or previously adopted the findings. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an applicant identifies seven land use regulation standards and takes the position that they are not "clear and objective," and for that reason may not be applied to deny its application for approval of "needed housing," a city errs by applying those standards to deny the request for approval of needed housing without explaining in its findings why the city believes it is entitled to

apply those standards to deny the application for needed housing. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A local government errs in denying an application for permit approval because it fails to provide adequate parking facilities, where there is no standard that requires "adequate parking facilities" and the local government finds that the proposal complies with the applicable off-street parking requirement. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A county governing body's unexplained decision to rely on the on-line Merriam-Webster Dictionary definition of the term "penstock" does not constitute an interpretation that is adequate for review, where the governing body's decision does not show it was a considered choice between possible definitions. *Pacificorp v. Deschutes County*, 70 Or LUBA 89 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will deny an assignment of error that alleges that the city's findings are inadequate to explain why a proposed PUD is "reasonably compatible and harmonious with adjacent nearby land uses" where the assignment of error fails to challenge all of the city's findings and instead selectively quotes and challenges only portions of the findings. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the final decision consists of a single page stating that the application is "approved with conditions" and an attached staff report, which includes findings of compliance with approval standards and recommended conditions of approval, LUBA will conclude that the final decision adopts the staff report as incorporated findings and conditions. *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is necessary where the decision fails to adopt any findings addressing an applicable standard that limits fill to 20 feet of the "edge of the shoulder of driveways," even if the city implicitly adopted the applicant's position that the edge of a parking lot constitutes the edge of the shoulder of a "driveway," where the site plan appears to show fill placement more than 20 feet from the edge of the parking lot. *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. The local governing body is entitled to some latitude in reconciling competing plan policies that address different but related needs regarding residential land use and housing, and findings are not inconsistent merely because they recognize some tension between the policies. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A challenge to a single sentence that expresses a very broad view of the words "public need" in a comprehensive plan policy does not alone provide a basis for reversal or remand where the local

government's decision is supported by almost three single-spaced pages of findings that explain the local government's reasoning. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings are inadequate to explain why fire protection standards are met where the findings do not address whether the standards are met or why the evidence in the record supports a conclusion that it is feasible to meet the standards, particularly where the only evidence in the record is that the fire district is concerned about wildfires and will perform the required inspections. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings are inadequate to explain why the hearings officer concluded that a proposed aggregate operation will not force a significant change in or significantly increase the cost of accepted farming practices where the decision fails to consider whether the standard is met but rather relies on a determination that a haul road that opponents argue will force a significant change in farming practices was authorized in previous decisions. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where, based on Natural Resources Conservation Service data, opponents take the position that the water table lies two feet below the surface of a proposed topsoil mining operation, but the local government accepts the applicant's position that the water table lies 125 feet below the surface, but no party identifies the evidence the applicant and local government relied on for the 125-foot estimate, LUBA will remand the decision so that the county can adopt findings explaining the large discrepancy in the two estimates and why it accepted the 125-foot estimate. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the location, nature and height of an earthen berm that a hearings officer relied on to find that a proposed top soil mining operation complies with screening and sound mitigation standards is unclear, LUBA will remand for the hearings officer to adopt findings that more clearly identify the location, nature and height of the required berm. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is necessary where a city deletes two refinement plan policies requiring protection of existing manufactured dwelling parks, and zones the parks to make them non-conforming uses, but the findings do not explain how the amendments are consistent with a comprehensive plan policy requiring conservation of existing affordable housing. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is required where the hearings officer's findings either do not address an applicable approval criterion at all, or rely on findings from a different decision made more than 10 years prior to the challenged decision that appear to be addressing a different approval criterion. *Vesper Park v. Washington County*, 68 Or LUBA 106 (2013).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A city's final decision includes adequate findings and a code interpretation adequate for review, where the final decision adopts a planning staff decision as its own, and the planning staff decision embodies a code interpretation that is adequate for review. *Sellwood-Moreland Improvement League v. City of Portland*, 68 Or LUBA 213 (2013).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings are adequate to demonstrate that in determining that a proposed conditional use airport is compatible with the neighborhood, the county considered "other related impacts" from the airport, including testimony from neighbors regarding safety and the risk of crash, and imposed conditions of approval that require that addressed those safety concerns. *Yih v. Linn County*, 68 Or LUBA 412 (2013).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings are inadequate to explain why a tentative planned unit development (PUD) and subdivision will not be a significant risk to public health and safety, where evidence in the record demonstrates that the portions of the property that will be developed with roads, parking lots, and sewer, water and electrical lines contain loose soils. In that circumstance, where the findings do not conclude that the public health and safety standard does not apply to roads, parking lots, and sewer, electrical and water lines, and there is no finding that these aspects of the proposed PUD and subdivision can be constructed on those loose soils without causing unreasonable or significant public health and safety concerns, the findings are inadequate. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 33 (2013).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. The findings denying an application for a quasi-judicial zoning and comprehensive plan map amendment are adequate, where they explain that the two commissioners who participated in the decision could not agree whether the application satisfied two approval criteria and that by operation of law that failure to achieve a majority vote in favor of the application results in denial. The county was not required to adopt findings that are adequate to deny the application on the merits, where the decision does not deny the application on the merits. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Even if there is no statutory or other legal requirement that a building permit must in all cases be supported by findings, the record must be sufficient for LUBA or Court of Appeals review if the building permit qualifies as a land use decision. But the initial burden in an appeal to LUBA of such a building permit is to establish an arguable legal error. Once that is done, if the record is not sufficient to establish that the local government correctly applied the law, remand may be required. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will not consider whether a city erred in the way it applied the roof height measuring method it applied, where petitioner only argues that a different roof height measuring method

should have been used and LUBA concludes that the city applied the correct roof height measuring method. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings that batching operations on property zoned exclusive farm use that would be prohibited under ORS 215.301(2) are authorized under ORS 215.301(2) and a 1981 permit are inadequate where the findings do not respond to arguments that a 1997 permit modified the 1981 permit to disallow batching operations. *Poto v. Linn County*, 67 Or LUBA 162 (2013).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A hearings official's expressions of misgivings about the quality of evidence submitted by an applicant do not mean the hearings officer required the applicant to meet an impermissible "absolute certainty" burden of proof. *Teen Challenge v. Lane County*, 67 Or LUBA 300 (2013).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Notwithstanding that a city erroneously determined that a particular section of the development code exempted a permit applicant from development code buffer requirements, where another section of the development code cited by the petitioner clearly does exempt the permit applicant from the buffer requirements, LUBA will affirm the city's decision. ORS 197.835(11)(b). *Nielsen v. City of Gresham*, 66 Or LUBA 24 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city is required upon annexation to apply the city zoning district that "most closely approximates" the county zoning district and the city applies a city zoning district that treats 13 uses much differently than another city zone that appears to regulate those 13 uses in the same way the county zoning district regulates those 13 uses, remand is required because the city's findings inadequately explain why the zoning district the city applied nevertheless "most closely approximates" the county zoning district it replaces. *Mintz v. City of Beaverton*, 66 Or LUBA 118 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the city takes the position during the initial proceedings below that an adopted plan is an applicable approval criterion, but reverses that position during the multi-hearing proceedings before the city council and takes the position that the adopted plan is not an applicable approval criterion because it is not yet effective, a city does not commit error in failing to adopt findings that confirm that the plan is not a source of approval criteria. *Vest v. City of Molalla*, 66 Or LUBA 155 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Substantial evidence in the record supports a city's finding that a proposed cell tower location is the only feasible location where the evidence demonstrates that (1) alternative sites are located outside of the search area identified by applicant for meeting its coverage objectives, (2) the tower cannot reasonably be located within a right-of-way because there is not sufficient area within the right-of-way to locate all of the necessary equipment, (3) co-location is not feasible because the heights of existing towers are inadequate, and (4) co-location on an existing rooftop facility is not

feasible due to inadequate structural integrity of the rooftop. *Hill v. City of Portland*, 66 Or LUBA 250 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where on remand of a decision that amends a county zoning ordinance, the county adopts a new ordinance with new amendments, but does not explicitly or implicitly re-adopt the original ordinance, on appeal to LUBA of the new ordinance the petitioner cannot challenge the original ordinance or the findings adopted on remand that are intended to support the original ordinance. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. The absence of findings addressing whether an ordinance adopted on remand is consistent with applicable comprehensive plan policies is not a basis for reversal or remand, where the ordinance merely deletes text from the original ordinance subject to remand, on remand the county adopted findings concluding that the original ordinance is consistent with the plan policies, and the petitioner identifies nothing in the deletions accomplished by the remand ordinance that might cause the county to reach a different conclusion with respect to the remand ordinance. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A challenge that the local government's findings are inadequate to identify potential conflicts under OAR 660-023-0180(5)(b) from a proposed aggregate mining operation provides no basis for reversal or remand of a decision where the petitioner's argument reads in isolation two sentences from 77 pages of findings while ignoring several pages of findings that make clear that the local government considered all conflicts required to be considered under OAR 660-023-0180(5)(b), and where the petitioner does not identify with any specificity a particular source of conflict that the local government failed to consider. *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings are inadequate to explain why a prohibition on constructing a berm within a floodway is not applicable, where the decision relies on construction of a noise berm to be located partially within a floodway to minimize noise conflicts with sensitive uses. *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A petitioner's arguments that the local government misconstrued OAR 660-012-0070(5) and (6) and adopted inadequate findings not supported by substantial evidence do not provide a basis for reversal or remand, where OAR 660-012-0070(7) governs the local government's decision instead of OAR 660-012-0070(5) and (6), and the two sets of rules have different substantive terms, requirements and standards. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Remand is necessary where a county adopts standards that impose limitations on development of wind energy facilities, but the record includes no findings or other indications that the county considered whether the amendments are consistent with comprehensive plan policies that

encourage the county to promote development of alternative energy sources. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. In approving a property line adjustment between two EFU-zoned parcels to facilitate a proposed farm dwelling, under a standard that requires that the adjusted parcel "qualifies for a homesite," a county may rely on a concurrent county decision approving a farm dwelling on the adjusted parcel to conclude that the "qualifies for a homesite" standard is met, and need not require farm income evidence or adopt findings as part of the adjustment decision that again demonstrate that the adjusted parcel qualifies for a farm dwelling. *Louks v. Jackson County*, 65 Or LUBA 58 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A hearings officer's finding that a code requirement that a proposed kennel be compatible with surrounding uses is met where the kennel is required to satisfy applicable DEQ noise standards is inadequate, where the findings do not explain why the hearings officer concluded that compliance with the applicable DEQ noise standards necessarily means that the proposed use is compatible with surrounding residential uses. *Butcher v. Washington County*, 65 Or LUBA 263 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A hearings officer's finding that a proposed kennel operation is compatible with surrounding uses is inadequate and is not based on substantial evidence in the record, where the findings do not explain the basis for assuming that impacts from the noise and traffic associated with the kennel operation will be limited to the kennel's historic operating levels, and no condition of approval limits the operation to its historic levels. *Butcher v. Washington County*, 65 Or LUBA 263 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will remand a decision where the findings are inadequate to explain why a hearings officer interprets setback provisions that require a 100-foot setback to apply only to a proposed new kennel building and to not apply to outdoor dog play areas. *Butcher v. Washington County*, 65 Or LUBA 263 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A comprehensive plan policy that requires a city to "adopt a program to improve maintenance of septic systems for the benefit of all residents" does not specify how the program will improve septic system maintenance and therefore does not necessarily require that a city septic system maintenance system must be mandatory and regulatory, as opposed to voluntary and educational, so long as the program will improve maintenance of septic systems. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Although there is no general legal requirement that all legislative land use decisions must be supported by findings, where the scope and meaning of at least some applicable comprehensive plan policies are unclear, it is highly unlikely that a decision to replace an existing mandatory, regulatory program to improve septic system maintenance with a voluntary, educational program to achieve the same goal will be defensible on appeal without adequate findings. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a permit extension criterion requires a local government to find that the permit applicant was not responsible for its failure to complete the development authorized by the permit within the term of the permit, a local government errs in finding that its determination concerning whether the applicant was responsible for that failure need not be supported substantial evidence. And while an applicant's claim that it could not have completed development within the term of the term of the original permit due to a historic downturn in the economy might be substantial evidence if that is the only evidence in the record, that unsubstantiated claim is not substantial evidence if there is other evidence that the applicant was seeking an alternate development proposal during the term of the original permit. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. General findings that address some of the impacts of a proposal on the surrounding neighborhood are inadequate to explain how the proposal satisfies specific conditional use criteria that apply to the proposal. *Poe v. City of Warrenton*, 63 Or LUBA 20 (2011).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county land use code enforcement proceeding is initiated by a "complaint" rather than "an application for a land use decision," and the procedures followed by the county were its procedures for code enforcement proceedings rather than the quasi-judicial land use hearing procedures set out at ORS 197.763, the ORS 197.763(1) and 197.835(3) "raise it or waive it" rule does not apply, and petitioner's failure to raise an issue below does not prevent petitioner from raising the issue for the first time at LUBA. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the critical finding in a hearings officer's decision in a code enforcement proceeding is that petitioner had a longstanding regular practice of mowing grass and blackberry bushes in the riparian zone on his property, the only evidence that supports that finding is the testimony of the code enforcement officer based on field notes regarding conversations he had with petitioner that are not part of the record, petitioner testifies in the hearings before the hearings officer that he mowed in the riparian area on only one occasion, and it is not clear that the hearings officer even recognized that the testimony of petitioner and the code enforcement officer conflicted on the critical issue, remand is required. The hearings officer may be able to explain why he believed the code enforcement officer over petitioner, but without any explanation his decision is not supported by substantial evidence. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a hearings officer's order appears to require that a property owner submit a plan to the Oregon Department of Fish and Wildlife to replant a significant area of petitioner's property with native vegetation and the factual and legal basis for that requirement is not apparent in the hearings officer's decision, the decision must be remanded so that the hearings officer may explain the factual and legal basis for the order. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an applicable comprehensive plan policy allows a local government to approve a partition

of a property that is located partially within an urban growth boundary (UGB) along the UGB line if the property is "legally created," remand is required where the local government's findings fail to explain how the dividing an approximately 30-acre parent parcel in 1973 without review under applicable land partition regulations results in a "legally created" property. *Jacobsen v. Douglas County*, 62 Or LUBA 1 (2010).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioners argue the city erroneously assumed that future industrial development would result in 10 employees per acre in arriving at an estimate of the gross buildable acres needed, but it is clear from the city's findings that its estimate of gross buildable acres needed did not rely on that assumption, petitioner's assignment of error provides no basis for reversal or remand. *Friends of Yamhill County v. City of Newberg*, 62 Or LUBA 5 (2010).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where audio recording of the hearing at which a motion to adopt a proposed plan was passed discloses that the motion also was sufficient to adopt a separate supporting findings document, the fact that the motion described in the minutes of that hearing makes no mention of the separate findings document provides no basis for remand. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A petitioner's argument that the city failed to comply with a transportation system plan policy that requires that the city hold a public meeting with affected property owners before selecting a roadway alignment provides no basis for reversal or remand, where the city adopted findings that the cited policy does not apply to the kind of decision on appeal and was satisfied even if it did apply, and petitioner fails to assign error to or otherwise challenge those findings. *Reeves v. City of Wilsonville*, 62 Or LUBA 142 (2010).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A local government decision that determines that an entire property is located on a foredune and denies an application for a dwelling based on that determination will be remanded where the findings do not explain why the local government reached the conclusion it reached and the conclusion is not supported by any evidence in the record identified by the local government. *Rudell v. City of Bandon*, 62 Or LUBA 279 (2010).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A petitioner's objection to a hearings officer's finding that the portion of a site that is within a designated potential landslide area is "relatively small" provides no basis for reversal or remand where the finding is accurate and supported by the record and the finding has no apparent effect on the hearings officer's application of the applicable landslide hazard regulation. *Gravatt v. City of Portland*, 62 Or LUBA 382 (2011).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county considers a variety of evidence in concluding that a tract is not suitable for commercial forest use but does not consider the cf/ac/yr of wood fiber data that must be considered

in inventorying lands that are suitable for commercial forest use under OAR 660-006-0010 and 660-006-0005(2), remand is required. *Just v. Linn County*, 60 Or LUBA 74 (2009).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government's findings rely heavily on particular factors set out in OAR 660-033-0020(1)(a)(B) to conclude that land does not qualify as "other lands" that are suitable for farm use under OAR 660-033-0020(1)(a)(B), and petitioner waived his right to challenge the findings concerning those particular factors because petitioner raised no issue below concerning those particular factors, LUBA will deny an assignment of error that challenges the adequacy of the county's OAR 660-033-0020(1)(a)(B) findings. *Just v. Linn County*, 60 Or LUBA 74 (2009).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A county's conclusory finding that a subdivision applicant does not have a vested right to complete a subdivision under Section 5(3) of Ballot Measure 49 provides no basis for reversal or remand, where the county had adopted a decision that reached the same conclusion over one month earlier and that separate decision had not been judicially challenged and was therefore final. *Hoffman v. Jefferson County*, 60 Or LUBA 101 (2009).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioner assigns error under OAR 660-012-0060, arguing that the county inadequately mitigated for the traffic impacts of a proposed destination resort, but petitioner neither assigns error to the county's finding that the destination resort will not "significantly affect" the transportation facilities within the meaning of OAR 660-012-0060 nor challenges the legal reasoning that the county adopted in support of that finding, LUBA will deny the assignment of error. *Eder v. Crook County*, 60 Or LUBA 204 (2009).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Although a local government land use decision maker is entitled to choose between conflicting believable expert testimony, where the decision maker does not demonstrate that it recognized the conflicting expert testimony and chose to believe one expert's testimony rather than the other expert's testimony, remand is required. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Absent a local or specific statutory requirement that legislative land use decisions be supported by findings, such decisions need not be supported by findings as long as LUBA and the appellate courts with the aid of the parties and the record can perform their review function. *Friends of Umatilla County v. Umatilla County*, 58 Or LUBA 12 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. In challenging a finding that a city adopted in support of its decision to vacate certain rights-of-way, a petitioner must do more than allege the challenged finding is false. *Bowers v. City of Eugene*, 58 Or LUBA 51 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. ORS 197.829(2) permits LUBA to interpret a local code provision in the first instance where there is a missing or inadequate governing body interpretation, but does not permit LUBA to supply missing

findings of compliance with applicable approval criteria. *Holbrook v. City of Rockaway Beach*, 58 Or LUBA 179 (2009).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an applicable comprehensive plan policy and intergovernmental agreement provision require a city to determine that adequate public services are available to a property that is proposed to be annexed, a city errs in failing to adopt findings regarding the availability of police protection. *Bowler v. City of Cave Junction*, 56 Or LUBA 152 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings that describe the only forest practice that adjoining timber operators identified as impacted by proposed mining on forest land are adequate for purposes of a code significant change/increase standard, where the code standard does not implement the statutory significant change/increase standard, and the petitioners do not explain why the code standard requires an exhaustive description of all forest practices on nearby lands. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. While a county's failure to describe accepted farming practices on nearby lands would likely require remand under the ORS 215.296(1) significant change/increase standard or a code provision implementing that standard, such a failure is not necessarily reversible error under a similar code significant change/increase standard that does not implement the statute. Any failure to describe accepted farming practices under the code standard is harmless, where the county adopted unchallenged findings, supported by substantial evidence, that the proposed mining will not significantly affect any farm or forest practices. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a street vacation standard required the city to find "a greater public benefit would be obtained from the vacation than from retaining the right-of-way in its present status" and the city adopts findings that, among other things, explain that the vacation will cause minimal out of direction travel, petitioner must do more than quote parts of the city's findings and claim they are preposterous. *Olson v. City of Springfield*, 56 Or LUBA 229 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city applies a street vacation criterion that requires the city to find "a greater public benefit would be obtained from the vacation than from retaining the right-of-way in its present status" and finds the required benefit would be realized by the new secure parking area that would be constructed in the vacated right-of-way adjacent to a new Justice Center, remand is not required simply because petitioner would have applied that "greater public benefit" criterion differently and retained the right-of-way for transportation purposes. With such a subjective standard, different reasonable persons could easily reach different conclusions about the public benefit to be derived from the proposed street vacation. *Olson v. City of Springfield*, 56 Or LUBA 229 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A code provision stating that where a planned development standard and the underlying zone conflict, the planned development standard controls does not resolve conflicts between planned

development standards and other code provisions that are not part of the underlying zone. *Saddle Butte Residents' Association v. Douglas County*, 56 Or LUBA 269 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A criterion that requires a county to find that a proposed subdivision is "consistent with the general nature of the area" is very subjective. Where the county's findings cite the existence of many existing small parcels in the area that are similar in size to the proposed subdivision lots and petitioners merely cite concerns about possible interference with farming operations and a wildlife refuge, the concerns that petitioners cite are not so overwhelming that the county was obligated to acknowledge and expressly address those concerns in its findings. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city "overrides" code provisions requiring that a subdivision developer construct sidewalks without identifying a basis in the city's code or comprehensive plan to waive or vary the sidewalk requirement, LUBA will remand the decision for the city to adopt findings explaining what authority allows the city to override the sidewalk requirement. *Soares v. City of Corvallis*, 56 Or LUBA 551 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where two 25-foot test pits show an aggregate layer that is at least 20 feet deep and shows no sign of diminishing and the decision maker does not seem to have appreciated that the test pits were consistent with the first 25 feet of two deep borings located elsewhere on the site that showed an aggregate layer of far more than the 25-foot width required to qualify as a significant aggregate resource site under OAR 660-023-0180(3)(d)(B)(ii), remand is required so that the county can make it clearer that it understood the significance of the two 25-foot test pits. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where LUBA determines that three county findings regarding the significance of an aggregate site are not supported by substantial evidence, are inadequately explained, or fail to appreciate the significance of certain evidence in the record, remand is required where LUBA cannot assume the findings were minor or unimportant parts of the county's ultimate decision that the applicant failed to demonstrate that the aggregate site qualifies as "significant," under OAR 660-023-0180(3). *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will remand a decision approving a broadcast tower that requires an above-ground water storage tank but does not require that the tank be screened as required by site design approval criteria. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a comprehensive plan categorizes lands within the urban growth boundary according to suitability for development, a county errs by denying a request for rezoning on the basis that the requested rezoning is inconsistent with the comprehensive plan, where the findings identify

nothing in the comprehensive plan that supports a conclusion that the property's low suitability rating precludes the requested rezoning. *Sperber v. Coos County*, 56 Or LUBA 763 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a rezoning standard requires a finding that the rezoning "will not seriously interfere with permitted uses on other nearby parcels," a county's findings that the standard is not met due to "access and fire safety concerns" are inadequate, where those findings address concerns with development on the rezoned property and have no obvious bearing on interference with development on nearby parcels. *Sperber v. Coos County*, 56 Or LUBA 763 (2008).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the dispute during local proceedings on remand regarding a visual impact approval criterion centered on whether photographic evidence submitted by broadcast tower opponents simulated six-foot diameter microwave antennas or much larger antennas, the hearings officer's unexplained decision to allow microwave antennas to be sited on the towers without additional review so long as they did not exceed eight feet in diameter requires remand so that the hearings officer can explain her selection of the eight-foot parameter. *Save Our Skyline v. City of Bend*, 55 Or LUBA 12 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A hearings officer's decision to incorporate a "safe harbor" in her approval of broadcast towers that would allow additional microwave antennas to be sited on the towers in the future without additional review against visual impact approval criteria so long as they were not sited higher than 150 feet is erroneous, where the decision included no explanation for why the 150-foot parameter was selected. *Save Our Skyline v. City of Bend*, 55 Or LUBA 12 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county's findings note that property contains a spring and a road and that adjacent lands contain dwellings, but do not otherwise explain why the spring and the road and the adjacent dwellings make resource use of the property impracticable, the county's findings are inadequate to demonstrate compliance with OAR 660-004-0028(2). *Gordon v. Polk County*, 55 Or LUBA 57 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A city's failure to find that it is feasible to construct a driveway without encroaching on adjacent property is not a basis for remand, where the applicable criteria require no finding of feasibility, and the petitioner identifies no physical or other impediment to constructing the driveway without encroachment. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner does not explain why challenged findings are inadequate, but rather disagrees with the conclusion reached in those findings, petitioner's challenge to the findings will not be sustained. *Knapp v. City of Corvallis*, 55 Or LUBA 376 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. To obtain remand of development approval based on evidentiary grounds, it is insufficient to simply

cite the evidence that the hearings officer rejected and argue that the evidence undermines the hearings officer's ultimate evidentiary choice. The petitioner must also challenge and establish error in the findings in which the hearings officer explained why he found petitioner's evidence unreliable. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

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

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Petitioner's argument that a finding is not supported by substantial evidence provides no basis for reversal or remand, where petitioner does not establish that the finding is required to address a relevant legal standard. *Meadow Neighborhood Assoc. v. Washington County*, 54 Or LUBA 124 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A city's findings in support of its decision to deny permit approval must adequately interpret and apply the criteria the city relies on to deny the application in a way that is consistent with the language of the criteria and must provide a coherent explanation for why the city believes the proposal does not comply with the criteria. A city decision will be remanded where its findings do not comply with these minimum requirements for adequate findings. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city's decision focuses largely or entirely on the water tower that proposed cellular antennae would be sited on, and the antennae rather than the water tower are the subject of the conditional use application, the city's decision will be remanded. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where it is clear that an ordinance that was adopted to replace a previously adopted ordinance was relying on the findings that were adopted to support the previously adopted ordinance, a county's failure to expressly state that it was relying on those findings to support the replacement ordinance provides no basis for reversal or remand. *Thompson v. Umatilla County*, 54 Or LUBA 531 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A planning staff decision that a proposed crematory expansion to a nonconforming mortuary use is an outright permitted use in a residential zone will be remanded, where the decision does not explain the basis for that conclusion and the city's code appears to prohibit expansions of nonconforming uses. *Hallowell v. City of Independence*, 53 Or LUBA 165 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A local government errs in imposing a condition of approval limiting the maximum number of lots when that number was lower than the number of lots proposed by the applicant and the density

allowed in the zone is consistent with the number of lots proposed by the applicant. *Gunzel v. City of Silverton*, 53 Or LUBA 174 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government rejects an engineer's report supporting the applicant's proposed lot sizes as not being "adequate documentation" under a local code provision allowing the applicant's proposed lot sizes based on that documentation, it is error for the city to fail to fully explain why the report is inadequate. *Gunzel v. City of Silverton*, 53 Or LUBA 174 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A broadcast tower approval criterion that requires a decision maker to determine whether identified "public benefits outweigh any impacts which cannot be mitigated" is subjective. In assessing a findings and evidentiary challenge to a decision maker's weighing of public benefits, the question is whether that weighing is (1) inadequately explained (necessitating a remand for additional findings) or (2) unreasonable (and therefore not supported by substantial evidence). *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city council adopts a staff report as supporting findings and the staff report quotes the applicant's proposed findings verbatim, but inserts the words "applicant states" at the beginning of each finding, LUBA will reject a challenge that the findings are inadequate to express what the city council found where: (1) the findings are worded as findings, (2) the findings immediately follow the criteria the findings address, and (3) it is sufficiently clear from the decision that the city council intended to adopt the applicant's findings as its own. *Ettro v. City of Warrenton*, 53 Or LUBA 485 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a rezoning opponent specifically cites and quotes comprehensive plan policies and argues the proposed rezoning is inconsistent with those policies, it is generally risky for a local government to approve the rezoning without specially addressing the cited comprehensive plan policies. However, where the petitioner makes no attempt to tie his substantive arguments to the cited plan policies and the city's responsive findings adequately address petitioner's substantive arguments, the city's failure to tie its responsive findings to the cited plan policies is not important. *Ettro v. City of Warrenton*, 53 Or LUBA 485 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner challenges a city council's findings concerning a screening and buffering criterion, but fails to challenge a finding that the city council adopted by reference, and that finding addresses and finds that the proposal complies with that criterion, LUBA will deny the assignment of error. *Ettro v. City of Warrenton*, 53 Or LUBA 485 (2007).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where planned unit development subdivision opponents argued before the city that the proposal was inconsistent with a number of comprehensive plan provisions, and it is not clear why at least some of those comprehensive plan requirements are not relevant approval requirements, the city erred by not addressing those comprehensive plan provisions in its findings and explaining why

they do not apply as approval requirements or why the proposal is consistent with those requirements if they do apply. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city adjustment committee lacks authority to consider a legal issue, the adjustment committee does not err by failing to address that legal issue in its findings, even though petitioners raised the legal issue below. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA frequently analyzes findings challenges and evidentiary challenges separately and generally analyzes findings challenges first, because LUBA's resolution of the findings challenge frequently affects its resolution of the evidentiary challenge or makes it unnecessary to decide the evidentiary challenge. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. It is not unreasonable for a local decision maker to cite issues raised regarding the evidence submitted by an applicant's engineers that were not responded to, and to rely on opponents' experts' testimony to find that the applicant failed to carry its burden of proof. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where specific criticisms of a transportation impact analysis are made, silence or continued support of the transportation impact analysis by the city engineer and Oregon Department of Transportation engineers is not sufficient to refute those issues. Ignoring issues is not the same thing as implicitly refuting those issues. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Under a variance standard requiring that the "hardship" not be "self-created," a finding that the "applicant's desire to partition his property" created the "hardship" is an insufficient basis to deny the variance request, where the hardship is the lack of alternative access to the proposed parcel and there is no explanation in the findings how petitioner's desire to partition his property created the lack of alternative access to the proposed parcel. *Krishchenko v. City of Canby*, 52 Or LUBA 290 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where (1) a hearings officer clearly recognizes a flooding issue, (2) the hearings officer thoroughly analyzes the issue, (3) LUBA can see no obvious flaws in the hearings officer's analysis, and (4) petitioners neither acknowledge nor make any attempt to challenge the findings, petitioners fail to allege error that would provide a basis for reversal or remand. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a zoning map amendment criterion requires the applicant to demonstrate that the uses allowed in the new zone would not "materially and/or adversely affect the character of the neighborhood," selection of too small an area for analysis could frustrate the purpose of the

criterion. However, where petitioners do not show that the area selected was too small and the city's findings explain that the residential to commercial rezoning is in an area that is already a mixed commercial and residential area, petitioners do not demonstrate a basis for remand. *Cornelius First v. City of Cornelius*, 52 Or LUBA 486 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county signs a land use compatibility statement certifying that a state agency permit applicant's proposal complies with all applicable local land use regulations, but fails to include any findings to support that certification, LUBA will remand the decision so that the county can adopt the required findings. *Wolfgram v. Douglas County*, 52 Or LUBA 536 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A petitioner may not fail to assign error to a finding that certain issues were not preserved and are not within the hearings officer's scope of review, and instead on appeal to LUBA, simply assign error with respect to the same issues that the hearings officer found were not preserved. *Franzke v. Tigard*, 52 Or LUBA 761 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. That a city's decision is based in part on an erroneous interpretation of applicable law provides no basis for remand where its decision is separately based on findings that correctly interpret and apply the applicable law. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city's decision was sustained in a prior appeal based on an interpretation that a comprehensive plan goal would be applied at the time a building permit was issued for the property, and the building permit is subsequently issued without addressing the comprehensive plan goal, LUBA will remand for the city to adopt findings addressing the comprehensive plan goal. *Jebousek v. City of Newport*, 51 Or LUBA 93 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where there are several ways a site may qualify as a geologic hazard area and a permit is issued in which the city considers some but not all of those ways, LUBA will remand so that the city can adopt the required findings. *Jebousek v. City of Newport*, 51 Or LUBA 93 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city is required by the Metro Code to prepare and release a report prior to annexation that describes how the annexation is consistent with agreements that the city is not a party to, but the Metro Code review criteria that govern review of the annexation on appeal do not require that the annexation be consistent with agreements the city is not a party to, Metro may not deny the annexation ordinance based on the city's failure to comply with the report requirement without explaining why that violation of the report requirements has the same status as a violation of one of the review criteria and provides a basis for denial. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county finds that an original mining plan did not "minimize" turbidity impacts within the

meaning of OAR 660-023-0180(5)(c) and 660-023-0180(1)(g), the county is not barred by the waiver principle in *Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678 (1992), from revisiting that turbidity impact minimization question where the county's decision regarding the original mining plan is remanded for other reasons and on remand a revised and more limited mining plan is proposed. *Westside Rock v. Clackamas County*, 51 Or LUBA 264 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county denies an application for a mineral and aggregate zoning overlay because the applicant failed to supply a certificate that the mine would not result in an increase in flood elevations, the county's decision must identify the legal requirement that the certificate be submitted at the time the zoning overlay is approved. *Westside Rock v. Clackamas County*, 51 Or LUBA 264 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a variance criterion allows a variance if topography makes strict compliance with the lot depth requirement an unreasonable hardship and the city's findings granting the variance for four lots do not explain why a proposed roadway could not be relocated slightly to make four lots comply with the lot depth requirement, remand is required. *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. If the argument included in support of an assignment of error clearly alleges that findings are not supported by substantial evidence, the fact that an assignment of error that challenges the adequacy of the city's findings does not expressly include a substantial evidence challenge does not preclude LUBA review of the substantial evidence arguments that follow that assignment of error. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a variance criterion requires the city to find that "public need" outweighs "adverse impacts" of developing wetlands and a party argues there is no market demand for the commercial development that the variance would allow, the city must address in its findings the role, if any, that market demand plays under the variance criterion and explain why the public need, as the city interprets those words, outweighs the identified potential adverse impacts. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a variance criterion requires the city to find that "public need" outweighs "adverse impacts" of developing wetlands and a party identifies many potential adverse impacts of such development, a city's findings must do more than explain how the potential adverse impacts will be mitigated; the findings must explain why the public need outweighs the potential adverse impacts, as they may be mitigated. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A county finding that there is "nothing in the record" that would lead the county to believe that a proposed mining operation would cause a risk of traffic accidents does not demonstrate that the county ignored evidence that petitioners submitted to show the mine could cause such a risk, where

there are other findings that show the county merely was not persuaded that petitioners' testimony outweighed the testimony submitted by the applicant. *Lindsey v. Josephine County*, 51 Or LUBA 383 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where intervenors provide in their response brief an alternative theory for affirming the challenged decision in the event necessary findings are found not to be supported by substantial evidence, and that alternative theory does not appear in the challenged findings, LUBA will decline to affirm on that basis, and will remand to allow the local government to consider that alternative theory in the first instance. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings demonstrating compliance with an approval criterion that requires that a proposed RV park be compatible with surrounding residential areas based, in part, on vegetative screening are not sufficient to demonstrate compliance with a comprehensive plan policy requiring buffer zones between residential areas and conflicting land uses. *Jacobsen v. City of Winston*, 51 Or LUBA 602 (2006).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Technical revisions to a tentative subdivision plan need not be decided with public participation, and a condition of tentative subdivision plan approval requiring that, prior to submittal of the final plat, county staff will "red-line" the plat and return to applicant's surveyor for corrections is not an impermissible deferral of findings to the second step of a two-step process. *Angius v. Washington County*, 50 Or LUBA 33 (2005).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Petitioner's arguments do not provide a basis for remand where petitioner fails to challenge a county's interpretation that a criterion that the "land must have adequate carrying capacity to support the densities and types of uses allowed by the proposed plan and zone designations" is satisfied where the land has adequate carrying capacity for uses and densities authorized by the challenged decision, rather than for all possible uses allowed in the zone. *Doob v. Josephine County*, 49 Or LUBA 113 (2005).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner shows that a county's findings are inadequate, but the quality of the evidentiary record and the findings that could reasonably be adopted based on that record are disputed, remand is the appropriate remedy where (1) petitioner does not show that a county's decision is "outside the range of discretion allowed the [county] under its comprehensive plan and implementing ordinances," which would require reversal of the county's decision and an order to approve the permit under ORS 197.835(10)(a) or (2) that the county's decision to deny the permit "violates a provision of applicable law and is prohibited as a matter of law," which would justify a decision by LUBA to reverse the county court's decision under OAR 661-010-0073(1)(c). *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an interpretation of an ambiguous code standard that bars variances in some circumstances

is needed to explain why the local government believes that standard did not bar an approved variance, and the appealed decision does not include either an express or implied interpretation of the code standard, remand is required. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Although LUBA is authorized to interpret ambiguous local land use legislation in the first instance if the local government fails to adopt a needed interpretation, where interpreting the land use legislation in a way that would be consistent with the local government's decision is problematic, LUBA will not attempt to interpret the legislation in the first instance. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. If a local government wishes to interpret and apply traditional variance standards differently than those standards have traditionally been interpreted and applied, it must articulate an interpretation of those standards that is sufficient for review. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Annexation of a portion of road with one owner, though not required to result in a decision, is quasi-judicial, and therefore must be supported by findings addressing applicable standards. *Patterson v. City of Independence*, 48 Or LUBA 155 (2004).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. The conclusory nature of a finding that faults the applicant for failing to present any evidence or evaluation of adverse impacts does not provide a basis for remand, where the hearings officer interpreted the code to require at least some evidence or evaluation of adverse impacts, and the applicant provided none. *Wiper v. City of Eugene*, 47 Or LUBA 21 (2004).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – inadequate Findings. Where a finding is ambiguous and could be read to misinterpret a code provision, but read in context it is reasonably clear that the local government did not intend the erroneous interpretation petitioner ascribes to it, and in fact intended an interpretation consistent with the code provision, petitioner's arguments based on that ambiguous finding do not provide a basis for reversal or remand. *Wynn v. Polk County*, 47 Or LUBA 73 (2004).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. When a petitioner raises an issue concerning a specific comprehensive plan provision, a local government is obligated to explain the extent to which, if any, the provision applies to the decision. *Doob v. Josephine County*, 47 Or LUBA 147 (2004).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Failure to adopt findings addressing a comprehensive plan policy requiring provision of preferential carpool and vanpool parking for new commercial uses is not a basis for remand, where the code leaves details of parking lot construction and striping to the city engineer at building permit review, the challenged decision requires the applicant to comply with all code parking requirements, and the petitioner offers no reason that the city engineer cannot require the applicant

to provide carpool and vanpool parking as part of building permit review. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city transportation plan assigns responsibility to the city engineer to determine the scope of a traffic study necessary to assess development impacts on "nearby key intersections," the city engineer's decision to limit the traffic study to intersections adjacent to the subject property and not to require study of intersections five blocks away is not a basis for reversal or remand, absent an explanation from petitioners as to why those intersections are both "nearby" and "key." *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Although all legislative decisions need not be supported by findings when the local government can supply argument and citation to the record in its brief to demonstrate compliance with the applicable criteria, such arguments must be based on evidence contained in the record rather than created out of whole cloth. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304 (2004).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A county does not fulfill its obligation under the local code to consider the effect of proposed fill on "aquatic life and habitat, and wildlife habitat" by simply finding that the Oregon Department of Fish and Wildlife's failed to express any concern regarding the proposal. However, where other county findings addressing a similar standard make it clear the county was relying on the relatively small amount of fill proposed and the impacted nature of the affected wetlands, to approve the requested fill, the county's finding regarding the agency's lack of concern provides no basis for reversal or remand. *Bonnett v. Deschutes County*, 46 Or LUBA 318 (2004).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local code standard requires that an applicant seeking to place fill in a wetland for a driveway consider whether there are practical alternatives to placing fill in wetlands, and the record indicates there may be a practical building site that could be reached by a shorter driveway that would not require filling the wetland that was not considered by the county based on a misconstruction of the local code standard, LUBA will remand the decision so that the county can consider whether the site is a practical building site. *Bonnett v. Deschutes County*, 46 Or LUBA 318 (2004).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A city's failure to address subjective language in a sign code criterion does not provide a basis for reversal or remand, where the petitioner also argues that applying that code language to approve or deny a sign application would be inconsistent with Article I, section 8, of the Oregon Constitution. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. An adjoining property owner who faces loss of his only current access in the future and assigns error to a city council's decision not to require a subdivision applicant to provide access presents no basis for reversal or remand, where the city council interprets a local code provision that requires

subdivision applicants to provide access to adjoining properties not to apply where the adjoining properties currently have access and the property owner fails to demonstrate how the city council's interpretation is erroneous under ORS 197.829(1). *McFall v. City of Sherwood*, 46 Or LUBA 735 (2004).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where LUBA concludes that relevant local code provisions make the comprehensive plan requirements potentially applicable to an application for subdivision approval and that a particular comprehensive plan provision applies and is not merely aspirational, and the local government approved the subdivision without addressing the comprehensive plan provision, the subdivision approval decision must be remanded. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A county's finding that proposed mining activities are not minimized sufficiently to avoid conflicts with identified riparian resources is not adequate, where the riparian area is located near water courses that will receive water diverted from mining cells and the county adopted other findings that mining will not affect identified wetlands that are located between the riparian area and presumably would be more susceptible to fluctuations in water levels than the riparian areas. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a code provision appears to require analysis of cumulative impacts of development proposals, but the city's decision does not address cumulative impacts and the city's response brief fails to explain why no cumulative impact analysis is required or why the existing findings adequately address such impacts, LUBA will remand for the city to provide that explanation. *Bauer v. City of Portland*, 44 Or LUBA 210 (2003).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where LUBA cannot determine from the appealed decision or the record whether an approved parkway corridor crosses an inventoried Goal 5 significant vegetation and wildlife area, the decision must be remanded. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a zoning ordinance requirement that a site have 150 feet of frontage could apply in a number of different ways to a site with multiple road frontages, and the local government's findings are inadequate to explain why the city applied that requirement in the way that it did, LUBA will remand for the city to interpret the zoning ordinance requirement in the first instance. *Miles v. City of Florence*, 44 Or LUBA 411 (2003).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will remand a decision where petitioner identifies a discrepancy between the county zoning map and the map the county relied upon to approve a rezoning application, where the discrepancy may affect the county's determination that coastal shorelands are not affected by the rezoning, and the county's findings do not explain why the county did not rely on the county zoning map to establish the zoning boundary. *Doty v. Coos County*, 44 Or LUBA 448 (2003).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. There is no inconsistency in a city council subdivision approval decision that (1) refuses to delay approval or require setbacks for a possible future freeway, (2) requires elimination of a proposed subdivision access to the existing roadway that might be displaced by the possible future freeway, and (3) eliminates a planning commission requirement for pedestrian access to the roadway that might be displaced by the possible future freeway where (a) the possible future freeway is not yet included in the city's comprehensive plan, (b) the decision to eliminate the proposed roadway connection is based on an Oregon Department of Transportation policy that would preclude approval of the roadway connection, and (c) a code provision excuses pedestrian connections where they are found to be "infeasible or inappropriate" and the city council adopts an unchallenged finding that the pedestrian connection is "not necessary." *Baida v. City of Medford*, 44 Or LUBA 473 (2003).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where no code, statute or condition of preliminary subdivision plat approval requires that the city resolve an issue regarding an alleged encroachment before granting final subdivision plat approval, the city's failure to resolve such issues do not provide a basis for reversal or remand. *Jordan v. City of Portland*, 44 Or LUBA 586 (2003).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A challenge to the adequacy of a finding that concludes that a local ordinance provision regarding the developability of nonstandard lots does not apply to a determination regarding lot legality provides no basis for reversal or remand, where LUBA decides that the disputed ordinance provision clearly does not apply. *Bear Creek Corporation v. Jackson County*, 44 Or LUBA 685 (2003).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. City findings that specifically respond to a petitioner's interpretational challenge and address the only comprehensive plan goal that petitioner cites in support of that interpretational challenge are adequate to overcome petitioner's challenge that the city's findings are inadequate. *Dimone v. City of Hillsboro*, 44 Or LUBA 698 (2003).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. An assignment of error challenging the evidentiary support for an alleged finding that a private bridge is not available to serve a proposed residential development provides no basis for remand where the decision is not based on the alleged finding and petitioner fails to challenge the findings that the city did make in support of its decision. *Oregon Diverse Industries v. City of Jacksonville*, 43 Or LUBA 135 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A finding that a proposed Head Start program is not a school is inadequate, where it does not answer the relevant the question under the code, which is whether the proposed use is a "public building." *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local approval criterion requires a finding that a proposed use will have a minimal adverse impact on surrounding uses compared to the impact of development permitted outright, a city may

not limit its impact analysis to only one permitted use, where other permitted uses in the zone may have impacts similar to those of the proposed use. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local approval criterion requires a finding that a proposed use will "preserve assets of particular interest in the community," a city council's finding that the proposed use does not satisfy the criterion is inadequate where the finding merely sets out a series of concerns about the proposed use without explaining why those concerns are "assets of particular interest" that the proposed use will not preserve. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will remand a city decision denying a partition application where it is not clear what documents make up the local decision and the documents that are identified as containing the final land use decision do not set out the city's rationale for denying the application. *Martin v. City of Dunes City*, 43 Or LUBA 354 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county's legislative decision changes the comprehensive plan designation for a property from Industrial to Primary Agriculture, and the record does not reflect that the county considered other potentially suitable designations or explained why other potentially suitable designations should not be applied, the decision and record are insufficient to demonstrate that applicable criteria were considered. *Manning v. Marion County*, 42 Or LUBA 56 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where it is unclear who would own a proposed "personal use airport" in an EFU zone, and whether the uses that the owner plans to make of the airport would be consistent with the uses allowed under ORS 215.283(2)(h), the owner must be identified and the county's findings must explain why it concludes that the proposed uses fall within the uses allowed with a personal use airport. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A finding that a proposed use complies with a code criterion requiring a demonstration that the use be consistent with applicable comprehensive plan policies is inadequate where it merely summarizes the applicable comprehensive plan policies, and does not address issues raised regarding compliance with particular policy provisions. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Petitioner's challenge to the adequacy of findings that conclude that, as conditioned, a proposed personal use airport will not result in a "significant adverse impact on the livability, value or appropriate development" of an abutting use will be sustained where the findings fail to address testimony that, notwithstanding the mitigating conditions of approval, the proposed airport will result in significant adverse impacts to an adjoining national monument. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a hearings official adopts detailed findings concerning the nature of the "surroundings" in applying a local approval criterion that requires that a proposed use be compatible with its surroundings, geographic ambiguity about the outer reach of the "surroundings" that were considered by the hearings official will provide no basis for remand, where petitioners identify no uses that they believe fall within the relevant "surroundings" and were not considered by the hearings official. *Knight v. City of Eugene*, 41 Or LUBA 279 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local "compatibility" standard is extremely subjective and reasonable persons could draw different conclusions from the record about whether a proposed 90-foot cellular tower would be compatible with its mixed residential and commercial surroundings, a hearings official's decision that the tower would be compatible will not be reversed on appeal simply because petitioners would reach the opposite conclusion. *Knight v. City of Eugene*, 41 Or LUBA 279 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Although local governments are required to address legitimate issues that are raised in a quasi-judicial land use proceeding concerning relevant approval criteria, local governments are not required to address in their findings every conflict in the evidence or every criticism that is made of particular evidence. *Knight v. City of Eugene*, 41 Or LUBA 279 (2002).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A petitioner's challenge to a finding that rezoning of a property is warranted to satisfy a commercial land need will be denied, where the need for commercial land is only one of several reasons given for the rezoning and the other reasons given are not challenged. *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner does not explain why approval criteria for fill in a floodplain and coastal shoreland necessitated precise delineation of the floodplain boundaries and precise knowledge about the location, amount and nature of the fill, the local government's failure to precisely delineate and describe the floodplain and fill provides no basis for remand. *Willhoft v. City of Gold Beach*, 41 Or LUBA 130 (2001).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioner raises issues regarding whether a proposed site design complies with potentially applicable approval criteria, the local government's decision must respond by either (1) determining that the cited provisions are not applicable approval criteria or (2) demonstrating that the proposal complies with such provisions. *Elliott v. City of Redmond*, 40 Or LUBA 242 (2001).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will deny an assignment of error that challenges a decision for failing to make findings regarding applicable criteria when the decision properly incorporates additional findings that do address the applicable approval criteria, and the incorporated findings are not inadequate on their face. *McNern v. City of Corvallis*, 39 Or LUBA 591 (2001).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an approval criterion requires that a proposed cellular phone tower must not alter the character of the surrounding area, petitioner's arguments that the criterion is violated provide no basis for reversal or remand where petitioner challenges findings that the county did not adopt and fails to challenge the findings that the county did adopt. *Pereira v. Columbia County*, 39 Or LUBA 575 (2001).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioner challenges a finding that an amended approval criterion does not apply, but petitioner does not challenge alternative findings that the city adopted to address the amended approval criterion in the event it were found to apply, petitioner presents no basis for reversal or remand. *Adams v. City of Medford*, 39 Or LUBA 464 (2001).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner only expressed disagreement with assumptions included in a transportation impact study and repeats evidentiary arguments he made to the city council without attempting to challenge the findings the city adopted to respond to those arguments, petitioner presents no basis for reversal or remand. *Adams v. City of Medford*, 39 Or LUBA 464 (2001).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city adopts findings addressing issues raised by petitioner during local proceedings, petitioner presents no basis for reversal or remand by repeating those issues at LUBA without challenging the findings the city adopted to address those issues. *Adams v. City of Medford*, 39 Or LUBA 464 (2001).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a site design review criterion requires that, "wherever possible," direct driveway access to arterial streets not be allowed, and the challenged decision approves a site plan with direct driveway access onto an arterial street and a collector street without explaining why it is not possible to limit access to the collector street, the decision must be remanded. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Although LUBA may overlook a city's failure to adopt findings addressing an approval criterion for signs under ORS 197.835(11)(b) where the record clearly supports the decision, where the record provides only an idea of what the signs will look like and the criterion requires a highly subjective judgment, application of ORS 197.835(11)(b) is not appropriate. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Although a decision maker is required to adopt findings that respond to relevant issues that are raised in quasi-judicial land use hearings, the decision maker is not necessarily required to adopt findings addressing particular items of evidence, provided LUBA is able to conclude that a reasonable decision maker could reach the disputed decision based on all the evidence. *Schwerdt v. City of Corvallis*, 38 Or LUBA 174 (2000).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioner challenges the adequacy and evidentiary basis for a local government's decision determining that a proposed development "is or will be compatible" with the land use development pattern in the vicinity of the request, LUBA will analyze the findings to determine (1) whether the findings are adequate; (2) whether there is substantial evidence in the record to support a finding that, absent some conditions of approval, the compatibility standard is met; and (3) if conditions of approval are necessary to establish compatibility, whether the local government adopted such conditions. *DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. The Portland City Code does not require that the city adopt findings of fact to support its legislative decisions. Therefore, on appeal to LUBA, the city may rely upon citations to the comprehensive plan, code, the record and arguments in its brief to demonstrate that the legislative decision is consistent with applicable plan and code provisions. *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 870 (2000).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A petitioner's arguments that amended land use regulations violate a comprehensive plan policy by increasing housing costs and discouraging infill development provide no basis for remand, where the plan policy encourages both infill and preserving neighborhood livability and the city's findings explain that the regulations are needed to ensure that infill housing development can be accommodated in neighborhoods without eroding livability. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an issue was raised below concerning whether a proposed bed and breakfast facility violated a plan policy regulating commercial development and is not addressed in a hearings officer's decision and the policy itself and related plan and land use regulation provisions are unclear whether the policy applies, LUBA will remand the decision. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a zoning ordinance standard requires consideration of residential appearance and function of an "area" in approving a bed and breakfast facility, and a hearings officer's findings use different areas in applying that criterion so that the analysis is internally inconsistent, the findings are inadequate to demonstrate compliance with the standard. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a zoning ordinance standard requires that the transportation system be capable of serving the proposed and existing uses and the findings addressing that standard focus exclusively on the relatively small traffic generating impact of the proposal without ever addressing the adequacy of the transportation system, the findings are inadequate to demonstrate compliance with the standard. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A city does not err by failing to address a comprehensive plan policy that requires an impact assessment for in-water structures, where the decision does not approve any in-water structures. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county's findings are adequate to identify accepted farming practices on lands surrounding a proposed aggregate mining operation but do not explain why they will not be significantly affected by the mining operation, the county's decision must be remanded. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a party argues that the decision is supported by substantial evidence, but fails to identify where in the record that evidence is located, LUBA will not search the record for such evidence. *DLCD v. Wallowa County*, 37 Or LUBA 105 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the staff report identifies an approval criterion and the final decision fails to demonstrate compliance with the criterion or take the position that the criterion does not apply, the decision will be remanded. *Latta v. City of Joseph*, 36 Or LUBA 708 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A finding that the soils on the subject property are unsuitable for farm use is an inadequate, unexplained conclusion where the subject property is predominantly Class VI soils and the comprehensive plan provides that such soils have significant importance for grazing. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A committed-exception zone-change decision that acknowledges the existence of Goal 5 resources on the subject property, but concludes that the county's existing Goal 5 plan provisions will address any conflicts, is not adequate to demonstrate compliance with Goal 5, where the findings do not state which of the county's existing Goal 5 plan provisions ensure continued compliance once the exception is taken, and the findings do not consider whether the zone change may introduce the possibility of new conflicting uses. *Pekarek v. Wallowa County*, 36 Or LUBA 494 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A finding that a proposed planned unit development will "reduce" site disturbance is inadequate to demonstrate compliance with a standard that requires that the proposed development shall be designed to avoid unnecessary site disturbance. *Salo v. City of Oregon City*, 36 Or LUBA 415 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will not exercise its authority under ORS 197.835(11)(b) to affirm a decision notwithstanding inadequate findings, where the local government fails to adopt findings of compliance with a criterion requiring that planned unit development be designed to minimize the

number and size of cuts and fills, and it is not obvious from evidence in the record that the PUD design minimizes cuts and fills. *Salo v. City of Oregon City*, 36 Or LUBA 415 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will reject an assignment of error that alleges findings are inadequate but fails to explain why the disputed findings are critical to the county's decision. *Cotter v. Clackamas County*, 36 Or LUBA 172 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Exercise of LUBA's authority under ORS 197.829(2) to interpret local land use law in the first instance is not appropriate where the relevant code provision prohibiting reduction of acreage available for farm use could refer to reduction (1) of acreage on adjacent lands or (2) of acreage on the subject property that is available for use in conjunction with farm uses on adjacent lands. Where both interpretations are plausible and it is disputed factually whether the relevant lands could be used in conjunction with adjacent lands, a remand to the county to render its interpretation in the first instance is appropriate. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the county approves a golf course expansion without adopting findings addressing a comprehensive plan provision that prohibits approval of urban uses outside urban growth boundaries, LUBA will remand the decision so that the county can adopt findings addressing whether the subject golf course is "urban" and whether the proposed expansion of the golf course is consistent with the comprehensive plan provision. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city council interprets a code standard that excuses a permit applicant from providing required parking where "special circumstances exist constituting a hardship" as being satisfied where the cost of providing the one additional parking site that is possible on the property will constitute an "economic hardship out of proportion to the gain of parking spaces," and petitioner does not specifically challenge the city council's findings, LUBA will affirm that interpretation unless it exceeds the city's interpretive discretion under ORS 197.829(1). *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. An assignment of error challenging the adequacy of findings that an approval criterion is met must be denied, where the decision maker also adopts alternative findings that the approval criterion does not apply to the challenged permit application and those alternative findings are not challenged. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. An assignment of error criticizing a city council for not discussing conflicting evidence will be rejected, because it is the written decision rather than oral deliberations where the decision maker is required to explain its choice between conflicting evidence. Moreover, where LUBA can determine that a reasonable decision maker would rely on the evidence the decision maker relied

on, findings specifically addressing the conflicting evidence are not necessary. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Petitioner's assignment of error will not be rejected solely because petitioner failed to challenge alternative findings that state law might preempt the county regulations at issue in the assignment of error, where the hearings officer's alternative finding does not clearly conclude that state law preempts. *Neels v. Clackamas County*, 36 Or LUBA 54 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a hearings officer's findings are inadequate to explain why a proposed use that qualifies as a permitted use as a "household" does not also fall within the definition of a "nursing home," which is only allowed as a conditional use, a remand would normally be required. However, where the facts are not disputed, and LUBA is presented with a straightforward question of law, it may consider whether the proposed use falls within the definition of "nursing home." *Neels v. Clackamas County*, 36 Or LUBA 54 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A county fails to justify amending its UGB to include commercial land at a freeway interchange where, although the interchange land would have advantages over lands further from the freeway but already inside the UGB, the county fails to demonstrate a particular need for commercial land at the interchange or that the lands inside the UGB are unsuitable for commercial development. *DLCD v. Douglas County*, 36 Or LUBA 26 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county's findings do not establish that a need for commercial land can only be satisfied at a freeway interchange, its findings considering alternatives outside the UGB are also inadequate where those findings fail to consider Class II through VI agricultural or nonresource lands simply because they are not close to a freeway interchange. *DLCD v. Douglas County*, 36 Or LUBA 26 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Factor 3 of Goal 14 is not met if the public facilities and services have to be upgraded to serve land that is added to its UGB and alternative sites within the UGB that could accommodate identified needs already have public facilities and services. *DLCD v. Douglas County*, 36 Or LUBA 26 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. The ultimate issue in LUBA's review of a decision adopting a committed exception under OAR 660-004-0028 is whether the adopted findings that are relevant and supported by substantial evidence are sufficient to demonstrate compliance with the standard of ORS 197.732(1)(b) that uses allowed by the goal are impracticable. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. In considering whether farm uses are impracticable, a county may not limit its consideration to "traditional" agricultural uses, where the feasibility of "nontraditional" agricultural uses is raised

as an issue before the county. However, where the county's findings nevertheless address the feasibility of "nontraditional" uses, the county's possible misunderstanding of the scope of the required analysis provides no basis for reversal or remand. *Lovinger v. Lane County*, 36 Or LUBA 1 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A county's conclusory finding that goals protecting housing are not violated by rezoning rural residential property for industrial use because proximity of the property to commercial and industrial uses and an interstate highway makes use of the property for rural residential uses impracticable is inadequate, where the record includes no evidence of conflicts with those uses that might make rural residential uses impracticable. *James v. Josephine County*, 35 Or LUBA 493 (1999).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county's land use decision approving a forest template dwelling consists of a single-page form that contains blanks for the subject property's legal description, zoning, size and the names and addresses of the applicant and any representatives plus signature lines, the decision is not supported by adequate findings. *Krieger v. Wallowa County*, 35 Or LUBA 305 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a city's decision adopts more restrictive land use regulations affecting residential lands, it must consider the impact of those regulations on unincorporated lands inside the UGB, if the city relies on such land to meet its identified housing needs. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A city's failure to adopt findings specifically addressing a plan criterion is not error where the substance of the plan policy is addressed in the city's findings. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a sentence in a decision can be read to adopt an improperly narrow interpretation of a code, but when that sentence is read in context with the rest of the decision it is clear that the improper interpretation was not adopted, LUBA will assume the improper interpretation was not intended. *Hannah v. City of Eugene*, 35 Or LUBA

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an applicable approval criterion requires storm drainage plans that meet certain standards, the local government may not approve a land division without such storm drainage plans, or without finding that such plans are feasible and delegating the required evaluation to a sewerage agency. *Sunningdale-Case Heights Assoc. v. Washington Co.*, 34 Or LUBA 549 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a hearings officer interprets an approval criterion to require an explanation of resource practices on the property, the applicant may not rely on a lack of evidence of impacts on resource

practices to establish that there will be no such adverse impacts. *Parsley v. Jackson County*, 34 Or LUBA 540 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings that were not adopted by the decision maker in support of the challenged decision provide no basis for reversal or remand, even if the findings are inadequate. *Rouse v. Tillamook County*, 34 Or LUBA 530 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where specific issues are raised concerning compliance with an approval criterion, the findings supporting the decision must respond to those issues. *Rouse v. Tillamook County*, 34 Or LUBA 530 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where local standards require that there be a "demonstrated public need" for a proposed subdivision of five-acre lots, letters from real estate agents describing the lack of listings for five-acre parcels do not "clearly support" a finding of demonstrated public need for the subdivision absent evidence relating the lack of listings to an identified need. *Turrell v. Harney County*, 34 Or LUBA 423 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings that the applicant has testified that applicable criteria will be met are conclusory and inadequate because they fail to identify the review standards, set out the facts relied upon or explain how those facts led to the decision. *Turrell v. Harney County*, 34 Or LUBA 423 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where it is not apparent that provision of water to a rural subdivision merely constitutes attachment to an existing proximate water supply rather than an "extension" of the water system, which is prohibited by Goal 11, LUBA will remand the decision for Goal 11 findings. *DeShazer v. Columbia County*, 34 Or LUBA 416 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A city's error in not including findings addressing certain conditions of preliminary subdivision and PUD plan approval provides no basis for reversal or remand where the parties identify evidence in the record that clearly shows compliance with the conditions. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioner contends that findings are inadequate and not supported by substantial evidence, but fails to identify any particular criterion and only expresses disagreement with the city's evaluation of the evidence, petitioner provides no basis for reversal or remand. *Kelley v. City of Cascade Locks*, 34 Or LUBA 374 (1998).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. When a challenged decision fails to incorporate a staff report or council minutes as findings, LUBA's

review of the challenged decision for adequate findings is limited to the decision itself. *Hackler v. City of Hermiston*, 33 Or LUBA 755 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government decision appears to authorize a nonconforming use and additional dwelling without notice or findings to support those approvals, LUBA will remand the decision. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Although LUBA may interpret a local ordinance, it is not required to do so. *Opp v. City of Portland*, 33 Or LUBA 654 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. To comply with OAR 660-06-025(5)(a), a local government's findings must describe the farm or forest practices on adjacent and nearby forest lands, as well as explain why the proposed use does not significantly affect those practices. Findings that do not address all nearby lands and that simply refer to an adjacent property as a "woodlot" where a "small flock of sheep" is raised are inadequate. *Donnelly v. Curry County*, 33 Or LUBA 624 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where visual impact, noise and safety issues are relevant to compliance with applicable standards and are raised by petitioner below, the local government must adequately address those issues, and conclusory findings unsupported by substantial evidence are inadequate. *Port Dock Four, Inc. v. City of Newport*, 33 Or LUBA 613 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a hearings officer's findings incorporate staff report findings that are inconsistent concerning one issue, LUBA will not remand the hearings officer's decision where it is clear that the hearings officer's findings superseded the staff report on that issue. *Central Bethany Dev. Co. v. Washington County*, 33 Or LUBA 463 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. The county's findings of compliance with applicable criteria are inadequate where they do not identify the relevant approval standards, set out the facts relied upon, or explain how the facts lead to the conclusion that applicable standards are satisfied. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. There is no legal requirement that a local government address in its findings conflicting evidence upon which it chooses not to rely. Where a petitioner presents conflicting evidence to the city during a local appeal, but does not raise new issues, the city may rely on findings prepared prior to the local appeal. *Tandem Development Corp. v. City of Hillsboro*, 33 Or LUBA 335 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the city makes a determination that it is feasible to comply with a local code standard

requiring that each lot in a proposed subdivision be buildable, it may defer addressing engineering details to a later date. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A hearings officer's finding that other residentially zoned property "may not be developable" does not factually justify the conclusion that "there are no non-agricultural lands" with priority for development. *Alliance for Responsible Land Use v. Deschutes County*, 33 Or LUBA 12 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A county's findings are inadequate where an applicable criterion for a zone change requires a finding that the need will be best served by changing the classification of the property in question as compared with other available property, and the county's findings do not provide any express comparison of the subject property to other available property. *Alliance for Responsible Land Use v. Deschutes County*, 33 Or LUBA 12 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. The county's findings classifying livestock sales and shows as a "farm use" rather than as "stockyard and animal sales" are inadequate when the challenged decision does not relate the general findings to the property at issue, and therefore does not establish that the proposed use complies with the approval standards. *Collins v. Klamath County*, 32 Or LUBA 338 (1997).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Allegations that amount to no more than a disagreement with the local government's ultimate conclusion in its findings provide no basis for reversal or remand of the challenged decision. *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings provide no basis for reversal or remand when they are not necessary to support an applicable criterion. *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the county attempts to apply a rural residential zoning density in an irrevocably committed exception area, a conclusory finding that redesignation of the subject parcel will not cause adjacent resource lands to satisfy working paper guidelines for irrevocably committed exceptions does not substitute for the actual analysis required under OAR 660-04-018(2)(b)(B) regarding the potential commitment of adjacent resource lands to nonresource use. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings adopted by the county approving a committed exception to Goals 3 and 4 are inadequate where they contain no discussion or explanation of how the existing uses on adjacent parcels make resource use on the subject property impracticable. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. The county's reliance on the existence of adjacent non-resource parcels in justifying a committed

exception is impermissible under OAR 660-04-028(6)(c)(A) where the findings do not adequately establish how or when the adjacent parcels were created. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the county's findings regarding parcel size and ownership patterns on lands adjacent to a proposed exception area contain no reference to the analysis required by OAR 660-04-028(6)(c)(A), and do not suggest that the county is relying upon separate incorporated documents to provide that analysis, the county's incorporation of the entire application does not provide a sufficient reference to the specific documents relied upon by the county to satisfy the applicable criteria. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. The county's findings fail to demonstrate that the proposed use requires the use of resource land, as required by OAR 660-04-020(2)(a), where the findings only indicate that the proposed racetrack requires (1) low density, (2) varied topography with dirt base, and (3) 15-to-17-acre minimum size. *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the county's findings regarding the alternative sites analysis required by OAR 660-04-020(2)(b) offer little or no support for the conclusions drawn, LUBA will remand the county's decision on that basis alone, and need not reach the substantial evidence challenges. *Middleton v. Josephine County*, 31 Or LUBA 423 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. When a city's final decision does not contain an interpretation of a comprehensive plan provision, LUBA need not remand for an interpretation, but may itself determine whether the city's decision is correct. *Stewart v. City of Brookings*, 31 LUBA 325 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings are inadequate when they rely on a consultant's summary conclusions which are not based on evidence in the record. *Friends of Metolius v. Jefferson County*, 31 Or LUBA 160 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a hearings officer's interpretation of an applicable code provision is inadequate for review because it omits necessary analytical steps, this Board may make the determination of whether the county's decision is correct. *Miller v. Clackamas County*, 31 Or LUBA 104 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A local decision is subject to reversal, rather than remand, when the local government cannot demonstrate compliance with an applicable approval criterion. When a significant factual issue remains, the resolution of which could determine whether compliance is possible, the decision must be remanded. *DLCD v. Clatsop County*, 31 Or LUBA 90 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. County findings are inadequate when they fail to interpret an applicable local regulation, and fail

to identify facts upon which the county relied in reaching its conclusions. LUBA will not overlook such inadequacies in the findings when no party cites evidence in the record that compels the interpretation and conclusion made by the county. *DLCD v. Clatsop County*, 31 Or LUBA 90 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. In the absence of adequate findings, LUBA may affirm a local government's conclusion that a particular criterion is satisfied when facts in the record clearly support the conclusion. However, when there are no findings of compliance with a particular criterion, which was identified as applicable by the local staff and raised as an issue during the local proceedings, LUBA will not consider whether disputed facts could support findings of compliance. *DLCD v. Clatsop County*, 31 Or LUBA 90 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. When the county relies on a 1979 conditional use permit to find that a proposed partition satisfies the county's approval criteria, the county must make affirmative findings that the conditional use permit is valid. *Tognoli v. Crook County*, 30 Or LUBA 272 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A 1B designation on the county's Goal 5 inventory means that inadequate information exists on the site to determine its nature and, therefore, a county cannot rely on a site being listed as a 1B site to conclude that aggregate uses are allowed outright. *Tognoli v. Crook County*, 30 Or LUBA 272 (1996).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local decision approving a replacement dwelling does not make specific findings regarding the applicability of a local ordinance establishing a legal access requirement, and does not indicate whether legal access is a mandatory approval standard, the decision must be remanded for appropriate findings. *Drake v. Polk County*, 30 Or LUBA 199 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. While ORS 197.835(9) requires LUBA to affirm a local government decision in the absence of adequate findings if the parties identify evidence that "clearly supports" the decision, "clearly supports" will be interpreted narrowly to mean "makes obvious" or "makes inevitable." *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Although ORS 197.829(2) allows LUBA, in certain circumstances, to interpret a local ordinance to the extent necessary to determine whether a local land use decision is correct, it is still the local government's responsibility to interpret its own comprehensive plan and land use regulations in the first instance, and LUBA is not required to do so. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. ORS 197.835(9)(b) and 197.829(2) authorize LUBA to remedy minor oversights and imperfections in local government land use decisions, but do not permit or require LUBA to assume the

responsibilities assigned to local governments, such as the weighing of evidence, the preparation of adequate findings and the interpretation of comprehensive plans and local land use regulations. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. When a local ordinance requires a determination that its specific requirements can be satisfied by the imposition of conditions, the city must make findings, supported by substantial evidence, with respect to feasibility. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county code provision requires that a temporary mobile home be connected to an existing septic system "if feasible" and the county acknowledges the applicants have not applied for the authorization necessary to determine such feasibility, the county's findings are inadequate to establish compliance with the applicable code provision. *Collier v. Marion County*, 29 Or LUBA 462 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A local government's conclusion that required netting will have limited visual impacts on adjacent properties is unacceptably conclusory when unsupported by findings concerning how much netting is required or how high the netting must be. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Failure of local government findings to address a specific issue raised by a party below, which is relevant to compliance with applicable approval standards, is a basis for remand. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. When the evidence in the record is conflicting, and the local government's findings fail to explain the basis for its conclusion or state which evidence it finds persuasive, LUBA must remand the decision for additional findings. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994), and *J.C. Reeves Corp. v. Clackamas County*, 131 Or App 615, 887 P2d 360 (1994), findings in support of a condition requiring an applicant for site plan approval for a fast food restaurant to construct certain street and frontage improvements must compare traffic and other effects of development to required improvements. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioner challenges the adequacy of one set of local government findings addressing a particular approval criterion for a comprehensive plan map change, but does not challenge a different set of local government findings also addressing the same criterion, petitioner's assignment of error will be denied. *Mitchell v. City of Medford*, 29 Or LUBA 158 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioner seeks remand because the challenged decision fails to include findings on specific

relevant issues raised in testimony below, petitioner must explain why the cited testimony is relevant to an applicable approval standard. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. The absence of findings in support of a legislative decision is not in itself a basis for reversal or remand. It is possible for respondents to defend against a challenge to a legislative decision through argument in their briefs and citations to plan provisions, code provisions and evidence in the record. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. That the findings supporting the challenged decision are similar or identical to those adopted in a previous local government decision based on a different site plan does not, of itself, provide a basis for reversal or remand. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. There is no statutory or administrative law requirement that *all* legislative decisions be supported by findings. However, where there is a local code provision requiring that findings be adopted in support of legislative decisions, the absence of such findings, or the adoption of purely conclusory findings, can provide a basis for reversal or remand. *Foster v. Coos County*, 28 Or LUBA 609 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government adopts finding which, among other things, explain how a proposed road alignment will reduce traffic delay and congestion and thereby minimize air quality impacts as required by a plan policy, and petitioner merely cites testimony that the proposed alignment will increase trips and pollution but does not specifically challenge the local government's findings, petitioner provides no basis for reversal or remand. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioner alleges a realigned minor arterial will in fact operate as a major arterial, but fails to challenge the local government's findings explaining why it believes the realigned roadway is properly classified as a minor arterial, petitioner provides no basis for reversal or remand. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where LUBA cannot determine which portions of a lower level local decision maker's decision are incorporated into the challenged governing body decision, the governing body's decision must be remanded. *Ellis v. City of Bend*, 28 Or LUBA 332 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a challenged permit decision is not supported by any findings, the decision must be remanded. *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA is not required to remand a decision for a local government to interpret its comprehensive

plan in the first instance unless petitioners offer some explanation for why they believe the plan provision the local government failed to address in its decision applies in the circumstances presented in the appeal. *Holsheimer v. Clackamas County*, 28 Or LUBA 279 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local governing body's findings are unclear with regard to whether the local government interprets the provisions of the local code's unstable slopes overlay district as applicable to approval of a subdivision preliminary plat, the challenged decision does not contain an interpretation adequate for review and must be remanded. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where respondent contends the findings challenged by petitioner are not critical to the appealed decision, and petitioner identifies no approval standards to which the challenged findings are relevant, the challenged findings, even if defective, provide no basis for reversal or remand. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings need not be perfect, and conditions may be imposed to assure compliance with approval standards. However, LUBA must be able to determine from the findings, conditions and evidence in the record that the relevant approval standards are met. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government adopts a number of different findings addressing a code standard requiring protection of the visual character of the area, and petitioners challenge some but not all of those findings, but make no attempt to explain why the findings taken as a whole are inadequate, petitioners provide no basis for reversal or remand. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioners challenge planning commission findings addressing a standard requiring that the proposed use not force a significant change in farm or forest practices on adjoining lands, but do not challenge findings adopted by the county court which go beyond the planning commission findings, petitioners fail to provide a basis for reversal or remand. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government decision identifies a number of comprehensive plan provisions as approval standards for a request to cut trees, it may not approve the request without adopting findings demonstrating that the application complies with the identified plan policies. *Gettman v. City of Bay City*, 28 Or LUBA 116 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where one of the local government's critical findings depends on the scope of the term "houseboat," and the term is not defined in the local code or in the challenged decision, the decision

must be remanded for the local government to supply the needed explanation of the scope of the term. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Even if a local code provision requiring that six percent of the gross area of a proposed subdivision be dedicated for open space is properly interpreted as a minimum rather than a maximum requirement, a decision requiring dedication of much more than six percent of the gross area of a proposed subdivision must be remanded so that the local government may adopt findings explaining that interpretation and showing the "rough proportionality" requirement of *Dolan v. City of Tigard* is satisfied. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. That a legislative land use decision is not supported by findings is not, in itself, a basis for reversal or remand, because no applicable legal standard requires that *all* legislative land use decisions be supported by findings. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. If the local government interpretation of an applicable comprehensive plan provision expressed in a challenged decision is unclear, such that LUBA cannot determine whether the findings supporting the decision are adequate to demonstrate compliance with that plan provision, LUBA will remand the decision to the local government to clarify its interpretation. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Arguments that approval of a fill permit violates local code provisions on fill in drainageways provide no basis for reversal or remand where (1) the local government adopted findings that the disputed fill was not placed in a drainageway, (2) those findings are supported by substantial evidence, and (3) petitioner does not specifically challenge the findings. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner fails to challenge a local governments' findings that fill is not located in a drainageway or floodway and that the fill will not endanger adjoining properties, as required by local code and plan standards governing fill, but rather expresses disagreement with the local government based in part on evidence not the record, petitioner's challenge provides no basis for reversal or remand. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the local code's definition of "northern lot line" is ambiguous and recognizes there can be more than one northern lot line on any given piece of property, and the challenged decision determining compliance with solar access setback requirements simply contains a conclusory statement that a flag lot has only one northern lot line, LUBA will remand the decision for adoption of interpretive findings. *Sullivan v. City of Ashland*, 27 Or LUBA 411 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. If local government findings addressing different approval standards conflict with each other, and this conflict is not reconciled in the challenged decision, the conflict may undermine the findings sufficiently to render them inadequate to support the local government's determinations of compliance. *Doob v. Josephine County*, 27 Or LUBA 293 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government fails to adopt findings identifying and applying applicable criteria, it is not possible for LUBA to perform its review function. *Laine v. City of Rockaway Beach*, 26 Or LUBA 417 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A petitioner's assignment of error will be rejected where it simply alleges code violations, without supplying any supporting argument, or alleges inconsistent findings and lack of substantial evidence, without identifying the challenged findings. *Draganowski v. Curry County*, 26 Or LUBA 420 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Petitioner's argument that the county failed to address evidence that escaped dogs can cause great damage in rural areas provides no basis for reversal or remand, where the county found the proposed kennel will comply with a code standard requiring no significant increase in the cost of accepted farm and forest practices because the design of the kennel will result in no dogs escaping from the facility. *Larry Kelly Farms, Inc. v. Marion County*, 26 Or LUBA 401 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a comprehensive plan contains no existing inventory of significant aggregate resource sites and imposes different standards for plan amendments, depending on whether the amendment is a plan text or a plan map amendment, the local government must explain in its decision its rationale in processing and approving a request to amend the plan to designate a site as a significant aggregate resource site as a plan text amendment. *Nathan v. City of Turner*, 26 Or LUBA 382 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner lists a number of apparently relevant comprehensive plan policies and argues the local government erred by not addressing the policies in its decision, petitioner's argument is sufficiently developed for LUBA review, and the decision must be remanded so that the local government can address those policies in its findings. *Waugh v. Coos County*, 26 Or LUBA 300 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the challenged decision refers to a staff report and the applicant's proposed findings and explicitly incorporates those documents by reference, and those documents are attached as exhibits to the decision, the decision adequately adopts those documents as findings in support of the decision. *Lucier v. City of Medford*, 26 Or LUBA 213 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Although the small size of a property may limit the size and impacts of a proposed development, and therefore provide a basis for explanatory findings demonstrating compliance with approval standards limiting development impacts, the decision approving such development may not simply cite the small size of the property and conclude the standards are met. *Lucier v. City of Medford*, 26 Or LUBA 213 (1994).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the challenged decision does not identify the characteristics of a proposed "soil remediation" use, or compare those characteristics with those of the listed, permitted uses in the applicable zone, the findings are inadequate to demonstrate the proposed "soil remediation" use is similar to the listed, permitted uses in the applicable zone. *Murphy Citizens Advisory Comm. v. Josephine County*, 26 Or LUBA 181 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the challenged decision fails to explain whether an arguably relevant comprehensive plan provision imposes limitations on the kinds of uses allowed in the applicable zone, LUBA must remand the decision for such an interpretation. *Murphy Citizens Advisory Comm. v. Josephine County*, 26 Or LUBA 181 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioners raised an issue below concerning whether a particular code provision is an applicable approval standard, and the challenged decision contains no interpretation explaining that code provision is either inapplicable or satisfied, LUBA must remand the challenged decision. *Hixson v. Josephine County*, 26 Or LUBA 159 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioners contend the local government failed to adopt findings addressing standards that appear to be relevant to the challenged decision, and the challenged decision includes only a conclusory statement that applicants have adequately demonstrated compliance with such standards, LUBA will remand the decision for lack of adequate findings. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the challenged decision applies some design review standards to an application for conditional use permit approval, but fails to explain why other apparently applicable design review standards are inapplicable to the conditional use permit stage, the challenged decision must be remanded for the local government to adopt findings addressing the applicability of these other design review standards. *Moore v. Clackamas County*, 26 Or LUBA 40 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the local code requires that a proposed driving range not alter the character of the surrounding area "in a manner which substantially limits, impairs or precludes the use of surrounding properties" for listed permitted uses, and findings acknowledge safety as a relevant consideration but simply rely upon the striking areas being more than 300 yards from adjacent

properties to satisfy that safety consideration, the findings are inadequate to explain how the code standard is satisfied. *Moore v. Clackamas County*, 26 Or LUBA 40 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a challenged decision states certain findings supersede other inconsistent findings, a general challenge that findings adopted to support the decision are internally inconsistent provides no basis for reversal or remand, where petitioner fails to explain why the findings are inadequate to establish consistency with particular approval criteria or explain why alleged inconsistencies are not resolved by the designated superseding findings. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. An erroneous finding that the local government cannot impose a condition of subdivision approval requiring measures to mitigate off-site traffic impacts, provides no basis for reversal or remand, where the local government adopts superseding findings explaining why it believes such measures are not warranted and the local government's authority to require such measures is permissive rather than mandatory. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a challenged decision grants subdivision approval, petitioner's challenge to a finding that the property is located in two residential zones provides no basis for reversal or remand, where petitioner makes no attempt to explain why the zoning of the property is critical to the decision and both zones impose the same minimum lot area. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county code provision requires that there be no other "feasible location" for a proposed use, county findings that do not explain *why* identified alternative sites are not "feasible locations" for the proposed use are impermissibly conclusory, and LUBA will remand the challenged decision unless "the parties identify relevant evidence in the record which clearly supports" the county's decision in this regard. *Simmons v. Marion County*, 25 Or LUBA 647 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings supporting approval of a PUD that determine there are solutions available to various landslide, drainage and related problems affecting the subject property, and that those solutions are possible, likely and reasonably certain to succeed, are adequate to establish that the local government did not improperly defer compliance with relevant PUD standards. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the challenged decision lacks adequate findings of compliance with a relevant approval standard, LUBA will not reverse or remand if the parties cite evidence in the record that "clearly supports" a determination of compliance with the standard. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioner cites an apparently applicable standard, and respondents do not cite any findings of compliance with that standard, LUBA will remand the decision for the local government to adopt findings of compliance with the standard or an explanation of why the standard is inapplicable. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. In denying a request for permit approval, ORS 215.416(9) requires that a county provide an explanation of why the county believes the request fails to satisfy applicable standards. Where the required explanation is missing, LUBA will remand the decision. *Ball and Associates v. Josephine County*, 25 Or LUBA 525 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a subdivision approval standard simply requires connection with a storm drainage system, and there is no allegation that the subdivision cannot be connected to a storm drainage system, allegations that the challenged decision fails to find the storm drainage system will be adequate to handle storm water provide no basis for reversal or remand of the decision. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. That a challenged decision granting subdivision approval fails to demonstrate feasibility of compliance with an approval condition requiring that a subdivision street provide "no worse" access to an adjoining property than is currently provided to that adjoining property provides no basis for reversal or remand, where assuring "no worse" access is not required by any applicable approval standard. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Under ORS 215.448(1)(c), home occupations must be operated in dwellings or other buildings normally associated with uses permitted in the applicable zone. Where the county adopts no findings addressing this requirement, the decision must be remanded for findings of compliance with the requirement. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA may not interpret a local government's comprehensive plan in the first instance, rather the local government must interpret its own plan, and LUBA may review that interpretation. *Citizens for Resp. Growth v. City of Seaside*, 25 Or LUBA 367 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. No statute or appellate court case requires that all legislative land use decisions be supported by findings. Absent allegations by petitioner that a legislative decision violates particular legal standards, a local government's failure to adopt findings in support of that legislative decision addressing the statewide planning goals and local comprehensive plan is not, of itself, a basis for reversal or remand of the decision. *Oregon City Leasing, Inc. v. Columbia County*, 25 Or LUBA 129 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where findings state facts relevant to whether a proposed nonfarm use will interfere with accepted farming practices, but do not identify the types of farming occurring in the area, and those findings are challenged as inadequate and not supported by substantial evidence, LUBA will sustain the challenge in the absence of any attempt by respondents to defend the findings or identify evidence supporting the findings. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a decision recites facts that might provide a basis for explaining why a proposed nonfarm use will not materially alter the land use pattern of the area, but the findings do not identify the relevant area, examine uses existing in the area, or explain why the proposed use will not materially alter the stability of the land use pattern of the area, the findings are inadequate. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings that a parcel lacks water rights and does not produce sufficient forage for livestock without supplemental feed are inadequate to demonstrate the parcel is generally unsuitable land for agricultural production, where the parcel is large, has two active springs and is currently leased for grazing. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county approves a 120 unit PUD on rural land, but fails to address plan policies limiting the provision of urban public services on rural land, a remand is required so that the county may adopt findings explaining why these standards are not violated by the proposed PUD. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. When a party raises a relevant issue below concerning whether a perceived surplus of classroom seats is in fact not a surplus due to the effects of already approved development, the local government must address that issue in its findings. *Burghardt v. City of Molalla*, 25 Or LUBA 43 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where unchallenged findings adopted by a local government are sufficient to demonstrate that an applicable approval standard is not met, petitioner's challenge to other findings of nonconformance with that approval standard provide no basis for reversal or remand. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Allegations that amount to no more than a disagreement with the ultimate conclusion reached by the local government in its findings, provide no basis for reversal or remand of the challenged decision. *McGowan v. City of Eugene,* 24 Or LUBA 540 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings that a proposed comprehensive plan map designation will offer more protection for resources identified in certain comprehensive plan policies than the existing plan map designation

are adequate to support the change in plan designation, absent some explanation of why those findings are inadequate. *Reeves v. Washington County*, 24 Or LUBA 483 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the challenged findings are not necessary to the decision and do not purport to be binding on future proceedings, they provide no basis for reversal or remand. *Reeves v. Washington County*, 24 Or LUBA 483 (1993).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government fails to adopt any findings addressing apparently applicable statewide planning goal, administrative rule and comprehensive plan criteria, the local government may not avoid a remand by arguing petitioner failed to preserve its ability to raise the issue of compliance with those provisions by not raising the issue with sufficient specificity during the local proceedings. In such circumstances, it is the failure to adopt findings that necessitates remand. *ODOT v. City of Waldport*, 24 Or LUBA 344 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. That there are no findings establishing that the local government independently verified the evidence submitted by an applicant provides no basis for reversal or remand of the local government's decision. *Giesy v. Benton County*, 24 Or LUBA 328 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will not consider a challenge to the adequacy of or evidentiary support for particular findings supporting a land use decision, where petitioner fails to include sufficient argument explaining why those findings are critical to the challenged decision. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner alleges a zoning map amendment violates plan policies and an LCDC administrative rule, a local government is obligated to adopt findings explaining either why the plan policies and rule do not apply to the disputed zone change or why the zone change is consistent with the plan policies and rule. *Recht v. City of Depoe Bay*, 24 Or LUBA 129 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a decision maker does not clearly identify in its decision the portions of a document that it adopts by reference as findings, it runs a risk that LUBA will not be able to identify and review any portion of such document as findings of the decision maker. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government's determination of compliance with a code standard requiring that adequate water service be provided to a proposed development is based entirely on the use of surface water, whether there are sufficient findings and evidence to demonstrate the adequacy of ground water to serve the proposed resort does not provide a basis for reversal or remand of the local government's decision. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government adopts findings specifically addressing an approval standard, petitioners may not fail to challenge the adequacy of the local government's findings, or their evidentiary support, and simply allege reasons why they believe the standard might be violated. *Mercer v. Josephine County*, 23 Or LUBA 608 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Inadequate findings concerning one of the bases for denying a permit application provide no basis for reversal or remand where there are other adequate findings of noncompliance with applicable approval standards. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A local government commits no error by failing to adopt findings addressing the impacts of a comprehensive plan transportation map amendment on an inventoried Goal 5 resource site, where the record shows the resource site is located outside the area affected by the challenged plan transportation map amendment. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. City decisions granting preliminary and final subdivision plat approvals which are not supported by findings which identify the relevant approval standards and explain why those standards are met must be remanded for adoption of the required findings. ORS 227.173(2). *Warren v. City of Aurora*, 23 Or LUBA 507 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A challenged land use decision must contain findings addressing the applicable approval standards. *Veach v. Wasco County*, 23 Or LUBA 515 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government neither adopts findings demonstrating compliance with a permit approval standard, nor finds it is feasible to comply with that standard, but instead defers the required determination of compliance with that standard to a later stage of the approval process where only the applicant has a right to notice and to participation and to appeal the decision, the decision must be remanded. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government adopts findings expressing alternative bases for concluding a particular approval criterion is met, and petitioner challenges only the findings addressing one of the bases, the assignment of error will be denied. *Avgeris v. Jackson County*, 23 Or LUBA 124 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner challenges a decision approving a nonforest dwelling on the basis of past bug infestations, but makes no attempt to demonstrate any connection between the proposed dwelling and the likelihood of additional bug infestations, and the local government adopted unchallenged findings that the dwelling would reduce the likelihood of such infestation, petitioner's challenge will be rejected. *Camp v. Josephine County*, 23 Or LUBA 6 (1992).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings which are not essential to the challenged decision, even if erroneous in some way, do not provide a basis for reversal or remand of the decision. *Marson v. Clackamas County*, 22 Or LUBA 497 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. That a finding is impermissibly conclusory, or is without evidentiary support in the record, is a basis for reversal or remand only if that finding is essential to the challenged decision. Therefore, where petitioners challenge the adequacy of or evidentiary support for a specific finding, they must also explain why that finding is essential to demonstrating compliance with an applicable approval standard. *Brandt v. Marion County*, 22 Or LUBA 473 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a county's findings in support of a decision approving a division of an EFU-zoned farm parcel into two farm parcels fail to distinguish between commercial and noncommercial agricultural enterprises in the area, the decision must be remanded. *Still v. Marion County*, 22 Or LUBA 331 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government fails to adopt findings explaining why an amendment to its acknowledged comprehensive plan complies with the statewide planning goals, LUBA relies on respondents to provide argument and citations to the record in response to a petitioner's allegations concerning goal violations. *Von Lubken v. Hood River County*, 22 Or LUBA 307 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where there is no applicable standard requiring a demonstration that there is a need for the proposed use, that findings stating there is a need for the proposed use are inadequate or not supported by substantial evidence provides no basis for reversal or remand. *Murray v. Clackamas County*, 22 Or LUBA 247 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the challenged decision includes findings which appear sufficient to meet an applicable approval criterion, and petitioners offer no explanation of why the findings are inadequate, petitioners provide no basis for reversing or remanding the decision. *Broetje-McLaughlin v. Clackamas County*, 22 Or LUBA 198 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where findings are inadequate to allow review of a local government's decision, LUBA will remand the decision. *Seger v. City of Portland*, 22 Or LUBA 162 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. While LUBA does not reverse or remand on the basis of inadequate findings if the local government cites evidence in the record to "clearly support" the challenged decision, where the evidence in the record is conflicting, such evidence does not "clearly support" the challenged decision. *Cummins v. Washington County*, 22 Or LUBA 129 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. In amending its urban renewal plan, a city is not required to adopt a financial analysis for an unsubsidized headquarters hotel or find that an unsubsidized headquarters hotel is financially feasible under ORS 457.085(3)(g) and 457.095(6) where (1) the original urban renewal plan included a subsidized headquarters hotel as an authorized project, and (2) the amendment to the urban renewal plan does not presently withdraw authorization for a public subsidy for the headquarters hotel. *Holladay Investors, Ltd. v. City of Portland,* 22 Or LUBA 90 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA does not reverse or remand a decision on the basis of inadequate findings where the parties cite evidence in the record which clearly supports the decision. *Kirkpatrick v. Jackson County*, 22 Or LUBA 3 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where the challenged decision incorrectly states that certain issues are not relevant to the applicable approval criteria, but also includes findings addressing those issues, there is no basis for reversal or remand of the decision unless petitioners establish that the findings are inadequate to demonstrate compliance with the applicable approval standards. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. An incorrect finding does not provide a basis for reversal or remand where there is no indication in the challenged decision that the decision maker relied on the incorrect finding in determining compliance with applicable approval criteria. *Reynolds v. Clackamas County*, 21 Or LUBA 412 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where petitioners provide no explanation of why detailed findings addressing particular approval standards are inadequate to demonstrate compliance with those standards, LUBA will not sustain petitioner's assignment of error. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local code standard provides blocks may not exceed 1,000 feet unless topography or location of adjoining streets justifies an exception, and an issue is raised during the local proceedings concerning a proposed block in excess of 1,000 feet, the local government must adopt findings explaining why a block in excess of 1,000 feet is justified. *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government finds that otherwise applicable street width standards need not be satisfied in a proposed subdivision under a local code provision allowing narrower roads where consistent with "a plan for the neighborhood," and petitioners do not challenge that finding, petitioners' arguments that the subdivision violates street width requirements must be rejected. *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Challenges to findings that are not necessary to show compliance with applicable approval standards provide no basis for reversal or remand. *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where LUBA upholds one or more bases for a county's decision denying a request for land use approval, findings concerning an additional basis for denying approval provide no basis for reversal or remand, even if such findings are erroneous. *Carsey v. Deschutes County*, 21 Or LUBA 118 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a local government's findings are inadequate to establish that a proposed homeless shelter will not provide "care," but the record contains evidence which clearly supports such a determination, LUBA will affirm the local government's determination. *Smith v. City of Portland*, 21 Or LUBA 111 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. An assignment of error which simply alleges that findings addressing approval standards are conclusory will be rejected, even though some of the challenged findings are conclusory, if other findings addressing the approval standards are not conclusory and petitioner provides no additional argument in support of his allegations. *Wethers v. City of Portland*, 21 Or LUBA 78 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a necessary finding is technically defective in that it does not identify the facts upon which the decision relies, but the respondent identifies evidence in the record "which clearly supports" the decision, the defective finding provides no basis for reversal or remand. ORS 197.835(9)(b). *Wethers v. City of Portland*, 21 Or LUBA 78 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a petitioner alleges a local government failed to address specific plan policies in approving plan and zone map amendments, and the local government neither identifies findings addressing those plan policies nor claims the cited plan policies are inapplicable, the decision must be remanded so the local government can adopt findings explaining why its decision is consistent with the plan policies. *Wethers v. City of Portland*, 21 Or LUBA 78 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Findings addressing land use standards may or may not be required to support a legislative land use decision. However, the absence of such findings has no bearing on whether a decision actually is a land use decision. *Jentzsch v. City of Sherwood*, 20 Or LUBA 575 (1991).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. If findings in support of a denial of quasi-judicial land use approval adequately explain a sufficient basis for denial, they will be upheld. *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Allegations regarding the adequacy of the local government's findings to establish compliance with a particular comprehensive plan policy provide no basis for reversal or remand of the local government's decision if that policy is not an approval standard. *Thormahlen v. City of Ashland*, 20 Or LUBA 218 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where a challenged finding is conclusory and inadequate, but clearly relies on the preceding finding which is much more detailed, and petitioner does not challenge the preceding finding, the inadequacy of the challenged finding itself provides no basis for reversal or remand. *Keudell v. Union County*, 19 Or LUBA 394 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. LUBA will only reverse or remand a challenged decision on the basis of inadequate findings if the findings are necessary to the decision. *Lowrie v. Polk County*, 19 Or LUBA 363 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where respondent does not cite evidence in the record in support of its contention that there is evidence in the record which clearly supports the findings it failed to make, LUBA cannot deny a challenge to the adequacy of the findings on the basis of ORS 187.835(9)(b). *Chambers v. Clackamas County*, 19 Or LUBA 355 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. In addition to demonstrating that a challenged finding is inadequate or unsupported by substantial evidence, a petitioner must demonstrate the challenged finding is necessary to support the challenged decision. *Griffith v. City of Milwaukie*, 19 Or LUBA 300 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A challenge to the adequacy of and evidentiary support for a finding that a modification of a previously imposed condition of land use approval is justified based on changed circumstances provides no basis for reversal or remand, where none of the applicable criteria require that modifications of conditions of approval be based on changed circumstances. *Griffith v. City of Milwaukie*, 19 Or LUBA 300 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A city decision to require, as a condition of approval, dedication of a right-of-way to improve street system efficiency and to provide future access to interior developable parcels is supported by adequate findings and substantial evidence in the record where the city's findings and the evidentiary record are sufficient to show a legitimate planning purpose is furthered by requiring the right-of-way dedication. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an existing plaza fully satisfies a code requirement for at least one plaza in excess of five percent of the area of the block, no "adjustment" was required to grant a requested development approval which includes a plaza of less than five percent of the block's area. Because no

"adjustment" was required, even if the findings explaining the justification for the "adjustment" are inadequate, they provide no basis for remand. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 19 Or LUBA 1 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. Where an ordinance provision requires that a proposed conditional use be consistent with the comprehensive plan, and petitioners contend an apparently relevant plan provision was not addressed, the county must identify findings establishing, or evidence "clearly supporting," a determination that either (1) the plan provision does not apply, or (2) the proposed conditional use is consistent with the plan provision. *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. OAR 660-04-020(2)(a) requires that the amount of land included in a goal exception be justified. Where a county's findings make no attempt to justify the number of acres included in an exception for a landfill, the county's decision must be remanded so that findings justifying the amount of acreage included in the exception can be adopted. *Dyke v. Clatsop County*, 18 Or LUBA 787 (1990).

28.8.6 LUBA Scope of Review – Grounds for Reversal/Remand – Inadequate Findings. A local government is not required to explain in its findings why it chose not to rely on certain evidence, as long as LUBA can conclude a reasonable decision maker could decide as the local government did, in view of all the evidence in the record. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a decision-maker relies on 40-foot contour maps in the record, sourced from county data, to determine the slopes on the subject property, an argument that the decision-maker erred by disregarding finer-scale, two-foot contour maps that petitioners submitted provides no basis for reversal or remand where the decision-maker reasoned that petitioners' contour maps were "not reliable, accurate or trustworthy evidence" because they were not signed by a registered professional surveyor and because they contained an incorrect scale, and where the petitioners have not otherwise established that credible evidence weighs overwhelmingly in favor of their description of the slopes on the subject property or that the evidence upon which the decision-maker did rely was not substantial evidence. *Velasquez v. Jackson County*, 80 Or LUBA 1 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a local government adopts a post-acknowledgment plan amendment creating a new zone that allows 20-acre lots, an argument that DEQ rules indicate that properties of 10 or more acres in size are generally able to support on-site wastewater systems is not sufficient to establish compliance with Goal 11 with respect to wastewater where those rules appear for the first time in the response brief, where there are no findings or evidence in the record addressing wastewater, and where there is no evidence in the record that the rule is accurate within the portion of the local government's jurisdiction at issue. Similarly, references to the proximity of the majority of candidate lands to fire districts, to evidence that more demand for funds would not be created in one of the districts, to 10 years of data indicating that less than two percent of fires resulted from residential structures, and to local fire protection standards with which future development would be required to comply are not sufficient to establish compliance with Goal 11 with respect to fire protection where there is no analysis of the likelihood of increased fire as more residences are potentially introduced into the area or discussion of the capacity of the existing fire service organizations to provide more service. *DLCD v. Douglas County*, 80 Or LUBA 98 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a neighbor describes observing, from their living room view, minimal orchard, meadow, and garden-related activity on the property and, other than horses belonging to some of the owners of the property, never seeing any livestock or other animals on the property between 1970 and 2004, and where the neighbor subsequently reiterates that there was no farm use, such as cattle or crops, between 1978 and 1983 and that, during the 1980s, owners of the property kept their show horses on the property, a local government may reasonably conclude that the property was "not managed for three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced $20,000 or more in annual gross income" for purposes of *former* ORS 197.247(1)(a) (1991), even where the record includes (1) aerial photos from 1979 and 1982, (2) a 1979 permit for a new barn, (3) a 1987 farm dwelling approval, and (4) testimony from other area residents contradicting the neighbor's testimony, where the record does not disclose the proximity of the other area residents' properties to the subject property or whether those area residents had made firsthand observations of the subject property during the relevant statutory period. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. For purposes of designating marginal lands under *former* ORS 197.247

(1991), it is not enough for an applicant to provide a list of the allegedly qualifying lots or parcels; the applicant must provide foundational evidence that the lots or parcels are lawful and that lots or parcels that were in common ownership on July 1, 1983, are not overcounted. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. An attorney-land-use-consultant-prepared ESEE analysis including numerous plans, reports, and other documents supporting the redesignation and rezoning of protected habitat from forest land to marginal land under *former* ORS 197.247 (1991) is not sufficient to rebut expert testimony including (1) a letter authored by an ODFW biologist that generally discusses the cumulative impact of development on habitat and (2) general ODFW guidance related to levels of residential density in areas of peripheral big game habitat absent evidence of the attorney land use consultant's expertise. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In the context of an application to remove property from a county's Goal 5 inventory of significant aggregate resources, where the county has previously determined, in two separate final, acknowledged decisions—one based on area-specific soils mapping and the other based on periodic review which resulted in an updated inventory—that the property should not be included on the county's Goal 3 inventory of agricultural lands; where the county zoned the property for surface mining, a zone that does not implement Goal 3, after one of those previous determinations; and where the ESEE analysis for the property does not specify a post-mining zoning designation or use, a conclusion that the property is not agricultural land is supported by substantial evidence. The county, having previously determined that the property is not agricultural land, is not required to revisit whether the property is agricultural land. *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 252 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In the context of an application to change the comprehensive plan designation of property to Rural Residential Exception Area, where a comprehensive plan provision provides that "any new Rural Residential Exception Areas need to be justified through initiating a non-resource plan amendment and zone change by demonstrating that the property does not meet the definition of agricultural * * * land," a county correctly determines that an applicant satisfies that provision by producing copies of the county's adopted and acknowledged agricultural lands inventories, which do not include the property. Even where an opponent submits an NRCS soils map into the record, which the opponent argues shows the property's soils constitute agricultural lands, where the NRCS website that the opponent used to prepare the soils map includes a disclaimer regarding the large scale of mapping, stating that "[e]nlargement of maps beyond the scale of mapping can cause misunderstanding of the detail of mapping and accuracy of soil line placement," a reasonable decision-maker would rely on the inventories to conclude that the property is not agricultural land, and a reasonable decision-maker could determine that the NRCS soils map is less credible than the inventories. *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 252 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a city bureau manages the city's transportation system, including private uses in the city right-of-way, and where bureau staff have special expertise in the safe and efficient use of the right-of-way and various demands on streets, including traffic, parking, and loading, statements from the bureau (1) that studio apartments have lower turnover rates, less need for unloading large furniture, and, thus, less need for a loading space, and (2) that signed, infrequent on-street loading will not have a negative effect on the traffic safety or other transportation functions of the abutting right-of-way are evidence that would permit a reasonable person to find that an on-street loading space is adequate for a proposed studio apartment building's loading needs such that the development continues to meet the intended purpose of, and, therefore, qualifies for an adjustment to, an off-street loading space requirement, even where there is testimony in the record from an opponent of the development regarding anticipated negative congestion and safety impacts of off-street loading. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a city within Metro's jurisdiction adopts its portion of an intergovernmental concept plan into its comprehensive plan and applies an industrial zoning designation to a portion of the planning area with slopes greater than 10 percent, that Metro's previous decision to include the planning area in its UGB stated that land needed for industrial uses should generally have slopes of less than 10 percent and that a previous Metro housing need projection anticipated almost 600 more housing units than the industrial zoning designation would allow provide no basis for reversal or remand where Metro's previous UGB decision is not evidence, an applicable approval criterion, or a relevant consideration for the city in determining the correct zoning designation for the property and where Metro's previous housing need projection has been superseded by a later decision to remove the property from its inventory of buildable residential lands. *Watts v. City of Tualatin*, 80 Or LUBA 339 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where an approved site plan indicates that a replacement dwelling will be sited on an *adjacent* property, but where the building permit for the replacement dwelling allows a replacement dwelling "in the same footprint as the original home," and where an ArcGIS map marked with distances and existing development indicate that the footprint of the original dwelling was located on the *subject* property, a conclusion that the subject property does not "include[] a dwelling" for purposes of forest template dwelling approval under ORS 215.750(4)(d) is not supported by substantial evidence. *Bielefeld v. Lane County*, 80 Or LUBA 480 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will not second-guess a decision-maker's choice between conflicting evidence, including expert testimony, so long as a reasonable person could decide as the decision-maker did. *Fairmount Neighborhood Assoc. v. City of Eugene*, 80 Or LUBA 551 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a local code provision provides that issuance of a conditional use permit (CUP) requires a determination that "[t]he proposed use is or may be made compatible with

existing adjacent permitted uses and other uses permitted in the underlying zone," a local government decision granting a CUP is not supported by substantial evidence where it does not identify and describe all of the existing and permitted uses on adjacent properties and where it fails to analyze or measure the extent of the potential impacts of the proposed use and instead proceeds straight to mitigation measures. *Currie v. Douglas County*, 79 Or LUBA 585 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law. A county fails to correctly apply the farm impacts test at ORS 215.296(1) where it concludes that there are only a few farm or forest uses in the area but does not identify and discuss each farm or forest use, where it does not describe the operations on each of the surrounding properties devoted to farm or forest use, where it does not identify evidence of the unmitigated impacts of the proposed nonfarm use, and where it concludes that such impacts will be reduced but does not identify evidence that significant impacts are avoided. *Currie v. Douglas County,* 79 Or LUBA 585 (2019).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a county's comprehensive plan policy provides that "areas" may be designated rural commercial when the areas (1) have a "historical commitment" to commercial uses, or (2) the "areas" are "located within an Unincorporated Community" and have "direct access to a road of at least collector classification," petitioner has not demonstrated that the county commissioners' findings regarding the meaning of "area" are inadequate or that the county's reliance on a previous interpretation as authority for interpreting the term "areas" as used in rezoning criteria to refer only to the property being considered for rezoning, and not also to include the surrounding area, was in error where petitioner cites to no contextual differences suggesting that the term "areas" should be interpreted differently than the same term used in similar rezoning standards, or authority suggesting the county has an obligation to adopt specific findings regarding the parties' alternative interpretations. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will uphold a county's interpretation of its own comprehensive plan policy regarding when a property may be designated rural commercial where the county evaluated the historic uses of the subject property and concluded that those uses did not demonstrate a "historical commitment to commercial uses," after concluding that (1) temporary commercial uses, (2) incidental or accessory commercial uses to permitted residential or farm uses on the property, and (3) the current unlawful commercial uses on the property were not sufficient to demonstrate "historical commitment" of the property to commercial use, where the county chose to focus on "commitment" which the county understood to require an inquiry into the nature of the historic uses on the property and a determination of whether commercial uses have constrained the scope of the uses on the property such that going forward only commercial uses are feasible, rather than defining commitment in terms of years of commercial use. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Even though an applicant provides evidence of ownership of 200 or more acres in western Oregon after the application is deemed complete, a hearings officer correctly

concludes that an application for a forest template dwelling satisfies ORS 215.740(3), where nothing in the statute or local development ordinances requires an applicant for a large tract forest dwelling to prove ownership of the parcel at the time an application is submitted. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer's decision that an applicant has a nonconforming use right to grow up to 18 marijuana plants for medical purposes under the Oregon Medical Marijuana Act is supported by substantial evidence in the record, and LUBA will reject an assignment of error that argues that the hearings officer's decision is not supported by substantial evidence in the whole record, where (1) the record includes copies of at least twelve cards issued by the Oregon Health Authority (OHA), administrator of the medical marijuana program, some of which are expired, duplicates, or outside of the relevant consideration dates; (2) the hearings officer relied on some of those OHA cards to reach his conclusion about the number of plants allowed; (3) the hearings officer adopted eight pages of findings explaining his decision and his understanding of the evidence; and (4) petitioner fails to challenge those findings or explain why the evidence supports his application. *Feetham v. Jackson County*, 77 Or LUBA 296 (2018).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where county code requires a building in which marijuana is grown to be "equipped with an effective odor control system" which must "prevent unreasonable interference of neighbors' use and enjoyment of their property," and the odor control system is deemed permitted only after the applicant submits "a report by a [licensed] mechanical engineer * * * demonstrating that the system will control odor so as not to unreasonably interfere with neighbors' use and enjoyment of their property," a board of county commissioners' conclusion that the application satisfies these requirements is supported by substantial evidence where it relies upon an engineers' report which demonstrates that the applicant's proposed odor control system "will control" odor as designed. The odor control system need not be actually built prior to the project receiving approval. *King v. Deschutes County*, 77 Or LUBA 339 (2018).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will deny a petitioner's challenges to a county board of commissioners' conclusion that a project application satisfies the county code requirement that "[s]ustained noise" generated from a building in which marijuana is grown "shall not exceed 30 dB(A)," based upon statements made in the applicant's engineers' report where petitioner argues the engineer reports failed to adequately describe the system as built, did not consider site-specific characteristics or address allegations that the odor control systems will generate noise in excess of 30 dB(A), but petitioner failed to point to any evidence in the record that calls into question the engineer's statements that the operation will not produce "sustained" noise that exceeds permissible levels. *King v. Deschutes County*, 77 Or LUBA 339 (2018).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will deny a petitioner's challenge to a county board of commissioners' conclusion that a marijuana production project applicant had satisfied the requirement to provide proof that water is available to the property by providing a "statement that water is supplied from a public or private water provider," by providing a letter from a private

company stating it would supply water to the property where petitioner argues the letter is insufficient because the private water provider does not hold a water right. Based on its plain language, the county code does not require such a statement, but only requires a statement from a "private water provider" that they will provide water for the operation. *King v. Deschutes County*, 77 Or LUBA 339 (2018).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will deny petitioner's challenge that the provider of water must have "an authorized source of water under Oregon Water Law" where county code requires an applicant for marijuana production to provide proof that water is available to the property by providing a statement that "water is supplied from a public or private water provider," the county code does not further define "provider of water," and the county imposed a condition of approval requiring "the use of water from any source for marijuana production shall comply with all applicable state statutes and regulations including ORS 537.545 and OAR 690-340-0010." *King v. Deschutes County*, 77 Or LUBA 339 (2018).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A motion to take evidence under OAR 661-010-0045 is warranted only for one or more of the limited bases set out in OAR 661-010-0045(1). If granted, the motion allows new evidence to be admitted into LUBA's record only for those limited purposes; such evidence is not admitted into the local evidentiary record and cannot be cited to support or undermine findings of compliance with applicable approval criteria. *Conte v. City of Eugene*, 77 Or LUBA 547 (2018).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a municipal code requires that the "front lot line" of a corner lot "must" be considered the narrower street frontage "except when [city staff] determine[] topographical or access problems make such a designation impractical," the city's decision was not supported by substantial evidence in the record pursuant to ORS 197.835(9)(a)(C) when it determined that the lack of sidewalks on the narrower frontage, and the absence of a door on the side of the house facing the narrower frontage were "access problems" that made designating the narrower street frontage the front lot line "impractical." *McMonagle v. City of Ashland*, 76 Or LUBA 1 (2017).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioners seek reversal or remand of the city's decision pursuant to OAR 661-010-0071, and LUBA's decision agrees with petitioners that the city's decision improperly construed the municipal code and was not supported by substantial evidence in the record, but it is possible on remand that the petitioner's proposal could demonstrate compliance with the municipal code without significant changes to the proposed development, remand is the appropriate remedy. *McMonagle v. City of Ashland*, 76 Or LUBA 1 (2017).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A finding that city streets have adequate capacity to accommodate traffic generated on annexed land is not supported by substantial evidence, where the finding cites and relies only upon extra-record street capacity data found in the transportation system plans of three

nearby cities, rather than any evidence in the record. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Remand is necessary where a code provision allows a property line adjustment as long as the adjustment does not result in an unbuildable parcel being made buildable, but the record includes no evidence regarding whether the adjusted parcel had one or more buildable sites prior to the adjustment, and the findings on that point are conclusory and not supported by substantial evidence. *Lowell v. Jackson County*, 75 Or LUBA 251 (2017).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A finding that the noise created by wind turbines site on top of a building located next to a bay will be mitigated by ocean noise and noise generated by nearby sewage pumps is not supported by substantial evidence, where the record includes no evidence concerning how loud the ocean and sewage pumps are at the site of the building. *Burgermeister v. Tillamook County*, 75 Or LUBA 350 (2017).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A findings and evidentiary challenge to a county's decision that wind turbines will not be so noisy as to violate a "substantial impact on the neighborhood" standard will be rejected, where the county found that the wind turbines would be no noisier than a "refrigerator," an "average home," a "quiet bedroom," or a "quiet library," and petitioner makes no specific challenge to those findings or their evidentiary support. *Burgermeister v. Tillamook County*, 75 Or LUBA 350 (2017).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. City comprehensive plan goals, other adopted city plans and sub-plans, Metro Regional Framework and Regional Transportation Plans, and the Oregon Transportation Plan and Oregon Freight Plan are subject to judicial notice under ORS 40.090(4) or (7). However, LUBA will not consider "adjudicative facts" or facts found within judicially cognizable documents that are asserted for an "adjudicative" purpose, *i.e.*, to provide evidentiary support or countervailing evidence with respect to an applicable approval criterion in an adjudicatory setting. *Columbia Pacific v. City of Portland*, 75 Or LUBA 552 (2017).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Remand is required where the county standards provide that a parcel created by land sale contract is a legal lot of record only if the contract is (1) dated and signed by the parties, (2) includes a separate legal description, and (3) does not include more than one legal description, but the county concluded that a parcel is as a legal lot of record based on an incomplete copy of a land sale contract without signatures that did not provide a separate legal description for the subject parcel. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. ORS 197.835(11)(b) is a limited vehicle that does not allow LUBA to affirm a decision based on an alternative legal theory not considered below, if that alternative theory requires significant, discretionary legal and evidentiary determinations regarding which

instrument created a disputed parcel, and whether the resulting parcel is a legal lot of record. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA's standard of review of evidentiary challenges to a limited land use decision under ORS 197.828(2)(a) is arguably less rigorous than the standard of review of a land use decision under ORS 197.835(9)(a)(C). *Reinert v. Clackamas County*, 74 Or LUBA 427 (2016).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Remand is necessary where a code provision requires that development with multiple access points take access from the lower classification street, unless "physical conditions preclude" taking access from the lower classification street, and the city approves the development with access to a higher classification street without any evidence or explanation in the record demonstrating the code provision is complied with or that the exception applies. *McCollough v. City of Eugene,* 74 Or LUBA 573 (2016).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Remand is necessary where a code standard requires that a percentage of the "frontage" be occupied by buildings, but the city approved development with 50 feet of frontage occupied by no buildings without any explanation in the record or decision why the standard is met. *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Remand is required where a city approves development based on a calculation of a lot's frontage along a cul-de-sac with the frontage measured in a straight line across the cul-de-sac, instead of along the property line, without any explanation in the record or decision for why measuring the frontage in that manner is consistent with code definition of frontage: the portion of the lot abutting a street. *McCollough v. City of Eugene,* 74 Or LUBA 573 (2016).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The standard of review that LUBA applies in reviewing substantial evidence challenges to critical findings of fact is not particularly demanding. City findings that a landslide poses a danger to water reservoirs, which are supported by the testimony of two engineers, one of them a geotechnical engineer, are supported by substantial evidence where the contrary evidence is not sufficient to call the testimony of the engineers into question. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A city finding that the reinforcing bars on a nineteenth century reservoir are spaced 10 feet apart is supported by substantial evidence, where a building assessment, a Natural Register Narrative and testimony by an engineer all take the position that the reinforcing bars are spaced 10 feet apart. A petitioner's substantial evidence challenge, which relies on poor quality, inconclusive, old black and white photos is not sufficient to call the reliability of the evidence the city relied on into question. *Fernandez v. City of Portland,* 73 Or LUBA 107 (2016).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer's conclusion that the transportation systems are adequate to support a proposed mining use is not supported by substantial evidence in the record where the hearings officer relies on a county road engineer's statement that is not supported by any estimates or actual measurements of traffic volumes or capacity, and are conclusory statements based on a traffic impact statement that does not address capacity of the public roads to serve the proposed use. *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301 (2016).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer's conclusion that proposed mining activities will not increase the risk of fire is not supported by substantial evidence in the record where the hearings officer relies on a letter from the Oregon Department of Forestry that does not evaluate the fire hazard from transporting hot asphalt from the batch plant in trucks on a haul road. *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301 (2016).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A reasonable decision maker could rely on planning staff testimony that with zoning ordinance provisions allowing transfer of density, it is not necessary to remove 500,000 cubic yards of rock from a five-acre site to permit the site to be developed residentially. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Evidence in the record consisting of (1) a permit issued in 1992 authorizing an aggregate processing operation on a site that is included on the county's inventory, and (2) subsequent annual review letters from the county confirming that the conditions of the permit are met and renewing the permit are substantial evidence supporting a county's conclusion that the aggregate processing operation is "currently approved" within the meaning of OAR 660-023-0180(5)(g). *Pioneer Asphalt, Inc. v. Umatilla County*, 71 Or LUBA 65 (2015).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The difference between substantial evidence review of a limited land use decision under ORS 197.828(2)(a) and the more rigorous substantial evidence review of a land use decision at ORS 197.835(9)(a)(C) is legally irrelevant where LUBA concludes that the evidence in the record is evidence a reasonable decision maker would rely on under the more rigorous ORS 197.835(9)(a)(C) "substantial evidence in the whole record" standard of review. *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A reasonable person could find based on the evidence in the record that where only a modest increase in vehicle trips is created by a PUD, the PUD is "reasonably compatible with adjacent and nearby land uses," particularly given the inherently subjective nature of the criterion. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Based on evidence in the record that (1) no level of service deficiencies would occur based on new trips added to the area and (2) the PUD will not generate additional

traffic above the threshold required for a TIA, A reasonable person could find, that a PUD will have minimal impact on traffic off-site, particularly given the inherently subjective nature of the criterion. *Oakleigh-McClure Neighbors v. City of Eugene,* 70 Or LUBA 132 (2014).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Land use proceedings are not governed by rules of evidence, and a local government may rely in part on a planner's testimony regarding a phone conversation with the fire district chief, among other evidence, to conclude that the water supply is sufficient for fire suppression, notwithstanding that the fire district chief did not submit direct testimony. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will reject an argument that a hearings officer errs in approving a variance from a 22-foot street width standard to allow an 18-foot width because the narrower width does not provide the same level of access as the required width, where the variance criteria do not require the varied road width to provide the same level of access. *Carver v. Washington County*, 70 Or LUBA 278 (2014).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer does not err in concluding that the applicant for a road width variance had exhausted all practical methods to construct the road to code-required width, where the evidence shows that only one of several adjoining landowners was willing to sell the right-of-way necessary for the code-required width. *Carver v. Washington County*, 70 Or LUBA 278 (2014).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A decision that redesignates a proposed new driveway as an industrial use based on "a historical commitment to industrial uses" is not supported by substantial evidence in the record where there is no evidence that the portion of the property on which the new driveway will be located has a "historical commitment to industrial uses." *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where, based on Natural Resources Conservation Service data, opponents take the position that the water table lies two feet below the surface of a proposed topsoil mining operation, but the local government accepts the applicant's position that the water table lies 125 feet below the surface, but no party identifies the evidence the applicant and local government relied on for the 125-foot estimate, LUBA will remand the decision so that the county can adopt findings explaining the large discrepancy in the two estimates and why it accepted the 125-foot estimate. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the evidence in the record demonstrates that an applicant for a destination resort map amendment's consultant compared the entirety of the applicant's ownership of land within the county, based on the county's ownership database, to the properties proposed for inclusion on the map of eligible lands, and disqualified several properties from inclusion on

the map that included ineligible lands and did not comply with ORS 197.435(7) (the 30 percent rule), a reasonable person could rely on that evidence to conclude that the remaining properties included on the map comply with ORS 197.435(7) and that the proposed map amendment is supported by an adequate factual base. *Root v. Klamath County*, 68 Or LUBA 124 (2013).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where identifying the intersections that must be included and studied in a transportation impact analysis is governing by the local government's code, and under the code an intersection should have been included and studied, a city decision that the intersection need not be studied because it was not identified at an earlier scoping stage is error. *Oregon Coast Alliance v. City of Newport*, 68 Or LUBA 318 (2013).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Substantial evidence in the record supports a decision that noise from a conditional use airport will have minimal impact on the surrounding neighborhood where the only evidence in the record is a noise study submitted by the applicant that provides an accurate measurement of the airplane noise. *Yih v. Linn County*, 68 Or LUBA 412 (2013).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A city's decision that it has the required majority of consents to annex an area is supported by substantial evidence, where the contract consents have been executed and recorded and there is nothing on the face of the documents that calls their validity into question. Not-yet-litigated contentions of the consenting landowners that the contract consents are invalid because they were obtained through coercion or that the contract consents have been revoked do not so undermine the contract consents that they can no longer be viewed as substantial evidence. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Given the subjectivity of a criterion requiring that the proposed comprehensive plan map amendment be "in the public interest with regard to neighborhood or community concerns," a reasonable person could rely on the testimony of industrial businesses adjacent to the property that a proposed mixed-use apartment building located along a heavily used truck route could create conflicts between the residents and truck traffic to support a finding of that the proposed change is not in the public interest. *Vest v. City of Molalla*, 66 Or LUBA 155 (2012).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Unless presented with some evidence to the contrary, a city decision maker could reasonably assume that proposed residential development will generate negligible air and noise pollution. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Substantial evidence in the record supports a city's finding that a proposed cell tower location is the only feasible location where the evidence demonstrates that (1) alternative sites are located outside of the search area identified by applicant for meeting its coverage objectives, (2) the tower cannot reasonably be located within a right-of-way because there is not

sufficient area within the right-of-way to locate all of the necessary equipment, (3) co-location is not feasible because the heights of existing towers are inadequate, and (4) co-location on an existing rooftop facility is not feasible due to inadequate structural integrity of the rooftop. *Hill v. City of Portland*, 66 Or LUBA 250 (2012).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where none of the applicable approval criteria require that evidence must be provided by an engineer licensed in Oregon or require the city's decision to be based solely on the testimony of a licensed engineer, the fact that the engineer is not licensed in Oregon, by itself, is not a basis to reverse or remand the decision. *Hill v. City of Portland*, 66 Or LUBA 250 (2012).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A petitioner's arguments that the local government misconstrued OAR 660-012-0070(5) and (6) and adopted inadequate findings not supported by substantial evidence do not provide a basis for reversal or remand, where OAR 660-012-0070(7) governs the local government's decision instead of OAR 660-012-0070(5) and (6), and the two sets of rules have different substantive terms, requirements and standards. *Storm v. Yamhill County*, 66 Or LUBA 415 (2012).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. It is the local government that determines—either explicitly or implicitly—whether the party with the burden of proof has carried his or her burden of proof. A local government decision must conclude that the governing criteria are satisfied—presumably because the party with the burden of proof carried his or her burden. Once that decision is made, it is subject to LUBA review to determine whether the local government's decision is supported by substantial evidence. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A county is entitled to rely on a wind turbine operator's expert's testimony regarding alleged noise violations where the opponent's expert's criticisms of that testimony fall substantially short of demonstrating that a reasonable person would not rely on the operator's expert's testimony. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A petitioner's challenge to a city's local appeal fee, on the grounds that the record does not include evidence establishing that the fee is consistent with ORS 227.180(1)(c), is not a basis for reversal or remand, where the city's final decision maker lacks authority under the city code to develop an evidentiary record regarding the appeal fee. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer's decision that it is feasible for a proposed kennel operation to comply with DEQ's applicable noise standard is not supported by substantial evidence in the record, where an engineer's report concludes that noise from dogs barking in the outdoor kennel play area could exceed the DEQ hourly noise level limits on the property directly to the

east and there is nothing in the record that rebuts that conclusion. *Butcher v. Washington County*, 65 Or LUBA 263 (2012).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Arguments that a proposed system for controlling odor and leachate will not in fact control odor and leachate generated by the proposed use are insufficient to demonstrate that the decision is not supported by substantial evidence where nothing in the record calls into question the efficacy of the proposed odor and leachate system. *Cottonwood Capital Property Mgmt. LLC v. City of Portland*, 65 Or LUBA 370 (2012).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the critical finding in a hearings officer's decision in a code enforcement proceeding is that petitioner had a longstanding regular practice of mowing grass and blackberry bushes in the riparian zone on his property, the only evidence that supports that finding is the testimony of the code enforcement officer based on field notes regarding conversations he had with petitioner that are not part of the record, petitioner testifies in the hearings before the hearings officer that he mowed in the riparian area on only one occasion, and it is not clear that the hearings officer even recognized that the testimony of petitioner and the code enforcement officer conflicted on the critical issue, remand is required. The hearings officer may be able to explain why he believed the code enforcement officer over petitioner, but without any explanation his decision is not supported by substantial evidence. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearing official's failure to require that the applicant for a group care home show exactly where the proposed home would be located within a proposed 7,700-square-foot footprint, how large the home would be and what it would look like provides no basis for reversal or remand, where the applicable approval standard only requires that the home not have significant adverse impacts, and the hearing official explains that the potential number of residents and other operational characteristics of the home are known and the impacts of the home are more likely to be attributable to the operational characteristics than the design, size and location of the home. *Phillips v. Lane County*, 62 Or LUBA 92 (2010).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Although a hearing official is entitled to rely on the expert opinion of a county sanitarian that a required septic drain-field expansion is feasible, where opponents offer a detailed explanation for why the subject property may not be able to accommodate the required expansion and replacement drain-field, the county sanitarian must supply more than an unexplained expression of belief that the needed expansion is feasible. *Phillips v. Lane County*, 62 Or LUBA 92 (2010).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A local government decision that determines that an entire property is located on a foredune and denies an application for a dwelling based on that determination will be remanded where the findings do not explain why the local government reached the conclusion it

reached and the conclusion is not supported by any evidence in the record identified by the local government. *Rudell v. City of Bandon*, 62 Or LUBA 279 (2010).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The lack of evidence in the record regarding depth or location of contaminated groundwater on a mining site and the possibility that groundwater might enter the adjacent river is not a basis to reverse or remand under a code provision requiring consideration of impacts on conflicting uses within 250 feet of the property, where the only conflicting use identified is a city water intake located 3,500 feet upstream of the mining site beyond the head of tide, and the petitioner cites no evidence or argument suggesting how contaminated groundwater from the site could migrate upstream above the head of tide to impact the municipal water intake. *Oregon Shores Cons. Coalition v. Curry County*, 61 Or LUBA 8 (2010).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Although a local government land use decision maker is entitled to choose between conflicting believable expert testimony, where the decision maker does not demonstrate that it recognized the conflicting expert testimony and chose to believe one expert's testimony rather than the other expert's testimony, remand is required. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Erroneous information, if relied upon by a city council in rendering a land use decision, might result in a decision that is not supported by substantial evidence. But where petitioner fails to identify any erroneous information, petitioner provides no basis for reversal or remand. *Bowers v. City of Eugene*, 58 Or LUBA 51 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the permission of an adjoining private landowner is necessary to provide access to proposed development, the applicant need not submit evidence that the adjoining landowner has granted permission or that it is feasible for the landowner to grant permission, as long as such permission is not precluded as a matter of law and the local government imposes conditions ensuring that permission will be obtained prior to final development approval. *Holbrook v. City of Rockaway Beach*, 58 Or LUBA 179 (2009).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A county errs in taking "official notice" of evidence that is not in the record where it purports to take official notice of the scenic qualities of an area and the decision relies on those qualities. *Hegele v. Crook County*, 56 Or LUBA 1 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Arguments that merely cite to opposing testimony and contend that that testimony should be believed over the evidence the local government chose to rely upon are insufficient to demonstrate that the decision is not supported by substantial evidence. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A criterion that requires a county to find that a proposed subdivision is "consistent with the general nature of the area" is very subjective. Where the county's findings cite the existence of many existing small parcels in the area that are similar in size to the proposed subdivision lots and petitioners merely cite concerns about possible interference with farming operations and a wildlife refuge, the concerns that petitioners cite are not so overwhelming that the county was obligated to acknowledge and expressly address those concerns in its findings. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where two 25-foot test pits show an aggregate layer that is at least 20 feet deep and shows no sign of diminishing and the decision maker does not seem to have appreciated that the test pits were consistent with the first 25 feet of two deep borings located elsewhere on the site that showed an aggregate layer of far more than the 25-foot width required to qualify as a significant aggregate resource site under OAR 660-023-0180(3)(d)(B)(ii), remand is required so that the county can make it clearer that it understood the significance of the two 25-foot test pits. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Failure to submit required information in the application materials is not necessarily a basis for remand, if the respondent identifies other evidence in the record that is sufficient to support a finding of compliance with the approval criteria, or at least explains why required information is not necessary to support the decision. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioners' evidence contradicted the applicant's expert's assumptions and conclusions regarding the projected volume of sewage and the adequacy of the proposed treatment methods, and nothing in the record responded to or rebutted that evidence, it was not reasonable for the county to rely on intervenor's evidence in light of petitioners' contradictory and unrebutted evidence. *Oregon Shores Conservation Coalition v. Coos County*, 55 Or LUBA 545 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Remand is necessary where the city concludes based on petitioner's traffic impact analysis that proposed development will cause intersection performance to fall below the minimum standard, but the city misconstrues the analysis, which indicates that the proposed development will not cause the intersection to fall below the minimum performance standard. *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. To obtain remand of development approval based on evidentiary grounds, it is insufficient to simply cite the evidence that the hearings officer rejected and argue that the evidence undermines the hearings officer's ultimate evidentiary choice. The petitioner must also challenge and establish error in the findings in which the hearings officer explained why he found petitioner's evidence unreliable. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer's partial reliance on an ambiguous easement to determine that an applicable approval criterion was not met was not unreasonable in light of the easement's confusing language and other evidence in the record regarding that language. *Adams v. Jackson County*, 54 Or LUBA 103 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer is not obligated to disregard evidence placed in the record by an applicant that creates a question about whether an applicable approval criterion is met, even if the applicant later repudiates or explains some of that evidence, where other evidence remains unexplained. *Adams v. Jackson County*, 54 Or LUBA 103 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In resolving an evidentiary challenge, LUBA will not consider evidence supporting the application (1) that was submitted as part of final legal argument after the evidentiary record closed, and (2) that the hearings officer declined to consider for that reason. *Lenox v. Jackson County*, 54 Or LUBA 272 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a hearings officer's evaluation of the evidence is based in part on a considered assessment that one set of witnesses is more credible or reliable than others with respect to a disputed factual issue, it will be a rare circumstance where LUBA has a basis to overturn that credibility judgment. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer does not err in determining that property that is accessed directly from a county road meets a code requirement for access for a home occupation permit, even though adjoining property owners may possess a right to use that access as well. *Merrill v. Clackamas County*, 54 Or LUBA 713 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A city's findings that applicable transportation criteria were satisfied based on an applicant's transportation impact analysis (TIA) is supported by substantial evidence, notwithstanding the TIA's reliance on some traffic counts that were more than 12 months old, where the requirement that traffic counts be less than 12 months old was not absolute and some of the traffic counts used in the TIA were less than 12 months old. *Lubischer v. City of Hillsboro*, 53 Or LUBA 143 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A broadcast tower approval criterion that requires a decision maker to determine whether identified "public benefits outweigh any impacts which cannot be mitigated" is subjective. In assessing a findings and evidentiary challenge to a decision maker's weighing of public benefits, the question is whether that weighing is (1) inadequately explained (necessitating a remand for additional findings) or (2) unreasonable (and therefore not supported by substantial evidence). *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a land use approval criterion requires that the applicant demonstrate that a proposed off-road vehicle and bicycle park in a forest zone will not "significantly increase fire hazards," A local government's decision that the applicant failed to carry his burden because he failed to accurately identify where proposed fire access roads would be located in relation to park trails is supported by substantial evidence. *Gillette v. Lane County*, 52 Or LUBA 1 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The party who puts forth the larger effort to produce evidence regarding a land use application is not necessarily entitled to prevail under a substantial evidence review solely by virtue of that larger effort. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The critical issue for the local decision maker will generally be whether any expert or lay testimony offered by permit opponents raises questions or issues that undermine or call into question the conclusions or supporting documentation that are presented by the applicant's experts and, if so, whether any such questions or issues are adequately rebutted by the applicant's experts. LUBA's role on review is to determine if a reasonable person would have answered those questions as the local decision maker did, in view of all of the evidence in the record. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A local decision maker may assign some additional significance to the testimony of the city engineer or Oregon Department of Transportation engineers regarding transportation system impacts based on their neutrality regarding the merits of the development proposal itself. But that process of assigning any extra weight necessarily calls for a case by case determination by the local decision maker, with LUBA deferring to any such assignments of extra weight that are reasonable, based on the evidence in the whole record. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA's role on review is not to determine which side's evidence LUBA believes to be weightier. LUBA is limited to determining whether the local decision maker's decision to rely on some experts' testimony rather than others is reasonable, in view of all of the evidence. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA frequently analyzes findings challenges and evidentiary challenges separately and generally analyzes findings challenges first, because LUBA's resolution of the findings challenge frequently affects its resolution of the evidentiary challenge or makes it unnecessary to decide the evidentiary challenge. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. It is not unreasonable for a local decision maker to cite issues raised

regarding the evidence submitted by an applicant's engineers that were not responded to, and to rely on opponents' experts' testimony to find that the applicant failed to carry its burden of proof. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A local government's decision is supported by substantial evidence despite the fact that a wetlands delineation report and a biological assessment that were discussed during the local proceedings are not included in the record, where parts of the wetlands delineation report are quoted in the application and there is a great deal of other evidence in the record that the local government relied on. *Neighbors 4 Responsible Growth v. City of Veneta*, 52 Or LUBA 325 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In an evidentiary challenge to a hearings officer's denial of proposed development, the applicant can prevail only if the applicant demonstrates that no reasonable person could reach the conclusion the hearings officer did, considering the evidence in the whole record. *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In reviewing a petitioner's contention that the evidence submitted by its multi-disciplinary team was such that the county's decision to rely on the testimony of opponent's expert was unreasonable, LUBA must avoid improperly reweighing the evidence and limit its role to determining whether the evidence is such that a reasonable decision maker could have decided as it did. *Westside Rock v. Clackamas County*, 51 Or LUBA 264 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where there is conflicting expert testimony regarding the location of a river channel migration zone and the probability that the river channel might migrate to capture a proposed floodplain mining site causing river turbidity, the county's decision to believe the larger channel migration zone should apply is supported by substantial evidence. *Westside Rock v. Clackamas County*, 51 Or LUBA 264 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. If the argument included in support of an assignment of error clearly alleges that findings are not supported by substantial evidence, the fact that an assignment of error that challenges the adequacy of the city's findings does not expressly include a substantial evidence challenge does not preclude LUBA review of the substantial evidence arguments that follow that assignment of error. *Neighbors 4 Responsible Growth v. City of Veneta*, 51 Or LUBA 363 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A county finding that there is "nothing in the record" that would lead the county to believe that a proposed mining operation would cause a risk of traffic accidents does not demonstrate that the county ignored evidence that petitioners submitted to show the mine could cause such a risk, where there are other findings that show the county merely was not persuaded

that petitioners' testimony outweighed the testimony submitted by the applicant. *Lindsey v. Josephine County*, 51 Or LUBA 383 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Largely unchallenged testimony of a county engineer who is a professional engineer, but not a traffic engineer, may constitute substantial evidence concerning the safety of a proposed intersection. *Ghena v. Josephine County*, 51 Or LUBA 681 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Petitioners may not rely on evidence that post-dates the decision on appeal to argue that a board of county commissioners' decision that relies on testimony by the county engineer is not supported by substantial evidence. *Ghena v. Josephine County*, 51 Or LUBA 681 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Even assuming a county correctly interprets local code provisions designed to implement OAR 660-033-0130(4)(c)(B) regarding the general suitability for the production of farm crops to refer to the grapes and not the vines, its determination that the portion of the property is generally unsuitable for growing grapes is not supported by substantial evidence where there is no evidence that the vines on that portion do not produce grapes. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Hearings officer's conclusion that it is feasible to comply with local grading permit review standards is not supported by substantial evidence where the conclusion is based on testimony of county staff, and the staff report provides only that staff will review the grading permit for compliance with those review standards prior to commencement of on-site improvements. *Angius v. Washington County*, 50 Or LUBA 33 (2005).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A city's decision to annex property as an "island" annexation pursuant to ORS 222.750 is supported by substantial evidence although the record does not include ordinances approving previous annexations, or an explanation of how the territories being annexed are "surrounded" under ORS 222.750, where the record includes an annexation map depicting the city limits and the previously annexed properties that create the island. *Costco Wholesale Corporation v. City of Beaverton*, 50 Or LUBA 476 (2005).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the evidentiary record is not clear about whether 1000 dwelling units can be developed on a site without damaging wetlands and jeopardizing endangered western lilies that occupy some of those wetlands, and it appears that a hydrologic assessment is necessary to determine if the wetlands would be damaged in ways that jeopardize continued recovery of the western lily, the city's decision to approve a master plan of development for the 1000 dwelling units without first requiring the hydrologic assessment is error. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where an applicant's expert and the United States Fish and Wildlife Service disagree about the adequacy of the expert's survey of endangered western lilies on the site of a proposed development, LUBA will defer to the city's choice to believe the applicant's expert. While the United States Fish and Wildlife Service may ultimately prevail in future federal permitting proceedings, a city's choice between conflicting testimony at the city's master plan of development approval stage presents no basis for reversal or remand. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the decision maker adopts application fee increases but fails to recognize that doing so inadvertently increases local appeal fees, remand is necessary for the local government to take evidence and adopt findings demonstrating that the increased appeal fees are consistent with ORS 227.180(1). *Doty v. City of Bandon*, 49 Or LUBA 411 (2005).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a petitioner shows that a county's findings are inadequate, but the quality of the evidentiary record and the findings that could reasonably be adopted based on that record are disputed, remand is the appropriate remedy where (1) petitioner does not show that a county's decision is "outside the range of discretion allowed the [county] under its comprehensive plan and implementing ordinances," which would require reversal of the county's decision and an order to approve the permit under ORS 197.835(10)(a) or (2) that the county's decision to deny the permit "violates a provision of applicable law and is prohibited as a matter of law," which would justify a decision by LUBA to reverse the county court's decision under OAR 661-010-0073(1)(c). *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings official decision that a proposed chiropractic home occupation that would generate eight client trips per day does not constitute "excessive traffic" on a short, dead-end unimproved residential street that serves a relatively small number of existing residences is supported by substantial evidence. *Revoal v. City of Eugene*, 47 Or LUBA 136 (2004).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will reject a challenge to the evidentiary support for a finding that mining traffic will significantly conflict with agricultural practices, within the meaning of OAR 660-023-0180(4)(b)(E), where there is evidence that (1) truck traffic from the mine will cause the level of service for vehicles entering and exiting a nearby farm stand to be reduced from LOS C to LOS D, (2) truck traffic will interfere with the use of the road for the transport of agricultural equipment, and the applicant has not demonstrated that those conflicts will be minimized. *Eugene Sand and Gravel, Inc. v. Lane County*, 46 Or LUBA 254 (2004).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A hearings officer's decision that a road existed in 1992 is supported by substantial evidence where the record includes conflicting expert and lay testimony regarding the existence of the road in 1992 and the road need not have been improved to any particular standard

and was the kind of primitive road that a reasonable person might or might not have recognized as a road. *Bonnett v. Deschutes County*, 46 Or LUBA 318 (2004).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. An arborist's and professional engineer's testimony is not substantial evidence that it is impracticable to save two groves of mature trees in constructing a discount superstore and parking, where the arborist and professional engineer do not consider the practicability of reducing the building footprint or the area of the site that will be developed with parking. *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680 (2004).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The lack of evidence supporting findings that the subject property has no physical features that might limit development is not a basis for reversal or remand, where no party contended below that any physical features of the property limit development. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will not remand a county decision for failing to include a sample of light-green visqueen to support a finding that the material is nonreflective, where the challenged decision is not based on such a finding. *Lorenz v. Deschutes County*, 45 Or LUBA 635 (2003).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The absence of required information or analysis in an application is not necessarily viewed as a procedural error, and may be a basis for reversal or remand even without a showing of prejudice to petitioner's substantial rights, where the information or analysis is necessary to determine compliance with approval criteria. *Bauer v. City of Portland*, 44 Or LUBA 210 (2003).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where LUBA cannot determine from the appealed decision or the record whether an approved parkway corridor crosses an inventoried Goal 5 significant vegetation and wildlife area, the decision must be remanded. *Friends of Eugene v. City of Eugene*, 44 Or LUBA 239 (2003).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a decision approving a subdivision that finds it is infeasible to extend a road from the proposed subdivision to an adjoining property and a petitioner at LUBA argues that the finding is not supported by substantial evidence, LUBA will remand where the respondent cites no evidence that supports the finding. *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a finding concerning traffic safety is not supported by substantial evidence in the record, but it is clear that traffic safety was at most a peripheral concern and other findings addressing a general "adversely affects neighborhoods" standard make it clear that the county's focus was on roadway and intersection capacity rather than traffic safety per se, the lack

of evidence supporting the disputed traffic safety finding provides no basis for reversal or remand. *Swyter v. Clackamas County*, 42 Or LUBA 30 (2002).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a petitioner only expressed disagreement with assumptions included in a transportation impact study and repeats evidentiary arguments he made to the city council without attempting to challenge the findings the city adopted to respond to those arguments, petitioner presents no basis for reversal or remand. *Adams v. City of Medford*, 39 Or LUBA 464 (2001).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will reverse a city's annexation approval where a city fails to establish that the minimum number of informed consents have been received to allow the city to approve an annexation without holding an election. *Johnson v. City of La Grande*, 39 Or LUBA 377 (2001).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A city's finding that the portion of a dwelling exceeding a code-mandated height limit adversely affects the ocean view of a neighboring property is supported by substantial evidence where the record includes photographs, a videotape and drawings that show the subject dwelling blocking the view of ocean water from the neighboring property, notwithstanding that the photographs, videotape and drawings show that the subject dwelling blocks only a tiny sliver of ocean water view. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A petitioner fails to demonstrate a decision is not supported by substantial evidence where only some of the evidence that the city relied upon is challenged, and the decision is supported by unchallenged documentary and testimonial evidence. *Schwerdt v. City of Corvallis*, 38 Or LUBA 174 (2000).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioner challenges the adequacy and evidentiary basis for a local government's decision determining that a proposed development "is or will be compatible" with the land use development pattern in the vicinity of the request, LUBA will analyze the findings to determine (1) whether the findings are adequate; (2) whether there is substantial evidence in the record to support a finding that, absent some conditions of approval, the compatibility standard is met; and (3) if conditions of approval are necessary to establish compatibility, whether the local government adopted such conditions. *DLCD v. City of Warrenton*, 37 Or LUBA 933 (2000).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A city's conclusion that additional parking is needed is supported by substantial evidence notwithstanding contrary evidence contained within a parking study, where the city found the parking study is limited in scope and does not account for certain variables, and there is also evidence that parking is unavailable during peak times and that persons avoid a particular store because of a perceived lack of parking. *Douglas v. City of Lake Oswego*, 37 Or LUBA 826 (2000).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where an applicant submits evidence that an intersection will operate at level of service C but later submits evidence showing the intersection will operate at level of service E, a finding that the intersection will operate at level of service C is not supported by substantial evidence. Where the finding concerning the intersection is a necessary part of the decision, the decision must be remanded. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In addressing a substantial evidence challenge, where the response brief provides no transcripts or partial transcripts and provides no assistance in locating the portion of the audio tapes in the record where relevant testimony is located, LUBA will not search for testimony on audio tapes. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA does not independently analyze the evidence, but reviews evidence in the record solely to determine whether it was reasonable for the decision maker to rely on that evidence in making a decision. Where the written evidence is conflicting and a video tape makes it clear that only small remnants of past farming or Christmas tree growing efforts on the subject property remain among the piles of debris that have been scattered over the subject property, it is reasonable for a hearings officer to conclude there is no current farm use of the property. *Best Buy in Town, Inc. v. Washington County*, 35 Or LUBA 446 (1999).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a land use decision is challenged on evidentiary grounds, LUBA relies on the parties to direct it to relevant evidence in the record so that LUBA can determine whether there is substantial evidence in the record to support the challenged decision. *Johns v. City of Lincoln City*, 35 Or LUBA 421 (1999).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA does not duplicate the role of a local hearings officer. Where the evidence is conflicting such that a reasonable decision maker could reach different conclusions based on that evidence, the choice of which evidence to believe and which conclusion to reach is for the hearings officer. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a hearings officer gives several reasons why she was not persuaded by affidavit testimony submitted by a permit applicant, petitioner does not establish that the applicant carried his burden of proof as a matter of law. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A permit applicant with the burden of demonstrating compliance with an off-site odor standard may not rely on the lack of odor-based complaints in an earlier code enforcement proceeding to establish compliance with the odor standard, where the record includes

testimony about possible off-site odor problems. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A county's improper reliance on poor past management practices in concluding a property is not suitable for commercial forest use provides no basis for reversal or remand, where there is other evidence in the record that a reasonable person could rely on to reach that conclusion. *Dept. of Transportation v. Coos County*, 35 Or LUBA 285 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A local government's reliance on a traffic study using a method not currently preferred but nonetheless required by the state Department of Transportation (ODOT) does not provide a basis for reversal or remand, where traffic analysis under either of two methods recognized by ODOT supports the conclusion reached by the local government. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a site plan depicting setbacks was before the county decision maker, and was inadvertently not submitted to LUBA, testimony discussing the measurements and setbacks depicted on the site plan is evidence that may support the county's s findings regarding setbacks, notwithstanding that the site plan is itself absent from the record. *Thomas v. Wasco County*, 35 Or LUBA 173 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A condition of approval limiting the hours of operation is supported by substantial evidence where the city council found that loading and unloading of vehicles next to an adjoining residential area during irregular hours would create a nuisance and the Oregon State Police impose a similar limitation on towing of impounded vehicles. *Williamson v. City of Arlington*, 35 Or LUBA 90 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A condition requiring a drainage plan for a towing facility is supported by substantial evidence notwithstanding the owner's claim that towed vehicles would be drained of fluids, where the record showed the city council questioned the owner's claim and it was not clear where the drained fluids would be stored. *Williamson v. City of Arlington*, 35 Or LUBA 90 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the city's decision is based on a well-reasoned analysis that reaches the conclusion that a state road crossing a lot is located on an easement rather than on land owned in fee by the state, the city's determination that the lot may include the area occupied by the state road in determining whether the lot meets minimum lot size requirements is supported by substantial evidence. *Marshall v. City of Yachats*, 35 Or LUBA 82 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a code criterion requires that a 79-unit residential development must not have adverse impacts on public facilities, the local government cannot make findings of

compliance with that code criterion and its findings cannot be supported by substantial evidence where there is no information in the record concerning potential traffic impacts from the proposal. *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a hearings officer interprets an approval criterion to require an explanation of resource practices on the property, the applicant may not rely on a lack of evidence of impacts on resource practices to establish that there will be no such adverse impacts. *Parsley v. Jackson County*, 34 Or LUBA 540 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioner contends that findings are inadequate and not supported by substantial evidence, but fails to identify any particular criterion and only expresses disagreement with the city's evaluation of the evidence, petitioner provides no basis for reversal or remand. *Kelley v. City of Cascade Locks*, 34 Or LUBA 374 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a county finds that the subject property's soils constitute "high-value farmland" as that concept is defined by statute, but there is no evidence in the record that supports that ultimate conclusion, the decision must be remanded. *Corp. of Presiding Bishop v. Klamath County*, 34 Or LUBA 131 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Findings concerning the size and density of a proposal which simply cite to assessor's records as the basis for the findings are not supported by substantial evidence, where the record does not include the assessor's records or any other evidence that supports the findings. *Johnston v. City of Albany*, 34 Or LUBA 32 (1998).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioners assert that a local government decision is not supported by substantial evidence, and no party cites evidence in the record to support the local government's decision, LUBA will not search the record to find supporting evidence. *Fjarli v. City of Medford*, 33 Or LUBA 451 (1997).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A two-acre minimum lot size on property located within two miles of a UGB, in combination with the provision of an urban water system and access to public schools, raises valid concerns about the impacts of a proposed subdivision on the UGB, and a finding that consists solely of a city administrator's opinion that the city has no concerns regarding the impact of the proposed subdivision is not substantial evidence to support the county's conclusion that the proposed subdivision will not affect the UGB. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Unsupported statements and assurances that a proposed dwelling will

comply with local roof height and pitch standards do not constitute substantial evidence. *Pekarek v. Wallowa County*, 33 Or LUBA 225 (1997).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Selected portions of an engineer's letter, cited to support a finding that water supply is adequate, do not constitute substantial evidence where that finding is undermined by the engineer's letter taken as a whole and by other conflicting evidence. *Pekarek v. Wallowa County*, 33 Or LUBA 225 (1997).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In reviewing evidence, LUBA may not substitute its judgment for that of the local decision maker, but must consider and weigh all evidence in the record to determine if the local decision maker's conclusion is supported by substantial evidence. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will defer to a local government's choice between conflicting evidence if it concludes a reasonable person would have reached the decision the local government made in view of all of the evidence in the record. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will remand the county's expansion of a nonconforming use where the county fails to make the requisite findings regarding the level of intensity of use that existed when the use became nonconforming, and the level of intensity that has continued, uninterrupted, since that time. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A local government decision approving an irrevocably committed exception under OAR 660-04-028 to Goals 3 and 4 will be remanded where it does not include findings supported by substantial evidence establishing that uses allowed by Goals 3 and 4 are impracticable. *DLCD v. Columbia County*, 32 Or LUBA 221 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A local government decision approving a physically developed exception under OAR 660-04-025 to Goals 3 and 4 will be remanded where the findings do not establish that the property is physically developed with non-resource uses. *DLCD v. Columbia County*, 32 Or LUBA 221 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. There is insufficient evidence in the county's findings to support a conclusion of compatibility with farm use where the findings do not include evidence regarding the surrounding farm uses in the area, and do not explain how the proposed nonfarm dwelling will be compatible with the identified farm uses. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The county's findings lack evidentiary support for the conclusion that a proposed dwelling will not materially alter the stability of the surrounding area where there is inadequate evidence regarding the surrounding area, inadequate evidence regarding the uses existing in the area, and no evidence regarding how the proposed dwelling will not alter the stability of those uses in the selected area. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the county's factual findings determine that the subject parcel contains soils that are presumptively suitable for farm use, but then conclude that the proposed dwelling is situated on land that is unsuitable for farm use, the county's conclusion is not supported by substantial evidence in the record. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A demonstration that a particular tax lot will be ineligible for a nonfarm dwelling for three years is not substantial evidence that supports a finding that the tax lot has no real potential for a nonfarm dwelling. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Without information concerning the nature and duration of the lease, the use of a particular tax lot as a leased tax-exempt watershed is not substantial evidence which supports a finding that the lot will remain ineligible for a nonfarm dwelling during a term that is reasonable for purposes of a stability analysis. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the resume of a soil scientist does not establish his credentials to determine forest productivity and the only scientific data in the record are the results of soil tests, the soil scientist's conclusions with respect to forest productivity are not substantial evidence. *DLCD v. Curry County*, 31 Or LUBA 503 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the county's conclusion that two parcels are not contiguous for purposes of OAR 660-04-028(6)(c)(B) is not factually established in the record and is inconsistent with evidence relied upon by the county regarding nonresource use on adjacent parcels, the county's finding is not supported by substantial evidence in the record. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a petitioner challenges percentages relied upon by the county in support of a finding, the petitioner must provide citations to the record where the data upon which it relies to calculate its own percentages can be found. *Helvetia Community Assoc. v. Washington County*, 31 Or LUBA 446 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. There is no general requirement that survey evidence supporting a consultant's calculation of area be included in the record; instead, LUBA must determine whether,

considering all relevant evidence in the record, a reasonable person could rely on the consultant's calculations. *Squires v. City of Portland*, 31 Or LUBA 335 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In considering the substantiality of evidence supporting a Goal 3 reasons exception for realignment of a highway, LUBA must look at the evidence supporting the challenged decision for the entire four-mile stretch of highway and all the impacted properties, not just the evidence of effects on one of the properties. *Schrock Farms, Inc. v. Linn County*, 31 Or LUBA 57 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Petitioners' challenge of the reliability of an environmental impact statement (EIS) that was relied upon by the county in its decision is insufficient where the challenge is based solely on the age of the EIS, without identification of other evidence in the record that undermines the EIS. *Schrock Farms, Inc. v. Linn County*, 31 Or LUBA 57 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a standard requires a comparison of the traffic or parking generated by a proposed use to the traffic or parking that normally occurs in the district, and the findings contain no such comparison or other factual support to establish the basis upon which the county reached its conclusion that the standard is satisfied, the findings are inadequate and not supported by substantial evidence. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA's review of a local decision is based upon the local record. Where petitioners do not show that they presented evidence during the local hearings process to establish compliance with each factor of an applicable code provision, a recitation in the petition for review of how each factor is satisfied is insufficient to establish such compliance. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will not substitute its judgment for that of the local decision maker. Without references to conflicting evidence in the record that so undermines the evidence upon which the county based its conclusion as to compel a conclusion that a reasonable person could not have reached the county's conclusion, LUBA will not find the county's findings lack substantial evidence. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. When petitioner's objections below were not directed to the relevant criteria, they do not support a claim that the hearings officer's factual conclusions were erroneous. *Martin v. Jackson County*, 30 Or LUBA 317 (1996).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Because the city's decision does not explain, based on evidence in the record, how the city reached its conclusion that a certain ordinance criterion was satisfied, LUBA must remand. *Noble v. City of Fairview*, 30 Or LUBA 180 (1995).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. An unsupported statement in an application is not evidence, and an estimate of a geologist as to resource quantity, made without reference to evidence of any kind, is not substantial evidence. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The county's finding, made as part of its Goal 5 ESEE analysis, that an aggregate site located within a Big Game Habitat Range is not uniquely suited to wildlife must be supported by substantial evidence, not just a statement that the wildlife can "freely relocate" to other parts of the Big Game Habitat Range. *Palmer v. Lane County*, 29 Or LUBA 436 (1995).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. When the evidentiary support for imposition of a condition of approval is challenged, LUBA must determine whether the evidence in the record would lead a reasonable person to conclude there is a need for the condition to further a relevant planning purpose. *Carter v. Umatilla County*, 29 Or LUBA 181 (1995).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where LUBA concludes a reasonable person could reach the decision made by a local government, in view of all the evidence cited in the record, LUBA will defer to the local government's choice between conflicting evidence. *Carter v. Umatilla County*, 29 Or LUBA 181 (1995).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioner does not challenge the local government's determination that even if the subject property was not created by a minor land partition, the proposed single family dwelling is permissible, petitioner's challenge to the evidentiary support for the determination that the subject property was created by minor partition does not provide a basis for reversal or remand. *Sullivan v. City of Ashland*, 28 Or LUBA 699 (1995).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a local government adopts finding which, among other things, explain how a proposed road alignment will reduce traffic delay and congestion and thereby minimize air quality impacts as required by a plan policy, and petitioner merely cites testimony that the proposed alignment will increase trips and pollution but does not specifically challenge the local government's findings, petitioner provides no basis for reversal or remand. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioners challenge the evidentiary support for findings addressing an applicable approval standard, and no party cites any evidence in the record to support such findings, the challenged decision must be remanded. *Neuman v. City of Albany*, 28 Or LUBA 337 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a finding that the gravel extraction rate at a proposed site will not change from historic rates is not supported by substantial evidence, and the finding appears to play a significant role in the local government's finding of compliance with a code "compatibility" requirement, the challenged decision approving a conditional use permit for a gravel operation is not supported by substantial evidence. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Arguments that approval of a fill permit violates local code provisions on fill in drainageways provide no basis for reversal or remand where (1) the local government adopted findings that the disputed fill was not placed in a drainageway, (2) those findings are supported by substantial evidence, and (3) petitioner does not specifically challenge the findings. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a petitioner fails to challenge a local governments' findings that fill is not located in a drainageway or floodway and that the fill will not endanger adjoining properties, as required by local code and plan standards governing fill, but rather expresses disagreement with the local government based in part on evidence not the record, petitioner's challenge provides no basis for reversal or remand. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioners contend a challenged decision is not supported by substantial evidence in the record, LUBA relies on the parties to provide it with citations to evidence in the record that supports their positions. Where no party cites any evidence in the record supporting findings challenged for lack of supporting evidence, LUBA will sustain the assignment of error. *DLCD v. Polk County*, 27 Or LUBA 345 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioners assert that findings supporting a local government determination of compliance with an applicable approval standard lack evidentiary support, and no party cites evidence in the record to support the local government's determination, LUBA will not search the record to find supporting evidence and will sustain petitioners' assignment of error. *Doob v. Josephine County*, 27 Or LUBA 293 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. There is no requirement that an expert witness explain the basis for all assumptions underlying the expert's evidence, or that evidence supporting the expert's assumptions be included in the record. Under ORS 197.835(7)(a)(C), where petitioners argue an assumption underlying an expert's conclusions is undermined by other evidence, LUBA must determine whether, considering all relevant evidence in the record, a reasonable person could rely on the expert's conclusions. *ODOT v. Clackamas County*, 27 Or LUBA 141 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In deciding whether a challenged decision is supported by substantial evidence in the whole record, LUBA is required to consider whether supporting evidence is refuted

or undermined by other evidence in the record, but cannot reweigh the evidence. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a local decision maker's order denying rehearing (1) indicates evidence submitted with the request for rehearing was considered only for the limited purpose of determining whether to grant the request for rehearing, and (2) does not amend or add to the original decision, the evidence submitted with the request for rehearing, although in the local record submitted to LUBA, is not part of the evidentiary record supporting the challenged decision. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. It is reasonable for a local government decision maker to rely upon statements made by representatives of the Oregon Department of Transportation (ODOT) stating that ODOT's requirements are met, even though the evidence underlying the ODOT representatives' statements is not included in the local record. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A general allegation that a decision is not supported by substantial evidence is insufficient for review by LUBA. *Collins v. Klamath County*, 26 Or LUBA 434 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A petitioner's assignment of error will be rejected where it simply alleges code violations, without supplying any supporting argument, or alleges inconsistent findings and lack of substantial evidence, without identifying the challenged findings. *Draganowski v. Curry County*, 26 Or LUBA 420 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioners contend the challenged decision is not supported by substantial evidence concerning the impacts of the proposed use on nongame wildlife, but do not challenge the local government's determination that the relevant approval standards do not require consideration of impacts on nongame wildlife, LUBA will deny the assignment of error. *Bottum v. Union County*, 26 Or LUBA 407 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The responsibility for weighing and determining what evidence to believe lies with the local government. LUBA's scope of review is limited to determining whether the challenged decision is supported by evidence in the record that a reasonable person could rely upon to reach the conclusions in the challenged decision. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioner cites evidence that certain approval standards are not satisfied and respondent fails to identify evidence in the record in support of the decision, LUBA

will remand the decision for lack of substantial evidence. LUBA will not independently search the record for supporting evidence. *Lucier v. City of Medford*, 26 Or LUBA 213 (1994).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. It is the parties' responsibility to identify the evidence in the record that supports their positions. Where parties cite large documents in their entirety, and do not identify where in these documents relevant material is located, LUBA will not search through the documents looking for supporting evidence. *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A local government's decision that a proposed plan map amendment would negatively impact groundwater quantity and violate an applicable plan criterion is supported by substantial evidence where there is conflicting lay and expert testimony, and the expert testimony concedes the uncertainty of the proposal's impacts. *Ericsson v. Washington County*, 26 Or LUBA 169 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA may not reweigh evidence or substitute its judgment for that of a local government concerning a proposal's compliance with applicable standards. *Hixson v. Josephine County*, 26 Or LUBA 159 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioner cites evidence in the record that at least some golf ball striking areas are proposed to be closer than 300 yards from nearby properties, and the county cites no evidence to undermine this evidence, findings that the nearest golf ball striking area is more than 300 yards from adjacent properties are not supported by substantial evidence in the whole record. *Moore v. Clackamas County*, 26 Or LUBA 40 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Under ORS 197.830(13)(a), LUBA's review is limited to the record of the proceedings below. Statements in a local government comprehensive plan background and inventory document, that are not included in the record, cannot constitute substantial evidence in support of a challenged decision. *Fleck v. Marion County*, 25 Or LUBA 745 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Under ORS 197.835(7)(a)(C), LUBA is authorized to reverse or remand a challenged decision on evidentiary grounds only when there is not substantial evidence *in the whole record* to support the decision. Arguments that the application and the applicants' statements do not provide sufficient evidence to support the decision do not provide a basis for reversal or remand. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a decision is challenged on evidentiary grounds, LUBA relies on the parties to provide it with record citations to the supporting or countervailing evidence on which their argument depends. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Determining compatibility is inherently subjective. Where there is conflicting believable evidence concerning a proposed PUD's compatibility with the surrounding neighborhood, LUBA will not disturb the local government's determination that the height of the proposed buildings is compatible with the surrounding neighborhood. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the governing body ratifies an act of another local government official in the challenged decision, that aspect of the challenged decision is itself substantial evidence that the local official possessed authority to accomplish the disputed act. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will defer to a local government's choice between conflicting believable evidence. *Cemper v. Clackamas County*, 25 Or LUBA 486 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioners challenge the evidentiary support for a finding, but fail to show the finding is critical to the decision, the challenge provides no basis for reversal or remand. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. That a particular finding is not supported by substantial evidence provides a basis for reversing or remanding a challenged decision only if that finding is critical to demonstrating compliance with an applicable approval standard. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the local code includes a broad definition of the term "wetland," and the local government denies a permit application because it determines evidence in the record establishes that petitioner's grading activities on the subject property created a "wetland" within the meaning of the local code, LUBA cannot say that the local government's determination is wrong as a matter of law. *Annett v. Clackamas County*, 25 Or LUBA 111 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where findings state facts relevant to whether a proposed nonfarm use will interfere with accepted farming practices, but do not identify the types of farming occurring in the area, and those findings are challenged as inadequate and not supported by substantial evidence, LUBA will sustain the challenge in the absence of any attempt by respondents to defend the findings or identify evidence supporting the findings. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Under ORS 197.828(2)(a), when the evidentiary support for a condition of

approval is challenged, LUBA must determine whether the evidence in the record could lead a reasonable person to conclude that considering the impacts of the proposed development, there is a need for the condition to further a legitimate planning purpose. *Sherwood Baptist Church v. City of Sherwood*, 24 Or LUBA 502 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. That a particular finding is not supported by substantial evidence, of itself, provides no basis for remanding a decision, unless the finding is critical to the decision. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. While LUBA must consider all relevant evidence in the record cited by the parties in reviewing a substantial evidence challenge, including evidence that detracts from the challenged decision as well as evidence that supports it, LUBA may not reweigh the evidence. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where LUBA concludes a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, it defers to the local government's choices between conflicting evidence and of reasonable conclusions to be drawn from the evidence. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where there is conflicting believable evidence, the choice of which evidence to believe belongs to the local government. *Giesy v. Benton County*, 24 Or LUBA 328 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Lack of substantial evidence *in an application* does not provide grounds for LUBA to reverse or remand a decision. LUBA is authorized to reverse or remand a land use decision on evidentiary grounds only if it is not supported by substantial evidence *in the whole record*. *Tylka v. Clackamas County*, 24 Or LUBA 296 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In reviewing an evidentiary challenge, LUBA relies on the parties to identify the evidence in the record that supports their positions. *Todd v. Columbia County*, 24 Or LUBA 289 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a golf course adjoining an orchard will force alterations in accepted farming practices and increase the costs associated with such practices, the relevant question under ORS 215.296(1) is whether such alterations and increased costs will be *significant*. Where there is evidence in the whole record that would allow a local government decision maker to answer that question either way, LUBA is required by ORS 197.835(7)(a)(C) to defer to the local government's judgment. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA will not consider a challenge to the adequacy of or evidentiary support for particular findings supporting a land use decision, where petitioner fails to include sufficient argument explaining why those findings are critical to the challenged decision. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where findings are not essential to the challenged decision, it is not necessary for LUBA to determine whether those findings are supported by substantial evidence in the record. *Thatcher v. Clackamas County*, 24 Or LUBA 207 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Lack of evidentiary support for a finding provides a basis for reversal or remand only if the finding is essential to the decision. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a reasonable person would not conclude, based on the evidence cited in the record, that the proposed use will comply with an applicable approval standard, the local government's determination of compliance with that approval standard is not supported by substantial evidence. *Reynolds v. Clackamas County*, 24 Or LUBA 14 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The choice between different reasonable conclusions, based on the evidence in the record, belongs to the local government decision maker. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a local government finds that approval criteria will be met if certain conditions are imposed, and those conditions are requirements to obtain state agency permits, a decision approving the subject application simply requires that there be substantial evidence in the record that the applicant is not precluded from obtaining such state agency permits as a matter of law. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a local government's determination of compliance with a code standard requiring that adequate water service be provided to a proposed development is based entirely on the use of surface water, whether there are sufficient findings and evidence to demonstrate the adequacy of ground water to serve the proposed resort does not provide a basis for reversal or remand of the local government's decision. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA is authorized to reverse or remand a challenged local government decision on evidentiary grounds only if the local government made a *decision* not supported by

substantial evidence in the whole record. ORS 197.835(7)(a)(C). *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. That findings are not supported by substantial evidence provides a basis for reversal or remand only if the findings are essential to the challenged decision. *Larson v. Wallowa County*, 23 Or LUBA 527 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Allegations that local government decision makers gave testimony by certain persons undue credibility provide no basis for reversal or remand. *Reed v. Benton County*, 23 Or LUBA 486 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the record does not contain information on the quality of the aggregate resource at other aggregate sites already on the county plan's inventory, the county cannot perform the comparison of relative value of Goal 5 resource sites required by OAR 660-16-000(3) in making its required determination of resource quality. *Calhoun v. Jefferson County*, 23 Or LUBA 436 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the relevant facts are not in dispute, the choice between different reasonable conclusions based on the undisputed evidence in the record belongs to the local government. *Dority v. Clackamas County*, 23 Or LUBA 384 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA's review is limited by ORS 197.830(13)(a) to the record of the proceeding below, except in instances where an evidentiary hearing is authorized by ORS 197.830(13)(b). Therefore, local government enactments of which LUBA takes official notice under OEC 202 do not thereby become part of the local record which may provide evidentiary support for the challenged decision. *Ramsey v. City of Portland*, 23 Or LUBA 291 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. ORS 197.835(7)(a)(C) does not require a legislative land use decision to be supported by substantial evidence. Where petitioners cite no independent basis for a requirement that the challenged legislative land use decision be supported by substantial evidence, petitioners provide no basis for reversal or remand. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA may take official notice of state legislative or administrative history to aid in interpretation of state statutes or administrative rules. However, where such documents are not part of the local record, statements of fact in the documents cannot constitute evidentiary support for the challenged decision. *Adkins v. Heceta Water District*, 23 Or LUBA 207 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where conflicting evidence does not so undermine the evidence relied upon by the local decision maker that it is unreasonable for the decision maker to rely upon it, the choice between such conflicting believable evidence belongs to the local government decision maker and LUBA will not disturb that choice. *Harwood v. Lane County*, 23 Or LUBA 191 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Substantial evidence challenges directed at findings which are not critical to the challenged decision, provide no basis for reversal or remand. *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. ORS 197.835(7)(a)(C) does not impose a substantive requirement that legislative land use decisions be supported by substantial evidence in the whole record. *Alexiou v. Curry County*, 22 Or LUBA 639 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Substantial evidence is evidence a reasonable person would rely on in reaching a decision. Where a reasonable person could reach the decision made by the local government, in view of all the evidence in the record, LUBA defers to the local government's choice between conflicting evidence. *Angel v. City of Portland*, 22 Or LUBA 649 (1992).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. That a finding is impermissibly conclusory, or is without evidentiary support in the record, is a basis for reversal or remand only if that finding is essential to the challenged decision. Therefore, where petitioners challenge the adequacy of or evidentiary support for a specific finding, they must also explain why that finding is essential to demonstrating compliance with an applicable approval standard. *Brandt v. Marion County*, 22 Or LUBA 473 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In order to overturn, on evidentiary grounds, a local government's determination that an applicable approval criterion is not met, it is not sufficient for petitioner to show there is substantial evidence in the record to support his position. Rather, the evidence must be such that a reasonable trier of fact could only say that petitioner's evidence should be believed. *Samoilov v. Clackamas County*, 22 Or LUBA 446 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. No purpose would be served by determining whether inadequate findings are supported by substantial evidence in the record. *Forster v. Polk County*, 22 Or LUBA 380 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Findings that transportation systems are adequate to serve proposed housing for elderly persons who walk with the assistance of canes or walkers, are not supported by substantial evidence where the evidence establishes that the only access to public transportation

is by walking down a road dangerous to pedestrians. *Murray v. Clackamas County*, 22 Or LUBA 247 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where there is no applicable standard requiring a demonstration that there is a need for the proposed use, that findings stating there is a need for the proposed use are inadequate or not supported by substantial evidence provides no basis for reversal or remand. *Murray v. Clackamas County*, 22 Or LUBA 247 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. When the evidentiary support for imposition of a condition of approval is challenged, what LUBA must determine is whether the evidence in the record would lead a reasonable person to conclude that there is a need for the condition to further a relevant planning purpose. *Wastewood Recyclers v. Clackamas County*, 22 Or LUBA 258 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. If the challenged decision does not explain the purpose of a condition, it is more difficult for LUBA to conclude imposition of the condition is supported by substantial evidence in the record. *Wastewood Recyclers v. Clackamas County*, 22 Or LUBA 258 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Substantial evidence is evidence a reasonable person would rely upon in reaching a decision. In determining whether a decision is supported by substantial evidence, LUBA considers all the evidence in the record to which it is cited, including evidence that refutes or detracts from that relied on by the local government decision maker. *Eckis v. Linn County*, 22 Or LUBA 27 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A petitioner's substantial evidence challenge will be rejected where only one type of evidence relied upon by a local government decision maker is challenged and there are other types of unchallenged believable evidence in the record which support the decision. *Wentland v. City of Portland*, 22 Or LUBA 15 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the local government's findings are inadequate, no purpose would be served by determining whether they are supported by substantial evidence. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a local code requires that a conditional use not substantially limit or impair use of petitioner's property, and the local government concedes that the proposed use will cause negative impacts on the use of petitioner's property, but cites no evidence in the record that (1) these impacts will not substantially limit or impair use of petitioner's property, or (2) required mitigation measures will sufficiently reduce these impacts, LUBA will uphold petitioner's evidentiary challenge. *Reynolds v. Clackamas County*, 21 Or LUBA 412 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. While a local government cannot rely upon evidence of changed circumstances since adoption of its comprehensive plan to justify *noncompliance* with plan approval criteria for plan and zone map amendments, it may be able to rely upon evidence of changed circumstances as a basis for finding *compliance* with applicable plan and zone map amendment approval criteria. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the applicant for a nonconforming use determination presents evidence which is inconsistent and vague, such evidence is not substantial evidence to establish the existence of a nonconforming use. *Smith v. Lane County*, 21 Or LUBA 228 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where findings are not essential to the challenged decision, it is unnecessary for LUBA to determine whether those findings are supported by substantial evidence in the record. *Lung v. Marion County*, 21 Or LUBA 302 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a U.S. Census Bureau form was not placed before the local decision maker before it adopted the appealed decision, the form has no bearing on the issue raised in the petition for review of whether there is sufficient evidence in the local record to support the challenged decision. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where findings are not essential to the challenged decision, it is not necessary for LUBA to determine whether those findings are supported by substantial evidence in the record. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. That a board of county commissioners' findings are inconsistent with findings previously adopted by the county hearings officer provides no basis for reversal or remand so long as the board of county commissioners' findings are supported by substantial evidence. *Carsey v. Deschutes County*, 21 Or LUBA 118 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where there is evidence in the record to "clearly support" the challenged decision, there is also necessarily "substantial evidence" in the record to support the decision. *Smith v. City of Portland*, 21 Or LUBA 111 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Although a local government is not legally obligated to identify or discuss in its findings evidence it chooses not to believe, it may be that without such an explanation LUBA will be unable to determine that the findings the city does adopt are supported by substantial evidence. *Wethers v. City of Portland*, 21 Or LUBA 78 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. No purpose is served by LUBA reviewing the evidentiary support for inadequate findings. *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where conflicting evidence in the record does not so undermine the evidence relied upon by the local government as to make it unreasonable for the local government to rely upon that evidence, the choice between such conflicting believable evidence belongs to the local government and will not be disturbed by LUBA. *Stefan v. Yamhill County*, 21 Or LUBA 18 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. If a decision which relies on evidence from site observations by local decision makers is appealed to LUBA and challenged on substantial evidence grounds, LUBA will review the evidentiary support for that decision, including evidence from such site observations and rebuttal evidence, to determine whether it would be reasonable to rely upon it. *Angel v. City of Portland*, 21 Or LUBA 1 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioner makes an evidentiary challenge, but LUBA must in any case remand the appealed decision for further local proceedings which will include the submittal of additional evidence, LUBA will not determine whether there is substantial evidence in the existing record to support the appealed decision. *Angel v. City of Portland*, 21 Or LUBA 1 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. To overturn on evidentiary grounds a local government's determination that an applicable approval standard is not met, it is not enough for a petitioner to show that there is substantial evidence in the record to support his position. Rather, the evidence must be such that a reasonable trier of fact could only say the petitioner's evidence should be believed. *West v. Clackamas County*, 20 Or LUBA 433 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. The choice between different reasonable conclusions, based on the evidence in the whole record, belongs to the local government. *West v. Clackamas County*, 20 Or LUBA 433 (1991).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where the findings are inadequate, no purpose would be served by determining whether the findings are supported by substantial evidence. *Benjamin v. City of Ashland*, 20 Or LUBA 265 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. If a plan policy is not an approval standard for the challenged decision, it is of no consequence that there is not substantial evidence in the record to support a determination of compliance with that policy. *Benjamin v. City of Ashland*, 20 Or LUBA 265 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a purpose statement in the local code's conditional use provisions states general objectives only, and does not purport to act as an independent approval standard, petitioners' contention that evidence in the record establishes the proposed use is not in compliance with that purpose statement provides no basis for reversal or remand of the challenged decision approving a conditional use permit. *Beck v. City of Tillamook*, 20 Or LUBA 178 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Whether statements in the county's decision which are not findings of fact, but rather are recitations of evidence and argument submitted by the applicant, are supported by substantial evidence in the record is of no consequence. *Shirley v. Washington County*, 20 Or LUBA 127 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where LUBA determines the local government's findings are inadequate to establish compliance with relevant approval standards, no purpose is served by determining whether those findings are supported by substantial evidence. *Schryver v. City of Hillsboro*, 20 Or LUBA 90 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where a local code provision is not an approval standard for the appealed zone change, inadequacy of the evidence supporting local government findings addressing that provision provides no basis for reversal or remand. *Bridges v. City of Salem*, 19 Or LUBA 373 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In addition to demonstrating that a challenged finding is inadequate or unsupported by substantial evidence, a petitioner must demonstrate the challenged finding is necessary to support the challenged decision. *Griffith v. City of Milwaukie*, 19 Or LUBA 300 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A challenge to the adequacy of and evidentiary support for a finding that a modification of a previously imposed condition of land use approval is justified based on changed circumstances provides no basis for reversal or remand, where none of the applicable criteria require that modifications of conditions of approval be based on changed circumstances. *Griffith v. City of Milwaukie*, 19 Or LUBA 300 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where an ordinance requires that site plans be prepared by persons with designated credentials and the planning director is delegated responsibility for determining the qualifications of a person to prepare a site plan, a party wishing to challenge the planning director's decision to accept a site plan must offer some explanation, to the local government or to LUBA, why the person preparing the site plan is not qualified. If a party fails to do so, LUBA will not find the local government committed error because the record lacks substantial evidence that the person preparing the site plan was qualified to do so. *Headley v. Jackson County*, 19 Or LUBA 109 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A city decision to require, as a condition of approval, dedication of a right-of-way to improve street system efficiency and to provide future access to interior developable parcels is supported by adequate findings and substantial evidence in the record where the city's findings and the evidentiary record are sufficient to show a legitimate planning purpose is furthered by requiring the right-of-way dedication. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where LUBA concludes a reasonable person could reach the decision adopted by the local government, in view of all the evidence in the record, LUBA defers to the local government's choice between conflicting evidence. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Where petitioner's traffic engineer and the city engineer present conflicting testimony concerning which sight distance standards apply and the correct method of calculating sight distances, the city may properly rely on its engineer's testimony. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In determining whether there is substantial evidence in the record to support a local government decision, LUBA considers all relevant evidence in the record cited by the parties, including both that which supports the local government decision and that which detracts from it. *Eckis v. Linn County*, 19 Or LUBA 15 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Just as the choice between reasonable conflicting evidence belongs to the local decision maker, the choice between different reasonable conclusions, based on undisputed evidence in the whole record, also belongs to the local decision maker. Where the decision maker's conclusions are among the reasonable conclusions which could be drawn from the evidence in the record, LUBA will conclude the decision is supported by substantial evidence. *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. Although city findings concerning the percentage effect of up to two hours of shading on solar heating effectiveness are not supported by substantial evidence, LUBA will affirm the city's decision that a standard requiring mitigation of adverse affects through design treatment is met where other findings and evidence are adequate to show the shading impacts are mitigated. *Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. In determining whether evidence is substantial, LUBA must consider the evidence in the *whole* record, both evidence which supports and evidence which detracts from the

challenged decision. ORS 197.837(7)(a)(C); *Younger v. City of Portland*, 305 Or 346, 356, 752 P2d 262 (1988). *Weist v. Jackson County*, 18 Or LUBA 627 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA does not substitute its judgment for that of a local government where the evidence in the record is conflicting, and reasonable persons could adopt different findings or reach conflicting conclusions. In such circumstances, LUBA will affirm a local government's choice between conflicting, but supported, findings or conclusions, even though a reasonable person could also have adopted different findings or conclusions based on the evidence in the record. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. A local government is not required to explain in its findings why it chose not to rely on certain evidence, as long as LUBA can conclude a reasonable decision maker could decide as the local government did, in view of all the evidence in the record. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand – Unsupported by Substantial Evidence. LUBA need not review the evidentiary support for findings which are not essential to the decision below. *Beck v. City of Tillamook*, 18 Or LUBA 587 (1990).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A local government's erroneous statement in the findings that it was not required to consider the petitioner's testimony does not establish that the local government committed procedural error where other findings establish that the local government did consider that testimony. *ODOT v. Grant County*, 80 Or LUBA 192 (2019).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where LUBA concludes that a local government's conclusion that an application did not meet an applicable approval criterion was a valid basis for denial, although any error committed with respect to alternative or independent bases for denial would generally not provide a basis for reversal or remand, remand is nonetheless required where LUBA also concludes that the local government failed to address a threshold argument from the applicant that, if correct, would prevent the local government from applying criteria that would prohibit approval of the application. *M & T Partners, Inc. v. City of Salem*, 80 Or LUBA 221 (2019).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where petitioner argues the city governing body's finding regarding the applicability of a zoning ordinance was erroneous, and the city concedes the finding is erroneous, but when the error is not critical to the city council's interpretation or ultimate conclusions, the error does not provide a basis for reversal or remand. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Petitioner's argument that the county hearings officer's failure to adopt findings of compliance with a county code provision (Washington County Development Code (CDC 421-7.8)) is not a position presented "without probable cause" sufficient to entitle an award of attorney fees against a non-prevailing party, where LUBA agreed with petitioner that the hearings officer's failure to adopt any findings explicitly addressing CDC 421-7.8 would warrant remand, unless, as occurred here, other findings with respect to other standards (CDC 422) in the hearings officer's decision were sufficient to address the substantive standards set forth in CDC 421-7.8, and therefore the hearings officer's failure to adopt findings addressing CDC 421-7.8 was harmless error. *McAndrew v. Washington County*, 78 Or LUBA 1094 (2018).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Any error in a planning commission's finding that the petitioner lacked standing to file a local appeal is harmless, where on appeal to the board of commissioners the board disposed of petitioner's appeal on the merits and did not rely on standing as a basis to deny the appeal. *Richards v. Jefferson County*, 77 Or LUBA 152 (2018).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. The Goal 5 rule, at OAR chapter 660, division 023, includes a "standard" process for inventorying, evaluating and protecting natural resources, at OAR 660-023-0030 through -050, that includes rules for evaluating the ESEE consequences for allowing, limiting, or prohibiting uses that conflict with a natural resource site. The Goal 5 rule also includes "special" standards and procedures for specific types of Goal 5 resources, including those that govern aggregate mineral resources, at OAR 660-023-0180. According to OAR 660-023-0020(1), sometimes both the standard process and a special process apply; sometimes the special process supersedes the standard process in

whole, or in part, and in case of conflict the specific process controls. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. OAR 660-023-0180(5)(a) requires the local government to identify conflicts with existing and approved uses located within a determined "impact area" limited in size to 1,500 feet from the boundaries of the mining area, unless factual information indicates "significant potential conflicts" beyond 1,500 feet. After deciding to allow mining under OAR 660-023-0180(5), the county must also go on to consider whether to allow, limit, or prevent new or future conflicting uses within the impact area pursuant to OAR 660-023-0180(7). For this limited inquiry, the county must conduct the analysis pursuant to the standard ESEE process in OAR 660-023-0040 and -0050. OAR 660-023-0040(3) requires local governments to "determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource," which means that unlike the impact area determined under OAR 660-023-0180(5)(a), the impact area determined under OAR 660-023-0040(3) is not initially limited to 1,500 feet and the geographic extent of the impact area is determined by evaluating whether "allowed uses could adversely affect the identified resource," rather than evaluating whether there is factual information indicating "significant potential conflicts" beyond an initial 1,500 feet. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Petitioners have not established that a county's failure to determine an impact area for purposes of OAR 660-023-0180(7) pursuant to the standard ESEE process at OAR 660-023-0040(3) is more than harmless error, where it is not clear that an impact area determined under OAR 660-023-0040(3) would be larger or different than the one the county established under OAR 660-023-0180(5)(a), petitioners have not identified any new conflicting uses within a more expansive impact area that could adversely impact the mining site and that therefore should have been limited or prevented based on the arguably more sensitive OAR 660-023-0040(3) test, compared to the "significant potential conflict" test that the county employed under OAR 660-023-0180(5)(a), and because the applicant is the only party that could possibly be harmed by employing a potentially smaller impact area as determined under OAR 660-023-0180(5)(a), and the applicant is not challenging that potentially smaller impact area but rather is actively defending it on appeal. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. In the context of a post-acknowledgment plan amendment to inventory a significant aggregate site and allow mining of that site under Goal 5, if the local government concludes based on its ESEE analysis that new conflicting uses should be allowed within the impact area under the existing comprehensive plan and land use regulations, the local government's program to achieve the goal in that regard may consist of simply relying on its acknowledged comprehensive plan and land use regulations to protect the resource site from new conflicting uses pursuant to OAR 660-023-0040(2)(a). *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Remand is necessary where two city councilors disclose the existence, but not the substance, of an *ex parte* communication, and the record includes no basis to conclude that the substance of the

communications was incidental or immaterial. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Even if a local government errs in failing to place a letter from the applicant to the city attorney into the public record of the application, the procedural error does not prejudice the petitioner's substantial right or provide a basis for remand under ORS 197.835(9)(a)(B), where the letter was never placed in front of or relied upon by the final decision maker, and the letter includes no arguments or evidence intended to demonstrate compliance with approval criteria. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A city may err in introducing a copy of the application into the record after the close of the evidentiary record before the city council, the final decision maker. However, the procedural error does not provide a basis for remand under ORS 197.835(9)(a)(B) where the petitioner does not demonstrate that the procedural error played a role in the final decision, or otherwise prejudiced the petitioner's substantial rights. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A city council's erroneous finding that zoning ordinance text amendments are non-substantive provides no basis for reversal or remand, where petitioner fails to show the Mischaracterization of the nature of the text amendments led the city to fail to address applicable law. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. LUBA will reject an argument that, without a master plan map, a local government cannot determine exactly how many lots exist within the master plan area or whether existing development exceeds a maximum number of dwelling units imposed in the master plan, where the county adopted findings identifying how many dwellings currently exist within the master plan area, and the petitioner fails to challenge those findings. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A hearings officer's erroneous statement that a portion of a meander channel that the State of Oregon quitclaimed to an adjoining property owner in 1985 was "in existence" prior to 1985 is harmless error, where the remainder of the hearings officer's findings make it clear that he was not finding that the quitclaimed portion of land existed as a discrete and lawful unit of land prior to 1985, but that the meander channel as a whole existed as, or as part of, a discrete unit of land owned by the state since statehood in 1859. *Landwatch Lane County v. Lane County*, 75 Or LUBA 473 (2017).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a local government arguably erred by refusing to accept certain evidence, but the local government also takes the position that the evidence is irrelevant, and a petitioner at LUBA assigns error only to the local government's refusal to accept the evidence without also challenging the local government's finding that the evidence is irrelevant, any error the county may have made in refusing to accept the evidence is harmless. *Wood v. Crook County*, 74 Or LUBA 278 (2016).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A hearings officer's incorrect statement regarding the applicability of a code provision is harmless error where the petitioner's argument about the meaning of the code provision is simply incorrect and accordingly, remand would serve no purpose. *Reinert v. Clackamas County*, 74 Or LUBA 427 (2016).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. It is likely that the Court of Appeals would not require that a land use hearings officer ruling on a request to alter a nonconforming use must apply the legal principle stated in *Parks v. Tillamook Co. Comm./Spliid*, 11 Or App 177, 196-97, 501 P2d 85 (1972), that nonconforming uses are disfavored and subject to strict scrutiny under state law. However, where it does not appear that the *Parks* principle played any role in the hearings officer's decision, the hearings officer's citation to *Parks* provides no basis for reversal or remand. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A hearings officer's error in identifying 1984 instead of 1962 as the date a composting operation became nonconforming, for purposes of verifying the lawful existence of the proposed nonconforming use, is harmless error, where the hearings officer concluded, based on substantial evidence, that a composting operation did not exist at all on the property until 1990. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A hearings officer's error in identifying 1984 instead of 1962 as the date a composting operation became nonconforming did not prejudice the applicant's substantial rights to present evidence regarding the lawful existence of the use prior to the date the use became nonconforming. Any remand to correct the erroneous citation to 1984 would focus on the correct date of nonconformity, 1962, and the applicant had a full opportunity to present evidence that the operation lawfully existed in 1962. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. LUBA will not consider the parties' arguments about whether a city erred by faulting an applicant for referring to proposed open space as a park, where the accuracy of the applicant's description of the open space was not a basis for the city's denial of the permit application. *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. The lack of evidentiary support for a finding that a vegetative buffer is superior to a distance buffer at reducing visual incompatibilities is not harmless error, where the only evidence on that point is to the contrary, and under the local government's interpretation of the compatibility standard whether one buffer method is better at reducing or minimizing adverse visual impacts than another method appears to be a legitimate consideration. *Forest Park Neighborhood Assoc. v. Washington County*, 73 Or LUBA 193 (2016).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A city council's erroneous interpretation that the maximum 180-day period for a temporary use permit must begin on the date the permit is issued is harmless error, and provides no basis for remand,

where the applicant never asked that the 180 period begin on a date after the permit was issued. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a city council adopts alternative interpretations of a disputed standard that allows building height increases, and approves a proposed building height increase under both interpretations, the city's decision must be affirmed where the petitioner at LUBA only assigns error to one of the city council's interpretations. *Preserve the Pearl, LLC v. City of Portland*, 72 Or LUBA 261 (2015).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A hearings officer's decision to deny verification of an asphalt batch plant does not amount to a decision to approve and verify the "nature and extent" of a previously existing concrete batch plant on the same property, where the hearings officer's findings that cite evidence regarding the previously existing concrete batch plant are not essential to the decision to deny the application before the hearings officer to verify an asphalt batch plant. *Rogue Advocates v. Jackson County*, 71 Or LUBA 148 (2015).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. That a local government may have erroneously found that a natural gas pipeline is not a water-related use provides no basis for reversal or remand, where the county does not rely on that finding in denying the application for permit approval for the pipeline. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A notice of decision's characterization of a decision as legislative when it is actually a quasi-judicial decision does not, in itself, warrant remand so long as the relevant criteria were applied and there were no procedural errors that prejudiced petitioner's substantial rights. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Failure to assign error to the county's primary finding, pursuant to ORS 197.835(7), that the text amendment is consistent with "specific policies" in the county's comprehensive plan that are the basis for the amendment, makes it unnecessary to address the petitioner's challenge to the county's alternative findings that the amendment is consistent with the statewide planning goals. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Even if the record does not include evidence supporting a county's declaration that an emergency exists, allowing an ordinance to take effect immediately rather than 90 days later, the lack of evidentiary support for the declaration does not provide a basis to reverse or remand the ordinance, where the only identified consequence is that the ordinance became effective 90 days later instead of on adoption, and in either case the ordinance is effective at the time of LUBA's review. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A petitioner's challenge to alternative findings that a parcel being rezoned was legally created does

not provide a basis for reversal or remand, where the petitioner fails to challenge the county's primary finding that the rezoning standards do not require a finding that the parcel was legally created. *O'Brien v. Lincoln County*, 65 Or LUBA 286 (2012).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A finding expressing an erroneous understanding of the local decision-maker's standard of evidentiary review is harmless error at best, where no party identifies any findings addressing the approval criteria or evidence in which the decision-maker applied that erroneous standard of review. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a county's decision that land is not suitable for commercial forest use misapplies the test that LUBA determined must be applied in an earlier appeal, but the county also properly applies and adequately explains why the land does not qualify as suitable for commercial forest uses under the correct test, the county's misapplication of the test does not provide a basis for reversal or remand. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. An allegedly erroneous and overbroad code interpretation that all commercial uses allowed in any commercial zone are allowed under the use category "retail and wholesale trade facilities" in an airport overlay zone does not warrant reversal or remand, where the interpretative error, if any, does not undermine the governing body's principal interpretation that the proposed travel plaza is a "retail and wholesale trade facility." *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a local government approves a cell tower based on the demonstrated coverage needs of a particular cellular provider, a finding suggesting that the tower could also serve the needs of another provider who did not submit evidence of coverage needs is an extraneous finding, and at most harmless error. *Oberdorfer v. Deschutes County*, 62 Or LUBA 296 (2010).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. It is harmless error to rely on new evidence that is accepted after the close of the record regarding water quality impacts of a proposed alteration to a nonconforming use, where the hearings officer also denied the proposed alteration based on fire safety impacts, and the petitioner/applicant does not challenge that basis for denial. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A county's alleged failure to process a permit application under "Type II" procedures, which provide for a *de novo* hearing on appeal of an administrative decision, does not provide a basis for remand, where the county initially processed the application under "Type I" procedures that provide for a hearing limited to the issues raised in the appeal petition, but in fact the county provided a *de novo* hearing on the appeal not limited to the issues raised in the appeal petition. *Jensen Properties v. Washington County*, 61 Or LUBA 155 (2010).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A county's error in quoting and applying superseded code provisions in its decision is harmless error, where the petitioner fails to identify any substantive difference between the superseded and current code standards. *Jensen Properties v. Washington County*, 61 Or LUBA 155 (2010).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a local government provides the decision maker with the original subdivision application narrative but fails to provide the decision maker with the amended application narrative, where the differences between the two narratives are such that LUBA cannot determine whether the local government's failure to provide the amended application narrative to the decision maker was harmless error, remand is required. *Montgomery v. City of Dunes City*, 60 Or LUBA 274 (2010).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. LUBA will not resolve arguments that a $660 fee to conduct a hearing on remand is inconsistent with ORS 215.422, where the county notified the petitioner/applicant of the hearing fee but ultimately held the remand hearing without requiring petitioner to pay the fee. Under these circumstances, LUBA's resolution of the issue would be advisory. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. ORS 197.829(2) permits LUBA to interpret a local code provision in the first instance where there is a missing or inadequate governing body interpretation, but does not permit LUBA to supply missing findings of compliance with applicable approval criteria. *Holbrook v. City of Rockaway Beach,* 58 Or LUBA 179 (2009).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where LUBA has affirmed a county's determination to waive certain road improvement standards under a local code provision prohibiting the county from requiring road improvements that are not roughly proportional to the impact of proposed development, any error the county may have made in also granting variances to those road improvement standards under general variance standards is harmless error. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A county's error in failing to identify which farm practices on nearby lands are excluded from the significant change/increase analysis because they are part of "hobby farms" and are not intended to generate a profit is harmless error, where the governing body adopted unchallenged planning commission findings that discuss impacts of the proposed mining on farm practices without distinguishing between "hobby farms" and other farms, and conclude that any impacts on farm practices will be insignificant. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. While a county's failure to describe accepted farming practices on nearby lands would likely require remand under the ORS 215.296(1) significant change/increase standard or a code provision implementing that standard, such a failure is not necessarily reversible error under a similar code significant change/increase standard that does not implement the statute. Any failure to describe accepted farming practices under the code standard is harmless, where the county adopted

unchallenged findings, supported by substantial evidence, that the proposed mining will not significantly affect any farm or forest practices. *Comden v. Coos County*, 56 Or LUBA 214 (2008).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Even if a local government erred in concluding that noise and air quality standards are "performance standards" rather than approval criteria applicable to a proposed transportation center, that error is harmless where the noise and air quality standards apply only to specified uses, and the specified uses do not include anything resembling the proposed transportation center. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a subdivision approval standard was waived under Ballot Measure 37 (ORS 197.352), a hearings officer's findings addressing that standard in approving a subsequent application for subdivision approval could not provide a basis for remand of the subdivision decision, even if those findings were defective in some way. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where the petitioner raises a number of issues, some directed at a remanded decision that is not before the city, and others at the application that is before the city, and the city prudently adopts findings addressing all issues raised, the findings that address issues regarding an application that is not before the city are surplusage and not binding on the city or parties, and LUBA will not address challenges to those findings. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A hearings officer's finding that can be read to conclude that a code provision does not apply is not a basis for remand, where the hearings officer adopted a planning director's decision that clearly applies the code provision and determines that the application complies with it, and petitioners do not challenge the director's findings. *Citizens for Responsibility v. Lane County*, 54 Or LUBA 1 (2007).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Remand is necessary where a hearings officer misunderstood the applicant's argument regarding a critical piece of evidence, that misunderstanding played a significant role in denying the application, and LUBA cannot determine if the hearings officer's misunderstanding was harmless error. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. An erroneous interpretation that appears in the prefatory section of a hearings officer decision is harmless error, where the hearings officer never applied the interpretation in the body of the decision and there is no indication that the erroneous interpretation made any difference in evaluating the evidence. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A county's conclusion that OAR 660-010-0010 does not apply to a decision designating forest land as marginal lands under ORS 197.247 (1991) is harmless error, where the decision is supported by

an analysis that is based on objective, empirical measurements of forest productivity consistent with the rule's requirements. *Herring v. Lane County*, 54 Or LUBA 417 (2007).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. An alleged inconsistency between the oral decision by the governing body and the final written decision signed on the governing body's behalf by the planning director is at most harmless error and is not itself a basis for remand, where the governing body's decision must be remanded for additional findings in any case, and the decision on remand will supersede the challenged decision, rendering any error moot. *O'Rourke v. Union County*, 54 Or LUBA 614 (2007).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A county's erroneous finding that designating forest land as marginal lands under ORS 197.247 (1991) is not subject to OAR 660-006-0010, which governs the inventory of forest lands, is harmless error, where the county's decision nonetheless complies with the substantive requirements of the rule. *Anderson v. Lane County*, 54 Or LUBA 669 (2007).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A hearings officer's statements on matters beyond the application before him are *dicta* and harmless error, where the statements appear to play no role in the decision before the hearings officer, and have no binding or presumptive effect on other decisions. *Chackel Family Trust v. City of Bend*, 53 Or LUBA 385 (2007).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A hearings officer had authority to modify a prior permit's condition of approval requiring a perimeter fence, notwithstanding a code provision that prohibits a modification that is a "substitute for an appeal," where the requested modification is to approve a different fence location following a court order two years after the permit decision, and thus the modification could not have been the subject of an appeal. *Chackel Family Trust v. City of Bend*, 53 Or LUBA 385 (2007).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where in adopting a committed exception under OAR 660-004-0028 the local government includes findings addressing some of the standards for adopting a reasons exception under OAR 660-004-0020(2), LUBA will remand to the local government to either delete those findings or explain what relevance they have to the committed exception. *Friends of Linn County v. Linn County*, 53 Or LUBA 420 (2007).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Any error in adopting findings concluding that omission of information in the application can never constitute a "misstatement of fact," for purposes of determining whether to refer a revocation request to a hearing, is harmless error, where the planning director nonetheless adopted findings addressing whether particular omissions were material misstatements of fact. *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a hearings officer reopens the evidentiary record to allow parties to present arguments and evidence concerning whether a different adjustment/variance criterion than had been applied before should

be applied to an application for an adjustment/variance, and petitioners do not argue that the hearings officer's actions failed to provide petitioners with an adequate opportunity to present their arguments on the merits concerning which adjustment/variance criterion should apply, petitioners fail to demonstrate that the hearings officer's action resulted in prejudice to their substantial rights or that any substantive error on the hearings officer's part was not harmless error. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A plan amendment provision stating that the applicant for an amendment must state "compelling reasons" why the amendment should be considered at this time, rather than as part of periodic review, is not an approval criterion requiring a particular finding. To the extent a finding is required, where the petitioner does not dispute that the application stated a compelling reason to proceed immediately, the failure to adopt a finding to that effect is harmless error. *Oregon Shores Cons. Coalition v. Lane County*, 52 Or LUBA 471 (2006).

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

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. LUBA will not affirm a decision under the harmless error doctrine or ORS 197.835(11)(b) notwithstanding failure to adopt findings applicable to conditional uses allowed in the zone, based on findings adopted to address similar site review standards, where it is not clear that the zoning district provides for the proposed use at all. *Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582 (2006).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. That a city's decision is based in part on an erroneous interpretation of applicable law provides no basis for remand where its decision is separately based on findings that correctly interpret and apply the applicable law. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Even if a hearings officer's assumption that the applicant could legally conduct both an outdoor mass gathering and a smaller gathering during the same three month period is erroneous, any error is harmless and not a basis to reverse or remand the decision, where a proposal for outdoor gatherings was not part of the application, and the hearings officer's statement was merely *dicta*, not binding on the parties in any way. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. The fact that a local government could have reached the decision it did without considering and relying on improperly received evidence does not make that error harmless. When a local government relies

on evidence not properly before it to render a decision, it violates the parties' substantial rights. *Wal-Mart Stores, Inc. v. City of Oregon City*, 50 Or LUBA 87 (2005).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. That a county theoretically could have adopted a rezoning decision by resolution as a zoning map "correction" under a code process that would not require written notice to petitioner does not mean that the county's failure to provide written notice to petitioner as required under the code process it did use was harmless error. *Sullivan v. Polk County*, 49 Or LUBA 543 (2005).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a land use decision expressly incorporates a particular document, that document is incorporated whether or not it is attached to the challenged decision when mailed. That the local government inadvertently attached the wrong document to the decision when mailing it does not have the legal effect of incorporating the attached document, and the act of attaching the wrong document is harmless error. *Grabhorn v. Washington County*, 49 Or LUBA 746 (2005).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A county's error in finding that ORS 215.253 imposes an absolute bar on adopting and applying local land use regulations to farm uses provides no basis for remand of land use decision approving a feedlot, where petitioners identify no existing, applicable local land use regulations that apply to county approval of a feedlot. *Friends of Jefferson County v. Jefferson County*, 48 Or LUBA 107 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A land use hearings officer's findings that a radio tower proposal would not increase radio frequency interference would provide no basis for remand, even if the findings are inadequate and the findings are not supported by substantial evidence, where the local government's authority to regulate radio frequency interference is preempted by federal law. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. LUBA will not resolve a petitioner's challenge to a county's interpretation of a comprehensive plan policy where, under the facts found by the county and affirmed by LUBA, the plan policy would be applied the same way under either petitioner's or the county's interpretation. Under such circumstances, the interpretative dispute between the parties is merely hypothetical, and the alleged misinterpretation provides no basis for reversal or remand. *Doob v. Josephine County*, 48 Or LUBA 227 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A local government's failure to adequately identify documents it intends to incorporate by reference as findings, and its adoption of testimony as findings, are not by themselves a basis for reversal or remand. Instead, the attempted incorporation fails and the city may not rely on such documents or testimony to provide "findings" in support of the decision. If the city has adopted other findings that adequately support the decision, the failed incorporation and improper attempt to adopt testimony as findings are harmless error. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a decision cites three reasons for rejecting an alternative building location proposed by a permit opponent, under a code provision authorizing the local government to require alternative building locations to protect scenic views from adjoining properties, potential flaws in two of the three reasons are not a basis for reversal or remand, where the third reason is an independent and sufficient basis to reject the proposed alternative. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A local government's failure to address issues raised regarding whether a enhanced wetland project is consistent with the purpose of the EFU zone is at most harmless error, where petitioners do not explain why the purpose statement is an approval criterion. *Cadwell v. Union County*, 48 Or LUBA 500 (2005).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A city's alleged misinterpretation of a code provision does not provide a basis for reversal or remand, where the only significance petitioner attaches to the misinterpretation relates to an issue that was not raised below and is therefore beyond LUBA's review. *Comrie v. City of Pendleton*, 47 Or LUBA 38 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a planning commission fails to formally appoint a three-person citizens' advisory committee from the community at large when considering major land use regulation amendment, as required by an applicable citizen involvement comprehensive plan requirement, that failure does not constitute reversible error where the planning commission in fact seeks the advice of four members of the city's design review committee who are citizens of the community. Where no party disputes that the design review committee members are members of the community at large, the planning commission's decision to seek input from the design review committee either constitutes de facto compliance with the citizen involvement requirement or renders any failure to formally appoint a citizens advisory committee a procedural error that resulted in no prejudice to the petitioner or other citizens of the community. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Even assuming a county errs in "rounding up" rather than "rounding down" in calculating the number of developable and undeveloped acres under a standard that requires one undeveloped acre for every developed acre, that error provides no basis for reversal or remand, where the result of rounding up is consistent with the purpose of the standard, to ensure that the number of developed acres does not exceed the number of undeveloped acres. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Even if it was error for the city to refer to proposed reconfigurations of existing lots as "tracts," where petitioners identify no reason why the erroneous reference provides a basis for reversal or remand, the reference is at most harmless error and does not provide a basis for reversal or remand. *South v. City of Portland*, 46 Or LUBA 558 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Even if a finding that an existing sign is illegal is erroneous, that error is harmless and does not provide a basis for remand, where the legality of the existing sign plays no role in approving the sign expansion under the applicable approval criteria. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Any error in a hearings officer's conclusion that the terms of an easement allow a public utility to file a land use application without the property owner's signature is harmless, where the code allows a public utility with condemnation authority to sign land use applications, and there is no dispute that the applicant is a public utility with condemnation powers under applicable statutes. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where LUBA affirms one of two independent bases for not requiring a subdivision applicant to provide access to an adjoining property owner's property, petitioner's challenge to the other basis for the city's decision can provide no basis for remand and LUBA will not consider the challenge. *McFall v. City of Sherwood*, 46 Or LUBA 735 (2004).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. An erroneous assumption in a supplemental study regarding traffic impacts of development under proposed zoning for purposes of OAR 660-012-0060(2)(d) is harmless error, where the initial traffic study reached the same conclusion of compliance with the rule using the correct assumption, and petitioner offers no reason to believe that remand to correct the erroneous assumption in the supplemental study will alter that ultimate conclusion. *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Even if a city erroneously applied its zoning ordinance standards for lots or parcels to an applicant's request for a lot line adjustment, that error provides no basis for reversal or remand where the city's decision to deny the lot line adjustment request was not based on those standards. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. The lack of evidence supporting findings that the subject property has no physical features that might limit development is not a basis for reversal or remand, where no party contended below that any physical features of the property limit development. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Remand to adopt specific findings addressing a local criterion requiring that comprehensive plan amendments be "in the public interest and will be of general public benefit" is not warranted where the findings and narrative text of the amendments make it abundantly clear that the local government believes that the amendments are in the public interest and will benefit the public. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. LUBA will not affirm a county decision that must otherwise be reversed on an alternative ground that was not considered by the county and for which there is no evidentiary support. *Perkins v. Umatilla County*, 45 Or LUBA 445 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. An applicant's failure to submit a farm management plan, as required by the county code, provides no basis for reversal or remand where petitioner's argument is that the farm management plan is required to compare the income that will be generated by a proposed hunting preserve with the income that is generated by the commercial farm on the property and LUBA affirms the county's interpretation of the code that relevant approval criteria do not require a comparison of hunting preserve and commercial farm incomes. *Underhill v. Wasco County*, 45 Or LUBA 566 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A hearings officer's erroneous finding that land is currently employed for nursery stock production is harmless error, where petitioners do not establish that nursery stock production must precede issuance of a permit that is necessary to construct an accessory greenhouse. *Lorenz v. Deschutes County*, 45 Or LUBA 635 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A county's erroneous application of an "adequate herbaceous forage" stand ard in approving a nonfarm partition is not harmless error, where the county focused preponderantly on that standard and failed to adopt findings addressing the required considerations under the correct standard. *Hanna v. Crook County*, 44 Or LUBA 386 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where five tax lots make up one parcel, a hearings officer's erroneous finding that the tax lots make up two parcels is not a basis for reversal or remand of a permit for a forest dwelling under ORS 215.750(1) if there are a sufficient number of parcels within the 160-acre template to satisfy the approval standard without considering those five tax lots. *Testa v. Clackamas County*, 44 Or LUBA 402 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where LUBA's remand requires the county to resolve an issue regarding three tax lots, but the county on remand accepts evidence on broader issues, the county's error, if any, in confining its final decision to resolving the dispute regarding the three tax lots is harmless, given that the county could have initially chosen to confine the remand proceeding to the basis for LUBA's remand. *CCCOG v. Columbia County*, 44 Or LUBA 438 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. That certain documents may not have been provided to the planning commission provides no basis for remand, where the planning commission decision was appealed to the city governing body, the governing body adopted the city's final decision and there is no contention that the disputed documents were provided to the city governing body. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where LUBA finds that a local government correctly determined that a particular conditional use approval criterion applies, but LUBA disagrees with the local government's reasons for concluding that the criterion applies, the local government's erroneous reasons for correctly concluding that the criterion applies provide no basis for reversal or remand. *Dundas v. Lincoln County*, 43 Or LUBA 407 (2002).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where persons other than the resident will participate in a home occupation, but the county cites the wrong zoning code provision that is violated by such participation by nonresidents, LUBA will not remand the decision for the county to address the correct code provision where the decision includes other bases for denial of the application. *Hick v. Marion County*, 43 Or LUBA 483 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where LUBA cannot tell if the local government simply weighed conflicting evidence, or instead impermissibly rejected the opponent's evidence for failure to satisfy a nonexistent burden of proof, the local government's error in explicitly shifting the burden of proof to the opponents is not harmless. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Even if evidence is improperly accepted by the local government, remand is not appropriate where petitioners fail to demonstrate that the improperly accepted evidence is potentially relevant to an approval criterion. Evidence regarding development of a neighborhood plan, ownership patterns in the neighborhood, and whether a proposed hotel can meet height limitations is not potentially relevant to a criterion that requires a proposed hotel to be consistent with regard to "building size, height, color, material and form" with other structures in the neighborhood. *Terra v. City of Newport*, 40 Or LUBA 286 (2001).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. It is error for a member of a local governing body to announce that he is close friends with the parties and will not participate in the decision on a variance request, but nevertheless later make the motion to approve the written decision and vote on the written decision. However, the error is harmless where the member of the governing body does not participate in the evidentiary hearing or the 4-0 oral vote at the conclusion of the evidentiary hearing to approve the variance. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Any error in failing to comply with code provisions for amending the Metro UGB is harmless, where the pertinent code provisions are not based on statute, goal or rule; the provisions have been superseded by new standards that would apply on remand; and it is undisputed that the decision does not violate the new standards. *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 539 (2001).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A county's inadequate findings of compliance with inapplicable approval criteria are harmless error, and

provide no basis to reverse or remand the challenged decision. *Wolverton v. Crook County*, 39 Or LUBA 256 (2000).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a permit application omits required information, the omitted information is not contained elsewhere in the record, and the omitted information is necessary to demonstrate compliance with an applicable approval standard, the failure to provide the required information is not harmless procedural error and provides a basis for reversal or remand. *Hausam v. City of Salem*, 39 Or LUBA 51 (2000).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A lack of supporting information in an application does not provide a basis for reversal or remand when the missing information is not necessary to determine compliance with a specific approval standard. *Roth v. Jackson County*, 38 Or LUBA 894 (2000).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. It is inconsistent with ORS 215.296(1) to arbitrarily limit the scope of analysis to properties within 500 feet of the subject property, where doing so results in failure to consider substantial evidence in the record of significant impacts from the proposed use to accepted farming practices on lands beyond 500 feet. However, where petitioners fail to challenge a finding that there are no significant impacts within 500 feet, and an extrapolation of that finding to lands beyond 500 feet, the county's error does not provide a basis for reversal or remand. *Wilbur Residents v. Douglas County*, 37 Or LUBA 156 (1999).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a county code provision requires a *de novo* review and a hearings officer's decision includes language that suggests the hearings officer erroneously believed a *de novo* review was not required, there is no basis for reversal or remand where record makes it clear that the hearings officer nevertheless conducted the requisite *de novo* review. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a local government decision does not incorporate a new city but erroneously applies LCDC's rules concerning incorporation of new cities in the course of taking an exception to Goal 14, the error is harmless and provides no basis for reversal or remand. *James v. Josephine County*, 35 Or LUBA 493 (1999).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where an approval criterion requires compliance with two off-site impact standards and a hearings officer finds that neither impact standard is met, the possibility that the hearings officer's finding concerning one of the impact standards is defective provides no basis for remand where the finding concerning the other impact standard is upheld and is sufficient by itself to support permit denial. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where the zoning ordinance requirements for giving notice of permit hearings are inconsistent with statutory

requirements, the statutory conflict is not rendered harmless error by a zoning code requirement that the county give "any other notice required by law." *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Goal 14 does not apply to property within a city's limits, and therefore a city's conclusory finding of compliance with Goal 14 is harmless error. *Larvik v. City of La Grande*, 34 Or LUBA 467 (1998).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. The omission of information required by a local code from a development application is harmless procedural error if the required information is located elsewhere in the record. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. The failure of the notices of the city and county planning commission hearings to include a listing of applicable review criteria from the city and county zoning ordinances and plans is not an error justifying remand where the criteria were listed in the staff report, the parties were provided an opportunity to comment on the staff report at the hearing at which it was presented, the parties were provided almost two weeks to submit written comments on the staff report and petitioners have not demonstrated substantial prejudice. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Allegations that the planning director provided allegedly erroneous advice to the planning commission cannot provide a basis for reversal or remand, where there is no indication in the record that the planning commission agreed with the allegedly erroneous advice and the challenged decision is the city council's decision affirming the planning commission decision. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. The omission of required information from an application constitutes harmless procedural error if the required information is located elsewhere in the record. However, where such information is not located elsewhere in the record and such information is necessary for a determination of compliance with relevant approval standards, such an error is not harmless and warrants reversal or remand of the challenged decision. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. That a local code's definition of the term "taking" neither accurately nor completely reflects the opinions of appellate courts and LUBA regarding what constitutes a "taking" of private property for public use under the Fifth Amendment to the U.S. Constitution or Article I, section 18, of the Oregon Constitution provides no basis for reversal or remand, where the term "taking" is not used elsewhere in the code. *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A local government determination that an inapplicable code standard is satisfied is harmless error, and provides no basis for reversal or remand. *Gettman v. City of Bay City*, 28 Or LUBA 116 (1994).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A hearings officer's reliance on a dictionary definition of "in conjunction with" without providing the dictionary definition relied upon is harmless error, where it is apparent from the decision that the hearings officer interpreted the code term to require establishment of a customer/seller or seller/customer relationship between the proposed commercial use and timber and farm uses in the community. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where an application for subdivision tentative plan approval does not contain information on the location of driveways and easements required by the code, but petitioners fail to establish the missing information is relevant to any applicable approval standard, the error is harmless and does not provide a basis for reversal or remand. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a decision approving a planned development states in one place that it grants detailed development plan approval, but it is clear from the decision and findings as a whole that it grants conceptual development plan approval, the single erroneous reference is a harmless error and provides no basis for reversal or remand. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where the applicability of certain comprehensive plan policies was debated during the local proceedings, and petitioners had opportunities to and did present argument concerning these policies, the local government's failure to list the policies as applicable approval standards, as required by ORS 197.195(3)(c)(C), is harmless and provides no basis for reversal or remand. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. An applicant's failure to include particular information required by the local code on a permit application provides no basis for reversal or remand, unless petitioner explains why the missing information is necessary to determine compliance with specific applicable approval standards. *Wissusik v. Yamhill County*, 27 Or LUBA 94 (1994).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. In order for a petitioner to obtain reversal or remand by LUBA of a challenged decision because information required by the local code is missing from the subject land development application, petitioner must argue that the missing information is not found elsewhere in the record and explain why the missing information is necessary to determine compliance of the proposed development with applicable approval standards. *Murphy Citizens Advisory Comm. v. Josephine County*, 25 Or LUBA 312 (1993).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where the date when a challenged ordinance would have become effective without an emergency clause has passed, any error by the local government in adopting such emergency clause is harmless, and provides no basis for reversal or remand. *City of La Grande v. Union County*, 25 Or LUBA 52 (1993).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where county regulations establish different approval standards for major and minor partitions, a county's error in treating an application as being for a minor partition, rather than for a major partition, is not harmless. *Schrock Farms, Inc. v. Linn County*, 24 Or LUBA 58 (1992).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where a local government adopted a definition of "contiguous" during the proceedings below, but did not rely on that definition in making the challenged decision, any errors in the substance of the definition, or the procedures by which it was adopted, provide no basis for reversal or remand. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Unlike a local government, LUBA is specifically required by statute to consider arguments that a local government decision is unconstitutional and to reverse or remand an unconstitutional decision. Therefore, procedural errors a local government may have committed in considering constitutional issues during local proceedings are harmless errors. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where an application for a conditional use permit for a mobile home park includes neither a site plan nor other specific information required under the local code, and the site plan and specific information are relevant to determining compliance with applicable approval criteria, their omission is not a harmless procedural error. *Burghardt v. City of Molalla*, 22 Or LUBA 369 (1991).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where the challenged decision incorrectly states that certain issues are not relevant to the applicable approval criteria, but also includes findings addressing those issues, there is no basis for reversal or remand of the decision unless petitioners establish that the findings are inadequate to demonstrate compliance with the applicable approval standards. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. An incorrect finding does not provide a basis for reversal or remand where there is no indication in the challenged decision that the decision maker relied on the incorrect finding in determining compliance with applicable approval criteria. *Reynolds v. Clackamas County*, 21 Or LUBA 412 (1991).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where the local decision maker correctly determines that a proposed zone change does not comply with a comprehensive plan policy, his erroneous speculation about what would satisfy the plan policy provides no basis for reversal or remand. *Reeder v. Clackamas County*, 20 Or LUBA 238 (1990).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. A local government commits harmless error by mischaracterizing and reviewing a "major partition" as though it were a "subdivision," as those terms are defined in the city's code, where petitioner fails

to identify any approval criteria which impose different standards on major partitions and subdivisions. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Findings that address consistency with a policy not yet adopted by the city, but which do not purport to base imposition of a disputed condition on that policy, are surplusage and provide no basis for reversal or remand. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

28.8.8 LUBA Scope of Review – Grounds for Reversal/Remand – Harmless Error. Where an existing plaza fully satisfies a code requirement for at least one plaza in excess of five percent of the area of the block, no "adjustment" was required to grant a requested development approval which includes a plaza of less than five percent of the block's area. Because no "adjustment" was required, even if the findings explaining the justification for the "adjustment" are inadequate, they provide no basis for remand. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 19 Or LUBA 1 (1990).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will reject a county's interpretation of its code—that a code provision which sets forth approval criteria regarding an application for a variance to the minimum lot size requirements within the county's urban growth area may not apply to the county's decision because it only applies to decisions made by the county's planning director but not to decisions made by the planning commission or board of county commissioners—that was made for the first time in its response brief, because that interpretation is not reflected in the decision and is therefore not an interpretation by the local government. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where the county approved a proposed variance to the 20-acre minimum lot size for two one-acre parcels, pursuant to a county code provision that provides that the county planning director may approve a variance for a proposed project if the city does not object to the variance, LUBA will reverse the county's decision as "prohibited as a matter of law" pursuant to OAR 661-010-0071(c) where the county approved the variance as "consistent with the * * * city's comprehensive plan," but the city objected to the proposed variance because of the proposal's inconsistency with the city's comprehensive plan. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Although the county concedes it erred in denying a plan amendment and zone change application based on the belief that the subject property was, at the time the county made its decision, within a designated urban reserve area, when the LCDC's urban reserve designation regarding the subject property had not actually become final at the time in question, LUBA will not remand the decision if the county's decision identifies at least one valid basis for denial that is affirmed on appeal. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. When petitioners do not seek relief from any conditions imposed or any aspect of the city's planned unit development (PUD) approval under the general track and LUBA's only option is to affirm, reverse, or remand, the petitioners are asking LUBA to issue what is essentially an advisory opinion regarding the present case. LUBA lacks express statutory or cited judicial authority to issue an advisory opinion on the legal matters presented in the petition and issuing such an advisory opinion would be contrary to one of the express statutory purposes of LUBA's review: that our review should be consistent with "sound principles governing judicial review." ORS 197.805. *Dreyer v. City of Eugene*, 78 Or LUBA 391 (2018).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where LUBA sustains petitioner's assignment of error and remands a local government's decision denying petitioner's application, LUBA will address an intervenor's contingent cross assignments of error in a cross petition for review, where those cross-assignments of error raise issues that might provide additional bases for remanding the decision, in order to correct other alleged errors on remand. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. A hearings officer errs in failing to include a condition approval limiting mining activities to five acres at any one time and requiring reclamation of each five-acre area prior to mining the next five-acre area, given

the importance of the proposed five-acre limit to the hearings officer's conclusion that the mining activities would not have a significant impact on wildlife habitat. *Martucci v. Jackson County*, 77 Or LUBA 252 (2018).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where LUBA has affirmed a local government's primary interpretation of a comprehensive plan policy, supporting the local government's decision to deny the application, LUBA need not resolve challenges to independent, alternative interpretations supporting denial. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Arguments that future construction of a potential pedestrian trail within a subdivision tract will violate applicable environmental review standards are not a basis to reverse or remand the subdivision decision that creates the tract, where the subdivision decision before LUBA does not approve the pedestrian trail or conduct environmental review, but defers those determinations to a future application for environmental review, when and if the applicant proposes to construct the pedestrian trail. *Frewing v. City of Portland*, 74 Or LUBA 59 (2016).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will not affirm a hearings officer's decision based on a legal theory that application of a rural industrial zone to rural property does not require an exception to Goal 14, where the hearings officer did not adopt that theory and instead approved an exception to Goal 14 to apply the rural industrial zone. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where a petitioner's arguments under an assignment of error are entirely derivative of arguments made under other assignments of error, such derivative arguments provide no independent basis for reversal or remand. *Seabreeze Associates Limited Partnership v. Tillamook County*, 71 Or LUBA 218 (2015).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Under ORS 197.829(2), LUBA is authorized to interpret county land use regulations in the first instance in cases where the local government has failed to do so. Where a party raises an argument that a building used to board horses is authorized as a permitted use under the zoning and development ordinance, and the hearings officer does not consider the argument and does not adopt findings in response to the party's argument, LUBA may interpret the zoning ordinance and determine whether the building used to board horses is a permitted or conditional use in the zone. *Stavrum v. Clackamas County*, 71 Or LUBA 290 (2015).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will not entertain arguments based on equitable estoppel unless the proponent first provides a sufficient basis to conclude that the legislature granted LUBA the authority to reverse or remand a land use decision based on equitable doctrines. *Macfarlane v. Clackamas County*, 70 Or LUBA 126 (2014).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. A county decision that requires an applicant to secure an easement over property that may be owned by petitioner does not result in a taking of petitioner's property. If the easement is not obtained, then the

condition will not be satisfied and no construction will occur. *Reading v. Douglas County*, 70 Or LUBA 458 (2014).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. A county decision that approves an application to partition a 41-acre parcel located within a deer winter range overlay zone into two approximately 20-acre parcel, where the minimum parcel size for properties located in the deer winter range overlay zone is 80 acres, is "prohibited as a matter of law" under OAR 661-010-0071(1)(c). *ODFW v. Klamath County*, 66 Or LUBA 92 (2012).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. That a city may have posted an inaccurate copy of its comprehensive plan on its website during permit proceedings does not provide a basis for remand of the decision that followed those permit proceedings. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Granting a motion for voluntary remand over a petitioner's objection is consistent with the legislative policy in ORS 197.805 that LUBA is to conduct its review proceedings "consistently with sound principles governing judicial review," where LUBA concludes the voluntary remand will give the local government an opportunity to eliminate some contested legal issues, facilitate focused arguments on any contested legal issues that remain, and thereby facilitate any required final appellate disposition of a land use dispute. *Dexter Lost Valley Community Assoc. v. Lane County*, 66 Or LUBA 350 (2012).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will grant a motion for voluntary remand over a petitioner's objection where there is no reason to suspect that the county's request is made for any reason other than to have a second chance to adopt a defensible response to the issues that petitioner raises in the petition for review. Voluntary remand is not appropriate if motivated by a desire to create delay, or other improper reasons. *Dexter Lost Valley Community Assoc. v. Lane County*, 66 Or LUBA 350 (2012).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Bias on the part of a decision maker in a quasi-judicial land use proceeding may be a basis for remand. However, in a LUBA appeal of a city council decision that followed *de novo* review of a planning commission decision, allegations of bias on the part of a single planning commissioner will provide a basis for remand only if the petitioner shows the alleged bias of the planning commissioner tainted the record that was reviewed by the city council. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. A petitioner's motion for an evidentiary hearing to establish bias on the part of a planning commissioner will be denied where (1) the decision on review is a city council decision that followed a *de novo* review of a planning commission decision, (2) the only claim of impropriety on the part of the planning commission that might have tainted the record on review was a planning commission majority vote to refuse to consider evidence offered by petitioner, and (3) the allegedly biased planning commissioner voted with the planning commission minority to accept the evidence offered by petitioner. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. In a county code enforcement proceeding before a hearings officer, petitioner's complaints that a county code enforcement officer improperly interfered with pending civil litigation between petitioner and his neighbor and improperly contacted the Oregon Department of Fish and Wildlife regarding the county hearings officer's decision in the code enforcement proceeding after the hearings officer's decision was entered provide no basis for reversing or remanding the hearings officer's decision. The alleged improprieties by the county code enforcement officer may be actionable in a different forum, but they provide no basis for remanding the county hearings officer's decision. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. The exclusive remedy for an alleged failure by a county code enforcement officer to produce requested public records is to petition the county district attorney for relief under ORS 192.460. Where the disputed photographs and the substance of the disputed field notes were made part of the record before a hearings officer in a land use code enforcement proceeding and petitioner was permitted to submit contrary evidence and cross examine the code enforcement officer in the hearing before the hearings officer, there was no prejudice to petitioner's substantial rights and no basis for remand. *Wigen v. Jackson County*, 63 Or LUBA 490 (2011).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Even assuming LUBA has authority to reject an otherwise meritorious exhaustion/waiver challenge based on the argument that the county is equitably estopped from asserting exhaustion/waiver due to alleged erroneous advice from county planning staff in accepting the local notice of appeal, the argument fails where based on petitioners' affidavits the best that can be said with confidence is that there was mutual misunderstanding and miscommunication regarding the sufficiency of the local notice of appeal and what issues petitioners wished to raise therein. *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. When a motion for voluntary remand is filed either for the purpose of allowing an applicant to withdraw its application or after an applicant has withdrawn the application, a local government need not represent that it will address all of the issues presented by a petitioner in order for that motion to be granted. *Jacobsen v. Douglas County*, 62 Or LUBA 461 (2010).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. When in reviewing an application to expand a nonconforming campground to permit installation of 13 new park model recreational vehicle (RV) units, a hearings officer also concludes that 22 park model RV units previously installed pursuant to county building permits require goal exceptions to be lawful, that conclusion is non-binding *dictum* and does not provide a basis for remand, where the decision does not purport to revoke or invalidate the building permits, or impose any conditions or make binding determinations with respect to the 22 previously installed RV units. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. That a park model recreational vehicle (RV) is defined in the state building code as one type of recreational vehicle

does not mean that the permanent installation of park model RVs on rural forest land is equivalent to temporary campground use by self-propelled or pull-behind RVs, under Oregon's statewide planning goals, administrative rules, and implementing land use regulations. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

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

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Equitable estoppel cannot arise from the actions of local government officials who purport to waive the provisions of a mandatory law or otherwise exceed their authority. *West v. City of Salem*, 61 Or LUBA 166 (2010).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will deny a city's voluntary motion to remand where the petition for review has not yet been filed and motion does not explicitly state that the city will address all of petitioner's issues regarding the appealed decision. *Jacobsen v. City of Winston*, 61 Or LUBA 536 (2010).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where the findings identify issues that the local government thinks were not properly preserved for appeal under local code provisions requiring a notice of appeal to specify the grounds for appeal, and petitioners do not challenge those findings, any assignments of error in the petition for review that raise issues that the city found were waived provide no basis for reversal or remand of the decision. *Citizens for Responsible Development v. City of The Dalles*, 59 Or LUBA 369 (2009).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Failure to disclose *ex parte* communications that have no bearing on applicable approval criteria or to issues material to approving or denying a land use application does not necessarily warrant remand. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. General expressions of support or opposition to a proposed annexation are not *ex parte* contacts within the meaning of ORS 227.180(3), because they include no factual or legal assertions that bear on approval criteria or on any issue material to approval of the annexation that could possibly be rebutted. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where LUBA sustains an assignment of error and remands a county decision, and the county hearings officer adopts approximately two pages of findings on remand addressing that assignment of error, it is the hearings officer's reasoning in rejecting the assignment of error that is before LUBA in a subsequent appeal. Where a petitioner merely re-alleges the assignment of error and makes no

meaningful attempt to challenge the hearings officer's reasoning in rejecting the assignment of error, LUBA will deny the assignment of error. *Kipfer v. Jackson County*, 58 Or LUBA 436 (2009).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will grant a motion for voluntary remand over a petitioner's objections where the appeal concerns both a property line adjustment and a conditional use permit and although it appears the property line adjustment might be subject to reversal, it is not clear whether the property line adjustment is essential to the conditional use permit approval. *Fenn v. Douglas County*, 56 Or LUBA 261 (2008).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will grant a motion for voluntary remand of a property line adjustment decision over a petitioner's objections where the statutes governing property line adjustments recently changed and although the property line adjustment decision appears to violate the statutes that were in effect when the decision was rendered, it is unclear whether the property line adjustment would be barred by the amended statutes. *Fenn v. Douglas County*, 56 Or LUBA 261 (2008).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where LUBA determines that three county findings regarding the significance of an aggregate site are not supported by substantial evidence, are inadequately explained, or fail to appreciate the significance of certain evidence in the record, remand is required where LUBA cannot assume the findings were minor or unimportant parts of the county's ultimate decision that the applicant failed to demonstrate that the aggregate site qualifies as "significant," under OAR 660-023-0180(3). *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Although there might be circumstances where LUBA could reverse or remand a land use decision based on equitable estoppel principles, where a petitioner fails to demonstrate that the elements of equitable estoppel set forth in *Coos County v. State of Oregon*, 303 Or 173, 734 P2d 1348 (1973), are present, LUBA will not sustain an assignment of error based on an equitable estoppel argument. *Chaves v. Jackson County*, 56 Or LUBA 643 (2008).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will remand a decision approving a broadcast tower that relies in part on a "safe harbor" approach the hearings officer adopted in a different permit proceeding, where LUBA has remanded that other permit decision to resolve an issue under that approach but the county has taken no action on remand and the challenged decision does not resolve the issue. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. When the arguments presented in support of an assignment of error are so poorly stated and developed that the overwhelming majority of the assignment of error cannot reasonably responded to, LUBA will not require respondents to respond to every disjointed argument presented in the assignment of error. *Sommer v. Josephine County*, 54 Or LUBA 507 (2007).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. In the absence of a reviewable interpretation by a local government of its code, LUBA is authorized under ORS

197.829(2) to interpret the local government's code in the first instance. *Munkhoff v. City of Cascade Locks*, 54 Or LUBA 660 (2007).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. A local government errs in approving a development that proposes multiple duplex and fourplex buildings on one lot where the definition of those buildings and the context of that definition establishes that the local government's code allows only one building per lot. *Munkhoff v. City of Cascade Locks*, 54 Or LUBA 660 (2007).

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

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where an assignment of error relies exclusively on an allegation that the challenged decision contains no findings regarding a particular approval criterion, and in fact findings addressing the approval criterion do exist, but the petitioner fails to challenge those findings, the assignment of error fails to provide a basis to reverse or remand the challenged decision. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. To obtain voluntary remand over a petitioner's objections, the local government must demonstrate only that it will review all of the issues raised in the petition for review. Voluntary remand requires no confession of error, and petitioner is not guaranteed a particular result. *Grabhorn v. Washington County,* 50 Or LUBA 510 (2005).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Voluntary remand is warranted where the local government states that it will either address all issues raised in the petition for review or revoke the decision in its entirety. At least where the petitioner seeks to reverse or nullify the challenged decision, petitioner is not entitled to dictate the basis on which the local government revokes a remanded decision. *Grabhorn v. Washington County*, 50 Or LUBA 510 (2005).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will reverse a city council decision that interprets its code provisions regarding accessory uses to include a tennis facility that includes four grass courts, bleachers, restrooms and shower facilities and parking and camping areas as accessory uses to a single-family dwelling, where the code permits "service clubs, lodges and other public uses" as a conditional use in the zone, and the tennis facility appears to fall squarely within that category. *McCormick v. City of Baker City*, 46 Or LUBA 50 (2003).

28.9 LUBA Scope of Review – State Agency Decisions. LUBA does not have jurisdiction to review a decision by the Department of Land Conservation and Development approving a county periodic review work task. *Colony v. Wallowa County*, 46 Or LUBA 586 (2004).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will remand a city's zoning designation decision, where the decision is dependent on the validity of a concurrent annexation decision that LUBA has concluded does not comply with applicable law. *Just v. City of Lebanon*, 45 Or LUBA 179 (2003).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. In applying local legislation to grant a permit holder's request to extend a two-year forest template dwelling permit for one additional year, a county commits reversible error in providing that the permit will expire if the dwelling is not completed within that three-year period where ORS 215.417(1) and OAR 660-033-0140(5)(a) require that a forest template dwelling permit be honored for four years. Where the county concedes on appeal to LUBA that it erroneously failed to apply OAR 660-033-0140(5)(a), LUBA will reverse the county's decision even though the permit opponent does n ot assign error to that aspect of the county's decision. *Butori v. Clatsop County*, 45 Or LUBA 553 (2003).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. That a county may have required hunting preserve buffers in other decisions that approve hunting preserves does not necessarily mean that the county errs in not requiring a hunting preserve buffer in an appealed decision, where there may have been factual differences or different evidence in the proceedings that led to the appealed deci sion that explain the different results. *Underhill v. Wasco County*, 45 Or LUBA 566 (2003).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where LUBA and the Court of Appeals have already decided that local ordinance provisions require that an applicant for a lot line adjustment demonstrate that the proposed use of the property after the lot line adjustment is served by adequate public facilities and is compatible with comprehensive plan policies, a city may not interpret those same provisions in such a way as to relieve an applicant of that burden. *Robinson v. City of Silverton*, 44 Or LUBA 308 (2003).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Even though granting a motion for voluntary remand would give a local government a second chance to respond to issues that it failed to respond to in the appealed decision, a motion for voluntary remand will not be denied for that reason alone, because forcing the local government to defend a decision that it does not believe is defensible would not serve the ORS 197.805 goal of quickly reaching finality in land use matters. *Doob v. Josephine County*, 43 Or LUBA 130 (2002).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Denial of a motion for voluntary remand may be warranted if it is shown that a local government is making only half-hearted attempts to respond to relevant issues and then seeking serial voluntary remands to correct those half-hearted attempts. *Doob v. Josephine County*, 43 Or LUBA 130 (2002).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where all of the assignments of error in petitioner's petition for review challenge a condition of approval for a planned unit development that requires a 5,000-square-foot minimum lot size, and the local government moves for a voluntary remand to consider all of petitioners' assignments of error and reconsider whether it can impose the minimum lot size, LUBA will grant the motion for voluntary remand over petitioner's objection. In that circumstance, the possibility that the city will again impose the minimum lot size condition of approval is not, in and of itself, a sufficient reason to deny the motion. *OTAK, Inc. v. City of Sherwood*, 40 Or LUBA 218 (2001).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. A city's discretionary decision to not continue a hearing is reviewable by LUBA for an abuse of discretion. *Reeder v. City of Oregon City*, 37 Or LUBA 794 (2000).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where a local appeal is on the record, and the issues to be considered are limited to those raised in the notice of appeal, and there is likely to be a significant delay in the resolution of the appeal if a hearing is continued, a city does not abuse its discretion by denying an applicant's request for a continuance. *Reeder v. City of Oregon City*, 37 Or LUBA 794 (2000).

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

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. A local government is not estopped from following the appeal procedure that is required by its code where it is unclear whether county staff (1) made any false statements to the applicant concerning appeal procedures, (2) were aware that any of their representations were incorrect, or (3) intended that the applicant take any action based on such representations; and the applicant does not identify how she was induced to act differently by the county's representations. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will grant a city's motion for a voluntary remand in order to reconsider its Goal 5 determinations in light of petitioner's concerns, even though LUBA would owe no deference to the city's interpretation and application of Goal 5. *Hribernick v. City of Gresham*, 35 Or LUBA 329 (1998).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Petitioner is not denied the right to have its record objection reviewed by a superior tribunal if LUBA grants the city's request for a voluntary remand. Any error that LUBA may have committed in resolving the record objection may be raised if petitioner appeals the city's decision on remand, and appellate review is available to challenge any LUBA decision in such a subsequent appeal. *Hribernick v. City of Gresham*, 35 Or LUBA 329 (1998).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. An evidentiary hearing to establish decision makers' "personal interest" in a proposal due to their ownership of proximate property is not warranted because, even if true, such a "personal interest" could not provide a basis for reversing or remanding the decision. *ODOT v. City of Mosier*, 34 Or LUBA 797 (1998).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where a necessary interpretation of a local ordinance is absent or inadequate, LUBA will decline to interpret the local provision in the first instance, pursuant to ORS 197.829(2), when multiple interpretations are possible, and neither the county nor the applicant files a response brief. *Wodarczak v. Yamhill County*, 34 Or LUBA 453 (1998).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. A county is not bound by "issue" or "claim" preclusion to a prior finding of noncompliance with an approval criterion in a prior land use proceeding. *Femling v. Coos County*, 34 Or LUBA 328 (1998).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where more than one site plan appears in the record, a local government errs if its decision does not adequately identify which site plan is approved. *Brown v. City of Portland*, 33 Or LUBA 700 (1997).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where petitioner fails to demonstrate that its substantial rights have been prejudiced, a motion for voluntary remand filed by the local government one week prior to oral argument will be allowed. *Smith v. Douglas County*, 33 Or LUBA 682 (1997).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. When petitioner objects to a motion for voluntary remand by a local government, petitioner must identify circumstances that make a LUBA decision on the merits clearly more important than remanding to first allow the local government to address the issues raised in the petition for review. *Smith v. Douglas County*, 33 Or LUBA 682 (1997).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. A party challenging a local land use decision must provide some particularized basis for showing it to be subject to remand or reversal. *Laurence v. Douglas County*, 33 Or LUBA 292 (1997).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. A voluntary remand is appropriate if the local government agrees to reconsider all of the issues raised by the petitioners. It is not necessary for the local government to confess error. *Village Properties, L.P. v. Oregon City*, 33 Or LUBA 206 (1997).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. The failure of a city council expressly to consider denial of an application is not a basis for reversal or remand when the city council concluded the record supported approval. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. In the absence of a reviewable interpretation concerning the applicability of a possibly relevant zoning code provision, LUBA will remand for an interpretation. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Under ORS 197.829(2), enacted in 1995, LUBA is not required to remand decisions for local government interpretations of local provisions when LUBA is able to make the necessary interpretations. *Friends of Metolius v. Jefferson County*, 31 Or LUBA 160 (1996).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. When a petitioner requests a voluntary remand over the objections of an intervenor after the time allowed for a voluntary remand under ORS 197.830(12)(b), and the county's agreement to consider all issues on remand is equivocal, LUBA will deny the motion for a remand. *Brugh v. Coos County*, 30 Or LUBA 467 (1996).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. When a county approves one exception area, LUBA cannot select and approve certain parts of that exception area while remanding for further action on the balance. *DLCD v. Coos County*, 30 Or LUBA 229 (1995).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. When a petitioner mistakenly bases a challenge on zoning variance criteria rather than applicable, very similar subdivision variance criteria, LUBA will consider arguments to the extent they can be related to the applicable criteria. *Williams v. City of Philomath*, 30 Or LUBA 5 (1995).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. That an applicant's objective is reasonable is not relevant to whether the city adjustment committee erred in applying the city's zoning ordinance sign adjustment criteria to deny requested sign height adjustment. *Blue Beacon International v. City of Portland*, 29 Or LUBA 536 (1995).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Under OAR 661-10-021, a local government has a unilateral right to withdraw a decision for reconsideration if the notice of withdrawal is filed on or before the date the record is due. A motion for voluntary remand may be filed after the record is filed and, if granted by LUBA, is not governed by the provisions of OAR 661-10-021, including the 90-day deadline specified in that rule for decisions on reconsideration. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Code provisions that provide interim resource protection to property not on a local government's acknowledged Goal 5 resource inventories, until the Goal 5 planning process can be carried out, do not implement Goal 5. Therefore, local interpretations of such code provisions are not subject to reversal by LUBA under ORS 197.829(4). *Gage v. City of Portland*, 28 Or LUBA 307 (1994).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. During the local proceedings, the applicant for development approval bears the burden of proof to establish its application satisfies relevant approval standards. Where the local government shifted that burden

to opponents of the development application, the challenged decision must be remanded. *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. ORS 197.835(8) applies only where LUBA determines a local government made a land use decision exceeding the local government's discretionary authority under applicable comprehensive plan and land use regulation provisions, not where LUBA determines the local government misconstrued its permissible scope of review on remand from a previous LUBA appeal. *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32 (1994).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. While ORS 197.830(12)(b) grants a local government the unilateral power to withdraw an appealed decision for reconsideration before the date the record is due, it does not eliminate the discretion LUBA has under ORS 197.835 and 197.805 to grant a motion for voluntary remand after the record is filed, in accordance with sound principles of judicial review. *Mazeski v. Wasco County*, 27 Or LUBA 45 (1994).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where the sole issue raised in the petition for review concerns the proper interpretation of a local government regulation, and the challenged decision does not contain an interpretation of that regulation for LUBA to review, proceeding with the appeal can do nothing to narrow the issues on remand, and LUBA will grant a motion for voluntary remand over petitioner's objections. *Mazeski v. Wasco County*, 27 Or LUBA 45 (1994).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Even though LUBA might agree with a county's argument in its brief that the purpose section of its EFU zoning district is not an approval standard for a farm dwelling permit application, if the challenged decision itself does not interpret the code provision, LUBA must remand the decision for the county to interpret the provision in the first instance. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA cannot interpret a local government's ordinances in the first instance, but rather must review the local government's interpretation of its ordinances. Consequently, the failure of the local government to make the initial interpretation of local ordinance provisions is a basis for remand. *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where findings adopted by the initial local decision maker interpreted a local ordinance provision, but those findings were *replaced* by findings adopted by the local governing body which do not include an interpretation of the ordinance provision, LUBA must remand the decision to the local government to interpret the provision in the first instance. *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where the challenged local government decision is not included in the record submitted to LUBA, LUBA must remand the decision. *Lathrop v. Wallowa County*, 25 Or LUBA 693 (1993).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. In considering an applicant's request for voluntary remand of a decision granting development approval, where petitioner objects to the request, LUBA will not infer bad faith or improper motives from the potential economic return the applicant may receive if the proposed development is ultimately approved. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Unless the particular circumstances of a case make narrowing the issues on remand clearly more important than allowing a local government's request for a voluntary remand of its decision to address each of the issues raised in the petition for review, a motion for voluntary remand should be granted. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will not deny a request for voluntary remand of a challenged land use decision, simply because different approval criteria may apply on remand. Petitioners are entitled to obtain review by LUBA to assure a correct decision is rendered, whatever approval criteria may be applicable. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA owes local governments no deference in interpreting state law. However, where a number of the issues raised in the petition for review do not turn on interpretation of state law, the presence of questions of state law does not, alone, make a voluntary remand inappropriate. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where petitioner fails to establish a false representation was made, and also fails to establish that the representation made was made by a person with authority to bind the local decision maker, petitioner has not adequately alleged estoppel against the local decision maker. *DLCD v. Wasco County*, 25 Or LUBA 529 (1993).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where petitioner asserts the local government is estopped from denying his application, but fails to allege the facts establishing the elements of estoppel, petitioner has not provided a basis for reversal or remand of the challenged decision. *Cemper v. Clackamas County*, 25 Or LUBA 486 (1993).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where a local government concedes one of petitioner's 10 assignments of error and agrees to address petitioner's remaining assignments of error on remand, remand is appropriate so that the local government may consider petitioner's arguments in the first instance and provide any required interpretations of local law. *Weeks v. City of Tillamook*, 117 Or App 449, 844 P2d 914 (1992). *Fechtig v. City of Albany*, 24 Or LUBA 577 (1993).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. LUBA will grant a motion to remand a challenged decision that is submitted after the petition for review is filed, over the objections of petitioners, regardless of whether the motion is submitted by the respondent or

intervenor-respondent, so long as the respondent represents to the Board that it will consider and address on remand all issues raised in the petition for review. *Mulholland v. City of Roseburg*, 24 Or LUBA 240 (1992).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. Where a petition for review has been filed, granting a local government request for remand of an appealed decision, over petitioner's objection, is consistent with the statutory policy favoring complete and expeditious review only if the local government demonstrates that the proceedings on remand will be capable of providing petitioner with the relief it would otherwise be entitled to receive from LUBA. *Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 267 (1991).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. To establish a claim of bias sufficient to result in reversal or remand of a challenged decision, a petitioner is required to clearly demonstrate that the public officials charged with bias are incapable of making a decision on the basis of the evidence and argument presented. *Cummins v. Washington County*, 22 Or LUBA 129 (1991).

28.8.9 LUBA Scope of Review – Grounds for Reversal/Remand – Other. If a local government request for remand of its decision does not demonstrate that *all* of the allegations of error made by petitioner in the petition for review will be addressed on remand, LUBA will not remand the decision over petitioner's objections. *Angel v. City of Portland*, 20 Or LUBA 541 (1991).

28.9 LUBA Scope of Review – State Agency Decisions. Where DEQ has determined that for budgetary reasons it will no longer enforce its noise regulations, counties are free to enforce those noise standards if they wish, but they are not required to do so. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

28.9 LUBA Scope of Review – State Agency Decisions. It would be inconsistent with the purpose of *former* OAR 660-025-0040 to review a county's approval of an amendment to a city's urban growth boundary (UGB) for compliance with the statewide planning goals or statutes, rules, or local ordinances implementing those goals, where in periodic review the Land Conservation and Development Commission reviewed the very same UGB amendment and determined that it complied with applicable goals and rules. *Gordon v. Polk County*, 54 Or LUBA 721 (2007).

28.9 LUBA Scope of Review – State Agency Decisions. Under former OAR 660-025-0040(2), LUBA has jurisdiction over issues that do not involve compliance with the statewide planning goals. *Gordon v. Polk County*, 53 Or LUBA 618 (2007).

28. 9 LUBA Scope of Review – State Agency Decisions. In lieu of judicial review by the Court of Appeals of an order of the Columbia River Gorge Commission regarding any action of a county pursuant to the Columbia River Gorge Scenic Area Act, the county's decision may be appealed to LUBA. Such an appeal must be filed within 21 days after the Columbia River Gorge Commission decision becomes final and LUBA may not consider any issue concerning interpretation or implementation of the Columbia River Gorge Scenic Act. *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580 (2000).

28.9 LUBA Scope of Review – State Agency Decisions. An appeal to LUBA of a county decision under the Columbia River Gorge Scenic Act, prior to the date the Columbia River Gorge Commission issues a final decision reviewing the county decision, is premature and will be dismissed. Appellate jurisdiction for review of such a county decision in the first instance lies with the Columbia River Gorge Commission. *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580 (2000).

28.9 LUBA Scope of Review – State Agency Decisions. Petitioner's sole remedy on appeal from a DSL approval of a fill permit, stated in ORS 196.835, is to request a contested case hearing and, if desired, to appeal to the Court of Appeals from the order issued following the hearing. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

28.9 LUBA Scope of Review – State Agency Decisions. If a DSL finding of compatibility is not based on a final land use decision made by the city, LUBA lacks jurisdiction over the appeal from the finding of compatibility. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

28.9 LUBA Scope of Review – State Agency Decisions. A DSL finding of compatibility that relies on the separate opinions of two city planners and the city attorney is not based on a final land use decision made by the city. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

28.9 LUBA Scope of Review – State Agency Decisions. Although OAR 660-31-035(1), which governs Class A permits, does not require that an affected local government's compatibility determination either be in writing or be supported by written findings in order to be relied upon by a state agency issuing a permit, the absence of a writing raises the question of whether there actually is a local government determination. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

28.9 LUBA Scope of Review – State Agency Decisions. Two factors govern whether a local government's determination of compatibility with its acknowledged plan and regulations, made as part of a state agency approval process, is a "final" decision applying the local government's plan and regulations: (1) the state agency must be required by statute, rule or other authority, to assure that the proposal is compatible with the local government plan and regulations; and (2) the state agency must be authorized by statute, rule or other legal authority to rely on the local government's determination. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

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

28.10 LUBA Scope of Review – Limited Land Use Decisions. Where a city bureau manages the city's transportation system, including private uses in the city right-of-way, and where bureau staff have special expertise in the safe and efficient use of the right-of-way and various demands on streets, including traffic, parking, and loading, statements from the bureau (1) that studio apartments have lower turnover rates, less need for unloading large furniture, and, thus, less need for a loading space, and (2) that signed, infrequent on-street loading will not have a negative effect on the traffic safety or other transportation functions of the abutting right-of-way are evidence that would permit a reasonable person to find that an on-street loading space is adequate for a proposed studio apartment building's loading needs such that the development continues to meet the intended purpose of, and, therefore, qualifies for an adjustment to, an off-street loading space requirement, even where there is testimony in the record from an opponent of the development regarding anticipated negative congestion and safety impacts of off-street loading. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

28.10 LUBA Scope of Review – Limited Land Use Decisions. ORS 197.195(1) prohibits a local government from directly applying comprehensive plan requirements as a basis for its decision on an application for limited land use decision approval, where the comprehensive plan requirements have not been incorporated into the local government's land use regulations. That prohibition is simply inapplicable to the city's business license regulations, and ORS 197.195(1) does not prohibit a local government from conditioning its approval of a limited land use decision on compliance with its business licensing requirements. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

28.10 LUBA Scope of Review – Limited Land Use Decisions. ORS 197.828(2)(b) authorizes LUBA to reverse or remand a limited land use decision that "does not comply with applicable provisions of the land use regulations[.]" A petitioner's argument that a limited land use decision fails to comply with a notation on a recorded plat provides no basis for reversal or remand of the decision where the petitioner fails to establish that the recorded plat is a "land use regulation" as defined in ORS 197.015(11). *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

28.10 LUBA Scope of Review – Limited Land Use Decisions. LUBA's standard of review of evidentiary challenges to a limited land use decision is not the same as the standard of review of a land use decision. For limited land use decisions, LUBA may not reverse or remand a limited land use decision unless "the decision is not supported by substantial evidence in the record." Under ORS 197.828(2)(a), in determining whether the decision is "supported by substantial evidence in

the record[]" LUBA may not remand a decision on the basis that there exists evidence in the record supporting a different decision. *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

28.10 LUBA Scope of Review – Limited Land Use Decisions. The difference between substantial evidence review of a limited land use decision under ORS 197.828(2)(a) and the more rigorous substantial evidence review of a land use decision at ORS 197.835(9)(a)(C) is legally irrelevant where LUBA concludes that the evidence in the record is evidence a reasonable decision maker would rely on under the more rigorous ORS 197.835(9)(a)(C) "substantial evidence in the whole record" standard of review. *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

28.10 LUBA Scope of Review – Limited Land Use Decisions. A decision to "incorporate" comprehensive plan policies into a local government's land use regulations, to make those policies criteria directly applicable to a limited land use decision, must be accomplished by as post - acknowledgment plan amendment that expressly makes specific policies applicable approval criteria for limited land use decisions. The mere adoption of land use regulations to implement comprehensive policies does not "incorporate" such policies into land use regulations as directly applicable criteria. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

28.10. LUBA Scope of Review – Limited Land Use Decisions. A city council's interpretation of its land use legislation that a general incorporation of the city's comprehensive plan into its zoning ordinance is not sufficient under ORS 197.195 to make individual comprehensive plan policies decision making approval criteria for limited land use decisions is not reversible under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). *Johnson v. City of Gladstone*, 65 Or LUBA 225 (2012).

28.10 LUBA Scope of Review - Limited Land Use Decisions. ORS 227.175(10)(a)(E)(ii), which was adopted in response to the Court of Appeals' decision in *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997), and specifically provides that a *de novo* appeal of a permit decision under 227.175(10)(a) may not be limited to issues raised in the local notice of appeal, does not apply to appeals of limited land use decisions. *McKeown v. City of Eugene*, 46 Or LUBA 494 (2004).

28.10. LUBA Scope of Review – Limited Land Use Decisions. The fact that a local decision is properly described as a limited land use decision does not mean that the decision may be directly appealed to LUBA, where the local government establishes a process where an initial limited land use decision must first be appealed to a local hearings officer. *Southeast Neighbors v. City of Eugene*, 43 Or LUBA 286 (2002).

28.10. LUBA Scope of Review – Limited Land Use Decisions. LUBA does not have jurisdiction to review a limited land use decision, where petitioner failed to timely appeal an initial decision by the planning director to a local hearings officer pursuant to local code provisions that allow for local appeals of limited land use decisions. *Southeast Neighbors v. City of Eugene*, 43 Or LUBA 286 (2002).

28.10. LUBA Scope of Review – Limited Land Use Decisions. An allegation that a city mischaracterized its decision as a limited land use decision does not itself provide a basis for

reversal or remand, absent a further allegation that the city failed to follow the procedures applicable to the decision and that petitioners' substantial rights were prejudiced by that failure. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

28.10. LUBA Scope of Review – Limited Land Use Decisions. Whatever prejudice to petitioners' substantial rights might have occurred before the initial decision maker, when the city arguably failed to provide petitioners an adequate opportunity to comment before the planning commission on whether a proposed design complied with applicable criteria, was cured by providing petitioners an opportunity to present testimony directed at applicable criteria in a subsequent appeal to the city council. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

28.10 LUBA Scope of Review – Limited Land Use Decisions. Where petitioners do not explain how the city's failure to conduct a public hearing (if one was required under local code) prejudiced their substantial rights, there is no basis for reversal or remand pursuant to ORS 197.828(2)(d). *Venable v. City of Albany*, 33 Or LUBA 1 (1997).

28.10 LUBA Scope of Review – Limited Land Use Decisions. Contrary to the contention that limited land use decisions require only cursory findings, ORS 227.173(2), which states the requirement for findings in support of a city permit approval, makes no distinction between land use decision findings and limited land use decision findings. *Design Home Construction v. City of Silverton*, 32 Or LUBA 452 (1997).

28.10 LUBA Scope of Review – Limited Land Use Decisions. There is no meaningful difference between ORS 197.195(3)(c)(B) and 197.763(1) "raise it or waive it" requirements. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

28.10 LUBA Scope of Review – Limited Land Use Decisions. Where a local government provides public hearings before the planning commission and city council before making a limited land use decision, petitioner's allegations that the notice preceding the city council hearing fails to comply the requirements of ORS 197.195(3)(b) for notice of the application provide no basis for reversal or remand where petitioner fails to challenge the adequacy of the notice of hearing that preceded the planning commission hearing. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

28.10 LUBA Scope of Review – Limited Land Use Decisions. LUBA's review of limited land use decisions is limited to issues raised before the local government, unless (1) the local government did not satisfy the procedural requirements of ORS 197.195, or (2) the limited land use decision adopted differs significantly from the proposal described in the local notice of proposed action. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

28.10 LUBA Scope of Review – Limited Land Use Decisions. Assignments of error that contend disputed conditions of approval either exceed a local government's authority under, or improperly construe, applicable law, if sustained, provide a basis for reversal or remand of a challenged decision, regardless of whether the challenged decision is a land use decision or limited land use decision. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

28.10 LUBA Scope of Review – Limited Land Use Decisions. The term "permits," as used in Oregon Laws 1991, chapter 3, section 7, refers to all decisions defined as "permits" when that law was enacted. The subsequent amendment to the ORS 227.160(2) definition of "permit" to exclude limited land use decisions does not apply. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

28.10 LUBA Scope of Review – Limited Land Use Decisions. LUBA applies statutory waiver requirements to limited land use decisions the same way it applies them to land use decisions. LUBA's review of limited land use decisions is limited to issues raised below unless (1) the local government did not satisfy the procedural requirements of ORS 197.195, or (2) the limited land use decision adopted differs significantly from that described in the local notice of proposed action. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

28.10 LUBA Scope of Review – Limited Land Use Decisions. If a party contends an issue petitioners seek to raise before LUBA in an appeal challenging a limited land use decision was not raised during the local proceedings, and petitioners neither identify where in the record the issues were raised below nor claim the local government failed to follow the procedures required by ORS 197.195, petitioners may not raise the issue for the first time before LUBA. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

28.10 LUBA Scope of Review – Limited Land Use Decisions. In LUBA's review of alleged procedural errors, the substantial rights referred to in ORS 197.828(2)(d) concerning limited land use decisions are the same rights referred to in ORS 197.835(7)(a)(B) concerning land use decisions. *Mannenbach v. City of Dallas*, 25 Or LUBA 136 (1993).

28.10 LUBA Scope of Review – Limited Land Use Decisions. Under ORS 197.828(2)(d), in determining whether remand is appropriate where a local government commits procedural error, LUBA must determine whether the substantial rights of the parties were prejudiced by the error. The substantial rights of parties include the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing. *Warren v. City of Aurora*, 25 Or LUBA 11 (1993).

28.11 LUBA Scope of Review – Effect of Ballot Measure 37 Waiver (ORS 197.352). LUBA has jurisdiction to review decisions that post-date and rely on Ballot Measure 37 waivers, if those decisions apply land use laws that were not waived under Ballot Measure 37. However, in those appeals LUBA's scope of review does not include challenges to the underlying Ballot Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

28.11 LUBA Scope of Review – Effect of Ballot Measure 37 Waiver (ORS 197.352). Decisions under ORS 197.352(8) about whether land use laws should be or can be waived under Ballot Measure 37 are not land use decisions and are not reviewable by LUBA. But where questions arise about the scope of previously issued Ballot Measure 37 waivers in subsequent land use decisions that rely on those Ballot Measure 37 waivers, LUBA's scope of review includes resolving any ambiguities about the scope of a previously issued Ballot Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

28.11 LUBA Scope of Review – Effect of Ballot Measure 37 Waiver (ORS 197.352). LUBA will remand a decision approving a subdivision pursuant to a Ballot Measure 37 waiver where the county fails to address arguments raised below that the subdivision is inconsistent with a 1959 subdivision ordinance that predated the claimants' date of acquisition and that was not waived under the state and local waivers. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

28.11 LUBA Scope of Review – Effect of Ballot Measure 37 Waiver (ORS 197.352). Where the Ballot Measure 37 claimant dies prior to receiving development approval and the property is transferred by operation of law to his heirs, the county errs in approving development on land no longer owned by the Ballot Measure 37 claimant, pursuant to waivers that grant only the claimant the right to develop the property free of the goals, statutes and rules specified in the waiver. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

28.11 LUBA Scope of Review – Effect of Ballot Measure 37 Waiver (ORS 197.352). Where the state specifically waives only Goal 3 and related statutes and administrative rules, an argument that the state should also have waived Goals 7, 11 and 14 is beyond LUBA's scope of review and must be asserted in a different forum. The only question LUBA may decide is which goals and regulations the state actually waived. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

28.11 LUBA Scope of Review – Effect of Ballot Measure 37 Waiver (ORS 197.352). LUBA has authority to interpret ORS 197.352, or any other statute, as may be necessary in the context of reviewing a land use decision that is subject to LUBA's jurisdiction. *Welch v. Yamhill County*, 55 Or LUBA 697 (2007).

28.12 LUBA Scope of Review – Effect of Ballot Measure 49 (ORS 195.300 to 195.336). Under the Court of Appeals' decision in *Pete's Mountain Homeowners Assn. v. Clackamas Cty*., 227 Or App 140, 204 P3d 802, *rev den*, 346 Or 589, 214 P3d 821 (2009), where an application for subdivision relies on Ballot Measure 37 waivers, those waivers qualify as "standards and criteria" under the ORS 215.427(3)(a) goal-post statute, and the subdivision application is not subject to subsequently enacted standards and criteria. But Ballot Measure 49, which post-dates Ballot Measure 37 and is inconsistent with the ORS 215.427(3)(a) goal-post statute overrides the goal-post statute and limits the Ballot Measure 37 subdivision applicant to one of the three remedies specified in Ballot Measure 49. *Hoffman v. Jefferson County*, 60 Or LUBA 101 (2009).

28.12 LUBA Scope of Review – Effect of Ballot Measure 49 (ORS 195.300 to 195.336). In an appeal of a subdivision decision that relies on Ballot Measure 37 waivers and a Ballot Measure 49 vested rights decision, LUBA's scope of review includes resolving questions about the scope of the previously issued Ballot Measure 37 waiver. A decision about the scope of a previously issued Ballot Measure 37 waiver is not a decision about the "nature and extent of [just] compensation" under Measure 49 (ORS 195.305(7)) and is therefore subject to LUBA review. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

29.1.1 Comprehensive Plans – Adoption – Generally. There is no internal comprehensive plan conflict if lands that were previously added to a comprehensive plan map under prior mapping standards are allowed to remain on that map after the county adopts new mapping standards that those lands do not satisfy, so long as the county intended the new mapping standards to apply prospectively. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

29.1.1 Comprehensive Plans – Adoption – Generally. A regional parks, recreation and open space plan that the controlling regional plan requires to be adopted at least in part as a refinement of the controlling regional plan may not be adopted as a purely aspirational document that is binding on no one. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006).

29.1.1 Comprehensive Plans – Adoption – Generally. Any parks and recreation planning obligation that is imposed by the ORS 197.015(6) definition of "comprehensive plan" does not necessarily have to "indicate specific locations of any [recreational] area, activity or use." *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006).

29.1.1 Comprehensive Plans – Adoption – Generally. Goal 8 is "[t]o satisfy the recreational needs of the citizens of the state and visitors and, where appropriate, to provide for the siting of necessary recreational facilities including destination resorts." While it might be consistent with Goal 8 to do so, Goal 8 does not mandate that comprehensive plans include a list of park, open space and recreation facilities that will be constructed during the planning period or include an estimate of the costs of such facilities. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006).

29.1.2 Comprehensive Plans – Adoption – Procedure. ORS 215.060 provides that action regarding a comprehensive plan shall have no effect, unless 10 days' advance public notice of each hearing is published in a newspaper of general circulation. Where the required 10 days' notice is given, the county's subsequent decision to adopt different parts of the proposed comprehensive plan amendments by separate ordinances does not require new notice under ORS 215.060. *Johnson v. Jefferson County,* 56 Or LUBA 72 (2008).

29.1.2 Comprehensive Plans – Adoption – Procedure. An indication on the notice of adoption furnished to DLCD under ORS 197.610(1) that the Statewide Planning Goals do not apply to a proposed plan or code amendment or a new land use regulation is a ministerial act without independent significance, not a land use decision subject to LUBA's jurisdiction. *Petersen v. Columbia County*, 33 Or LUBA 253 (1997).

29.1.2 Comprehensive Plans – Adoption – Procedure. ORS 215.503(2)(a), requiring all legislative acts related to comprehensive plans or zoning adopted by a county governing body to be by ordinance, applies to legislative decisions adopting or amending comprehensive plans and zoning ordinances, not to quasi-judicial plan or zone changes. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

29.1.3 Comprehensive Plans – Adoption – Standards. ORS 197.610(1) requires that the Land Conservation and Development Commission be given notice at least 45 days before the first evidentiary hearing on adoption of a post-acknowledgment comprehensive plan amendment. Where the required notice is given, a second notice is not required under ORS 197.610(1) simply because the local government decides to adopt different parts of the proposed comprehensive plan amendment by separate ordinances. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

29.1.3 Comprehensive Plans – Adoption – Standards. Background reports, which typically contain data and information that describe a community's resources and features and address the topics specified in the applicable Statewide Planning Goals, are not the equivalent of comprehensive plans, which set forth the community's long-range objectives and the policies by which it intends to achieve them. *Mount Hood Stewardship Council v. Clackamas County*, 33 Or LUBA 284 (1997).

29.1.3 Comprehensive Plans – Adoption – Standards. A former comprehensive plan that is "retained [by a local government] as resource and background documents" for its current comprehensive plan, does not establish approval standards for land use decisions. *Tylka v. Clackamas County*, 24 Or LUBA 296 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a significant resource overlay zone provision requires that (1) resource sites not be altered or impacted to a degree that destroys their significance, (2) the proposed development not result in the loss of habitat for threatened or endangered species, (3) all feasible alternatives to the development that would not result in a substantial adverse impact on identified resource values be considered and rejected, (4) the development be sited on the property in such a manner that minimizes adverse impacts on identified resources, and (5) documentation be provided regarding requirements for state or federal permits or licenses and that appropriate resource management agencies have reviewed the development proposal against their plans, policies, and programs, the local government does not err in concluding that that provision applies at the development stage rather than the PAPA stage. *VanSickle v. Klamath County*, 80 Or LUBA 241 (2019).

29.2.1 Comprehensive Plans – Amendment – Generally. That an alteration to a proposed PAPA is required by LUBA's decision in a prior appeal and reduces the subject acreage does not mean as a matter of law that the proposed PAPA is not "altered to such an extent that the materials submitted no longer reasonably describe the proposed change," thereby requiring notice of the alteration to DLCD pursuant to ORS 197.610(6). *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

29.2.1 Comprehensive Plans – Amendment – Generally. Under ORS 197.610(6), if a proposed PAPA is altered to such an extent that the notice submitted to DLCD under ORS 197.610(1) and (3) no longer reasonably describes it, the local government must submit notice of the alterations to DLCD at least 10 days before the final evidentiary hearing, which DLCD thereafter provides to the public. The larger statutory scheme at ORS 197.610 to 197.625 is intended to expand notice and participatory options for DLCD and a broader audience that may not receive local notice. A local government's errors under ORS 197.610(6) require remand where they are of a kind or degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function. *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

29.2.1 Comprehensive Plans – Amendment – Generally. Where notice under ORS 197.610(6) is sent to DLCD 17 days *after* the final evidentiary hearing occurred and describes the "date of first evidentiary hearing" and the "date of final hearing" but does not identify the date of the "final evidentiary hearing," where there is a disparity between the text of the notice and the text of an ordinance included with the notice regarding the subject acreage, and where the notice is sent during a time when the record is left open only for evidence that is responsive to evidence that was submitted earlier, the totality of the errors in the submission of the notice and in the notice itself are of a kind and degree that make it doubtful that the ORS 197.610 to 197.625 process performed its function, and remand is required. *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

29.2.1 Comprehensive Plans – Amendment – Generally. A county's comprehensive plan is a working document that must be updated to reflect existing conditions and future planning obligations. Where nothing in the statewide planning goals or the county's comprehensive plan prohibits amendments to expand areas in the county to which certain plan designations may be applied, provided those areas meet all applicable statutory and rule requirements, such amendments do not provide grounds for remand or reversal. Counties have wide latitude to adopt and revise their comprehensive plans and zoning ordinances; amendments to the comprehensive

plan need only comply with the statewide planning goals. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

29.2.1 Comprehensive Plans – Amendment – Generally. Goal 14 prohibits urban uses on rural lands. Where a county's text amendments to its comprehensive plan do not allow any urban uses on rural land, but merely expand the allowable locations in the county that could be the subject of an application to change the plan designation to rural industrial, and the text amendments require the applicant to demonstrate that the proposed use for which the rural industrial plan designation change is consistent with all statewide planning goals, including Goal 14, a petitioner's arguments that the amendments violate Goal 14 do not provide a basis for reversal or remand. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

29.2.1 Comprehensive Plans – Amendment – Generally. A petitioner's challenge to a county's amendments to its comprehensive plan that expand the allowable locations in the county that could be the subject of an application to change the plan designation to rural commercial and rural industrial, that argue that the county's adopted and acknowledged rural commercial and rural industrial zones impermissibly allow urban uses in contravention of Goal 14 are an impermissible collateral attack on an acknowledged land use regulation where no provisions of the county's code were amended by the challenged decision. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

29.2.1 Comprehensive Plans – Amendment – Generally. *Department of Transportation v. Douglas County*, 157 Or App 18, 24-25, 967 P2d 901 (1998), does not stand for the broad proposition that in an appeal of an amendment to an existing acknowledged comprehensive plan a petitioner may challenge both the amended and unamended parts of the comprehensive plan. *Department of Transportation* was a case where the county was attempting to bring its entire comprehensive plan into compliance with the transportation planning rule, and in that circumstance LUBA review was not limited to the amendment. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

29.2.1 Comprehensive Plans – Amendment – Generally. LUBA will reject an assignment of error based on OAR 660-012-0035(3)(b), where petitioner makes no attempt to explain why the OAR 660-012-0035(3)(b) transportation system planning obligation has any bearing on or relevance to a quasi-judicial comprehensive plan and zoning map amendment that makes no changes to the city's acknowledged transportation system plan. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

29.2.1 Comprehensive Plans – Amendment – Generally. In considering whether new comprehensive plan and zoning map designations are consistent with statewide planning goal, comprehensive plan and code requirements of adequate and safe transportation facilities, a city does not err by concluding the new designations will have no impact on those facilities because the new designations include a condition that development under the new designations be suspended as soon as it generates the same traffic impact that would be generated under the existing acknowledge comprehensive plan and zoning map designations. *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

29.2.1 Comprehensive Plans – Amendment – Generally. ORS 215.431 expressly authorizes county governing bodies to allow planning commissions and hearing officers to make final decisions on some types of comprehensive plan amendments. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

29.2.1 Comprehensive Plans – Amendment – Generally. That a comprehensive plan map amendment may be quasi-judicial, and therefore potentially approvable by a planning commission, does not mean relevant statutes may not require that action be taken by the governing body before the map amendment can become final and effective. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

29.2.1 Comprehensive Plans – Amendment – Generally. The Court of Appeals' decision in *Colwell v. Washington County*, 79 Or App 82, 718 P2d 747 (1986), which held that a final decision by the governing body is necessary to make a comprehensive plan map amendment final and effective, was based on several statutes, some of which apply to counties only and some of which apply to both cities and counties. Absent a statutory exception, a final decision by a city's governing body is necessary to make a comprehensive plan map amendment final and effective. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

29.2.1 Comprehensive Plans – Amendment – Generally. A petitioner is not required to appeal a planning commission decision approving a comprehensive plan map amendment to the city council, where under applicable law a decision by the city council is required in any event to make the comprehensive plan map amendment final and effective. In that circumstance, a petitioner is not required by ORS 197.825(2)(a) to exhaust a remedy that would do no more than require the city council to do what applicable statutes and Goal 2 already require the city council to do. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

29.2.1 Comprehensive Plans – Amendment – Generally. There is no internal comprehensive plan conflict if lands that were previously added to a comprehensive plan map under prior mapping standards are allowed to remain on that map after the county adopts new mapping standards that those lands do not satisfy, so long as the county intended the new mapping standards to apply prospectively. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

29.2.1 Comprehensive Plans – Amendment – Generally. Although amendments to county standards for mapping sites that are eligible for destination resort siting are comprehensive plan amendments, and therefore potentially could result in significant affects on transportation facilities that could implicate OAR 660-012-0060, altering the standards for adding sites to the map in the future has no impact on transportation facilities. It is the future map amendments themselves that might significantly affect a transportation facility and implicate OAR 660-012-0060, and a county must consider OAR 660-012-0060 at the time those comprehensive plan amendments are adopted in the future. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

29.2.1 Comprehensive Plans – Amendment – Generally. In land use regulation, grandfather clauses shield land use rights that were gained under old land use laws from the application of new land use laws so that the new land use laws are only applied prospectively. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

29.2.1 Comprehensive Plans – Amendment – Generally. A city does not err in determining that a golf course can support open space values when considering whether existing or proposed comprehensive plan designations better support various comprehensive plan policies. *Haertl Development Company v. City of Portland*, 59 Or LUBA 69 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. When determining what comprehensive plan designation is more appropriate, a local government may consider evidence regarding wildlife habitat protection, recreation, need for parkland, water quality preservation, noise and air pollution, and tree preservation with respect to the entire property at issue in deciding that open space is the proper designation. The consideration is not limited to inventoried habitat and riparian areas. *Haertl Development Company v. City of Portland*, 59 Or LUBA 69 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. An ordinance that adds a destination resort overlay to a number of acres that were not included on the originally adopted destination resort overlay map "amends" the destination resort overlay map. That the county may have intended to include those acres within the destination resort overlay when the map was originally adopted does not make the map "amendment" something other than an "amendment." *Remington Ranch, LLC v. Crook County*, 59 Or LUBA 361 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. An ordinance that repeals an existing comprehensive plan and zoning map and replaces it with a revised map is an "amendment" of the existing comprehensive plan and zoning map. *Remington Ranch, LLC v. Crook County*, 59 Or LUBA 361 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. When an applicant files a consolidated set of applications for: (1) a comprehensive plan amendment; (2) a zone change that is dependent on that plan map amendment; and (3) a development permit that is dependent on that zone change, the goal post rule at ORS 197.427(3)(a) does not apply to "freeze" in place the standards and criteria that applied to that development permit as of the date the applications were filed. Instead the standards and criteria that apply are those supplied by the new plan and zoning designations. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. Where the challenged decision only creates a new zoning district without applying that zoning district to any property, a petitioner's argument that future development proposals may violate the new zoning district's requirement that new commercial development be small-scale and low impact is premature. *Carver v. Deschutes County*, 58 Or LUBA 323 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a petitioner argues that a comprehensive plan amendment is inconsistent with a comprehensive plan policy, but the cited comprehensive plan policy has been repealed, petitioner provides no basis for reversal or remand. *Carver v. Deschutes County*, 58 Or LUBA 323 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. While an annexation must be made in compliance with a city's acknowledged comprehensive plan, no statute or administrative rule

requires that in annexing territory the city must contemporaneously amend its comprehensive plan map to depict the new city boundaries. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. Where part of a subarea plan is adopted by one ordinance and part of that subarea plan is adopted by a second ordinance, and the first ordinance is remanded by LUBA but the second ordinance is affirmed, the part of the subarea plan adopted by the second ordinance may provide the comprehensive plan basis for a parking garage. Where the second ordinance adopts a subarea plan parking policy and zoning code amendments that specifically authorize parking garages on certain specified properties and a city subsequently issues a decision approving a parking garage pursuant to the policy and zoning code, the city's decision will be affirmed on appeal notwithstanding that the first ordinance was remanded, where petitioners identify no other comprehensive plan provisions that are inconsistent with approval of the parking garage. *NWDA v. City of Portland*, 58 Or LUBA 533 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), did not overrule or modify *Colwell v. Washington County*, 79 Or App 82, 91, 718 P2d 747 (1986), and similar cases holding that the ORS 197.825(2)(a) exhaustion requirement does not require a petitioner to file a local appeal of a lower body's initial comprehensive plan amendment decision to the governing body, because applicable statutes require the governing body to conduct a hearing on the amendment in any event. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. Notwithstanding that a county's code provides that the planning commission's decision on a comprehensive plan amendment is "final" unless a local appeal is filed, under ORS 215.060 the county governing body must hold a public hearing on the plan amendment and take final action, and therefore the planning commission's initial decision on the plan amendment is not "final" in any meaningful sense. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. Even where a county's code provides for local appeal as one of three possible paths by which a governing body will review the planning commission's initial decision on a comprehensive plan amendment, because ORS 215.060 requires the governing body to hold a public hearing on a plan amendment at which testimony and issues can be raised, in that circumstance a petitioner before LUBA is not required to file a local appeal and specify issues in a notice of local appeal in order to exhaust administrative remedies or avoid waiver under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

29.2.1 Comprehensive Plans – Amendment – Generally. When ORS 197.620(1) was first adopted, the requirement that a person must have "participated" during the local proceedings that led to adoption of a post-acknowledgment plan amendment required that an appellant have done more than make a bare neutral appearance during the local proceedings. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572 (2006).

29.2.1 Comprehensive Plans – Amendment – Generally. The text, context and statutory history of ORS 197.620(1) and 197.830(2) establish that while a bare neutral appearance will satisfy the

standing requirement under ORS 197.830(2) that an appellant must have "appeared," such a bare neutral appearance will not satisfy the standing requirement under ORS 197.620(1) that an appellant must have "participated." To have participated under ORS 197.620(2), an appellant must have asserted a position on the merits. *Century Properties, LLC v. City of Corvallis*, 51 Or LUBA 572 (2006).

29.2.1 Comprehensive Plans – Amendment – Generally. While deviations from the post acknowledgment plan amendment notice requirements at ORS 197.610(1) may constitute procedural errors that will not provide a basis for remand absent prejudice to a petitioner's substantial rights, a complete failure to provide notice to the Department of Land Conservation and Development under ORS 197.610(1) is a substantive error and requires remand without regard to whether the failure prejudiced petitioner's substantial rights. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

29.2.1 Comprehensive Plans – Amendment – Generally. Language in the notice of a plan amendment that can be read to say that the plan designation of a parcel was changed from General Industrial to Light Industrial is not a basis to conclude at a later date that the parcel is designated Light Industrial rather than General Industrial, where the plan amendment itself does not change property's plan designation to Light Industrial. *Status v. City of Corvallis*, 48 Or LUBA 254 (2004).

29.2.1 Comprehensive Plans – Amendment – Generally. A city does not err in failing to follow comprehensive plan amendment procedures in approving an annexation, where the annexation decision does not amend the city's comprehensive plan. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004).

29.2.1 Comprehensive Plans – Amendment – Generally. A comprehensive plan citizen participation provision that requires appointment of a three-person citizens' advisory committee when the planning commission is considering a major change to the local government's land use regulations is not correctly interpreted to give the planning commission unlimited discretion in deciding what changes constitute major changes. *Dobson v. City of Newport*, 47 Or LUBA 267 (2004).

29.2.1 Comprehensive Plans – Amendment – Generally. A post-acknowledgement plan amendment that redesignates more than two acres for commercial use must follow one of the three courses of action set out at OAR 660-009-0010(4). Although one of those permissible courses of action is to demonstrate that the post-acknowledgement plan amendment is consistent with the part of the acknowledged comprehensive plan that was adopted to implement the Goal 9 administrative rule, where the proposed action appears to be inconsistent with implementation strategies in the plan, the city must amend its acknowledged comprehensive plan following the planning requirements of OAR 660-009-0015 through 660-009-0025 and in doing so it must prepare an economic opportunities analysis. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

29.2.1 Comprehensive Plans – Amendment – Generally. A city may rely on the residential buildable lands inventory in its acknowledged comprehensive plan and need not update that inventory when adopting a post-acknowledgment plan amendment. Where that inventory shows a

surplus of residential buildable lands both before and after a plan amendment that designates some of those lands to allow other uses, the city may rely on that remaining surplus to find the plan amendment is consistent with Goal 10 housing planning requirements. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

29.2.1 Comprehensive Plans – Amendment – Generally. An assignment of error that challenges a county's failure to apply code criteria governing zoning map amendments provides no basis for reversal or remand where the assignment of error contends the zoning code criteria should have been applied to a comprehensive plan map amendment. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

29.2.1 Comprehensive Plans – Amendment – Generally. A comprehensive plan policy that allegedly was adopted to clarify that certain county soils that had never been rated for forest productivity were assumed to be non-forest soils was ineffective to accomplish that purpose, where the plan policy also provided an alternative procedure for determining the suitability of soils for forest use to be applied where "a determination cannot be made" using the county's soil rating system. *Doob v. Josephine County*, 41 Or LUBA 303 (2002).

29.2.1 Comprehensive Plans – Amendment – Generally. OAR 660-018-0010(11) and 660-018-0010(13), read together, exempt small tract zoning map amendments from the requirement, at OAR 660-018-0020 and ORS 197.610, that DLCD be notified of proposed plan or land use regulation amendments. *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 21 (2001).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a county fails to provide 45 days' advance notice to the Department of Land Conservation and Development prior to the first hearing on a post acknowledgment plan amendment, and provides no explanation for why emergency circumstances warrant shorter notice, the county's decision must be remanded. *Donnell v. Union County*, 39 Or LUBA 419 (2001).

29.2.1 Comprehensive Plans – Amendment – Generally. ORS 215.050(2) requires that zoning amendments shall implement the adopted comprehensive plan. When a local government adopts a zone change but does not adopt a contemporaneous comprehensive plan change, resulting in plan map/zoning map inconsistency, the decision must be remanded. *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).

29.2.1 Comprehensive Plans – Amendment – Generally. Read in conjunction with the "safe harbor" provisions of OAR 660-013-0140, the requirement at OAR 660-013-0160(5) that a local government achieve full compliance with the Airport Planning Rule in amending its comprehensive plan and land use regulations applies only when the local government amends its plan or land use regulations to add different requirements than the plan or land use regulations previously imposed. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291 (2000).

29.2.1 Comprehensive Plans – Amendment – Generally. The "air, rail, water and pipeline transportation plan" required by OAR 660-012-0020(2)(e) to be included in a local government's Transportation System Plan need not include any information other than that specified in the rule,

i.e., the location and extent of existing or planned facilities. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291 (2000).

29.2.1 Comprehensive Plans – Amendment – Generally. A demonstration of need for a UGB amendment must be based upon and consistent with the local government's planning documents adopted pursuant to the Goal 2-mandated planning process. In order to amend the UGB based on different population and capacity projections than those in the local government's comprehensive plan, the local government must amend the plan to include those different projections. *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000).

29.2.1 Comprehensive Plans – Amendment – Generally. A local government's failure to adopt a transportation system plan (TSP) by the date required by OAR 660-012-0055 does not preclude the local government from amending the transportation element of its comprehensive plan until it adopts a TSP, where it is clear under the comprehensive plan that the transportation element is a separate policy document than the TSP, and the amendments to the transportation element are not intended to and do not have the effect of adopting a TSP. *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

29.2.1 Comprehensive Plans – Amendment – Generally. A comprehensive plan amendment that changes a minor arterial to a major arterial changes the functional classification of a transportation facility and thus requires findings of compliance with OAR 660-012-0060. *Volny v. City of Bend*, 37 Or LUBA 493 (2000).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a city approves a development plan for a university district as part of a quasi-judicial proceeding, but does not incorporate it into the city's comprehensive plan or land use regulations, the development plan is not a comprehensive plan or land use regulation, and thus amendments to that plan are not subject to review for compliance with statewide planning goals or the Transportation Planning Rule. *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

29.2.1 Comprehensive Plans – Amendment – Generally. A local government does not violate the Goal 2 consistency requirement by using updated population projections instead of population projections in its comprehensive plan to determine the size of the urban land need under the urban reserve rule, OAR 660-021-0030, where the two projections serve different purposes and use of the updated projections does not undermine or conflict with the comprehensive plan or implementing regulations. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

29.2.1 Comprehensive Plans – Amendment – Generally. The Transportation Planning Rule, OAR 660-012-0060, requires that when a plan amendment "significantly affects" a transportation facility the local government must either ensure that the amendment is consistent with its transportation plan or amend its plan. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. When a land use allowed by a comprehensive plan amendment would "significantly affect" a transportation facility, a local government may not avoid the requirements of the Transportation Planning Rule, OAR 660-012-

0060, by conditioning the amendment on improvements that maintain the facility above the thresholds provided in OAR 660-012-0060(2). *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. If a local government's watershed is already in violation of applicable state environmental standards, it may not amend its comprehensive plan to allow future development that will compound that violation without either finding that the amendment is consistent with Goal 6 or taking an exception to Goal 6. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. Goal 11 applies when a local government redesignates land to allow for more intensive uses that place greater demand on public facilities than uses allowed under an existing designation. Goal 11 is not implicated when a local government redesignates land to allow a shopping center that will place fewer demands on public facilities than the residential uses allowed under the current designation. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. The Transportation Planning Rule requirements set forth at OAR 660-012-0045(2) by their terms apply directly to local codes, not local comprehensive plans. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. The OAR 660-012-0045(2)(g) requirement that local governments adopt "regulations assuring that amendments to land use designations, densities, and design standards are consistent with the functions, capacities and levels of service of facilities identified in the TSP" is not satisfied by a plan provision that fails to refer to the Transportation Planning Rule by name or number and that imposes a different threshold for application of the rule standard than is required by the rule. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. LUBA has no jurisdiction to review provisions of an acknowledged comprehensive plan for compliance with the Transportation Planning Rule, where those plan provisions are not amended by the challenged decision and are not affected by the challenged decision in a way that affects their compliance with the statewide planning goals. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. The requirement of OAR 660-012-0015(2)(a) that regional TSPs be consistent with the state TSP is violated by a comprehensive plan amendment that purports to require that ODOT provide access under circumstances that are not consistent with ODOT policies. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. Where petitioners' arguments are directed at unamended provisions of an acknowledged comprehensive plan rather than the comprehensive plan amendments adopted by the challenged decision, petitioners present no basis for reversal or remand. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

29.2.1 Comprehensive Plans – mendment – Generally. An amendment to a future streets plan does not significantly affect a transportation facility, and the TPR does not apply, where the record demonstrates that the decision does not change a functional classification or any standards relating to functional classifications and traffic levels would not be increased. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. Where the local code permits the city council to "delete, add or modify any of the provisions" of a legislative proposal, the city council does not err by adopting an option that is different from the option that was provided to the city council. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a comprehensive plan does not provide for a proposed expansion of a mining site, a conditional use permit is insufficient to permit the expansion. In that circumstance, OAR 660-023-0180 requires a post-acknowledgment plan amendment and Goal 5 analysis. *Trademark Construction, Inc. v. Marion County*, 34 Or LUBA 202 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. LUBA's scope of review is not precluded or affected when petitioner assigns error to a plan amendment but fails to assign error to a corresponding zone change. Under ORS 197.175(2)(b) and 197.835(7)(b), zoning ordinances must conform to and comply with the local government's comprehensive plan, therefore a remand on the basis of error respecting the plan amendment would necessarily invalidate the corresponding zone change. *Geaney v. Coos County*, 34 Or LUBA 189 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. A plan amendment redesignating land as commercial on the basis of a nonconforming use is subject to review for compliance with applicable statewide planning goals, notwithstanding an acknowledged comprehensive plan policy that directs designation of such land as commercial rather than recognizing the nonconforming use, where a goals compliance challenge to the amendment is not an indirect compliance challenge to the comprehensive plan policy itself. *Geaney v. Coos County*, 34 Or LUBA 189 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. Goal 14 is applicable to a plan amendment redesignating rural land as commercial, where the land is outside the UGB and the commercial designation would permit any commercial use of any size or intensity, including large commercial uses such as a Wal-Mart store that are urban in character and intensity. *Geaney v. Coos County*, 34 Or LUBA 189 (1998).

29.2.1 Comprehensive Plans – Amendment – Generally. Application of criteria included in an acknowledged comprehensive plan governing redesignation of resource lands does not obviate the requirement that comprehensive plan and land use regulation amendments comply with the statewide planning goals. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

29.2.1 Comprehensive Plans – Amendment – Generally. When a change in the type or intensity of an existing use is proposed for an exception area, the county must (1) make findings showing either that Goal 14 does not apply or the proposal complies with an existing Goal 14 exception; or (2) take a new Goal 14 exception. *Leathers v. Marion County*, 31 Or LUBA 220 (1996).

29.2.1 Comprehensive Plans – Amendment – Generally. When an earlier acknowledged comprehensive plan amendment imposes a condition that any proposed conditional use or use variance shall require a revised exception to the Statewide Planning Goals, a new plan amendment is required before additional conditional uses can be allowed, since taking an exception necessitates a plan amendment. *Leathers v. Marion County*, 31 Or LUBA 220 (1996).

29.2.1 Comprehensive Plans – Amendment – Generally. Under the county's comprehensive plan, ODOT's initiation of eminent domain proceedings gave it the requisite "ownership" interest in property to file an application for a plan amendment regarding the property, and that interest was not affected, for purposes of the plan amendment, by dismissal of the eminent domain proceeding after the agency's application was deemed complete. *Schrock Farms, Inc. v. Linn County*, 31 Or LUBA 57 (1996).

29.2.1 Comprehensive Plans – Amendment – Generally. If it is obvious from the record that a particular goal does not apply to a proposed comprehensive plan amendment, it is not a basis for remand that the local government has not actually stated in its written decision that the goal does not apply. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

29.2.1 Comprehensive Plans – Amendment – Generally. When the city does not deliver notice of a comprehensive plan map amendment and facilities plan amendment to DLCD, as required by ORS 197.615(1), the amendments will not be deemed acknowledged under ORS 197.625(1) by the passage of time. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

29.2.1 Comprehensive Plans – Amendment – Generally. All comprehensive plan amendments must comply with the Statewide Planning Goals. When adopting a comprehensive plan amendment, it is the local government's obligation to explain in its findings why the plan amendment complies with the goals or why arguably applicable goal standards need not be addressed and satisfied. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

29.2.1 Comprehensive Plans – Amendment – Generally. Where the local code provides petitioner has a right to initiate a minor comprehensive plan amendment, but only the local government can initiate a major plan amendment, and that the local government may refuse to do so for any reason, the process for local government-initiated plan amendments is not an administrative remedy petitioner is required to exhaust before seeking LUBA review of a local government decision that petitioner's proposed plan amendment is a major plan amendment. *Cone v. City of Eugene*, 29 Or LUBA 133 (1995).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a local government decision to classify petitioner's proposed comprehensive plan amendment as "major" is final, and denies petitioner a *right* he would otherwise have under the local code to have his proposed amendment reviewed on its merits, the local government's decision is a land use decision as defined in ORS 197.015(10)(a)(A)(iii) and is subject to review by LUBA. *Cone v. City of Eugene*, 29 Or LUBA 133 (1995).

29.2.1 Comprehensive Plans – Amendment – Generally. Where amendments to a local government's comprehensive plan or land use regulations do not amend or affect the local government's acknowledged Citizen Involvement Program (CIP), the only way a petitioner can demonstrate a violation of Goal 1 is by demonstrating a failure to comply with the acknowledged CIP. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

29.2.1 Comprehensive Plans – Amendment – Generally. An amendment to a "refinement plan" that is part of a local government's comprehensive plan is a comprehensive plan amendment and is reviewable for compliance with applicable provisions of the Statewide Planning Goals and their implementing rules. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

29.2.1 Comprehensive Plans – Amendment – Generally. Legislative changes to acknowledged comprehensive plans or land use regulations that reduce a local government's supply of industrially designated land must be supported by (1) findings demonstrating the remaining industrially designated land is adequate to satisfy the requirements of Goal 9, (2) argument establishing compliance with Goal 9 based on plan provisions, code provisions and evidence in the record, or both. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

29.2.1 Comprehensive Plans – Amendment – Generally. The "public need" standard formerly imposed on quasi-judicial zone changes under *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), does not apply to comprehensive plan amendments, unless the applicable comprehensive plan or land use regulations impose such a "public need" standard. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

29.2.1 Comprehensive Plans – Amendment – Generally. In adopting post-acknowledgment comprehensive plan amendments, other than amendments to the plan's acknowledged Goal 5 inventory itself, a local government is entitled to rely on its acknowledged Goal 5 inventory and need not consider possible impacts on alleged Goal 5 resource sites that are not included on the Goal 5 inventory. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a proposed transportation facility includes open space and pedestrian and bicycle facilities to satisfy comprehensive plan policies implementing Goal 8, petitioner's speculation that those facilities might be eliminated in the future in favor of more traffic lanes provides no basis for reversal or remand. Such changes would require a plan amendment and a demonstration that the altered facility complies with the plan policies. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

29.2.1 Comprehensive Plans – Amendment – Generally. A comprehensive plan amendment must comply with the statewide planning goals. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

29.2.1 Comprehensive Plans – Amendment – Generally. Where the only inventory of historic structures maintained by a city has not been adopted as part of the city's acknowledged comprehensive plan, a post-acknowledgment decision not to designate an inventoried building as a historical landmark is not a de facto post-acknowledgment plan amendment, even though the

decision may ultimately allow the building to be demolished. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

29.2.1 Comprehensive Plans – Amendment – Generally. ORS 215.503(2)(a), requiring all legislative acts related to comprehensive plans or zoning adopted by a county governing body to be by ordinance, applies to legislative decisions adopting or amending comprehensive plans and zoning ordinances, not to quasi-judicial plan or zone changes. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

29.2.1 Comprehensive Plans – Amendment – Generally. An amendment to a "refinement plan" that is part of a local government's comprehensive plan is a comprehensive plan amendment. *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583 (1994).

29.2.1 Comprehensive Plans – Amendment – Generally. A comprehensive plan amendment is quasi-judicial in nature if it results from a private development application, must comply with criteria in the Statewide Planning Goals and the plan itself, and affects a specific area, involving one property owner and a single property. *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583 (1994).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a challenged decision adopts a new plan policy stating the city will allow a particular commercial-designated area to be developed "to serve both neighborhood commercial needs and as a community commercial center," but declines to change a plan policy that commercial development of the area should be at an intensity consistent with General Office or Neighborhood Commercial zoning, LUBA will remand the decision for the city to interpret the relevant plan and code provisions in the first instance. *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583 (1994).

29.2.1 Comprehensive Plans – Amendment – Generally. Providing notice of a post-acknowledgment plan or land use regulation amendment to the Department of Land Conservation and Development under ORS 197.610(1) is inadequate to satisfy a local government's coordination obligations. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

29.2.1 Comprehensive Plans – Amendment – Generally. Where the acknowledged county comprehensive plan includes a methodology for rating forest soil types, a decision identifying and applying a soil type not included in the acknowledged plan provisions, to support a plan map amendment and zone change to nonresource designations, has the effect of improperly amending the acknowledged plan without following post-acknowledgment amendment procedures. *Doob v. Josephine County*, 27 Or LUBA 293 (1994).

29.2.1 Comprehensive Plans – Amendment – Generally. Where LUBA has remanded a city decision annexing certain property, a subsequent city decision amending the comprehensive plan and zoning designations for that property, in reliance on the annexation, exceeds the city's authority. *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

29.2.1 Comprehensive Plans – Amendment – Generally. Comprehensive plan and zone amendments which *lessen* the impacts or demands that goal, plan and code standards were adopted

to address are likely to be consistent with those goal, plan and code standards. *McInnis v. City of Portland*, 27 Or LUBA 1 (1994).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a comprehensive plan contains no existing inventory of significant aggregate resource sites and imposes different standards for plan amendments, depending on whether the amendment is a plan text or a plan map amendment, the local government must explain in its decision its rationale in processing and approving a request to amend the plan to designate a site as a significant aggregate resource site as a plan text amendment. *Nathan v. City of Turner*, 26 Or LUBA 382 (1994).

29.2.1 Comprehensive Plans – Amendment – Generally. Prior to local government action to designate new or existing plans and regulations as its Transportation System Plan (TSP), in the manner required by OAR 660-12-010(2), any challenge to adoption of a plan or regulation amendment based on failure to comply with the TSP requirements of OAR 660-12-010 through 660-12-050 is premature. *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

29.2.1 Comprehensive Plans – Amendment – Generally. Where property is not included on the inventory of Goal 5 resource sites in a county's acknowledged comprehensive plan, the county is not required to consider in a post-acknowledgment plan map amendment proceeding whether the subject property ought to be added to the Goal 5 inventory. *Waugh v. Coos County*, 26 Or LUBA 300 (1993).

29.2.1 Comprehensive Plans – Amendment – Generally. A county may not amend its transportation plan in ways which conflict with the Oregon Bicycle Bill requirements set out at ORS 366.514(1), even though those statutory requirements would apply in any event. *Bicycle Transportation Alliance v. Washington Co.*, 26 Or LUBA 265 (1993).

29.2.1 Comprehensive Plans – Amendment – Generally. A local government may not amend its comprehensive plan to allow location of roadway alignments anywhere within one-mile-wide corridors without demonstrating the selected alignment complies with the statewide planning goals or that the local code standards applicable to such alignment decisions are sufficient to assure compliance with the statewide planning goals. *Bicycle Transportation Alliance v. Washington Co.*, 26 Or LUBA 265 (1993).

29.2.1 Comprehensive Plans – Amendment – Generally. It is impermissible for a local government to amend a land use ordinance or comprehensive plan provision in the guise of interpreting either. *Murphy Citizens Advisory Comm. v. Josephine County*, 26 Or LUBA 181 (1993).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a local government's final decision is not to adopt a legislative amendment to its acknowledged comprehensive plan and land use regulations, ORS 197.830(2) and 197.620(1) deny standing to appeal such a final decision to LUBA. *ODOT v. Klamath County*, 25 Or LUBA 761 (1993).

29.2.1 Comprehensive Plans – Amendment – Generally. Although the statewide planning goals apply when an acknowledged comprehensive plan is amended, an appeal challenging a post-

acknowledgment plan amendment may present goal compliance questions that either were or should have been raised prior to acknowledgment and, therefore, are foreclosed by acknowledgment. *Reeves v. Washington County*, 24 Or LUBA 483 (1993).

29.2.1 Comprehensive Plans – Amendment – Generally. Findings that a proposed comprehensive plan map designation will offer more protection for resources identified in certain comprehensive plan policies than the existing plan map designation are adequate to support the change in plan designation, absent some explanation of why those findings are inadequate. *Reeves v. Washington County*, 24 Or LUBA 483 (1993).

29.2.1 Comprehensive Plans – Amendment – Generally. Plan text and map amendments and zoning text and map amendments are not "permits," as that term is defined in ORS 215.402(4). *Leonard v. Union County*, 24 Or LUBA 362 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. That a local government may have provided inadequate notice of a post-acknowledgment plan and land use regulation amendment to the Department of Land Conservation and Development (DLCD) will not excuse a person's failure to file a notice of intent to appeal that decision with LUBA within 21 days after the decision became final, where the person was not entitled to receive notice of the challenged decision from DLCD. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. LUBA does not apply land use decision making approval criteria in the first instance. It is the local government's responsibility to consider the evidentiary record, identify the applicable standards, make the decision in the first instance and explain the basis for its decision in its findings. *ODOT v. City of Waldport*, 24 Or LUBA 344 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. A local code requirement that a comprehensive plan amendment be "necessary to fulfill an identified public need" would be satisfied if, pursuant to the Goal 5 planning process, the local government determined that the subject site is a significant resource site and should be protected. *Gonzalez v. Lane County*, 24 Or LUBA 251 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. Where Statewide Planning Goals are apparently applicable to a comprehensive plan amendment, a local government must either explain in its decision why the amendment complies with such apparently applicable goals, explain why those goals do not apply to the proposed plan amendment or explain why an exception to those goals is justified. *ODOT v. City of Newport*, 23 Or LUBA 408 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. To adopt a quasi-judicial plan amendment, a local government must make findings establishing the proposed amendment is in compliance with the Statewide Planning Goals. *ODOT v. Clackamas County*, 23 Or LUBA 370 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. In amending its comprehensive plan, it is error for a local government to neither explain in its decision why apparently applicable

Statewide Planning Goals do not apply, adopt findings demonstrating compliance with such goals, nor take an exception to such goals. *ODOT v. Clackamas County*, 23 Or LUBA 370 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. To adopt a quasi-judicial comprehensive plan amendment, a local government must adopt findings establishing the proposed amendment is in compliance with the Statewide Planning Goals. *Klein v. City of Hubbard*, 23 Or LUBA 367 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. In amending its comprehensive plan, it is a local government's obligation to explain in its findings why apparently applicable Statewide Planning Goal standards need not be addressed and satisfied. It is error for a local government to neither identify any goals applicable to a proposed plan amendment nor explain why apparently applicable goals are satisfied. *Klein v. City of Hubbard*, 23 Or LUBA 367 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. The applicant for comprehensive plan and zone map amendments has the burden of establishing compliance of the proposed amendments with the applicable approval standards. *Hess v. City of Portland*, 23 Or LUBA 343 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. Amending an acknowledged multi-jurisdictional metropolitan area comprehensive plan so that it is inconsistent with an unamended city "refinement plan" is permissible where the comprehensive plan (1) recognizes such conflicts may exist, (2) provides that all such conflicts are resolved in favor of the comprehensive plan, and (3) recognizes that amendments to refinement plans needed to make them consistent with the comprehensive plan may be delayed. *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. Unless a county can establish that its acknowledged comprehensive plan somehow obviates its obligation under ORS 197.175(2)(a) and 197.835(4) and Goal 14, it must either amend its comprehensive plan to include the subject property within an urban growth boundary or adopt an exception to Goal 14, before it may plan and zone rural land for urban uses. *Caine v. Tillamook County*, 22 Or LUBA 687 (1992).

29.2.1 Comprehensive Plans – Amendment – Generally. Inconsistencies between a decision made by two service districts and a county comprehensive plan and land use regulations do not make the service districts' decision a decision by the county or a de facto amendment to the county comprehensive plan. *Price v. Arch Cape Service District*, 22 Or LUBA 807 (1991).

29.2.1 Comprehensive Plans – Amendment – Generally. ORS 197.615(2)(a) requires that a local government give notice of decisions amending its acknowledged comprehensive plan and land use regulations to persons who participate during the local proceedings and request such notice in writing. *Club Wholesale v. City of Salem*, 19 Or LUBA 576 (1990).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a local government has no rules establishing specific procedures or forms for persons participating in post-acknowledgment plan and land use regulation amendment proceedings to utilize in making a written request for notice under ORS 197.615(2)(a)(B), and has no rules establishing to whom requests for such notice must

be directed, a request for a copy of the city's final *decision* directed to the city attorney is sufficient to satisfy ORS 197.615(2)(a)(B). *Club Wholesale v. City of Salem*, 19 Or LUBA 576 (1990).

29.2.1 Comprehensive Plans – Amendment – Generally. Where a local government provides a party with a copy of the decision amending its comprehensive plan and land use regulations, but fails to advise the party of the date the challenged decision became final or of the requirements for appealing the decision to LUBA, the notice requirements of ORS 197.615(2)(b)(B) and (D), applicable to post-acknowledgment plan and land use regulation amendments, are not satisfied. *Club Wholesale v. City of Salem*, 19 Or LUBA 576 (1990).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. Where petitioner alleges a local government failed to meet its obligations under ORS 227.186 to provide notice of a comprehensive plan amendment, a zone change, or a change in a land use regulation that may affect the permissible uses of property to be mailed to the owner of each lot or parcel that the ordinance proposes to rezone or that would be affected by a change in the permissible uses of the property, petitioner fails to allege a basis for reversal or remand when petitioner fails to allege the "procedural error" prejudiced petitioner's "substantial rights." *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. A county fails to comply with ORS 215.060, which requires "the governing body" to (1) conduct at least one hearing; and (2) conduct those hearings after at least 10 days' advance notice of "each of the hearings" is published in a newspaper of general circulation, where the county fails to publish in a newspaper of general circulation the notice of the public hearing before the board of county commissioners regarding proposed text amendments to a comprehensive plan. *Oregon Coast Alliance v. Clatsop County*, 75 Or LUBA 277 (2017).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that does not include the "text" of the proposed amendment as defined by OAR 660-018-0020(2) is inadequate to perform the notice function required by ORS 197.610(1). *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that includes the text of the proposed amendment as that term is defined in OAR 660-018-0020(2), but was submitted approximately 23 days prior to the city's initial evidentiary hearing is adequate to perform the notice function required by ORS 197.610(1). *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. Where a city has a process requiring that proposed amendments to a comprehensive plan and zoning code be subject to hearing and review by the planning commission and proposed design review guidelines be subject to hearing and review by the design commission, a notice of proposed amendment regarding the matters before the planning commission is not sufficient to apprise DLCD or others who receive notice pursuant to ORS 197.610(2) of the design review proceedings. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that erroneously states that the initial evidentiary hearing had been held and does not indicate whether further opportunities to provide evidence are available is not adequate to satisfy ORS 197.610(1), which requires that notice of proposed post-acknowledgement land use amendments be submitted to DLCD at least 45 days prior to the initial evidentiary proceedings on those amendments. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. Although a complete failure to provide advanced published notice pursuant to ORS 215.060 renders an ordinance of "no legal effect," if published notice is provided, challenges to the adequacy of that notice are analyzed as procedural errors and provide a basis for reversal or remand if such errors prejudice a petitioner's substantial rights. *Ramsey v. Multnomah County*, 44 Or LUBA 722 (2003).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. ORS 215.503 (2003) requires a county to provide mailed written notice of the first hearing on an ordinance to property owners whose property could be rezoned due to a comprehensive plan amendment, but it does not require additional public notice every time LUBA remands an ordinance. *Ramsey v. Multnomah County*, 44 Or LUBA 722 (2003).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. Because ORS 215.060 specifically provides that a county's failure to provide notice of an action regarding its plan as required by the statute shall result in the county's action having "no legal effect," LUBA may not overlook a county's failure to provide the notice required by ORS 215.060, notwithstanding that the lack of notice did not prejudice petitioner's substantial rights. *Ramsey v. Multnomah County*, 43 Or LUBA 25 (2002).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. Mailing individual notice of a proposed comprehensive plan amendment to affected property owners is not sufficient to meet the requirement under ORS 215.060 that a county publish notice of such action in a "newspaper of general circulation" or "in the territory * * * concerned." *Ramsey v. Multnomah County*, 43 Or LUBA 25 (2002).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. ORS 216.060 provides that a county may give notice of a plan amendment by mail, radio, television or other means *in addition to* publishing notice in a "newspaper of general circulation," but the statute does not allow a county to provide notice by such other means *instead of* by publication in a newspaper. *Ramsey v. Multnomah County*, 43 Or LUBA 25 (2002).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. OAR 660-018-0010(11) and 660-018-0010(13), read together, exempt small tract zoning map amendments from the requirement, at OAR 660-018-0020 and ORS 197.610, that DLCD be notified of proposed plan or land use regulation amendments. *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 21 (2001).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. Because a local government's proceedings on remand from LUBA are a continuation of its original proceedings and not a new proceeding, a local government that has sent notice of a proposed post-acknowledgment plan amendment to DLCD as required by ORS 197.610 is not required under the statute or rules implementing the statute to send additional notice of the proposed amendment during the remand proceedings. *Northwest Aggregates Co. v. City of Scappoose*, 38 Or LUBA 291 (2000).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. A *pro forma* declaration of "emergency circumstances," unaccompanied by stated reasons directed at the necessity for expedited review, is insufficient to satisfy ORS 197.610. Cited concerns about unregulated development in the floodplain constitute a sufficient declaration of emergency under ORS 197.610 to allow expedited adoption proceedings. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. ORS 215.060, which requires notice and public hearings prior to action by the governing body of a county "regarding the plan," does not apply to a statement on a notice of adoption to DLCD that the Statewide Planning Goals do not apply to a newly adopted land use regulation. *Petersen v. Columbia County*, 33 Or LUBA 253 (1997).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. Where the city code requires public hearings before the planning commission and the city council prior to the adoption of a legislative amendment to the city's comprehensive plan, the failure to hold any hearings is a substantive violation of the city code which affects the rights of anyone who might have appeared and commented. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. The city's failure to comply with ORS 197.610(1) in not submitting proposed comprehensive plan amendments to LCDC or DLCD is a substantive error that requires remand. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. An unrecorded meeting between DLCD staff and intervenors' representative is insufficient to notify DLCD that a proposal submitted under ORS 197.610 has been modified. *DLCD v. Yamhill County*, 31 Or LUBA 488 (1996).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. Where petitioners allege the planning commission denied them an opportunity to submit evidence relevant to a proposed comprehensive plan amendment, but petitioners were able to submit the evidence during a *de novo* hearing on the proposed plan amendment before the governing body, the alleged error in the planning commission proceedings was cured by the governing body's *de novo* review. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. Where the local code requires the governing body to review the planning commission's recommendation on a proposed comprehensive plan amendment, but does not limit the governing body's authority to adopt a plan amendment to instances where the planning commission recommendation is free from error, that there was an error in the procedures by which the planning commission arrived at its recommendation does not deprive the governing body of jurisdiction over the proposed plan amendment. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

29.2.2 Comprehensive Plans – Amendment – Text Amendment: Procedure. If the local governing body's interpretation of its comprehensive plan as not already designating the subject

property as a 1B aggregate resources site, or providing a method of doing so without amending the acknowledged plan, is not clearly wrong, LUBA will defer to the governing body's interpretation. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

29.2.3 Comprehensive Plans – Amendments – Text Amendments: Standards. A city's conclusion that zoning ordinance text amendments are consistent with the city's comprehensive plan policy which requires city to "maximize * * * intermodal transportation linkages" because the amendments will not affect the city's supply of land zoned for economic or industrial use is not responsive to the language of the comprehensive plan policy objective. On its face, a city's zoning ordinance which prohibits new and expanded intermodal fossil fuel transportation facilities appears to be inconsistent with the comprehensive plan policy objective language, and this apparent inconsistency requires some analysis and a direct explanation. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. When a county amends a zoning ordinance to require a particular study area when applying a maximum residential density standard within that zoning district, the county cannot rely on an earlier LUBA decision that allowed use of a similar study area in a quasi-judicial decision affecting a single property. Instead, the county must establish in amending the zoning ordinance that mandating the particular study area in all cases in that zone in the future is consistent with the maximum residential density standard and Goal 5, which the maximum residential density standard was adopted to implement. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A county must justify its decision to replace an ambiguous existing maximum residential density standard with a similarly worded but much more methodologically precise maximum residential standard and may not simply rely on the similar wording to conclude that the new standard is consistent with the county's comprehensive plan and Goal 5. *ODFW v. Crook County*, 72 Or LUBA 316 (2015).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. In adopting zoning that makes existing manufactured dwelling parks non-conforming uses in a high-density residential zone, a city is not required to consider in isolation a comprehensive plan policy requiring conservation of existing affordable housing, but may consider and balance other plan policies that promote competing policy objectives. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Remand is necessary where a city deletes two refinement plan policies requiring protection of existing manufactured dwelling parks, and zones the parks to make them non-conforming uses, but the findings do not explain how the amendments are consistent with a comprehensive plan policy requiring conservation of existing affordable housing. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A county's population projection is supported by an adequate factual base when it relies on a massive supply of groundwater in the regional aquifer and future acquisition of rights to the aquifer in order to meet future water needs for population growth. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100 (2005).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. While population forecasts may eventually be used to provide a partial basis for a local government to take future actions that might have an effect upon farmland, the forecasts do not have an effect on farmland, and therefore do not implicate Goal 3. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100 (2005).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A local government may take past and future annexations into account in determining its future growth rate. *Friends of Deschutes County v. Deschutes County*, 49 Or LUBA 100 (2005).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Including "public or private racetracks" among the uses allowed in a new public/quasi-public plan designation and parks and recreation zone is not inconsistent with general comprehensive plan language requiring "sensitivity to natural features" and encouragement of mixed development. *Okray v. City of Cottage Grove*, 47 Or LUBA 297 (2004).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A post-acknowledgement plan amendment that redesignates more than two acres for commercial use must follow one of the three courses of action set out at OAR 660-009-0010(4). Although one of those permissible courses of action is to demonstrate that the post-acknowledgement plan amendment is consistent with the part of the acknowledged comprehensive plan that was adopted to implement the Goal 9 administrative rule, where the proposed action appears to be inconsistent with implementation strategies in the plan, the city must amend its acknowledged comprehensive plan following the planning requirements of OAR 660-009-0015 through 660-009-0025 and in doing so it must prepare an economic opportunities analysis. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Unless the requirements of a periodic review remand order are embodied in a city's comprehensive plan or other applicable regulations, an allegation that a proposed comprehensive plan amendment and zone change are inconsistent with that periodic review remand order is not a basis for reversal or remand. *Friends of Marion County v. City of Keizer*, 45 Or LUBA 236 (2003).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A county does not exceed the authority granted under ORS 195.025(1) or 197.005(3) by adopting county comprehensive plan amendments that inform cities what considerations will suffice to gain county concurrence in UGB amendments or other decisions requiring county concurrence. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. ORS 195.036 does not require a county to employ any particular methodology to project future population, and is silent with respect to whether different methodologies may be used for different areas of the county. As long as the county's choice of methodology is supported by an adequate factual base, the county may choose to use different methodologies in different areas of the county. *Tipperman v. Union County*, 44 Or LUBA 98 (2003).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A reasonable factfinder would not rely on 1990-2000 building permit data to project a higher than historic population increase through the year 2020, where the analysis of building permit data assumes without any basis that each building permit resulted in construction of a permanent non-seasonal dwelling, and fails to adequately take into account the number of abandoned, demolished, removed or replaced dwellings. *Tipperman v. Union County*, 44 Or LUBA 98 (2003).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A reasonable factfinder would not assume that every new job and student slot created in the county over the next 20 years will be filled by a new immigrant to the county, for purposes of projecting county population increase, particularly given the relatively high rate of unemployment in the county, and the unlikelihood that all new jobs will be full-time or family-wage jobs likely to induce in-migration. *Tipperman v. Union County*, 44 Or LUBA 98 (2003).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A county's choice to allocate a higher than historic rate of growth to one city, in coordinating the county's 20-year population projection among cities and unincorporated areas, is supported by an adequate factual base, where the record includes evidence that the city was the fastest growing city in the county in the 1990s and is likely to annex rural residential land at a higher rate than other cities. *Tipperman v. Union County*, 44 Or LUBA 98 (2003).

29.2.3 Comprehensive Plans – Amendment – Map Amendment: Procedure. OAR 660-018-0010(11) and 660-018-0010(13), read together, exempt small tract zoning map amendments from the requirement, at OAR 660-018-0020 and ORS 197.610, that DLCD be notified of proposed plan or land use regulation amendments. *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 21 (2001).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A county's 2020 population projection is supported by an adequate factual base, notwithstanding that it is based on 1991-1997 population figures that differ from official state estimates for those years, where a reasonable person could conclude that, when the two sets of figures are adjusted to cover the same period of time, the difference between the county and state figures falls within a statistically acceptable margin of error. *DLCD v. Douglas County*, 37 Or LUBA 129 (1999).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A county population projection is supported by an adequate factual base, notwithstanding that it is based on assumptions regarding economic growth that are inconsistent with the county's historic economic growth patterns, where a reasonable person could conclude that those historic economic growth patterns are not indicative of the county's long-term economic prospects. *DLCD v. Douglas County*, 37 Or LUBA 129 (1999).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A county plan amendment imposing a "sequencing" requirement that proposed attached housing be built before completing proposed detached housing is supported by an adequate factual base, where a reasonable decision maker could conclude, based on testimony in the record, that the sequencing requirement is necessary to forestall attempts to underbuild attached housing, which may subvert

the county's minimum density standard. *West Hills Development Co. v. Washington County*, 37 Or LUBA 46 (1999).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Petitioners fail to demonstrate that a county's plan amendment lacks an adequate factual base and is inconsistent with Goal 10 where petitioners merely speculate that the county's plan amendment, which requires that proposed attached housing be built at a site before completing proposed detached housing, will adversely affect the county's buildable lands inventory. *West Hills Development Co. v. Washington County*, 37 Or LUBA 46 (1999).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Petitioners fail to demonstrate that a county's minimum density standard lacks an adequate factual base or is inconsistent with Goal 10 where petitioners merely speculate that application of the standard will make it impossible to develop certain lands at lower densities. Even if petitioners' speculations are correct, the only probable result is that those lands will be developed at higher densities, which is not inconsistent with Goal 10. *West Hills Development Co. v. Washington County*, 37 Or LUBA 46 (1999).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A decision to remove 40 acres of land from a city's inventory of multi-family residential land must be shown to be consistent with the inventory of buildable lands in the housing element of the city's comprehensive plan. A general finding that there are other available lands that would satisfy residential needs is inadequate to explain why the city's inventory of multi-family residential land remains adequate to meet the city's needs despite a decision to remove 40 acres from that inventory. *Mulford v. Town of Lakeview*, 36 Or LUBA 715 (1999).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Approval standards for approval of "development" do not apply to a legislative amendment of a future streets plan. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A local government is not required to select the most favorable or logical future streets plan where the applicable criterion simply requires that the streets plan provide logical extension, continuation and interconnection. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A legislative comprehensive plan amendment must comply with the statewide planning goals, and that requirement is not met simply because subsequent development applications would be reviewed pursuant to acknowledged criteria. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. An amendment to an acknowledged comprehensive plan must be reviewed for compliance with the statewide planning goals, notwithstanding that the acknowledged plan has an acknowledged process for amending the plan, where the amendment can be reviewed for compliance with the statewide planning goals without necessarily challenging the acknowledged process itself. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Findings that state aggregate sites already on the comprehensive plan inventory are being depleted faster than expected, conclude there is a need to preserve additional aggregate sites to provide for long-term supply at multiple sites to protect the competitive nature of the aggregate market and explain why it is in the public interest that a competitive aggregate market be maintained, are sufficient to satisfy a code requirement that there be a "public need" to add the subject site to the plan inventory. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Where a legislative comprehensive plan amendment adopts policies arguably relevant to OAR 660-12-060, either the decision must be supported by findings addressing OAR 660-12-060 or respondents must demonstrate, through arguments in their briefs and citation to provisions of the local government's plan and regulations or the record, that the challenged policies comply with OAR 660-12-060. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Where an applicable standard requires a determination that a proposed plan amendment complies with the plan, findings that state only that the proposal "appears" to satisfy the plan are inadequate to demonstrate compliance with that standard. *Makepeace v. Josephine County*, 25 Or LUBA 370 (1993).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Comprehensive plan amendments must comply with the statewide planning goals. *Neuharth v. City of Salem,* 25 Or LUBA 267 (1993).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. A process included in an acknowledged comprehensive plan for correcting scrivener's errors does not excuse a local government from demonstrating that a substantive amendment to the plan complies with the statewide planning goals. *Von Lubken v. Hood River County,* 22 Or LUBA 307 (1991).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. In amending an acknowledged comprehensive plan, a local government is required by statute to assure the plan as amended complies with the statewide planning goals and the amendment does not create a conflict with the unamended portions of the acknowledged comprehensive plan and land use regulations. *Von Lubken v. Hood River County,* 22 Or LUBA 307 (1991).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Even if a particular standard in an acknowledged comprehensive plan goes beyond what is required by Goal 3 or the EFU zoning statutes, it does not necessarily follow that what is left after the plan is amended to delete that standard is sufficient to comply with Goal 3. *Von Lubken v. Hood River County*, 22 Or LUBA 307 (1991).

29.2.3 Comprehensive Plans – Amendment – Text Amendment: Standards. Although the provision of ORS 197.160(1)(b) requiring local government citizen involvement programs to provide for a citizen advisory committee(s) may establish an approval standard for the adoption or

amendment of local government citizen involvement programs, it does not establish substantive or procedural requirements for the review of other types of plan amendments. *Wade v. Lane County,* 20 Or LUBA 369 (1990).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. That an alteration to a proposed PAPA is required by LUBA's decision in a prior appeal and reduces the subject acreage does not mean as a matter of law that the proposed PAPA is not "altered to such an extent that the materials submitted no longer reasonably describe the proposed change," thereby requiring notice of the alteration to DLCD pursuant to ORS 197.610(6). *Save TV Butte v. Lane County*, 80 Or LUBA 422 (2019).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Although a city code requires that the city's zoning map, the Metro Plan map and Metro Refinement Plan maps must be consistent, a city does not err by amending its zoning map and the Metro Plan map without adopting a conforming amendment to the Metro Refinement Plan map, where another code section provides that amendments to the Metro Plan map result in automatic conforming changes to the Metro Refinement Plan map by operation of law. *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. While an annexation must be made in compliance with a city's acknowledged comprehensive plan, no statute or administrative rule requires that in annexing territory the city must contemporaneously amend its comprehensive plan map to depict the new city boundaries. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. A decision that amends the comprehensive plan and zoning maps for a 20-acre parcel in single ownership is properly viewed as a quasi-judicial decision under *Strawberry Hill 4 Wheelers*, and therefore the county erred in conducting the hearing and adopting the decision under legislative procedures, which do not provide written notice to adjoining landowners. *Sullivan v. Polk County*, 49 Or LUBA 543 (2005).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Although a complete failure to provide advanced published notice pursuant to ORS 215.060 renders an ordinance of "no legal effect," if published notice is provided, challenges to the adequacy of that notice are analyzed as procedural errors and provide a basis for reversal or remand if such errors prejudice a petitioner's substantial rights. *Ramsey v. Multnomah County*, 44 Or LUBA 722 (2003).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. ORS 215.503 (2003) requires a county to provide mailed written notice of the first hearing on an ordinance to property owners whose property could be rezoned due to a comprehensive plan amendment, but it does not require additional public notice every time LUBA remands an ordinance. *Ramsey v. Multnomah County*, 44 Or LUBA 722 (2003).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Because ORS 215.060 specifically provides that a county's failure to provide notice of an action regarding its plan as required by the statute shall result in the county's action having "no legal effect," LUBA may not overlook a county's failure to provide the notice required by ORS 215.060, notwithstanding that the lack of notice did not prejudice petitioner's substantial rights. *Ramsey v. Multnomah County*, 43 Or LUBA 25 (2002).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Mailing individual notice of a proposed comprehensive plan amendment to affected property owners is not sufficient to meet the requirement under ORS 215.060 that a county publish notice of such action in a "newspaper of general circulation" or "in the territory * * * concerned." *Ramsey v. Multnomah County*, 43 Or LUBA 25 (2002).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. ORS 216.060 provides that a county may give notice of a plan amendment by mail, radio, television or other means *in addition to* publishing notice in a "newspaper of general circulation," but the statute does not allow a county to provide notice by such other means *instead of* by publication in a newspaper. *Ramsey v. Multnomah County*, 43 Or LUBA 25 (2002).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Where a county has a unified zoning map and comprehensive plan map, any application for a zoning map amendment is by necessity also an application for a comprehensive plan map amendment. A combined zoning and comprehensive plan map amendment application is not one of the three kinds of land use applications described in ORS 215.427(1), and for that reason the fixed goal post rule at ORS 215.427(3) does not apply. *Rutigliano v. Jackson County*, 42 Or LUBA 565 (2002).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Neither Goal 2 nor ORS 197.175(2) require that zoning ordinance amendments that are necessary to implement a comprehensive plan map amendment be adopted at the same time as the plan amendment. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Findings that express confidence that particular existing zoning districts could be applied to implement a conditional plan map amendment are legally irrelevant, where the decision to amend the zoning map to implement the new plan map designation is deferred to a later date. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Imposition of an ineffective condition as part of a comprehensive plan map amendment may result in remand where the condition is necessary to ensure compliance with a relevant approval criterion. However, such an ineffective condition does not provide a basis for reversal or remand where it is not shown that the condition is necessary to ensure compliance with plan map amendment approval criteria. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Goal 2 does not forbid a comprehensive plan map amendment that will revert in two years to the previously existing acknowledged plan map designations, under specified conditions. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Where a comprehensive plan map amendment adopts a plan map designation that authorizes several zoning districts, LUBA will assume the city will later apply the zoning districts that will comply with

housing goals, rather than zoning districts that might violate those housing goals. If inappropriate zoning districts are applied later, the decisions adopting those zoning districts can be corrected through an appeal of those zoning map decisions. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Substantial evidence supports a city council's finding that the planning commission, rather than a neighborhood association, "initiated" a plan and zone map change as required by local ordinance, where the planning commission was informed of the ordinance requirement, and voted to conduct proceedings on the request of the neighborhood association to consider the map change. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. A quasi-judicial plan and zone map amendment initiated by the city planning commission is an "application for a land use decision," for purposes of the notice requirements of ORS 197.763(3), and thus the city's notice of hearing must list the applicable criteria from its ordinance and plan. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

29. 2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. When the city does not deliver notice of a comprehensive plan map amendment and facilities plan amendment to DLCD, as required by ORS 197.615(1), the amendments will not be deemed acknowledged under ORS 197.625(1) by the passage of time. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

29. 2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. There is no requirement that a legislative land use decision redesignating numerous properties include findings specifically setting out the justification for the change in designation made for each affected property. *McInnis v. City of Portland*, 27 Or LUBA 1 (1994).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Changing acknowledged plan map designations for industrially designated lands to allow a combination of industrial, commercial and residential uses does not violate the Goal 9 requirement that a local government have sufficient suitable industrially designated sites, where the local government will have more than enough constraint-free industrially designated land to meet projected needs, notwithstanding the plan map amendments. *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. A local government may not condition approval of zoning and comprehensive plan map amendments on an applicant's agreement to relinquish a right granted in a prior land use decision, unless there is a sufficient connection between the requested map amendments and the prior land use decision. *Olson Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Although detailed findings are not always required to justify conditions of land use approval, the evidentiary record must be sufficient to demonstrate a connection between the condition imposed and the planning

purpose served by the condition. *Olson Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991).

29. 2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. Where the evidentiary record demonstrates that the proposed expansion of a medical clinic is needed to provide adequate facilities for existing patients and staff and would not result in additional patients or staff, the local government improperly conditioned approval of required plan and zoning map amendments on the clinic's agreement to relinquish a previously granted approval for parking lot egress onto an adjoining street. *Olson Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991).

29.2.4 Comprehensive Plans – Amendment – Map Amendment: Procedure. ORS 215.431 does not apply to designated forestlands and, therefore, comprehensive plan amendments concerning such forestlands must be adopted by the county governing body. *Wickwire v. Clackamas County*, 21 Or LUBA 278 (1991).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Although a city code requires that the city's zoning map, the Metro Plan map and Metro Refinement Plan maps must be consistent, a city does not err by amending its zoning map and the Metro Plan map without adopting a conforming amendment to the Metro Refinement Plan map, where another code section provides that amendments to the Metro Plan map result in automatic conforming changes to the Metro Refinement Plan map by operation of law. *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where the city code initially requires the city to choose from low density residential (LDR), medium density residential (MDR) and high density residential (HDR) plan map designations based on which designation's criteria "clearly apply or predominate," it does not necessarily follow that the LDR criteria could not predominate simply because three of the four MDR criteria are met and five of the six HDR criteria are met, because the criteria for the three map designations are not mutually exclusive and most or all of the LDR criteria appear to be met. *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A county does not err in approving an application to correct an error in the original the plan and zone map designations of an existing mine from its original "Forest" plan map and zoning designation to Quarry and Mine Operations (QM), where the county's program to achieve Goal 5 is the QM designation and the mine was included on the county's inventory of significant aggregate sites when the initial plan and zone error occurred in 1984. *Landwatch Lane County v. Lane County*, 77 Or LUBA 474 (2018).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Nothing in the definition of "tract" in ORS 197.435(7) or any other statute or rule requires a map that shows in totality the locations of an applicant's land ownership within the county for purposes of satisfying the last sentence of ORS 197.435(7), the destination resort "30% Rule." *Root v. Klamath County*, 68 Or LUBA 124 (2013).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Although amendments to county standards for mapping sites that are eligible for destination resort siting are comprehensive plan amendments, and therefore potentially could result in significant affects on transportation facilities that could implicate OAR 660-012-0060, altering the standards for adding sites to the map in the future has no impact on transportation facilities. It is the future map amendments themselves that might significantly affect a transportation facility and implicate OAR 660-012-0060, and a county must consider OAR 660-012-0060 at the time those comprehensive plan amendments are adopted in the future. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where a plan amendment standard requires a finding that the change conforms to "applicable goals and polices" in the comprehensive plan, the city's findings address those plan goals and policies the city deemed "applicable," and on appeal petitioner argues generally that the city failed to address all plan goals

and policies but does not identify any "applicable" goals or policies not addressed, LUBA will reject the argument. *Smith v. City of Salem*, 61 Or LUBA 87 (2010).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A code provision requiring that a neighborhood plan "shall be the basis for any neighborhood recommendation" to the city council on a comprehensive plan map amendment may govern the neighborhood association, but is not an approval criterion that the city council is required to address, and the neighborhood association's alleged failure to base its recommendation on the neighborhood plan is not a basis for reversal or remand of the city council's decision. *Smith v. City of Salem*, 61 Or LUBA 87 (2010).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A comprehensive plan provision prohibiting application of a Rural Residential plan designation to land that is currently designated farm or forest "unless an exception to the applicable Goal 3 or 4 is justified" could be interpreted such that the prohibition does not apply to nonresource land that is not subject to either goal. However, the stronger textual reading is that the qualifier "applicable" simply reflects that the subject property is currently designated under either Goal 3 or Goal 4, whichever is applicable, and an exception to the applicable goal is required in order to redesignate the property to Rural Residential. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A Metro decision to amend the urban growth boundary to include 308 acres for Industrial development that was based on an assumption that only 120 acres of the 308 acres would be developed for Industrial use likely would provide a basis for the local government to plan all but 120 acres of the 308 acres for non-industrial uses. But where the 120 acres the local government designates for industrial uses include acres that were already within the UGB, the local government's comprehensive plan mapping is inconsistent with Metro's map designation for the 308 acres. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where Metro has designated 308 acres for industrial development, a city decision to plan only 120 of those acres for industrial development based on a finding that Metro only intended 120 acres to be developed industrially must be remanded where the record does not include substantial evidence that Metro only intended 120 of the 308 acres to be developed industrially. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. LUBA will remand a decision redesignating non-resource land to rural residential, where it is unclear whether the comprehensive plan limits the rural residential plan designation to lands for which an exception to resource goals is taken, the plan includes a different designation, Rural Use, that is specifically intended for nonresource lands, and the county's findings do not address the issue or provide an interpretation of the relevant plan provisions. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A plan amendment provision stating that the applicant for an amendment must state "compelling reasons" why the amendment should be considered at this time, rather than as part of periodic review, is not

an approval criterion requiring a particular finding. To the extent a finding is required, where the petitioner does not dispute that the application stated a compelling reason to proceed immediately, the failure to adopt a finding to that effect is harmless error. *Oregon Shores Cons. Coalition v. Lane County*, 52 Or LUBA 471 (2006).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. LUBA will affirm a governing body's interpretation of a plan provision allowing plan amendments when "necessary to correct an identified error in application of the plan," to include not only instances where the plan was erroneous when first implemented, but also instances where circumstances have changed over time. *Oregon Shores Cons. Coalition v. Lane County*, 52 Or LUBA 471 (2006).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A plan amendment standard requiring consideration of specified "compatibility factors" does not require the local government to assume that the property will be developed with the most intensive use that could theoretically be approved on the property, given that steep slopes and other development limitations make it highly unlikely that the most intensive use could be developed on the property. *Mason v. City of Corvallis*, 49 Or LUBA 199 (2005).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A post-acknowledgement plan amendment that redesignates more than two acres for commercial use must follow one of the three courses of action set out at OAR 660-009-0010(4). Although one of those permissible courses of action is to demonstrate that the post-acknowledgement plan amendment is consistent with the part of the acknowledged comprehensive plan that was adopted to implement the Goal 9 administrative rule, where the proposed action appears to be inconsistent with implementation strategies in the plan, the city must amend its acknowledged comprehensive plan following the planning requirements of OAR 660-009-0015 through 660-009-0025 and in doing so it must prepare an economic opportunities analysis. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A proposal to swap plan designations for two portions of a single parcel does not require separate findings addressing each portion, where the applicable plan amendment criteria do not necessarily require separate findings, and petitioner does not identify any meaningful difference between the two areas that would require separate consideration. *Excelsior Investment Co. v. City of Medford*, 44 Or LUBA 553 (2003).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Absent some requirement to the contrary, a local government need not choose the most minimal means to accomplish its objective, and may choose to amend the comprehensive plan map and zoning map to allow a proposed use, notwithstanding that a zoning map amendment alone might accomplish the same objective. *Excelsior Investment Co. v. City of Medford*, 44 Or LUBA 553 (2003).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards In determining whether there is an adequate supply of commercial land within the city, a city does not err in failing to consider the supply of land outside the city but within the urban growth boundary that might be designated for commercial uses once annexed, where the city's comprehensive plan does not

designate any lands outside the city but within the UGB for commercial uses. *Walker v. City of Dayton*, 44 Or LUBA 766 (2003).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards In determining whether the comprehensive plan map should be amended to provide for additional land designated for residential use, the relative scarcity of land zoned under one of three residential zoning districts in the city is not enough to establish that the supply of land designated on the comprehensive plan map for residential use is insufficient. *Walker v. City of Dayton*, 44 Or LUBA 766 (2003).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards In determining whether the comprehensive plan map should be amended to provide additional land designated for residential use, the city does not err in considering lands outside city limits but within the urban growth boundary, where the city's comprehensive plan designates much of the area outside city limits but within the UGB for residential uses. *Walker v. City of Dayton*, 44 Or LUBA 766 (2003).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. An application to change a unified comprehensive plan and zoning map does not in itself require a "discretionary approval of a proposed development of land" and is therefore not an application for a "permit" within the meaning of ORS 215.402(4). *Rutigliano v. Jackson County*, 42 Or LUBA 565 (2002).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where a county's legislative decision changes the comprehensive plan designation for a property from Industrial to Primary Agriculture, and the record does not reflect that the county considered other potentially suitable designations or explained why other potentially suitable designations should not be applied, the decision and record are insufficient to demonstrate that applicable criteria were considered. *Manning v. Marion County*, 42 Or LUBA 56 (2002).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. LCDC's 1985 acknowledgement of a county's rural residential zone has the legal effect of establishing that the rural residential zoning district *may* be applied consistent with Goal 14 to rural lands outside a UGB. However, the 1985 acknowledgment does not have the legal effect of establishing that *all* future applications of the zoning district to particular properties, no matter what the circumstances, will necessarily comply with Goal 14. *DLCD v. Klamath County*, 40 Or LUBA 221 (2001).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. The existence of vacant land that is planned and zoned for multi-family residential use does not mean there can be no need for additional multi-family residential designated land, where there is a specific multi-family residential need identified and none of the land that is already designated for multi-family residential use is suitable for that specific need. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. In determining whether rezoning of land from multi-family to single-family residential uses is consistent with Goal 10 and the city's obligation to provide for multi-family dwellings, the relevant inquiry is not limited by the amount of land designated for multi-family residential uses. The city can take into account multi-family dwellings that have been approved in other zones in determining whether the

proposed rezoning is consistent with the city's obligation to provide a sufficient number of multi-family dwellings. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Approval standards for approval of "development" do not apply to a legislative amendment of a future streets plan. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A local government is not required to select the most favorable or logical future streets plan where the applicable criterion simply requires that the streets plan provide logical extension, continuation and interconnection. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A legislative comprehensive plan amendment must comply with the statewide planning goals, and that requirement is not met simply because subsequent development applications would be reviewed pursuant to acknowledged criteria. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. An amendment to an acknowledged comprehensive plan must be reviewed for compliance with the statewide planning goals, notwithstanding that the acknowledged plan has an acknowledged process for amending the plan, where the amendment can be reviewed for compliance with the statewide planning goals without necessarily challenging the acknowledged process itself. *Fogarty v. City of Gresham*, 34 Or LUBA 309 (1998).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. In approving comprehensive plan and zoning map amendments, the county's findings must demonstrate that Goal 14 is satisfied without reliance on past practices or on plan and code provisions that are subject to revision during periodic review. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. In approving a comprehensive plan amendment, the county's analysis and findings regarding potential effects of an aggregate operation on surrounding lands are sufficient to support a 1B listing on the county's Goal 5 inventory. Because listing the site as a potential aggregate resource does not actually permit a mining operation, the county is not required to address the requirements of ORS 215.296 as part of its decision. *O'Rourke v. Union County*, 32 Or LUBA 447 (1997).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. The county's approval of a minor amendment to its rural comprehensive plan meets the applicable local code criteria when it sets forth specific reasons why the redesignation of the property as rural residential is "desirable, appropriate and proper." *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A county cannot rely on findings regarding water quality and quantity on other parcels to satisfy criteria in its comprehensive plan that require a site-specific evaluation of the water supply on the subject parcel, absent a determination that the conditions on surrounding lands can be relied upon to determine

the water quality and quantity on the subject parcel. *Doob v. Josephine County*, 31 Or LUBA 275 (1996).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where an ordinance changing the plan and zone designations of the subject property provides the property will revert to its former designations if a final order denying a conditional use permit (CUP) for a mobile home park is issued, the local governing body acts within its interpretive discretion in deciding the contingency is not met when LUBA remands a local government decision approving a CUP for a mobile home park and the local government does not take further action on that application. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where petitioner challenges the adequacy of one set of local government findings addressing a particular approval criterion for a comprehensive plan map change, but does not challenge a different set of local government findings also addressing the same criterion, petitioner's assignment of error will be denied. *Mitchell v. City of Medford*, 29 Or LUBA 158 (1995).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. By definition, all land outside an acknowledged UGB and not the subject of an exception to Goal 14 is "rural" land. When amending its acknowledged comprehensive plan and zone designations for such land, a local government must demonstrate that the new plan and zone designations comply with Goal 14 or adopt an exception to Goal 14. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. In adopting a quasi-judicial comprehensive plan and land use regulation amendment, a local government is obligated either to demonstrate compliance with the Transportation Planning Rule (TPR) or, alternatively, establish that the TPR does not apply. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where a comprehensive plan amendment adopts a map indicating a street may be considered to receive a "Green Street" classification in the future, and future application of the "Green Street" classification will itself require a plan amendment, petitioners' challenge to the plan amendment based on Goal 12 and the Transportation Planning Rule is premature. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. When adopting post-acknowledgment plan and zone map amendments affecting residentially designated land within an urban growth boundary, a local government must demonstrate that it continues to satisfy its Goal 10 obligation to maintain an adequate inventory of buildable lands. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where a local comprehensive plan map amendment standard requires that there be no suitable alternative sites in the "vicinity" of the proposed use, the local governing body may interpret "vicinity" to mean a

reasonable area around the site of the proposed use, rather than the entire market area served by the proposed use. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. When adopting a comprehensive plan map amendment, a city can rely on its acknowledged plan and regulations as providing a sufficient number of large parcels of industrially designated land to comply with a plan policy requiring the designation of a sufficient number of such parcels, where the plan map amendment does not affect the inventory or use of such parcels. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Goal 9 does not require that a post-acknowledgment plan amendment changing the designation of urban land from Industrial-Commercial to Industrial be supported by a demonstration that the proposed industrial use of the land is necessary to the local economy or will provide products that existing producers cannot supply. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A local government decision changing the comprehensive plan and zone designations of land with identified Goal 5 resources, must identify conflicting uses potentially allowable under the proposed new designations. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. In determining whether land subject to a proposed comprehensive plan and zone map change is composed of predominantly Class I-IV soils, as required by OAR 660-33-020(1)(a)(A), it is permissible for a local government to examine only the acreage under consideration. *DLCD v. Curry County*, 28 Or LUBA 205 (1994).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. In determining whether land subject to a proposed comprehensive plan and zone map change is (1) suitable for farm use, (2) necessary to permit farm use on other agricultural land, or (3) intermingled with lands of Class I-IV soils; as required by OAR 660-33-020(1)(a)(B) to (C) and (b); a local government's analysis must include all property in common ownership with the subject land. *DLCD v. Curry County*, 28 Or LUBA 205 (1994).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A comprehensive plan policy governing "establish[ment] and change" of an urban growth boundary is not applicable to a local government decision amending the plan and zoning map designations of property that is entirely within the urban growth boundary. *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A local government can show an amendment to its acknowledged comprehensive plan and zoning maps complies with Goal 12 (Transportation) by establishing either (1) there is a safe and adequate transportation system to serve development under the proposed map designations, or (2) development of the property under the proposed designations will not create greater or different

transportation demands and impacts than development under the existing, acknowledged designations. *ODOT v. Clackamas County*, 27 Or LUBA 141 (1994).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where petitioners contend the local government may not rely on particular plan provisions in denying a plan map amendment, but the local government did not rely upon those provisions in denying the requested plan map amendment, petitioners' challenge provides no basis for reversal or remand. *Ericsson v. Washington County*, 26 Or LUBA 169 (1993).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. More than the mere possibility of compliance with applicable standards is required to grant land use approval. However, it does not follow that the possibility that the additional development allowable under a requested comprehensive plan map amendment will violate an applicable standard is insufficient to provide a basis for denial of the request. It is the applicant's burden to establish compliance with all approval standards. *Ericsson v. Washington County*, 26 Or LUBA 169 (1993).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Under Goals 3 and 4, designation of property as agricultural on a comprehensive plan map does not carry any inference that the land is not also forestland. Therefore, the principle in *Urquhart v. Lane Council of Governments*, 80 Or App 176, 721 P2d 870 (1986), does not preclude application of Goal 4 to a plan map amendment for such property. *Westfair Associates Partnership v. Lane County*, 25 Or LUBA 729 (1993).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where nothing requires a local government to determine whether the subject property is a "legal lot" as a prerequisite to approving a plan amendment and zone change, it is unnecessary for the local government to determine whether the subject property constitutes a lawfully created parcel. *Makepeace v. Josephine County*, 25 Or LUBA 370 (1993).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where an applicable standard requires a determination that a proposed plan amendment complies with the plan, findings that state only that the proposal "appears" to satisfy the plan are inadequate to demonstrate compliance with that standard. *Makepeace v. Josephine County*, 25 Or LUBA 370 (1993).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Comprehensive plan amendments must comply with the statewide planning goals. *Neuharth v. City of Salem*, 25 Or LUBA 267 (1993).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where the challenged decision simply replaces one rural comprehensive plan map designation with another rural plan map designation for property located outside an acknowledged urban growth boundary and does not purport to approve any particular present or future use of the property, an exception to Goal 14 is not required. *Reeves v. Washington County*, 24 Or LUBA 483 (1993).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Under ORS 197.175(2)(d), a county is required to assure that amendments to its comprehensive plan map comply with the acknowledged comprehensive plan. Where a number of plan provisions applicable to such a decision impose conflicting requirements, the county must adopt findings balancing those conflicting plan provisions in determining whether the request is consistent with the plan. *Marson Trucking, Inc. v. Clackamas County*, 24 Or LUBA 386 (1993).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where the decision whether to designate property as Agriculture or Forest on comprehensive plan maps is governed by specific plan policies, a county acts within its discretion in determining that it is not required to apply and balance other generally applicable Agricultural and Forest plan policies. *Marson Trucking, Inc. v. Clackamas County*, 24 Or LUBA 386 (1993).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where a county adopts a plan map designating land within three miles of the county's borders as available for destination resort siting, without determining whether such land is within three miles of high-value crop areas located in a neighboring county, the county has failed to comply with the requirement of ORS 197.455 and Goal 8 that land within three miles of high-value crop areas not be available for destination resort use. *Alliance for Resp. Land Use v. Deschutes County*, 23 Or LUBA 476 (1992).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. The amendment of a local government comprehensive plan map designation from agriculture to rural residential to accommodate a large mixed-use development on rural land requires the application of the Statewide Planning Goals because the amendment could have secondary effects on the acknowledged plan and zoning regulations that were unanticipated at the time of acknowledgment, and the question of whether the proposed use is urban or rural requires a case-by-case analysis. *Kaye v. Marion County*, 23 Or LUBA 452 (1992).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. OAR 660-06-003(1)(b) of the amended Goal 4 rules provides that those rules apply immediately to plan map amendments involving forestlands. *Dobson v. Polk County*, 22 Or LUBA 701 (1992).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. That a plan map amendment is legislative rather than quasi-judicial does not mean that the statewide planning goals or comprehensive plan or code provisions do not apply to the decision. Neither does it necessarily mean findings in support of the decision are not required. *Davenport v. City of Tigard*, 22 Or LUBA 577 (1992).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where a local government amends its comprehensive plan transportation map to change the functional classification of existing roadways and designate new collector roadways, it must identify possible conflicts the action may cause with inventoried Goal 5 resource sites and explain how those conflicts are resolved. *Davenport v. City of Tigard*, 22 Or LUBA 577 (1992).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A local government is entitled to rely on existing acknowledged implementation measures when amending its comprehensive plan map, where the plan map amendment will not affect inventoried Goal 5 resources or will affect them only in a manner already anticipated by the acknowledged comprehensive plan. *Davenport v. City of Tigard*, 22 Or LUBA 577 (1992).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where failure contemporaneously to complete all improvements envisioned by a legislative amendment to a comprehensive plan transportation map would result in traffic having to use an inadequate unsignalized intersection, the local government must explain how the amendment satisfies a plan policy requiring it to "plan for a safe and efficient street * * * system that meets current needs and anticipated future growth and development." *Davenport v. City of Tigard*, 22 Or LUBA 577 (1992).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where a local government legislatively amends its comprehensive plan transportation map to designate a new minor collector in a location such that construction of the minor collector will violate applicable code street construction standards, and also amends the plan to exempt the minor collector from all such street construction standards, the local government must adopt findings explaining why the exemption is justified. *Davenport v. City of Tigard*, 22 Or LUBA 577 (1992).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. The applicability of the statewide planning goals depends on the substantive nature of a proposed plan inventory map amendment, not on whether it is characterized as legislative or quasi-judicial. *Gray v. Clatsop County*, 22 Or LUBA 270 (1991).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. It is inconsistent with Goal 18 Implementation Requirement 2 to relocate a construction setback line on a local government comprehensive plan map so that construction of buildings is potentially allowable in an area classified as active dunes. *Gray v. Clatsop County*, 22 Or LUBA 270 (1991).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. When amending a construction setback line on a comprehensive plan map in an area classified as active or conditionally stable dunes, a local government must adopt the findings required by Goal 18 Implementation Requirement 1. *Gray v. Clatsop County*, 22 Or LUBA 270 (1991).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Amendments of acknowledged comprehensive plans and land use regulations must be consistent with controlling provisions of the acknowledged comprehensive plan. *DLCD v. Polk County*, 21 Or LUBA 463 (1991).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where a comprehensive plan provides two agricultural plan map designations, which are applied based on characteristics of the agricultural lands, but includes no standards for determining which designation to apply to properties with some of the characteristics of each, a decision to change

the plan map designation from one to the other does not violate the plan. *DLCD v. Polk County*, 21 Or LUBA 463 (1991).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. There is no rule of general applicability to local government plan/zone change proceedings that requires a local government to consider the most intensive uses possible under the new plan/zone designation when approving a plan/zone change. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. While a local government cannot rely upon evidence of changed circumstances since adoption of its comprehensive plan to justify *noncompliance* with plan approval criteria for plan and zone map amendments, it may be able to rely upon evidence of changed circumstances as a basis for finding *compliance* with applicable plan and zone map amendment approval criteria. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where a county comprehensive plan provision states that in acting on certain plan map amendments the county shall "determine the appropriate [plan designation] considering" certain items, those items are *factors* which must be *considered* by the county, not *approval standards*. *Shirley v. Washington County*, 20 Or LUBA 127 (1990).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where there is a proposed plan map amendment from a forest to a farm designation, in the absence of concurrent consideration of a specific nonfarm development proposal, and the county comprehensive plan requires consideration of "demonstrated need consistent with LCDC goals," the "need" to be demonstrated and considered is the need to designate the subject property for exclusive farm use. *Shirley v. Washington County*, 20 Or LUBA 127 (1990).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. There is no rule of general applicability that in all local government plan/zone change proceedings, the impacts of the most intensive uses allowed under the new designation must be considered. *Shirley v. Washington County*, 20 Or LUBA 127 (1990).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A comprehensive plan policy governing "requests for rezonings to higher intensity residential uses" has no applicability where the issue is whether the *plan* map designation should be changed. *Bridges v. City of Salem*, 19 Or LUBA 373 (1990).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where there is a surplus of land planned and zoned for multifamily residential development, a market shortage of multifamily housing does not necessarily demonstrate a "public need" justifying designation of additional multifamily planned and zoned land. *Bridges v. City of Salem*, 19 Or LUBA 373 (1990).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where under the city's comprehensive plan, land for multifamily development is to be designated based on factors such as public facilities, neighborhood plans, renewal and in-fill studies, and sector plans, not

according to the proportionate population of subareas of the city, the city's assumption that 12 percent of the additional multifamily housing needed in the city is needed in a particular subarea, simply because 12 percent of the city population currently lives in that subarea, is unjustified. *Bridges v. City of Salem*, 19 Or LUBA 373 (1990).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where a large area of existing single family residential development is designated for multifamily residential use, but the city's findings do not address the potential for providing needed multifamily housing through conversion of existing single-family development, the findings fail to demonstrate that the existing multifamily designated land is inadequate to satisfy the identified public need for such housing. *Bridges v. City of Salem*, 19 Or LUBA 373 (1990).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A comprehensive plan statement that separation of use types along topographic, natural vegetation, and other features is "desirable" does not establish an approval criterion applicable to plan and zone map amendments. *Bridges v. City of Salem*, 19 Or LUBA 373 (1990).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. Where the subject property qualifies as forestland under provisions of the county's acknowledged comprehensive plan, and petitioner does not explain why the acknowledged plan standards do not control, an exception to Statewide Planning Goal 4 is required before the subject property can be redesignated and rezoned for nonforest uses. *Chambers v. Clackamas County*, 19 Or LUBA 355 (1990).

29.2.5 Comprehensive Plans – Amendment – Map Amendment: Standards. A "public need" criterion which requires determining whether additional land for a proposed destination resort is required "in consideration of that amount already provided by the current zoning district within the area to be served" only requires consideration of other land already designated DR, not other areas which are eligible for destination resort siting. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

29.3.1 Comprehensive Plans – Applicability – Generally. When Community Plan adopted as part of the county's comprehensive plan includes a Significant Natural and Cultural Resources (SNR) Map, and an applicant for development of property that is included on the SNR Map provides the county with additional information identifying "the location of the natural resource(s)," as required by the applicable approval criteria, the requirement to precisely identify the location of the protected resource does not amount to an amendment of the SNR Map. *Warren v. Washington County*, 78 Or LUBA 107 (2018).

29.3.1 Comprehensive Plans – Applicability – Generally. When the hearings officer makes findings on a wildlife habitat area located within a Significant Natural and Cultural Resources (SNR) Map, the hearings officer's task is to consider all of the evidence in the record and determine whether the applicable approval criteria are satisfied. A hearings officer's task is not to determine whether intervenor's submittals in support of the application are "supported by substantial evidence in the record." Rather, the hearings officer must weigh the evidence submitted against the applicable standards and criteria, and make that determination. *Warren v. Washington County*, 78 Or LUBA 107 (2018).

29.3.1 Comprehensive Plans – Applicability – Generally. When a city approves an application, nothing requires the city or intervenor to rezone the property in connection with the application, when the current zoning is inconsistent with the comprehensive plan, and the current zoning does not allow for more intensive development than contemplated in the comprehensive plan. *Richardi v. City of Eugene*, 78 Or LUBA 299 (2018).

29.3.1 Comprehensive Plans – Applicability – Generally. In applying a development code standard that authorizes a local government to approve exceptions to lot size standards for planned developments if the development's "design and amenities" warrant the exceptions, the fact that preservation of open space is encouraged by the comprehensive plan does not mean the exceptions must be approved simply because the proposal would preserve open space. That the proposed open space is consistent with the comprehensive plan does not require approval of the requested exceptions. *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016).

29.3.1 Comprehensive Plans – Applicability – Generally. A comprehensive plan policy requiring protection of "natural open space" does not apply to a former private golf course that is identified in a neighborhood sub-area plan as "Parks, Open Space," where the comprehensive plan distinguishes between "natural" open spaces and other types of open spaces, and the subject property is not identified as "natural" open space in any planning document. *Smith v. City of Salem*, 61 Or LUBA 87 (2010).

29.3.1 Comprehensive Plans – Applicability – Generally. Based on the Court of Appeals' decisions in *1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216, 124 P3d 1249 (2005), and *D.S. Parklane Development, Inc. v. Metro*, 165 Or App 1, 22, 994 P2d 1205 (2000), it would be error for a local government to ignore available commercial and industrial land data in its acknowledged comprehensive plan and rely instead on different data that is not part of the acknowledged comprehensive plan to conclude that a land use regulation amendment will leave the local government with an adequate supply of commercial and industrial land. However, if the local government also adopts adequate findings based on the commercial and industrial land data

in its acknowledged comprehensive plan that the land use regulation amendment will not leave the local government with an inadequate supply of commercial and industrial land, the local government's additional findings that rely on data that is not included in the comprehensive plan provide no basis for reversal or remand. *McDougal Bros. Investments v. City of Veneta*, 59 Or LUBA 207 (2009).

29.3.1 Comprehensive Plans – Applicability – Generally. A regional plan requirement that local governments "review their land use regulations and revise them, if necessary, to include measures to limit new buildings for retail commercial uses" in areas the regional agency has designated for industrial and employment development is nominally directed solely at *land use regulations*. But that regional plan requirement also would apply to limit *comprehensive plan* amendments, to the extent those comprehensive plan amendments would authorize land use regulations that would be inconsistent with the regional agency's requirement for land use regulations that limit retail commercial uses in such areas. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

29.3.1 Comprehensive Plans – Applicability – Generally. Where part of a subarea plan is adopted by one ordinance and part of that subarea plan is adopted by a second ordinance, and the first ordinance is remanded by LUBA but the second ordinance is affirmed, the part of the subarea plan adopted by the second ordinance may provide the comprehensive plan basis for a parking garage. Where the second ordinance adopts a subarea plan parking policy and zoning code amendments that specifically authorize parking garages on certain specified properties and a city subsequently issues a decision approving a parking garage pursuant to the policy and zoning code, the city's decision will be affirmed on appeal notwithstanding that the first ordinance was remanded, where petitioners identify no other comprehensive plan provisions that are inconsistent with approval of the parking garage. *NWDA v. City of Portland*, 58 Or LUBA 533 (2009).

29.3.1 Comprehensive Plans – Applicability – Generally. A county does not err in failing to adopt findings addressing a county comprehensive plan inventory of mobile home parks in the course of approving a planned unit development that will replace an existing mobile home park, where pursuant to an urban growth management agreement the city rather than county comprehensive plan governs the application. *Saddle Butte Residents' Association v. Douglas County*, 56 Or LUBA 269 (2008).

29.3.1 Comprehensive Plans – Applicability – Generally. A state agency permit renewal decision that concludes, based on substantial evidence, that the renewed permit does not involve a substantial modification to or intensification of the permitted activity, and thus no land use compatibility statement is required from the affected local government, is not a land use decision subject to LUBA's jurisdiction under ORS 197.015(11)(a)(B), because it is not an agency decision with respect to which the agency is required to apply the goals. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

29.3.1 Comprehensive Plans – Applicability – Generally. Regional plan provisions that limit regional planning to a designated region are not violated or improperly amended by non-regulatory expressions of interest in a city parks, recreation and open space plan concerning parks outside the region and city in the county, where the city's plan makes it clear that the county's plan is the

controlling planning document for such parks. *Home Builders Assoc. v. City of Eugene*, 52 Or LUBA 341 (2006).

29.3.1 Comprehensive Plans – Applicability – Generally. OAR 660-023-0180 prohibits application of local government standards to post-acknowledgment plan amendment to add a site to the plan inventory of significant aggregate sites, unless such standards (1) were adopted after 1989 and (2) provide "specific criteria" for proposals to amend the plan inventory of aggregate sites. A general agricultural policy requiring that nonagricultural development be based on demonstrated public need is not a "specific criteri[on]" regarding proposals to amend the aggregate inventory and therefore OAR 660-023-0180 prohibits application of the policy. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

29.3.1 Comprehensive Plans – Applicability – Generally. No reasonable person could interpret a plan policy stating that the county plans to participate with other counties in a regional aggregate needs analysis as imposing a requirement that an applicant seeking to amend the county's aggregate inventory must establish a "public need" for aggregate. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

29.3.1 Comprehensive Plans – Applicability – Generally. Under OAR 731-015-0075, an ODOT Class 3 project to improve a highway interchange must comply with any affected local government's comprehensive plan and, if the project does not comply, any comprehensive plan amendments that are necessary to bring the project into compliance must be adopted *before* ODOT issues its Revised Environmental Assessment for the interchange project. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

29.3.1 Comprehensive Plans – Applicability – Generally. A county errs by finding that its acknowledged zoning ordinance fully implements the acknowledged comprehensive plan, thus making it unnecessary to apply comprehensive plan provisions directly to an application for permit approval, where the acknowledged zoning ordinance specifically requires that the application for permit approval must demonstrate compliance with the acknowledged comprehensive plan and the county does not identify any zoning ordinance provisions that implement applicable comprehensive plan policies. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

29.3.1 Comprehensive Plans – Applicability – Generally. If state legislation preempts county regulation of noise from a firearm training facility, then comprehensive plan text that purports to regulate such noise is contrary to state statute and unenforceable. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

29.3.1 Comprehensive Plans – Applicability – Generally. If a county has not yet amended its comprehensive plan and land use regulations to comply with OAR 660-023-0180, OAR 660-023-0180(7) requires that the county directly apply the substantive requirements and procedures of OAR 660-023-0180 to consideration of a post-acknowledgment plan amendment concerning mining authorization. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

29.3.1 Comprehensive Plans – Applicability – Generally. The scope of additional conflicts that may be considered under OAR 660-023-0180(4)(b)(F), is a question of state law and a county's

interpretation of OAR 660-023-0180(4)(b)(F) is not entitled to the deferential standard of review required by ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

29.3.1 Comprehensive Plans – Applicability – Generally. Absent a statutory provision or agreement to the contrary, development within a UGB and outside a city's corporate limits is subject to the county's jurisdiction, ordinance and comprehensive plan. An intergovernmental agreement that requires the county to apply city comprehensive plan map designations does not, by implication, also require the county to apply city comprehensive plan text provisions. *City of Newberg v. Yamhill County*, 36 Or LUBA 473 (1999).

29.3.1 Comprehensive Plans – Applicability – Generally. Where a county's comprehensive plan contains or is required to contain provisions that by their terms apply to a decision vacating a county road within city limits, the county must apply those provisions. If any such provisions apply, the county's road vacation decision is a land use decision subject to LUBA's jurisdiction. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

29.3.1 Comprehensive Plans – Applicability – Generally. Because ORS 368.361(3) imposes on the county the obligation to conduct proceedings and make findings in vacating a county right-of-way within city limits, the county and not the city has the obligation of applying any provisions of the city's comprehensive plan or land use ordinance that the city would apply, were the city conducting the vacation. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

29.3.1 Comprehensive Plans – Applicability – Generally. A hearings officer's determination that an EFU-zoned property is not necessary to provide a proposed public service is not inconsistent with a drainage master plan and does not constitute an impermissible collateral attack on the drainage master plan, where the drainage master plan was not adopted in accordance with post-acknowledgment procedures and only identifies the site as a "preferred" site. *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998).

29.3.1 Comprehensive Plans – Applicability – Generally. Background reports, which typically contain data and information that describe a community's resources and features and address the topics specified in the applicable Statewide Planning Goals, are not the equivalent of comprehensive plans, which set forth the community's long-range objectives and the policies by which it intends to achieve them. *Mount Hood Stewardship Council v. Clackamas County*, 33 Or LUBA 284 (1997).

29.3.1 Comprehensive Plans – Applicability – Generally. Where the city's comprehensive plan expressly requires that new subdivisions shall have sidewalks, the city may not use the variance procedures of its subdivision ordinance in order to grant an exception to the comprehensive plan sidewalk requirement. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

29.3.1 Comprehensive Plans – Applicability – Generally. If a county recognizes a citizens planning advisory committee (CPAC) chosen in violation of election procedures previously adopted by resolution and incorporated by reference in its comprehensive plan, it ignores a

substantive violation of its plan and land use regulations, and the CPAC is a nullity. *Boom v. Columbia County*, 31 Or LUBA 318 (1996).

29.3.1 Comprehensive Plans – Applicability – Generally. The city's finding that its comprehensive plan contemplates a rationing of building permits through a traffic management ordinance does not satisfy inquiry into whether that rationing violates the state moratorium statute. *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

29.3.1 Comprehensive Plans – Applicability – Generally. The fact that a city, in prior years, had an acknowledged ordinance rationing building permits does not excuse the city from seeking acknowledgement of a new rationing ordinance or from complying with the state moratorium statute. *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

29.3.1 Comprehensive Plans – Applicability – Generally. A special district ordinance stating the district will provide service to all existing residences and all residences "hereafter constructed pursuant to a valid [county] building permit" is not inconsistent with the county comprehensive plan, because the county may issue building permits only if such permits are consistent with its acknowledged plan and implementing regulations. *Churchill v. Neahkahnie Water District*, 29 Or LUBA 354 (1995).

29.3.1 Comprehensive Plans – Applicability – Generally. Where a local government has a combined comprehensive plan and zoning map, there can be no *Baker* comprehensive plan/zoning map conflict. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

29.3.1 Comprehensive Plans – Applicability – Generally. Where a local government decision amending its land use regulations does not interpret comprehensive plan goals and map designations as being inapplicable to such amendments, but rather explains how the proposed amendment implements certain comprehensive plan goals and is consistent with certain plan map designations, it is clear the governing body interprets those plan goals and map designations as being applicable to the land use regulation amendment. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

29.3.1 Comprehensive Plans – Applicability – Generally. ORS 275.320 to 275.340 deal with a county's proprietary power to manage county-acquired land. The designation of county-acquired real property as "county forests, public parks or recreational areas" under ORS 275.320 does not supersede the comprehensive land use planning process established under ORS chapter 197. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

29.3.1 Comprehensive Plans – Applicability – Generally. An amendment to an acknowledged land use regulation must comply with the local government's acknowledged comprehensive plan. ORS 197.175(2)(d); 197.835(5)(a). *Rea v. City of Seaside*, 26 Or LUBA 444 (1994).

29.3.1 Comprehensive Plans – Applicability – Generally. Where a city comprehensive plan expressly recognizes that the county has jurisdiction to issue land use permits prior to annexation of unincorporated areas, the city must annex an unincorporated area before it has jurisdiction to

grant land use permits for such unincorporated areas. *Recht v. City of Newport*, 26 Or LUBA 316 (1993).

29.3.1 Comprehensive Plans – Applicability – Generally. A local government does not authorize projects not included in its comprehensive plan where a Recommended Roadways Improvement Map provision states that failure to include a particular project on that map does not preclude development of such project if the project is otherwise allowed by the comprehensive plan. *Bicycle Transportation Alliance v. Washington Co.*, 26 Or LUBA 265 (1993).

29.3.1 Comprehensive Plans – Applicability – Generally. Where a local government decision forming a service district to provide sewerage services discusses, but does not authorize, a particular means of sewage treatment, petitioner's challenge of the decision on the basis that the particular means of treatment violates a plan policy concerning extension of urban services outside UGBs is premature. *DLCD v. Marion County*, 23 Or LUBA 619 (1992).

29.3.1 Comprehensive Plans – Applicability – Generally. A local governing body is required by ORS 197.175(2)(d) to apply applicable provisions of its comprehensive plan and land use regulations in determining whether a wrecking certificate should be approved, notwithstanding that it has not adopted regulations as authorized by ORS 822.140(3). *Bradbury v. City of Independence*, 22 Or LUBA 398 (1991).

29.3.1 Comprehensive Plans – Applicability – Generally. That a nonconforming use is inconsistent with comprehensive plan provisions that did not exist or apply on the date the use became nonconforming provides no basis for reversal or remand, because ORS 215.130(5) provides the use may continue notwithstanding such inconsistency. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

29.3.1 Comprehensive Plans – Applicability – Generally. Where an ordinance provision requires that a proposed conditional use be consistent with the comprehensive plan, and petitioners contend an apparently relevant plan provision was not addressed, the county must identify findings establishing, or evidence "clearly supporting," a determination that either (1) the plan provision does not apply, or (2) the proposed conditional use is consistent with the plan provision. *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Traffic performance standards in the local government's transportation system plan (TSP) are not approval criteria applicable to a limited land use decision that were incorporated pursuant to ORS 197.195(1), where the applicable criteria either do not refer to the TSP at all or where they only generally "incorporate[] by reference the city's public facility master plans, including plans for domestic water, sanitary sewer, storm drainage, parks, and transportation." *Oster v. City of Silverton*, 79 Or LUBA 447 (2019).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Traffic performance standards in the local government's transportation system plan (TSP) are not approval criteria applicable to a limited land use decision that were incorporated pursuant to ORS 197.195(1), where the applicable criteria either do not refer to the TSP at all or where they only generally "incorporate[] by reference the city's public facility master plans, including plans for domestic water, sanitary sewer, storm drainage, parks, and transportation." *Oster v. City of Silverton*, 79 Or LUBA 447 (2019).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. LUBA will reject a county's interpretation of its code—that a code provision which sets forth approval criteria regarding an application for a variance to the minimum lot size requirements within the county's urban growth area may not apply to the county's decision because it only applies to decisions made by the county's planning director but not to decisions made by the planning commission or board of county commissioners—that was made for the first time in its response brief, because that interpretation is not reflected in the decision and is therefore not an interpretation by the local government. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where the county approved a proposed variance to the 20-acre minimum lot size for two one-acre parcels, pursuant to a county code provision that provides that the county planning director may approve a variance for a proposed project if the city does not object to the variance, LUBA will reverse the county's decision as "prohibited as a matter of law" pursuant to OAR 661-010-0071(c) where the county approved the variance as "consistent with the * * * city's comprehensive plan," but the city objected to the proposed variance because of the proposal's inconsistency with the city's comprehensive plan. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. When Community Plan adopted as part of the county's comprehensive plan includes a Significant Natural and Cultural Resources (SNR) Map, and an applicant for development of property that is included on the SNR Map provides the county with additional information identifying "the location of the natural resource(s)," as required by the applicable approval criteria, the requirement to precisely identify the location of the protected resource does not amount to an amendment of the SNR Map. *Warren v. Washington County*, 78 Or LUBA 107 (2018).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. When the hearings officer makes findings on a wildlife habitat area located within a Significant Natural and Cultural Resources (SNR) Map, the hearings officer's task is to consider all of the evidence in the record and determine whether the applicable approval criteria are satisfied. A hearings officer's task is

not to determine whether intervenor's submittals in support of the application are "supported by substantial evidence in the record." Rather, the hearings officer must weigh the evidence submitted against the applicable standards and criteria, and make that determination. *Warren v. Washington County*, 78 Or LUBA 107 (2018).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. When a city approves an application, nothing requires the city or intervenor to rezone the property in connection with the application, when the current zoning is inconsistent with the comprehensive plan, and the current zoning does not allow for more intensive development than contemplated in the comprehensive plan. *Richardi v. City of Eugene*, 78 Or LUBA 299 (2018).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. The Goal 2 requirement that acknowledged comprehensive plans be the "basis" for land use decisions is not violated by citation to an adopted, but unacknowledged housing strategy document, where the cited portion of the document directly implements, in almost identical language, policy recommendations in the city's acknowledged housing needs analysis. *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Language in a city's acknowledged housing needs analysis finding an existing deficit of affordable housing in the city, and recommending that the city identify surplus city land for development with government-subsidized housing, provides a policy basis for the city to rezone public land from an open space zone to a residential zone that allows high density residential development. *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. That a city's acknowledged buildable lands inventory indicates that the city already has an adequate supply of land zoned for R-3 (high density residential) does not undermine the city council's conclusion that rezoning additional land to R-3 is necessary to address an identified shortage of affordable housing, where the city finds that the private housing market has been unable to address the need for affordable housing despite an adequate supply, and that rezoning surplus public land to R-3, to be donated to a housing agency, is necessary to facilitate development of affordable housing. *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where it is not clear whether the enacting body intended comprehensive plan or land use regulation provisions to be mandatory approval criteria, LUBA examines the wording and context of the particular provisions to determine whether they must be applied as mandatory approval criteria. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A list of special characteristics of a historic district are not mandatory approval criteria where they are not worded as mandatory requirements for future housing proposals. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where it is unclear whether historic guidelines operate as mandatory approval criteria, but the guidelines include a column identified as "Principle – Good Example" and a column identified as "Not Allowed," and in each column there is a list of activities and features, the activities and features in the "Not Allowed" column are prohibited. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. The kind of conflict between a zoning map designation and a comprehensive plan map designation that under *Baker v. City of Milwaukie*, 271 Or 500, 514, 533 P2d 772 (1975), results in the zoning map designation giving way to the comprehensive plan map designation is where the zoning map designation would allow a more intensive use than the comprehensive plan map designation would allow. *Devlin v. Linn County*, 75 Or LUBA 163 (2017).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. LUBA will affirm a governing body's interpretation of the phrase "designated common area" as used in a plan policy governing a resort community zone to mean something different than a definition of "common area" in an unrelated section of the comprehensive plan that cross-references the definition of "common property" as used in the Oregon Planned Communities Act at ORS 94.550(7), where the latter definition was adopted at a different time and to serve a different purpose than the plan policy governing the resort community zone. *Kine v. Deschutes County*, 75 Or LUBA 407 (2017).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. General expressions of concern that traffic from additional rural residential development would degrade the quality of a rural residential neighborhood are insufficient under ORS 197.763(1) to raise issues regarding consistency with comprehensive plan policies that promote rural residential neighborhoods, absent specific citation to such policies during the proceedings below. *Neil v. Columbia County*, 74 Or LUBA 442 (2016).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A hearings officer does not err in rejecting a zone change applicant's proposed zoning diagram that orients true north toward the top border of the diagram, instead of matching the orientation of the north arrow on the applicable comprehensive plan map, which is tilted two degrees relative to the top border, where there is no basis to assume that the tilted north arrow on the comprehensive plan map is a "scriveners' error." *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A hearings officer correctly interprets the provisions of the comprehensive plan's Housing chapter as not applying to an application for a zone change because a residential zone change proposes only a change in the zoning and possible density of housing but does not propose a particular type of housing. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A hearings officer correctly interprets the provisions of the comprehensive plan's Public Facilities and Services chapter as not applying to an application for a zone change, where the chapter's policies are directed at development, and the adopted land use regulations implement the policies and apply at the time of development. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A zoning ordinance regulation that allows fill if it will not increase the elevation of land is not necessarily inconsistent with a comprehensive plan provision that bans fill altogether, where fill only qualifies as fill, as defined in the comprehensive plan, if the fill will raise the elevation of land. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where respondents respond to petitioner's argument that a proposed development violates comprehensive plan standards by arguing in their response brief that the challenged decision is a "limited land use decision" and the plan policies therefore do not apply under ORS 197.195(1) because the plan policies have not been incorporated into the city's land use regulations, and petitioner does not respond to that argument at oral argument or seek permission to respond in a reply brief, petitioner's assumption that the plan policies apply is inadequate to state a basis for reversal or remand. *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A 1,200 average daily traffic standard for local streets is not a hard and fast standard where other comprehensive plan language makes it clear that level of traffic on a local street is merely "desirable" and a number of other factors are considered in determining whether to classify a street as a "local" street. *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a county applies a new rural zone that effectively prohibits new residential uses within a rural unincorporated community, the county may have to consider whether application of the new zone is consistent with its comprehensive plan Housing Element if the county relies upon vacant land within that community to meet an identified need to serve local, rural housing needs. *Seabreeze Associates Limited Partnership v. Tillamook County*, 71 Or LUBA 218 (2015).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A petitioner fails to establish that a comprehensive plan policy requiring the county to encourage development that can be efficiently converted to higher densities applies to a county decision to apply a new zone to a rural unincorporated community, where the plan policy specifies which communities it applies to, but does not mention the community where the new zone is applied to. *Seabreeze Associates Limited Partnership v. Tillamook County*, 71 Or LUBA 218 (2015).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Comprehensive plan descriptions of plan map designations are not properly applied as mandatory permit approval criteria. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A decision to "incorporate" comprehensive plan policies into a local government's land use regulations, to make those policies criteria directly applicable to a limited land use decision, must be accomplished by as post-acknowledgment plan amendment that expressly makes specific policies applicable approval criteria for limited land use decisions. The mere adoption of land use regulations to implement

comprehensive policies does not "incorporate" such policies into land use regulations as directly applicable criteria. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A hearings officer does not misconstrue a site plan review standard requiring a finding that "negative impacts to the transportation system are mitigated adequately" as not requiring the applicant to construct bike lanes that are shown in the Bicycle System Element of the city's Transportation System Plan (TSP), where the code standard does not refer to the TSP or indicate that site plan review is the vehicle to provide for construction of bike lanes depicted in the TSP. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. One way to satisfy the ORS 197.175(2)(d) requirement that post acknowledgment land use decisions must comply with a local government's acknowledged comprehensive plan is to apply applicable comprehensive plan requirements directly as permit approval criteria. *Friends of the Hood River Waterfront v. City of Hood River*, 68 Or LUBA 459 (2013).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. One way to satisfy the ORS 197.175(2)(d) requirement that post acknowledgment land use decisions must comply with a local government's acknowledged comprehensive plan is to apply acknowledged land use regulations that were adopted to fully implement the comprehensive plan. But in this circumstance, acknowledged land use regulations typically are not written to include an express requirement that permits must be consistent with the acknowledged comprehensive plan. *Friends of the Hood River Waterfront v. City of Hood River*, 68 Or LUBA 459 (2013).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Frequently, neither the acknowledged comprehensive plan nor the acknowledged land use regulations foreclose the possibility that some comprehensive plan requirements may continue to apply directly to individual land use decisions following acknowledgment. In this situation, while it may be that some of a city's land use regulations generally implement and displace the comprehensive plan as directly applicable permit approval criteria, the text and context of potentially applicable comprehensive plan requirements must be examined to determine if the plan requirement is one that must be applied directly as an approval standard in determining whether to approve or deny an application for permit approval. *Friends of the Hood River Waterfront v. City of Hood River*, 68 Or LUBA 459 (2013).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. It is not enough for a petitioner at LUBA to identify "mandatory" language in a comprehensive plan policy. The text and context of the comprehensive plan must establish both (1) that the plan requirement is mandatory (rather than hortatory or aspirational) and (2) that the mandate must be applied directly as a permit approval standard for the permit decision on appeal. *Friends of the Hood River Waterfront v. City of Hood River*, 68 Or LUBA 459 (2013).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. In determining whether a comprehensive plan requirement applies directly to an application for permit approval, a local government is performing a function quite similar to the function the city was performing in

Siporen v. City of Medford, 349 Or 247, 243 P3d 776 (2010), *i.e.*, whether a comprehensive plan requirement is "applicable." Under *Siporen* a local government's interpretations of its comprehensive plan to determine which plan requirements are applicable as individual permit approval criteria are entitled to deference so long as its interpretations are "plausible." If the city's interpretation is plausible, LUBA must defer, even if LUBA believes there is a better interpretation. *Friends of the Hood River Waterfront v. City of Hood River*, 68 Or LUBA 459 (2013).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where one plan strategy directs that lands subject to flooding be designated "Floodplain" and the following plan strategy directs that no permanent structures may be erected in lands subject to flooding unless the structure complies with the "Floodplain" criteria, a local governing body's interpretation of those plan strategies to require application of the "Floodplain" criteria only in areas that have already been designated "Floodplain" runs afoul of ORS 174.010 by failing to "give effect" to the second strategy and by "inserting what has been omitted" in the second strategy by inserting a requirement that the lands subject to flooding must have been zoned "Floodplain." *Friends of the Hood River Waterfront v. City of Hood River*, 68 Or LUBA 459 (2013).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Whatever difference there may be between the word "consistent" in a local standard that requires conditional use permits to be consistent with the comprehensive plan and the word "comply" as used in ORS 197.175(2)(d), which requires that land use decisions be adopted in compliance with the comprehensive plan, land use decisions must comply with both requirements. *Friends of the Hood River Waterfront v. City of Hood River*, 67 Or LUBA 179 (2013).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. There is no reason why land use regulations could not fully implement a comprehensive plan, making it unnecessary to consider the comprehensive plan when making permit decisions. But there must be something in the text of the comprehensive plan or the land use regulations or both to support that result. *Friends of the Hood River Waterfront v. City of Hood River*, 67 Or LUBA 179 (2013).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. If a governing body intended that its land use regulations fully implement its comprehensive plan, so that the plan could never operate as a source of permit approval standards, it presumably would not have adopted a conditional use permit criterion that requires conditional uses "shall be consistent with the comprehensive plan." *Friends of the Hood River Waterfront v. City of Hood River*, 67 Or LUBA 179 (2013).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where comprehensive plan goals and policies are directed at structures, development, floodplains and flood hazard areas, and the local governing body does not specifically address the text of those goals and policies in concluding that they do not apply and approving a building to be constructed in the floodplain, remand is required so that the governing body can explain why the text of those goals and policies supports its position that they do not apply. *Friends of the Hood River Waterfront v. City of Hood River*, 67 Or LUBA 179 (2013).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a comprehensive plan policy adopted to implement Goal 5 is just as open ended and aspirational as Goal 5 itself and in unchallenged findings the city explains Goal 5 has been fully implemented through the Goal 5 resource inventory and ESEE evaluation process, petitioner fails to establish that the policy must be considered directly in approving a conditional use permit. *Friends of the Hood River Waterfront v. City of Hood River*, 67 Or LUBA 179 (2013).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Remand is necessary where a county adopts standards that impose limitations on development of wind energy facilities, but the record includes no findings or other indications that the county considered whether the amendments are consistent with comprehensive plan policies that encourage the county to promote development of alternative energy sources. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A city planning commission interpretation that a comprehensive plan policy does not apply to a planned unit development application for a cell tower is correct where the text of the policy directs the city to implement one of several means of protecting open space, including adopting planned unit development ordinances, and does not contain any language that suggests that it is intended to apply on a case-by-case basis to individual applications for planned unit development approval that are processed under the city's adopted planned unit development ordinances. *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A city planning commission interpretation that a comprehensive plan policy does not apply to a planned unit development application to site a cell tower is not correct, where (1) the text of the policy provides specific and mandatory direction that public facilities "be designed and located" to "preserve[] and enhance" desirable features of the area, (2) the preamble to the applicable comprehensive plan policy refers to "daily decisions" being guided by "site planning," and (3) there is no similar provision in the city's development code that requires the city to consider whether the design and location of a public facility "preserve[s] and enhance[s] desirable features of the area." *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy requiring that the county consider proximity to residential uses and seasonal wind directions when making land use decisions relative to industrial or other uses likely to pose a threat to air quality does not apply to a legislative text amendment that simply adds landfill expansions to the list of uses potentially allowed in the EFU zone. Such a policy is directed at specific development proposals with a limited geographic focus, not legislative text amendments affecting large areas of the county. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. In general, comprehensive plan policies that are worded as "shoulds" or in other similar nonmandatory language do not operate as independent mandatory approval criteria. But comprehensive plan policies must be interpreted in context, and where one comprehensive plan policy states that "right of way vacations are to be based upon the criteria" set forth in the comprehensive plan's right-of-way vacation policies, that suggests the right-of-way vacations policies are not nonmandatory policies that the

city council is free to ignore, even if they are worded as "shoulds." *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Comprehensive plan policies may be mandatory considerations, such that the local government is obligated to adopt findings addressing those considerations, even if individual policies are not mandatory approval criteria that must be independently satisfied or complied with. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A finding that the public interest will not be prejudiced if a right-of-way is vacated is not adequate to address a comprehensive plan policy that asks whether the proposed right-of-way vacation "satisfies a compelling public need," because the finding answers a different question than the question asked by the comprehensive plan policy. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A finding that a proposed right-of-way vacation "will not degrade * * * accessibility in the surrounding neighborhoods" is not sufficient to address a comprehensive plan policy that "[a] proposed vacation should not limit, nor make more difficult, safe and convenient pedestrian and bicycle access," where the barrier that two cemeteries currently pose for pedestrian, bicycle and vehicular traffic was the topic of considerable testimony and the vacation would eliminate the only existing publicly owned property to provide pedestrian and bicycle access through the cemeteries. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where in approving a destination resort in coastal shorelands that is dependent on groundwater the county addresses a number of comprehensive plan policies implementing Goal 17, but does not address a potentially applicable plan policy in the plan Goal 17 element that requires the county take measures to protect groundwater, remand is necessary for the county to either address the policy or explain why it is not applicable. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a plan amendment standard requires a finding that the change conforms to "applicable goals and polices" in the comprehensive plan, the city's findings address those plan goals and policies the city deemed "applicable," and on appeal petitioner argues generally that the city failed to address all plan goals and policies but does not identify any "applicable" goals or policies not addressed, LUBA will reject the argument. *Smith v. City of Salem*, 61 Or LUBA 87 (2010).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A Metro regional government Urban Growth Management Functional Plan (UGMFP) housing density requirement is not an approval standard applicable to a county's land use decision approving a residential subdivision, where the UGMFP density requirement applies directly only when Metro region local governments fail to adopt implementing regulations, and the county adopted regulations implementing the UGMFP density requirement. *Kane v. City of Beaverton*, 61 Or LUBA 234 (2010).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy that a county should "strive to promote and encourage" a safe transportation network" is not a mandatory approval standard that applies directly to an application for land division. *MEK Properties, LLC v. Coos County*, 61 Or LUBA 360 (2010).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A land use regulation purpose statement that calls for dividing land so as to "promote public health, safety, convenience, and general welfare" and to "minimize * * * hazards" and to "minimize safety hazards and adverse impacts on the neighboring area" are not a mandatory approval standards that apply directly to an application for land division. *MEK Properties, LLC v. Coos County*, 61 Or LUBA 360 (2010).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A county decision to deny a partition based on a land use regulation design and development standard that requires "[a]ny access approval request under this section shall be reviewed to assure that no development occurs in known natural hazard areas without appropriate safeguards * * *" must be remanded where it is not clear that the standard applies to a partition that proposes no new access, it is not clear that the partition is accurately viewed as "development" and it is not clear whether there is any "known natural hazard area" present. *MEK Properties, LLC v. Coos County*, 61 Or LUBA 360 (2010).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. When a goal exception is taken to facilitate proposed development, any comprehensive plan policies that implement the goal for which the exception is taken no longer govern that development. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Remand is necessary where the local government adopts exceptions to Statewide Planning Goals 11 and 14 to approve a destination resort, but fails to address comprehensive plan transportation policies that appear to implement Statewide Planning Goal 12 (Transportation), for which the local government did not adopt an exception, and the decision fails to explain why those policies are either satisfied or not applicable. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A county errs in failing to address whether a mitigation plan for a destination resort is consistent with applicable comprehensive plan policies governing wildlife protection, and instead finding that issues raised regarding compliance with those policies will be addressed by requiring the applicant to obtain approval of the plan from the Oregon Department of Fish and Wildlife. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A city governing body does not err in interpreting comprehensive plan policies that govern "development" to be inapplicable to a proposal to annex and extend sewer service to fully developed property. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. When comprehensive plan and land use regulation amendments are adopted together, the land use regulations must be consistent with the amended comprehensive plan provisions rather than existing comprehensive

plan provisions that are being replaced by the new comprehensive plan provisions. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A county does not err in failing to adopt findings addressing a county comprehensive plan inventory of mobile home parks in the course of approving a planned unit development that will replace an existing mobile home park, where pursuant to an urban growth management agreement the city rather than county comprehensive plan governs the application. *Saddle Butte Residents' Association v. Douglas County*, 56 Or LUBA 269 (2008).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A local government does not err in not considering comprehensive plan policies that are not applicable approval criteria. *Hermanson v. Lane County*, 56 Or LUBA 433 (2008).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a comprehensive plan categorizes lands within the urban growth boundary according to suitability for development, a county errs by denying a request for rezoning on the basis that the requested rezoning is inconsistent with the comprehensive plan, where the findings identify nothing in the comprehensive plan that supports a conclusion that the property's low suitability rating precludes the requested rezoning. *Sperber v. Coos County*, 56 Or LUBA 763 (2008).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan goal that the city should "promote, on an equitable basis, the highest level of services the citizens will support" is too general and nonmandatory to function as an approval criterion for a permit application seeking a variance to off-street parking requirements. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy requiring the city to designate areas for *public* off-street parking facilities is not an applicable approval criterion with respect to an application for a variance to *private* off-street parking facilities. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A county's interpretation that a comprehensive plan policy, which implements Statewide Planning Goal 7 (Natural Disasters and Hazards), requires regulation of development in known areas potentially subject to natural disasters and is aimed at reducing risks to life and property that are *caused by natural hazards*, is not applicable in the context of a determination whether development is appropriate in a beaches and dunes area, pursuant to a comprehensive plan policy that implements Statewide Planning Goal 18 (Beaches and Dunes), which is aimed at reducing impacts that may be *caused by the proposed development*. *Borton v. Coos County*, 52 Or LUBA 46 (2006).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a refinement plan specifies that applicable plan policies are "guidance for decision-making," as long as the decision maker actually considers applicable plan policies and explains the basis for its choice to give one policy greater weight than another, where different policies compete or point to different results, LUBA will not disturb that choice on review. *Bothman v. City of Eugene*, Or LUBA 701 (2006).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Findings that an intervening road will buffer commercial and residential uses, and that rely on site design review standards to minimize adverse impacts of future commercial uses, are sufficient to explain why a zone change from office to commercial uses is consistent with a refinement plan policy that encourages location of office uses as a transition between commercial and residential uses. *Bothman v. City of Eugene*, Or LUBA 701 (2006).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Even where a comprehensive plan provision might not constitute an independently applicable mandatory approval criterion for a rezoning proposal, it may nonetheless represent a relevant and necessary consideration that must be reviewed and balanced with other relevant plan provisions pursuant to ordinances that require that the proposed rezoning be consistent with applicable plan provisions. *Bothman v. City of Eugene,* 51 Or LUBA 426 (2006).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy that expresses a clear policy preference that a specifically identified area remain in its existing zoning is a policy that must be considered and balanced with other applicable policies when rezoning property in the area, under rezoning criteria requiring that the proposed rezoning be consistent with applicable plan provisions, notwithstanding that the plan policy is not couched in absolute or mandatory terms. *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy that expresses a clear policy preference that general office uses buffer commercial and residential uses in a specific area is a policy that must be considered and balanced with other applicable policies in rezoning property in that area that is (1) zoned and developed for general office uses and (2) acts as a buffer between commercial and residential-zoned and developed areas. *Bothman v. City of Eugene,* 51 Or LUBA 426 (2006).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy requiring that the county "insure adequate provisions" for schools is a planning mandate to the county, not an approval criterion requiring that applicants for a planned unit development provide land for schools. *City of Damascus v. Clackamas County*, 50 Or LUBA 514 (2005).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. In order to "incorporate" a comprehensive plan standard into a local government's land use regulations within the meaning of ORS 197.195(1) and thus apply that plan standard to a limited land use decision as an approval criterion, the local government must at least amend its land use regulation to identify specific plan policies or provisions that apply to a limited land use decision as approval criteria. A code requirement to "comply with the comprehensive plan" is insufficient to incorporate any comprehensive plan standard under ORS 197.195(1). *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A finding that annexation is necessary to protect significant natural features on a site under more protective city regulations is a sufficient explanation for why there is a "public need" annexation, notwithstanding a plan

policy indicating a preference for infill and redevelopment over annexation. No amount of infill or redevelopment could preserve significant natural features on the site. *Mason v. City of Corvallis*, 49 Or LUBA 199 (2005).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy stating that the city should "work toward" development of vacant lands before annexing additional lands does not mandate anything and therefore is not an approval standard governing an annexation proposal. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Remand is necessary to adopt findings addressing a plan policy that requires the city to promote higher-density residential development adjacent to two identified service centers, and either explain why (1) the policy does not apply to an application to rezone property to medium-density residential or (2) why allowing medium-density residential development far from service centers is consistent with the policy. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A plan policy stating that the city will "provide incentives to enable" higher-density residential infill is not a mandatory approval criterion applicable to a quasi-judicial rezoning application. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A detailed water quality resources report that discusses the effects of development on groundwater is sufficient to satisfy a comprehensive plan policy that requires a "Development Impact Statement" addressing the "effect on the groundwater supply." *Dinges v. City of Oregon City*, 49 Or LUBA 376 (2005).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A city's acknowledged comprehensive plan is a potential source of approval criteria in reviewing an application for conditional use approval, because ORS 197.175(2)(d) requires that local governments "make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations." *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. The statutory requirement that land use decisions be consistent with acknowledged comprehensive plans does not mean that all parts of the comprehensive plan necessarily are approval standards, or that comprehensive plan provisions that can operate as approval standards are necessarily relevant to all quasi-judicial land use permit applications. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Even if a comprehensive plan provision is a relevant standard for a quasi-judicial land use permit application, it may simply be a relevant consideration that must be considered with other relevant considerations, rather than a mandatory approval criterion that must separately be satisfied along with other mandatory approval criteria. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. In determining whether particular comprehensive plan goals and policies are relevant approval criteria for a quasi-judicial

land use permit application, it is appropriate to consider first whether the comprehensive plan itself assigns a particular role to those goals and policies. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Remand is necessary to reconsider what plan policies apply to a proposal to rezone property from one commercial zone to another, when the findings are predicated on an erroneous assumption that the property is plan designated medium density residential rather than commercial. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. An approval standard that requires that the local government identify the alternative that "most effectively carries out comprehensive plan goals and policies" necessarily requires balancing when the plan includes many overlapping policies that can work at cross-purposes. Findings that explain how the city chose to balance those plan goals and policies and which goals and policies the city emphasized are adequate, even if petitioners would have emphasized other goals and policies. *Doob v. City of Grants Pass*, 48 Or LUBA 587 (2005).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. It is within a city's interpretive discretion under ORS 197.829(1) to interpret comprehensive plan language setting out considerations for locating commercial development in the city as being planning directives to the city to be used in determining the appropriate plan designation or zone, and not as approval standards that an applicant for commercial development permitted outright in a particular zone must satisfy. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a local code separately requires that quasi-judicial zoning map amendments comply with the local code and comply with applicable comprehensive plan policies, a local government must consider whether there are particular comprehensive plan policies that apply to the zoning map amendment and a local government may not interpret the code to fully implement the comprehensive plan. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where an intergovernmental agreement calls for a county to incorporate into its plan and code the city's ordinances and plan provisions that address lands within the UGB, but the county never does so, the county did not err in refusing to treat the city's provisions as applicable approval criteria. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A blanket finding that "many" of the plan policies cited by opponents are not applicable mandatory approval criteria is inadequate to provide a reviewable interpretation or determination that a particular plan policy is inapplicable, especially when the decision imposes conditions that appear to be directed at the policy's requirements. *Chin v. City of Corvallis*, 46 Or LUBA 1 (2003).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a refinement plan policy prohibits "development" of property prior to master plan approval, the code definition of

"development" includes excavation and fill, and there is no textual or contextual basis to conclude that "development" for purposes of the policy excludes excavation and fill authorized by a grading permit, then the policy is applicable to a challenged permit authorizing excavation and fill on the property. Because the grading permit "concerns" the application of a comprehensive plan provision, the permit is a land use decision subject to LUBA's jurisdiction. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. That regulations governing grading permits do not expressly require compliance with comprehensive plan policies does not necessarily indicate that specific comprehensive plan policies cannot apply to grading permits, especially where the grading permit regulations require planning department review for compliance with "any applicable laws." *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Annexation decisions are governed by comprehensive plan annexation criteria or, if no such comprehensive plan criteria have been adopted, by the statewide planning goals. Where a city annexation decision is adopted without applying either its comprehensive plan or the statewide planning goals, the decision must be remanded. *Morsman v. City of Madras*, 45 Or LUBA 16 (2003).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a local code provision expressly requires that a proposed subdivision must "conform to" the comprehensive plan, the local government errs in interpreting the code to preclude the possibility that there are any comprehensive plan provisions that might apply directly to the subdivision proposal. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where LUBA concludes that relevant local code provisions make the comprehensive plan requirements potentially applicable to an application for subdivision approval and that a particular comprehensive plan provision applies and is not merely aspirational, and the local government approved the subdivision without addressing the comprehensive plan provision, the subdivision approval decision must be remanded. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. While ORS 197.175(2)(d) states that land use and limited land use decisions must be in compliance with acknowledged plan and land use regulations, it does not implicitly prohibit a city from applying other standards such as statutes or county regulations that are not part of the city's acknowledged plan or regulations. *City of Woodburn v. Marion County*, 45 Or LUBA 423 (2003).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. ORS 197.175 requires that land use decisions comply with the applicable comprehensive plan. However, whether a particular plan provision is an approval criterion for a particular quasi-judicial land division application depends on the language of the comprehensive plan and its implementing regulations, with appropriate deference to any explicit or implicit interpretations of the comprehensive plan and implementing regulations by the local government. *Donivan v. City of La Grande*, 43 Or LUBA 477 (2003).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A finding that a proposed use complies with a code criterion requiring a demonstration that the use be consistent with applicable comprehensive plan policies is inadequate where it merely summarizes the applicable comprehensive plan policies, and does not address issues raised regarding compliance with particular policy provisions. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where the comprehensive plan expressly provides that certain policies are approval criteria for conditional use master plans and those policies appear to apply, a city's unexplained conclusion that the policies do not apply is insufficient and remand is required. *Boly v. City of Portland*, 40 Or LUBA 537 (2001).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where comprehensive plan policies require efforts to reduce automobile use and encourage mass transit use, and arguments are presented that approving an additional parking lot adjacent to a light rail station is inconsistent with those policies, the city's unexplained dismissal of the issue requires remand. *Boly v. City of Portland*, 40 Or LUBA 537 (2001).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A city decision to approve a one-story building addition rather than a two-story addition will be affirmed where the petitioner fails to demonstrate that general comprehensive plan policies that advocate a compact urban form (1) apply to the challenged application, and (2) are violated by the city's decision. *Thompson v. City of Ashland*, 40 Or LUBA 298 (2001).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a local governing body interprets comprehensive plan provisions not to impose relevant approval criteria for a particular rezoning request it is entitled to great deference on review. However, where a local governing body simply declares that the provisions are not approval criteria without any explanation, the declaration expresses no reviewable interpretation and the declaration is not entitled to deference. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a generally worded purpose statement in a city's comprehensive plan provides that a zoning designation is intended to confine strip commercial development to its existing locations, but does not expressly provide that the zoning designation may be applied only to those locations, the local government's interpretation of the purpose statement to allow the zoning designation to be applied to other locations so long as it does not result in strip commercial development is not clearly wrong. *Neighbors for Livability v. City of Beaverton*, 40 Or LUBA 52 (2001).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a variance criterion requires that a variance conform to the comprehensive plan, a city's finding that a variance will promote in-fill and higher residential density is insufficient to demonstrate that the variance, allowing a lot to be divided into two lots, satisfies that criterion where the findings identify no comprehensive plan provisions encouraging in-fill and higher residential density. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan provision requiring that all transportation-related decisions consider specified land use impacts is a mandatory approval criterion potentially applicable to a decision vacating a county road. *Mekkers v. Yamhill County*, 39 Or LUBA 367 (2001).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy statement that a local government "will rely" on the Forest Practices Act (FPA) to protect surface waters and fish and wildlife does not have the effect of making the FPA requirements into approval criteria for a forest template dwelling. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A land use regulation text amendment establishing subjective criteria is consistent with a city's plan policy providing that its land use regulations be as "clear and objective as possible," where the city demonstrates that the subjective criteria are necessary in order to ensure compliance with other policy objectives. *Home Depot, Inc. v. City of Portland*, 37 Or LUBA 870 (2000).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a local land use regulation requires that a permit application be consistent with any relevant neighborhood plan, neighborhood plan policies which are described in the neighborhood plan as having the force of law are at least potentially relevant approval criteria for the permit. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A petitioner's arguments that a zoning ordinance amendment violates a plan policy discouraging uses that are not water dependent provides no basis for remand, where the challenged decision raises the maximum building height and does not approve any particular use of the property. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A city does not err by failing to address a comprehensive plan policy that requires an impact assessment for in-water structures, where the decision does not approve any in-water structures. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. OAR 660-023-0180(4)(b)(F), which allows the county to consider land use conflicts with a proposed mine if such conflicts must be considered under a county mining ordinance adopted pursuant to ORS 517.780, does not permit a county to apply its comprehensive plan and land use regulations as decisional criteria for the proposed mine, notwithstanding a general provision in the mining ordinance that requires compliance with the county comprehensive plan and land use regulations. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A conflict or inconsistency with a comprehensive plan or land use regulation provision is not the kind of conflict that may be considered under OAR 660-023-0180(4)(b). The conflicts that may considered under the rule

include conflicts between land uses. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where access to a mining site is via a "local road," OAR 660-023-0180(4)(b)(B) allows a county to consider conflicts with that local road. However, where access to a mining site is via an arterial highway there are no local roads used for access and egress to the mining site and OAR 660-023-0180(4)(b)(B) does not permit the county to consider conflicts with other roads. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A local government may not expand the 1,500-foot impact area required by OAR 660-023-0180(4)(a) based on potential conflicts that exceed the scope of conflicts that may be considered under OAR 660-023-0180(4)(b). *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. OAR 660-023-0180(4)(d) directs that a county proceed to "determine the ESEE consequences of either allowing, limiting, or not allowing mining at the site," only where conflicts with a mining site are properly identified under OAR 660-023-0180(4)(b) and there are not "reasonable and practical measures" that would minimize those conflicts. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. When the local government cannot show that a comprehensive plan policy requiring site-specific soil surveys and geologic studies when potential geologic problems exist is couched in mandatory terms and absent some indication that it has been fully implemented in the zoning code, the policy is decisional criteria for development applications. *Highland Condominium Assoc. v. City of Eugene*, 37 Or LUBA 13 (1999).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. In the absence of a city's determination whether a comprehensive plan policy is a mandatory approval criterion, LUBA will exercise its interpretative discretion under ORS 197.829(2) to determine that the plan policy is a mandatory approval criterion, where the terms of the plan policy require the city to determine that essential public services "can be provided to a site" before granting development approval. That the plan policy specifies an exception to its requirements reinforces the conclusion that it is mandatory. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy requiring that "[e]xcavations and fills shall be limited to those minimal areas where alteration is necessary to accommodate allowed development" is couched in terms imposing certain requirements in development approvals, and is thus a mandatory approval criterion. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A county comprehensive plan provision requiring that the county use the transportation system efficiently by locating industrial uses close to transportation is directed at legislative decisions, and does not constitute a

mandatory approval criterion applicable to a quasi-judicial decision to rezone land to allow industrial uses. *City of Newberg v. Yamhill County*, 36 Or LUBA 473 (1999).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A city commission is within its interpretative discretion under ORS 197.829 to determine that a requirement that planned unit development within a natural hazards zone be consistent with applicable comprehensive plan policies is satisfied by a demonstration of compliance with ordinance standards implementing those comprehensive plan policies. *Salo v. City of Oregon City*, 36 Or LUBA 415 (1999).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. ORS 197.175 requires that land use decisions comply with acknowledged comprehensive plans. When approval criteria included in acknowledged land use regulations entirely displace the comprehensive plan as relevant approval criteria, the comprehensive plan must make that intent clear. *Durig v. Washington County*, 35 Or LUBA 196 (1998).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Review criteria for subdivision approval found in the county's acknowledged comprehensive plan are applicable by their terms to every subdivision, even where the subject property has been redesignated following a Goal exception. *Turrell v. Harney County*, 34 Or LUBA 423 (1998).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a city interprets an element of its comprehensive plan as a policy statement intended to guide creation of standards, rather than an approval criterion itself, and that interpretation is not inconsistent with the plan's express language, purpose or underlying policy, LUBA will defer to that interpretation. *Jebousek v. City of Newport*, 34 Or LUBA 340 (1998).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. In the absence of an explicit statement that provisions of a comprehensive plan are not mandatory approval criteria, whether plan provisions constitute approval criteria depends on a case-by-case analysis of the wording and context of the particular provisions. *Trademark Construction, Inc. v. Marion County*, 34 Or LUBA 202 (1998).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a land use regulation requires that a proposed use demonstrate consistency with a comprehensive plan, the local government may measure the consistency of the proposed use with policies and other relevant standards in the comprehensive plan, even ones that, in themselves, may not constitute specific, mandatory approval criteria. *Trademark Construction, Inc. v. Marion County*, 34 Or LUBA 202 (1998).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where petitioner does not demonstrate that a forest management strategy is part of a county's comprehensive plan, petitioner has not carried its burden of showing that the application of the forest management strategy is a land use decision over which LUBA has jurisdiction. *Mount Hood Stewardship Council v. Clackamas County*, 33 Or LUBA 284 (1997).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. The city's failure to address aspirational criteria stated in the city's comprehensive plan does not provide a basis for reversal or remand. *Stewart v. City of Brookings*, 31 LUBA 325 (1996).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a comprehensive plan policy is couched in mandatory terms, but does not state an approval standard, the county's failure to address that policy in its decision is not error. *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 (1996).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy that does not set out approval criteria for a land use permit decision may nevertheless state an underlying purpose or policy with which the county's interpretation of its zoning ordinance must be consistent. *DLCD v. Tillamook County*, 30 Or LUBA 221 (1995).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Even if an interpretation of a local ordinance is colorable on its face, it may be inconsistent with the express, language, purpose and policy underlying the ordinance and expressed in a comprehensive plan. In such cases, LUBA cannot affirm the local government's interpretation under ORS 197.829(1)(a) to (c). *DLCD v. Tillamook County*, 30 Or LUBA 221 (1995).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. ORS 227.173(1) requires that permit standards and criteria be set out in local development ordinances and that land use decisions identify applicable standards and criteria. The statute does not prohibit a local government from requiring compliance with comprehensive plan policies through an ordinance, or from applying comprehensive plan criteria in quasi-judicial proceedings. *Holland v. City of Cannon Beach*, 30 Or LUBA 85 (1995).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A city's hearing notice is not defective for failure to list certain comprehensive plan provisions when the city makes specific findings that those provisions are not approval criteria. *Stevens v. City of Medford*, 29 Or LUBA 422 (1995).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where the local code specifically requires the application of a historic landmark designation to be consistent with comprehensive plan historic preservation policies, but does not indicate any plan policies are applicable to decisions on permits for demolition of property subject to the historic landmark designation, the local governing body is not clearly wrong in interpreting the plan and code to provide that no plan policies are applicable to its review of such a demolition permit application. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where the challenged decision is made by a governing body and does not explain whether or to what extent apparently applicable comprehensive plan standards apply to the proposal, the challenged decision must be remanded for such an explanation. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. To decide whether a challenged decision is a "land use decision" under ORS 197.015(10)(a)(A)(ii), because it concerns the application of a comprehensive plan, LUBA must determine whether arguably relevant plan provisions cited by the parties are standards or criteria for making the challenged decision. *Fraser v. City of Joseph*, 28 Or LUBA 217 (1994).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a local government interprets a comprehensive plan provision using the word "should" as imposing a nonmandatory consideration, findings demonstrating compliance with the plan provision are not required. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A local government acts within its interpretive discretion in interpreting a plan policy that "residential development should only be encouraged" in certain areas not to be an approval standard for individual development applications. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. The requirement of ORS 197.175(2)(d) that a land use decision or limited land use decision comply with a local government's acknowledged comprehensive plan, does not necessarily mean that all plan provisions apply directly to individual development applications. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where one part of a comprehensive plan states it is implemented through legislative acts, but another part states that subdivisions must be in conformance with the plan and the code expressly states all subdivision decisions must be consistent with the plan, it is not contrary to the express words, purpose or policy of either the code or the plan for the city to apply certain plan housing policies to a subdivision application. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Following acknowledgment, ORS 197.175(2)(d) requires that a local government make its land use decisions in compliance with *applicable* provisions of its acknowledged comprehensive plan and land use regulations. However, individual comprehensive plan provisions may not impose mandatory approval criteria or apply to particular types of land use decisions. *Draganowski v. Curry County*, 26 Or LUBA 420 (1994).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where property is annexed and it is not clear whether a plan policy and implementing measure governing annexations applies in the particular circumstances, a remand is required so that the local government may either apply the plan policy and implementing measure or explain why it does not apply. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a comprehensive plan explicitly provides that certain plan provisions are advisory, such provisions are not mandatory land use approval standards, even if such plan provisions are worded in mandatory

terms. *Downtown Comm. Assoc. v. City of Portland*, 80 Or App 336, 722 P2d 1258, *rev den*, 302 Or 86 (1986). *Eskandarian v. City of Portland*, 26 Or LUBA 98 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a comprehensive plan or land use regulation does not explicitly designate which portions of the plan or land use regulation operate as mandatory land use approval criteria, a case-by-case inquiry, examining the wording and context of the particular plan and land use regulation provisions, is required to identify mandatory approval standards. *Eskandarian v. City of Portland*, 26 Or LUBA 98 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where comprehensive plan goals are worded as aspirations, and the plan states that whereas plan policies are to be used in daily decision making, plan goals are general directions for the future, LUBA will affirm a local determination that the plan goals are not approval standards for a permit application. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Although Goal 11 requires that local governments include schools in comprehensive plan provisions for public facilities and services, there is no legal requirement that subdivision approval decisions include a determination that schools are adequate, unless the acknowledged comprehensive plan or land use regulations impose such a requirement. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy requiring cooperative efforts among neighboring jurisdictions concerning public facilities and services, with no mention of schools, does not provide a basis for reversing or remanding a decision approving a subdivision despite allegedly inadequate schools. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy directed at how a city expends funds for public facilities and services is not an approval standard applicable to approval of individual subdivision requests. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a comprehensive plan policy specifically refers to wetlands identified in "future inventorying processes," it is reasonable for the local government to interpret that plan policy as inapplicable to individual permit decisions not involving wetlands identified on the local government's acknowledged plan inventory. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A local government's failure to establish compliance with aspirational plan provisions which "encourage" and provide guidance about what a local government should do, is not a basis for LUBA to reverse or remand a challenged decision. *Neuharth v. City of Salem*, 25 Or LUBA 267 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A local code may provide a PUD process in which an approved PUD overall development plan, rather than the

comprehensive plan standards applied in approving the overall development plan, governs final PUD approval. *Westlake Homeowners Assoc. v. City of Lake Oswego,* 25 Or LUBA 145 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a county approves a 120-unit PUD on rural land, but fails to address plan policies limiting the provision of urban public services on rural land, a remand is required so that the county may adopt findings explaining why these standards are not violated by the proposed PUD. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A requirement in a local code that development be "consistent" with comprehensive plan policies and standards, is a general requirement that does not transform otherwise nonmandatory plan standards into approval standards. *McGowan v. City of Eugene*, 24 Or LUBA 540 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Under ORS 197.175(2)(d), a county is required to assure that amendments to its comprehensive plan map comply with the acknowledged comprehensive plan. Where a number of plan provisions applicable to such a decision impose conflicting requirements, the county must adopt findings balancing those conflicting plan provisions in determining whether the request is consistent with the plan. *Marson Trucking, Inc. v. Clackamas County*, 24 Or LUBA 386 (1993).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A former comprehensive plan that is "retained [by a local government] as resource and background documents" for its current comprehensive plan, does not establish approval standards for land use decisions. *Tylka v. Clackamas County*, 24 Or LUBA 296 (1992).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a local code standard requires that creation of new nonfarm and nonforest parcels be consistent with comprehensive plan forest and agriculture policies, the local government's findings must demonstrate compliance with all such plan policies or explain why they do not apply. *DLCD v. Curry County*, 24 Or LUBA 200 (1992).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy that simply requires a county to "encourage" maximum utilization of vacant city land is not a mandatory approval standard for a zone change and subdivision application. *Larson v. Wallowa County*, 23 Or LUBA 527 (1992).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where golf courses are listed as conditionally permitted uses in an EFU zoning district, and an applicable code standard requires that proposed golf courses comply with applicable comprehensive plan policies, a county must balance applicable plan policies, and may not focus on particular plan policies to the exclusion of others. *Wells v. Clackamas County*, 23 Or LUBA 402 (1992).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a code approval standard applicable to a permit decision fully incorporates and refines a comprehensive plan

policy, the plan policy does not apply directly to the permit decision as an approval criterion. *Avgeris v. Jackson County*, 23 Or LUBA 124 (1992).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Whether plan policies are approval standards applicable to individual permit decisions is determined by reference to both the words used in the particular plan policy and the structure of the plan itself. In the absence of something in the plan to the contrary, plan policies worded in aspirational and general terms are intended to guide development of implementing ordinances, not individual permit decisions. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A plan policy which contains mandatory language, and specifically envisions that it may be necessary to apply "additional measures" to particular development applications to protect the "integrity and function" of estuarine areas and to "carry out" the plan policy, is a mandatory standard applicable to individual applications for development adjacent to an estuarine area. *Citizens for Resp. Growth v. City of Seaside*, 23 Or LUBA 100 (1992).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy that is limited in its application to forest dwellings and to land exceeding a specified productivity rating, does not apply to a request for approval of a nonforest dwelling on property having less than the productivity rating specified in the policy. *Camp v. Josephine County*, 23 Or LUBA 6 (1992).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a comprehensive plan policy directs the local government to adopt particular implementing regulations, and nothing in the wording or context of the policy indicates it was intended to apply to individual land use actions, the policy is not an approval standard for such actions. *Miller v. City of Dayton*, 22 Or LUBA 661 (1992).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Comprehensive plan policies and local code requirements establishing standards for construction of streets are not approval standards applicable to comprehensive plan transportation map amendments. *Davenport v. City of Tigard*, 22 Or LUBA 577 (1992).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Particular comprehensive plan provisions may or may not be standards governing individual land use decisions. Even where plan provisions are approval criteria for some types of land use decisions, they may not be approval standards for all types of land use decisions. *Goodrich v. Jackson County*, 22 Or LUBA 434 (1991).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Comprehensive plan agriculture policies are criteria applicable to a request for conditional use approval for a nonfarm use in an exclusive farm use zone, where the zoning ordinance specifically provides that conditional uses must comply with plan goals and policies and there is nothing in the language of the plan agriculture policies which suggests they were not intended to apply as applicable approval standards. *Waker Assoc., Inc. v. Clackamas County*, 22 Or LUBA 233 (1991).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Conditions imposed on particular property as part of the adoption of a quasi-judicial plan amendment/zone change are potentially applicable to decisions approving development of that property. *Broetje-McLaughlin v. Clackamas County*, 22 Or LUBA 198 (1991).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. ORS 215.130, and county regulations adopted pursuant thereto, provide limited authorization for counties to approve alterations to nonconforming uses which are contrary to provisions of their comprehensive plans and land use regulations. Therefore, plan policies are not approval standards for alteration of a nonconforming use. *Scott v. Josephine County*, 22 Or LUBA 82 (1991).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. When determining the applicability of comprehensive plan provisions to individual conditional use decisions, LUBA will first consider whether the comprehensive plan itself contains language which identifies how the provisions in question are intended to apply to individual conditional use decisions. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where the comprehensive plan emphasizes that plan policies are intended to *guide* development actions and decisions, and that the plan must be implemented through the local code to have effect, such plan policies are not approval standards for individual conditional use decisions. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A local code statement of an intent not to encourage perpetuation of nonconforming uses and plan policies which are directed at zoning decisions and adoption of implementing land use regulations and planning inventories do not state approval standards applicable to decisions concerning modification of individual nonconforming uses. *Strawn v. City of Albany*, 21 Or LUBA 172 (1991).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Whether a plan policy is an approval standard depends upon the wording and context of the plan provision. *Stefan v. Yamhill County*, 21 Or LUBA 18 (1991).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a comprehensive plan policy states that "no proposed rural area development shall substantially impair or conflict with the use of farm *or forest* land," but the applicable rural zoning district contains no provisions addressing interference with forest uses, the plan policy itself is an approval standard for nonfarm dwellings proposed in that zone with regard to potential conflicts with forest uses. *Stefan v. Yamhill County*, 21 Or LUBA 18 (1991).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Comprehensive plan policies which contain aspirational language regarding goals to be implemented through the adoption of land use regulations are not mandatory approval criteria for individual permit applications and, therefore, it is unnecessary for LUBA to determine whether a decision approving a permit complies with such plan policies. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A plan policy that certain uses or activities be encouraged states general objectives, not permit approval criteria. *Benjamin v. City of Ashland*, 20 Or LUBA 265 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. In determining whether a particular comprehensive plan provision is an approval standard, LUBA considers the language used in the plan provision and the context in which it appears. A plan policy that states general objectives in non-mandatory terms is not an approval standard. *Thormahlen v. City of Ashland*, 20 Or LUBA 218 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A local code requirement that certain land use actions be consistent with the comprehensive plan does not transform all plan provisions into approval criteria for those decisions. To determine whether particular plan provisions are approval standards, LUBA looks to the language used in the plan provisions and the context in which such plan provisions appear. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Comprehensive plan policies that simply encourage certain development patterns are not independent approval criteria for decisions made under the plan. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where the local comprehensive plan includes "specific" policies, but does not establish that all "specific" policies are merely advisory, the local government must determine for each relevant "specific" policy, based on the language and context of that policy, whether it is a regulatory standard potentially applicable to individual development proposals. *Axon v. City of Lake Oswego*, 20 Or LUBA 108 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy that "services shall be available or committed prior to approval of development" is a mandatory approval standard for individual development proposals. *Axon v. City of Lake Oswego*, 20 Or LUBA 108 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where the local code provides for the approval of an overall PUD development plan and allows approved PUDs to be developed in phases, and the local government addresses the public services impacts of an entire PUD and finds relevant plan policies satisfied in approving such an overall PUD plan, the local government is not required to readdress plan public services policies in subsequent approval of a development phase, provided the requested phase approval is consistent with the type and intensity of development in the approved overall PUD plan. *Hoffman v. City of Lake Oswego*, 20 Or LUBA 64 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where a comprehensive plan provides that plan "goals, policies, strategies and standards" are "legally binding to land use decisions" when expressed in mandatory language, relevant plan agricultural goals, policies, strategies and standards which are expressed in mandatory language are applicable to a request for

conditional use approval for a golf course in the county's exclusive farm use zone. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where the comprehensive plan is defined as including the plan policy document, plan map, zoning map and zoning and subdivision ordinances, as well as a number of other documents, a local code provision requiring that individual land use decisions comply with the comprehensive plan is not correctly interpreted as requiring compliance with only the zoning map and zoning and subdivision ordinances. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where plan standards identify nonfarm uses that may be allowed in the county's exclusive farm use zone and require that such uses be "minimized," a plan standard requiring that "development" not occur on lands capable of sustaining accepted farming practices is properly interpreted as not applying to the nonfarm uses specifically allowed in the exclusive farm use zone. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A finding that no plan policies apply to a proposed conditional use is adequate to demonstrate compliance with the comprehensive plan where petitioner fails to allege that any particular plan policies apply to the proposed use. *Keudell v. Union County*, 19 Or LUBA 394 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan policy governing "requests for rezonings to higher intensity residential uses" has no applicability where the issue is whether the *plan* map designation should be changed. *Bridges v. City of Salem*, 19 Or LUBA 373 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. A comprehensive plan statement that separation of use types along topographic, natural vegetation, and other features is "desirable" does not establish an approval criterion applicable to plan and zone map amendments. *Bridges v. City of Salem*, 19 Or LUBA 373 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where the comprehensive plan specifies that a particular plan policy is itself an implementing measure, LUBA will conclude that policy applies as an approval criterion for land use decisions. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Comprehensive plan policies which the plan states are specifically implemented through particular sections of the local code do not constitute independent approval standards for land use actions. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Whether comprehensive plan goals and policies or zoning ordinance purpose sections are approval standards for conditional use approval in a particular instance, depends upon an examination of the relevant plan and code provisions. *Rowan v. Clackamas County*, 19 Or LUBA 163 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where the county code explicitly requires that a nonfarm conditional use in an exclusive farm use zone "satisfy" applicable plan goals and policies, and the county plan provides that its goals and policies shall "direct future decisions on land use actions," the plan agriculture goals and policies are applicable to approval of the nonfarm conditional use. *Rowan v. Clackamas County*, 19 Or LUBA 163 (1990).

29.3.2 Comprehensive Plans – Applicability – As Decision Criteria. Where there is an apparent conflict between a plan provision and an amended code provision, the city must explain in its findings why the code amendment does not conflict with the plan provision. *Nicolai v. City of Portland*, 19 Or LUBA 142 (1990).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. The Goal 2 requirement that acknowledged comprehensive plans be the "basis" for land use decisions is not violated by citation to an adopted, but unacknowledged housing strategy document, where the cited portion of the document directly implements, in almost identical language, policy recommendations in the city's acknowledged housing needs analysis. *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. Language in a city's acknowledged housing needs analysis finding an existing deficit of affordable housing in the city, and recommending that the city identify surplus city land for development with government-subsidized housing, provides a policy basis for the city to rezone public land from an open space zone to a residential zone that allows high density residential development. *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. That a city's acknowledged buildable lands inventory indicates that the city already has an adequate supply of land zoned for R-3 (high density residential) does not undermine the city council's conclusion that rezoning additional land to R-3 is necessary to address an identified shortage of affordable housing, where the city finds that the private housing market has been unable to address the need for affordable housing despite an adequate supply, and that rezoning surplus public land to R-3, to be donated to a housing agency, is necessary to facilitate development of affordable housing. *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. A city must rely on its acknowledged Goal 9 inventory and Goal 9 elements to demonstrate that after a proposed plan amendment the city's comprehensive plan continues to comply with Goal 9, and the city cannot rely instead upon an unacknowledged economic opportunities analysis to make that demonstration. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. A reference in an ordinance to a city's engineering design manual is not sufficient to incorporate the manual into the city's acknowledged plan and land use regulations. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. Goal 2 is not violated by adopting a plan amendment that references unacknowledged land use regulations. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. That a county's comprehensive plan was acknowledged in the 1990s to comply with Goal 4 does not shield the county from the obligation, at ORS 197.646(1) and (3), to apply subsequently adopted amendments to Goal 4 or the Goal 4 rule until the county incorporates those amendments into its comprehensive plan. Because the Goal 4 rule was amended in 2008 and 2011 to provide a prioritized list of data sources a county must consider when determining whether land is forest land subject to Goal 4, the county cannot simply apply its acknowledged comprehensive plan standards for identifying forest land, but must also apply the amended Goal 4 rule, until the county

incorporates those rule amendments into its comprehensive plan. *Rogue Advocates v. Josephine County*, 66 Or LUBA 45 (2012).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. In an appeal of a post-acknowledgment plan amendment that redesignates an estuarine area from a natural management unit to a conservation management unit, the petitioner cannot argue that the acknowledged conservation unit provisions that allow riprap as a conditional use are inconsistent with Goal 16. *Oregon Shores Cons. Coalition v. Lane County*, 52 Or LUBA 471 (2006).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. Even if the Goal 17 requirements governing shorelands "suitable for water-dependent uses" and "especially suited for water-dependent uses" have an independent significance under Goal 17, where the county's acknowledged code and plan treat the two phrases interchangeably, any error in conflating the meaning of the two phrases cannot be challenged in a permit decision. *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500 (2006).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. That LCDC acknowledged a 1999 decision including resource land within an urban unincorporated community (UUC) does not mean that LCDC concurred with the county's apparent intent to later plan and zone the land for non-resource uses. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. While the acknowledgment process shields local governments from collateral attacks on acknowledged plans and ordinances, any errors the local government may have made in that process do not obviate goal and rule requirements that govern subsequent plan and zoning amendments. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. "Deemed acknowledgment" under ORS 197.615 does not satisfy ORS 197.505 requirement that local ordinances establishing a moratorium be acknowledged under ORS 197.251. *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. An action engaged in or practice in accordance with an acknowledged comprehensive plan provision or implementing ordinance must be justified by an acknowledged provision that fully sets forth the essential structure, form and requirements for such action or practice. *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. Where a local government's acknowledged comprehensive plan and land use regulations apply a freshwater wetland designation to certain property, the local government's application of regulations governing freshwater wetlands to development of the subject property is not error, even though comprehensive plan inventory documents suggest the property is in fact a saltwater marsh. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

29.3.3 Comprehensive Plans – Applicability – Effect of Acknowledgment. Following acknowledgment, ORS 197.175(2)(d) requires that a local government make its land use decisions in compliance with *applicable* provisions of its acknowledged comprehensive plan and land use regulations. However, individual comprehensive plan provisions may not impose mandatory approval criteria or apply to particular types of land use decisions. *Draganowski v. Curry County*, 26 Or LUBA 420 (1994).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. Remand is necessary where a city adopts a legislative text amendment prohibiting expansion of existing fossil fuel terminals, without addressing consistency with a subarea plan policy objective to "maintain, protect and enhance private transportation investments" in the subarea, "including rail and marine terminals, to ensure continued viability as a major center for the import and export of industrial products in the State of Oregon." *Columbia Pacific v. City of Portland,* 76 Or LUBA 15 (2017).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. Sub-area plan language describing as a "buffer" the neighborhood that includes property proposed for rezoning from a high density residential to a higher density residential zone need not be interpreted to limit density to no more than the median density between the two zones. A planning commission does not err in concluding that the proposed rezone is consistent with the "buffer" description based on other density, height and design restrictions. *Conte v. City of Eugene,* 65 Or LUBA 326 (2012).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. That a sub-area comprehensive plan map designates an area as "Medium and High Density" does not imply an intent to limit density below the maximum density otherwise allowed under the area's general comprehensive plan map designation and zoning. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. Where part of a subarea plan is adopted by one ordinance and part of that subarea plan is adopted by a second ordinance, and the first ordinance is remanded by LUBA but the second ordinance is affirmed, the part of the subarea plan adopted by the second ordinance may provide the comprehensive plan basis for a parking garage. Where the second ordinance adopts a subarea plan parking policy and zoning code amendments that specifically authorize parking garages on certain specified properties and a city subsequently issues a decision approving a parking garage pursuant to the policy and zoning code, the city's decision will be affirmed on appeal notwithstanding that the first ordinance was remanded, where petitioners identify no other comprehensive plan provisions that are inconsistent with approval of the parking garage. *NWDA v. City of Portland*, 58 Or LUBA 533 (2009).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. A comprehensive plan policy that a city fund certain public facilities by systems development charges to the maximum extent allowed by law is not an approval standard that the city must consider in approving a petition to annex land, where that land will not be planned and zoned to allow urban development at the time of annexation. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. A comprehensive plan map and a sub-area plan map do not conflict in depicting the plan designation of a particular property, where the comprehensive plan map is at a scale of one inch to 8,000 feet, is not property-specific, and does not clearly indicate whether the plan designation of the property is commercial or residential, while the sub-area plan map is large-scale, property-specific, and clearly depicts the property as commercial. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. Where a local land use regulation requires that a permit application be consistent with any relevant neighborhood plan, neighborhood plan policies which are described in the neighborhood plan as having the force of law are at least

potentially relevant approval criteria for the permit. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. Where a city approves a development plan for a university district as part of a quasi-judicial proceeding, but does not incorporate it into the city's comprehensive plan or land use regulations, the development plan is not a comprehensive plan or land use regulation, and thus amendments to that plan are not subject to review for compliance with statewide planning goals or the Transportation Planning Rule. *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. An amendment to a "refinement plan" that is part of a local government's comprehensive plan is a comprehensive plan amendment and is reviewable for compliance with applicable provisions of the Statewide Planning Goals and their implementing rules. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. An amendment to a "refinement plan" that is part of a local government's comprehensive plan is a comprehensive plan amendment. *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583 (1994).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. Where a subarea plan has been adopted as part of the local government's comprehensive plan, and includes a map establishing the boundaries of the subarea, petitioners' argument that the subject site is not part of the relevant neighborhood does not alter the applicability of the subarea plan to a proposed comprehensive plan map amendment for the subject site. *Hess v. City of Portland*, 23 Or LUBA 343 (1992).

29.3.4 Comprehensive Plans – Applicability – Subarea Plans. Amending an acknowledged multi-jurisdictional metropolitan area comprehensive plan so that it is inconsistent with an unamended city "refinement plan" is permissible where the comprehensive plan (1) recognizes such conflicts may exist, (2) provides that all such conflicts are resolved in favor of the comprehensive plan, and (3) recognizes that amendments to refinement plans needed to make them consistent with the comprehensive plan may be delayed. *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992).

29.4 Comprehensive Plans – Interpretation. When comprehensive plan policies are not mandatory approval standards for a land use application, but the application must be evaluated for consistency with applicable plan policies, the evaluation may require some weighing and balancing of competing policy directions embodied in the applicable plan provisions. The local government's evaluation, weighing and balancing of competing interests as well as ambiguous comprehensive plan provisions are entitled to a deferential standard of review under ORS 197.829(1)(a)–(c) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Yamhill Creek Solar, LLC v. Yamhill County*, 78 Or LUBA 245 (2018).

29.4 Comprehensive Plans – Interpretation. Where every residential plan map designation criterion is written so that it applies to an "area," and the term "area" is not defined and application of the criteria can produce dramatically different results depending on the meaning of "area," remand is required for the decision maker to explain its interpretation of the term "area." *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

29.4 Comprehensive Plans – Interpretation. Where the city code initially requires the city to choose from low density residential, medium density residential and high density residential plan map designations based on which designation's criteria "clearly appl[y]" or "predominate," that determination is sufficiently ambiguous and subjective that remand is required whether the decision maker does not explain its understanding of what it means to "clearly appl[y]" or "predominate." *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

29.4 Comprehensive Plans – Interpretation. Where two of three different residential plan map designation criteria require proximity to a "transit transfer station," but the code does not define the term "transit transfer station," and the decision applies those criteria without adopting interpretive findings to explain the decision maker's understanding of the meaning of the term "transit transfer station," remand is required. *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

29.4 Comprehensive Plans – Interpretation. LUBA will affirm a city council's interpretation of a comprehensive plan policy requiring that city parks be protected against incompatible uses, to mean that city parks will be protected against approval of incompatible uses on adjoining lands, not that the city is also precluded from rezoning city parks to allow non-park uses of park lands, where the city council's narrower interpretation is not inconsistent with the express language, purpose and policy underlying the plan policy. *Crowley v. City of Hood River*, 77 Or LUBA 117 (2018).

29.4 Comprehensive Plans – Interpretation. Where petitioners argue the city's ordinance adopting legislative text amendments to the city's zoning ordinances is inconsistent with applicable city comprehensive plan and subordinate plans, but where the city adopted findings addressing most of the cited comprehensive plan goals and policies, petitioners must do more than simply disagree with the city's conclusions. Given the generally worded language of most of the goals and policies at issue, and the leeway a governing body has in balancing and weighing consistency of a zoning text amendment with a variety of competing policy objectives, petitioners must demonstrate that the city council failed to meaningfully consider a reasonably specific and

pertinent comprehensive goal or policy to state a basis for remand or reversal. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

29.4 Comprehensive Plans – Interpretation. Although proposed development of a new bridge will cost close to the total amount that the region expects to receive in funding from all sources over the next 20 years, and although there is no evidence that full funding can be expected, a decision to approve comprehensive plan amendments to facilitate the bridge does not necessarily violate an Oregon Highway Plan (OHP) policy that requires state and local government to approve major improvements to state highway facilities in local comprehensive plans and transportation system plans only if the improvements "would be a cost-effective means to achieve the objective," because the OHP policy is not a mandatory criterion, but an evaluation factor the Oregon Department of Transportation will use in their evaluation of a project for inclusion in the OHP. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

29.4 Comprehensive Plans – Interpretation. A finding that the mixed-use development that might be developed under a new plan map designation will be "near" a transit corridor is sufficient to demonstrate compliance with a plan policy to focus mixed-use development "along" transit corridors, where the city's plan and land use regulations do not define either term and the term "along" is sufficiently subjective that the city's implicit interpretation and application of the policy is not implausible under *Siporen v. City of Medford*, 349 Or 247, 249, 243 P3d 776 (2010). *Nicita v. City of Oregon City*, 75 Or LUBA 38 (2017).

29.4 Comprehensive Plans – Interpretation. A County Court's interpretation of a comprehensive plan residential density standard that limits residential density in deer winter range to one dwelling unit per 160 acres to only consider nonfarm dwellings when computing density is not affirmable under ORS 197.829(1)(a) and *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010), where there is no textual support in the wildlife density standard itself for only counting nonfarm dwellings in computing density and the comprehensive plan policies the density limit was adopted to implement also do not support distinguishing between farm and nonfarm dwellings in computing density. *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 186 (2017).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy to "maintain present residential density levels in established neighborhoods" has nothing to do with the number of days a residence is occupied. Therefore, a zoning ordinance amendment that favors year-round domicile and long-term rental use of residences, as opposed to short term vacation rental use, does not violate the residential density policy. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

29.4 Comprehensive Plans – Interpretation. A city council's decision to amend its zoning ordinance to treat transient occupancy vacation rental use of residences differently from the use of the same residences as second homes, long-term rentals or domiciles is not inconsistent with comprehensive plan policy to "preserve and maintain the predominately residential character of [the city] through appropriate zoning and land use development regulations," as the city interprets the policy. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

29.4 Comprehensive Plans – Interpretation. LUBA will affirm a governing body's interpretation of a comprehensive plan policy concerning sites "developed as a golf course" to apply to sites adjoining a fairway that were landscaped and used as a playable area in 2001 when the policy was adopted, because the interpretation is not inconsistent with the text of the policy. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

29.4 Comprehensive Plans – Interpretation. Where LUBA affirms a local decision-maker's interpretation and conclusion regarding the applicability of a comprehensive plan policy, no purpose would be served by addressing other challenges to alternative bases for local government's decision to deny the application. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

29.4 Comprehensive Plans – Interpretation. Where the text of a county comprehensive plan policy limits redevelopment of areas developed as golf courses or designated open space or common area within a resort, but includes no language prohibiting redevelopment of other areas within the resort, interpreting the policy to implicitly prohibit new residential development anywhere within the resort would impermissibly insert what has been omitted pursuant to ORS 174.010, and may not survive even the deferential review required under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan's text limits application of a Rural Industrial plan map designation to three exception areas that were built or committed to rural industrial use before the county enacted planning and zoning, the county must first amend the comprehensive plan text to expand the eligible areas for the Rural Industrial plan map designation before applying that designation to properties that are not within the three exception areas. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 441 (2017).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan goal of "protecting and maintaining neighborhoods" is not necessarily violated by a development that will displace five existing houses. A city commission interpretation that the proposal complies with the goal, notwithstanding the loss of the five houses, so long as the proposal will otherwise protect and maintain the nearby neighborhood, is not reversible under ORS 197.829(1). *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan policy calls on the city to "[m]aintain the existing residential housing stock in established older neighborhoods by maintaining existing Comprehensive Plan and zoning designations <u>where appropriate</u>," and the city commission adopts a number of reasons why it believes maintaining existing planning and zoning designations is "not appropriate," a petitioner must do more than set out reasons why he thinks maintaining the existing planning and zoning is appropriate without directly challenging the city commission's reasoning. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan policy requires that a city "ensure that potential loss of affordable housing is replaced" when changing comprehensive plan and zoning map designations, city findings that city-wide efforts to encourage affordable housing will be sufficient to make up for the loss of five dwellings through construction of a

medical center made possible under new comprehensive plan and zoning map designations are sufficient to demonstrate the policy will not be violated. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

29.4 Comprehensive Plans – Interpretation. LUBA will reject a petitioner's challenge that a city's findings fail to demonstrate that allowing higher density residential development in an existing area of low density residential development, instead of in areas already planned for dense development, is consistent with a comprehensive plan policy encouraging compact development, where the petitioner fails to challenge the city council's interpretation of the policy as encouraging compact development in all areas of the city, not just in areas most suitable for high density development. *Kine v. City of Bend*, 74 Or LUBA 403 (2016).

29.4 Comprehensive Plans – Interpretation. A city council's findings that a site has "good access" to an arterial, because it is within a one-third-mile drive from an arterial and has direct pedestrian and bicycle access to the arterial, are sufficient to establish consistency with a comprehensive plan policy requiring "good access to an arterial," particularly given the subjective nature of the policy. *Kine v. City of Bend*, 74 Or LUBA 403 (2016).

29.4 Comprehensive Plans – Interpretation. A city council's interpretation of a comprehensive plan policy requiring that medium density residential development be located "near commercial services and employment" as being satisfied by a location near some commercial services and employment, but not necessarily a comprehensive range of commercial services and employment, is plausible and not reversible under ORS 197.829(1). *Kine v. City of Bend*, 74 Or LUBA 403 (2016).

29.4 Comprehensive Plans – Interpretation. How to determine whether a proposed zoning diagram is consistent with the comprehensive plan, based on trying to match surveyed lines to features depicted on the plan map, is a mixed question of law and fact, involving interpretation of the comprehensive plan map. LUBA owes no deference to a hearings officer's interpretation of the comprehensive plan map, or the interpretative exercise of selecting which plan map features to match with surveyed lines. *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

29.4 Comprehensive Plans – Interpretation. Where one of seven factors that the comprehensive plan describes as "guid[ing] the determination of the most appropriate zone" guides the county to consider "[a]vailability of transit" and provides that "land within walking distance (approximately one-quarter mile) of a transit stop should be zoned for smaller lots," a hearings officer errs in concluding that land within approximately one-quarter mile of a transit stop is not within "walking distance" because sidewalks are not present. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

29.4 Comprehensive Plans – Interpretation. Where the comprehensive plan sets out seven factors that "guide the determination of the most appropriate zone," a hearings officer errs in weighing some of the factors as less important than other factors without any support for that weighting in the express language of the factors or other parts of the comprehensive plan. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

29.4 Comprehensive Plans – Interpretation. Where one of seven factors that the comprehensive plan describes as "guid[ing] the determination of the most appropriate zone" guides the county to consider "proximity to jobs, shopping, and cultural activities" and guides that areas in proximity to jobs, shopping and cultural activities should be considered for smaller lots, a hearings officer errs in concluding that land that is proximate to jobs and shopping should not be zoned for smaller lots based on the hearings officer's negative assumptions about the quality of the jobs and shopping. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

29.4 Comprehensive Plans – Interpretation. Where one of seven factors that the comprehensive plan describes as "guid[ing] the determination of the most appropriate zone" guides that areas that have historically developed on large lots should "remain zoned consistent with the existing development pattern," and the hearings officer interprets the "existing development pattern" to be synonymous with the existing zoning, remand is required in order for the hearings officer to explain why a change from 10,000-square-foot lots to 8,500-square-foot lots in an area with some 8,500-square-foot lots is not "consistent with the existing development pattern." *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

29.4 Comprehensive Plans – Interpretation. Where the comprehensive plan sets out seven factors that "guide the determination of the most appropriate zone," and the factors are not competing policies and do not work at cross purposes, a hearings officer errs in weighting some of the factors as less important than other factors without any support for that weighting in the express language of the factors or other parts of the comprehensive plan. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

29.4 Comprehensive Plans – Interpretation. Where the city code requires that a development's sewer facilities must be consistent with the sewer master plan and the sewer master plan calls for an upgraded 15-inch sewer line in a street that adjoins the development, city findings that explain a temporary cross-basin connection to provide sewer service to the development is acceptable because sewer flows from the development are inadequate to result in a properly functioning 15-inch sewer line, and the development approval is conditioned on the development connecting to the adjacent 15-inch sewer line when it becomes available in the future, are adequate to explain why the temporary cross-basin connection is not inconsistent with the code and sewer master plan. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

29.4 Comprehensive Plans – Interpretation. A general water master plan policy that "the timing of future system improvements will be triggered by specific developments and increase in system demands" need not be interpreted to require that a proposal for a 180-unit residential development must fund construction of the two-million-gallon, $8.7-million reservoir that is identified as the ultimate solution to an existing water pressure problem. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

29.4 Comprehensive Plans – Interpretation. Where the relevant planning documents submitted to comply with the Goal 5 administrative rule requirement for an inventory of significant mineral and aggregate resource sites are all ambiguous, and none of those documents clearly states that they are an inventory of significant mineral and aggregate resource sites, a board of county commissioners' interpretation that an inventory that was submitted for acknowledgment by LCDC

showed both "significant" mineral and aggregate sites and mineral and aggregate sites for which there was not enough information to complete Goal 5 planning is not "inconsistent with the express language of the comprehensive plan," and therefore is not reversible under ORS 197.829(1)(a). Where the other bases that would also authorize LUBA to reverse the interpretation set out in ORS 197.829(1)(b), (c), and (d) also do not apply, LUBA must affirm the interpretation. *Delta Property Company, LLC v. Lane County*, 72 Or LUBA 250 (2015).

29.4 Comprehensive Plans – Interpretation. A zoning ordinance regulation that allows fill if it will not increase the elevation of land is not necessarily inconsistent with a comprehensive plan provision that bans fill altogether, where fill only qualifies as fill, as defined in the comprehensive plan, if the fill will raise the elevation of land. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

29.4 Comprehensive Plans – Interpretation. Where a potentially dispositive issue under a zoning code requirement that development be served by public facilities is whether a private septic system qualifies as "public facilities," LUBA will reject arguments in respondent's brief that the city council relied on a comprehensive plan definition of "public facilities" that might be broad enough to include private septic systems as public facilities, where nothing in the city council's decision suggests the city council relied on the comprehensive plan definition. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

29.4 Comprehensive Plans – Interpretation. For an implied interpretation of a local standard to be adequate for review, the findings embodying the interpretation must carry one possible meaning of the ambiguous language in the standard, and an easily inferred explanation of that meaning. A finding that proposed rezoning to higher density residential use is consistent with a plan policy that requires "good access" to an arterial because the property is located near a minor arterial does not embody an implied interpretation adequate for review to the effect that "good access" is satisfied by physical proximity of the property to the arterial, regardless of the quality of access to that arterial. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

29.4 Comprehensive Plans – Interpretation. A 1,200 average daily traffic standard for local streets is not a hard and fast standard where other comprehensive plan language makes it clear that level of traffic on a local street is merely "desirable" and a number of other factors are considered in determining whether to classify a street as a "local" street. *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

29.4 Comprehensive Plans – Interpretation. Comprehensive plan descriptions of plan map designations are not properly applied as mandatory permit approval criteria. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

29.4 Comprehensive Plans – Interpretation. LUBA will affirm a local government's interpretation of the provisions of its comprehensive plan that implement Goal 17 to be as protective as, but not more protective than, Goal 17, where the text of the comprehensive plan provisions make clear that the local government did not intend to regulate coastal shorelands more protectively than Goal 17. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

29.4 Comprehensive Plans – Interpretation. LUBA is required under ORS 197.829(1) to affirm a local government's interpretation of a provision of its comprehensive plan that identifies the location of the coastal shorelands boundary as "the top of the seacliff along the seacliff shoreline" as a "general guide as to the location of the [boundary]" rather than a specific minimum elevation, where the interpretation is not inconsistent with the express language of the provision or the comprehensive plan map, and is plausible. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

29.4 Comprehensive Plans – Interpretation. Goal 17 provides in part that coastal shorelands must include "adjacent areas of geologic instability where the geologic instability is related to or will impact a coastal water body[.]" In order to be consistent with Goal 17, a cliff erosion geologic hazard analysis that is relied on to determine the location of the coastal shorelands boundary must consider geologic instability from all causes of cliff erosion where the cliff erosion could impact the ocean. A geologic hazard analysis that does not analyze "adjacent areas of geologic instability" from causes of erosion other than waves hitting the shore cannot be relied on to locate the boundary consistent with Goal 17. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

29.4 Comprehensive Plans – Interpretation. Goal 17 requires in part that coastal shorelands must include "lands within 100 feet of the ocean shore[.]" A county decision that locates the coastal shorelands boundary at the top of the beach and at the bottom or mid-point of shorefront cliffs is inconsistent with Goal 17, because such locations are arguably where the "ocean shore," as defined in ORS 390.605(2), ends and that interpretation gives little or no depth to the coastal shorelands boundary beyond the "ocean shore" in some places. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

29.4 Comprehensive Plans – Interpretation. A Metro regional trail that is 22 miles long and includes a multi-use pathway, trailheads, parking, restrooms, shelters, picnic areas, interpretative and educational facilities etc. can constitute a "park" that is prohibited in regionally significant industrial areas, where the proposed trail falls within the broad definition of "park" as defined in the Metro Code, and treating the regional trail as a "park" is consistent with Metro Framework Plan provisions intended to protect regionally significant industrial areas from public amenities intended to serve persons other than workers or residents in the industrial area. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

29.4 Comprehensive Plans – Interpretation. A Metro regional trail that is 22 miles long, connects rivers, parks and natural areas, and includes a number of recreational and educational facilities, is most accurately characterized as a "park" for purposes of a Metro Plan prohibition on parks in regionally significant industrial areas, rather than a transportation facility or "public facility" that is allowed in industrial areas, where the regional trail is not intended to provide transportation for the residents and workers of the industrial area, but is primarily a community recreational amenity. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

29.4 Comprehensive Plans – Interpretation. Plan goals requiring that development be "compatible" and seek to "protect" nearby neighborhoods are somewhat subjective. Where a local government recognizes that greater proposed building height and mass could result in incompatibility and (1) reduces the proposed building height, (2) requires that increased building

heights be stepped down next to adjoining residential neighborhoods, (3) requires enhanced design review, and (4) imposes additional minimum setbacks, LUBA will not second guess the city regarding the adequacy of those measure to protect nearby neighborhoods so as to achieve compatibility. *Lowery v. City of Portland,* 68 Or LUBA 339 (2013).

29.4 Comprehensive Plans – Interpretation. LUBA will reject petitioner's challenge to a plan map amendment for a proposal that would result in taller building heights, based on a plan compatibility policy, where the proposal is subject to conflicting plan policies, only one of which supports petitioner's position opposing the increased building height on compatibility grounds, and petitioner fails to challenge the local governments findings balancing those polities to find that the increase building heights equally or betters supports the policies viewed as a whole. *Lowery v. City of Portland,* 68 Or LUBA 339 (2013).

29.4 Comprehensive Plans – Interpretation. In determining whether a comprehensive plan requirement applies directly to an application for permit approval, a local government is performing a function quite similar to the function the city was performing in *Siporen v. City of Medford,* 349 Or 247, 243 P3d 776 (2010), *i.e.*, whether a comprehensive plan requirement is "applicable." Under *Siporen* a local government's interpretations of its comprehensive plan to determine which plan requirements are applicable as individual permit approval criteria are entitled to deference so long as its interpretations are "plausible." If the city's interpretation is plausible, LUBA must defer, even if LUBA believes there is a better interpretation. *Friends of the Hood River Waterfront v. City of Hood River,* 68 Or LUBA 459 (2013).

29.4 Comprehensive Plans – Interpretation. Where one plan strategy directs that lands subject to flooding be designated "Floodplain" and the following plan strategy directs that no permanent structures may be erected in lands subject to flooding unless the structure complies with the "Floodplain" criteria, a local governing body's interpretation of those plan strategies to require application of the "Floodplain" criteria only in areas that have already been designated "Floodplain" runs afoul of ORS 174.010 by failing to "give effect" to the second strategy and by "inserting what has been omitted" in the second strategy by inserting a requirement that the lands subject to flooding must have been zoned "Floodplain." *Friends of the Hood River Waterfront v. City of Hood River,* 68 Or LUBA 459 (2013).

29.4 Comprehensive Plans – Interpretation. If a governing body intended that its land use regulations fully implement its comprehensive plan, so that the plan could never operate as a source of permit approval standards, it presumably would not have adopted a conditional use permit criterion that requires conditional uses "shall be consistent with the comprehensive plan." *Friends of the Hood River Waterfront v. City of Hood River,* 67 Or LUBA 179 (2013).

29.4 Comprehensive Plans – Interpretation. Where comprehensive plan goals and policies are directed at structures, development, floodplains and flood hazard areas, and the local governing body does not specifically address the text of those goals and policies in concluding that they do not apply and approving a building to be constructed in the floodplain, remand is required so that the governing body can explain why the text of those goals and policies supports its position that they do not apply. *Friends of the Hood River Waterfront v. City of Hood River,* 67 Or LUBA 179 (2013).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan and zoning ordinance standard that requires a city to apply to annexed properties the city zone that "most closely approximates" the "standards," "density," and "uses" in the existing county zone requires a three-pronged inquiry. The city's choice of a zone will be affirmed where standards in the zone the city applied and the standards in the zone petitioners believe should have been applied are identical, the density in the zone applied by the city is closer to the county zone, and the two zones are equally approximate for 33 of the uses allowed in the county zone and the zone favored by petitioners more closely approximates 13 uses. *Mintz v. City of Beaverton*, 67 Or LUBA 374 (2013).

29.4 Comprehensive Plans – Interpretation. Although interpreting a comprehensive plan policy that requires permit applicants to "provide pedestrian connections with adjacent neighborhoods" to require pedestrian connections with nearby neighborhoods that do not border the property for which permit approval is sought may be "plausible," the city council's less expansive interpretation to require connections only with adjacent neighborhoods that border the proposed development is also "plausible" and therefore not reversible under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

29.4 Comprehensive Plans – Interpretation. LUBA will affirm a governing body's interpretation of comprehensive plan policies that "encourage" alternative energy sources, to allow the county to adopt restrictions on development of wind energy facilities to protect other uses, as long as such restrictions do not preclude the siting of wind energy facilities, because the interpretation is consistent with the text of the comprehensive plan policies. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

29.4 Comprehensive Plans – Interpretation. Where the mandatory Goals and Policies section of a comprehensive plan call for multi-family housing to be located in the city's residential zones and the Goals and Policies say nothing about locating multi-family housing in the city's commercial zone, amending the zoning ordinance to delete multi-family housing as a permitted use in the city's commercial zone is not inconsistent with the comprehensive plan. *Cassidy v. City of Glendale*, 66 Or LUBA 314 (2012).

29.4 Comprehensive Plans – Interpretation. Text of an acknowledged Resource Protection Program may be unambiguous when read in isolation but may be ambiguous when read in context with the ESEE Consequences Determination. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

29.4 Comprehensive Plans – Interpretation. Representations by a former owner that it only intended to mine 25 acres of an 80-acre site are insufficient legislative history to establish that the acknowledged Resource Protection Program for the site limits mining to 25 acres, where the programs for other sites expressly limited mining geographically but the program for the 80-acre site zoned all 80 acres for mining and imposed no express geographical limits. *Mark Latham Excavation Inc. v. Deschutes County*, 65 Or LUBA 32 (2012).

29.4 Comprehensive Plans – Interpretation. A city planning commission interpretation that a comprehensive plan policy does not apply to a planned unit development application for a cell tower is correct where the text of the policy directs the city to implement one of several means of protecting open space, including adopting planned unit development ordinances, and does not contain any language that suggests that it is intended to apply on a case-by-case basis to individual applications for planned unit development approval that are processed under the city's adopted planned unit development ordinances. *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

29.4 Comprehensive Plans – Interpretation. A city planning commission interpretation that a comprehensive plan policy does not apply to a planned unit development application to site a cell tower is not correct, where (1) the text of the policy provides specific and mandatory direction that public facilities "be designed and located" to "preserve[] and enhance" desirable features of the area, (2) the preamble to the applicable comprehensive plan policy refers to "daily decisions" being guided by "site planning," and (3) there is no similar provision in the city's development code that requires the city to consider whether the design and location of a public facility "preserve[s] and enhance[s] desirable features of the area." *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy implementing Statewide Planning Goal 3, which states that the county's policy is to "continue to preserve" for farm use lands with agricultural soils, does not impliedly preclude the county from adopting a text amendment that authorizes in the EFU zone one of the non-farm uses allowed on EFU land under ORS 215.283(2). Authorizing on EFU land non-farm uses listed in ORS 215.283(2) is consistent with Goal 3 as a matter of law. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

29.4 Comprehensive Plans – Interpretation. Although city governing body interpretations are entitled to considerable deference under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010), where there is no reviewable express or implied interpretation, LUBA has nothing to defer to. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

29.4 Comprehensive Plans – Interpretation. Sub-area plan language describing as a "buffer" the neighborhood that includes property proposed for rezoning from a high density residential to a higher density residential zone need not be interpreted to limit density to no more than the median density between the two zones. A planning commission does not err in concluding that the proposed rezone is consistent with the "buffer" description based on other density, height and design restrictions. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

29.4 Comprehensive Plans – Interpretation. That a sub-area comprehensive plan map designates an area as "Medium and High Density" does not imply an intent to limit density below the maximum density otherwise allowed under the area's general comprehensive plan map designation and zoning. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

29.4 Comprehensive Plans – Interpretation. A city does not err by requiring that an applicant for development approval dedicate and construct a road extension through the area proposed for

development where the transportation system plan shows the road extension. It does not matter that the extension shown on the transportation system plan is conceptual. *Reeves v. City of Wilsonville*, 62 Or LUBA 142 (2010).

29.4 Comprehensive Plans – Interpretation. LUBA will affirm a county governing body's interpretation that an application to change the comprehensive plan map designation for property to Rural Use is not by itself a request for a right to develop more than one residence on the property and therefore need not be concurrently accompanied by a RU zone change application, when that interpretation is consistent with the express language of the provision. *City of Jacksonville v. Jackson County*, 62 Or LUBA 439 (2011).

29.4 Comprehensive Plans – Interpretation. LUBA will affirm a city council's implicit interpretation of a comprehensive plan requirement that amendments affecting less than five "separately owned tax lots" be processed as a minor plan amendment to mean lots or parcels owned by different persons, and reject petitioner's contrary interpretation that "separately owned" means lots or parcels potentially conveyable to different persons, where petitioner does not challenge the city council's interpretation or explain why it is reversible under ORS 197.829(1). *Smith v. City of Salem*, 61 Or LUBA 87 (2010).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan provision prohibiting application of a Rural Residential plan designation to land that is currently designated farm or forest "unless an exception to the applicable Goal 3 or 4 is justified" could be interpreted such that the prohibition does not apply to nonresource land that is not subject to either goal. However, the stronger textual reading is that the qualifier "applicable" simply reflects that the subject property is currently designated under either Goal 3 or Goal 4, whichever is applicable, and an exception to the applicable goal is required in order to redesignate the property to Rural Residential. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

29.4 Comprehensive Plans – Interpretation. Context includes previous versions of an ordinance. Where the previous comprehensive plan expressly permitted nonresource land to be designated Rural Residential, but subsequent plan amendments (1) eliminated that language and replaced it with language restricting the Rural Residential designation to lands subject to an exception to Goals 3 or 4, and (2) adopted a Rural Use designation limited to nonresource lands that do not require an exception, that context suggests that the county intended to restrict the Rural Residential designation to resource lands which require a goal exception, and exclusively employ the Rural Use designation for nonresource lands that do not require a goal exception. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

29.4 Comprehensive Plans – Interpretation. Where a county's Rural Residential plan designation implements OAR 660-004-0040, which applies exclusively to rural residential areas that are subject to Goal 3 or 4 exceptions, and expressly does not apply to nonresource lands not subject to those goals, it is reasonable to presume that the Rural Residential designation also applies exclusively to resource lands for which a Goal 3 or 4 exception is taken, and is not intended to apply to nonresource lands. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

29.4 Comprehensive Plans – Interpretation. As part of a text and context analysis, LUBA may consider any local legislative history in the record for purposes of understanding the intent in adopting the text and context being considered. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

29.4 Comprehensive Plans – Interpretation. LUBA will reverse a governing body's interpretation of an ambiguous plan provision, the text of which can be read to allow nonresource lands to be redesignated Rural Residential, where that interpretation is inconsistent with the text, context, purpose and underlying policy of the plan provision, and contrary to an administrative rule that the plan provision implements. *Rogue Advocates v. Jackson County*, 60 Or LUBA 392 (2010).

29.4 Comprehensive Plans – Interpretation. Because a comprehensive plan is made up of both text and maps, LUBA's deferential standard of review set out at ORS 197.829(1) applies to local government interpretations of plan maps as well as local government interpretations of plan text. *Oregon Shores Cons. Coalition v. Curry County*, 60 Or LUBA 415 (2010).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan includes large scale maps or tax lot specific text those maps or text might provide context that would guide or limit a local government's interpretation of a small scale comprehensive plan estuary map that is not tax lot specific. *Oregon Shores Cons. Coalition v. Curry County*, 60 Or LUBA 415 (2010).

29.4 Comprehensive Plans – Interpretation. Where a composite map that is produced by enlarging a small scale comprehensive plan estuary map and applying it to a larger scale tax lot specific map has a fairly significant margin of error, it is plausible to interpret the small scale comprehensive plan estuary map to (1) include an entire small tax lot in a natural management unit, (2) exclude the entire small tax lot in a natural management unit or (3) place the small tax lot partially in a natural management unit and partially in a conservation management unit. In that circumstance, no further explanation is required for the local government's choice among the three plausible interpretations. *Oregon Shores Cons. Coalition v. Curry County*, 60 Or LUBA 415 (2010).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan generally describes the resources that were to be protected by designating a natural estuary management unit on a small scale comprehensive plan map in 1981, a petitioner fails to show the local government's failure to interpret the comprehensive plan to include a small tax lot in the natural management unit is inconsistent with the "purpose" or "underlying" policy of the plan, within the meaning of ORS 197.829(1)(b) and (c), where, under the local government's interpretation, the natural estuary management unit still includes all of the resources that the comprehensive plan identified as justifying the natural estuary management unit in 1981. *Oregon Shores Cons. Coalition v. Curry County*, 60 Or LUBA 415 (2010).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan in one instance says the city's level of service standard applies to zone changes, but does not state that the standard applies *exclusively* to zone changes, and in another instance the comprehensive plan states that the level of service standard applies when changing land use designations and to development, the

comprehensive plan text does not support the city's ultimate interpretation that the level of service standard applies only to zone changes. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan policy calls for a local government to "review parking requirements for residential development with the purpose of reducing the required number of spaces per unit," a legislative decision that amends parking space requirements for multiple family dwellings to increase the required number of parking spaces must be remanded so that the local government can adopt findings that explain how that legislative decision is consistent with the comprehensive plan policy. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy that requires a local government to "review local zoning and development regulations periodically to remove barriers to higher density housing and to make provision for a full range of housing options" does not prohibit the local government from adopting maximum building height limits and off-street parking requirements that might prove to be a barrier to higher density housing or achieving a full range of housing options. The comprehensive plan policy simply requires that the local government assess and correct, on a periodic basis, any land use regulations that prove to be a barrier to housing density or providing a full range of housing options. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

29.4 Comprehensive Plans – Interpretation. Where a land use regulation amendment would inevitably lead to increased impervious surfaces, it is possible that LUBA would remand the amendment so that the enacting local government could adopt findings to explain why such an amendment is consistent with a plan policy that requires that the local government "include measures in local land development regulations that minimize the amount of impervious surface in new development." However, where a petitioner at LUBA simply assumes that lower maximum building heights and increased off-street parking requirements will lead to more impervious surfaces, petitioner fails to set out a basis for reversal or remand. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

29.4 Comprehensive Plans – Interpretation. Where no new roads or intersections are proposed as part of a partition, a hearings officer errs in interpreting a comprehensive plan policy that requires development to be served by adequate roadway facilities to require a showing of compliance with local ordinance criteria and road design standards that apply only to new roads and intersections. *Pelz v. Clackamas County*, 59 Or LUBA 219 (2009).

29.4 Comprehensive Plans – Interpretation. A Metro regional plan requirement that a local government's comprehensive plan map designations be "derived from the general boundaries" on Metro's less detailed maps gives the local government some flexibility in locating the boundaries on its comprehensive plan map. But where Metro's maps designate 308 acres for Industrial use, that flexibility does not allow a local government to designate a significant number of those 308 acres for non-industrial uses. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

29.4 Comprehensive Plans – Interpretation. A Metro regional plan provision that requires the Metro Chief Operating Office to conform Metro's maps to the comprehensive plan mapping that

local governments adopt after Metro adds land to the urban growth boundary suggests that local governments have some authority to deviate from Metro's map designations for the property that is added to the urban growth boundary when they first applies their comprehensive plan map to that property. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

29.4 Comprehensive Plans – Interpretation. A Metro decision to amend the urban growth boundary to include 308 acres for Industrial development that was based on an assumption that only 120 acres of the 308 acres would be developed for Industrial use likely would provide a basis for the local government to plan all but 120 acres of the 308 acres for non-industrial uses. But where the 120 acres the local government designates for industrial uses include acres that were already within the UGB, the local government's comprehensive plan mapping is inconsistent with Metro's map designation for the 308 acres. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

29.4 Comprehensive Plans – Interpretation. Where Metro has designated 308 acres for industrial development, a city decision to plan only 120 of those acres for industrial development based on a finding that Metro only intended 120 acres to be developed industrially must be remanded where the record does not include substantial evidence that Metro only intended 120 of the 308 acres to be developed industrially. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

29.4 Comprehensive Plans – Interpretation. An apparent conflict between regional plan provisions that (1) direct local governments to adopt comprehensive plan maps for property added to the urban growth boundary that are consistent with Metro's maps and (2) direct that Metro conform its maps to the comprehensive plan maps that are adopted by local governments following urban growth boundary amendments could be explained by other regional plan provisions that require local governments to identify lands that are undevelopable or are to be protected from development pursuant to environmental protection mandates. The regional plan directive that Metro conform its maps to the comprehensive plan maps that are adopted by local governments following UGB amendments could be to ensure that Metro's maps identify lands that are undevelopable or are to be protected from development. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

29.4 Comprehensive Plans – Interpretation. An apparent conflict between regional plan provisions that (1) direct local governments to adopt comprehensive plan maps for property added to the urban growth boundary that are consistent with Metro's maps and (2) direct that Metro conform its maps to the comprehensive plan maps that are adopted by local governments following urban growth boundary amendments could be explained if the urban growth boundary amendment itself expressly envisioned that some of the land Metro designated for industrial use would in fact not be put to industrial use. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

29.4 Comprehensive Plans – Interpretation. An apparent conflict between regional plan provisions that (1) direct local governments to adopt comprehensive plan maps for property added to the urban growth boundary that are consistent with Metro's maps and (2) direct that Metro conform its maps to the comprehensive plan maps that are adopted by local governments following urban growth boundary amendments might be avoided if the evidentiary record demonstrates that

land that Metro designated for industrial use at the time of the urban growth boundary amendment is no longer needed to ensure a 20-year regional supply of industrial land. *Graser-Lindsey v. City of Oregon City*, 59 Or LUBA 388 (2009).

29.4 Comprehensive Plans – Interpretation. A city governing body does not err in interpreting comprehensive plan policies that govern "development" to be inapplicable to a proposal to annex and extend sewer service to fully developed property. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

29.4 Comprehensive Plans – Interpretation. A county does not err in interpreting a comprehensive plan policy requiring that airports be compatible with surrounding uses to be satisfied by incorporated findings addressing conditional use permit standards that, the county found, ensure that the airport is compatible with surrounding uses. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

29.4 Comprehensive Plans – Interpretation. LUBA will affirm a governing body's interpretation of a comprehensive plan policy that requires that development shall comply with "applicable" Department of Environmental Quality (DEQ) standards to not require that the applicant demonstrate that a proposed personal use airport will comply with a DEQ noise program that DEQ has suspended. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

29.4 Comprehensive Plans – Interpretation. A statement in a city's comprehensive plan that purports to describe the intent of a regional government code requirement is not itself a legal requirement of any kind. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

29.4 Comprehensive Plans – Interpretation. A city does not err by interpreting a comprehensive plan policy that requires the city to "annex lands to the city through a process that considers the effects on public services" to allow it to defer such consideration to an ongoing but unfinished concept planning process where: (1) the concept plan will precede actual urbanization of the annexed areas, (2) the plan will provide the basis for planning and zoning of annexed areas for urban development, and (3) the concept plan will determine how public facilities are extended to annexed areas as they urbanize. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

29.4 Comprehensive Plans – Interpretation. LUBA will remand a decision redesignating non-resource land to rural residential, where it is unclear whether the comprehensive plan limits the rural residential plan designation to lands for which an exception to resource goals is taken, the plan includes a different designation, Rural Use, that is specifically intended for nonresource lands, and the county's findings do not address the issue or provide an interpretation of the relevant plan provisions. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy that directs a county to "adopt large lot zoning to protect rural, agricultural and forest areas," does not apply directly to an application to subdivide rural agricultural land. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy that uses the word "should" is generally not a mandatory approval criterion. *Wolfgram v. Douglas County*, 54 Or LUBA 54 (2007).

29.4 Comprehensive Plans – Interpretation. Even where a comprehensive plan provision might not constitute an independently applicable mandatory approval criterion for a rezoning proposal, it may nonetheless represent a relevant and necessary consideration that must be reviewed and balanced with other relevant plan provisions pursuant to ordinances that require that the proposed rezoning be consistent with applicable plan provisions. *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy that expresses a clear policy preference that general office uses buffer commercial and residential uses in a specific area is a policy that must be considered and balanced with other applicable policies in rezoning property in that area that is (1) zoned and developed for general office uses and (2) acts as a buffer between commercial and residential-zoned and developed areas. *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006).

29.4 Comprehensive Plans – Interpretation. LUBA will affirm a governing body's interpretation that only a portion of a coastal shorelands zone is designated as "suitable for water-dependent uses" and therefore subject to a policy that limits non-water-dependent development, where the zone refers to a comprehensive map that depicts only a portion of the zone as being "especially suited for water-dependent uses" and read in context it is clear that the policy is not intended to apply throughout the zone. *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500 (2006).

29.4 Comprehensive Plans – Interpretation. Where a proposed plan amendment, zone change and goal exception would result in a split-zoned parcel with the northern portion planned and zoned for residential use and the southern portion planned and zoned for resource use, and a policy in the county's comprehensive plan at least arguably permits land divisions along boundaries separating exception areas from resource lands, and such a division would result in lots smaller than the minimum lot size permitted by the county's acknowledged Goal 14 exception, the county must adopt Goal 14 findings or, if necessary, adopt a specific exception to Goal 14. *Wetherell v. Douglas County*, 51 Or LUBA 730 (2006).

29.4 Comprehensive Plans – Interpretation. Where it is possible to interpret a development code provision to require consideration of more facilities and services than a similar comprehensive plan policy and to require that those facilities and services be already available at the time of annexation, but a local government implicitly interprets the development code policy simply to implement the comprehensive plan policy and to be coextensive with the plan policy, LUBA will defer to that interpretation where there are other development code provisions that support that limited interpretation. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

29.4 Comprehensive Plans – Interpretation. A county errs in construing a comprehensive plan finding that "lands producing less than eighty cubic feet per acre [cf/ac/yr] per year are generally not used for commercial uses" to define a threshold of 80 cf/ac/yr for "forest lands" protected by

Goal 4, where the text and context indicate that the finding is a statement of historical fact not a minimum threshold, and the county's interpretation is undercut by the fact that the county's Goal 4 plan designations include lands capable of producing 85 cf/ac/yr as prime timberlands, and lands capable of producing considerably less than 80 cf/ac/yr as nonprime timberlands. *Wetherell v. Douglas County*, 50 Or LUBA 167 (2005).

29.4 Comprehensive Plans – Interpretation. Where the drawings that accompany an access management plan are unclear, LUBA will assume that the more detailed construction plans that will be necessary to construct proposed improvements will call for improvements that are consistent with applicable design standards, where there is nothing in the record that suggests otherwise. *Rhodes v. City of Talent*, 50 Or LUBA 415 (2005).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan describes the rural industrial plan designation as appropriate for areas where industrial uses are located in close proximity to a natural resource, the county does not err in allowing the expansion of an existing industrial use where the code provisions implementing that designation provide for uses that do not require close proximity to a natural resource and strict application of the plan provision would essentially eviscerate the application of another plan policy that allows limited exceptions for modest expansions of existing industrial uses. *Doob v. Josephine County*, 49 Or LUBA 113 (2005).

29.4 Comprehensive Plans – Interpretation. A detailed water quality resources report that discusses the effects of development on groundwater is sufficient to satisfy a comprehensive plan policy that requires a "Development Impact Statement" addressing the "effect on the groundwater supply." *Dinges v. City of Oregon City*, 49 Or LUBA 376 (2005).

29.4 Comprehensive Plans – Interpretation. The statutory requirement that land use decisions be consistent with acknowledged comprehensive plans does not mean that all parts of the comprehensive plan necessarily are approval standards, or that comprehensive plan provisions that can operate as approval standards are necessarily relevant to all quasi-judicial land use permit applications. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

29.4 Comprehensive Plans – Interpretation. Even if a comprehensive plan provision is a relevant standard for a quasi-judicial land use permit application, it may simply be a relevant consideration that must be considered with other relevant considerations, rather than a mandatory approval criterion that must separately be satisfied along with other mandatory approval criteria. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

29.4 Comprehensive Plans – Interpretation. In determining whether particular comprehensive plan goals and policies are relevant approval criteria for a quasi-judicial land use permit application, it is appropriate to consider first whether the comprehensive plan itself assigns a particular role to those goals and policies. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

29.4 Comprehensive Plans – Interpretation. Where it is not clear from the comprehensive plan map whether the plan designation governing the subject property is a base or an overlay plan designation, LUBA will affirm a governing body's interpretation that the plan designation is an

overlay designation, where the comprehensive plan text does not list or describe the designation as a base plan designation. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

29.4 Comprehensive Plans – Interpretation. Language in the notice of a plan amendment that can be read to say that the plan designation of a parcel was changed from General Industrial to Light Industrial is not a basis to conclude at a later date that the parcel is designated Light Industrial rather than General Industrial, where the plan amendment itself does not change property's plan designation to Light Industrial. *Status v. City of Corvallis*, 48 Or LUBA 254 (2004).

29.4 Comprehensive Plans – Interpretation. LUBA will exercise its discretion under ORS 197.829(2) to interpret a comprehensive plan policy governing commercial zones to be inapplicable to a zone change to an industrial zone, notwithstanding that the proposed use is a commercial use, where the local government interpreted several similar plan policies to be inapplicable, and the context of the plan policy indicates that commercial uses in industrial zones are governed by industrial, not commercial, plan policies. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan map and a sub-area plan map do not conflict in depicting the plan designation of a particular property, where the comprehensive plan map is at a scale of one inch to 8,000 feet, is not property-specific, and does not clearly indicate whether the plan designation of the property is commercial or residential, while the sub-area plan map is large-scale, property-specific, and clearly depicts the property as commercial. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

29.4 Comprehensive Plans – Interpretation. A governing body's interpretations that (1) the transportation system plan (TSP) is part of the city's comprehensive plan, (2) projects described in the TSP supersede transportation projects described in the comprehensive plan, and (3) extension of a different street than contemplated in the TSP is consistent with TSP language intended to allow the city flexibility in choosing which street to extend, are not reversible under ORS 197.829(1). *Comrie v. City of Pendleton*, 47 Or LUBA 38 (2004).

29.4 Comprehensive Plans – Interpretation. Even if routing industrial traffic through a residential subdivision would violate a comprehensive plan policy that "encourages" provision of access to industrial zones "without going through* * * residential areas," allowing traffic to pass along one side of a rural subdivision does not allow traffic to pass through a residential area. *Concerned Citizens v. Malheur County*, 47 Or LUBA 208 (2004).

29.4 Comprehensive Plans – Interpretation. Where the city's new acknowledged comprehensive plan includes a provision stating that existing development zones continue to apply until the new code is acknowledged, it is within the city's discretion under ORS 197.829(1) to interpret that plan provision to resolve any conflicts between the old zoning code and new comprehensive plan designations. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

29.4 Comprehensive Plans – Interpretation. A city interpretation of a zoning district to allow a large regional hospital within a residentially planned area is not inconsistent with the "underlying policy" or "purpose" of a regional plan that the zoning district was adopted in part to implement.

Although the regional plan, viewed alone, does not envision such regional hospitals within residentially planned areas, the regional plan expressly delegates authority to the city to elaborate on the auxiliary uses that may be allowed in such residential areas and the city has adopted a refinement plan that expressly authorizes regional hospitals in the residentially planned area. *Jaqua v. City of Springfield*, 46 Or LUBA 134 (2004).

29.4 Comprehensive Plans – Interpretation. When a comprehensive plan has overlapping or conflicting policies, it is permissible for a local government to interpret them and apply them in a manner that balances those policies. *Milne v. City of Canby*, 46 Or LUBA 213 (2004).

29.4 Comprehensive Plans – Interpretation. LUBA will affirm a city decision that interprets a comprehensive plan community park policy to describe a type of park and not to impose approval criteria for particular park developments, where relevant plan policies describe four categories of parks within the city, but neither the plan nor the zoning code includes minimum standards for the development of parks. *Monogios and Co. v. City of Pendleton*, 46 Or LUBA 356 (2004).

29.4 Comprehensive Plans – Interpretation. Where a refinement plan policy prohibits "development" of property prior to master plan approval, the code definition of "development" includes excavation and fill, and there is no textual or contextual basis to conclude that "development" for purposes of the policy excludes excavation and fill authorized by a grading permit, then the policy is applicable to a challenged permit authorizing excavation and fill on the property. Because the grading permit "concerns" the application of a comprehensive plan provision, the permit is a land use decision subject to LUBA's jurisdiction. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

29.4 Comprehensive Plans – Interpretation. A city council interpretation of a comprehensive plan policy that prohibits "highway commercial development" south of a particular intersection as prohibiting "any commercial development" south of the intersection rather than "Highway Commercial" zoning or commercial development with direct access to the highway is not reversibly wrong. *Barton v. City of Lebanon*, 45 Or LUBA 214 (2003).

29.4 Comprehensive Plans – Interpretation. A city's interpretation of comprehensive plan policies that apply to "residential development" as not applying to a proposed radio tower is not inconsistent with the language or apparent purpose of the policies and is therefore not reversible under ORS 197.829(1). *Citizens for Env. Resp. Dev. v. City of Beaverton*, 45 Or LUBA 378 (2003).

29.4 Comprehensive Plans – Interpretation. Arbitrary and inconsistent interpretation of approval criteria in deciding applications for land use permits can provide a basis for reversal or remand; however where a city applies a plan policy to one kind of decision and does not apply it to another kind of decision, the differences in the two decisions can explain the different applications of the plan policy. *Citizens for Env. Resp. Dev. v. City of Beaverton*, 45 Or LUBA 378 (2003).

29.4 Comprehensive Plans – Interpretation. Where a city's interpretation that a broadcast radio tower may be allowed in a residential zoning district as a "private utility" and a "utility substation and related facilities" includes a number of erroneous interpretations of the city's zoning

ordinance, but LUBA identifies a potentially sustainable interpretation of relevant zoning ordinance terms that would appear to permit approval of the radio tower, remand is nevertheless required where there are reasons why the city might not agree with LUBA's interpretation. *Citizens for Env. Resp. Dev. v. City of Beaverton*, 45 Or LUBA 378 (2003).

29.4 Comprehensive Plans – Interpretation. Where a local government adopts unchallenged findings explaining that a demonstration that a proposed conditional use complies with all relevant zoning ordinance criteria is also sufficient to establish that the conditional use complies with the comprehensive plan, petitioners' challenge at LUBA that the conditional use is inconsistent with particular comprehensive plan provisions that are not specifically addressed in the conditional use decision provides no basis for reversal or remand. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

29.4 Comprehensive Plans – Interpretation. A local government interpretation that the subject property constitutes a "neighborhood" for the purpose of determining whether a proposed development is consistent with a plan policy that requires maintaining existing residential density levels within existing neighborhoods is not subject to deference under ORS 197.829(1) because it is inconsistent with the definition of "neighborhood" set out in the zoning ordinance and the dictionary definition of that term. *Roberts v. Clatsop County*, 44 Or LUBA 178 (2003).

29.4 Comprehensive Plans – Interpretation. A local government interpretation that defines "existing residential density levels" as the maximum density allowed in the most intensive residential zoning district within the neighborhood is inconsistent with the text and apparent purpose of a policy that requires the local government to maintain existing residential density levels in established neighborhoods, because it does not take into account the majority of the property in the neighborhood that is zoned and developed at substantially lower density levels. *Roberts v. Clatsop County*, 44 Or LUBA 178 (2003).

29.4 Comprehensive Plans – Interpretation. A city interpretation of a comprehensive plan term "top of the bluff" as the elevation on the property where the steeply pitched face of the bluff stops and a more level part begins is not inconsistent with the express language of the plan. *Crowley v. City of Bandon*, 43 Or LUBA 79 (2002).

29.4 Comprehensive Plans – Interpretation. A zoning map that has a scale of one inch equals 800 feet is not of so gross a scale that it cannot be relied upon to locate a zoning boundary line on a 26-acre parcel. *DLCD v. City of Gold Beach*, 43 Or LUBA 319 (2002).

29.4 Comprehensive Plans – Interpretation. A city is within its discretion to interpret a comprehensive plan provision requiring establishment of a master plan prior to allowing development within a commercial district as being satisfied by the design review process where the city code defines "master plan" as a plan created through the land use review process governing design review and conditional use review, and the city does not have an independent process for establishing a master plan. *Barman v. City of Cornelius*, 42 Or LUBA 548 (2002).

29.4 Comprehensive Plans – Interpretation. A board of county commissioners does not exceed its interpretive discretion under ORS 197.829(1) when it interprets a comprehensive plan policy to "[e]nsure that traffic attracted to commercial development will not adversely affect

neighborhoods" as being limited to examining traffic impacts on "residential" neighborhoods and to the "local" streets that serve such residential neighborhoods. *Swyter v. Clackamas County*, 42 Or LUBA 30 (2002).

29.4 Comprehensive Plans – Interpretation. A board of county commissioners acts within its interpretive discretion under ORS 197.829(1) where it interprets a comprehensive plan policy to "[e]nhance energy conservation and transportation system efficiency by locating opportunities for housing near work and shopping areas" to be met in the "obverse" situation where a proposal would "locate work and shopping areas near housing." *Swyter v. Clackamas County*, 42 Or LUBA 30 (2002).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan provision that directs that a city should work with a county to ensure that certain lands are planned for residential development does not require the city to zone those lands exclusively for residential development. *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy that the county restrict rural industrial development to uses that will not require improvements at public expense is not necessarily inconsistent with adoption of an urban renewal plan that will provide publicly funded improvements to support future rural industrial development, where the policy can be read in context to allow such improvements. In that circumstance, rather than interpret the policy in the first instance, LUBA will remand a decision approving the urban renewal plan to the county to explain why the urban renewal plan conforms to the policy. *Zimmerman v. Columbia County*, 40 Or LUBA 483 (2001).

29.4 Comprehensive Plans – Interpretation. It is within a governing body's discretion under ORS 197.829(1) to interpret a comprehensive plan provision that allows commercial rezoning of "areas" having "an historical commitment to commercial uses," neither to require a demonstration of exclusive commercial use, nor to require that the "area" under consideration include an entire parcel. *Huff v. Clackamas County*, 40 Or LUBA 264 (2001).

29.4 Comprehensive Plans – Interpretation. Statutory nonconforming use provisions at ORS 215.130 do not prohibit rezoning land to allow uses that would not be allowed to continue as nonconforming uses. Nor is the statute violated or undermined by the county's consideration of a history of illegal commercial uses, in applying a plan provision that allows land that has an "historical commitment" to commercial uses to be rezoned for commercial use. *Huff v. Clackamas County*, 40 Or LUBA 264 (2001).

29.4 Comprehensive Plans – Interpretation. Where a local governing body interprets comprehensive plan provisions not to impose relevant approval criteria for a particular rezoning request it is entitled to great deference on review. However, where a local governing body simply declares that the provisions are not approval criteria without any explanation, the declaration expresses no reviewable interpretation and the declaration is not entitled to deference. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

29.4 Comprehensive Plans – Interpretation. Although rezoning a 1.94-acre parcel from residential to commercial may not violate comprehensive plan policies that require an adequate supply of urban land to meet urban needs and support of transportation systems by locating housing near work and shopping areas, a local government errs in finding that those polices are irrelevant. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

29.4 Comprehensive Plans – Interpretation. Where a generally worded purpose statement in a city's comprehensive plan provides that a zoning designation is intended to confine strip commercial development to its existing locations, but does not expressly provide that the zoning designation may be applied only to those locations, the local government's interpretation of the purpose statement to allow the zoning designation to be applied to other locations so long as it does not result in strip commercial development is not clearly wrong. *Neighbors for Livability v. City of Beaverton*, 40 Or LUBA 52 (2001).

29.4 Comprehensive Plans – Interpretation. LUBA will defer to a city council interpretation of a comprehensive plan annexation policy that requires the city to "insure that there is a five year supply of vacant land within the city," as imposing a general anti-sprawl requirement rather than an absolute requirement that the city include no more than a five-year supply of vacant land. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

29.4 Comprehensive Plans – Interpretation. The existence of vacant land that is planned and zoned for multi-family residential use does not mean there can be no need for additional multi-family residential designated land, where there is a specific multi-family residential need identified and none of the land that is already designated for multi-family residential use is suitable for that specific need. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

29.4 Comprehensive Plans – Interpretation. Where comprehensive plan and zoning ordinance provisions require preservation of "County Road 804" as established by a circuit court decision adopting an official survey of the road, the scope of the survey determines the parts of County Road 804 subject to that protection. That the survey shows no private property boundaries within a certain subdivision crossed by the road is a strong indication the circuit court decision did not intend to establish anything with respect to that subdivision. *Oregon Shores Cons. Coalition v. Lincoln County*, 38 Or LUBA 699 (2000).

29.4 Comprehensive Plans – Interpretation. A county urbanization policy that was adopted to implement Goal 14 must be interpreted consistently with Goal 14's prohibition against approval of urban uses on rural land. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

29.4 Comprehensive Plans – Interpretation. A petitioner's arguments that amended land use regulations violate a comprehensive plan policy by increasing housing costs and discouraging infill development provide no basis for remand, where the plan policy encourages both infill and preserving neighborhood livability and the city's findings explain that the regulations are needed to ensure that infill housing development can be accommodated in neighborhoods without eroding livability. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

29.4 Comprehensive Plans – Interpretation. A plan goal requiring preservation of neighborhood diversity does not require diversity of housing designs where, in context, the word "diversity" is properly interpreted to refer to "age, income, race and ethnic background" of the people in the neighborhood rather than housing designs. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

29.4 Comprehensive Plans – Interpretation. The standard of review LUBA must apply to a governing body's interpretation of its own land use regulations is not affected by whether the decision in which the interpretation appears is quasi-judicial or legislative. The deferential standard of review required by *Clark v. Jackson County*, 313 Or 508, 836 P2d 719 (1992), is based on the governing body's presumed better understanding of the intended meaning of its legislation and the governing body's political accountability for that legislation. *Homebuilders Association v. City of Portland*, 37 Or LUBA 707 (2000).

29.4 Comprehensive Plans – Interpretation. Where a local land use regulation requires that a permit application be consistent with any relevant neighborhood plan, neighborhood plan policies which are described in the neighborhood plan as having the force of law are at least potentially relevant approval criteria for the permit. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

29.4 Comprehensive Plans – Interpretation. A hearings officer's interpretation of a neighborhood plan policy as not imposing an absolute traffic reduction requirement is reasonable and correct where that interpretation is consistent with the way the city council has interpreted similarly worded policies in other proceedings and the interpretation is not inconsistent with the language of the policy. *Hatfield v. City of Portland,* 37 Or LUBA 664 (2000).

29.4 Comprehensive Plans – Interpretation. Where an issue was raised below concerning whether a proposed bed and breakfast facility violated a plan policy regulating commercial development and is not addressed in a hearings officer's decision and the policy itself and related plan and land use regulation provisions are unclear whether the policy applies, LUBA will remand the decision. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

29.4 Comprehensive Plans – Interpretation. A city council's interpretation that a comprehensive plan policy that requires that scenic views be "promoted and protected" is met where a zoning ordinance amendment will not significantly affect scenic views is not "clearly wrong," and must be affirmed by LUBA under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

29.4 Comprehensive Plans – Interpretation. Where a Goal 4 committed exception imposes a zoning district with a five-acre minimum lot size and a lot of record provision that allows development of lots smaller than five acres but does not impose a specific residential density limit, the county governing body exceeds its interpretive discretion in interpreting the exception as imposing a 2.3-acre minimum residential density. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

29.4 Comprehensive Plans – Interpretation. Where a city comprehensive plan provision requires a site-specific investigation of natural hazards "prior to development," the city is within

the discretion afforded it by ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 504, 836 P2d 710 (1992), in interpreting that provision to apply at the stage where the city is evaluating a specific proposal for development such as a building permit. *Jebousek v. City of Newport,* 36 Or LUBA 124 (1999).

29.4 Comprehensive Plans – Interpretation. Where a plan policy provides that the purpose of a rural industrial zone is to allow industrial uses in close proximity to the resources upon which they rely, but it is not clear how that policy applies and the list of allowed uses in the rural industrial zone does not appear to be consistent with the policy, LUBA will remand the decision so that the local government can interpret the plan policy in the first instance. *James v. Josephine County*, 35 Or LUBA 493 (1999).

29.4 Comprehensive Plans – Interpretation. A city's interpretation that a plan map designation of a site as a "potential" middle school site allows actual development of the site as a middle school without first amending the plan to remove the word "potential" from the map designation is clearly within the discretion extended to the city by ORS 197.829(1). *Lodge v. City of West Linn*, 35 Or LUBA 42 (1998).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan provision that requires a city to jointly review annexation procedures with the county is satisfied where the decision explains that the city's efforts to involve the county in the proceeding, and the county's choice to minimally participate, satisfy the policy. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

29.4 Comprehensive Plans – Interpretation. Where a city interprets an element of its comprehensive plan as a policy statement intended to guide creation of standards, rather than an approval criterion itself, and that interpretation is not inconsistent with the plan's express language, purpose or underlying policy, LUBA will defer to that interpretation. *Jebousek v. City of Newport*, 34 Or LUBA 340 (1998).

29.4 Comprehensive Plans – Interpretation. In the absence of an explicit statement that provisions of a comprehensive plan are not mandatory approval criteria, whether plan provisions constitute approval criteria depends on a case-by-case analysis of the wording and context of the particular provisions. *Trademark Construction, Inc. v. Marion County*, 34 Or LUBA 202 (1998).

29.4 Comprehensive Plans – Interpretation. Where a county adopts the comprehensive plan of a city pursuant to an intergovernmental agreement, LUBA will not defer to the county's interpretation of the city's plan. *Trademark Construction, Inc. v. Marion County*, 34 Or LUBA 202 (1998).

29.4 Comprehensive Plans – Interpretation. Where a land use regulation requires that a proposed use demonstrate consistency with a comprehensive plan, the local government may measure the consistency of the proposed use with policies and other relevant standards in the comprehensive plan, even ones that, in themselves, may not constitute specific, mandatory approval criteria. *Trademark Construction, Inc. v. Marion County*, 34 Or LUBA 202 (1998).

29.4 Comprehensive Plans – Interpretation. Where petitioner does not demonstrate that a forest management strategy is part of a county's comprehensive plan, petitioner has not carried its burden of showing that the application of the forest management strategy is a land use decision over which LUBA has jurisdiction. *Mount Hood Stewardship Council v. Clackamas County*, 33 Or LUBA 284 (1997).

29.4 Comprehensive Plans – Interpretation. In approving a zone map amendment, the county cannot support a required finding of adequate water on the subject parcel solely by relying on evidence of water on nearby parcels, absent an explanation how that evidence leads to the conclusion that the subject parcel has adequate water, or an interpretation of the county code such that it requires only a showing of adequate water in the area. *Doob v. Josephine County*, 32 Or LUBA 364 (1997).

29.4 Comprehensive Plans – Interpretation. A county's "clarifying policy," which substantively changes the requirements for compliance with the county's policy implementing Goal 4, amounts to an improper amendment of the county's comprehensive plan. *Doob v. Josephine County*, 31 Or LUBA 275 (1996).

29.4 Comprehensive Plans – Interpretation. County findings which conclude that the subject parcel is not suitable for farming, but do not evaluate each of the factors identified in the applicable comprehensive plan policy implementing Goal 3, are inadequate to establish compliance with the plan. *Doob v. Josephine County*, 31 Or LUBA 275 (1996).

29.4 Comprehensive Plans – Interpretation. Where the subject parcel contains soils that are rated Class III when irrigated, the county must consider in its soil evaluation the feasibility of providing irrigation to the parcel. Without such an evaluation, the findings are inadequate to reach a conclusion regarding the suitability of the soil for farm use under the county's comprehensive plan. *Doob v. Josephine County*, 31 Or LUBA 275 (1996).

29.4 Comprehensive Plans – Interpretation. A county cannot rely on findings regarding water quality and quantity on other parcels to satisfy criteria in its comprehensive plan that require a site-specific evaluation of the water supply on the subject parcel, absent a determination that the conditions on surrounding lands can be relied upon to determine the water quality and quantity on the subject parcel. *Doob v. Josephine County*, 31 Or LUBA 275 (1996).

29.4 Comprehensive Plans – Interpretation. Under ORS 197.829(2), in the absence of local findings, LUBA may interpret the applicability of the city's comprehensive plan provisions in the first instance. *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 (1996).

29.4 Comprehensive Plans – Interpretation. It is within the county's interpretive discretion to find that a code provision protecting agricultural land for farm use conflicts with a plan policy that certain land is not suitable for agricultural production and is committed to residential development. *Reeves v. Yamhill County*, 30 Or LUBA 135 (1995).

29.4 Comprehensive Plans – Interpretation. ORS 197.829(2) permits LUBA to determine whether a local government decision is correct, even when local government fails to interpret

adequately a provision of its comprehensive plan or land use regulations. *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147 (1995).

29.4 Comprehensive Plans – Interpretation. To challenge successfully the city's interpretation of a comprehensive plan format and provisions and the city's conclusion that two plan provisions are not land use regulations, a petitioner must establish that the city's interpretation of the contested plan provisions is clearly wrong. *Fraser v. City of Joseph*, 30 Or LUBA 13 (1995).

29.4 Comprehensive Plans – Interpretation. There is no statutory or administrative law requirement that *all* legislative land use decisions be supported by findings. However, where a challenged legislative land use decision was made by the local governing body and the apparently applicable legal standards at issue on appeal are local comprehensive plan provisions, the interpretation of those provisions must initially be made by the governing body in its decision. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 429 (1995).

29.4 Comprehensive Plans – Interpretation. A local governing body acts within its interpretive authority in construing a comprehensive plan provision employing nonmandatory language as not imposing a mandatory approval criterion for approval of a subdivision. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

29.4 Comprehensive Plans – Interpretation. Where a local comprehensive plan map amendment standard requires that there be no suitable alternative sites in the "vicinity" of the proposed use, the local governing body may interpret "vicinity" to mean a reasonable area around the site of the proposed use, rather than the entire market area served by the proposed use. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

29.4 Comprehensive Plans – Interpretation. A local government acts within its interpretive discretion in interpreting comprehensive plan policies requiring "protection and preservation" of certain natural resources together with other plan policies calling for construction of a particular roadway to allow construction of the roadway, provided impacts on the natural resources are limited. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

29.4 Comprehensive Plans – Interpretation. Where the challenged decision is adopted by the governing body, LUBA may not interpret the applicability of arguably applicable comprehensive plan policies. Rather, the governing body must interpret the applicability of such plan policies in the first instance. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan goal is written as a directive to a local government, it may not defer a determination of compliance with that plan goal to other jurisdictions. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

29.4 Comprehensive Plans – Interpretation. Where the local government determined comprehensive plan objectives are mandatory approval standards in a recently appealed local decision, it may not later determine that plan objectives are mere guidelines and not mandatory approval standards in a different decision appealed to LUBA, in the absence of some explanation for the disparity. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

29.4 Comprehensive Plans – Interpretation. Where comprehensive plan policies conflict, it is permissible for a governing body to consider and balance such plan policies. *Waker Associates, Inc. v. Clackamas County*, 111 Or App 189, 194, 826 P2d 20 (1992). *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan provision potentially applies to a proposal, and a governing body's decision is silent concerning the applicability of such a plan provision, the challenged decision must be remanded for the governing body to interpret the plan provision. *Neuman v. City of Albany*, 28 Or LUBA 337 (1994).

29.4 Comprehensive Plans – Interpretation. LUBA is not required to remand a decision for a local government to interpret its comprehensive plan in the first instance unless petitioners offer some explanation for why they believe the plan provision the local government failed to address in its decision applies in the circumstances presented in the appeal. *Holsheimer v. Clackamas County*, 28 Or LUBA 279 (1994).

29.4 Comprehensive Plans – Interpretation. Where a local government interprets a comprehensive plan provision using the word "should" as imposing a nonmandatory consideration, findings demonstrating compliance with the plan provision are not required. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

29.4 Comprehensive Plans – Interpretation. Where a county governing body's interpretation of the term "severe geologic hazard," as used in its comprehensive plan, is not so wrong as to be beyond colorable defense, LUBA will defer to it. *Mazeski v. Wasco County*, 28 Or LUBA 178 (1994).

29.4 Comprehensive Plans – Interpretation. If a city council decision approving a subdivision does not explain how the city interprets relevant comprehensive plan and code provisions to allow a 40-foot street right-of-way, the decision must be remanded for the city council to interpret the local provisions in the first instance. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

29.4 Comprehensive Plans – Interpretation. Where a challenged decision determines certain comprehensive plan policies are mandatory approval standards applicable to the proposed action, but LUBA cannot determine from the decision what the local government believes those policies require, the decision must be remanded for the local government to interpret the policies. *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

29.4 Comprehensive Plans – Interpretation. If a local government is presented with a plan or land use regulation provision that must be interpreted, and there is a reasonable interpretation that is *consistent* with the "state statute, land use goal or rule the comprehensive plan provision or land use regulation implements," that interpretation may not be rejected by the local government in favor of an interpretation that is *inconsistent* with those statutes, goals or rules. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

29.4 Comprehensive Plans – Interpretation. Where an acknowledged comprehensive plan inventories certain property as a county park available to meet present and future recreational needs and includes a policy requiring that such property be designated and zoned for recreational use, it is inconsistent with Goal 8 to interpret the plan to allow changing the designation and zoning of that property to non-recreational uses without amending the plan text and demonstrating the amended plan remains in compliance with Goal 8. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

29.4 Comprehensive Plans – Interpretation. Where nothing in its comprehensive plan or code requires that a particular level of service be maintained at affected street intersections at all times, the local government's interpretation of its plan and code as allowing short traffic system failures for infrequent, large, special events is not clearly wrong, and LUBA will defer to it. *Heine v. City of Portland*, 27 Or LUBA 571 (1994).

29.4 Comprehensive Plans – Interpretation. If the local government interpretation of an applicable comprehensive plan provision expressed in a challenged decision is unclear, such that LUBA cannot determine whether the findings supporting the decision are adequate to demonstrate compliance with that plan provision, LUBA will remand the decision to the local government to clarify its interpretation. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

29.4 Comprehensive Plans – Interpretation. A local government acts within its interpretive discretion in interpreting a plan policy that "residential development should only be encouraged" in certain areas not to be an approval standard for individual development applications. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

29.4 Comprehensive Plans – Interpretation. Where petitioner contends the challenged decision fails to address a comprehensive plan provision that appears to contain a standard applicable to the proposal, the local government must explain in its decision why the plan provision either is inapplicable to the proposal or is satisfied by the proposal. LUBA may not make such determinations in the first instance. *Laine v. City of Rockaway Beach*, 27 Or LUBA 493 (1994).

29.4 Comprehensive Plans – Interpretation. Where a challenged decision incorrectly concludes arguments based on an arguably applicable comprehensive plan provision are precluded by the acknowledgment of an earlier decision, and does not interpret that plan provision, LUBA must remand the decision for the local government to interpret the plan provision in the first instance. *Rea v. City of Seaside*, 27 Or LUBA 443 (1994).

29.4 Comprehensive Plans – Interpretation. LUBA lacks authority to interpret local comprehensive plan provisions in the first instance. Where certain comprehensive plan policies are arguably applicable to a development application and the challenged decision approving or denying that application does not include an interpretation of those policies, LUBA must remand the decision so the local government can interpret and apply its plan policies. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

29.4 Comprehensive Plans – Interpretation. Where a school district concludes a proposed school site complies with a city's comprehensive plan in a school district proceeding in which the

city participates, the city council nevertheless may reach a contrary conclusion concerning the proposed site's compliance with the city comprehensive plan in a subsequent city proceeding. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

29.4 Comprehensive Plans – Interpretation. Where the applicability of local comprehensive plan or land use regulation provisions is ambiguous, the local government is entitled to considerable deference in determining their applicability. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

29.4 Comprehensive Plans – Interpretation. A local government interpretation of its comprehensive plan and zoning code, that approval of a school at a particular site requires compliance with a plan policy concerning schools, is not so wrong as to be reversible under ORS 197.829, notwithstanding that the relevant zoning district lists schools as a permitted use at the subject site. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

29.4 Comprehensive Plans – Interpretation. It is reasonable to expect that a local government, in applying subjective comprehensive plan and code provisions, will include interpretive findings in its final decision. The parties to such local proceedings should know to include arguments concerning proper interpretation of such provisions in their presentations. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy concerning financial participation by developers in "off-site improvements" does not apply to improvements required within the subject property's frontage along an abutting street, even though the subject property does not obtain access directly from that street. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

29.4 Comprehensive Plans – Interpretation. Under ORS 197.829(4), if a comprehensive plan provision or land use regulation is clearly designed to implement a statewide planning goal or goals, a local government may not interpret such a plan provision or land use regulation in a manner inconsistent with the goals it implements. *DLCD v. City of Donald*, 27 Or LUBA 208 (1994).

29.4 Comprehensive Plans – Interpretation. A local government interpretation of a plan policy as governing how it inventories, plans and zones its forestland, and as not applying to a decision approving a non-forestland division and dwelling, will be sustained where the interpretation is consistent with the words and apparent purpose of the policy. *Draganowski v. Curry County*, 26 Or LUBA 420 (1994).

29.4 Comprehensive Plans – Interpretation. Where the challenged decision fails to explain whether an arguably relevant comprehensive plan provision imposes limitations on the kinds of uses allowed in the applicable zone, LUBA must remand the decision for such an interpretation. *Murphy Citizens Advisory Comm. v. Josephine County*, 26 Or LUBA 181 (1993).

29.4 Comprehensive Plans – Interpretation. It is impermissible for a local government to amend a land use ordinance or comprehensive plan provision in the guise of interpreting either. *Murphy Citizens Advisory Comm. v. Josephine County*, 26 Or LUBA 181 (1993).

29.4 Comprehensive Plans – Interpretation. Where a question of proper interpretation of a comprehensive plan provision is raised during local proceedings, the interpretation required for LUBA review of the decision on appeal must be provided in the decision. The local government may not supply the interpretation in its brief on appeal. *Eskandarian v. City of Portland*, 26 Or LUBA 98 (1993).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan provides that a four-minute response time is critical for certain types of emergencies, a conclusion that a three to five-minute response time for emergency vehicles is adequate to comply with the plan is inadequate to establish compliance with the plan. *Langford v. City of Eugene,* 26 Or LUBA 60 (1993).

29.4 Comprehensive Plans – Interpretation. To find compliance with a local code requirement that schools be adequate to meet anticipated demand, a local government must find that existing school facilities are adequate to serve the proposed project or that they can be made adequate by employing available techniques to maximize school facility capacity. *Langford v. City of Eugene*, 26 Or LUBA 60 (1993).

29.4 Comprehensive Plans – Interpretation. Where a local government's interpretation of its own comprehensive plan that the introductory sections in the land use chapter are not independent approval standards is not clearly wrong, LUBA must defer to that interpretation. *Moore v. Clackamas County*, 26 Or LUBA 40 (1993).

29.4 Comprehensive Plans – Interpretation. A county may interpret a comprehensive plan provision prohibiting plan map amendments designating "forest lands" for rural development as referring to the definition of "forest lands" contained in Goal 4 when the comprehensive plan provision was adopted. Such an interpretation would not allow development that would otherwise be prohibited by the current version of Goal 4 and, therefore, is not inconsistent with the current version of Goal 4. *Westfair Associates Partnership v. Lane County*, 25 Or LUBA 729 (1993).

29.4 Comprehensive Plans – Interpretation. Although a county had in the past applied a predominance test so that a property was not designated forest where less than one half of the property qualified as forestlands, such a test is not required by Goal 4. Findings that explain such a test may result in large parcels containing significant acreage of forestland not being designated for forest use under Goal 4 are adequate to support a decision not to apply the predominance test. *Westfair Associates Partnership v. Lane County*, 25 Or LUBA 729 (1993).

29.4 Comprehensive Plans – Interpretation. Use of comprehensive plan forestland division standards as an aide in determining whether a property includes sufficient forestland to be designated in the comprehensive plan for forest uses under Goal 4 is not an improper use of the forestland division standards. *Westfair Associates Partnership v. Lane County*, 25 Or LUBA 729 (1993).

29.4 Comprehensive Plans – Interpretation. LUBA may not interpret a local government's comprehensive plan in the first instance, rather the local government must interpret its own plan, and LUBA may review that interpretation. *Citizens for Resp. Growth v. City of Seaside*, 25 Or LUBA 367 (1993).

29.4 Comprehensive Plans – Interpretation. LUBA will defer to a local government's determination that provisions in a comprehensive plan requiring the local government to "encourage" particular kinds of activities are not mandatory approval standards. *McGowan v. City of Eugene*, 24 Or LUBA 540 (1993).

29.4 Comprehensive Plans – Interpretation. LUBA may not interpret a local code in the first instance, but rather must review a local government's interpretation of its code. However, a local government interpretation of its code must be adequate for LUBA's review and may not consist of a mere conclusory statement. *DLCD v. Crook County*, 24 Or LUBA 393 (1993).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan policy provides that a change from a 10-acre minimum zone to a five-acre minimum zone requires that "parcels are generally five acres," a county's interpretation of this policy to require consideration of the entire 10-acre minimum zoned area that includes the subject property is not "clearly contrary" to the terms of, or "inconsistent with the express language" or "apparent purpose and policy" of, the plan policy and must be upheld. *Thatcher v. Clackamas County*, 24 Or LUBA 207 (1992).

29.4 Comprehensive Plans – Interpretation. Where a county plan policy provides that a particular zone change requires that "parcels are generally five acres," and the county's decision simply states that a total of 58.8 percent of the parcels in the relevant area being five acres or less does *not* satisfy this plan policy, the decision does not interpret what the policy requires, and LUBA will remand the decision so the county can interpret its plan in the first instance. *Thatcher v. Clackamas County*, 24 Or LUBA 207 (1992).

29.4 Comprehensive Plans – Interpretation. A local code or plan provision prohibiting uses in certain areas of a jurisdiction, where those uses would otherwise be permissible under the base zoning district, does not create an implied authorization for the prohibited uses in areas of the jurisdiction not covered by the prohibition. *Goose Hollow Foothills League v. City of Portland*, 24 Or LUBA 69 (1992).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan policy specifically provides for formation of service districts within one of three types of designated rural areas, and there is nothing inconsistent with the language of that policy, its context or its purpose in interpreting it as having nothing to do with service districts in the other two types of rural areas, the local government's interpretation of that policy as not precluding formation of service districts in the other two types of rural areas will be sustained. *DLCD v. Marion County*, 23 Or LUBA 619 (1992).

29.4 Comprehensive Plans – Interpretation. Comprehensive plan provisions that govern the circumstances warranting formation of service districts, the permissible scope of sewerage facilities and whether such facilities are to be provided by public or private entities, are correctly

interpreted as not prohibiting the formation of service districts to provide sewerage services. *DLCD v. Marion County*, 23 Or LUBA 619 (1992).

29.4 Comprehensive Plans – Interpretation. Where there is a conflict between (1) plan text describing the geographic location of a Goal 5 forest resource site, and (2) other plan text giving its acreage, resolving that conflict in favor of the geographic location is at least as reasonable as resolving the conflict in favor of the acreage figure, LUBA will defer to the local government's interpretation of its plan. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

29.4 Comprehensive Plans – Interpretation. Where a local government's interpretation of its comprehensive plan Goal 5 inventory is consistent with the plan language and appears to be consistent with the purpose and policy of the plan, LUBA may not reject that interpretation. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

29.4 Comprehensive Plans – Interpretation. Where the record establishes that a proposed street will have the characteristics of both a local street and minor collector street, the question of the proper street designation is debatable, and the choice of which designation to apply is within the local government's discretion. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

29.4 Comprehensive Plans – Interpretation. A county comprehensive plan map with a scale of 1 inch to 9 miles is ambiguous and, therefore, the county must interpret and apply its plan map to specific properties in the first instance. *Larson v. Wallowa County*, 23 Or LUBA 527 (1992).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy requiring that certain natural resources be preserved should be interpreted together with the plan Goal 5 inventory, to require the local government to preserve the corresponding natural resource site(s) identified in that inventory. *Larson v. Wallowa County*, 23 Or LUBA 527 (1992).

29.4 Comprehensive Plans – Interpretation. Neither the Goal 2 coordination provision nor similarly worded coordination requirements imposed by local comprehensive plan policies requires affected units of government to agree with the decision ultimately adopted by another government. *ODOT v. Clackamas County*, 23 Or LUBA 370 (1992).

29.4 Comprehensive Plans – Interpretation. Where a plan policy requires that urban services must be provided prior to or concurrent with subdivision approval, a school superintendent's testimony that the expected number of elementary schools students can be accommodated within existing or expanded school facilities utilizing a variety of options, is sufficient to support the local government's finding that the proposed subdivision complies with the plan policy. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

29.4 Comprehensive Plans – Interpretation. Where a local government interprets a provision in its comprehensive plan requiring provision of urban services prior to or concurrent with subdivision approval as not including school bus service, and that interpretation is not inconsistent with other plan provisions or with the practice of some school districts in the area, the local government's interpretation is within its interpretive discretion. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

29.4 Comprehensive Plans – Interpretation. A service district is not required to approve sewer and water hookups on a first come, first served basis, where none of the applicable comprehensive plan provisions adopted pursuant to Goal 11 limit the manner in which such hookups must be approved. *Price v. Arch Cape Service District*, 22 Or LUBA 592 (1992).

29.4 Comprehensive Plans – Interpretation. Where a comprehensive plan rural housing policy establishes a projected need for 900 rural dwelling units by the year 2000 to meet seasonal and permanent housing needs, a decision subject to that policy approving a 50-lot subdivision is not required also to find that the proposed subdivision is rural in nature, where the policy does not require such a finding and other plan and code standards limit the allowable residential density. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan standard establishing a minimum building site requirement of one acre is not inconsistent with plan and code requirements that subdivision lots in a zoning district allowing development at a density of one unit per five acres be clustered to provide not less than 30 percent common open space. Such a plan standard simply sets a minimum area requirement for each clustered lot. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

29.4 Comprehensive Plans – Interpretation. It is possible to interpret a comprehensive plan standard requiring that "the minimum percentage of common open space shall be 30 percent, excluding roads and property under water," as requiring that the exclusion apply (1) only to the lands subject to the open space requirement, (2) only to the lands that may be used to satisfy the open space requirement, or (3) to both. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

29.4 Comprehensive Plans – Interpretation. A local government complies with a plan provision requiring that it "request comments from the School District concerning land use * * * actions," where the local government provides the school district with notice of a proposed PUD preliminary master plan approval. Such a plan provision does not require that the school district make comments, only that comments be requested. *Gerl v. City of Lincoln City*, 22 Or LUBA 512 (1992).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan provision requiring that conflicts between conditional uses and airports be "minimized" is not violated by approval of a proposed conditional use simply because other possible uses allowed in the zone would have *fewer* conflicts with airports. So long as conflicts between the proposed conditional use and airports are minimized, that other possible uses might have fewer conflicts is irrelevant. *Waker Assoc., Inc. v. Clackamas County*, 22 Or LUBA 233 (1991).

29.4 Comprehensive Plans – Interpretation. Where existing code and comprehensive plan provisions impose a higher approval standard than the local government believes is appropriate, the appropriate course is to amend the plan and code. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

29.4 Comprehensive Plans – Interpretation. Comprehensive plan goals and policies that are worded as broad standards establishing policy direction for the local government in its

comprehensive planning efforts are not approval standards for quasi-judicial zone changes. *Angel v. City of Portland*, 21 Or LUBA 1 (1991).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy that "new development include sidewalks in [its] design" applies only to new development, and does not require sidewalks along property that is not part of a proposed new development. *White v. City of Oregon City*, 20 Or LUBA 470 (1991).

29.4 Comprehensive Plans – Interpretation. Statements from introductory findings to a comprehensive plan chapter are not plan policies or approval standards for land use decisions. *19th Street Project v. City of The Dalles*, 20 Or LUBA 440 (1991).

29.4 Comprehensive Plans – Interpretation. A particular use could be both a commercial use and an institutional use where the applicable plan and land use regulations do not define "commercial use" and "institutional use" as mutually exclusive use categories. *Sarti v. City of Lake Oswego*, 20 Or LUBA 387 (1991).

29.4 Comprehensive Plans – Interpretation. Plan policies that discourage, but do not preclude, location of commercial uses in residential areas, do not demonstrate that the "institutional uses" allowed in residential zoning districts cannot include "commercial uses." *Sarti v. City of Lake Oswego*, 20 Or LUBA 387 (1991).

29.4 Comprehensive Plans – Interpretation. A local decision maker's refusal to follow a prior erroneous construction of a comprehensive plan policy is not error. *Reeder v. Clackamas County*, 20 Or LUBA 238 (1990).

29.4 Comprehensive Plans – Interpretation. Neither the equal protection clause of the 14th Amendment to the U.S. Constitution nor the equal privileges and immunities provision of Article I, section 20, of the Oregon Constitution requires a local decision maker to adhere to a prior erroneous interpretation of a comprehensive plan policy. *Reeder v. Clackamas County*, 20 Or LUBA 238 (1990).

29.4 Comprehensive Plans – Interpretation. In determining whether a particular comprehensive plan provision is an approval standard, LUBA considers the language used in the plan provision and the context in which it appears. A plan policy that states general objectives in non-mandatory terms is not an approval standard. *Thormahlen v. City of Ashland*, 20 Or LUBA 218 (1990).

29.4 Comprehensive Plans – Interpretation. In determining whether the local government has correctly interpreted and applied the term "open space" in making the appealed decision, LUBA will apply the definitions of that term contained in the local government's comprehensive plan and zoning ordinance. *Schryver v. City of Hillsboro*, 20 Or LUBA 90 (1990).

29.4 Comprehensive Plans – Interpretation. Where the local plan requires that the increased density and smaller lots allowed in a PUD be offset by the provision of "useable open space," such open space must benefit the entire PUD, and cannot consist of the oversize private front and rear yards of the larger lots. *Schryver v. City of Hillsboro*, 20 Or LUBA 90 (1990).

29.4 Comprehensive Plans – Interpretation. Where a local government requires property designated as a significant natural area on its Goal 5 inventory to be developed through its PUD process, and a comprehensive plan provision requires PUD development proposals "to address preservation of wildlife habitat and natural vegetation," the local government has made an OAR 660-16-010(3)(c) "limit conflicting uses" decision, and a decision approving a PUD on such property must be supported by findings demonstrating how wildlife habitat and natural vegetation will be preserved. *Schryver v. City of Hillsboro*, 20 Or LUBA 90 (1990).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy that simply directs a county to enter into urban area planning agreements with adjacent jurisdictions to coordinate land use planning does not *adopt* such agreements as part of the comprehensive plan. *City of Portland v. Multnomah County*, 19 Or LUBA 468 (1990).

29.4 Comprehensive Plans – Interpretation. After-the-fact statements by county commissioners and the planning director concerning the intended applicability of plan provisions are not competent legislative history. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

29.4 Comprehensive Plans – Interpretation. There is no irresolvable conflict between a plan standard directing that golf courses be allowed in an exclusive farm use zone and a plan standard providing that development may not occur on lands capable of sustaining accepted agricultural practices. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

29.4 Comprehensive Plans – Interpretation. Where plan standards identify nonfarm uses that may be allowed in the county's exclusive farm use zone and require that such uses be "minimized," a plan standard requiring that "development" not occur on lands capable of sustaining accepted farming practices is properly interpreted as not applying to the nonfarm uses specifically allowed in the exclusive farm use zone. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

29.4 Comprehensive Plans – Interpretation. A plan requirement that the city "strive to maintain at least a five-year supply of land for [particular needs] in the city limits" does not prohibit the use of employment zoned land for nonemployment conditional uses, so long as the city's findings establish that the city has strived to maintain a five-year supply of employment land. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

29.4 Comprehensive Plans – Interpretation. Application of plan agricultural goals requiring preservation of agricultural lands to proposed nonfarm conditional uses in exclusive farm use zones does not effectively prohibit such nonfarm conditional uses, if the ordinance requirement to satisfy the purposes of the plan goals is interpreted and applied by balancing the degree to which a proposed nonfarm use furthers or conflicts with various plan goals and policies. *Rowan v. Clackamas County*, 19 Or LUBA 163 (1990).

29.4 Comprehensive Plans – Interpretation. A plan standard requiring a soils report, with specific content, signed by a registered civil engineer is not necessarily met by *any* soils report with the required content and signed by a registered engineer. Where the plan standard makes it clear that the purpose of the plan standard is to prevent or mitigate safety hazards, the city may

evaluate the required soils report to determine whether such hazards are prevented or mitigated. *J.K. Land Corporation v. City of Gresham*, 19 Or LUBA 66 (1990).

29.4 Comprehensive Plans – Interpretation. Where significant wildlife habitat is identified on maps and inventories in the acknowledged city comprehensive plan, the city may not determine that a site not shown on the map or listed in the inventory includes significant wildlife habitat in acting on an individual development application. *J.K. Land Corporation v. City of Gresham*, 19 Or LUBA 66 (1990).

29.4 Comprehensive Plans – Interpretation. Where the comprehensive plan makes it clear that that a plan policy is to be implemented through the county code provisions governing approval of conditional use permits and site plans for aggregate extraction operations, the plan policy does not provide approval standards for a plan amendment adding a site to the aggregate resources inventory. *Eckis v. Linn County*, 19 Or LUBA 15 (1990).

29.4 Comprehensive Plans – Interpretation. Where comprehensive plan provisions explicitly envision location of commercial uses in residentially zoned areas and impose requirements to mitigate adverse impacts from such proximity, the plan does not prohibit adjoining commercially and residentially planned and zoned properties. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

29.4 Comprehensive Plans – Interpretation. A comprehensive plan policy that states that, in order to minimize conflicts between agricultural and nonagricultural uses, a county "shall develop and implement buffering techniques on the periphery of urban growth boundaries which abut agricultural land," is not an approval standard for a conditional use permit for a nonfarm use far removed from any urban growth boundary. *Weist v. Jackson County*, 18 Or LUBA 627 (1990).

29.4 Comprehensive Plans – Interpretation. A plan policy that approval of nonagricultural uses on farmland be supported by findings that "no feasible alternative site in the area exists which has less impact on agricultural land" requires either (1) an analysis of potential alternative sites and a comparison of the impacts on agricultural land of the proposed use at the subject and alternative feasible sites; or (2) a determination that the proposed use at the subject site will have *no* impacts on agricultural land. *Weist v. Jackson County*, 18 Or LUBA 627 (1990).

29.4 Comprehensive Plans – Interpretation. County interpretation of its plan agricultural land policy to allow it to balance the applicant's need for additional acreage for a golf course, against the county policy favoring retention of EFU-zoned land in large blocks for agricultural use, is a correct interpretation of the county policy. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

30.1.1 Zoning Ordinances – Adoption – Generally. Where a city's motion to supplement the record with notice of adoption of ordinance will not supplement or complete the challenged decision in any way that is challenged by petitioner, the motion will be denied due to its lack of bearing on the merits of the appeal. *Western PCS, Inc. v. City of Lake Oswego,* 33 Or LUBA 369 (1997).

30.1.1 Zoning Ordinances – Adoption – Generally. The provision of ORS 197.610(2) allowing "less than 45 days' notice" to the Director of DLCD of decisions adopting new land use regulations in emergency circumstances does not authorize not giving any notice at all. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

30.1.2 Zoning Ordinances – Adoption – Procedure. Where a local government adopts an ordinance that repeals and readopts, verbatim, 34 previously adopted and acknowledged land use ordinances, solely to correct a problem with the publication notice for the readopted ordinances, the repeal and readoption of the 34 ordinances does not accomplish any "change" or amendment to the acknowledged ordinances that would require that the re-adoption be processed as a post-acknowledgment plan amendment under ORS 197.610 *et seq.* Repeal and verbatim readoption of a previously acknowledged ordinance does not change the acknowledged status of the ordinance, such that pursuant to ORS 197.175(2)(e) the statewide planning goals then apply directly to decisions made under the readopted ordinance. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

30.1.2 Zoning Ordinances – Adoption – Procedure. ORS 215.060 provides that action regarding a comprehensive plan shall have no effect, unless 10 days' advance public notice of each hearing is published in a newspaper of general circulation. Where the required 10 days' notice is given, the county's subsequent decision to adopt different parts of the proposed comprehensive plan amendments by separate ordinances does not require new notice under ORS 215.060. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

30.1.2 Zoning Ordinances – Adoption – Procedure. An indication on the notice of adoption furnished to DLCD under ORS 197.610(1) that the Statewide Planning Goals do not apply to a proposed plan or code amendment or a new land use regulation is a ministerial act without independent significance, not a land use decision subject to LUBA's jurisdiction. *Petersen v. Columbia County*, 33 Or LUBA 253 (1997).

30.1.2 Zoning Ordinances – Adoption – Procedure. ORS 215.503(2)(a), requiring all legislative acts related to comprehensive plans or zoning adopted by a county governing body to be by ordinance, applies to legislative decisions adopting or amending comprehensive plans and zoning ordinances, not to quasi-judicial plan or zone changes. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

30.1.3 Zoning Ordinances – Adoption – Standards. ORS 227.173(1) requires that "[a]pproval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance." A development code that permits the city engineer to waive or modify city street and roadway improvement standards where "in his/her judgment special circumstances dictate such change" is sufficient to comply with the ORS 227.173(1) requirement for "standards and criteria." *Zirker v. City of Bend*, 59 Or LUBA 1 (2009).

30.1.3 Zoning Ordinances – Adoption – Standards. ORS 197.610(1) requires that the Land Conservation and Development Commission be given notice at least 45 days before the first evidentiary hearing on adoption of a post-acknowledgment comprehensive plan amendment. Where the required notice is given, a second notice is not required under ORS 197.610(1) simply because the local government decides to adopt different parts of the proposed comprehensive plan amendment by separate ordinances. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

30.1.3 Zoning Ordinances – Adoption – Standards. Where an intergovernmental agreement calls for a county to incorporate into its plan and code the city's ordinances and plan provisions that address lands within the UGB, but the county never does so, the county did not err in refusing to treat the city's provisions as applicable approval criteria. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

30. 1.3 Zoning Ordinances – Adoption – Standards. Where appeal fee waiver criteria are set out in the city's land use regulations, an appeal fee waiver form that requests that the applicant provide certain information in seeking an appeal fee waiver does not establish criteria that must be met to obtain the appeal fee waiver. *St. Johns Neighborhood Assoc. v. City of Portland*, 38 Or LUBA 275 (2000).

30.1.3 Zoning Ordinances – Adoption – Standards. If a city does not include a tree-cutting regulation in its zoning ordinance and the regulation does not establish standards for implementing the city's comprehensive plan, it is not a "land use regulation," as the term is defined in ORS 197.015(11). *Ramsey v. City of Portland*, 30 Or LUBA 212 (1995).

30.2.1 Zoning Ordinances – Amendment – Generally. Where local code amendments allow accessory uses and structures in an EFU zone, arguments that (1) the amendments improperly exempt such structures from a local code requirement that steps be taken to minimize adverse impacts on farm and forest uses and (2) the provisions governing such uses are inconsistent with ORS 215.213(3)(b) provide no basis for reversal or remand where the amended code is comparable to the prior code and where the petitioner does not develop any argument explaining why the amendments are substantive instead of technical. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

30.2.1 Zoning Ordinances – Amendment – Generally. Provisions of a challenged ordinance that refer to or rely on provisions of a prior ordinance that LUBA remanded are invalid, even where the prior ordinance contained a severability clause purporting to allow unchallenged aspects of the prior ordinance to take effect after LUBA's remand. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

30.2.1 Zoning Ordinances – Amendment – Generally. Where a significant resource overlay zone provision requires that (1) resource sites not be altered or impacted to a degree that destroys their significance, (2) the proposed development not result in the loss of habitat for threatened or endangered species, (3) all feasible alternatives to the development that would not result in a substantial adverse impact on identified resource values be considered and rejected, (4) the development be sited on the property in such a manner that minimizes adverse impacts on identified resources, and (5) documentation be provided regarding requirements for state or federal permits or licenses and that appropriate resource management agencies have reviewed the development proposal against their plans, policies, and programs, the local government does not err in concluding that that provision applies at the development stage rather than the PAPA stage. *VanSickle v. Klamath County*, 80 Or LUBA 241 (2019).

30.2.1 Zoning Ordinances – Amendment – Generally. Where a city within Metro's jurisdiction adopts its portion of an intergovernmental concept plan into its comprehensive plan and applies an industrial zoning designation to a portion of the planning area with slopes greater than 10 percent, that Metro's previous decision to include the planning area in its UGB stated that land needed for industrial uses should generally have slopes of less than 10 percent and that a previous Metro housing need projection anticipated almost 600 more housing units than the industrial zoning designation would allow provide no basis for reversal or remand where Metro's previous UGB decision is not evidence, an applicable approval criterion, or a relevant consideration for the city in determining the correct zoning designation for the property and where Metro's previous housing need projection has been superseded by a later decision to remove the property from its inventory of buildable residential lands. *Watts v. City of Tualatin*, 80 Or LUBA 339 (2019).

30.2.1 Zoning Ordinances – Amendment – Generally. The planning commission's conclusion that the subject properties are subject to "site review requirements" is not supported by anything in the text of the Old Code, Ordinance 20224, or the New Code. *Simons Investment Properties, LLC v. City of Eugene*, 80 Or LUBA 458 (2019).

30.2.1 Zoning Ordinances – Amendment – Generally. A county's comprehensive plan is a working document that must be updated to reflect existing conditions and future planning

obligations. Where nothing in the statewide planning goals or the county's comprehensive plan prohibits amendments to expand areas in the county to which certain plan designations may be applied, provided those areas meet all applicable statutory and rule requirements, such amendments do not provide grounds for remand or reversal. Counties have wide latitude to adopt and revise their comprehensive plans and zoning ordinances; amendments to the comprehensive plan need only comply with the statewide planning goals. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

30.2.1 Zoning Ordinances – Amendment – Generally. Goal 14 prohibits urban uses on rural lands. Where a county's text amendments to its comprehensive plan do not allow any urban uses on rural land, but merely expand the allowable locations in the county that could be the subject of an application to change the plan designation to rural industrial, and the text amendments require the applicant to demonstrate that the proposed use for which the rural industrial plan designation change is consistent with all statewide planning goals, including Goal 14, a petitioner's arguments that the amendments violate Goal 14 do not provide a basis for reversal or remand. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

30.2.1 Zoning Ordinances – Amendment – Generally. A petitioner's challenge to a county's amendments to its comprehensive plan that expand the allowable locations in the county that could be the subject of an application to change the plan designation to rural commercial and rural industrial, that argue that the county's adopted and acknowledged rural commercial and rural industrial zones impermissibly allow urban uses in contravention of Goal 14 are an impermissible collateral attack on an acknowledged land use regulation where no provisions of the county's code were amended by the challenged decision. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

30.2.1 Zoning Ordinances – Amendment – Generally. The fact that an adopted local code amendment includes language which was not included in the notice to DLCD required by ORS 197.610(1) is not by itself sufficient to explain why the notice was inadequate so as to require reversal or remand of the amendment decision. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

30.2.1 Zoning Ordinances – Amendment – Generally. A local code amendment adopted to implement provisions of ORS 197.724 is not an "action[] taken under ORS 197.722 to ORS 197.728" so as to place the amendment decision outside of LUBA's scope of review pursuant to ORS 197.726(1). Instead, such an amendment is an action taken under ORS 197.646(1), which requires local governments to amend their land use regulations "to comply with a new requirement in land use statutes." *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

30.2.1 Zoning Ordinances – Amendment – Generally. Senate Bill (SB) 1051 (2018), section 12 did not require cities to amend their land use regulations to implement SB 1051 by July 1, 2018. SB 1051 itself is silent regarding any requirement, much less a deadline for a city to amend its land use regulations to comply with its provisions. SB 1051, section 12 provides for a delayed "operative date" of July 1, 2018. That delayed operative date provides a grace period before which the provisions of SB 1051 did not apply, and after which, the statute applies directly and cities are required to "allow" accessory dwelling in areas required by the statue. But SB 1051 does not direct

cities as to the mechanism by which to allow accessory dwellings. *Home Builders Assoc. v. City of Eugene*, 78 Or LUBA 441 (2018).

30.2.1 Zoning Ordinances – Amendment – Generally. While ORS 197.646(1) requires the city to amend its land use regulations to implement SB 1051 (2018), ORS 197.646(2)(b) requires the Land Conservation and Development Commission (LCDC) to establish by rule the time period within which a local government must amend its code to implement a new land use statute "if the legislation does not specify a time period for compliance[.]" LCDC has not adopted any rules specifying a time period for implementation of SB 1051, and SB 1051 itself does not require cities to adopt amendments to their codes that implement all of the provisions of SB 1051 by July 1, 2018. *Home Builders Assoc. v. City of Eugene*, 78 Or LUBA 441 (2018).

30.2.1 Zoning Ordinances – Amendment – Generally. A city council does not err by amending its zoning ordinance to prohibit renting dwellings in a residential zone for weddings following a ruling by a municipal court that the zoning ordinance did not prohibit such use, where the city believed its zoning ordinance already prohibited such use and petitioner offers no legal theory for why the city could not adopt such an amendment to clarify the issue. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

30.2.1 Zoning Ordinances – Amendment – Generally. ORS 227.180(1)(b) authorizes city councils to provide that a decision by a hearings officer or other decision-making authority in a proceeding for discretionary permit or zone change approval is the city's final decision. But ORS 227.180(1)(b) does not authorize a city council to make a hearings officer's or other decision-making authority's decision the city's final decision concerning an application for a comprehensive plan map amendment. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

30.2.1 Zoning Ordinances – Amendment – Generally. A zoning ordinance standard that requires that zoning map amendments must be consistent with relevant comprehensive plan policies provides no basis for reversal or remand, where petitioners appealed an annexation ordinance and failed to appeal the ordinance that rezoned the annexed properties. *Knaupp v. City of Forest Grove*, 67 Or LUBA 398 (2013).

30.2.1 Zoning Ordinances – Amendment – Generally. Where on remand of a decision that amends a county zoning ordinance, the county adopts a new ordinance with new amendments, but does not explicitly or implicitly re-adopt the original ordinance, on appeal to LUBA of the new ordinance the petitioner cannot challenge the original ordinance or the findings adopted on remand that are intended to support the original ordinance. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

30.2.1 Zoning Ordinances – Amendment – Generally. Whether a city council initially tries to reverse a hearings official's interpretation of the city zoning code by amending the zoning code has no bearing on whether the city council could also effectively reverse the hearings official's interpretation by adopting an interpretation of its own. *Randazzo v. City of Eugene*, 65 Or LUBA 272 (2012).

30.2.1 Zoning Ordinances – Amendment – Generally. An ordinance that adds a destination resort overlay to a number of acres that were not included on the originally adopted destination resort overlay map "amends" the destination resort overlay map. That the county may have intended to include those acres within the destination resort overlay when the map was originally adopted does not make the map "amendment" something other than an "amendment." *Remington Ranch, LLC v. Crook County*, 59 Or LUBA 361 (2009).

30.2.1 Zoning Ordinances – Amendment – Generally. An ordinance that repeals an existing comprehensive plan and zoning map and replaces it with a revised map is an "amendment" of the existing comprehensive plan and zoning map. *Remington Ranch, LLC v. Crook County*, 59 Or LUBA 361 (2009).

30.2.1 Zoning Ordinances – Amendment – Generally. While a local government may have a legitimate planning interest in adopting regulations that effectively consolidate substandard-size lots for development purposes, the method it chooses to determine which properties are consolidated for development purposes cannot be based on apparently arbitrary differences in the wording or form of deeds, such as whether or not a deed transferring multiple properties listed each property under a separate heading. *Thomas v. Wasco County*, 58 Or LUBA 452 (2009).

30.2.1 Zoning Ordinances – Amendment – Generally. Where the "Decision" section of a land use decision expressly grants only "planned unit development subdivision plan" approval, but the decision read as a whole clearly also grants the zoning map amendment that was included in the planned unit development and subdivision plan application, LUBA will interpret the decision to grant all three of the requested approvals. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

30.2.1 Zoning Ordinances – Amendment – Generally. City findings that there has been increased commercial development in the neighborhood and that traffic has increased on a nearby state highway and resulted in increased noise are sufficient to demonstrate compliance with a subjective "changed neighborhood conditions" rezoning criterion. *Jaffer v. City of Monmouth*, 51 Or LUBA 633 (2006).

30.2.1 Zoning Ordinances – Amendment – Generally. Absent some authority to the contrary, the uses allowed within a Public Parks zone or a Public Amusement zone are not limited to "recreational" or "public amusement" uses. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

30.2.1 Zoning Ordinances – Amendment – Generally. A hearings officer errs in concluding that a commercial zone implements the medium density residential plan designation, simply because some commercial uses are allowed in some residential zones. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

30.2.1 Zoning Ordinances – Amendment – Generally. An assignment of error that challenges a county's failure to apply code criteria governing zoning map amendments provides no basis for reversal or remand where the assignment of error contends the zoning code criteria should have been applied to a comprehensive plan map amendment. *Doherty v. Morrow County*, 44 Or LUBA 141 (2003).

30.2.1 Zoning Ordinances – Amendment – Generally. Where an ordinance that adopts legislative amendments to a zoning ordinance includes no findings responding to concerns that the amendments violate Statewide Planning Goals 5 and 9 and a comprehensive plan policy, (2) there is no evidence in the record that would allow LUBA to conclude those concerns are without merit, and (3) the comprehensive plan provision pertaining to protection of industrial lands and quarries under Goals 5 and 9 is ambiguous, LUBA will remand the ordinance. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

30.2.1 Zoning Ordinances – Amendment – Generally. The fixed goal post rule established by ORS 215.427(3) does not apply to an application for a zone change where (1) that application for a zone change is part of, or submitted contemporaneously with, an application for a comprehensive plan amendment, and (2) the zone change is requested to implement the requested comprehensive plan amendment rather than as a separate request that could be approved independently of the requested comprehensive plan map amendment. *Friends of the Applegate v. Josephine County*, 44 Or LUBA 786 (2003).

30.2.1 Zoning Ordinances – Amendment – Generally. Where the ORS 215.283(1)(w) authorization for rural fire service facilities in EFU zones had taken effect, but a county had not yet amended its zoning ordinance to reflect the statutory change, ORS 215.283(1)(w) applies directly, and the county does not violate the zoning ordinance by approving a rural fire service facility in its EFU zone. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

30.2.1 Zoning Ordinances – Amendment – Generally. ORS 215.050(2) requires that zoning amendments shall implement the adopted comprehensive plan. When a local government adopts a zone change but does not adopt a contemporaneous comprehensive plan change, resulting in plan map/zoning map inconsistency, the decision must be remanded. *DLCD v. Klamath County*, 38 Or LUBA 769 (2000).

30.2.1 Zoning Ordinances – Amendment – Generally. Criteria governing an application to rezone property to allow for the siting of a mobile home park need not comply with requirements in ORS 197.307 and ORS 197.480 for "clear and objective" standards regulating the siting of needed mobile homes, at least when a city has otherwise planned and designated sufficient land to satisfy the need for mobile home parks within its jurisdiction. *Evergreen Development, Inc. v. City of Coos Bay*, 38 Or LUBA 470 (2000).

30.2.1 Zoning Ordinances – Amendment – Generally. New land use regulations can only become acknowledged under ORS 197.625(2) if the ordinance adopting those new land use regulations is "affirmed on appeal under ORS 197.830 to 197.855." Where LUBA remands the adopting ordinance because a portion of the new land use regulations is found to be defective, without specifically affirming the remaining portions of those regulations, no part of the ordinance is considered acknowledged under ORS 197.625. *Western States v. Multnomah County*, 37 Or LUBA 835 (2000).

30.2.1 Zoning Ordinances – Amendment – Generally. In amending an acknowledged zoning ordinance to reduce maximum building heights, a city is not required to demonstrate that the

amendment complies with the statewide planning goals where the acknowledged comprehensive plan contains "specific policies or other provisions which provide the basis for the regulation." ORS 197.835(7)(b). However, where the comprehensive plan includes only general policies that make no reference to maximum building heights, the city must demonstrate that the amendment complies with the statewide planning goals. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

30.2.1 Zoning Ordinances – Amendment – Generally. A county acts within the discretion afforded by ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992), where the zoning ordinance requires a finding that utilities and services likely to be needed by the "anticipated uses" are available, the county limits allowed uses on the property to the applicant's proposed use, and the county interprets the term "anticipated uses" to consist solely of the proposed use. A reasonable person could construe the term "anticipated uses" to denote something less than the range of uses allowed in the zone. *City of Newberg v. Yamhill County*, 36 Or LUBA 473 (1999).

30.2.1 Zoning Ordinances – Amendment – Generally. That a local government might in future quasi-judicial proceedings recognize that the procedures required by its amended zoning ordinance conflict with the procedures required by ORS 215.416(11) for permit decisions, and therefore follow the procedures required by the statute, does not make the procedures required by the amended zoning ordinance consistent with the statute and does not make a LUBA appeal challenging the zoning ordinance amendment premature. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

30.2.1 Zoning Ordinances – Amendment – Generally. Where petitioner fails to assign error to detailed findings explaining why certain acknowledged comprehensive plan provisions constitute "specific policies" that, under ORS 197.835(7)(b), make it unnecessary for the city to demonstrate compliance with statewide planning goals when amending city land use regulations to implement those policies, LUBA will reject an assignment of error alleging the city erred by failing to demonstrate that the new and amended land use regulations comply with the statewide planning goals. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

30.2.1 Zoning Ordinances – Amendment – Generally. Under OAR 660-012-0045(2) local codes must require compliance with ODOT access standards or require that an applicant obtain an access permit from ODOT as a condition of approval. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

30.2.1 Zoning Ordinances – Amendment – Generally. LUBA's scope of review is not precluded or affected when petitioner assigns error to a plan amendment but fails to assign error to a corresponding zone change. Under ORS 197.175(2)(b) and 197.835(7)(b), zoning ordinances must conform to and comply with the local government's comprehensive plan, therefore a remand on the basis of error respecting the plan amendment would necessarily invalidate the corresponding zone change. *Geaney v. Coos County*, 34 Or LUBA 189 (1998).

30.2.1 Zoning Ordinances – Amendment – Generally. Where the county's decision to apply overlay zoning directly implements plan policies that were previously determined to comply with the statewide planning goals, and the policies are sufficiently specific to provide the basis for case-

by-case evaluation of development applications, ORS 197.835(7)(b) does not require the local government to apply the goals independently to the decision. *Cuddeback v. City of Eugene*, 32 Or LUBA 418 (1997).

30.2.1 Zoning Ordinances – Amendment – Generally. Under ORS 197.646(3), there is no grace period prior to required local government compliance with amendments to statutes, rules or Statewide Planning Goals. *DLCD v. Lincoln County*, 31 Or LUBA 240 (1996).

30.2.1 Zoning Ordinances – Amendment – Generally. Where a local government does not identify specific provisions in its comprehensive plan which it contends provide the basis for challenged land use regulation amendments, under ORS 197.835(5)(b), LUBA is required to reverse or remand the land use regulation amendments if they do not comply with applicable provisions of the Statewide Planning Goals. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

30.2.1 Zoning Ordinances – Amendment – Generally. Where amendments to a local government's comprehensive plan or land use regulations do not amend or affect the local government's acknowledged Citizen Involvement Program (CIP), the only way a petitioner can demonstrate a violation of Goal 1 is by demonstrating a failure to comply with the acknowledged CIP. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

30.2.1 Zoning Ordinances – Amendment – Generally. Where respondents do not identify specific provisions in the applicable comprehensive plan, which they contend provide the basis for challenged zone changes, under ORS 197.825(5)(b) LUBA is required to reverse or remand the zone changes if they do not comply with applicable provisions of the Statewide Planning Goals or their implementing rules. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

30.2.1 Zoning Ordinances – Amendment – Generally. Legislative changes to acknowledged comprehensive plans or land use regulations that reduce a local government's supply of industrially designated land must be supported by (1) findings demonstrating the remaining industrially designated land is adequate to satisfy the requirements of Goal 9, (2) argument establishing compliance with Goal 9 based on plan provisions, code provisions and evidence in the record, or both. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

30.2.1 Zoning Ordinances – Amendment – Generally. Where the deadlines established by OAR 660-12-055(1) and (2) for adoption of regional and local transportation system plans (TSPs) have not yet passed, and the local government has not yet adopted a TSP, the requirements of OAR 660-12-045(2) and (3) for regulations implementing TSPs are inapplicable to a decision amending the local code. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. That the record shows a code amendment will affect a site that has direct access onto a particular road is a sufficient basis for requiring the local government's determination under OAR 660-12-060(2)(c), that the amendment does not allow land uses resulting in "levels of travel or access * * * inconsistent with the functional classification of a transportation facility," to include consideration of impacts on that road. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. Where a local government decision amending its land use regulations does not interpret comprehensive plan goals and map designations as being inapplicable to such amendments, but rather explains how the proposed amendment implements certain comprehensive plan goals and is consistent with certain plan map designations, it is clear the governing body interprets those plan goals and map designations as being applicable to the land use regulation amendment. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. Post-acknowledgment local code amendments which are not adopted to satisfy periodic review requirements are deemed acknowledged under ORS 197.625, if such amendments are not appealed to LUBA. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. ORS 215.503(2)(a), requiring all legislative acts related to comprehensive plans or zoning adopted by a county governing body to be by ordinance, applies to legislative decisions adopting or amending comprehensive plans and zoning ordinances, not to quasi-judicial plan or zone changes. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. Where petitioners contend legislative land use regulation amendments are inconsistent with certain arguably relevant comprehensive plan provisions, and those plan provisions are not interpreted in the challenged decision, LUBA must remand the challenged decision for the local government to adopt the necessary plan interpretations as part of its decision. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. Providing notice of a post-acknowledgment plan or land use regulation amendment to the Department of Land Conservation and Development under ORS 197.610(1) is inadequate to satisfy a local government's coordination obligations. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. Where petitioners contend a land use regulation amendment fails to comply with the statewide planning goals and implementing rules, and respondents fail to identify specific provisions in the local comprehensive plan that provide the basis for the challenged amendment, LUBA will assume no such provisions exist, and under ORS 197.835(5)(b) LUBA has authority to reverse or remand the land use regulation amendment if it does not comply with the statewide planning goals or implementing rules. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. Where LUBA has remanded a city decision annexing certain property, a subsequent city decision amending the comprehensive plan and zoning designations for that property, in reliance on the annexation, exceeds the city's authority. *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. Any amendment to an acknowledged land use regulation must comply with all applicable statewide planning goals, if the comprehensive plan "does not contain specific policies or other provisions that provide the basis for the regulation." ORS 197.835(5)(b). *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. Comprehensive plan and zone amendments which *lessen* the impacts or demands that goal, plan and code standards were adopted to address are likely to be consistent with those goal, plan and code standards. *McInnis v. City of Portland*, 27 Or LUBA 1 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. An amendment to an acknowledged land use regulation must comply with the local government's acknowledged comprehensive plan. ORS 197.175(2)(d); 197.835(5)(a). *Rea v. City of Seaside,* 26 Or LUBA 444 (1994).

30.2.1 Zoning Ordinances – Amendment – Generally. Prior to local government action to designate new or existing plans and regulations as its Transportation System Plan (TSP), in the manner required by OAR 660-12-010(2), any challenge to adoption of a plan or regulation amendment based on failure to comply with the TSP requirements of OAR 660-12-010 through 660-12-050 is premature. *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

30.2.1 Zoning Ordinances – Amendment – Generally. An ordinance that amends an acknowledged land use regulation is subject to the requirements of ORS 197.610 and 197.615. *Oregon City Leasing, Inc. v. Columbia County*, 26 Or LUBA 203 (1993).

30.2.1 Zoning Ordinances – Amendment – Generally. It is impermissible for a local government to amend a land use ordinance or comprehensive plan provision in the guise of interpreting either. *Murphy Citizens Advisory Comm. v. Josephine County*, 26 Or LUBA 181 (1993).

30.2.1 Zoning Ordinances – Amendment – Generally. A local government cannot simply conclude its failure to list shopping centers as a permitted or conditional use in any existing zoning district creates an ambiguity and, on that basis, determine it will allow shopping centers as a conditional use in a particular zoning district. Such an action constitutes improperly amending the zoning ordinance in the guise of interpreting it. *Loud v. City of Cottage Grove*, 26 Or LUBA 152 (1993).

30.2.1 Zoning Ordinances – Amendment – Generally. Where a local government's final decision is not to adopt a legislative amendment to its acknowledged comprehensive plan and land use regulations, ORS 197.830(2) and 197.620(1) deny standing to appeal such a final decision to LUBA. *ODOT v. Klamath County*, 25 Or LUBA 761 (1993).

30.2.1 Zoning Ordinances – Amendment – Generally. If a challenged permit decision misconstrues an acknowledged land use regulation, that provides a basis for reversing or remanding the decision under ORS 197.835(6) and (7)(a)(D). It does not mean the challenged decision is a land use regulation amendment. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

30.2.1 Zoning Ordinances – Amendment – Generally. Plan text and map amendments and zoning text and map amendments are not "permits," as that term is defined in ORS 215.402(4). *Leonard v. Union County*, 24 Or LUBA 362 (1992).

30.2.1 Zoning Ordinances – Amendment – Generally. That a local government may have provided inadequate notice of a post-acknowledgment plan and land use regulation amendment to the Department of Land Conservation and Development (DLCD) will not excuse a person's failure to file a notice of intent to appeal that decision with LUBA within 21 days after the decision became final, where the person was not entitled to receive notice of the challenged decision from DLCD. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

30.2.1 Zoning Ordinances – Amendment – Generally. LUBA does not apply land use decision making approval criteria in the first instance. It is the local government's responsibility to consider the evidentiary record, identify the applicable standards, make the decision in the first instance and explain the basis for its decision in its findings. *ODOT v. City of Waldport*, 24 Or LUBA 344 (1992).

30.2.1 Zoning Ordinances – Amendment – Generally. The applicant for comprehensive plan and zone map amendments has the burden of establishing compliance of the proposed amendments with the applicable approval standards. *Hess v. City of Portland*, 23 Or LUBA 343 (1992).

30.2.1 Zoning Ordinances – Amendment – Generally. Under ORS 197.835(5)(b), an amendment to a local government land use regulation is subject to reversal or remand for failure to comply with the Statewide Planning Goals, unless the comprehensive plan contains "specific policies * * * which provide the basis for" the amended regulation. *Ramsey v. City of Portland*, 23 Or LUBA 291 (1992).

30.2.1 Zoning Ordinances – Amendment – Generally. That a previously approved zone change included a condition providing that if a conditional use permit for a mobile home park on the subject property is not obtained, the property would revert to its previous zoning, does not make the merits of the previous rezoning decision subject to LUBA's review in an appeal of the local government decision approving the conditional use permit. *Burghardt v. City of Molalla*, 22 Or LUBA 369 (1991).

30.2.1 Zoning Ordinances – Amendment – Generally. There is nothing unconstitutional about providing only published notice of legislative rezoning. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

30.2.1 Zoning Ordinances – Amendment – Generally. ORS 197.615(2)(a) requires that a local government give notice of decisions amending its acknowledged comprehensive plan and land use regulations to persons who participate during the local proceedings and request such notice in writing. *Club Wholesale v. City of Salem*, 19 Or LUBA 576 (1990).

30.2.1 Zoning Ordinances – Amendment – Generally. Where a local government has no rules establishing specific procedures or forms for persons participating in post-acknowledgment plan and land use regulation amendment proceedings to utilize in making a written request for notice

under ORS 197.615(2)(a)(B), and has no rules establishing to whom requests for such notice must be directed, a request for a copy of the city's final *decision* directed to the city attorney is sufficient to satisfy ORS 197.615(2)(a)(B). *Club Wholesale v. City of Salem*, 19 Or LUBA 576 (1990).

30.2.1 Zoning Ordinances – Amendment – Generally. Where a local government provides a party with a copy of the decision amending its comprehensive plan and land use regulations, but fails to advise the party of the date the challenged decision became final or of the requirements for appealing the decision to LUBA, the notice requirements of ORS 197.615(2)(b)(B) and (D), applicable to post-acknowledgment plan and land use regulation amendments, are not satisfied. *Club Wholesale v. City of Salem*, 19 Or LUBA 576 (1990).

30.2.1 Zoning Ordinances – Amendment – Generally. While a decision to approve a zone change does not approve a "permit," within the meaning of ORS 227.160(2), a decision that approves both a variance and a minor partition does approve a "permit." *Harvard Medical Park, Ltd. v. City of Roseburg*, 19 Or LUBA 555 (1990).

30.2.2 Zoning Ordinances – Amendment – Text Amendment: Procedure. Where the only variable between multiple Urban Growth Area-Urban Growth Management (UGA-UGM) zones is lot size, and where a county code provision provides that "[t]he density of one UGA-UGM zoning district is not interchangeable with the density of another UGA-UGM zoning district without prior review and approval by the affected city and * * * County," an interpretation by the county that the provision applies to zone changes of the subject property or changes to the underlying density of the zone in which the subject property is located, but that it does not apply to lot size variances, is inconsistent with the express language of the provision. In such cases, where the local code does not define "density" and the dictionary defines "density" as the quantity or number per unit of area, LUBA will make its own determination that a lot size variance in a UGA-UGM zone may qualify as an "interchange[]" with the density of another UGA-UGM zone, thereby requiring city review and approval. *City of Albany v. Linn County*, 79 Or LUBA 528 (2019).

30.2.2 Zoning Ordinances – Amendment – Text Amendment: Procedure. Whether a city council initially tries to reverse a hearings official's interpretation of the city zoning code by amending the zoning code has no bearing on whether the city council could also effectively reverse the hearings official's interpretation by adopting an interpretation of its own. *Randazzo v. City of Eugene*, 65 Or LUBA 272 (2012).

30.2.2 Zoning Ordinances – Amendment – Text Amendment: Procedure. Under the second sentence of ORS 197.830(1), the 21-day deadline for filing an appeal with LUBA does not begin to run until the city gives individual written notice of its post acknowledgment land use regulation amendment to persons who are entitled to receive such notice. Even if the Department of Land Conservation and Development is the only person entitled to receive written notice of the city's decision, the agency is always entitled to such notice and all other persons with standing to appeal to LUBA have 21 days from the date notice is given to the Department of Land Conservation and Development to file an appeal. *Dobson v. City of Newport*, 47 Or LUBA 589 (2004).

30.2.2 Zoning Ordinances – Amendment – Text Amendment: Procedure. Providing notice and a copy of proposed zoning ordinance amendments to DLCD under ORS 197.610(1) and then adopting an additional zoning ordinance amendment that was not included with the notice without providing additional notice to DLCD is not error. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

30.2.2 Zoning Ordinances – Amendment – Text Amendment: Procedure. The broad notice and potential for participation by DLCD and others under ORS 197.610 is the *quid pro quo* for ORS 197.625, which deems post-acknowledgment land use regulation amendments to be consistent with the statewide planning goals as a matter of law, if the amendment is not appealed or is affirmed on appeal. Therefore, whether errors in a city's notice to DLCD under ORS 197.610 warrant remand depends upon whether the errors are of the kind or of a degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function. If so, remand may be required, without regard

to whether petitioners before LUBA can demonstrate prejudice to their substantial rights. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

30.2.2 Zoning Ordinances – Amendment – Text Amendment: Procedure. Where a city's notice to DLCD under ORS 197.610(1) states that the initial evidentiary hearing on a proposed zoning ordinance amendment will be held on November 7 and the hearing is actually held on November 6, and LUBA cannot determine whether persons who may have been depending on notice that DLCD subsequently provided of that initial evidentiary hearing may have been prejudiced by the city's error, LUBA will remand the city's decision. *OCAPA v. City of Mosier*, 44 Or LUBA 452 (2003).

30.2.2 Zoning Ordinances – Amendment – Text Amendment: Procedure. A *pro forma* declaration of "emergency circumstances," unaccompanied by stated reasons directed at the necessity for expedited review, is insufficient to satisfy ORS 197.610. Cited concerns about unregulated development in the floodplain constitute a sufficient declaration of emergency under ORS 197.610 to allow expedited adoption proceedings. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

30.2.2 Zoning Ordinances – Amendment – Text Amendment: Procedure. If a city's decision to adopt a tree-cutting ordinance is not a statutory land use decision, none of the notice provisions found in ORS 197.830 or any other land use statute apply, except perhaps by analogy. *Ramsey v. City of Portland*, 30 Or LUBA 212 (1995).

30.2.2 Zoning Ordinances – Amendment – Text Amendment: Procedure. Where an ordinance amends the text of a zoning ordinance by adding a temporary overlay district, identifies a map showing where the overlay district applies an "attachment to" the zoning map and does not purport to amend the section of the zoning ordinance under which the zoning map is adopted, it is reasonable and correct to interpret a code notice of hearing provision governing amendments to the text of the zoning ordinance, rather than another provision governing amendments to the "zoning map," as applicable. *Orenco Neighborhood v. City of Hillsboro*, 29 Or LUBA 186 (1995).

30.2.2 Zoning Ordinances – Amendment – Text Amendment: Procedure. Applying the three-factor analysis used by the Oregon Supreme Court in *Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), a city council-initiated ordinance amending the city code to list nonprofit rehabilitation training centers as a conditional use in several of the city's residential zones is legislative in nature. *Andrews v. City of Brookings*, 27 Or LUBA 39 (1994).

30.2.2 Zoning Ordinances – Amendment – Text Amendment: Procedure. Although the party initiating a challenged zoning ordinance amendment was not clearly identified on the application and notices of local public hearings as required by the local code, such procedural errors provide no basis for reversal or remand where petitioners' substantial rights were not prejudiced. *Parmenter v. Wallowa County*, 21 Or LUBA 490 (1991).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. LUBA will remand a legislative text amendment prohibiting new fossil fuel export terminals when nothing in the city's decision or the record explains how the amendment is consistent with the city's comprehensive plan policy requiring the city to "support multimodal freight transportation improvements to provide competitive regional access to global markets." *Columbia Pacific v. City of Portland,* 76 Or LUBA 15 (2017).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Where a city adopts a legislative text amendment prohibiting expansion of existing fossil fuel terminals without considering consistency with a subarea plan policy objective to "foster a business and policy environment that promotes continued private and public sector investments in infrastructure, facilities, equipment and jobs," LUBA will remand the decision to the city to consider whether prohibiting expansion of fossil fuel terminals is consistent with the objective. *Columbia Pacific v. City of Portland,* 76 Or LUBA 15 (2017).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Remand is necessary where a city adopts a legislative text amendment prohibiting expansion of existing fossil fuel terminals, without addressing consistency with a subarea plan policy objective to "maintain, protect and enhance private transportation investments" in the subarea, "including rail and marine terminals, to ensure continued viability as a major center for the import and export of industrial products in the State of Oregon." *Columbia Pacific v. City of Portland,* 76 Or LUBA 15 (2017).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. LUBA will reject an argument that a legislative text amendment prohibiting new or expanded fossil fuel terminals is inconsistent with the Metro Framework Plan and Metro Transportation Plan where the city's code requires only that code text amendments are consistent with Metro's Urban Growth Management Functional Plan. *Columbia Pacific v. City of Portland,* 76 Or LUBA 15 (2017).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. A county ordinance that adopts a text amendment to a comprehensive plan that discontinues a coastal advisory committee that is provided for in the comprehensive plan, and replaces it with a process for "appointing advisory committees to address specific land use issues" does not violate the requirements of Statewide Planning Goal 1 (Citizen Involvement) to provide for "clearly define[d] * * * procedures by which the general public will be involved in the on-going land-use planning process" and for the "continuity of citizen participation and of information that enables citizens to identify and comprehend issues." *Oregon Coast Alliance v. Clatsop County*, 75 Or LUBA 277 (2017).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. A city council does not err by amending its zoning ordinance to prohibit renting dwellings in a residential zone for weddings following a ruling by a municipal court that the zoning ordinance did not prohibit such use, where the city believed its zoning ordinance already prohibited such use and petitioner offers no legal theory for why the city could not adopt such an amendment to clarify the issue. *Whittemore v. City of Gearhart,* 75 Or LUBA 374 (2017).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. A zoning text amendment that merely lists other existing development standards that may or may not apply to needed housing on their own terms cannot be challenged on the basis that the unamended development standards may include subjective or unclear standards applicable to needed housing, in violation of ORS 197.307(4) and Goal 10. If the existing unamended development standards violate ORS 197.307(4), such violations can be challenged only in an appeal of a decision that adopts, amends or applies those standards. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Where a zoning amendment standard requires that the city shall consider the comprehensive plan, and the city's transportation system plan proposes a pedestrian crossing near the rezoned property that the applicant's traffic engineer testified may require changes to the proposed development, but the findings do not address the issue, remand is necessary for the city to consider the issue or explain why no such consideration is warranted under the zoning amendment standard. *Save Downtown Canby v. City of Canby*, 67 Or LUBA 385 (2013).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Where a local government adopts a new zone in one legislative decision and then applies that new zone to property in a separate legislative decision, which is then appealed to LUBA, a challenge that the new zone is contrary to the statewide planning goals may be precluded by acknowledgment of the first decision. However, acknowledgment does not insulate the new zone from a facial challenge on statutory or constitutional grounds, advanced in the appeal of the second legislative decision that for the first time applies the new zone to specific properties. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Zoning text amendments intended to permit a majority of lands zoned for recreational commercial uses to be used for residential development unrelated to recreational commercial uses are inconsistent with comprehensive plan policies that impose on the city an affirmative obligation to support development of the zone with recreational commercial uses. *Sorensen v. City of Creswell*, 54 Or LUBA 468 (2007).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Absent some authority to the contrary, the uses allowed within a Public Parks zone or a Public Amusement zone are not limited to "recreational" or "public amusement" uses. *Cox v. Polk County*, 49 Or LUBA 78 (2005).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. A finding that allowing dog control facilities on public property in several public use zones will save public money is sufficient to explain why a legislative text amendment is in the "public interest." *Cox v. Polk County*, 49 Or LUBA 78 (2005).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Where a development code includes a requirement that its standards for subdivision approval must "provide safe * * * traffic conditions," findings that explain how an amended development code subdivision

approval standard will make the transportation system safer are adequate to demonstrate compliance with that development code requirement notwithstanding that alternative subdivision approval standards might result in safer traffic conditions or achieve those safer traffic conditions more quickly. *Doob v. City of Grants Pass*, 48 Or LUBA 587 (2005).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. A zoning code amendment that purports to legalize lots or parcels that were created by deed or land sales contract in violation of the applicable local criteria at the time of creation is inconsistent with ORS 92.010 and ORS 215.010(1). *Stevens v. Jackson County*, 47 Or LUBA 381 (2004).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Oregon Laws 1993, chapter 590, section 6, allows counties to avoid implementing statutory changes to the destination resort requirements until no later than their next periodic review. Even if a county has not concluded its next periodic review, it cannot substantially amend its pre-1993 destination resort regulations without implementing those changes. *Stevens v. Jackson County*, 47 Or LUBA 381 (2004).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Given the ubiquity of land use regulations governing contemporary zoning decisions, it is doubtful whether the "spot zoning" standard described in *Smith v. Washington County*, 241 Or 380, 406 P2d 545 (1965), continues to have independent applicability. Whether a rezoning decision constitutes arbitrary or spot zoning depends on whether the decision is made in derogation of established criteria or made without criteria. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Because a local rule establishing a one-year expiration period for permits is not a "land use regulation," the fact that the rule was not adopted in accordance with the procedural requirements or ORS 197.610 through 197.625 has no bearing on its effectiveness. *Rest Haven Memorial Park v. City of Eugene*, 44 Or LUBA 231 (2003).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. LUBA may not overlook the fact that a new land use regulation is facially noncompliant with a Metro standard that the regulation is intended to implement, simply because the regulation requires compliance with unspecified standards of a sewerage agency that allegedly comply with the Metro standard. Even if the sewerage agency standards comply with the Metro standard, it is questionable whether the city may adopt noncompliant regulations and rely on a separate local government or agency to ensure compliance with the Metro standard. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Where a city adopts a comprehensive update to its zoning code in an effort to comply with the ORS 197.307(6) requirement that standards applied to needed housing statutes be "clear and objective," and in so doing carries forward preexisting standards that are not clear and objective, such standards are subject to review under ORS 197.307(6), and such review does not constitute an impermissible collateral attack on those standards. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. A code amendment that grants discretionary authority for city staff to impose conditions on approval of needed housing may constitute or contain "standards" or "procedures for approval" that must, under ORS 197.307(6), be clear and objective. Such standards are subject to review in an appeal of the city's legislative decision adopting the amendment. *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. The ORS 92.285 prohibition against adopting retroactive ordinances includes ordinances that allow retroactive application. *Church v. Grant County*, 37 Or LUBA 646 (2000).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. A legislative amendment that changes mobile home parks from a conditional use to a use in a floating zone which has not been applied to any particular site conflicts with ORS 197.480(1) and (2), which require that the city zone specific lands for mobile home parks, commensurate with the need for such parks. *Creswell Court v. City of Creswell*, 35 Or LUBA 234 (1998).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Requiring an applicant to prove a need for a mobile home park in addition to applying for a rezoning and site review for an allowed use violates ORS 197.480(1) and the ORS 197.307(6) requirement for clear and objective standards. *Creswell Court v. City of Creswell*, 35 Or LUBA 234 (1998).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Where ORS 197.435 requires that the county locate and exclude all high value crop areas from a destination resort zone overlay and the county's analysis of the high value crop areas is limited to farms that actually demonstrated the ability to grow high value crops, rather than those capable of producing them, the county's analysis is inconsistent with Goal 8 and the statute. *Boyer v. Baker County*, 35 Or LUBA 223 (1998).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. The statutory order of operations for confirming that a destination resort overlay amendment meets the requirements of Goal 8 and ORS 197.435(2) is to first map the concentrations of commercial farms and then determine which farms could produce the requisite $1,000 per-acre per-year yield. *Boyer v. Baker County*, 35 Or LUBA 223 (1998).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. A land development ordinance amendment adopting a half-acre minimum lot size for a flood hazard zone is not reviewable for compliance with Goal 5 where the acknowledged comprehensive plan calls for a half-acre minimum in the flood hazard zone. *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660 (1998).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. The ORS 215.110(6) prohibition against retroactive land use regulations does not prohibit amending land use regulations to legalize uses that were constructed illegally. *Femling v. Coos County*, 34 Or LUBA 328 (1998).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Where a post-acknowledgment code amendment adds a certain type of use to the uses allowed in a particular zone, comprehensive plan provisions which do not refer to that type of use and could be consistent with a number of different code amendments are not "specific" policies providing the basis for the code amendment, as referred to in ORS 197.835(5)(b). *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Regardless of whether one or more of its zoning districts already allow a particular use, a local government may choose to amend its zoning ordinance to allow that use in another zoning district, so long as it complies with applicable legal standards in doing so. *Melton v. City of Cottage Grove*, 28 Or LUBA 1 (1994).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Under OAR 660-06-003(1)(d), (2)(d), (3) and the "Applicability Matrix" of OAR 660-06-003(5), the Goal 4 rule applies to virtually all land use regulation amendments. *DLCD v. Columbia County*, 24 Or LUBA 32 (1992).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Amending an acknowledged comprehensive plan and land use regulations to establish a process for case-by-case application of the Goal 5 planning process in conjunction with individual development requests does not comply with Goal 5 and the Goal 5 administrative rule. *Ramsey v. City of Portland*, 23 Or LUBA 291 (1992).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. In amending its acknowledged zoning ordinance to add a broad definition of a "utility facility" and to allow utility facilities in all zoning districts, without any express limitation on the size or scale of such facilities, a local government must adopt findings identifying and addressing relevant comprehensive plan and statewide planning goal requirements, including Goals 11 and 14 (which preclude urban levels of facilities and development on rural lands). *Parmenter v. Wallowa County*, 21 Or LUBA 490 (1991).

30.2.3 Zoning Ordinances – Amendment – Text Amendment: Standards. Where there is an apparent conflict between a plan provision and an amended code provision, the city must explain in its findings why the code amendment does not conflict with the plan provision. *Nicolai v. City of Portland*, 19 Or LUBA 142 (1990).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. Where the only variable between multiple Urban Growth Area-Urban Growth Management (UGA-UGM) zones is lot size, and where a county code provision provides that "[t]he density of one UGA-UGM zoning district is not interchangeable with the density of another UGA-UGM zoning district without prior review and approval by the affected city and * * * County," an interpretation by the county that the provision applies to zone changes of the subject property or changes to the underlying density of the zone in which the subject property is located, but that it does not apply to lot size variances, is inconsistent with the express language of the provision. In such cases, where the local code does not define "density" and the dictionary defines "density" as the quantity or number per unit of area, LUBA will make its own determination that a lot size variance in a UGA-UGM zone may qualify as an "interchange[]" with the density of another UGA-UGM zone, thereby requiring city review and approval. *City of Albany v. Linn County*, 79 Or LUBA 528 (2019).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. Where a property owner whose property is subject to a rezoning application withdraws consent to the zone change, that withdrawal of consent may be effective to deprive a county of jurisdiction to proceed on the zone change application, even if it is possible that a circuit court will ultimately determine that the nonconsenting property owner is contractually obligated to support the zone change by contracts entered into by their predecessor-in-interest. *Setniker v. Polk County*, 75 Or LUBA 1 (2017).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. ORS 227.180(1)(b) authorizes city councils to provide that a decision by a hearings officer or other decision-making authority in a proceeding for discretionary permit or zone change approval is the city's final decision. But ORS 227.180(1)(b) does not authorize a city council to make a hearings officer's or other decision-making authority's decision the city's final decision concerning an application for a comprehensive plan map amendment. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. Where a comprehensive plan categorizes lands within the urban growth boundary according to suitability for development, a county errs by denying a request for rezoning on the basis that the requested rezoning is inconsistent with the comprehensive plan, where the findings identify nothing in the comprehensive plan that supports a conclusion that the property's low suitability rating precludes the requested rezoning. *Sperber v. Coos County*, 56 Or LUBA 763 (2008).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. While ORS 215.223(3) requires a county to provide notice of the hearing on a "zone change," a proposal to correct the official zoning map to accurately reflect previously adopted ordinances is not a "zone change" within the meaning of ORS 215.223(3), and therefore the county's failure to provide notice of such a map correction does not violate the statute. *Sullivan v. Polk County*, 51 Or LUBA 107 (2006).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. Where a planning commission recommendation to correct the zoning map is a condition precedent to the governing body's correction of the zoning map under the local code, the governing body cannot "substitute"

for the required recommendation a planning commission recommendation to rezone the subject property under a different code provision. *Sullivan v. Polk County*, 51 Or LUBA 107 (2006).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. A decision that amends the comprehensive plan and zoning maps for a 20-acre parcel in single ownership is properly viewed as a quasi-judicial decision under *Strawberry Hill 4 Wheelers*, and therefore the county erred in conducting the hearing and adopting the decision under legislative procedures, which do not provide written notice to adjoining landowners. *Sullivan v. Polk County*, 49 Or LUBA 543 (2005).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. LUBA will remand a city's zoning designation decision, where the decision is dependent on the validity of a concurrent annexation decision that LUBA has concluded does not comply with applicable law. *Just v. City of Lebanon*, 45 Or LUBA 179 (2003).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. Where a county has a unified zoning map and comprehensive plan map, any application for a zoning map amendment is by necessity also an application for a comprehensive plan map amendment. A combined zoning and comprehensive plan map amendment application is not one of the three kinds of land use applications described in ORS 215.427(1), and for that reason the fixed goal post rule at ORS 215.427(3) does not apply. *Rutigliano v. Jackson County*, 42 Or LUBA 565 (2002).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. A city does not exceed its discretion under ORS 197.829(1) in interpreting code language providing for "rezoning" of property for limited commercial purposes "on a conditional use basis" to allow limited commercial uses on the property pursuant to a conditional use permit, without amending the zoning map to apply a commercial zone to the property. *Chilla v. City of North Bend*, 41 Or LUBA 539 (2002).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. Neither Goal 2 nor ORS 197.175(2) require that zoning ordinance amendments that are necessary to implement a comprehensive plan map amendment be adopted at the same time as the plan amendment. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. The lack of an available implementing zoning district at the time a conditional plan map amendment is adopted does not provide a basis for reversal or remand. In that event, at the time the city amends its zoning map to implement the conditional plan map amendment, it will be required to (1) adopt a new implementing zoning district or amend an existing zoning district so that it could be applied, or (2) adopt further plan map amendments that may be required to allow adoption of an implementing zoning district. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. Where a comprehensive plan map amendment adopts a plan map designation that authorizes several zoning districts, LUBA will assume the city will later apply the zoning districts that will comply with housing goals, rather than zoning districts that might violate those housing goals. If inappropriate

zoning districts are applied later, the decisions adopting those zoning districts can be corrected through an appeal of those zoning map decisions. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. Substantial evidence supports a city council's finding that the planning commission, rather than a neighborhood association, "initiated" a plan and zone map change as required by local ordinance, where the planning commission was informed of the ordinance requirement, and voted to conduct proceedings on the request of the neighborhood association to consider the map change. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. A quasi-judicial plan and zone map amendment initiated by the city planning commission is an "application for a land use decision," for purposes of the notice requirements of ORS 197.763(3), and thus the city's notice of hearing must list the applicable criteria from its ordinance and plan. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure. There is no requirement that a legislative land use decision redesignating numerous properties include findings specifically setting out the justification for the change in designation made for each affected property. *McInnis v. City of Portland*, 27 Or LUBA 1 (1994).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure A local government decision approving a quasi-judicial zone change must be supported by written findings identifying the applicable criteria, setting out the facts relied on and explaining the reasons why the facts establish compliance with the applicable standards. *Strecker v. City of Spray*, 25 Or LUBA 264 (1993).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure Where no specific use is proposed in conjunction with a zone change, the notice of hearing is not required to indicate all of the possible uses of the property under the proposed new zone. However, where a reasons goal exception for a particular use is also proposed, ORS 197.763(3)(a) requires that the notice of hearing identify the particular use proposed to be made of the property. *Caine v. Tillamook County*, 22 Or LUBA 687 (1992).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure A local government may not condition approval of zoning and comprehensive plan map amendments on an applicant's agreement to relinquish a right granted in a prior land use decision, unless there is a sufficient connection between the requested map amendments and the prior land use decision. *Olson Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure Although detailed findings are not always required to justify conditions of land use approval, the evidentiary record must be sufficient to demonstrate a connection between the condition imposed and the planning purpose served by the condition. *Olson Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure Where the evidentiary record demonstrates that the proposed expansion of a medical clinic is needed to provide adequate facilities for existing patients and staff and would not result in additional patients or staff, the local government improperly conditioned approval of required plan and zoning map amendments on the clinic's agreement to relinquish a previously granted approval for parking lot egress onto an adjoining street. *Olson Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991).

30.2.4 Zoning Ordinances – Amendment – Map Amendment: Procedure Where a county's land development ordinance provides for adoption of resolutions of intent to rezone and makes such resolutions binding commitments that the county will grant rezoning when conditions stated in such resolutions of intent to rezone are met, a resolution of intent to rezone is a final appealable decision. *Headley v. Jackson County*, 19 Or LUBA 109 (1990).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a local code provision requires that a requested zone change be justified by proof that "[t]he potential impact upon the area resulting from the change has been considered," a finding that "[n]o significant evidence was presented by the Applicant regarding the impact upon the area, and certainly nothing indicating that the impact would be minimal or positive," does not *impermissibly* shift the burden of persuasion to the applicant because the applicant has the ultimate burden of establishing that their application complies with applicable criteria. *Carroll v. City of Malin*, 80 Or LUBA 298 (2019).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A county does not err in approving an application to correct an error in the original the plan and zone map designations of an existing mine from its original "Forest" plan map and zoning designation to Quarry and Mine Operations (QM), where the county's program to achieve Goal 5 is the QM designation and the mine was included on the county's inventory of significant aggregate sites when the initial plan and zone error occurred in 1984. *Landwatch Lane County v. Lane County*, 77 Or LUBA 474 (2018).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where the hearings officer adopts a board of commissioners' interpretation of a comprehensive plan policy that was articulated in a different decision, and that interpretation is not challenged on appeal, LUBA will reject a challenge to the adequacy of the hearings officer's findings, arguing that the findings fail to resolve all potential inconsistencies or ambiguities in applying the commissioners' interpretation to the proposed rezoning at issue, where the findings adequately explain the hearings officer's understanding of the plan policy, as interpreted by the commissioners, and adequately explain how the policy is applied to the rezoning application before the hearings officer. *Landwatch Lane County v. Lane County*, 75 Or LUBA 302 (2017).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A hearings officer does not err in rejecting a zone change applicant's proposed zoning diagram that orients true north toward the top border of the diagram, instead of matching the orientation of the north arrow on the applicable comprehensive plan map, which is tilted two degrees relative to the top border, where there is no basis to assume that the tilted north arrow on the comprehensive plan map is a "scriveners' error." *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Notwithstanding statements that a hearings officer considered all documents in the record, where a hearings officer expressly declines to consider a proposed zoning diagram under the erroneous assumption that the diagram is not based on the adopted comprehensive plan map, remand is necessary for the hearings officer to consider the proposed diagram free of that mistaken assumption. *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where the only way a zone change applicant can demonstrate that proposed zoning is consistent with a small-scale comprehensive plan map that is not property-specific is to match surveyed lines with features depicted on the comprehensive plan map such as roads, a reasonable decision-maker would not rely solely upon an approach that matches only a single survey line with a single feature, but would

at least consider approaches that match multiple survey lines with multiple features, given the greater accuracy and reliability of a multiple-referent approach. *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Remand is necessary where a hearings officer determines that a proposed zone change is consistent with a comprehensive plan map that is not property-specific by matching a single survey line with a road depicted on the plan map, but fails to consider other matchups between survey lines and features on the map that might provide a more accurate alignment of the zoning boundary with the comprehensive plan map, absent an explanation for why the additional survey lines matchups are unreliable. *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. For an implied interpretation of a local standard to be adequate for review, the findings embodying the interpretation must carry one possible meaning of the ambiguous language in the standard, and an easily inferred explanation of that meaning. A finding that proposed rezoning to higher density residential use is consistent with a plan policy that requires "good access" to an arterial because the property is located near a minor arterial does not embody an implied interpretation adequate for review to the effect that "good access" is satisfied by physical proximity of the property to the arterial, regardless of the quality of access to that arterial. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A finding of compliance with a zone change standard requiring consistency with a comprehensive plan policy requiring that higher density residential uses be sited "near employment" is inadequate, where the finding does not address proximity to employment at all, other than state that the property is adjacent to a small convenience commercial node. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A finding of consistency with a comprehensive plan policy requiring that higher density residential use be sited in locations with "good access" to arterials is inadequate, where the finding states only that the site is located near an arterial, but without attempting to evaluate whether the site has or will in fact have good access to the arterial. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A finding of consistency with a comprehensive plan policy requiring that residential densities maintain a proper relationship between public facilities and services and population distribution is inadequate, where the finding merely recites that proposed higher density residential development will comply with the density requirements in the code, but without explaining how density will maintain the proper relationship between public facilities and population distribution. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A finding of consistency with a comprehensive plan provision requiring that future development shall respect the character of the existing area is inadequate, where the finding simply states that the general character of the area is "residential," without evaluating whether placing higher density residential

development in the middle of an area zoned and developed with low density residential development is consistent with respecting the character of the existing area. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a zone change standard requires a finding that adequate transportation networks to support the use are presently provided or planned to be provided concurrently with development of the property, a finding that this standard is met because future development will be subject to subdivision and site design review is inadequate to establish that the subject site has required secondary access or that such access is planned to be provided concurrently with development of the property. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A petitioner fails to establish that findings that a zone change is justified based on evidence of change in the community, where the findings identify two changes in the community that justify the zone change, but the petitioner challenges only the adequacy and evidentiary support for the findings regarding one of the identified changes. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Findings are inadequate to establish that rezoning land adjacent to an estuary to allow for urban residential development is consistent with Goal 16, where federal agencies testified that development allowed under the rezone would adversely affect estuarine resources, but the findings do not address that testimony, or evaluate impacts of development on the estuary as Goal 16, Implementation Requirement 1 requires. *Oregon Coast Alliance v. City of Brookings*, 71 Or LUBA 14 (2015).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A zone change applicant's voluntary representations regarding the density and number of parking spaces that could be constructed under the new zoning are not binding on that applicant's subsequent design review application that proposes a higher density and fewer parking spaces, where nothing in the zone change criteria required submittal or approval of development plans, and the hearings officer did not consider or rely upon the applicant's voluntary representations in approving the zone change. *Sellwood-Moreland Improvement League v. City of Portland*, 68 Or LUBA 213 (2013).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. That the county initially adopted a problematic interpretation of the criteria for applying a limited use overlay zone to limit uses allowed on land for which a reasons exception is taken does not provide a basis for reversal or remand, where the county adopted an alternative interpretation that is consistent with the text of the zone change criteria. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Under a zone change criterion that requires a finding that the proposed base zone is "best suited" to accommodate the proposed use, in order to apply a limited use overlay zone to limit uses of the property to uses justified in a reasons exception, the fact that other base zones would also accommodate the proposed use does not undermine the county's finding that the proposed tourist commercial zone is best suited, where there is no evidence that the other zones are better suited than the tourist commercial zone, and the reasons exception was expressly justified based on tourist commercial

uses and application of the tourist commercial base zone. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. LUBA will affirm a governing body's interpretation of a code standard allowing imposition of a limited use overlay zone if "it is required to limit the uses permitted in the proposed zone" by the reasons exception rule at OAR chapter 660, division 4, to employ the overlay zone to limit uses to ensure consistency with Statewide Planning Goal 12 (Transportation), and the need to take an exception to Goal 12, even though the county took reasons exceptions only to other statewide planning goals, where the county's interpretation is not inconsistent with the express language, purpose or underlying policy of the code standard. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A zone change application is not "an application for development of needed housing" within the meaning of ORS 197.307(3)(b) and is not subject to the prohibition in ORS 197.307(6) (2009) against applying criteria that are not "clear and objective" to such applications. *EEC Holdings LLC v. City of Eugene*, 65 Or LUBA 179 (2012).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A governing body's interpretation of a code provision allowing rezoning when "zoning previously adopted for the area was in error" to focus on the parcel to be rezoned rather than the surrounding area is consistent with the text of the provision, and will be affirmed. *O'Brien v. Lincoln County*, 65 Or LUBA 286 (2012).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A petitioner's challenge to alternative findings that a parcel being rezoned was legally created does not provide a basis for reversal or remand, where the petitioner fails to challenge the county's primary finding that the rezoning standards do not require a finding that the parcel was legally created. *O'Brien v. Lincoln County*, 65 Or LUBA 286 (2012).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a local government adopts a new zone in one legislative decision and then applies that new zone to property in a separate legislative decision, which is then appealed to LUBA, a challenge that the new zone is contrary to the statewide planning goals may be precluded by acknowledgment of the first decision. However, acknowledgment does not insulate the new zone from a facial challenge on statutory or constitutional grounds, advanced in the appeal of the second legislative decision that for the first time applies the new zone to specific properties. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. When zone change approval standards require that the zone change be compatible with *potential* adverse impacts and that there be adequate public services to serve *possible* uses, the local government must consider the potential or likely uses allowed by the zone change in determining whether those approval standards are satisfied. The local government may not defer such considerations until development is proposed. *Santiam Water Control District v. City of Stayton*, 54 Or LUBA 553 (2007).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Under a local code provision that requires evaluation of the traffic impacts caused by "development of the property" being rezoned, in rezoning land to allow for a new aggregate mine the local government is not required to evaluate the cumulative traffic impacts of the new mine along with other mines the applicant operates. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a zoning map amendment criterion requires the applicant to demonstrate that the uses allowed in the new zone would not "materially and/or adversely affect the character of the neighborhood," selection of too small an area for analysis could frustrate the purpose of the criterion. However, where petitioners do not show that the area selected was too small and the city's findings explain that the residential to commercial rezoning is in an area that is already a mixed commercial and residential area, petitioners do not demonstrate a basis for remand. *Cornelius First v. City of Cornelius*, 52 Or LUBA 486 (2006).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A standard requiring a finding that the uses allowed by the proposed zoning "can be served through the orderly extension of key urban facilities and services" does not require evaluation of all theoretically possible uses allowed in the new zone. A city does not err in interpreting such a standard as being satisfied by evidence that uses likely to be developed under the new zone, given the property's size and other constraints, can be served by key urban facilities and services. *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A city does not err in assuming that two developed lots that are part of a five-lot tract will not be redeveloped when rezoned, for purposes of a rezoning standard requiring that uses allowed in the proposed zoning can be served by urban services, including transportation facilities, where the applicant does not propose redevelopment and the code requires a similar evaluation when property is redeveloped. *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A rezoning criterion requiring that the site be "suitable" for the proposed medium-density residential zone requires an assumption that the property will develop with the multi-family dwelling units allowed in the proposed zone, but does not necessarily require the local government to speculate as to the particular quality or density of actual development. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. The predicate for correcting the zoning map is a mismatch between the map and one or more underlying ordinances that authorize zoning map changes. That process cannot be used to change the zoning map designation to reflect amendments that no ordinance has ever authorized. *Sullivan v. Polk County*, 49 Or LUBA 543 (2005).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Remand is necessary to reconsider what plan policies apply to a proposal to rezone property from one commercial zone to another, when the findings are predicated on an erroneous assumption that the property is plan

designated medium density residential rather than commercial. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Given the ubiquity of land use regulations governing contemporary zoning decisions, it is doubtful whether the "spot zoning" standard described in *Smith v. Washington County*, 241 Or 380, 406 P2d 545 (1965), continues to have independent applicability. Whether a rezoning decision constitutes arbitrary or spot zoning depends on whether the decision is made in derogation of established criteria or made without criteria. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A city's refusal to interpret a zoning ordinance standard that requires that requested rezoning must be the "best suited for the specific site, based on specific policies of the * * * [c]omprehensive [p]lan" to require that the applicant demonstrate a current unmet need for the uses allowed in the requested zone is not reversible under ORS 197.829(1), where no plan policy is worded to impose that requirement. *Dimone v. City of Hillsboro*, 44 Or LUBA 698 (2003).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Although a city might reasonably interpret a rezoning criterion that requires application of the "best suited" zone to require that an applicant demonstrate a need for the uses that would be allowed under the requested zoning, a city might also reasonably reject that interpretation and find that current land use needs are not relevant to its decision regarding which zoning district is "best suited." *Dimone v. City of Hillsboro*, 44 Or LUBA 698 (2003).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A county is within its discretion under ORS 197.829(1) in interpreting a code provision requiring a showing of "public need" for "rezonings," to apply only to map amendments to a base zone, and not to map amendments to an overlay zone. *Doty v. Jackson County*, 43 Or LUBA 34 (2002).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A local government is within its discretion under ORS 197.829(1) to interpret a standard requiring that "other lands in the county" be unavailable for the uses allowed under proposed rezoning to be satisfied by examining lands in the vicinity of the subject property, and not to require consideration of all lands throughout the entire county. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 97 (2002).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Although market demand for rural residential housing is not sufficient to establish "need" for such housing for purposes of taking an exception to statewide planning goals governing rural resource lands, there is no reason why market demand cannot suffice to establish "need" for rural residential housing for purposes of a local rezoning standard, nor any reason why such need must be evaluated against the county's Goal 10 inventory. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 97 (2002).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. An application to change a unified comprehensive plan and zoning map does not in itself require a "discretionary

approval of a proposed development of land" and is therefore not an application for a "permit" within the meaning of ORS 215.402(4). *Rutigliano v. Jackson County*, 42 Or LUBA 565 (2002).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A local zone change criterion that requires a showing that "there is an existing, demonstrable need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area, the existing market demand which such uses will satisfy, and the availability and location of other lands so zoned and their suitability for the use allowed by the zone" is not satisfied by determining that there is a lack of residentially zoned land within a five-mile study area, where the study did not include consideration of the "importance of [the use] to the citizenry or the economy of the area," and did not consider the suitability of other appropriately zoned land for the use allowed by the zone. *DLCD v. Yamhill County*, 42 Or LUBA 126 (2002).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A city is within its discretion under ORS 197.829(1) in interpreting code language providing for "certain limited commercial" uses within a Residential Transitional zone as not limiting commercial uses to those listed in the Limited Commercial zone. *Chilla v. City of North Bend*, 41 Or LUBA 539 (2002).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a zone change criterion requires that an area have a "historical commitment to commercial uses" and the county governing body finds that criterion is met by a property that has been vacant for 11 years but was used for commercial purposes for the prior 65 years, LUBA will defer to that interpretation under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a zoning map is part of the city's zoning ordinance, an amendment of the zoning map constitutes a land use regulation amendment, within the meaning of OAR 660-012-0060, and must meet the requirements of OAR 660-012-0060(1) if the zoning map amendment will significantly affect a transportation facility. *Adams v. City of Medford*, 39 Or LUBA 464 (2001).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a city's finding that a zoning map amendment will not significantly affect transportation facilities is based on a lengthy transportation impact study, and petitioner attacks that finding based on other evidence of questionable relevance without developing any arguments challenging the transportation impact study, petitioner provides no basis for reversal or remand. *Adams v. City of Medford*, 39 Or LUBA 464 (2001).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A city may demonstrate compliance with a zoning change criterion that requires that the identified public need will be best served by rezoning the proposed site by showing that other sites, individually or as a group, are inferior to the proposed site. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Remand is appropriate where the county's decision rezones 10 acres of a 121-acre farm/forest parcel to allow the landowner to site a nonresource dwelling, without explaining why the rezone is consistent with

a code provision prohibiting rezoning that affords "special privileges to an individual property owner not available to the general public." *McLane v. Klamath County*, 37 Or LUBA 888 (2000).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. In determining whether rezoning of land from multi-family to single-family residential uses is consistent with Goal 10 and the city's obligation to provide for multi-family dwellings, the relevant inquiry is not limited by the amount of land designated for multi-family residential uses. The city can take into account multi-family dwellings that have been approved in other zones in determining whether the proposed rezoning is consistent with the city's obligation to provide a sufficient number of multi-family dwellings. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where the notice of hearing contained an error in identifying the zoning map designation being requested, the error provides no basis for reversal or remand where the error had no effect on the approval standards the zone change request was subject to and therefore resulted in no prejudice to petitioner. *Sanders v. Yamhill County*, 34 Or LUBA 69 (1998).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. In approving comprehensive plan and zoning map amendments, the county's findings must demonstrate that Goal 14 is satisfied without reliance on past practices or on plan and code provisions that are subject to revision during periodic review. *Brown v. Jefferson County*, 33 Or LUBA 418 (1997).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. In approving a zone map amendment, the county cannot support a required finding of adequate water on the subject parcel solely by relying on evidence of water on nearby parcels, absent an explanation how that evidence leads to the conclusion that the subject parcel has adequate water, or an interpretation of the county code such that it requires only a showing of adequate water in the area. *Doob v. Josephine County*, 32 Or LUBA 364 (1997).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. The statewide goals apply independently to a county's zoning amendment where the comprehensive plan specifies that zone changes must comply with applicable statewide goals. *Doob v. Josephine County*, 32 Or LUBA 364 (1997).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where the county attempts to apply a rural residential zoning density in an irrevocably committed exception area, a conclusory finding that redesignation of the subject parcel will not cause adjacent resource lands to satisfy working paper guidelines for irrevocably committed exceptions does not substitute for the actual analysis required under OAR 660-04-018(2)(b)(B) regarding the potential commitment of adjacent resource lands to nonresource use. *Johnson v. Lane County*, 31 Or LUBA 454 (1996).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. That an existing conditional use asphalt batch plant could be a permitted use under a county's mineral and aggregate overlay zone does not require that the county incorporate the conditional use into a decision approving application of the overlay zone to an area including the existing conditional use or that

the county re-approve the conditional use as part of the decision applying the overlay zone. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where an ordinance changing the plan and zone designations of the subject property provides the property will revert to its former designations if a final order denying a conditional use permit (CUP) for a mobile home park is issued, the local governing body acts within its interpretive discretion in deciding the contingency is not met when LUBA remands a local government decision approving a CUP for a mobile home park and the local government does not take further action on that application. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. By definition, all land outside an acknowledged UGB and not the subject of an exception to Goal 14 is "rural" land. When amending its acknowledged comprehensive plan and zone designations for such land, a local government must demonstrate that the new plan and zone designations comply with Goal 14 or adopt an exception to Goal 14. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. In adopting a quasi-judicial comprehensive plan and land use regulation amendment, a local government is obligated either to demonstrate compliance with the Transportation Planning Rule (TPR) or, alternatively, establish that the TPR does not apply. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where respondents do not identify specific provisions in the applicable comprehensive plan, which they contend provide the basis for challenged zone changes, under ORS 197.825(5)(b) LUBA is required to reverse or remand the zone changes if they do not comply with applicable provisions of the Statewide Planning Goals or their implementing rules. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. When adopting post-acknowledgment plan and zone map amendments affecting residentially designated land within an urban growth boundary, a local government must demonstrate that it continues to satisfy its Goal 10 obligation to maintain an adequate inventory of buildable lands. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A local government decision changing the comprehensive plan and zone designations of land with identified Goal 5 resources, must identify conflicting uses potentially allowable under the proposed new designations. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where the comprehensive plan requires a zone change application to demonstrate the chosen site is superior or equal to alternative sites, findings that simply state no one identified alternative sites during the local proceedings are inadequate to establish compliance with the plan standard. *Neuman v. City of Albany*, 28 Or LUBA 337 (1994).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a local government wishes to defer a determination of compliance with a code zone change standard requiring that storm sewers can accommodate potential development, it must, at a minimum, identify in the challenged decision feasible engineering solutions to accommodate storm water runoff and require that such solutions be in place prior to development. *Neuman v. City of Albany*, 28 Or LUBA 337 (1994).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. In determining whether land subject to a proposed comprehensive plan and zone map change is composed of predominantly Class I-IV soils, as required by OAR 660-33-020(1)(a)(A), it is permissible for a local government to examine only the acreage under consideration. *DLCD v. Curry County*, 28 Or LUBA 205 (1994).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. In determining whether land subject to a proposed comprehensive plan and zone map change is (1) suitable for farm use, (2) necessary to permit farm use on other agricultural land, or (3) intermingled with lands of Class I-IV soils; as required by OAR 660-33-020(1)(a)(B) to (C) and (b); a local government's analysis must include all property in common ownership with the subject land. *DLCD v. Curry County*, 28 Or LUBA 205 (1994).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a county proposes to change the zoning of agricultural land designated Farm/Forest on its comprehensive plan map, a standard that "the purpose of the Comprehensive Plan and Zoning Ordinance will be carried out by approving the proposal" requires the county to explain how the proposed zone change carries out the purpose of the Farm/Forest plan designation and the plan agricultural goals. *DLCD v. Polk County*, 27 Or LUBA 345 (1994).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where property is the subject of a concurrent comprehensive plan map amendment and zone change, the zone change is made under an unacknowledged plan amendment and must comply with those statewide planning goals applicable to the unacknowledged plan amendment. ORS 197.175(2)(e) and 197.625(3)(b). *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A comprehensive plan policy governing "establish[ment] and change" of an urban growth boundary is not applicable to a local government decision amending the plan and zoning map designations of property that is entirely within the urban growth boundary. *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A local government can show an amendment to its acknowledged comprehensive plan and zoning maps complies with Goal 12 (Transportation) by establishing either (1) there is a safe and adequate transportation system to serve development under the proposed map designations, or (2) development of the property under the proposed designations will not create greater or different transportation demands and impacts than development under the existing, acknowledged designations. *ODOT v. Clackamas County*, 27 Or LUBA 141 (1994).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. ORS 197.752(1) imposes a general planning obligation on local governments; it is not an approval standard directly applicable to rezoning or annexation decisions. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where nothing requires a local government to determine whether the subject property is a "legal lot" as a prerequisite to approving a plan amendment and zone change, it is unnecessary for the local government to determine whether the subject property constitutes a lawfully created parcel. *Makepeace v. Josephine County*, 25 Or LUBA 370 (1993).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a local government approves a zone change to protect a Goal 5 resource site, compliance with the Goal 5 planning process is sufficient to establish satisfaction of a local code requirement that a zone change "shall not be contrary to the public interest." *Gonzalez v. Lane County*, 24 Or LUBA 251 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a comprehensive plan policy provides that a change from a 10-acre minimum zone to a five-acre minimum zone requires that "parcels are generally five acres," a county's interpretation of this policy to require consideration of the entire 10-acre minimum zoned area that includes the subject property is not "clearly contrary" to the terms of, or "inconsistent with the express language" or "apparent purpose and policy" of, the plan policy and must be upheld. *Thatcher v. Clackamas County*, 24 Or LUBA 207 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. In applying a zone change criterion requiring that there be an error in "the zoning adopted for the area," the appropriate focus is on the time and circumstances under which the existing zoning of the area was applied. *Recht v. City of Depoe Bay*, 24 Or LUBA 129 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. That different zoning may provide additional flexibility in developing property provides no basis for finding there was an error in applying the existing zoning to the property. *Recht v. City of Depoe Bay*, 24 Or LUBA 129 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a petitioner alleges a zoning map amendment violates plan policies and an LCDC administrative rule, a local government is obligated to adopt findings explaining either why the plan policies and rule do not apply to the disputed zone change or why the zone change is consistent with the plan policies and rule. *Recht v. City of Depoe Bay*, 24 Or LUBA 129 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. If property is not included in the Goal 5 inventory of the acknowledged comprehensive plan, and a proposed zone change does not affect that inventory, a local government is not required to consider whether the property should be included on that inventory. *Larson v. Wallowa County*, 23 Or LUBA 527 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A local zoning map amendment standard requiring that there be a "need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area," requires that the local government adequately identify and justify the area selected for the required analysis. *Friedman v. Yamhill County*, 23 Or LUBA 306 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A local zoning map amendment standard requiring that there be a "need for the particular uses allowed by the requested zone," is not satisfied by findings that there is a need for rural housing on 2.5-acre lots where there is no attempt to explain why the rural housing need cannot be satisfied on vacant rural land zoned to allow rural residential development with one and five-acre minimum lot sizes. *Friedman v. Yamhill County*, 23 Or LUBA 306 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A local zoning map amendment standard requiring that there be a "need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area," is not met where the findings simply assume the importance of rural housing to the citizenry or economy of the area. *Friedman v. Yamhill County*, 23 Or LUBA 306 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A local zoning map amendment standard requiring demonstration of a need to rezone property for rural residential development is not satisfied where the record shows a significant amount of vacant property currently zoned to allow such rural residential development. The local government may not assume such land is not "available" for rural residential development simply because it is not currently listed for sale. *Friedman v. Yamhill County*, 23 Or LUBA 306 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a code zone change approval standard requires there be a "demand" for the "uses listed in the proposed zone at the proposed location," and the code also requires consideration of "the public interest" in allowing the zone change and the "availability of other appropriate[ly] zoned property," the desire of an individual property owner for a particular use on a particular parcel is not sufficient, in and of itself, to constitute a "demand." *DLCD v. Clatsop County*, 23 Or LUBA 173 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A proposal to rezone a parcel of land outside of an urban growth boundary from an exclusive farm use zone to a medium density residential zone requires that the local government demonstrate compliance with Goals 3, 5, 6, 11 and 12, or that an exception to those goals be adopted. *Caine v. Tillamook County*, 22 Or LUBA 687 (1992).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A local code provision establishing general approval criteria for nonlegislative zone changes does not apply to changes in overlay zone boundaries which are controlled by comprehensive plan inventory maps identifying the location and physical characteristics of certain types of resource areas. *Gray v. Clatsop County*, 22 Or LUBA 270 (1991).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Amendments of acknowledged comprehensive plans and land use regulations must be consistent with controlling provisions of the acknowledged comprehensive plan. *DLCD v. Polk County*, 21 Or LUBA 463 (1991).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a comprehensive plan provides two agricultural plan map designations, which are applied based on characteristics of the agricultural lands, but includes no standards for determining which designation to apply to properties with some of the characteristics of each, a decision to change the plan map designation from one to the other does not violate the plan. *DLCD v. Polk County*, 21 Or LUBA 463 (1991).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. There is no rule of general applicability to local government plan/zone change proceedings which requires a local government to consider the most intensive uses possible under the new plan/zone designation when approving a plan/zone change. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. While a local government cannot rely upon evidence of changed circumstances since adoption of its comprehensive plan to justify *noncompliance* with plan approval criteria for plan and zone map amendments, it may be able to rely upon evidence of changed circumstances as a basis for finding *compliance* with applicable plan and zone map amendment approval criteria. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. When rezoning property, possible impacts of other more intensive uses permissible under the proposed zone may have to be considered where the proposed use is not among the more intensive uses allowed in the zone or there is little assurance the property will be used for the proposed use or a comparably intensive use. *Wethers v. City of Portland*, 21 Or LUBA 78 (1991).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Comprehensive plan goals and policies that are worded as broad standards establishing policy direction for the local government in its comprehensive planning efforts are not approval standards for quasi-judicial zone changes. *Angel v. City of Portland*, 21 Or LUBA 1 (1991).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. There is no rule of general applicability that in all local government plan/zone change proceedings, the impacts of the most intensive uses allowed under the new designation must be considered. *Shirley v. Washington County*, 20 Or LUBA 127 (1990).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A comprehensive plan statement that separation of use types along topographic, natural vegetation, and other features is "desirable" does not establish an approval criterion applicable to plan and zone map amendments. *Bridges v. City of Salem*, 19 Or LUBA 373 (1990).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where the subject property qualifies as forestland under provisions of the county's acknowledged comprehensive plan, and petitioner does not explain why the acknowledged plan standards do not control, an exception to Statewide Planning Goal 4 is required before the subject property can be redesignated and rezoned for nonforest uses. *Chambers v. Clackamas County*, 19 Or LUBA 355 (1990).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. Where a local government uses a two-stage approval process and determines whether a proposed zoning map amendment complies with applicable goal, plan and land use regulations in the first stage, petitioners may not fail to appeal the first stage approval decision and later assert goal, plan and land use regulation violations in a challenge of the local government's decision granting approval of the second stage. *Headley v. Jackson County*, 19 Or LUBA 109 (1990).

30.2.5 Zoning Ordinances – Amendment – Map Amendment: Standards. A "public need" criterion that requires determining whether additional land for a proposed destination resort (DR) is required "in consideration of that amount already provided by the current zoning district within the area to be served" only requires consideration of other land already designated DR, not other areas which are eligible for DR siting. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

30.3 Zoning Ordinance – Applicability. Where a county suspends operation of a verified nonconforming use based on notice of noncompliance with DEQ rules, and subsequently lifts that suspension based on notice that corrective actions have been taken, the county is not required to apply land use regulations relating to the discontinuation of nonconforming uses where those land use regulations apply only in the context of an application for development of a nonconforming use or a code enforcement proceeding. Because the county is not required to apply land use regulations, lifting the suspension is not a "land use decision" for purposes of ORS 197.015(10)(a)(A) and LUBA therefore lacks jurisdiction under ORS 197.825(1). *Campbell v. Columbia County*, 79 Or LUBA 56 (2019).

30.3 Zoning Ordinances – Applicability. A zone verification is a limited tool and only those issues actually addressed in the zone verification decision are protected from collateral attack. *Richardi v. City of Eugene*, 78 Or LUBA 299 (2018).

30.3 Zoning Ordinances – Applicability. When a city approves an application, nothing requires the city or intervenor to rezone the property in connection with the application, when the current zoning is inconsistent with the comprehensive plan, and the current zoning does not allow for more intensive development than contemplated in the comprehensive plan. *Richardi v. City of Eugene*, 78 Or LUBA 299 (2018).

30.3 Zoning Ordinances – Applicability. When local code sets out independent grounds for granting a variance, and when only one of three rezoning criteria must be met in order to grant a rezoning, and the city adequately demonstrated that one criterion was satisfied, LUBA need not consider arguments relating to the other two criteria. *American Tower Corp v. City of Tualatin*, 78 Or LUBA 350 (2018).

30.3 Zoning Ordinances – Applicability. Where it is not clear whether the enacting body intended comprehensive plan or land use regulation provisions to be mandatory approval criteria, LUBA examines the wording and context of the particular provisions to determine whether they must be applied as mandatory approval criteria. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

30.3 Zoning Ordinances – Applicability. A list of special characteristics of a historic district are not mandatory approval criteria where they are not worded as mandatory requirements for future housing proposals. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

30.3 Zoning Ordinances – Applicability. Where it is unclear whether historic guidelines operate as mandatory approval criteria, but the guidelines include a column identified as "Principle – Good Example" and a column identified as "Not Allowed," and in each column there is a list of activities and features, the activities and features in the "Not Allowed" column are prohibited. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

30.3 Zoning Ordinances – Applicability. ORS 215.427(3)(a) generally requires that approval or denial of a permit application be based on "standards and criteria" that were in effect when the application is first submitted. Expanding a sewer improvement district boundary so that a ban against connecting properties that are not within the sewer improvement district to the public sewer

system no longer bars connection of a dwelling on the property to the public sewer system, as it did when the permit application was first submitted, does not create a new standard or criterion after the application was submitted. In that circumstance, ORS 215.427(3)(a) does not preclude the city from requiring that the dwelling connect to the public sewer system, even though it could not have done so at the time the application was submitted. *Evans v. City of Bandon*, 74 Or LUBA 418 (2016).

30.3 Zoning Ordinances – Applicability. Where pursuant to ORS 197.772(3) a local government removes property from an inventory of historic resources at the request of the property owner, code provisions implementing Goal 5 that would otherwise require evaluation of whether removal is consistent with Goal 5 do not apply. Removal under ORS 197.772(3) and removal under Goal 5 and implementing regulations are alternatives. *Lake Oswego Preservation Society v. City of Lake Oswego*, 70 Or LUBA 103 (2014).

30.3 Zoning Ordinances – Applicability. Absent wording to the contrary, generally worded zoning district purpose statements are not mandatory approval criteria for permits or other site-specific land use decisions. A zoning district purpose statement that development in the zone "is expected to be suitable for locations adjacent to residential neighborhoods" is not a mandatory approval criteria for permits or other site specific land use decisions. *Mariposa Townhouses v. City of Medford*, 68 Or LUBA 479 (2013).

30.3 Zoning Ordinances – Applicability. The zoning designation of property that is shown on the official zoning map is the valid zoning designation for the property. *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

30.3 Zoning Ordinances – Applicability. Where a property is to be developed with a commercial or industrial use, the internal driveway on that property that connects the commercial or industrial buildings to the nearest public right-of-way is properly viewed as part of the commercial or industrial use, whether that driveway is labeled as "accessory" to the business or an integral part of the use itself. *Wilson v. Washington County*, 63 Or LUBA 314 (2011).

30.3 Zoning Ordinances – Applicability. Where the local government concedes that a local code provision setting forth the purpose for a particular zoning classification is aspirational, that purpose statement is not an approval criterion that can provide a basis for denial of an application. *Rudell v. City of Bandon*, 62 Or LUBA 279 (2010).

30.3 Zoning Ordinances – Applicability. A code purpose statement is not a mandatory planning directive where nothing in the wording or the context of the purpose statement suggests that it is. *SEIU v. City of Happy Valley*, 58 Or LUBA 261 (2009).

30.3 Zoning Ordinances – Applicability. Where the section of the zoning ordinance governing adjustments includes a purpose statement followed by adjustment approval criteria and a separate zoning section specifically states that the specified approval criteria for land use reviews establish "the bounds for the issues that must be addressed by the applicant," a city is not obligated to adopt findings to explain why a requested adjustment is consistent with the adjustment chapter purpose statement. *Pearman v. City of Portland*, 56 Or LUBA 570 (2008).

30.3 Zoning Ordinances – Applicability. ORS 215.750 does not prohibit a local government from applying a local code provision requiring an applicant for a forest template dwelling to demonstrate that the dwelling is "necessary for and accessory to" the forest use. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

30.3 Zoning Ordinances – Applicability. LUBA will not defer to a local government's interpretation of the phrase "necessary for and accessory to" forest management as meaning "convenient and efficient" to forest management, where such an interpretation is contrary to the plain meaning of the word "necessary," the express language of the provision at issue, and other language in the provision. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

30.3 Zoning Ordinances – Applicability. A county's decision to accept a deed for a road easement is a land use decision, where the county has adopted procedures as part of its subdivision regulations that require the county to apply standards in those regulations and its zoning ordinance in accepting land for use as county roads. *Niederhof v. Deschutes County*, 48 Or LUBA 626 (2004).

30.3 Zoning Ordinances – Applicability. Where the city's new acknowledged comprehensive plan includes a provision stating that existing development zones continue to apply until the new code is acknowledged, it is within the city's discretion under ORS 197.829(1) to interpret that plan provision to resolve any conflicts between the old zoning code and new comprehensive plan designations. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

30.3 Zoning Ordinances – Applicability. Where an intergovernmental agreement calls for a county to incorporate into its plan and code the city's ordinances and plan provisions that address lands within the UGB, but the county never does so, the county did not err in refusing to treat the city's provisions as applicable approval criteria. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

30.3 Zoning Ordinances – Applicability. Where a county has not yet adopted land division regulations that apply to minor partitions, a minor partition nevertheless requires prior county approval of a variance under the zoning ordinance where one of the parcels created by the minor partition does not comply with the minimum parcel size that is required under the zoning ordinance. *DeBoer v. Jackson County*, 46 Or LUBA 24 (2003).

30.3 Zoning Ordinances – Applicability. Where a local government has adopted no local highway design safety standards, it commits no error by applying American Association of State Highway and Transportation Official standards to reject a subdivision opponent's intersection site distance concerns, notwithstanding that it has not adopted those standards and may have been laboring under the incorrect assumption that it had adopted those standards. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

30.3 Zoning Ordinances – Applicability. Under a standard requiring that a proposed subdivision not create a "significant hazard to life or property," a city may require evidence that development of property subject to flooding not present a significant flood hazard. That the subject is not mapped as a floodway on the city's hazard maps and therefore not subject to the city's flood hazard

regulations does not mean that the city cannot address flood hazards under other applicable criteria. *Starks Landing, Inc. v. City of Rivergrove*, 43 Or LUBA 237 (2002).

30.3 Zoning Ordinances – Applicability. Where a city cannot find its acknowledged shoreland land use regulations, it may not apply the county's shoreland land use regulations to approve a request to place fill in the shoreland; it must apply Goal 17 (Coastal Shorelands) directly. *Willhoft v. City of Gold Beach*, 39 Or LUBA 353 (2001).

30.3 Zoning Ordinances – Applicability. An access road to a winery is an accessory use to the winery. When the zoning for the location of the proposed access road does not allow wineries, the access road cannot be established as an accessory use on that part of the property. *Roth v. Jackson County*, 38 Or LUBA 894 (2000).

30.3 Zoning Ordinances – Applicability. Although ORS 215.296(10) allows a local government to impose additional standards on a conditional use permit for aggregate mining, it does not apply to a comprehensive plan amendment designating a significant resource site and establishing a surface mining overlay pursuant to the Goal 5 rules. *Stockwell v. Benton County*, 38 Or LUBA 621 (2000).

30.3 Zoning Ordinances – Applicability. The conditional use approval criteria from local government ordinances do not apply to post-acknowledgement plan amendments pursuant to the Goal 5 rules. *Stockwell v. Benton County*, 38 Or LUBA 621 (2000).

30.3 Zoning Ordinances – Applicability. New land use regulations can only become acknowledged under ORS 197.625(2) if the ordinance adopting those new land use regulations is "affirmed on appeal under ORS 197.830 to 197.855." Where LUBA remands the adopting ordinance because a portion of the new land use regulations is found to be defective, without specifically affirming the remaining portions of those regulations, no part of the ordinance is considered acknowledged under ORS 197.625. *Western States v. Multnomah County*, 37 Or LUBA 835 (2000).

30.3 Zoning Ordinances – Applicability. Where a code provision authorizing permit revocation is expressly limited to Type II discretionary permits, the code provision does not authorize revocation of Type I ministerial permits. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

30.3 Zoning Ordinances – Applicability. A code provision authorizing the county to institute "appropriate proceedings to prevent, enjoin * * * abate, or remove the unlawful location, construction, maintenance, repair, alteration or use" of unlawfully constructed structures is sufficient to authorize the county to institute proceedings to revoke a ministerial zoning permit where the structure actually constructed under the zoning permit is inconsistent with the site plan that was approved by the zoning permit. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

30.3 Zoning Ordinances – Applicability. Because ORS 368.361(3) imposes on the county the obligation to conduct proceedings and make findings in vacating a county right-of-way within city limits, the county and not the city has the obligation of applying any provisions of the city's

comprehensive plan or land use ordinance that the city would apply, were the city conducting the vacation. *Oregon Shores Cons. Coalition v. Lincoln County*, 36 Or LUBA 288 (1999).

30.3 Zoning Ordinances – Applicability. ORS 197.175 requires that land use decisions comply with acknowledged comprehensive plans. When approval criteria included in acknowledged land use regulations entirely displace the comprehensive plan as relevant approval criteria, the comprehensive plan must make that intent clear. *Durig v. Washington County*, 35 Or LUBA 196 (1998).

30.3 Zoning Ordinances – Applicability. A code requirement that a street connection need not be required if certain circumstances exist does not obligate the local government to expressly find that such circumstances do not exist before requiring the street connection. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998).

30.3 Zoning Ordinances – Applicability. Where there is no requirement to determine whether property is surplus for purposes of rezoning, a local government does not violate any procedural rights by not considering the surplus status of the property in its decision to rezone the property. *St. Johns Neighborhood v. City of Portland*, 34 Or LUBA 46 (1998).

30.3 Zoning Ordinances – Applicability. Where a local code requires that manufactured home parks "which contain land within the floodplain district" be subject to a "Type III" review, Type III review is required to approve a proposed manufactured home park, notwithstanding that no "development" is proposed for the portion of the park located in the floodplain district. *Johnston v. City of Albany*, 34 Or LUBA 32 (1998).

30.3 Zoning Ordinances – Applicability. A "public need" approval standard contained in a resolution attached as an appendix to the acknowledged zoning ordinance was not repealed by implication and must be applied to a request for permit approval. *Port Dock Four, Inc. v. City of Newport*, 33 Or LUBA 613 (1997).

30.3 Zoning Ordinances – Applicability. When a local governing body determines that a condition imposed in connection with an earlier land use decision either has or has not been complied with, but does not base its determination on the interpretation and application of land use regulations, the determination is not a land use decision over which LUBA has jurisdiction. *Mar-Dene Corp. v. City of Woodburn*, 33 Or LUBA 245 (1997).

30.3 Zoning Ordinances – Applicability. A county that wishes to limit lot-of-record dwellings to protect agricultural lands cannot rely on policies and regulations implementing ORS 215.283(3)(d), which protects agricultural land, but must legislatively adopt new policies and regulations pursuant to ORS 215.705(5). However, policies and regulations with an apparent purpose other than to protect agricultural land are not superseded by ORS 215.705. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

30.3 Zoning Ordinances – Applicability. Where the city's zoning code requires a structure or use be lawfully existing at the time the ordinance making it nonconforming was adopted, the city may not find an existing use to be nonconforming until it determines, based on substantial

evidence, that the use was lawfully existing at the time the ordinance making it nonconforming was adopted. *Miller v. City of Joseph*, 31 Or LUBA 472 (1996).

30.3 Zoning Ordinances – Applicability. The city's affirmation of the status of an existing use as a nonconforming use requires the application of the city's zoning ordinance and is therefore a land use decision over which LUBA has jurisdiction. *Miller v. City of Joseph*, 31 Or LUBA 472 (1996).

30.3 Zoning Ordinances – Applicability. The city's affirmation of the status of an existing use as a nonconforming use requires the application of the city's zoning ordinance and is therefore a land use decision over which LUBA has jurisdiction. *Smith v. City of Phoenix*, 31 Or LUBA 358 (1996).

30.3 Zoning Ordinances – Applicability. Where the city's zoning code requires a structure or use be lawfully existing at the time the ordinance making it nonconforming was adopted, the city may not find an existing use to be nonconforming until it determines, based on substantial evidence, that the use was lawfully existing at the time the ordinance making it nonconforming was adopted. *Smith v. City of Phoenix*, 31 Or LUBA 358 (1996).

30.3 Zoning Ordinances – Applicability. Under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994), and *J.C. Reeves Corp. v. Clackamas County*, 131 Or App 615, 887 P2d 360 (1994), the city must show a right-of-way dedication is roughly proportional to the impact of a proposed development. To require the dedication when the city finds there will be no impact is unconstitutional. *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

30.3 Zoning Ordinances – Applicability. Where a local government has a combined comprehensive plan and zoning map, there can be no *Baker* comprehensive plan/zoning map conflict. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

30.3 Zoning Ordinances – Applicability. Where a local government's acknowledged comprehensive plan and land use regulations apply a freshwater wetland designation to certain property, the local government's application of regulations governing freshwater wetlands to development of the subject property is not error, even though comprehensive plan inventory documents suggest the property is in fact a saltwater marsh. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

30.3 Zoning Ordinances – Applicability. For a decision to concern the application of a land use regulation, as provided in ORS 197.015(10)(a)(A)(iii), it is not enough that the decision touch on some aspect of a land use regulation; the land use regulation must contain provisions that are standards or criteria for making the challenged decision. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

30.3 Zoning Ordinances – Applicability. A county can establish procedures for determinations concerning nonconforming uses as part of its zoning ordinance and, if it does so, can require parties to seek a determination regarding the existence or expansion of a nonconforming use through such

zoning ordinance procedures, rather than allowing such issues to be initially determined in the county's code enforcement process. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

30.3 Zoning Ordinances – Applicability. Regardless of whether a goal exception for a proposed bridge and connector road is properly adopted, the zoning applied to the site of the proposed bridge and connector road must allow those uses. *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

30.3 Zoning Ordinances – Applicability. Where a comprehensive plan or land use regulation does not explicitly designate which portions of the plan or land use regulation operate as mandatory land use approval criteria, a case-by-case inquiry, examining the wording and context of the particular plan and land use regulation provisions, is required to identify mandatory approval standards. *Eskandarian v. City of Portland*, 26 Or LUBA 98 (1993).

30.3 Zoning Ordinances – Applicability. Where a challenged decision grants subdivision approval, petitioner's challenge to a finding that the property is located in two residential zones provides no basis for reversal or remand, where petitioner makes no attempt to explain why the zoning of the property is critical to the decision and both zones impose the same minimum lot area. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

30.3 Zoning Ordinances – Applicability. The use of land for a recreational parachuting center and for parachute landings is a "land use" subject to regulation by local land use ordinances. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

30.3 Zoning Ordinances – Applicability. The standards in effect at the time a development application is filed are the standards applicable to approval of such development applications. *Veach v. Wasco County*, 23 Or LUBA 515 (1992).

30.3 Zoning Ordinances – Applicability. Comprehensive plan policies and local code requirements establishing standards for construction of streets are not approval standards applicable to comprehensive plan transportation map amendments. *Davenport v. City of Tigard*, 22 Or LUBA 577 (1992).

30.3 Zoning Ordinances – Applicability. A local governing body is required by ORS 197.175(2)(d) to apply applicable provisions of its comprehensive plan and land use regulations in determining whether a wrecking certificate should be approved, notwithstanding that it has not adopted regulations as authorized by ORS 822.140(3). *Bradbury v. City of Independence*, 22 Or LUBA 398 (1991).

30.3 Zoning Ordinances – Applicability. Conditions imposed on particular property as part of the adoption of a quasi-judicial plan amendment/zone change are potentially applicable to decisions approving development of that property. *Broetje-McLaughlin v. Clackamas County*, 22 Or LUBA 198 (1991).

30.3 Zoning Ordinances – Applicability. Even where the local code's definition of "use" is broad, some *de minimus* or transitory purposes for which land is "arranged, designed[,] intended

[or] occupied" do not come under the code's regulation of uses. However, a proposed use of property as a part time site for a motor home, involving grading, tree removal and deposition of 60 cubic yards of gravel, is not properly included in such an exception. *Tylka v. Clackamas County*, 22 Or LUBA 166 (1991).

30.3 Zoning Ordinances – Applicability. Where a previous local decision approved alteration of a nonconforming use for only two years, a request to remove that limitation is a request for a new approval for alteration of a nonconforming use, and the local government must apply its code criteria for alteration of a nonconforming use to such a request. *Scott v. Josephine County*, 22 Or LUBA 82 (1991).

30.3 Zoning Ordinances – Applicability. A zoning ordinance lot dimension requirement that lots in a particular zone be a certain width "at the front building line" is applicable to the creation of an undeveloped lot. *Ward v. City of Lake Oswego*, 21 Or LUBA 470 (1991).

30.3 Zoning Ordinances – Applicability. A local code statement of an intent not to encourage perpetuation of nonconforming uses and plan policies which are directed at zoning decisions and adoption of implementing land use regulations and planning inventories do not state approval standards applicable to decisions concerning modification of individual nonconforming uses. *Strawn v. City of Albany*, 21 Or LUBA 172 (1991).

30.3 Zoning Ordinances – Applicability. A code provision requiring submittal of information to allow county planning staff to set standards pertaining to "location, quality and quantity" of the resource available is not an approval criterion and, therefore, does not impose an obligation that the county adopt findings establishing the location, quality and quantity of the resource. *Keudell v. Union County*, 19 Or LUBA 394 (1990).

30.3 Zoning Ordinances – Applicability. Whether comprehensive plan goals and policies or zoning ordinance purpose sections are approval standards for conditional use approval in a particular instance, depends upon an examination of the relevant plan and code provisions. *Rowan v. Clackamas County*, 19 Or LUBA 163 (1990).

30.4 Zoning Ordinances – Interpretation. Where a significant resource overlay zone provision requires that (1) resource sites not be altered or impacted to a degree that destroys their significance, (2) the proposed development not result in the loss of habitat for threatened or endangered species, (3) all feasible alternatives to the development that would not result in a substantial adverse impact on identified resource values be considered and rejected, (4) the development be sited on the property in such a manner that minimizes adverse impacts on identified resources, and (5) documentation be provided regarding requirements for state or federal permits or licenses and that appropriate resource management agencies have reviewed the development proposal against their plans, policies, and programs, the local government does not err in concluding that that provision applies at the development stage rather than the PAPA stage. *VanSickle v. Klamath County*, 80 Or LUBA 241 (2019).

30.4 Zoning Ordinances – Interpretation. Where a local code provision requires that a minimum of 250 square feet of "outdoor area" be provided for each residential lot and specifically states that the outdoor area may include "decking" and a "covered patio," as long as that covered patio is not "fully enclosed," the local government does not err by concluding that a covered deck that is attached to the dwelling, but not enclosed, can satisfy the minimum outdoor area requirement. *Bohan v. City of Portland*, 80 Or LUBA 263 (2019).

30.4 Zoning Ordinances – Interpretation. Where a design guideline for a historic district in a city requires that exterior alterations and additions to historic resources "be designed to be compatible primarily with the original resource, secondarily with adjacent properties, and finally * * * with the rest of the District," where the city council interprets the term "compatible" as not requiring uniformity, and where the petitioner has not demonstrated that that interpretation is inconsistent with the express language, purpose, or underlying policy that provides the basis for that design guideline, LUBA will uphold the city council's conclusion that two proposed new buildings meet the design guideline because they are similar to a historic resource on the same property, to adjacent properties, and to the historic district with respect to some design elements, even where they are dissimilar to adjacent properties with respect to other design elements. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

30.4 Zoning Ordinances – Interpretation. Where a county code provision allows "[p]arks, playgrounds, [and] community centers" in the Rural Residential (RR) zone, where the county code does not include a definition of "park," and where the board of county commissioners county relies upon the dictionary definition of "park" and the types of park uses recognized nationally and found in a nearby city park and in other county parks to conclude that the provision allows (1) year-round use of a portion of RR-zoned property for day camps, retreats, and environmental education programming for a maximum of 100 persons and a weeklong overnight camp serving youth, and (2) the use of another portion of the property "for small social gatherings of its members and guests of up to 500 persons in size for picnics, weddings, and memorials during the months of April through October weather permitting," LUBA will affirm the board of county commissioners' interpretation of the provision, even if a different interpretation might be better. *Klein v. Lane County*, 80 Or LUBA 287 (2019).

30.4 Zoning Ordinances – Interpretation. Where a county code provision allows "campgrounds" in the Rural Residential (RR) zone but not "youth camps," and where the board of

county commissioners relies on the definition of "youth camp" elsewhere in the code to conclude that a "youth camp" must be a permanent use, LUBA will affirm the board of county commissioners' interpretation of the provision to allow a weeklong youth overnight camp in the RR zone where the petitioners do not identify any provision of any statute or administrative rule with which the county's interpretation is inconsistent or establish that the county's interpretation is inconsistent with the express language of the county code or the underlying purpose of the RR zone. *Klein v. Lane County*, 80 Or LUBA 287 (2019).

30.4 Zoning Ordinances – Interpretation. Where a local code provision generally prohibits development and grading in "areas of land movement," LUBA will affirm a hearings officer's interpretation of that provision to prohibit development and grading in "an area where a land slide or some other earth movement has already occurred—not an area where such activity *could* occur." *Chang v. Clackamas County*, 80 Or LUBA 321 (2019).

30.4 Zoning Ordinances – Interpretation. A local government errs by finding that compliance with a local code provision prohibiting diversion of storm water into areas with steep slopes and "areas of land movement, slump or earth flow, and mud or debris flow" is satisfied by compliance with a separate local code provision requiring development to provide "[p]ositive drainage and adequate conveyance of surface water * * * from roofs, footings, foundations, and other impervious or near-impervious surfaces to an appropriate discharge point." *Chang v. Clackamas County*, 80 Or LUBA 321 (2019).

30.4 Zoning Ordinances – Interpretation. The planning commission's conclusion that the subject properties are subject to "site review requirements" is not supported by anything in the text of the Old Code, Ordinance 20224, or the New Code. *Simons Investment Properties, LLC v. City of Eugene*, 80 Or LUBA 458 (2019).

30.4 Zoning Ordinances – Interpretation. In the context of an application to construct a 94-unit apartment complex, where a local code provision defines "net density" to mean "the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development, such as common open space or recreation facilities," while a maintenance building and internal parking circulation areas are properly included in the net density calculation, a leasing office should be excluded from the acreage used to calculate net density. *Hulme v. City of Eugene*, 80 Or LUBA 488 (2019).

30.4 Zoning Ordinances – Interpretation. Where the circumstances under which a local code provision applies are not clearly articulated in that provision or specified in any other local code provision, LUBA cannot say that an argument that the governing body misinterpreted that provision is one that "no reasonable lawyer would conclude * * * possessed legal merit" for purposes of awarding attorney fees under ORS 197.830(15)(b), even where the governing body's interpretation was required to be affirmed under ORS 197.829(1). *Vannatta v. City of St. Helens*, 80 Or LUBA 1018 (2019).

30.4 Zoning Ordinances – Interpretation. Where a local ordinance prohibits development within a floodway without a permit and provides an exemption for agricultural uses under which "temporary, removable structures should be allowed during drier months if their removal can be

assured by late fall," but where the ordinance does not contain an express requirement that the structures be moved to or stored on the subject property, a hearings officer errs in deciding that such an exemption cannot be applied simply because the record does not include any evidence that the subject property contains a usable storage area outside the floodplain. *Armstrong v. Jackson County*, 79 Or LUBA 161 (2019).

30.4 Zoning Ordinances – Interpretation. Where a city's minimum lot size requirements are based, in part, upon a code provision which requires a measurement of a lot's "slope," and the city interprets the term "slope" to be determined using post-development grades, rather than pre-development grades, LUBA will uphold the city's interpretation as "plausible" subject to *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), where the city found that "slope" is an ambiguous term, and the city interprets the term in a manner consistent with its interpretation of the text and in context of historical application of the code provision. An ambiguous code provision term is one with more than one possible construction of the term, and the local government interprets such a term in a "plausible" manner when read consistently with the express language of the code, as read in context. *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

30.4 Zoning Ordinances – Interpretation. Where a code provision states that the "provisions of this code shall be interpreted as minimum requirements. When this code imposes a greater restriction than is required by other provisions of law * * * the provisions of this code shall control," and petitioners argue that the city erred in applying the least restrictive, rather than the most restrictive interpretation of the city's code requirement that minimum lot size be determined by "slope," by allowing project applicants to measure slope after grading, rather than before grading, to maximize their potential minimum developable lot size, but petitioners do not identify what other provision of law imposes a lesser restriction as regards to minimum lot size that the city should have applied, petitioners have not provided a basis for reversal or remand. *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

30.4 Zoning Ordinances – Interpretation. Even if a local government's interpretation of its code were less plausible than petitioners' preferred interpretation, the "existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible' under the *Siporen* [*v. City of Medford*, 349 Or 247, 243 P3d 776 (2010),] standard." *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012). *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

30.4 Zoning Ordinances – Interpretation. Where an applicant proposes to occupy one guest apartment within an 18,000-square-foot dwelling while allowing the remainder of the dwelling and all of its amenities to be used by bed and breakfast guests, a county's conclusion that the bed and breakfast is not a "subordinate use" of the dwelling, and therefore not a home occupation, and that the applicant is not a "resident of the dwelling" is consistent with the plain meaning of the code language and is supported by substantial evidence in the record where there is evidence that the applicant "spends a couple of days a week" at a different home, and that the subject dwelling does not appear to be occupied when viewed from the road or neighboring properties, even though the applicant provides a copy of her driver's license that lists the subject dwelling. *Lee v. Marion County*, 79 Or LUBA 199 (2019).

30.4 Zoning Ordinances – Interpretation. Where a local code defines a bed and breakfast inn as "having no more than five sleeping rooms for [that] purpose[,]" and where an applicant proposes to make seven bedrooms in a dwelling available for rental even though only five would be rented at any one time, a county may correctly conclude that the proposal does not qualify as a bed and breakfast inn and the county is not obligated to develop conditions that might permit approval of the proposal. However, where a local code does not include any qualitative limits on the use of the dwelling and its premises, a county may not conclude that a proposal does not qualify as a bed and breakfast inn because it does not limit guests' use of the dwelling to their sleeping quarters and an area of the dwelling in which to eat the single morning meal. *Lee v. Marion County*, 79 Or LUBA 199 (2019).

30.4 Zoning Ordinances – Interpretation. Where the county planning director processed a similar use determination under the county's Type II review to determine whether an electrical transmission line is allowed in a particular zone, the board of county commissioners reviewed the director's similar use determination in a consolidated appeal under a Type III process, and petitioners argue that the county erred by not providing an intermediate decision by a decisionmaker other than the county governing body, that alleged procedural error provides no basis for reversal or remand because that alleged error does not prejudice petitioner's substantial rights. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

30.4 Zoning Ordinances – Interpretation. Where a county determines an electrical transmission line is a "similar use" authorized in a particular zone pursuant to the county's "similar use determination" process, which allows a similar use "[w]here a proposed use is not specifically identified by [the code], or [the code] is unclear as to whether the use is allowed in a particular zone," petitioners' argument that the county may make a similar use determination only if the proposed use is not specifically identified anywhere in the county's code is without merit. A similar use determination is not necessary or appropriate where the use is specifically permitted or prohibited in the subject zone. In adopting the similar use determination process, the county contemplated instances where a use is specifically identified as an allowed use in some zones but not specifically identified as an allowed use in the subject zone. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

30.4 Zoning Ordinances – Interpretation. Where petitioners argue that the county made inadequate findings that a proposed electrical transmission project is consistent with general use priorities for estuary zones because the county did not address certain code provisions addressing estuary zones, LUBA is not required to remand the decision to the county for it to interpret its local code provisions in the first instance; LUBA may make its own determination of whether the local government decision is correct. ORS 197.829(2). Where the county determined that the code provision in question is a general priority statement, which does not constitute mandatory approval criteria, LUBA will uphold the county's decision where the provision provides an inclusive list of general use priorities for estuarine resources and value, and where, in the alternative, the county addressed those impacts to the estuarine resources and values in other applicable parts of the county's code. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

30.4 Zoning Ordinances – Interpretation. A city council's interpretation of a local code provision which provides that, "[i]n the event of a tie [vote by the city council], the [planning

commission's] decision which is the subject of appeal * * * shall stand," as not limiting the number of times that the city council may vote on a matter is not inconsistent with the express language of that provision and therefore affirmable under ORS 197.829(1)(a). *Vannatta v. City of St. Helens*, 79 Or LUBA 271 (2019).

30.4 Zoning Ordinances – Interpretation. Where a local code provision prohibits uses that "alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties," a hearings officer errs in reducing the inquiry into a single inquiry into whether the proposed use makes the use of nearby properties "substantially worse," since the words "limit" and "impair' have different meanings and since, where a local code uses two different terms in the same provision, it is presumed that the enacting body intends two different meanings. *York v. Clackamas County*, 79 Or LUB 278 (2019).

30.4 Zoning Ordinances – Interpretation. Where a local code provision requires a finding that a proposed use "will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel," the proper comparison is between the proposed use and the pre-existing use, not between the proposed use and typical uses of the same type. *York v. Clackamas County*, 79 Or LUB 278 (2019).

30.4 Zoning Ordinances – Interpretation. Where a local code provision requires (1) that an applicant for an extension of a conditional use permit on resource-zoned lands "state[] reasons that prevented [them] from beginning or continuing development within the approval period" and (2) that the local government determine that those are "reasons for which the applicant was not responsible," a local government interpretation that the provision may be satisfied where the reason for the delay is that additional state or federal approvals have been applied for, but not yet secured, even where the application for such state or federal approval proposes development which differs from that approved by the conditional use permit, is not inconsistent with the express language of the provision and therefore provides no basis for reversal or remand under ORS 197.829(1)(a). *Williams v. Coos County*, 79 Or LUBA 352 (2019).

30.4 Zoning Ordinances – Interpretation. Where one local code provision authorizes the local government to grant "an extension of up to two (2) years" for a conditional use permit on non-resource lands, and another provision provides that "[a]dditional extensions may be applied," a local government interpretation of those provisions as allowing supplemental extensions beyond the one allowed under the first provision is supported by the plain meaning of the word "additional," is not inconsistent with the express language of either provision, and therefore provides no basis for reversal or remand under ORS 197.829(1)(a). *Williams v. Coos County*, 79 Or LUBA 352 (2019).

30.4 Zoning Ordinances – Interpretation. Where a local code provision prohibits the local government from approving an application for development if the property is "in violation of applicable land use regulations," a local governing body's interpretation that a decision that (1) determines only that existing development requires land use approvals, or (2) denies an application to approve existing development does not constitute a determination of a "violation" is not inconsistent with the express language, purpose, or policy of the code provision and is therefore

entitled to deference under ORS 197.829(1)(a) to (c). *Bishop v. Deschutes County*, 79 Or LUBA 380 (2019).

30.4 Zoning Ordinances – Interpretation. Where a local code provision prohibits a "[p]layground, recreation facility or community center owned and operated by a government agency or nonprofit community organization," a local governing body does not misconstrue the provision by interpreting the phrase "owned and operated by a government agency or nonprofit community organization" as applying to each antecedent rather than just to the last antecedent, community centers, and therefore as permitting a private recreation facility in the zone, where (1) the provision's language implements state law, which is concerned only with public facilities, (2) the code sets out a separate use category for "recreation-oriented facility," and (3) the local government has historically viewed the provision to encompass only public facilities. *Bishop v. Deschutes County*, 79 Or LUBA 380 (2019).

30.4 Zoning Ordinances – Interpretation. Where the predominant use of a proposed facility controls whether it is permitted in a zone, a local government does not err in concluding that the allocation of two-thirds of the physical space in a building to office uses makes the office use the predominant use of the building, even where the primary purpose of the office uses is to facilitate other uses in the building which are not allowed in the underlying zone. *Sky Lakes Medical Center, Inc. v. City of Klamath Falls*, 79 Or LUBA 490 (2019).

30.4 Zoning Ordinances – Interpretation. A local code amendment is not inconsistent with an administrative rule, so as to require reversal or remand of the amendment decision, merely because the amendment uses the phrase "ministerial decision" while the rule uses the phrase "administrative decision," where the code does not treat those phrases differently. In addition, a local code amendment is not inconsistent with an administrative rule authorizing counties to grant extensions of permits if they determine the applicant was unable to begin or continue development "for reasons for which the applicant was not responsible" merely because the amendment provides a list of examples of such reasons, especially where the rule provides no definition or guidance for that phrase. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

30.4 Zoning Ordinances – Interpretation. While a variance should not be used as a substitute for rezoning, a local government does not err in granting a variance without a showing that strict application of the zoning ordinance would cause "practical difficulties or unnecessary hardships because of exceptional or extraordinary circumstances or conditions affecting the applicant's property" in a zone which the local code specifically exempts from that standard. *City of Albany v. Linn County*, 79 Or LUBA 528 (2019).

30.4 Zoning Ordinances – Interpretation. Where the only variable between multiple Urban Growth Area-Urban Growth Management (UGA-UGM) zones is lot size, and where a county code provision provides that "[t]he density of one UGA-UGM zoning district is not interchangeable with the density of another UGA-UGM zoning district without prior review and approval by the affected city and * * * County," an interpretation by the county that the provision applies to zone changes of the subject property or changes to the underlying density of the zone in which the subject property is located, but that it does not apply to lot size variances, is inconsistent with the express language of the provision. In such cases, where the local code does not define "density"

and the dictionary defines "density" as the quantity or number per unit of area, LUBA will make its own determination that a lot size variance in a UGA-UGM zone may qualify as an "interchange[]" with the density of another UGA-UGM zone, thereby requiring city review and approval. *City of Albany v. Linn County*, 79 Or LUBA 528 (2019).

30.4 Zoning Ordinances – Interpretation. Where a local code provision provides that "[a]pproval of [a] variance is limited to the minimum necessary to permit otherwise normal development of the property for the proposed use," an interpretation by the local government that the provision means a variance may be approved if it permits development consistent with the surrounding land use pattern and the uses permitted in the underlying zone, and that it does not mean a variance may only be approved if it is necessary to permit development that is allowed in the zone, is not inconsistent with the language of the code or the purposes or policies underpinning the provision. *City of Albany v. Linn County*, 79 Or LUBA 528 (2019).

30.4 Zoning Ordinances – Interpretation. The fact that a tentative plan for a destination resort proposes a different pace of development than the final master plan, such as by sub-phasing development, does not materially affect the findings of fact on which the final master plan approval was based so as to constitute a "substantial change" to the final master plan, thereby requiring a new application, where neither the final master plan nor applicable regulations require that all development authorized in the first phase of the final master plan occurs at the same time. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019).

30.4 Zoning Ordinances – Interpretation. Where the final master plan for a destination resort includes a mitigation plan requiring the applicant to replace the water consumed by the resort with a quantity and quality of water that will maintain fish habitat in an impacted stream, the fact that the tentative plan for one phase of development modifies the timing, but not the overall amount, of the mitigation water required to be provided does not materially affect the findings of fact on which the final master plan approval was based so as to constitute a "substantial change" to the final master plan, thereby requiring a new application, where there is no evidence that such modification will impact the efficacy of mitigation and there is evidence that such modification will result in more gradual, spread out impacts. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019).

30.4 Zoning Ordinances – Interpretation. Where a local code provision provides that issuance of a conditional use permit requires a determination that "[t]he proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone," an interpretation by the local government that it need not consider the impact of the proposed use on property values and neighbor peace of mind is not inconsistent with the provision's express language or underlying policies. *Currie v. Douglas County*, 79 Or LUBA 585 (2019).

30.4 Zoning Ordinances – Interpretation. LUBA will reject a county's interpretation of its code—that a code provision which sets forth approval criteria regarding an application for a variance to the minimum lot size requirements within the county's urban growth area may not apply to the county's decision because it only applies to decisions made by the county's planning director but not to decisions made by the planning commission or board of county commissioners—that was made for the first time in its response brief, because that interpretation

is not reflected in the decision and is therefore not an interpretation by the local government. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

30.4 Zoning Ordinances – Interpretation. Where the county approved a proposed variance to the 20-acre minimum lot size for two one-acre parcels, pursuant to a county code provision that provides that the county planning director may approve a variance for a proposed project if the city does not object to the variance, LUBA will reverse the county's decision as "prohibited as a matter of law" pursuant to OAR 661-010-0071(c) where the county approved the variance as "consistent with the * * * city's comprehensive plan," but the city objected to the proposed variance because of the proposal's inconsistency with the city's comprehensive plan. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

30.4 Zoning Ordinances – Interpretation. Where a local code provision requires that a proposed development project not "seriously interfere" with the preservation of "fish and wildlife areas and habitat" as identified under the county's comprehensive plan, a hearings officer does not err in applying the code provision only to that portion of the property that is designated as "fish and wildlife areas and habitat." *McAndrew v. Washington County*, 78 Or LUBA 21 (2018).

30.4 Zoning Ordinances – Interpretation. When a city approves an application, nothing requires the city or intervenor to rezone the property in connection with the application, when the current zoning is inconsistent with the comprehensive plan, and the current zoning does not allow for more intensive development than contemplated in the comprehensive plan. *Richardi v. City of Eugene*, 78 Or LUBA 299 (2018).

30.4 Zoning Ordinances – Interpretation. A zone verification is a limited tool and only those issues actually addressed in the zone verification decision are protected from collateral attack. *Richardi v. City of Eugene*, 78 Or LUBA 299 (2018).

30.4 Zoning Ordinances – Interpretation. Where a LUBA decision merely "ascertain[ed] and declare[d]" what the laws at issue provided from the time of their enactment pursuant to ORS 174.010, such interpretative exercise cannot constitute a "change in the law." *Hood River Valley Residents Comm. v. Hood River County*, 78 Or LUBA 478 (2018).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's code interpretation of a county zoning ordinance that provides that a permit extension may be granted if the "approval criteria for the original decision found in a state goal, policy, statute or administrative rule, the Comprehensive Plan or this Ordinance have not changed," and the county board of commissioners interprets "have not changed" to mean an administrative or legislative amendment to the administratively enacted or codified law described in the same provision, and not include decisional law not that is not administratively enacted or codified, as long as such interpretation is "plausible." *Hood River Valley Residents Comm. v. Hood River County*, 78 Or LUBA 478 (2018).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a city governing body's code interpretation where a prohibition on adjustment "[t]o allow an increase in density in the [low density residential] RL zone" does not specify what denominator should be used to determine

whether a proposed adjustment increases the density in the RL zone, or explain how "density in the RL zone" is measured, and the city used as the denominator the gross acreage of a subdivision as a whole, rather than the acreage of individual properties. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

30.4 Zoning Ordinances – Interpretation. The city's comprehensive plan housing goal, Goal 10, and its policies and implementing measures, provide further contextual support for the city's interpretation of its code regarding a prohibition on lot size adjustment "[t]o allow an increase in density in the [low density residential] RL zone" by using as the denominator the gross acreage of a subdivision as a whole, rather than the acreage of individual properties. One of the Goal 10 housing goals is to "[p]romote the efficient use of vacant land by encouraging infill development which is sensitive to existing neighborhoods, and by encouraging new development which achieves the density allowed by the comprehensive plan." The city's interpretation is consistent with Goal 10 and the policies and implementing measures because it interprets "density" and "acre" to allow new infill development of vacant land to achieve a density that is allowed by the comprehensive plan. *Hunt v. City of the Dalles,* 78 Or LUBA 509 (2018).

30.4 Zoning Ordinances – Interpretation. Where petitioner argues the city governing body's finding regarding the applicability of a zoning ordinance was erroneous, and the city concedes the finding is erroneous, but when the error is not critical to the city council's interpretation or ultimate conclusions, the error does not provide a basis for reversal or remand. *Hunt v. City of the Dalles*, 78 Or LUBA 509 (2018).

30.4 Zoning Ordinances – Interpretation. Where a county's code defines "recreational vehicle" (RVs) as a temporary dwelling unit intended for vacation, emergency or recreational use, but that cannot be used for permanent residential use, the county errs in interpreting the provisions of a forest zone, which allows as a conditional use "recreational vehicles" without any express durational limits, to allow an RV to be used as a permanent residence, because that interpretation gives no effect to the categorical exclusions in the code definition of "recreational vehicle." *Oregon Coast Alliance v. Tillamook County,* 77 Or LUBA 192 (2018).

30.4 Zoning Ordinances – Interpretation. That county staff have in the past approved recreational vehicles as permanent residential dwellings does not provide a basis to interpret the county code to allow recreational vehicles to be used as permanent residential dwellings, where the county code definition of "recreational vehicle" prohibits their use as permanent residential dwellings. *Oregon Coast Alliance v. Tillamook County,* 77 Or LUBA 192 (2018).

30.4 Zoning Ordinances – Interpretation. That different setbacks standards with different language are interpreted to require the same setback distance does not run afoul of the general interpretative requirement to give different effect to different words used in the same statute, where the local government shows that the different words nevertheless support requiring the same setback distance. *Brannon v. Multnomah County,* 77 Or LUBA 275 (2018).

30.4 Zoning Ordinances – Interpretation. The question under *Siporen v. City of Medford,* 349 Or 247, 259, 243 P3d 776 (2010), is not whether petitioner's interpretation that a "street alignment and connections standard" and a "street connectivity standard" can be met by street extensions that

terminate in a cul-de-sac is plausible. The question under *Siporen* is whether the city council's contrary interpretation that the standards require street extensions that connect with other streets on both ends is plausible, and the city council's interpretation is certainly plausible. *Martin v. City of Tigard*, 77 Or LUBA 288 (2018).

30.4 Zoning Ordinances – Interpretation. A decision that adopts a different position regarding *how* a street connectivity standard applies in a decision following a LUBA remand from the position adopted in the initial decision is not inconsistent with the holding in *Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701, *rev den*, 328 Or 115 (1998). In *Holland*, the Court of Appeals held a city erred by concluding in its initial decision that a slope and density standard had been repealed and therefore did not apply to a land division, and when its decision to deny the land division was remanded by LUBA, took the opposite position and applied the slope and density standard to deny the land division following remand. The change of position in Holland was a change of position in *whether* the standard applied, which is different from a change of position in *how* a standard applied. *Martin v. City of Tigard*, 77 Or LUBA 288 (2018).

30.4 Zoning Ordinances – Interpretation. The undefined standard categories "site-related development standards" and "use-related development standards" are ambiguous; a front setback standard and a maximum height standard could fall into either category. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

30.4 Zoning Ordinances – Interpretation. Where a general category called "use-related development standards" is followed by a nonexclusive list of examples, and minimum front setback and maximum height standards are not included on the list, that is some support for concluding that minimum front setback and maximum height standards are not use-related development standards. But where one of the specified examples of a general category called "use-related development standards" is "size of use standards," it is certainly possible that a maximum height standard qualifies as a "size of use standard" and thus could qualify as a "use-related development standard." *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

30.4 Zoning Ordinances – Interpretation. A hearings officer's finding that concentrating dwelling units on one area of a property is solely attributable to a density transfer provision is not entirely accurate where modifications (variances) are needed to construct a multi-family structure that is taller and closer to the front lot line than would be permitted in the zone. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

30.4 Zoning Ordinances – Interpretation. Where a hearings officer's findings provide an inadequate explanation for why he concluded minimum front setback and maximum building height standards qualify as "site-related development standards," that prior city hearings officers and the city council have reached the same conclusion is some support for the hearings officer's conclusion. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

30.4 Zoning Ordinances – Interpretation. Although local legislative history is generally not subject to official notice by LUBA and cannot be considered on appeal if it is not included in the local record, where the legislative history is contemporary commentary that was adopted by the

city council when it adopted the legislation, LUBA will consider the commentary. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

30.4 Zoning Ordinances – Interpretation. Where a prior version of the zoning ordinance only allowed modifications for setback and height standards, and the zoning ordinance was amended to allow a general category of standards, that lends some support to the local government's position that the general category of standards includes setback and height standards. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

30.4 Zoning Ordinances – Interpretation. Although LUBA may take official notice of commentary that was adopted with an ordinance, where that ordinance does not enact or amend the ambiguous zoning ordinance language at issue, it is of no significance in resolving the ambiguity. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

30.4 Zoning Ordinances – Interpretation. A hearings officer's findings cannot be faulted for failing to address the impacts of a modification (variance) on petitioner's nearby residence, where the findings expressly address those impacts and the relationship between the proposed structure and petitioner's residence and point out that the proposed structure is downslope and offset from petitioner's residence. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

30.4 Zoning Ordinances – Interpretation. A hearings officer's failure to adopt findings that address potential impacts of a proposed building on one nearby dwelling in granting a maximum height modification (variance) is not a basis for remand, where the "on balance" nature of the modification (variance) approval standard does not necessarily require individual findings for every nearby residence, a public walkway between that dwelling and the proposed dwelling reduces any legitimate expectation of privacy, and the topography and scale of the proposed building is such that where the two structures adjoin each other they will be of similar height. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

30.4 Zoning Ordinances – Interpretation. A city commission's interpretation of its code to permit the city to exercise its property rights under ORS 197.772(1) to refuse to consent to historic landmark designation separately from the city's grant of authority to the historic review board to consider and approve applications for historic landmark designations is plausible, and therefore must be affirmed under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010). Therefore, the historic review board must terminate consideration of a neighborhood association's application to designate city-owned property as a historic landmark when the city manager refuses to consent to the proposed historic landmark designation. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

30.4 Zoning Ordinances – Interpretation. A city commission's interpretation of a city manager's general authority to exercise "supervision over all city property" to be broad enough to include authority for the city manager to refuse to consent to a proposed historic landmark designation for city-owned property is not reversible under ORS 197.835(9)(a)(D) ("[i]mproperly construed the applicable law"). *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

30.4 Zoning Ordinances – Interpretation. A local government does not misinterpret the term "substation" by interpreting it to be an example of the use category "utilities" that is broad enough to include a wireless transmission tower. And it does not matter that the wireless transmission tower is a cell tower and that there were no cell towers in 1984 when the legislation defining substation and utilities was adopted. There were radio transmission and communication towers in 1984, which are similar to cell towers, and it is not unusual for new uses to come into existence and fall into existing broad use categories. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

30.4 Zoning Ordinances – Interpretation. A local governing body's conclusion—that the general category of utility "[d]istribution plants and substations" adopted in 1984 is broad enough to include a wireless transmission tower—is not inconsistent with contemporary and other dictionary definitions of "distribution," "plant" and "substation." *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

30.4 Zoning Ordinances – Interpretation. A local governing body does not err by refusing to view the term "distribution plants and substations" as a technical term or term of art. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

30.4 Zoning Ordinances – Interpretation. When a local government adopts a new rule of interpretation it is not limited to applying that new rule of interpretation to subsequently enacted legislation. *Rawson v. Hood River County*, 77 Or LUBA 415 (2018).

30.4 Zoning Ordinances – Interpretation. Where petitioners take the position that historic review and site plan review approval standards are so incompatible that site plan review entirely displaces historic review, but the city council's interpretation of its code that both reviews are possible and that historic review may be completed before site plan review is plausible, LUBA must defer to the city council's interpretation. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

30.4 Zoning Ordinances – Interpretation. Where it is not clear whether the enacting body intended comprehensive plan or land use regulation provisions to be mandatory approval criteria, LUBA examines the wording and context of the particular provisions to determine whether they must be applied as mandatory approval criteria. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

30.4 Zoning Ordinances – Interpretation. A list of special characteristics of a historic district are not mandatory approval criteria where they are not worded as mandatory requirements for future housing proposals. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

30.4 Zoning Ordinances – Interpretation. Where it is unclear whether historic guidelines operate as mandatory approval criteria, but the guidelines include a column identified as "Principle – Good Example" and a column identified as "Not Allowed," and in each column there is a list of activities and features, the activities and features in the "Not Allowed" column are prohibited. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

30.4 Zoning Ordinances – Interpretation. A prohibition against "extensive grading of the lot" is subjective. Findings that explain that approved grading is only the amount necessary to allow vehicular access to the lot and that the lowering of the proposed dwelling elevates the prominence of adjoining historic structures are adequate to establish the approved grading does not violate the extensive grading standard. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

30.4 Zoning Ordinances – Interpretation. A city council's findings that a master plan design guideline to "[d]evelop buildings that are appropriately scaled to the neighborhood," is met by a proposal to build a seven-story apartment building with a five-story wing rather than a four-story wing, representing a proposal to increase the building height by 10 feet, where surrounding buildings range in height from three to seven stories, is not in error. Such a finding is sufficient to satisfy city's local ordinance which requires a finding that under a proposed modification "[t]he resulting development will better meet the applicable design guidelines," and that "[o]n balance the proposal will be consistent with the purpose of the standard modified" where the 10-foot modification represents a trade-off for a clipped corner which allows for increased pedestrian access and sunlight into a proposed public square. *Michaelson v. City of Portland,* 77 Or LUBA 504 (2018).

30.4 Zoning Ordinances – Interpretation. A city council's comparative approach of evaluating all design changes related to a proposed development modification at once to determine whether the resulting development better meets applicable guidelines, is not error. The nature of design review often involves tradeoffs and balancing between design features to achieve a more optimal overall design under the applicable guidelines. *Michaelson v. City of Portland,* 77 Or LUBA 504 (2018).

30.4 Zoning Ordinances – Interpretation. The city planning commission improperly construed the plain language of a code section that requires that the "front lot line" of a corner lot "must" be considered the narrower street frontage "except when [city staff] determine[] topographical or access problems make such a designation impractical" when it relied on the historical site plan and orientation of the existing house on the corner lot to designate the front lot line, because those considerations are not "topographical or access problems." *McMonagle v. City of Ashland,* 76 Or LUBA 1 (2017).

30.4 Zoning Ordinances – Interpretation. Where a municipal code requires that the "front lot line" of a corner lot "must" be considered the narrower street frontage "except when [city staff] determine[] topographical or access problems make such a designation impractical," the city's decision was not supported by substantial evidence in the record pursuant to ORS 197.835(9)(a)(C) when it determined that the lack of sidewalks on the narrower frontage, and the absence of a door on the side of the house facing the narrower frontage were "access problems" that made designating the narrower street frontage the front lot line "impractical." *McMonagle v. City of Ashland,* 76 Or LUBA 1 (2017).

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30.4 Zoning Ordinances – Interpretation. Where petitioners seek reversal or remand of the city's decision pursuant to OAR 661-010-0071, and LUBA's decision agrees with petitioners that the city's decision improperly construed the municipal code and was not supported by substantial evidence in the record, but it is possible on remand that the petitioner's proposal could demonstrate compliance with the municipal code without significant changes to the proposed development, remand is the appropriate remedy. *McMonagle v. City of Ashland*, 76 Or LUBA 1 (2017).

30.4 Zoning Ordinances – Interpretation. Where a standard requires full street connections with spacing of no more than 530 feet between connections, findings that suggest the standard could be met by extending an existing east-west street to connect an existing north-south street with an existing Walmart parking lot require additional explanation, since the standard appears to envision a street that connects one street with another street. *Martin v. City of Tigard*, 76 Or LUBA 85 (2017).

30.4 Zoning Ordinances – Interpretation. Where a standard requires public street connections at intervals of no more than 660 feet but authorizes variances where certain conditions exist, a finding that sight distance and existing development might preclude the required extension may be an adequate basis for granting a variance, but those conditions are not a basis for simply overlooking the street interval standard. *Martin v. City of Tigard*, 76 Or LUBA 85 (2017).

30.4 Zoning Ordinances – Interpretation. Where a standard requires public street connections at intervals of no more than 660 feet a finding that a public street connection is not required where existing street connections are 930 feet apart because the property to be developed is only 400 feet south of the northern existing street represents a misconstruction of the standard. The standard establishes a maximum distance between streets rather than a maximum distance between property to be developed and the nearest street connection. *Martin v. City of Tigard*, 76 Or LUBA 85 (2017).

30.4 Zoning Ordinances – Interpretation. A city council does not err by failing to impose a condition requiring that a hotel be reduced in height to address potential land use conflicts, where the city council finds a shorter hotel is not needed to avoid potential land use conflicts. Whether a hotel of the height proposed will present land use conflicts with neighboring properties is a subjective determination, and where LUBA concludes the record establishes the city council's decision not to impose a condition was within its discretion, LUBA will deny an assignment of error that challenges the city council's failure to impose the condition. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

30.4 Zoning Ordinances – Interpretation. Where a code "principle" is worded as alternative actions an applicant "should" take, and some of the "standards" that follow that "principle" are clearly worded as mandatory, while others are clearly worded as non-mandatory considerations, where the challenged decision does not address the disputed "principle," remand is required for

the city council to determine if the disputed "principles" are mandatory and, if so, to ensure one of the mandatory alternatives is satisfied. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

30.4 Zoning Ordinances – Interpretation. LUBA will reverse a governing body's interpretation that a large office complex providing offices for a number of local, regional, state and federal agencies is "accessory" to a small local fire station with a staff of four firefighters, where no reasonable person could conclude that the office complex is incidental and subordinate to the fire station, or subordinate in extent, area or purpose. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

30.4 Zoning Ordinances – Interpretation. LUBA will reverse a governing body's interpretation that a 100-seat educational facility is "accessory" to a small local fire station with a staff of four firefighters, where even if it is presumed that the four firefighters sometimes take classes at the facility, no reasonable person could conclude that a 100-seat educational facility is incidental and subordinate to the fire station, or subordinate in extent, area or purpose. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a finding that a proposed gas processing facility will not cause emissions of steam that could obscure visibility within an airport approach surface, where the finding is supported by substantial expert testimony that the facility will not generate visible steam and in any case is proposed to be located outside the airport approach surface. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

30.4 Zoning Ordinances – Interpretation. A County Court's interpretation of a comprehensive plan residential density standard that limits residential density in deer winter range to one dwelling unit per 160 acres to only consider nonfarm dwellings when computing density is not affirmable under ORS 197.829(1)(a) and *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010), where there is no textual support in the wildlife density standard itself for only counting nonfarm dwellings in computing density and the comprehensive plan policies the density limit was adopted to implement also do not support distinguishing between farm and nonfarm dwellings in computing density. *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 186 (2017).

30.4 Zoning Ordinances – Interpretation. Deference under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), and ORS 197.829(1) is only appropriate for interpretations that are adopted by the local governing body. Those interpretations include interpretations that are adopted initially by other bodies, so long as the local governing body adopts those interpretations of other bodies. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

30.4 Zoning Ordinances – Interpretation. Where a local governing body adopts a planning commission decision on appeal, interpretations adopted directly by the planning commission or adopted by incorporation by the planning commission are entitled to deference under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), and ORS 197.829(1). *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

30.4 Zoning Ordinances – Interpretation. An interpretation of local law that is offered in a brief at LUBA, but was not adopted by the local government, is not entitled to deference under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), and ORS 197.829(1). *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance lists general use categories for a particular zoning district, followed by a listing of particular uses under those general use categories, a local governing body's interpretation that adopts a broad dictionary definition of the use category "Utilities" and finds that a cell tower is a permitted use under that definition, when cell towers are not one of the two particular uses listed under the general category of Utilities, is not an interpretation that must be affirmed under ORS 197.829(1) and is not entitled to deference under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance separation standard applies to "buildings," defined in the zoning ordinance as "[a] structure built for support, shelter, or enclosure of persons, animals, chattels, or property of any kind," a local government is within its interpretive discretion to interpret the separation standard not to apply to cell towers. Although cell towers are "structures," they are not "built for support, shelter, or enclosure of persons, animals, chattels, or property of any kind." *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

30.4 Zoning Ordinances – Interpretation. A county is not required to apply the federal "least intrusive" standard under the Telecommunications Act of 1996 to a permit request under the county's zoning ordinance, where the county's zoning ordinance does not impose that standard. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

30.4 Zoning Ordinances – Interpretation. Even if a county has historically required "reasonable separation" between certain uses in the past, where the county's zoning ordinance does not include a "reasonable separation" standard, the county does not err by failing to require a cell tower on industrially zoned property to maintain reasonable separation from adjoining exclusive farm use and rural residentially zoned property. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

30.4 Zoning Ordinances – Interpretation. Where the zoning code does not define "hospital structures" but does separately list "Hospitals" and "Medical and dental clinics, outpatient; [and] infirmary services" as permitted uses, a city does not misconstrue the zoning code by concluding that a "medical office building "does not qualify as a "hospital" and therefore need not have a backup source of electricity, which hospitals are required to have under the zoning code. *Nicita v. City of Oregon City*, 74 Or LUBA 176 (2016).

30.4 Zoning Ordinances – Interpretation. Where a county development ordinance requires that all permits and approval for an allowed primary use must be obtained before any accessory use may be established, the county errs by approving a proposal to process aggregate material as an accessory use where the primary use, aggregate mining, is not proposed or approved. *Rogue Advocates v. Jackson County*, 74 Or LUBA 214 (2016).

30.4 Zoning Ordinances – Interpretation. A city council's interpretation that the use category of mass shelter is limited to shelters located in a "building" is inconsistent with the express language of the applicable code provisions, where the code defines "mass shelter" in part as a "structure" containing sleeping areas, and as the code defines "structures," they are not limited to structures that are "buildings." *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

30.4 Zoning Ordinances – Interpretation. A city council's finding that the use category of "mass shelter" is limited to shelters that provide "indoor space," and therefore a proposed tent camp in an industrial zone is not a mass shelter that is prohibited in the industrial zone, is inconsistent with the definition of "mass shelter," which is not limited to shelters that provide indoor space, and further inconsistent with the purpose of the prohibition on mass shelters in industrial areas: to protect industrial uses from incompatible shelter uses. *Central Eastside Industrial Council v. City of Portland,* 74 Or LUBA 221 (2016).

30.4 Zoning Ordinances – Interpretation. A city council's interpretation that a mass shelter's sleeping areas must be located in permanent structures with foundations, and therefore a proposed tent camp that provides sleeping areas within large 10-person tents is not a mass shelter, is inconsistent with the code definition of mass shelter, which does not require that a mass shelter's sleeping areas be located in permanent structures with foundations. *Central Eastside Industrial Council v. City of Portland,* 74 Or LUBA 221 (2016).

30.4 Zoning Ordinances – Interpretation. A city council's interpretation that a proposed tent camp is not a "mass shelter" because the campers, rather than the tent camp operators, will provide sleeping pads is not consistent with the applicable text and definitions, which do not turn on who provides sleeping pads that shelter residents will sleep on. *Central Eastside Industrial Council v. City of Portland,* 74 Or LUBA 221 (2016).

30.4 Zoning Ordinances – Interpretation. It is inconsistent with the purpose of a code prohibition on mass shelters in an industrial zone to approve, as an outright permitted "Community Service" use, a tent camp that is functionally identical to a mass shelter. *Central Eastside Industrial Council v. City of Portland,* 74 Or LUBA 221 (2016).

30.4 Zoning Ordinances – Interpretation. Where the city code excludes from the use category of "Community Service" any uses where tenancy is arranged on a month-to-month basis or longer period, a city errs in concluding that a proposed tent camp, which allows indefinite and potentially permanent tenancy by campers and staff, is a Community Service use allowed outright in an industrial zone. *Central Eastside Industrial Council v. City of Portland,* 74 Or LUBA 221 (2016).

30.4 Zoning Ordinances – Interpretation. Where a destination resort has received both conceptual and final master plan approval, and the final master plan approval decision was remanded, the county may again grant final master plan approval, even though the conceptual master plan approval decision has become void due to the passage of time, where the initial final master plan approval decision effectively incorporated and displaced the conceptual master plan approval decision with regard to the only legal issues remaining on remand. *Central Land and Cattle Company, LLC v. Deschutes County,* 74 Or LUBA 326 (2016).

30.4 Zoning Ordinances – Interpretation. A code limitation that "[a]ny substantial change to the approved plan will require a new application" does not require a new application for a destination resort whose original owners declared bankruptcy and were replaced by new owners. The code limitation is directed at changes in the approved plan, not at changes in the owners. *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326 (2016).

30.4 Zoning Ordinances – Interpretation. The larger size of a 5,000-square-foot structure in a forest zone is not determinative of whether it can be correctly viewed as "accessory" to a 3,600-square-foot residence. *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

30.4 Zoning Ordinances – Interpretation. Whether a proposed use is properly viewed as "accessory" to an existing residential use in a forest zone calls for a subjective judgment. Where a use began as an unauthorized use with a commercial component, and the commercial component is relocated to another site, a hearings official determines a number of limits imposed on the use are sufficient to ensure it is "accessory," and the board of commissioners adopts the hearings official's interpretation as its own, LUBA will defer to that interpretation under ORS 197.829(1). *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

30.4 Zoning Ordinances – Interpretation. Where a development code permits an applicant to resubmit the same application for verification of a nonconforming use less than two years after it was denied if the denial decision was based on a material mistake of fact, a hearings officer does not misconstrue the code in concluding that a denial decision that is based on conflicting evidence is not the same thing as a decision that is based on a material mistake of fact. *Kartavykh v. Clackamas County*, 74 Or LUBA 518 (2016).

30.4 Zoning Ordinances – Interpretation. Nothing in the express language of ORS 455.315, which exempts agricultural buildings from the requirements of the Oregon Structural Specialty Code, or in the legislative history of the statute, supports a county's interpretation of ORS 455.315 as applying *only* on lands zoned for farm or forest use. *Gross v. Jackson County*, 74 Or LUBA 563 (2016).

30.4 Zoning Ordinances – Interpretation. In order for the agricultural building exemption at ORS 455.315 to apply, the structure must be located "on a farm or forest operation[.]" *Gross v. Jackson County*, 74 Or LUBA 563 (2016).

30.4 Zoning Ordinances – Interpretation. ORS 455.315 exempts agricultural buildings only from the requirements of "a state structural specialty code" and does not exempt agricultural buildings from electrical and mechanical codes contained in ORS Chapter 455. *Gross v. Jackson County*, 74 Or LUBA 563 (2016).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a hearings officer's interpretation that review of a greenhouse use is required by a local code provision that requires review of "Type I" uses that are allowed "of right," where the local code requires "non-discretionary staff review to demonstrate compliance with the standards of" the zoning ordinance. *Gross v. Jackson County*, 74 Or LUBA 563 (2016).

30.4 Zoning Ordinances – Interpretation. Where an assignment of error challenges an interpretation that the decision on appeal does not adopt, the assignment of error does not establish a basis for reversal or remand. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

30.4 Zoning Ordinances – Interpretation. A county finding that wind turbines are a conditional use in a commercial zone is not reversible error, even though wind turbines are not listed as a conditional use in the zone, where the balance of the decision clearly demonstrates the county in fact utilized its authority to approve uses that are similar to listed permitted and conditional uses in the zone to approve the wind turbines. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance expressly allows approval of uses that are not listed as permitted or conditional uses, if they are similar to listed uses in the zone, there is no negative inference that uses may not be approved as similar to uses in the zone, simply because the similar use is listed as a permitted or conditional use in other zones. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

30.4 Zoning Ordinances – Interpretation. Where the city code requires that a development's sewer facilities must be consistent with the sewer master plan and the sewer master plan calls for an upgraded 15-inch sewer line in a street that adjoins the development, city findings that explain a temporary cross-basin connection to provide sewer service to the development is acceptable because sewer flows from the development are inadequate to result in a properly functioning 15-inch sewer line, and the development approval is conditioned on the development connecting to the adjacent 15-inch sewer line when it becomes available in the future, are adequate to explain why the temporary cross-basin connection is not inconsistent with the code and sewer master plan. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

30.4 Zoning Ordinances – Interpretation. A city council does not misconstrue a development code limitation that a temporary use permit may not "be issued for a period exceeding 180 days in any 365 day period" to require a single period of 180 days and not allow the holder of the permit to operate for up to 180 nonconsecutive days in any 365-day period. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

30.4 Zoning Ordinances – Interpretation. A city council's interpretation of a development code limitation that a temporary use permit may not "be issued for a period exceeding 180 days in any 365 day period" to require that the 180-day period begin on the date the permit is issued has the effect of omitting the "in any 365 day period" language and reading in a requirement that the start date for the 180 days must be the date the permit is issued. That interpretation is therefore inconsistent with the express language of the 180-day limit. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

30.4 Zoning Ordinances – Interpretation. Where the authority to impose conditions that specifically applies to temporary use permits does not appear to be broad enough to allow the city to impose a condition of temporary use permit approval regarding vendors, but temporary use permit decisions qualify as Type II decisions, and the development code broadly authorizes Type

II decisions to include conditions of approval, a city does not exceed its conditioning authority in imposing the Vendor condition. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

30.4 Zoning Ordinances – Interpretation. Where LUBA sustains three assignments of error, but denies a fourth assignment of error, rejecting petitioner's challenge to a county commissioners' interpretation that a permit expiration standard that requires a finding that the applicant is not at fault for failing to complete the use authorized by the permit is met because the county's multi-stage destination resort process is so complicated, and LUBA's decision is reversed on appeal, with the Court of Appeals concluding that making the complexity of the multi-stage resort process the *only* consideration in applying the standard is an implausible interpretation of the standard, LUBA will sustain the fourth assignment of error as well. *Gould v. Deschutes County*, 72 Or LUBA 258 (2015).

30.4 Zoning Ordinances – Interpretation. Where a standard that permits the base zoning building height maximum to be increased if the "increased height is consistent with the purposes" of the applicable plan district's height limits, but does not expressly require that the proposed height increase must be consistent with all of the purposes or that each of the purposes operates as an approval criterion, a city council interpretation that the proposed height increase does not have to be consistent with all the purposes and that the individual purposes do not apply separately as approval criteria does not insert or omit text from the zoning code, in contravention of ORS 174.010. *Preserve the Pearl, LLC v. City of Portland*, 72 Or LUBA 261 (2015).

30.4 Zoning Ordinances – Interpretation. Where a city council explains that interpreting a standard that requires that a proposal to increase building height to be consistent with a list of purposes requires consistency with *all* of those purposes is not possible, which would render the plan designation that makes an area of the city eligible for such building height increases a nullity, that explanation provides contextual support for the city council's interpretation that the proposed building height increase need only be consistent with the purposes on balance. *Preserve the Pearl, LLC v. City of Portland*, 72 Or LUBA 261 (2015).

30.4 Zoning Ordinances – Interpretation. Where contextual requirements are written in terms of standards or criteria, all of which must be met, but the disputed standard merely requires that a proposed height increase be consistent with the purposes set out in the applicable height limit section of the code, that context supports the city's interpretation that the proposed height increase need not be consistent with all of the purposes and that the purposes do not operate as individual approval criteria. *Preserve the Pearl, LLC v. City of Portland*, 72 Or LUBA 261 (2015).

30.4 Zoning Ordinances – Interpretation. A zoning ordinance regulation that allows fill if it will not increase the elevation of land is not necessarily inconsistent with a comprehensive plan provision that bans fill altogether, where fill only qualifies as fill, as defined in the comprehensive plan, if the fill will raise the elevation of land. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

30.4 Zoning Ordinances – Interpretation. Where a resolution only bars extension of public sewer service outside a sewer district, that resolution does not provide a basis for reversing or

remanding a decision that grants land use approval to use an individual septic system. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

30.4 Zoning Ordinances – Interpretation. Where a potentially dispositive issue under a zoning code requirement that development be served by public facilities is whether a private septic system qualifies as "public facilities," LUBA will reject arguments in respondent's brief that the city council relied on a comprehensive plan definition of "public facilities" that might be broad enough to include private septic systems as public facilities, where nothing in the city council's decision suggests the city council relied on the comprehensive plan definition. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

30.4 Zoning Ordinances – Interpretation. Where a decision includes potentially conflicting findings that (1) all of a geologist's recommendations must be implemented or (2) only those recommendations identified by staff must be implemented, but the first finding can be harmonized with the second because the first finding does not expressly require that all of the geologist's recommendations must be implemented, it is appropriate to interpret the first finding to only require implementation of the staff identified recommendations. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

30.4 Zoning Ordinances – Interpretation. Where the word "property" is not defined in the local code, the county correctly considers context provided by the definitions of "property line adjustment" and "property line," both of which include reference to a "lot of record," in order to interpret the meaning of "property" to refer generally to whatever units of land (parcel, lot, or lot of record) that are subject to a property line adjustment. *LaBare v. Clackamas County*, 71 Or LUBA 25 (2015).

30.4 Zoning Ordinances – Interpretation. A development ordinance that links the terms "mining" and "quarrying" suggests the term "mining" should not be limited to removal of minerals that exclude rock, where dictionary definitions of "quarrying" frequently define that term to include rock removal. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

30.4 Zoning Ordinances – Interpretation. Where a development code states that "minerals" include three general categories: solids, liquids, and gases, but these general categories are followed by specific examples: "coal and ores," "crude petroleum" and "natural gases," the rule of statutory construction *ejusdem generis* lends some support for interpreting the word "minerals" to be a narrow category of precious and/or valuable substances, as opposed to mere rock or aggregate. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

30.4 Zoning Ordinances – Interpretation. Where a development code definition of the term "excavation" separately lists removal of "minerals" and "rock" as possible examples of "excavation," that suggests "minerals" and "rock" are different things and that "minerals" do not include "rock." *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

30.4 Zoning Ordinances – Interpretation. Where a development code definition of "surface mining" duplicates a statute that defines "surface mining" to include mining of "minerals," without expressly incorporating the broad statutory definition of "minerals" or the statutory exceptions to

that broad definition of "minerals" the development code definition of "surface mining" lends some support to the position that the enactors of the development code intended the word "minerals" to have a more narrow meaning than the statutory definition of that term. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

30.4 Zoning Ordinances – Interpretation. One possible inference when a development code definition of "surface mining" duplicates a statute that defines "surface mining" to include mining of "minerals," is that the enactors of the development code intended the word "minerals" to have its statutory meaning, even if the enactors did not expressly incorporate the broad statutory definition of "minerals" or the statutory exceptions to that broad definition of "minerals" into the development code. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

30.4 Zoning Ordinances – Interpretation. There is nothing inherently inappropriate about a local government distinguishing between acceptable excavations that are necessary for development and excavations that are of a nature and extent that constitutes mining. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

30.4 Zoning Ordinances – Interpretation. While dictionaries are not always a reliable way to determine the intended meaning of an undefined term like "minerals," where the development codes expressly directs that undefined terms "have the normal dictionary meaning" it is appropriate to rely on dictionary definitions to interpret the word "minerals" to include basalt rock. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

30.4 Zoning Ordinances – Interpretation. Under the law of the case principle articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), the parties in a LUBA appeal of a decision following LUBA's remand of an earlier decision may not revisit legal issues that were resolved by LUBA in the prior appeal. Where the board of county commissioners could have reviewed the first decision and resolved interpretive issues differently than the hearings officer did in the first decision, but did not do so prior to the first LUBA appeal, the board of commissioners may not revisit resolved interpretive issues in the decision following remand and is not entitled to the deferential standard of review required by ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), in the second appeal. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

30.4 Zoning Ordinances – Interpretation. As a general proposition, a board of commissioners is free to interpret its land use regulations. But a hearings officer would not be free to interpret county land use regulations differently than LUBA did following a LUBA remand of the hearings officer's initial decision, and the board of commissioners is also not free to do so in a local appeal of the hearings officer's decision following LUBA's remand. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

30.4 Zoning Ordinances – Interpretation. Where a destination resort conceptual master plan approval becomes void under applicable land use regulations if conditions of approval are not "substantially exercised" within two years, and the governing body does not distinguish between conditions based on their importance or the level of difficulty in exercising those conditions, a finding that 19 of 42 conditions have been "fully complied with" is not adequate to establish that

the 42 conditions have been "substantially exercised." *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

30.4 Zoning Ordinances – Interpretation. Where a destination resort conceptual master plan approval becomes void under applicable land use regulations if conditions of approval are not "substantially exercised" within two years, the governing body may not dismiss the significance of the applicant's failure to exercise 22 of 42 conditions because those conditions required the applicant to secure additional permits as the failure of a "contingency" to occur. The conditions were written in a manner that required the applicant to secure the permits to exercise the condition, such that they were a necessary step to exercise the condition, and the significance of the applicant's failure to secure the permits may not be dismissed entirely as a failure of a "contingency." *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

30.4 Zoning Ordinances – Interpretation. Where a destination resort conceptual master plan approval becomes void under applicable land use regulations if conditions of approval are not "substantially exercised" within two years, and the process and complexity of destination resort final master plan approval makes it difficult to do so within two years, the solution is to amend county land use regulations so as not to subject conceptual master plan approval to the two-year deadline or to write conceptual master plan approval conditions so that they can be exercised without first securing final master plan approval. The solution is not to take the position that the two-year deadline to "substantially exercise" the conditions of approval should not be applied, where the county land use regulations as currently written clearly make the two-year deadline applicable. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

30.4 Zoning Ordinances – Interpretation. Where the county's land use regulations require the county to find that the failure of an applicant to fully comply with any conditions of conceptual master plan approval within two years is not the "fault of the applicant," LUBA will defer to a board of commissioner's finding that the complexity of the proposal and the complexity of the county's destination resort review process relieves the applicant of any fault in fully complying with the conceptual master plan conditions of approval. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

30.4 Zoning Ordinances – Interpretation. A city council's occasional erroneous reference to a "Definition of Village Character" as a "purpose statement" is not a basis for remand, where it is clear that the city council simply refused to interpret the definition as a mandatory permit approval standard that required the city to compare proposed development with existing development to determine if the proposed development is "small scale." *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

30.4 Zoning Ordinances – Interpretation. A city council's interpretation that a code "Definition of Village Character" is not a mandatory permit approval standard, and that village character is achieved through compliance with substantive code standards that follow the definition, is consistent with the text and context of the code, where the code standards that follow the definition all state "village character" will be created or enhanced "by" or "through" "compliance with the following" "requirements," "criteria" or "design standards." *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

30.4 Zoning Ordinances – Interpretation. A petitioner's argument that a city's code requires that proposed development be compared with the width and length of buildings on adjoining lots, in addition to height, to ensure the proposed development is "small scale" will be rejected where petitioner cites no code language that requires that the proposed development must be directly compared with adjoining development, petitioner cites nothing to support its contention that width and length must invariably be considered in addition to height, and the code is reasonably interpreted to achieve "village character" through standards set out in the code, rather than through a direct comparison of the proposed development with surrounding development. *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

30.4 Zoning Ordinances – Interpretation. A city council's interpretation that the "work" portion of live/work units will "equally or better" meet a plan purpose of achieving a compact commercial core than would a commercial use, because the work area is an office or commercial use in fact if not name, is plausible and a basis for granting an exception to a code standard that would otherwise prohibit ground floor residential development. A petitioner must do more that speculate that work portion of a live/work unit will not be put to office or commercial use. *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

30.4 Zoning Ordinances – Interpretation. Where a city council concludes that a proposed development that includes live/work units and an associated library and gym would be at least as supportive of a plan purpose of creating a high-density retail commercial core as a design that complied with a code "no ground floor residential" standard, by including a parking lot instead, that interpretation is plausible and a sufficient basis for granting an exception to the code "no ground floor residential" standard. *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

30.4 Zoning Ordinances – Interpretation. In applying a conditional use "compatibility" standard that requires consideration of the "operating characteristics of the use," a local government does not err in considering the safety of the use. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

30.4 Zoning Ordinances – Interpretation. Where county zoning ordinance language replicates and was adopted to implement Goal 4 and LCDC's Goal 4 administrative rule, the board of county commissioner's interpretation of that zoning ordinance language is not entitled to deferential review under ORS 197.829(1) and is instead reviewed under ORS 197.835(9)(a)(D) to determine if the board of commissioners "improperly construed the applicable law." *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

30.4 Zoning Ordinances – Interpretation. A board of county commissioners erroneously interprets a county zoning standard that replicates the OAR 660-006-0025(5)(a) requirement that certain nonforest uses in forest zones must not "[f]orce a significant change in, or significantly increase the cost of" forest practices, where under the board of commissioners' interpretation that standard is treated as a broader "significant impacts" standard that is unconnected to "costs" or "changes in" "forest practices." *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

30.4 Zoning Ordinances – Interpretation. Even under the deferential standard of review required by ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 260-61, 243 P3d 776 (2010), interpreting a generally worded forest land protection policy so strictly that a use that is expressly allowed as a conditional use in the forest zone could never be approved is inconsistent with the text of the policy and implausible. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

30.4 Zoning Ordinances – Interpretation. A board of county commissioners' interpretation of a zoning standard that requires that a proposed natural gas pipeline must "not limit the potential for more intensive use of the area" as being violated by the proposal unless the pipeline results in "no restrictions" on more intensive uses is neither inconsistent with the text of the zoning standard nor implausible and therefore is not reversible under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 260-61, 243 P3d 776 (2010). *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

30.4 Zoning Ordinances – Interpretation. A board of commissioners correctly interprets a zoning standard that requires that a "project's" public benefits outweigh expected adverse impacts to (1) limit consideration to the pipeline for which county permit approval is sought and (2) exclude any public benefits that may be generated by the LNG terminal that would be located in, and require the separate approval of, a city located in the county. The permit applicant's position that the county should consider the benefits of the LNG terminal but not the LNG terminal's expected adverse impacts is incorrect, because "project" cannot mean one thing when considering benefits and something else when considering expected adverse impacts. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

30.4 Zoning Ordinances – Interpretation. While the particular wording of a purpose statement or related provisions can lead to a contrary result, purpose statements generally are not applied as mandatory permit approval criteria. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

30.4 Zoning Ordinances – Interpretation. Where a county code provides a methodology for interpreting ambiguous code provisions, and provides that the "Planning Official shall interpret the meaning of the term," that provision does not operate as a delegation of exclusive interpretative authority to the Planning Official, or require the county governing body to defer to the Planning Official's interpretation. *Stevens v. City of Island City*, 71 Or LUBA 275 (2015).

30.4 Zoning Ordinances – Interpretation. A code provision requiring that a home occupation shall not utilize over 600 square feet of floor area cannot plausibly be interpreted to limit only the square feet physically occupied by a truck or trailer as part of a home occupation to perform maintenance work on trucks and trailers. Because the home occupation activity is the maintenance and not the storage of trucks and trailers, any interpretation that ignores the square footage necessary for employees to perform maintenance tasks is not consistent with the text of the code provision. *Stevens v. City of Island City*, 71 Or LUBA 275 (2015).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm as plausible a governing body's interpretation of a code provision requiring a geologic assessment where development cannot be

accomplished without measures to "mitigate or control" the risk of geologic hazard, to trigger the need for a geologic assessment only if the development activity itself causes the risk of geologic hazard to increase above its pre-development state, and to not require geologic assessment simply because the applicant proposes measures, such as planting vegetation, intended to reduce existing landslide risk below the pre-development state. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

30.4 Zoning Ordinances – Interpretation. A hearings officer errs in concluding a previously approved master plan was superseded by a new zoning district where the hearings officer unduly relies on (1) the lack of a clause in the ordinance specifically stating that the underlying master plan is not superseded and (2) the alleged lack of any references to the underlying master plan in the enacting ordinance or its findings, where there are in fact references in the enacting ordinance findings to the master plan, and the hearings officer failed to consider the presumption under the zoning ordinance that new zoning provisions do not repeal or impair existing land use approvals. *Widgi Creek Homeowners Association v. Deschutes County*, 71 Or LUBA 321 (2015).

30.4 Zoning Ordinances – Interpretation. Where a new Resort Community Zone is applied to two existing resort areas and includes standards for new development, and one plan policy says new development on undeveloped resort property in the first resort is to be guided by water and sewer service availability and another policy says any new development in the second resort must be consistent with its previously approved master plan, but no plan policy mentions the first resort's master plan, that omission supports a conclusion that the first resort's master plan does not apply to new development in that resort. *Widgi Creek Homeowners Association v. Deschutes County*, 71 Or LUBA 321 (2015).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance is deeply ambiguous regarding whether a previously approved resort master plan continues to have regulatory effect after a new Resort Community Zone is applied to the property, with parts of the ordinance, its supporting findings and the comprehensive plan supporting opposite conclusions, it is appropriate for LUBA to remand for the hearings officer to first address all of the conflicting language. *Widgi Creek Homeowners Association v. Deschutes County*, 71 Or LUBA 321 (2015).

30.4 Zoning Ordinances – Interpretation. Where conditional use approval requires a finding of compliance with a three-pronged standard that "the proposed use will not alter the character of the surrounding area in a manner that substantially limits, impairs, or precludes the use of surrounding properties," and the decision maker only addresses the "precludes" prong in granting approval, remand is required to address the other two prongs. *Morton v. Clackamas County*, 70 Or LUBA 7 (2014).

30.4 Zoning Ordinances – Interpretation. Where a hearings officer's findings appear to substitute a common law nuisance standard for the applicable code standard, but the hearings officer never applies the identified common law nuisance standard, LUBA will view the findings as surplusage rather than an improper attempt to substitute an inapplicable standard for the applicable standard. *Morton v. Clackamas County*, 70 Or LUBA 7 (2014).

30.4 Zoning Ordinances – Interpretation. A hearings officer correctly concludes that an isolated wetland is not a "riparian corridor," where the code defines riparian corridor as "an area, adjacent to a water area," and the isolated wetland is not "adjacent to a water area." *Carver v. Washington County*, 70 Or LUBA 23 (2014).

30.4 Zoning Ordinances – Interpretation. Where the Court of Appeals interpreted similar operative language in a county's code to determine that "riparian zones" are areas adjacent to water areas designated in a community plan, a hearings officer correctly interprets the term "riparian corridor" in that code to apply only to riparian areas that are proximate to designated water areas. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

30.4 Zoning Ordinances – Interpretation. A local code provision authorizing a private street if the street is "not needed to provide access to other properties in the area" is not violated by a required pedestrian/bicycle connection between the proposed private street and offsite transit facilities, because "other properties in the area" does not refer to transit facilities in a public right-of-way. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

30.4 Zoning Ordinances – Interpretation. A local government errs in denying an application for permit approval because it fails to provide adequate parking facilities, where there is no standard that requires "adequate parking facilities" and the local government finds that the proposal complies with the applicable off-street parking requirement. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

30.4 Zoning Ordinances – Interpretation. A local government errs in denying an application for approval of a "residential" development for failure to comply with an approval standard that applies to "commercial, institutional and office park uses." *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

30.4 Zoning Ordinances – Interpretation. While a county governing body cannot be faulted for not considering dictionary definitions that were not cited to it below, the county governing body can be faulted for relying on a general on-line dictionary definition of "penstock," when a party asserted that term has a technical meaning and cited two treatises in support its position that the term has a narrower meaning that the on-line general dictionary definition. *Pacificorp v. Deschutes County*, 70 Or LUBA 89 (2014).

30.4 Zoning Ordinances – Interpretation. A county governing body's unexplained decision to rely on the on-line Merriam-Webster Dictionary definition of the term "penstock" does not constitute an interpretation that is adequate for review, where the governing body's decision does not show it was a considered choice between possible definitions. *Pacificorp v. Deschutes County*, 70 Or LUBA 89 (2014).

30.4 Zoning Ordinances – Interpretation. A hearings officer correctly rejects an interpretation that connecting two dwellings by a causeway creates a single "dwelling," with two or more "dwelling units," based on a general code definition of "dwelling," where a narrower definition of dwelling that limits "dwelling" to a single dwelling unit applies in the zone. *Macfarlane v. Clackamas County*, 70 Or LUBA 126 (2014).

30.4 Zoning Ordinances – Interpretation. Even if a structure qualifies as a nonconforming structure with regard to a general 20-foot setback required in the applicable zoning district, that does not obviate a 30-foot setback requirement for schools, where the use of the structure is to be converted for the first time to a school. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

30.4 Zoning Ordinances – Interpretation. Even if a structure qualifies as a nonconforming structure with regard to a general 20-foot setback required in the applicable zoning district, that does not obviate a land use code off-street parking requirement for schools, where the use of the structure is to be converted for the first time to a school. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

30.4 Zoning Ordinances – Interpretation. ORS 215.750 and OAR 660-006-0027(3) authorize local governments to approve forest template dwellings if at least three dwellings existed within a specified 160-acre area and those dwellings continue to exist at the time forest template dwelling approval is requested. A hearings officer's interpretation of the word "dwelling" in local laws adopted to implement ORS 215.750 and OAR 660-006-0027(3) such that a former dwelling that has been vacant for many years and is in a state of disrepair that would preclude use as a residence does not qualify as a "dwelling" for purposes of satisfying ORS 215.750 and OAR 660-006-0027(3) is more consistent with the underlying purpose of the statute and rule. That underlying purpose is to allow forest template dwellings in circumstances where there is existing limited residential development on forest lands, and the hearings officer's interpretation is more consistent with that underlying purpose than interpreting the word "dwelling" to include long abandoned structures, no matter how derelict and uninhabitable as a dwelling in its current condition. *West v. Multnomah County*, 70 Or LUBA 235 (2014).

30.4 Zoning Ordinances – Interpretation. Land use regulations that set out approval criteria for commercial composting operations and also state "[a]dditionally, these facilities shall be subject to" DEQ and Metro rules simply advise applicants for county approval of commercial composting facilities that there are other legal requirements that must be satisfied before a composting facility can commence operation. That language does not obligate the county to apply DEQ and Metro rules and find the proposed facility complies with those rules. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

30.4 Zoning Ordinances – Interpretation. Generally, a land use regulation requirement that a modified conditional use must be "consistent" with the originally approved conditional use is satisfied, where the originally approved conditional use had two parts and the modified conditional use simply eliminates one of those parts and makes minor, non-substantial changes to the remaining part. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

30.4 Zoning Ordinances – Interpretation. Where applicable land use regulations require that a proposal to modify a previously approved conditional use must be "consistent" with previously approved conditional use, and the proposal would eliminate the previously approved composting operation and make minor changes to the previously approved topsoil mining operation, the modified conditional use is correctly viewed as "consistent" with the previously approved conditional use. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

30.4 Zoning Ordinances – Interpretation. In considering whether the proposed modifications to a previously approved conditional use comply with conditional use approval criteria, if legal issues raised in the modification proceedings are relevant issues regarding approval standards that could not have been raised when the original proposal was approved, the local government is required to address those issues. Conversely, if the arguably relevant issues raised in the modification proceedings could have been fully raised when the original proposal was approved, those legal issues are not a product of the modification and the local government is not required to consider those issues. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

30.4 Zoning Ordinances – Interpretation. While a 4.4 units per acre maximum density standard may limit the number of lots that would otherwise be possible with a 5,000-square-foot minimum lot size without the maximum density standard, the minimum lot size and maximum density standards are not inconsistent. Therefore, there would be no textual inconsistency in interpreting the development code to impose a maximum density standard. *Greller v. City of Newberg*, 70 Or LUBA 499 (2014).

30.4 Zoning Ordinances – Interpretation. Where the Metro Code requires that a city retain its Goal 5 protections for tree groves unless removing those protections "would allow no more than a *de minimis* increase in the amount of development that could occur in areas identified as upland wildlife habitat," a city does not err in comparing the area of each tree grove where development would occur with the remaining area of each tree grove, rather than comparing the area of each tree grove where development would occur with the entire area identified as upland habitat Metro-wide or within the entire city. *Metro v. City of Lake Oswego*, 68 Or LUBA 136 (2013).

30.4 Zoning Ordinances – Interpretation. Where the Metro Code requires that a city retain its Goal 5 protections for tree groves unless removing those protections "would allow no more than a *de minimis* increase in the amount of development that could occur in areas identified as upland wildlife habitat," a city erroneously applies the *de minimis* limitation by assuming, based on speculation that the owner of the large house will not want to further divide the property, that a one-acre lot with a large house on it in a zone that allows 7,500-square-foot lots will not be divided and developed with additional residences. *Metro v. City of Lake Oswego*, 68 Or LUBA 136 (2013).

30.4 Zoning Ordinances – Interpretation. A city's final decision includes adequate findings and a code interpretation adequate for review, where the final decision adopts a planning staff decision as its own, and the planning staff decision embodies a code interpretation that is adequate for review. *Sellwood-Moreland Improvement League v. City of Portland*, 68 Or LUBA 213 (2013).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a staff code interpretation to the effect that a district-specific density transfer provision governing single-family development in single-family zones does not supersede or conflict with a general city-wide density transfer provision applicable to multi-family development in multi-family zones, where the two density transfer provisions would never apply to the same development, and therefore would not create incompatibility or conflict, such that the specific would control the general. *Sellwood-Moreland Improvement League v. City of Portland*, 68 Or LUBA 213 (2013).

30.4 Zoning Ordinances – Interpretation. A Metro regional trail that includes a multi-use pathway, trailheads, parking, restrooms, shelters, picnic areas, interpretative and educational facilities etc. can constitute a "park" that is prohibited in a city industrial zone, where the proposed trail falls within the broad code definition of "park." That the industrial zone allows bicycle and pedestrian paths in greenways and natural areas does not mean that the proposed regional trail is allowed in the industrial zone, where the trail is not located in a greenway or natural area and is more than a bicycle and pedestrian path. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

30.4 Zoning Ordinances – Interpretation. Remand is necessary where a city's code requires that the city council "shall" vote on a valid challenge to the impartiality of a council member, but the city council ignores a valid challenge and does not vote. That the code provisions governing the required vote state that the city council "may" disqualify the challenged member is properly read in context as authorizing disqualification, and not as granting the city council the discretion to vote or not, as it sees fit. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a city council interpretation of a code standard requiring that a proposed facility is "consistent with the overall needs of the community" to also include consideration of impacts/benefits on citizens of adjoining cities, where that broad understanding of "community" is not inconsistent with the text, context, purpose or policy underlying the standard. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

30.4 Zoning Ordinances – Interpretation. An argument that a city council misconstrued a "mitigate permanent disturbances" standard to apply only to disturbances to the surface of wetlands does not provide a basis for remand, where fairly read the city council findings apply the standard to evaluate disturbances to the soils and water column that constitute a wetland, and conclude that placing a pipe underground in the bedrock 34 to 60 feet below the wetland would not cause permanent disturbance to the wetland. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

30.4 Zoning Ordinances – Interpretation. A standard that requires mitigation of permanent disturbances to wetlands is not properly construed to apply to the entirety of a parcel that contains a wetland area, such that the standard is applied to disturbances elsewhere on the parcel that have no impact on the wetland area. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a city council interpretation of a code standard requiring mitigation of "permanent disturbances" to water resource areas, to require no mitigation when a proposed pipeline is laid across a culvert within the paved area of a street, and thus would result in no additional impacts on the water resource, where the interpretation is consistent with the text and apparent purpose of the standard to minimize impacts on water resource areas. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

30.4 Zoning Ordinances – Interpretation. LUBA will not interpret a definition of "multi-dwelling structure" to preclude construction of a building that straddles a lot line, where the definition is written to distinguish "multi-dwelling structures" from attached dwellings which must be located on their own lot. *Beaumont-Wilshire Neighbors v. City of Portland,* 68 Or LUBA 393 (2013).

30.4 Zoning Ordinances – Interpretation. A built-in barbeque grill that is constructed on a three-foot concrete based qualifies as a "structure," which is defined as "any object constructed in or on the ground." As such, the barbeque grill is subject to setback requirements that apply to structures. *Beaumont-Wilshire Neighbors v. City of Portland,* 68 Or LUBA 393 (2013).

30.4 Zoning Ordinances – Interpretation. While the definition of "structure," which is "any object constructed in or on the ground," is potentially broad enough to include synthetic turf, synthetic turf is more similar to "paved areas and vegetative landscaping materials," which are exempt from the definition of structure. *Beaumont-Wilshire Neighbors v. City of Portland,* 68 Or LUBA 393 (2013).

30.4 Zoning Ordinances – Interpretation. In approving a wedding venue and event business in a forest zone under a code provision that allows, on a "temporary" basis, uses otherwise not allowable in the applicable zone, a county must consider whether the proposed use is properly characterized as a "home occupation," which is an allowed conditional use in the forest zone, subject to restrictions. If the proposed is properly characterized as a home occupation allowable in the forest zone, then the code does not allow the county to issue a temporary use permit for that use. *White v. Lane County*, 68 Or LUBA 423 (2013).

30.4 Zoning Ordinances – Interpretation. A county errs in approving a five-year renewable permit for an existing wedding venue and event business as a "temporary" use, without considering whether the use is "temporary" as defined under the county code, *i.e.*, something that exists only for a limited, transitory interval, and whether conditions are necessary to limit the duration of the use to ensure that it is in fact a "temporary" use. *White v. Lane County,* 68 Or LUBA 423 (2013).

30.4 Zoning Ordinances – Interpretation. A county errs in interpreting a code provision to allow temporary use of an "existing structure" even if the structure was recently and illegally built for a use prohibited in the zone, where the text and context of the temporary use provisions suggest that temporary use of an "existing structure" is intended for a lawful structure, and the county's broader interpretation brings the code into conflict with nonconforming use statutes. *White v. Lane County,* 68 Or LUBA 423 (2013).

30.4 Zoning Ordinances – Interpretation. Where an applicant sought confirmation that a methadone clinic is a permitted use in a professional office zone, and there is no reason to believe the applicant's request also sought confirmation for other unspecified medical services, the city's confirmation regarding the methadone clinic does not include other unspecified medical services. An applicant's and city's failure to specify expressly that a methadone clinic that is the subject of a land use approval application was to be an outpatient clinic is not error, where the requirement that the approved methadone clinic must be an outpatient clinic is inferable from the application and decision. *Mariposa Townhouses v. City of Medford,* 68 Or LUBA 479 (2013).

30.4 Zoning Ordinances – Interpretation. Absent wording to the contrary, generally worded zoning district purpose statements are not mandatory approval criteria for permits or other site-specific land use decisions. A zoning district purpose statement that development in the zone "is expected to be suitable for locations adjacent to residential neighborhoods" is not a mandatory approval criteria for permits or other site specific land use decisions. *Mariposa Townhouses v. City of Medford*, 68 Or LUBA 479 (2013).

30.4 Zoning Ordinances – Interpretation. Where competing interpretations of a development code are equally plausible, and there is some contextual support for the interpretation selected by a hearings officer, LUBA will conclude that the hearings officer did not "[i]mproperly construe[] the applicable law," within the meaning of ORS 197.835(9)(a)(D). *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

30.4 Zoning Ordinances – Interpretation. Where a development code requires that conditions of permit approval be satisfied within two years after the permit approval becomes final to avoid having the permit approval become void, and satisfying those 38 conditions within two years will be difficult because satisfying some of those conditions of approval would require the applicant to first secure additional approval decisions, a hearings officer is not permitted to interpret the code to require that the applicant only satisfy those conditions of approval that do not require additional approval decisions. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

30.4 Zoning Ordinances – Interpretation. Where a development code requires that permit conditions of approval must be substantially satisfied and that "any failure to fully comply with the conditions is not the fault of the applicant," for a county hearings officer to find that the permit is not void, the hearing hearings officer must be able to find both that all conditions of approval, viewed as a whole, have been substantially exercised *and* that, for any of the conditions of approval where there has been a failure to fully exercise the condition, the applicant is not at fault. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

30.4 Zoning Ordinances – Interpretation. Where the applicable land use regulations do not require that the owner of the property that is the subject of a permit application sign the application or join in the application, a local government errs by denying the application on the basis that the property owner opposes the permit application. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 43 (2013).

30.4 Zoning Ordinances – Interpretation. A local government errs in finding that a previously approved variance is no longer legally effective, based on a finding that (1) the sign that was approved "can never exist" and (2) the facts that existed at the time of the variance was approved no longer exist, where the findings do not explain why a sign with the characteristics of the sign that was originally approved "can never exist,' or why the change in facts has the legal effect of making the variance legally ineffective. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 43 (2013).

30.4 Zoning Ordinances – Interpretation. Where there is nothing in the applicable land use regulations that requires the applicant for a sign permit pursuant to a previously approved variance to demonstrate that it is not possible to construct a conforming sign, the local government errs in

denying the sign permit based on the applicant's failure to demonstrate it is not possible to construct a conforming sign instead. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 43 (2013).

30.4 Zoning Ordinances – Interpretation. LUBA will not consider whether a county has authority to approve conditional zoning where the applicant modified its proposal making conditional zoning unnecessary before the board of commissioners could make a decision about whether the county had such authority. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

30.4 Zoning Ordinances – Interpretation. A driveway that is located on the property it serves, or on another private property, is properly viewed as a part of the use it serves. But a public right-of-way that provides access to property is not properly viewed as part of the use that the public right-of-way provides access to. *Lost Creek Rock Products, LLC v. Lane County*, 67 Or LUBA 96 (2013).

30.4 Zoning Ordinances – Interpretation. Mining truck traffic, while it is on the mining site and inside a 200-foot buffer that separates the mining site from adjoining properties, is properly viewed as part of the mining use for purposes of regulations limiting the impacts of the mining use. But when that truck traffic passes onto a public right-of-way, it is no longer properly viewed as part of the mining use. *Lost Creek Rock Products, LLC v. Lane County*, 67 Or LUBA 96 (2013).

30.4 Zoning Ordinances – Interpretation. A zoning overlay height restriction that can be interpreted in isolation to apply to an entire property, instead of only to the portion of the property that is subject to the overlay, should not be interpreted in isolation, where a separate zoning ordinance provision expressly addresses properties that are subject to more than one zone and makes it clear that the overlay zone restrictions should only be applied to the portion of the property that is subject to the overlay zone. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

30.4 Zoning Ordinances – Interpretation. Where limiting application of a zoning main entrance requirement to commercial tenants and not applying that requirement to residential tenants would require that LUBA insert limiting text into the zoning ordinance that is not included in the zoning ordinance, LUBA may not do so and the main entrance requirement applies to both commercial and residential tenants. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

30.4 Zoning Ordinances – Interpretation. Where a city code provides that in reviewing an application for development approval a traffic impact study "may" be required in two circumstances, but petitioners do not establish that either of those circumstances are present, petitioners' argument that the city erred by failing to require a traffic impact study provides no basis for reversal or remand. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

30.4 Zoning Ordinances – Interpretation. Where a city code sets out a particular method for measuring the height of hipped roofs and a different method for measuring other types of roofs, the hipped roof method applies notwithstanding that the proposed hipped roof is a compound hipped roof rather than the simple hipped roof displayed in a code diagram of roof types. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

30.4 Zoning Ordinances – Interpretation. Where a county has specific procedures for identifying and resolving development code violations and appeals from those procedures are to circuit court, LUBA will sustain a county's interpretation that it is not obligated to review a decision by a county enforcement officer that a property is not in violation of the development code as part of a permit application for a home occupation on the property that was the subject of the enforcement officer's decision. *Green v. Douglas County,* 67 Or LUBA 234 (2013).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a county governing body's interpretation of standards governing placement of fill and levees in different areas of the flood plain as allowing fills and levees in the "flood fringe" area as long as the fill or levee does not increase the base flood level by one foot and does not extend from the "flood fringe" into the "floodway," which regulates fill and levees more stringently. *Protect Grand Island Farms v. Yamhill County,* 67 Or LUBA 278 (2013).

30.4 Zoning Ordinances – Interpretation. A comprehensive plan and zoning ordinance standard that requires a city to apply to annexed properties the city zone that "most closely approximates" the "standards," "density," and "uses" in the existing county zone requires a three-pronged inquiry. The city's choice of a zone will be affirmed where standards in the zone the city applied and the standards in the zone petitioners believe should have been applied are identical, the density in the zone applied by the city is closer to the county zone, and the two zones are equally approximate for 33 of the uses allowed in the county zone and the zone favored by petitioners more closely approximates 13 uses. *Mintz v. City of Beaverton,* 67 Or LUBA 374 (2013).

30.4 Zoning Ordinances – Interpretation. Where a rezoning standard originated in a city/county agreement but was later adopted as part of the city's comprehensive plan and land use regulations, the city's interpretation of that rezoning standard is entitled to deference under ORS 197.829(1) and *Siporen v. City of Medford,* 349 Or 247, 243 P3d 776 (2010). *Mintz v. City of Beaverton,* 67 Or LUBA 374 (2013).

30.4 Zoning Ordinances – Interpretation. Where the county zoning that applied to recently annexed territory inside a city's urban growth boundary provided that dwellings were allowed only if the property "was designated for residential use by the city," and the city took the position in its brief that the property was not designated for residential use, LUBA will assume that the city is correct where (1) petitioners do not argue in their petition for review that property was designated for residential use and (2) petitioners fail to respond to the city's argument in its brief. *Knaupp v. City of Forest Grove,* 67 Or LUBA 398 (2013).

30.4 Zoning Ordinances – Interpretation. A petitioner fails to establish that a city erroneously interpreted a county "ten percent/10,000 square foot" limitation on commercial development in a mixed-use zone to apply to individual development proposals rather than the larger comprehensive plan areas when a large number of small developments might be proposed where there is textual support for both the city's and petitioner's interpretation. *Mintz v. City of Beaverton,* 66 Or LUBA 118 (2012).

30.4 Zoning Ordinances – Interpretation. Unless presented with some evidence to the contrary, a city decision maker could reasonably assume that proposed residential development will generate negligible air and noise pollution. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

30.4 Zoning Ordinances – Interpretation. Under *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009), LUBA is free to consider any legislative history it considers useful and where the available legislative history is completely consistent with the city's interpretation and completely inconsistent with petitioner's interpretation, the legislative history is useful in resolving the different interpretations. *Cassidy v. City of Glendale*, 66 Or LUBA 314 (2012).

30.4 Zoning Ordinances – Interpretation. Where the mandatory Goals and Policies section of a comprehensive plan call for multi-family housing to be located in the city's residential zones and the Goals and Policies say nothing about locating multi-family housing in the city's commercial zone, amending the zoning ordinance to delete multi-family housing as a permitted use in the city's commercial zone is not inconsistent with the comprehensive plan. *Cassidy v. City of Glendale*, 66 Or LUBA 314 (2012).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a city council's interpretation of a standard requiring that the proposed road vacation be in the public interest, to the effect that "public interest" can include benefits flowing from development facilitated by the road vacation, not limited to the road vacation itself, where nothing in the text suggests limits on what considerations inform whether the vacation is in the public interest. *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a planning director's interpretation that site design review standards do not apply to a proposed landfill expansion because the expansion was authorized in a 1980 decision that pre-dated the site design review standards, where nothing in the code compels application of the site design review standards to an already authorized landfill expansion. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

30.4 Zoning Ordinances – Interpretation. Where applicable overlay zone regulations do not specify how they apply to a site that is located partially within the overlay zone and partially outside the overlay zone, and the overlay zones can be applied in more than one plausible way in that circumstance, the overlay zone regulations are ambiguous and a building permit that applies those overlay zone regulations that is appealed to LUBA does not qualify for either of the exceptions to LUBA's review jurisdiction set out at ORS 197.015(10)(b)(A) and (B) for ministerial decisions that do not require interpretation or are subject to clear and objective standards. *Richmond Neighbors v. City of Portland*, 66 Or LUBA 464 (2012).

30.4 Zoning Ordinances – Interpretation. A county code section that provides general standards for "adjustments" does not provide additional standards for a property line adjustment, where the relevant text and context indicates that "adjustment" as used in that code section means an adjustment or variance to a minimum lot size or similar standard, not a property line adjustment that requires no variance. *Louks v. Jackson County*, 65 Or LUBA 58 (2012).

30.4 Zoning Ordinances – Interpretation. A city planning commission's interpretation of a code provision that requires "adequate screening" as requiring screening of a 75 foot-tall cell tower to a reasonable extent and its conclusion that screening the bottom two thirds of a 75-foot-tall tower is sufficient to provide "adequate screening" are correct, given the inherently subjective nature of a criterion that requires "adequate screening." *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

30.4 Zoning Ordinances – Interpretation. Where a proposed cell tower meets the objective standards set out in the city's code for telecommunications towers and where the tower will be screened from view while still allowing the tower to function as intended, LUBA will uphold a city's conclusion that the proposed cell tower is "reasonably compatible and harmonious" with the neighborhood, particularly given the inherently subjective nature of the criterion. *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

30.4 Zoning Ordinances – Interpretation. That the county initially adopted a problematic interpretation of the criteria for applying a limited use overlay zone to limit uses allowed on land for which a reasons exception is taken does not provide a basis for reversal or remand, where the county adopted an alternative interpretation that is consistent with the text of the zone change criteria. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation of a code standard allowing imposition of a limited use overlay zone if "it is required to limit the uses permitted in the proposed zone" by the reasons exception rule at OAR chapter 660, division 4, to employ the overlay zone to limit uses to ensure consistency with Statewide Planning Goal 12 (Transportation), and the need to take an exception to Goal 12, even though the county took reasons exceptions only to other statewide planning goals, where the county's interpretation is not inconsistent with the express language, purpose or underlying policy of the code standard. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation of a local code provision to require only consideration of current adequacy of transportation facilities, notwithstanding local traffic analysis guidelines that require analysis of impacts from future planned uses, where the county interprets the guidelines to be non-mandatory, and that interpretation is not inconsistent with the express language, purpose or policy of the relevant local provisions. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

30.4 Zoning Ordinances – Interpretation. Where a zoning standard that requires that structures "be compatible with adjacent developments and surrounding land uses" without specifying whether the referenced adjacent developments and surrounding land uses are limited to *existing* developments and uses, a city council's interpretation that the zoning standard is limited to existing developments and uses is not reversible under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). *Johnson v. City of Gladstone*, 65 Or LUBA 225 (2012).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance allows "Government Services" uses if they are not "specifically listed" uses in other zoning districts, a city council is within its interpretive discretion under *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776

(2010), when it concludes that a VA outpatient clinic is allowable as a Government Services use, notwithstanding that "Medical Health Facilities" are allowed in some city zones. Because the VA outpatient clinic would offer a variety of services some of which are not offered by the typical private and public clinics that would be allowed as "Medical Health Facilities," the VA outpatient clinic is not a "specifically listed" use in any zoning district. *Randazzo v. City of Eugene*, 65 Or LUBA 272 (2012).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance would allow a VA outpatient clinic use as "Government Services" uses only if the use is not "specifically listed" uses in other zoning districts, and the zoning ordinance authorizes "Medical Health Facilities" in other zoning districts, the critical question is whether authorizing "Medical Health Facilities" in those other zones is sufficient to "specifically list" the proposed VA outpatient clinic use. In resolving that question, the maxim of statutory construction in ORS 174.020 that calls for selection of a particular provision over a more general provision where they conflict is of no particular assistance. *Randazzo v. City of Eugene*, 65 Or LUBA 272 (2012).

30.4 Zoning Ordinances – Interpretation. A governing body's interpretation of a code provision allowing rezoning when "zoning previously adopted for the area was in error" to focus on the parcel to be rezoned rather than the surrounding area is consistent with the text of the provision, and will be affirmed. *O'Brien v. Lincoln County*, 65 Or LUBA 286 (2012).

30.4 Zoning Ordinances – Interpretation. The zoning designation of property that is shown on the official zoning map is the valid zoning designation for the property. *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

30.4 Zoning Ordinances – Interpretation. LUBA will not defer to an interpretation of a zoning ordinance that appears only in a city's reply brief and is inconsistent with an implied interpretation that is included in the city council's decision on appeal. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

30.4 Zoning Ordinances – Interpretation. Where a city council interprets a comprehensive plan policy to require that a new voluntary, educational septic system maintenance program "will improve upon" its existing mandatory, regulatory septic system maintenance program and the evidence shows that the existing program has improved septic system maintenance, a city council decision to repeal the existing program before the new program is developed and adopted is inconsistent with the comprehensive plan policy. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

30.4 Zoning Ordinances – Interpretation. A comprehensive plan policy that requires a city to "adopt a program to improve maintenance of septic systems for the benefit of all residents" does not specify how the program will improve septic system maintenance and therefore does not necessarily require that a city septic system maintenance system must be mandatory and regulatory, as opposed to voluntary and educational, so long as the program will improve maintenance of septic systems. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

30.4 Zoning Ordinances – Interpretation. Although there is no general legal requirement that all legislative land use decisions must be supported by findings, where the scope and meaning of at least some applicable comprehensive plan policies are unclear, it is highly unlikely that a decision to replace an existing mandatory, regulatory program to improve septic system maintenance with a voluntary, educational program to achieve the same goal will be defensible on appeal without adequate findings. *Oregon Coast Alliance v. City of Dunes City*, 65 Or LUBA 358 (2012).

30.4 Zoning Ordinances – Interpretation. Where a permit extension may be granted based on a finding that the failure to complete the proposal within the original term of the permit was "for reasons which the applicant was not responsible," a board of county commissioners is within its discretion to interpret that standard to be met if a prudent developer would have delayed construction based on a funding shortfall. The county is also within its interpretive discretion not to require that the applicant explain why it could not have altered its decision to fund the project with donations or why it could not have reallocated other resources to construct the proposal. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation of a "public need and public benefit" standard not to require a weighing of the positive against the negative impacts of proposed mining, and instead to require only that there is a public need for and benefit from the additional supply of aggregate, where that interpretation is consistent with the express language of the code provision. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

30.4 Zoning Ordinances – Interpretation. A governing body's interpretation that a code phrase "passive use recreational facilities," part of a wetland protection zone that generally prohibits development in wetland setback areas, includes trails and similar recreational facilities, and does not include developed recreational facilities such as an in-ground concrete swimming pool, is consistent with the text and context of the code provision. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

30.4 Zoning Ordinances – Interpretation. A governing body does not err in concluding that an in-ground concrete swimming pool is a "structure" as that term is defined in the city code, because it has a "fixed connection" to the ground. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

30.4 Zoning Ordinances – Interpretation. Where a land use regulation prohibits a county from approving a permit for land if the land has been "developed in violation of" the county land use regulation, a planning commission does not misconstrue the land use regulation in requiring that there be an adjudicated violation regarding the land rather than mere allegations of an existing violation or evidence of a violation. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

30.4 Zoning Ordinances – Interpretation. A city setback reduction criterion requires the city to find that views of the ocean across a currently vacant lot will not be any more "obstructed" with a proposed front yard setback reduction than they would be without that setback reduction. Where it is the construction of the portion of the house that meets all setback requirements that almost entirely obstructs the view of the ocean, a city interpretation that any *de minimis* impact the proposed front yard setback might have on impaired view of the ocean that will remain through

the small side yard does not amount to an "obstruction" is within the city's interpretive discretion under ORS 197.829(1). *Burton v. City of Cannon Beach*, 63 Or LUBA 300 (2011).

30.4 Zoning Ordinances – Interpretation. Where a property is to be developed with a commercial or industrial use, the internal driveway on that property that connects the commercial or industrial buildings to the nearest public right-of--way is properly viewed as part of the commercial or industrial use, whether that driveway is labeled as "accessory" to the business or an integral part of the use itself. *Wilson v. Washington County*, 63 Or LUBA 314 (2011).

30.4 Zoning Ordinances – Interpretation. A destination resort approval standard requiring that "adverse effects on surrounding lands are to be avoided first and minimized if avoidance is not possible" clearly gives priority to avoiding adverse affects. Remand is necessary where the applicant demonstrated and the county considered only whether adverse effects of the destination resort on an adjoining wildlife refuge can be minimized, and the county failed to consider whether adverse effects can be avoided. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

30.4 Zoning Ordinances – Interpretation. Where a breeding kennel arguably qualifies as animal husbandry, and animal husbandry is a farm use, a local government interpretation that the breeding kennel qualifies as a farm use is not inconsistent with the express language, purpose and policy of the land use regulation. *Siegert v. Crook County*, 63 Or LUBA 379 (2011).

30.4 Zoning Ordinances – Interpretation. A local government's interpretation of a local code provision that allows a multi-use path to be constructed in a riparian corridor area if it is "necessary to maintain a functional trail system" is not inconsistent with the express language of any relevant plan or local code provision where a comprehensive plan map depicts a multi-use path within the riparian corridor area, even though the map labels the trail as "conceptual." *League of Women Voters v. City of Corvallis*, 63 Or LUBA 432 (2011).

30.4 Zoning Ordinances – Interpretation. A local government errs in denying an application for a use expressly allowed as a conditional use in the applicable zone on the grounds that the proposed conditional use is inconsistent with the purpose of the zone, where no code provision makes the zone purpose statement an applicable approval criterion, and the zone purpose statement includes no language suggesting that the purpose statement functions as a mandatory approval criterion for conditional uses allowed in the zone. *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

30.4 Zoning Ordinances – Interpretation. LUBA will reject a city council's interpretation of a code provision allowing a property owner to site a recreational vehicle (RV) on the property for "temporary living purposes" to require that the RV be accessory to or in conjunction with a permanent dwelling on the property, where nothing in the applicable code provision expressly or impliedly requires a dwelling, and the city has expressly required, in other inapplicable code provisions, that an RV be an accessory use to or be in conjunction with a dwelling. *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

30.4 Zoning Ordinances – Interpretation. While a local government has latitude to identify applicable standards and criteria in its comprehensive plan and land use regulations, under ORS 227.173(1) the "standards and criteria" must already exist in the plan and ordinance, and the local

government cannot manufacture standards and criteria to apply to approve or deny a permit application. *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a hearings officer's determination that a short-term vacation rental operated using a dwelling on a forest-zoned parcel is a commercial "visitor accommodation" use not permitted in the forest zone rather than a residential use permitted in the zone, where the county's code distinguishes between residential tenancies arranged on a month-to-month basis or longer and commercial "visitor accommodations" with a tenancy less than 30 days. *Davis v. Jackson County*, 63 Or LUBA 486 (2011).

30.4 Zoning Ordinances – Interpretation. A group home for recovering addicts is not rendered something other than a group home simply because the applicant also plans to allow "birthday parties, student graduations, open houses, small luncheons and other similar activities," where the hearing official explains that those activities are consistent with a group care home use and "not out of character" with activities that are common in single family dwellings occupied by a larger family. *Phillips v. Lane County*, 62 Or LUBA 92 (2010).

30.4 Zoning Ordinances – Interpretation. Where a development code allows single-family dwelling outright, but requires special use approval for group care home and prohibits special use approval if the proposed use would have "significant adverse impacts," a hearings official does not erroneously interpret that code requirement to require that any impacts of the proposed special use must be "significantly greater or different than that of a single-family residence of the same size." *Phillips v. Lane County*, 62 Or LUBA 92 (2010).

30.4 Zoning Ordinances – Interpretation. A code provision requiring the "continuation" of existing streets in adjoining subdivisions is not properly interpreted to require that connections be made to internal roads in the adjoining subdivision, where such a connection would have to cross existing platted residential lots. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

30.4 Zoning Ordinances – Interpretation. Under *Flying J. Inc. v. Marion County*, 49 Or LUBA 28, 36-37, *aff'd*, 201 Or App 99, 117 P3d 1027 (2005), where the text of an ordinance that adopts zoning designation amendments expresses a clear intent that the prior zoning for a parcel be retained but the map attached to the ordinance shows a change in zoning, that conflict is resolved in favor of the text. *Turner v. Jackson County*, 62 Or LUBA 199 (2010).

30.4 Zoning Ordinances – Interpretation. Where one sentence of a zoning ordinance provides that "any dispute" concerning the zoning of property is to be resolved by reference to the official zoning map, but that sentence appears immediately after a sentence that states that initial zoning boundary determinations are to be made based on maps generated by the local government's GIS system, those sentences should be read together to require that any disputes that arise based on the GIS maps or facts that arise after the zoning ordinance was adopted be resolved in favor of the official zoning map. But those sentences of the zoning ordinance do not require that a text/map conflict in the enacting zoning ordinance itself be resolved in favor of the official zoning map, where it is clear the new zoning shown for a property on the official zoning map was a mistake, and the text of the enacting ordinance clearly states that the zoning of the property was not changed by the ordinance. *Turner v. Jackson County*, 62 Or LUBA 199 (2010).

30.4 Zoning Ordinances – Interpretation. The inference described in *Sarti v. City of Lake Oswego*, 20 Or LUBA 387, *rev'd*, 106 Or App 594, 809 P2d 701 (1991)—that provision for a specific listed use in one zone precludes that use from being authorized in a different zone under a broader use category—has no role in reviewing local government code interpretations under ORS 197.829(1), where the proper question is whether the interpretation is consistent with the text and context of the code language. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation of the use category "retail and wholesale trade facilities" to include a travel plaza that sells fuel, convenience items and food to travelers, where the proposed use fits within the plain and ordinary meaning of the use category's broad terms, and nothing in the text or context narrows the scope of the use category. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

30.4 Zoning Ordinances – Interpretation. An allegedly erroneous and overbroad code interpretation that all commercial uses allowed in any commercial zone are allowed under the use category "retail and wholesale trade facilities" in an airport overlay zone does not warrant reversal or remand, where the interpretative error, if any, does not undermine the governing body's principal interpretation that the proposed travel plaza is a "retail and wholesale trade facility." *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

30.4 Zoning Ordinances – Interpretation. LUBA will reverse under ORS 197.829(1) a governing body's interpretation that a Limited Use overlay zone is applied to limit uses in exception areas only when the applicant requests it, and that instead conditions of approval can be applied to limit uses, when (1) the Limited Use overlay zone is expressly intended for that purpose, (2) nothing in the code suggests an alternative mechanism to limit uses or authorizes attaching conditions of approval to limit uses in exception areas, and (3) under the county's interpretation and the criteria that govern designation of the overlay zone there are no circumstances under which the overlay zone could be applied. *Devin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010).

30.4 Zoning Ordinances – Interpretation. Under *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992), where an approval criterion requires a determination that property is a legal or lawfully created parcel, the relevant question is whether any local government approvals required at the time were obtained, not whether the local government correctly applied the applicable approval criteria to create the property. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

30.4 Zoning Ordinances – Interpretation. Under *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), where the applicable criteria expressly or implicitly require a determination that a unit of land proposed for development is a legal or lawfully created "parcel" under code definitions that set out several ways to create a "parcel," the relevant question is whether the unit of land was in fact created in one of the ways set out in the definition, not whether substantive or procedural errors might have been made in the process of creating the parcel. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

30.4 Zoning Ordinances – Interpretation. Under a code provision defining a lot or parcel as (1) a unit of land created by partition or subdivision, or (2) a unit of land under single ownership, which complies with all applicable laws at the time the lot or parcel was created, the phrase "complies with all applicable laws" modifies the immediately preceding phrase, units of land created by means other than partition or subdivision, and does not require a determination that a parcel created by partition complies with all applicable laws at the time it was created. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

30.4 Zoning Ordinances – Interpretation. Under a code provision requiring that the applicant for development within a riparian area demonstrate that "reasonable steps" have been taken to reduce adverse impact on the environment, it is not a "reasonable step" to require the applicant to forego constructing a short driveway connecting to the adjacent public right-of-way and instead require obtaining lengthy driveway easements over several adjoining properties to connect the subject property to a different, non-adjacent public street. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

30.4 Zoning Ordinances – Interpretation. A code criterion intended to protect against adverse environmental impacts within a floodplain corridor does not require the applicant for a driveway within the corridor to address alleged traffic safety and vision clearance conflicts with users of nearby driveways. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

30.4 Zoning Ordinances – Interpretation. It is not error for a city to rely in part on an existing pathway that does not meet city standards for new pathways to satisfy a land use regulation connectivity requirement, where other proposed pathways meet city standards and, viewed collectively, are themselves sufficient to satisfy the connectivity requirement. *Walker v. City of Sandy*, 62 Or LUBA 358 (2010).

30.4 Zoning Ordinances – Interpretation. It is not error for a city to rely in part on a road extension that is planned for an unspecified date in the future to satisfy a land use regulation connectivity requirement, where other proposed pathways, viewed collectively, are themselves sufficient to satisfy the connectivity requirement. *Walker v. City of Sandy*, 62 Or LUBA 358 (2010).

30.4 Zoning Ordinances – Interpretation. It is not error for a city to rely in part on a proposed pathway that will be closed to the general public during school hours to satisfy a land use regulation connectivity requirement, where other proposed pathways are open to the general public during school hours and, viewed collectively, are themselves sufficient to satisfy the connectivity requirement. *Walker v. City of Sandy*, 62 Or LUBA 358 (2010).

30.4 Zoning Ordinances – Interpretation. A landslide hazard regulation that requires that development be located on the "safest part of the site," without providing any guidance on how to measure safety or how small that part might be, could be interpreted to require that development be located on the safest square inch of the site. In that circumstance the regulation would either be unworkable or potentially run afoul of the ORS 227.173(1) requirement that approval or denial of permits be governed by "standards," if applicants were expected to find a way to make the regulation workable. *Gravatt v. City of Portland*, 62 Or LUBA 382 (2011).

30.4 Zoning Ordinances – Interpretation. A landslide hazard regulation need not be interpreted to require an unqualified search for the "safest part of the site" where another part of the regulation only requires that an applicant demonstrate that development will be located where the "risk of landslide affecting the site" is "reasonably limited." *Gravatt v. City of Portland*, 62 Or LUBA 382 (2011).

30.4 Zoning Ordinances – Interpretation. Where the zoning ordinance definition of "noise-sensitive uses" is ambiguous and could be interpreted to include the entire parcel where the use is located or more narrowly to include only the use's structure, and there is some contextual support for limiting the use to the structure, LUBA will defer to the local government's decision to adopt the more narrow interpretation. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

30.4 Zoning Ordinances – Interpretation. Where one section of a zoning ordinance permits the city engineer to approve more than one driveway access to lots and parcels "subject to access requirements," and another section of the zoning ordinance setting out the city's access requirements generally prohibits direct access to arterials where a lot or parcel already has access to a lower category roadway, a city correctly denies the request for the direct arterial access. In that case the two sections of the zoning ordinance do not conflict; the contingent authority to grant more than one driveway is simply limited by the section setting out access requirements. *Athletic Club of Bend, Inc. v. City of Bend*, 61 Or LUBA 349 (2010).

30.4 Zoning Ordinances – Interpretation. A land use regulation design standard that authorizes a county to "require design and public dedication of streets or roads to ensure the development and continuance of a convenient roadway network" may not be sufficiently broad to authorize a county to require extensive off-site road improvements, but it could be interpreted to authorize a county to require that the partition include an internal road system that connects with any roads on adjoining properties. *MEK Properties, LLC v. Coos County*, 61 Or LUBA 360 (2010).

30.4 Zoning Ordinances – Interpretation. A code standard allowing modifications to a conditional use permit that are not "materially inconsistent with the conditions of the original approval" does not preclude all modifications that are inconsistent in some way with the original conditions of approval, only modifications that "materially" or "significantly" conflict with the original conditions of approval. *Connecting Eugene v. City of Eugene*, 61 Or LUBA 439 (2010).

30.4 Zoning Ordinances – Interpretation. The hearings officer correctly interprets a code standard allowing modifications to a conditional use permit that result in "insignificant changes" in the physical appearance of development, use of the site, or impact on surrounding properties to be concerned with modifications that change the proposed development, not a modification to a deadline to complete the development as originally approved. *Connecting Eugene v. City of Eugene*, 61 Or LUBA 439 (2010).

30.4 Zoning Ordinances – Interpretation. The more deferential standard of review set out at ORS 197.829(1) applies to interpretations by local government governing bodies. The deferential standard of review set out at ORS 197.829(1) does not apply to interpretations by other local decision makers, such as hearings officers, and LUBA reviews such interpretations under ORS

197.835(9)(a)(D) to determine whether the hearings officer "[i]mproperly construed the applicable law." *Waverly Landing Condo. Owners' Assoc. v. City of Portland*, 61 Or LUBA 448 (2010).

30.4 Zoning Ordinances – Interpretation. A petitioner's argument that portions of a proposed sewer pump station and related improvements that were approved as a use that is permitted outright would qualify as a "utility corridor" and therefore require conditional use approval provides no basis for reversal or remand, where petitioner only offers a focused argument regarding the pressure sewer line component of the approved facility and such pressure sewer lines are expressly excluded from the definition of "utility corridor" because they are to be located wholly within street rights-of-way. *Waverly Landing Condo. Owners' Assoc. v. City of Portland*, 61 Or LUBA 448 (2010).

30.4 Zoning Ordinances – Interpretation. Just because a proposed sewer pump station can be viewed as part of a larger "regional" sewer system, it does not necessarily follow that the sewer pump station itself must also be viewed as a "regional level" facility for purposes of determining whether the sewer pump station is accurately characterized as a "basic utility" (a local facility) or a "utility corridor" (a "regional level" facility). *Waverly Landing Condo. Owners' Assoc. v. City of Portland*, 61 Or LUBA 448 (2010).

30.4 Zoning Ordinances – Interpretation. A county's concerns that the roads that will be needed to provide access to the parcels that will be created by a series of partitions are not sufficient to authorize the county to condition final partition plat approval on the applicant agreeing to construct those roads and provide financial guarantees to construct those road, where the county code distinguishes between partitioners and subdividers and requires that subdividers construct or guarantee construction of roads prior to final plat approval. *Sperber v. Coos County*, 60 Or LUBA 44 (2009).

30.4 Zoning Ordinances – Interpretation. A local government's interpretation of its ordinance is not "inconsistent" with the language of the ordinance, within the meaning of ORS 197.829(1)(a), if the interpretation is plausible, given the interpretive principles that ordinarily apply to the construction of ordinances under the rules of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010).

30.4 Zoning Ordinances – Interpretation. In determining whether a local government's interpretation of local land use law is inconsistent with the "express language" of the local land use law, LUBA and the appellate courts apply the statutory construction principles in ORS 174.010, which preclude interpretations that insert or delete words. *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010).

30.4 Zoning Ordinances – Interpretation. A local government's interpretation of its own land use laws to allow the planning commission complete discretion to grant an unlimited number of one-year permit approval extensions will not be affirmed under ORS 197.829(1), where the local government's interpretation adds language that is not present in the local land use law, and the interpretation defeats the purpose of the local land use law, which is to limit the life of a permit decision that is not acted on. *Scovel v. City of Astoria*, 60 Or LUBA 371 (2010).

30.4 Zoning Ordinances – Interpretation. Where petitioners assign error to a local government construction of applicable local land use law, the question for LUBA is whether the local government's interpretation must be sustained under ORS 197.829(1), not whether petitioners' interpretation is sustainable or a better interpretation than the local government's interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

30.4 Zoning Ordinances – Interpretation. A local governing body's interpretation of its land use regulations to limit the scope of review of a site plan and architectural review committee is inconsistent with the text of the land use regulations where the governing body ignores and fails to give effect to land use regulation text that is inconsistent with its interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

30.4 Zoning Ordinances – Interpretation. A local government's interpretation of its land use regulations to limit application of (1) its land use regulation's requirement for preparation of a transportation impact analysis and (2) its minimum level of service standard to zone change decisions and certain planned unit development decisions cannot be sustained, where the text of the relevant land use regulation sections is inconsistent with that interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

30.4 Zoning Ordinances – Interpretation. Under ORS 197.829(1), *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), a local government's interpretation and LUBA's review of that interpretation are guided by the principles articulated in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). Where the local government's interpretation finds almost no support in the relevant text of the land use regulation and comprehensive plan, LUBA will not defer to that interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

30.4 Zoning Ordinances – Interpretation. In considering an application for a three-parcel partition, the failure of an existing intersection that is not adjacent to the property to satisfy local zoning ordinance standards that apply to the design and construction of a new road or intersection does not provide a basis for the county to deny an application for a partition, where no new roads or intersections are proposed as part of the partition. *Pelz v. Clackamas County*, 59 Or LUBA 219 (2009).

30.4 Zoning Ordinances – Interpretation. Where a code provision prohibits development approval for property that is not in full compliance with all code requirements and prior approvals, unless the approval results in the property coming into full compliance, a hearings officer does not err in interpreting the code to require the applicant to apply for all permits and approvals necessary to correct all code or permit violations as part of the development application, and to reject as insufficient the applicant's willingness to seek future permit approvals. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance provision requires that a local government identify the "local need for a different land use" that approval of a proposed a plan amendment will fulfill, the local government does not err in identifying the local need as a

need for trucking businesses in a variety of locations throughout the county, including rural communities. *Kinnett v. Douglas County*, 59 Or LUBA 293 (2009).

30.4 Zoning Ordinances – Interpretation. Where a county zoning ordinance limits lots and parcels to "one principal use," a county's interpretation of its code to allow more than one kind of industrial use to constitute "one principal use" of a parcel, so long as all those industrial uses are all airport related industrial uses, is not reversible under ORS 197.829(1). *Brockman v. Columbia County*, 59 Or LUBA 302 (2009).

30.4 Zoning Ordinances – Interpretation. In applying a destination resort approval standard that requires that destination resorts employ mitigation measures to ensure "no net loss of wildlife," a county may allow an applicant to utilize data developed in approval of a nearby destination resort that utilized seven indicator species to estimate the nature and extent of the damage that must be fully mitigated. A reasonable person would rely on such data unless opposing data is submitted to show the analysis that relies on indicator species missed or inadequately addressed some aspect of the wildlife resource. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

30.4 Zoning Ordinances – Interpretation. Where a destination resort approval standard requires that destination resorts employ mitigation measures to ensure "no net loss of wildlife," an assignment of error that a county erred by applying that standard to allow one species to be replaced by another provides no basis for reversal or remand, where the applicant's approach to demonstrating compliance with the "no net loss of wildlife" standard does not in fact propose to replace existing species with other species and proposes to fully mitigate all expected damage to wildlife habitat. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

30.4 Zoning Ordinances – Interpretation. In applying a destination resort approval standard that requires that destination resorts employ mitigation measures to ensure "no net loss of wildlife," a county does not err by focusing on wildlife habitat rather than the wildlife itself. In developing a destination resort, wildlife itself is generally not purposefully harmed; the harm is caused through destruction or damage to the wildlife habitat. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

30.4 Zoning Ordinances – Interpretation. A street connectivity standard that requires that development must "include street connections to any streets that abut, are adjacent to, or terminate at the development site" is not correctly interpreted to allow a development proposal that would extend an abutting street a short distance into the development and then terminate the street without connecting it to an adjoining street. *Konrady v. City of Eugene*, 59 Or LUBA 466 (2009).

30.4 Zoning Ordinances – Interpretation. A hearings official does not err by finding that a street connectivity standard that requires that development street systems not create "excessive travel lengths" is violated by a subdivision proposal that will result in eleven existing residents and the residents of three of the proposed lots having to drive one quarter of a mile out of direction to make certain trips. While the hearings official likely could have adopted a more permissive reading of the standard, it was not error to adopt the strict interpretation that the hearings official adopted. *Konrady v. City of Eugene*, 59 Or LUBA 466 (2009).

30.4 Zoning Ordinances – Interpretation. LUBA will reverse a county governing body's code interpretation that a conditional use allowed in an Acreage Residential zone that generates any amount of dust leaving the property must be denied because it is not in harmony with the purpose of the zone to buffer urban uses from farm uses, where the zone allows a number of dust-generating uses as permitted and conditional uses in the zone, including farm use, and under the county's interpretation few if any of those uses could ever be approved in the zone. *Davis v. Polk County*, 58 Or LUBA 1 (2008).

30.4 Zoning Ordinances – Interpretation. LUBA will remand a decision determining that a conditional use is inconsistent with one of seven purposes of the underlying zone, where it is not clear whether the county must address each of the seven purposes and determine whether the proposed use is, on balance consistent with those purposes, or whether inconsistency with a single zone purpose is sufficient to deny the application, and the county's decision does not address the issue. *Davis v. Polk County*, 58 Or LUBA 1 (2008).

30.4 Zoning Ordinances – Interpretation. Where a city code standard requires that a city find that vacating a public right-of-way is in the "public interest," and the city finds that the vacation results in practically no loss of transportation facilities and greater development flexibility for surrounding properties, the city's finding is sufficient to demonstrate compliance with the "public interest" standard, and the city is not required to consider the possible secondary effects of building a new basketball arena on the surrounding properties. *Bowers v. City of Eugene*, 58 Or LUBA 51 (2008).

30.4 Zoning Ordinances – Interpretation. A code purpose statement is not a mandatory planning directive where nothing in the wording or the context of the purpose statement suggests that it is. *SEIU v. City of Happy Valley*, 58 Or LUBA 261 (2009).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation of a code provision that authorizes uses in a zone that are similar to listed uses, to allow a proposed use that is similar to a listed use, even if the proposed use is specifically listed in another zone, where the governing body's interpretation gives independent effect to that code provision and is consistent with its text and context. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

30.4 Zoning Ordinances – Interpretation. Where a county's code includes not one but two separate provisions authorizing uses that are not listed as permitted uses in that zone, or listed anywhere as a permitted use in any zone, if the use is "similar to" uses permitted in the zone, it is clear that the county is not concerned with maintaining bright lines between use categories, and the county does not err in approving a "truck stop" as a similar use to an "automobile service station," even though the applicable zone does not list truck stops as a permitted use while other zones in the county do. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

30.4 Zoning Ordinances – Interpretation. A county does not err in concluding that the county's noise ordinance is not a conditional use approval standard for a personal use airport, where the noise ordinance is not part of the county's zoning regulations, the noise ordinance functions as a performance standard rather than an approval standard, and the noise ordinance includes an

exclusion for noises generated by approved conditional uses. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

30.4 Zoning Ordinances – Interpretation. Absent code language to the contrary, a county does not err in finding that regulations governing a particular zoning district apply only to land located within that district, and not to uses proposed on land adjacent to the district. *Crockett v. Curry County*, 58 Or LUBA 520 (2009).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation of a code provision requiring that a proposed use that is "inconsistent" with the transportation plan must be processed as a plan amendment, to require only that the county determine whether the proposed use is in conflict with any transportation plan policy, and not to require that the county find that the proposed use is specifically authorized by the transportation plan. *Crockett v. Curry County*, 58 Or LUBA 520 (2009).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation of a code provision allowing second-floor residential use of a commercial building if "accessory to an active commercial use," to permit residential use by persons who are not owners or employees of the commercial use, where the code defines an accessory use as one that is "incidental and subordinate," rather than related to or associated with. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

30.4 Zoning Ordinances – Interpretation. Where the relevant code provisions impose smaller building size limits on outright permitted commercial uses than conditionally permitted commercial uses, LUBA will affirm a governing body's interpretation that a 4,353-square-foot structure housing both outright permitted and conditionally permitted commercial uses is not subject to the 4,000-square-foot limit on outright permitted commercial uses. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

30.4 Zoning Ordinances – Interpretation. A county does not err in interpreting a standard that requires a finding that property have landscape features "whose preservation requires planned development rather than conventional lot-by-lot development" to require a comparison between planned development and conventional lot-by-lot development, instead of a comparison between proposed planned development and the existing development on the property. *Saddle Butte Residents' Association v. Douglas County*, 56 Or LUBA 269 (2008).

30.4 Zoning Ordinances – Interpretation. A county does not err in interpreting a planned development standard requiring that at least 50 percent of the development be open space "retained for common use by owners and residents of the development" to refer to both commonly owned open space and privately owned open space. *Saddle Butte Residents' Association v. Douglas County*, 56 Or LUBA 269 (2008).

30.4 Zoning Ordinances – Interpretation. The purpose of a zoning limitation that commercial development in a specified area should consist of "retail that is small in scale" could be to limit floor space area and it could also be to require that commercial uses have "a small or local market area." *Loprinzi's Gym v. City of Portland*, 56 Or LUBA 358 (2008).

30.4 Zoning Ordinances – Interpretation. Where zoning ordinance commentary states that the purpose of a zoning ordinance limitation is to encourage "a local scale of retail," and encourage businesses that are "local serving rather than providing a regional draw," a city does not err in finding that the purpose of a zoning regulation that limits commercial uses to 10,000 square feet is to encourage locally oriented businesses rather than businesses of any particular size. *Loprinzi's Gym v. City of Portland*, 56 Or LUBA 358 (2008).

30.4 Zoning Ordinances – Interpretation. Findings in support of an adjustment to a 10,000-square-foot maximum floor space limit to allow a 33,000-square-foot health club are inadequate to demonstrate that granting the adjustment will "equally or better" meet the purpose of the adjusted regulation, where the purpose of the adjusted regulation is to assure the resulting business is "locally serving" and the findings offer no working explanation of what the city thinks "locally serving" means and the findings do not address the "equally or better" requirement at all. *Loprinzi's Gym v. City of Portland*, 56 Or LUBA 358 (2008).

30.4 Zoning Ordinances – Interpretation. A local government errs in denying a PUD on the basis that the proposal did not meet the provisions of the purpose statement for the PUD ordinance where the decision does not mention the purpose statement provisions and it is not clear that the purpose statement is a mandatory approval criterion. *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387 (2008).

30.4 Zoning Ordinances – Interpretation. A zoning ordinance provision that simply says duplexes and triplexes may be allowed through a Type I (nondiscretionary) procedure if certain specified nondiscretionary standards are met is not properly interpreted to render inapplicable other apparently applicable nondiscretionary approval criteria. *Tallman v. City of Bend*, 56 Or LUBA 398 (2008).

30.4 Zoning Ordinances – Interpretation. A checklist prepared by a city's planning department to identify which criteria apply when approving a duplex or triplex does not render apparently applicable zoning criteria that are not identified on the checklist inapplicable to an application for approval of a duplex. It is the zoning ordinance that determines which standards apply, not the checklist. *Tallman v. City of Bend*, 56 Or LUBA 398 (2008).

30.4 Zoning Ordinances – Interpretation. A city is not required to interpret traditional variance language ("practical difficulty or unnecessary hardship") in accordance with the traditional strict meaning of that language, particularly when that language is not used as part of the city's variance code but instead was borrowed from the variance context to be used as a test for expanding nonconforming uses. *Azore Enterprises, LLC v. City of Hillsboro*, 56 Or LUBA 422 (2008).

30.4 Zoning Ordinances – Interpretation. A regional government code provision that requires local government comprehensive plans to include a legal requirement that property be annexed before the property is allowed to urbanize has no bearing on whether a local government may annex property before completing legally required concept planning for the annexed area. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

30.4 Zoning Ordinances – Interpretation. A city comprehensive plan policy that a concept plan should be adopted to guide zoning does not require that the concept plan be adopted before the property that will be the subject of that concept plan can be annexed. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

30.4 Zoning Ordinances – Interpretation. A city does not err by interpreting a code requirement that "adequacy and availability of public facilities and services" be "considered" as a "factor" in reviewing annexation proposals to allow it to defer needed public facility planning to an ongoing but incomplete concept planning process where: (1) annexation, in and of itself, authorizes no additional urban development of the annexed property, (2) no urban development of the annexed property could be allowed under the zoning that will remain in place following annexation, (3) no urban development would be allowed until the concept plan is adopted to allow urbanization of the annexed area, and (4) the concept plan will be required to address the public facilities and services that will be needed for urbanization of the annexed area. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

30.4 Zoning Ordinances – Interpretation. Where the section of the zoning ordinance governing adjustments includes a purpose statement followed by adjustment approval criteria and a separate zoning section specifically states that the specified approval criteria for land use reviews establish "the bounds for the issues that must be addressed by the applicant," a city is not obligated to adopt findings to explain why a requested adjustment is consistent with the adjustment chapter purpose statement. *Pearman v. City of Portland*, 56 Or LUBA 570 (2008).

30.4 Zoning Ordinances – Interpretation. In applying an adjustment criterion that requires the city to find "granting the adjustment will equally or better meet the purpose of the regulation to be modified," a city does not err in finding that criterion is met where the purpose of the criterion recognizes that off-street parking may not be needed where property is in close proximity to transit and the property for which an adjustment to off-street parking requirements is requested is located in close proximity to three transit streets with frequent service and a bikeway and Flexcar locations. *Pearman v. City of Portland*, 56 Or LUBA 570 (2008).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation that a code provision requiring that private wells be shown to meet certain bacteriological quality standards does not also require a showing of sufficient quantity, where the code provision does not mention water quantity and other code standards appear to govern water quantity. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

30.4 Zoning Ordinances – Interpretation. Where a hearings official interprets a street connectivity standard to include a balancing test where the city would determine whether wetland values should take "precedence over the connectivity standards" or whether "it is more appropriate to meet the connectivity standards than to preserve wetlands," but the street connectivity standards themselves provide no textual support for that interpretation, LUBA will remand for a correct interpretation and application of the street connectivity standards. *GloryBee Foods, Inc. v. City of Eugene*, 56 Or LUBA 729 (2008).

30.4 Zoning Ordinances – Interpretation. Where a text and context analysis does not clearly answer an interpretive question, under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), it is appropriate to consider legislative history and maxims of statutory construction. Where there is no legislative history or relevant maxim of statutory construction, and the interpretive question therefore turns on which of several dictionary meanings of the term "preclude" should apply, LUBA will remand for the hearings officer to select the appropriate dictionary definition, considering other parts of the ambiguous zoning ordinance standard and other relevant context. *GloryBee Foods, Inc. v. City of Eugene*, 56 Or LUBA 729 (2008).

30.4 Zoning Ordinances – Interpretation. Where a city's decision explains how its zoning ordinance assigns floor area ratios to properties and that the past, present or future use of property does not affect a property's assigned floor area ratio, a petitioner's argument that property that will shortly be developed as a park should not have any floor area ratio provides no basis for reversal or remand. *Trinkaus v. City of Portland*, 56 Or LUBA 771 (2008).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a city council interpretation that allowing family and social guests to stay in two recreational vehicles parked on a lot adjoining the property owner's dwelling does not constitute a "recreational vehicle park" as that term is defined in the code, because it is not open to the "general public." *Fessler v. City of Fossil*, 55 Or LUBA 1 (2007).

30.4 Zoning Ordinances – Interpretation. Specific code provisions that require imposition of a surface mining overlay zone on property within one-half mile of the mining site, which are intended to protect the site from adverse uses, control over general code provisions requiring that owners of property being rezoned sign the application. The purpose of the overlay zone would be frustrated if nearby property owners could effectively veto a mining operation by refusing to sign the application. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a city council's interpretation of a planned unit development standard authorizing septic tanks for individual lots where it is "impractical" to connect the development to the city sewer system, to govern only circumstances requiring permanent septic tank installations, not temporary septic tanks to be used until the city system is upgraded, followed by mandatory connection to the city system. *Coquille Citizens for Resp. Growth v. City of Coquille*, 55 Or LUBA 155 (2007).

30.4 Zoning Ordinances – Interpretation. LUBA will reject a hearings officer's interpretation of local declaratory ruling provisions to permit the planning director to "initiate" a declaratory ruling application by joining an application improperly filed by a third party, where the text and context of the declaratory ruling provisions state that the planning director may only "initiate" an application by "filing an application" accompanied by the required information. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

30.4 Zoning Ordinances – Interpretation. Where a local code requires the applicant for a declaratory ruling to carry the initial and ultimate burden of proof and persuasion regarding the question submitted, a hearings officer errs in allowing the applicant to simply demonstrate that there is an interpretative dispute and leave it to third parties to take positions on that dispute and

provide the only information to resolve that dispute. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

30.4 Zoning Ordinances – Interpretation. A code provision allowing a "property owner" to request a declaratory ruling related "to the use of the owner's property" does not permit a neighborhood association to request a declaratory ruling related to the use of property that the association does not own. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

30.4 Zoning Ordinances – Interpretation. Remand is necessary where entitlement to initiate a declaratory ruling request rests on whether the applicant is the "permit holder," use of the subject property was arguably authorized by a number of different permits, and the hearings officer rejected a neighborhood's association's claim to be a "permit holder" without determining which permits are at issue and which persons hold those permits. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

30.4 Zoning Ordinances – Interpretation. Where a city code requires that one of two different methods for determining the top of the bank be applied, depending on which of two specified site conditions are found, the choice of method for determining the top of the bank is governed by the corresponding site condition, notwithstanding that the resulting top of the bank is discontinuous. The city errs in determining the location of the top of the bank based not on one of the two specified methods, but rather on the city's preference for a continuous setback. *Kingsley v. City of Portland*, 55 Or LUBA 256 (2007).

30.4 Zoning Ordinances – Interpretation. A county zoning code requirement that groundwater impacts be considered in approving subdivisions in "rural areas identified by the Oregon Water Resources Department in coordination with the County as having declining groundwater levels" is not properly interpreted to be limited to areas that the Oregon Water Resources Department has designated as a "critical groundwater area." More informal identifications of declining groundwater areas could suffice to implicate the zoning requirement. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

30.4 Zoning Ordinances – Interpretation. In applying a land use regulation standard that only requires a service provider certification or letter, a decision maker is not obligated to ensure that every representation in a service provider's certification or letter is correct or supported by substantial evidence. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

30.4 Zoning Ordinances – Interpretation. A hearings officer's finding that a land use regulation that applies to "areas with potential for forest or brush fires" does not apply to a proposed development because it is not located in a "fire hazard area" does not misinterpret the land use regulation where there is no reason to believe the hearings officer assigned different meanings to the phrases "fire hazard area" and "areas with potential for forest or brush fires." *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

30.4 Zoning Ordinances – Interpretation. A city council interpretation of the code term "access" to include a driveway is not inconsistent with the text, context, purpose or policy of that term. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a county's determination that the Agriculture-A zone adopted in 1971 was not an "exclusive farm use" zone subject to the limitations of ORS 215.203 (1971), for purposes of determining whether proposed dwellings under a Ballot Measure 37 waiver must be "in conjunction with farm use," where the 1971 ordinance included a separate "exclusive farm use" zone that permitted only the uses allowed under ORS 215.203 (1971), the Agriculture-A zone in contrast permitted a large number of nonfarm uses that bore no relationship to the uses allowed in the statute, and the obvious inference is that the county did not intend the Agriculture-A zone to implement ORS 215.203 (1971). *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

30.4 Zoning Ordinances – Interpretation. A city's argument that certain historic preservation permit compatibility review criteria are mere considerations will be rejected where the argument is presented for the first time in the city's brief on appeal, the city's decision does not treat the criteria as mere considerations and the criteria appear in a section of the development code entitled "Review Criteria." *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

30.4 Zoning Ordinances – Interpretation. Petitioners' argument that a city erred by failing to find that proposed alterations to a historic building are necessary to ensure its continued use will be rejected on appeal, where the local code merely says some alterations will be necessary to ensure continued use of historic resources and other provisions of the code expressly set out the criteria that the city must address in its findings. *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

30.4 Zoning Ordinances – Interpretation. A city council erroneously concludes that it need not consider U.S. Secretary of Interior Standards in resolving ambiguities in its historic preservation code provisions where those code provisions were adopted to implement the Secretary of Interior Standards. In that circumstance, the Secretary of Interior Standards provide relevant context in the statutory interpretation template that is required by *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993). *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

30.4 Zoning Ordinances – Interpretation. A city cannot rely on the fact that nearby non-historic buildings have canopies in approving new canopies for a historic building, where the relevant approval standard requires that the proposed canopies more closely approximate the original historic design or style of the historic building or be compatible with the historic building or district. However, so long as the city applies the relevant approval standard, it does not commit error by also finding that nearby non-historic buildings have canopies. *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a city council interpretation of a code provision providing minimum performance standards for "streets" to include unsignalized intersections. *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

30.4 Zoning Ordinances – Interpretation. Petitioner fails to demonstrate that the city erred in evaluating the performance of an intersection by measuring delays associated with each directional approach rather than the entire intersection, particularly when petitioner's own expert used the same method to evaluate intersection performance. *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

30.4 Zoning Ordinances – Interpretation. Absent a local regulation that requires otherwise, it is permissible to locate an accessory parking lot on land that is zoned differently than the land on which the primary use the parking lot serves is located. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

30.4 Zoning Ordinances – Interpretation. Where a county's zoning code allows it to approve uses that are not "specified in" the zoning code as temporary uses, it may be possible for the county to approve a meteorological tower as a temporary use, even though the zoning code lists "energy facilities" as a conditional use and the zoning code defines "energy facilities" to include meteorological towers. But where the county's decision does not explain why the wind measurement device is not "specified in" the zoning code unless it is separately and specifically listed, the decision must be remanded to provide the missing explanation. *Womble v. Wasco County*, 54 Or LUBA 68 (2007).

30.4 Zoning Ordinances – Interpretation. Where a county's zoning code allows it to approve uses that are not "so recurrent as to require specific or general regulations to control them" as temporary uses, a county decision approving a meteorological tower as a temporary use will be remanded where the zoning code in fact includes general regulations for meteorological towers, the county applies those general regulations in its decision, and the county's decision makes no attempt to explain the apparent inconsistency. *Womble v. Wasco County*, 54 Or LUBA 68 (2007).

30.4 Zoning Ordinances – Interpretation. Where subdivision approval criteria require consideration of competing goals or factors, such as contributing to orderly development and preserving natural features, it is permissible and even necessary to conduct a weighing or balancing process between development and preservation of natural features. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

30.4 Zoning Ordinances – Interpretation. A subdivision approval standard requiring preservation of natural features that is written to apply to circumstances where there have been no previous efforts to identify natural features plays a more limited role where the subdivision application is preceded by two final, binding land use decisions that have already largely determined which natural features will be preserved and which will be lost to development. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance allows "roadside stands," that sell "agricultural produce," a land use hearings officer correctly applies the *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), template and the county zoning ordinance by applying dictionary definitions of "agricultural" and "produce" to conclude that a roadside stand may not include an espresso cart. The hearings officer correctly concluded from

those definitions that while coffee beans are agricultural produce, espresso coffee drinks are not. *Collver v. Lane County*, 54 Or LUBA 147 (2007).

30.4 Zoning Ordinances – Interpretation. A hearings officer's interpretation of the phrase "mechanical means" as applying to technology using light emitting diodes in electronic signs is correct. *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295 (2007).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance has chapters for individual zones that list some uses that are "permitted" and list other uses that require conditional use approval, and in a separate chapter lists uses that are "permitted in all zones," those uses are permitted without a conditional use permit. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

30.4 Zoning Ordinances – Interpretation. Where a zoning district requires conditional use approval for structures that are more than 30 feet tall, absent a separate zoning provision that calls for a different conclusion, a 70-foot cellular tower would require conditional use approval. But where a separate chapter of the zoning code both authorizes cellular towers in all zones as a "permitted" use and expressly provides that such towers may exceed the height limits otherwise imposed by the zoning ordinance, a cellular tower does not require conditional use approval. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

30.4 Zoning Ordinances – Interpretation. An equipment shed may or may not be allowed as part of a utility, where the zoning ordinance defines a "building," in part, as a "structure" and allows utilities in all zones but prohibits such utilities from including a "building." Because the zoning ordinance distinguishes between "structures" and "accessory structures," the issue becomes whether the equipment shed qualifies as an "accessory structure" and whether the prohibition is limited to "structures" and does not extend to "accessory structures." *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance defines the term "use" to encompass the "purpose for which land * * * is * * * intended," the "use" includes a new roadway that must be constructed to provide access to the use. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

30.4 Zoning Ordinances – Interpretation. A hearings officer's findings that a proposed cellular tower complies with a siting standard that requires the tower to minimize its effect on scenic values are adequate, where the findings note the developed nature of the butte where the cellular tower would be located and demonstrate that the hearings officer was persuaded that the standard was met by the applicant's proposal to shorten the tower from 100 feet to 70 feet and to offer alternative designs that would make the tower look more like its surroundings. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

30.4 Zoning Ordinances – Interpretation. LUBA's standard of review of county counsel's interpretation of a local zoning code provision is whether that interpretation is correct. *Love v. Klamath County*, 54 Or LUBA 410 (2007).

30.4 Zoning Ordinances – Interpretation. A county's interpretation of a local code provision as allowing the construction and use of a motorcycle track without review is incorrect where that provision requires site plan review for development of land, the code defines "development" broadly to include making a physical change in the land, and evidence in the record indicates that a bulldozer was used to develop a large portion of the land with a track and jumps. *Love v. Klamath County*, 54 Or LUBA 410 (2007).

30.4 Zoning Ordinances – Interpretation. Where a conditional use approval criterion requires that a proposed conditional use be consistent with the operating characteristics of the base zone, a city interpretation of that criterion to allow the city to deny a proposed conditional use simply because it is a nonresidential use, where the base zone allows many nonresidential uses as conditional uses in the base zone, is erroneous. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation that the use category of "truck sales, service, storage and maintenance" includes dispensing of fuel to trucks, notwithstanding that the code includes a different use category of "truck stop" that expressly permits dispensing fuel, where other context indicates that the county intended truck "service" to include dispensing fuel. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

30.4 Zoning Ordinances – Interpretation. Where a local code includes specific conditional use standards for a particular use category that is a permitted use in some zones and a conditional use in other zones, LUBA will affirm the local government's interpretation that the conditional use standards do not apply to that use if it is proposed in a zone where it is a permitted use. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

30.4 Zoning Ordinances – Interpretation. LUBA will reject a local government's interpretation of an ordinance recital stating that "[a]t such time as a development agreement is executed" the comprehensive plan "will be amended" to provide an exception to access spacing standards described in the ordinance to mean that the access spacing exception applies to proposed development notwithstanding the absence of an executed development agreement. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

30.4 Zoning Ordinances – Interpretation. In the absence of a reviewable interpretation by a local government of its code, LUBA is authorized under ORS 197.829(2) to interpret the local government's code in the first instance. *Munkhoff v. City of Cascade Locks*, 54 Or LUBA 660 (2007).

30.4 Zoning Ordinances – Interpretation. A local government errs in approving a development that proposes multiple duplex and fourplex buildings on one lot where the definition of those buildings and the context of that definition establishes that the local government's code allows only one building per lot. *Munkhoff v. City of Cascade Locks*, 54 Or LUBA 660 (2007).

30.4 Zoning Ordinances – Interpretation. When a conditional use permit (CUP) has a conditional of approval that the CUP "will become invalid" if specified actions are not taken before

a specified deadline or an extension of the deadline is not granted, and the applicant neither completes the specified actions nor seeks an extension, the local government may not grant an extension of the CUP after the time for receiving an extension has expired and the CUP is rendered invalid. *Michaels v. Douglas County*, 53 Or LUBA 16 (2006).

30.4 Zoning Ordinances – Interpretation. A governing body's interpretation of a code provision defining the study area for an aggregate mine, to exclude haul roads used to transport finished aggregate material off-site, is consistent with the text of the code provision and is not reversible under ORS 197.829(1). *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

30.4 Zoning Ordinances – Interpretation. A city's mistake in codifying an ordinance in a manner that makes it unclear whether commercial uses are optional or mandatory in a mixed-use zone is immaterial, where the ordinance language that was not codified unambiguously makes commercial uses in the applicable zone optional rather than mandatory. *Lubischer v. City of Hillsboro*, 53 Or LUBA 143 (2006).

30.4 Zoning Ordinances – Interpretation. A section of the city's zoning code regarding employment opportunities that is phrased in terms of "goals and objectives" rather than "requirements" is not an approval criterion. *Lubischer v. City of Hillsboro*, 53 Or LUBA 143 (2006).

30.4 Zoning Ordinances – Interpretation. Any inconsistency between the allowed uses in a zoning district and the purpose of the underlying zone cannot be challenged in an appeal of a development approval. Such a challenge is an impermissible collateral attack on the ordinance that adopted the zoning district. *Toler v. City of Cave Junction*, 53 Or LUBA 158 (2006).

30.4 Zoning Ordinances – Interpretation. A county does not err by interpreting a development code approval criterion that requires that proposed uses must be shown to be compatible with surrounding uses to require consideration of only the existing surrounding uses and not potential future uses. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

30.4 Zoning Ordinances – Interpretation. A county does not err by interpreting a development code compatibility standard for the first time in its written decision, where the interpretation was not beyond the range of interpretations that could reasonably have been anticipated during the evidentiary phase of the county's proceedings, and petitioners do not demonstrate (1) that there is specific evidence that they could present that differs in substance from the evidence that they already submitted or (2) that the new evidence is directly responsive to the county's interpretation. *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998). *Clark v. Coos County*, 53 Or LUBA 325 (2007).

30.4 Zoning Ordinances – Interpretation. A permit approval standard that requires that proposed uses be shown to be compatible with surrounding uses is subjective. Each of a county's findings concerning individual factors that lead the county to find a proposed use is compatible with surrounding uses need not be sufficient to support the county's ultimate conclusion. The county's

findings are viewed as a whole and the county is entitled to select the factors that it wishes to emphasize. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

30.4 Zoning Ordinances – Interpretation. In determining whether a proposed cell tower is compatible with surrounding uses, a county does not err by taking into account the number of surrounding residences and the residential density. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

30.4 Zoning Ordinances – Interpretation. In applying a compatibility standard, a county may take into consideration the effect that existing trees will have in screening views of a proposed cell tower from adjoining properties, notwithstanding that there are no trees on the cell tower property itself and few trees to the west and north of the property. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

30.4 Zoning Ordinances – Interpretation. In applying a compatibility standard, a county does not err by taking into account the screening that will be produced by a condition that requires the applicant for a cell tower to plant vegetation and trees, even though the vegetation and trees will not completely screen the tower for many years, if ever. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

30.4 Zoning Ordinances – Interpretation. In applying a compatibility standard, a county does not err by taking into account the effect that requiring a cell tower to be painted green may have in visually blending the tower with nearby trees, even though painting the tower green will have little or no effect on blocked views of a nearby bay. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

30.4 Zoning Ordinances – Interpretation. In applying a compatibility standard a county does not err by failing to consider whether subdivision covenants, conditions and restrictions prohibit cell towers, where (1) it is not possible to determine if the covenants, conditions and restrictions were adopted to achieve compatibility, (2) there is a dispute about whether the covenants, conditions and restrictions apply, and (3) the county is not the body with jurisdiction to determine whether the covenants, conditions and restrictions apply. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

30.4 Zoning Ordinances – Interpretation. In applying a compatibility standard, a county does not err in failing to consider evidence about the impact the proposed use may have on property values, where the evidence is conflicting and the development code does not list impact on property values as a mandatory consideration in applying the compatibility standard. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

30.4 Zoning Ordinances – Interpretation. An undefined and subjective "public benefit" criterion need not be interpreted in conjunction with a tower sharing criterion to require that a tower applicant demonstrate a current market need for a tower, as opposed to a future market need. *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

30.4 Zoning Ordinances – Interpretation. A broadcast tower approval criterion that requires a decision maker to determine whether identified "public benefits outweigh any impacts which

cannot be mitigated" is subjective. In assessing a findings and evidentiary challenge to a decision maker's weighing of public benefits, the question is whether that weighing is (1) inadequately explained (necessitating a remand for additional findings) or (2) unreasonable (and therefore not supported by substantial evidence). *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

30.4 Zoning Ordinances – Interpretation. A broadcast tower approval criterion that limits total emission levels is not implicated by a request to remove a prior condition of approval to allow an existing tower to remain in place, where no additional emitting antenna are to be added to the tower by the request and all existing antenna were subject to the total emission limit criterion when they were placed on the tower. *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

30.4 Zoning Ordinances – Interpretation. Where a city's zoning ordinance allows damaged nonconforming structures to be restored, the city does not err in interpreting its zoning ordinance not to allow a damaged nonconforming carport to be entirely removed and replaced with a taller bulkier carport that occupies the same footprint as the old carport. *Hatton v. City of Eugene,* 53 Or LUBA 583 (2007).

30.4 Zoning Ordinances – Interpretation. Purpose statements that set out objectives to be achieved and state that those objectives are to be achieved by other provisions in that chapter are not mandatory approval criteria. *Burlison v. Marion County*, 52 Or LUBA 216 (2006).

30.4 Zoning Ordinances – Interpretation. A hearings officer's interpretation of a code standard requiring that proposed grading not cause erosion to any greater extent than would occur in the "absence of development" to mean in the "absence of *proposed* development," not prior development activities that predated the grading permit application, is reasonable and will be affirmed. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

30.4 Zoning Ordinances – Interpretation. A county grading permit standard stating that grading activities "shall also occur pursuant to" the standards of the local sanitary sewer agency does not incorporate those standards into the code or require that the county determine whether the grading permit complies with the agency's standards. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a hearings officer's interpretation of a code provision requiring that the applicant submit a letter from the service provider, to require only that the letter be submitted, not that it be free of error, where nothing in the text or context suggests that the county is supposed to second-guess the service provider's assessment. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

30.4 Zoning Ordinances – Interpretation. As a general rule there is no reason why a local government could not interpret an "orderly development" land division criterion to impose a more stringent standard than Oregon Department of Transportation's standard that the performance of failing intersections not be worsened by a proposal. However, where such an interpretation appears to be inconsistent with other city criteria and those apparent inconsistencies are not addressed in the decision maker's findings, LUBA will reject the interpretation as incorrect. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

30.4 Zoning Ordinances – Interpretation. Where a local code provision is expressly directed at building permits and a hearing officer finds that the provision does not apply to a request for subdivision approval, and petitioners do not assign error to those findings, petitioners' assignment of error that the hearings officer should have applied the provision in approving the subdivision will be denied. *Bickford v. City of Tigard,* 52 Or LUBA 301 (2006).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance limits residential development on "weak foundation soils," but does not define that term, the city's interpretation of that term to include soils that the National Resource Conservation Service rates as having "severe" limitations but not to include soils rated as having "moderate" or "slight" limitations is not reversible under ORS 197.829(1). *Jebousek v. City of Newport,* 52 Or LUBA 435 (2006).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance requires a "site specific investigation by a registered geologist or engineer," and the local government finds that a preliminary site evaluation prepared by a geologist was sufficient to constitute the required site specific investigation, a petitioner's objection that the preliminary site evaluation is insufficient will be rejected, where petitioner fails to challenge the city's findings that explain why the city viewed the preliminary site evaluation as sufficient. *Jebousek v. City of Newport,* 52 Or LUBA 435 (2006).

30.4 Zoning Ordinances – Interpretation. Where a zoning map amendment criterion requires the applicant to demonstrate that the uses allowed in the new zone would not "materially and/or adversely affect the character of the neighborhood," selection of too small an area for analysis could frustrate the purpose of the criterion. However, where petitioners do not show that the area selected was too small and the city's findings explain that the residential to commercial rezoning is in an area that is already a mixed commercial and residential area, petitioners do not demonstrate a basis for remand. *Cornelius First v. City of Cornelius,* 52 Or LUBA 486 (2006).

30.4 Zoning Ordinances – Interpretation. That a base commercial zone does not provide for residential uses does not mean that an overlay zone that allows residential uses is necessarily inconsistent with the base zone. Absent some textual or contextual basis to conclude otherwise, LUBA will affirm a governing body's interpretation that the overlay zone may authorize additional uses not authorized in the base zone. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

30.4 Zoning Ordinances – Interpretation. Whether language in a purpose statement of a land use regulation functions as an approval criterion or imposes additional affirmative duties on the local government in approving or denying proposed development depends on the text and context of that language. A prohibition in a recreational commercial zone purpose statement on "traditional residential uses" unless such uses are "necessary to support the primary recreationally-oriented uses" imposes an affirmative obligation on the local government in approving residential development in the zone. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's code interpretation that harmonizes and gives effect to two conflicting provisions, where the only other

interpretation proffered would nullify an entire code chapter. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

30.4 Zoning Ordinances – Interpretation. A hearings officer does not err in interpreting a code provision that allows the "preparation of land for cultivation" that is a "customarily accepted agricultural activity" without a permit in agricultural zones to require the landowner to demonstrate that a proposal to cover an existing landfill with 100,000 cubic yards of soil not only involves "preparation of land for cultivation" but is also a "customarily accepted agricultural activity." *Ehler v. Washington County*, 52 Or LUBA 663 (2006).

30.4 Zoning Ordinances – Interpretation. LUBA will defer to a city council interpretation of a code provision allowing flag lots where a "public street cannot be provided" to allow flag lots where *code-compliant* public streets cannot be provided. Because a non-compliant public street would almost always be theoretically possible, any other interpretation would essentially prohibit flag lots. *Cutsforth v. City of Albany*, 51 OR LUBA 56 (2006).

30.4 Zoning Ordinances – Interpretation. A city does not err in interpreting a code provision requiring that a subdivision plat provide access "that will allow its development in accordance" with the code to not require that the applicant provide additional access to a parcel that is already developed consistent with applicable zoning. The code does not require the applicant to provide access to allow for potential redevelopment of developed parcels. *Cutsforth v. City of Albany*, 51 OR LUBA 56 (2006).

30.4 Zoning Ordinances – Interpretation. Where the code defines "amphitheater" to include "fixed, permanent or temporary seating," a phrase that clearly refers to physical objects such as chairs or benches, a hearings officer errs in interpreting "temporary seating" to include bare ground on which people may sit or spread a blanket. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a hearings officer's interpretation that tents are temporary "structures" for purposes of applying fire safety siting standards to a campground, where the code defines "structure" broadly in a manner that is not limited to permanent structures, and the code clearly subjects campgrounds to fire safety siting standards. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

30.4 Zoning Ordinances – Interpretation. A zoning ordinance purpose statement that provides that the "regulations" in a special zoning district are intended to protect the special development pattern in the district is not itself an approval standard that must be applied in approving a partition. The adopted regulations are the approval standards that must be applied and the city is not required to directly consider whether the proposed partition would protect the special development pattern. *McKnight v. City of Portland*, 51 Or LUBA 394 (2006).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a hearings officer's interpretation of a code provision requiring calculation of groundwater availability based on a study area including the "average size of lots and parcels within one-quarter mile" of the subject property to include the entirety of all lots or parcels that are at least partially within one-quarter mile of the

property. A hearing officer's refusal to interpret the code to require that the study area be limited to just those portions of lots or parcels within a one-quarter-mile radius is not erroneous, where the county staff manual for more detailed groundwater studies requires consideration of the entirety of lots or parcels that are bisected by a one-quarter-mile radius, and it is reasonably clear that both types of studies consider the same area. *Upright v. Marion County*, 51 Or LUBA 415 (2006).

30.4 Zoning Ordinances – Interpretation. Where the purpose of a groundwater study area is to accurately assess the risk to groundwater from residential development, an interpretation that more accurately represents the existing and potential residential development conditions in the area is more consistent with the purpose and underlying policy of the study than a contrary but textually plausible interpretation that considers undevelopable portions of lots as being developable and hence overstates potential development pressures. *Upright v. Marion County*, 51 Or LUBA 415 (2006).

30.4 Zoning Ordinances – Interpretation. A standard requiring a finding that the uses allowed by the proposed zoning "can be served through the orderly extension of key urban facilities and services" does not require evaluation of all theoretically possible uses allowed in the new zone. A city does not err in interpreting such a standard as being satisfied by evidence that uses likely to be developed under the new zone, given the property's size and other constraints, can be served by key urban facilities and services. *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006).

30.4 Zoning Ordinances – Interpretation. A city does not err in assuming that two developed lots that are part of a five-lot tract will not be redeveloped when rezoned, for purposes of a rezoning standard requiring that uses allowed in the proposed zoning can be served by urban services, including transportation facilities, where the applicant does not propose redevelopment and the code requires a similar evaluation when property is redeveloped. *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation that only a portion of a coastal shorelands zone is designated as "suitable for water-dependent uses" and therefore subject to a policy that limits non-water-dependent development, where the zone refers to a comprehensive map that depicts only a portion of the zone as being "especially suited for water-dependent uses" and read in context it is clear that the policy is not intended to apply throughout the zone. *Oregon Shores Cons. Coalition v. Coos County*, 51 Or LUBA 500 (2006).

30.4 Zoning Ordinances – Interpretation. Where it is possible to interpret a development code provision to require consideration of more facilities and services than a similar comprehensive plan policy and to require that those facilities and services be already available at the time of annexation, but a local government implicitly interprets the development code policy simply to implement the comprehensive plan policy and to be coextensive with the plan policy, LUBA will defer to that interpretation where there are other development code provisions that support that limited interpretation. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

30.4 Zoning Ordinances – Interpretation. A code standard allowing an increased or reduced setback for cellular towers based on considerations such as topography, etc., that increase or reduce

off-site impacts need not be interpreted to include an implicit "no net increase" in off-site impacts standard. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

30.4 Zoning Ordinances – Interpretation. A hearings officer errs in interpreting a code standard that allows a reduced setback for cellular towers based on listed considerations that increase or reduce off-site impacts, to allow a reduced setback as long as the applicant has minimized off-site impacts "to the extent possible" given the dimensional constraints of the property, where considerations such as the shape of the property and whether the applicant has minimized off-site impacts to the extent possible are not among the permissible considerations. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

30.4 Zoning Ordinances – Interpretation. A code standard requiring site design review where "proposed development" involves "projects with multiple principal structures on one tract" does not apply to a proposal for a cellular tower on a parcel already developed with a dwelling, because the application does not propose more than one principal structure. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation that retaining walls that prevent erosion of a bluff on a public park are accessory to park uses, notwithstanding that the walls also serve to protect adjoining private property. *Moreland v. City of Depoe Bay*, 50 Or LUBA 44 (2005).

30.4 Zoning Ordinances – Interpretation. Where a code provision prohibiting removal of "riparian vegetation" plausibly could be interpreted either to apply throughout the zone or only within a defined "zone of riparian vegetation," LUBA will affirm a governing body's interpretation that the code provision applies only within the zone of riparian vegetation. *Moreland v. City of Depoe Bay*, 50 Or LUBA 44 (2005).

30.4 Zoning Ordinances – Interpretation. A local government does not err by interpreting a local "need" standard to impose a much less rigorous standard than the need standard that was included in prior version of Goal 2 for approval of a reasons exception. *Wetherell v. Douglas County*, 50 Or LUBA 275 (2005).

30.4 Zoning Ordinances – Interpretation. That a code provision prohibiting application of urban residential zones outside urban growth boundaries is outdated may be a compelling argument for amending the code provision, but it is not a sufficient reason for the local government to ignore it. *Oregon Shores Cons. Coalition v. Coos County*, 50 Or LUBA 444 (2005).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a governing body's interpretation allowing residential units within a "recreational planned unit development," notwithstanding that "residential uses" are prohibited in the underlying zone, where the zone nonetheless allows a recreational planned unit development, and the code definition of that term includes residential units as a core component. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005).

30.4 Zoning Ordinances – Interpretation. A code standard requiring that the local government apply the more restrictive standard when two or more conflicting standards apply does not govern

circumstances where it is unclear which of two standards applies. In such circumstances, the local government must interpret its code to determine which of the standards governs the proposed use. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005).

30.4 Zoning Ordinances – Interpretation. Where both possible interpretations of a code density standard equally conflict with other code provisions, the choice of which interpretation to adopt is up to the local government. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005).

30.4 Zoning Ordinances – Interpretation. Where a local code requires that the zoning map be amended to an "appropriate designation" of the city when an area is annexed, and the city adopts county zoning for the annexed area but does not explain how county zoning satisfies the code requirement, remand is appropriate for the city to adopt findings or an interpretation demonstrating that the county zoning is consistent with the code requirement. *Hammons v. City of Happy Valley*, 49 Or LUBA 38 (2005).

30.4 Zoning Ordinances – Interpretation. A challenge to the adequacy of findings will be sustained where the decision maker fails to explain why a code provision that prohibits development unless a developer makes transportation improvements necessary to maintain a particular level of service applies only at the time of a zone change and not to a site plan and architectural review application. *Wal-Mart Stores, Inc. v. City of Medford*, 49 Or LUBA 52 (2005).

30.4 Zoning Ordinances – Interpretation. Petitioner's arguments do not provide a basis for remand where petitioner fails to challenge a county's interpretation that a criterion that the "land must have adequate carrying capacity to support the densities and types of uses allowed by the proposed plan and zone designations" is satisfied where the land has adequate carrying capacity for uses and densities authorized by the challenged decision, rather than for all possible uses allowed in the zone. *Doob v. Josephine County*, 49 Or LUBA 113 (2005).

30.4 Zoning Ordinances – Interpretation. A general code standard requiring streets to be improved with curbs and other facilities "if required" is not properly interpreted to require curbs for a private street, where the specific standards governing private streets do not require curbs. *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

30.4 Zoning Ordinances – Interpretation. A rezoning criterion requiring that the site be "suitable" for the proposed medium-density residential zone requires an assumption that the property will develop with the multi-family dwelling units allowed in the proposed zone, but does not necessarily require the local government to speculate as to the particular quality or density of actual development. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

30.4 Zoning Ordinances – Interpretation. Where a city's Master Plan Development District simply allows the uses that are permitted in certain other districts, the city erroneously interprets its code to allow those uses without the minimum lot size, minimum lot width, limit on building coverage, front or rear setback requirements or building height or any other standards or regulations that are applied to those uses in the other zoning districts. Those limitations from the other zoning districts apply unless the city applies the Master Plan Development District provision

that allows the city to apply alternative standards in certain circumstances. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

30.4 Zoning Ordinances – Interpretation. A city land use regulation requirement that a master plan of development demonstrate that transportation facilities are "adequate," does not require any particular level of internal or external roadway connectivity. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

30.4 Zoning Ordinances – Interpretation. A local government is within its discretion under ORS 197.829(1) to interpret a planned unit development regulation requiring protection of "public safety" on sites with natural hazards "through clustering of development" on that portion of the site suitable for development as not requiring consideration of off-site impacts of proposed development. *Dinges v. City of Oregon City*, 49 Or LUBA 376 (2005).

30.4 Zoning Ordinances – Interpretation. Where the text of a particular zoning district that allows permitted uses to be reviewed as conditional uses seems to call for a focus on the characteristics of the use itself, but the conditional use chapter of the zoning ordinance expressly provides that conditional uses may require special consideration due to unique site characteristics, the city does not err in interpreting the zoning district text to allow it to consider whether unique site characteristics justify treating the permitted use as a conditional use. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

30.4 Zoning Ordinances – Interpretation. A county errs in interpreting a rezoning code provision requiring that "[o]ther lands in the county" are unavailable or not as well-suited as the subject property to limit the inquiry to lands outside UGBs, where nothing in the text or context so limits the inquiry, and context directs the county to locate uses allowed under the proposed zone within UGBs. *Friends of Yamhill County v. Yamhill County*, 49 Or LUBA 529 (2005).

30.4 Zoning Ordinances – Interpretation. Where an interpretation of an ambiguous code standard that bars variances in some circumstances is needed to explain why the local government believes that standard did not bar an approved variance, and the appealed decision does not include either an express or implied interpretation of the code standard, remand is required. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

30.4 Zoning Ordinances – Interpretation. Although LUBA is authorized to interpret ambiguous local land use legislation in the first instance if the local government fails to adopt a needed interpretation, where interpreting the land use legislation in a way that would be consistent with the local government's decision is problematic, LUBA will not attempt to interpret the legislation in the first instance. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

30.4 Zoning Ordinances – Interpretation. If a local government wishes to interpret and apply traditional variance standards differently than those standards have traditionally been interpreted and applied, it must articulate an interpretation of those standards that is sufficient for review. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

30.4 Zoning Ordinances – Interpretation. Where code language limiting "gross square footage" is ambiguous and, based on text and context, could plausibly limit either "footprint" or "gross floor area," a governing body's choice between two equally plausible meanings is within its discretion under ORS 197.829(1) and *Church v. Grant County,* 187 Or App 518, 524, 69 P3d 759 (2003). *Bemis v. City of Ashland,* 48 Or LUBA 42 (2004).

30.4 Zoning Ordinances – Interpretation. A city code provision that requires a conditional use permit applicant to show that there is a substantial reason for siting the proposed use where it is conditionally allowed, as opposed to another zone where it is permitted outright, does not require that the permit applicant consider zones in other jurisdictions. *Save Our Skyline v. City of Bend,* 48 Or LUBA 192 (2004).

30.4 Zoning Ordinances – Interpretation. Radio towers over 200 feet tall are allowed in exclusive farm use zones under ORS 215.283(2)(m) or ORS 215.438. Neither of those statutes requires that such radio towers must be allowed outright. *Save Our Skyline v. City of Bend,* 48 Or LUBA 192 (2004).

30.4 Zoning Ordinances – Interpretation. Although there is language in the Oregon Supreme Court's decision in *Brentmar v. Jackson County,* 321 Or 481, 496, 900 P2d 1030 (1995), that suggests otherwise, the public utility facilities authorized by ORS 215.283(1)(d) are not allowed "as of right," in the exclusive farm use zone, as that term is generally used in zoning parlance. The Supreme Court used that term as a shorthand description for uses that are not subject to additional county regulation rather than as a description of a use that is not subject to discretionary review, as shown by the fact that ORS 215.283(1)(d) itself subjects public facilities in exclusive farm use zones to discretionary review. *Save Our Skyline v. City of Bend,* 48 Or LUBA 192 (2004).

30.4 Zoning Ordinances – Interpretation. An applicant is not obligated to disaggregate a coordinated and related application for radio towers that was presented in that way at the city's request, simply because it might allow part of that proposal to be approved at a different site in a different zone that allows some parts of the proposal outright. *Save Our Skyline v. City of Bend,* 48 Or LUBA 192 (2004).

30.4 Zoning Ordinances – Interpretation. A subdivision approval standard that requires a subdivision street layout must "best balance needs for economy, safety, efficiency and environmental compatibility" does not require that one or more alternative street layouts necessarily must be evaluated in all cases. *Doob v. City of Grants Pass,* 48 Or LUBA 245 (2004).

30.4 Zoning Ordinances – Interpretation. Where it is not clear from the comprehensive plan map whether the plan designation governing the subject property is a base or an overlay plan designation, LUBA will affirm a governing body's interpretation that the plan designation is an overlay designation, where the comprehensive plan text does not list or describe the designation as a base plan designation. *Staus v. City of Corvallis,* 48 Or LUBA 254 (2004).

30.4 Zoning Ordinances – Interpretation. Code language that prohibits a city from requiring design changes that are "materially different from customary development in the area" is not properly interpreted to mandate that the city impose a roof height that is customary within the area,

or prohibit the city from approving a roof height that is not customary. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

30.4 Zoning Ordinances – Interpretation. A hearings officer errs in concluding that a commercial zone implements the medium density residential plan designation, simply because some commercial uses are allowed in some residential zones. *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

30.4 Zoning Ordinances – Interpretation. Given the significant regulatory distinctions between "single family dwellings" and "tourist rental cabins" allowed in a rural zone, a county may approve proposed cabins that will be owner-occupied part of the year under the densities allowed for "tourist rental cabins" only if their use for something other than "tourist rental cabins" is *de minimis*. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

30.4 Zoning Ordinances – Interpretation. Owner-occupancy for 120 days per year is not a *de minimis* use of a dwelling, consistent with the status of dwellings as "tourist rental cabins." *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

30.4 Zoning Ordinances – Interpretation. LUBA will reject an argument that a code limitation on "buildable area" regulates only the interior, habitable space of a dwelling, where the local government has previously interpreted the code provision to regulate uninhabited structures such as garages or sheds, and the context and legislative history of the provision indicates that it is intended to limit the area of a lot or parcel covered by structures, not the area of interior or habitable space. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

30.4 Zoning Ordinances – Interpretation. An interpretation that some decks but not others are regulated under a code provision limiting the "building area" of a lot or parcel is inconsistent with the text and purpose of the provision, where the relevant terms do not distinguish between types of decks and the apparent purpose of the provision is to limit the area of a lot or parcel covered by structures. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

30.4 Zoning Ordinances – Interpretation. A governing body's interpretation that it has authority to modify a condition of preliminary subdivision plat approval under a code standard allowing "minor changes" to an unrecorded subdivision plat is not reversible under ORS 197.829(1). *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1 (2004).

30.4 Zoning Ordinances – Interpretation. A land use regulation requiring a city to consider all related applications in one proceeding does not require the applicant to submit all applications necessary for development at the same time, or prevent the city from approving those applications before it, notwithstanding that further applications may be necessary. *Nielson v. City of Stayton*, 47 Or LUBA 52 (2004).

30.4 Zoning Ordinances – Interpretation. A hearings officer errs in determining that an internal logging road is not a "road" because of its poor condition and infrequent use, where the code definition of "road" does not assign significance to the road's condition or frequency of use. *McAlister v. Jackson County*, 47 Or LUBA 125 (2004).

30.4 Zoning Ordinances – Interpretation. Where a hearings officer misinterprets the code term "road," but does not address either the applicant's proposed interpretation that a logging track can be a "road" or a contrary planning staff interpretation that only platted rights-of-way or legally described easements are "roads," LUBA will remand the decision to the hearings officer to reconsider what constitutes a "road." *McAlister v. Jackson County*, 47 Or LUBA 125 (2004).

30.4 Zoning Ordinances – Interpretation. Where a conditional use approval criterion requires a finding that the proposed conditional use will have minimal adverse impacts "compared to the impact of development that is permitted outright," a county decision that interprets that criterion to be met by a proposed commercial recreational park, because an otherwise identical publicly owned recreational park could be approved as a use permitted outright, is not reversible under ORS 197.829(1). *Gumtow-Farrior v. Crook County*, 47 Or LUBA 186 (2004).

30.4 Zoning Ordinances – Interpretation. Findings that rely on code drainage requirements to avoid impacts on adjacent farming are adequate to demonstrate compliance with a code standard requiring no significant impact on farming, where the only issue raised regarding impacts on adjacent farming involved drainage. *Nelson v. Curry County*, 47 Or LUBA 196 (2004).

30.4 Zoning Ordinances – Interpretation. A code standard requiring that stormwater be directed away from adjacent farmlands and "into the existing storm drainage system" does not require the applicant to redirect stormwater into a different drainage basin than the one historically serving the subject property. *Nelson v. Curry County*, 47 Or LUBA 196 (2004).

30.4 Zoning Ordinances – Interpretation. A governing body's interpretation of a design review criterion requiring that the "bulk and scale" of a proposed retail supercenter be "compatible" with surrounding buildings as necessitating a comparison of the size of the proposed buildings and surrounding buildings—and not just visual compatibility—is consistent with the text of the criterion and not reversible under ORS 197.829(1)(a). *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256 (2004).

30.4 Zoning Ordinances – Interpretation. There is no intrinsic reason why a regulatory concern to ensure compatibility of size between proposed and existing development must be expressed as zoning standards rather than as site design review standards. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256 (2004).

30.4 Zoning Ordinances – Interpretation. A city's interpretation that a code definition of "Construction Sales and Services," allowing retail sale of "materials used in construction, maintenance and repair/remodel of buildings," does not limit the materials sold to any particular subset of "repair/remodel" materials is not inconsistent with the express language, purpose or underlying policy of the code definition. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

30.4 Zoning Ordinances – Interpretation. Unless required by local standards, a city is not required to ensure that development permitted outright under existing plan and zoning standards will not cause transportation facilities to fall below operational thresholds during the relevant planning period. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

30.4 Zoning Ordinances – Interpretation. A city code that requires planned development proposals to preserve trees "to the greatest degree possible" does not require that the applicant fundamentally change the nature of the application to maximize tree preservation. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

30.4 Zoning Ordinances – Interpretation. A city may not interpret a code exception for tree cutting permits to exempt a subdivision from a separate local code requirement for a tree protection plan, where the exemption for tree cutting permits has nothing to do with the separate tree protection plan requirement. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

30.4 Zoning Ordinances – Interpretation. A city does not err by interpreting a code requirement that 20 percent of the site for a planned development be landscaped to allow an applicant to include areas of the site that will be included in common open space and left in their natural state. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

30.4 Zoning Ordinances – Interpretation. When viewed alone, the word "within" in a code provision that requires that dwellings must be within a template area to be counted is ambiguous, because it could mean the dwelling must be at least partially within or it could mean the dwelling must be entirely within. However, where a related provision specifies that "all or part of" a parcel must be within the template, the failure to include the "all or part of" modifier provides contextual support for interpreting the provision without the modifier as requiring that the entire dwelling must be within the template area. *Worman v. Multnomah County*, 47 Or LUBA 410 (2004).

30.4 Zoning Ordinances – Interpretation. LUBA's assumption that an ambiguous code provision should be interpreted in one way in a prior LUBA appeal where the correctness of that interpretation was not at issue is of extremely limited precedential value in a subsequent appeal where the correctness of that interpretation is at issue. *Worman v. Multnomah County*, 47 Or LUBA 410 (2004).

30.4 Zoning Ordinances – Interpretation. An ambiguous county code provision that allows lands that were incorrectly identified as agricultural or forest land under Goals 3 and 4 to be rezoned for rural residential use is correctly interpreted to require that an applicant show that a particular property is neither agricultural land nor forest land because land will frequently qualify as both agricultural and forest land and the Land Conservation and Development Commission's rules allow such lands to be zoned for either for exclusive farm use or for forest use. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

30.4 Zoning Ordinances – Interpretation. A county does not err in interpreting its code provision to require that it compute the average cubic foot per year production capability based on the percentage of different soil types on the property. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

30.4 Zoning Ordinances – Interpretation. A city does not exceed its discretion under ORS 197.829(1) in interpreting a code provision requiring that development not be contrary to

applicable comprehensive plan policies to allow a balancing of competing comprehensive plan policies. *Chin v. City of Corvallis*, 46 Or LUBA 1 (2003).

30.4 Zoning Ordinances – Interpretation. Where a county has not yet adopted land division regulations that apply to minor partitions, a minor partition nevertheless requires prior county approval of a variance under the zoning ordinance where one of the parcels created by the minor partition does not comply with the minimum parcel size that is required under the zoning ordinance. *DeBoer v. Jackson County*, 46 Or LUBA 24 (2003).

30.4 Zoning Ordinances – Interpretation. A city council's conclusion that a tennis facility is accessory to residential use of a property is inconsistent with the text and context of its code, where the code defines an accessory use as uses incidental and subordinate to the primary use, and a city interpretation relies on the seasonal and nonprofit characteristics of the tennis facility and ignores other characteristics that demonstrate that the tennis facility is of much greater scale and intensity than the residential uses located on the property. *McCormick v. City of Baker City*, 46 Or LUBA 50 (2003).

30.4 Zoning Ordinances – Interpretation. That a city sign code adopts the Oregon Motorist Information Act (OMIA) by reference may indicate that the city intends to allow at least some OMIA-permitted signs within the city, but does not necessarily indicate that all OMIA-permitted signs are allowed in the city, much less that OMIA-permitted signs are allowed outright without further city regulation. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

30.4 Zoning Ordinances – Interpretation. Where a sign code provision stating that state sign permit holders need not seek separate city approval can be read either to (1) allow such signs outright within the city, or (2) allow such signs only if otherwise permitted by the sign code, and either interpretation is consistent with the text and context of the provision, the city's choice between interpretations is not reversible under ORS 197.829(1)(a). *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

30.4 Zoning Ordinances – Interpretation. Where the purpose of a sign code includes preventing sign clutter and minimizing distractions for motorists, a sign code interpretation that results in smaller and lower signs along public highways than would result under other interpretations is consistent with the code's purpose and underlying policy, for purposes of ORS 197.829(1)(b) and (c). *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

30.4 Zoning Ordinances – Interpretation. A broad and poorly defined sign code prohibition on "billboards" does not necessarily require inquiry into the content of signs or allow content-based distinctions where, as interpreted by the city, the code allows or prohibits all signs, including "billboards," based on specific standards that do not require inquiry into the content of proposed signs. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

30.4 Zoning Ordinances – Interpretation. A poorly defined code prohibition on "billboards" is not unconstitutionally overbroad when, read in context, it is subject to a narrowing construction that clarifies the meaning of "billboard" and the precise scope of the prohibition. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

30.4 Zoning Ordinances – Interpretation. A poorly defined code prohibition on "billboards" is not unconstitutionally vague where, as interpreted and read in context, the sign code provides definite and objective standards governing all signs, including billboards, and does not grant the city "unbridled discretion" to approve or deny proposed signs. *Media Art v. City of Tigard*, 46 Or LUBA 61 (2003).

30.4 Zoning Ordinances – Interpretation. A use determination adopted pursuant to ORS 227.160(2)(b) may include a description of the procedures the city anticipates will be used to consider an application for that use. *Boly v. City of Portland*, 46 Or LUBA 197 (2004).

30.4 Zoning Ordinances – Interpretation. A planning commission incorrectly interprets a code standard prohibiting "construction" on slopes greater than 30 percent to limit only construction of a building within a building envelope, and not to include a steep driveway and retaining walls, where the plain meaning of "construction" is not limited to buildings, the text and context do not suggest that the governing body intended to limit its regulatory effect to building envelopes, and the proposed driveway and retaining walls implicate the same regulatory concerns regarding erosion and visual scarring underlying the code standard as would construction of a building. *McCulloh v. City of Jacksonville*, 46 Or LUBA 267 (2004).

30.4 Zoning Ordinances – Interpretation. Where a local code defines "dwelling unit" to include "sanitation" facilities, a septic system that will serve only one dwelling is part of the dwelling, and may not be sited in any zone where the dwelling itself could not be located. *Hodge Oregon Properties, LLC v. Lincoln County*, 46 Or LUBA 290 (2004).

30.4 Zoning Ordinances – Interpretation. A local code requirement that a house could only be allowed in a floodplain if "no alternative exists on the subject property which would allow the structure to be placed outside of the flood plain," does not require that an applicant reconfigure the proposed house or reduce the size of its footprint to locate the house outside the floodplain. *Bonnett v. Deschutes County*, 46 Or LUBA 318 (2004).

30.4 Zoning Ordinances – Interpretation. A local code requirement that allows additional improvements to roads that already encroach into a 50-foot stream setback if those improvements do not "encroach into the setback any more than the existing * * * roadway," is correctly interpreted to allow improvements to a roadway that is located entirely with the 50-foot setback so long as the roadway is not enlarged on the side of the road that faces the stream, where petitioner identifies no textual or contextual support for interpreting the code to require protection of a narrow strip of land on the landward side of the roadway or any policy or purpose that would be furthered by interpreting the code in that manner. *Willhite v. Clackamas County*, 46 Or LUBA 340 (2004).

30.4 Zoning Ordinances – Interpretation. A local code provision that requires that at least 75 percent of a 50-foot setback area must "be preserved with native vegetation" is correctly interpreted to require preservation of whatever native vegetation is already located within 75 percent of the setback area rather than requiring that native vegetation be planted in 75 percent of a setback area where there is no existing native vegetation. *Willhite v. Clackamas County*, 46 Or LUBA 340 (2004).

30.4 Zoning Ordinances – Interpretation. A local code provision that requires that at least 75 percent of a 50-foot setback area from a stream must "be preserved with native vegetation" is correctly interpreted to require protection of 75 percent of whatever area there is between a roadway and a stream, where the roadway encroaches into the 50-foot setback area. *Willhite v. Clackamas County,* 46 Or LUBA 340 (2004).

30.4 Zoning Ordinances – Interpretation. Where the local code requires that any "features explicitly included" in a subdivision application must comply with applicable development standards, a city errs in declining to consider whether existing houses and a proposed shared driveway easement shown on a subdivision application comply with applicable development standards. *McKeown v. City of Eugene,* 46 Or LUBA 494 (2004).

30.4 Zoning Ordinances – Interpretation. Where the definition of "lot width" in a local code is written with regularly shaped lots in mind, and city's interpretation and application of that definition to an irregularly shaped lot produces a lot width that is no stranger than the lot width that is produced by petitioner's interpretation and application of that definition, LUBA will defer to the city's interpretation. *McKeown v. City of Eugene,* 46 Or LUBA 494 (2004).

30.4 Zoning Ordinances – Interpretation. A county's interpretation that cabins used more than half the year for residential use by owner-occupants and less than half the year for rental to tourists qualify as "tourist rental cabins" is inconsistent with the code definition of that term, where rental to tourists is the key definitional element, the code applies important regulatory distinctions to tourist uses and residential uses, and nothing in the text or context of the code suggests that more than *de minimis* residential use of the cabins is compatible with their status as tourist rental cabins. *Friends of the Metolius v. Jefferson County,* 46 Or LUBA 509 (2004).

30.4 Zoning Ordinances – Interpretation. Where a code definition of "tourist rental cabins" can plausibly be read to allow separate ownership of buildings and land on property, and legislative history in the record supports that interpretation, a county's interpretation that the cabins and underlying land need not be in common ownership is consistent with that definition and not reversible under ORS 197.829(1). *Friends of the Metolius v. Jefferson County,* 46 Or LUBA 509 (2004).

30.4 Zoning Ordinances – Interpretation. Where the challenged decision does not explain why the area of large covered porches attached to approved dwellings was not included in calculating the maximum "buildable area," and relevant code definitions suggest that such accessory structures are part of "buildings," remand is necessary to interpret the code and determine whether such structures should be included in calculating the buildable area. *Friends of the Metolius v. Jefferson County,* 46 Or LUBA 509 (2004).

30.4 Zoning Ordinances – Interpretation. Where a county code defines "owner" to be the "legal owners(s) of record as shown on the tax rolls of the County," an interpretation that the fee simple owners are not owners because the value of the fee ownership is minimal in comparison to the value of the easement that crosses that property is not sustainable. *Baker v. Washington County,* 46 Or LUBA 591 (2004).

30.4 Zoning Ordinances – Interpretation. Where an Institute of Transportation Engineer's manual states that an average trip generation rate for discount superstores should only be used if the square footage of the proposed store falls within the square footage range of the stores that were used to produce the average trip generation rate, a city correctly rejects an applicant's use of the average trip generation rate for a proposed store that falls outside that square footage range. *Wal-Mart Stores, Inc. v. City of Hillsboro*, 46 Or LUBA 680 (2004).

30.4 Zoning Ordinances – Interpretation. A city does not err in refusing to speculate about who might ultimately prevail in a quiet title action in considering whether to approve a subdivision and whether to require provision of access to the disputed property in approving the subdivision. The city may assume that the record owner of the disputed property owns the property. *McFall v. City of Sherwood*, 46 Or LUBA 735 (2004).

30.4 Zoning Ordinances – Interpretation. LUBA will defer to a city council interpretation of its zoning ordinance as not requiring a separate zoning amendment application where city zoning is applied to property inside the city's urban growth boundary as part of the annexation process. *Barton v. City of Lebanon*, 45 Or LUBA 214 (2003).

30.4 Zoning Ordinances – Interpretation. Although ORS 197.829(2) authorizes LUBA to interpret city zoning ordinances, where the city fails to do so and both petitioner and respondent present possible interpretations in their briefs that are plausible but both interpretations have problems, LUBA will remand the decision to the city so that it may address the interpretive issue in the first instance. *Renaissance Development v. City of Lake Oswego*, 45 Or LUBA 312 (2003).

30.4 Zoning Ordinances – Interpretation. In considering whether a local government interpretation of a local provision is consistent with the express language of the provision under ORS 197.829(1), LUBA may consider the context of the provision. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003).

30.4 Zoning Ordinances – Interpretation. An interpretation of a local code provision to allow an offsite parking lot in conjunction with a commercial use in a residential zone where such commercial uses are prohibited is not reversible under ORS 197.829(1), where the context of the code provision includes regulations governing the residential zone that expressly allow a public parking area for use by persons patronizing a particular building or establishment. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003).

30.4 Zoning Ordinances – Interpretation. A hearings officer does not err in evaluating the adequacy of the "approach" to an intersection, rather than individual turning movements in the intersection, where the applicable code provisions do not specify a particular method for evaluating intersection adequacy, and that method is consistent with the highway capacity manual and county highways standards cited by the code provisions. *Noble v. Clackamas County*, 45 Or LUBA 366 (2003).

30.4 Zoning Ordinances – Interpretation. A hearings officer's interpretation of a local code to conclude that a "wholesale nursery" is properly viewed as an "agricultural use" is consistent with

the text of the code's definition of "agricultural use," where the term is expressly defined to include "horticultural use." *Lorenz v. Deschutes County*, 45 Or LUBA 635 (2003).

30.4 Zoning Ordinances – Interpretation. Where petitioners' assignment of error is based on the erroneous assumption that a code standard that prohibits home occupations that are "objectionable due to [emissions]" prohibits *any* discernable emissions, and petitioners do not challenge city findings that the emissions that can be expected from a proposed home occupation will not be objectionable, the assignment of error provides no basis for reversal or remand. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance provision authorizes the city to permit uses that are "of the same general type as [permitted] uses," a city commits no error in failing to apply that same provision in the opposite way to *prohibit* uses that are of the same general type as prohibited uses. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance requirement that a site have 150 feet of frontage could apply in a number of different ways to a site with multiple road frontages, and the local government's findings are inadequate to explain why the city applied that requirement in the way that it did, LUBA will remand for the city to interpret the zoning ordinance requirement in the first instance. *Miles v. City of Florence*, 44 Or LUBA 411 (2003).

30.4 Zoning Ordinances – Interpretation. A prerequisite for application of the deferential standard of review under ORS 197.829(1) is, at a minimum, a written decision or document adopted by the governing body that contains an express or implicit interpretation of a local provision that is adequate for review. A city attorney's interpretation of a local provision is not entitled to deference under that standard, even assuming that the city council informally directed the city attorney to apply that interpretation in denying the challenged building permits. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

30.4 Zoning Ordinances – Interpretation. A prerequisite for application of the deferential standard of review under ORS 197.829(1) is, at a minimum, a written decision or document adopted by the governing body that contains an express or implicit interpretation of a local provision that is adequate for review. A city attorney's interpretation of a local provision is not entitled to deference under that standard, even assuming that the city council informally directed the city attorney to apply that interpretation in denying the challenged building permits. *West Coast Media v. City of Gladstone*, 44 Or LUBA 503 (2003).

30.4 Zoning Ordinances – Interpretation. A code provision stating that the planning director "may" issue a clarification of ambiguous code language through a process requiring a hearing is permissive and does not require the director to provide a hearing in evaluating a particular development proposal that happens to involve ambiguous code language. *Holtz v. City of Portland*, 44 Or LUBA 595 (2003).

30.4 Zoning Ordinances – Interpretation. Two code height limitations are not "at the same level" and "in conflict" for purposes of a code provision that requires the city to apply the most restrictive limitation when standards at the same level are in conflict, where one height limitation

is a generally applicable standard and the other is a specific alternative to the general height standard. *Holtz v. City of Portland*, 44 Or LUBA 595 (2003).

30.4 Zoning Ordinances – Interpretation. Although a code provision that prohibits approval of a conditional use permit in circumstances where there are existing violations of county ordinances does not dictate that a condition of approval be included with a conditional use permit that the conditional use permit may be revoked if those violations recur in the future, it is within the county's discretion to interpret that code provision to permit it to impose such a condition. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

30.4 Zoning Ordinances – Interpretation. ORS 215.185 and ORS 197.825(3)(a) do not provide the exclusive procedures by which a county may enforce its zoning ordinance to require that property owners stop using their property in a way that the county believes violates its zoning ordinance. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

30.4 Zoning Ordinances – Interpretation. A county EFU zone limit on farm recreational uses that requires that such uses "be subordinate to the commercial agricultural operation in scope, scale and impact, and shall contribute 'added value' to the commercial agricultural farm operation" does not necessarily prohibit a farm recreational use that generates more income than the commercial agricultural operation on the property. *Underhill v. Wasco County*, 43 Or LUBA 277 (2002).

30.4 Zoning Ordinances – Interpretation. A code provision that allows certain uses in a zone "provided that the use promotes the purpose of the zone" is, on its face, a mandatory approval criterion. A city interpretation that fails to give any meaning to that language, and effectively reads it out of the code, is inconsistent with the express language of the code and is not entitled to deference under ORS 197.829(1). *Crowley v. City of Bandon*, 43 Or LUBA 79 (2002).

30.4 Zoning Ordinances – Interpretation. A local government is within its discretion under ORS 197.829(1) to interpret a standard requiring that "other lands in the county" be unavailable for the uses allowed under proposed rezoning to be satisfied by examining lands in the vicinity of the subject property, and not to require consideration of all lands throughout the entire county. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 97 (2002).

30.4 Zoning Ordinances – Interpretation. A city is within its discretion under ORS 197.829(1) in interpreting the term "bankful stage" to be equivalent to "top of the bank," where the pertinent code language was modeled on a Metro ordinance that expressly equates the two terms. Such an interpretation is not rendered erroneous simply because the unusual topographic facts of a case may make locating the "bankful stage" at the "top of the bank" mean that a portion of the subject property is undevelopable. *Starks Landing, Inc. v. City of Rivergrove*, 43 Or LUBA 237 (2002).

30.4 Zoning Ordinances – Interpretation. A governing body's interpretation of a code provision that fails to provide any independent meaning to a key term and that effectively eliminates that term from any function in the code is not entitled to deference under ORS 197.829(1). *Church v. Grant County*, 43 Or LUBA 291 (2002).

30.4 Zoning Ordinances – Interpretation. A city governing body's interpretation of a variance criterion, which requires variances to "conform to the comprehensive plan," to be satisfied where a requested lot depth variance does not violate any identified comprehensive plan policy will be sustained on appeal, where no identified comprehensive plan policies expressly discourage or encourage lot depth variances. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

30.4 Zoning Ordinances – Interpretation. A reasonable person could interpret the term "lodge" in the phrase "lodges and grange halls" to refer to more than a fraternal meeting place, and to include a commercial lodging facility like an inn or resort hotel, where both senses are within the dictionary definition of the term, and other code provisions the county separately provide for a "fraternal meeting place" and a "hotel, motel or lodge." *Baker v. Lane County*, 43 Or LUBA 493 (2003).

30.4 Zoning Ordinances – Interpretation. A code interpretation to the effect that the county need not consider lesser height variances if the proposed additional height poses no conflicts with views is inconsistent with code language that (1) requires consideration of lesser or no variances, and (2) contains no exception for variances that do not pose conflicts with views. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

30.4 Zoning Ordinances – Interpretation. A code interpretation that limits the scope of alternative height variances that must be considered to those that provide the applicant with the same 35-foot height limitation allowed in a different regulatory zone is an impermissible amendment in the guise of interpretation, where the interpretation changes a rigorous alternatives analysis into a pro forma exercise and eliminates a regulatory distinction between zoning districts. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

30.4 Zoning Ordinances – Interpretation. Where a city's plan and zoning ordinance provisions provide that development within 500 feet of transit stops "should" be pedestrian-oriented and encourage "pedestrian and transit-friendly development criteria," the city's interpretation that those provisions do not require that only pedestrian-oriented uses may be permitted within 500 feet of a transit stop or promoted within the applicable zoning district is entitled to deference. *Barman v. City of Cornelius*, 42 Or LUBA 548 (2002).

30.4 Zoning Ordinances – Interpretation. A city is within its discretion to interpret a zoning ordinance that encourages uses that complement and support existing uses and discourages "auto dependent commercial uses" as not constituting an outright prohibition of auto-dependent uses such as an automobile service station, as long as the automobile service station will be clustered near existing complementary uses such as a shopping center and a fast-food restaurant. *Barman v. City of Cornelius*, 42 Or LUBA 548 (2002).

30.4 Zoning Ordinances – Interpretation. A city is within its discretion to interpret a comprehensive plan provision requiring establishment of a master plan prior to allowing development within a commercial district as being satisfied by the design review process where the city code defines "master plan" as a plan created through the land use review process governing design review and conditional use review, and the city does not have an independent process for establishing a master plan. *Barman v. City of Cornelius*, 42 Or LUBA 548 (2002).

30.4 Zoning Ordinances – Interpretation. A city's interpretation of a "public interest" standard for street vacations, that the standard is met when the record shows that potential future development in the area will not require the retention of the street, is not reversible under ORS 197.829(1). *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385 (2002).

30.4 Zoning Ordinances – Interpretation. The deferential standard of appellate review of interpretations of local land use laws that is required under ORS 197.829(1) does not apply where the decision maker is not the local legislative body and does not apply to local government interpretations of state land use law. *Jordan v. Columbia County*, 42 Or LUBA 341 (2002).

30.4 Zoning Ordinances – Interpretation. Absent some indication that a parks master plan controls inconsistent zoning ordinance provisions, a city does not err in applying the one-third-mile parks service area specified in the zoning code over the "1/4 to 1/2-mile" area specified in the parks master plan. *Carver v. City of Salem*, 42 Or LUBA 305 (2002).

30.4 Zoning Ordinances – Interpretation. A code provision limiting dwelling density to "one dwelling per 38 acres" in a big game overlay zone is meaningless unless given a frame of reference. An interpretation that the required frame of reference is the entire 640-acre section in which the proposed dwelling is located, rather than the area of the section subject to the overlay zone, is not reversible under ORS 197.829(1)(a) to (c), where related code provisions refer to the dwelling density in relation to the "section," and the county's interpretation is not inconsistent with the purpose of and policy underlying the overlay zone. *Matiaco v. Columbia County*, 42 Or LUBA 277 (2002).

30.4 Zoning Ordinances – Interpretation. A code provision limiting the planning director's interpretative powers, and prohibiting interpretations of the zoning ordinance that find a use not listed in the zone is "substantially similar" to a listed use, does not necessarily limit the board of commissioners' interpretative powers. To the extent it may, the commissioners' interpretation that the proposed use *is* a listed use is consistent with the code prohibition. *Yeager v. Benton County*, 42 Or LUBA 72 (2002).

30.4 Zoning Ordinances – Interpretation. A proposed communication tower may be subject to code provisions governing "transmission and receiving towers," even though it is county-owned and thus also arguably falls within a broad category of "municipal uses" allowed in the zone. Where a regulatory scheme lists as permitted uses in a zone both a general category of uses and a specific category of uses, with different sets of requirements, and the proposed use fits within the specific category, the specific category and its requirements apply exclusively. *Luedtke v. Clackamas County*, 41 Or LUBA 493 (2002).

30.4 Zoning Ordinances – Interpretation. LUBA will decline to interpret a local provision in the first instance, to determine whether a proposed radio communication tower is a "radio and television transmission and receiving" tower and therefore subject to a special setback, where viewed in context the meaning and apparent purpose of the provision is subject to considerable doubt. *Luedtke v. Clackamas County*, 41 Or LUBA 493 (2002).

30.4 Zoning Ordinances – Interpretation. It is within a city governing body's discretion under ORS 197.829(1) to interpret a code provision requiring that the transportation system be capable of safely supporting the proposed use, considering eight factors including "level of service," as not requiring that affected intersections maintain an acceptable level of service at all times. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

30.4 Zoning Ordinances – Interpretation. A zoning ordinance provision that expresses a preference for nonstructural over structural solutions to erosion and flooding problems does not apply to an application for recreational vehicle park expansion that proposes erosion or flooding measures, at least where the proposal does not make structural erosion or flood control measures likely or inevitable. *Willhoft v. City of Gold Beach*, 41 Or LUBA 130 (2001).

30.4 Zoning Ordinances – Interpretation. Remand is necessary where a code provision allows a single-family dwelling as a permitted use in a scenic protection zone "provided the use promotes the purpose of the zone," but the local government's decision neither determines that the proposed dwelling promotes the purpose of the zone nor explains why that requirement does not apply. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

30.4 Zoning Ordinances – Interpretation. The terms and not the title of a code provision setting forth certain exceptions to prohibited activities in riparian areas control the scope of the exceptions in that provision. LUBA will affirm a hearings officer's interpretation to that effect where the text and context of the provision indicate that the provision applies more broadly than its title suggests. *Tylka v. Clackamas County*, 41 Or LUBA 53 (2001).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm as reasonable and correct a hearings officer's interpretation of code provisions requiring that a proposed recycling facility be served by an adequate transportation system, to allow the facility notwithstanding some impacts on nearby failing intersections, so long as imposed conditions are sufficient to ensure that those impacts are *de minimis*. *K.B. Recycling, Inc. v. Clackamas County*, 41 Or LUBA 29 (2001).

30.4 Zoning Ordinances – Interpretation. A development code provision that prohibits consideration of a permit application where a federal or state law violation exists on the property does not apply where a permit opponent alleges federal or state law violations but there is no final adjudication by a court or state or federal agency finding that such violations exist. Such a code provision does not require a local government to independently consider such allegations or make its own findings concerning the alleged violations. *Farrell v. Jackson County*, 41 Or LUBA 1 (2001).

30.4 Zoning Ordinances – Interpretation. It is within a city council's discretion under ORS 197.829(1) to interpret its code to limit design review of historic landmarks to historic design review criteria, where the code's design review provisions state that historic landmarks are exempt from design review and are instead subject to historic design review. *Pearl District Neigh. Assoc. v. City of Portland*, 40 Or LUBA 436 (2001).

30.4 Zoning Ordinances – Interpretation. An apparent conflict between a city's current code, as interpreted, and a set of uncodified ordinances and guidelines that reflect superseded code

language provides no basis to reverse the city's code interpretation. *Pearl District Neigh. Assoc. v. City of Portland*, 40 Or LUBA 436 (2001).

30.4 Zoning Ordinances – Interpretation. It is within a city council's discretion under ORS 197.829(1) to interpret a code provision that requires the "transportation structure" to be "adequate," as not requiring separate quantified empirical analysis with respect to separate components of the transportation system, such as parking. Under that interpretation, it is permissible for the city to rely on the ready availability of transit, bicycle and pedestrian transportation, and evidence that development allowed under rezoning can satisfy previously established off-street parking requirements, to conclude that the transportation structure is adequate with respect to parking. *Wakelin v. City of Portland*, 40 Or LUBA 401 (2001).

30.4 Zoning Ordinances – Interpretation. Code provisions protecting historic structures that are described in the county's inventory as significant, important or contributing to the significance of the overall resource are not properly interpreted to protect an accessory structure on the subject property that is not mentioned in the county's inventory. *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

30.4 Zoning Ordinances – Interpretation. A code provision allowing a historic resource to be relocated if it is on land that is "needed to accommodate" a planned transportation project is not properly interpreted in context to require the county to determine if an alternative alignment would not require relocation, where a related code provision prohibits the county from considering alternative alignments. *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

30.4 Zoning Ordinances – Interpretation. A code standard requiring that expansion of existing structures be supported by the "same improvements" is not reasonably interpreted to allow expansion only where the original *unimproved* septic system supports the structure. The standard is more reasonably read to allow expansion supported by an upgraded septic system, as long as it is not a different septic system. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

30.4 Zoning Ordinances – Interpretation. Where a generally worded purpose statement in a city's comprehensive plan provides that a zoning designation is intended to confine strip commercial development to its existing locations, but does not expressly provide that the zoning designation may be applied only to those locations, the local government's interpretation of the purpose statement to allow the zoning designation to be applied to other locations so long as it does not result in strip commercial development is not clearly wrong. *Neighbors for Livability v. City of Beaverton*, 40 Or LUBA 52 (2001).

30.4 Zoning Ordinances – Interpretation. Where the first and second steps of a four-step PUD approval process each yield decisions that are not final or binding in any respect, neither the local government's decision granting first-step approval nor its decision granting second-step approval is a final land use decision subject to LUBA's jurisdiction. *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 21 (2001).

30.4 Zoning Ordinances – Interpretation. Where the first step of a three-step planned unit development (PUD) approval process yields a decision that is final and binding in certain respects,

the local government's decision granting such approval is a final land use decision subject to LUBA's jurisdiction. *Neighbors for Sensible Dev. v. City of Sweet Home*, 39 Or LUBA 766 (2001).

30.4 Zoning Ordinances – Interpretation. A city's failure to respond to issues raised below regarding whether the "street frontage" of a flag lot is the same as its "front building line" provides no basis for remand, where it is clear under the city's land division ordinance that "street frontage" and "front building line" are not the same. *Webb v. City of Bandon*, 39 Or LUBA 584 (2001).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance fire protection standard expressly applies only to new dwellings, the county does not err in approving a cellular phone tower without applying the fire protection standard. *Pereira v. Columbia County*, 39 Or LUBA 575 (2001).

30.4 Zoning Ordinances – Interpretation. Under *McKay Creek Valley Assoc. v. Washington County*, 118 Or App 543, 848 P2d 624 (1993), the county need not inquire into the legality of parcels subject to a rezoning application, where the applicable rezoning criteria do not expressly require a "lawfully created parcel" or a "legal parcel," or impose a similar requirement of legality. *Maxwell v. Lane County*, 39 Or LUBA 556 (2001).

30.4 Zoning Ordinances – Interpretation. It is within a local governing body's discretion under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), to interpret "public building or use," as it is used in its zoning ordinance, to include the lease of office space to a state agency for a "public office" where public use is defined as "[a]ny building or property publicly owned or operated * * *." *Harvey v. City of Baker City*, 39 Or LUBA 515 (2001).

30.4 Zoning Ordinances – Interpretation. Where a city code requires that a lot line adjustment may be approved only if adequate public facilities are available to serve the resulting parcels and the proposal is compatible with the comprehensive plan, the city errs in interpreting the code to limit its consideration to the lot line adjustment itself and not the uses proposed on the adjusted lots. *Mountain West Investment v. City of Silverton*, 39 Or LUBA 507 (2001).

30.4 Zoning Ordinances – Interpretation. Where the local zoning regulation provides for conditional use review for fields used in "organized sports" or "other facilities that draw spectators," conditional use review is not required to allow a graded area within a park to be reserved for occasional use for children's soccer practice. *Kent v. City of Portland*, 39 Or LUBA 455 (2001).

30.4 Zoning Ordinances – Interpretation. A city council does not commit reversible error by imposing a condition that requires that a parking lot for a home occupation be accessed from an alley, notwithstanding that the zoning ordinance defines "alley" as a street that provides secondary access to property. *Latta v. City of Joseph*, 39 Or LUBA 318 (2001).

30.4 Zoning Ordinances – Interpretation. Where an approval criterion contains two subsections with similar or overlapping requirements, but the local government's findings do not address one of the subsections or interpret the criterion to the effect that findings of compliance with both

subsections are unnecessary, remand is appropriate to address the omitted subsection or adopt an interpretation justifying the omission. *Chilla v. City of North Bend*, 39 Or LUBA 121 (2000).

30.4 Zoning Ordinances – Interpretation. Where a local government fails to interpret a local provision, and the purpose of the provision is unclear and subject to numerous interpretations, LUBA will decline to interpret the provision in the first instance and remand the decision to the local government. *OTCNA v. City of Cornelius*, 39 Or LUBA 62 (2000).

30.4 Zoning Ordinances – Interpretation. A city may demonstrate compliance with a zoning change criterion that requires that the identified public need will be best served by rezoning the proposed site by showing that other sites, individually or as a group, are inferior to the proposed site. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

30.4 Zoning Ordinances – Interpretation. When a local ordinance creates an exemption from additional approval criteria for uses permitted in the underlying zone, and the ordinance distinguishes between permitted uses and uses subject to administrative review, it is incorrect to determine that wineries, which are uses subject to administrative review, are permitted uses in the exclusive farm use zone, and thus not subject to the additional approval criteria. *Roth v. Jackson County*, 38 Or LUBA 894 (2000).

30.4 Zoning Ordinances – Interpretation. A local government's interpretation that "commercial timberland properties" only refers to properties "operated by or for the benefit of commercial timber operations," and does not include property operated by individuals, is clearly wrong. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

30.4 Zoning Ordinances – Interpretation. Siting requirements for forest template dwellings that require that impacts and fire risks be "minimized" govern *where* a proposed dwelling should be sited rather than *whether* a dwelling should be approved. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

30.4 Zoning Ordinances – Interpretation. A code provision requiring consideration of traffic impacts on facilities that "serve" property can be read to allow approval notwithstanding *de minimis* impacts on distant transportation facilities that are operating at an unsatisfactory level of service, but only tangentially "serve" the property. *Anderson v. City of Medford*, 38 Or LUBA 792 (2000).

30.4 Zoning Ordinances – Interpretation. Where a city code provision allows conditional use approval of a building that exceeds a mandatory height limit provided the increased building height "does not adversely affect the ocean * * * views" of neighboring structures, the city's interpretation of that provision to mean that the part of the building exceeding the height limit may not block any part of a neighboring property's view of ocean water from any perspective within the neighboring property is not clearly wrong. *Rivera v. City of Bandon*, 38 Or LUBA 736 (2000).

30.4 Zoning Ordinances – Interpretation. Where comprehensive plan and zoning ordinance provisions require preservation of "County Road 804" as established by a circuit court decision adopting an official survey of the road, the scope of the survey determines the parts of County

Road 804 subject to that protection. That the survey shows no private property boundaries within a certain subdivision crossed by the road is a strong indication the circuit court decision did not intend to establish anything with respect to that subdivision. *Oregon Shores Cons. Coalition v. Lincoln County*, 38 Or LUBA 699 (2000).

30.4 Zoning Ordinances – Interpretation. The impracticability standard of the Metro Code (MC) for locational amendments to the Urban Growth Boundary (UGB) performs a limited version of the functional role that Goal 14, factor 6, and Goal 2, Part II(c)(2), play in the context of more comprehensive UGB amendments: ensuring that agricultural land is included in the UGB only when nonagricultural lands cannot reasonably accommodate the proposed use. Because the MC must be consistent with Goals 2 and 14, the decision is not entitled to deference under ORS 197.829(1). *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

30.4 Zoning Ordinances – Interpretation. "Practicable" has two distinct connotations: (1) technical possibility; and (2) prudential balancing of costs and other relevant considerations. An alternative is impracticable where it is either technically infeasible or, based on all relevant considerations, including consideration of cost, it would not be a feasible alternative. *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

30.4 Zoning Ordinances – Interpretation. An identification of a need for additional lands under Goal 14, factors 1 and 2, is to be an essential predicate for application of the ORS 197.298 priorities. Where a proposed urban growth boundary amendment is not based upon a demonstration of need, but rather upon locational considerations, ORS 197.298 is not applicable. *Malinowski Farm v. Metro*, 38 Or LUBA 633 (2000).

30.4 Zoning Ordinances – Interpretation. A city council's interpretation of code "compatibility" and "livability" standards as requiring that it consider whether a permit proposal for a 24-hour adult video business would result in increased potential for criminal activity and in increased vacancies in nearby offices is not impermissibly vague and is within the city's interpretive discretion under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

30.4 Zoning Ordinances – Interpretation. Where a city code does not define its requirement for "substantial construction" before the term of a conditional use permit expires, the city errs in interpreting the code "substantial construction" requirement as being met by securing all required permits, based on a definition of "substantial construction" in the code of another jurisdiction. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000).

30.4 Zoning Ordinances – Interpretation. Where a code provides that a conditional use permit becomes void after one year unless the planning commission extends that term not to exceed an additional one year, the planning commission erroneously interprets and applies that code limitation to allow it to accept a request for extension after the one-year anniversary of the conditional use permit and to extend the conditional use permit beyond the two-year anniversary of the conditional use permit. *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000).

30.4 Zoning Ordinances – Interpretation. A city's interpretation of a "no adverse effect" standard to permit some adverse impacts on adjacent properties, so long as the impacts do not affect the uses on those properties, is not clearly wrong. *Kane v. City of Beaverton*, 38 Or LUBA 183 (2000).

30.4 Zoning Ordinances – Interpretation. In considering whether a proposed privately owned, university-related hotel qualifies under a zoning code provision authorizing uses "customarily associated with major universities," a city does not err in considering examples of university-related hotels that have different ownership and operating relationships than the proposed university-related hotel. *Schwerdt v. City of Corvallis*, 38 Or LUBA 174 (2000).

30.4 Zoning Ordinances – Interpretation. LUBA will reject a hearings officer's interpretation that a code standard imposing a riparian buffer zone within a "setback area" does not apply unless a structure is proposed, where a broader interpretation to apply the buffer zone in other circumstances is equally plausible and more consistent with the identified purpose of the code standard. *Tylka v. Clackamas County*, 37 Or LUBA 922 (2000).

30.4 Zoning Ordinances – Interpretation. LUBA will remand for the county to determine to what extent a code standard imposing a riparian buffer prohibits the removal of native vegetation and whether a proposal for a recreational vehicle camp site within the buffer violates that standard because maintenance of the site requires removal of certain small trees and some native vegetation. *Tylka v. Clackamas County*, 37 Or LUBA 922 (2000).

30.4 Zoning Ordinances – Interpretation. Where a local land use regulation requires that a permit application be consistent with any relevant neighborhood plan, neighborhood plan policies which are described in the neighborhood plan as having the force of law are at least potentially relevant approval criteria for the permit. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance standard requires consideration of residential appearance and function of an area in approving a bed and breakfast facility, a hearings officer does not err by addressing traffic and activity impacts of the proposal under the "function" prong of the standard rather than as part of the "appearance" prong. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance standard requires consideration of residential appearance and function of an "area" in approving a bed and breakfast facility, and a hearings officer's selection of a two-block area for analysis is based on assumed walking distance to cars parked off-site and is no less plausible than petitioner's rationale for selecting a larger area for analysis, the hearings officer does not misconstrue the applicable law. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

30.4 Zoning Ordinances – Interpretation. A county governing body's interpretation that a zoning ordinance requirement that "activities" specified in a farm management plan be implemented did not require that each and every task for which a cost estimate was provided in the farm management plan for each year be implemented is not "clearly wrong," and, therefore, is

not reversible under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Rochlin v. Multnomah County*, 37 Or LUBA 237 (1999).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm a local governing body's interpretation of its land use regulation where petitioners express disagreement with the interpretation but do not explain why the interpretation is inconsistent with the text of the regulation or otherwise legally incorrect. *Freedom v. City of Ashland*, 37 Or LUBA 123 (1999).

30.4 Zoning Ordinances – Interpretation. A county governing body does not exceed its interpretive discretion in interpreting a zoning ordinance provision that allows development of lots of record notwithstanding the lot's failure to meet lot area, width and depth requirements as not also excusing the zoning requirement that lots that are less than five acres in size be served by a public or community water system. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

30.4 Zoning Ordinances – Interpretation. A county governing body does not exceed its interpretive discretion in interpreting a zoning ordinance provision that delegates responsibility to the planning director to interpret the zoning ordinance as not preventing the governing body from interpreting the comprehensive plan in the first instance following an appeal of a planning director decision to the planning commission and the county governing body. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

30.4 Zoning Ordinances – Interpretation. A city planner's determination that residential youth treatment facilities constitute "household living" foreclosed considering such facilities as "group living" because "group living" is defined by the city code to exclude those facilities that fit the "household living" definition. *Buckman Community Assoc. v. City of Portland*, 36 Or LUBA 630 (1999).

30.4 Zoning Ordinances – Interpretation. Using a dictionary to define "guardianship," a provision not defined in the city code, is neither arbitrary nor capricious because it is consistent with both the legislative intent and the documents explaining the city's overall intent in adopting the amendments. *Buckman Community Assoc. v. City of Portland*, 36 Or LUBA 630 (1999).

30.4 Zoning Ordinances – Interpretation. The city correctly determined that an adolescent residential treatment facility is "household living" and thus an allowed use in a residential zone, when the city's code defines "household living" to include persons related by guardianship, and the residents of the facility are under the legal guardianship of the operator of the facility. *Buckman Community Assoc. v. City of Portland*, 36 Or LUBA 630 (1999).

30.4 Zoning Ordinances – Interpretation. A county acts within the discretion afforded by ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992), where the zoning ordinance requires a finding that utilities and services likely to be needed by the "anticipated uses" are available, the county limits allowed uses on the property to the applicant's proposed use, and the county interprets the term "anticipated uses" to consist solely of the proposed use. A reasonable person could construe the term "anticipated uses" to denote something less than the range of uses allowed in the zone. *City of Newberg v. Yamhill County*, 36 Or LUBA 473 (1999).

30.4 Zoning Ordinances – Interpretation. Where a code provision authorizing permit revocation is expressly limited to Type II discretionary permits, the code provision does not authorize revocation of Type I ministerial permits. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

30.4 Zoning Ordinances – Interpretation. A code provision authorizing the county to institute "appropriate proceedings to prevent, enjoin * * * abate, or remove the unlawful location, construction, maintenance, repair, alteration or use" of unlawfully constructed structures is sufficient to authorize the county to institute proceedings to revoke a ministerial zoning permit where the structure actually constructed under the zoning permit is inconsistent with the site plan that was approved by the zoning permit. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

30.4 Zoning Ordinances – Interpretation. Where a code permit revocation provision provides that the hearings officer "may grant a reasonable time for rectification" it does not *require* that the hearings officer do so, and a hearings officer decision revoking a zoning permit without granting time for rectification does not violate that code provision. *Woods v. Grant County*, 36 Or LUBA 456 (1999).

30.4 Zoning Ordinances – Interpretation. Where the first clause of a local code provision requires that design review comply with a set of criteria used to rezone property and the second clause requires that design review also comply with those criteria addressed at the time the subject property was rezoned, a hearings officer's interpretation limiting design review to the subset of criteria addressed at the time the property was rezoned fails to give effect to the first clause of the code provision, and is therefore not reasonable and correct. *Blazer Construction, Inc. v. City of Eugene*, 36 Or LUBA 391 (1999).

30.4 Zoning Ordinances – Interpretation. LUBA will not reject a substantial evidence challenge based on a code informational requirement, where the challenged decision does not interpret the code requirement as being purely informational, but, to the contrary, appears to require that the information submitted under the code provision be the kind of information a reasonable person would rely on. *Baughman v. City of Portland*, 36 Or LUBA 353 (1999).

30.4 Zoning Ordinances – Interpretation. Where a city interprets its zoning ordinance as requiring that a "recycling center" have the "primary purpose" of extracting recyclables from a waste stream, but not requiring that any particular percentage of the waste stream will be recycled, the city's conclusion that a proposed facility is a "recycling center" is supported by substantial evidence, notwithstanding the absence of evidence quantifying the percentage of recyclables in the waste stream. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

30.4 Zoning Ordinances – Interpretation. That a proposed use meets the definition of a "materials recovery facility" at OAR 340-093-0030(57) is neither relevant nor controlling in determining whether the local government correctly categorized the proposed use as a "recycling center" under its development ordinance, where the development ordinance was not adopted to implement the rule. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm as not clearly wrong an interpretation that commercial uses not otherwise listed as allowed uses in a university district are allowed when they are uses "customarily associated" with universities and thus fall within the definition of a use expressly allowed in the district. *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

30.4 Zoning Ordinances – Interpretation. Where a local code does not dictate how rear and front lot lines are to be identified, a city council is within its interpretive discretion under ORS 197.829 in requiring that building orientation be considered. *Barnard Perkins Corp. v. City of Rivergrove*, 36 Or LUBA 218 (1999).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance requires that a proposed use must "satisfy the goals and policies of the Comprehensive Plan which apply to the proposed use," the county must, as a threshold matter, determine which plan goals and policies apply to the use. *Cotter v. Clackamas County*, 36 Or LUBA 172 (1999).

30.4 Zoning Ordinances – Interpretation. After the county has identified the applicable comprehensive plan goals and policies to which a proposal must conform under local ordinance, a finding that the proposal is incompatible with particular goals and provisions will not necessarily be fatal where the zoning ordinance only requires that the proposal satisfy the plan goals and policies on balance. *Cotter v. Clackamas County*, 36 Or LUBA 172 (1999).

30.4 Zoning Ordinances – Interpretation. An interpretation of a zoning ordinance that shifts the burden of demonstrating compliance with minimum lot size approval standards to opponents of the application is erroneous. *Wood v. Crook County*, 36 Or LUBA 143 (1999).

30.4 Zoning Ordinances – Interpretation. Exercise of LUBA's authority under ORS 197.829(2) to interpret local land use law in the first instance is not appropriate where the relevant code provision prohibiting reduction of acreage available for farm use could refer to reduction (1) of acreage on adjacent lands or (2) of acreage on the subject property that is available for use in conjunction with farm uses on adjacent lands. Where both interpretations are plausible and it is disputed factually whether the relevant lands could be used in conjunction with adjacent lands, a remand to the county to render its interpretation in the first instance is appropriate. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

30.4 Zoning Ordinances – Interpretation. Where a code provision requires an applicant for expansion of a golf course on EFU-zoned land to demonstrate that alternative urban sites are not available and an applicant applies to expand an existing golf course, a hearings officer's interpretation of the provision as limiting the requisite alternative site analysis to locations where the existing golf course can expand is reasonable and correct. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

30.4 Zoning Ordinances – Interpretation. Where a local ordinance definition of "housekeeping unit" requires a sharing of domestic tasks and management of household affairs, an assisted-care dwelling may qualify as a housekeeping unit notwithstanding that a resident caregiver will perform

many of the domestic tasks and management of household affairs. *Neels v. Clackamas County*, 36 Or LUBA 54 (1999).

30.4 Zoning Ordinances – Interpretation. A county code "stability" standard that does not implement the statutory nonfarm use "stability" standard is not subject to case law interpreting the statutory "stability" standard, but such a code "stability" standard necessarily connotes a temporal period and a scope of causative impact for analysis. However, a county's interpretation of the local "stability" standard as focusing on short-term effects and direct impacts rather than long-term and cumulative impacts is not clearly wrong and therefore must be affirmed by LUBA. *Ray v. Douglas County*, 36 Or LUBA 45 (1999).

30.4 Zoning Ordinances – Interpretation. Where provisions allowing enforcement of the city's ordinance only specifically authorize judicial remedies, the city's interpretation of the enforcement provisions as allowing the city to conduct quasi-judicial proceedings to determine nonconforming use status is inconsistent with the terms of that provision and not entitled to deference under *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992), or ORS 197.829(1). *Dept. of Transportation v. City of Mosier*, 35 Or LUBA 701 (1999).

30.4 Zoning Ordinances – Interpretation. A proposal to site a drug and alcohol recovery facility within a single-family dwelling in a residential zone must be permitted when the relevant code provision permits outright those activities that are conducted in buildings "designed or used for the occupancy of one family" and the proposed recovery facility is to be located in such a structure. *Recovery House VI v. City of Eugene*, 35 Or LUBA 419 (1999).

30.4 Zoning Ordinances – Interpretation. Where the zoning ordinance allows a variance from its standards when those standards create a hardship due to one or more defined conditions, a hearing officer errs in requiring the applicant to demonstrate hardship in addition to those stated in the defined conditions. *Kelley v. Clackamas County*, 35 Or LUBA 215 (1998).

30.4 Zoning Ordinances – Interpretation. It is reasonable and correct to interpret a code provision requiring that "vehicle to be repaired shall be located within an enclosed building" to require that repaired vehicles remain within an enclosed building until they are removed from the property. *Gibbons v. Clackamas County*, 35 Or LUBA 210 (1998).

30.4 Zoning Ordinances – Interpretation. It is reasonable and correct to consider vehicles used to pick up and drop off customers who have vehicles waiting to be repaired as "vehicles associated with" an auto repair home occupation. *Gibbons v. Clackamas County*, 35 Or LUBA 210 (1998).

30.4 Zoning Ordinances – Interpretation. A city council's interpretation of its zoning ordinance as requiring conditional use approval for a towing yard as an "other industrial use" will be sustained where towing yards are not listed as an outright permitted use and the zoning code does not allow uses that are similar to outright permitted uses as permitted uses. *Williamson v. City of Arlington*, 35 Or LUBA 90 (1998).

30.4 Zoning Ordinances – Interpretation. A city may impose a condition requiring annual review of a conditional use approval under a general code provision allowing conditions of

approval the city council determines are necessary "to avoid a detrimental impact." *Williamson v. City of Arlington*, 35 Or LUBA 90 (1998).

30.4 Zoning Ordinances – Interpretation. A city does not err in regulating conditional uses differently from uses permitted outright even if a particular conditional use is similar to a use permitted outright. *Williamson v. City of Arlington*, 35 Or LUBA 90 (1998).

30.4 Zoning Ordinances – Interpretation. A city council interpretation of the term "flood" as being limited to the "base flood" or 100-year flood must be sustained by LUBA where the stated objectives and introductory language of the zoning code are consistent with the narrow interpretation. *Visher v. City of Cannon Beach*, 35 Or LUBA 74 (1998).

30.4 Zoning Ordinances – Interpretation. Requiring that a street be connected to allow through traffic does not inevitably mean the street will cease to function as a local street, where there are identified measures that can be used to discourage non-local traffic. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998).

30.4 Zoning Ordinances – Interpretation. Where a sentence in a decision can be read to adopt an improperly narrow interpretation of a code, but when that sentence is read in context with the rest of the decision it is clear that the improper interpretation was not adopted, LUBA will assume the improper interpretation was not intended. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998).

30.4 Zoning Ordinances – Interpretation. Where a local government does not expressly interpret a code provision, but adopts findings that are sufficiently detailed to demonstrate that it interprets the provision to require evaluation of the subject property rather than surrounding properties, LUBA will defer to that interpretation. *Rouse v. Tillamook County*, 34 Or LUBA 530 (1998).

30.4 Zoning Ordinances – Interpretation. Where a local code requires that sewer facilities be "available" as a condition of approval for annexation, the local government's interpretation of the "available" criterion as being met where extension of sewer services is feasible within the current planning period is not clearly wrong. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

30.4 Zoning Ordinances – Interpretation. Where petitioner's home occupation includes the movement and storage of vehicles on the subject property, that activity is external evidence of the business for purposes of a local ordinance based on ORS 215.448 that limits allowable external evidence of a home occupation, even though such activity is incidental to the primary business activity. *Sheldon Fire & Rescue, Inc. v. Washington County*, 34 Or LUBA 474 (1998).

30.4 Zoning Ordinances – Interpretation. Where a local ordinance limits external evidence of a home occupation to one small sign, a hearings officer may reasonably interpret the ordinance to mean that the storage and movement of vehicles on the subject property is external evidence of the business, and therefore prohibited. *Sheldon Fire & Rescue, Inc. v. Washington County*, 34 Or LUBA 474 (1998).

30.4 Zoning Ordinances – Interpretation. Where a code requires that the final subdivision and PUD plans be in "substantial conformance" with the preliminary approval and the city interprets the "substantial conformance" requirement by analogizing to the distinction drawn in the code between "major" subdivision/PUD amendments, which must be approved quasi-judicially, and "minor" amendments, which may be approved administratively, the city's interpretation will be upheld. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

30.4 Zoning Ordinances – Interpretation. A code requirement that each lot in a subdivision be approved with provisions for sewage disposal is reasonably interpreted as not applying to lots that are not to be developed. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

30.4 Zoning Ordinances – Interpretation. Where a petitioner at LUBA challenges an interpretation that first appeared in the challenged decision, petitioner need not have raised an issue concerning that interpretation during the local proceedings. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

30.4 Zoning Ordinances – Interpretation. A code provision that imposes different standards depending on how many "functions" the street supports is ambiguous. A county interpretation that equates "function" with the number of units that use the street for "access" rather than the number of units that "border" the street is a plausible interpretation. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

30.4 Zoning Ordinances – Interpretation. Where a local government fails to adopt a needed interpretation of a land use ordinance, LUBA may interpret the ordinance on appeal. LUBA will do so where the facts are undisputed, a pure question of law is presented and the parties adequately address the interpretive issue in their briefs. *Tylka v. Clackamas County*, 34 Or LUBA 14 (1998).

30.4 Zoning Ordinances – Interpretation. Where the purpose of a local provision is unclear and subject to numerous interpretations, LUBA will decline to interpret the provision in the first instance. *Bradbury v. City of Bandon*, 33 Or LUBA 664 (1997).

30.4 Zoning Ordinances – Interpretation. A county may regulate or define uses allowed under ORS 215.283(2) as long as it does not define those uses more expansively than permitted by state law. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

30.4 Zoning Ordinances – Interpretation. A county may interpret its local codification of nonfarm uses allowed in EFU zones more restrictively than state law requires. Such a more restrictive interpretation is not contrary to ORS 215.283(2)(d) and will be affirmed by LUBA where it is not so inconsistent with the zoning ordinance as to be clearly wrong. *R/C Pilots Association v. Marion County*, 33 Or LUBA 532 (1997).

30.4 Zoning Ordinances – Interpretation. A hearings officer's finding that other residentially zoned property "may not be developable" does not factually justify the conclusion that "there are no non-agricultural lands" with priority for development. *Alliance for Responsible Land Use v. Deschutes County*, 33 Or LUBA 12 (1997).

30.4 Zoning Ordinances – Interpretation. A county's findings are inadequate where an applicable criterion for a zone change requires a finding that the need will be best served by changing the classification of the property in question as compared with other available property, and the county's findings do not provide any express comparison of the subject property to other available property. *Alliance for Responsible Land Use v. Deschutes County*, 33 Or LUBA 12 (1997).

30.4 Zoning Ordinances – Interpretation. LUBA will defer under ORS 197.829(1) to a local government's interpretation of conditional use permit criteria even when that interpretation is at odds with LUBA's own interpretation of identical statutory criteria governing an application for a nonfarm dwelling. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

30.4 Zoning Ordinances – Interpretation. A code approval standard that requires "a clear picture of the existing land use pattern" in a specified area is not satisfied by general findings about zoning and details about some of the properties in the area. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

30.4 Zoning Ordinances – Interpretation. Where a conditional use is proposed on EFU land, the compatibility of the proposed use with uses on adjacent properties is necessary to ensuring the stability of existing uses, but it does not alone ensure stability. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

30.4 Zoning Ordinances – Interpretation. In reviewing a hearings officer's decision, where LUBA is unable to fathom the meaning of a local ordinance and no interpretation is provided by the hearings officer, LUBA will give the county the opportunity to interpret the code in the first instance. *Jackson County Citizens League v. Jackson County*, 32 Or LUBA 212 (1996).

30.4 Zoning Ordinances – Interpretation. In making a zoning classification determination, the city properly relied on the definition and review procedures set forth in ORS 227.160(2) and ORS 227.175(11), and was not required to follow the local procedural requirements for a Type I review. *North Portland Citizens v. City of Portland*, 32 Or LUBA 70 (1996).

30.4 Zoning Ordinances – Interpretation. LUBA will affirm the city planning bureau's determination that a proposed probation/parole office is an office use, permitted of right in a General Commercial zone, where that determination is reasonable and correct. *North Portland Citizens v. City of Portland*, 32 Or LUBA 70 (1996).

30.4 Zoning Ordinances – Interpretation. Provisions of a zoning ordinance should be interpreted in a manner which gives meaning to all parts of the ordinance. *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996).

30.4 Zoning Ordinances – Interpretation. Under ORS 197.829(2), enacted in 1995, LUBA is not required to remand decisions for local government interpretations of local provisions when LUBA is able to make the necessary interpretations. *Friends of Metolius v. Jefferson County*, 31 Or LUBA 160 (1996).

30.4 Zoning Ordinances – Interpretation. When a residential use is established on the subject property and the existing residence may be expanded without a variance, a requested height variance is not necessary under any colorable interpretation of the standard "necessary to accommodate a use or accessory use on the parcel which can be reasonably expected to occur within the zone or vicinity." *DeBardelaben v. Tillamook County,* 31 Or LUBA 131 (1996).

30.4 Zoning Ordinances – Interpretation. Development that has not occurred and that will be governed by the limitations of the applicable zone cannot be used to justify a variance on the basis that the property owner seeking the variance will otherwise be precluded from the enjoyment of substantial property rights enjoyed by the majority of landowners in the vicinity. *DeBardelaben v. Tillamook County,* 31 Or LUBA 131 (1996).

30.4 Zoning Ordinances – Interpretation. When a house already exists on the subject property, the fact it cannot be enlarged in precisely the manner desired by the property owner does not render the property incapable of reasonable economic use without a variance. *DeBardelaben v. Tillamook County,* 31 Or LUBA 131 (1996).

30.4 Zoning Ordinances – Interpretation. The county's interpretation of the "incapable of reasonable economic use" variance standard to mean "incapable of the property's highest and best use under its zoning and of an intensity of use consistent with other similarly situated properties" is clearly wrong. *DeBardelaben v. Tillamook County*, 31 Or LUBA 131 (1996).

30.4 Zoning Ordinances – Interpretation. The informal adoption by a statement in a quasi-judicial decision of a definition of the term "firearms training facility," which term is found in both a state administrative rule and the county's zoning ordinance, does not constitute the amendment of an acknowledged land use regulation. *J.C. Reeves Corp. v. Washington County*, 31 Or LUBA 115 (1996).

30.4 Zoning Ordinances – Interpretation. A zoning ordinance provision that states land use districts may "float" within the boundaries of a proposed planned development can be interpreted to mean that such districts may be dissolved and totally reconfigured, with densities reallocated. *Huntzicker v. Washington County*, 30 Or LUBA 397 (1996).

30.4 Zoning Ordinances – Interpretation. ORS 197.829(3) permits LUBA, in cases where a local government fails to interpret adequately a provision of its land use regulations, to make its own determination of whether the local government decision is correct. *Thompson v. City of St. Helens*, 30 Or LUBA 339 (1996).

30.4 Zoning Ordinances – Interpretation. LUBA cannot defer to a local government's interpretation of its own ordinance when it cannot discern what the interpretation is, and will not exercise its discretion under ORS 197.829(2) to interpret a county provision in the first instance where the purpose of the provision is unclear and subject to numerous interpretations. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

30.4 Zoning Ordinances – Interpretation. A county may interpret a zoning ordinance to regulate the establishment of nonforest dwellings more stringently than is required under ORS 215.750. *Dilworth v. Clackamas County*, 30 Or LUBA 279 (1996).

30.4 Zoning Ordinances – Interpretation. It is within the county's interpretive discretion to find that a code provision protecting agricultural land for farm use conflicts with a plan policy that certain land is not suitable for agricultural production and is committed to residential development. *Reeves v. Yamhill County*, 30 Or LUBA 135 (1995).

30.4 Zoning Ordinances – Interpretation. ORS 197.829(2) permits LUBA to determine whether a local government decision is correct, even when local government fails to interpret adequately a provision of its comprehensive plan or land use regulations. *East Lancaster Neigh. Assoc. v. City of Salem*, 30 Or LUBA 147 (1995).

30.4 Zoning Ordinances – Interpretation. The city correctly determined that city, rather than county, zoning applies to a proposed development pursuant to an urban fringe management agreement between the city and the county where there was no evidence that the city violated the procedures established in the agreement with respect to the proposed development. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46 (1995).

30.4 Zoning Ordinances – Interpretation. When petitioners fail to satisfy the county's jurisdictional appeal provision requiring local appellants to state the basis of their standing, the county is not at liberty to take notice of petitioners' standing or to excuse their failure satisfy the requirement as "harmless error." *Tipton v. Coos County*, 29 Or LUBA 474 (1995).

30.4 Zoning Ordinances – Interpretation. When a county zoning ordinance provision states that a local appeal will be dismissed if the requirements of the provision are not satisfied, the provision is jurisdictional. An appellant's failure to satisfy a jurisdictional requirement results in dismissal of the appeal. *Tipton v. Coos County*, 29 Or LUBA 474 (1995).

30.4 Zoning Ordinances – Interpretation. Where petitioners contend the governing body failed to follow procedures arguably required by the local code for making the challenged legislative land use decision, LUBA must defer to the governing body's interpretation of the code and cannot interpret the code provisions in the first instance. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 429 (1995).

30.4 Zoning Ordinances – Interpretation. Where the city's zoning code allows private households in the commercial-service/professional zone so long as the private households meet the development standards of a multifamily zone, LUBA will affirm the city's interpretation that private households includes a multiplex dwelling. *Stevens v. City of Medford*, 29 Or LUBA 422 (1995).

30.4 Zoning Ordinances – Interpretation. Where the city's zoning code provides that some permitted uses are subject to special use restrictions, LUBA will affirm the city's interpretation that the existence of special use restrictions does not convert a permitted use into an unpermitted use. *Stevens v. City of Medford*, 29 Or LUBA 422 (1995).

30.4 Zoning Ordinances – Interpretation. Where petitioner appealed a planning director determination that a solid waste transfer station is an outright permitted use in a particular zone, the city was neither required nor authorized to expand the scope of the local appeal hearing to include consideration of whether a solid waste transfer station is also an appropriate use in that zone. *Pend-Air Citizen's Comm. v. City of Pendleton,* 29 Or LUBA 362 (1995).

30.4 Zoning Ordinances – Interpretation. LUBA will defer to a local governing body's interpretation of Standard Industrial Code Manual provisions incorporated into the local government's own zoning ordinance, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule that the local enactment implements. *Pend-Air Citizen's Comm. v. City of Pendleton,* 29 Or LUBA 362 (1995).

30.4 Zoning Ordinances – Interpretation. Evidence that a solid waste transfer station may conflict with neighboring residential uses is not relevant to the issue of whether a solid waste transfer station is an outright permitted use in a particular zone. *Pend-Air Citizen's Comm. v. City of Pendleton,* 29 Or LUBA 362 (1995).

30.4 Zoning Ordinances – Interpretation. Code demolition permit pre-application requirements that the owner of historic property "endeavor to prepare an economically feasible plan" for preservation and "solicit purchase offers" must be interpreted in light of other code demolition permit provisions which clearly leave the decision to sell or not sell the historic property up to the property owner. *Save Amazon Coalition v. City of Eugene,* 29 Or LUBA 335 (1995).

30.4 Zoning Ordinances – Interpretation. Where the local code specifically requires the application of a historic landmark designation to be consistent with comprehensive plan historic preservation policies, but does not indicate any plan policies are applicable to decisions on permits for demolition of property subject to the historic landmark designation, the local governing body is not clearly wrong in interpreting the plan and code to provide that no plan policies are applicable to its review of such a demolition permit application. *Save Amazon Coalition v. City of Eugene,* 29 Or LUBA 238 (1995).

30.4 Zoning Ordinances – Interpretation. LUBA will defer to the local governing body's interpretation that under its code provisions governing permits for the demolition of historic properties, the planning director's determination regarding compliance with pre-application requirements is not reviewable by the historic review board or appealable to the governing body. *Save Amazon Coalition v. City of Eugene,* 29 Or LUBA 238 (1995).

30.4 Zoning Ordinances – Interpretation. A local governing body acts within its interpretive discretion in interpreting a code conditional use permit standard regarding feasibility of meeting "projected increased demand" for school facilities to refer to current demand, plus demand from other developments that have received final approval and the demand created by the proposed development, and not to include demand from future permitted development of residentially zoned land. *Burghardt v. City of Molalla,* 29 Or LUBA 223 (1995).

30.4 Zoning Ordinances – Interpretation. Where a local code requires a "recreation/open space area" as part of a mobile home park, it is reasonable for the local government to interpret "recreation/open space area" to include wetlands. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

30.4 Zoning Ordinances – Interpretation. Where determining whether a notice of intent to appeal was timely filed under ORS 197.830(3) depends on determining which code notice of hearing provision applied to the local proceeding, and LUBA can infer from the challenged decision which notice provision the local governing body believes governs the local proceeding and agrees with that interpretation, even without the deference required by *Clark*, LUBA is not required to remand the decision for the governing body to make its interpretation explicit. *Orenco Neighborhood v. City of Hillsboro*, 29 Or LUBA 186 (1995).

30.4 Zoning Ordinances – Interpretation. Where an ordinance amends the text of a zoning ordinance by adding a temporary overlay district, identifies a map showing where the overlay district applies an "attachment to" the zoning map and does not purport to amend the section of the zoning ordinance under which the zoning map is adopted, it is reasonable and correct to interpret a code notice of hearing provision governing amendments to the text of the zoning ordinance, rather than another provision governing amendments to the "zoning map," as applicable. *Orenco Neighborhood v. City of Hillsboro*, 29 Or LUBA 186 (1995).

30.4 Zoning Ordinances – Interpretation. A local government may interpret relevant code provisions to require that either (1) the required appeal fee, or (2) a fee waiver previously approved by the planning director, be included in a local appeal when it is filed. In such circumstance, it is a local appellant's responsibility to obtain approval of a fee waiver request prior to submitting an appeal. *Ramsey v. City of Portland*, 29 Or LUBA 139 (1995).

30.4 Zoning Ordinances – Interpretation. Where a code contains both a provision governing the expiration of quasi-judicial land use approvals generally and a provision specifically governing the expiration of planned development approvals, the local governing body is within its discretion under ORS 197.829 and *Clark* in interpreting the code to mean the expiration of planned development approvals is governed *only* by the specific code provision. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

30.4 Zoning Ordinances – Interpretation. Where the code provides "if no extensions are granted, the authorization shall expire," the local governing body is within its discretion under ORS 197.829 and *Clark* in interpreting this provision to mean that if an extension is requested prior to the expiration of the approval period, the approval does not expire while local government review of the extension request is pending. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

30.4 Zoning Ordinances – Interpretation. If a code includes provisions for extending planned development approvals and for requesting changes in approved final development plans, the local governing body is within its discretion under ORS 197.829 and *Clark* in interpreting these provisions together to mean if a change in an approved final development plan is requested before the original approval expires, the approval does not expire while the modification application is

being processed, and a separate extension application is not necessary. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

30.4 Zoning Ordinances – Interpretation. A code provision requiring that certain applications for changes to an approved planned development (PD) final development plan "shall be processed in the same manner as for a new PD" must be interpreted consistently with ORS 227.178(3) to mean that any standard which would be applicable to a new application for PD approval is applicable to such applications for changes to approved PDs. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

30.4 Zoning Ordinances – Interpretation. Stacking enough lumber to build a house around a mobile home located in a mobile home and recreational vehicle park is not properly viewed as an accessory use to the use of the mobile home as a dwelling. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

30.4 Zoning Ordinances – Interpretation. Without a demonstration that the interpretation of a local code provision in the challenged decision is significantly different from a previously established local government interpretation of that provision, petitioners fail to establish the local government erred by announcing the disputed interpretation for the first time in its final decision. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

30.4 Zoning Ordinances – Interpretation. A local governing body acts within its interpretive authority in construing a code provision stating local street design and construction cost provisions apply "unless otherwise approved in the tentative development plan," as allowing the local government to waive those local street standards when granting tentative subdivision plan approval. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

30.4 Zoning Ordinances – Interpretation. A code conditional use standard requiring reasonable compatibility with, and no more than minimal impact on, "appropriate development" of surrounding properties authorizes the local government to consider a proposed conditional use's compatibility with, and impact on, future development of vacant properties. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632 (1995).

30.4 Zoning Ordinances – Interpretation. A local governing body may interpret a code requirement that "[b]efore granting any appeal, [the governing body] shall make findings of fact, setting forth wherein the planning commission's findings were in error," to allow the governing body to substitute its judgment for that of the planning commission on questions of fact or law, and to find the planning commission erred because it relied on different evidence or reached a different conclusion than did the governing body. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632 (1995).

30.4 Zoning Ordinances – Interpretation. Where the challenged decision was adopted by a decision maker other than the local governing body, and the decision fails to contain an interpretation of relevant code provisions, LUBA may interpret the local code. *Beveled Edge Machines, Inc. v. City of Dallas*, 28 Or LUBA 790 (1995).

30.4 Zoning Ordinances – Interpretation. Where individual guidelines made applicable by an overlay zone are expressed in nonmandatory terms, a governing body is well within its interpretive discretion in determining compliance with such guidelines is not required, even where the code provides that overlay zone provisions supersede provisions of the base zone. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

30.4 Zoning Ordinances – Interpretation. There can be no possible rational dispute that an adjustment changing the number of parking spaces required for a proposed development does not violate a code prohibition against adjustments that are "exception[s] to the procedural steps of a procedure or to change assigned procedures." *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

30.4 Zoning Ordinances – Interpretation. Where a local government's zoning ordinance establishes a process for administrative actions to determine the existence of nonconforming uses, and another local ordinance gives a compliance hearings officer jurisdiction over complaints regarding violations of the zoning ordinance, it is reasonable and correct to interpret these ordinances to require that the existence of a nonconforming use be determined through an administrative action, not raised as a defense in a compliance proceeding. *Watson v. Clackamas County*, 28 Or LUBA 602 (1995).

30.4 Zoning Ordinances – Interpretation. In reviewing a decision adopted by the local governing body, LUBA must review the governing body's interpretation of local code provisions and may not interpret the local code in the first instance, unless there is "no possible rational dispute" regarding the correct interpretation of the local code. *Foster v. Coos County*, 28 Or LUBA 609 (1995).

30.4 Zoning Ordinances – Interpretation. The question of whether the governing body erroneously accepted a local appeal turns on the interpretation of relevant provisions of the city's code. Because LUBA may not interpret the local code in the first instance when reviewing a decision by a governing body, the decision must be remanded for such an interpretation. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

30.4 Zoning Ordinances – Interpretation. A hearings officer's interpretation of the local code is incorrect where the hearings officer determines a private easement that will be generally used by members of the public and occupants of a proposed subdivision, is not an "area to be dedicated for new roads" to serve the proposed subdivision. *Ellison v. Clackamas County*, 28 Or LUBA 521 (1995).

30.4 Zoning Ordinances – Interpretation. Where the challenged decision was made by the hearings officer and petitioners contend a zoning district purpose statement is a mandatory standard applicable to proposed development, LUBA may determine, in the first instance, whether the provision is an approval applicable to the proposal. *Ellison v. Clackamas County*, 28 Or LUBA 521 (1995).

30.4 Zoning Ordinances – Interpretation. Where a code zoning district purpose statement is aspirational only, it is reasonable and correct to determine the purpose statement is not a mandatory

approval standard applicable to the proposed development. *Ellison v. Clackamas County*, 28 Or LUBA 521 (1995).

30.4 Zoning Ordinances – Interpretation. A local government acts within its interpretational discretion in construing local code provisions that treat "contiguous" parcels in "common ownership" as a single unit of land as not including parcels in common ownership which meet only at a common corner and share no common sides. *Tognoli v. Crook County*, 28 Or LUBA 527 (1995).

30.4 Zoning Ordinances – Interpretation. In the absence of something in the local code to the contrary, if a use satisfies the code definition of motel, it may be treated as a motel for purposes of determining whether such use falls within an exemption applicable to motels, and it does not matter that the use may also satisfy the code definition of a condominium. *Kaady v. City of Cannon Beach*, 28 Or LUBA 509 (1995).

30.4 Zoning Ordinances – Interpretation. To determine whether a use is a motel under the local code, a local government does not err in examining the original prospectus for the use. *Kaady v. City of Cannon Beach*, 28 Or LUBA 509 (1995).

30.4 Zoning Ordinances – Interpretation. Where a local code requires that a second farm dwelling be shown "conclusively" to be "necessary for the operation of the commercial farm," but does not define the term necessary, it is appropriate to use the dictionary definition of the term "necessary." *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

30.4 Zoning Ordinances – Interpretation. Where a local code requires that a second farm dwelling be shown to be "necessary," absent a definition to the contrary or contrary legislative history, the term "necessary" has the same meaning in the Goal 3 context that it has in the Goal 4 context. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

30.4 Zoning Ordinances – Interpretation. It is unreasonable for a local hearings officer to interpret a code provision prohibiting "unit enlargements or expansions" of existing mobile home parks unless they are "made to conform substantially with all requirements for new construction" as inherently inapplicable to any proposed alteration of a nonconforming mobile home park, because such an interpretation would make this code provision a nullity. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

30.4 Zoning Ordinances – Interpretation. Where a code standard for determining nonconforming use status requires that the use "would have been allowed" under the zoning applicable when the use became nonconforming, it is reasonable and correct to interpret the code standard to require that at the time the use became nonconforming, it complied with an applicable code provision prohibiting objectionable off-site impacts. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

30.4 Zoning Ordinances – Interpretation. Where the city code established no process or procedure for city determinations of compliance with a provision prohibiting permitted uses from having objectionable off-site impacts, the city cannot interpret a code nonconforming use standard

to require that a city determination of compliance with the impacts provision was obtained *before* the use became nonconforming. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

30.4 Zoning Ordinances – Interpretation. LUBA will defer to a local government's interpretation that the term "development" used in the local code does not include zone changes. *Neuman v. City of Albany*, 28 Or LUBA 337 (1994).

30.4 Zoning Ordinances – Interpretation. Determining whether the local code allows a proposed wastewater treatment facility as part of, or incidental to, the uses that it serves, or whether it requires the proposed wastewater treatment facility to be regulated as a separate use, requires interpretation and judgment. Therefore, the exception to LUBA's jurisdiction provided by ORS 197.015(10)(b)(A) does not apply. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

30.4 Zoning Ordinances – Interpretation. Where the local code provides for discretionary review of certain development applications by the planning director, and also provides a process for the planning director to refer questions concerning code interpretation to the governing body, the code does not divest the planning director of authority to interpret the code in carrying out his duties. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

30.4 Zoning Ordinances – Interpretation. Where the local code defines the term "feedlot" to involve animals that are prepared for shipment to "market," it is neither reasonable nor correct to interpret "market" to mean only the "final" market to which the animals are shipped. *Derry v. Douglas County*, 28 Or LUBA 212 (1994).

30.4 Zoning Ordinances – Interpretation. A hearings officer's interpretation of a conditional use permit for a "tourist park" as not allowing placement of mobile homes within the approved "tourist park," as that term is defined by the local code, is reasonable and correct. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

30.4 Zoning Ordinances – Interpretation. A local government's interpretation of a code "compatibility" standard as not requiring consideration of "view impacts" is not "clearly wrong" and will be sustained by LUBA. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

30.4 Zoning Ordinances – Interpretation. A county governing body may interpret a code conditional use standard requiring that a proposed use have minimal adverse impacts compared to the impacts of development "permitted outright" as inapplicable in a zoning district that lists no outright permitted uses. *Mazeski v. Wasco County*, 28 Or LUBA 178 (1994).

30.4 Zoning Ordinances – Interpretation. Where local conditional use approval standards do not specifically refer to impacts on property values, but rather to compatibility with "uses" and "land use patterns" and changes in "accepted farm or forest practices" or their cost, a local governing body is within its discretion under ORS 197.829 in interpreting such standards not to require consideration of a proposed conditional use's impact on property values. *Tucker v. Douglas County*, 28 Or LUBA 134 (1994).

30.4 Zoning Ordinances – Interpretation. If a city council decision approving a subdivision does not explain how the city interprets relevant comprehensive plan and code provisions to allow a 40-foot street right-of-way, the decision must be remanded for the city council to interpret the local provisions in the first instance. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

30.4 Zoning Ordinances – Interpretation. A county governing body's interpretation that an otherwise applicable code permit standard requiring "Class I-IV soils [to] be preserved and maintained for farm use" is not applicable to land for which an exception to Statewide Planning Goal 3 (Agricultural Lands) has been adopted as part of the acknowledged county comprehensive plan, is not "clearly wrong," and is within the governing body's discretion under ORS 197.829. *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

30.4 Zoning Ordinances – Interpretation. In reviewing a local government hearings officer's interpretation of a land use regulation, LUBA determines whether the interpretation is reasonable and correct. The deference to a local governing body interpretation required by ORS 197.829 does not apply to interpretations by hearings officers. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

30.4 Zoning Ordinances – Interpretation. A county does not err by interpreting a local code provision allowing "commercial or processing activities that are in conjunction with timber and farm uses," in a rural residential zone, in the same way the Oregon Supreme Court has interpreted similar language in the exclusive farm use zoning statutes. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

30.4 Zoning Ordinances – Interpretation. A hearings officer's reliance on a dictionary definition of "in conjunction with" without providing the dictionary definition relied upon is harmless error, where it is apparent from the decision that the hearings officer interpreted the code term to require establishment of a customer/seller or seller/customer relationship between the proposed commercial use and timber and farm uses in the community. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

30.4 Zoning Ordinances – Interpretation. A hearings officer correctly construes a local code provision allowing "commercial or processing activities that are in conjunction with timber and farm uses" in the relevant rural area to require that a landscaping business' sales and purchases be primarily to customers and from suppliers that constitute timber or farm uses in the relevant rural area. *Stroupe v. Clackamas County*, 28 Or LUBA 107 (1994).

30.4 Zoning Ordinances – Interpretation. Where a particular activity is allowed as a conditional use, and is subject to criteria specifically and solely applicable to such activity, the governing body acts within its interpretive discretion under ORS 197.829 in determining such activity is not also subject to criteria generally applicable to conditional uses in the zone. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

30.4 Zoning Ordinances – Interpretation. Where one of the local government's critical findings depends on the scope of the term "houseboat," and the term is not defined in the local code or in

the challenged decision, the decision must be remanded for the local government to supply the needed explanation of the scope of the term. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

30.4 Zoning Ordinances – Interpretation. Even if a local code provision requiring that six percent of the gross area of a proposed subdivision be dedicated for open space is properly interpreted as a minimum rather than a maximum requirement, a decision requiring dedication of much more than six percent of the gross area of a proposed subdivision must be remanded so that the local government may adopt findings explaining that interpretation and showing the "rough proportionality" requirement of *Dolan v. City of Tigard* is satisfied. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

30.4 Zoning Ordinances – Interpretation. A city council acts within its interpretive authority under ORS 197.829 in applying a code provision as a mandatory approval standard, notwithstanding its use of the word "should." So long as the city makes it clear that it does interpret the code provision as a mandatory approval standard, it need not explain why in its decision. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

30.4 Zoning Ordinances – Interpretation. If a local government is presented with a plan or land use regulation provision that must be interpreted, and there is a reasonable interpretation that is *consistent* with the "state statute, land use goal or rule the comprehensive plan provision or land use regulation implements," that interpretation may not be rejected by the local government in favor of an interpretation that is *inconsistent* with those statutes, goals or rules. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

30.4 Zoning Ordinances – Interpretation. Where nothing in its comprehensive plan or code requires that a particular level of service be maintained at affected street intersections at all times, the local government's interpretation of its plan and code as allowing short traffic system failures for infrequent, large, special events is not clearly wrong, and LUBA will defer to it. *Heine v. City of Portland*, 27 Or LUBA 571 (1994).

30.4 Zoning Ordinances – Interpretation. Where ORS 215.416(3) and (11) require a county to provide an opportunity for a local appeal of a design review decision made by the planning director without a hearing, the county cannot interpret a code provision requiring that "final design review approval" has been granted to be satisfied when a local appeal of the planning director's design review approval decision is pending. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

30.4 Zoning Ordinances – Interpretation. Where the code provides a conditional use permit does not expire if "substantial construction" has occurred, and that "substantial construction" means 10 percent of the total project value has been expended for construction authorized under a development permit, the local government erred by counting expenditures for a culvert and fill creek crossing that were made when the permits issued authorized only a bridge crossing. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

30.4 Zoning Ordinances – Interpretation. Where a local government's interpretation of the term "motel," as defined by local ordinance, to include a particular development is not contrary to the

express words, policy or purpose of that ordinance, LUBA will defer to the local government's interpretation. *Kaady v. City of Cannon Beach*, 27 Or LUBA 464 (1994).

30.4 Zoning Ordinances – Interpretation. ORS 197.307(5)(d) expresses an alternative standard that is satisfied if the exterior materials of a manufactured home *either* (1) are similar those commonly used on dwellings in the community, *or* (2) are comparable to those used on surrounding dwellings. Because local governments cannot adopt standards more restrictive than those set out in ORS 197.307(5), a city cannot interpret a local regulation implementing ORS 197.307(5)(d) as allowing it to require, in a particular instance, that a manufactured home *must* satisfy the second alternative. *Brewster v. City of Keizer*, 27 Or LUBA 432 (1994).

30.4 Zoning Ordinances – Interpretation. Where the local code's definition of "northern lot line" is ambiguous and recognizes there can be more than one northern lot line on any given piece of property, and the challenged decision determining compliance with solar access setback requirements simply contains a conclusory statement that a flag lot has only one northern lot line, LUBA will remand the decision for adoption of interpretive findings. *Sullivan v. City of Ashland*, 27 Or LUBA 411 (1994).

30.4 Zoning Ordinances – Interpretation. A city correctly interprets code provisions for formal interpretations of its zoning code as allowing it to interpret a chapter not included in those identified in the "short title" of the zoning code, where the disputed chapter is substantively part of the zoning code and the record shows omission of the chapter was not intended. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

30.4 Zoning Ordinances – Interpretation. Where the applicability of local comprehensive plan or land use regulation provisions is ambiguous, the local government is entitled to considerable deference in determining their applicability. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

30.4 Zoning Ordinances – Interpretation. A local government interpretation of its comprehensive plan and zoning code, that approval of a school at a particular site requires compliance with a plan policy concerning schools, is not so wrong as to be reversible under ORS 197.829, notwithstanding that the relevant zoning district lists schools as a permitted use at the subject site. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

30.4 Zoning Ordinances – Interpretation. It is reasonable to expect that a local government, in applying subjective comprehensive plan and code provisions, will include interpretive findings in its final decision. The parties to such local proceedings should know to include arguments concerning proper interpretation of such provisions in their presentations. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

30.4 Zoning Ordinances – Interpretation. Where a local code provision does not explicitly state the requirements listed thereunder for a complete development application are "jurisdictional," the local government's interpretation of the code provision as imposing procedural rather than jurisdictional requirements is not inconsistent with the express words, purpose or policy of the

code and, therefore, must be affirmed. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

30.4 Zoning Ordinances – Interpretation. A local government acts within the interpretive discretion afforded by ORS 197.829 in finding a code requirement for a statement of the nature of the applicant's interest in the subject property is satisfied where the application states the applicant is the "future property owner" and there is evidence in the record that the applicant has acquired or will acquire the property. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

30.4 Zoning Ordinances – Interpretation. Where consistency with the city's "short term parking strategy" is a code requirement, a city cannot determine its "short term parking strategy" is something that *underlies* various provisions of its plan and code and cannot announce that strategy for the first time in a decision on a permit application. This violates the requirement of ORS 227.173(1) that permit standards and criteria *themselves* must be set out in the city's development ordinances. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

30.4 Zoning Ordinances – Interpretation. Where a local government relies on conditions to ensure that use of an approved parking structure is limited to "short term parking," as required by its code, any interpretations of code provisions necessary to support its determination that the code limitation to "short term parking" is satisfied must be set out in the challenged decision or supporting findings, not in the local government's brief. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

30.4 Zoning Ordinances – Interpretation. Although the substance of particular objections by neighbors may lead to a conclusion that one or more local code adjustment criteria are violated, the *fact* that one or more neighbors object has no legal significance. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

30.4 Zoning Ordinances – Interpretation. Petitioners' allegations that an applicant cannot simultaneously seek the benefit of two separate local code provisions allowing deviations from code height and setback requirements provide no basis for reversal or remand, where nothing in the code precludes seeking approval under both provisions. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

30.4 Zoning Ordinances – Interpretation. A local government is within its interpretive discretion in counting an access driveway separated by a median into two one-way driveways as two access points, for purposes of satisfying the number of access points required by the local code. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

30.4 Zoning Ordinances – Interpretation. That other inapplicable sections of the local code permit one-way driveways with a minimum 15-foot pavement width provides no basis for allowing 15-foot wide paved driveways where the applicable code section unambiguously requires a 24-foot pavement width. Such an interpretation is clearly wrong, and exceeds the local government's interpretive discretion. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

30.4 Zoning Ordinances – Interpretation. Under ORS 197.829(4), if a comprehensive plan provision or land use regulation is clearly designed to implement a statewide planning goal or goals, a local government may not interpret such a plan provision or land use regulation in a manner inconsistent with the goals it implements. *DLCD v. City of Donald*, 27 Or LUBA 208 (1994).

30.4 Zoning Ordinances – Interpretation. Where a Transitional Timber zone provides that uses of land "not specifically mentioned" in that zone are prohibited, and the principal uses permitted outright in the zone are resource and resource-related uses, not commercial uses, LUBA will defer to the local government's interpretation that the zone does not allow parking, storage and maintenance of a commercial truck. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

30.4 Zoning Ordinances – Interpretation. Where a code provision requires that effects on an area's "appearance and function" be determined based specifically on factors set out in that provision, a local government may interpret the code provision to be satisfied by a determination based solely on those factors, even if the code also provides that words have their "normal dictionary meaning," and the dictionary definitions of "appearance" and "function" suggest additional factors are relevant. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

30.4 Zoning Ordinances – Interpretation. Where the local code provides that nonconforming use rights are lost if the site of a nonconforming use is "vacant" for two continuous years, and also provides that words used in the code have their normal dictionary meaning, the local government may interpret "vacant" to mean "free from activity" consistent with the nonconforming use rights, but cannot embellish that definition by adding a requirement for the absence of "a bona fide effort to provide goods and services for profit." *Rhine v. City of Portland*, 27 Or LUBA 86 (1994).

30.4 Zoning Ordinances – Interpretation. LUBA will defer to local government decisions giving different interpretations to the same language appearing in different sections of its code, where there are related code provisions that provide some justification for the different construction of such identical code language. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

30.4 Zoning Ordinances – Interpretation. LUBA is not required to remand a decision for a local government interpretation of its code, where the interpretive issue raised by petitioner is so untenable that LUBA can reject it without an authoritative determination by the local decision maker. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

30.4 Zoning Ordinances – Interpretation. A local government interpretation of its sign ordinance that regardless of whether a sign is an awning, fascia or other sign type, it is subject to certain measurement requirements, is not contrary to the express words, policy or context of the ordinance, and LUBA will defer to it. *Heath Northwest, Inc. v. City of Portland*, 26 Or LUBA 535 (1994).

30.4 Zoning Ordinances – Interpretation. 1993 Oregon Laws, chapter 792, section 43, codifies *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), with the exception that LUBA is not required to defer to a local government's interpretation of its regulations if that interpretation is

contrary to a state statute, statewide planning goal or administrative rule which the regulations implement. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

30.4 Zoning Ordinances – Interpretation. A local government's interpretation of its code provisions on farm dwellings is within the interpretive discretion afforded local governments by *Clark v. Jackson County* and 1993 Oregon Laws, chapter 792, section 43, so long as its interpretation does not provide less protection to EFU-zoned land than what ORS 215.283(1)(f) and OAR 660-05-030(4) provide. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

30.4 Zoning Ordinances – Interpretation. Under Oregon Laws 1993, chapter 792, section 43(4), LUBA is not required to affirm a local government's interpretation of its own code provision if that interpretation is "contrary to a state statute, land use goal or [administrative] rule that the [code provision] implements." *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

30.4 Zoning Ordinances – Interpretation. Where the challenged decision does not identify the characteristics of a proposed "soil remediation" use, or compare those characteristics with those of the listed, permitted uses in the applicable zone, the findings are inadequate to demonstrate the proposed "soil remediation" use is similar to the listed, permitted uses in the applicable zone. *Murphy Citizens Advisory Comm. v. Josephine County*, 26 Or LUBA 181 (1993).

30.4 Zoning Ordinances – Interpretation. It is impermissible for a local government to amend a land use ordinance or comprehensive plan provision in the guise of interpreting either. *Murphy Citizens Advisory Comm. v. Josephine County*, 26 Or LUBA 181 (1993).

30.4 Zoning Ordinances – Interpretation. Where the local code defines an accessory use or structure as one which is subordinate to and serves a principal structure or principal use, a local government is within its interpretive discretion under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), to require that the principal use or structure exist before an accessory structure or use may be approved. *McPeek v. Coos County*, 26 Or LUBA 165 (1993).

30.4 Zoning Ordinances – Interpretation. Where petitioners raised an issue below concerning whether a particular code provision is an applicable approval standard, and the challenged decision contains no interpretation explaining that code provision is either inapplicable or satisfied, LUBA must remand the challenged decision. *Hixson v. Josephine County*, 26 Or LUBA 159 (1993).

30.4 Zoning Ordinances – Interpretation. A local government cannot simply conclude its failure to list shopping centers as a permitted or conditional use in any existing zoning district creates an ambiguity and, on that basis, determine it will allow shopping centers as a conditional use in a particular zoning district. Such an action constitutes improperly amending the zoning ordinance in the guise of interpreting it. *Loud v. City of Cottage Grove*, 26 Or LUBA 152 (1993).

30.4 Zoning Ordinances – Interpretation. A local government decision that a shopping center may be allowed in a particular zone under code "similar use" provisions must (1) express an interpretation of the "similar use" provisions that is adequate for LUBA review, (2) actually apply the interpretation adopted, and (3) explain how the decision is consistent with that interpretation. *Loud v. City of Cottage Grove*, 26 Or LUBA 152 (1993).

30.4 Zoning Ordinances – Interpretation. Where petitioners contend certain information required by the local code "prior to the approval of subdivisions" must be in the record at the time of tentative plat approval, and the challenged tentative plat approval decision does not interpret the local code with regard to *at what stage* of the subdivision approval process the required information must be submitted to the county, LUBA must remand the decision for the local government to interpret its code in the first instance. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

30.4 Zoning Ordinances – Interpretation. Where allowing a proposed commercial use in an industrial zone requires a finding that the proposed use is incompatible with the existing commercial area, the relevant inquiry is whether the proposed use is compatible with development in the existing commercial area, not whether it is consistent with the commercial zone or uses allowed in that zone. *O'Neal v. Deschutes County*, 26 Or LUBA 126 (1993).

30.4 Zoning Ordinances – Interpretation. Where a local code imposes limitations on "shopping complexes," a local government approving a commercial use may not simply conclude that that those limitations do not apply, where the issue of the applicability of the shopping complex limitations is raised during local proceedings. *O'Neal v. Deschutes County*, 26 Or LUBA 126 (1993).

30.4 Zoning Ordinances – Interpretation. A local government may interpret a local subdivision approval standard requiring that each lot have "an adequate quantity and quality of water to support the proposed use of the land" as not requiring consideration of the impacts of providing water to the subdivision lots on the water supplies of adjacent properties. *Perry v. Yamhill County*, 26 Or LUBA 73 (1993).

30.4 Zoning Ordinances – Interpretation. Local code provisions which simply allow increased density for controlled income and rent housing do not eliminate the requirement that such housing comply with other requirements of the local code. *Langford v. City of Eugene*, 26 Or LUBA 60 (1993).

30.4 Zoning Ordinances – Interpretation. Where LUBA remands a local government decision for an interpretation of ambiguous code provisions, and no appeal is taken from LUBA's determination concerning the code's ambiguity, petitioner is barred from arguing before LUBA that the disputed code provision is unambiguous, in an appeal from the local decision on remand. *McGowan v. City of Eugene*, 26 Or LUBA 9 (1993).

30.4 Zoning Ordinances – Interpretation. LUBA will defer to a local government's interpretation of a code requirement, that a PUD tentative plan covering a portion of property under single ownership be accompanied by a statement proving the entire property can be developed and used in accord with code standards, as requiring that the PUD not render the remainder of the property undevelopable. *McGowan v. City of Eugene*, 26 Or LUBA 9 (1993).

30.4 Zoning Ordinances – Interpretation. A local government may interpret its code requirement for a "description" of the subject property showing "access" not to require a final legal

determination concerning the existence of access adequate to serve the proposed use, where the subject property is served by a disputed easement. Only the circuit court can provide a final legal determination concerning the nature and scope of a disputed easement. *Mohler v. Josephine County*, 26 Or LUBA 1 (1993).

30.4 Zoning Ordinances – Interpretation. That a proposed paintball game park could be allowed as a "private recreation use" in a commercial zone does not mean it cannot be allowed as a "park" in an EFU zone. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

30.4 Zoning Ordinances – Interpretation. A local government's interpretation of "park," as used in a provision of its zoning ordinance, need not be consistent with a definition of "park areas" in a separate ordinance establishing administrative regulations for the use of parks owned or controlled by the local government. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

30.4 Zoning Ordinances – Interpretation. Where a local code requires certain nonresidential conditional uses in an EFU zone to be "a principal use of the property," it is within a local government's discretion to interpret this phrase to apply only to the portion of the property on which the conditional use will be located, and to require that the proposed use be more than a strictly personal use of the property owner. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

30.4 Zoning Ordinances – Interpretation. Where a church is proposed to be located in an EFU zone, and a county code provision requires that there be "no other feasible location" for the proposed use that satisfies a code standard requiring that certain nonfarm uses in the EFU zone be located on land "generally unsuitable" for farm use, the county may interpret the code provision to require that there be no other feasible location for the propose church *in the EFU zone* that is generally unsuitable for agricultural production. *Simmons v. Marion County*, 25 Or LUBA 647 (1993).

30.4 Zoning Ordinances – Interpretation. Where a county code provision requires that there be no other "feasible location" for a proposed church, and the challenged decision establishes that there is a present need for the proposed church, the county is within its discretion to interpret "feasible location" not to include sites that are not currently available for sale. *Simmons v. Marion County*, 25 Or LUBA 647 (1993).

30.4 Zoning Ordinances – Interpretation. Notwithstanding that LUBA may prefer a different interpretation of local code provisions, where the local decision maker's interpretation of the local code is not internally inconsistent and not clearly wrong, LUBA will defer to it. *DLCD v. Crook County*, 25 Or LUBA 625 (1993).

30.4 Zoning Ordinances – Interpretation. Where the challenged decision contains an interpretation of the local code that a particular standard is inapplicable to the proposed development, and that interpretation is not clearly contrary to the express words, policy or context of the local code, LUBA will defer to that interpretation. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

30.4 Zoning Ordinances – Interpretation. An interpretation of local code provisions, that the local appeal time runs from the date the decision is mailed to parties, is not clearly wrong, and LUBA will defer to it. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

30.4 Zoning Ordinances – Interpretation. Where a code approval standard for home occupations in a resource zone requires that a home occupation be "situated upon generally unsuitable land for the production of farm and forest products," the local government may interpret the standard to require that the entire property on which the home occupation is proposed to be located be "generally unsuitable." *Smith v. Clackamas County*, 25 Or LUBA 568 (1993).

30.4 Zoning Ordinances – Interpretation. Where the challenged decision includes contradictory findings regarding compliance with an applicable local code approval standard, LUBA cannot interpret the standard itself, but rather must remand the decision to the local government to interpret the standard in the first instance. *Larson v. Wallowa County*, 25 Or LUBA 537 (1993).

30.4 Zoning Ordinances – Interpretation. Where the local code states that "failure to comply with this subsection shall be a jurisdictional defect," and a local appellant fails to establish compliance with that subsection, the local government is free to interpret its code to require dismissal of the local appeal, and LUBA will defer to that interpretation. *DLCD v. Wasco County*, 25 Or LUBA 529 (1993).

30.4 Zoning Ordinances – Interpretation. Where a local code does not either specifically prohibit or allow the filing of appeals and appeal fees by facsimile, it is not "clearly wrong" for the local government to determine that a local appeal is not properly filed under the local code where both appeal fees and the appeal document itself are filed by facsimile. *DLCD v. Wasco County*, 25 Or LUBA 529 (1993).

30.4 Zoning Ordinances – Interpretation. A county may reasonably interpret the term "existing commercial farm enterprises" in a code provision establishing a minimum lot size standard for farm dwellings, as not including property that is not presently operated as part of a commercial farm operation. *Giesy v. Benton County*, 25 Or LUBA 493 (1993).

30.4 Zoning Ordinances – Interpretation. Where the county code requires the "farm unit" on which a farm dwelling is proposed to be located to be consistent with the size of existing commercial farm enterprises in the area, and also recognizes that commercial farms may be composed of several separate management units, it is reasonable for the county to interpret "farm unit" to include all land that is part of a farm operation, including land in different locations. *Giesy v. Benton County*, 25 Or LUBA 493 (1993).

30.4 Zoning Ordinances – Interpretation. Where a farm dwelling approval standard in a local code requires a county to consider the median size of commercial farms in a specific area, as reported by certain government agencies or "other similar source," it is within the county's discretion to interpret the "other similar source" provision to allow it to consider relevant evidence from the county planning department, county assessor's office or other reliable sources. *Giesy v. Benton County*, 25 Or LUBA 493 (1993).

30.4 Zoning Ordinances – Interpretation. A local government determination that occasionally staying on the subject property in a travel trailer is not residential use of the property for purposes of determining whether a nonconforming residential use has been "discontinued," is not a clearly wrong interpretation of the code, and LUBA will defer to it. *Cemper v. Clackamas County*, 25 Or LUBA 486 (1993).

30.4 Zoning Ordinances – Interpretation. Where a code chapter prohibiting vegetation disturbance in certain areas allows activities authorized by a land use decision made before the effective date of the chapter, the local government may interpret the code to allow activities authorized under a newly amended PUD development plan, if those *same* activities where authorized under an original PUD development plan approved prior to the effective date of the code chapter. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

30.4 Zoning Ordinances – Interpretation. Where a local code requires that home occupations occupy no more than 1000 square feet of an accessory building, an interpretation of that provision as excluding portions of the accessory building used to access the part of the accessory building used for the home occupation makes full use of the local government's interpretative discretion. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

30.4 Zoning Ordinances – Interpretation. Where the local code defines "traveler's accommodations" to include an establishment rented to travelers for a fee, on a daily or weekly basis, and the local government interprets that code definition as not excluding cabins that are occupied by owners for less than 36 days per year, such an interpretation is not clearly contrary to the local code, and LUBA will defer to it. *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411 (1993).

30.4 Zoning Ordinances – Interpretation. A permit approval condition that amendments to the approved master plan must be approved by the planning department is not inconsistent with, and does not eliminate, the right established by the local code to appeal a decision by the planning director on such an administrative action to the planning commission. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

30.4 Zoning Ordinances – Interpretation. A local code provision requiring that "consideration * * * be given to [certain specified] factors" does not establish mandatory approval standards for local government decisions, but rather merely lists "factors" which the local government must consider. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

30.4 Zoning Ordinances – Interpretation. Where the local code expresses an intent not to duplicate state mobile home park approval standards, LUBA will defer to the local government's interpretation that the state approval standard in ORS 446.100(1)(a) is not part of the "applicable Oregon Law," which the code requires to be considered in making permit decisions. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

30.4 Zoning Ordinances – Interpretation. That a local government may have, in the past, erroneously interpreted its ordinances as not requiring a public hearing, does not require that the local government perpetuate that error. *McInnis v. City of Portland*, 25 Or LUBA 376 (1993).

30.4 Zoning Ordinances – Interpretation. Where a code provision governing notice of decisions on a certain type of land use action does not expressly provide it applies only to a decision by the planning director, LUBA will defer to a local government's interpretation that the code provision also applies to a decision by the hearings officer on appeal from a decision by the planning director. *Reusser v. Washington County*, 25 Or LUBA 252 (1993).

30.4 Zoning Ordinances – Interpretation. Where one code provision requires a local government's notice of decision to identify the local appeal fee, and another provision states that failure to pay the proper local appeal fee prior to expiration of the period for filing an appeal constitutes a "jurisdictional" defect, the local government may interpret the two code provisions together to mean that the period for filing an appeal does not begin to run until the required notice of decision, identifying the proper appeal fee, is provided to the appealing party. *Reusser v. Washington County*, 25 Or LUBA 252 (1993).

30.4 Zoning Ordinances – Interpretation. Where a local code allows approval of a rural planned development (RPD) "in conjunction with" a land division, and establishes comprehensive standards for RPDs, including standards for lot line adjustments in an approved RPD, the local government's interpretation of a code provision allowing revisions to an approved land division as giving it authority to approve lot line adjustments in an approved RPD which are not otherwise allowable under the RPD provisions, is clearly wrong. *Reusser v. Washington County*, 25 Or LUBA 252 (1993).

30.4 Zoning Ordinances – Interpretation. Local code requirements that floodplain alterations for a driveway be in the public interest and meet some public need or public convenience are satisfied by determinations that (1) there is a public need for, and public interest in, the provision of housing; (2) the subject property is zoned for residential use; and (3) there is a need for, and a public interest in, the provision of access to the property to enable residential use. *Clarke v. City of Hillsboro*, 25 Or LUBA 195 (1993).

30.4 Zoning Ordinances – Interpretation. Where the local code requires that the subject property be reasonably suited for the "use proposed," a local government does not err by determining the suitability of the entire parcel for the proposed use and not just the site of the proposed residence. *Clarke v. City of Hillsboro*, 25 Or LUBA 195 (1993).

30.4 Zoning Ordinances – Interpretation. LUBA is limited to considering the interpretations of ambiguous code language that are adopted by the decision-making body and may not consider interpretations that are not adopted by the decision maker, even if the offered interpretation is reasonable. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

30.4 Zoning Ordinances – Interpretation. A local government interpretation of a local code provision which prohibits direct access to major collectors by commercial, industrial and institutional uses with more than 150 feet of frontage as not applying to proposed residential subdivisions with more than 150 feet of frontage is reasonable. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

30.4 Zoning Ordinances – Interpretation. Under a local code standard requiring that arterial streets not "penetrate identifiable neighborhoods," LUBA will defer to the local government's determination of what constitutes an identifiable neighborhood, unless the local government's determination is clearly wrong. *Mannenbach v. City of Dallas*, 25 Or LUBA 136 (1993).

30.4 Zoning Ordinances – Interpretation. Where a local government determines a use does not fit neatly into any of the available definitional categories in its code, but provides a reasonable explanation for categorizing the use according to its primary use, LUBA will defer to that interpretation. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

30.4 Zoning Ordinances – Interpretation. Where a local government correctly determines that a parking lot is a nonconforming use, and was not automatically made an approved conditional use under applicable code provisions, it commits no error in failing to apply plan and code provisions that would apply to expansion of the parking lot if it were correctly viewed as a conditional use. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

30.4 Zoning Ordinances – Interpretation. Where the local code includes an exception to the term "wetland" for wetlands created by "human activity as part of an approved development project," and there is no dispute that the subject wetland was created with the knowledge and consent of the local government, it is clearly wrong for the local government to fail to consider whether the wetland is within the local code exception. *Annett v. Clackamas County*, 25 Or LUBA 111 (1993).

30.4 Zoning Ordinances – Interpretation. A local government's interpretation that a local code standard requiring a determination concerning the adequacy of schools "existing or planned for the area" is satisfied by findings that there is unspent money in a school district's budget, is an interpretation of the local code that is "clearly wrong." *Burghardt v. City of Molalla*, 25 Or LUBA 43 (1993).

30.4 Zoning Ordinances – Interpretation. A local government may interpret the term "processing of aggregate," as used in an industrial zoning district of its code, to include asphalt plants, even though the code language was adopted at a time when LUBA had interpreted similar language in the EFU statute not to include asphalt plants. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

30.4 Zoning Ordinances – Interpretation. A local government is within its interpretive discretion in interpreting the term "development" as including farming, where the code defines the term broadly and includes a nonexclusive list of examples of development that includes "site alteration such as * * * grading * * * or clearing." *Trumper v. Washington County*, 24 Or LUBA 552 (1993).

30.4 Zoning Ordinances – Interpretation. Where a local government interprets its own enactments in a way that is inconsistent with the express terms of a local provision, and there is at least one plausible interpretation of the disputed provision that is consistent with its express terms, LUBA will not defer to the local government's interpretation. *McGowan v. City of Eugene*, 24 Or LUBA 540 (1993).

30.4 Zoning Ordinances – Interpretation. A requirement in a local code that development be "consistent" with comprehensive plan policies and standards, is a general requirement that does not transform otherwise nonmandatory plan standards into approval standards. *McGowan v. City of Eugene*, 24 Or LUBA 540 (1993).

30.4 Zoning Ordinances – Interpretation. Local ordinances governing when a local decision becomes final are effective only to the extent they do not conflict with state statutes. *A Storage Place v. City of Tualatin*, 24 Or LUBA 637 (1993).

30.4 Zoning Ordinances – Interpretation. Where LUBA must determine whether an ambiguous code provision (*i.e.*, one that is capable of more than one sustainable interpretation) is applicable to a challenged decision, and the challenged decision does not contain a reviewable interpretation of that provision, LUBA must remand the decision for the local government to interpret the provision in the first instance. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

30.4 Zoning Ordinances – Interpretation. Where petitioners contend a local government erred in failing to apply a code provision to the challenged decision, and the decision contains no interpretation of that code provision, but the code language unambiguously establishes that the provision in question is not applicable to the challenged decision, LUBA is not required to remand the decision so the local government can interpret its code in the first instance. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

30.4 Zoning Ordinances – Interpretation. Where under certain provisions of a local enactment, consideration of the geologic stability of the subject site would be relevant to the conditional use permit approval process, but other code provisions create a separate geologic hazard review process that may be initiated at any time prior to or in conjunction with filing an application for *any* required local permit, LUBA will defer to the local government's interpretation that it is not required to address geologic stability as part of the conditional use permit process. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

30.4 Zoning Ordinances – Interpretation. Where a local government determines an application for a home occupation on a parcel adjoining another parcel on which an earlier application for the same home occupation was denied, is an application for a "substantially similar" use, LUBA will defer to that interpretation of the local code requirement that an application may not be "substantially similar" to a previously denied application. *Roozenboom v. Clackamas County*, 24 Or LUBA 433 (1993).

30.4 Zoning Ordinances – Interpretation. Where a code provision is capable of more than one rational interpretation, and the code provision was adopted to implement an LCDC administrative rule, consideration of the context and purpose of the administrative rule is relevant in determining the meaning of the code provision. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

30.4 Zoning Ordinances – Interpretation. Where a county code does not allow new dwellings as a permitted use in a particular zone, but allows "maintenance, repair or replacement of existing

dwellings" as a permitted use in that zone, lawfully established existing dwellings are not nonconforming uses in that zone. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

30.4 Zoning Ordinances – Interpretation. LUBA may not interpret a local code in the first instance, but rather must review a local government's interpretation of its code. However, a local government interpretation of its code must be adequate for LUBA's review and may not consist of a mere conclusory statement. *DLCD v. Crook County*, 24 Or LUBA 393 (1993).

30.4 Zoning Ordinances – Interpretation. In the absence of a statutory policy pertaining to forestlands that, like the statutory policy concerning EFU land, requires the preservation of forestland in large blocks, LUBA cannot require that a local government interpret and apply its nonforest use "generally unsuitable" land approval standard in the same manner as the similarly worded statutory standard pertaining to nonfarm uses on EFU land. *DLCD v. Coos County*, 24 Or LUBA 349 (1992).

30.4 Zoning Ordinances – Interpretation. Where a local code requires a proposed nonforest dwelling site to be on land generally unsuitable for forest uses, that standard can be interpreted to mean either that the proposed nonforest dwelling site itself, or that the entire forest parcel, must be generally unsuitable for forest uses. LUBA will defer to the local government's choice between those permissible interpretations. *DLCD v. Coos County*, 24 Or LUBA 349 (1992).

30.4 Zoning Ordinances – Interpretation. LUBA is required to defer to a local government's interpretation of its zoning ordinance, so long as the proffered interpretation is not "clearly contrary to the enacted language," or "inconsistent with express language of the ordinance or its apparent purpose or policy." *Tylka v. Clackamas County*, 24 Or LUBA 296 (1992).

30.4 Zoning Ordinances – Interpretation. Where a local code identifies RV camping facilities as one type of service recreational facility, and certain zones specifically list RV camping facilities as a conditional use, whereas other zones list only service recreational facilities in general, the other zones simply allow a broader range of service recreational facilities, including RV camping facilities. *Tylka v. Clackamas County*, 24 Or LUBA 296 (1992).

30.4 Zoning Ordinances – Interpretation. The code provision that was in effect when the application for a variance was filed, and which states a variance "shall become void after the expiration of one (1) year if no substantial construction has taken place," must be interpreted and applied when the local government determines whether a previously approved variance remains valid. *Todd v. Columbia County*, 24 Or LUBA 289 (1992).

30.4 Zoning Ordinances – Interpretation. Where a local code provision states that tree protection is a proper Justification for approval of a proposed setback reduction, the local government's interpretation that the provision allows it to approve a setback reduction to protect a particular tree, even though the setback reduction will result in the destruction of another tree, is not clearly contrary to the express terms of the code and LUBA will defer to the interpretation. *Barker v. City of Cannon Beach*, 24 Or LUBA 221 (1992).

30.4 Zoning Ordinances – Interpretation. Where a local code requires that one of several considerations must be "achieved" to approve a setback reduction request, and there are adequate findings that one of those considerations is achieved, it provides no basis for reversal or remand that other considerations may not also be achieved. *Barker v. City of Cannon Beach*, 24 Or LUBA 221 (1992).

30.4 Zoning Ordinances – Interpretation. Where abutting property is already developed and there is no pending development application for abutting property, a local code requirement that a proposed setback reduction not substantially reduce the privacy "which is or will be enjoyed" by abutting property owners is satisfied by an analysis of the current uses, activities and characteristics of developed abutting property. *Barker v. City of Cannon Beach*, 24 Or LUBA 221 (1992).

30.4 Zoning Ordinances – Interpretation. Where a local code requires that a stream corridor and buffer zone be established prior to development of property, once the corridor and buffer zone are established by the local government as part of a minor partition decision, it is unnecessary for the local government to reexamine those boundaries in order to issue building and tree cutting permits for parcels created by the partition. *Forest Highlands Neigh. Assoc. v. City of Lake Oswego*, 24 Or LUBA 215 (1992).

30.4 Zoning Ordinances – Interpretation. Where a parcel was created by deed, at a time when the local government interpreted its partitioning regulations to be inapplicable to parcels created in that manner, the local government may subsequently determine that a permit application complies with a code requirement that a proposed use be on a "parcel," without reexamining the applicability of its partitioning regulations when the parcel was created. *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992).

30.4 Zoning Ordinances – Interpretation. LUBA will defer to a local government's interpretation of its code so long as the proffered interpretation is not "clearly contrary to the enacted language," or "inconsistent with express language of the ordinance or its apparent purpose or policy." An interpretation of a local code provision to require that in order to be recognized as separately developable, a parcel must have been in separate ownership on a particular date, is not "clearly contrary" to the terms of, or "inconsistent with the express language" or "apparent purpose or policy" of, the code provision. *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992).

30.4 Zoning Ordinances – Interpretation. Where the local code provides that a conditional use permit expires one year after it is approved, unless construction occurs demonstrating the CUP has been "used," and where the code also prohibits the local government from issuing building or other permits required for construction until appeals have been "completed," the running of the one year period for "using" a conditional use permit is tolled during those periods of time when a building or other permit necessary to "use" the conditional use permit cannot properly be issued due to an appeal. *Weeks v. City of Tillamook*, 24 Or LUBA 155 (1992).

30.4 Zoning Ordinances – Interpretation. Where the local code provides that a land use permit "shall be valid for * * * one year after the date of approval," it is not inconsistent with the language, purpose or policy of the code to interpret the one-year period during which a permit remains valid

to exclude time when the permittee is prevented from carrying out the permit due to a stop work order issued by the local government. *Schob v. Deschutes County*, 24 Or LUBA 147 (1992).

30.4 Zoning Ordinances – Interpretation. In applying a zone change criterion requiring that there be an error in "the zoning adopted for the area," the appropriate focus is on the time and circumstances under which the existing zoning of the area was applied. *Recht v. City of Depoe Bay*, 24 Or LUBA 129 (1992).

30.4 Zoning Ordinances – Interpretation. That different zoning may provide additional flexibility in developing property provides no basis for finding there was an error in applying the existing zoning to the property. *Recht v. City of Depoe Bay*, 24 Or LUBA 129 (1992).

30.4 Zoning Ordinances – Interpretation. Where a local government interprets a code requirement that all functions associated with a proposed use take place "within the building" proposed to house the use to be satisfied, where a covered play area will be part of the total "floor area" of such building, its interpretation of the code is not inconsistent with the code's express language, purpose or policy and, therefore, must be affirmed. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

30.4 Zoning Ordinances – Interpretation. In the absence of a connection between a local code requirement that a "letter of intent" to share tower space be recorded and another code requirement concerning "substantial construction," the failure to record a "letter of intent" does not mean that construction actually completed pursuant to building permits may not be considered in determining whether the "substantial construction" requirement is met. *Columbia River Television v. Multnomah County*, 24 Or LUBA 82 (1992).

30.4 Zoning Ordinances – Interpretation. In the absence of a code requirement to the contrary, a provision in a local code authorizing the development of a parcel to proceed to completion so long as "substantial construction" occurs within a certain period of time does not require the application of a traditional vested rights analysis. *Columbia River Television v. Multnomah County*, 24 Or LUBA 82 (1992).

30.4 Zoning Ordinances – Interpretation. Where a local code allows recycling and other incidental uses, LUBA will defer to a local government interpretation of the code as allowing a recycling facility that accepts waste material including both solid waste and recyclable material, where approximately 70 percent of the material accepted will be recycled and approximately 30 percent will be disposed of at a landfill. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

30.4 Zoning Ordinances – Interpretation. A local code or plan provision prohibiting uses in certain areas of a jurisdiction, where those uses would otherwise be permissible under the base zoning district, does not create an implied authorization for the prohibited uses in areas of the jurisdiction not covered by the prohibition. *Goose Hollow Foothills League v. City of Portland*, 24 Or LUBA 69 (1992).

30.4 Zoning Ordinances – Interpretation. The existence of overlapping prohibitions in a local code does not provide a sufficient basis for creating an exception to one of the overlapping

prohibitions that has no basis in the language of the code. *Goose Hollow Foothills League v. City of Portland*, 24 Or LUBA 69 (1992).

30.4 Zoning Ordinances – Interpretation. Where a code provides that changes having significant impacts are major PUD amendments, and lists categories of changes that *might* result in significant impacts, whether a proposed amendment falls within a category on the list is not in itself determinative of whether the amendment is major. Because the categories are not independent bases for identifying a major amendment, a determination that a proposed PUD amendment is not major need not be supported by findings addressing each category. *Gage v. City of Portland*, 24 Or LUBA 47 (1992).

30.4 Zoning Ordinances – Interpretation. A code provision requiring the existence of legal access is satisfied by an existing access easement, notwithstanding that portions of the existing driveway are located outside the easement. *Mercer v. Josephine County*, 23 Or LUBA 608 (1992).

30.4 Zoning Ordinances – Interpretation. Where the purposes of a county's commercial zones are to provide for retail-oriented needs in areas characterized by good transportation services, and such needs and services are not identified with a particular proposed golf course, the county's interpretation of its own ordinance that the golf course is not a commercial use is not inconsistent with express language of the local ordinance or the ordinance's apparent purpose or policy and will be affirmed. *West v. Clackamas County*, 23 Or LUBA 558 (1992).

30.4 Zoning Ordinances – Interpretation. Where a county code contains a general PUD provision stating that individual lot size in PUDs is unrestricted, but is subsequently amended to include a prohibition against "flexible lot size developments" in a particular zone, the code is correctly interpreted to prohibit PUDs which would create individual lots smaller than the minimum lot size required by that particular zone. *Niedermeyer v. Clackamas County*, 23 Or LUBA 380 (1992).

30.4 Zoning Ordinances – Interpretation. Where the local code provides that a conflict between the requirements of a base zone and an overlay zone are to be resolved in favor of the overlay zone, that a base zone permits a particular industrial use outright does not prohibit the local government from denying such a use on the basis of the requirements of the overlay zone. *Seger v. City of Portland*, 23 Or LUBA 334 (1992).

30.4 Zoning Ordinances – Interpretation. A city decision which approves an application by a county for an RV campground, but limits the approval to "a 'public' campground and to the applicant, a public entity," satisfies the city code definition of "public use" as a "use owned or operated by a public, governmental or nonprofit organization * * *." *Hydes v. City of John Day*, 23 Or LUBA 313 (1992).

30.4 Zoning Ordinances – Interpretation. A local zoning map amendment standard requiring that there be a "need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area," requires that the local government adequately identify and justify the area selected for the required analysis. *Friedman v. Yamhill County*, 23 Or LUBA 306 (1992).

30.4 Zoning Ordinances – Interpretation. A local zoning map amendment standard requiring that there be a "need for the particular uses allowed by the requested zone," is not satisfied by findings that there is a need for rural housing on 2.5-acre lots where there is no attempt to explain why the rural housing need cannot be satisfied on vacant rural land zoned to allow rural residential development with 1- and 5-acre minimum lot sizes. *Friedman v. Yamhill County,* 23 Or LUBA 306 (1992).

30.4 Zoning Ordinances – Interpretation. A local zoning map amendment standard requiring that there be a "need for the particular uses allowed by the requested zone, considering the importance of such uses to the citizenry or the economy of the area," is not met where the findings simply assume the importance of rural housing to the citizenry or economy of the area. *Friedman v. Yamhill County,* 23 Or LUBA 306 (1992).

30.4 Zoning Ordinances – Interpretation. A local zoning map amendment standard requiring demonstration of a need to rezone property for rural residential development is not satisfied where the record shows a significant amount of vacant property currently zoned to allow such rural residential development. The local government may not assume such land is not "available" for rural residential development simply because it is not currently listed for sale. *Friedman v. Yamhill County,* 23 Or LUBA 306 (1992).

30.4 Zoning Ordinances – Interpretation. In the absence of specific plan or code provisions to the contrary, a local code provision providing that single family dwellings are permitted uses in a "Recreational Residential" zone permits the short-term rental of such dwellings. *Brogoitti v. Wallowa County,* 23 Or LUBA 247 (1992).

30.4 Zoning Ordinances – Interpretation. Where a code zone change approval standard requires there be a "demand" for the "uses listed in the proposed zone at the proposed location," and the code also requires consideration of "the public interest" in allowing the zone change and the "availability of other appropriate[ly] zoned property," the desire of an individual property owner for a particular use on a particular parcel is not sufficient, in and of itself, to constitute a "demand." *DLCD v. Clatsop County,* 23 Or LUBA 173 (1992).

30.4 Zoning Ordinances – Interpretation. Where local code provisions governing appeals state the governing body may "affirm, reverse or modify in whole or in part, any decision * * * of the planning commission," the code does *not* limit the governing body's scope of review to issues raised in the notice of appeal of a planning commission decision. *Horizon Construction, Inc. v. City of Newberg,* 23 Or LUBA 159 (1992).

30.4 Zoning Ordinances – Interpretation. A local code jurisdictional requirement that the local appeal document, which under the code includes the required appeal fee, be "signed" but which does not state *where* such signature must be located, is satisfied by the local appellant's signature on his personal check submitted as the filing fee. *Breivogel v. Washington County,* 23 Or LUBA 143 (1992).

30.4 Zoning Ordinances – Interpretation. A local code provision that requires the planning commission to conduct a site review of certain proposed developments, but which establishes no separate procedure for site review, does not prevent a city council decision approving a conditional use permit for the proposed development from being a final land use decision appealable to LUBA, even though the planning commission never conducted such site review. *Citizens for Resp. Growth v. City of Seaside,* 23 Or LUBA 100 (1992).

30.4 Zoning Ordinances – Interpretation. A code approval standard requiring that a farm dwelling be located on a parcel "planted in perennials capable of producing upon harvest, an average of at least 10,000 dollars in gross annual income" does not require that the *site* be capable of producing the required income, but rather that the *perennials planted* on the site be capable of producing, upon harvest, the required income. *McKay Creek Valley Assoc. v. Washington County*, 23 Or LUBA 85 (1992).

30.4 Zoning Ordinances – Interpretation. Where a code standard requires a determination that there is a demonstrated need for a proposed golf course "which outweighs the need for, or benefits of, the existing or potential farm or forest use," the county correctly applied that standard by determining even though there is a need for more golf courses in the county, the value of the property for farmland outweighs that need. *Barber v. Marion County*, 23 Or LUBA 71 (1992).

30.4 Zoning Ordinances – Interpretation. Where a local government elects to limit the length of cul-de-sac streets, it may also establish how the length of such streets is to be measured. However, where no particular method of measuring the length of cul-de-sac streets is specified in its land use regulations, the local government must determine length applying the regulations as they are written and applying the plain and ordinary meaning of the operative term "length." *Sully v. City of Ashland,* 23 Or LUBA 25 (1992).

30.4 Zoning Ordinances – Interpretation. Under applicable city land use regulation definitions and general understanding the length of a cul-de-sac street is measured to the end of whatever turnaround is provided; not to the point at which the right-of-way widens to accommodate the turnaround. *Sully v. City of Ashland,* 23 Or LUBA 25 (1992).

30.4 Zoning Ordinances – Interpretation. Where a code standard requires that a certain "overall residential density" be maintained in sensitive big game habitat areas, but does not provide how "overall residential density" is to be determined, the standard is reasonably interpreted to require that the specified residential density be maintained on the property that is the subject of the development application. *Sterling Mine Properties v. Jackson County*, 23 Or LUBA 18 (1992).

30.4 Zoning Ordinances – Interpretation. Where the local code employs the terms "necessary for and accessory to," as a standard for farm dwellings in a mixed farm/forest zone, and where that standard appears to have been adopted to comply with Goal 4, it is appropriate to interpret the ordinance standard in a manner consistent with the interpretation of those terms in the context of Goal 4. *Tipperman v. Union County*, 22 Or LUBA 775 (1992).

30.4 Zoning Ordinances – Interpretation. Where a local government interprets the phrase "necessary for and accessory to" in the local code as requiring only a showing that a proposed

dwelling is convenient to the continuation of the resource use of the property, such interpretation is incorrect. *Tipperman v. Union County*, 22 Or LUBA 775 (1992).

30.4 Zoning Ordinances – Interpretation. A subdivision ordinance standard requiring that cut and fill slopes not exceed one foot vertically to two feet horizontally "unless physical conditions demonstrate the propriety of other standards" allows two means of compliance. The local government may find either that the 2-to-1 slope limit will be met, or that physical conditions make a different slope standard proper. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

30.4 Zoning Ordinances – Interpretation. Where a conditional use permit approval standard in an EFU zone requires that there be "no other feasible location for the proposed use," the term "feasible location" does not mean "ideal location," but rather a location which is capable of being used for the proposed use. *Simmons v. Marion County*, 22 Or LUBA 759 (1992).

30.4 Zoning Ordinances – Interpretation. Where a conditional use permit approval standard in an EFU zone requires that there be "no other feasible location for the proposed use," the price of land at an alternative site is not justification for finding that site infeasible, in the absence of evidence that the price is unreasonable for a site for the proposed use. *Simmons v. Marion County*, 22 Or LUBA 759 (1992).

30.4 Zoning Ordinances – Interpretation. Even though a county decision suggests it interprets its zoning ordinance to limit forest dwellings to those necessary for and accessory to commercial forest management, such a narrow interpretation provides no basis for reversal or remand where the county also found the proposed dwelling is not necessary for and accessory to other forest uses argued by petitioners. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

30.4 Zoning Ordinances – Interpretation. A forest zoning district purpose and intent section providing that the zone is for forest related uses and "other compatible uses," does not allow approval of a use solely upon a showing the use will be compatible with forest uses, where subsequent sections of the zoning district identify allowable uses and establish standards for their approval. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

30.4 Zoning Ordinances – Interpretation. A local code criterion requiring that a request for land use approval be in the "public interest" does not require that the local government determine whether denial of the request would constitute a taking of private property without just compensation in violation of Article I, section 18, of the Oregon Constitution or the Fifth Amendment to the U.S. Constitution. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

30.4 Zoning Ordinances – Interpretation. ORS 215.296(1), and identical local code provisions, require that a county consider the impacts of a proposed nonfarm use on *all* "surrounding lands devoted to farm or forest use," whether that use is commercial or noncommercial. *Schellenberg v. Polk County*, 22 Or LUBA 673 (1992).

30.4 Zoning Ordinances – Interpretation. Where a proposed residential detoxification facility will take blood pressure and body temperature of potential admittees, but will refuse to admit

anyone in need of medical attention and will not provide any medication or medical treatment on site, a local government's determination that the proposed facility will provide "primarily" health care is erroneous as a matter of law. *Harmony House, Inc. v. City of Salem*, 22 Or LUBA 629 (1992).

30.4 Zoning Ordinances – Interpretation. Where the local code explicitly provides that antennae are usually required to be above roof level, and the only function a tower serves is to elevate antennae sufficiently above roof level so they may receive and transmit signals in conjunction with ground-based processing equipment, the tower falls within the code exemption from building height requirements for "appurtenances usually required to be placed above the roof level." *Greenlees v. Yamhill County*, 22 Or LUBA 604 (1992).

30.4 Zoning Ordinances – Interpretation. A comprehensive plan standard establishing a minimum building site requirement of one acre is not inconsistent with plan and code requirements that subdivision lots in a zoning district allowing development at a density of one unit per five acres be clustered to provide not less than 30 percent common open space. Such a plan standard simply sets a minimum area requirement for each clustered lot. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

30.4 Zoning Ordinances – Interpretation. A local code definition of common open space as space to be "used, maintained and enjoyed by the owners and occupants of the individual building units" does not require that for all common open space the owners and occupants have physical access to "use" such common open space. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

30.4 Zoning Ordinances – Interpretation. Absent zoning ordinance provisions to the contrary, a PUD preliminary master plan approval is a "development permit" and where the zoning ordinance requires that an environmental assessment "be filed prior to the issuance of any development permit," it is error to approve a PUD preliminary master plan prior to the filing of the required environmental assessment. *Gerl v. City of Lincoln City*, 22 Or LUBA 512 (1992).

30.4 Zoning Ordinances – Interpretation. Where the local code defines public facilities to include public schools, and contains a standard requiring that conditional uses be timely considering the adequacy of public facilities, the local government must determine that at the time the proposed development will occur public schools will be adequate to serve the proposed development. *Burghardt v. City of Molalla*, 22 Or LUBA 369 (1991).

30.4 Zoning Ordinances – Interpretation. Where the local code establishes specific requirements for applications for mobile home parks, and also requires that the site plan for a proposed conditional use include information specifically required by the code for the proposed use, a conditional use permit application for a mobile home park must also include the information required for applications for mobile home parks. *Burghardt v. City of Molalla*, 22 Or LUBA 369 (1991).

30.4 Zoning Ordinances – Interpretation. An acknowledged zoning ordinance provision concerning division of EFU-zoned farm parcels providing that "evaluation shall include the subject property and commercial agricultural enterprises located in the same zone within one-half mile of

the subject property" is properly interpreted as identifying the *minimum* area to be evaluated, and areas beyond a one-half-mile radius may have to be evaluated to establish the nature of the existing commercial agricultural enterprise in the area. *Still v. Marion County*, 22 Or LUBA 331 (1991).

30.4 Zoning Ordinances – Interpretation. Where the local code establishes a "two-step" process for approving PUDs which requires that (1) preliminary development plan approval be granted only if the PUD will fulfill all applicable code requirements, and (2) final development plan approval be granted if the final plan complies with the preliminary plan and any conditions imposed thereon, the local government has created a PUD master plan approval process which governs all further aspects of the PUD development process. *Gilson v. City of Portland*, 22 Or LUBA 343 (1991).

30.4 Zoning Ordinances – Interpretation. A local code provision establishing general approval criteria for nonlegislative zone changes does not apply to changes in overlay zone boundaries which are controlled by comprehensive plan inventory maps identifying the location and physical characteristics of certain types of resource areas. *Gray v. Clatsop County*, 22 Or LUBA 270 (1991).

30.4 Zoning Ordinances – Interpretation. Where there appear to be conflicting code provisions such that a code approval criterion has the effect of nullifying another code provision which specifically allows a use subject to that approval criterion, the local government should first consider whether the code standard is sufficiently ambiguous that it can be interpreted in a manner that avoids the conflict. If the code can be interpreted to avoid the conflict, that interpretation should be adopted. *Waker Assoc., Inc. v. Clackamas County*, 22 Or LUBA 233 (1991).

30.4 Zoning Ordinances – Interpretation. Whether the provisions of a zoning ordinance "purpose" section are approval criteria for individual land use decisions depends on the wording of the specific provisions and their context. *Tylka v. Clackamas County*, 22 Or LUBA 166 (1991).

30.4 Zoning Ordinances – Interpretation. Whether a proposed sewage treatment facility will produce odors is a relevant consideration in determining compliance with a local conditional use permit standard requiring findings that the "location, size, design, and operation are compatible with and will not adversely affect the livability or appropriate development of abutting properties in the surrounding neighborhood." *Sitsler v. City of Mill City*, 22 Or LUBA 125 (1991).

30.4 Zoning Ordinances – Interpretation. Where the local code does not contain a specific purpose statement for a zoning district, determining a proposed conditional use is similar to, and produces no significant impacts different from those produced by, uses permitted outright in the zoning district is a correct means of determining compliance with a code requirement that a conditional use be in harmony with the purpose and intent of the zoning district. *Brandt v. Marion County*, 22 Or LUBA 74 (1991).

30.4 Zoning Ordinances – Interpretation. A proposed subdivision's effect on groundwater availability in the area is relevant to determining compliance with a local code standard requiring that a proposal not have more than a "minimal adverse effect on livability, value and appropriate development of the area." *Kirkpatrick v. Jackson County*, 22 Or LUBA 3 (1991).

30.4 Zoning Ordinances – Interpretation. Whether a proposed bridge will cause waters to exceed a water overflow easement is a relevant consideration under a local code standard requiring that a proposal not have more than a "minimal adverse impact on livability, value and appropriate development of the area." *Kirkpatrick v. Jackson County*, 22 Or LUBA 3 (1991).

30.4 Zoning Ordinances – Interpretation. Petitioner's argument that an approved residential care facility is really a correctional facility provides no basis for remand where the code definition of residential care facility appears to be broad enough to include correctional facilities, (2) the local government found the proposal satisfies the code definition of residential care facility, and (3) petitioner does not challenge the local government's findings. *Wentland v. City of Portland*, 22 Or LUBA 15 (1991).

30.4 Zoning Ordinances – Interpretation. ORS 197.763(3)(b) does not require a local government to list related code provisions as "applicable criteria" in its notice of a quasi-judicial land use hearing in order to be able to consider them in interpreting the central code provisions at issue consistently with such related code provisions. *Ward v. City of Lake Oswego*, 21 Or LUBA 470 (1991).

30.4 Zoning Ordinances – Interpretation. Where language used in a local ordinance corresponds to language used in a state statute or statewide planning goal, it is appropriate to interpret those ordinance provisions consistently with available authority for interpreting the relevant statute or goals. *Tice v. Josephine County*, 21 Or LUBA 371 (1991).

30.4 Zoning Ordinances – Interpretation. A local code provision that allows "outdoor recreation activities" on forest-zoned lands, and the identical provision used in former Goal 4 (Forest Lands), are not correctly interpreted to include a motorcycle racetrack. *Tice v. Josephine County*, 21 Or LUBA 371 (1991).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance definition of "motel" is broad enough to include transient housing available only to groups using a convention center, the city may properly consider such transient housing as motel units available to satisfy temporary housing demand. *Hay v. City of Cannon Beach*, 21 Or LUBA 364 (1991).

30.4 Zoning Ordinances – Interpretation. Local government interpretation of code to provide that parcels zoned for motel use are "available" for such use even though presently developed with single family houses, on the basis of incentive to redevelop such property due to higher financial return associated with motel use, is not wrong as a matter of law. *Hay v. City of Cannon Beach*, 21 Or LUBA 364 (1991).

30.4 Zoning Ordinances – Interpretation. Under a code provision requiring there be a demand for a use at the proposed location, even if a demand for the use is identified, there is no demand for the use at the proposed location if there are other appropriately zoned parcels on which the use may be built. *Hay v. City of Cannon Beach*, 21 Or LUBA 364 (1991).

30.4 Zoning Ordinances – Interpretation. Where a "commercial kennel" is defined in a local code as including "boarding" and "breeding" of dogs, such "commercial kennel" does not include

a facility where up to 50 dogs are given three months of intensive training to protect their masters, and the boarding provided is incidental to such training. *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

30.4 Zoning Ordinances – Interpretation. Where a code standard provides that the standard applies "to the establishment, maintenance, and operation of" the proposed use, a local government must determine whether the standard is met prior to granting the requested discretionary permits. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

30.4 Zoning Ordinances – Interpretation. A local code provision allowing a "resident" of a dwelling to conduct a home occupation does not require that such "resident" also be the owner of the dwelling in which the home occupation is to be conducted. *Tarbell v. Jefferson County*, 21 Or LUBA 294 (1991).

30.4 Zoning Ordinances – Interpretation. A city code provision (1) requiring that certain "development * * * shall provide open space * * * approved by the city," (2) establishing a prioritized list of types of open space, and (3) providing an option to provide fees in lieu of open space, grants the city, not the developer, the option to require dedication of open space rather than a fee in lieu. *Oswego Properties, Inc. v. City of Lake Oswego*, 21 Or LUBA 137 (1991).

30.4 Zoning Ordinances – Interpretation. A city code provision (1) requiring that certain "development * * * shall provide open space * * * approved by the city," (2) establishing a prioritized list of types of open space, and (3) providing an option to provide fees in lieu of open space, but failing to provide standards for determining whether to require open space or fees in lieu, violates the requirement of ORS 227.173(1) that permit decisions be governed by standards in the city's code. *Oswego Properties, Inc. v. City of Lake Oswego*, 21 Or LUBA 137 (1991).

30.4 Zoning Ordinances – Interpretation. City code provisions defining open space broadly, listing "distinctive natural areas" as first priority open space and requiring that development preserve areas for open space are properly interpreted as violated by a proposal to locate a building foundation immediately next to a specimen tree designated as a "distinctive natural area." Under such provisions, a "distinctive natural area" is not limited to the tree itself, and the code provides sufficient standards to guide the city's decision making under ORS 227.173(1). *Oswego Properties, Inc. v. City of Lake Oswego*, 21 Or LUBA 137 (1991).

30.4 Zoning Ordinances – Interpretation. A city code provision (1) requiring that certain "development * * * shall provide open space * * * approved by the city," and (2) establishing a prioritized list of types of open space, concluding with "other" open space, does not violate the requirement of ORS 227.173(1) that permit decisions be governed by standards in the city's code. *Oswego Properties, Inc. v. City of Lake Oswego*, 21 Or LUBA 137 (1991).

30.4 Zoning Ordinances – Interpretation. A code requirement that newly created forest parcels be "large enough to permit efficient management for the production of wood fiber or other forest uses," does not require that the division be "necessary" to carry out the proposed forestry uses. *DLCD v. Curry County*, 21 Or LUBA 130 (1991).

30.4 Zoning Ordinances – Interpretation. A code requirement that an applicant for an "extraordinary exception" for a boathouse demonstrate "an extraordinary and unreasonable hardship which can be relieved only by allowing the intensification of use" is a stringent standard traditionally applied to requests for variances. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

30.4 Zoning Ordinances – Interpretation. That a request for approval of an extraordinary exception involves intensification of an existing use rather than a new use is unimportant where the same standards govern both new uses and intensification of existing uses. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

30.4 Zoning Ordinances – Interpretation. Where existing code and comprehensive plan provisions impose a higher approval standard than the local government believes is appropriate, the appropriate course is to amend the plan and code. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

30.4 Zoning Ordinances – Interpretation. Where the language employed in the purpose statement of a code PUD chapter evidences only what the local government intends the consequences of application of the specific provisions of that PUD chapter to be, the purpose statement does not establish independent approval standards for individual PUD applications. *White v. City of Oregon City*, 20 Or LUBA 470 (1991).

30.4 Zoning Ordinances – Interpretation. If the local code states that certain provisions are applicable where the governing body assumes jurisdiction, on its own motion, to review a decision of a lower body, those provisions do not apply to appeals of such decisions initiated by persons other than the governing body. *Adams v. Jackson County*, 20 Or LUBA 398 (1991).

30.4 Zoning Ordinances – Interpretation. A particular use could be both a commercial use and an institutional use where the applicable plan and land use regulations do not define "commercial use" and "institutional use" as mutually exclusive use categories. *Sarti v. City of Lake Oswego*, 20 Or LUBA 387 (1991).

30.4 Zoning Ordinances – Interpretation. Plan policies that discourage, but do not preclude, location of commercial uses in residential areas, do not demonstrate that the "institutional uses" allowed in residential zoning districts cannot include "commercial uses." *Sarti v. City of Lake Oswego*, 20 Or LUBA 387 (1991).

30.4 Zoning Ordinances – Interpretation. Where a zoning ordinance specifically lists a use as allowed in one zoning district and fails to specifically list that use in a second zoning district, but includes in the list of permitted uses in the second zoning district a more open ended category of uses, there is an "inference" that the use specifically allowed in the first zoning district is not also allowed in the second zoning district under the open ended use category. *Sarti v. City of Lake Oswego*, 20 Or LUBA 387 (1991).

30.4 Zoning Ordinances – Interpretation. A local government's categorization of dance schools in its commercial zones as "Services - Amusement," while other types of schools are categorized as "Services - Educational," provides some indication that the local government does not view

such schools as "private educational facilities" allowable in its residential zones. *Sarti v. City of Lake Oswego,* 20 Or LUBA 387 (1991).

30.4 Zoning Ordinances – Interpretation. "Educational facilities" and other similar terms in zoning ordinances generally are not interpreted to include facilities providing instruction in "arts, crafts or sports." *Sarti v. City of Lake Oswego,* 20 Or LUBA 387 (1991).

30.4 Zoning Ordinances – Interpretation. Where a local code (1) fails to provide a definition of "educational facilities" allowable in residential districts, (2) gives no indication that an expansive meaning is intended, and (3) explicitly provides for private dance schools in commercial zoning districts, the local government's interpretation of "educational facilities" as including private dance schools is incorrect. *Sarti v. City of Lake Oswego,* 20 Or LUBA 387 (1991).

30.4 Zoning Ordinances – Interpretation. Where the code requires certain flood standards to be applied when the county receives "an application for a use or development," and the flood standards authorize the county to deny or require redesign of a proposed development, the flood standards are applicable to approval of the initial development application. *Komning v. Grant County*, 20 Or LUBA 355 (1990).

30.4 Zoning Ordinances – Interpretation. Where a local code lists the undefined term "commercial riding" as a use which may be conditionally permitted in a zoning district, and the general approval standards for conditional uses require that they "not significantly impact [adjoining] uses," the potential impacts of a proposed use are relevant only to compliance with the conditional use approval standard, not to determining whether the proposed use constitutes "commercial riding." *Kittleson v. Lane County,* 20 Or LUBA 286 (1990).

30.4 Zoning Ordinances – Interpretation. Local code provisions which regulate "public" airports, and state that "private landing strips * * * may still be subject to applicable regulations," are inapplicable to private airports, but recognize that there may be *other* requirements that apply to private airports. *Wissusik v. Yamhill County,* 20 Or LUBA 246 (1990).

30.4 Zoning Ordinances – Interpretation. Where the code requires a proposed conditional use "be reasonably compatible with and have minimal impact on the livability * * * of abutting properties and the surrounding neighborhood," open space which can be considered a part of the neighborhood livability protected by the code is limited to officially designated open space and de facto open space that is incidental to appropriate development of property in the neighborhood. *Benjamin v. City of Ashland*, 20 Or LUBA 265 (1990).

30.4 Zoning Ordinances – Interpretation. ALUO 18.104.040(B) requires the city to demonstrate that the *proposed* "development will be reasonably compatible with and have minimal impact on the livability * * * of abutting properties and the surrounding neighborhood." It does not require the city to consider whether alternative proposals or designs will be *more* compatible with or have *less* impact on the surrounding neighborhood. *Benjamin v. City of Ashland*, 20 Or LUBA 265 (1990).

30.4 Zoning Ordinances – Interpretation. Where the local code states that required determinations regarding the compatibility and impacts of proposed developments are to be based on *consideration* of certain listed factors, the factors are not themselves approval standards, and no one factor is conclusive. *Thormahlen v. City of Ashland*, 20 Or LUBA 218 (1990).

30.4 Zoning Ordinances – Interpretation. A city may establish compliance with a code provision which specifically requires a determination of a public need before additional land may be annexed by adopting findings demonstrating that a determination of public need to annex the subject property is supported by relevant plan provisions and explaining why other relevant plan policies not supportive of such a determination may be disregarded. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

30.4 Zoning Ordinances – Interpretation. In determining whether the local government has correctly interpreted and applied the term "open space" in making the appealed decision, LUBA will apply the definitions of that term contained in the local government's comprehensive plan and zoning ordinance. *Schryver v. City of Hillsboro*, 20 Or LUBA 90 (1990).

30.4 Zoning Ordinances – Interpretation. Where the county code imposes a general unsuitability requirement similar to ORS 215.213(3)(d) (1977) on the approval of nonforest dwellings in a forest zone, the county did not err in finding this requirement unmet where limitations on the subject parcel's capacity for the production of forest products could be overcome if the parcel is managed in conjunction with other land and there is other land managed for forest production reasonably close to the subject parcel. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

30.4 Zoning Ordinances – Interpretation. Where the local code states that a person may appeal to the planning commission from "a decision" made pursuant to the code by the planning director, *all* decisions made by the planning director, whether ministerial or discretionary, are appealable to the planning commission. *Komning v. Grant County*, 20 Or LUBA 481 (1990).

30.4 Zoning Ordinances – Interpretation. Where the comprehensive plan is defined as including the plan policy document, plan map, zoning map and zoning and subdivision ordinances, as well as a number of other documents, a local code provision requiring that individual land use decisions comply with the comprehensive plan is not correctly interpreted as requiring compliance with only the zoning map and zoning and subdivision ordinances. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

30.4 Zoning Ordinances – Interpretation. Where the applicable local code imposes no explicit requirement that the local government find a proposed golf course site to be superior to other available properties or find that there would be fewer impacts on farming practices associated with developing the proposed site as compared with other possible sites, the county did not err by failing to conduct an exhaustive alternative sites analysis. *Von Lubken v. Hood River County*, 19 Or LUBA 404 (1990).

30.4 Zoning Ordinances – Interpretation. Where a county's land development ordinance provides for adoption of resolutions of intent to rezone and makes such resolutions binding

commitments that the county will grant rezoning when conditions stated in such resolutions of intent to rezone are met, a resolution of intent to rezone is a final appealable decision. *Headley v. Jackson County*, 19 Or LUBA 109 (1990).

30.4 Zoning Ordinances – Interpretation. Notwithstanding an ordinance provision that a resolution of intent to rezone will be void if the applicant fails to meet any condition included in the resolution, the resolution is not void where LUBA remands, pursuant to a stipulation by the parties, a subsequent decision approving a required site plan, where the resolution of intent to rezone imposes no time limit for approval of the site plan. *Headley v. Jackson County*, 19 Or LUBA 109 (1990).

30.4 Zoning Ordinances – Interpretation. Compliance with a criterion that "adequate sewer [and] water * * * services will be provided" to serve a proposed destination resort requires identification of an available method for providing adequate sewage disposal and domestic water service to the proposed development that is reasonably certain to comply with applicable standards and produce the desired result. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

30.4 Zoning Ordinances – Interpretation. Where a local Greenway ordinance requires that the city "*provide* public access to and along the river to the maximum extent possible," the city must determine (1) its decision will provide access to the river at the location of the development, or (2) its decision will provide access to the maximum extent in view of the uses allowable at the location and the characteristics of the site. *O'Brien v. City of West Linn*, 18 Or LUBA 665 (1990).

30.4 Zoning Ordinances – Interpretation. County interpretation of a code "minimum" lot size standard requiring that the lot size be based on the needs of the use to impose a requirement that a golf course in an EFU zone include only the number of acres needed for the golf course is a correct interpretation of the code. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

31.1.1 Permits – Approval Standards – Generally. Establishing that proposed "agri-tourism or other commercial events or activities" are "necessary to support the commercial farm uses or the commercial agricultural enterprises in the area" for purposes of ORS 215.283(4)(d)(A) is a relatively high hurdle: the county must find that the events are essential in order to maintain the existence of either the commercial farm uses on the subject property or the commercial agricultural enterprises in the area. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

31.1.1 Permits – Approval Standards – Generally. A demonstration that proposed "agri-tourism or other commercial events or activities" are "necessary to support" an approved commercial activity in conjunction with farm use under ORS 215.283(2)(a), such as a brewery, is not sufficient to demonstrate that the events are "necessary to support" an "existing commercial farm use of the tract," such as the growing of filberts, for purposes of ORS 215.283(4)(d)(A), even where revenue from the brewery "supplements" revenue from the growing of filberts. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

31.1.1 Permits – Approval Standards – Generally. A county may not allow unlimited, successive one-year extensions of permits for residential development on resource land where state statute and regulation provide that such permits "shall be valid for four years" and that "[a]n extension" thereof "shall be valid for two years," where nothing in the legislative history suggests an intent to allow more than one extension. *Landwatch Lane County v. Lane County*, 79 Or LUBA 96 (2019).

31.1.1 Permits – Approval Standards – Generally. Where a cross-petitioner seeks a remedy not available to it by statute, it is an obstacle to LUBA's review of the cross-assignment of error. LUBA lacks authority to affirm in part, and reverse in part a local government's approval of cross-petitioner's project application. ORS 197.835(1). Even assuming that the city erred by applying Willamette Greenway standards to cross-petitioner's housing project application, because they are not "clear and objective," the city's decision approving the development could not be reversed because it is not "prohibited as a matter of law." If LUBA agreed with cross-petitioners, the correct disposition would be remand, except that remand was not requested and would have no effect on the city's decision approving the application. In such a situation, LUBA will consider the request a contingent cross-assignment of error. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

31.1.1 Permits – Approval Standards – Generally. A county decision determining vested rights involves the "discretionary approval of a proposed development of land," and is therefore a "permit" decision under ORS 215.402(4). Such decisions must be processed under procedures consistent with ORS 215.416, regardless of whether a party's request for the "permit" decision is accompanied by requests for non-"permit" decisions, whether the request is labeled or easily identifiable as an "application" for a "permit," or whether the party affirmatively requests the required procedures. *Gillette v. Lincon County*, 79 Or LUBA 549 (2019).

31.1.1 Permits – Approval Standards – Generally. In *Pete's Mountain Homeowners Assn. v. Clackamas Cty.*, 227 Or App 140, 204 P3d 802, *rev den*, 346 Or 589 (2009), the Court of Appeals held that Ballot Measure 49, which was approved to replace previously approved Ballot Measure 37, must be given effect and replaces Ballot Measure 37 which would otherwise apply to a particular permit application, notwithstanding the ORS 215.427(3)(a) goal post statute that

requires that a permit application be subject to the standards in effect when the permit application was filed. *Pete's Mountain* case of conflicting statutes—Ballot Measure 49 conflicted with and applied in place of the goal post statute. The holding in *Pete's Mountain* does not mean that new county cell tower regulations apply to a permit application that was submitted before the new cell tower regulations were adopted. In that circumstance the goal post statute applies and the new cell tower regulations do not apply, because there is no statutory conflict. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

31.1.1 Permits – Approval Standards – Generally. A permit approval standard that only requires a city to find that a proposed demolition is supportive of the comprehensive plan goals and policies "on balance," and only suggests six factors that "may" be considered, gives the city significant latitude in applying that approval standard. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

31.1.1 Permits – Approval Standards – Generally. An applicant is not required to demonstrate that a use that is allowed outright in one zone also satisfies conditional use standards applicable in an adjoining zone by virtue of the access to that outright permitted use being located in the adjoining zone. *Del Rio Vineyards, LLC v. Jackson County*, 73 Or LUBA 301 (2016).

31.1.1 Permits – Approval Standards – Generally. ORS 227.180(1)(b) authorizes city councils to provide that a decision by a hearings officer or other decision-making authority in a proceeding for discretionary permit or zone change approval is the city's final decision. But ORS 227.180(1)(b) does not authorize a city council to make a hearings officer's or other decision-making authority's decision the city's final decision concerning an application for a comprehensive plan map amendment. *Housing Land Advocates v. City of Happy Valley*, 73 Or LUBA 405 (2016).

31.1.1 Permits – Approval Standards – Generally. A development code that provides that a permit is void if "conditions of a permit or approval" are not substantially or completely satisfied within two years is properly interpreted to refer to conditions of approval in the permit that are enumerated as such, and the development code need not be interpreted to require substantial or complete construction of other aspects of the development approved under the permit that are not reflected in the conditions of permit approval. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

31.1.1 Permits – Approval Standards – Generally. Where a development code requires that conditions of permit approval be satisfied within two years after the permit becomes final and provides that the permit approval is void unless the conditions of approval are satisfied "within the time period," a permit opponent's argument that the applicant may not rely on actions that were taken to satisfy the condition before the permit was approved is textually plausible. Nevertheless, where LUBA cannot identify any reason why the enactor of the code would have intended that the actions that satisfied the condition of approval must be duplicated "within the time period," LUBA will not interpret the code to impose such a requirement. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

31.1.1 Permits – Approval Standards – Generally. There is no generally applicable requirement that a permit applicant must establish that construction of the use proposed in the permit

application is feasible as proposed. *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009), and *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007), discuss the concept of "feasibility" in the context of a multiple step approval process where there is uncertainty about whether all applicable criteria are satisfied and actions will be required in the future to ensure compliance with all criteria, and neither of those cases is authority for a generally applicable "feasibility" requirement for land use permits. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

31.1.1 Permits – Approval Standards – Generally. Under ORS 215.416(3) and (11), when rendering a statutory land use permit decision, a county must provide a prior public hearing on the application, or provide notice and an opportunity for a de novo appeal after the statutory permit decision is rendered without a public hearing. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.1 Permits – Approval Standards – Generally. Where there is uncertainty about whether a local appeal is available but the local government advises a petitioner that it will provide a local appeal, that petitioner may safely exhaust that local appeal without fear of being advised later that the deadline for appealing the decision directly to LUBA expired while the petitioner exhausted the appeal that the local government provided but later determined should not have been provided. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.1 Permits – Approval Standards – Generally. A decision that extends a statutory permit may itself be a statutory permit if the extension decision is governed by standards that require the exercise of discretion. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.1 Permits – Approval Standards – Generally. A decision that extends a statutory permit may itself be a statutory permit if the extension is a request for "approval of a proposed development of land." *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.1 Permits – Approval Standards – Generally. Where a statutory permit by local law will become void if not acted on within a stated deadline, a decision to extend the permit for an additional term under discretionary criteria is itself a statutory permit. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.1 Permits – Approval Standards – Generally. Where local law does not require adherence to the notice and hearing or notice and local appeal procedures that apply to statutory permits, a local government does not err by adhering to those statutory notice and hearing or notice and local appeal procedures when it discovers that the decision it is being asked to adopt may qualify as a statutory permit. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.1 Permits – Approval Standards – Generally. Even if approving a front yard setback reduction would permit constructing a dwelling in a location that would alter the way that dwelling approval criteria will apply, if the decision granting a front yard setback does not also grant approval to construct the dwelling, the dwelling approval criteria need not be applied at the time the front yard setback is approved. *Burton v. City of Cannon Beach*, 63 Or LUBA 300 (2011).

31.1.1 Permits – Approval Standards – Generally. Where a local government decision determines that the issue of whether an application for a permit complies with applicable criteria has been resolved in a prior proceeding on the permit application, the local government decision is not a decision on a "permit" as defined in ORS 215.402, because the decision does not approve development. *Kersey v. Lake County*, 62 Or LUBA 239 (2010).

31.1.1 Permits – Approval Standards – Generally. Under *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992), where an approval criterion requires a determination that property is a legal or lawfully created parcel, the relevant question is whether any local government approvals required at the time were obtained, not whether the local government correctly applied the applicable approval criteria to create the property. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

31.1.1 Permits – Approval Standards – Generally. Under *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), where the applicable criteria expressly or implicitly require a determination that a unit of land proposed for development is a legal or lawfully created "parcel" under code definitions that set out several ways to create a "parcel," the relevant question is whether the unit of land was in fact created in one of the ways set out in the definition, not whether substantive or procedural errors might have been made in the process of creating the parcel. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

31.1.1 Permits – Approval Standards – Generally. Under a code provision defining a lot or parcel as (1) a unit of land created by partition or subdivision, or (2) a unit of land under single ownership, which complies with all applicable laws at the time the lot or parcel was created, the phrase "complies with all applicable laws" modifies the immediately preceding phrase, units of land created by means other than partition or subdivision, and does not require a determination that a parcel created by partition complies with all applicable laws at the time it was created. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

31.1.1 Permits – Approval Standards – Generally. In applying a land use regulation standard that only requires a service provider certification or letter, a decision maker is not obligated to ensure that every representation in a service provider's certification or letter is correct or supported by substantial evidence. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

31.1.1 Permits – Approval Standards – Generally. The general grant of authority in ORS 215.422(1)(c) does not impose a specific limit on local land use appeal fees, but ORS 215.416(11)(b) imposes a specific $250 dollar limit on local appeal fees that counties can charge for local appeal of a permit decision that is rendered initially without a hearing. For such appeals, the $250 dollar limit applies in place of the higher appeal fee that might otherwise be permissible under ORS 215.422(1)(c). *Meadow Neighborhood Assoc. v. Washington County*, 54 Or LUBA 124 (2007).

31.1.1 Permits – Approval Standards – Generally. ORS 215.416(8)(a) simply requires that permit approval standards be included in a county's land use regulations. The ORS 215.416(8)(b)

requirement that permit standards that apply to needed housing be "clear and objective" does not apply to permits for other kinds of development. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

31.1.1 Permits – Approval Standards – Generally. Where a hearings officer finds that a proposed subdivision complies with all approval criteria and imposes a condition of subdivision approval that requires preparation of a habitat enhancement plan at a later date, but says nothing about what procedures will be required to review and approve the habitat enhancement plan, opponent's arguments that a public hearing will be required to review and approve the habitat enhancement plan are premature. *Kyle v. Washington County*, 52 Or LUBA 399 (2006).

31.1.1 Permits – Approval Standards – Generally. The fixed goal posts rule in ORS 215.427(3)(a) only applies where the county's comprehensive plan and land use regulations are acknowledged at the time the permit application is submitted. *Niederhof v. Deschutes County*, 48 Or LUBA 626 (2004).

31.1.1 Permits – Approval Standards – Generally. A local code standard that prohibits development in wetlands does not violate the ORS 197.307(6) requirement for "clear and objective" approval standards for needed housing. Where an applicant seeks a variance to that local code prohibition against development in wetlands, ORS 197.307(6) does not prohibit application of subjective variance approval standards. *Linstromberg v. City of Veneta*, 47 Or LUBA 99 (2004).

31.1.1 Permits – Approval Standards – Generally. A city does not err in refusing to speculate about who might ultimately prevail in a quiet title action in considering whether to approve a subdivision and whether to require provision of access to the disputed property in approving the subdivision. The city may assume that the record owner of the disputed property owns the property. *McFall v. City of Sherwood*, 46 Or LUBA 735 (2004).

31.1.1 Permits – Approval Standards – Generally. Generally, where a civil statute of limitation is changed to shorten the limitation period, the change is applied prospectively only. But where the statute is changed to lengthen the limitation period, the change applies both prospectively and retroactively. Applying that principle to ORS 215.417, forest template dwelling permits with a two-year duration that were issued before ORS 215.417 took effect, but which had not yet expired on the date ORS 215.417 took effect, must be honored for four years. *Butori v. Clatsop County*, 45 Or LUBA 553 (2003).

31.1.1 Permits – Approval Standards – Generally. A county commits no error in applying a zoning code requirement that a conditional use be found to be in harmony with the purpose and intent of the zone as a mandatory approval criterion where the provision expressly requires that determination. The county's identification in its notice of hearing of the chapter in which that zoning code requirement appears is sufficient to give the applicant notice of that approval criterion where the chapter is short and code requirement for a finding concerning that criterion is clear. *Hick v. Marion County*, 43 Or LUBA 483 (2003).

31.1.1 Permits – Approval Standards – Generally. An application to change a unified comprehensive plan and zoning map does not in itself require a "discretionary approval of a

proposed development of land" and is therefore not an application for a "permit" within the meaning of ORS 215.402(4). *Rutigliano v. Jackson County*, 42 Or LUBA 565 (2002).

31.1.1 Permits – Approval Standards – Generally. Remand is necessary where a code provision allows a single-family dwelling as a permitted use in a scenic protection zone "provided the use promotes the purpose of the zone," but the local government's decision neither determines that the proposed dwelling promotes the purpose of the zone nor explains why that requirement does not apply. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

31.1.1 Permits – Approval Standards – Generally. Where a city code provision requires that a "proposal" to adjust development standards be reviewed for compliance with specific criteria, it is reasonable for the city to determine that the scope of the "proposal" is the adjustment proposed by the applicant and therefore that an application for a setback adjustment for a building facade does not require review of the building design as a whole. *Lee v. City of Portland*, 40 Or LUBA 498 (2001).

31.1.1 Permits – Approval Standards – Generally. Under *McKay Creek Valley Assoc. v. Washington County*, 118 Or App 543, 848 P2d 624 (1993), the county need not inquire into the legality of parcels subject to a rezoning application, where the applicable rezoning criteria do not expressly require a "lawfully created parcel" or a "legal parcel," or impose a similar requirement of legality. *Maxwell v. Lane County*, 39 Or LUBA 556 (2001).

31.1.1 Permits – Approval Standards – Generally. An assignment of error that a city erred by approving a floodplain permit in the absence of a valid conditional use permit for the proposed use provides no basis for reversal or remand where petitioner fails to demonstrate that a conditional use permit for the proposed use must be obtained prior to obtaining a floodplain permit. *Willhoft v. City of Gold Beach*, 39 Or LUBA 353 (2001).

31.1.1 Permits – Approval Standards – Generally. Where a site design review criterion requires that, "wherever possible," direct driveway access to arterial streets not be allowed, and the challenged decision approves a site plan with direct driveway access onto an arterial street and a collector street without explaining why it is not possible to limit access to the collector street, the decision must be remanded. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

31.1.1 Permits – Approval Standards – Generally. A permit application may be approved based on adopted standards and criteria that are not yet acknowledged. However, under ORS 197.625(3), if the standards and criteria are not ultimately acknowledged, any improvements that have been made in reliance on a permit issued under the unacknowledged standards and criteria may have to be removed. *Western States v. Multnomah County*, 37 Or LUBA 835 (2000).

31.1.1 Permits – Approval Standards – Generally. ORS 197.625(3)(a) and 215.428(3) (1997) do not require that the county apply a land use regulation that was in effect when the permit application is filed, where the ordinance that adopted the land use regulation is appealed to LUBA and remanded before the county makes a final decision on the permit. *Western States v. Multnomah County*, 37 Or LUBA 835 (2000).

31.1.1 Permits – Approval Standards – Generally. An argument that a local government failed to provide adequate notice of evidence needed to satisfy applicable criteria will fail where the county's staff report interprets the code to require certain evidence and petitioner in fact provides evidence to show that the criterion, as interpreted, is satisfied. *McKenney v. Deschutes County*, 37 Or LUBA 685 (2000).

31.1.1 Permits – Approval Standards – Generally. Where a county prohibits the refiling of a new or substantially similar application until two years after a final decision denying an application; the decision maker determines that a second application, filed less than a year after the first, was "substantially similar" because it involved the same use on the same property and the changes in the facts supporting the application were otherwise insufficient to demonstrate that the application is different; and the decision maker points to evidence in the record to support his conclusions, that decision is supported by substantial evidence. *Munn v. Clackamas County*, 37 Or LUBA 621 (2000).

31.1.1 Permits – Approval Standards – Generally. Where LUBA cannot determine whether the challenged decision is a "zoning classification" decision as described in ORS 227.160(2)(b), or a "permit" decision as defined by ORS 227.160(2), LUBA will remand to allow the city to make that determination. *Davis v. City of Ashland*, 37 Or LUBA 224 (1999).

31.1.1 Permits – Approval Standards – Generally. LUBA will not reject a substantial evidence challenge based on a code informational requirement, where the challenged decision does not interpret the code requirement as being purely informational, but, to the contrary, appears to require that the information submitted under the code provision be the kind of information a reasonable person would rely on. *Baughman v. City of Portland*, 36 Or LUBA 353 (1999).

31.1.1 Permits – Approval Standards – Generally. ORS 227.178(3) provides that the standards and criteria that are in effect when a subdivision application is submitted govern approval of the subdivision application, but ORS 227.178(3) does not limit a local government's authority to adopt construction or development standards that apply after the subdivision is approved. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

31.1.1 Permits – Approval Standards – Generally. Where a previous, unappealed development is not part of the conditional use approval proposal in question, a local government cannot require a conditional use permit for that development as part of its evaluation of the proposed use. *Tylka v. Clackamas County*, 34 Or LUBA 14 (1998).

31.1.1 Permits – Approval Standards – Generally. The submittal of a land use permit application leads to *one* local review process, including any local appeals, and culminates in *one* final local land use decision appealable to LUBA. Any relevant issues concerning the acceptance, processing and approval or denial of such application may be raised in an appeal to LUBA, subject to the requirements of ORS 197.763(1) and 197.835(2) that such issues have been raised below. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

31.1.1 Permits – Approval Standards – Generally. Where conditional use approval is sought for the construction of a building to serve an existing use, whether that existing use is lawful is relevant to approval of the proposed building. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

31.1.1 Permits – Approval Standards – Generally. In order to defer determinations of compliance with mandatory approval standards to a later stage where no public hearing is contemplated, the local government must first determine that compliance with those standards is possible. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

31.1.1 Permits – Approval Standards – Generally. The term "permits," as used in Oregon Laws 1991, chapter 3, section 7, refers to all decisions defined as "permits" when that law was enacted. The subsequent amendment to the ORS 227.160(2) definition of "permit" to exclude limited land use decisions does not apply. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

31.1.1 Permits – Approval Standards – Generally. A local government may not defer determinations of compliance with approval standards applicable to partition approval to the building permit approval stage. *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

31.1.1 Permits – Approval Standards – Generally. Where a code approval standard *prohibits* the proposed use *unless* an exception is justified under a second code standard that requires the local government to have a "short term parking strategy," if the local government has not adopted a "short term parking strategy," it cannot make use of the exception provided by the second standard and must deny the application. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

31.1.1 Permits – Approval Standards – Generally. The requirement of ORS 197.175(2)(d) that a land use decision or limited land use decision comply with a local government's acknowledged comprehensive plan, does not necessarily mean that all plan provisions apply directly to individual development applications. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

31.1.1 Permits – Approval Standards – Generally. ORS 197.195, which establishes minimum procedural requirements for making limited land use decisions, does not require that local governments provide either a public hearing or a local appeal. ORS 227.175(3) and (10) do not apply to limited land use decisions, because they are not "permits," as defined in ORS 227.160(2). *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

31.1.1 Permits – Approval Standards – Generally. The meaning of the term "standards and criteria" in ORS 227.178(3) is a question of state law, and a city's interpretation and application of this term does not bind LUBA. The role of the term "standards and criteria" in ORS 227.178(3) is to assure both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on a decision permitting or denying an application will remain constant throughout the proceedings. *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

31.1.1 Permits – Approval Standards – Generally. Where local code language unambiguously requires findings of compliance with certain standards prior to issuance of a permit, the standards are properly viewed as approval standards, rather than performance standards, which only provide a basis for revocation of a permit after it is issued. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

31.1.1 Permits – Approval Standards – Generally. Where the local government's plan and land use regulations are acknowledged, a local government is under no obligation to establish compliance with Goal 5 or to perform an ESEE consequences analysis in approving an application for a conditional use permit. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

31.1.1 Permits – Approval Standards – Generally. ORS 215.130(2) allows cities to adopt contingent plan and zoning designations for property to be annexed in the future, but it does not allow cities to grant contingent permits for property to be annexed in the future. *Recht v. City of Newport*, 26 Or LUBA 316 (1993).

31.1.1 Permits – Approval Standards – Generally. Where a city comprehensive plan expressly recognizes that the county has jurisdiction to issue land use permits prior to annexation of unincorporated areas, the city must annex an unincorporated area before it has jurisdiction to grant land use permits for such unincorporated areas. *Recht v. City of Newport*, 26 Or LUBA 316 (1993).

31.1.1 Permits – Approval Standards – Generally. Under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), there can easily be more than one affirmable local government interpretation of a particular code provision. Nevertheless, *Clark* does not allow a local government arbitrarily to vary its interpretation of an approval standard when acting on permit applications. *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

31.1.1 Permits – Approval Standards – Generally. To find compliance with a local code requirement that schools be adequate to meet anticipated demand, a local government must find that existing school facilities are adequate to serve the proposed project or that they can be made adequate by employing available techniques to maximize school facility capacity. *Langford v. City of Eugene*, 26 Or LUBA 60 (1993).

31.1.1 Permits – Approval Standards – Generally. Local code provisions that simply allow increased density for controlled income and rent housing do not eliminate the requirement that such housing comply with other requirements of the local code. *Langford v. City of Eugene*, 26 Or LUBA 60 (1993).

31.1.1 Permits – Approval Standards – Generally. In order to determine compliance with a code permit approval standard requiring that "the proposed use will not alter the character of the surrounding area" in a particular manner, the local government must first identify the "surrounding area" to be considered. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

31.1.1 Permits – Approval Standards – Generally. After acknowledgment, local government permit decisions are governed by the acknowledged plan and regulations, not the statewide planning goals. ORS 197.175(2)(d). *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

31.1.1 Permits – Approval Standards – Generally. Because a permit applicant has the burden of demonstrating compliance with each approval criterion, a single supported finding of noncompliance with an approval criterion is sufficient to support a decision denying the permit. *Ball and Associates v. Josephine County*, 25 Or LUBA 525 (1993).

31.1.1 Permits – Approval Standards – Generally. Under ORS 197.175(2)(d), a local government's acknowledged comprehensive plan and land use regulations, not the statewide planning goals, govern permit decisions. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

31.1.1 Permits – Approval Standards – Generally. Where the local code expresses an intent not to duplicate state mobile home park approval standards, LUBA will defer to the local government's interpretation that the state approval standard in ORS 446.100(1)(a) is not part of the "applicable Oregon Law," which the code requires to be considered in making permit decisions. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

31.1.1 Permits – Approval Standards – Generally. Where a city's plan and land use regulations were unacknowledged at the time the subject permit application was initially filed, ORS 227.178(3) does not restrict the applicable standards to those in effect when the application was filed. *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

31.1.1 Permits – Approval Standards – Generally. A local code may provide a PUD process in which an approved PUD overall development plan, rather than the comprehensive plan standards applied in approving the overall development plan, governs final PUD approval. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

31.1.1 Permits – Approval Standards – Generally. For purposes of identifying the "standards and criteria" that are "applicable at the time the application was first submitted" under ORS 227.178(3), the *acknowledged* comprehensive plan standards and criteria continue to apply, even after adoption of an ordinance repealing or amending those acknowledged standards and criteria, until the newly adopted plan standards and criteria are themselves deemed acknowledged. *Davenport v. City of Tigard*, 25 Or LUBA 67 (1993).

31.1.1 Permits – Approval Standards – Generally. Once a local government's plan and land use regulations are acknowledged under ORS 197.251, the acknowledged plan and land use regulations, not the statewide planning goals, apply to permit decisions. ORS 197.175(2)(d). *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

31.1.1 Permits – Approval Standards – Generally. Plan text and map amendments and zoning text and map amendments are not "permits," as that term is defined in ORS 215.402(4). *Leonard v. Union County*, 24 Or LUBA 362 (1992).

31.1.1 Permits – Approval Standards – Generally. Following LUBA reversal of a city decision approving a permit application, the choice between whether to allow the permit application to be amended or to require that a new permit application be submitted is within the city's discretion,

provided any local code requirements governing that choice are followed. *Seitz v. City of Ashland*, 24 Or LUBA 311 (1992).

31.1.1 Permits – Approval Standards – Generally. Where a parcel was created by deed, at a time when the local government interpreted its partitioning regulations to be inapplicable to parcels created in that manner, the local government may subsequently determine that a permit application complies with a code requirement that a proposed use be on a "parcel," without reexamining the applicability of its partitioning regulations when the parcel was created. *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992).

31.1.1 Permits – Approval Standards – Generally. Where a decision approving a permit application is remanded by LUBA, and the application is thereafter modified to correct the deficiencies identified in LUBA's remand, without changing the nature of the original proposal, the local government does not err by applying on remand approval standards as they existed when the permit application was first submitted. Approval standards, as amended following submittal of the original permit application, need not be applied in such circumstances. ORS 227.178(3). *Wentland v. City of Portland*, 23 Or LUBA 321 (1992).

31.1.1 Permits – Approval Standards – Generally. Amending an acknowledged comprehensive plan and land use regulations to establish a process for case-by-case application of the Goal 5 planning process in conjunction with individual development requests does not comply with Goal 5 and the Goal 5 administrative rule. *Ramsey v. City of Portland*, 23 Or LUBA 291 (1992).

31.1.1 Permits – Approval Standards – Generally. A local code requirement that a home occupation be "operated in" a dwelling or other buildings normally associated with the dwelling is not satisfied by the parking of repossessed vehicles outside of the dwelling until such vehicles are either loaded on trucks for disposal or driven away. *Stevenson v. Douglas County*, 23 Or LUBA 227 (1992).

31.1.1 Permits – Approval Standards – Generally. Where a code approval standard applicable to a permit decision fully incorporates and refines a comprehensive plan policy, the plan policy does not apply directly to the permit decision as an approval criterion. *Avgeris v. Jackson County*, 23 Or LUBA 124 (1992).

31.1.1 Permits – Approval Standards – Generally. Where a city's comprehensive plan and land use regulations were not acknowledged when a permit application was initially filed, ORS 227.178(3) does not restrict the standards applicable to that application to those in effect when the application was filed. *Schatz v. City of Jacksonville*, 23 Or LUBA 40 (1992).

31.1.1 Permits – Approval Standards – Generally. Where a local government held further evidentiary hearings on a permit application after issuance of an LCDC enforcement order, and made its final decision approximately four months after the enforcement order was issued, the local government was required to consider and comply with the enforcement order in adopting its decision. *Schatz v. City of Jacksonville*, 23 Or LUBA 40 (1992).

31.1.1 Permits – Approval Standards – Generally. Where an LCDC limited acknowledgment order issued pursuant to ORS 197.251(9) grants acknowledgment of a local government's comprehensive plan and land use regulations with regard to certain Statewide Planning Goals, it is error for the local government to thereafter apply those goals in making a decision on a permit application. *Schatz v. City of Jacksonville*, 23 Or LUBA 40 (1992).

31.1.1 Permits – Approval Standards – Generally. A local government is required by statute to make land use decisions consistent with the standards established in its acknowledged comprehensive plan and land use regulations, and those standards cannot be replaced or superseded by a written "policy" adopted by the planning director. *Sterling Mine Properties v. Jackson County*, 23 Or LUBA 18 (1992).

31.1.1 Permits – Approval Standards – Generally. After acknowledgment, the local comprehensive plan and land use regulations, not the Statewide Planning Goals, govern a local government's decisions on land development permit applications. *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 452 (1991).

31.1.1 Permits – Approval Standards – Generally. Where a permit approval criterion requires the local government to determine that transportation systems are adequate, the local government may not rely on the fact it found a street to be adequate in an earlier decision approving a similar permit for the same property, particularly in view of the new evidence submitted below and issues raised below with regard to the adequacy of the street. *Broetje-McLaughlin v. Clackamas County*, 22 Or LUBA 198 (1991).

31.1.1 Permits – Approval Standards – Generally. A permit approval criterion that a proposed use "not alter the character of the surrounding area in a manner which substantially [limits] use of surrounding properties for the primary uses [of the zoning district]" requires the adoption of findings describing the character of the surrounding area, as well as findings concerning the impacts of the proposed use on that character. *Broetje-McLaughlin v. Clackamas County*, 22 Or LUBA 198 (1991).

31.1.1 Permits – Approval Standards – Generally. Where the local code clearly and unambiguously states that specific code standards apply only to certain types of development, the local government does not err in declining to apply those standards to a proposed development that does not fit within the listed development types. *Tylka v. Clackamas County*, 22 Or LUBA 166 (1991).

31.1.1 Permits – Approval Standards – Generally. Where existing code and comprehensive plan provisions impose a higher approval standard than the local government believes is appropriate, the appropriate course is to amend the plan and code. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

31.1.1 Permits – Approval Standards – Generally. Whether comprehensive plan goals and policies or zoning ordinance purpose sections are approval standards for conditional use approval in a particular instance, depends upon an examination of the relevant plan and code provisions. *Rowan v. Clackamas County*, 19 Or LUBA 163 (1990).

31.1.1 Permits – Approval Standards – Generally. ORS 215.428(3) does not preclude an applicant from submitting a new permit application, similar or identical to a previous permit application found inconsistent with applicable standards, for the purpose of obtaining review under amended approval standards in effect when the new application is filed. *Eckis v. Linn County*, 19 Or LUBA 15 (1990).

31.1.2 Permits – Approval Standards – Application Requirements. A county decision determining vested rights involves the "discretionary approval of a proposed development of land," and is therefore a "permit" decision under ORS 215.402(4). Such decisions must be processed under procedures consistent with ORS 215.416, regardless of whether a party's request for the "permit" decision is accompanied by requests for non-"permit" decisions, whether the request is labeled or easily identifiable as an "application" for a "permit," or whether the party affirmatively requests the required procedures. *Gillette v. Lincon County*, 79 Or LUBA 549 (2019).

31.1.2 Permits – Approval Standards – Application Requirements. A permit applicant's communication to a county—three days before the 180-day deadline to make a permit application complete under ORS 215.427(3)—that he intended to submit additional information to make his application complete is insufficient to constitute a request that the application be deemed complete under ORS 215.427(2)(b) and is insufficient to keep a permit application from becoming void under ORS 215.427(4)(a) through (c). *Bora Architects, Inc. v. Tillamook County*, 76 Or LUBA 330 (2017).

31.1.2 Permits – Approval Standards – Application Requirements. A county decision that approves a permit application that has become void under ORS 215.427(4) is "prohibited as a matter of law" and must be reversed. *Bora Architects, Inc. v. Tillamook County*, 76 Or LUBA 330 (2017).

31.1.2 Permits – Approval Standards – Application Requirements. Under the Court of Appeals' reasoning in *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993), the statutory term "standards and criteria" is sufficiently malleable to encompass a two-step code requirement that first requires that an applicant submit sufficient information to allow the local government to determine whether mitigation conditions of approval are needed for the proposed mining use, and second requires that the local government determine if conditions of approval are needed and develop and impose those conditions if they are needed. *Tidewater Contractors v. Curry County*, 65 Or LUBA 424 (2012).

31.1.2 Permits – Approval Standards – Application Requirements. A joint application for a conditional use permit by owners of illegally divided parcels cannot rectify an illegal partition under a local code provision that prohibits the approval of permits unless "the violation can be rectified as part of the proposed development," at least where the local government does not purport to validate unlawfully created parcels, pursuant to ORS 92.176. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

31.1.2 Permits – Approval Standards – Application Requirements. Where an application requirement states that a tentative plat must show the approximate location of any wetlands on a property, a local government does not err in not requiring an application to submit a full wetland delineation. *Citizens for Responsible Development v. City of The Dalles*, 59 Or LUBA 369 (2009).

31.1.2 Permits – Approval Standards – Application Requirements. ORS 215.427(2) merely provides that a local government may request additional information before proceeding with a permit or rezoning application if it believes such information is necessary. The statute does not mean that once a local government indicates the application is complete that necessarily means the

application includes substantial evidence that all applicable criteria are satisfied. *Sperber v. Coos County*, 56 Or LUBA 763 (2008).

31.1.2 Permits – Approval Standards – Application Requirements. Even though a local government may be in a position to require a modified application, that does not mean it must do so, when a condition of approval requiring submission of a revised plat neither constitutes procedural error nor prejudices a party's substantial rights. *Sisters Forest Planning Comm. v. Deschutes County*, 45 Or LUBA 145 (2003).

31.1.2 Permits – Approval Standards – Application Requirements. The absence of required information or analysis in an application is not necessarily viewed as a procedural error, and may be a basis for reversal or remand even without a showing of prejudice to petitioner's substantial rights, where the information or analysis is necessary to determine compliance with approval criteria. *Bauer v. City of Portland*, 44 Or LUBA 210 (2003).

31.1.2 Permits – Approval Standards – Application Requirements. Under a code provision requiring a "mitigation site plan" if development results in unavoidable significant detrimental environmental impacts, it is not error for the city to consider proposed mitigation in finding that the development will not result in significant impacts, and thus avoid the requirement for a mitigation site plan, where that approach does not avoid prescribed types of mitigation, and instead simply eliminates submission of redundant information. *Bauer v. City of Portland*, 44 Or LUBA 210 (2003).

31.1.2 Permits – Approval Standards – Application Requirements. ORS 227.175(2) requires that a city provide the opportunity for a consolidated permit application and review process; the statute does not require that each ordinance that adopts a new land use permitting process must separately set out provisions for such consolidated review. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282 (2001).

31.1.2 Permits – Approval Standards – Application Requirements. Where a permit application omits required information, the omitted information is not contained elsewhere in the record, and the omitted information is necessary to demonstrate compliance with an applicable approval standard, the failure to provide the required information is not harmless procedural error and provides a basis for reversal or remand. *Hausam v. City of Salem*, 39 Or LUBA 51 (2000).

31.1.2 Permits – Approval Standards – Application Requirements. ORS 215.416(2) does not obligate a county to follow a consolidated procedure in considering a request for a local land use approval. Rather, the statute provides that if an applicant chooses to submit a consolidated application, the county must have a procedure available to review the consolidated application as a whole. *McKenney v. Deschutes County*, 37 Or LUBA 685 (2000).

31.1.2 Permits – Approval Standards – Application Requirements. In the absence of a code prohibition or some other obstacle identified by petitioner, a city may find a proposal that is substantially modified on remand from LUBA to be a continuation of the original application. *Sullivan v. City of Woodburn*, 33 Or LUBA 356 (1997).

31.1.2 Permits – Approval Standards – Application Requirements. The omission of information required by a local code from a development application is harmless procedural error if the required information is located elsewhere in the record. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

31.1.2 Permits – Approval Standards – Application Requirements. The county's application requirements for a conditional use permit are not approval criteria; the fact that application requirements may not have been satisfied provides no basis for remand absent a showing that the failure to satisfy the requirements resulted in noncompliance with at least one mandatory approval criterion. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

31.1.2 Permits – Approval Standards – Application Requirements. To obtain reversal or remand of a decision because information required by the local code is missing from the application, petitioner must explain why the missing information is necessary to determine compliance of the proposed development with applicable approval standards, and the missing information must not be found elsewhere in the record. *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

31.1.2 Permits – Approval Standards – Application Requirements. Code provisions which simply require a land use application to contain certain information, and explain the burden is on the applicant to establish compliance with relevant approval criteria, do not impose an affirmative requirement on the applicant to disclose a dispute the applicant may have with another jurisdiction concerning another permit. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

31.1.2 Permits – Approval Standards – Application Requirements. The omission of required information from an application constitutes harmless procedural error if the required information is located elsewhere in the record. However, where such information is not located elsewhere in the record and such information is necessary for a determination of compliance with relevant approval standards, such an error is not harmless and warrants reversal or remand of the challenged decision. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

31.1.2 Permits – Approval Standards – Application Requirements. Where the local code creates a process for the submittal and review of an applicant's "development impact statement" (DIS) as part of preliminary subdivision plat approval, the local governing body has considerable discretion in interpreting the role of the DIS process and must determine, in the first instance, whether the DIS content requirements are mere requests for information or impose substantive approval standards. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

31.1.2 Permits – Approval Standards – Application Requirements. Absent a statutory or local code provision to the contrary, a local government may recognize a property owner who signs a permit application as an applicant, or allow a change in the applicants for a permit. *Reeves v. Yamhill County*, 28 Or LUBA 123 (1994).

31.1.2 Permits – Approval Standards – Application Requirements. In order for a petitioner to obtain reversal or remand of a decision because information required by the local code is missing from the application, petitioner must explain why the missing information is necessary to

determine compliance of the proposed development with applicable approval standards, and the missing information must not be found elsewhere in the record. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

31.1.2 Permits – Approval Standards – Application Requirements. Where an application for subdivision tentative plan approval does not contain information on the location of driveways and easements required by the code, but petitioners fail to establish the missing information is relevant to any applicable approval standard, the error is harmless and does not provide a basis for reversal or remand. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

31.1.2 Permits – Approval Standards – Application Requirements. An applicant's failure to include particular information required by the local code on a permit application provides no basis for reversal or remand, unless petitioner explains why the missing information is necessary to determine compliance with specific applicable approval standards. *Wissusik v. Yamhill County*, 27 Or LUBA 94 (1994).

31.1.2 Permits – Approval Standards – Application Requirements. Unless a county notifies the applicant that its permit application is incomplete, as required by ORS 215.428(2), and the deficiency is not remedied within 180 days, under ORS 215.428(3) the county must apply the standards and criteria in effect when the application was filed. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

31.1.2 Permits – Approval Standards – Application Requirements. Where petitioner argues the local government erred by approving a conditional use permit without the consent of all owners of the subject property, but identifies no plan, code or other legal standard requiring that such consent be obtained, LUBA cannot grant relief. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

31.1.2 Permits – Approval Standards – Application Requirements. In the absence of a code provision to the contrary, a local government is not required to allow modifications to a subdivision application to enable its approval. *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

31.1.2 Permits – Approval Standards – Application Requirements. Where a sign-permitting process involves two steps—obtaining a sign permit and architectural review approval—and each step requires the filing of an application and an application fee, and is subject to different standards which are intended to be applied in addition to the requirements of the other, under ORS 227.178(3) an application for sign permit or architectural review approval is subject to the standards in effect when that particular application is submitted. *A Storage Place v. City of Tualatin*, 25 Or LUBA 202 (1993).

31.1.2 Permits – Approval Standards – Application Requirements. Where the record includes a permit application dated prior to the adoption of certain land use regulation amendments changing the applicable approval standards, and petitioner offers no reason to believe the application was not submitted prior to those amendments, LUBA will assume the permit application was submitted before the amended standards took effect. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

31.1.2 Permits – Approval Standards – Application Requirements. Under ORS 215.428(1) to (3), an application for permit approval is considered complete when it is filed, unless the county notifies the permit applicant that information is missing. ORS 215.428(2). *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

31.1.2 Permits – Approval Standards – Application Requirements. Where the local code establishes specific requirements for applications for mobile home parks, and also requires that the site plan for a proposed conditional use include information specifically required by the code for the proposed use, a conditional use permit application for a mobile home park must also include the information required for applications for mobile home parks. *Burghardt v. City of Molalla*, 22 Or LUBA 369 (1991).

31.1.2 Permits – Approval Standards – Application Requirements. A local code provision that establishes minimum requirements for what must be included in a PUD preliminary development plan application does not establish or modify the approval standards for such plans set forth elsewhere in the code. *Gilson v. City of Portland*, 22 Or LUBA 343 (1991).

31.1.2 Permits – Approval Standards – Application Requirements. Where an application for a residential care facility does not include a vicinity map showing the proposed site in relation to public transportation systems, as required by the local code, but information concerning the location of public transportation is found elsewhere in the record, the failure to include such vicinity map in the application is a procedural error that does not prejudice petitioner's substantial rights. *Murray v. Clackamas County*, 22 Or LUBA 247 (1991).

31.1.2 Permits – Approval Standards – Application Requirements. Where the local code requires that a PUD application include a landscaping plan, and the landscaping plan is not available anywhere in the record and is necessary for the city to adequately address compliance with an applicable approval standard, the omission of the plan is not a harmless or procedural error. *Schryver v. City of Hillsboro*, 20 Or LUBA 90 (1990).

31.1.2 Permits – Approval Standards – Application Requirements. A person files an "application for a permit," as provided in ORS chapter 215, when the person makes it known what the person seeks approval for and that county action to grant approval is requested. A county may require the person to use county forms and procedures, but may not rely on a lack of county forms or procedures to claim no application for a permit was submitted. *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 651 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a city approves a building permit for a temporary mass shelter under the city's Housing Emergency Ordinance because it satisfies the development standards in the city's Central Employment (EX) zone, where the petitioner argues not that the EX zone development standards that the city applied in approving the building permit are not "clear and objective" but, rather, that the city was required but failed to apply other land use standards in approving the building permit, and where LUBA concludes that none of those other land use standards are applicable approval criteria, the city's decision is subject to the building permit exclusion from LUBA's jurisdiction in ORS 197.015(10)(b)(B). *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

31.1.3 Permits – Approval Standards – Standards/Criteria. Establishing that proposed "agri-tourism or other commercial events or activities" are "necessary to support the commercial farm uses or the commercial agricultural enterprises in the area" for purposes of ORS 215.283(4)(d)(A) is a relatively high hurdle: the county must find that the events are essential in order to maintain the existence of either the commercial farm uses on the subject property or the commercial agricultural enterprises in the area. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

31.1.3 Permits – Approval Standards – Standards/Criteria. A demonstration that proposed "agri-tourism or other commercial events or activities" are "necessary to support" an approved commercial activity in conjunction with farm use under ORS 215.283(2)(a), such as a brewery, is not sufficient to demonstrate that the events are "necessary to support" an "existing commercial farm use of the tract," such as the growing of filberts, for purposes of ORS 215.283(4)(d)(A), even where revenue from the brewery "supplements" revenue from the growing of filberts. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where an applicant has conducted both festival-related uses and non-festival-related park and campground uses on property zoned Rural Residential and Impacted Forest, where the festival-related uses are verified nonconforming uses, and where the applicant applies for a special use permit to legalize the non-festival-related park and campground uses, LUBA will affirm the county's interpretation that its nonconforming use provisions do not apply to the special use permit application where the county expressly explains that the special use permit does not authorize festival-related uses and where the petitioners identify no law preventing the county from issuing permits that have the effect of legalizing special uses that have been occurring independent of a preexisting nonconforming uses. *Klein v. Lane County*, 80 Or LUBA 287 (2019).

31.1.3 Approval Standards – Standards/Criteria. Under the codification requirement at ORS 215.416(8)(a), permit approval standards and criteria must inform interested parties of the basis on which an application will be approved or denied. *Waveseer of Oregon, LLC v. Deschutes County*, 80 Or LUBA 435 (2019).

31.1.3 Approval Standards – Standards/Criteria. A board of county commissioners' broad interpretation of "youth activity center" that encompasses a wide variety of youth-oriented activities that may occur outdoors or in a farm structure as part of an existing farm use or that may occur in and around a residence as accessory to a residential use is unreasonable under ORS

475B.486 and violates the codification requirement at ORS 215.416(8)(a). *Waveseer of Oregon, LLC v. Deschutes County*, 80 Or LUBA 435 (2019).

31.1.3 Permits – Approval Standards – Standards/Criteria. According to the "law of the case" pursuant to *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), matters conclusively resolved before LUBA cannot be relitigated in subsequent appeals of subsequent decisions on the same matter. However, that principle is not violated where (1) LUBA remands to the county to adopt new findings, based on substantial evidence, and (2) on remand, the county accepts new evidence and adopts new findings, as LUBA directed. Where LUBA's original decision discussed certain requirements to provide guidance and framework on remand, and some of the county's findings are still insufficient on remand does not mean that the county violated the "law of the case." *Richards v. Jefferson County*, 79 Or 171 (2019).

31.1.3 Permits – Approval Standards – Standards/Criteria. On remand, where LUBA instructed the county to resolve whether the project applicant's farm operation qualifies as a "commercial farming operation" for purposes of applying for an accessory farm dwelling for a relative, LUBA established that certain findings and evidence are necessary to establish compliance with OAR 660-033-0130(9). The county's findings fall short of establishing that the applicant's farm operation qualifies as a "commercial farming operation," because it is an undefined term, and it is the county's obligation to attempt to articulate the thresholds that separate a "commercial" from a non-commercial farming operation, and to determine those thresholds in the first instance. Although the county has some discretion to determine the thresholds, that determination will necessarily constitute a mixed question of fact and law, subject to LUBA's review for legal error and evidentiary sufficiency. *Richards v. Jefferson County*, 79 Or 171 (2019).

31.1.3 Permits – Approval Standards – Standards/Criteria. The focus of OAR 660-033-0130(9) and county code that implements it regarding whether the "farm operator * * * continue[s] to play the predominant role in the management and farm use of the farm," is on the farm operator's involvement in farm operations *on the subject property*, not on off-farm businesses that may relate to the farm operation. The commercial farm operator's involvement in off-farm businesses do not help establish any element of OAR 660-033-0130(9). The commercial farm operator's involvement in off-farm businesses are relevant to establishing the elements of OAR 660-033-0130(9) only in so much as the time spent on those businesses and away from the farm operation might undermine the claim that the farm operator will continue to play the "predominant role" in the farm operation and requires assistance in running the farm operation. *Richards v. Jefferson County*, 79 Or 171 (2019).

31.1.3 Permits – Approval Standards – Standards/Criteria. LUBA will remand a decision by the county planning department approving conversion of a portion of an existing church into a "parsonage," a term which is undefined by state or local law, but which includes a kitchen, bedroom, and bathroom for the use by the church's pastor, where the county's decision fails to identify any land use standards that apply to the proposed use, and did not provide notice or an opportunity for a hearing or otherwise follow the procedures in ORS 215.416(11) without apparent explanation, and LUBA determines that the application for the proposed parsonage is an application for a "permit" as defined in ORS 215.402(4). *Wetherell v. Douglas County*, 78 Or LUBA 33 (2018).

31.1.3 Permits – Approval Standards – Standards/Criteria. Although it is not clear a proposed "parsonage," which is a portion of a church to include a bedroom, kitchen and bathroom for use by the church's pastor, must be evaluated and approved or denied under the criteria that apply to a nonfarm dwelling under the county's land use ordinance implementing ORS 215.284, those land use standards require the exercise of discretion in approving the development of land. Further, it is possible, even probable, that any application for a proposed residential use associated with a church must be evaluated under the standards at ORS 215.441, and accordingly the county must process such an application according to its procedures that apply to permits. *Wetherell v. Douglas County*, 78 Or LUBA 33 (2018).

31.1.3 Permits – Approval Standards – Standards/Criteria. LUBA will affirm a governing body's code interpretation of a county zoning ordinance that provides that a permit extension may be granted if the "approval criteria for the original decision found in a state goal, policy, statute or administrative rule, the Comprehensive Plan or this Ordinance have not changed," and the county board of commissioners interprets "have not changed" to mean an administrative or legislative amendment to the administratively enacted or codified law described in the same provision, and not include decisional law not that is not administratively enacted or codified, as long as such interpretation is "plausible." *Hood River Valley Residents' Committee v. Hood River County*, 78 Or LUBA 478 (2018).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a city has two separate criteria—a transportation impacts criterion, and a services and utilities criterion—both of which are generally concerned with achieving and maintaining an adequate and safe transportation system, and both criteria must be satisfied, a finding that one of those criteria is satisfied does not necessarily mean the other criterion is satisfied. In such a situation, simply because the city found no "traffic impacts" requiring mitigation under the traffic impacts criterion does not mean the city imposed an unconstitutional exaction when it required right-of-way dedication and street improvements as conditions of approval to satisfy the services and utilities criterion. It simply means the city applies the rights-of-way requirements through the services and utilities criterion, rather than the transportation impacts criterion. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a code "principle" is worded as alternative actions an applicant "should" take, and some of the "standards" that follow that "principle" are clearly worded as mandatory, while others are clearly worded as non-mandatory considerations, where the challenged decision does not address the disputed "principle," remand is required for the city council to determine if the disputed "principles" are mandatory and, if so, to ensure one of the mandatory alternatives is satisfied. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

31.1.3 Permits – Approval Standards – Standards/Criteria. In *Pete's Mountain Homeowners Assn. v. Clackamas Cty.*, 227 Or App 140, 204 P3d 802, *rev den*, 346 Or 589 (2009), the Court of Appeals held that Ballot Measure 49, which was approved to replace previously approved Ballot Measure 37, must be given effect and replaces Ballot Measure 37 which would otherwise apply to a particular permit application, notwithstanding the ORS 215.427(3)(a) goal post statute that requires that a permit application be subject to the standards in effect when the permit application

was filed. *Pete's Mountain* case of conflicting statutes—Ballot Measure 49 conflicted with and applied in place of the goal post statute. The holding in *Pete's Mountain* does not mean that new county cell tower regulations apply to a permit application that was submitted before the new cell tower regulations were adopted. In that circumstance the goal post statute applies and the new cell tower regulations do not apply, because there is no statutory conflict. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

31.1.3 Permits – Approval Standards – Standards/Criteria. ORS 215.427(3)(a) generally requires that approval or denial of a permit application be based on "standards and criteria" that were in effect when the application is first submitted. Expanding a sewer improvement district boundary so that a ban against connecting properties that are not within the sewer improvement district to the public sewer system no longer bars connection of a dwelling on the property to the public sewer system, as it did when the permit application was first submitted, does not create a new standard or criterion after the application was submitted. In that circumstance, ORS 215.427(3)(a) does not preclude the city from requiring that the dwelling connect to the public sewer system, even though it could not have done so at the time the application was submitted. *Evans v. City of Bandon*, 74 Or LUBA 418 (2016).

31.1.3 Permits – Approval Standards – Standards/Criteria. A development standard requiring a developer to dedicate and improve adjoining roads to city half-street standards "to the extent the city demonstrates consistency with constitutional requirements" merely acknowledges that the city's ability to require dedications and improvements may be limited by the Takings Clause of the U.S. Constitution, and is not properly understood to allow city staff to waive the code requirements on a case-by-case basis without any analysis or explanation. *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

31.1.3 Permits – Approval Standards – Standards/Criteria. An argument that an existing road serving a proposed planned unit development fails to comply with standards in the fire code provides no basis for reversal or remand of the decision where the fire code is not a "standard and criteria" that is "set forth in the [city's] development ordinance" within the meaning of ORS 227.173, and nothing in the city's development ordinance requires any consideration of the fire code standards during the tentative PUD phase of approval. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

31.1.3 Permits – Approval Standards – Standards/Criteria. A city's acceptance of dedication of a right-of-way does not make the location of the right-of-way as depicted in the dedication a "standard[]" within the meaning of ORS 227.178(3)(a). *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339 (2016).

31.1.3 Permits – Approval Standards – Standards/Criteria. A local code provision that prohibits grading or development on portions of a site that exceed 20 percent is "clear enough for an applicant to know what [it] must show during the application process." *Lee v. City of Portland*, 57 Or App 798, 802, 646 P2d 662 (1982). Nothing in the language of ORS 227.173(1) requires that a *method* of measuring slope must be included in the provision in order to determine whether the 20 percent standard is met. *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51 (2013).

31.1.3 Permits – Approval Standards – Standards/Criteria. A local code provision that sets out the circumstances when environmental review is *required* for a development proposal does not foreclose an applicant from voluntarily seeking environmental review through a different process made available in a different code section that gives applicants the choice of satisfying approval standards or seeking environmental review under subjective approval standards. *Von Clemm v. City of Portland*, 66 Or LUBA 379 (2012).

31.1.3 Permits – Approval Standards – Standards/Criteria. In order for the local government to postpone a determination of compliance with an applicable criterion to a future proceeding, the local government must first determine, based on evidence in the record, that "compliance with the approval criterion is possible." The evidentiary showing that is required in order for the local government to determine that future compliance is "possible" is not the same evidentiary showing that will be required when a local government makes the required ultimate finding that an approval criterion is satisfied or will be satisfied with measures that are "likely and reasonably certain to succeed." *Gould v. Deschutes County*, 227 Or App 601, 612, 206 P3d 1106 (2009). *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

31.1.3 Permits – Approval Standards – Standards/Criteria. In establishing that a request for land use approval complies with applicable approval standards, a local government may find that the approval standard is met or find that any needed technical solutions that may be required to comply with the standard are "possible, likely and reasonably certain to succeed." *Gould v. Deschutes County*, 216 Or App 150, 161, 171 P3d 1017 (2007) (citing *Meyer v. City of Portland*, 67 Or App 274, 281-82, 678 P2d 741, *rev den*, 297 Or 82, 679 P2d 1367 (1984)). *Johnson v. City of Gladstone*, 65 Or LUBA 225 (2012).

31.1.3 Permits – Approval Standards – Standards/Criteria. Factors set out in a purpose statement provision provide context for interpreting a code provision that requires the local government to determine that a proposed development is compatible with uses and development on adjacent land, even though the factors set out in the purpose statement are not independent approval criteria. *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

31.1.3 Permits – Approval Standards – Standards/Criteria. Under the Court of Appeals' reasoning in *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993), the statutory term "standards and criteria" is sufficiently malleable to encompass a two-step code requirement that first requires that an applicant submit sufficient information to allow the local government to determine whether mitigation conditions of approval are needed for the proposed mining use, and second requires that the local government determine if conditions of approval are needed and develop and impose those conditions if they are needed. *Tidewater Contractors v. Curry County*, 65 Or LUBA 424 (2012).

31.1.3 Permits – Approval Standards – Standards/Criteria. A local government errs in denying an application for a use expressly allowed as a conditional use in the applicable zone on the grounds that the proposed conditional use is inconsistent with the purpose of the zone, where no code provision makes the zone purpose statement an applicable approval criterion, and the zone

purpose statement includes no language suggesting that the purpose statement functions as a mandatory approval criterion for conditional uses allowed in the zone. *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

31.1.3 Permits – Approval Standards – Standards/Criteria. While a local government has latitude to identify applicable standards and criteria in its comprehensive plan and land use regulations, under ORS 227.173(1) the "standards and criteria" must already exist in the plan and ordinance, and the local government cannot manufacture standards and criteria to apply to approve or deny a permit application. *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

31.1.3 Permits – Approval Standards – Standards/Criteria. ORS 227.173(1), which requires that city decisions on applications for permits be based on standards and criteria in the city's development ordinance, does not mandate that a PUD Master Plan also include "standards and criteria," as those words are used in ORS 227.173(1). *Athletic Club of Bend v. City of Bend*, 63 Or LUBA 467 (2011).

31.1.3 Permits – Approval Standards – Standards/Criteria. In making a decision on a land use application, a local government is required to determine whether the application complies with all applicable land use approval criteria at the time it renders a decision on the application. A local government is not entitled to include a general condition that requires a successful applicant to come back to the county each time a land use regulation that was not considered is discovered after the original approval decision has become final. *Kersey v. Lake County*, 62 Or LUBA 239 (2010).

31.1.3 Permits – Approval Standards – Standards/Criteria. Absent permit approval criteria requiring otherwise, a petitioner cannot challenge an earlier unappealed decision extending a permit approval for 18 months, in the context of an appeal of a later decision modifying the permit. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

31.1.3 Permits – Approval Standards – Standards/Criteria. A code criterion intended to protect against adverse environmental impacts within a floodplain corridor does not require the applicant for a driveway within the corridor to address alleged traffic safety and vision clearance conflicts with users of nearby driveways. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

31.1.3 Permits – Approval Standards – Standards/Criteria. ORS 92.040(2) provides that "only those local government laws * * * that are in effect at the time of [subdivision] application shall govern subsequent construction on the property * * *." A local government does not violate ORS 92.040(2) by applying access standards that were adopted after a subdivision was recorded to deny a request for direct driveway access onto an arterial road adjoining one of the subdivision lots where the proposed driveway would be constructed in part "off" the property and the approved master plan showed access to the lot from an internal local roadway. *Athletic Club of Bend, Inc. v. City of Bend*, 61 Or LUBA 349 (2010).

31.1.3 Permits – Approval Standards – Standards/Criteria. A code standard allowing modifications to a conditional use permit that are not "materially inconsistent with the conditions of the original approval" does not preclude all modifications that are inconsistent in some way with the original conditions of approval, only modifications that "materially" or "significantly"

conflict with the original conditions of approval. *Connecting Eugene v. City of Eugene*, 61 Or LUBA 439 (2010).

31.1.3 Permits – Approval Standards – Standards/Criteria. The hearings officer correctly interprets a code standard allowing modifications to a conditional use permit that result in "insignificant changes" in the physical appearance of development, use of the site, or impact on surrounding properties to be concerned with modifications that change the proposed development, not a modification to a deadline to complete the development as originally approved. *Connecting Eugene v. City of Eugene*, 61 Or LUBA 439 (2010).

31.1.3 Permits – Approval Standards – Standards/Criteria. Under the Court of Appeals' decision in *Pete's Mountain Homeowners Assn. v. Clackamas Cty.*, 227 Or App 140, 204 P3d 802, *rev den*, 346 Or 589 (2009), where an application for subdivision relies on Ballot Measure 37 waivers, those waivers qualify as "standards and criteria" under the ORS 215.427(3)(a) goal-post statute, and the subdivision application is not subject to subsequently enacted standards and criteria. But Ballot Measure 49, which post-dates Ballot Measure 37 and is inconsistent with the ORS 215.427(3)(a) goal-post statute overrides the goal-post statute and limits the Ballot Measure 37 subdivision applicant to one of the three remedies specified in Ballot Measure 49. *Hoffman v. Jefferson County*, 60 Or LUBA 101 (2009).

31.1.3 Permits – Approval Standards – Standards/Criteria. If a local government interprets its code to the effect that federal particulate matter standards supply the relevant test for compliance with local approval standards, articulates that interpretation for the first time in its final decision, and denies the application for failure to present evidence of compliance with the federal standards, remand would likely be necessary to give the applicant an opportunity to present evidence addressing the federal standards. However, remand is not warranted where the decision merely discusses federal standards, but ultimately concludes that those standards do not govern. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

31.1.3 Permits – Approval Standards – Standards/Criteria. It is generally the applicant's responsibility to anticipate a range of reasonable interpretations or approaches to demonstrating compliance with an approval standard, even if the approval standard is nonspecific and subjective, and to shape the evidence accordingly. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a local government denies an application based on one approval criterion, and LUBA remands the decision in part for the local government to consider whether additional approval standards apply, it is possible that in determining that additional approval standards apply the local government could identify additional bases for denial under the additional criteria, even if such additional bases for denial were not cited in the original decision. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

31.1.3 Permits – Approval Standards – Standards/Criteria. A street connectivity requirement that development street systems not create "excessive travel lengths" is sufficient to qualify as a standard or criterion, and therefore does not violate the ORS 227.173(1) requirement that permit decisions must "be based on standards and criteria." *Konrady v. City of Eugene*, 59 Or LUBA 466 (2009).

31.1.3 Permits – Approval Standards – Standards/Criteria. When an applicant files a consolidated set of applications for: (1) a comprehensive plan amendment; (2) a zone change that is dependent on that plan map amendment; and (3) a development permit that is dependent on that zone change, the goal post rule at ORS 197.427(3)(a) does not apply to "freeze" in place the standards and criteria that applied to that development permit as of the date the applications were filed. Instead the standards and criteria that apply are those supplied by the new plan and zoning designations. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009).

31.1.3 Permits – Approval Standards – Standards/Criteria. A code provision that lists additional conditional use restrictions that a county may impose to protect certain natural resources is an approval standard, in the sense that it authorizes the county to impose additional conditions if found to be necessary, and the county could, theoretically, deny the application if it concluded that no feasible conditions could be crafted that the county will protect the identified resources. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

31.1.3 Permits – Approval Standards – Standards/Criteria. A code provision stating that when it appears that the area of a proposed partition is to be ultimately divided into four or more lots or parcels the code provisions pertaining to subdivisions apply simply authorizes the city to apply subdivision procedures and standards to a partition application, and does not itself constitute "standard" or "criteria" under which the city could deny the partition application. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a city discovers late in a proceeding on a partition application that its code may require application of certain subdivision approval standards, the city should identify any applicable subdivision standards and give the applicant the opportunity to demonstrate compliance with them, even if that would require the city to make its decision after the statutory deadline for taking final action on the application has passed. However, it is inconsistent with ORS 227.178(3) for the city to summarily deny the partition and effectively force the applicant to submit a new application, where that denial is not based on any applicable standard or criteria. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

31.1.3 Permits – Approval Standards – Standards/Criteria. In applying a land use regulation standard that only requires a service provider certification or letter, a decision maker is not obligated to ensure that every representation in a service provider's certification or letter is correct or supported by substantial evidence. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

31.1.3 Permits – Approval Standards – Standards/Criteria. Petitioners' argument that a city erred by failing to find that proposed alterations to a historic building are necessary to ensure its continued use will be rejected on appeal, where the local code merely says some alterations will be necessary to ensure continued use of historic resources and other provisions of the code expressly set out the criteria that the city must address in its findings. *Burgess v. City of Corvallis*, 55 Or LUBA 482 (2008).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a city's code conditionally permits cellular antennae on existing buildings, a city decision that denies a request for conditional use approval to site cellular antennae on an existing water tower simply because the water tower is an existing nonconforming structure will be remanded, where there is no language in the city's code that would permit such a limitation and the city provides no explanation for reading such a limitation into its code. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

31.1.3 Permits – Approval Standards – Standards/Criteria. ORS 215.427(3) does not preclude the local government's compliance with OAR 660-041-0030, which requires notice to DLCD of an application for a permit pursuant to a Ballot Measure 37 waiver, because the rule is not an "approval standard or criteria" applicable to a permit application. *DLCD v. Deschutes County*, 54 Or LUBA 799 (2007).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where local code criteria applicable to approval of a forest template dwelling do not include any reference to local floodplain regulations, and those floodplain regulations appear to regulate the actual construction and placement of structures within a floodplain zone, and are more properly addressed at the time a building permit is issued, the county does not err in failing to adopt findings addressing those floodplain regulations in approving a forest template dwelling. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

31.1.3 Permits – Approval Standards – Standards/Criteria. A comprehensive plan policy that merely describes the county's resource designations is not a mandatory tentative subdivision plan approval criterion, and the county was therefore not required to adopt findings addressing it. *Doob v. Josephine County*, 50 Or LUBA 209 (2005).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where the text of a particular zoning district that allows permitted uses to be reviewed as conditional uses seems to call for a focus on the characteristics of the use itself, but the conditional use chapter of the zoning ordinance expressly provides that conditional uses may require special consideration due to unique site characteristics, the city does not err in interpreting the zoning district text to allow it to consider whether unique site characteristics justify treating the permitted use as a conditional use. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 472 (2005).

31.1.3 Permits – Approval Standards – Standards/Criteria. While ORS 227.178(3), as interpreted in *Holland v. City of Cannon Beach*, 154 Or App 450, 926 P2d 701 (1998), prohibits a local government from changing its position with respect to the applicability of approval standards during the proceedings on a permit application, neither the statute nor *Holland* prohibit a local government from reinterpreting the meaning of indisputably applicable approval standards. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

31.1.3 Permits – Approval Standards – Standards/Criteria. The ORS 227.178(3) prohibition on "shifting the goal posts" and the prohibition described in *Alexanderson v. Clackamas County*, 126 Or App 549, 869 P2d 873 (1994), on reinterpretations of local provisions that are a "product of a design to act arbitrarily and inconsistently from case to case" are distinct and independent

prohibitions, although both may be invoked in particular circumstances. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a conditional use approval criterion provides that conditional use approval "may be denied if the applicant" fails to make a specified demonstration concerning the proposed location of the conditional use, a county court's interpretation of the term "may" to render the criterion nonmandatory is not inconsistent with the language of the criterion or any identified underlying purpose or policies and is therefore not reversible under ORS 197.829(1). *Gumtow-Farrior v. Crook County*, 47 Or LUBA 186 (2004).

31.1.3 Permits – Approval Standards – Standards/Criteria. A zoning ordinance provision that requires that identified resource protection areas "link" with other identified resource protection areas is not so vague as to violate the ORS 227.173 requirement that review of land use permits be based on "standards and criteria." *Renaissance Development v. City of Lake Oswego*, 45 Or LUBA 312 (2003).

31.1.3 Permits – Approval Standards – Standards/Criteria. A zoning ordinance provision that requires maintenance of "an ecologically viable plant and wildlife community" is not so vague as to violate the ORS 227.173 requirement that review of land use permits be based on" standards and criteria." *Renaissance Development v. City of Lake Oswego*, 45 Or LUBA 312 (2003).

31.1.3 Permits – Approval Standards – Standards/Criteria. LUBA will remand a decision that denies a permit application because it does not comply with a zoning ordinance standard that requires "the largest trees be included in [a] protection area," where the decision does not allow the applicant to determine how many of the large trees on the property must be protected and does not provide any guidance on how the city applies that standard. *Renaissance Development v. City of Lake Oswego*, 45 Or LUBA 312 (2003).

31.1.3 Permits – Approval Standards – Standards/Criteria. A city's finding that buried concrete reservoirs will not cause "significant detrimental impact" to the environment is supported by substantial evidence, where the city's code defines that term to mean development that disrupts or destroys ecological systems, and evidence in the record shows that the surface over the buried reservoirs will be restored and replanted and the reservoirs will not significantly affect underground hydrology. *Bauer v. City of Portland*, 44 Or LUBA 210 (2003).

31.1.3 Permits – Approval Standards – Standards/Criteria. Under a code provision requiring a "mitigation site plan" if development results in unavoidable significant detrimental environmental impacts, it is not error for the city to consider proposed mitigation in finding that the development will not result in significant impacts, and thus avoid the requirement for a mitigation site plan, where that approach does not avoid prescribed types of mitigation, and instead simply eliminates submission of redundant information. *Bauer v. City of Portland*, 44 Or LUBA 210 (2003).

31.1.3 Permits – Approval Standards – Standards/Criteria. A city's refusal to interpret a zoning ordinance standard that requires that requested rezoning must be the "best suited for the specific site, based on specific policies of the * * * [c]omprehensive [p]lan" to require that the

applicant demonstrate a current unmet need for the uses allowed in the requested zone is not reversible under ORS 197.829(1), where no plan policy is worded to impose that requirement. *Dimone v. City of Hillsboro*, 44 Or LUBA 698 (2003).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a local approval criterion requires a finding that a proposed use will have a minimal adverse impact on surrounding uses compared to the impact of development permitted outright, a city may not limit its impact analysis to only one permitted use, where other permitted uses in the zone may have impacts similar to those of the proposed use. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a local approval criterion requires a finding that a proposed use will "preserve assets of particular interest in the community," a city council's finding that the proposed use does not satisfy the criterion is inadequate where the finding merely sets out a series of concerns about the proposed use without explaining why those concerns are "assets of particular interest" that the proposed use will not preserve. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

31.1.3 Permits – Approval Standards – Standards/Criteria. A city's finding that a proposed use will place an "excessive burden on traffic" based on a conclusion that the applicant failed to provide a traffic study that estimated the number of vehicles that would use local streets is inadequate, where there is a trip generation study in the record that provides the evidence the finding states is missing. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

31.1.3 Permits – Approval Standards – Standards/Criteria. A 1979 board of county commissioners decision directing the county planning department to issue septic and building permits for a single-family dwelling does not necessarily confer a continuing right to construct a dwelling where no permits were ever issued, no steps have been taken to construct the approved development, and county approval standards have changed in the years since the 1979 decision such that the proposed development no longer complies with applicable criteria. *PJT, Inc. v. Jackson County*, 42 Or LUBA 536 (2002).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a county has adopted specific ordinances to shield certain land use permits from subsequent changes in law without regard to whether the permit holder has a vested right to complete construction of the use based on substantial construction of the authorized use prior to the change in law, uses approved by land use permits that are not shielded from subsequent changes in law by the ordinances are not similarly shielded from those changes in law and must comply with existing law. *PJT, Inc. v. Jackson County*, 42 Or LUBA 536 (2002).

31.1.3 Permits – Approval Standards – Standards/Criteria. LUBA will remand a decision denying an application to place and remove fill in a riparian zone, where the findings do not independently address the relevant standards and it is not clear what evidence the hearings officer relied on to apply the standards. *Griffin v. Jackson County*, 41 Or LUBA 159 (2001).

31.1.3 Permits – Approval Standards – Standards/Criteria. The standard a county must apply under ORS 215.275 in considering siting of a public utility facility on EFU land is the same standard mandated by *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998): "whether the facility must be sited in an EFU zone in order to provide the service." The factors specified in ORS 215.275 may be used merely to demonstrate compliance with that ultimate standard. *City of Albany v. Linn County*, 40 Or LUBA 38 (2001).

31.1.3 Permits – Approval Standards – Standards/Criteria. When considering approval of a public utility facility on EFU land, the factors listed in ORS 215.275(2) are intended to be applied not only to the proposed EFU site, but also to the non-EFU sites considered as potential alternatives. *City of Albany v. Linn County*, 40 Or LUBA 38 (2001).

31.1.3 Permits – Approval Standards – Standards/Criteria. Under ORS 215.275, when a county considers siting of a certain type of public utility facility on EFU land, the county need not consider as a "reasonable alternative" a different type of utility facility designed to meet the same need as the proposed facility type. *City of Albany v. Linn County*, 40 Or LUBA 38 (2001).

31.1.3 Permits – Approval Standards – Standards/Criteria. A city is allowed latitude under ORS 227.173(1) in adopting nonspecific and highly subjective criteria, and in explaining what such criteria require in particular cases. Design review criteria requiring that proposed signs enhance the character of historic districts are not impermissibly vague under ORS 227.173(1), where a reasonable applicant could discern from the criteria and the city's explanation of the district's character why the proposed sign violates the criteria. *Multi-Light Sign Co. v. City of Portland*, 39 Or LUBA 605 (2001).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where the ORS 215.283(1)(w) authorization for rural fire service facilities in EFU zones had taken effect, but a county had not yet amended its zoning ordinance to reflect the statutory change, ORS 215.283(1)(w) applies directly, and the county does not violate the zoning ordinance by approving a rural fire service facility in its EFU zone. *Keicher v. Clackamas County*, 39 Or LUBA 521 (2001).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a city cannot find its acknowledged shoreland land use regulations, it may not apply the county's shoreland land use regulations to approve a request to place fill in the shoreland; it must apply Goal 17 (Coastal Shorelands) directly. *Willhoft v. City of Gold Beach*, 39 Or LUBA 353 (2001).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a city code provision states that, following approval of a permit application, impacts of the proposal must be mitigated, a requirement that the city manager adopt rules to implement that code mitigation requirement does not violate ORS 227.173(1), which requires that the "standards and criteria" for approval or denial of a land use permit be included in the city's development ordinances. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282 (2001).

31.1.3 Permits – Approval Standards – Standards/Criteria. A city does not err by failing to apply comprehensive plan annexation policies in reviewing an application for annexation, where

those policies were adopted after the application for annexation was submitted and became complete. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

31.1.3 Permits – Approval Standards – Standards/Criteria. When a variance approval is based on a specific finding that the proposed use is permitted in the underlying zone, the variance approval establishes a time frame for constructing the proposed use, and when the applicant applies for the building permit within the allotted time, the city is obligated by ORS 227.178(3) to apply the same "standards and criteria" that were applicable at the time the variance application was submitted. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000).

31.1.3 Permits – Approval Standards – Standards/Criteria. ORS 227.178(3) implicitly requires that a city apply a consistent set of standards to the discretionary approval of the proposed development of land and the construction of that development in accordance with the discretionary approval. A city may not apply one set of standards to the discretionary approval of a proposed development of land and subsequently apply an amended standard to deny a building permit to construct the development in accordance with the discretionary permit. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000).

31.1.3 Permits – Approval Standards – Standards/Criteria. The approval of a "permit" under ORS 227.160(2) and 227.178(3) carries with it the right to obtain the building permits that are necessary to build the approved proposed development of land, provided the applicant seeks and obtains those building permits within the time specified in the permit itself or in accordance with any applicable land use regulations that establish a deadline for seeking and obtaining required building permits. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000).

31.1.3 Permits – Approval Standards – Standards/Criteria. A county errs by finding that its acknowledged zoning ordinance fully implements the acknowledged comprehensive plan, thus making it unnecessary to apply comprehensive plan provisions directly to an application for permit approval, where the acknowledged zoning ordinance specifically requires that the application for permit approval must demonstrate compliance with the acknowledged comprehensive plan and the county does not identify any zoning ordinance provisions that implement applicable comprehensive plan policies. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

31.1.3 Permits – Approval Standards – Standards/Criteria. Siting requirements for forest template dwellings that require that impacts and fire risks be "minimized" govern *where* a proposed dwelling should be sited rather than *whether* a dwelling should be approved. *Fessler v. Yamhill County*, 38 Or LUBA 844 (2000).

31.1.3 Permits – Approval Standards – Standards/Criteria. A code provision that authorizes a city to condition permit approval on execution of a waiver of remonstrance is not a permit approval criterion. Where the applicant expresses opposition to executing such a waiver of remonstrance, the city may condition its approval of the permit on execution of the waiver of remonstrance, but the city may not deny the permit based on such expressions of opposition. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

31.1.3 Permits – Approval Standards – Standards/Criteria. A city's decision violates ORS 227.173(1) where the city relies on "factors" or "considerations" unconnected to approval standards in its land use regulations to deny a permit application. *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000).

31.1.3 Permits – Approval Standards – Standards/Criteria. A local government is not obligated to accept evidence that ODOT approved access onto a state highway as sufficient to satisfy a county criterion that the proposed quarry operation not impose an undue burden on public improvements, which include public roads. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368 (1999).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where the staff report identifies an approval criterion and the final decision fails to demonstrate compliance with the criterion or take the position that the criterion does not apply, the decision will be remanded. *Latta v. City of Joseph*, 36 Or LUBA 708 (1999).

31.1.3 Permits – Approval Standards – Standards/Criteria. That a use is authorized under a zoning ordinance or granted building or zoning permits does not, alone, shield the use from later-adopted zoning ordinance amendments that prohibit the use or impose a requirement for additional permits. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

31.1.3 Permits – Approval Standards – Standards/Criteria. OAR 660-033-0135 and 660-033-0140 have no legal effect on the continued validity of farm dwelling permits approved prior to the adoption of those rules or the county's authority to impose time limits on those previously approved permits or to adopt standards for extending those new time limits. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

31.1.3 Permits – Approval Standards – Standards/Criteria. Under ORS 215.428(3), OAR 660-033-0140 may not be applied to applications for farm dwelling permits that were filed prior to the effective date of the rule and were pending on the date the rule became effective. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where decisions on an extension of a permit are not governed by clear and objective standards, such decisions involve the exercise of discretion and satisfy the discretionary element of the definition of "permit" at ORS 215.402(4). *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998).

31.1.3 Permits – Approval Standards – Standards/Criteria. An application for an extension of a conditional use permit involves the "discretionary approval of a proposed development of land" and is subject to the requirement at ORS 215.416 that approval or denial of a permit be subject to standards and criteria, where the local code contains no standards governing permit extensions and thus grants unfettered discretion to the county to approve or deny the extension. *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998).

31.1.3 Permits – Approval Standards – Standards/Criteria. ORS 197.175 requires that land use decisions comply with acknowledged comprehensive plans. When approval criteria included

in acknowledged land use regulations entirely displace the comprehensive plan as relevant approval criteria, the comprehensive plan must make that intent clear. *Durig v. Washington County,* 35 Or LUBA 196 (1998).

31.1.3 Permits – Approval Standards – Standards/Criteria. While petitioners may raise issues concerning compliance with approval criteria that are not identified in the local notice of hearing, petitioners must supply some explanation why they believe a "purpose statement" should be viewed as an approval criterion; petitioners may not simply assume that it is a criterion. *Rouse v. Tillamook County,* 34 Or LUBA 530 (1998).

31.1.3 Permits – Approval Standards – Standards/Criteria. Concern that a campfire may cause a forest fire that burns down neighboring structures is not a relevant consideration in determining whether a proposed use will alter the character of the surrounding area by limiting or impairing primary uses. *Tylka v. Clackamas County,* 34 Or LUBA 14 (1998).

31.1.3 Permits – Approval Standards – Standards/Criteria. ORS 227.178(3) does not prevent a city from adopting an interpretation of a comprehensive plan that is different than the interpretation that was in effect on the date the permit application was submitted, and applying that new interpretation to the permit application. *Holland v. City of Cannon Beach,* 34 Or LUBA 1 (1998).

31.1.3 Permits – Approval Standards – Standards/Criteria. A "public need" approval standard contained in a resolution attached as an appendix to the acknowledged zoning ordinance was not repealed by implication and must be applied to a request for permit approval. *Port Dock Four, Inc. v. City of Newport,* 33 Or LUBA 613 (1997).

31.1.3 Permits – Approval Standards – Standards/Criteria. Identification of a development code section number is sufficient to provide notice of the applicable criteria in a notice of hearing. It is not necessary to interpret the development code section in the notice of hearing to identify the portions of the identified development code section that institute mandatory approval criteria. *Fjarli v. City of Medford,* 33 Or LUBA 451 (1997).

31.1.3 Permits – Approval Standards – Standards/Criteria. LUBA will not find that the application of a broad design review standard violates the Fourteenth Amendment to the U.S. Constitution unless petitioner shows that a policy unlawfully discriminating in favor of some persons against others either has been adopted or has been followed in practice. *Johns v. City of Lincoln City,* 32 Or LUBA 195 (1996).

31.1.3 Permits – Approval Standards – Standards/Criteria. Findings are inadequate to establish that a proposed use does or can satisfy the definition of "light industrial business" when there are no factual findings regarding the number of employees necessary for the proposed use. *Miller v. City of Joseph,* 31 Or LUBA 472 (1996).

31.1.3 Permits – Approval Standards – Standards/Criteria. That an applicant's personal expertise is critical in designing a proposed use does not preclude compliance with a local ordinance requirement that a conditional use permit run with the land. Neither is it necessary to

condition approval of the use on continuing participation by that applicant, since it is not dependent on her for its operation. *Martin v. Jackson County*, 30 Or LUBA 317 (1996).

31.1.3 Permits – Approval Standards – Standards/Criteria. An approval standard requiring compatibility with the design of other developments in the same general vicinity does not require that an industrial use in an industrial zone be designed to resemble nearby elementary schools or residential dwellings. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

31.1.3 Permits – Approval Standards – Standards/Criteria. ORS 227.173(1) requires that permit standards and criteria be set out in local development ordinances and that land use decisions identify applicable standards and criteria. The statute does not prohibit a local government from requiring compliance with comprehensive plan policies through an ordinance, or from applying comprehensive plan criteria in quasi-judicial proceedings. *Holland v. City of Cannon Beach*, 30 Or LUBA 85 (1995).

31.1.3 Permits – Approval Standards – Standards/Criteria. A local government is not mandated to grant variances to its street design standards when the site characteristics preclude compliance with them; satisfaction of some criteria does not excuse an applicant from complying with other applicable criteria. *Holland v. City of Cannon Beach*, 30 Or LUBA 85 (1995).

31.1.3 Permits – Approval Standards – Standards/Criteria. ORS 215.236(2) requires that farm assessment disqualifications be filed within 120 days of approval of a nonfarm dwelling permit only when the subject property is assessed for farm use at the time of approval. A county's decision to modify a condition of approval requiring disqualification from farm assessment within 120 days after approval does not violate ORS 215.236(2) when the subject property was not assessed for farm use at the time of approval. *Wakeman v. Jackson County*, 29 Or LUBA 521 (1995).

31.1.3 Permits – Approval Standards – Standards/Criteria. ORS 197.829 governs this Board's scope of review in reviewing local government governing bodies' interpretations of local enactments. ORS 197.829(4) has nothing to do with whether a particular statutory provision applies directly as an approval standard for a local government land use decision. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

31.1.3 Permits – Approval Standards – Standards/Criteria. Whereas ORS 358.653(1) imposes a duty on state agencies and local governments that have a proprietary interest in historically significant properties to consult with the state Historic Preservation Office prior to seeking demolition of such properties, it does not establish requirements for state agencies and local governments to follow in carrying out their authority to regulate property under the ownership and control of other entities. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

31.1.3 Permits – Approval Standards – Standards/Criteria. A local governing body acts within its interpretive discretion in interpreting a code conditional use permit standard regarding feasibility of meeting "projected increased demand" for school facilities to refer to current demand, plus demand from other developments that have received final approval and the demand created by the proposed development, and not to include demand from future permitted development of residentially zoned land. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where LUBA remands a local government decision granting a home occupation permit, the permit expires on the date the decision is remanded. Under a local code requirement limiting home occupation permits to one year, the year is measured from the date of a decision on remand granting the permit, not the date of the original permit decision. *Wuester v. Clackamas County*, 27 Or LUBA 314 (1994).

31.1.3 Permits – Approval Standards – Standards/Criteria. Regardless of whether the local decision maker imposed a condition requiring satisfaction of DEQ noise standards, DEQ noise standards are not approval criteria for an auto repair home occupation permit, where the local code does not make DEQ noise standards applicable approval criteria. *Wuester v. Clackamas County*, 27 Or LUBA 314 (1994).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where local code language unambiguously requires findings of compliance with certain standards prior to issuance of a permit, the standards are properly viewed as approval standards, rather than performance standards, which only provide a basis for revocation of a permit after it is issued. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

31.1.3 Permits – Approval Standards – Standards/Criteria. Even though LUBA might agree with a county's argument in its brief that the purpose section of its EFU zoning district is not an approval standard for a farm dwelling permit application, if the challenged decision itself does not interpret the code provision, LUBA must remand the decision for the county to interpret the provision in the first instance. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where comprehensive plan goals are worded as aspirations, and the plan states that whereas plan policies are to be used in daily decision making, plan goals are general directions for the future, LUBA will affirm a local determination that the plan goals are not approval standards for a permit application. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a comprehensive plan policy specifically refers to wetlands identified in "future inventorying processes," it is reasonable for the local government to interpret that plan policy as inapplicable to individual permit decisions not involving wetlands identified on the local government's acknowledged plan inventory. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

31.1.3 Permits – Approval Standards – Standards/Criteria. A local code provision requiring that "consideration * * * be given to [certain specified] factors" does not establish mandatory approval standards for local government decisions, but rather merely lists "factors" which the local government must consider. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

31.1.3 Permits – Approval Standards – Standards/Criteria. As long as comprehensive plan issues relating to the impact of an entire PUD on internal and external roadways were addressed in approving an overall development plan, under applicable local code provisions particular

questions concerning those issues that were not raised in granting overall development plan approval may not be raised during final PUD approval. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

31.1.3 Permits – Approval Standards – Standards/Criteria. LUBA will not assume changes in a PUD proposal between outline development plan approval and preliminary development plan approval constitute a new PUD application (requiring application of then existing approval standards), where there is nothing in the local code to support so characterizing the amended PUD proposal. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

31.1.3 Permits – Approval Standards – Standards/Criteria. While ORS 227.178(3) identifies the criteria that a city must apply to a permit application, it has *no* bearing on whether the city *must*, following reversal or remand of a permit decision by this Board, (1) accept an amended application reviewable against the criteria in effect when the original application was submitted, or (2) require a new application reviewable against the criteria in effect when the new application is submitted. *Seitz v. City of Ashland*, 24 Or LUBA 311 (1992).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where (1) a standard was deleted from the local comprehensive plan prior to the filing of a permit application, (2) the ordinance deleting the standard was remanded by LUBA while the permit application was pending, but (3) the local government made a second decision to delete the standard and that decision was deemed acknowledged prior to the local government's final decision on the permit application, the standard does not apply to the permit application. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

31.1.3 Permits – Approval Standards – Standards/Criteria. A code provision requiring the existence of legal access is satisfied by an existing access easement, notwithstanding that portions of the existing driveway are located outside the easement. *Mercer v. Josephine County*, 23 Or LUBA 608 (1992).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where an applicable code criterion requires that an existing structure have been issued all necessary permits in the past and a party raises a substantial issue concerning whether such is the case, the local government is required to adopt findings explaining why the code criterion is met and those findings must be supported by substantial evidence. *Mercer v. Josephine County*, 23 Or LUBA 608 (1992).

31.1.3 Permits – Approval Standards – Standards/Criteria. That a recently constructed roadway stream crossing was built to create a pond to satisfy fire district requirements for stored water provides no basis for requiring that a county approve use of such a roadway to provide access to newly created parcels. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

31.1.3 Permits – Approval Standards – Standards/Criteria. The standards in effect at the time a development application is filed are the standards applicable to approval of such development applications. *Veach v. Wasco County*, 23 Or LUBA 515 (1992).

31.1.3 Permits – Approval Standards – Standards/Criteria. Comprehensive plan policies and local code requirements establishing standards for construction of streets are not approval standards applicable to comprehensive plan transportation map amendments. *Davenport v. City of Tigard*, 22 Or LUBA 577 (1992).

31.1.3 Permits – Approval Standards – Standards/Criteria. A local government complies with a plan provision requiring that it "request comments from the School District concerning land use * * * actions," where the local government provides the school district with notice of a proposed PUD preliminary master plan approval. Such a plan provision does not require that the school district make comments, only that comments be requested. *Gerl v. City of Lincoln City*, 22 Or LUBA 512 (1992).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where relevant plan provisions require that a local government consider the impacts of a proposed PUD on police and fire protection and transportation routes, a local government must consider such impacts and may not, in finding compliance with such plan provisions, rely solely on the failure of the relevant service providers to provide comments. *Gerl v. City of Lincoln City,* 22 Or LUBA 512 (1992).

31.1.3 Permits – Approval Standards – Standards/Criteria. The factors listed in ORS 822.140(3)(a) to (f) are considerations for the adoption of ordinances regulating the siting or expansion of wrecking yards. These factors are not approval standards for applications for local approval of individual Department of Motor Vehicles wrecking certificates. *Bradbury v. City of Independence*, 22 Or LUBA 398 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a county's approval of a permit is mandated by an order of the circuit court issued pursuant to a writ of mandamus under ORS 215.428(7), the county's decision approving the permit is not a "land use decision," as defined in ORS 197.015(10), because the county was not required to apply its comprehensive plan or land use regulations in adopting that decision. *Gearhard v. Klamath County*, 22 Or LUBA 377 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where the height limitation for the underlying zone is a standard applicable to approval of a PUD preliminary development plan, under ORS 227.178(3) the preliminary development plan must comply with the building height limitation in effect when the preliminary development plan application was first submitted. *Gilson v. City of Portland*, 22 Or LUBA 343 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. Conditions imposed on particular property as part of the adoption of a quasi-judicial plan amendment/zone change are potentially applicable to decisions approving development of that property. *Broetje-McLaughlin v. Clackamas County,* 22 Or LUBA 198 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. When determining the applicability of comprehensive plan provisions to individual conditional use decisions, LUBA will first consider whether the comprehensive plan itself contains language which identifies how the provisions in

question are intended to apply to individual conditional use decisions. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where the comprehensive plan emphasizes that plan policies are intended to *guide* development actions and decisions, and that the plan must be implemented through the local code to have effect, such plan policies are not approval standards for individual conditional use decisions. *Schellenberg v. Polk County*, 21 Or LUBA 425 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. Performance standards are not necessary prerequisites to issuance of a conditional use permit. However, a code standard may be a performance standard, a permit approval standard, or some combination of the two. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a code standard provides that the standard applies "to the establishment, maintenance, and operation of" the proposed use, a local government must determine whether the standard is met prior to granting the requested discretionary permits. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where compliance with applicable discretionary permit approval standards will require detailed plans or studies of the type typically required at the time a building permit is requested, it may be possible for the local government to find at the time of discretionary permit approval that it is feasible to comply with the standards and to defer to a later stage selection of the particular technical solution to achieve the standard. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. A local government may impose conditions and rely on those conditions in determining that an application for discretionary permit approval meets applicable approval standards. However, there is no general requirement that a local government *must* apply conditions to modify a proposal so that applicable standards are met. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. A code standard requiring provision of screening by "an ornamental fence, wall, or hedge or landscaped berm in addition to such natural desirable vegetation in the landscaped area," is not met by a 20-foot-high pile of gravel or aggregate. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. A local code statement of an intent not to encourage perpetuation of nonconforming uses and plan policies that are directed at zoning decisions and adoption of implementing land use regulations and planning inventories do not state approval standards applicable to decisions concerning modification of individual nonconforming uses. *Strawn v. City of Albany*, 21 Or LUBA 172 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. Statements from introductory findings to a comprehensive plan chapter are not plan policies or approval standards for land use decisions. *19th Street Project v. City of The Dalles*, 20 Or LUBA 440 (1991).

31.1.3 Permits – Approval Standards – Standards/Criteria. Under ORS 215.428(3), the county flood standards in effect at the time the "application" was first submitted to the county apply. However, for the purpose of determining which county flood standards must be applied, the dispositive "application" is the one to which county flood standards are applicable. *Komning v. Grant County,* 20 Or LUBA 355 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where the code requires certain flood standards to be applied when the county receives "an application for a use or development," and the flood standards authorize the county to deny or require redesign of a proposed development, the flood standards are applicable to approval of the initial development application. *Komning v. Grant County*, 20 Or LUBA 355 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. A plan policy that certain uses or activities be encouraged states general objectives, not permit approval criteria. *Benjamin v. City of Ashland*, 20 Or LUBA 265 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where the local code states that required determinations regarding the compatibility and impacts of proposed developments are to be based on *consideration* of certain listed factors, the factors are not themselves approval standards, and no one factor is conclusive. *Thormahlen v. City of Ashland*, 20 Or LUBA 218 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where a purpose statement in the local code's conditional use provisions states general objectives only, and does not purport to act as an independent approval standard, petitioners' contention that evidence in the record establishes the proposed use is not in compliance with that purpose statement provides no basis for reversal or remand of the challenged decision approving a conditional use permit. *Beck v. City of Tillamook*, 20 Or LUBA 178 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where the comprehensive plan requires an "urban level of service" of schools, but does not define "urban level of service," a city does not err in interpreting that term consistent with the school district's "considerations" for providing adequate school facilities. However, because those school district considerations were not adopted by the city as standards, the city did not err by failing to adopt findings specifically addressing each consideration when approving a development. *Axon v. City of Lake Oswego,* 20 Or LUBA 108 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. The requirement of ORS 215.298(2) that permits for mining of aggregate on EFU-zoned land only be issued for sites included on an inventory in an acknowledged comprehensive plan became effective October 3, 1989 and does not apply to a pending application submitted prior to that date. *Clark v. Jackson County,* 19 Or LUBA 220 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where the comprehensive plan specifies that a particular plan policy is itself an implementing measure, LUBA will conclude that

policy applies as an approval criterion for land use decisions. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. Comprehensive plan policies which the plan states are specifically implemented through particular sections of the local code do not constitute independent approval standards for land use actions. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where the county code explicitly requires that a nonfarm conditional use in an exclusive farm use zone "satisfy" applicable plan goals and policies, and the county plan provides that its goals and policies shall "direct future decisions on land use actions," the plan agriculture goals and policies are applicable to approval of the nonfarm conditional use. *Rowan v. Clackamas County*, 19 Or LUBA 163 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. A comprehensive plan policy which states that, in order to minimize conflicts between agricultural and nonagricultural uses, a county "shall develop and implement buffering techniques on the periphery of urban growth boundaries which abut agricultural land," is not an approval standard for a conditional use permit for a nonfarm use far removed from any urban growth boundary. *Weist v. Jackson County*, 18 Or LUBA 627 (1990).

31.1.3 Permits – Approval Standards – Standards/Criteria. Where ordinance provides that conditional use permit applications may be approved, approved with conditions or denied, and states the approval authority must find that the proposed use is not in violation of "the appropriate regulations and standards" in the ordinance, the ordinance provides that a conditional use permit may be approved or denied based on mandatory criteria located elsewhere in the zoning ordinance. *Beck v. City of Tillamook*, 18 Or LUBA 587 (1990).

31.1.4 Permits – Approval Standards – Use of Conditions. A county provision, which requires the signature of all owners of the subject property on an application for a conditional use permit, may be satisfied by a county-imposed condition requiring that a property owner sign the conditional use permit application before any building permits may issue, where the county provision grants permission to the hearings officer to impose conditions the hearings officer "deems necessary" to fulfill the purpose and intent of the county's code. *Harris v. Marion County*, 78 Or LUBA 209 (2018).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a county code provision requires that a proposed solar facility may not "create unnecessary negative impacts on agricultural operations," including dividing a field or multiple fields "in such a way that creates small or isolated pieces of property that are more difficult to farm," and placing solar facility components on lands in a manner that "could disrupt common and accepted farming practices," a hearings officer's decision errs in concluding that a 12-acre solar facility located on a 14.15-acre lot will not create an isolated strip of cultivated land because as s a matter of simple arithmetic, some portion of the 14.15-acre lot will remain outside the 12-acre solar facility. *Harris v. Marion County*, 78 Or LUBA 209 (2018).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a county code provision requires a finding that development of a proposed solar facility will "not result in unnecessary soil erosion or loss," and includes a provision that this finding "*may* be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual," and "[t]he approved plan *shall* be attached to the decision *as a condition of approval*," that provision allows an applicant and the county the *option* of relying on a qualified soil and erosion control plan to satisfy the provision and, if that option is followed, by imposing a condition of approval that requires compliance with the approved plan. The phrase "attached to the decision as a condition of approval" is a term of art that does not mean that the plan must be physically attached to the decision. *Harris v. Marion County*, 78 Or LUBA 209 (2018).

31.1.4 Permits – Approval Standards – Use of Conditions. LUBA will reject petitioner's argument that a proposed "art studio" is in reality an "accessory dwelling" in the forest zone in violation of state and local law where the county hearings officer imposed several conditions intended to ensure that the proposed "art studio" would not be used as an "accessory dwelling," and petitioner's speculation that the applicant might violate one or more conditions of approval provides no basis for reversal or remand. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a city code provides that a property owner must, as a condition of permit or partition approval, either provide the improvements or pay into an improvement fund if a street adjoining property without direct access to the street does not have standard full-width improvements, and petitioner argues that the code provision is not applicable to his proposed property partition, LUBA will sustain, in part, petitioner's challenge upon remand from the Court of Appeals, where the arguments on appeal have evolved and it is apparent that remand is necessary for the hearings officer to adopt findings regarding LUBA's underlying conclusion that the hearings officer was correct in concluding that the condition requiring a waiver of remonstrance against a street or stormwater facility

improvement was justified under *Clark v. City of Albany*, 31 Or LUBA 375, 380, *aff'd*, 144 Or App 192, 924 P2d 877 (1966), and did not constitute a takings. *Hill v. City of Portland*, 78 Or LUBA 334 (2018).

31.1.4 Permits – Approval Standards – Use of Conditions. To determine whether a local government's conditions of approval satisfy the *Nollan v. California Coastal Comm'n*, 483 US 825, 831-32, 107 S Ct 3141, 97 L Ed 677 (1987), "essential nexus" prong of the two-part test for assessing the constitutionality of a government exaction, the local government must show "(1) what interests would allow the [local government] to deny [the applicant's proposed land] partition, and (2) how the exaction would serve those interests." *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

31.1.4 Permits – Approval Standards – Use of Conditions. A waiver of remonstrance to the formation of a local improvement district (LID) is not subject to the constitutional exaction analysis because it, by itself, does not result in a loss of petitioner's property. Conditions of approval, such as a waiver of remonstrance, may be applied by a local government to ensure that a development proposal conforms to the applicable approval criteria or to ensure the enforcement of other local government regulations. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

31.1.4 Permits – Approval Standards – Use of Conditions. Where an application for design review approval does not seek approval to operate between the hours of 10 p.m. and 7 a.m., which requires conditional use approval under the city's land use regulations, the city does not err by failing to impose a condition of approval that prohibits operation of a returnable bottle redemption center during those hours. *Glenwood 2006, LLC v. City of Beaverton*, 76 Or LUBA 162 (2017).

31.1.4 Permits – Approval Standards – Use of Conditions. Under ORS 215.296(2), a county may impose conditions of approval to ensure compliance with the ORS 215.296(1) "significant change/cost" standard, in which case the question on appeal to LUBA is not whether the decision establishes that the proposed use complies with ORS 215.296(1), but whether the decision establishes that the proposed use, as conditioned, complies with ORS 215.296(1). *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government could reasonably conclude that a landfill expansion complies with the ORS 215.296(1) "significant change/cost" standard, notwithstanding testimony from an adjacent hay farmer regarding the need for weekly litter patrols to prevent trash entering farm soils or destroying farm equipment, based in part on a condition of approval that requires a second litter fence between the working face of the landfill and adjacent hay fields, where there is no dispute that the existing litter fence is somewhat effective at reducing the volume of wind-blown trash that escapes the landfill, and the second litter fence will reduce that volume further. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government can impose conditions of approval to ensure compliance with the ORS 215.296(1) "significant change/cost" standard that require the applicant to assume the cost or burden of performing actions on nearby farms necessary to prevent a significant change in accepted farming practices on those farms or

significant increase in costs on those farms. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government could reasonably conclude that a landfill expansion complies with the ORS 215.296(1) "significant change/cost" standard, notwithstanding testimony from an adjacent hay farmer regarding the need for weekly litter patrols year-round to prevent trash entering farm soils or destroying farm equipment, based in part on a condition of approval that requires the landfill operator to provide, pay for, or reimburse the farmer for litter patrols prior to harvest, even if the condition does not entirely eliminate the need for litter patrols at non-harvest times. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government could reasonably conclude that a landfill expansion complies with the ORS 215.296(1) "significant change/cost" standard, notwithstanding testimony that the existing intermittent falconry program simply displaces nuisance birds onto nearby farms, based on conditions of approval that require a more intensive falconry program and implementation of integrated techniques recommended by a wildlife biologist to discourage nuisance birds from remaining in the area. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.1.4 Permits – Approval Standards – Use of Conditions. A condition requiring the landfill operator to buy at market prices the entire crop of berries and cherries produced by a nearby farmer concerned with nuisance bird impacts on her crop is sufficient to reduce to insignificance the alleged adverse impacts of the landfill on the farmer's farm practices. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the authority to impose conditions that specifically applies to temporary use permits does not appear to be broad enough to allow the city to impose a condition of temporary use permit approval regarding vendors, but temporary use permit decisions qualify as Type II decisions, and the development code broadly authorizes Type II decisions to include conditions of approval, a city does not exceed its conditioning authority in imposing the Vendor condition. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a previously approved conditional use is being modified to eliminate one part of the previously approved use, and conditions of that previous approval are to be modified or eliminated, where the original condition was imposed solely to ensure the part of the conditional use that is to be eliminated is consistent with relevant approval standards, no explanation is required to eliminate such conditions of approval. However, where it is not clear whether the original condition of approval was imposed at least in part to ensure that part of the conditional use that is to be retained is consistent with one or more relevant approval standards, and an issue is raised concerning whether the proposed modification or elimination of the condition would cause the modified conditional use to violate one or more applicable approval standards, the local government is obligated to explain why the condition can be eliminated or modified without causing the modified conditional use to no longer comply with relevant approval standards. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

31.1.4 Permits – Approval Standards – Use of Conditions. LUBA will not assume a condition imposing a limit on the number of trips a proposed development will be allowed to generate until traffic signals are installed at two nearby intersection will not be effective to serve the intended purpose simply because one petitioner cannot recall ever seeing a condition like that or another petitioner currently has difficulty backing from her driveway onto one of the affected streets. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

31.1.4 Permits – Approval Standards – Use of Conditions. A city council is entitled to rely on its transportation bureau's recommendation that two intersections be signalized and the timing of an existing signal be modified to address possible transportation impacts of a proposed development of land, where no party raised any question whether the signal could modified and the two intersections signalized. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

31.1.4 Permits – Approval Standards – Use of Conditions. Failure to impose a condition of approval requiring the applicant to modify a settlement agreement with neighbors to allow a second dwelling on a rural residential property is not a basis for remand, where the petitioner fails to establish that the settlement agreement limits the number of dwellings allowed on the property. *Purtzer v. Jackson County*, 67 Or LUBA 205 (2013).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the local code allows the local government to impose conditions of approval to ensure that a proposal conforms to applicable development standards, and nothing cited by the petitioner prohibits the local government from approving an application for development subject to conditions of approval or relying on those conditions to find that the proposal, as conditioned, complies with applicable development standards, the petitioner's arguments that the city should not have imposed conditions of approval provide no basis for reversal or remand of the decision. *Von Clemm v. City of Portland*, 66 Or LUBA 379 (2012).

31.1.4 Permits – Approval Standards – Use of Conditions. In order for the local government to postpone a determination of compliance with an applicable criterion to a future proceeding, the local government must first determine, based on evidence in the record, that "compliance with the approval criterion is possible." The evidentiary showing that is required in order for the local government to determine that future compliance is "possible" is not the same evidentiary showing that will be required when a local government makes the required ultimate finding that an approval criterion is satisfied or will be satisfied with measures that are "likely and reasonably certain to succeed." *Gould v. Deschutes County*, 227 Or App 601, 612, 206 P3d 1106 (2009). *Northgreen Property LLC v. City of Eugene*, 65 Or LUBA 83 (2012).

31.1.4 Permits – Approval Standards – Use of Conditions. In establishing that a request for land use approval complies with applicable approval standards, a local government may find that the approval standard is met or find that any needed technical solutions that may be required to comply with the standard are "possible, likely and reasonably certain to succeed." *Gould v. Deschutes County*, 216 Or App 150, 161, 171 P3d 1017 (2007) (citing *Meyer v. City of Portland*, 67 Or App 274, 281-82, 678 P2d 741, *rev den*, 297 Or 82, 679 P2d 1367 (1984)). *Johnson v. City of Gladstone*, 65 Or LUBA 225 (2012).

31.1.4 Permits – Approval Standards – Use of Conditions. Although a local government may not defer a required finding of compliance with a quasi-judicial permit approval standard to a later date where there will be no hearing, a local government's decision to impose a condition of approval that will require that some action be taken in the future after hearings have concluded does not necessarily mean the local government has deferred the required finding of compliance. *Johnson v. City of Gladstone*, 65 Or LUBA 225 (2012).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a local government decision maker considering an application to extend the term of a permit fails to apply local standards that apply to modifications of conditions of approval, based on findings that those standards only apply to modifications of conditions of approval, but the term of the permit is in part imposed by a condition of approval and the decision maker fails to address that fact, LUBA will remand. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the county code requires the signature of all owners of the property, and to ensure compliance with respect to a proposed pipeline crossing multiple properties the county imposes a condition requiring that the approval becomes effective only when the utility provider supplies all required signatures, an ambiguity in the condition regarding whether all signatures of all property owners are required for the approval to become effective is not a basis to remand the decision, where it is reasonably clear from the condition and findings that the county intended that all signatures of all owners be obtained before the approval becomes effective and building permits for any part of the pipeline can be obtained. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

31.1.4 Permits – Approval Standards – Use of Conditions. A county errs in deferring a county code requirement to obtain the signatures of all property owners to a subsequent administrative proceeding that does not provide notice or opportunity for public input, in which staff is granted the discretion to determine whether a circuit court order condemning an easement or less-than-fee interest in property "obviates" the need to obtain the signature of the fee owner. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

31.1.4 Permits – Approval Standards – Use of Conditions. A county errs in deferring the requirement to obtain the signatures of all property owners to a subsequent administrative proceeding, in which staff are granted the discretion to determine whether the county signature requirement is preempted or rendered invalid under federal law. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a maximum setback shown on a preliminary plat was not required by law but rather was voluntarily agreed to by the property owner as an accommodation to the Oregon Department of Fish and Wildlife prior to its and the county's adoption of a setback requirement to protect wildlife habitat, and there is no evidence that the setback was to be measured in any particular way from the county road, a county need not require that the setback be measured in precisely the way shown on the plat. In that circumstance, the county may look at the underlying purpose for the setback and not require that the setback be

measured solely from a short segment of the partitioned property's county road frontage. *Kuhn v. Deschutes County*, 62 Or LUBA 165 (2010).

31.1.4 Permits – Approval Standards – Use of Conditions. In making a decision on a land use application, a local government is required to determine whether the application complies with all applicable land use approval criteria at the time it renders a decision on the application. A local government is not entitled to include a general condition that requires a successful applicant to come back to the county each time a land use regulation that was not considered is discovered after the original approval decision has become final. *Kersey v. Lake County*, 62 Or LUBA 239 (2010).

31.1.4 Permits – Approval Standards – Use of Conditions. Even if a local government lacks authority under its code to modify the location of a driveway allowed under a previous permit approval, and can only modify express conditions of permit approval, petitioner does not demonstrate error where the permit included an express condition of approval limiting the use to that proposed by the applicant, including the location of the driveway, and thus modifying the location is a modification of the condition of approval. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a zoning ordinance expressly prohibits a county from issuing a use permit as a precondition of commencing mining until the applicant secures a state agency approval for a reclamation plan, the local government's failure to include such a requirement in the conditions attached to its conditional use and site plan approval decision is harmless error. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

31.1.4 Permits – Approval Standards – Use of Conditions. Conditions of approval are not too vague under the Court of Appeals' reasoning in *Sisters Forest Planning Committee v. Deschutes Cty.*, 198 Or App 311, 108 P3d 1175 (2005), where the conditions of approval are not any more vague than many of the standards they were imposed to address. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a road improvement condition is imposed on a two-phase subdivision and the county subsequently approves phase I without the required road improvement and approves a partition in place of phase II without requiring compliance with the road improvement condition, the road improvement condition may not be extended to apply to a partition of one of the parcels in the partition that was approved in place of phase II of the subdivision. *MEK Properties, LLC v. Coos County*, 61 Or LUBA 360 (2010).

31.1.4 Permits – Approval Standards – Use of Conditions. Where there is substantial evidence in the record that an applicant is not precluded as a matter of law from obtaining state and federal permits, a local government does not err in finding that an applicable comprehensive plan provision that has the legal effect of requiring the applicant to secure state and federal permits is satisfied by imposing a condition of approval that the applicant secure such permits. *Citizens for Responsible Development v. City of The Dalles*, 59 Or LUBA 369 (2009).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government is not obligated under ORS 197.522 to utilize a rough sketch of a possible subdivision configuration to impose conditions to grant subdivision approval where the sketch would only permit approval of a speculative subdivision that is only potentially consistent with other subdivision approval criteria. *Konrady v. City of Eugene*, 59 Or LUBA 466 (2009).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the permission of an adjoining private landowner is necessary to provide access to proposed development, the applicant need not submit evidence that the adjoining landowner has granted permission or that it is feasible for the landowner to grant permission, as long as such permission is not precluded as a matter of law and the local government imposes conditions ensuring that permission will be obtained prior to final development approval. *Holbrook v. City of Rockaway Beach*, 58 Or LUBA 179 (2009).

31.1.4 Permits – Approval Standards – Use of Conditions. A code provision stating that permitted types of traffic impact mitigation "may include such improvements" as paving, curbing, contributions to traffic signals, etc. is not an exclusive list, and does not preclude a county from requiring an applicant to contribute money toward a future improvement project instead of requiring the applicant to actually construct the improvement. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

31.1.4 Permits – Approval Standards – Use of Conditions. Remand is necessary where a county's findings approving a personal use airport rely heavily on a proposed condition limiting operations at a personal use airport to 20 flights per month, but the county failed to impose such a condition. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

31.1.4 Permits – Approval Standards – Use of Conditions. A code provision requiring that the city shall not grant permit approval for property with an existing violation unless the violation is rectified as part of the proposed development may be satisfied by a condition of approval requiring a property line adjustment that will rectify the violation. The local government is not required to deny the permit application, require the applicant to obtain a property line adjustment, and then file a second permit application. *McConnell v. City of Grants Pass*, 55 Or LUBA 280 (2007).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a city approves a floodplain permit to construct a driveway within a floodplain, the city does not err in conditioning approval on obtaining a separate encroachment permit from the city to authorize encroachment of a portion of the driveway into a public right-of-way. Such a condition does not impermissibly "defer" any determination of compliance with the floodplain permit before the city. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

31.1.4 Permits – Approval Standards – Use of Conditions. Provided local law does not dictate a different result, local governments generally may approve a proposed development of land after providing any required notice and hearings−without finding that the proposal complies with all relevant approval criteria−so long as the local government defers the required findings to a later stage and ensures that a second opportunity for any required notice and public hearing is provided before the required findings are adopted at that later stage. *Meadow Neighborhood Assoc. v. Washington County*, 55 Or LUBA 472 (2007).

31.1.4 Permits – Approval Standards – Use of Conditions. It may not be appropriate to grant conditional approval while deferring required findings to a subsequent approval stage, even where there will be a full public right to participate in the subsequent approval stage, where the initial decision has the effect of rendering the subsequent review moot or prevents meaningful review. However, where the initial decision has no legal or preclusive effect on the subsequent review, such conditional approval provides no basis for reversal or remand. *Meadow Neighborhood Assoc. v. Washington County*, 55 Or LUBA 472 (2007).

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

31.1.4 Permits – Approval Standards – Use of Conditions. Approval of a cellular tower with the roadway that will be necessary to provide access with a condition of approval that the applicant seek and obtain an easement to construct the road is appropriate, where the record demonstrates that it is feasible for the applicant to secure the required easement. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government impermissibly defers a finding of compliance with an approval standard requiring that the proposed use will not impose an undue burden on the transportation system, where the local government makes no findings of compliance with respect to a disputed intersection, but instead imposes conditions of approval requiring the applicant to submit a traffic study to determine impacts on the intersection, and to execute a development agreement determining the applicant's contribution to improve the intersection, under a process that does not provide for a hearing or public participation. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

31.1.4 Permits – Approval Standards – Use of Conditions. The first of three options under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), is to find that "feasible solutions to identified problems exist" and impose necessary conditions to ensure compliance with approval standards. LUBA will reject a claim that a local government has implicitly exercised the first option under *Rhyne*, where there is no evidence in the record that the proposed use complies with a particular approval standard, and no findings of compliance or feasibility of compliance. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government errs in deferring a requirement for submission of a geotechnical analysis to a later stage of the proceedings that does not provide for notice or hearing. *Township 13 Homeowners Assoc. v. City of Waldport*, 53 Or LUBA 250 (2007).

31.1.4 Permits – Approval Standards – Use of Conditions. A condition of approval requiring certain actions may not be necessary, where the decision approves a site plan or similar document that proposes such actions for approval. However, that principle does not apply to

recommendations in a forest plan that was submitted into the record but was not submitted for approval and was not approved. To have binding effect, recommendations in the forest plan must be imposed as specific conditions of approval. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

31.1.4 Permits – Approval Standards – Use of Conditions. Under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), one of the options that is potentially available to a local government facing evidentiary uncertainty regarding whether a land use approval standard is met is to find that feasible solutions exist to identified problems and impose conditions if necessary to ensure that those feasible solutions are later developed and implemented. *Gillette v. Lane County*, 52 Or LUBA 1 (2006).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a local government finds that a local approval standard will be met by imposing conditions of approval that the local government itself will ultimately enforce, the record must demonstrate that it is feasible for the proposed use to satisfy that condition. However, where a condition of approval requires that an applicant secure a state agency permit, the record need only demonstrate that the state agency permit is not precluded as a matter of law. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

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

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

31.1.4 Permits – Approval Standards – Use of Conditions. Technical revisions to a tentative subdivision plan need not be decided with public participation, and a condition of tentative subdivision plan approval requiring that, prior to submittal of the final plat, county staff will "red-line" the plat and return to applicant's surveyor for corrections is not an impermissible deferral of findings to the second step of a two-step process. *Angius v. Washington County*, 50 Or LUBA 33 (2005).

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

31.1.4 Permits – Approval Standards – Use of Conditions. Failure to adopt findings addressing a comprehensive plan policy requiring provision of preferential carpool and vanpool parking for

new commercial uses is not a basis for remand, where the code leaves details of parking lot construction and striping to the city engineer at building permit review, the challenged decision requires the applicant to comply with all code parking requirements, and the petitioner offers no reason that the city engineer cannot require the applicant to provide carpool and vanpool parking as part of building permit review. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a county code requires the "development proposal" to include a survey and assessment of archaeological sites and, if indicated, a management plan, a condition requiring that a management plan be completed prior to final plat approval is not permissible where neither the code nor the condition provides an opportunity for public participation in final plat approvals. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

31.1.4 Permits – Approval Standards – Use of Conditions. In applying a standard that requires that development within 100 feet of a wetland minimize wildlife impacts, a county commits no error in finding that it is uncertain whether there are wetlands present and imposing a condition of approval that the subdivision applicant prepare a wetlands study and demonstrate that the standard is satisfied in a subsequent quasi-judicial administrative review before final plat approval. *Willhite v. Clackamas County*, 46 Or LUBA 340 (2004).

31.1.4 Permits – Approval Standards – Use of Conditions. As a general rule, local governments are not obligated to approve development that is inconsistent with applicable criteria, even if conditions of approval may be imposed that would render the proposal consistent with applicable criteria. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government's decision that it is feasible to satisfy an approval criterion that a private road can be dedicated to the public, by imposing conditions of approval, is supported by substantial evidence where: (1) the underlying easement requires a public dedication upon request; (2) the ownership of all property underlying the proposed road is demonstrated; and (3) all owners are bound by the public dedication request. *Sisters Forest Planning Comm. v. Deschutes County*, 45 Or LUBA 145 (2003).

31.1.4 Permits – Approval Standards – Use of Conditions. Under a code provision requiring a "mitigation site plan" if development results in unavoidable significant detrimental environmental impacts, it is not error for the city to consider proposed mitigation in finding that the development will not result in significant impacts, and thus avoid the requirement for a mitigation site plan, where that approach does not avoid prescribed types of mitigation, and instead simply eliminates submission of redundant information. *Bauer v. City of Portland*, 44 Or LUBA 210 (2003).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a city requires that a property owner grant an easement across its property to provide pedestrian access between a vacated street and an existing street as a condition of development approval, and determines that the easement will satisfy city requirements for connectivity, the city has established a nexus between the exaction and the city's legitimate governmental interest in ensuring adequate transportation connectivity. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

31.1.4 Permits – Approval Standards – Use of Conditions. In requiring an easement for a pedestrian walkway as a condition of development approval, a city may consider the impacts that reasonably flow from the approval granted, including the possible use of the walkway by employees of the development to access adjoining streets and by residents of neighboring properties to access the development on foot or by bicycle. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

31.1.4 Permits – Approval Standards – Use of Conditions. A city adequately quantifies the impact of a proposed development on the area's bicycle and pede strian transportation system and establishes that an exaction for a pedestrian walkway across the subject property is roughly proportional to the impact of the development where the city: (1) considers the types of uses in the vicinity and concludes that the walkway is necessary to allow access to a transit stop and other neighborhood amenities; (2) explains that persons working at or patronizing the development would be impeded from accessing a neighborhood attraction to the west of the subject property without the walkway; and (3) explains that the subject property could be developed as six individual lots, with sidewalks required for each, and the decision to combine the lots into one development has impacts on the city's transportation system that the required easement ameliorates. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

31.1.4 Permits – Approval Standards – Use of Conditions. A finding that a proposed parking layout may be relocated to expand the septic drainfield does not conflict with a condition requiring that parking shall be provided as shown in the site plan, where it is clear that the purpose of the condition is to satisfy a standard addressing the number of parking spaces, and not the location of the parking lot. *Baker v. Lane County*, 43 Or LUBA 493 (2003).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a permit approval criterion requires that certain driveway improvements be made to ensure emergency vehicle access, it is error to simply approve the permit conditioned on future construction of the required driveway improvements, where there is focused testimony during the permit evidentiary hearing that the easement the permit applicant intended to rely on would not permit the required improvements. The permit findings must address the testimony and explain why it is reasonable to assume the required improvements can be made. *Harshman v. Jackson County*, 41 Or LUBA 330 (2002).

31.1.4 Permits – Approval Standards – Use of Conditions. A reasonable person could conclude that a combination of conditions requiring that most classes begin outside the peak morning hour and prohibiting drop-offs during the peak morning hour is sufficient to ensure that drop-offs associated with a proposed high school will not impact a failing intersection during the peak morning hour. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the local government adopts a finding of current compliance and imposes conditions to ensure compliance with an approval criterion, that those conditions require additional informal review by local government staff does not mean that the local government has impermissibly "deferred" a finding of compliance with that criterion to a later stage without notice or hearing. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

31.1.4 Permits – Approval Standards – Use of Conditions. Draft transportation and parking demand plans for a proposed school are substantial evidence supporting a finding of compliance with a "safe streets" approval standard, notwithstanding that the conditions of approval require that the school submit and city staff approve *final* plans in which the city might impose additional or different terms. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

31.1.4 Permits – Approval Standards – Use of Conditions. Under a code standard that allows only *de minimis* traffic impacts on failing intersections, the county is in a position to find compliance with the standard only if it quantifies the traffic volume that is expected to pass through intersections notwithstanding conditions designed to avoid impacts and determines that such traffic volume is *de minimis*, or if it imposes conditions sufficient on their face to ensure that expected impacts will be *de minimis*. *K.B. Recycling, Inc. v. Clackamas County*, 41 Or LUBA 29 (2001).

31.1.4 Permits – Approval Standards – Use of Conditions. Conditions imposed to ensure that only *de minimis* traffic volumes from a proposed recycling facility impact nearby failing intersections during certain times are insufficient and unenforceable, where the county's decision fails to (1) define what *de minimis* traffic volumes are, (2) specify the times when the conditions apply, and (3) impose conditions or identify solutions that a reasonable person would find adequate to ensure that traffic associated with the facility uses a longer alternate route rather than the short direct route through failing intersections. *K.B. Recycling, Inc. v. Clackamas County*, 41 Or LUBA 29 (2001).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a city's approval of an adjustment to a building facade setback standard is conditioned in part on a requirement that the approved building permit reflect the same architectural amenities depicted in exhibits submitted with the adjustment application, that condition of approval is sufficient to ensure that those amenities will actually be constructed. *Lee v. City of Portland*, 40 Or LUBA 498 (2001).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a county's findings simply state that conditions are being imposed to address identified environmental impacts from a proposed aggregate extraction site that must be addressed under local approval criteria, but the conditions that are imposed have nothing to do with the cited environmental concerns, the decision must be remanded to the county. *Donnell v. Union County*, 39 Or LUBA 419 (2001).

31.1.4 Permits – Approval Standards – Use of Conditions. A decision that does not apply the statewide planning goals, a comprehensive plan provision or a land use regulation, but rather applies a condition of approval in a previously approved land use permit, does not fall within the statutory definition of a "land use decision." *Frevach Land Company v. Multnomah County*, 38 Or LUBA 729 (2000).

31.1.4 Permits – Approval Standards – Use of Conditions. A code provision that authorizes a city to condition permit approval on execution of a waiver of remonstrance is not a permit approval criterion. Where the applicant expresses opposition to executing such a waiver of remonstrance, the city may condition its approval of the permit on execution of the waiver of remonstrance, but the city may not deny the permit based on such expressions of opposition. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a local code provision allows approval of a conditional use notwithstanding significant adverse impacts on abutting properties if the proposed use is in the public interest and conditions are imposed to balance any conflicting interests, the local government's determination of what conditions are needed to mitigate conflicts entails judgment calls that are not subject to precise calculation. LUBA will affirm the local government's decision regarding such mitigating conditions if a reasonable person could conclude, based on the evidence presented, that the conditions are appropriate to balance the conflicting interests. *Rogue Valley Manor v. City of Medford*, 38 Or LUBA 266 (2000).

31.1.4 Permits – Approval Standards – Use of Conditions. Imposition of an ineffective condition as part of a comprehensive plan map amendment may result in remand where the condition is necessary to ensure compliance with a relevant approval criterion. However, such an ineffective condition does not provide a basis for reversal or remand where it is not shown that the condition is necessary to ensure compliance with plan map amendment approval criteria. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

31.1.4 Permits – Approval Standards – Use of Conditions. In applying a local provision based on the no significant change/increased cost standard, the local government is not required to perform the impossible task of proving a negative or to quantify how much imposed conditions will reduce conflicts with farm uses below a certain threshold. It need only affirmatively consider the impacts of a proposed use on farm or forest practices, and in so doing, consider whether the use will force a significant change or significantly increase the cost of those practices. *Gutoski v. Lane County*, 34 Or LUBA 219 (1998).

31.1.4 Permits – Approval Standards – Use of Conditions. When a local governing body determines that a condition imposed in connection with an earlier land use decision either has or has not been complied with, but does not base its determination on the interpretation and application of land use regulations, the determination is not a land use decision over which LUBA has jurisdiction. *Mar-Dene Corp. v. City of Woodburn*, 33 Or LUBA 245 (1997).

31.1.4 Permits – Approval Standards – Use of Conditions. A county impermissibly defers a finding that a proposed dwelling complies with applicable land use design standards when, in the absence of substantial evidence supporting a finding of compliance, the county imposes a condition that the dwelling's compliance with design standards be reviewed at a later building permit stage. *Pekarek v. Wallowa County*, 33 Or LUBA 225 (1997).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the city makes a determination that it is feasible to comply with a local code standard requiring that each lot in a proposed subdivision be buildable, it may defer addressing engineering details to a later date. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

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

31.1.4 Permits – Approval Standards – Use of Conditions. The county properly approved a conditional use permit for a golf course and recreational vehicle campground where it determined the feasibility of compliance with an applicable approval standard and imposed a condition to ensure that compliance. *Just v. Linn County*, 32 Or LUBA 325 (1997).

31.1.4 Permits – Approval Standards – Use of Conditions. A local code requirement that a solid waste disposal site must be screened from view is satisfied by a condition requiring the applicant to screen the facility itself, but not the entire property. *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76 (1996).

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

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

31.1.4 Permits – Approval Standards – Use of Conditions. In order to satisfy a local code provision that requires compliance with state agency codes, the city must find which state codes contain approval criteria, and also find that as a matter of law, the applicants are not precluded from obtaining such state agency permits. *Miller v. City of Joseph*, 31 Or LUBA 472 (1996).

31.1.4 Permits – Approval Standards – Use of Conditions. Conditioning approval on the satisfactory outcome of a separate administrative process does not preclude a finding of compliance with a zoning code standard, as long as compliance is found to be feasible and that finding is based on substantial evidence. *McArthur v. Lane County*, 31 Or LUBA 309 (1996).

31.1.4 Permits – Approval Standards – Use of Conditions. Conditions of approval requiring Tri-Met to install restrooms and drinking fountains for the westside corridor project are not "reasonable and necessary" within the meaning of Oregon Laws 1991, chapter 3, section 7(1)(b), because those improvements are not required by the final environmental impact statement, and the project can be completed and operate without the required improvements. *Tri-County Metro Trans. Dist. v. City of Beaverton*, 31 Or LUBA 214 (1996).

31.1.4 Permits – Approval Standards – Use of Conditions. Conditions of approval requiring Tri-Met to install an enhanced trackway and esplanade for the westside corridor project are not "reasonable and necessary" within the meaning of Oregon Laws 1991, chapter 3, section 7(1)(b), because the project can be completed and operate without the required improvements. *Tri-County Metro Trans. Dist. v. City of Beaverton*, 31 Or LUBA 214 (1996).

31.1.4 Permits – Approval Standards – Use of Conditions. If a city relies on the preservation of open space to make a finding that there will be adequate buffering between commercial and

residential uses, the city must condition approval on the designation of a specifically described parcel as open space. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. Whether or not a local government has authority to design and construct a road owned by another jurisdiction has no bearing on whether the local government can condition development approval upon a finding that the road be able to accommodate a proposed development. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. A condition imposed on a mineral and aggregate operation does not violate ORS 215.253(1) simply because it has the potential of impacting some farm uses. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. Nothing in ORS chapter 215 requires a conditional use process before a county can impose on the application of a mineral and aggregate overlay zone conditions requiring minor road improvements of the type listed in ORS 215.283(1)(L), which "may be established" in any EFU-zoned area. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government decision that states it "reflects the historic use of" the subject property, and imposes certain limitations on the operation of a nonconforming use on that property, is not the equivalent of a determination regarding the nature and extent of the use existing on the property when restrictive zoning was first applied. *Suydam v. Deschutes County*, 29 Or LUBA 273 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government may properly grant permit approval based on either (1) a finding that an applicable approval standard is satisfied, or (2) a finding that it is feasible to satisfy an applicable approval standard and the imposition of conditions necessary to ensure that the standard will be satisfied. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a local government relies on particular features to assure compliance of a proposed use with approval standards, it must assure there is an adequate reason to assume such features actually will be part of the use. More than testimony by the applicant expressing willingness to provide such features is required. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. When the evidentiary support for imposition of a condition of approval is challenged, LUBA must determine whether the evidence in the record would lead a reasonable person to conclude there is a need for the condition to further a relevant planning purpose. *Carter v. Umatilla County*, 29 Or LUBA 181 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the local government wishes to defer a determination of compliance with an applicable approval standard it must ensure that the later approval process provides any statutorily or locally required notice and an opportunity for input. *Hilderbrand v. Marion County*, 28 Or LUBA 703 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. Where conditions of a prior nonforest dwelling approval do not require a determination of compliance with any discretionary land use standard, the fact that a building permit may only be issued after it is determined that such conditions are satisfied provides no basis for LUBA's jurisdiction. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. There is no generally applicable legal standard requiring a local government to have a "substantial or reasonable basis" for declining to impose a condition proposed by a party to a local government land use proceeding. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the challenged decision does not determine the proposal complies with mandatory approval standards applicable to the proposal or that compliance with such standards is feasible, the local government may not defer a determination of compliance with such standards to the city engineer, to be made in a process not involving notice or hearing. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a decision to eliminate conditions of approval requires local review under code zone change standards, the decision is a land use decision, and not a limited land use decision. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. Limitations on a local government's authority over development applications must be specifically expressed in the local code. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

31.1.4 Permits – Approval Standards – Use of Conditions. In order to defer determinations of compliance with mandatory approval standards to a later stage where no public hearing is contemplated, the local government must first determine that compliance with those standards is possible. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. In addressing a code requirement concerning visual impacts, a local government is not required to establish that every condition imposed will mitigate all visual impacts. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Findings need not be perfect, and conditions may be imposed to assure compliance with approval standards. However, LUBA must be able to determine from the findings, conditions and evidence in the record that the relevant approval standards are met. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. If a condition is *necessary* for consistency with a final order approving a light rail transit (LRT) facility, under Oregon Laws 1991, chapter 3, section 7(1)(b), a local government is *required* to impose such a condition in approving a local permit for the LRT facility, and the limitations in the second sentence of that section do not apply. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Under Oregon Laws 1991, chapter 3, section 7(1)(b), a "necessary" condition is a condition required for a light rail transit project to meet applicable permit criteria in a local government's comprehensive plan or code. However, such a condition cannot be imposed if by itself, or together with other conditions, it would prevent implementation of the approved light rail transit project. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. A condition of approval that either a portable or flush toilet be provided, depending on what DEQ rules require, is sufficient to assure compliance with a code requirement that the site be served by adequate sewerage facilities, where petitioner does not contend that a flush toilet cannot be approved under DEQ rules, but rather argues only that the existing portable toilet violates applicable rules. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. A code section authorizing conditions "requiring design features which minimize environmental impacts * * *" is sufficient authority to impose a condition that an identified wetland be crossed by a bridge rather than a road placed on fill. Where the record includes testimony expressing concern about placing fill in the wetland, the record is sufficient to show such a condition furthers a valid planning purpose. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. ORS 197.763(1) does not require petitioners to raise with specificity, prior to the close of the evidentiary hearing, issues regarding aspects of a condition of approval that were not imposed until the governing body adopted the local government's final decision. *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Absent other limitations, if a local code gives local decision makers authority to impose conditions of approval that protect the public from adverse effects associated with a proposed use, this authority to impose conditions is not limited to conditions required to establish compliance with a particular permit approval standard. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Code provisions that allow a local government to impose conditions of approval "reasonably calculated to fulfill public needs," and to require right-of-way dedication and road improvements, authorize the local government to require modification of a proposed subdivision plat to eliminate a one-foot "spite strip" separating a new street serving the subdivision from the adjoining property. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. A condition of approval requiring elimination of a one-foot "spite strip" separating a new street serving a subdivision from the adjoining property is reasonably related to the impacts of the proposed subdivision and, therefore, does not effect an unconstitutional "taking" under either the United States or Oregon Constitution. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a proposed subdivision will add traffic to an abutting arterial street, although direct access to the subdivision will be provided by local streets, a local government approval condition requiring that the developer construct sidewalks, storm sewers and other frontage improvements along the portion of the arterial abutting the subdivision is reasonably related to the impacts of the proposed subdivision and is not an unconstitutional taking. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a local government relies on conditions to ensure that use of an approved parking structure is limited to "short term parking," as required by its code, any interpretations of code provisions necessary to support its determination that the code limitation to "short term parking" is satisfied must be set out in the challenged decision or supporting findings, not in the local government's brief. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Although a local government may impose conditions and rely on such conditions to determine a development application meets applicable approval standards, there is no general requirement that a local government *must* apply conditions to modify a proposal so that applicable standards are met, rather than deny the application. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Elevation plans submitted by an applicant to establish compliance with code "physical compatibility" requirements become part of the applicant's conditional use proposal, and it is not necessary for the local government to impose compliance with these plans as a condition of approval in order to rely on them in approving the proposed development. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. That a condition of approval contains an ambiguous term does not, of itself, establish the condition is unconstitutionally vague. Rather, some ambiguity is tolerated where the ambiguous language of a condition is circumscribed by reference to specific, non-vague regulations. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. The issue in determining whether a condition of approval is unconstitutionally vague is whether a reasonable applicant could understand what must be done to comply with the condition. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Read in the context of a local code scheme governing LIDs which includes a specific remonstrance process, a condition of permit approval requiring that petitioner not file a remonstrance against the formation of an LID means only that a remonstrance under the local code may not be filed, but does not prohibit the presentation of oral objections or the filing of any other written objection to a proposed LID. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Where petitioners do not challenge findings that a condition of approval is reasonably related to mitigation of impacts associated with

the particular development proposal, petitioners fail to establish the challenged action is overbroad. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. A condition of approval limiting petitioners' rights to remonstrate against LIDs does not impermissibly infringe on petitioners' First Amendment rights to freedom of expression where the condition does not require the local decision maker to disregard petitioners' political views about LIDs and leaves petitioners free to object to the formation of a proposed LID in a variety of ways other than by remonstrance. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. A condition of permit approval that prohibits remonstrance against the formation of an LID, but does not proscribe other kinds of objections to an LID, only limits the manner in which expression may be exercised and does not directly and absolutely restrain the exercise of free expression in violation of Article I, section 8, of the Oregon Constitution. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. A condition of permit approval prohibiting remonstrance against the formation of an LID does not violate ORS 260.665 (protecting voting rights) where petitioners are neither prevented from voting nor required to vote in any particular manner. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a local government determined, in a proceeding satisfying state and local requirements for notice and hearing, that the proposed use will comply with applicable access standards, based on conditions requiring subsequent preparation and approval of a plan for access improvements necessary to solve an identified sight distance problem, compliance with such approval conditions may be determined by the local government technical staff, without notice or hearing. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a local government relies on particular features of a proposed use to assure compliance with approval standards, it must assure there is an adequate reason to assume such features actually will be part of the proposal. *Collins v. Klamath County*, 26 Or LUBA 434 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a local government denies a request to remove a condition placed on a previous land use approval, based on its determination that *neither* of two sets of circumstances giving rise to the condition has changed, and petitioner challenges the local government's determination concerning only *one* set of circumstances, LUBA will affirm the local government's decision. *Livingston v. Jackson County*, 26 Or LUBA 395 (1994).

31.1.4 Permits – Approval Standards – Use of Conditions. ORS 215.130(2) allows cities to adopt contingent plan and zoning designations for property to be annexed in the future, but it does not allow cities to grant contingent permits for property to be annexed in the future. *Recht v. City of Newport*, 26 Or LUBA 316 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. Where LUBA determines a condition of approval was erroneously imposed, but rejects all other assignments of error, a remand rather than reversal nevertheless is required, if LUBA is unable to determine whether the local government relied on the erroneous condition of approval in concluding that all applicable approval criteria are met. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. Under ORS 197.835(7)(a)(D) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), LUBA must defer to a local government's interpretation of "applicable law" adopted by the local government, regardless of whether that applicable law is a zoning ordinance or conditions of approval imposed by a prior quasi-judicial order. *Perry v. Yamhill County*, 26 Or LUBA 73 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a local government order granting subdivision preliminary plat approval defers a determination of compliance with a particular approval standard, and also allows final plat approval to occur in phases, the local government may interpret that order as allowing it to grant final plat approval for a phase, so long as each lot in the phase for which final plat approval is sought has been found to comply with the deferred standard. *Perry v. Yamhill County*, 26 Or LUBA 73 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the applicant submits a drainage plan for a proposed subdivision to a local government, and the local government relies on that drainage plan in determining compliance with a local drainage standard in its order granting subdivision approval, the drainage plan is effectively made part of the approved subdivision plat. In these circumstances, it is not necessary for the local government to adopt a separate condition of approval requiring compliance with the drainage plan. *Perry v. Yamhill County*, 26 Or LUBA 73 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. That an approved wetland mitigation plan includes property that was not within the development application, does not mean that a local government may not rely upon the wetland mitigation plan as a condition of approval of the development application. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. That a challenged decision granting subdivision approval fails to demonstrate feasibility of compliance with an approval condition requiring that a subdivision street provide "no worse" access to an adjoining property than is currently provided to that adjoining property provides no basis for reversal or remand, where assuring "no worse" access is not required by any applicable approval standard. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. A condition of partition approval requiring consolidation of existing driveways into a single driveway to address comprehensive plan and local code policies concerning traffic safety is justified, even though the property is developed and new development is not proposed as part of the partition request, where the property could be developed more intensively in the future. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. A condition of partition approval requiring that three existing driveways presently serving property to be partitioned be consolidated into a single driveway does not "take" a cognizable property interest, within the meaning of the Fifth Amendment to the U.S. Constitution or Article I, section 18, of the Oregon Constitution. Such a condition simply requires that a property owner exercise the property right of access differently. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. Where there is a reasonable relationship between the development potential of a parcel to be divided and the impacts reasonably attributable to the divided parcel on the one hand, and the city's need to respond to legitimate traffic concerns on the other, and it would be more difficult to address such concerns when there are three parcels rather than a single parcel, notwithstanding the lack of current plans to develop the property further, a condition requiring consolidation of existing driveways is appropriate. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. A condition of approval requiring that not more than 1000 square feet of an existing structure be partitioned for use in conjunction with a home occupation is sufficient to assure compliance with a local code provision requiring that home occupations occupy no more than 1000 square feet of an accessory building. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. A permit approval condition that amendments to the approved master plan must be approved by the planning department is not inconsistent with, and does not eliminate, the right established by the local code to appeal a decision by the planning director on such an administrative action to the planning commission. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. Conditions may be imposed on a proposed activity where the conditions are authorized by the local code, are reasonably related to the proposed use and reasonably further a legitimate planning purpose. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a condition of approval imposing a fine for a violating the terms of a conditional use permit, regardless of the amount of actual damage sustained due to the violation, is not specifically authorized by the local code, such condition is beyond the local government's authority to impose. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. While a local government is free to impose conditions to enable it to approve a development application, it is not required to do so and may, instead, chose to deny development that, as proposed, does not satisfy relevant standards. *Decuman v. Clackamas County*, 25 Or LUBA 152 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. Under ORS 197.828(2)(a), when the evidentiary support for a condition of approval is challenged, LUBA must determine whether the evidence in the record could lead a reasonable person to conclude that considering the impacts of

the proposed development, there is a need for the condition to further a legitimate planning purpose. *Sherwood Baptist Church v. City of Sherwood*, 24 Or LUBA 502 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. Both the Oregon and U.S. Constitutions require that there be a "reasonable relationship" between a challenged condition of approval and the impacts of, or needs generated by, the proposed development. *Sherwood Baptist Church v. City of Sherwood*, 24 Or LUBA 502 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. The U.S. Constitution imposes a requirement that there be an "essential nexus" between the legitimate public purpose for which a development application could be denied, and the condition imposed. *Sherwood Baptist Church v. City of Sherwood*, 24 Or LUBA 502 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. It is a local government's final written decision that is subject to LUBA's review. That conditions imposed in the local government's final written decision were not discussed in the decision maker's deliberations does not provide a basis for reversal or remand. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government may, by imposing conditions or otherwise, defer a final determination concerning compliance with an applicable permit approval standard to a later stage. However, if the decision to be made at the later stage is itself discretionary, the approval process for the later stage must provide the statutorily required notice and opportunity for hearing, even though the code may not require such notice and hearing. *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a local government finds that approval criteria will be met if certain conditions are imposed, and those conditions are requirements to obtain state agency permits, a decision approving the subject application simply requires that there be substantial evidence in the record that the applicant is not precluded from obtaining such state agency permits as a matter of law. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

31.1.4 Permits – Approval Standards – Use of Conditions. Absent code provisions to the contrary, that local government decision makers retain authority to impose conditions of approval, does not require that they develop conditions to limit or modify an application to achieve compliance with applicable approval criteria. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

31.1.4 Permits – Approval Standards – Use of Conditions. When conducting a multistage permit approval process, if a local government finds compliance, or feasibility of compliance, with all approval criteria during the first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure those criteria are met and to defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a later stage. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the local code states "nothing construed herein shall be deemed to require the [local government] to grant a Conditional Use Permit," a local government may deny a conditional use permit if the development, as proposed, does not satisfy applicable approval standards. In such instance, the local government is not *required* to impose conditions on the proposed development to attain compliance with the approval standards. *Horizon Construction, Inc. v. City of Newberg*, 23 Or LUBA 159 (1992).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the plan map designation for property is changed in a manner that allows residential development which could greatly exceed the capacity of schools serving the property, the plan map amendment must be conditioned in some way to limit the impact on schools or to require that such limits be imposed prior to development. Nonbinding promises by the applicant are not sufficient. *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992).

31.1.4 Permits – Approval Standards – Use of Conditions. A permit condition stating all log trucks must "depart the [subject] property as near to 4:00 a.m. as possible" is correctly interpreted to require that all log trucks must leave the subject property at 4:00 a.m., unless it is not possible to do so. Such a condition is violated where log trucks departed from the property on several occasions at 6:30 a.m. for the convenience of the applicant's logging operation. *Marson v. Clackamas County*, 22 Or LUBA 497 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. Findings that a code standard requiring that development have a minimal adverse impact on the livability of adjoining property are adequate with regard to impact on views from adjoining properties where the findings explain that a sight obscuring fence will block the only view of the development from a window of a house on the adjoining property and a condition of approval is imposed requiring construction of such a sight obscuring fence. *Goodrich v. Jackson County*, 22 Or LUBA 434 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. A code provision that developers "may be required to participate financially in improving [off-site] roadways sufficient to accommodate traffic generated by the development" applies to both improvement of existing off-site roads and construction of new off-site roads, and is directly applicable to the local government's imposition of a condition of preliminary subdivision plat approval requiring the subdivider to pay for construction of an off-site road. *J.C. Reeves Corp. v. Clackamas County*, 22 Or LUBA 360 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. When the evidentiary support for imposition of a condition of approval is challenged, what LUBA must determine is whether the evidence in the record would lead a reasonable person to conclude that there is a need for the condition to further a relevant planning purpose. *Wastewood Recyclers v. Clackamas County*, 22 Or LUBA 258 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. If the challenged decision does not explain the purpose of a condition, it is more difficult for LUBA to conclude imposition of the condition is supported by substantial evidence in the record. *Wastewood Recyclers v. Clackamas County*, 22 Or LUBA 258 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. Where an applicant seeks approval for development outside of a "stream corridor area," but has already placed related development within the "stream corridor area" on the same property without obtaining necessary local permits, the local government has authority to impose conditions on approval of the applicant's proposed development requiring that the unauthorized development be removed or that necessary local permits be obtained for the unauthorized development. *Tylka v. Clackamas County*, 22 Or LUBA 166 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a local code provides "[t]he Review Authority may impose conditions on any Type II or III development approval," and the proposed access requires Type III development approval procedures, the local government may impose conditions on approval of the proposed access. *Cummins v. Washington County*, 22 Or LUBA 129 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. While there is no general requirement that a local government adopt findings justifying its decision to impose conditions of approval, where petitioner raises an issue below concerning whether a local government can properly impose conditions of approval, the local government must address that issue in its findings. *Cummins v. Washington County*, 22 Or LUBA 129 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. Where applicable plan and land use regulations allow a local government to impose conditions in granting land use approval, conditions of approval may be imposed to achieve legitimate planning purposes. *Olson Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. Although detailed findings are not always required to justify conditions of land use approval, the evidentiary record must be sufficient to demonstrate a connection between the condition imposed and the planning purpose served by the condition. *Olson Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the evidentiary record demonstrates that the proposed expansion of a medical clinic is needed to provide adequate facilities for existing patients and staff and would not result in additional patients or staff, the local government improperly conditioned approval of required plan and zoning map amendments on the clinic's agreement to relinquish a previously granted approval for parking lot egress onto an adjoining street. *Olson Memorial Clinic v. Clackamas County*, 21 Or LUBA 418 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. LUBA will not conclude that a hearings officer, in reviewing a request for conditional use approval, improperly relied on prior land use violations by the applicant to refuse to consider approval with conditions, unless such refusal is clearly stated in the decision. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. Where compliance with applicable discretionary permit approval standards will require detailed plans or studies of the type typically required at the time a building permit is requested, it may be possible for the local government to

find at the time of discretionary permit approval that it is feasible to comply with the standards and to defer to a later stage selection of the particular technical solution to achieve the standard. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government may impose conditions and rely on those conditions in determining that an application for discretionary permit approval meets applicable approval standards. However, there is no general requirement that a local government *must* apply conditions to modify a proposal so that applicable standards are met. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. The requirement that conditions imposed to ensure that a proposed nonfarm use will not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands "be clear and objective," does not necessarily require a local government to adopt *findings* explaining why conditions imposed for this purpose are clear and objective. *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. Where a code requires that conditions imposed be "clear and objective," but does not define "clear and objective," such conditions are "clear and objective" if their application does not require the exercise of "any significant factual or legal judgment." *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51 (1991).

31.1.4 Permits – Approval Standards – Use of Conditions. Conditions of approval must have some reasonable connection with the use proposed. A condition requiring a demonstration that adequate on-site vehicular circulation will be possible has such a reasonable connection to a proposed expansion of an existing use that may make internal vehicular circulation more difficult or impossible in view of planned highway intersection improvements. *Wheeler v. Marion County*, 20 Or LUBA 379 (1990).

31.1.4 Permits – Approval Standards – Use of Conditions. Where the local code establishes procedures and notice requirements for hearings on administrative actions, but does not require that determinations of compliance with conditions imposed on administrative action approvals themselves be processed as administrative actions, proceedings to determine compliance with such conditions are not required to follow the hearing and notice procedures for administrative actions. *Von Lubken v. Hood River County*, 20 Or LUBA 208 (1990).

31.1.4 Permits – Approval Standards – Use of Conditions. Where LUBA determined in a previous appeal that a local government properly found compliance with applicable code standards and, through conditions, deferred responsibility for developing particular technical solutions to the planning commission, and LUBA's decision was not appealed, the local government is entitled to determine compliance with the conditions of approval administratively, without notice and public hearing. *Von Lubken v. Hood River County*, 20 Or LUBA 208 (1990).

31.1.4 Permits – Approval Standards – Use of Conditions. Where city regulations governing applications for conditional use approval do not make all contiguous property owned by an

applicant subject to the conditional use review, and an applicant files a conditional use application for only a portion of his property, the city does not have authority to impose conditions on contiguous property owned by the applicant which is not the subject of the application. *Goodman v. City of Portland*, 19 Or LUBA 289 (1990).

31.1.4 Permits – Approval Standards – Use of Conditions. Where no development is presently proposed, a local government does not improperly defer required determinations of compliance with site plan review criteria by requiring, in a condition of approval, that future development must comply with such criteria. *Headley v. Jackson County*, 19 Or LUBA 109 (1990).

31.1.4 Permits – Approval Standards – Use of Conditions. A city may rely on ORS 92.090(3), which states that a subdivision or partition may not be approved unless streets are "dedicated without any reservation," to require immediate, rather than future, dedication of required rights-of-way. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government may demonstrate compliance of a proposed use with an applicable standard by (1) determining that the proposal *can* comply with the standard, if certain conditions are imposed; and (2) imposing those conditions to ensure compliance. *Eckis v. Linn County*, 19 Or LUBA 15 (1990).

31.1.4 Permits – Approval Standards – Use of Conditions. The requirement to comply with ordinance criteria applicable to the resolution/conceptual site plan stage of the destination resort review process cannot be avoided by deferring those determinations to the preliminary development plan stage of the review process, through restatement of the first stage approval criteria as conditions of approval for the second stage. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

31.1.4 Permits – Approval Standards – Use of Conditions. A local government may demonstrate compliance with an approval criterion by (1) determining that the proposal *can* comply with the criterion, if certain conditions are imposed; and (2) relying on the imposition of those conditions to ensure compliance. However, a local government may not *defer* a determination of compliance with a mandatory approval criterion based on the expectation that more detailed information may be developed in the future to demonstrate compliance with the standard. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

31.1.5 Permits – Approval Standards – Statutory Requirement for. Establishing that proposed "agri-tourism or other commercial events or activities" are "necessary to support the commercial farm uses or the commercial agricultural enterprises in the area" for purposes of ORS 215.283(4)(d)(A) is a relatively high hurdle: the county must find that the events are essential in order to maintain the existence of either the commercial farm uses on the subject property or the commercial agricultural enterprises in the area. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A demonstration that proposed "agri-tourism or other commercial events or activities" are "necessary to support" an approved commercial activity in conjunction with farm use under ORS 215.283(2)(a), such as a brewery, is not sufficient to demonstrate that the events are "necessary to support" an "existing commercial farm use of the tract," such as the growing of filberts, for purposes of ORS 215.283(4)(d)(A), even where revenue from the brewery "supplements" revenue from the growing of filberts. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

31.1.5 Permits – Approval Standards – Statutory Requirements for. Where state statute requires that a local government provide either a public hearing before ruling on an application for a statutory permit or an opportunity for an appeal that includes a *de novo* public hearing, although the local government may require a notice of appeal that sets forth with reasonable particularity the issues that the appealing party will raise at the hearing, the local government may not, consistent with the statute, (1) make that notice requirement a jurisdictional bar to obtaining the hearing, (2) limit the issues specified to five types of issues, or (3) approve or reject requests for hearings based on a qualitative assessment of how well the appellant has explained the issues specified. *Landwatch Lane County v. Lane County*, 79 Or LUBA 96 (2019).

31.1.5 Permits – Approval Standards – Statutory Requirements for. A county may not allow unlimited, successive one-year extensions of permits for residential development on resource land where state statute and regulation provide that such permits "shall be valid for four years" and that "[a]n extension" thereof "shall be valid for two years," where nothing in the legislative history suggests an intent to allow more than one extension. *Landwatch Lane County v. Lane County*, 79 Or LUBA 96 (2019).

31.1.5 Permits – Approval Standards – Statutory Requirements for. A county decision determining vested rights involves the "discretionary approval of a proposed development of land," and is therefore a "permit" decision under ORS 215.402(4). Such decisions must be processed under procedures consistent with ORS 215.416, regardless of whether a party's request for the "permit" decision is accompanied by requests for non-"permit" decisions, whether the request is labeled or easily identifiable as an "application" for a "permit," or whether the party affirmatively requests the required procedures. *Gillette v. Lincon County*, 79 Or LUBA 549 (2019).

31.1.5 Permits – Approval Standards – Statutory Requirement for. LUBA will remand a decision by the county planning department approving conversion of a portion of an existing church into a "parsonage," a term which is undefined by state or local law, but which includes a kitchen, bedroom, and bathroom for the use by the church's pastor, where the county's decision fails to identify any land use standards that apply to the proposed use, and did not provide notice

or an opportunity for a hearing or otherwise follow the procedures in ORS 215.416(11) without apparent explanation, and LUBA determines that the application for the proposed parsonage is an application for a "permit" as defined in ORS 215.402(4). *Wetherell v. Douglas County*, 78 Or LUBA 33 (2018).

31.1.5 Permits – Approval Standards – Statutory Requirement for. ORS 197.312(5) is not limited to only applications for a statutory permit because Senate Bill 1051 does not cross reference or otherwise cite the definition of "permit" in ORS 227.160(2), and the ORS 227.160(2) definition of "permit" limits its use "[a]s used in ORS 227.160 to 227.186." *Kamps-Hughes v. City of Eugene*, 78 Or LUBA 457 (2018).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A local code provision that prohibits grading or development on portions of a site that exceed 20 percent is "clear enough for an applicant to know what [it] must show during the application process." *Lee v. City of Portland*, 57 Or App 798, 802, 646 P2d 662 (1982). Nothing in the language of ORS 227.173(1) requires that a *method* of measuring slope must be included in the provision in order to determine whether the 20 percent standard is met. *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51 (2013).

31.1.5 Permits – Approval Standards – Statutory Requirement for. Under ORS 215.416(3) and (11), when rendering a statutory land use permit decision, a county must provide a prior public hearing on the application, or provide notice and an opportunity for a de novo appeal after the statutory permit decision is rendered without a public hearing. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.5 Permits – Approval Standards – Statutory Requirement for. Where there is uncertainty about whether a local appeal is available but the local government advises a petitioner that it will provide a local appeal, that petitioner may safely exhaust that local appeal without fear of being advised later that the deadline for appealing the decision directly to LUBA expired while the petitioner exhausted the appeal that the local government provided but later determined should not have been provided. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A decision that extends a statutory permit may itself be a statutory permit if the extension decision is governed by standards that require the exercise of discretion. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A decision that extends a statutory permit may itself be a statutory permit if the extension is a request for "approval of a proposed development of land." *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.5 Permits – Approval Standards – Statutory Requirement for. Where a statutory permit by local law will become void if not acted on within a stated deadline, a decision to extend the permit for an additional term under discretionary criteria is itself a statutory permit. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.5 Permits – Approval Standards – Statutory Requirement for. Where local law does not require adherence to the notice and hearing or notice and local appeal procedures that apply to statutory permits, a local government does not err by adhering to those statutory notice and hearing or notice and local appeal procedures when it discovers that the decision it is being asked to adopt may qualify as a statutory permit. *Bard v. Lane County*, 63 Or LUBA 1 (2011).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A requirement that mining "not be allowed closer than one-quarter mile from any noise or dust sensitive use" is properly interpreted to impose a minimum setback, leaving the applicant to select the mining site so long as the site selected is at least one-quarter mile from any noise or dust sensitive use. Any attempt by the local government to interpret the standard to allow it unbridled discretion to enlarge the one-quarter-mile setback would likely run afoul of the ORS 215.416(8)(a) requirement that permit applications be approved or denied based on "standards." *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

31.1.5 Permits – Approval Standards – Statutory Requirement for. ORS 215.416(8)(a) simply requires that permit approval standards be included in a county's land use regulations. The ORS 215.416(8)(b) requirement that permit standards that apply to needed housing be "clear and objective" does not apply to permits for other kinds of development. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

31.1.5 Permits – Approval Standards – Statutory Requirement for. While ORS 227.178(3), as interpreted in *Holland v. City of Cannon Beach*, 154 Or App 450, 926 P2d 701 (1998), prohibits a local government from changing its position with respect to the applicability of approval standards during the proceedings on a permit application, neither the statute nor *Holland* prohibit a local government from reinterpreting the meaning of indisputably applicable approval standards. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

31.1.5 Permits – Approval Standards – Statutory Requirement for. The ORS 227.178(3) prohibition on "shifting the goal posts" and the prohibition described in *Alexanderson v. Clackamas County*, 126 Or App 549, 869 P2d 873 (1994), on reinterpretations of local provisions that are a "product of a design to act arbitrarily and inconsistently from case to case" are distinct and independent prohibitions, although both may be invoked in particular circumstances. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A local code standard that prohibits development in wetlands does not violate the ORS 197.307(6) requirement for "clear and objective" approval standards for needed housing. Where an applicant seeks a variance to that local code prohibition against development in wetlands, ORS 197.307(6) does not prohibit application of subjective variance approval standards. *Linstromberg v. City of Veneta*, 47 Or LUBA 99 (2004).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A code criterion requiring that a proposal be shown to be compatible with the surrounding area and to not have more than a minimal impact on the livability and appropriate development of the surrounding area is not unconstitutionally vague and does not violate the ORS 227.173(1) requirement that permit

approval criteria be included in the city's land use regulations. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A city's decision violates ORS 227.173(1) where the city relies on "factors" or "considerations" that are unconnected to approval standards established in its land use regulations to deny a permit application. *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000).

31.1.5 Permits – Approval Standards – Statutory Requirement for. To establish a challenge under ORS 227.173(1) or ORS 215.416(8), a petitioner must demonstrate that a standard is so vague that an applicant is unable to determine whether and how approval may be granted. *McKenney v. Deschutes County*, 37 Or LUBA 685 (2000).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A 3,500-square-foot memorial garden including nine-foot-high granite walls, landscaping and walkways causes a "material change in the use or appearance of land" and is thus "development" for purposes of determining whether approval of the proposed memorial is a permit as defined at ORS 227.160(2). *Carlsen v. City of Portland*, 36 Or LUBA 614 (1999).

31.1.5 Permits – Approval Standards – Statutory Requirement for. Cities may not adopt "stand alone" sets of discretionary approval criteria and apply those criteria to approve the development of land without regard to the requirements of ORS chapter 227, merely because those criteria are not codified in the city's development ordinance. *Carlsen v. City of Portland*, 36 Or LUBA 614 (1999).

31.1.5 Permits – Approval Standards – Statutory Requirement for. City approval of a memorial garden pursuant to discretionary criteria embodied in a "siting policy" constitutes the discretionary approval of proposed development of land under city legislation or regulation and is thus a "permit" as defined at ORS 227.160(2), notwithstanding that the "siting policy" is not codified within the city's development ordinance. *Carlsen v. City of Portland*, 36 Or LUBA 614 (1999).

31.1.5 Permits – Approval Standards – Statutory Requirement for. The failure of a city to codify a particular land use regulation within its zoning ordinance does not mean that the city has failed to "set forth" that regulation in the city's "development ordinance" as required by ORS 227.173(1). For purposes of ORS 227.173(1), the scope of the city's development ordinance is not a function of how the city's land use legislation is codified. *Carlsen v. City of Portland*, 36 Or LUBA 614 (1999).

31.1.5 Permits – Approval Standards – Statutory Requirement for. An application for an extension of a conditional use permit involves the "discretionary approval of a proposed development of land" and is subject to the requirement at ORS 215.416 that approval or denial of a permit be subject to standards and criteria, where the local code contains no standards governing permit extensions and thus grants unfettered discretion to the county to approve or deny the extension. *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A local code conditional use permit standard requiring that "the characteristics of the proposed use will have minimal adverse impact on the livability, value, or appropriate development of abutting properties and the surrounding area" is not impermissibly vague. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A zoning code requirement that certain comprehensive plan policies be complied with unless the applicant demonstrates there is "good cause" not to, is not impermissibly vague. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A code requirement that a parking structure be "consistent with the City's short term parking strategy" does not, in itself, satisfy the requirement of ORS 227.173(1) that permit standards and criteria be set forth in development ordinances, because it explains nothing about the basis on which such an application will be approved or denied. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

31.1.5 Permits – Approval Standards – Statutory Requirement for. Where consistency with the city's "short term parking strategy" is a code requirement, a city cannot determine its "short term parking strategy" is something that *underlies* various provisions of its plan and code and cannot announce that strategy for the first time in a decision on a permit application. This violates the requirement of ORS 227.173(1) that permit standards and criteria *themselves* must be set out in the city's development ordinances. *BCT Partnership v. City of Portland*, 27 Or LUBA 278 (1994).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A local code provision that imposes "compatibility" as a permit approval criterion adequately informs interested parties of the basis on which an application will be approved or denied and, therefore, complies with ORS 215.416(8). *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A city code provision (1) requiring that certain "development * * * shall provide open space * * * approved by the city," (2) establishing a prioritized list of types of open space, and (3) providing an option to provide fees in lieu of open space, but failing to provide standards for determining whether to require open space or fees in lieu, violates the requirement of ORS 227.173(1) that permit decisions be governed by standards in the city's code. *Oswego Properties, Inc. v. City of Lake Oswego*, 21 Or LUBA 137 (1991).

31.1.5 Permits – Approval Standards – Statutory Requirement for. City code provisions defining open space broadly, listing "distinctive natural areas" as first priority open space and requiring that development preserve areas for open space are properly interpreted as violated by a proposal to locate a building foundation immediately next to a specimen tree designated as a "distinctive natural area." Under such provisions, a "distinctive natural area" is not limited to the tree itself, and the code provides sufficient standards to guide the city's decision making under ORS 227.173(1). *Oswego Properties, Inc. v. City of Lake Oswego*, 21 Or LUBA 137 (1991).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A city code provision (1) requiring that certain "development * * * shall provide open space * * * approved by the city," and (2) establishing a prioritized list of types of open space, concluding with "other" open space, does not violate the requirement of ORS 227.173(1) that permit decisions be governed by standards in the city's code. *Oswego Properties, Inc. v. City of Lake Oswego*, 21 Or LUBA 137 (1991).

31.1.5 Permits – Approval Standards – Statutory Requirement for. A petitioner does not waive its right under ORS 215.428(3) to have its application reviewed under the criteria in effect when the application was first submitted, where petitioner's statements in the proceedings to amend the criteria do not show petitioner was aware of such rights and petitioner did assert its rights before the planning commission and board of commissioners. *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 651 (1990).

31.1.5 Permits – Approval Standards – Statutory Requirement for. The analysis required to determine whether a local government decision concerning the development of land involves discretion, and is therefore a "permit" under ORS 215.402(4), is similar to the analysis required to determine whether the ministerial exception to the definition of land use decision stated in ORS 197.015(10)(b) applies. *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 651 (1990).

31.1.5 Permits – Approval Standards – Statutory Requirement for. Where the applicable land use regulations provide no definition of "private school," and other applicable approval standards require that buildings accessory to the school "be essential to the operation of a school," an application for a private school and accessory buildings requires the exercise of discretion and, therefore, is an application for a "permit," as that term is defined at ORS 215.402(4). *Kirpal Light Satsang v. Douglas County*, 18 Or LUBA 651 (1990).

31.2.1 Permits – Types – Building. To some extent, the ministerial decision exclusion from LUBA's jurisdiction in ORS 197.015(10)(b)(A) is separate and distinct from the building permit exclusion from LUBA's jurisdiction in ORS 197.015(10)(b)(B). *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

31.2.1 Permits – Types – Building. The statutory distinction between ORS 197.015(10)(b)(B) and ORS 197.015(10)(b)(A) reflects a recognition that building permits are substantively different from more generic land use decisions and that the legislature intended that LUBA's jurisdiction over building permit decisions would be (1) limited and (2) evaluated under a different standard. *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

31.2.1 Permits – Types – Building. Where a city approves a building permit for a temporary mass shelter under the city's Housing Emergency Ordinance because it satisfies the development standards in the city's Central Employment (EX) zone, where the petitioner argues not that the EX zone development standards that the city applied in approving the building permit are not "clear and objective" but, rather, that the city was required but failed to apply other land use standards in approving the building permit, and where LUBA concludes that none of those other land use standards are applicable approval criteria, the city's decision is subject to the building permit exclusion from LUBA's jurisdiction in ORS 197.015(10)(b)(B). *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

31.2.1 Permits – Types – Building. LUBA will reject an argument that a building permit approval is a "permit" as defined at ORS 227.160(2) (discretionary approval of the development of land), where all arguably discretionary determinations regarding the nature and categorization of the proposed use were previously resolved in an unappealed zoning classification decision, and the building permit decision on appeal simply relied on the zoning classification decision. *McCollough v. City of Eugene,* 74 Or LUBA 573 (2016).

31.2.1 Permits – Types – Building. Where an applicant obtains from the city a zoning classification decision concluding that a specific type of housing development is an allowed use, but noting that if the use is changed to provide services to persons other than residents of the development, the development must be approved as a conditional use, and the applicant thereafter seeks and the city approves building permits based on the same specific housing development proposed in the zoning classification decision, the city is not required to impose conditions to preclude the applicant from changing the use to one that requires conditional use approval. *McCollough v. City of Eugene,* 74 Or LUBA 573 (2016).

31.2.1 Permits – Types – Building. A building permit decision that does not apply any comprehensive plan and land use regulation is not a statutory "land use decision" defined at ORS 197.015(10)(a), even if the building at issue was initially approved as part of a planned unit development decision that is on remand from LUBA. The remanded decision is not a comprehensive plan or land use regulation for purposes of ORS 197.015(10)(a). *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

31.2.1 Permits – Types – Building. A decision can be wrong or erroneous, yet not qualify as a statutory "land use decision" defined at ORS 197.015(10)(a). Even if a local government lacked

authority to issue a building permit, or otherwise erred in approving that permit, where the petitioner does not establish that any comprehensive plan provision or land use regulation applied to the building permit, the permit is not within LUBA's jurisdiction, and any errors committed in issuing the decision can only be challenged in circuit court. *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

31.2.1 Permits – Types – Building. LUBA will decline to apply the "significant impact" land use decision test to allow the Board to review building permit decisions that merely implement earlier statutory land use decisions, even if the building permit decisions are the proximate step leading to actual construction and other actions affecting land use, and even if some of the earlier statutory land use decisions were remanded by LUBA and still before the local government. Extending the significant impacts test to allow LUBA's review over such building permits would represent an end run around the statutory scheme for reviewing land use decisions. *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

31.2.1 Permits – Types – Building. Whether a building permit also qualifies as a statutory "permit," as ORS 227.160(2) defines that term does not turn on the complexity of the applicable land use regulations. Whether the building permit qualifies as a statutory permit turns on whether the applicable land use regulations are ambiguous about (1) the nature of the proposed use or (2) whether the proposed use is among the uses that are identified in the land use regulation as permitted. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

31.2.1 Permits – Types – Building. Where there is no question under applicable land use regulations that a proposed apartment building is permitted outright in the applicable zone, and the only ambiguities concern the development regulations that apply in approving the apartment use, those ambiguities mean the building permit approving the apartment building is a land use decision and that none of the ORS 197.015(10)(b) exclusions for nondiscretionary decisions apply. But that building permit is not a statutory "permit," as ORS 227.160(2) defines that term, since the use is permitted outright and the only ambiguities concern the development standards that apply to that permitted use. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

31.2.1 Permits – Types – Building. Whether a building permit also qualifies as a statutory "permit," as ORS 227.160(2) defines that term does not turn on the complexity of the applicable land use regulations. Whether the building permit qualifies as a statutory permit turns on whether the applicable land use regulations are ambiguous about (1) the nature of the proposed use or (2) whether the proposed use is among the uses that are identified in the land use regulation as permitted. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

31.2.1 Permits – Types – Building. Where there is no question under applicable land use regulations that a proposed apartment building is permitted outright in the applicable zone, and the only ambiguities concern the development regulations that apply in approving the apartment use, those ambiguities mean the building permit approving the apartment building is a land use decision and that none of the ORS 197.015(10)(b) exclusions for nondiscretionary decisions apply. But that building permit is not a statutory "permit," as ORS 227.160(2) defines that term, since the use is permitted outright and the only ambiguities concern the development standards that apply to that permitted use. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

31.2.1 Permits – Types – Building. In approving a building permit for a building "customarily provided in conjunction with farm use" in the EFU zone under ORS 215.213(1)(e) or 215.283(1)(e), one factual variable a county should consider is whether the building is intended to be used as an accessory building to non-farm uses authorized on the property, such as a private use airport, instead of or in addition to an accessory to farm use of the property. *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

31.2.1 Permits – Types – Building. A local government correctly concludes that no timely local appeal of a building permit was filed where nothing in two letters sent to the city after the permit was granted indicated that the letters were intended to constitute appeals of the building permit. *Ortman v. City of Forest Grove*, 55 Or LUBA 426 (2007).

31.2.1 Permits – Types – Building. Where a local code provision is expressly directed at building permits and a hearing officer finds that the provision does not apply to a request for subdivision approval, and petitioners do not assign error to those findings, petitioners' assignment of error that the hearings officer should have applied the provision in approving the subdivision will be denied. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

31.2.1 Permits – Types – Building. Absent some explanation for why a building permit decision that modifies a condition of partition approval involves the kind and degree of discretion that distinguishes a statutory "permit" as that term is defined at ORS 215.402(4) from other kinds of permits, LUBA will not presume that challenged permit is an ORS 215.402(4) permit. *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

31.2.1 Permits – Types – Building. Land use regulations that allow "on-site" signs but prohibit "off-site" signs are not clear and objective, as applied to a proposal to construct a sign advertising a business located on a different parcel than the sign, and a building permit decision approving such a sign as a permitted use is not subject to the ORS 197.015(10(b)(B) exception to LUBA's jurisdiction. *Frymark v. Tillamook County*, 45 Or LUBA 486 (2003).

31.2.1 Permits – Types – Building. A building permit may also constitute a statutory "permit" as defined by ORS 227.160 or 215.402, and thus require a local government to provide notice and opportunity for hearing before taking action on that permit, where approval or denial of the permit requires a discretionary determination regarding whether the proposed use is allowed or not allowed under applicable land use regulations. *Frymark v. Tillamook County*, 45 Or LUBA 486 (2003).

31.2.1 Permits – Types – Building. Approval of a building permit for a use that is unquestionably a permitted use in the applicable zone is not a "permit" as defined in ORS 227.160(2)(a) simply because, in issuing the permit, the local government interprets an ambiguous term in a land use regulation that applies to that permitted use. An interpretation of such a regulation in such circumstances is not the type of "discretionary approval" that results in a "permit" under ORS 227.160(2)(a). *Tirumali v. City of Portland*, 41 Or LUBA 231 (2002).

31.2.1 Permits – Types – Building. A planning director's interpretation that the base point from which a building height is calculated is established by determining the elevation of property after fill has been placed on the property is correct where the context makes it clear that some manipulation of the elevation may be done so long as the fill has been placed pursuant to approved grading plans. *Tirumali v. City of Portland*, 41 Or LUBA 231 (2002).

31.2.1 Permits – Types – Building. An otherwise clear and objective building permit, as that concept is used in ORS 197.015(10)(b)(B), remains clear and objective even if, as applied in a particular circumstance, it undermines the purpose or policy that it implements. *Tirumali v. City of Portland*, 37 Or LUBA 859 (2000).

31.2.1 Permits – Types – Building. A calculation mistake made during the course of applying a clear and objective building permit standard does not render a decision applying that standard a land use decision. *Tirumali v. City of Portland*, 37 Or LUBA 859 (2000).

31.2.1 Permits – Types – Building. Where a planning commission decision states the planning commission voted to "approve" a "recommendation to grant the building permit," and respondent identifies no zoning code provision specifically assigning decision making responsibility for building permits to another decision maker, LUBA will conclude the planning commission approved the building permit. *Mills v. City of Yachats*, 29 Or LUBA 1 (1995).

31.2.1 Permits – Types – Building. The city council must provide an appeal of a planning commission decision to approve a building permit, regardless of whether the planning commission was the proper body to approve a building permit, where the planning commission in fact approves the building permit and the zoning code provides that "any action of the planning commission pursuant to [the zoning code] may be appealed to the city council." *Mills v. City of Yachats*, 29 Or LUBA 1 (1995).

31.2.1 Permits – Types – Building. Where a local government approved a conditional use permit for a nonforest dwelling in 1992, and petitioner's notice of intent to appeal simply identifies the local government's 1994 building permit approval as the appealed decision, petitioner's appeal has the legal effect of appealing only the 1994 building permit decision. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

31.2.1 Permits – Types – Building. Where petitioner's claim is that a building permit violates clear and objective standards, petitioner fails to establish a basis for LUBA's jurisdiction over the appeal. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

31.2.1 Permits – Types – Building. Petitioner's argument that a decision to approve a building permit is a land use decision because the decision requires the application of a LCDC enforcement order fails where the enforcement order does not establish land use standards for the issuance of building permits. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

31.2.1 Permits – Types – Building. Where conditions of a prior nonforest dwelling approval do not require a determination of compliance with any discretionary land use standard, the fact that a

building permit may only be issued after it is determined that such conditions are satisfied provides no basis for LUBA's jurisdiction. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

31.2.1 Permits – Types – Building. Where petitioner appeals local government decisions issuing a building permit and denying a request for a local appeal of the building permit, and petitioner's notice of intent to appeal is filed more than 21 days after petitioner had actual notice of the building permit decision but within 21 days of the decision that there is no right to a local appeal, the notice of intent to appeal is untimely filed with regard to the building permit decision and the only issue to be resolved in the LUBA appeal is whether the local government determination that there is no right to a local appeal of the building permit decision is erroneous. *Mills v. City of Yachats*, 28 Or LUBA 736 (1994).

31.2.1 Permits – Types – Building. A local government decision approving a building permit is a "land use decision" subject to review by LUBA if it involves the application of the goals, a comprehensive plan or a land use regulation and does not qualify as a ministerial decision under ORS 197.015(10)(b)(A) or (B). *Sullivan v. City of Ashland*, 27 Or LUBA 411 (1994).

31.2.1 Permits – Types – Building. LUBA will not reverse or remand a local government decision refusing to issue a building permit for a structure to be placed on a parcel unlawfully divided, pursuant to a local code requirement that no building permit may be issued if the parcel of land on which a structure is to be placed or used is in violation of any local ordinance. *Woosley v. Marion County*, 24 Or LUBA 231 (1992).

31.2.1 Permits – Types – Building. Where a local code requires that a stream corridor and buffer zone be established prior to development of property, once the corridor and buffer zone are established by the local government as part of a minor partition decision, it is unnecessary for the local government to reexamine those boundaries in order to issue building and tree cutting permits for parcels created by the partition. *Forest Highlands Neigh. Assoc. v. City of Lake Oswego*, 24 Or LUBA 215 (1992).

31.2.1 Permits – Types – Building. A decision approving a building permit is a land use decision subject to LUBA's jurisdiction only if the building permit approval decision involves the application of the goals, comprehensive plan or a land use regulation and does not qualify as a ministerial decision under ORS 197.015(10)(b). *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

31.2.1 Permits – Types – Building. Where the only determinations that must be made for the approval of a building permit are whether the applicant has certifications concerning septic approval and electrical and plumbing permits, and those determinations do not involve application of the goals, comprehensive plan, or land use regulations, the approval of the building permit is not a land use decision subject to LUBA's jurisdiction. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

31.2.1 Permits – Types – Building. A city is not prohibited from issuing a building permit pursuant to an unappealed planning commission decision, notwithstanding that a second application seeking to expand the scope of the project approved by the unappealed planning

commission decision was denied by the city council. *Townsend v. City of Newport*, 21 Or LUBA 286 (1991).

31.2.1 Permits – Types – Building. A local government cannot deny building permits for approved conditional uses based on subsequent local code interpretations, where the subject conditional use permit remains effective and was not appealed locally or to LUBA. *Townsend v. City of Newport*, 21 Or LUBA 286 (1991).

31.2.1 Permits – Types – Building. Where petitioners' local notice of review specifically identifies as the subject of the appeal a building permit (the only local government decision concerning the proposed use of which petitioners were aware), but also indicated an intent to request review of any local decision authorizing the proposed use, LUBA will interpret petitioners' local notice of review to appeal both the building permit and an earlier zoning clearance decision required for issuance of the building permit. *Komning v. Grant County*, 20 Or LUBA 481 (1990).

31.2.1 Permits – Types – Building. A zoning clearance approval which requires determinations on whether a proposed use is incidental and subordinate to an existing use, and whether and the extent to which an existing use is a lawful nonconforming use, requires interpretation and the exercise of judgment within the meaning of ORS 197.015(10)(b)(A) and (C) and, therefore, is a "permit" under ORS 215.402(4). *Komning v. Grant County*, 20 Or LUBA 481 (1990).

31.2.1 Permits – Types – Building. Where *all* determinations involving application of the acknowledged county plan and code are made in the county site plan review decision, and issuance of a building permit is not dependent on site plan approval, issuance of a building permit does not demonstrate compatibility of the subject use with the acknowledged county plan and regulations. *Sparacino v. Klamath County*, 18 Or LUBA 804 (1990).

31.2.2 Permits – Types – Conditional Use. Where a significant resource overlay zone provision requires that (1) resource sites not be altered or impacted to a degree that destroys their significance, (2) the proposed development not result in the loss of habitat for threatened or endangered species, (3) all feasible alternatives to the development that would not result in a substantial adverse impact on identified resource values be considered and rejected, (4) the development be sited on the property in such a manner that minimizes adverse impacts on identified resources, and (5) documentation be provided regarding requirements for state or federal permits or licenses and that appropriate resource management agencies have reviewed the development proposal against their plans, policies, and programs, the local government does not err in concluding that that provision applies at the development stage rather than the PAPA stage. *VanSickle v. Klamath County*, 80 Or LUBA 241 (2019).

31.2.2 Permits – Types – Conditional Use. A condition of approval requiring an applicant that has applied to site a solar facility in an area currently used for growing Christmas trees to offer a fire safety training course to the local fire district is inadequate to establish that "[t]he proposed use will not * * * significantly increase risks to fire suppression personnel" for purposes of OAR 660-006-0025(5)(b) and local code provisions implementing that rule. *Chang v. Clackamas County*, 80 Or LUBA 321 (2019).

31.2.2 Permits – Types – Conditional Use. Where a local code provision requires a finding that "[t]he proposed use is appropriate, considering the adequacy of public facilities and services existing or planned for the area affected by the use," and where the record includes undisputed expert testimony that fire and emergency access are inadequate unless a proposed trail and its bridges are built to certain standards, it is insufficient for the local government to state, without any supporting evidence, that it is "feasible" to design the trail and bridges to provide adequate fire and emergency access and then punt all determinations regarding trail and bridge design to a subsequent master planning process. *Van Dyke v. Yamhill County*, 80 Or LUBA 348 (2019).

31.2.2 Permits – Types – Conditional Use. Where a local code provision requires (1) that an applicant for an extension of a conditional use permit on resource-zoned lands "state[] reasons that prevented [them] from beginning or continuing development within the approval period" and (2) that the local government determine that those are "reasons for which the applicant was not responsible," a local government interpretation that the provision may be satisfied where the reason for the delay is that additional state or federal approvals have been applied for, but not yet secured, even where the application for such state or federal approval proposes development which differs from that approved by the conditional use permit, is not inconsistent with the express language of the provision and therefore provides no basis for reversal or remand under ORS 197.829(1)(a). *Williams v. Coos County*, 79 Or LUBA 352 (2019).

31.2.2 Permits – Types – Conditional Use. Where one local code provision authorizes the local government to grant "an extension of up to two (2) years" for a conditional use permit on non-resource lands, and another provision provides that "[a]dditional extensions may be applied," a local government interpretation of those provisions as allowing supplemental extensions beyond the one allowed under the first provision is supported by the plain meaning of the word "additional," is not inconsistent with the express language of either provision, and therefore

provides no basis for reversal or remand under ORS 197.829(1)(a). *Williams v. Coos County*, 79 Or LUBA 352 (2019).

31.2.2 Permits – Types – Conditional Use. Where a local code provision provides that issuance of a conditional use permit requires a determination that "[t]he proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone," an interpretation by the local government that it need not consider the impact of the proposed use on property values and neighbor peace of mind is not inconsistent with the provision's express language or underlying policies. *Currie v. Douglas County*, 79 Or LUBA 585 (2019).

31.2.2 Permits – Types – Conditional Use. Where a local code provision provides that issuance of a conditional use permit (CUP) requires a determination that "[t]he proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone," a local government decision granting a CUP is not supported by substantial evidence where it does not identify and describe all of the existing and permitted uses on adjacent properties and where it fails to analyze or measure the extent of the potential impacts of the proposed use and instead proceeds straight to mitigation measures. *Currie v. Douglas County*, 79 Or LUBA 585 (2019).

31.2.2 Permits – Types – Conditional Use. A county provision, which requires the signature of all owners of the subject property on an application for a conditional use permit, may be satisfied by a county-imposed condition requiring that a property owner sign the conditional use permit application before any building permits may issue, where the county provision grants permission to the hearings officer to impose conditions the hearings officer "deems necessary" to fulfill the purpose and intent of the county's code. *Harris v. Marion County*, 78 Or LUBA 209 (2018).

31.2.2 Permits – Types – Conditional Use. Where a county code provision requires a finding that development of a proposed solar facility will "not result in unnecessary soil erosion or loss," and includes a provision that this finding "*may* be satisfied by the submittal and county approval of a soil and erosion control plan prepared by an adequately qualified individual," and "[t]he approved plan *shall* be attached to the decision *as a condition of approval*," that provision allows an applicant and the county the *option* of relying on a qualified soil and erosion control plan to satisfy the provision and, if that option is followed, by imposing a condition of approval that requires compliance with the approved plan. The phrase "attached to the decision as a condition of approval" is a term of art that does not mean that the plan must be physically attached to the decision. *Harris v. Marion County*, 78 Or LUBA 209 (2018).

31.2.2 Permits – Types – Conditional Use. Where a county code provision requires that a proposed solar facility may not "create unnecessary negative impacts on agricultural operations," including dividing a field or multiple fields "in such a way that creates small or isolated pieces of property that are more difficult to farm," and placing solar facility components on lands in a manner that "could disrupt common and accepted farming practices," a hearings officer's decision errs in concluding that a 12-acre solar facility located on a 14.15-acre lot will not create an isolated strip of cultivated land because as s a matter of simple arithmetic, some portion of the 14.15-acre lot will remain outside the 12-acre solar facility. *Harris v. Marion County*, 78 Or LUBA 209 (2018).

31.2.2 Permits – Types – Conditional Use. A decision to grant temporary approval of driveway access is not a decision to modify a previous conditional use approval decision that imposed a condition that required the applicant to obtain fire department approval of the proposed driveway access. *Seits v. Yamhill County*, 77 Or LUBA 310 (2018).

31.2.2 Permits – Types – Conditional Use. Where an applicant proposes to bifurcate a proposed business development into two segments, one to be approved as a conditional use, and another to be approved as a home occupation, to avoid application of permit standards that would otherwise prohibit the business use viewed as a whole, both sets of permit requirements potentially apply to any components of the segmented use that are shared or overlap. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.2.2 Permits – Types – Conditional Use. Where in order to avoid code prohibitions on "external evidence" of a home occupation an applicant attempts to authorize all outdoor processing associated with a log home manufacturing business under a conditional use permit for the primary processing of forest products, and all indoor processing associated with the business as part of a home occupation, any activities that use shared equipment, vehicles or employees, such as transporting logs from the outdoor primary processing site to the indoor secondary processing site, are not authorized exclusively under the primary processing permit, but are also subject to the prohibition on external evidence required of the home occupation permit. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.2.2 Permits – Types – Conditional Use. The primary processing of logs pursuant to a conditional use permit for the primary processing of forest products is not itself subject to home occupation standards, even if the logs are later transported to a structure on the property for secondary processing under a home occupation permit. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.2.2 Permits – Types – Conditional Use. An asphalt batch plant that received a conditional use permit under the conditional use permit criteria that applied at the time the plant was approved is not a nonconforming use, and the local code provisions that govern discontinuance of a nonconforming use do not apply to an application that seeks a comprehensive plan text and zoning map amendment to add additional property that is adjacent to the conditional use to the county's inventory of significant aggregate sites. *Pioneer Asphalt, Inc. v. Umatilla County*, 71 Or LUBA 65 (2015).

31.2.2 Permits – Types – Conditional Use. Where applicable land use regulations require that a proposal to modify a previously approved conditional use must be "consistent" with previously approved conditional use, and the proposal would eliminate the previously approved composting operation and make minor changes to the previously approved topsoil mining operation, the modified conditional use is correctly viewed as "consistent" with the previously approved conditional use. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

31.2.2 Permits – Types – Conditional Use. In considering whether the proposed modifications to a previously approved conditional use comply with conditional use approval criteria, if legal

issues raised in the modification proceedings are relevant issues regarding approval standards that could not have been raised when the original proposal was approved, the local government is required to address those issues. Conversely, if the arguably relevant issues raised in the modification proceedings could have been fully raised when the original proposal was approved, those legal issues are not a product of the modification and the local government is not required to consider those issues. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

31.2.2 Permits – Types – Conditional Use. Where a previously approved conditional use is being modified to eliminate one part of the previously approved use, and conditions of that previous approval are to be modified or eliminated, where the original condition was imposed solely to ensure the part of the conditional use that is to be eliminated is consistent with relevant approval standards, no explanation is required to eliminate such conditions of approval. However, where it is not clear whether the original condition of approval was imposed at least in part to ensure that part of the conditional use that is to be retained is consistent with one or more relevant approval standards, and an issue is raised concerning whether the proposed modification or elimination of the condition would cause the modified conditional use to violate one or more applicable approval standards, the local government is obligated to explain why the condition can be eliminated or modified without causing the modified conditional use to no longer comply with relevant approval standards. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

31.2.2 Permits – Types – Conditional Use. LUBA will reject a city council's interpretation of a code provision allowing a property owner to site a recreational vehicle (RV) on the property for "temporary living purposes" to require that the RV be accessory to or in conjunction with a permanent dwelling on the property, where nothing in the applicable code provision expressly or impliedly requires a dwelling, and the city has expressly required, in other inapplicable code provisions, that an RV be an accessory use to or be in conjunction with a dwelling. *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

31.2.2 Permits – Types – Conditional Use. A hearings officer does not err in concluding that modifying a condition of approval imposing a 20-year deadline to complete development, to allow an additional three years to complete development, is not "materially inconsistent" with the original condition of approval, where the additional time represents only a 15 percent increase and nothing in the original permit approval suggests that the original 20-year completion deadline was intended to be inflexible. *Connecting Eugene v. City of Eugene*, 61 Or LUBA 439 (2010).

31.2.2 Permits – Types – Conditional Use. A reasonable decision maker could conclude that the applicant for a proposed motorcycle race track failed to demonstrate compliance with an approval standard requiring that the property act as a buffer between urban and agricultural uses, which the county interpreted to require evidence that the race track, as mitigated, would externalize less dust than would agricultural use of the property, where the applicant failed to present any evidence quantifying dust impacts, comparing dust impacts of farm uses and the race track, or estimating the effectiveness of mitigation. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

31.2.2 Permits – Types – Conditional Use. LUBA will reverse a county governing body's code interpretation that a conditional use allowed in an Acreage Residential zone that generates any amount of dust leaving the property must be denied because it is not in harmony with the purpose

of the zone to buffer urban uses from farm uses, where the zone allows a number of dust-generating uses as permitted and conditional uses in the zone, including farm use, and under the county's interpretation few if any of those uses could ever be approved in the zone. *Davis v. Polk County*, 58 Or LUBA 1 (2008).

31.2.2 Permits – Types – Conditional Use. LUBA will remand a decision determining that a conditional use is inconsistent with one of seven purposes of the underlying zone, where it is not clear whether the county must address each of the seven purposes and determine whether the proposed use is, on balance consistent with those purposes, or whether inconsistency with a single zone purpose is sufficient to deny the application, and the county's decision does not address the issue. *Davis v. Polk County*, 58 Or LUBA 1 (2008).

31.2.2 Permits – Types – Conditional Use. A code provision that lists additional conditional use restrictions that a county may impose to protect certain natural resources is an approval standard, in the sense that it authorizes the county to impose additional conditions if found to be necessary, and the county could, theoretically, deny the application if it concluded that no feasible conditions could be crafted that the county will protect the identified resources. *Western Land & Cattle, Inc. v. Umatilla County*, 58 Or LUBA 295 (2009).

31.2.2 Permits – Types – Conditional Use. Under ORS 227.178(4), where a city has notified a conditional use permit applicant that the application requires additional supporting information, and the applicant fails to provide the information and fails to provide the city notice that the applicant will not provide the requested information, the city may treat the application as void. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

31.2.2 Permits – Types – Conditional Use. When a conditional use permit (CUP) has a conditional of approval that the CUP "will become invalid" if specified actions are not taken before a specified deadline or an extension of the deadline is not granted, and the applicant neither completes the specified actions nor seeks an extension, the local government may not grant an extension of the CUP after the time for receiving an extension has expired and the CUP is rendered invalid. *Michaels v. Douglas County*, 53 Or LUBA 16 (2006).

31.2.2 Permits – Types – Conditional Use. Federal law preempts a local determination that a proposed cellular communications facility is unsafe where the Federal Aviation Administration (FAA) has issued a "Determination of No Hazard" under FAA rules. *U.S. Cellular v. Klamath County*, 53 Or LUBA 442 (2007).

31.2.2 Permits – Types – Conditional Use. Where a 1995 conditional use permit conceptually approved cemetery uses on a portion of the site and required a buffer between cemetery uses on that portion and adjoining residential uses, LUBA will affirm a hearings officer determination that modification of the 1995 permit is necessary to develop that portion of the site with non-cemetery uses or to dispense with the buffer required in the 1995 permit. *Wiper v. City of Eugene*, 47 Or LUBA 21 (2004).

31.2.2 Permits – Types – Conditional Use. Where a conditional use permit condition can reasonably be interpreted to require a 75-foot vegetative buffer between cemetery uses and

residential uses, and the city's code allows modifications to a conditional use permit only if consistent with the original conditions, LUBA will affirm a hearings officer's determination that a proposed modification that provides for no vegetative buffer between cemetery and residential uses is inconsistent with the original conditions. *Wiper v. City of Eugene*, 47 Or LUBA 21 (2004).

31.2.2 Permits – Types – Conditional Use. Subjective, discretionary conditional use and design review criteria are precisely the type of land use regulations that Congress intended to regulate, as applied to religious practices and institutions, in enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA). Although such standards may be "generally applicable" in the sense that they apply broadly to a number of secular and non-secular uses, their application to approve or deny a proposed church requires an "individualized assessment" and thus is subject to RLUIPA. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.2.2 Permits – Types – Conditional Use. Application of discretionary design review criteria to proposed religious buildings involves the "proposed use" of land within the meaning of, and is thus subject to, the Religious Land Use and Institutionalized Persons Act (RLUIPA), where the local government may deny a proposed church if the applicant fails to demonstrate compliance with such design review criteria. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.2.2 Permits – Types – Conditional Use. Where a city zoning ordinance permits consideration of consolidated applications and it is not apparent that an independent process is available to consider related permits, and petitioners raised the issue of compliance with standards required for the related permits during the pendency of a conditional use application, the city erred by failing to address petitioners' argument that the related permit standards must be satisfied before the conditional use permit could be approved. *Monogios and Co. v. City of Pendleton*, 42 Or LUBA 291 (2002).

31.2.2 Permits – Types – Conditional Use. Under a code standard that allows only *de minimis* traffic impacts on failing intersections, the county is in a position to find compliance with the standard only if it quantifies the traffic volume that is expected to pass through intersections notwithstanding conditions designed to avoid impacts and determines that such traffic volume is *de minimis*, or if it imposes conditions sufficient on their face to ensure that expected impacts will be *de minimis*. *K.B. Recycling, Inc. v. Clackamas County*, 41 Or LUBA 29 (2001).

31.2.2 Permits – Types – Conditional Use. Conditions imposed to ensure that only *de minimis* traffic volumes from a proposed recycling facility impact nearby failing intersections during certain times are insufficient and unenforceable, where the county's decision fails to (1) define what *de minimis* traffic volumes are, (2) specify the times when the conditions apply, and (3) impose conditions or identify solutions that a reasonable person would find adequate to ensure that traffic associated with the facility uses a longer alternate route rather than the short direct route through failing intersections. *K.B. Recycling, Inc. v. Clackamas County*, 41 Or LUBA 29 (2001).

31.2.2 Permits – Types – Conditional Use. An assignment of error that a city erred by approving a floodplain permit in the absence of a valid conditional use permit for the proposed use provides no basis for reversal or remand where petitioner fails to demonstrate that a conditional use permit

for the proposed use must be obtained prior to obtaining a floodplain permit. *Willhoft v. City of Gold Beach*, 39 Or LUBA 353 (2001).

31.2.2 Permits – Types – Conditional Use. Where a city imposes conditions of approval requiring external street improvements as part of a land use decision approving a conditional use permit, the aspects of the decision requiring external street improvements are not subject to the exception to the definition of land use decision at ORS 197.015(10)(b)(D), notwithstanding that if the required improvements were imposed in a separate decision not involving conditional use approval, those improvements might fit within the exception. *Terra v. City of Newport*, 36 Or LUBA 582 (1999).

31.2.2 Permits – Types – Conditional Use. The judicial doctrine of vested rights does not apply to development allowed under a conditional use permit, where the permit is approved under an ordinance obligating the user to commence construction within six months or request an extension from the city. *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998).

31.2.2 Permits – Types – Conditional Use. A governing body's interpretation of a local provision is within the discretion afforded by ORS 197.829(1) and Clark v. Jackson County, where the local ordinance requires that development allowed under a conditional use permit be commenced within six months in order to become effective, and the governing body interprets the ordinance to mean that development has commenced when the applicant has complied with all conditions precedent and obtained all required permits. *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998).

31.2.2 Permits – Types – Conditional Use. An application for an extension of a conditional use permit involves the "discretionary approval of a proposed development of land" and is subject to the requirement at ORS 215.416 that approval or denial of a permit be subject to standards and criteria, where the local code contains no standards governing permit extensions and thus grants unfettered discretion to the county to approve or deny the extension. *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998).

31.2.2 Permits – Types – Conditional Use. Concern that a campfire may cause a forest fire that burns down neighboring structures is not a relevant consideration in determining whether a proposed use will alter the character of the surrounding area by limiting or impairing primary uses. *Tylka v. Clackamas County*, 34 Or LUBA 14 (1998).

31.2.2 Permits – Types – Conditional Use. Where a previous, unappealed development is not part of the conditional use approval proposal in question, a local government cannot require a conditional use permit for that development as part of its evaluation of the proposed use. *Tylka v. Clackamas County*, 34 Or LUBA 14 (1998).

31.2.2 Permits – Types – Conditional Use. In complying with the city's demand that it file an application for a conditional use permit in order to continue its operation, petitioner accepted the validity of that demand for the purposes of the proceeding on its application, and LUBA therefore cannot review the decision to require a conditional use permit. *Recovery House VI v. City of Eugene*, 33 Or LUBA 327 (1997).

31.2.2 Permits – Types – Conditional Use. A use permitted outright cannot be a conditional use. *Northwest Environmental Adv. v. City of Portland*, 33 Or LUBA 45 (1997).

31.2.2 Permits – Types – Conditional Use. LUBA will defer under ORS 197.829(1) to a local government's interpretation of conditional use permit criteria even when that interpretation is at odds with LUBA's own interpretation of identical statutory criteria governing an application for a nonfarm dwelling. *Ray v. Douglas County*, 32 Or LUBA 388 (1997).

31.2.2 Permits – Types – Conditional Use. The county fails to establish that, under local code, a second dwelling is authorized as a conditional use in an EFU zone where the findings do not explain why the proposed dwelling is authorized and do not explain when the primary dwelling was established or whether its use is resource-related. *Le Roux v. Malheur County*, 32 Or LUBA 124 (1996).

31.2.2 Permits – Types – Conditional Use. Findings are inadequate to establish that a proposed use does or can satisfy the definition of "light industrial business" when there are no factual findings regarding the number of employees necessary for the proposed use. *Miller v. City of Joseph*, 31 Or LUBA 472 (1996).

31.2.2 Permits – Types – Conditional Use. That an applicant's personal expertise is critical in designing a proposed use does not preclude compliance with a local ordinance requirement that a conditional use permit run with the land. Neither is it necessary to condition approval of the use on continuing participation by that applicant, since it is not dependent on her for its operation. *Martin v. Jackson County*, 30 Or LUBA 317 (1996).

31.2.2 Permits – Types – Conditional Use. That an existing conditional use asphalt batch plant could be a permitted use under a county's mineral and aggregate overlay zone does not require that the county incorporate the conditional use into a decision approving application of the overlay zone to an area including the existing conditional use or that the county re-approve the conditional use as part of the decision applying the overlay zone. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

31.2.2 Permits – Types – Conditional Use. A reasonable person would not conclude that a code conditional use permit standard requiring a proposed development to be timely considering the adequacy of storm drainage systems is satisfied, where there is no evidence in the record concerning the existence or adequacy of storm drainage facilities to handle anticipated runoff from the proposed development. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

31.2.2 Permits – Types – Conditional Use. Where conditional use approval is sought for the construction of a building to serve an existing use, whether that existing use is lawful is relevant to approval of the proposed building. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

31.2.2 Permits – Types – Conditional Use. Under ORS 433.763(1)(c), a county may subject outdoor mass gatherings of more than 120 hours duration to conditional use permit land use regulations. *Fence v. Jackson County*, 29 Or LUBA 147 (1995).

31.2.2 Permits – Types – Conditional Use. Where an improvement agreement signed by a county is limited to implementing a conditional use permit previously approved by the county, and does not modify that conditional use permit, the improvement agreement does not require application of land use standards and does not constitute a "land use decision," as that term is defined by ORS 197.015(10). *Franklin v. Deschutes County,* 29 Or LUBA 79 (1995).

31.2.2 Permits – Types – Conditional Use. A code conditional use standard requiring reasonable compatibility with, and no more than minimal impact on, "appropriate development" of surrounding properties authorizes the local government to consider a proposed conditional use's compatibility with, and impact on, future development of vacant properties. *Horizon Construction, Inc. v. City of Newberg,* 28 Or LUBA 632 (1995).

31.2.2 Permits – Types – Conditional Use. A hearings officer's interpretation of a conditional use permit for a "tourist park" as not allowing placement of mobile homes within the approved "tourist park," as that term is defined by the local code, is reasonable and correct. *Jones v. Lane County,* 28 Or LUBA 193 (1994).

31.2.2 Permits – Types – Conditional Use. A county governing body may interpret a code conditional use standard requiring that a proposed use have minimal adverse impacts compared to the impacts of development "permitted outright" as inapplicable in a zoning district that lists no outright permitted uses. *Mazeski v. Wasco County,* 28 Or LUBA 178 (1994).

31.2.2 Permits – Types – Conditional Use. Where local conditional use approval standards do not specifically refer to impacts on property values, but rather to compatibility with "uses" and "land use patterns" and changes in "accepted farm or forest practices" or their cost, a local governing body is within its discretion under ORS 197.829 in interpreting such standards not to require consideration of a proposed conditional use's impact on property values. *Tucker v. Douglas County,* 28 Or LUBA 134 (1994).

31.2.2 Permits – Types – Conditional Use. Where a particular activity is allowed as a conditional use, and is subject to criteria specifically and solely applicable to such activity, the governing body acts within its interpretive discretion under ORS 197.829 in determining such activity is not also subject to criteria generally applicable to conditional uses in the zone. *Cole v. Columbia County,* 28 Or LUBA 62 (1994).

31.2.2 Permits – Types – Conditional Use. Where the code provides a conditional use permit does not expire if "substantial construction" has occurred, and that "substantial construction" means 10 percent of the total project value has been expended for construction authorized under a development permit, the local government erred by counting expenditures for a culvert and fill creek crossing that were made when the permits issued authorized only a bridge crossing. *McKenzie v. Multnomah County,* 27 Or LUBA 523 (1994).

31.2.2 Permits – Types – Conditional Use. Elevation plans submitted by an applicant to establish compliance with code "physical compatibility" requirements become part of the applicant's conditional use proposal, and it is not necessary for the local government to impose compliance

with these plans as a condition of approval in order to rely on them in approving the proposed development. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

31.2.2 Permits – Types – Conditional Use. Where petitioner argues the local government erred by approving a conditional use permit without the consent of all owners of the subject property, but identifies no plan, code or other legal standard requiring that such consent be obtained, LUBA cannot grant relief. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

31.2.2 Permits – Types – Conditional Use. A local government's approval of a conditional use permit for a "public air park" does not grant approval for a recreational parachuting center, where the site plan for the public air park does not show a recreational parachuting center was either contemplated or approved. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

31.2.2 Permits – Types – Conditional Use. Where under certain provisions of a local enactment, consideration of the geologic stability of the subject site would be relevant to the conditional use permit approval process, but other code provisions create a separate geologic hazard review process that may be initiated at any time prior to or in conjunction with filing an application for *any* required local permit, LUBA will defer to the local government's interpretation that it is not required to address geologic stability as part of the conditional use permit process. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

31.2.2 Permits – Types – Conditional Use. Where the local code provides that a conditional use permit expires one year after it is approved, unless construction occurs demonstrating the CUP has been "used," and where the code also prohibits the local government from issuing building or other permits required for construction until appeals have been "completed," the running of the one-year period for "using" a conditional use permit is tolled during those periods of time when a building or other permit necessary to "use" the conditional use permit cannot properly be issued due to an appeal. *Weeks v. City of Tillamook,* 24 Or LUBA 155 (1992).

31.2.2 Permits – Types – Conditional Use. In evaluating the compliance of an application for a conditional use permit for a bed and breakfast with a local traffic impacts approval standard, it is proper to evaluate the impacts of a reasonable residential use of the dwelling, together with the proposed bed and breakfast use. *Adler v. City of Portland,* 24 Or LUBA 1 (1992).

31.2.2 Permits – Types – Conditional Use. Where the local code lists uses as conditionally permitted, such listing does not, of itself, imply that the local government must approve all applications for conditional uses or that it is limited to the imposition of conditions of approval. *Adler v. City of Portland*, 24 Or LUBA 1 (1992).

31.2.2 Permits – Types – Conditional Use. In the absence of a local code requirement to the contrary, a local government has no legal obligation to impose conditions of approval in lieu of denying an application for conditional use approval. *Adler v. City of Portland*, 24 Or LUBA 1 (1992).

31.2.2 Permits – Types – Conditional Use. Where the local code states "nothing construed herein shall be deemed to require the [local government] to grant a Conditional Use Permit," a local

government may deny a conditional use permit if the development, as proposed, does not satisfy applicable approval standards. In such instance, the local government is not *required* to impose conditions on the proposed development to attain compliance with the approval standards. *Horizon Construction, Inc. v. City of Newberg*, 23 Or LUBA 159 (1992).

31.2.2 Permits – Types – Conditional Use. A local code requirement that a review body may not consider a request for a conditional use permit within one year following a previous denial of "such" request, prohibits submission of a conditional use permit application for the same use on the same property as previously denied. It does not prohibit the submission of a conditional use permit application for a different use of the property. *Silani v. Klamath County*, 22 Or LUBA 735 (1992).

31.2.2 Permits – Types – Conditional Use. Where a local code provision prohibits submission of an application for a conditional use permit for a use previously denied within one year of denial, it is error for the local government to refuse to accept evidence concerning whether a proposed conditional use is the same as the conditional use previously denied. *Silani v. Klamath County*, 22 Or LUBA 735 (1992).

31.2.2 Permits – Types – Conditional Use. That a previously approved zone change included a condition providing that if a conditional use permit for a mobile home park on the subject property is not obtained, the property would revert to its previous zoning, does not make the merits of the previous rezoning decision subject to LUBA's review in an appeal of the local government decision approving the conditional use permit. *Burghardt v. City of Molalla*, 22 Or LUBA 369 (1991).

31.2.2 Permits – Types – Conditional Use. Where the local code defines public facilities to include public schools, and contains a standard requiring that conditional uses be timely considering the adequacy of public facilities, the local government must determine that at the time the proposed development will occur public schools will be adequate to serve the proposed development. *Burghardt v. City of Molalla*, 22 Or LUBA 369 (1991).

31.2.2 Permits – Types – Conditional Use. Where the local code establishes specific requirements for applications for mobile home parks, and also requires that the site plan for a proposed conditional use include information specifically required by the code for the proposed use, a conditional use permit application for a mobile home park must also include the information required for applications for mobile home parks. *Burghardt v. City of Molalla*, 22 Or LUBA 369 (1991).

31.2.2 Permits – Types – Conditional Use. Whether a proposed sewage treatment facility will produce odors is a relevant consideration in determining compliance with a local conditional use permit standard requiring findings that the "location, size, design, and operation are compatible with and will not adversely affect the livability or appropriate development of abutting properties in the surrounding neighborhood." *Sitsler v. City of Mill City*, 22 Or LUBA 125 (1991).

31.2.2 Permits – Types – Conditional Use. Where the local code does not contain a specific purpose statement for a zoning district, determining a proposed conditional use is similar to, and

produces no significant impacts different from those produced by, uses permitted outright in the zoning district is a correct means of determining compliance with a code requirement that a conditional use be in harmony with the purpose and intent of the zoning district. *Brandt v. Marion County*, 22 Or LUBA 74 (1991).

31.2.2 Permits – Types – Conditional Use. Performance standards are not necessary prerequisites to issuance of a conditional use permit. However, a code standard may be a performance standard, a permit approval standard, or some combination of the two. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

31.2.2 Permits – Types – Conditional Use. A local government may impose conditions and rely on those conditions in determining that an application for discretionary permit approval meets applicable approval standards. However, there is no general requirement that a local government *must* apply conditions to modify a proposal so that applicable standards are met. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

31.2.2 Permits – Types – Conditional Use. A local government cannot deny building permits for approved conditional uses based on subsequent local code interpretations, where the subject conditional use permit remains effective and was not appealed locally or to LUBA. *Townsend v. City of Newport*, 21 Or LUBA 286 (1991).

31.2.2 Permits – Types – Conditional Use. In considering a request for conditional use approval, a local government may consider the future impact of proposed highway intersection improvements on the proposal. *Wheeler v. Marion County*, 20 Or LUBA 379 (1990).

31.2.2 Permits – Types – Conditional Use. A county has a legitimate planning interest in assuring adequate vehicular circulation within a zoning district applicable to highway interchanges. This legitimate planning interest includes both access to properties abutting public rights-of-way and circulation within such properties. *Wheeler v. Marion County*, 20 Or LUBA 379 (1990).

31.2.2 Permits – Types – Conditional Use. Conditions of approval must have some reasonable connection with the use proposed. A condition requiring a demonstration that adequate on-site vehicular circulation will be possible has such a reasonable connection to a proposed expansion of an existing use which may make internal vehicular circulation more difficult or impossible in view of planned highway intersection improvements. *Wheeler v. Marion County*, 20 Or LUBA 379 (1990).

31.2.2 Permits – Types – Conditional Use. Where a local code lists the undefined term "commercial riding" as a use which may be conditionally permitted in a zoning district, and the general approval standards for conditional uses require that they "not significantly impact [adjoining] uses," the potential impacts of a proposed use are relevant only to compliance with the conditional use approval standard, not to determining whether the proposed use constitutes "commercial riding." *Kittleson v. Lane County*, 20 Or LUBA 286 (1990).

31.2.2 Permits – Types – Conditional Use. Where city regulations governing applications for conditional use approval do not make all contiguous property owned by an applicant subject to the

conditional use review, and an applicant files a conditional use application for only a portion of his property, the city does not have authority to impose conditions on contiguous property owned by the applicant which is not the subject of the application. *Goodman v. City of Portland*, 19 Or LUBA 289 (1990).

31.2.2 Permits – Types – Conditional Use. Where a code standard requires a conditional use to have no more than *minimal impact* on the livability and appropriate development of abutting properties and the surrounding neighborhood, the local government must (1) identify the qualities constituting the livability and appropriate development of abutting properties and the surrounding neighborhood, and (2) determine whether the proposed use will have more than a minimal impact on the identified qualities. Whether the proposed conditional use will have fewer impacts than uses permitted outright in the zone is immaterial. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

31.2.2 Permits – Types – Conditional Use. Where ordinance provides that conditional use permit applications may be approved, approved with conditions or denied, and states the approval authority must find that the proposed use is not in violation of "the appropriate regulations and standards" in the ordinance, the ordinance provides that a conditional use permit may be approved or denied based on mandatory criteria located elsewhere in the zoning ordinance. *Beck v. City of Tillamook*, 18 Or LUBA 587 (1990).

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

31.2.3 Permits – Types – Design Review. Where a significant resource overlay zone provision requires that (1) resource sites not be altered or impacted to a degree that destroys their significance, (2) the proposed development not result in the loss of habitat for threatened or endangered species, (3) all feasible alternatives to the development that would not result in a substantial adverse impact on identified resource values be considered and rejected, (4) the development be sited on the property in such a manner that minimizes adverse impacts on identified resources, and (5) documentation be provided regarding requirements for state or federal permits or licenses and that appropriate resource management agencies have reviewed the development proposal against their plans, policies, and programs, the local government does not err in concluding that that provision applies at the development stage rather than the PAPA stage. *VanSickle v. Klamath County*, 80 Or LUBA 241 (2019).

31.2.3 Permits – Types – Design Review. Where a design guideline for a historic district in a city requires that exterior alterations and additions to historic resources "be designed to be compatible primarily with the original resource, secondarily with adjacent properties, and finally * * * with the rest of the District," where the city council interprets the term "compatible" as not requiring uniformity, and where the petitioner has not demonstrated that that interpretation is inconsistent with the express language, purpose, or underlying policy that provides the basis for that design guideline, LUBA will uphold the city council's conclusion that two proposed new buildings meet the design guideline because they are similar to a historic resource on the same property, to adjacent properties, and to the historic district with respect to some design elements, even where they are dissimilar to adjacent properties with respect to other design elements. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

31.2.3 Permits – Types – Design Review. A hearings officer does not misconstrue a development code requirement that a project applicant must demonstrate that environmental impacts have been "minimized to the extent practicable," in finding that the project applicant is not required to propose a smaller sized dwelling. *McAndrew v. Washington County*, 78 Or LUBA 21 (2018).

31.2.3 Permits – Types – Design Review. A petitioner's argument that an application to modify a site plan to replace a previously approved produce stand with a coffee kiosk cannot be processed as a modification, but instead requires a new site plan application, does not provide a basis for remand, where the local government adopted findings rejecting that argument, and the petitioner does not challenge those findings. *Aboud v. City of Stayton*, 77 Or LUBA 300 (2018).

31.2.3 Permits – Types – Design Review. A petitioner's argument that the city erred in processing the application as a minor rather than major site plan modification does not provide a basis for remand, where the city adopted findings that the only difference between a major and minor modification is procedural, and the petitioner does not argue that the procedures the city provided, including a hearing that petitioner attended, prejudiced petitioner's substantial rights. *Aboud v. City of Stayton,* 77 Or LUBA 300 (2018).

31.2.3 Permits – Types – Design Review. A petitioner's argument that the city erred in failing to require the applicant for a site plan modification to include landscaping information that was omitted from the original site plan application does not provide a basis for remand, where the applicant proposed no changes to the landscaping, and the city determined that its authority extended only to proposed modifications to the original site plan. *Aboud v. City of Stayton,* 77 Or LUBA 300 (2018).

31.2.3 Permits – Types – Design Review. LUBA will reject an argument that because a city's discretionary site review standards apply to proposed development, the city's approval is thus a "permit" as defined at ORS 227.160(2) (discretionary approval of the development of land), where even if the city's site review standards apply, the result would be a limited land use decision as defined at ORS 197.015(12), which is excluded from the ORS 227.160(2) definition of permit. *McCollough v. City of Eugene,* 74 Or LUBA 573 (2016).

31.2.3 Permits – Types – Design Review. LUBA will reject a proposed interpretation of a city code site review provision that would broadly apply to all proposed needed housing, including single-family dwellings, and result in imposition of discretionary standards and lengthy procedures that could easily have the effect of discouraging needed housing, contrary to ORS 197.307(4), where there is an alternative interpretation that harmonizes the relevant text and context and does not force the city's code into conflict with ORS 197.307(4). *McCollough v. City of Eugene,* 74 Or LUBA 573 (2016).

31.2.3 Permits – Types – Design Review. Where a city's code offers a path for developers to qualify proposed housing as "needed housing," in order to obtain waiver of certain standards that would otherwise apply, LUBA will similarly interpret a related code provision requiring that site review provisions be applied when "the application proposes needed housing," to the effect that the site review provisions apply only if the applicant seeks to qualify the proposed housing as "needed housing." *McCollough v. City of Eugene,* 74 Or LUBA 573 (2016).

31.2.3 Permits – Types – Design Review. To address a historic design standard requiring that new construction be "compatible with the appearance and character of the historic district," adequate findings must, at a minimum, (1) describe the appearance and character of the historic district, as relevant, (2) describe the appearance and character of the proposed structure, and (3) explain why the proposed structure is or is not compatible with the appearance and character of the historic district. *Kliewer v. City of Bend,* 73 Or LUBA 321 (2016).

31.2.3 Permits – Types – Design Review. To address a historic design standard requiring that new construction be "compatible with the appearance and character of the historic district," the decision-maker is not required to reference the description of the appearance and character of a

historic district included in the nomination to the federal historic register, but that description is a relevant and convenient source. Because the decision-maker must base the compatibility analysis on something, unless the decision-maker duplicates some of the descriptive work in the federal register nomination, there may be no practical substitute for considering the federal register nomination. *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

31.2.3 Permits – Types – Design Review. Remand for more adequate findings is required where a historic design standard requires a finding that the relationship of new construction to the street and open space between buildings is compatible with the adjacent historic buildings and the historic character of the surrounding area, but the findings address only compliance with code setback requirements, and fail to identify or address compatibility with adjacent historic buildings and the historic character of the surrounding area. *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

31.2.3 Permits – Types – Design Review. A finding that the height of new construction is "similar" to dwellings within a historic district is insufficient to establish compliance with a standard requiring that new construction not exceed the height of historic buildings in the surrounding area, where the surrounding area includes both historic and non-historic buildings, and the findings do not identify what buildings the height is compared to, or find that the height of new construction does not exceed the height of the tallest historic building in the surrounding area. *Kliewer v. City of Bend*, 73 Or LUBA 321 (2016).

31.2.3 Permits – Types – Design Review. LUBA will affirm a city council's code interpretation to the effect that minimum frontage and floor-area-ratio standards apply to the collective structures of a proposed fueling station as a whole, including the canopy, paved area, and an exterior trellis wall, even though the standards do not easily apply to those structures viewed individually, where the petitioner fails to demonstrate that the city council's interpretation is inconsistent with the express language, purpose or underlying policy of the code. *Save Downtown Canby v. City of Canby*, 70 Or LUBA 68 (2014).

31.2.3 Permits – Types – Design Review. LUBA will affirm a city council's code interpretation to the effect that minimum frontage and floor-area-ratio standards apply to the collective structures of a proposed fueling station as a whole, including the canopy, paved area, and an exterior trellis wall, even though the standards do not easily apply to those structures viewed individually, where the petitioner fails to demonstrate that the city council's interpretation is inconsistent with the express language, purpose or underlying policy of the code. *Save Downtown Canby v. City of Canby*, 70 Or LUBA 68 (2014).

31.2.3 Permits – Types – Design Review. Where a city code limits the maximum number of parking spaces, and requires that parking must be provided on the same lot as the building served, or on an off-site lot within 500 feet of the building, a hearings officer misconstrues the code to allow parking spaces that are intended to serve hospital campus buildings that are located more than 500 feet away, under the theory that the various lots that make up the hospital campus constitute a single "lot" and the various buildings of the hospital campus a single development, where nothing in the code provides that the hospital campus is a single lot or constitutes a single development for off-street parking purposes. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

31.2.3 Permits – Types – Design Review. A hearings officer does not misconstrue a site plan review standard requiring a finding that "negative impacts to the transportation system are mitigated adequately" as not requiring the applicant to construct bike lanes that are shown in the Bicycle System Element of the city's Transportation System Plan (TSP), where the code standard does not refer to the TSP or indicate that site plan review is the vehicle to provide for construction of bike lanes depicted in the TSP. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

31.2.3 Permits – Types – Design Review. A city staff interpretation that a site design review permit is not a "development permit" subject to certain submittal requirements because site design review does not directly authorize any alteration of land is inconsistent with the applicable text and context, where under that interpretation none of the city's discretionary or nondiscretionary permits qualify as development permits, leaving the category of development permits an empty set. *CRAW v. City of Warrenton*, 67 Or LUBA 263 (2013).

31.2.3 Permits – Types – Design Review. A code provision prohibiting the location of loading docks on a building side that faces the highway is not concerned with the orientation of the loading docks, but the orientation of the building side. The code provision is not met by a loading dock located against an L-shaped façade with the long axis facing the highway. *CRAW v. City of Warrenton*, 67 Or LUBA 263 (2013).

31.2.3 Permits – Types – Design Review. LUBA will sustain a city council interpretation of a 1991 planning commission site plan decision to approve both a 70,000-square-foot retail store and a 30,000-square-foot "future expansion" area, notwithstanding a condition that refers only to approval of the retail store, where the site plan depicts both improvements, the 1991 decision approves the "site plan" without restriction, and the record indicates that the planning commission intended to approve both improvements. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

31.2.3 Permits – Types – Design Review. LUBA will sustain a city council interpretation of a site plan condition of approval to impose no limits on the type merchandise sold at a retail store that is allowed outright in the applicable zone, where the condition authorizes sale of "general merchandise, to include" listed examples, and the fairest reading of the condition is that the list of examples is illustrative, not exclusive. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

31.2.3 Permits – Types – Design Review. A site plan decision that approves (1) a building and (2) a "future expansion" of that same building is a single building, not separate phases or components of a multi-phase development, for purposes of determining whether there is a vested right to construct the expansion. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

31.2.3 Permits – Types – Design Review. A hearings officer does not err in interpreting a code standard requiring historic design review for alterations to a building having exterior materials "specifically listed" in the city's historic resource inventory not to require that contributing exterior materials be specifically described as contributing. If fairly read the text and context of the building

description in the inventory indicates that a particular exterior material contributes to the building's significance, then historic design review is required to alter that exterior material. *Carlton Development LLC v. City of Portland*, 62 Or LUBA 157 (2010).

31.2.3 Permits – Types – Design Review. That a city's historic resource inventory lists a building's "wood sash windows" in the "Description" paragraph rather than in the "Significance" paragraph does not mean that the windows are not contributing features, where in context it is clear that the inventory uses the description paragraph to list all contributing and noncontributing building features, and the significance paragraph is simply a summary conclusion based on the features listed in the description paragraph. *Carlton Development LLC v. City of Portland*, 62 Or LUBA 157 (2010).

31.2.3 Permits – Types – Design Review. A hearings officer does not err in concluding that "wood sash windows" are specifically listed features contributing to a building's historic significance, such that a historic design review permit is required to replace the windows with vinyl windows, where the city's inventory concludes that the building is a "contributing" resource based on the features listed in the building description, including the original wood sash windows. *Carlton Development LLC v. City of Portland*, 62 Or LUBA 157 (2010).

31.2.3 Permits – Types – Design Review. A governing body's interpretation of a design review criterion requiring that the "bulk and scale" of a proposed retail supercenter be "compatible" with surrounding buildings as necessitating a comparison of the size of the proposed buildings and surrounding buildings—and not just visual compatibility—is consistent with the text of the criterion and not reversible under ORS 197.829(1)(a). *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256 (2004).

31.2.3 Permits – Types – Design Review. There is no intrinsic reason why a regulatory concern to ensure compatibility of size between proposed and existing development must be expressed as zoning standards rather than as site design review standards. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256 (2004).

31.2.3 Permits – Types – Design Review. A traffic engineer's critique of the applicant's traffic study that questions the accuracy and sufficiency of the study's calculation of traffic impacts and facility capacity is sufficient to support denial of proposed development under standards requiring the applicant to demonstrate that nearby transportation facilities can accommodate traffic impacts of the development. *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

31.2.3 Permits – Types – Design Review. Denial of a proposed school bus storage yard is supported by evidence that access to the yard relies on a private fire lane that the applicant cannot improve and that limits bus movement, under design standards requiring a "safe and efficient" circulation pattern. *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

31.2.3 Permits – Types – Design Review. Assuming ORS 197.522 is applicable outside the moratoria context, that statute does not require a local government to develop on its own conditions of approval that would render proposed development compliant with applicable criteria, as an alternative to denial. Rather, the initial burden of proposing conditions to make development

consistent with applicable criteria belongs to the applicant. *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

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

31.2.3 Permits – Types – Design Review. The governing body is within its discretion under ORS 197.829(1) in interpreting a standard to be a post-approval performance standard on industrial uses rather than an approval criterion, where the standard is within a section entitled "performance standards" and prescribes impermissible levels of pollution rather than approval criteria. *Oien v. City of Beaverton*, 46 Or LUBA 109 (2003).

31.2.3 Permits – Types – Design Review. Subjective, discretionary conditional use and design review criteria are precisely the type of land use regulations that Congress intended to regulate, as applied to religious practices and institutions, in enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA). Although such standards may be "generally applicable" in the sense that they apply broadly to a number of secular and non-secular uses, their application to approve or deny a proposed church requires an "individualized assessment" and thus is subject to RLUIPA. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.2.3 Permits – Types – Design Review. Application of discretionary design review criteria to proposed religious buildings involves the "proposed use" of land within the meaning of, and is thus subject to, the Religious Land Use and Institutionalized Persons Act (RLUIPA), where the local government may deny a proposed church if the applicant fails to demonstrate compliance with such design review criteria. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.2.3 Permits – Types – Design Review. An apparent discrepancy between the sidewalks depicted on the site plan submitted for design review approval and the sidewalk depicted on the approved final subdivision plat does not provide a basis for reversal or remand, where the design review decision did not address sidewalks or approve a particular sidewalk design. *Jordan v. City of Portland*, 44 Or LUBA 586 (2003).

31.2.3 Permits – Types – Design Review. Where a city code provision requires that a "proposal" to adjust development standards be reviewed for compliance with specific criteria, it is reasonable for the city to determine that the scope of the "proposal" is the adjustment proposed by the applicant and therefore that an application for a setback adjustment for a building facade does not require review of the building design as a whole. *Lee v. City of Portland*, 40 Or LUBA 498 (2001).

31.2.3 Permits – Types – Design Review. Where petitioner raises issues regarding whether a proposed site design complies with potentially applicable approval criteria, the local government's decision must respond by either (1) determining that the cited provisions are not applicable

approval criteria or (2) demonstrating that the proposal complies with such provisions. *Elliott v. City of Redmond*, 40 Or LUBA 242 (2001).

31.2.3 Permits – Types – Design Review. A city does not err in failing to provide a local appeal of a design review decision under design review procedures, where the subject property is within an historic district and the city's code specifies that design review proposals in historic districts are governed by historic design procedures that provide no right of local appeal. *Multi-Light Sign Co. v. City of Portland*, 39 Or LUBA 605 (2001).

31.2.3 Permits – Types – Design Review. Where a site design review criterion requires that, "wherever possible," direct driveway access to arterial streets not be allowed, and the challenged decision approves a site plan with direct driveway access onto an arterial street and a collector street without explaining why it is not possible to limit access to the collector street, the decision must be remanded. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

31.2.3 Permits – Types – Design Review. Where the first clause of a local code provision requires that design review comply with a set of criteria used to rezone property and the second clause requires that design review also comply with those criteria addressed at the time the subject property was rezoned, a hearings officer's interpretation limiting design review to the subset of criteria addressed at the time the property was rezoned fails to give effect to the first clause of the code provision, and is therefore not reasonable and correct. *Blazer Construction, Inc. v. City of Eugene*, 36 Or LUBA 391 (1999).

31.2.3 Permits – Types – Design Review. Local government decisions granting design review approval for segments of a light rail transit (LRT) line that do not approve final *engineering* design or construction of the LRT facility are not within the exception to the definition of "land use decision" established by ORS 197.015(10)(b)(D). *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

31.2.3 Permits – Types – Design Review. Local government decisions granting design review approval for segments of a light rail transit line do not adopt or amend a city or county public facility plan and, therefore, are not excluded from being considered "land use decisions" under ORS 197.712(2)(e). *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

31.2.3 Permits – Types – Design Review. A local government decision granting design review plan approval must identify the design review plan approved. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

31.2.3 Permits – Types – Design Review. Where ORS 215.416(3) and (11) require a county to provide an opportunity for a local appeal of a design review decision made by the planning director without a hearing, the county cannot interpret a code provision requiring that "final design review approval" has been granted to be satisfied when a local appeal of the planning director's design review approval decision is pending. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

31.2.4 Permits – Types – Other. Establishing that proposed "agri-tourism or other commercial events or activities" are "necessary to support the commercial farm uses or the commercial agricultural enterprises in the area" for purposes of ORS 215.283(4)(d)(A) is a relatively high hurdle: the county must find that the events are essential in order to maintain the existence of either the commercial farm uses on the subject property or the commercial agricultural enterprises in the area. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

31.2.4 Permits – Types – Other. A demonstration that proposed "agri-tourism or other commercial events or activities" are "necessary to support" an approved commercial activity in conjunction with farm use under ORS 215.283(2)(a), such as a brewery, is not sufficient to demonstrate that the events are "necessary to support" an "existing commercial farm use of the tract," such as the growing of filberts, for purposes of ORS 215.283(4)(d)(A), even where revenue from the brewery "supplements" revenue from the growing of filberts. *Friends of Yamhill County v. Yamhill County*, 80 Or LUBA 135 (2019).

31.2.4 Permits – Types – Other. Where an applicant has conducted both festival-related uses and non-festival-related park and campground uses on property zoned Rural Residential and Impacted Forest, where the festival-related uses are verified nonconforming uses, and where the applicant applies for a special use permit to legalize the non-festival-related park and campground uses, LUBA will affirm the county's interpretation that its nonconforming use provisions do not apply to the special use permit application where the county expressly explains that the special use permit does not authorize festival-related uses and where the petitioners identify no law preventing the county from issuing permits that have the effect of legalizing special uses that have been occurring independent of a preexisting nonconforming uses. *Klein v. Lane County*, 80 Or LUBA 287 (2019).

31.2.4 Permits – Types – Other. A county decision determining vested rights involves the "discretionary approval of a proposed development of land," and is therefore a "permit" decision under ORS 215.402(4). Such decisions must be processed under procedures consistent with ORS 215.416, regardless of whether a party's request for the "permit" decision is accompanied by requests for non-"permit" decisions, whether the request is labeled or easily identifiable as an "application" for a "permit," or whether the party affirmatively requests the required procedures. *Gillette v. Lincon County*, 79 Or LUBA 549 (2019).

31.2.4 Permits – Types – Other. LUBA will affirm a governing body's code interpretation of a county zoning ordinance that provides that a permit extension may be granted if the "approval criteria for the original decision found in a state goal, policy, statute or administrative rule, the Comprehensive Plan or this Ordinance have not changed," and the county board of commissioners interprets "have not changed" to mean an administrative or legislative amendment to the administratively enacted or codified law described in the same provision, and not include decisional law not that is not administratively enacted or codified, as long as such interpretation is "plausible." *Hood River Valley Residents' Committee v. Hood River County*, 78 Or LUBA 478 (2018).

31.2.4 Permits – Types – Other. A city is not required to defer to a permit applicant's characterization of its proposal to remove up to 500,000 cubic yards of rock from a five-acre site

as mere site preparation that is necessary for a possible future proposal for residential development. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

31.2.4 Permits – Types – Other. Zoning classification decisions are often hypothetical and based on stated assumptions. If a methadone clinic that is found to be permitted in a zoning district thereafter provides services that go beyond the services specified in the application for a zoning classification decision, that may be addressed in an enforcement action and the zoning classification decision will not shield the applicant from such an enforcement action regarding activities that are not mentioned in the application. *Mariposa Townhouses v. City of Medford*, 68 Or LUBA 479 (2013).

31.2.4 Permits – Types – Other. A city's failure to enter a zoning classification decision into a registry as required by ORS 227.175(11)(a) does not make the decision something other than a zoning classification decision. *Mariposa Townhouses v. City of Medford*, 68 Or LUBA 479 (2013).

31.2.4 Permits – Types – Other. Under a code provision requiring that the applicant for development within a riparian area demonstrate that "reasonable steps" have been taken to reduce adverse impact on the environment, it is not a "reasonable step" to require the applicant to forego constructing a short driveway connecting to the adjacent public right-of-way and instead require obtaining lengthy driveway easements over several adjoining properties to connect the subject property to a different, non-adjacent public street. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

31.2.4 Permits – Types – Other. Where a petitioner does not challenge a hearings officer's finding that petitioner's use of his property for a wedding event required review and county approval under one code provision, and petitioner does not allege his wedding event received county review and approval, petitioner's arguments that the use could have been approved under a different code provision provide no basis for reversal or remand. *Reed v. Jackson County*, 61 Or LUBA 253 (2010).

31.2.4 Permits – Types – Other. Even if a local government erred in concluding that noise and air quality standards are "performance standards" rather than approval criteria applicable to a proposed transportation center, that error is harmless where the noise and air quality standards apply only to specified uses, and the specified uses do not include anything resembling the proposed transportation center. *Kane v. City of Beaverton*, 56 Or LUBA 240 (2008).

31.2.4 Permits – Types – Other. A land use compatibility statement that determines the appropriate zoning classification for a proposed use of land within an urban growth boundary may constitute a "zoning classification" decision as defined by ORS 227.160(2)(b), and thus not constitute a statutory "permit" that would require the city to provide notice and an opportunity for hearing. *Hallowell v. City of Independence*, 53 Or LUBA 165 (2006).

31.2.4 Permits – Types – Other. The fact that wineries are a permitted use in EFU zones under ORS 215.213(1) and 215.283(1) does not mean that wineries are "agricultural uses" permitted in a rural residential zone, where the code definition of "agricultural uses" does not include wineries,

and wineries are not among the uses allowed in the rural residential zone. *Roth v. Jackson County*, 40 Or LUBA 531 (2001).

31.2.4 Permits – Types – Other. A decision to extend the term of an expired conditional use permit is a discretionary approval of a proposed development of land and constitutes a "permit" as that term is defined by ORS 227.160(2). *Willhoft v. City of Gold Beach*, 38 Or LUBA 375 (2000).

31.2.4 Permits – Types – Other. A zoning ordinance that lacks provisions governing signs and that is nevertheless applied to evaluate whether a proposed billboard is an accessory use to industrial and commercial uses allowed in the relevant zone is not subject to facial challenge under Article I, section 8, as an ordinance directed at the content of speech or as a content-neutral ordinance that expressly prohibits speech. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

31.2.4 Permits – Types – Other. A zoning ordinance that is not directed at the content of speech and does not expressly prohibit speech may be challenged under Article I, section 8, only on an as-applied basis. To prevail, an as-applied challenge to a decision denying a proposed billboard because it is not an accessory use to uses allowed in an industrial and commercial zone must demonstrate that the decision burdens the applicant's rights of free expression without a rational basis for doing so. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

31.2.4 Permits – Types – Other. A local government may constitutionally distinguish between signs related to on-premises uses, and signs related only to off-premises uses or services, and deny a proposed billboard because it is unrelated to the primary use of the property, where the city's evaluation of the relationship between the sign and the premise does not entail a content-based distinction, and the on-premises/off-premises distinction is a rational means to preserve the zone for allowed uses. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

31.2.4 Permits – Types – Other. A local government does not impermissibly favor commercial speech over noncommercial speech because it allows signs related to on-premises uses in an industrial and commercial zone and prohibits all others. That signs related to on-premises commercial uses are allowed while unrelated commercial and noncommercial signs are prohibited is an incidental consequence of the permissible distinction drawn between signs related to on- and off-premises uses. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

31.2.4 Permits – Types – Other. A city's determination that a proposed billboard is not an accessory use "incidental, appropriate and subordinate" to the primary use on the property is subject to an inquiry so factually and legally circumscribed that it does not render constitutionally protected rights of free expression contingent upon the unbridled discretion of a government official. *Media Art Company v. City of Gates*, 35 Or LUBA 123 (1998).

31.2.4 Permits – Types – Other. Under ORS 227.215, the definition of "development" is sufficiently broad to encompass the removal of a tree for landscaping purposes, and a local government may regulate tree removal through the issuance of development permits. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

31.2.4 Permits – Types – Other. A fill permit issued by the city building division is excluded from the definition of a land use decision under ORS 197.015(10)(b)(A) where it involves the application of clear and objective standards that do not require interpretation or the exercise of policy or legal judgment. *Fechtig v. City of Albany*, 31 Or LUBA 441 (1996).

31.2.4 Permits – Types – Other. LUBA's review is limited to what is approved by the challenged decision. LUBA will not review the legal sufficiency of a development permit that the challenged decision does not purport to approve. *Hixson v. Josephine County*, 26 Or LUBA 159 (1993).

31.3.1 Permits – Particular Uses – Airports. LUBA will affirm a finding that a proposed gas processing facility will not cause emissions of steam that could obscure visibility within an airport approach surface, where the finding is supported by substantial expert testimony that the facility will not generate visible steam and in any case is proposed to be located outside the airport approach surface. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

31.3.1 Permits – Particular Uses – Airports. Findings are adequate to demonstrate that in determining that a proposed conditional use airport is compatible with the neighborhood, the county considered "other related impacts" from the airport, including testimony from neighbors regarding safety and the risk of crash, and imposed conditions of approval that require that addressed those safety concerns. *Yih v. Linn County*, 68 Or LUBA 412 (2013).

31.3.1 Permits – Particular Uses – Airports. A county does not err in generally identifying the extent of the surrounding neighborhood for purposes of determining whether a proposed conditional use airport will have minimal impacts on the surrounding neighborhood, where the decision makes reasonably clear that the county considered impacts from the proposed airport on other residential properties from noise generated from the proposed airport and from the risk of air crash on take off or landing crashes, and the petitioner does not point to any property or area that the county failed to consider as part of the "surrounding neighborhood." *Yih v. Linn County*, 68 Or LUBA 412 (2013).

31.3.1 Permits – Particular Uses – Airports. A county does not err in imposing a condition of approval that requires an applicant for a conditional use airport to obtain approval from the Oregon Department of Aviation, where the decision makes clear that the requirement to obtain ODA approval is not intended as a substitute for analyzing whether the airport is compatible with the surrounding neighborhood. *Yih v. Linn County*, 68 Or LUBA 412 (2013).

31.3.1 Permits – Particular Uses – Airports. Substantial evidence in the record supports a decision that noise from a conditional use airport will have minimal impact on the surrounding neighborhood where the only evidence in the record is a noise study submitted by the applicant that provides an accurate measurement of the airplane noise. *Yih v. Linn County*, 68 Or LUBA 412 (2013).

31.3.1 Permits – Particular Uses – Airports. A comprehensive plan policy requirement that the city "work" with an existing city airport to reduce airport-related incompatibilities with surrounding land uses is not a mandatory applicable approval standard for legislation that deletes superseded code provisions proscribing certain aircraft flight operations and requiring city council approval of new airports. *Oregon Aviation Watch v. City of Hillsboro*, 67 Or LUBA 252 (2013).

31.3.1 Permits – Particular Uses – Airports. An ordinance requiring that developers of residential property near an airport grant the airport an uncompensated "avigation easement" that allows the airport to subject the property to noise, vibrations, fumes, dust and fuel particle emissions is facially inconsistent with the federal and state Takings Clauses, because the easement does not advance the governmental interest in reducing land use conflicts between the airport and surrounding residential uses. Under the easement, the conflicts will exist to the same degree; the

only arguable effect is to make it more difficult for the property owner to advance a successful inverse condemnation or other legal action against the airport. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

31.3.1 Permits – Particular Uses – Airports. A city airport zone that authorizes air passenger and freight services at a regional airport consistent with the levels identified in the airport's master plan, which does not currently authorize such services, violates the Oregon Constitution Article I, section 21, delegation clause, because it effectively delegates to the airport the authority to determine what uses are allowed in the airport zone. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

31.3.1 Permits – Particular Uses – Airports. ORS 836.608(3)(a) prohibits local governments from imposing additional limitations on, and implicitly requires local governments to recognize and allow, both (1) aviation uses that were authorized by permit prior to January 1, 1997, and (2) aviation uses that existed at a personal use airport in 1996, regardless of whether a prior permit authorized those uses. *NAAVE v. Washington County,* 59 Or LUBA 153 (2009).

31.3.1 Permits – Particular Uses – Airports. ORS 836.608(2) requires local governments to establish an airport "boundary" that has the effect of determining the geographic extent of the "airport," based on areas that are developed or committed to airport uses. By implication, areas outside the boundary are not reasonably expected to be devoted to airport uses. The boundary of an "airport" is intended to include areas developed or reasonably expected to be developed with airport uses, including hangars, and airport uses including hangars are intended to be located within airport boundaries. *NAAVE v. Washington County,* 59 Or LUBA 153 (2009).

31.3.1 Permits – Particular Uses – Airports. ORS 836.630(3), which establishes a policy to encourage and support airports, applies a "thumb on the scale" that may be used to resolve a choice between two or more textually plausible interpretations in the manner of the policy. *NAAVE v. Washington County*, 59 Or LUBA 153 (2009).

31.3.1 Permits – Particular Uses – Airports. Where a city does not rely on the ORS 836.640 through 836.642 "through the fence" pilot program to adopt an Airport Related zoning district that authorizes airpark residential development with through the fence access to an airport, arguments that ORS 836.640 through 836.642 do not authorize the kind of through the fence access that is permitted in the city's new Airport Related zoning district provide no basis for reversal or remand. *Port of St. Helens v. City of Scappoose,* 58 Or LUBA 122 (2008).

31.3.1 Permits – Particular Uses – Airports. A city's legislative decision to adopt a new Airport Related zoning district without applying the new zoning district to any property is not reversible where petitioner fails to demonstrate that the zone could in no circumstances be applied to property in the future without violating applicable legal standards. *Port of St. Helens v. City of Scappoose,* 58 Or LUBA 122 (2008).

31.3.1 Permits – Particular Uses – Airports. Reports and approvals from the Federal Aviation Administration and Oregon Department of Aviation that a proposed personal use airport complies with federal and state safety requirements is substantial evidence that a county could rely upon,

among other evidence, to conclude that the airport is consistent with a comprehensive plan policy requiring that airports be located in areas that are safe for air operations. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

31.3.1 Permits – Particular Uses – Airports. Because a personal use airport is not among the three types of airports that require overlay zones under OAR 660-013-0070(1), the rule does not require a county to impose an overlay zone on a personal use airport. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

31.3.1 Permits – Particular Uses – Airports. A county does not err in interpreting a comprehensive plan policy requiring that airports be compatible with surrounding uses to be satisfied by incorporated findings addressing conditional use permit standards that, the county found, ensure that the airport is compatible with surrounding uses. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

31.3.1 Permits – Particular Uses – Airports. A county does not err in concluding that, as conditioned, a personal use airport will not "significantly" impact a neighboring equine facility, where the only adverse impact identified by the facility owner is that guests are advised to delay mounting or dismounting horses until after planes land or take-off, and conditions of approval limit operations to 20 flights per month. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

31.3.1 Permits – Particular Uses – Airports. LUBA will affirm a governing body's interpretation of a comprehensive plan policy that requires that development shall comply with "applicable" Department of Environmental Quality (DEQ) standards to not require that the applicant demonstrate that a proposed personal use airport will comply with a DEQ noise program that DEQ has suspended. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

31.3.1 Permits – Particular Uses – Airports. A county does not err in concluding that the county's noise ordinance is not a conditional use approval standard for a personal use airport, where the noise ordinance is not part of the county's zoning regulations, the noise ordinance functions as a performance standard rather than an approval standard, and the noise ordinance includes an exclusion for noises generated by approved conditional uses. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

31.3.1 Permits – Particular Uses – Airports. Remand is necessary where a county's findings approving a personal use airport rely heavily on a proposed condition limiting operations at a personal use airport to 20 flights per month, but the county failed to impose such a condition. *Johnson v. Marion County*, 58 Or LUBA 459 (2009).

31.3.1 Permits – Particular Uses – Airports. While the Aviation Protection Act, ORS 836.608(3)(a), permits "increases in flight activity" at existing airports without local government approval, the statute does not allow one type of listed aviation use to be metamorphosed into a different type of listed aviation use as an "increase" in flight activity. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

31.3.1 Permits – Particular Uses – Airports. In determining what airport uses "existed at any time" in 1996 for purposes of the Aviation Protection Act, ORS 836.608, a hearings officer errs in interpreting that phrase to include only frequent or regularly occurring airport uses, or uses that result in physical commitment of the land. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

31.3.1 Permits – Particular Uses – Airports. The act of giving airplane rides to friends or neighbors as an incidental part of a personal use flight is not the same use or activity as offering commercial scenic flights or tours, for purposes of determining what airport uses existed at a personal use airport in 1996 under the Aviation Protection Act, ORS 836.608. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

31.3.1 Permits – Particular Uses – Airports. A hearings officer errs in declining to review proposed flight instruction, scenic tours and forest patrol uses as "new uses" rather than "existing uses" under the Aviation Protection Act, ORS 836.608, and in requiring the applicant to submit a new application requesting approval for those "new uses," where the initial application sought approval of those uses under criteria that apply to new uses, county staff understood that the applicant sought approval as new uses and not existing uses, and the applicant requested that the hearings officer evaluate those uses as new uses if they did not qualify as existing uses. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

31.3.1 Permits – Particular Uses – Airports. The apparent corollary of ORS 836.608(3)(a), which provides that a local government shall not impose additional limitations on a previously approved airport use, is that any existing limitations or conditions imposed in earlier approval decisions can continue, as long as such limitations or conditions are consistent with other requirements of the Airport Protection Act. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

31.3.1 Permits – Particular Uses – Airports. The Aviation Protection Act, ORS 838.608, does not prohibit application of local land use standards to aviation activities that implement or are required by federal law, such as floodplain protection regulations. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

31.3.1 Permits – Particular Uses – Airports. ORS 836.623(1) requires explanatory findings addressing evidence that public safety requires a higher level of protection than the minimum set forth under the Airport Transportation Planning rule, even if the local government rejects that evidence and concludes that existing standards are sufficient to protect public safety. *Graham Oil Co. v. City of North Bend*, 44 Or LUBA 18 (2003).

31.3.1 Permits – Particular Uses – Airports. The proponent of "more stringent requirements" under ORS 836.623(1) has some burden to identify what additional requirements may be necessary to ensure public safety. Where the proponent merely argues that proposed development near an airport runway should be denied because existing standards cannot ensure ground safety against airplane crashes, local government findings rejecting the need for more stringent requirements may be equally conclusory. *Graham Oil Co. v. City of North Bend*, 44 Or LUBA 18 (2003).

31.3.1 Permits – Particular Uses – Airports. A reasonable decision maker may rely upon existing state and federal safety standards, and evidence of safety features designed to prevent fire or explosion in the event an airplane crashes into a proposed fuel station located near a runway, to conclude that no additional safety standards are necessary, notwithstanding testimony from the airport manager and aviation officials that the location of the proposed station is unsafe. *Graham Oil Co. v. City of North Bend*, 44 Or LUBA 18 (2003).

31.3.1 Permits – Particular Uses – Airports. ORS 836.616 does not authorize or require a local government to consider approval of commercial uses at an airport on a case-by-case basis where the applicable county land use regulations do not authorize such commercial uses. *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

31.3.1 Permits – Particular Uses – Airports. LUBA will not attempt to resolve a largely hypothetical dispute between a petitioner and a county over the degree of incidental social activity that might be permissible at an existing airport in conjunction with any particular activity that the county must allow under ORS 836.616(2). *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

31.3.1 Permits – Particular Uses – Airports. Where it is unclear who would own a proposed "personal use airport" in an EFU zone, and whether the uses that the owner plans to make of the airport would be consistent with the uses allowed under ORS 215.283(2)(h), the owner must be identified and the county's findings must explain why it concludes that the proposed uses fall within the uses allowed with a personal use airport. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

31.3.1 Permits – Particular Uses – Airports. Where a statute and local land use ordinance restricts personal use airports to "use by the owner," the applicant may utilize the airport for uses *incidental* to conducting private business, but not for the applicant's commercial aviation enterprise. *Berto v. Jackson County*, 33 Or LUBA 658 (1997).

31.3.1 Permits – Particular Uses – Airports. Where applicable rules regulating personal use airports would have allowed far more flights than the evidentiary record shows historically occurred at an airstrip when it became nonconforming, the county cannot use the administrative rule definitions as a surrogate descriptor of the nature and scope of the use at the time it became nonconforming. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

31.3.1 Permits – Particular Uses – Airports. A local government's approval of a conditional use permit for a "public air park" does not grant approval for a recreational parachuting center, where the site plan for the public air park does not show a recreational parachuting center was either contemplated or approved. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

31.3.1 Permits – Particular Uses – Airports. An airport that serves several counties, is "part of a regional system of airports for the greater Portland metropolitan area" and has 60,000 annual aircraft operations is an urban public facility use. Amending county plan and zoning maps to designate and zone additional land for such an urban airport use requires exceptions to Statewide Planning Goals 11 and 14. *Murray v. Marion County*, 23 Or LUBA 269 (1992).

31.3.1 Permits – Particular Uses – Airports. Where, at the time of the imposition of restrictive zoning, there was a lawful intermittent airport use of property, it is incorrect for a local government to conclude such use cannot constitute a nonconforming use because it was recreational, intermittent and did not involve the investment of substantial sums of money. *Warner v. Clackamas County*, 22 Or LUBA 220 (1991).

31.3.1 Permits – Particular Uses – Airports. Local code provisions which regulate "public" airports, and state that "private landing strips * * * may still be subject to applicable regulations," are inapplicable to private airports, but recognize that there may be *other* requirements which apply to private airports. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

31.3.2 Permits – Particular Uses – Farm Dwellings. A county may not allow unlimited, successive one-year extensions of permits for residential development on resource land where state statute and regulation provide that such permits "shall be valid for four years" and that "[a]n extension" thereof "shall be valid for two years," where nothing in the legislative history suggests an intent to allow more than one extension. *Landwatch Lane County v. Lane County*, 79 Or LUBA 96 (2019).

31.3.2 Permits – Particular Uses – Farm Dwellings. OAR 660-033-0130(8)(a)(A)(i) to (iv) provide in relevant part that a lawfully established dwelling may be repaired, altered or replaced if the dwelling "has, or formerly had" indoor plumbing. The rule's requirements are disjunctive and an applicant can satisfy the rule by demonstrating that a mobile home "has" or "formerly had" indoor plumbing. *Treadway v. Jefferson County*, 72 Or LUBA 122 (2015).

31.3.2 Permits – Particular Uses – Farm Dwellings. A lot of record dwelling approval under ORS 215.705(1) does not have the automatic effect of consolidating parcels within the tract in which the dwelling is approved; such consolidation must occur via a formal process that has the legal effect of vacating the interior property lines. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

31.3.2 Permits – Particular Uses – Farm Dwellings. OAR 660-033-0135(1) authorizes a farm dwelling on a "parcel," which obligates the local government to confirm that the subject property is a unit of land created in one of the ways described in ORS 92 and ORS 215.010, but it does not obligate the local government to determine whether the land use decision or process that created the property was legally correct in the sense that all applicable standards were properly applied and satisfied. Any legal errors in such decisions cannot be challenged in the appeal of a subsequent decision approving a dwelling on the parcel. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

31.3.2 Permits – Particular Uses – Farm Dwellings. The OAR 660-033-0135(1)(d) requirement allowing a farm dwelling on a parcel only if "there is no other dwelling on the subject tract" focuses on the "subject tract" as it exists when the local government approves the farm dwelling; that the parcel was once part of a different tract that included a dwelling does not prohibit approval of the farm dwelling, if the tract the parcel is currently a part of has no dwelling. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

31.3.2 Permits – Particular Uses – Farm Dwellings. OAR 660-033-0135(1)(c) allows a farm dwelling upon a finding that the dwelling will be occupied by persons principally engaged in farm use of the land at a commercial scale. Although the rule is ambiguous regarding whether the "land" means the parcel on which the dwelling would be located or the tract that includes the parcel, based on context it is reasonably clear that the unit of analysis for the "commercial scale" inquiry is the tract. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

31.3.2 Permits – Particular Uses – Farm Dwellings. A county errs in finding that a farm dwelling will be occupied by persons principally engaged in farm use of the land at a "commercial scale" for purposes of OAR 660-033-0135(1)(c) based on evidence of ranching activities on a 17,000-acre ranch that the subject tract is associated with, instead of the tract on which the proposed

dwelling will be located. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

31.3.2 Permits – Particular Uses – Farm Dwellings. A county is not required to impose a condition prohibiting use of a farm dwelling if the tract on which it is located is no longer used for farm use at a commercial scale. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

31.3.2 Permits – Particular Uses – Farm Dwellings. Seasonal occupation of a farm dwelling is not necessarily inconsistent with a finding that the dwelling will be occupied by persons "principally engaged" in farm use of the property, where the property is located in a high elevation area where pasture and farm use is possible only six months of the year. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

31.3.2 Permits – Particular Uses – Farm Dwellings. A county decision concerning whether to extend or terminate a permit authorizing construction of a farm dwelling based on whether there has to be "substantial compliance with the approved farm management plan" constitutes "discretionary approval" of a "proposed development of land" and, therefore, is a "permit" within the meaning of ORS 215.402(4). *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

31.3.2 Permits – Particular Uses – Farm Dwellings. A finding that simply states the farm management plan submitted by an applicant for farm dwelling approval meets the local code's definition of "commercial farm" is impermissibly conclusory. *Kunze v. Clackamas County*, 27 Or LUBA 130 (1994).

31.3.2 Permits – Particular Uses – Farm Dwellings. Where the local code allows a farm dwelling on EFU-zoned property that "is currently used for a commercial farm use," the local government may interpret its code to allow it to issue a building permit for a farm dwelling when a commercial farm management plan is substantially implemented, including a situation where perennial crops capable of producing the level of income required for commercial farm use have been planted on the property. *Kunze v. Clackamas County*, 27 Or LUBA 130 (1994).

31.3.2 Permits – Particular Uses – Farm Dwellings. Even though LUBA might agree with a county's argument in its brief that the purpose section of its EFU zoning district is not an approval standard for a farm dwelling permit application, if the challenged decision itself does not interpret the code provision, LUBA must remand the decision for the county to interpret the provision in the first instance. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

31.3.2 Permits – Particular Uses – Farm Dwellings. Conditioning approval of a farm dwelling on the applicant obtaining a zoning permit with the board of county commissioners acting as initial decision maker on the zoning permit rather than the planning director is at most a procedural error, which provides a basis for reversal or remand only if petitioner's substantial rights are violated. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

31.3.2 Permits – Particular Uses – Farm Dwellings. A county decision approving a dwelling on a lot or parcel that is a woodlot capable of producing 10,000 dollars or more in average gross annual income, as provided in ORS 215.213(2)(b)(B), is "discretionary" and is a "permit," as

defined by ORS 215.402(4). *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992).

31.3.2 Permits – Particular Uses – Farm Dwellings. In determining whether a proposed dwelling meets the ORS 215.213(2) standards for dwellings in conjunction with a Christmas tree farm use, it is incorrect to apply the "used exclusively" and "evidence of periodic maintenance practices" standards contained in ORS 215.203(2)(a) and (3)(a) and (d). Those ORS 215.203 standards are designed to constitute qualifications for particular taxation treatment, and are not land use standards applicable to approval of dwellings in conjunction with farm use. *Harwood v. Lane County*, 23 Or LUBA 191 (1992).

31.3.2 Permits – Particular Uses – Farm Dwellings. Nothing in ORS 215.213(2) requires a local government to find that a proposed dwelling in conjunction with farm use be "necessary" to the farm use of the property. *Harwood v. Lane County*, 23 Or LUBA 191 (1992).

31.3.2 Permits – Particular Uses – Farm Dwellings. Where there is neither a local code nor a statutory definition of the term "perennial," the commonly understood meaning of that term is applied. Under the commonly understood meaning of "perennial," a Christmas tree is a perennial under ORS 215.213(2)(b)(A). *Harwood v. Lane County*, 23 Or LUBA 191 (1992).

31.3.2 Permits – Particular Uses – Farm Dwellings. OAR 660-05-030(4) does not allow approval of a dwelling customarily provided in conjunction with farm use where the farm use that the dwelling would be customarily provided in conjunction with does not yet exist on the subject property. *Hayes v. Deschutes County*, 23 Or LUBA 91 (1992).

31.3.3 Permits – Particular Uses – Forest Dwellings. Where an approved site plan indicates that a replacement dwelling will be sited on an *adjacent* property, but where the building permit for the replacement dwelling allows a replacement dwelling "in the same footprint as the original home," and where an ArcGIS map marked with distances and existing development indicate that the footprint of the original dwelling was located on the *subject* property, a conclusion that the subject property does not "include[] a dwelling" for purposes of forest template dwelling approval under ORS 215.750(4)(d) is not supported by substantial evidence. *Bielefeld v. Lane County*, 80 Or LUBA 480 (2019).

31.3.3 Permits – Particular Uses – Forest Dwellings. Where a county approves a "forest template dwelling" under ORS 215.750(1)(c), arguments that the county relied on units of land that were unlawfully created through partition approval, rather than subdivision approval, provide no basis for reversal or remand since any procedural error the county committed in approving the land division cannot be collaterally attacked in an appeal of a subsequent decision that depends on the prior approval. *Landwatch Lane County v. Lane County*, 79 Or LUBA 65 (2019).

31.3.3 Permits – Particular Uses – Forest Dwellings. A county may not allow unlimited, successive one-year extensions of permits for residential development on resource land where state statute and regulation provide that such permits "shall be valid for four years" and that "[a]n extension" thereof "shall be valid for two years," where nothing in the legislative history suggests an intent to allow more than one extension. *Landwatch Lane County v. Lane County*, 79 Or LUBA 96 (2019).

31.3.3 Permits – Particular Uses – Forest Dwellings. A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

31.3.3 Permits – Particular Uses – Forest Dwellings. Where a county determines that a property qualifies for a forest template dwelling under ORS 215.750 because at least three dwellings existed on surrounding lots or parcels on January 1, 1993, based on a statement of the applicant, a recollection of the prior owner of one of the surrounding dwellings, an email from a contractor who worked on one of the surrounding dwellings, and a statement by the tax assessor that its records showed a dwelling in place on January 1, 1993, but where LUBA concludes that the county erred in accepting the email, where LUBA cannot determine whether the county would have reached the same conclusion without the email, and where the county's findings failed to address

evidence that the tax rolls indicate existence of the dwelling as of July 1993 rather than January 1993, LUBA will remand for the county to adopt adequate findings. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

31.3.3 Permits – Particular Uses – Forest Dwellings. Absent a legal definition for how the center point of a property must be established for purposes of determining whether it qualifies for a forest template dwelling under ORS 215.750, a county errs by not explaining the basis for its conclusion that its chosen method is the most appropriate and by not addressing opponents' arguments challenging that method. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

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31.3.3 Permits – Particular Uses – Forest Dwellings. Absent a legal definition for how the center point of a property must be established for purposes of determining whether it qualifies for a forest template dwelling under ORS 215.750, a county errs by not explaining the basis for its conclusion that its chosen method is the most appropriate and by not addressing opponents' arguments challenging that method. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

31.3.3 Permits – Particular Uses – Forest Dwellings. ORS 215.750 does not prohibit a local government from applying a local code provision requiring an applicant for a forest template

dwelling to demonstrate that the dwelling is "necessary for and accessory to" the forest use. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

31.3.3 Permits – Particular Uses – Forest Dwellings. LUBA will not defer to a local government's interpretation of the phrase "necessary for and accessory to" forest management as meaning "convenient and efficient" to forest management, where such an interpretation is contrary to the plain meaning of the word "necessary," the express language of the provision at issue, and other language in the provision. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

31.3.3 Permits – Particular Uses – Forest Dwellings. Findings concluding that a proposed dwelling will not significantly increase fire hazards in a forest zone are not necessarily adequate to also show that the dwelling will not significantly increase fire suppression costs or risks to fire suppression personnel. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

31.3.3 Permits – Particular Uses – Forest Dwellings. A hearings officer errs in concluding, based on expert testimony that isolated dwellings force firefighters to choose either to abandon such homes or to devote insufficient resources to defend them, that the proposed isolated dwelling will not significantly increase fire suppression costs or risks to fire suppression personnel because firefighters would simply abandon the dwelling. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

31.3.3 Permits – Particular Uses – Forest Dwellings. Remand is necessary where the applicant's forest consultant recommends vegetation removal as necessary to ensure compliance with approval criteria for a large tract forest dwelling, but the hearings officer does not adopt a condition of approval to that effect or explain why such measures are not necessary to ensure compliance with approval criteria. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

31.3.3 Permits – Particular Uses – Forest Dwellings. Under a code standard requiring that a forest dwelling be located at a site that minimizes the risks associated with wildfire, remand is necessary where the opponents' expert testified that the preferred site is isolated and will incur significantly more risk and cost to firefighters over alternative sites, there is no rebuttal of that testimony, and the findings do not state a sufficient basis to reject that testimony. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

31.3.3 Permits – Particular Uses – Forest Dwellings. Where the purpose of code standards for siting a large tract forest dwelling is to identify a site that minimizes the loss of forest lands to non-forest uses, it is appropriate to favor sites that are already developed for non-forest uses over undeveloped sites, because developed sites do not require additional loss of forest lands to forest uses. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

31.3.3 Permits – Particular Uses – Forest Dwellings. Where no county approval was required to create parcels of more than 20 acres in a transitional timber zone if the parcel was to be used for forest use and the question is whether a parcel that was created 16 years ago was created for forest use, the fact that the parcel was used only for growing trees for 16 years is sufficient to show the parcel was created for forest use and it does not matter that no trees were harvested during that 16-year period. *Neal v. Clackamas County*, 52 Or LUBA 248 (2006).

31.3.3 Permits – Particular Uses – Forest Dwellings. The broad statutory definition of "owner" under statutory lot- of-record provisions, which includes certain relatives of the fee title owner as the owner, does not apply in determining whether parcels are part of the same "tract" for purposes of approving a forest template dwelling. *Neal v. Clackamas County*, 52 Or LUBA 248 (2006).

31.3.3 Permits – Particular Uses – Forest Dwellings. Forest restocking requirements imposed by OAR 660-006-0029 do not constitute approval criteria that determine whether a dwelling may be approved on property zoned for forest use. *Hodge Oregon Properties, LLC v. Lincoln County*, 46 Or LUBA 290 (2004).

31.3.3 Permits – Particular Uses – Forest Dwellings. Where the local code neither requires the proposed conditional use to be the sole use of the entire subject parcel nor prohibits approval of a nonforest conditional use on a portion of a parcel on which a forest dwelling is located, a prior local decision approving a forest dwelling on the subject parcel does not prevent subsequent approval of a conditional use permit for a proposed nonforest use on a portion of that parcel. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

31.3.3 Permits – Particular Uses – Forest Dwellings. A determination that an onsite dwelling is essential to carrying out the proposed forest management operation, supported by adequate findings and substantial evidence, demonstrates compliance with a local standard requiring that a forest management dwelling be "necessary for * * * a permitted forest use." *DLCD v. Coos County*, 25 Or LUBA 158 (1993).

31.3.3 Permits – Particular Uses – Forest Dwellings. The "necessary for and accessory to" test for approval of forest dwellings is a significant limitation on the approval of permits for construction of single-family dwellings on lands planned and zoned for forest use. Further, the necessary and accessory test is not satisfied simply because a proposed forest dwelling is convenient for, or will enhance the cost effectiveness of, the forest use of a forest parcel. *Barnett v. Clatsop County*, 23 Or LUBA 595 (1992).

31.3.3 Permits – Particular Uses – Forest Dwellings. Where the findings supporting a local government decision approving a forest dwelling under the "necessary for and accessory to test" fail to explain why living on-site is *required* for performance of the identified forest management duties, the findings are inadequate to establish that the proposed forest dwelling is "necessary." *Barnett v. Clatsop County*, 23 Or LUBA 595 (1992).

31.3.3 Permits – Particular Uses – Forest Dwellings. Where a local government interprets the phrase "necessary for and accessory to" in the local code as requiring only a showing that a proposed dwelling is convenient to the continuation of the resource use of the property, such interpretation is incorrect. *Tipperman v. Union County*, 22 Or LUBA 775 (1992).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A county fails to correctly apply the farm impacts test at ORS 215.296(1) where it concludes that there are only a few farm or forest uses in the area but does not identify and discuss each farm or forest use, where it does not describe the operations on each of the surrounding properties devoted to farm or forest use, where it does not identify evidence of the unmitigated impacts of the proposed nonfarm use, and where it concludes that such impacts will be reduced but does not identify evidence that significant impacts are avoided. *Currie v. Douglas County*, 79 Or LUBA 585 (2019).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a local code provision provides that issuance of a conditional use permit requires a determination that "[t]he proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone," an interpretation by the local government that it need not consider the impact of the proposed use on property values and neighbor peace of mind is not inconsistent with the provision's express language or underlying policies. *Currie v. Douglas County*, 79 Or LUBA 585 (2019).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a local code provision provides that issuance of a conditional use permit (CUP) requires a determination that "[t]he proposed use is or may be made compatible with existing adjacent permitted uses and other uses permitted in the underlying zone," a local government decision granting a CUP is not supported by substantial evidence where it does not identify and describe all of the existing and permitted uses on adjacent properties and where it fails to analyze or measure the extent of the potential impacts of the proposed use and instead proceeds straight to mitigation measures. *Currie v. Douglas County*, 79 Or LUBA 585 (2019).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. How to (1) plan and zone an inventoried significant mineral and aggregate resource site, and (2) plan and zone any adjoining areas that may be needed for processing or buffers or to otherwise mitigate identified conflicts are separate questions from what property is properly included on a comprehensive plan Statewide Planning Goal 5 inventory of significant aggregate sites. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. The OAR 660-023-0180(1)(b) requirement to minimize conflicts does not require an absolute guarantee that a proposed mining operation will never violate Oregon Department of Environmental Quality (DEQ) standards. A local government does not err by finding that DEQ noise standards will be met, based on the applicant's sound study, and by imposing a condition of approval that mining be monitored for noise in the future and any changes in mining be made in the future to fully comply with DEQ noise standards, without requiring that mining cease until the mine fully complies with DEQ noise standards. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. OAR 340-225-0040 and OAR 340-225-0050 modeling requirements to determine whether a proposed mining operation will comply with ambient air quality and new source air particulate standards are not mere procedural requirements an applicant is free to ignore. The applicant and local government must either perform the required modeling or demonstrate that the modeling is unnecessary to demonstrate the

proposed mining will comply with the air particulate standards. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a county development ordinance requires that all permits and approval for an allowed primary use must be obtained before any accessory use may be established, the county errs by approving a proposal to process aggregate material as an accessory use where the primary use, aggregate mining, is not proposed or approved. *Rogue Advocates v. Jackson County*, 74 Or LUBA 214 (2016).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a county identifies three related reasons why introduction of inconsistent uses in an area is justified, but the petitioner challenges the findings and evidentiary support for only one reason, the failure to challenge the remaining two reasons is not a basis to reject petitioner's challenge, where the three reasons are not stated as independent alternatives, and the challenged reason appears to underpins the other two reasons. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. OAR 660-023-0180(7) requires that a local government conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses within the impact area of a Goal 5 resource. Where a petitioner raised general issues of compliance with OAR 660-023-0180(7) during the proceedings below, but in its findings the county declined to conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses, on appeal to LUBA the petitioner may challenge the county's finding that it need not conduct an ESEE analysis. The petitioner is not required to anticipate that the county will adopt findings concluding that no ESEE analysis is required. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Nothing in OAR 660-023-0180(7), which requires that a local government conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses within the impact area of a Goal 5 mining resource, allows a county to postpone the ESEE analysis to a future land use proceeding after it has approved the comprehensive plan and zoning changes to allow the mining use that triggers application of OAR 660-023-0180(7). *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Absent a land use regulation or other applicable law that requires a county to address compliance with state or federal archeological and cultural preservation laws in approving an application for a mining use, or to impose conditions requiring compliance with such laws if archeological or cultural sites are discovered during mining, the county does not err in failing to adopt such findings or impose such a condition. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A finding that mining will not conflict with deer and elk winter range on the subject property, because resident deer and elk will adjust to noise from mining and truck traffic on the property, is insufficient to address issues raised regarding impacts of truck traffic on deer and elk migration routes off the property, including the increased potential for collisions between trucks and deer and elk migrating across the county road. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A city is not required to defer to a permit applicant's characterization of its proposal to remove up to 500,000 cubic yards of rock from a five-acre site as mere site preparation that is necessary for a possible future proposal for residential development. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A development ordinance that links the terms "mining" and "quarrying" suggests the term "mining" should not be limited to removal of minerals that exclude rock, where dictionary definitions of "quarrying" frequently define that term to include rock removal. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a development code states that "minerals" include three general categories: solids, liquids, and gases, but these general categories are followed by specific examples: "coal and ores," "crude petroleum" and "natural gases," the rule of statutory construction *ejusdem generis* lends some support for interpreting the word "minerals" to be a narrow category of precious and/or valuable substances, as opposed to mere rock or aggregate. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a development code definition of the term "excavation" separately lists removal of "minerals" and "rock" as possible examples of "excavation," that suggests "minerals" and "rock" are different things and that "minerals" do not include "rock." *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a development code definition of "surface mining" duplicates a statute that defines "surface mining" to include mining of "minerals," without expressly incorporating the broad statutory definition of "minerals" or the statutory exceptions to that broad definition of "minerals" the development code definition of "surface mining" lends some support to the position that the enactors of the development code intended the word "minerals" to have a more narrow meaning than the statutory definition of that term. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. One possible inference when a development code definition of "surface mining" duplicates a statute that defines "surface mining" to include mining of "minerals," is that the enactors of the development code intended the word "minerals" to have its statutory meaning, even if the enactors did not expressly incorporate the broad statutory definition of "minerals" or the statutory exceptions to that broad definition of "minerals" into the development code. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. There is nothing inherently inappropriate about a local government distinguishing between acceptable excavations that are necessary for development and excavations that are of a nature and extent that constitutes mining. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. While dictionaries are not always a reliable way to determine the intended meaning of an undefined term like "minerals," where the

development codes expressly directs that undefined terms "have the normal dictionary meaning" it is appropriate to rely on dictionary definitions to interpret the word "minerals" to include basalt rock. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where applicable land use regulations require that a proposal to modify a previously approved conditional use must be "consistent" with previously approved conditional use, and the proposal would eliminate the previously approved composting operation and make minor changes to the previously approved topsoil mining operation, the modified conditional use is correctly viewed as "consistent" with the previously approved conditional use. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Remand is necessary where a conditional use permit approval standard requires a comparison of the adverse impacts of the proposed mining use on abutting properties with the impacts of development permitted outright on the abutting properties, but the local government findings compare only the impacts of proposed and existing mining and do not consider the impacts of uses permitted outright. *Dion v. Baker County*, 70 Or LUBA 438 (2014).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Remand is necessary where the decision (1) approves a two-year intensification of a mining operation and (2) modifies extraction limits to extend the life of the mining operation beyond the initial two-year period, but the only evidence regarding compliance with an approval standard requiring that the existing county road system be "adequate to accommodate the proposed use" addresses only the initial two-year period, not long-term impacts on the adequacy of the county road system. *Dion v. Baker County*, 70 Or LUBA 438 (2014).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A local government does not exceed its jurisdiction in attempting to determine whether the Department of State Lands or Department of Geology and Mineral Industries has jurisdiction to issue a state permit required for a riparian mining operation, so that the local government can find compliance with local standards and impose conditions requiring the applicant to obtain a permit from the appropriate agency. *Oregon Shores Cons. Coalition v. Curry County*, 61 Or LUBA 8 (2010).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Absent countervailing evidence, a letter from an applicant's engineer relating the site visit and verbal agreement of representatives from the Department of State Lands (DSL) and Department of Geology and Mineral Industries (DOGAMI) that DOGAMI and not DSL has jurisdiction over a proposed riparian mining operation is substantial evidence a decision maker could rely upon to conclude that DOGAMI has jurisdiction over the operation. *Oregon Shores Cons. Coalition v. Curry County*, 61 Or LUBA 8 (2010).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where there is uncertainty regarding the exact location of the jurisdictional line between the Department of State Lands (DSL) and Department of Geology and Mineral Industries (DOGAMI), but agency representatives agree that a proposed mining area is upland of the jurisdictional line and therefore subject to DOGAMI's jurisdiction, and as a precaution the county imposes a condition requiring that the applicant obtain

any permits required by either DSL or DOGAMI, any uncertainty regarding the location of the jurisdictional line does not undermine the county's finding that DOGAMI has jurisdiction. *Oregon Shores Cons. Coalition v. Curry County*, 61 Or LUBA 8 (2010).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. The lack of evidence in the record regarding depth or location of contaminated groundwater on a mining site and the possibility that groundwater might enter the adjacent river is not a basis to reverse or remand under a code provision requiring consideration of impacts on conflicting uses within 250 feet of the property, where the only conflicting use identified is a city water intake located 3,500 feet upstream of the mining site beyond the head of tide, and the petitioner cites no evidence or argument suggesting how contaminated groundwater from the site could migrate upstream above the head of tide to impact the municipal water intake. *Oregon Shores Cons. Coalition v. Curry County*, 61 Or LUBA 8 (2010).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where an applicant for a mining operation submits sufficient information to allow the local government to determine that a local water quality standard is satisfied, but the local government for extra assurance also requires the applicant to obtain a state agency water quality permit, the applicant is not required to submit its state agency application materials to the local government for review under the local approval standard. *Oregon Shores Cons. Coalition v. Curry County*, 61 Or LUBA 8 (2010).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a local government's Goal 5 Program to Achieve the Goal for a particular mineral and aggregate site requires "ongoing incremental reclamation (subject to [Department of Geology and Mineral Industries] review and approval)" the local government likely could interpret that requirement to allow it to write a condition requiring "ongoing incremental reclamation" but expressly providing that DOGAMI is free to determine whether "ongoing incremental reclamation" is possible or desirable and that DOGAMI may modify or waive that requirement altogether in its permitting process as DOGAMI sees fit. However, the county cannot simply abandon the requirement for "ongoing incremental reclamation" by claiming it lacks expertise in reclamation and does not understand the meaning of that requirement. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a zoning ordinance expressly prohibits a county from issuing a use permit as a precondition of commencing mining until the applicant secures a state agency approval for a reclamation plan, the local government's failure to include such a requirement in the conditions attached to its conditional use and site plan approval decision is harmless error. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Conditions of approval are not too vague under the Court of Appeals' reasoning in *Sisters Forest Planning Committee v. Deschutes Cty.*, 198 Or App 311, 108 P3d 1175 (2005), where the conditions of approval are not any more vague than many of the standards they were imposed to address. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a zoning ordinance requires a mining permit applicant to demonstrate that a proposed mining operation can meet certain state

standards and a state standard prohibits mining "without taking reasonable precautions to prevent particulate matter from becoming airborne," and a local government interprets that state standard to require that the applicant successfully prevent all particulate matter from becoming airborne, the local government erroneously interprets the state standard. The state standard only requires that the applicant take reasonable precautions; it does not require the elimination of all airborne particulate matter. *Hoffman v. Deschutes County*, 61 Or LUBA 173 (2010).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A condition requiring that the applicant for mining restrict rock blasting for up to three days after being notified of Native American cultural or religious visits to a nearby site is sufficient to ensure that noise from blasting will not conflict with such visits. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A county's failure to first determine the degree of adverse effects of blasting-generated dust on a nearby residence before conducting its ESEE analysis, as required by OAR 660-023-0180(5)(d)(A), is not reversible error, where the county's ESEE analysis finds that a condition of approval restricting blasting times to periods when the wind blows away from the residence will minimize or eliminate adverse impacts on the residence. That finding, if supported by the record, means that the county did not need to conduct an ESEE analysis at all with respect to impacts of dust on the residence. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A proposed aggregate resource site is significant if it meets any one of the criteria at subsections (a) through (c) of OAR 660-023-0180(3). *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Even if an aggregate resource site is found to be "significant" under OAR 660-023-0180(3)(a) or (b), OAR 660-023-0180(3)(d) dictates that such aggregate resource sites are not "significant," within the meaning of OAR 660-023-0180(3), if (1) more than 35 percent of the site's soils are rated Class I by the Natural Resource and Conservation Service or (2) more than 35 percent of the site's soils are rated Class II or a combination of Class I and II by the Natural Resource and Conservation Service and the average thickness of the aggregate layer does not exceed specified minimums in the rule. *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. If a mineral and aggregate site is found to be significant under OAR 660-023-0180(3), then local governments must determine whether mining will be allowed. That in turn requires a number of additional determinations regarding: (1) an impact area, (2) conflicts, and (3) whether conflicts can be minimized. OAR 660-023-0180(5)(a) through (c). If all identified conflicts can be minimized, mining must be allowed. OAR 660-023-0180(5)(c). If all identified conflicts cannot be minimized, the local government must then determine the economic, social, environmental, and energy consequences of allowing mining notwithstanding that the conflicts cannot be minimized. OAR 660-023-0180(5)(d). *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where OAR 660-023-0180(3)(d)(B) applies, and the requisite average thickness of the aggregate layer is not shown to

be present, an aggregate resource site is not "significant," within the meaning of OAR 660-023-0180(3). *Delta Property Company v. Lane County*, 58 Or LUBA 409 (2009).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A finding that a proposed aggregate site may have a large basalt outcrop in the middle of the site is not supported by substantial evidence, where the only evidence supporting the finding is data from an off-site well and that finding is inconsistent with a deep boring that is near the center of the site and between the center of the site and the off-site well that the finding relied on. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. To qualify as a "significant" aggregate resource site under OAR 660-023-0180(3)(d)(B)(ii), "the average thickness of the aggregate layer within the mining area" must exceed 25 feet. Where a county's findings suggest the county may have erroneously concluded that boulders should not be considered in determining whether the requisite 25-foot-thick layer is present on a proposed aggregate resource site, remand is necessary so that the county can either (1) adopt findings under OAR 660-0023-0180(3) that do not discount aggregate significance based on the possible presence of boulders or (2) explain why the presence of boulders properly affects the determination of significance under OAR 660-0023-0180(3). *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where an applicant seeking to establish that a proposed mining site qualifies as a significant aggregate resource site does not argue to the county that opponents' data from off-site wells is consistent with data from the applicant's on-site wells or that the data from the off-site wells is unreliable because it was not collected under the supervision of a geologist, it is not unreasonable for the county to rely on the opponents' evidence to conclude that the two on-site borings were not sufficient to establish that a 117-acre mining site qualifies as a significant aggregate resource site. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Two 25-foot-deep test pits that show an overburden of several feet on top of 20+ feet of aggregate material do not establish that there is an aggregate layer of more than 25 feet and they do not establish that the aggregate layer that is present on the site is less than 25 feet deep. The 25-foot-deep pit can only confirm the geology of the 25 feet below the surface where the test pit was dug. *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where LUBA determines that three county findings regarding the significance of an aggregate site are not supported by substantial evidence, are inadequately explained, or fail to appreciate the significance of certain evidence in the record, remand is required where LUBA cannot assume the findings were minor or unimportant parts of the county's ultimate decision that the applicant failed to demonstrate that the aggregate site qualifies as "significant," under OAR 660-023-0180(3). *Westside Rock v. Clackamas County*, 56 Or LUBA 601 (2008).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Specific code provisions that require imposition of a surface mining overlay zone on property within one-half mile of the mining site,

which are intended to protect the site from adverse uses, control over general code provisions requiring that owners of property being rezoned sign the application. The purpose of the overlay zone would be frustrated if nearby property owners could effectively veto a mining operation by refusing to sign the application. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. While an astronomer's testimony regarding the impact of dust on an observatory's telescopes is substantial evidence from which a reasonable decision maker could conclude that dust from an open-pit mining operation would significantly conflict with the observatory, the county could nonetheless rely on the distance between the site and the observatory and proposed measures to control dust to conclude that the mine would not significantly conflict with the observatory. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Reliance on Goal 5 zoning to protect habitat is an insufficient basis to conclude that there will be no "significant potential conflicts" with the habitat, where the findings fail to address evidence and testimony that mining will disrupt grouse flight patterns over the mining site to the Goal 5 protected habitat sites. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Findings excluding a cattle ranch four miles from the mining site from the impact area are inadequate, where the findings fail to address testimony that the ranch owns allotment land within one-half mile of the site and mining noise and impacts will displace cattle from the allotment to deeded land, increasing costs. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Under OAR 660-023-0180(5)(b), conflicts with residential uses "due to noise, dust, or other discharges" must be considered, even if those conflicts turn on "quality of life" or similar intangible values. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. The Goal 5 rule does not require a mining applicant to survey a buffer area to determine if there are unknown archeological sites within the buffer, when those sites are not inventoried Goal 5 resources. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where testimony indicates that tribal members conduct religious and cultural ceremonies near ancient pictograms identified on the county's Goal 5 inventory, the county must evaluate whether such visits are "existing" uses for purposes of OAR 660-023-0180(5)(b)(A) and if so evaluate alleged conflicts between proposed surface mining and those uses. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. For purposes of identifying conflicts with agricultural uses within the impact area under the second step of the Goal 5 process at OAR 660-023-0180(5)(b)(E), the rule is not concerned with the relative economic significance of the agricultural use, and the county errs in declining to evaluate impacts on grazing in the area simply

because that grazing is limited in scope or economic importance. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Findings that address impacts of a mine's groundwater well on the regional aquifer are inadequate to address testimony that the mining pit itself will de-water perched aquifers in the area. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Remand is necessary where the county's ESEE findings evaluate impacts of dust from daily mining activities on nearby residences, but fail to evaluate dust generated by blasting or determine whether such impacts may be minimized or reduced. *Walker v. Deschutes County*, 55 Or LUBA 93 (2007).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where there are unchallenged findings that an aggregate mine presents no actual risk of contamination to groundwater wells, a county is not obligated to adopt findings addressing the possibility that potential users of groundwater wells may *perceive* a risk of contamination. The mere perception of a risk is too tenuous and indirect to constitute a "negative impact" that must be analyzed under OAR 660-016-0005 and 660-016-0010. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Under a local code provision that requires evaluation of the traffic impacts caused by "development of the property" being rezoned, in rezoning land to allow for a new aggregate mine the local government is not required to evaluate the cumulative traffic impacts of the new mine along with other mines the applicant operates. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A governing body's interpretation of a code provision defining the study area for an aggregate mine, to exclude haul roads used to transport finished aggregate material off-site, is consistent with the text of the code provision and is not reversible under ORS 197.829(1). *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Remand is necessary where the local government's approval of an asphalt batch plant fails to address issues raised regarding the impact of emissions on especially sensitive crops grown nearby. *Rickreall Community Water Assoc. v. Polk County*, 53 Or LUBA 76 (2006).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a county denies an application for a mineral and aggregate zoning overlay because the applicant failed to supply a certificate that the mine would not result in an increase in flood elevations, the county's decision must identify the legal requirement that the certificate be submitted at the time the zoning overlay is approved. *Westside Rock v. Clackamas County*, 51 Or LUBA 264 (2006).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A local government reasonably viewed an engineer as a qualified expert, where the person had a degree in agricultural engineering

and several engineering certifications, participated actively in the local proceedings regarding a mineral and aggregate overlay and presented models to predict performance of mining plans, and challenged assumptions of the applicant's experts. *Westside Rock v. Clackamas County*, 51 Or LUBA 264 (2006).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. The testimony of experts in assessing the risk of turbid water discharges from proposed aggregate mining in a river's floodplain and the risk of avulsion is likely to be critical. Experts must collect and analyze the data and draw scientific conclusions to assess that risk and ultimately the issue will likely be which experts the decision maker finds more believable. *Westside Rock v. Clackamas County*, 51 Or LUBA 264 (2006).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where there is conflicting expert testimony regarding the location of a river channel migration zone and the probability that the river channel might migrate to capture a proposed floodplain mining site causing river turbidity, the county's decision to believe the larger channel migration zone should apply is supported by substantial evidence. *Westside Rock v. Clackamas County*, 51 Or LUBA 264 (2006).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. An acoustic engineer's statement that the procedures followed in conducting a noise study for an aggregate mine were "generally consistent" with procedures required by state administrative rule is sufficient to demonstrate compliance with the rule, particularly where the petitioners do not identify any material difference between the procedures followed and those required the rule. *Ray v. Josephine County*, 51 Or LUBA 443 (2006).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A finding that a proposed mine will have adverse effects on the livability, value and enjoyment of residential uses within the impact area might play some role in the required considerations under OAR 660-023-0180, but that finding is not, in and of itself, either a proper consideration under OAR 660-023-0180 or a sufficient basis for denying the requested permit. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A county's obligation under OAR 660-023-0180(4)(c) to consider reasonable measures to minimize conflicts associated with mining and its obligation under OAR 660-023-0180(4)(d) to consider economic, social, environmental and energy consequences of allowing, limiting or not allowing mining are "findings" obligations, and they do not place an obligation on the county to produce evidence regarding an application for mining. *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a local government has repealed its Goal 5 inventory of aggregate sites, the owner of EFU-zoned property listed on the repealed inventory is not entitled to a conditional use permit to mine the site under ORS 215.298(2). *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653 (2004).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. The lack of specific evidence on whether aggregate samples tested by a laboratory were "representative," as required by OAR 660-

023-0180(3)(a), does not provide a basis for reversal or remand, where the samples came from an existing quarry and there is no suggestion in the record that the sample was not representative or that the quality of rock in the existing quarry was not uniform. *Bryant v. Umatilla County*, 45 Or LUBA 653 (2003).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Notwithstanding that OAR 660-023-0180(3)(a) requires that aggregate samples meet ODOT specifications for sodium sulfate soundness, where it is undisputed that ODOT in fact has not promulgated any such specifications, the failure of the applicant to test aggregate samples for sodium sulfate soundness does not provide a basis for reversal or remand. *Bryant v. Umatilla County*, 45 Or LUBA 653 (2003).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. OAR 660-023-00180(4) establishes different requirements for evaluating conflicts between mining and agricultural practices and between mining and other uses. Therefore, a finding that proposed mining activities conflicts with nonagricultural uses will not be significant because air quality and traffic standards will be met does not necessarily establish that those conflicts will not either force a significant change in accepted agricultural practices or significantly increase the cost of those agricultural practices. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. The standard for reviewing conflicts between mining and accepted agricultural practices set out in OAR 660-023-0180(4)(c) is limited to "farm uses," as that term is defined in ORS 215.203(2). Uses identified as non-farm uses permitted under ORS 215.213(1) are not farm uses or agricultural practices that must be evaluated under that standard. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where an applicant identifies groundwater as a "discharge" to be considered as a conflict pursuant to OAR 660-023-0180(4)(b)(A), that applicant may not argue on appeal to LUBA that (1) groundwater is not a "discharge" within the meaning of that rule; or (2) that the impact of mining on groundwater may only be considered under OAR 660-023-0180(4)(b)(D) if the mining site is located within a critical groundwater area and is designated as such on the county's Goal 5 inventory of significant Goal 5 sites. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. OAR 660-023-0180(4) does not change an applicant's evidentiary burden to demonstrate that measures proposed to minimize of the impacts of mining are reasonable, practical and achievable. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A county's finding that proposed mining activities are not minimized sufficiently to avoid conflicts with identified riparian resources is not adequate, where the riparian area is located near water courses that will receive water diverted from mining cells and the county adopted other findings that mining will not affect identified wetlands that are located between the riparian area and presumably would be more susceptible to fluctuations in water levels than the riparian areas. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. The conflicts analysis that is mandated by OAR 660-023-0180(4)(b)(B) is limited to local roads that are used for access and egress. Where a proposed aggregate mine will use a state highway for access and egress, there are no road conflicts to be considered under the rule. *Friends of the Applegate v. Josephine County*, 44 Or LUBA 786 (2003).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Goal 6 does not require that a local government anticipate and precisely duplicate state and federal environmental permitting requirements in approving a post-acknowledgment plan amendment for an aggregate mine. The local government is only required to establish that there is a reasonable expectation that the proposed mine will be able to comply with the applicable state and federal environmental quality standards. *Friends of the Applegate v. Josephine County*, 44 Or LUBA 786 (2003).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A conditional use permit standard for aggregate extraction requiring that the applicant submit "sufficient information to allow the county to set standards" regarding the location, quality and quantity of resource available allows but does not obligate the county to set such standards in approving the permit. A local government's interpretation to that effect is consistent with the express language of the standard and is not reversible under ORS 197.829(1) or *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. ORS 215.286 does not require a guarantee that aggregate mining on land zoned for exclusive farm use will cause no adverse impacts on the water table on surrounding lands. *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a county approves aggregate mining in an airport overlay zone under a standard that allows water impoundments that do not significantly increase bird strike hazards, but the county does not address another local standard that appears to flatly prohibit such impoundments, LUBA will remand the decision to the county to resolve the apparent conflict between the two standards. *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Remand is appropriate where the local government approves an aggregate mine that appears to impact an inventoried Goal 5 groundwater resource without addressing issues raised below regarding whether the proposed mine complies with local provisions that were adopted to protect Goal 5 resources. *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A local government is not obligated to accept evidence that ODOT approved access onto a state highway as sufficient to satisfy a county criterion that the proposed quarry operation not impose an undue burden on public improvements, which include public roads. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368 (1999).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. OAR 660-023-0180, which governs comprehensive plan amendments for mineral and aggregate resources, establishes the procedures required to comply with Goal 5 but does not obviate the requirement to address other statewide planning goals. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. If a county has not yet amended its comprehensive plan and land use regulations to comply with OAR 660-023-0180, OAR 660-023-0180(7) requires that the county directly apply the substantive requirements and procedures of OAR 660-023-0180 to consideration of a post-acknowledgment plan amendment concerning mining authorization. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. OAR 660-023-0180(4)(b)(F), which allows the county to consider land use conflicts with a proposed mine if such conflicts must be considered under a county mining ordinance adopted pursuant to ORS 517.780, does not permit a county to apply its comprehensive plan and land use regulations as decisional criteria for the proposed mine, notwithstanding a general provision in the mining ordinance that requires compliance with the county comprehensive plan and land use regulations. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A conflict or inconsistency with a comprehensive plan or land use regulation provision is not the kind of conflict that may be considered under OAR 660-023-0180(4)(b). The conflicts that may considered under the rule include conflicts between land uses. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where access to a mining site is via a "local road," OAR 660-023-0180(4)(b)(B) allows a county to consider conflicts with that local road. However, where access to a mining site is via an arterial highway there are no local roads used for access and egress to the mining site and OAR 660-023-0180(4)(b)(B) does not permit the county to consider conflicts with other roads. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A local government may not expand the 1,500-foot impact area required by OAR 660-023-0180(4)(a) based on potential conflicts that exceed the scope of conflicts that may be considered under OAR 660-023-0180(4)(b). *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. OAR 660-023-0180(4)(d) directs that a county proceed to "determine the ESEE consequences of either allowing, limiting, or not allowing mining at the site," only where conflicts with a mining site are properly identified under OAR 660-023-0180(4)(b) and there are not "reasonable and practical measures" that would minimize those conflicts. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. That a type of nonfarm use is listed in ORS 215.283(2) authorizes a county to allow such uses in an EFU zone, but carries no implication that a particular use is consistent with the purpose of the EFU zone as a matter of law.

ORS 215.283(2) does not prohibit the county from applying a local criterion that requires a proposal to mine high-value agricultural topsoil in an EFU zone not seriously interfere with the purpose of that zone. *MacHugh v. Benton County*, 37 Or LUBA 65 (1999).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Even assuming that a county cannot categorically prohibit all mining operations in the EFU zone, the county can apply a local standard requiring that conditional uses not seriously interfere with the purpose of the zone to deny a proposal to mine high-value agricultural topsoil, where the county's application of its standard is limited to mining operations that permanently remove agricultural topsoil. *MacHugh v. Benton County*, 37 Or LUBA 65 (1999).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a comprehensive plan does not provide for a proposed expansion of a mining site, a conditional use permit is insufficient to permit the expansion. In that circumstance, OAR 660-023-0180 requires a post-acknowledgment plan amendment and Goal 5 analysis. *Trademark Construction, Inc. v. Marion County*, 34 Or LUBA 202 (1998).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Evidence of stockpiled rock in an otherwise unused and unmaintained quarry does not constitute an ongoing quarry operation, but supports a conclusion that the site has been discontinued or interrupted for the purposes of ORS 215.130. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Because abandonment is established through an active intent to discontinue the use, petitioner's lease of a quarry site to an unrelated business is evidence of intent to abandon the site as a quarry. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. A decision to list a site on a plan aggregate resources inventory as a "1B" site simply indicates the possible existence of an aggregate resource site. Such a decision, of itself, neither plans for nor regulates the *development* of aggregate resources and, therefore, OAR 660-16-030(1) does not apply. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a county decision adds a mineral and aggregate overlay zone to the site of a pre-existing conditional use asphalt batch plant within two miles of a planted vineyard, but does not expand or alter either the operation of or area subject to the conditional use permit, and the batch plant could continue to operate regardless of the challenged decision, the continuation of the batch plant is not prohibited by ORS 215.301. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. That an existing conditional use asphalt batch plant could be a permitted use under a county's mineral and aggregate overlay zone does not require that the county incorporate the conditional use into a decision approving application of the overlay zone to an area including the existing conditional use or that the county re-approve the conditional use as part of the decision applying the overlay zone. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a comprehensive plan map amendment to allow a proposed concrete batch plant will result in all aggregate and concrete trucks entering the subject property via a road that provides the sole access to certain existing dwellings, Goal 12 requires the local government to demonstrate the amendment will result in use of the road being safe and adequate. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a finding that the gravel extraction rate at a proposed site will not change from historic rates is not supported by substantial evidence, and the finding appears to play a significant role in the local government's finding of compliance with a code "compatibility" requirement, the challenged decision approving a conditional use permit for a gravel operation is not supported by substantial evidence. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. That a DOGAMI permit was not obtained does not establish that at the time a quarrying operation became nonconforming, it was removing up to 5,000 cubic yards of rock per year (the level of activity at which a DOGAMI permit is required). *Mazeski v. City of Mosier*, 27 Or LUBA 100 (1994).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where a county failed to interpret ORS 215.213(2)(d)(C) as allowing an aggregate processing facility that conducts part of the processing on-site but completes the process of making aggregate into asphalt or Portland cement off-site, and the party wishing to assign the county's interpretive failure as error did not appeal the county's decision to LUBA or file a cross-petition for review, LUBA will not consider the interpretive question. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238 (1993).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. ORS 215.213(2)(d)(D) authorizes the processing of mineral resources *other than aggregate*. Therefore, that statute does not authorize an aggregate processing facility, notwithstanding that the final processing of aggregate into asphalt or Portland cement occurs off-site. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 238 (1993).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Under ORS 517.780(1), where a county surface mining ordinance in effect on July 1, 1972 has been amended, but not repealed, the county's surface mining ordinance and amendments thereto are not subject to the fee limitations established by ORS 517.780(4) and 517.800. *Oregon City Leasing, Inc. v. Columbia County*, 25 Or LUBA 129 (1993).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. All provisions of the act that created ORS 215.301 must be related to uses allowed in EFU zones. Therefore, ORS 215.301 applies only to asphalt plants sited in EFU zones, not to an application to site an asphalt plant in an industrial zone. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where determining whether an existing quarry qualifies as a nonconforming use under applicable city code provisions requires a city to determine whether the existing quarry lawfully existed at the time the existing zoning was

last amended and whether the use has been discontinued for a year, the nonconforming use determination involves the exercise of significant legal and factual judgment and is a "permit" as that term is used in ORS 227.160(2). *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. The requirement of ORS 215.298(2) that permits for mining of aggregate on EFU-zoned land only be issued for sites included on an inventory in an acknowledged comprehensive plan became effective October 3, 1989 and does not apply to a pending application submitted prior to that date. *Clark v. Jackson County*, 19 Or LUBA 220 (1990).

31.3.4 Permits – Particular Uses – Mineral and Aggregate. Where 40 acres which produce only sparse forage of little value for grazing are generally unsuitable for grazing by themselves, but have historically been used for grazing in conjunction with the adjoining 400 acres, the adjoining 40 acres are not "generally unsuitable for farm use" within the meaning of ORS 215.213(3), 215.283(3) and county legislation implementing those statutes. *Clark v. Jackson County*, 19 Or LUBA 220 (1990).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. ORS 215.441 does not provide an independent basis to approve a dwelling within a church on property zoned EFU, and, where a local code provision provides that "[e]xisting churches may be maintained, enhanced or expanded on the same tract," a construction of that provision to independently allow a residential use of a church as an enhancement to the church impermissibly conflicts with ORS 215.203, ORS 215.283, and ORS 215.441. *Wetherell v. Douglas County*, 80 Or LUBA 183 (2019).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. A replacement dwelling allowed under ORS 215.213(1)(q) must be located on a lawful unit of land. *Landwatch Lane County v. Lane County*, 80 Or LUBA 415 (2019).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. ORS 215.750 and OAR 660-006-0027(3) authorize local governments to approve forest template dwellings if at least three dwellings existed within a specified 160-acre area and those dwellings continue to exist at the time forest template dwelling approval is requested. But neither the statute nor the rule defines the key term "dwelling" and neither the statute nor the rule explicitly addresses whether a long abandoned, derelict structure may qualify as a "dwelling," for purposes of qualifying for a forest template dwelling. *West v. Multnomah County*, 70 Or LUBA 235 (2014).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. ORS 215.750 and OAR 660-006-0027(3) authorize local governments to approve forest template dwellings if at least three dwellings existed within a specified 160-acre area and those dwellings continue to exist at the time forest template dwelling approval is requested. A hearings officer's interpretation of the word "dwelling" in local laws adopted to implement ORS 215.750 and OAR 660-006-0027(3) such that a former dwelling that has been vacant for many years and is in a state of disrepair that would preclude use as a residence does not qualify as a "dwelling" for purposes of satisfying ORS 215.750 and OAR 660-006-0027(3) is more consistent with the underlying purpose of the statute and rule. That underlying purpose is to allow forest template dwellings in circumstances where there is existing limited residential development on forest lands, and the hearings officer's interpretation is more consistent with that underlying purpose than interpreting the word "dwelling" to include long abandoned structures, no matter how derelict and uninhabitable as a dwelling in its current condition. *West v. Multnomah County*, 70 Or LUBA 235 (2014).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. ORS 215.750 and OAR 660-006-0027(3) authorize local governments to approve forest template dwellings if at least three dwellings existed within a specified 160-acre area and those dwellings continue to exist at the time forest template dwelling approval is requested. Where the record supports a hearings officer's finding that a dwelling that was constructed in 1906 has been unoccupied for many years prior to an application for approval of a forest template dwelling, the hearings officer correctly found that the 1906 dwelling was a nonconforming use in the county's forest zone that was first applied long after the 1906 dwelling was constructed. And the hearings officer correctly found that under local laws adopted to implement ORS 215.750 and OAR 660-006-0027(3), the forest template dwelling applicant must establish that the right to continue residential use of the 1906 dwelling was not lost through interruption or abandonment for two years or more before the 1906 dwelling could be counted as a dwelling that "continues to exist" at the time the application for approval of a forest template dwelling was filed. *West v. Multnomah County*, 70 Or LUBA 235 (2014).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. A hearings officer does not err in concluding that connecting a dwelling to a rural sewer service district's existing system constitutes either the establishment of a "new community sewer system" or a "new extension of a sewer system from within an urban growth boundary." *Purtzer v. Jackson County*, 67 Or LUBA 205 (2013).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. When a previous approval for a partition required that the parcels not be used for residential purposes unless legal access was provided to the parcels, a current application for a lot of record dwelling cannot be approved unless the proposed dwelling satisfies the access standards that applied at the time of the partition or satisfies current standards. The fact that the applicant has an easement for residential use does not mean that the easement satisfies the local government standards for legal access. *Estremado v. Jackson County*, 61 Or LUBA 148 (2010).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. A reasonable person could infer from photographs that show the front and two sides of a dwelling that the pictured dwelling has "intact exterior walls and roof structure," as required by ORS 215.283(1)(s)(A) for approval of a replacement dwelling in an exclusive farm use zone. *Hegele v. Crook County*, 56 Or LUBA 156 (2008).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where the evidence shows that a house had a kitchen sink, toilet and bathing facilities that were connected to a pipe that exited the house and traveled underground to a holding and disposal tank of some sort, that evidence is sufficient to establish that the dwelling had indoor plumbing that was connected to "a sanitary waste disposal system," as required by ORS 215.283(1)(s)(B) for approval of a replacement dwelling in an exclusive farm use zone. ORS 215.283(1)(s)(B) does not require that the applicant establish that the required "sanitary waste disposal system" qualifies as a "subsurface sewage disposal system," as defined by ORS 454.605(13). *Hegele v. Crook County*, 56 Or LUBA 156 (2008).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Under ORS 215.283(1)(s)(A) and (B), a county may approve a replacement dwelling only if the dwelling that is to be replaced "[h]as intact walls and roof structure" and "[h]as indoor plumbing." Although ORS 215.283(1)(s)(A) and (B) can be interpreted to require that the dwelling that is to be replaced must remain intact until the county decision approving the replacement dwelling becomes final, the statute does not have to be interpreted in that way, since ORS 215.283(1)(s)(E)(i) requires that the dwelling to be replaced must ultimately be removed. *Hegele v. Crook County*, 56 Or LUBA 156 (2008).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where a local code allows a non-farm dwelling only on land that is not predominantly composed of Class I through Class VI soils, and the property is composed predominantly of Class VI soils, a local government errs in finding that an application complies with that code provision. *Ott v. Lake County*, 54 Or LUBA 502 (2007).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. In determining whether a property is generally unsuitable for the production of farm crops and livestock or merchantable tree species,

a county's conclusion that any historic agricultural use on the property before that time does not provide a substantial hurdle is supported by substantial evidence where the county chooses to rely on an expert's opinion that proposed nonfarm parcels have not been used for agricultural operation in the past 20 years. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where the record reflects that 10 acres of irrigation rights were removed from two 20-acre parcels because (1) irrigating with that water was extremely inefficient, (2) the nonfarm parcels consist of 85 percent bare ground, and (3) moving the irrigation rights back would provide no benefit, county's findings that returning irrigation rights to the property would not render the nonfarm parcels generally suitable for the production of farm crops or livestock is supported by substantial evidence. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where the record reflects that at least 75 percent of the parcels proposed for nonfarm dwellings are incapable of supporting grazing, the county is not required to specifically consider whether neighboring ranchers could use the proposed nonfarm parcels in conjunction with other ranch land. *Peterson v. Crook County*, 52 Or LUBA 160 (2006).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where two parcels are divided by a fee interest in a strip of land owned by the county for use as a public roadway, the two parcels are not contiguous and are not part of the same "tract." In that circumstance, where one of the parcels already contains a dwelling, the approval of a forest template dwelling on the other parcel does not violate ORS 215.750(4)(d), which prohibits the approval of a forest template dwelling on a "tract" that already includes a dwelling. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where a strip of land was transferred in fee title to the county for roadway purposes, the resulting units of land lying on either side of that strip do not violate the requirement in ORS 92.014 (1955) that "[n]o person shall create a street or way for the purpose of partitioning a parcel of land without the approval of the agency or body authorized to give approval of plans for subdivision," where the record does not indicate that the roadway was created "for the purpose of partitioning land." Accordingly, the county does not err in determining that one of those resulting units of land is a lawfully created "parcel," and complies with the requirement in ORS 215.705(1)(a) that the lot or parcel on which a forest template dwelling is proposed was lawfully created. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where local code criteria applicable to approval of a forest template dwelling do not include any reference to local floodplain regulations, and those floodplain regulations appear to regulate the actual construction and placement of structures within a floodplain zone, and are more properly addressed at the time a building permit is issued, the county does not err in failing to adopt findings addressing those floodplain regulations in approving a forest template dwelling. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where the local code fire siting standards require that secondary fuel breaks (*i.e.*, a fuel break extending 130 feet in all directions around structures) "or their equivalent" apply to new residences, the county does not err in determining that secondary fuel breaks are not required in the riparian setback area, where the findings adopted in support of the riparian vegetation setback regulations acknowledge that riparian vegetation provides a sufficient natural barrier against the spread of fire. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Findings that the subject property is generally unsuitable for the production of farm crops and livestock or merchantable tree species are inadequate where the findings are based on the presence of rock outcroppings and shallow soils, but the findings do not indicate the percentage of the property covered by rock outcroppings and shallow soils. *Peterson v. Crook County*, 49 Or LUBA 223 (2005).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where a property had water rights that the applicant transferred to other property, the county must consider the possibility of transferring those rights back to the property and the potential capability of the soils if the water rights were transferred back in determining whether the subject property satisfies the "generally unsuitable" standard under ORS 215.263(5). *Peterson v. Crook County*, 49 Or LUBA 223 (2005).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Under ORS 215.705(4), an application for a dwelling in a mixed farm/forest zone must comply with the siting standards appropriate for the predominant use of the tract on January 1, 1993. A showing that no farm use of the property, as that term is defined in ORS 215.203(2), was occurring on the tract as of January 1, 1993, does not mean that, by default, the property was predominantly in forest use on that date. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. ORS 215.705(4) requires that a county must determine whether farm or forest uses predominated on a "tract" on January 1, 1993. However, the configuration of the tract is considered as it exists as of the time an application for a dwelling is submitted. Once the scope of the tract is identified, the inquiry turns to whether farm or forest uses predominated on that tract on January 1, 1993. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. In considering which of two uses, farm or forest, predominate on a tract as of January 1, 1993, a county may consider more than the number of acres devoted to farm or forest use to determine predominant use. However, those considerations must flow from the use that was made of the tract on January 1, 1993. Thus, income from farm and forest uses and the amount of activity directed at those uses may be considered, but historic uses and soil capability may not. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Portions of a tract that are used for nonfarm or nonforest activities have no relevance to the inquiry under ORS 215.705(4), which requires a county to determine whether farm or forest uses predominated on a tract as of January 1, 1993. If only a small portion of the property can reasonably be considered to be in farm or forest

use, the county need only consider that portion in its determination of predominant use. *Gambee v. Yamhill County*, 38 Or LUBA 420 (2000).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. In challenging a denial on evidentiary grounds, petitioner must demonstrate that the county's reliance on one method to determine the center of a parcel, rather than an alternative method, is either contrary to law or is so unreasonable that only petitioner's alternative can be believed as a matter of law. *Linker v. Multnomah County*, 38 Or LUBA 84 (2000).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where a statute or a county code does not define "center" or specify a procedure for determining the "center of the subject tract," the local government can choose any reasonable method to locate the center of the tract. *Linker v. Multnomah County*, 38 Or LUBA 84 (2000).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. A local government's method of determining the center of a lot or parcel does not have to be mathematically precise, so long as it is sufficiently accurate that a reasonable decision maker could have relied on it. *Linker v. Multnomah County*, 38 Or LUBA 84 (2000).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. A parcel that lies wholly outside the 160-acre template required to site a nonforest dwelling under ORS 215.750 may not be counted as a qualifying parcel, even if that parcel is part of a tract, some part of which lies inside the template. *Smith v. Jackson County*, 37 Or LUBA 779 (2000).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Petitioners fail to establish compliance with all mandatory approval criteria for a special medical hardship permit allowing a temporary mobile home on their property in a forest zone where they fail to present any evidence indicating that no reasonable housing alternatives exist that could meet one petitioner's needs for special medical attention. *Lopatin v. Clackamas County*, 32 Or LUBA 158 (1996).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. In approving a nonfarm dwelling under OAR 660-33-130(4)(c), analysis is required regarding whether the parcel can be sold, leased or otherwise put to profitable agricultural use, unless the county first finds that a parcel is generally unsuitable for farm use, regardless of size. *Moore v. Coos County*, 31 Or LUBA 347 (1996).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. To establish that a nonfarm dwelling will not materially alter the stability of the land use pattern in the area, the county must (1) select an appropriate area for consideration; (2) examine the types of uses existing in the selected area; and (3) determine that the proposed nonfarm use will not materially alter the stability of the existing uses in the selected area. *Thomas v. Wasco County*, 30 Or LUBA 302 (1996).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. A county may interpret a zoning ordinance to regulate the establishment of nonforest dwellings more stringently than is required under ORS 215.750. *Dilworth v. Clackamas County*, 30 Or LUBA 279 (1996).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. ORS 215.236(2) requires that farm assessment disqualifications be filed within 120 days of approval of a nonfarm dwelling permit only when the subject property is assessed for farm use at the time of approval. A county's decision to modify a condition of approval requiring disqualification from farm assessment within 120 days after approval does not violate ORS 215.236(2) when the subject property was not assessed for farm use at the time of approval. *Wakeman v. Jackson County*, 29 Or LUBA 521 (1995).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. How petitioners believe a property should have been assessed for property taxation before approval of a nonfarm dwelling permit is not relevant in a subsequent land use proceeding. *Wakeman v. Jackson County*, 29 Or LUBA 521 (1995).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. A local decision erroneously concludes a previous local decision did not grant conditional use approval for a nonfarm dwelling where (1) the previous decision states it approves a nonfarm dwelling, and (2) the local government treated the previous application as requesting nonfarm dwelling approval. *Rodriguez v. Marion County*, 26 Or LUBA 50 (1993).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where a previous local government decision approved a nonfarm dwelling, the local government cannot require the proposed nonfarm dwelling to be re-reviewed against the same standards. *Rodriguez v. Marion County*, 26 Or LUBA 50 (1993).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where a "generally unsuitable" approval standard for nonforest dwellings established by an LCDC enforcement order provides that land with certain soil types is presumed *not* to be "generally unsuitable," unless findings explain why "other factors" make the land generally unsuitable, it is reasonable to interpret such "other factors" to be limited to the physical characteristics listed in the first part of the approval standard. *DLCD v. Klamath County*, 25 Or LUBA 355 (1993).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where an approval standard requires that a proposed nonforest dwelling "not interfere seriously with the accepted forestry practices on adjacent lands," a local government must first determine what those accepted forestry practices are. Statements that "logging practices" which have occurred on adjacent properties are "logging" or "salvage logging" are not adequate descriptions of accepted forestry practices. *DLCD v. Klamath County*, 25 Or LUBA 355 (1993).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. ORS 215.283(3) applies to the "establishment" of a nonfarm dwelling in an EFU zone. In this context, "establishment" refers to the legal establishment of a nonfarm residential use, not merely to the construction of a nonfarm dwelling. *DLCD v. Columbia County*, 24 Or LUBA 32 (1992).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. A code standard requiring that a proposed nonfarm/nonforest dwelling in a farm/forest zone not materially alter the stability of the land use pattern of the area, requires findings (1) identifying an area for consideration, (2)

identifying the farm and forest practices occurring in the identified area, and (3) explaining of how the proposal will affect those practices. *Veach v. Wasco County*, 23 Or LUBA 492 (1992).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. A code requirement that a proposed nonresource dwelling not be incompatible or interfere with adjacent farm and forest uses requires findings (1) identifying an area zoned for farm and forest uses, (2) determining what farm and forest uses occur within that identified area, and (3) evaluating whether the proposed nonresource dwelling will be "incompatible" or will "interfere" with those practices. *Veach v. Wasco County*, 23 Or LUBA 492 (1992).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Evidence that soils on a particular parcel are not particularly good for farming does not clearly support a determination that a proposed nonresource dwelling will not materially alter the stability of the land use pattern of the area, or be incompatible or interfere with adjacent farm or forest uses. *Veach v. Wasco County*, 23 Or LUBA 492 (1992).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Forestlands containing soils that are below the national average for timber productivity are nevertheless suitable for timber production where the soils have a timber productivity rating which applicable law establishes as presumptively suitable for timber production. *DLCD v. Klamath County*, 23 Or LUBA 264 (1992).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Pine beetle infestation does not render land generally unsuitable for timber production where it is not established that such an infestation represents a permanent or long-term limitation on the timber productivity of the property. *DLCD v. Klamath County*, 23 Or LUBA 264 (1992).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. The small size of a lot does not render the lot unsuitable for timber production where the lot is part of a larger parcel and adjoins other larger forest parcels with which the lot could be managed for forest purposes. *DLCD v. Klamath County*, 23 Or LUBA 264 (1992).

31.3.5 Permits – Particular Uses – Nonresource Dwellings. Where the evidence in the record establishes (1) the soils on the subject property are suitable for the production of forest and farm products, (2) the subject property has been logged, and (3) other parcels in the area are suitable for the production of forest products or currently are used for the production of Christmas trees, there is substantial evidence that the subject property is not generally unsuitable for the production of farm and forest products. *Ralston v. Clackamas County*, 22 Or LUBA 573 (1992).

31.3.6 Permits – Particular Uses – Power Generators. A condition of approval requiring an applicant that has applied to site a solar facility in an area currently used for growing Christmas trees to offer a fire safety training course to the local fire district is inadequate to establish that "[t]he proposed use will not * * * significantly increase risks to fire suppression personnel" for purposes of OAR 660-006-0025(5)(b) and local code provisions implementing that rule. *Chang v. Clackamas County*, 80 Or LUBA 321 (2019).

31.3.6 Permits – Particular Uses – Power Generators. An approximately 80-acre photovoltaic solar power generation facility is not "industrial development" for purposes of OAR 660-004-0022(3)(c). *1000 Friends of Oregon v. Jackson County*, 80 Or LUBA 521 (2019).

31.3.6 Permits – Particular Uses – Power Generators. A county finding that wind turbines are a conditional use in a commercial zone is not reversible error, even though wind turbines are not listed as a conditional use in the zone, where the balance of the decision clearly demonstrates the county in fact utilized its authority to approve uses that are similar to listed permitted and conditional uses in the zone to approve the wind turbines. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

31.3.6 Permits – Particular Uses – Power Generators. Where findings identify an applicable conditional use standard that requires that conditional uses must not impair permitted uses on surrounding property, but the decision includes no findings of fact or findings explaining why the decision maker believed proposed wind turbines satisfied that standard, remand is required for adequate findings. *Burgermeister v. Tillamook County*, 73 Or LUBA 291 (2016).

31.3.6 Permits – Particular Uses – Power Generators. A code provision that requires the applicant for a wind energy facility to obtain the signature of residential landowners consenting to reducing a two-mile setback between the facility and residences violates the Delegation Clause, Article I, section 21, of the Oregon Constitution, because the signature requirement effectively allows neighbors to "veto" the application, for any or no reason, and without appeal or review. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

31.3.6 Permits – Particular Uses – Power Generators. State law that generally makes EFSC the sole authority to determine what constitutes the "applicable substantive criteria" when EFSC evaluates an application for a wind power generation facility preempts a county code provision that purports to dictate the county code requirements that will be included in the "applicable substantive criteria" applied in EFSC proceedings. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

31.3.6 Permits – Particular Uses – Power Generators. A county ordinance that allows a private residential landowner or a city council to unilaterally "waive" a two-mile setback from wind towers to a lesser distance, potentially to a zero setback, violates the Article I, section 21, delegation clause of the Oregon Constitution, because it authorizes an entity other than the county to determine whether there is a setback at all and if so the extent of that setback. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

31.3.6 Permits – Particular Uses – Power Generators. A county ordinance that allows a private residential landowner or a city council to "waive" a two-mile setback from wind towers and substitute a lesser or no setback violates the Due Process Clause of the U.S. Constitution, because it grants wind tower project neighbors the arbitrary and standardless power to determine whether and to what extent there is a setback for wind tower development. *Cosner v. Umatilla County*, 65 Or LUBA 9 (2012).

31.3.6 Permits – Particular Uses – Power Generators. Under DEQ's noise regulations a wind energy generation facility may add 10 decibels to the background ambient noise level. In determining whether the facility violates that noise standard the operator may assume that the background ambient noise level is 26 decibels or actually measure the background ambient noise level and the operator's selection of the assumed 26 decibel background ambient noise level at one measuring location and time does not preclude the operator from selecting actual measured background ambient noise level at other measurement locations and times. *Mingo v. Morrow County*, 63 Or LUBA 357 (2011).

31.3.6 Permits – Particular Uses – Power Generators. Ancillary local government decisions pertaining to the siting of energy generating facilities that might otherwise fall under the definition of land use decisions subject to LUBA's jurisdiction are nevertheless subject to the exclusive jurisdiction of the Oregon Energy Facility Siting Council, with direct review by the Oregon Supreme Court. *Thomas v. City of Turner*, 42 Or LUBA 39 (2002).

31.3.6 Permits – Particular Uses – Power Generators. OAR 660-06-025(4)(i) allows power generation facilities on forestlands without a Goal 4 exception, provided such facilities do not remove more than 10 acres of land from resource use. OAR 660-33-130(23) includes similar provisions for power generation facilities on agricultural lands without a Goal 3 exception, but requires that the power generation facilities not remove more than *20* acres of land from resource use. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

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

31.3.7 Permits – Particular Uses – Shopping Centers. LUBA will sustain a city council interpretation of a 1991 planning commission site plan decision to approve both a 70,000-square-foot retail store and a 30,000-square-foot "future expansion" area, notwithstanding a condition that refers only to approval of the retail store, where the site plan depicts both improvements, the 1991 decision approves the "site plan" without restriction, and the record indicates that the planning commission intended to approve both improvements. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

31.3.7 Permits – Particular Uses – Shopping Centers. LUBA will sustain a city council interpretation of a site plan condition of approval to impose no limits on the type merchandise sold at a retail store that is allowed outright in the applicable zone, where the condition authorizes sale of "general merchandise, to include" listed examples, and the fairest reading of the condition is that the list of examples is illustrative, not exclusive. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

31.3.7 Permits – Particular Uses – Shopping Centers. A site plan decision that approves (1) a building and (2) a "future expansion" of that same building is a single building, not separate phases or components of a multi-phase development, for purposes of determining whether there is a vested right to construct the expansion. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

31.3.7 Permits – Particular Uses – Shopping Centers. A governing body's interpretation of a design review criterion requiring that the "bulk and scale" of a proposed retail supercenter be "compatible" with surrounding buildings as necessitating a comparison of the size of the proposed buildings and surrounding buildings—and not just visual compatibility—is consistent with the text of the criterion and not reversible under ORS 197.829(1)(a). *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256 (2004).

31.3.7 Permits – Particular Uses – Shopping Centers. A finding that sales of non-construction related materials at a home improvement store, such as house plants, barbeques, etc., are incidental and subordinate to the primary use of "Construction Sales and Services" is supported by substantial evidence, where the testimony cited by petitioners takes a broader view of what constitutes non-construction related material that the local decision maker and in any case fails to establish that the sales of such non-construction related materials is so predominant as to make such sales the principal use. *Heilman v. City of Corvallis*, 47 Or LUBA 305 (2004).

31.3.7 Permits – Particular Uses – Shopping Centers. A traffic study concluding that there is adequate vehicular access to a shopping mall is substantial evidence supporting a finding of "adequate access and traffic control," notwithstanding that the study did not consider or quantify internal store-to-store vehicular traffic, where there is no evidence that such internal traffic is significant. *Graham Oil Co. v. City of North Bend*, 44 Or LUBA 18 (2003).

31.3.7 Permits – Particular Uses – Shopping Centers. A local government decision that a shopping center may be allowed in a particular zone under code "similar use" provisions must (1) express an interpretation of the "similar use" provisions that is adequate for LUBA review, (2) actually apply the interpretation adopted, and (3) explain how the decision is consistent with that interpretation. *Loud v. City of Cottage Grove*, 26 Or LUBA 152 (1993).

31.3.7 Permits – Particular Uses – Shopping Centers. Where a local code imposes limitations on "shopping complexes," a local government approving a commercial use may not simply conclude that that those limitations do not apply, where the issue of the applicability of the shopping complex limitations is raised during local proceedings. *O'Neal v. Deschutes County*, 26 Or LUBA 126 (1993).

31.3.7 Permits – Particular Uses – Shopping Centers. Where a prior city decision approving a PUD preliminary development plan for a shopping center does not clearly identify the particular commercial uses it approves, but describes the applicant's proposal and states that the proposed uses are approved, submittal of a site plan proposing an entirely different mixture of commercial uses constitutes more than a minor modification of the approved development plan. *Owen Development Group, Inc. v. City of Gearhart*, 25 Or LUBA 88 (1993).

31.3.7 Permits – Particular Uses – Shopping Centers. To show a public need for a 10-acre "community shopping center," of which the property proposed to be annexed would be a part, the city's findings must establish a nexus between the stated "need" to have additional retail businesses within the city and to stop retail leakage to a neighboring city, and the "need" for a "community shopping center" requiring a 10-acre vacant retail zoned site within the city. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where the county planning director processed a similar use determination under the county's Type II review to determine whether an electrical transmission line is allowed in a particular zone, the board of county commissioners reviewed the director's similar use determination in a consolidated appeal under a Type III process, and petitioners argue that the county erred by not providing an intermediate decision by a decisionmaker other than the county governing body, that alleged procedural error provides no basis for reversal or remand because that alleged error does not prejudice petitioner's substantial rights. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a county determines an electrical transmission line is a "similar use" authorized in a particular zone pursuant to the county's "similar use determination" process, which allows a similar use "[w]here a proposed use is not specifically identified by [the code], or [the code] is unclear as to whether the use is allowed in a particular zone," petitioners' argument that the county may make a similar use determination only if the proposed use is not specifically identified anywhere in the county's code is without merit. A similar use determination is not necessary or appropriate where the use is specifically permitted or prohibited in the subject zone. In adopting the similar use determination process, the county contemplated instances where a use is specifically identified as an allowed use in some zones but not specifically identified as an allowed use in the subject zone. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where petitioners argue that the county made inadequate findings that a proposed electrical transmission project is consistent with general use priorities for estuary zones because the county did not address certain code provisions addressing estuary zones, LUBA is not required to remand the decision to the county for it to interpret its local code provisions in the first instance; LUBA may make its own determination of whether the local government decision is correct. ORS 197.829(2). Where the county determined that the code provision in question is a general priority statement, which does not constitute mandatory approval criteria, LUBA will uphold the county's decision where the provision provides an inclusive list of general use priorities for estuarine resources and value, and where, in the alternative, the county addressed those impacts to the estuarine resources and values in other applicable parts of the county's code. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where the county makes a finding that an electrical transmission project "will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands," and "forest practices" are defined pursuant to the Oregon Forest Practices Act, petitioners' argument that the proposed transmission line will remove 36 acres from forest production is not sufficient to explain why the development will result in "a significant change in * * * forest practices * * * on * * * forest lands." OAR 660-006-0025(5). OAR 660-006-0025(5) contemplates the approval of limited non-forest uses on forest land, including the removal of some forest land from production to accommodate a use that is allowed as a conditional use on forest land, including clearing a 100-foot right-of-way with 25 feet of clearance from the ground to the lines, for the purpose of constructing electric transmission lines on forest lands. *Tilla-Bay Farms, Inc. v. Tillamook County*, 79 Or LUBA 235 (2019).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A county is not required to apply the federal "least intrusive" standard under the Telecommunications Act of 1996 to a permit request under the county's zoning ordinance, where the county's zoning ordinance does not impose that standard. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In *Pete's Mountain Homeowners Assn. v. Clackamas Cty.*, 227 Or App 140, 204 P3d 802, *rev den*, 346 Or 589 (2009), the Court of Appeals held that Ballot Measure 49, which was approved to replace previously approved Ballot Measure 37, must be given effect and replaces Ballot Measure 37 which would otherwise apply to a particular permit application, notwithstanding the ORS 215.427(3)(a) goal post statute that requires that a permit application be subject to the standards in effect when the permit application was filed. *Pete's Mountain* case of conflicting statutes—Ballot Measure 49 conflicted with and applied in place of the goal post statute. The holding in *Pete's Mountain* does not mean that new county cell tower regulations apply to a permit application that was submitted before the new cell tower regulations were adopted. In that circumstance the goal post statute applies and the new cell tower regulations do not apply, because there is no statutory conflict. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A board of commissioners correctly interprets a zoning standard that requires that a "project's" public benefits outweigh expected adverse impacts to (1) limit consideration to the pipeline for which county permit approval is sought and (2) exclude any public benefits that may be generated by the LNG terminal that would be located in, and require the separate approval of, a city located in the county. The permit applicant's position that the county should consider the benefits of the LNG terminal but not the LNG terminal's expected adverse impacts is incorrect, because "project" cannot mean one thing when considering benefits and something else when considering expected adverse impacts. *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246 (2015).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A utility facility authorized in an EFU zone under ORS 215.283(1)(c) is not limited to facilities that provide utility services to local or county residents, but includes a natural gas transmission line that connects an interstate natural gas pipeline to an export terminal. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. LUBA will reject an argument that a county erred in failing to deny a proposed natural gas transmission line allowed as a utility facility in an EFU zone under ORS 215.283(1)(c) based on comprehensive plan language that the petitioner argues limits utility facilities to those that serve county residents, because even if the county's comprehensive plan is interpreted to limit utility facilities, application of those limits to deny a use allowed outright under ORS 215.283(1) would exceed the county's authority, under the reasoning in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995). *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a county's decision modifies the alignment of a portion of a transmission pipeline that was approved in 2009, the

county's findings need not address challenges raised by a landowner regarding impacts of a different portion of the pipeline, the alignment of which is not modified. Because the modification decision approves no modification of that portion of the pipeline, such challenges are collateral attacks on the 2009 decision. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.283(1)(c), "[u]tility facilities necessary for public service" are permitted in EFU zones. ORS 215.283(1)(c) operates in conjunction with ORS 215.275(1), which provides that the utility facilities authorized by ORS 215.283(1)(c) are "necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service," and ORS 215.275(2), which sets out the alternatives analysis that must be used to demonstrate that a proposed utility facility is the type of utility facility authorized by ORS 215.283(1)(c) and 215.275(1). *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Transmission towers over 200 feet in height are allowed under subsection (2) of ORS 215.283. ORS 215.283(2)(m). Transmission towers that are not taller than 200 feet are allowable as "utility facilities necessary for public service" under subsection (1) of ORS 215.283. ORS 215.283(1)(c); 215.275. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.275, an applicant proposing to site a utility facility on EFU zoned land must consider alternatives that do not utilize EFU-zoned land. Such an applicant need not consider alternatives that do utilize EFU-zoned land and need not establish that there are not other EFU-zoned alternatives that would have fewer adverse impacts on the county's EFU zone. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. The general legislative farmland preservation policies set out in the statutory EFU zone play no role in applying the alternatives analysis required for utility facilities necessary for public service under ORS 215.275. *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1 (2012).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. LUBA will reject an argument that the alternative site study for a transmission tower proposed in an EFU zone erred in rejecting an alternative site in a light industrial area, where the petitioner cites to no evidence that the industrial area has a vacant location of the size necessary to prevent damage to other structures if the tower collapsed. *Hamilton v. Jackson County*, 63 Or LUBA 156 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.275, the alternative sites analysis for a utility facility proposed on EFU land evaluates alternative sites on land that is zoned other than EFU. The analysis is not required to evaluate alternative EFU-zoned sites. *Hamilton v. Jackson County*, 63 Or LUBA 156 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where the county code requires the signature of all owners of the property, and to ensure compliance with respect to a proposed pipeline crossing multiple properties the county imposes a condition requiring that the approval

becomes effective only when the utility provider supplies all required signatures, an ambiguity in the condition regarding whether all signatures of all property owners are required for the approval to become effective is not a basis to remand the decision, where it is reasonably clear from the condition and findings that the county intended that all signatures of all owners be obtained before the approval becomes effective and building permits for any part of the pipeline can be obtained. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. OAR 660-006-0025(4)(q) authorizes a 50-foot right-of-way for gas pipelines in forest zones. It is not inconsistent with OAR 660-006-0025(4)(q), and is expressly authorized by ORS 772.510(3), for a utility provider to obtain a temporary construction easement for stockpiling, storage, etc., in addition to the 50-foot permanent right-of-way authorized under the rule. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A finding that impacts of a proposed underwater pipeline on aquatic species will be "temporary and insignificant" is consistent with the Goal 16 obligation to "protect" estuarine resources. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where the applicant's expert assumed that a particular species of native oyster is not found near a pipeline crossing, but opponents raised the issue below, based on a 2009 scientific article, that that species of oyster has recently repopulated the crossing area and may be impacted by the pipeline, the findings do not address that issue, and LUBA cannot tell from the record or findings whether additional measures may be necessary to protect the native oysters beyond those in place to protect other aquatic species, remand is necessary for more adequate findings. *Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. That there is conflicting evidence in the record regarding whether an existing cell tower has capacity for co-locating the applicant's cellular antennas is not a basis for reversal or remand, where the decisionmaker could reasonably conclude based on substantial evidence in the record that the existing tower does not have capacity. *Oberdorfer v. Deschutes County*, 62 Or LUBA 296 (2010).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a local government approves a cell tower based on the demonstrated coverage needs of a particular cellular provider, a finding suggesting that the tower could also serve the needs of another provider who did not submit evidence of coverage needs is an extraneous finding, and at most harmless error. *Oberdorfer v. Deschutes County*, 62 Or LUBA 296 (2010).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. An applicant for approval of a cell tower may rely on letters from a school district director of communications and facilities and a special district property manager to establish that school district and special district property is not available as a site for a proposed cell tower. The applicant need not inquire beyond the districts' professional staff or contact the governing boards of the school district and special district. *McLaughlin v. City of Springfield*, 59 Or LUBA 275 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where an applicant for approval of a cell tower is required by local law to make a good faith effort to locate the cell tower on a site where the cell tower is allowed outright or with only site plan review, before seeking approval of a site that requires a discretionary land use permit, the applicant is obligated to make a reasonable effort to locate a feasible site that does not require a discretionary land use permit and to consider any other potential sites that are identified with reasonable specificity by other parties. *McLaughlin v. City of Springfield*, 59 Or LUBA 275 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A hearings officer does not err by relying on a cell tower applicant's engineer's testimony that a suggested alternative site would be too close to the applicant's existing cell towers, and would cause interference with those towers, as a basis for rejecting the alternative site as a feasible alternative. *McLaughlin v. City of Springfield*, 59 Or LUBA 275 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Utility facilities that are necessary for public service are a permitted use on EFU-zoned land. However, reasonable non-EFU-zoned alternative sites must be considered, and only if one or more of the factors listed at ORS 215.275(2) make the non-EFU-zoned sites infeasible can the utility facility be developed on EFU-zoned land. *Getz v. Deschutes County*, 58 Or LUBA 559 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. To comply with ORS 215.275(2), before approval for a utility facility on EFU-zoned land may be granted, an applicant must (1) make a reasonable effort to identify reasonable non-EFU-zoned sites, (2) consider any reasonable non-EFU zoned sites that are identified by other parties and (3) demonstrate that all identified non-EFU-zoned alternative sites are not feasible based on one or more of the factors set out in ORS 215.275(2). Where an applicant generally describes how alternative sites were selected, opponents may not fail to suggest any additional alternative non-EFU-zoned sites and on appeal of a decision approving the utility facility argue that the applicant's failure to provide a more detailed explanation for how the applicant selected alternative sites provides a basis for remand. *Getz v. Deschutes County*, 58 Or LUBA 559 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. It is not error for an applicant for approval of a utility facility on EFU-zoned land to change the focus of its analysis of whether alternative non-EFU-zoned sites are a feasible alternative, so long as the analysis that is ultimately accepted by the local government is legally defensible. *Getz v. Deschutes County*, 58 Or LUBA 559 (2009).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. An unappealed LUBA decision holding that a county cannot deny a proposed cell tower for noncompliance with county site design standards necessarily resolves the issue of whether the county can apply the site design standards at all, even in approving the tower. *Seeberger v. Yamhill County*, 56 Or LUBA 656 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where there is no evidence in the record that a proposed cell tower will have any impact on farm or forest practices, a county

may simply find that, and need not conduct a *pro forma* analysis of impacts on farm and forest practices. *Seeberger v. Yamhill County*, 56 Or LUBA 656 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. LUBA will remand a decision approving a broadcast tower that relies in part on a "safe harbor" approach the hearings officer adopted in a different permit proceeding, where LUBA has remanded that other permit decision to resolve an issue under that approach but the county has taken no action on remand and the challenged decision does not resolve the issue. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. LUBA will remand a decision approving a broadcast tower that requires an above-ground water storage tank but does not require that the tank be screened as required by site design approval criteria. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A local government is not obligated to impose a condition of approval requiring that a broadcast tower operator comply with federal radio frequency exposure limitations that the applicant must comply with in any event. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Absent some basis in the city code, a city does not have the authority to approve or deny a broadcast tower application based on the terms of the current lease agreement between the tower owner and the property owner. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A federal statute prohibiting local governments from prohibiting the provision of wireless telephone service does not authorize local governments to condition approval of a broadcast tower to require filters to reduce radio frequency interference with nearby wireless facilities. Even if a local code provision authorized such a condition, federal law would preempt the local government from applying it. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A hearings officer may rely on undisputed expert testimony that compliance with federal radio frequency exposure limits depends on whether non-employees at the site are aware of occupational exposure levels and have the ability to remove themselves from the site, combined with the fact that the site is fenced and signed to warn of occupational exposure levels, to conclude that a proposed broadcast tower complies with federal exposure limits. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A county cannot apply local site design standards to deny a proposed cellular tower in an exclusive farm use zone, a permitted use under ORS 215.283(1), because as explained in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030 (1995), state law generally prohibits local governments from imposing approval criteria on ORS 215.283(1) uses other than those authorized by statute. *T-Mobile USA v. Yamhill County*, 55 Or LUBA 83 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A county errs in denying a proposed cellular tower under ORS 215.275 for failure to evaluate opponents' claims that the tower could be located on alternative sites on non-agricultural land, when none of the alternative sites were identified with sufficient specificity to allow evaluation. *T-Mobile USA v. Yamhill County*, 55 Or LUBA 83 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. ORS 215.283(1) and 215.275 do not permit a county to deny an application to site a proposed cellular tower in an exclusive farm use zone simply because there is already some existing cellular service in the area. A proposed cellular communication facility may be justified based on a need to improve existing service. *T-Mobile USA v. Yamhill County*, 55 Or LUBA 83 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a zoning ordinance has chapters for individual zones that list some uses that are "permitted" and list other uses that require conditional use approval, and in a separate chapter lists uses that are "permitted in all zones," those uses are permitted without a conditional use permit. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a zoning district requires conditional use approval for structures that are more than 30 feet tall, absent a separate zoning provision that calls for a different conclusion, a 70-foot cellular tower would require conditional use approval. But where a separate chapter of the zoning code both authorizes cellular towers in all zones as a "permitted" use and expressly provides that such towers may exceed the height limits otherwise imposed by the zoning ordinance, a cellular tower does not require conditional use approval. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A hearings officer's findings that a proposed cellular tower complies with a siting standard that requires the tower to minimize its effect on scenic values are adequate, where the findings note the developed nature of the butte where the cellular tower would be located and demonstrate that the hearings officer was persuaded that the standard was met by the applicant's proposal to shorten the tower from 100 feet to 70 feet and to offer alternative designs that would make the tower look more like its surroundings. *Skyliner Summit at Broken Top v. City of Bend*, 54 Or LUBA 316 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In determining whether a proposed cell tower is compatible with surrounding uses, a county does not err by taking into account the number of surrounding residences and the residential density. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In applying a compatibility standard, a county may take into consideration the effect that existing trees will have in screening views of a proposed cell tower from adjoining properties, notwithstanding that there are no trees on the cell tower property itself and few trees to the west and north of the property. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In applying a compatibility standard, a county does not err by taking into account the screening that will be produced by a condition that requires the applicant for a cell tower to plant vegetation and trees, even though the vegetation and trees will not completely screen the tower for many years, if ever. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In applying a compatibility standard, a county does not err by taking into account the effect that requiring a cell tower to be painted green may have in visually blending the tower with nearby trees, even though painting the tower green will have little or no effect on blocked views of a nearby bay. *Clark v. Coos County*, 53 Or LUBA 325 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. The preservation of local zoning authority provided in the Federal Communications Act does not extend to other federal laws if such local authority is preempted under such laws. *U.S. Cellular v. Klamath County*, 53 Or LUBA 442 (2007)

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Federal law preempts a local determination that a proposed cellular communications facility is unsafe where the Federal Aviation Administration (FAA) has issued a "Determination of No Hazard" under FAA rules. *U.S. Cellular v. Klamath County*, 53 Or LUBA 442 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. An undefined and subjective "public benefit" criterion need not be interpreted in conjunction with a tower sharing criterion to require that a tower applicant demonstrate a current market need for a tower, as opposed to a future market need. *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A broadcast tower approval criterion that requires a decision maker to determine whether identified "public benefits outweigh any impacts which cannot be mitigated" is subjective. In assessing a findings and evidentiary challenge to a decision maker's weighing of public benefits, the question is whether that weighing is (1) inadequately explained (necessitating a remand for additional findings) or (2) unreasonable (and therefore not supported by substantial evidence). *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A broadcast tower approval criterion that limits total emission levels is not implicated by a request to remove a prior condition of approval to allow an existing tower to remain in place, where no additional emitting antenna are to be added to the tower by the request and all existing antenna were subject to the total emission limit criterion when they were placed on the tower. *Belluschi v. City of Portland*, 53 Or LUBA 455 (2007).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A code standard allowing an increased or reduced setback for cellular towers based on considerations such as topography, etc., that increase or reduce off-site impacts need not be interpreted to include an implicit "no net increase" in off-site impacts standard. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A hearings officer errs in interpreting a code standard that allows a reduced setback for cellular towers based on listed considerations that increase or reduce off-site impacts, to allow a reduced setback as long as the applicant has minimized off-site impacts "to the extent possible" given the dimensional constraints of the property, where considerations such as the shape of the property and whether the applicant has minimized off-site impacts to the extent possible are not among the permissible considerations. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. While a code standard that allows a reduced setback for cellular towers based on listed considerations that increase or reduce off-site impacts does not require that the hearings officer assign equal weight to each of the listed considerations, it also does not allow the hearings officer to assign conclusive weight to one consideration while ignoring others. Where some considerations point toward increasing the setback, and others point to reduction, the hearings officer must adopt findings addressing all relevant considerations and explaining what weight is given to each and why weighing of all the circumstances supports the ultimate conclusion. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A code standard requiring site design review where "proposed development" involves "projects with multiple principal structures on one tract" does not apply to a proposal for a cellular tower on a parcel already developed with a dwelling, because the application does not propose more than one principal structure. *Tollefson v. Jackson County*, 51 Or LUBA 790 (2006).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Federal law preempts local zoning conditions of approval that are imposed to regulate radio frequency interference. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

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

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Radio towers over 200 feet tall are allowed in exclusive farm use zones under ORS 215.283(2)(m) or ORS 215.438. Neither of those statutes requires that such radio towers must be allowed outright. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Although there is language in the Oregon Supreme Court's decision in *Brentmar v. Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995), that suggests otherwise, the public utility facilities authorized by ORS 215.283(1)(d) are not allowed "as of right," in the exclusive farm use zone, as that term is generally used in zoning parlance. The Supreme Court used that term as a shorthand description for uses that are not

subject to additional county regulation rather than as a description of a use that is not subject to discretionary review, as shown by the fact that ORS 215.283(1)(d) itself subjects public facilities in exclusive farm use zones to discretionary review. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Federal law does not preempt local laws that regulate the visual and aesthetic impact of radio towers and the antennas placed on those towers. *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a city is required to apply discretionary criteria in issuing a temporary approval decision, and that temporary approval decision is the only effective city decision that authorizes a broadcast tower and sets the stage for issuance of building permits to construct the tower, that temporary approval decision constitutes "discretionary approval of a proposed development of land" and is therefore a "permit," within the meaning of ORS 227.160(2). The city must either provide a public hearing before issuing an ORS 227.160(2) permit, or provide the opportunity for a local *de novo* appeal of that permit decision after it is issued. *Curl v. City of Bend*, 48 Or LUBA 530 (2005).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Whether a local government decision is a "final" decision is primarily governed by the form of the decision and whether all local appeals have been exhausted. That an otherwise final temporary decision may ultimately expire or be replaced by another decision does not mean that the temporary decision is not a final decision subject to appeal to LUBA. *Curl v. City of Bend*, 48 Or LUBA 530 (2005).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In adopting ORS 215.275, the legislature struck a particular balance between the siting of utility facilities in EFU zones and the statutory policy to preserve farmland for farm uses. Once that balance is struck, however, the county's task is to apply the terms of the statute. Nothing in ORS 215.275 requires direct consideration of agricultural land preservation policies, external to the statute, in applying its terms, or "balancing" the technical difficulty of alternatives against farmland preservation. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.275, a utility provider and the local government are not required to consider under ORS 215.275(2) any alternative that requires a different type of facility or that would not meet the essential features of the chosen facility, as defined by the utility provider. However, the utility provider and local government must consider under ORS 215.275(2) an alternative that appears to satisfy the applicant's defined objectives, even if the alternative is a facility in a non-EFU location that requires a different component design than the preferred EFU location. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. In addressing consideration of land costs in comparing "utility facilities that are not substantially similar," ORS 215.275(3) implies that the scope of "reasonable alternatives" that must be considered under ORS 215.275(2) includes non-EFU-zoned sites with conditions that may require at least some design modifications to the facility. However, nothing in the statute requires that a utility provider consider alternatives

that cannot satisfy the provider's defined objectives in providing the public service. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A utility provider need not consider and disqualify as "reasonable alternatives" under ORS 215.275(2) alternatives that require reassessment of its fundamental technology or its business plan, or that involve sites or facilities that would fail to provide public services to the desired coverage area. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a telecommunications provider defines as one of its objectives building its own wireless tower in order to lease space to other providers, any alternative such as collocation on existing telephone poles will not satisfy at least one of the provider's defined objectives, and therefore need not be considered and disqualified as a "reasonable alternative" under ORS 215.275(2). *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. ORS 215.275 does not require a utility provider to consider and disqualify as "reasonable alternatives" non-EFU locations on which the proposed utility facility would require a variance from applicable zoning standards. Such lands are either not "reasonable alternatives" or simply not "available" under ORS 215.275(2)(c), as a matter of law. *Sprint PCS v. Washington County*, 42 Or LUBA 512 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a city code provision regarding the siting of a telecommunication tower does not require a showing that a particular tower height at a specific location is the only way an applicant for the telecommunication tower can achieve its coverage objectives, a city decision that does not require an alternatives analysis is not inadequate, in the absence of evidence that feasible alternatives exist. *Johnson v. City of Eugene*, 42 Or LUBA 353 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Findings demonstrating that a proposed wireless communication tower must be sited in an EFU zone in order to provide service are inadequate where the findings fail to identify or describe any alternative non-EFU sites, including five specific sites suggested by petitioner. *Central Klamath County CAT v. Klamath County*, 41 Or LUBA 524 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A proposed communication tower may be subject to code provisions governing "transmission and receiving towers," even though it is county-owned and thus also arguably falls within a broad category of "municipal uses" allowed in the zone. Where a regulatory scheme lists as permitted uses in a zone both a general category of uses and a specific category of uses, with different sets of requirements, and the proposed use fits within the specific category, the specific category and its requirements apply exclusively. *Luedtke v. Clackamas County*, 41 Or LUBA 493 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. LUBA will decline to interpret a local provision in the first instance, to determine whether a proposed radio communication tower is a "radio and television transmission and receiving" tower and therefore subject to a special

setback, where viewed in context the meaning and apparent purpose of the provision is subject to considerable doubt. *Luedtke v. Clackamas County*, 41 Or LUBA 493 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.275, an applicant who wishes to site a utility facility on EFU-zoned land must show that it is infeasible to locate the facility on land that is not zoned EFU. *City of Albany v. Linn County*, 40 Or LUBA 38, 46 (2001). Findings that the site selected for a cellular communication tower is the best of the alternatives that were considered are inadequate to show that the non-EFU-zoned alternatives that were not selected are infeasible locations for the tower. *Harshman v. Jackson County*, 41 Or LUBA 330 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where two alternative non-EFU-zoned sites for a cellular communication tower that were not considered by the applicant are identified at the evidentiary hearing, a county may not grant approval for the tower on an EFU-zoned site without showing that use of those sites is infeasible or explaining why those sites need not be considered. *Harshman v. Jackson County*, 41 Or LUBA 330 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where reasonable persons could disagree about whether cellular tower mitigation measures will be sufficient, petitioners fail to demonstrate error in a hearings officer's findings that "native vegetation," the "flush-mounted antennae" and the proposed color scheme for a proposed cellular communication tower will diminish the visual impact of the tower so that the tower will be "relatively unobtrusive" and therefore meet the applicable mitigation requirements. *Harshman v. Jackson County*, 41 Or LUBA 330 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a local "compatibility" standard is extremely subjective and reasonable persons could draw different conclusions from the record about whether a proposed 90-foot cellular tower would be compatible with its mixed residential and commercial surroundings, a hearings official's decision that the tower would be compatible will not be reversed on appeal simply because petitioners would reach the opposite conclusion. *Knight v. City of Eugene*, 41 Or LUBA 279 (2002).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Collocation of cellular telecommunication facilities is not a reasonable alternative to constructing a new telecommunications tower on EFU-zoned property, where the applicant's siting requirements include constructing a facility where space will be leased to other telecommunication providers and collocation with existing towers will not meet that requirement. *Jordan v. Douglas County*, 40 Or LUBA 192 (2001).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where a permit application identifies ORS 215.275 as a criterion applicable to the county's decision approving a cellular communications tower on EFU-zoned land and proposes findings of compliance with the statute, the issue of compliance with the statute was raised below and the county's failure to address the statute can be assigned as error, notwithstanding petitioners' failure to raise that issue below. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Evidence that a proposed cellular communications tower on EFU land is within an optimal area for telecommunication coverage is insufficient to allow LUBA to conclude, under ORS 197.835(11)(b), that the record "clearly supports" a finding of compliance with ORS 215.275, which requires that the local government consider reasonable alternatives to siting the tower on EFU-zoned land. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Transmission towers that are less than 200 feet in height may only be approved on EFU-zoned land, under ORS 215.283(1)(d), where it is established that it is not feasible to locate the tower on non-EFU-zoned lands. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Transmission towers that are more than 200 feet in height may be approved under ORS 215.283(2)(L) on EFU-zoned land, subject to the approval criteria set out at ORS 215.296 and any locally adopted approval criteria. It is not necessary to establish that it is not feasible to locate such transmission towers on non-EFU-zoned lands. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. The utility cabinets that house the equipment that is needed to operate a wireless communication tower are properly viewed as part of the communication tower, rather than as a separate utility facility that must be separately approved. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. A land use decision maker commits no error by failing to require that an applicant for approval of a transmission tower justify the proposed height of the tower, where the relevant statutes impose different approval criteria depending on the height of the tower but do not require that the proposed tower height be justified. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Subsequent changes in county ordinances do not affect an energy facility for which a site certificate has been approved by EFSC. Under ORS 469.400(5), a county is required to issue the "appropriate permits" for such an energy facility, regardless of whether a subsequent change in county ordinances makes the "appropriate permit" a type different from that which was appropriate when the site certificate was approved. *McDole v. Lane County*, 23 Or LUBA 500 (1992).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Under ORS 215.283(1)(d) and 215.283(2)(L), transmission towers are allowable in EFU zones as "[u]tility facilities necessary for public service." Such towers may be allowed outright under ORS 215.283(1)(d), if they do not exceed 200 feet in height. Such towers may be allowed under ORS 215.283(2)(L), subject to the standards set forth at ORS 215.296(1), if they are over 200 feet in height. *Harris v. Polk County*, 23 Or LUBA 152 (1992).

31.3.8 Permits – Particular Uses – Transmission Towers/Lines. Where the local code explicitly provides that antennae are usually required to be above roof level, and the only function a tower serves is to elevate antennae sufficiently above roof level so they may receive and transmit signals

in conjunction with ground-based processing equipment, the tower falls within the code exemption from building height requirements for "appurtenances usually required to be placed above the roof level." *Greenlees v. Yamhill County*, 22 Or LUBA 604 (1992).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A local government could reasonably conclude that a landfill expansion complies with the ORS 215.296(1) "significant change/cost" standard, notwithstanding testimony from an adjacent hay farmer regarding the need for weekly litter patrols to prevent trash entering farm soils or destroying farm equipment, based in part on a condition of approval that requires a second litter fence between the working face of the landfill and adjacent hay fields, where there is no dispute that the existing litter fence is somewhat effective at reducing the volume of wind-blown trash that escapes the landfill, and the second litter fence will reduce that volume further. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A local government can impose conditions of approval to ensure compliance with the ORS 215.296(1) "significant change/cost" standard that require the applicant to assume the cost or burden of performing actions on nearby farms necessary to prevent a significant change in accepted farming practices on those farms or significant increase in costs on those farms. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A local government could reasonably conclude that a landfill expansion complies with the ORS 215.296(1) "significant change/cost" standard, notwithstanding testimony from an adjacent hay farmer regarding the need for weekly litter patrols year-round to prevent trash entering farm soils or destroying farm equipment, based in part on a condition of approval that requires the landfill operator to provide, pay for, or reimburse the farmer for litter patrols prior to harvest, even if the condition does not entirely eliminate the need for litter patrols at non-harvest times. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A local government could reasonably conclude that a landfill expansion complies with the ORS 215.296(1) "significant change/cost" standard, notwithstanding testimony that the existing intermittent falconry program simply displaces nuisance birds onto nearby farms, based on conditions of approval that require a more intensive falconry program and implementation of integrated techniques recommended by a wildlife biologist to discourage nuisance birds from remaining in the area. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A condition requiring the landfill operator to buy at market prices the entire crop of berries and cherries produced by a nearby farmer concerned with nuisance bird impacts on her crop is sufficient to reduce to insignificance the alleged adverse impacts of the landfill on the farmer's farm practices. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A farmer's reasonable apprehension about losing direct sale customers due to odor impacts of a landfill could lead the farmer to make changes in accepted farming practices or significantly increase the cost of farming practices; however, customer perceptions are not farm practices, and the feared or actual loss of direct sales customers alone, without any associated change or increased costs, is not a sufficient

basis to conclude that the ORS 215.296(1) "significant change/costs" standard is violated. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A local government could reasonably conclude that speculative concerns regarding the possibility of transmitting avian flu to nearby chicken farms via dead birds buried at a proposed landfill are adequately addressed by statutory and regulatory requirements intended to protect against that possibility. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. The applicant has the burden to demonstrate that individual insignificant impacts under ORS 215.296(1) are not cumulatively significant, and a local government cannot shift that burden to farmer/opponents to a proposed landfill, by finding that the farmer/opponents failed to explain how multiple impacts are cumulatively significant. *Stop the Dump Coalition v. Yamhill County*, 74 Or LUBA 1 (2016).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. OAR 660-033-0130(18)(a) authorizes expansion of "[e]xisting facilities wholly within a farm use zone," but does not expressly require that the facility existed wholly within a farm use zone in 1996, on the date the rule language was adopted. As written, the rule includes no such temporal qualification, and would allow expansion of a facility that currently exists wholly within a farm use zone, but that did not in 1996. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. ORS 215.283(2)(k) allows a solid waste disposal facility on EFU-zoned land for which a DEQ permit has been granted. Where the record shows that a currently operating facility proposed for expansion had a DEQ permit that has been extended, but does not include a copy of the current DEQ permit, remand is not necessary to remedy that evidentiary defect where the petitioner offers no reason to believe that the landfill is operating without a current permit, and the county imposed a condition requiring the applicant to provide a copy of the current permit prior to undertaking any expansion. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A county errs in applying a rigorous "compelling evidence" standard to evaluate testimony from farmers located more than one mile from a proposed landfill, regarding impacts of the landfill operation on their farm costs and practices. Nothing in ORS 215.296(1) suggests that a county can apply different evidentiary standards on different parties based on the geographic distance to the proposed non-farm use. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A county errs in discounting the testimony of farmer/opponents that a landfill operation causes significant changes or significant costs to their farm practices, for failure to quantify or specify the degree of impacts. While the county is free to give more weight to testimony that is quantified or more detailed over less quantified or detailed testimony, requiring opponents to quantify or specify the degree of impacts, while not requiring similar quantification or specification from the applicant, who has the burden of proof, effectively shifts the burden of proof to the opponents. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A county errs in placing "great weight" on a longitudinal study offered by the applicant to demonstrate that the proposed expansion of a landfill will not cause significant change/increase costs to surrounding farm practices, by showing that farm uses on surrounding lands have remained stable and even expanded under the impacts of the existing landfill. Farm use may have remained stable despite significant changes or significant increases in costs to farm practices, or indeed because such changes have allowed farm operations to continue despite the impacts of the landfill. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A finding that the amount of trash that escapes a landfill onto adjoining farm land is not "significant" in volume is not sufficient to demonstrate that the changes the farmer made to avoid trash damaging equipment and crops does not reflect a significant change or increased cost for purposes of ORS 215.296(1). The question is whether the changes are significant, not whether the impacts or volume of trash is significant. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. The apparent success of a change in farming practices in mitigating or preventing lost revenue from impacts of landfill operations on surrounding farmland does not demonstrate that the change itself is not a significant change in farm practices, for purposes of ORS 215.296(1). *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. That a pheasant raising operation may be a recently established farm practice on farm land adjacent to a proposed landfill does not mean that the operation is a "hobby" or noncommercial farm use such that the county need not evaluate alleged impacts from the landfill operation on the pheasant raising operation. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. To establish compliance with ORS 215.296(1), the applicant may initially survey farm uses on surrounding lands, and identify in general terms accepted farming practices associated with those farm uses. Remand is necessary where the initial survey identifies a farm stand adjacent to a proposed landfill, but does not identify, even in general terms, any accepted practices associated with the farm stand. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. Where it is undisputed that direct sales of agricultural products is an accepted farm practice, a county must address allegations that odor and visual impacts from a proposed landfill adversely impact direct sales of agricultural products, for purposes of establishing compliance with ORS 215.296(1), even if the alleged adverse impacts are based on customers' perceptions regarding landfill impacts. *Stop the Dump Coalition v. Yamhill County*, 72 Or LUBA 341 (2015).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A 1980 reasons exception and comprehensive plan and zoning amendment to allow for a waste disposal facility "authorizes" subsequent expansions of that landfill within the rezoned area for purposes of the exclusion to

LUBA's jurisdiction at ORS 197.015(10)(b)(H)(i), where the 1980 decision specifically contemplated that the facility would expand incrementally over time, with filled disposal cells capped and reclaimed, while the active landfill operation moves on to new disposal cells. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. LUBA will affirm a planning director's interpretation that site design review standards do not apply to a proposed landfill expansion because the expansion was authorized in a 1980 decision that pre-dated the site design review standards, where nothing in the code compels application of the site design review standards to an already authorized landfill expansion. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A reasonable person could conclude, based on evidence that commercial farms near existing landfills are viable agricultural operations, that a text amendment allowing existing landfills to expand their geographic scope will not have additional impacts on nearby farm uses, and is consistent with a comprehensive plan policy providing that proposed rural development shall not substantially conflict with farm and forest uses. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. ORS 215.283(2)(k) restricts a solid waste disposal facility from being "established" prior to Department of Environmental Quality (DEQ) permitting, but does not prohibit local government approval of a facility that is conditioned on receipt of the DEQ permit prior to establishment or building of the facility. *Crocker v. Jefferson County*, 60 Or LUBA 317 (2010).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. Under ORS 215.283(2)(k), buildings "necessary" for the operation of a waste disposal facility are permitted. Where the findings are insufficient, but the record includes evidence which clearly establishes that proposed buildings are "necessary," and no contrary evidence in the record is cited, LUBA will affirm the conclusion that the proposed buildings are "necessary." *Crocker v. Jefferson County*, 60 Or LUBA 317 (2010).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A finding that a proposed solid waste disposal operation will have "no significant effect" on farm or forest uses is not sufficient to also demonstrate that the operation will have "no adverse effect." While the two standards are similar, they are not the same, and separate findings are required. *Crocker v. Jefferson County*, 60 Or LUBA 317 (2010).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A facility where fruit process water is trucked to a lagoon, stored and later used to irrigate a hay crop is not properly viewed as a "utility facility," within the meaning of 215.213(1)(d) and ORS 215.283(1)(d), simply because aerators are employed in the lagoon to control odors. *Farrell v. Jackson County*, 41 Or LUBA 1 (2001).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A Land Use Compatibility Statement requirement that a proposal to apply process water from a fruit processing operation to

EFU-zoned land must "comply with all applicable local land use requirements" requires at a minimum that the county determine whether the proposal is a farm use and whether it is a utility facility. These determinations require the exercise of sufficient discretion that the county's decision is both a "land use decision" and a "permit," as those terms are defined by statute. *Farrell v. Jackson County,* 39 Or LUBA 149 (2000).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. Where industrial effluent is applied to poplar trees in an exclusive farm use zone so that heavy metals and nitrogen compounds in the effluent will bind to the soil and be taken up into the poplar trees, rather than being deposited into a creek, the proposed use is properly viewed as an extension of the city's sewerage treatment system and thus as a "utility facility," within the meaning of ORS 215.283(1)(d). *Cox v. Polk County*, 39 Or LUBA 1 (2000).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A proposed use of land may be both a "farm use" and a "utility facility," and where it qualifies as both, the proposed use must meet the approval criteria for both farm uses and utility facilities. *Cox v. Polk County*, 39 Or LUBA 1 (2000).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. The scope of the "solid waste disposal facility" subject to county regulation under ORS 215.283(2)(j) is coextensive with the scope of the facility for which DEQ grants a permit pursuant to ORS 459.245. Where the DEQ permit issued pursuant to ORS 459.245 governs only the septic treatment ponds on the subject property and does not govern the land application of treated wastes on adjacent parcels, the "solid waste disposal facility" subject to compliance with the county's conditional use criteria does not include those adjacent parcels. *Wilbur Residents v. Douglas County*, 37 Or LUBA 156 (1999).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. ORS 215.283(2)(j) authorizes a county to allow infrastructure such as equipment, facilities or buildings necessary for the operation of a solid waste disposal facility, but does not require a county to consider or approve off-site infrastructure that is not necessary for that facility. An adjacent farm parcel on which treated waste from the facility will be applied as fertilizer and for irrigation purposes is not "necessary" for the operation of the facility, and thus is not subject to the county's regulation under ORS 215.283(2)(j). *Wilbur Residents v. Douglas County,* 37 Or LUBA 156 (1999).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A decision that disposal of sewage effluent by applying it to farm land constitutes a "utility facility necessary for public service" within the meaning of ORS 215.283(1)(d) requires the exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of land use decision provided by ORS 197.015(10)(b)(A) for certain ministerial decisions. *Friends of the Creek v. Jackson County,* 36 Or LUBA 562 (1999).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A decision that disposal of sewage effluent by applying it to farm land constitutes a "farm use" within the meaning of ORS 215.203 requires the exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of "land use decision" provided by ORS

197.015(10)(b)(A) for certain ministerial decisions. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A decision authorizing construction of facilities necessary to apply sewage effluent to farm land constitutes the approval of a "proposed development of land" and thus is a "permit" within the meaning of ORS 215.215.402(4) if the decision involves the exercise of discretion. *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A decision that a proposal to transport treated effluent to an EFU-zoned parcel and apply that effluent to poplar trees constitutes a "farm use" within the meaning of ORS 215.283(1)(d) requires the exercise of policy or legal judgment and for that reason the decision does not qualify for the exception to the statutory definition of land use decision provided by ORS 197.015(10)(b)(A) for certain ministerial decisions. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. A decision authorizing construction of a lagoon on EFU-zoned land to store treated effluent constitutes the approval of a "proposed development of land" and thus constitutes a "permit" within the meaning of ORS 215.402(4) if the decision involves the exercise of discretion. *Friends of Clean Living v. Polk County*, 36 Or LUBA 544 (1999).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. Where a city interprets its zoning ordinance as requiring that a "recycling center" have the "primary purpose" of extracting recyclables from a waste stream, but not requiring that any particular percentage of the waste stream will be recycled, the city's conclusion that a proposed facility is a "recycling center" is supported by substantial evidence, notwithstanding the absence of evidence quantifying the percentage of recyclables in the waste stream. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. Substantial evidence supports a city's finding that the primary purpose of a proposed facility is to recover recyclables from a waste stream, where there is evidence that the most significant function and justification of the proposed facility is to recover recyclables, notwithstanding that the proposed facility might also serve or facilitate other economic purposes. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. That a proposed use meets the definition of a "materials recovery facility" at OAR 340-093-0030(57) is neither relevant nor controlling in determining whether the local government correctly categorized the proposed use as a "recycling center" under its development ordinance, where the development ordinance was not adopted to implement the rule. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. The city was clearly correct in classifying a proposed recycling processing center as a "waste and/or recycling transfer operation"

which is an allowed conditional use under local ordinance. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. Where petitioner appealed a planning director determination that a solid waste transfer station is an outright permitted use in a particular zone, the city was neither required nor authorized to expand the scope of the local appeal hearing to include consideration of whether a solid waste transfer station is also an appropriate use in that zone. *Pend-Air Citizen's Comm. v. City of Pendleton*, 29 Or LUBA 362 (1995).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. Evidence that a solid waste transfer station may conflict with neighboring residential uses is not relevant to the issue of whether a solid waste transfer station is an outright permitted use in a particular zone. *Pend-Air Citizen's Comm. v. City of Pendleton*, 29 Or LUBA 362 (1995).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. Where a local code allows recycling and other incidental uses, LUBA will defer to a local government interpretation of the code as allowing a recycling facility that accepts waste material including both solid waste and recyclable material, where approximately 70 percent of the material accepted will be recycled and approximately 30 percent will be disposed of at a landfill. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. Where there is uncontradicted evidence that up to 70 percent of the waste material to be accepted at a proposed recycling facility will be recycled, and that some recycling facilities accept material that includes both solid waste that cannot be recycled as well as recyclable material, a local government's finding that the solid waste transfer component of the proposed facility is "customarily incidental" to the recycling component of the facility is supported by substantial evidence in the record. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

31.3.9 Permits – Particular Uses – Waste Disposal Facilities. Where the evidence identified in the record concerning the acreage required to be included in a landfill site due to factors such as rights-of-way, buffers, setbacks, longer lifespan, need to accommodate waste from outside the county, etc. is unclear, LUBA may not, pursuant to ORS 197.835(9)(b), overlook the county's failure to adopt findings justifying the number of acres included in a goal exception for the landfill. *Dyke v. Clatsop County*, 18 Or LUBA 787 (1990).

31.3.10 Permits – Particular Uses – Home Occupations. Where certain activities are allowed as accessory to a home occupation use, they may not be allowed through a Type I process (*i.e.*, ministerial review of an application based on clear and objective standards and criteria) that does not provide the review that is required by ORS 215.448(1) and (4). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

31.3.10 Permits – Particular Uses – Home Occupations. Where an applicant proposes to bifurcate a proposed business development into two segments, one to be approved as a conditional use, and another to be approved as a home occupation, to avoid application of permit standards that would otherwise prohibit the business use viewed as a whole, both sets of permit requirements potentially apply to any components of the segmented use that are shared or overlap. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.3.10 Permits – Particular Uses – Home Occupations. An argument that the hearings officer failed to address a statutory home occupation standard requiring that the home occupation be operated "substantially" within a dwelling or accessory structure provides no basis for reversal or remand, where the county has adopted and applied a more rigorous home occupation standard that prohibits external evidence of the home occupation, except for signs and limited vehicle parking. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.3.10 Permits – Particular Uses – Home Occupations. Where in order to avoid code prohibitions on "external evidence" of a home occupation an applicant attempts to authorize all outdoor processing associated with a log home manufacturing business under a conditional use permit for the primary processing of forest products, and all indoor processing associated with the business as part of a home occupation, any activities that use shared equipment, vehicles or employees, such as transporting logs from the outdoor primary processing site to the indoor secondary processing site, are not authorized exclusively under the primary processing permit, but are also subject to the prohibition on external evidence required of the home occupation permit. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.3.10 Permits – Particular Uses – Home Occupations. The primary processing of logs pursuant to a conditional use permit for the primary processing of forest products is not itself subject to home occupation standards, even if the logs are later transported to a structure on the property for secondary processing under a home occupation permit. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.3.10 Permits – Particular Uses – Home Occupations. All on-site vehicle use associated with a proposed home occupation is subject to code limitations on the number and weight of vehicles, even if the vehicles are also associated with other uses allowed or conditionally allowed on the property. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.3.10 Permits – Particular Uses – Home Occupations. A hearings officer does not err in requiring the applicant for a home occupation to demonstrate that the home occupation is "clearly subordinate" to residential use of the property, where the code defines home occupation to include only commercial uses that are clearly subordinate to residential use of the property, and the

definition functions to disqualify home occupations that do not meet the definition. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.3.10 Permits – Particular Uses – Home Occupations. In determining whether a home occupation is "clearly subordinate" to residential use of the property, a hearings officer must consider all activities associated with the home occupation, including vehicle parking and usage on the property. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.3.10 Permits – Particular Uses – Home Occupations. Remand is necessary where the hearings officer concludes that a portion of a proposed log home manufacturing facility operating as a home occupation is "clearly subordinate" to residential use of the property, but without identifying what features or elements of the home occupation and residential uses are compared or considered in determining whether the home occupation is clearly subordinate to the residential use. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.3.10 Permits – Particular Uses – Home Occupations. A reasonable decision-maker could rely upon a diesel fume test conducted by the applicant to determine whether diesel fumes are detectable at the property line, combined with a condition of approval limiting idling and operation within 60 feet of the property line, to conclude that a "no fume detection" home occupation standard is met, notwithstanding conflicting anecdotal testimony from the neighbors across the road that they can sometimes detect diesel fumes. *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016).

31.3.10 Permits – Particular Uses – Home Occupations. A code provision requiring that a home occupation shall not utilize over 600 square feet of floor area cannot plausibly be interpreted to limit only the square feet physically occupied by a truck or trailer as part of a home occupation to perform maintenance work on trucks and trailers. Because the home occupation activity is the maintenance and not the storage of trucks and trailers, any interpretation that ignores the square footage necessary for employees to perform maintenance tasks is not consistent with the text of the code provision. *Stevens v. City of Island City*, 71 Or LUBA 275 (2015).

31.3.10 Permits – Particular Uses – Home Occupations. A finding that a proposed truck maintenance home occupation will comply with a 600-square-foot floor area limitation is inadequate and not supported by substantial evidence, where the findings do not address how much floor area employees will use in performing maintenance tasks, and there is no evidence in the record supporting a finding that the physical area occupied by trucks, tools, storage, and the area needed to perform maintenance tasks will occupy no more than 600 square feet. *Stevens v. City of Island City*, 71 Or LUBA 275 (2015).

31.3.10 Permits – Particular Uses – Home Occupations. Remand is required where city code limits a home occupation to 600 square feet in size in an accessory structure, the undisputed evidence is that the home occupation will occupy more than 600 square feet, but the city's decision simply imposes a condition of approval limiting the home occupation to 600 square feet. *Stevens v. City of Island City*, 68 Or LUBA 112 (2013).

31.3.10 Permits – Particular Uses – Home Occupations. Where the applicant for a home occupation fails to provide information regarding the location of office functions and equipment, and the code limits the entire home occupation to a 600-square-foot space that is already fully occupied by other functions, remand is necessary for the city to address the issue and impose any conditions necessary to ensure that office functions on the site comply with the code. *Stevens v. City of Island City*, 68 Or LUBA 112 (2013).

31.3.10 Permits – Particular Uses – Home Occupations. A petitioner's mere disagreement with a city's conclusion that, as conditioned, a commercial truck repair home occupation located in an accessory structure is secondary to residential use of the property does not establish that the city's conclusion is not supported by substantial evidence. *Stevens v. City of Island City*, 68 Or LUBA 112 (2013).

31.3.10 Permits – Particular Uses – Home Occupations. Where the code limits a home occupation to one employee, and the applicant proposes one full-time mechanic to maintain the applicant's commercial trucking fleet, but proposes no way for the applicant's drivers to bring and retrieve trucks for maintenance without violating the one-employee rule, remand is required for the city to address the issue and impose any necessary conditions. *Stevens v. City of Island City*, 68 Or LUBA 112 (2013).

31.3.10 Permits – Particular Uses – Home Occupations. Remand is required where the code prohibits use of noisy equipment as part of a home occupation, but the decision authorizes diesel truck start up and dispatch at night based on the presence of masking noise from nearby industrial uses, but does not explain how truck noise can be masked at night when nearby industrial uses are not active. *Stevens v. City of Island City*, 68 Or LUBA 112 (2013).

31.3.10 Permits – Particular Uses – Home Occupations. A home occupation standard requiring that conditions of approval be "readily administered by City staff" is met, where the city imposed 10 conditions of approval that are reasonably clear and objective and that primarily involve outdoor activities that can be readily observed and verified. *Stevens v. City of Island City*, 68 Or LUBA 112 (2013).

31.3.10 Permits – Particular Uses – Home Occupations. In approving a wedding venue and event business in a forest zone under a code provision that allows, on a "temporary" basis, uses otherwise not allowable in the applicable zone, a county must consider whether the proposed use is properly characterized as a "home occupation," which is an allowed conditional use in the forest zone, subject to restrictions. If the proposed is properly characterized as a home occupation allowable in the forest zone, then the code does not allow the county to issue a temporary use permit for that use. *White v. Lane County*, 68 Or LUBA 423 (2013).

31.3.10 Permits – Particular Uses – Home Occupations. A county does not improperly substitute a condition of approval for a finding that the proposed home occupation will be conducted "primarily in buildings," where the county finds based on testimony below that the home occupation will be conducted primarily in buildings and the county imposes a condition of approval that no more than 20 percent of any home occupation event may be conducted outside a building. *Green v. Douglas County*, 67 Or LUBA 234 (2013).

31.3.10 Permits – Particular Uses – Home Occupations. ORS 215.448(1) requires that a home occupation "shall employ on the site no more than five full-time or part-time persons." Because the statute does not specify the time of measurement, it is possible to interpret the ORS 215.448(1) five employee limit to apply "at any one time." *Green v. Douglas County*, 67 Or LUBA 234 (2013).

31.3.10 Permits – Particular Uses – Home Occupations. Where a county zoning ordinance requires that any violation of the county's development ordinance must be corrected before a permit for new development on the property can be approved, a county's interpretation that the correction requirement is triggered only if the county enforcement officer finds there is a violation, and is not triggered by mere allegations of violations, is plausible and must be sustained under *Siporen v. City of Medford*, 349 Or 247, 266, 243 P3d 776 (2010). *Green v. Douglas County*, 67 Or LUBA 234 (2013).

31.3.10 Permits – Particular Uses – Home Occupations. ORS 215.448(1) authorizes counties to approve home occupations but requires that home occupations in EFU, forest and mixed farm and forest zones must be "operated substantially in * * * the [d]welling * * * or buildings normally associated with uses permitted in the zone in which the property is located." As used in ORS 215.448(1), buildings must be an enclosed structure of some type, and activities that occur in open-sided structures such as gazebos and pavilions are essentially out-of-doors activities for purposes of ORS 215.448(1). *Green v. Douglas County*, 63 Or LUBA 200 (2011).

31.3.10 Permits – Particular Uses – Home Occupations. In amending ORS 215.448(1) in 1995 to authorize home occupations to include vehicle parking and to be operated "substantially" in a residence or buildings the legislature was concerned with four cases where permits for home occupations had been rejected because they included outdoor parking and other outdoor activities. In attempting to understand what the legislature meant by "substantially," it is appropriate to assume the legislature intended that those four home occupations, which included limited outdoor activity, would have been approvable under the amended statute. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

31.3.10 Permits – Particular Uses – Home Occupations. Under the ORS 215.448(1)(c) requirement that a home occupation be operated "substantially" in the dwelling or a building on the property, the home occupation must be conducted in the residence or buildings "to a large degree," "in the main," or as the "main part," compared to the portion of the home occupation conducted outside. In other words, the home occupation must be "largely" or "mainly" operated in the dwelling or buildings. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

31.3.10 Permits – Particular Uses – Home Occupations. ORS 215.448(1)(b) requires that a home occupation employ no more than five full-time or part-time persons. For purposes of applying that statutory limit, persons who are hired to assist in producing weddings and other events at an event-site home occupation must be counted in applying the ORS 215.448(1)(b) five person limit, and it does not matter whether the persons who are employed to produce the events are hired by the residents of the property or by those who attend events at the property. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

31.3.10 Permits – Particular Uses – Home Occupations. When a local code provision prevents the filing of substantially similar applications after the denial of a previous application, a home occupation permit application that proposes the same general construction contracting activity as the first application is nonetheless not substantially similar to the first application when it significantly reduces the scope and intensity of the proposed use. *Henkel v. Clackamas County*, 56 Or LUBA 495 (2008).

31.3.10 Permits – Particular Uses – Home Occupations. Under ORS 215.448(1) and the local code provision implementing that statute, a log home kit manufacturing facility is not a home occupation where the majority of the business activities in connection with the business, including the construction, dismantling, and transport of the homes are not conducted in the dwelling or in any structure normally associated with uses in an EFU zone. *Ott v. Lake County*, 54 Or LUBA 502 (2007).

31.3.10 Permits – Particular Uses – Home Occupations. Where the definition of "home occupation" in the local code includes a business activity that is conducted in a *dwelling* or *accessory building* normally associated with the primary uses allowed in the underlying zone, a local government need not determine whether the proposed *business* is normally associated with the permitted uses allowed in the zone. *Watts v. Clackamas County*, 51 Or LUBA 166 (2006).

31.3.10 Permits – Particular Uses – Home Occupations. Where the local noise standard applicable to home occupations provides that the proposed home occupation "shall not create noise that, when measured off the subject property, exceeds the greater of 60 dba or the ambient noise level," the hearings officer errs in interpreting that provision to allow noise spikes in excess of 60 dba. *Watts v. Clackamas County*, 51 Or LUBA 166 (2006).

31.3.10 Permits – Particular Uses – Home Occupations. A hearings officer's determination that it is feasible for a proposed home occupation to comply with local code criteria prohibiting the creation of vibration, glare, fumes or odors detectable to normal sensory perception off the subject property with a condition relocating the parking area for diesel vehicles away from abutting properties and limiting idling time of diesel vehicles to 10 minutes is not supported by substantial evidence, where the evidence relied upon is a conclusory statement in a planning staff memorandum that fumes and odors could be eliminated by limiting idling time and providing a sufficient buffer. *Watts v. Clackamas County*, 51 Or LUBA 166 (2006).

31.3.10 Permits – Particular Uses – Home Occupations. Where a local home occupation standard prohibits external evidence of a home occupation, an interpretation of that standard that allows a vehicle related to the home occupation to traverse the subject property to access an accessory structure in which the vehicle will be stored is reasonable. *Watts v. Clackamas County*, 51 Or LUBA 166 (2006).

31.3.10 Permits – Particular Uses – Home Occupations. A local government interpretation of its own code that allows home occupations to exhibit some characteristics of a business does not violate ORS 197.829(1) when the local government code expressly allows for up to five employees, on-premises signage, and on-premises parking. *Stewart v. Coos County*, 45 Or LUBA 525 (2003).

31.3.10 Permits – Particular Uses – Home Occupations. A condition of approval of a home occupation permit for a bed and breakfast inn that prohibits continued operation of a special events business as part of that home occupation does not violate the Religious Land Use and Institutionalized Persons Act of 2000, simply because some of those special events might be religious in nature or because one of the owners of the home occupation is an ordained minister and might perform weddings that might be scheduled by the special events business. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

31.3.10 Permits – Particular Uses – Home Occupations. It is within a city council's discretion to interpret its zoning ordinance to allow commercial-sized greenhouses as outright permitted uses in a residential zone and to allow a related home occupation florist business as a conditional use without considering the impacts that may be associated with the greenhouses. *Latta v. City of Joseph*, 39 Or LUBA 318 (2001).

31.3.10 Permits – Particular Uses – Home Occupations. A city council does not commit reversible error by imposing a condition that requires that a parking lot for a home occupation be accessed from an alley, notwithstanding that the zoning ordinance defines "alley" as a street that provides secondary access to property. *Latta v. City of Joseph*, 39 Or LUBA 318 (2001).

31.3.10 Permits – Particular Uses – Home Occupations. Where an issue was raised below concerning whether a proposed bed and breakfast facility violated a plan policy regulating commercial development and is not addressed in a hearings officer's decision and the policy itself and related plan and land use regulation provisions are unclear whether the policy applies, LUBA will remand the decision. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

31.3.10 Permits – Particular Uses – Home Occupations. Where a county prohibits the refiling of a new or substantially similar application until two years after a final decision denying an application; the decision maker determines that a second application, filed less than a year after the first, was "substantially similar" because it involved the same use on the same property and the changes in the facts supporting the application were otherwise insufficient to demonstrate that the application is different; and the decision maker points to evidence in the record to support his conclusions, that decision is supported by substantial evidence. *Munn v. Clackamas County*, 37 Or LUBA 621 (2000).

31.3.10 Permits – Particular Uses – Home Occupations. Where the statute authorizing counties to permit home occupations is amended to remove the limitation that the home occupation be conducted entirely within a dwelling or accessory building, but the county's home occupation ordinance still reflects the former statute, the county is not required to apply its home occupation ordinance consistently with the stricter requirements of the former statute and case law interpreting that statute. *Greer v. Josephine County*, 37 Or LUBA 261 (1999).

31.3.10 Permits – Particular Uses – Home Occupations. A county exceeds its interpretational discretion under ORS 197.829 and *Clark v. Jackson County* where it interprets an ordinance prohibiting home occupations that require alteration of a structure in a manner that changes the character of the structure under the Uniform Building Code, to allow such home occupations as

long as the structure is altered to conform to the Uniform Building Code. *Greer v. Josephine County*, 37 Or LUBA 261 (1999).

31.3.10 Permits – Particular Uses – Home Occupations. It is reasonable and correct to interpret a code provision requiring that "vehicle to be repaired shall be located within an enclosed building" to require that repaired vehicles remain within an enclosed building until they are removed from the property. *Gibbons v. Clackamas County*, 35 Or LUBA 210 (1998).

31.3.10 Permits – Particular Uses – Home Occupations. It is reasonable and correct to consider vehicles used to pick up and drop off customers who have vehicles waiting to be repaired as "vehicles associated with" an auto repair home occupation. *Gibbons v. Clackamas County*, 35 Or LUBA 210 (1998).

31.3.10 Permits – Particular Uses – Home Occupations. Where petitioner's home occupation includes the movement and storage of vehicles on the subject property, that activity is external evidence of the business for purposes of a local ordinance based on ORS 215.448 that limits allowable external evidence of a home occupation, even though such activity is incidental to the primary business activity. *Sheldon Fire & Rescue, Inc. v. Washington County*, 34 Or LUBA 474 (1998).

31.3.10 Permits – Particular Uses – Home Occupations. Where a local ordinance limits external evidence of a home occupation to one small sign, a hearings officer may reasonably interpret the ordinance to mean that the storage and movement of vehicles on the subject property is external evidence of the business, and therefore prohibited. *Sheldon Fire & Rescue, Inc. v. Washington County*, 34 Or LUBA 474 (1998).

31.3.10 Permits – Particular Uses – Home Occupations. A local governing body is not entitled to interpretive deference under ORS 197.829 and *Clark v. Jackson County* when interpreting statutory requirements for home occupations. *Holsheimer v. Clackamas County*, 28 Or LUBA 279 (1994).

31.3.10 Permits – Particular Uses – Home Occupations. Where a business is actually carried out as more than one separate and distinct part, any such part could be approved as a home occupation provided such part of the business complies with the requirements of ORS 215.448(1). *Holsheimer v. Clackamas County*, 28 Or LUBA 279 (1994).

31.3.10 Permits – Particular Uses – Home Occupations. For purposes of qualifying as a home occupation, the *storage* of paving materials, vehicles and equipment is not properly viewed as a part of a paving business that is separate and distinct from the daily *use* of such paving materials, vehicles and equipment in the business operation. *Holsheimer v. Clackamas County*, 28 Or LUBA 279 (1994).

31.3.10 Permits – Particular Uses – Home Occupations. In addressing the ORS 215.448(1)(c) requirement that a proposed home occupation "will not interfere with existing uses on nearby land or with other uses permitted in the zone in which the property is located," the local government

must identify the uses permitted in the applicable zone. *Holsheimer v. Clackamas County*, 28 Or LUBA 279 (1994).

31.3.10 Permits – Particular Uses – Home Occupations. Where LUBA remands a local government decision granting a home occupation permit, the permit expires on the date the decision is remanded. Under a local code requirement limiting home occupation permits to one year, the year is measured from the date of a decision on remand granting the permit, not the date of the original permit decision. *Wuester v. Clackamas County*, 27 Or LUBA 314 (1994).

31.3.10 Permits – Particular Uses – Home Occupations. Regardless of whether the local decision maker imposed a condition requiring satisfaction of DEQ noise standards, DEQ noise standards are not approval criteria for an auto repair home occupation permit, where the local code does not make DEQ noise standards applicable approval criteria. *Wuester v. Clackamas County*, 27 Or LUBA 314 (1994).

31.3.10 Permits – Particular Uses – Home Occupations. Where a code approval standard for home occupations in a resource zone requires that a home occupation be "situated upon generally unsuitable land for the production of farm and forest products," the local government may interpret the standard to require that the entire property on which the home occupation is proposed to be located be "generally unsuitable." *Smith v. Clackamas County*, 25 Or LUBA 568 (1993).

31.3.10 Permits – Particular Uses – Home Occupations. ORS 215.448(1) is an enabling statute that both authorizes local governments to approve home occupations and places limits on that authorization. A local government may not authorize home occupations that violate those statutory limitations. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

31.3.10 Permits – Particular Uses – Home Occupations. Under ORS 215.448(1)(c), home occupations may not be conducted outside the dwelling and other buildings normally associated with permitted uses in the zone. ORS 215.448(1)(c) does not provide for a *de minimis* exception to that requirement. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

31.3.10 Permits – Particular Uses – Home Occupations. Where the challenged decision authorizes a home occupation in an *existing* structure, the ORS 215.448(3) prohibition against authorizing construction of a structure that would not otherwise be allowed in the zone could not be violated. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

31.3.10 Permits – Particular Uses – Home Occupations. Under ORS 215.448(1)(c), home occupations must be operated in dwellings or other buildings normally associated with uses permitted in the applicable zone. Where the county adopts no findings addressing this requirement, the decision must be remanded for findings of compliance with the requirement. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

31.3.10 Permits – Particular Uses – Home Occupations. A condition of approval requiring that not more than 1000 square feet of an existing structure be partitioned for use in conjunction with a home occupation is sufficient to assure compliance with a local code provision requiring that

home occupations occupy no more than 1000 square feet of an accessory building. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

31.3.10 Permits – Particular Uses – Home Occupations. Where a county interprets a forest zone requirement that nonforest uses be located on generally unsuitable land for production of farm or forest products as requiring consideration of the suitability of the entire parcel, the county exercises its interpretive discretion to the fullest in interpreting a home occupation approval standard that incorporates the nonforest use standard by reference, as requiring consideration of only the land under the existing building where the home occupation will be located. *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

31.3.10 Permits – Particular Uses – Home Occupations. Where a local government determines an application for a home occupation on a parcel adjoining another parcel on which an earlier application for the same home occupation was denied, is an application for a "substantially similar" use, LUBA will defer to that interpretation of the local code requirement that an application may not be "substantially similar" to a previously denied application. *Roozenboom v. Clackamas County*, 24 Or LUBA 433 (1993).

31.3.10 Permits – Particular Uses – Home Occupations. A local code requirement that a home occupation be "operated in" a dwelling or other buildings normally associated with the dwelling is not satisfied by the parking of repossessed vehicles outside of the dwelling until such vehicles are either loaded on trucks for disposal or driven away. *Stevenson v. Douglas County*, 23 Or LUBA 227 (1992).

31.3.10 Permits – Particular Uses – Home Occupations. A local code provision allowing a "resident" of a dwelling to conduct a home occupation does not require that such "resident" also be the owner of the dwelling in which the home occupation is to be conducted. *Tarbell v. Jefferson County*, 21 Or LUBA 294 (1991).

31.3.10 Permits – Particular Uses – Home Occupations. Where the local code provides that a property owner may file a conditional use application, a property owner has standing to file an application for approval of a home occupation, even though the property owner does not propose to reside in the dwelling and conduct the home occupation. *Tarbell v. Jefferson County*, 21 Or LUBA 294 (1991).

There are currently no headnotes under this topic.

31.3.12 Permits – Particular Uses – Destination Resorts. The fact that a tentative plan for a destination resort proposes a different pace of development than the final master plan, such as by sub-phasing development, does not materially affect the findings of fact on which the final master plan approval was based so as to constitute a "substantial change" to the final master plan, thereby requiring a new application, where neither the final master plan nor applicable regulations require that all development authorized in the first phase of the final master plan occurs at the same time. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019).

31.3.12 Permits – Particular Uses – Destination Resorts. Where the final master plan for a destination resort includes a mitigation plan requiring the applicant to replace the water consumed by the resort with a quantity and quality of water that will maintain fish habitat in an impacted stream, the fact that the tentative plan for one phase of development modifies the timing, but not the overall amount, of the mitigation water required to be provided does not materially affect the findings of fact on which the final master plan approval was based so as to constitute a "substantial change" to the final master plan, thereby requiring a new application, where there is no evidence that such modification will impact the efficacy of mitigation and there is evidence that such modification will result in more gradual, spread out impacts. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a local code provision requires applicants for destination resorts to demonstrate that "[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource," where a proposed resort's consumptive use of groundwater is anticipated to impact the quantity and quality of water in an offsite stream, and where the applicant's final master plan includes a mitigation plan requiring the applicant to replace the water consumed by the resort with a quantity and quality of water that will maintain fish habitat in the stream, the local government may not impose a condition of approval allowing the applicant to demonstrate that the source of the mitigation water provides the requisite quantity and quality of water at a later date without review or input by interested persons. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019).

31.3.12 Permits – Particular Uses – Destination Resorts. ORS 197.435(5)(b) defines overnight lodgings, which are required at destination resorts. The overnight lodgings described in the first sentence of ORS 197.435(5)(b) are owned by the destination resort, whereas the "individually owned units" described in the second sentence of ORS 197.435(5)(b) are overnight lodgings that are not owned by the destination resort. Neither the resort-owned overnight lodgings authorized by the first sentence nor the individually owned overnight lodgings authorized by the second sentence must be "separately" owned. *Central Oregon Landwatch v. Deschutes County*, 76 Or LUBA 6 (2017).

31.3.12 Permits – Particular Uses – Destination Resorts. To qualify as a "separate rentable unit for overnight lodging" within the meaning of ORS 197.445(4), which requires a minimum number of overnight lodging units at destination resorts, a bedroom in an individually (privately) owned cabin with its own bathroom and lockable interior and exterior doors must actually be a "separate unit." The fact that the bedroom may be a "separately rentable accommodation" as described in the first sentence of ORS 197.435(5)(b)'s definition of "overnight lodgings" is irrelevant, since the first sentence of ORS 197.435(5)(b) governs overnight lodgings that are owned by the

destination resort, not individually (privately) owned overnight lodgings. *Central Oregon Landwatch v. Deschutes County*, 76 Or LUBA 6 (2017).

31.3.12 Permits – Particular Uses – Destination Resorts. The Goal 8 (Recreation Needs) adoption history shows the purpose of the second sentence of ORS 197.435(5)(b), which authorizes individually owned overnight lodging units at destination resorts, was to allow individually owned homes to be counted as overnight lodging units in very limited circumstances. *Central Oregon Landwatch v. Deschutes County*, 76 Or LUBA 6 (2017).

31.3.12 Permits – Particular Uses – Destination Resorts. The purpose of the destination resort statutes is to ensure that the statutory minimum number of overnight lodging units is actually available to tourists seeking to use destination resort facilities and that the maximum 2.5 residences to each overnight lodging unit ratio is preserved. *Central Oregon Landwatch v. Deschutes County*, 76 Or LUBA 6 (2017).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a hearings officer finds that the only evidence on a key legal issue regarding required mitigation for the impacts of a destination resort was presented by permit opponents, but the record makes it clear that the applicant also submitted conflicting evidence on that legal issue, remand is required. *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a hearings officer's finding takes inconsistent positions regarding the nature of the legal issue to be resolved in proceedings following a LUBA remand of a permit approval for a destination resort, a second remand is required. *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a destination resort has received both conceptual and final master plan approval, and the final master plan approval decision was remanded, the county may again grant final master plan approval, even though the conceptual master plan approval decision has become void due to the passage of time, where the initial final master plan approval decision effectively incorporated and displaced the conceptual master plan approval decision with regard to the only legal issues remaining on remand. *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a petitioner's challenge to a hearings officer's finding that a mitigation plan submitted in support of a request for approval of a destination resort is specific enough for review relies almost entirely on reasoning that LUBA adopted in remanding a prior county decision, and that LUBA reasoning was effectively rejected or qualified by the Court of Appeals in an appeal of LUBA's first decision, petitioner's challenge to the hearings officer's finding in the second appeal provides no basis for reversal or remand. *Central Land And Cattle Company v. Deschutes County*, 74 Or LUBA 326 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. A code limitation that "[a]ny substantial change to the approved plan will require a new application" does not require a new application for a destination resort whose original owners declared bankruptcy and were replaced by new owners. The code limitation is directed at changes in the approved plan, not at changes in

the owners. *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. Notwithstanding that the destination resort statutes at ORS 197.435 to 197.467 do not expressly authorize expansion of an existing destination resort, the statutes expressly allow destination resorts to be developed in phases, and therefore a proposal to expand an existing resort by adding the equivalent of a second phase that otherwise complies with all applicable approval criteria is consistent with the destination resort statutes. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. Where the applicant for a proposal to expand an existing destination resort relies upon "lockoff rooms" in the existing resort in combination with new lockoff rooms to satisfy the statutory requirement to provide at least 150 overnight lodging units, at a ratio of residential to lodging units that does not exceed 2.5 to 1, a petitioner's challenge to that proposal is not a collateral attack against the existing resort. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. Lockoff rooms, individual bedrooms in a single-family dwelling, are not "individually owned units" for purposes of the destination resort statute at ORS 197.435(5)(b), because individual bedrooms in a dwelling are not "individually owned." *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. Renting individual bedrooms in a house, with common areas and kitchen facilities, does not qualify as providing "overnight lodgings" required in a destination resort, because renting individual rooms in a house is similar to providing accommodations in dormitory rooms, and ORS 197.435(5)(b) provides that "dormitory rooms and similar accommodations do not qualify as "overnight lodgings." *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. A finding that is ambiguous regarding whether a restaurant and meeting area in a destination resort each provide 100 seats, as required by local code, is not a basis for reversal or remand, where all the evidence in the record indicates that the two facilities each provide 100 seats, and the petitioner cites no contrary evidence. Under these circumstances, LUBA will affirm that portion of the decision notwithstanding inadequate findings, because the evidence in the record "clearly supports" a finding that the 100-seat requirement is met. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. A general argument raised below that the applicant to expand a destination resort failed to provide a comprehensive wildlife management plan does not provide fair notice of specific issues raised on appeal regarding noncompliance with code standards that require "no net loss" of wildlife resources and imposition of a conservation easement. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. Where there is conflicting evidence regarding a subjective code standard requiring a finding that a destination resort expansion is "integral" to the remainder of the resort, LUBA will decline to use its authority under ORS

197.835(11)(b) to affirm a decision notwithstanding inadequate findings, based on evidence that "clearly supports" the decision. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a destination resort conceptual master plan approval becomes void under applicable land use regulations if conditions of approval are not "substantially exercised" within two years, and the governing body does not distinguish between conditions based on their importance or the level of difficulty in exercising those conditions, a finding that 19 of 42 conditions have been "fully complied with" is not adequate to establish that the 42 conditions have been "substantially exercised." *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a destination resort conceptual master plan approval becomes void under applicable land use regulations if conditions of approval are not "substantially exercised" within two years, the governing body may not dismiss the significance of the applicant's failure to exercise 22 of 42 conditions because those conditions required the applicant to secure additional permits as the failure of a "contingency" to occur. The conditions were written in a manner that required the applicant to secure the permits to exercise the condition, such that they were a necessary step to exercise the condition, and the significance of the applicant's failure to secure the permits may not be dismissed entirely as a failure of a "contingency." *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a destination resort conceptual master plan approval becomes void under applicable land use regulations if conditions of approval are not "substantially exercised" within two years, and the process and complexity of destination resort final master plan approval makes it difficult to do so within two years, the solution is to amend county land use regulations so as not to subject conceptual master plan approval to the two-year deadline or to write conceptual master plan approval conditions so that they can be exercised without first securing final master plan approval. The solution is not to take the position that the two-year deadline to "substantially exercise" the conditions of approval should not be applied, where the county land use regulations as currently written clearly make the two-year deadline applicable. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

31.3.12 Permits – Particular Uses – Destination Resorts. Where the county's land use regulations require the county to find that the failure of an applicant to fully comply with any conditions of conceptual master plan approval within two years is not the "fault of the applicant," LUBA will defer to a board of commissioner's finding that the complexity of the proposal and the complexity of the county's destination resort review process relieves the applicant of any fault in fully complying with the conceptual master plan conditions of approval. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

31.3.12 Permits – Particular Uses – Destination Resorts. Nothing in the definition of "tract" in ORS 197.435(7) or any other statute or rule requires a map that shows in totality the locations of an applicant's land ownership within the county for purposes of satisfying the last sentence of ORS 197.435(7), the destination resort "30% Rule." *Root v. Klamath County*, 68 Or LUBA 124 (2013).

31.3.12 Permits – Particular Uses – Destination Resorts. Under ORS 197.455(2), the map of lands eligible for destination resort siting that is adopted pursuant to the mapping criteria at ORS 197.455(1) is the "sole basis" for determining whether land is eligible for resort siting, and those mapping criteria are not revisited at the time of destination resort siting. Nonetheless, three of the ORS 197.455(1) mapping criteria include prohibitions and exceptions focused on the specifics of resort development that are difficult to meaningfully address at the mapping stage. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

31.3.12 Permits – Particular Uses – Destination Resorts. Nothing in the destination resort statutes prohibits a county from placing a site that is classified Fire Regime Condition Class 3 on its map of lands eligible for destination resort siting, as long as conditions or similar restrictions are imposed as part of the mapping decision that effectively ensure that prior to resort development the county has adopted a wildfire protection plan consistent with ORS 197.455(1)(f). *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

31.3.12 Permits – Particular Uses – Destination Resorts. Where the county adds a site to its map of lands eligible for destination resort siting, concludes based on site-specific traffic studies that destination resort development will significantly affect nearby transportation facilities within the meaning of OAR 660-012-0060, identifies the transportation improvements needed to ensure that allowed land uses are consistent with the performance standards of affected facilities, and requires the destination resort applicant to provide those improvements prior to development, the county has not deferred a determination of compliance with OAR 660-012-0060, but instead complied with the rule. That the county prudently imposed conditions requiring a second analysis and requiring additional improvements if needed at the time of development does not constitute an impermissible deferral of compliance with OAR 660-012-0060. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

31.3.12 Permits – Particular Uses – Destination Resorts. In concluding that a decision adding a site to the county's map of lands eligible for destination resort development complies with the Transportation Planning Rule, the county may "adopt" measures demonstrating that allowed land uses are consistent with the performance standard of affected transportation facilities within the meaning of OAR 660-012-0060(2)(a) by adopting conditions requiring that the destination resort applicant pay for and provide transportation improvements prior to resort development, and need not require that the improvements be in place on the date the county adds the site to its map of eligible lands. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

31.3.12 Permits – Particular Uses – Destination Resorts. The requirement at ORS 197.460(4) that an applicant for destination resort siting provide a traffic study that includes measures to mitigate a proportionate share of adverse impacts on transportation facilities is different from, and does not replace, the obligation to evaluate transportation impacts under OAR 660-012-0060 in amending the comprehensive plan map of lands eligible for destination resort siting. While a county might err if it relied entirely on ORS 197.460(4) to ensure compliance with OAR 660-012-0060, there is no error in citing ORS 197.460(4) as an additional basis to conclude that OAR 660-012-0060 is satisfied. *Central Oregon Landwatch v. Deschutes County*, 66 Or LUBA 192 (2012).

31.3.12 Permits – Particular Uses – Destination Resorts. Subsection (2) of ORS 197.455 requires that counties adopt a comprehensive plan map to identify lands within the county that are eligible for destination resort siting, and requires that the map "shall be the sole basis for determining whether tracts of land are eligible for destination resort siting." *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. Under ORS 197.455(1), the following types of land may not be included on a county's comprehensive plan map showing lands eligible for destination resort siting: (1) lands within 24 miles of large city urban growth boundaries, (2) a site with 50 or more contiguous acres of unique or prime farmland, (3) a site within 3 miles of a high value crop area, (4) land that is predominantly Cubic Foot Site Class I or 2 forestlands, (5) land in the Columbia River Gorge National Scenic Area, and (6) areas that have been identified as especially sensitive big game habitat. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. Lands that are shown on a county Destination Resort Eligible Lands Map are simply *eligible* for approval of a destination resort, and being included on the map carries with it no guarantee that a destination resort can be approved on the site. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. After a proposed destination resort site is included on a county's comprehensive plan map showing eligible sites, to complete the process and receive county approval for a destination resort, a proposed destination resort must meet the destination resort approval standards set out at ORS 197.445 and other statutory standards. Under the ORS 197.445 approval standards, a destination resort must: (1) be located on a site of 160 acres or more, (2) leave 50 percent of the site dedicated to open space, (3) commit to spend at least seven million dollars on recreation facilities and visitor accommodations, (4) meet certain requirements for visitor-oriented accommodations, and (5) limit commercial uses. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. Although the legislature does not use the term "tract" in ORS 197.455(1), which sets out areas and sites that must be excluded from a county map showing lands that are eligible for destination resort siting, the mapping process dictated by ORS 197.455(1) effectively requires that a county examine "tracts," as ORS 197.435(7) defines that term (*i.e.*, lots, parcels, and contiguous lots and parcels in common ownership), and exclude any tract if more than 30 percent of the tract lies within one or more of the "areas" listed at ORS 197.455(1)(a) through (e). *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. ORS 197.445 does not require that a proposed destination resort must be sited on a single tract. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. Although counties may regulate destination resorts more strictly than they are regulated by ORS 197.445 and 197.455 and related statutes, counties may not adopt destination resort regulations that would allow a county to approve

destination resort proposals that do not comply with the statutes governing mapping of eligible lands for and approval of destination resorts. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. ORS 197.455 imposes no minimum tract size standard for excluding land from a county's comprehensive plan map showing lands eligible for destination resort siting. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. Although ORS 197.445(4)(b)(B) requires that at least 50 units of overnight lodging be built before lots or residential units in a destination resort can be sold, and therefore might preclude approval of a destination resort that includes a previously platted and developed subdivision, there is no statutory requirement that previously platted subdivisions be excluded from a county's comprehensive plan map showing lands eligible for destination resort siting. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. Although amendments to county standards for mapping sites that are eligible for destination resort siting are comprehensive plan amendments, and therefore potentially could result in significant affects on transportation facilities that could implicate OAR 660-012-0060, altering the standards for adding sites to the map in the future has no impact on transportation facilities. It is the future map amendments themselves that might significantly affect a transportation facility and implicate OAR 660-012-0060, and a county must consider OAR 660-012-0060 at the time those comprehensive plan amendments are adopted in the future. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 123 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. If a county has within its boundaries some of the lands described in ORS 197.455(1)(a) through (e), the county must ensure that no tracts that include such ineligible lands are included on the map of eligible lands, since ORS 197.455(2) makes the map the "sole basis for determining whether tracts of land are eligible for destination resort siting." *Root v. Klamath County*, 63 Or LUBA 230 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. A map adopted by the county does not provide an adequate factual base under Goal 2 for a decision to amend the county's destination resort map where it is not possible to tell by looking at the map where the boundaries of the included properties are located, and the list of properties included in the record identifies properties as entire sections of land within townships and ranges, or numbered parcels within sections, ranges, and townships but the map does not include any section numbers or locations. *Root v. Klamath County*, 63 Or LUBA 230 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. Nothing in ORS 197.455(2) obligates the county to re-evaluate or re-qualify lands that have previously been included on the map of eligible lands by virtue of a final, unappealed land use decision, and to remove any of those previously included lands from the map of eligible lands if they are required to be excluded under ORS 197.455(1)(a) to (e). *Root v. Klamath County*, 63 Or LUBA 230 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. A local government errs in concluding that it is not required to apply Statewide Planning Goal 5 to a post acknowledgement plan amendment (PAPA) that adds lands to the county's map of lands eligible for a destination resort by relying on an ESEE analysis that was completed and adopted 16 years prior to the proposed PAPA and that does not include any analysis of the new lands proposed for inclusion on the destination resort map. *Root v. Klamath County*, 63 Or LUBA 230 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. Where it is not clear under a county's code that the planning commission proceeding on a final master plan application for a destination resort will necessarily be conducted as an ORS 197.763 quasi-judicial hearing with notice, the final master plan proceedings appear to be ministerial under the code, and nothing in the tentative master plan approval requires hearing and notice, the county errs in deferring discretionary tentative master plan approval standards to the proceedings on the application for final master plan approval without ensuring that those proceedings will infused with the same participatory rights as the tentative master plan approval. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. A destination resort approval standard requiring that "adverse effects on surrounding lands are to be avoided first and minimized if avoidance is not possible" clearly gives priority to avoiding adverse affects. Remand is necessary where the applicant demonstrated and the county considered only whether adverse effects of the destination resort on an adjoining wildlife refuge can be minimized, and the county failed to consider whether adverse effects can be avoided. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. Well reports generated when wells were dug decades ago are substantial evidence that a reasonable decision maker could rely upon to conclude that the wells can supply sufficient water for a proposed destination resort, where there is no countervailing evidence in the record, and the county addresses the possibility that the well reports are no longer accurate by imposing a condition requiring prior to final master plan approval that the applicant conduct pump tests and, if necessary, dig new wells, to ensure sufficient water. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. Where in approving a destination resort in coastal shorelands that is dependent on groundwater the county addresses a number of comprehensive plan policies implementing Goal 17, but does not address a potentially applicable plan policy in the plan Goal 17 element that requires the county take measures to protect groundwater, remand is necessary for the county to either address the policy or explain why it is not applicable. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. ORS 197.640 as amended in 2010 requires that the applicant for a destination resort submit an economic impacts analysis of the proposed development, where the resort is sited within 10 miles of an urban growth boundary. Although the statute does not tell counties what to do with that economic impacts analysis, the analysis must consider the potential negative economic impacts of the resort, if any, and cannot

simply describe the anticipated positive impacts of the resort. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

31.3.12 Permits – Particular Uses – Destination Resorts. ORS 197.455(2) requires that counties adopt a comprehensive plan map that shows lands that are eligible for destination resort siting, and excludes lands identified in ORS 197.455(1)(a) through (e), and ORS 197.455(2) provides that that comprehensive plan map is to be "the sole basis for determining whether tracts of land are eligible for destination resort siting pursuant to ORS 197.435 to 197.467." A county is not required to determine at the time decisions are made regarding individual applications for destination resort approval whether the proposal includes any of the prohibited lands identified in ORS 197.455(1)(a) through (e), if the adopted comprehensive plan map shows that the proposed lands are eligible for destination resort siting. *Eder v. Crook County*, 60 Or LUBA 204 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. Where petitioner assigns error under OAR 660-012-0060, arguing that the county inadequately mitigated for the traffic impacts of a proposed destination resort, but petitioner neither assigns error to the county's finding that the destination resort will not "significantly affect" the transportation facilities within the meaning of OAR 660-012-0060 nor challenges the legal reasoning that the county adopted in support of that finding, LUBA will deny the assignment of error. *Eder v. Crook County*, 60 Or LUBA 204 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a petitioner assigns error to a county's failure to require an applicant for destination resort approval to pay the required $20,000 application fee, but the record shows that (1) the applicant paid the required $20,000 application fee for a previous application for destination resort approval that was withdrawn and replaced by the destination resort application on appeal and (2) the county applied the prior application fee to the second application for destination resort approval, petitioner's assignment of error will be denied. *Eder v. Crook County*, 60 Or LUBA 204 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. A self-contained development providing visitor-oriented accommodations and developed recreational facilities, including a golf course, that a county previously approved as a "destination resort" under Goal 8 is a "destination resort" as that term is used in Goal 8 and under ORS 197.435 through 197.467. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. The standards for approving a destination resort under Goal 8 and ORS 197.435 through 197.467 function as a "safe harbor" that allows local governments to approve resorts that meet minimum standards, without the necessity of adopting exceptions to Goals 11 and 14. However, the statutory process is not the only means of approving a destination resort, and counties continue to have the option of approving a destination resort subject to exceptions to Goals 3, 4, 11 and 14. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. A county may rely on the reasons that justified a Goal 4 exception earlier approved by the county and Land Conservation and Development Commission (LCDC) for a proposed destination resort to justify reasons exceptions to Goals 11 and 14, where the record supports the county's finding that the Goal 4 reasons are still

valid and the Goals 11 and 14 exceptions merely implement and complete the earlier county and LCDC approval. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. Because Goal 11 and Goal 14 serve congruent policy objectives, the reasons sufficient to justify a Goal 14 exception for a destination resort may also be sufficient to justify an exception to Goal 11 to authorize a community sewer system to serve the destination resort. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. Where the county and the Land Conservation and Development Commission previously approved a Goal 4 exception for a destination resort under conditions requiring specified on-site accommodations and facilities, and the county imposed an overlay zone to ensure that the resort includes those on-site accommodations and facilities, in later adopting a reasons exception to Goal 14 to complete the proposed resort the county can consider those required accommodations and facilities to be essential characteristics of the proposed use, for purposes of the alternative sites analysis required under OAR 660-014-0040(3)(a). In that circumstance, the county does not err in concluding that alternative sites within urban growth boundaries cannot reasonably accommodate the proposed use. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. Remand is necessary where the local government adopts exceptions to Statewide Planning Goals 11 and 14 to approve a destination resort, but fails to address comprehensive plan transportation policies that appear to implement Statewide Planning Goal 12 (Transportation), for which the local government did not adopt an exception, and the decision fails to explain why those policies are either satisfied or not applicable. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. A county errs in failing to address whether a mitigation plan for a destination resort is consistent with applicable comprehensive plan policies governing wildlife protection, and instead finding that issues raised regarding compliance with those policies will be addressed by requiring the applicant to obtain approval of the plan from the Oregon Department of Fish and Wildlife. *Friends of Marion County v. Marion County*, 59 Or LUBA 323 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. Under ORS 197.455(2), counties are to adopt a map showing areas that are eligible for destination resorts. ORS 197.455(2) prohibits amending that map more frequently than once each 30 months. An ordinance that was adopted to repeal and replace a destination resort map 22 months after the map was amended to make additional property eligible for destination resorts violates ORS 197.455(2). *Remington Ranch, LLC v. Crook County*, 59 Or LUBA 361 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. In applying a destination resort approval standard that requires that destination resorts employ mitigation measures to ensure "no net loss of wildlife," a county may allow an applicant to utilize data developed in approval of a nearby destination resort that utilized seven indicator species to estimate the nature and extent of the damage that must be fully mitigated. A reasonable person would rely on such data unless

opposing data is submitted to show the analysis that relies on indicator species missed or inadequately addressed some aspect of the wildlife resource. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a destination resort approval standard requires that destination resorts employ mitigation measures to ensure "no net loss of wildlife," an assignment of error that a county erred by applying that standard to allow one species to be replaced by another provides no basis for reversal or remand, where the applicant's approach to demonstrating compliance with the "no net loss of wildlife" standard does not in fact propose to replace existing species with other species and proposes to fully mitigate all expected damage to wildlife habitat. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. In applying a destination resort approval standard that requires that destination resorts employ mitigation measures to ensure "no net loss of wildlife," a county does not err by focusing on wildlife habitat rather than the wildlife itself. In developing a destination resort, wildlife itself is generally not purposefully harmed; the harm is caused through destruction or damage to the wildlife habitat. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. A mitigation plan that is submitted to comply with a destination resort approval standard that requires that destination resorts employ mitigation measures to ensure "no net loss of wildlife" is inadequate where that mitigation plan proposes off-site mitigation and the location of the 4,501 acres that provide the needed mitigation, the nature of the habitat on those 4,501 acres, and the particular mix of mitigation measures that will be employed on those 4,501 acres are all unknown. Those details must be supplied at a stage where opponents still have a meaningful opportunity to challenge the adequacy of the proposed mitigation plan. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a county hearings officer's findings show she was persuaded that additional mitigation measures were necessary to address thermal impacts of destination resort groundwater use on a nearby cool water creek, the hearings officer's decision to accept the applicant's proposal to provide additional mitigation by reducing surface withdrawal from that cool water creek is inadequate where there was opposition testimony that the proposed mitigation would not mitigate the thermal impact. While there may be a simple answer to the opposition testimony, where that answer is missing in the record and the hearings officer's decision does not address that opposition testimony, the decision must be remanded. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. Where the record includes conflicting believable evidence about whether an applicant's assumption that 90 percent of the groundwater withdrawn for use by a destination resort will be returned to the subsurface hydrologic system and the county hearings officer findings recognize the conflicting evidence but choose to rely on the applicant's expert's position, which had been accepted by the Oregon Water Resources Department, the hearings officer's findings on that question are supported by substantial evidence. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. In applying a destination resort conceptual master plan condition of approval that requires that the final master plan "specify all recreational facilities," a county does not err by approving a final master plan that lists proposed recreational facilities but makes it clear that not all of the proposed recreational facilities necessarily will be built. While the condition could be interpreted to require more certainty and specificity, it need not be interpreted to require more certainty and specificity than was provided by the list of proposed recreation facilities. *Gould v. Deschutes County*, 59 Or LUBA 435 (2009).

31.3.12 Permits – Particular Uses – Destination Resorts. The requirement that destination resorts be limited to lands that are located "in a setting with high natural amenities" appears in the ORS 197.445 criteria that apply to individual destination resort applications, not the ORS 197.455 standards that identify lands that are potentially eligible for destination resort siting. A county is not required to find that all lands that it maps as potentially eligible for destination resort siting provide "a setting with high natural amenities." *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

31.3.12 Permits – Particular Uses – Destination Resorts. Under ORS 197.445(4), destination resorts must provide at least 150 units of "overnight lodging." ORS 197.435(5)(b) defines "overnight lodging" as "permanent, separately rentable accommodations that are not available for residential use" and then provides a nonexclusive list of examples that qualify as overnight lodging and a list of examples that do not qualify as overnight lodging. A land use regulation that expands on the list of examples that qualify as overnight lodging does not necessarily run afoul of the ORS 197.435(5)(b) definition. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

31.3.12 Permits – Particular Uses – Destination Resorts. Under ORS 197.445(4), destination resorts must provide at least 150 units of "overnight lodging." Where a zoning ordinance that was adopted to implement ORS 197.445(4) is ambiguous, such that the zoning ordinance could be interpreted to be inconsistent with ORS 197.445(4) or consistent with ORS 197.445(4), the county would be required to interpret the zoning ordinance to be consistent with ORS 197.445(4). *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

31.3.12 Permits – Particular Uses – Destination Resorts. ORS 197.445(5) limits commercial uses to "types and levels of use necessary to meet the needs of visitors" to destination resorts. A zoning ordinance that allows "commercial and entertainment" uses in destination resorts is likely consistent with ORS 197.445(5) since entertainment uses are likely to be commercial uses. But if an entertainment use were proposed that was not a commercial use, the county would be obligated to interpret the term entertainment consistently with ORS 197.445(5) and deny the proposed entertainment use. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a zoning ordinance amendment that potentially allowed more individual lots or units in a destination resort than permitted under applicable statutes at the time the zoning ordinance amendment was adopted, the decision need not be remanded where the statute was subsequently amended to allow the number of individual lots or units authorized by the zoning ordinance amendment. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

31.3.12 Permits – Particular Uses – Destination Resorts. ORS 197.445(1) requires a minimum site size of 160 acres for destination resorts. A zoning ordinance that allows internal rights-of-way to be included in determining whether a proposed destination resort complies with the ORS 197.445(1) 160-acre minimum site size does not violate the statute, because ORS 197.445(1) does not expressly require that rights-of-way be excluded when computing site size and even if the statute did require that rights-of-way be excluded, the statutory requirement would have to be satisfied. *Johnson v. Jefferson County*, 56 Or LUBA 72 (2008).

31.3.12 Permits – Particular Uses – Destination Resorts. A hearings officer's failure to address arguments that the applicant should improve transportation facilities affected by a proposed destination resort provides no basis for reversal or remand, where a prior development agreement and two earlier development approvals conclusively established the type and extent of transportation improvements the applicant is obligated to make in developing the resort, and the petitioners cite no authority for the hearings officer to require different improvements in approving a subdivision within that resort. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. A subdivision approval standard requiring preservation of natural features that is written to apply to circumstances where there have been no previous efforts to identify natural features plays a more limited role where the subdivision application is preceded by two final, binding land use decisions that have already largely determined which natural features will be preserved and which will be lost to development. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. By statute, the ratio of residential units to overnight lodging units may not exceed 2:1. A county is not free to ignore inconsistencies or errors in a destination resort conceptual master plan regarding the statutorily required 2:1 ratio, and assume that the final master plan will correct those errors. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. Because ORS 197.445(4)(b)(B) requires that the first 50 units of the required 150 units of overnight lodging in a destination resort be constructed before sales may close on individually owned lots or residential units, a county code standard that was adopted to implement the statute that allows those first 50 units to be financially assured rather than constructed is inconsistent with the statute and the statute controls. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. A county is not required to separately approve two villages that make up a single destination resort, even though the properties where the two villages would be constructed only touch corners in two places, the properties are topographically separated and the properties are connected by roadways that must travel onto adjoining properties. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. The legal requirement that a destination resort have "direct access" onto an arterial or collector road is satisfied by one such

access and a destination resort may have additional accesses that are not "direct." *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. Roadways that cross exclusive farm use zoned land to connect two villages in a destination resort are properly viewed as "[a]ccessory transportation improvements for a use that is allowed" in the exclusive farm use zone, within the meaning of OAR 660-012-0065(3)(a). *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. Where there is no dispute that a road that would be needed to provide access to a destination resort could be constructed across BLM land, the applicant need only demonstrate that securing the needed right-of-way from BLM is not precluded as a matter of law. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. An erroneous assumption in a traffic study that was submitted in support of an application for approval of a destination resort provides no basis for reversal or remand where the error had no effect on the validity of the traffic study. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a petitioner argues that the traffic study that was submitted in support of an application for approval of a destination resort should have examined a larger area, but cites no legal standard that would require consideration of a larger area, petitioner's argument provides no basis for remand. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. Approval of a destination resort requires a finding that negative impacts on fish and wildlife resources will be "completely mitigated." A finding that it is feasible to satisfy that requirement is sufficient where such impacts are identified, methods for mitigating such impacts on-site and off-site are identified, refinements to those methods are developed with the Oregon Department of Fish and Wildlife and the federal Bureau of Land Management, and both agencies indicate that those refined methods will succeed. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. An applicant for destination resort approval must demonstrate that there will be adequate water available to serve the proposed destination resort. An applicant's demonstration that there is no legal barrier to securing the needed permits to withdraw groundwater to serve the destination resort is sufficient. The applicant need not secure the mitigation credits that ultimately will be needed prior to conceptual master plan approval. *Gould v. Deschutes County*, 54 Or LUBA 205 (2007).

31.3.12 Permits – Particular Uses – Destination Resorts. Even if intersection improvements that are required in approving a destination resort will maintain acceptable levels of service on nearby roads and key intersections, it does not necessarily follow that there will not be conflicts between the increased levels of traffic the proposed destination resort will generate on these roads and agricultural traffic (including livestock and large slow-moving agricultural vehicles) seeking to negotiate these same roads. However, where the relevant approval standard only requires "reasonable compatibility," and the testimony on both sides of the seriousness of the conflicts from

such traffic is speculative, LUBA cannot say the county was unreasonable in finding the destination resort will be "reasonably compatible" with nearby farm use and farm traffic. *Burke v. Crook County*, 48 Or LUBA 23 (2004).

31.3.12 Permits – Particular Uses – Destination Resorts. Oregon Laws 1993, chapter 590, section 6, allows counties to avoid implementing statutory changes to the destination resort requirements until no later than their next periodic review. Even if a county has not concluded its next periodic review, it cannot substantially amend its pre-1993 destination resort regulations without implementing those changes. *Stevens v. Jackson County*, 47 Or LUBA 381 (2004).

31.3.12 Permits – Particular Uses – Destination Resorts. Without some explanation or evidence regarding how 100 proposed time share units, with separate "lock-out" suites, will be marketed and made available for overnight lodging, the application fails to assure that the proposed destination resort will offer at least 150 separate rentable units for overnight lodging, as required by ORS 197.445(4). *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

31.3.12 Permits – Particular Uses – Destination Resorts. A finding that a proposed destination resort is located in a setting with "high natural amenities" as required by ORS 197.445 is inadequate and not supported by substantial evidence, where neither the county's decision nor the record identifies or describes any high natural amenities near the proposed resort. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

31.3.12 Permits – Particular Uses – Destination Resorts. Because ORS 197.445 provides that a destination resort may provide for individually owned lots or units, and does not prohibit location of a major destination resort near a highway, the fact that a proposed resort offers 200 single-family lots and is located near a highway does not convert the proposal into something other than a destination resort, if it otherwise complies with all applicable statutory and local requirements. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

31.3.12 Permits – Particular Uses – Destination Resorts. ORS 197.467 requires imposition of a conservation easement to protect Goal 5-designated resources on the site of a proposed destination resort, and that requirement is not obviated by the fact that the Oregon Department of Fish and Wildlife has indicated that it will not require a conservation easement. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

31.3.12 Permits – Particular Uses – Destination Resorts. A county errs in interpreting a one dwelling per 40 acres density standard intended to protect Goal 5 wildlife habitat to be satisfied if the average dwelling density over a 1.2-million-acre area of the county does not exceed the standard, where the county's interpretation gives the standard no regulatory effect until over 28,000 dwellings are built in the area, and is inconsistent with the purpose of the standard to protect wildlife habitat. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

31.3.12 Permits – Particular Uses – Destination Resorts. A local standard imposing a one-dwelling-per-40-acres density limitation on Goal 5-protected wildlife habitat must be construed in a way that is consistent with its purpose and context to allow no more than one dwelling per 40 acres on the subject property. As applied to a destination resort, such a standard may effectively

prohibit a resort that proposes 200 single-family residential lots in a 500-acre area. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

31.3.12 Permits – Particular Uses – Destination Resorts. Facilities such as an "internet café," a "music festival stage," a lounge and dance area, and facilities intended to benefit permanent residents do not qualify as "developed recreational facilities" for purposes of statutes requiring a minimum expense on recreational facilities in order to qualify as a destination resort. *Wetherell v. Douglas County*, 44 Or LUBA 745 (2003).

31.3.12 Permits – Particular Uses – Destination Resorts. Whether certain persons are "applicants" for destination resort preliminary development plan approval, as defined in the local code, requires an interpretation by the local governing body in the first instance. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

31.3.12 Permits – Particular Uses – Destination Resorts. Findings which do not identify the ways a destination resort preliminary development plan is different from the previously approved conceptual site plan, the magnitude of such differences or why the local government believes the differences are minor, are not adequate to establish compliance with a code standard requiring the preliminary development plan to conform to the conceptual site plan and alterations, if any, to be minor in nature. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

31.3.12 Permits – Particular Uses – Destination Resorts. Under the requirement of ORS 197.455(2) and Goal 8(1)(b) that a destination resort not be located on a "site" with 50 or more contiguous acres of prime farmland, the "site" does not include adjacent property purchased by the applicants as a source of water rights, that will neither be designated for nor used as part of the proposed destination resort. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

31.3.12 Permits – Particular Uses – Destination Resorts. Where a county adopts a plan map designating land within three miles of the county's borders as available for destination resort siting, without determining whether such land is within three miles of high-value crop areas located in a neighboring county, the county has failed to comply with the requirement of ORS 197.455 and Goal 8 that land within three miles of high-value crop areas not be available for destination resort use. *Alliance for Resp. Land Use v. Deschutes County*, 23 Or LUBA 476 (1992).

31.3.12 Permits – Particular Uses – Destination Resorts. Use of a process, established by county plan and ordinance provisions, which allows a county to refine its mapping of areas where destination resorts are permitted, with regard to prime farmland, through determination of compliance with the statutory and goal siting criteria on a case-by-case basis, is not precluded by the destination resort statute. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

31.3.12 Permits – Particular Uses – Destination Resorts. Under ORS 197.445(2), Goal 8(1)(b) and plan criteria that a destination resort not be approved "on a site with 50 or more contiguous acres of * * * prime farmland identified and mapped by the United States Soil Conservation Service [SCS]," a county must rely on the *SCS's* identification of prime farmlands. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

31.3.12 Permits – Particular Uses – Destination Resorts. In addressing the statutory, goal and plan "prime farmland" criterion, a county is not required to rely on published SCS county soil maps and inventories, but rather may rely on other up to date, site-specific SCS identification and mapping of prime farmlands. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

31.3.12 Permits – Particular Uses – Destination Resorts. The requirement to comply with ordinance criteria applicable to the resolution/conceptual site plan stage of the destination resort review process cannot be avoided by deferring those determinations to the preliminary development plan stage of the review process, through restatement of the first stage approval criteria as conditions of approval for the second stage. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

31.3.12 Permits – Particular Uses – Destination Resorts. Compliance with a criterion that "adequate sewer [and] water * * * services will be provided" to serve a proposed destination resort requires identification of an available method for providing adequate sewage disposal and domestic water service to the proposed development that is reasonably certain to comply with applicable standards and produce the desired result. *Foland v. Jackson County*, 18 Or LUBA 731 (1990).

31.3.13 Permits – Particular Uses – Golf Courses. Hallways that are intended for human transit rather than human occupancy need not be counted toward the limit prescribed by OAR 660-033-0130(2)(a) on structures with a "design capacity" no greater than 100 people. *Oregon Coast Alliance v. Curry County*, 73 Or LUBA 52 (2016).

31.3.13 Permits – Particular Uses – Golf Courses. A local government's determination of the design capacity of a locker room that is based on the number of lockers and projected number of golfers using the locker room lockers at one time is supported by substantial evidence in the record where the applicant's architect provides testimony to support the determination. *Oregon Coast Alliance v. Curry County*, 73 Or LUBA 52 (2016).

31.3.13 Permits – Particular Uses – Golf Courses. OAR 660-033-0130(2)(a) excludes structures that are not "enclosed structures" from the required maximum "design capacity" calculation and a county's exclusion of outdoor decks and patios that are not enclosed is consistent with the express language of the rule. *Oregon Coast Alliance v. Curry County*, 73 Or LUBA 52 (2016).

31.3.13 Permits – Particular Uses – Golf Courses. OAR 660-033-0130(20)(a)'s description of a regular 18-hole golf course permitted as a conditional use on EFU-zoned land, as "generally characterized by a site of about 120 to 150 acres of land," does not impose a strict upper limit of 150 acres. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

31.3.13 Permits – Particular Uses – Golf Courses. OAR 660-033-0130(2)(a) prohibits certain enclosed structures, including a clubhouse associated with a golf course, with a "design capacity" greater than 100 people, if located within three miles of an urban growth boundary. "Design capacity" denotes the capacity for human occupation that a structure is designed for, not the number of people anticipated to use the structure at any one time. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

31.3.13 Permits – Particular Uses – Golf Courses. "Design capacity" as used in OAR 660-033-0130(2)(a), which limits the design capacity of certain structures on EFU-zoned land within three miles of an urban growth boundary, is not the same concept as "maximum occupancy" as that term is used for purposes of fire and safety codes in issuing a building permit for structures. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

31.3.13 Permits – Particular Uses – Golf Courses. Structures or portions of a structure that are not intended for human occupancy need not be counted toward the limit prescribed by OAR 660-033-0130(2)(a) on structures with a "design capacity" no greater than 100 people. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

31.3.13 Permits – Particular Uses – Golf Courses. Establishing that the "design capacity" of a structure does not exceed the 100-person limit prescribed in OAR 660-033-0130(2)(a) will likely require the testimony of an architect or designer, together with any necessary calculations or explanations regarding the designed capacity of the structure. Remand is necessary where the applicant proposes a 10,000-square-foot golf clubhouse structure with restaurant, lounge, pro shop, etc., but provides no design or other evidence regarding the designed capacity of the clubhouse,

other than testimony that the applicant expects no more than 50 golfers to use the clubhouse at any one time. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

31.3.13 Permits – Particular Uses – Golf Courses. Notwithstanding that the record includes no evidence quantifying how much water would be transferred between a ranch and a proposed golf course, a county's finding that the water transfer will not significantly change or increase the cost of farming practices on the ranch is supported by substantial evidence, where the ranch manager testifies that in exchange for transferring water, the applicant will improve the ranch's irrigation system, and the ranch anticipates no change in the amount of irrigation water available or irrigation practices. *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015).

31.3.13 Permits – Particular Uses – Golf Courses. Petitioners' argument that a proposed golf course expansion violates Goal 14 because it constitutes an expansion of an urban use onto rural EFU-zoned land provides no basis for reversal or remand, because Goal 14 does not apply to a permit to expand a use allowed in an EFU zone. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

31.3.13 Permits – Particular Uses – Golf Courses. Where the county approves a golf course expansion without adopting findings addressing a comprehensive plan provision that prohibits approval of urban uses outside urban growth boundaries, LUBA will remand the decision so that the county can adopt findings addressing whether the subject golf course is "urban" and whether the proposed expansion of the golf course is consistent with the comprehensive plan provision. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

31.3.13 Permits – Particular Uses – Golf Courses. Where a code provision requires an applicant for expansion of a golf course on EFU-zoned land to demonstrate that alternative urban sites are not available and an applicant applies to expand an existing golf course, a hearings officer's interpretation of the provision as limiting the requisite alternative site analysis to locations where the existing golf course can expand is reasonable and correct. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

31.3.13 Permits – Particular Uses – Golf Courses. Expansion of a golf course is not permitted under OAR 660-33-130(18) exception unless the existing facilities are within the same zone as the proposed expansion. *DLCD v. Jackson County*, 33 Or LUBA 302 (1997).

31.3.13 Permits – Particular Uses – Golf Courses. Limitations in OAR 660-33-120 and 660-33-130 are consistent with ORS 215.283 provision allowing golf courses on exclusive farm use land. *DLCD v. Jackson County*, 33 Or LUBA 302 (1997).

31.3.13 Permits – Particular Uses – Golf Courses. The county properly approved a conditional use permit for a golf course and recreational vehicle campground where it determined the feasibility of compliance with an applicable approval standard and imposed a condition to ensure that compliance. *Just v. Linn County*, 32 Or LUBA 325 (1997).

31.3.13 Permits – Particular Uses – Golf Courses. Where the county interprets "high value farm land" for purposes of its ordinance to mean "predominantly high value farm land," and concludes that because the subject property consists of predominantly non-high value farmland, a golf course

is permitted as a conditional use, LUBA will defer to the county's interpretation of its own code. *Just v. Linn County*, 32 Or LUBA 325 (1997).

31.3.13 Permits – Particular Uses – Golf Courses. Because LUBA's review is limited to the record of an appealed decision, LUBA cannot rely on a determination in another case that a proposed golf course is not a commercial use to support a determination, in the case on appeal, that a proposed golf driving range is not a commercial use. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

31.3.13 Permits – Particular Uses – Golf Courses. Findings that an orchard's accepted farming practices have not been significantly affected by trespassing golf balls are supported by substantial evidence where the evidence shows no orchard employees have been hit by golf balls, tree buffers are effective in deflecting golf balls and petitioner's testimony was discredited by video tape of petitioner collecting golf balls on the golf course property. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

31.3.13 Permits – Particular Uses – Golf Courses. Where there is conflicting evidence concerning the effectiveness of a condition requiring golf course closures during spraying operations to avoid significant effects on or cost increases in such spraying, a finding that the condition has been effective is supported by substantial evidence. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

31.3.13 Permits – Particular Uses – Golf Courses. Where the aerial spray applicator formerly used by an orchard will not spray orchards surrounded by a golf course and the only sprayer who will charges 2000 dollars more to do so, the county's findings must explain why this cost increase, viewed cumulatively with any other cost increases attributable to the golf course, is not significant. *Von Lubken v. Hood River County*, 28 Or LUBA 362 (1994).

31.3.13 Permits – Particular Uses – Golf Courses. Where an EFU zone allows "golf courses" as a conditional use, it must incorporate the definition of "golf course" in OAR 660-33-130(20) or specify that the rule definition applies. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

31.3.13 Permits – Particular Uses – Golf Courses. Where there is no definition of the term "golf course" in the local code, the plain and ordinary meaning of that term as it is defined in the dictionary applies, and a driving range is not the equivalent of a golf course. *DLCD v. Columbia County*, 24 Or LUBA 338 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. Where there is evidence in the local government record that the number of golf balls claimed to have landed in adjoining orchards is exaggerated, a decision approving a golf course and imposing a condition requiring the planting of trees to contain golf balls on-site and installation of a fence and screen to prevent golfers and golf balls from entering adjoining orchard property, is supported by substantial evidence. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. Where the aerial application of chemicals on an orchard adjoining a proposed golf course will be rendered more difficult, although possible, in

that at least one aerial sprayer indicates he would be willing to spray the affected orchard, and the decision approving the golf course requires the operator to close the golf course to facilitate such spraying, there is substantial evidence in the record that the golf course will not force a significant change in or significantly increase the cost of aerial spraying of the adjoining orchard. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. A decision that a golf course will not significantly change or increase the cost of ground spraying of an adjoining orchard is supported by substantial evidence, where there is conflicting evidence concerning the magnitude of ground spraying drift expected to travel onto adjoining properties, and the decision imposes a condition requiring that the golf course operator provide monitors to prevent golfers from coming into contact with ground spray drift. *Von Lubken v. Hood River County*, 24 Or LUBA 271 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. Where the purposes of a county's commercial zones are to provide for retail-oriented needs in areas characterized by good transportation services, and such needs and services are not identified with a particular proposed golf course, the county's interpretation of its own ordinance that the golf course is not a commercial use is not inconsistent with express language of the local ordinance or the ordinance's apparent purpose or policy and will be affirmed. *West v. Clackamas County*, 23 Or LUBA 558 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. In determining whether a proposed golf course on EFU-zoned land satisfies local standards requiring that the golf course be compatible with and not seriously interfere with farm uses, the local government must identify the farm uses in the area and explain how the proposal will be compatible, and not seriously interfere, with the identified farm uses. *Kaye v. Marion County*, 23 Or LUBA 452 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. Where there is expert evidence in the record that traffic systems in the area are inadequate to serve a proposed golf course, and only conclusory evidence to the contrary, a local government's finding of compliance with a code standard requiring adequate rural facilities to serve the proposed use is not supported by substantial evidence in the record. *Kaye v. Marion County*, 23 Or LUBA 452 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. A local government must determine compliance with a code standard requiring that a proposed golf course will have no significant adverse impact on wildlife. The local government may not leave a determination of compliance with a code approval standard to a state agency. *Kaye v. Marion County*, 23 Or LUBA 452 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. Where golf courses are listed as conditionally permitted uses in an EFU zoning district, and an applicable code standard requires that proposed golf courses comply with applicable comprehensive plan policies, a county must balance applicable plan policies, and may not focus on particular plan policies to the exclusion of others. *Wells v. Clackamas County*, 23 Or LUBA 402 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. Where a code standard requires a determination that there is a demonstrated need for a proposed golf course "which outweighs the need for, or benefits of, the existing or potential farm or forest use," the county correctly applied

that standard by determining even though there is a need for more golf courses in the county, the value of the property for farmland outweighs that need. *Barber v. Marion County*, 23 Or LUBA 71 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. Where the evidence establishes a reasonable farmer would not significantly change the manner in which the farm is managed due to a proposed golf course, and the opponents' evidence shows only that there is a remote possibility that there could be some impacts from such proposed golf course, the county's determinations that the proposed golf course will not seriously interfere with, force a significant change in, or significantly increase the cost of accepting farming practices in the area, are supported by substantial evidence. *Washington Co. Farm Bureau v. Washington County*, 22 Or LUBA 540 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. Under ORS 215.296(1), the burden is on the applicant to show a proposed golf center will force no significant change in accepted farming practices or their cost, and on the county to so find. *Berg v. Linn County*, 22 Or LUBA 507 (1992).

31.3.13 Permits – Particular Uses – Golf Courses. Although the EFU zoning statutes do not establish specific approval standards for golf courses in EFU zones, ORS 215.296(1) establishes standards applicable to nonfarm uses in EFU zones generally, and requires that approval of such uses not force a significant change in, or significantly increase the cost of, accepted farm or forest practices on surrounding lands. *Von Lubken v. Hood River County*, 22 Or LUBA 307 (1991).

31.3.13 Permits – Particular Uses – Golf Courses. The correct way to resolve a conflict between code provisions that (1) specifically allow approval of golf courses in an EFU zone as a conditional use, but (2) establish approval standards for golf courses which make it impossible to ever approve a golf course in the exclusive farm use zone, is to conclude that the approval standards making approval an impossibility were not intended to govern approval of golf courses. *Waker Assoc., Inc. v. Clackamas County*, 22 Or LUBA 233 (1991).

31.3.13 Permits – Particular Uses – Golf Courses. Findings of compliance with a standard that a proposed golf course will not "force a significant change in," or "significantly increase the cost of," accepted farm or forest practices on surrounding lands do not necessarily satisfy a standard that the proposed golf course will not "interfere seriously" with accepted farming practices. *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51 (1991).

31.3.14 Permits – Particular Uses – Churches. Although it is not clear a proposed "parsonage," which is a portion of a church to include a bedroom, kitchen and bathroom for use by the church's pastor, must be evaluated and approved or denied under the criteria that apply to a nonfarm dwelling under the county's land use ordinance implementing ORS 215.284, those land use standards require the exercise of discretion in approving the development of land. Further, it is possible, even probable, that any application for a proposed residential use associated with a church must be evaluated under the standards at ORS 215.441, and accordingly the county must process such an application according to its procedures that apply to permits. *Wetherell v. Douglas County*, 78 Or LUBA 33 (2018).

31.3.14 Permits – Particular Uses – Churches. ORS 215.441, which provides that if county zoning allows a church or other nonresidential place of worship, the county shall also allow certain accessory uses, is not an independent authorization of churches in any county zone, and does not extend any protections to churches proposed for zones where churches are not allowed. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

31.3.14 Permits – Particular Uses – Churches. LUBA will decline to render an advisory interpretation of ORS 215.441, which extends certain protections to a "church or other nonresidential place of worship" in county zones allowing such uses, where LUBA concludes that the applicable Wildlife Area (WA) overlay zone does not allow churches at all, and thus there is no need to resolve the parties' dispute regarding whether locating a proposed church within an existing dwelling results in a "nonresidential place of worship." *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

31.3.14 Permits – Particular Uses – Churches. A hearings officer Misconstrues the text and context of the county Wildlife Area overlay zone, which allows uses that are "permitted outright" and "permitted conditionally" in the underlying zone, by concluding that a church is a use "permitted outright" based solely on the fact that ORS 215.283(1) allows churches on lands zoned for exclusive farm use (EFU), when the question is whether churches are "permitted outright" in the *county* EFU zone, which does not list churches under the category of uses "permitted outright." *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

31.3.14 Permits – Particular Uses – Churches. Notwithstanding that uses listed in ORS 215.283(1), including churches, are generally allowed on lands zoned for exclusive farm use free of locally imposed restrictions, other state statutes and administrative rules can impose restrictions. Because ORS 215.441 and OAR 660-033-0130 impose restrictions on churches in EFU zones that require or authorize a county to undertake discretionary reviews of proposed churches, it is not accurate to characterize churches as uses "permitted outright" in a county EFU zone. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

31.3.14 Permits – Particular Uses – Churches. LUBA will reject an interpretation of a county Wildlife Area overlay zone, which implements Statewide Planning Goal 5 to protect winter range in part by prohibiting new churches in winter range, to the effect that the WA overlay zone prohibits churches in winter range areas only where the underlying base zone categorizes churches as a conditional use, but that interpretation would allow churches in winter range areas if the underlying base zone categorizes churches as something other than a conditional use, given that

conflicts between churches and winter range are the same whether churches are categorized as permitted or conditional uses. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

31.3.14 Permits – Particular Uses – Churches. A hearings officer Misconstrues the text and context of a county's Wildlife Area (WA) overlay zone, in concluding that prohibitions on certain new uses, including churches, in winter range areas are limited exclusively to areas where the underlying base zone categorizes such uses as conditional uses, where other provisions of the WA overlay zone make it clear that the prohibition on new uses in winter range is not limited to uses categorized as conditional uses in the underlying base zone. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

31.3.14 Permits – Particular Uses – Churches. LUBA will reject arguments that applying a county prohibition on churches in deer winter range would cause the county to violate the "equal terms" provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), because the county has allegedly allowed wedding event venues and similar uses on nearby properties, where the applicant does not argue or demonstrate that nearby properties are also subject to winter range restrictions or otherwise similarly zoned and situated as the subject property. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 284 (2017).

31.3.14 Permits – Particular Uses – Churches. ORS 215.441(1) requires a two-step analysis. The first step requires that a county determine whether its zoning ordinance allows a "church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship" on property. The words "or other nonresidential place of worship" were the legislature's attempt to recognize that the words "church, synagogue, temple, mosque, chapel, meeting house" might not adequately describe all religions' places of worship. *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157 (2009).

31.3.14 Permits – Particular Uses – Churches. ORS 215.441(1) requires a two-step analysis. The second step requires that counties allow "activities customarily associated with the practices of the religious activity." The words "the practices of the religious activity" in ORS 215.441(1) do not encompass religious or other activities that a particular religion may engage in, if those activities are not customary at the "church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship" that is identified in step one. *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157 (2009).

31.3.14 Permits – Particular Uses – Churches. A church office that would house administrative functions for a 17-county diocese, as well as some religious functions, is not a "church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship," within the meaning of ORS 215.441(1). *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157 (2009).

31.3.14 Permits – Particular Uses – Churches. Where the record does not establish that it is customary for a Catholic Church to locate its diocesan offices next to a rural retreat center and chapel, ORS 215.441(1) does not require that a county approve an application for approval of such offices in an EFU zone. *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157 (2009).

31.3.14 Permits – Particular Uses – Churches. A county's refusal to approve a diocesan office building next to a rural retreat center and chapel on EFU-zoned land does not result in a "substantial burden" on "religious exercise," within the meaning of the Religious Land Use and Institutionalized Persons Act. *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157 (2009).

31.3.14 Permits – Particular Uses – Churches. Where LUBA affirms a county's decision that a proposed church will require a reasons exception and, in dicta, rejects the applicant's claim under the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), that dicta does not preclude the applicant from challenging the county's subsequent denial of the applicant's request for a reasons exception as being inconsistent with the RLUIPA equal terms provision. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

31.3.14 Permits – Particular Uses – Churches. For purposes of the equal terms provision of the Religious Land Use and Institutionalized Persons Act, an "assembly" is a place where groups or individuals dedicated to similar social, educational or recreational purposes meet to pursue those interests, and includes golf courses, and private or public parks. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

31.3.14 Permits – Particular Uses – Churches. The legal question under the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) is whether the applicable zoning scheme allows religious assemblies on less equal terms than non-religious assemblies, with respect to the regulatory objective. That question is primarily resolved by examining the text of the applicable zoning scheme, and a claimant under RLUIPA is not generally required to produce traffic studies or other evidence comparing the adverse impacts of religious and non-religious assemblies. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

31.3.14 Permits – Particular Uses – Churches. While the state may have a compelling interest in preserving agricultural land and the integrity of urban growth boundaries, that interest does not justify an administrative rule that prohibits churches on agricultural land within three miles of an urban growth boundary while allowing golf courses and similar non-religious assemblies that appear to impact the state interest to the same degree. Therefore, the rule prohibition on churches on agricultural land within three miles of an urban growth boundary is inconsistent with the equal terms provision of the Religious Land Use and Institutionalized Persons Act. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

31.3.14 Permits – Particular Uses – Churches. A county does not violate the Religious Land Use and Institutionalized Persons Act (RLUIPA) by requiring that an applicant for a church on exclusive farm use land within three miles of an urban growth boundary apply for a statewide planning goal exception as required by OAR 660-033-0130. The exceptions process does not in itself impose a substantial burden on a person's religious exercise and does not constitute unfair delay. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

31.3.14 Permits – Particular Uses – Churches. The term "existing facilities" in OAR 660-033-0130 is limited to a facility that will continue in the same use. The rule does not allow an existing

residence to be converted to a church merely because it is an existing facility. *Young v. Jackson County*, 49 Or LUBA 327 (2005).

31.3.14 Permits – Particular Uses – Churches. An argument that unspecified land use regulations and siting standards must be complied with prior to approving a church on EFU-zoned lands is insufficient to apprise the decision maker that petitioner believes that the county must consider an exception to the administrative rule prohibition on churches on high-value farmland before considering whether that prohibition is inconsistent with federal law. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

31.3.14 Permits – Particular Uses – Churches. Even assuming that an administrative rule prohibition on churches on high-value farmland violates the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), nothing in RLUIPA requires that the local government must go further and relieve the applicant from the obligation to comply with other land use standards that apply to uses allowed in the zone and that do not impose a "substantial burden" on religious exercise. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

31.3.14 Permits – Particular Uses – Churches. Because Congress intended the Religious Land Use and Institutionalized Persons Act (RLUIPA) to subject land use regulations to at least the same level of scrutiny as would apply under the Free Exercise Clause of the U.S. Constitution, analysis of whether an administrative rule prohibition on churches on high-value farmland violates RLUIPA is also dispositive of the same claim under the Free Exercise Clause. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

31.3.14 Permits – Particular Uses – Churches. Prohibiting uses that are inconsistent with agriculture on high-value farmland, such as churches, while allowing agricultural-supportive structures and uses on high-value farmland, such as barns, wineries and farm stands, is rationally related to the policy of preserving high-value farmland for agricultural use, and neither treats religious assemblies on unequal terms with nonreligious assemblies nor discriminates against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

31.3.14 Permits – Particular Uses – Churches. Prohibiting establishment of new uses on high-value farmland, such as churches or golf courses, while allowing expansion of existing churches or golf courses on high-value farmland does not treat religious assemblies on unequal terms with nonreligious assemblies or discriminate against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

31.3.14 Permits – Particular Uses – Churches. An administrative rule that prohibits new churches and schools on land within three miles of an urban growth boundary (UGB), while allowing community centers "operated primarily by and for residents of the local rural community" within three miles of a UGB, does not violate the "equal terms" and nondiscrimination clauses of the Religious Land Use and Institutionalized Persons Act (RLUIPA), where the membership of the proposed church is primarily composed of people who reside within the UGB. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

31.3.14 Permits – Particular Uses – Churches. The Religious Land Use and Institutionalized Persons Act (RLUIPA) does not require local governments to provide for churches in all zones within its jurisdiction, or prohibit local governments from excluding churches from some zoning districts. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

31.3.14 Permits – Particular Uses – Churches. Whether a zoning prohibition on churches imposes a "substantial burden" on religious exercise under the Religious Land Use and Institutionalized Persons Act (RLUIPA) depends on whether the jurisdiction's zoning scheme as a whole fails to provide adequate opportunity to site a church within the jurisdiction. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

31.3.14 Permits – Particular Uses – Churches. The actual financial circumstances of a religious assembly, its financial ability to acquire land zoned for a church, and the existence of market-based constraints that apply equally to religious and non-religious land users, have no bearing on whether exclusion of churches in some zones within a jurisdiction imposes a "substantial burden" on religious exercise under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

31.3.14 Permits – Particular Uses – Churches. Evidence that a church is unable to acquire land with desired characteristics at a desirable price within an urban growth boundary is insufficient as a matter of law to demonstrate that an administrative rule prohibiting churches on high-value farmland owned by the church imposes a "substantial burden" on the church's free exercise rights, under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

31.3.14 Permits – Particular Uses – Churches. Given the subjectivity of criteria requiring that (1) the subject property be of adequate size to allow for "aesthetic design treatment," (2) the proposed building be "compatible" in scale and mass with adjoining structures, and (3) the site plan provide for "adequate" buffers, the testimony of residential neighbors that a proposed church on a 3.85-acre parcel fails to comply with these criteria is adequate to support the city's finding of noncompliance. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.3.14 Permits – Particular Uses – Churches. Conclusory testimony by an acoustic engineer that a proposed church will not violate "maximum allowable noise levels" is insufficient to show compliance as a matter of law with code standards that require a demonstration that proposed uses will not exceed specific decibel levels within a specified distance from adjoining residential uses. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.3.14 Permits – Particular Uses – Churches. Subjective, discretionary conditional use and design review criteria are precisely the type of land use regulations that Congress intended to regulate, as applied to religious practices and institutions, in enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA). Although such standards may be "generally applicable" in the sense that they apply broadly to a number of secular and non-secular uses, their application to approve or deny a proposed church requires an "individualized assessment" and thus is subject to RLUIPA. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.3.14 Permits – Particular Uses – Churches. Application of discretionary design review criteria to proposed religious buildings involves the "proposed use" of land within the meaning of, and is thus subject to, the Religious Land Use and Institutionalized Persons Act (RLUIPA), where the local government may deny a proposed church if the applicant fails to demonstrate compliance with such design review criteria. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.3.14 Permits – Particular Uses – Churches. A city's denial of a proposed church based on highly discretionary conditional use and design review standards constitutes imposition of a "substantial burden" on religious exercise within the meaning of the Religious Land Use and Institutionalized Persons Act (RLUIPA), at least where the city's land use scheme does not include zones where a church is allowed outright without an "individualized assessment," or where the record fails to show that there are more suitable sites in the city where the proposed church would likely be approved. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.3.14 Permits – Particular Uses – Churches. The regulatory effect of the Religious Land Use and Institutionalized Persons Act (RLUIPA) is not limited to prohibiting discrimination against religious institutions. Rather, Congress intended RLUIPA to require local governments to treat development proposals for buildings intended for religious exercise more favorably, if necessary, than other development proposals. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.3.14 Permits – Particular Uses – Churches. Where the petitioner demonstrates that denial of a proposed church imposes a "substantial burden" on religious exercise under Religious Land Use and Institutionalized Persons Act (RLUIPA), the burden of persuasion shifts to the local government to show that denial is the least restrictive means of furthering a compelling governmental interest. That showing is not made where the record indicates that the proposed church might satisfy local regulations with imposition of reasonable conditions of approval. *Corporation Presiding Bishop v. City of West Linn*, 45 Or LUBA 77 (2003).

31.3.14 Permits – Particular Uses – Churches. A hearings officer does not err in evaluating the adequacy of the "approach" to an intersection, rather than individual turning movements in the intersection, where the applicable code provisions do not specify a particular method for evaluating intersection adequacy, and that method is consistent with the highway capacity manual and county highways standards cited by the code provisions. *Noble v. Clackamas County*, 45 Or LUBA 366 (2003).

31.3.14 Permits – Particular Uses – Churches. Substantial evidence supports a hearings officer's conclusion that only five percent of traffic generated by a proposed church would turn south at an affected intersection, and that traffic counts performed in February are indicative of summer peak traffic loads, where it is undisputed that few if any church members reside south of the intersection, and the applicant's traffic engineer testified that the affected intersection is not subject to seasonal fluctuations in traffic levels. *Noble v. Clackamas County*, 45 Or LUBA 366 (2003).

31.3.14 Permits – Particular Uses – Churches. Absent a criterion requiring that the city consider the height of an existing church in approving the height of a proposed addition to that church, the height of the existing structure has no bearing on the city's decision. That the city calculated the height of the proposed addition based in part on the grade elevation of the existing structure does not compel the city to consider the height of the existing structure in approving the proposed addition. *Sattler v. City of Beaverton*, 41 Or LUBA 106 (2001).

31.3.14 Permits – Particular Uses – Churches. The OAR 660-033-0130(18) requirement that expansions of existing nonfarm uses on high-value soils must be limited to the "same tract" prohibits expansion of a church septic system onto a different tract, and the fact that DEQ rules permit such cross-boundary septic system expansions in certain circumstances does not modify or obviate the obligation to comply with OAR 660-033-0130(18). *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

31.3.14 Permits – Particular Uses – Churches. A church-owned parcel and an adjoining parcel on which the church owns an easement are not within the "same tract" for purposes of OAR 660-033-0130(18), which limits expansion of existing nonfarm uses on high-value soils to the "same tract." To constitute a "tract," the parcels must be in the same ownership, and the easement is legally insufficient to establish an identity of ownership in the two parcels. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

31.3.14 Permits – Particular Uses – Churches. An unsupported assurance by the applicant's attorney that the entire septic system necessary to support a proposed church expansion can be located on a church-owned parcel is not substantial evidence supporting a finding to that effect, where all the other evidence in the record regarding the feasibility of the septic system assumes that part of it will be located on an adjoining parcel. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

31.3.14 Permits – Particular Uses – Churches. A finding that a proposed church expansion doubling the capacity of the church will not have greater adverse traffic impacts is inadequate, where the finding relies solely on the church's current plan to consolidate multiple daily services into a single service, and fails to explain why concentrating traffic from multiple services will not result in greater impacts or to address the possibility that future growth in church membership associated with the expansion may require additional services. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

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

31.3.14 Permits – Particular Uses – Churches. Churches are not inherently urban in nature. A church that does not require urban services, serves a primarily rural congregation, and is used for religious services and educational programs is not an urban use requiring an exception from Goal 14. *Cox v. Yamhill County*, 29 Or LUBA 263 (1995).

31.3.14 Permits – Particular Uses – Churches. OAR 660-33-130(3) precludes approval of churches or public or private schools on agricultural lands "within 3 miles of an urban growth boundary." *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

31.3.14 Permits – Particular Uses – Churches. Where an EFU zone includes two provisions allowing churches and schools, and one of those provisions includes the OAR 660-33-130(3) restriction against approving churches and schools within three miles of an urban growth boundary but the other provision does not, LUBA will not assume the county will apply the provision that lacks the three-mile limitation as though it includes the three-mile limitation. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

31.3.14 Permits – Particular Uses – Churches. Where a church is proposed to be located in an EFU zone, and a county code provision requires that there be "no other feasible location" for the proposed use that satisfies a code standard requiring that certain nonfarm uses in the EFU zone be located on land "generally unsuitable" for farm use, the county may interpret the code provision to require that there be no other feasible location for the propose church *in the EFU zone* that is generally unsuitable for agricultural production. *Simmons v. Marion County*, 25 Or LUBA 647 (1993).

31.3.14 Permits – Particular Uses – Churches. Where a county code provision requires that there be no other "feasible location" for a proposed church, and the challenged decision establishes that there is a present need for the proposed church, the county is within its discretion to interpret "feasible location" not to include sites that are not currently available for sale. *Simmons v. Marion County*, 25 Or LUBA 647 (1993).

31.3.14 Permits – Particular Uses – Churches. Under the EFU zoning statute, counties may allow churches as outright permitted uses. However, where a particular EFU zone requires case-by-case findings that proposed nonfarm uses, including churches, will be compatible with farm uses and consistent with state Agricultural Land Use Policies, such findings must be made. *Avgeris v. Jackson County*, 23 Or LUBA 124 (1992).

31.3.14 Permits – Particular Uses – Churches. A finding that a proposed Buddhist temple complies with a code requirement that "the nature of the use requires a rural setting * * * even though the use may not provide primarily for the needs of rural residents" will be sustained, where there is substantial evidence in the record of a long standing tradition of locating temples serving a particular lineage of Buddhism in rural locations, and that intermediate and advanced techniques of that religion requiring a rural setting will be practiced at the proposed temple. *Avgeris v. Jackson County*, 23 Or LUBA 124 (1992).

31.3.14 Permits – Particular Uses – Churches. Where the record shows that a proposed church will not require urban services and will be located within a designated rural service center, adjacent to existing commercial and public uses, and is otherwise surrounded by large parcels in commercial farm use, a determination that the proposed church will not materially alter the stability of the land use pattern in the area is supported by substantial evidence *Simmons v. Marion County*, 22 Or LUBA 759 (1992).

31.3.15 Permits – Particular Uses – Schools. With regard to school structures on non-high-value farmland that existed prior to adoption of LCDC's three-mile rule, OAR 660-033-0130(2)(c) provides that such schools may be "maintained, enhanced or expanded on the same tract subject to other requirements of law, but enclosed existing structures within a farm use zone within three miles of an urban growth boundary may not be expanded beyond the requirements of this rule." The "requirements of this rule" in OAR 660-033-0130(2)(c) is a reference to the OAR 660-033-0130(2)(a) requirement that the design capacity of enclosed structures be no "greater than 100 people," and the OAR 660-033-0130(2)(b) requirement that enclosed structures be spaced "no less than one-half mile" apart. *Landwatch Lane County v. Lane County*, 76 Or LUBA 227 (2017).

31.3.15 Permits – Particular Uses – Schools. HB 3099, now codified at ORS 215.135, was adopted in 2009 to address legislative concerns about the new HB 3099 requirement that schools on EFU-zoned land must be "primarily for residents of the rural area in which the school is located" and perhaps concerns about new local criteria that might be adopted and applied to such existing schools. But there is nothing in the legislative history of HB 3099 that suggests it was also concerned with LCDC's three-mile rule at OAR 660-033-0130(2), adopted in 1993. ORS 215.135 and its parallel administrative rule at OAR 660-033-0130(18)(b) to (c) were not adopted to excuse existing schools from complying with LCDC's three-mile rule. To the extent the text of OAR 660-033-0130(2)(c) is ambiguous, the legislative history confirms that LCDC intended the OAR 660-033-0130(2)(a) 100-person design limit and the OAR 660-033-0130(2)(b) "no less than one-half mile" spacing requirement to apply to expansion of such existing structures. *Landwatch Lane County v. Lane County*, 76 Or LUBA 227 (2017).

31.3.15 Permits – Particular Uses – Schools. Where in 2005 an applicant receives discretionary permit approval for three school buildings, and initiates the development action within the initial two-year period set forth in OAR 660-033-0140(1) by constructing two school buildings, but fails to seek extension of the permit or obtain building permits for the third building until seven years after the two-year period expired, long after the school use became a nonconforming use, the applicant can no longer rely on the 2005 approval to authorize issuance of building permits for the third building. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

31.3.15 Permits – Particular Uses – Schools. Substantial evidence supports a finding that a proposed high school will not increase traffic through an affected intersection during the peak morning hour, notwithstanding failure of the traffic study to take certain trips into account, where the decision imposes conditions that effectively eliminate the possibility of those trips impacting the intersection. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

31.3.15 Permits – Particular Uses – Schools. A reasonable person could conclude that a combination of conditions requiring that most classes begin outside the peak morning hour and prohibiting drop-offs during the peak morning hour is sufficient to ensure that drop-offs associated with a proposed high school will not impact a failing intersection during the peak morning hour. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

31.3.15 Permits – Particular Uses – Schools. Draft transportation and parking demand plans for a proposed school are substantial evidence supporting a finding of compliance with a "safe streets" approval standard, notwithstanding that the conditions of approval require that the school submit

and city staff approve *final* plans in which the city might impose additional or different terms. *Friends of Collins View v. City of Portland*, 41 Or LUBA 261 (2002).

31.3.15 Permits – Particular Uses – Schools. Contextual statutory references to "public schools," "private schools" and "schools" indicate that the legislature intended the scope of "public or private schools" allowed in the EFU zone under ORS 215.283(1)(a) to include schools for elementary and secondary education, but not adult career schools. *Warburton v. Harney County*, 39 Or LUBA 398 (2001).

31.3.15 Permits – Particular Uses – Schools. Where the scope of "public or private schools" allowed in the EFU zone under ORS 215.283(1)(a) could be plausibly construed to include only schools for elementary and secondary education, or more broadly to include any kind of use that has an educational component, the statute should be interpreted not to include uses that would subvert the goal of preserving land for agriculture. *Warburton v. Harney County*, 39 Or LUBA 398 (2001).

31.3.15 Permits – Particular Uses – Schools. A county provision requiring that schools outside urban growth boundaries be "scaled to serve the rural population" is not unconstitutionally vague where a reasonable applicant would understand that to comply with that provision, the applicant must submit evidence that the school is no larger than needed to serve the anticipated number of rural students. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

31.3.15 Permits – Particular Uses – Schools. A county provision requiring that schools outside urban growth boundaries be "scaled to serve the rural population" does not infringe directly on religious practices, and thus is not subject to strict scrutiny, absent a showing that the proposed parochial school must exist on the same rural property as its supporting church for members to exercise their rights to free exercise of religion and their right to direct their children's education. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

31.3.15 Permits – Particular Uses – Schools. The Free Exercise Clause does not require an exemption from a county zoning ordinance that prohibits urban-sized schools on rural land, where the county has a strong interest in maintaining the boundaries between rural and urban uses, and the ordinance imposes only the minimal burden on religious practice of requiring the applicant to build a smaller parochial school than desired or locate the school on property within the nearby urban growth boundary. *Christian Life Center v. Washington County*, 36 Or LUBA 200 (1999).

31.3.15 Permits – Particular Uses – Schools. OAR 660-33-130(3) precludes approval of churches or public or private schools on agricultural lands "within 3 miles of an urban growth boundary." *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

31.3.15 Permits – Particular Uses – Schools. Where an EFU zone includes two provisions allowing churches and schools, and one of those provisions includes the OAR 660-33-130(3) restriction against approving churches and schools within three miles of an urban growth boundary but the other provision does not, LUBA will not assume the county will apply the provision that lacks the three-mile limitation as though it includes the three-mile limitation. *DLCD v. Douglas County*, 28 Or LUBA 242 (1994).

31.3.15 Permits – Particular Uses – Schools. Findings which identify a lack of evidence concerning road capacity and evidence concerning traffic congestion during weekend events at existing uses and a proposed agricultural/horticultural school complex are adequate to explain why a decision maker concluded the applicant failed to carry its burden concerning a code "minimal adverse impact" standard. *Brentmar v. Jackson County*, 27 Or LUBA 453 (1994).

31.3.15 Permits – Particular Uses – Schools. A local government interpretation of its comprehensive plan and zoning code, that approval of a school at a particular site requires compliance with a plan policy concerning schools, is not so wrong as to be reversible under ORS 197.829, notwithstanding that the relevant zoning district lists schools as a permitted use at the subject site. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

31.3.15 Permits – Particular Uses – Schools. Where "private school" is listed as a conditional use in a particular zone, but the challenged decision does not interpret the code definitions of "private school" and "commercial school," or explain why application of those definitions to the facts leads to the conclusion that the proposed school is a "private school," LUBA must remand the challenged decision to the county to adopt the required interpretation in the first instance. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

31.3.15 Permits – Particular Uses – Schools. Where a local code provision implementing ORS 215.283(1)(a) lists schools "including all buildings essential to the operation of a school" as a conditional use in an EFU zone, and the local government fails to interpret and apply the quoted provision in approving a conditional use permit for a school, LUBA must remand the decision for the local government to interpret its code provision in the first instance. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

31.3.16 Permits – Particular Uses – Manufactured Homes. Where a county's code defines "recreational vehicle" (RVs) as a temporary dwelling unit intended for vacation, emergency or recreational use, but that cannot be used for permanent residential use, the county errs in interpreting the provisions of a forest zone, which allows as a conditional use "recreational vehicles" without any express durational limits, to allow an RV to be used as a permanent residence, because that interpretation gives no effect to the categorical exclusions in the code definition of "recreational vehicle." *Oregon Coast Alliance v. Tillamook County*, 77 Or LUBA 192 (2018).

31.3.16 Permits – Particular Uses – Manufactured Homes. That county staff have in the past approved recreational vehicles as permanent residential dwellings does not provide a basis to interpret the county code to allow recreational vehicles to be used as permanent residential dwellings, where the county code definition of "recreational vehicle" prohibits their use as permanent residential dwellings. *Oregon Coast Alliance v. Tillamook County*, 77 Or LUBA 192 (2018).

31.3.16 Permits – Particular Uses – Manufactured Homes. A condition that purports to impose system development charges as a condition of approving conversion of a mobile home park to a manufactured dwelling subdivision is prohibited by ORS 92.845(1)(b), unless it falls within some exception to that statute. *D & B Home Investments v. City of Donald*, 51 Or LUBA 1 (2006).

31.3.16 Permits – Particular Uses – Manufactured Homes. ORS 92.845(1)(c) allows local governments to impose system development charges on conversion of a mobile home park to a manufactured dwelling subdivision only when such charges are "based on the prior approval" of the park. Where the prior park approval did not impose system development charges, ORS 92.845(1)(c) does not apply. *D & B Home Investments v. City of Donald*, 51 Or LUBA 1 (2006).

31.3.16 Permits – Particular Uses – Manufactured Homes. Pursuant to ORS 197.480(5), a local government can apply clear and objective criteria for the placement and design of manufactured home parks. A local provision requiring that each home in manufactured home parks be within 500 feet of a fire hydrant capable of providing a defined minimum flow is a clear and objective criterion. *Doob v. Josephine County*, 39 Or LUBA 276 (2001).

31.3.16 Permits – Particular Uses – Manufactured Homes. That a local government has neither conducted the inventory and needs analysis required by ORS 197.480 nor made a determination of needed housing with respect to manufactured home parks does not prohibit the local government from approving a manufactured home park, or waive the local government's obligation to comply with ORS 197.480. *Doob v. Josephine County*, 39 Or LUBA 276 (2001).

31.3.16 Permits – Particular Uses – Manufactured Homes. Subjective conditional use criteria designed to balance or mitigate the impacts of development on property or the adjoining community are not "clear and objective criteria and standards" that can be applied to approve or deny manufactured dwelling parks under ORS 197.480(5). *Multi/Tech Engineering v. Josephine County*, 37 Or LUBA 314 (1999).

31.3.16 Permits – Particular Uses – Manufactured Homes. Where a county fails to implement ORS 197.480 to designate residential areas in which manufactured dwelling parks can be located as allowed uses subject only to clear and objective criteria, and the county's ordinance subjects all manufactured dwelling parks to subjective conditional use criteria, the county cannot apply those criteria to approve or deny a manufactured dwelling park. *Multi/Tech Engineering v. Josephine County,* 37 Or LUBA 314 (1999).

31.3.16 Permits – Particular Uses – Manufactured Homes. Petitioners fail to establish compliance with all mandatory approval criteria for a special medical hardship permit allowing a temporary mobile home on their property in a forest zone where they fail to present any evidence indicating that no reasonable housing alternatives exist that could meet one petitioner's needs for special medical attention. *Lopatin v. Clackamas County*, 32 Or LUBA 158 (1996).

31.3.16 Permits – Particular Uses – Manufactured Homes. Where a local code requires a "recreation/open space area" as part of a mobile home park, it is reasonable for the local government to interpret "recreation/open space area" to include wetlands. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

31.3.16 Permits – Particular Uses – Manufactured Homes. Where the code regulates mobile home parks and RV facilities as separate and distinct uses, any nonconforming use determination that the subject property was used as both a mobile home park and an RV facility at the time restrictive zoning was applied must include determinations regarding the extent the property was used for each use. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

31.3.16 Permits – Particular Uses – Manufactured Homes. It is unreasonable for a local hearings officer to interpret a code provision prohibiting "unit enlargements or expansions" of existing mobile home parks unless they are "made to conform substantially with all requirements for new construction" as inherently inapplicable to any proposed alteration of a nonconforming mobile home park, because such an interpretation would make this code provision a nullity. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

31.3.16 Permits – Particular Uses – Manufactured Homes. A hearings officer's interpretation of a conditional use permit for a "tourist park" as not allowing placement of mobile homes within the approved "tourist park," as that term is defined by the local code, is reasonable and correct. *Jones v. Lane County,* 28 Or LUBA 193 (1994).

31.3.16 Permits – Particular Uses – Manufactured Homes. That state agencies may recognize and regulate "combination parks" which include both recreational vehicles and mobile homes occupied on a long-term basis does not mean a local government must adopt comprehensive plan and zoning provisions allowing such combination parks. *Jones v. Lane County,* 28 Or LUBA 193 (1994).

31.3.16 Permits – Particular Uses – Manufactured Homes. ORS 197.307(5)(d) expresses an alternative standard that is satisfied if the exterior materials of a manufactured home *either* (1) are similar those commonly used on dwellings in the community, *or* (2) are comparable to those used on surrounding dwellings. Because local governments cannot adopt standards more restrictive than those set out in ORS 197.307(5), a city cannot interpret a local regulation implementing ORS

197.307(5)(d) as allowing it to require, in a particular instance, that a manufactured home *must* satisfy the second alternative. *Brewster v. City of Keizer*, 27 Or LUBA 432 (1994).

31.3.17 Permits – Particular Uses – Firearms Training Facilities. ORS 197.770, which provides that existing firearms training facilities may continue, is silent regarding the expansion of an existing firearms training facility. Because the statute is silent on expansion, it does not prohibit expansion, if expansion is otherwise authorized and consistent with other applicable law. *H.T. Rea Farming Corp. v. Umatilla County*, 71 Or LUBA 125 (2015).

31.3.17 Permits – Particular Uses – Firearms Training Facilities. Where a local government implements OAR 660-033-0120, Table 1, and OAR 660-033-0130(2)(c), by adopting land use regulations that expressly authorize the expansion of all of the "Parks/Public/Quasi-Public" uses listed in Table 1 except an ORS 197.770 existing firearms training facility in an EFU zone, the unmistakable conclusion is that the local government deliberately chose not to allow expansion of a firearms training facility in the EFU zone. *H.T. Rea Farming Corp. v. Umatilla County*, 71 Or LUBA 125 (2015).

31.3.17 Permits – Particular Uses – Firearms Training Facilities. Where a local government implements OAR 660-033-0130(2)(c) by adopting land use regulations that expressly authorize the expansion of a number of uses in the EFU zone, but did not amend its regulations to provide for expansion of an ORS 197.770 firearms training facility in the EFU zone, the local government must apply its EFU zone regulations as adopted, and cannot directly apply the administrative rule to approve the expansion of an ORS 197.770 firearms training facility that its EFU zone does not authorize. *H.T. Rea Farming Corp. v. Umatilla County*, 71 Or LUBA 125 (2015).

31.3.17 Permits – Particular Uses – Firearms Training Facilities. ORS 197.770 provides that any firearms training facility in existence on September 9, 1995 may continue operating until the facility is no longer used as a firearms training facility. However, the statute is silent as to how to determine when a facility is "no longer used" as a firearms training facility or how long that use may be discontinued before the facility loses the protection of the statute. *Citizens for Responsibility v. Lane County*, 51 Or LUBA 588 (2006).

31.3.17 Permits – Particular Uses – Firearms Training Facilities. A determination that a firearms training facility has not lost the protection of ORS 197.770 requires evaluation of the actual use of the facility following September 9, 1995. Mere intent or capability to use the facility as a qualifying facility is insufficient to prevent loss of the statute's protection in the absence of actual use. *Citizens for Responsibility v. Lane County*, 51 Or LUBA 588 (2006).

31.3.17 Permits – Particular Uses – Firearms Training Facilities. Like the statutes governing nonconforming uses, ORS 197.770 does not specify what period of discontinued use as a firearms training facility disqualifies a facility from protection under the statute, but instead leaves it to the local government to determine. Where the local government's regulations provide a period of discontinuance for nonconforming uses but not a specific period for firearms training facilities, LUBA will assume the nonconforming use period of discontinuance applies. *Citizens for Responsibility v. Lane County*, 51 Or LUBA 588 (2006).

31.3.17 Permits – Particular Uses – Firearms Training Facilities. A qualifying firearms training facility under ORS 197.770 must provide courses and certificates required by one of three types of specified organizations. Training and certificates required by other types of organizations do not qualify. *Citizens for Responsibility v. Lane County*, 51 Or LUBA 588 (2006).

31.3.17 Permits – Particular Uses – Firearms Training Facilities. Absent a clear expression of intent to the contrary, LUBA will not infer legislative intent to retroactively legalize uses or structures that were unlawful when first commenced or constructed. Because there is no suggestion in ORS 197.770 that the legislature intended to legalize or protect unlawful or unauthorized "firearms training facilities" that existed on September 9, 1995, such facilities or unlawful expansions to such facilities are not protected by the statute. *Citizens for Responsibility v. Lane County,* 51 Or LUBA 588 (2006).

31.3.18 Permits – Particular Uses – Wineries. Under 2010 legislation, wineries authorized by ORS 215.283(1)(n) and 215.452 may offer "[s]ervices directly related to the sale and promotion of wine," and host "private events." ORS 215.452 limits "gross income from the sale of incidental items and services" to "25 percent of the gross income from the retail sale on-site of wine produced in conjunction with the winery." *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

31.3.18 Permits – Particular Uses – Wineries. The legislature in 2010 enacted amendments to ORS 215.452, which governs wineries that are a permitted use under ORS 215.283(1)(n), and those amendments failed to adopt a proposal to expressly preserve statutory authority to approve wineries under ORS 215.283(2)(a) as "commercial activities that are in conjunction with farm use." However, LUBA will not infer from that failure a legislative intent to eliminate ORS 215.283(2)(a) as basis for winery approval on EFU-zoned land, where it was common practice before 2010 to approve wineries under ORS 215.283(2)(a) as "commercial activities that are in conjunction with farm use" and the 2010 legislative history suggests that the legislature did not intended to eliminate that common practice. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

31.3.18 Permits – Particular Uses – Wineries. Approval of wineries under ORS 215.283(2)(a) as "commercial activities that are in conjunction with farm use" and approval of wineries under ORS 215.283(1)(n) and 215.452, which specifically authorize "wineries" on EFU-zoned land, are *alternative* ways to seek approval for a winery. Approval under ORS 215.283(2)(a) for expansions to an existing winery that was originally approved under ORS 215.283(1)(n) and 215.452 that are not permitted under ORS 215.452, has the legal effect of converting ORS 215.283(1)(n) and 215.452 winery into an ORS 215.283(2)(a) winery. Therefore the expanded winery as a whole must comply with the limits imposed on ORS 215.283(2)(a) wineries. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

31.3.18 Permits – Particular Uses – Wineries. ORS 215.283(1)(r) authorizes "processing of farm crops" as a permitted use in EFU zones. While a winery that only produces wine from wine grapes might qualify for approval under ORS 215.283(1)(r), a winery that includes a tasting room and hosts numerous events at the winery to promote sale of wine is more than "processing of farm crops" and must be approved under ORS 215.283(1)(n), which authorizes wineries that are limited in accordance with ORS 215.452 and 215.453 or under ORS 215.283(2)(a), which authorizes "commercial activities that are in conjunction with farm use." *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

31.3.18 Permits – Particular Uses – Wineries. A winery that is authorized to hold up to 44 public or private events annually to promote and sell wine produced at the winery and to prepare and serve meals at those events, but must limit sale of incidental items and services at the events and winery to no more than "25 percent of the gross income from the on-site sale of wine produced in conjunction with the winery," is permissible under the Supreme Court's and Court of Appeals' decisions in *Craven v. Jackson County*, because the events, food service and sale of incidental items and services are properly viewed as "incidental" and "secondary" to the winery. However, such a winery is approaching the point where the events, food service and sale of incidental items

and services can no longer be said to be "incidental" and "secondary" to the winery. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

31.3.18 Permits – Particular Uses – Wineries. A winery that was initially approved as a permitted use under ORS 215.283(1)(n) and 215.452 was not required to consider its impact on farm and forest practices on nearby lands because ORS 215.296(1)(a) and (b) do not apply to such permitted use wineries. However, if that winery is to be expanded later in ways that are not allowed under ORS 215.452, as a "commercial activit[y] that [is] in conjunction with farm use" under ORS 215.283(2)(a), the expanded winery must comply with ORS 215.296(1)(a) and (b), which apply to "commercial activities that are in conjunction with farm use." In that circumstance ORS 215.296(1)(a) and (b) apply to the entire winery as expanded, not just the later approved expansion. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

31.3.18 Permits – Particular Uses – Wineries. Petitioners' challenge to a winery expansion presents no basis for remand under the ORS 215.296(1)(a) and (b) significant change/increase standard, where the county's findings can be read to identify "spraying pesticides, burning fence lines and plowing fields" as accepted farming practices that might be impacted by an expanded winery operation, the county imposes a 200-foot buffer setback requirement on the winery and requires a recorded acknowledgement by the winery owner that nearby farms have a right to continue their accepted farming practices even if they impact the winery, and petitioners offer no direct challenge to the adequacy of those measure to avoid significant changes in or increases in the cost of accepted farming practices. *Friends of Yamhill County v. Yamhill County*, 66 Or LUBA 212 (2012).

31.3.19 Permits – Particular Uses – Farm Stands. The ORS 215.283(1)(o) authorization for farm stands authorizes structures that are designed and used for the sale of farm products and livestock, and also authorizes those structures to be used for "sale of retail incidental items and fee-based activity to promote sale of farm crops or livestock." The EFU statute is correctly interpreted also to authorize farm stand activities to be conducted outside the authorized structures. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

31.3.19 Permits – Particular Uses – Farm Stands. A farm stand permit that authorizes up to 22 al fresco dinners for up to 75 diners each year is inconsistent with the express prohibition in ORS 215.283(1)(o) and OAR 660-033-0130(23) against farm stand structures for banquets. Although the statute and rule are expressly directed at "structures for banquets," the prohibition extends to such large and frequent al fresco dinners, which fall within the meaning of "banquets," as that term is used in the statute and rule, and the prohibition extends to outdoor banquets. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

31.3.19 Permits – Particular Uses – Farm Stands. ORS 215.283(1)(o) and OAR 660-033-0130(23) authorize the "sale of retail incidental items and fee-based activity to promote the sale of farm crops or livestock" inside structures that are "designed and used for sale of farm crops and livestock," but they do not authorize structures that are specifically designed and used for retail sales and fee-based promotional activity. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

31.3.19 Permits – Particular Uses – Farm Stands. A county's condition of approval that farm stand "wholesale sales" be separately accounted and not included in applying the ORS 215.283(1)(o) requirement that "sale of retail incidental items and fee-based activity to promote sale of farm crops or livestock" not exceed "25 percent of the total annual sales of the farm stand," while an imperfect way to ensure that farm stand sales are not inflated with nonfarm stand sales to inflate the permissible sales from retail and fee-based activity, is a permissible condition under the statute. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

31.3.19 Permits – Particular Uses – Farm Stands. Where a county has authority to impose conditions of approval, a condition that requires a sworn annual report that demonstrates that a farm stand complied with the 25 percent limit on the percentage of sales from a farm stand that are attributable to retail and promotional activity, and that records be kept that confirm the accuracy of the report, is permissible under ORS 215.283(1)(o) and OAR 660-033-0130(23). *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

31.3.19 Permits – Particular Uses – Farm Stands. A farm stand permit that (1) authorizes "small-scale gatherings such as birthdays, picnics, and similar activities" and (2) requires that such gatherings "shall promote the farm stand and contemporaneous crops sold in the farm stand" does not exceed the ORS 215.283(1)(o) and OAR 660-033-0130(23) authority for farm stands. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

31.3.19 Permits – Particular Uses – Farm Stands. A farm stand permit that authorizes multiple food carts to sell a variety of prepared food at up to 24 events per year cannot be characterized as

"incidental retail sales," and exceeds the authority granted by ORS 215.283(1)(o) and OAR 660-033-0130(23). *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

31.3.19 Permits – Particular Uses – Farm Stands. ORS 215.283(1)(o) and OAR 660-033-0130(23) do not categorically prohibit food carts in all circumstances. If a permit authorizing a farm stand appropriately limited food carts so that they could be characterized as "incidental retail sales," they could be authorized at a farm stand. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

31.3.19 Permits – Particular Uses – Farm Stands. ORS 215.283(1)(o) and OAR 660-033-0130(23) do not prohibit all concessions at farm stands. The statute and rule only prohibit "large concessions." *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

31.3.19 Permits – Particular Uses – Farm Stands. A decision whether to approve an application for a "farm stand" necessarily requires the exercise of discretion to determine whether a proposed use is a "farm stand," i.e. a structure designed and used for the sale of agricultural products grown on the farm operation, including the sale of retail incidental items and "fee-based activities" to promote the sale of agricultural products sold at the stand and to determine whether the proposed use does not include structures designed for activity other than the sale of agricultural products. *Keith v. Washington County*, 66 Or LUBA 80 (2012).

31.3.20 Permits – Particular Uses – Needed Housing. That different decision-makers rely on different rationales and reach different conclusions about *why* a standard is met does not require a conclusion that the standard is not "clear" for purposes of ORS 197.307(4). *Arthur C. Piculell Living Trust v. City of Eugene*, 80 Or LUBA 492 (2019).

31.3.20 Permits – Particular Uses – Needed Housing. ORS 197.307(4) requires the standards and conditions that apply to needed housing to be both "clear" and "objective." *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 157-58 (1998), *aff'd*, 158 Or App 1, 970 P2d 685 (1999). *Arthur C. Piculell Living Trust v. City of Eugene*, 80 Or LUBA 492 (2019).

31.3.20 Permits – Particular Uses – Needed Housing. Failing to address future hypothetical changes to land use regulations does not render a condition unclear for purposes of ORS 197.307(4). *Arthur C. Piculell Living Trust v. City of Eugene*, 80 Or LUBA 492 (2019).

31.3.20 Permits – Particular Uses – Needed Housing. That the disjunctive word "or" can be, in some circumstances, an inclusive connector and, in others, an exclusive connector, depending on its context, does not make a standard unclear for purposes of ORS 197.307(4), especially where the purpose of the standard indicates that the standard employs the word "or" as a connector in its more ordinary, exclusive, "either/or" usage. *Arthur C. Piculell Living Trust v. City of Eugene*, 80 Or LUBA 492 (2019).

31.3.20 Permits – Particular Uses – Needed Housing. Where a cross-petitioner seeks a remedy not available to it by statute, it is an obstacle to LUBA's review of the cross-assignment of error. LUBA lacks authority to affirm in part, and reverse in part a local government's approval of cross-petitioner's project application. ORS 197.835(1). Even assuming that the city erred by applying Willamette Greenway standards to cross-petitioner's housing project application, because they are not "clear and objective," the city's decision approving the development could not be reversed because it is not "prohibited as a matter of law." If LUBA agreed with cross-petitioners, the correct disposition would be remand, except that remand was not requested and would have no effect on the city's decision approving the application. In such a situation, LUBA will consider the request a contingent cross-assignment of error. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

31.3.20 Permits – Particular Uses – Needed Housing. Where a petitioner argues that the local government erred under ORS 197.307(4) in applying ambiguous standards to an application to develop housing, and where an intervenor offers a traffic impact assessment (TIA) from a prior land use application that is not included in the local record to establish that the petitioner knew the local government would require compliance with the ambiguous standard, LUBA will deny a motion to take the TIA as evidence not in the record where the intervenor fails to explain how the evidence relates to any basis for LUBA to take additional evidence under OAR 661-010-0045(1) and since the facts that the TIA is offered to prove are not critical to the resolution of the appeal, as required under OAR 661-010-0045(2)(a). *Oster v. City of Silverton*, 79 Or LUBA 1058 (2019).

31.3.20 Permits – Particular Uses – Needed Housing. ORS 197.307(4) provides in relevant part that "a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of [ORS 197.307]." *Warren v. Washington County*, 76 Or LUBA 295 (2017).

31.3.20 Permits – Particular Uses – Needed Housing. Where the hearings officer did not determine whether property is "buildable land" as defined in ORS 197.295, and the Buildable Lands Inventory (BLI) adopted by Metro that identifies lands on the BLI is not in the record of the proceeding before the county and does not provide an obvious answer to the question of whether all or part of the property is on the BLI, LUBA will remand the decision for further findings on the buildable land issue. *Warren v. Washington County*, 76 Or LUBA 295 (2017).

31.3.20 Permits – Particular Uses – Needed Housing. Where the applicable version of the needed housing statute at ORS 197.303(1)(2001) identified "needed housing" as (1) housing on land that is included on the city's buildable lands inventory, *and* (2) housing types listed in ORS 197.303(1)(a) through (e) (2001), which includes "government assisted housing" as defined in (1)(b), petitioner's proposed Controlled Income Rent housing qualifies as "needed housing" because it is a "government assisted housing" project. *Wiper v. City of Eugene*, 75 Or LUBA 109 (2017).

31.3.20 Permits – Particular Uses – Needed Housing. A condition of approval that allows an applicant to pipe a portion of a creek required to extend sanitary sewer lines under a creek "only if it can demonstrate the necessity of doing so with a licensed engineering analysis as the only feasible means to connect wastewater service in this location" in order to locate Controlled Income Rent housing units, common areas, and infrastructure on property violates ORS 197.307(6)(2001)'s prohibition against applying special conditions that are not "clear and objective" to needed housing. *Wiper v. City of Eugene*, 75 Or LUBA 109 (2017).

31.3.20 Permits – Particular Uses – Needed Housing. LUBA will reject a proposed interpretation of a city code site review provision that would broadly apply to all proposed needed housing, including single-family dwellings, and result in imposition of discretionary standards and lengthy procedures that could easily have the effect of discouraging needed housing, contrary to ORS 197.307(4), where there is an alternative interpretation that harmonizes the relevant text and context and does not force the city's code into conflict with ORS 197.307(4). *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

31.3.20 Permits – Particular Uses – Needed Housing Where a city's code offers a path for developers to qualify proposed housing as "needed housing," in order to obtain waiver of certain standards that would otherwise apply, LUBA will similarly interpret a related code provision requiring that site review provisions be applied when "the application proposes needed housing," to the effect that the site review provisions apply only if the applicant seeks to qualify the proposed housing as "needed housing." *McCollough v. City of Eugene*, 74 Or LUBA 573 (2016).

31.3.20 Permits – Particular Uses – Needed Housing. A code standard that requires an applicant for needed housing to demonstrate that "[t]he street layout of the proposed PUD shall disperse motor vehicle traffic onto more than one public local street * * *" is not a "clear and objective standard" as required by ORS 197.307(4), because the term "disperse" could have different meanings and depending on which meaning the city chooses to apply, a proposed PUD could fail to meet the standard. Accordingly, the standard may not be applied to an application for needed housing. *Walter v. City of Eugene*, 73 Or LUBA 356 (2016).

31.3.20 Permits – Particular Uses – Needed Housing. Where the purpose of a standard is clear from the text of the standard, that standard is more likely to be a "clear and objective" standard within the meaning of ORS 197.307(4). *Walter v. City of Eugene*, 73 Or LUBA 356 (2016).

31.3.20 Permits – Particular Uses – Needed Housing. LUBA will reject a petitioner's attempt to manufacture an interpretation of a standard that applies to needed housing under which all development would be precluded and then complain that the standard is not clear and objective and may not be applied to needed housing when the city interprets the standard in the only way it can be reasonably applied and rejects the petitioner's interpretation. *Walter v. City of Eugene*, 73 Or LUBA 356 (2016).

31.3.20 Permits – Particular Uses – Needed Housing. ORS 197.307(4) requires a local government to apply only clear and objective conditions to proposed needed housing on buildable land. Conditions subject to ORS 197.307(4) include conditions imposed in earlier land use decisions that still govern development of buildable land. Accordingly, a local government may apply a condition of an earlier land use decision to needed housing on buildable land only if the condition is clear and objective. *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

31.3.20 Permits – Particular Uses – Needed Housing. A condition that prohibits the location of an assisted living facility within 135 feet of a property line is ambiguous and requires interpretation to determine whether the condition also prohibits the location of multi-family residential development within the 135-foot setback. Accordingly, the condition is not "clear and objective," and pursuant to ORS 197.307(4) cannot be applied to deny proposed development of needed housing. *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

31.3.20 Permits – Particular Uses – Needed Housing. Under ORS 197.307(6), a local government may impose unclear, subjective or discretionary standards and conditions on needed housing only if it offers an alternative path that allows needed housing subject only to clear and objective standards and conditions. It is not consistent with ORS 197.307(6) for a local government to require an applicant for needed housing to either (1) demonstrate that needed housing is consistent with an unclear and subjective condition of a 1981 development approval, or (2) apply under discretionary standards to modify the 1981 development approval to eliminate the unclear and subjective condition. *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

31.3.20 Permits – Particular Uses – Needed Housing. A local government may not require an applicant for needed housing to seek approval under discretionary standards to modify a condition of approval that was imposed on the subject property in an earlier decision approving planned development, unless the condition was imposed on development of needed housing and the predecessor-in-interest chose the discretionary planned development path in lieu of an alternate path for needed housing subject only to clear and objective standards and conditions, consistent with the two-track framework embodied in ORS 197.307(6). *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

31.3.20 Permits – Particular Uses – Needed Housing. ORS 197.307(7) authorizes a local government to impose "special conditions" on needed housing. However, pursuant to ORS

197.307(4), any "special conditions" imposed on needed housing must be clear and objective. *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

31.3.20 Permits – Particular Uses – Needed Housing. A street design standard stating that "cul-de-sacs should not serve more than 18 dwelling units" is not a clear and objective approval standard that can be applied to approve or deny needed housing for purposes of ORS 197.307(4), where in order to apply the standard to deny proposed housing accessed by an existing cul-de-sac the local government had to interpret the street design standard to determine (1) whether it applied at all to the proposed needed housing, and (2) whether it imposes a mandatory approval standard. *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

32.1 Planned Unit Developments – Procedures. When the purpose of a condition is to set a baseline to measure traffic impact throughout multiple phases of the development consistent with the "trip cap" imposed to meet Transportation Planning Rule, at OAR 660-012-0060 requirements without mitigation, a hearings officer does not err in concluding that the standards are to be interpreted based on the use of the same version of the Institute of Transportation Engineers Trip Generation Manual (ITE Manual). Additionally, the ITE Manual is a professional treatise that sets out methods for making evidentiary judgments regarding the traffic impacts of development, but it is not part of the city's acknowledged comprehensive plan or land use regulations, and therefore is not itself "standards and criteria" for purposes of ORS 227.178(3)(a) or 227.173(1), at least as applied in the present circumstance, thus compliance with the trip cap be determined by consistent applications of the same ITE Manual codes used to establish the trip cap. *Willamette Oaks LLC v. City of Eugene*, 78 Or LUBA 63 (2018).

32.1 Planned Unit Developments – Procedures. LUBA will affirm as correct a city planning commission's interpretation that a city code provision that prohibits "grading" on portions of a site that contains steep slopes does not prohibit all development activities that disturb soil, where the city's code does not define the terms "grading" and "excavating," but does define "development" as including both "grading" and "excavating" as separate terms. LUBA will affirm the city planning commission's conclusion that the grading prohibition is not violated by a PUD site plan that requires digging holes to install support posts for cantilevered dwellings and digging and refilling trenches to install water lines in areas containing steep slopes because those activities constitute excavation and not grading. *Fairmount Neighborhood Assoc. v. City of Eugene*, 78 Or LUBA 418 (2018).

32.1 Planned Unit Developments – Procedures. Where the city's code provides that development application materials "shall reflect that consideration has been given to [tree] preservation," the city does not err in finding that the code requirement is met when the applicant's submissions demonstrate that consideration was given to tree preservation through a tree survey and site design that preserves trees within a stand on slopes greater than 25 percent, contains yard sizes that decrease critical root zone impacts, and preserves trees between and around homes. Those application materials reflect that consideration was given to tree preservation even though some high and moderate priority trees must be removed to develop streets, utilities and building pads, and preservation of trees on residential lots would be left to the discretion of future lot owners. The code does not require the actual preservation of trees; instead, the code requires a project applicant to consider tree preservation and submit evidence to demonstrate that such consideration occurred. *Fairmount Neighborhood Assoc. v. City of Eugene*, 78 Or LUBA 418 (2018).

32.1 Planned Unit Developments – Procedures. Extension and improvement of a residential access road over an existing public right-of-way is not subject to a city code section that requires streets that are "dedicated to the public by the applicant * * * conform" with adopted street right-of-way maps. A proposed improvement of a type of street that is not depicted on the city's adopted street right-of-way map does not fail to "conform" with that map. *Fairmount Neighborhood Assoc. v. City of Eugene*, 78 Or LUBA 418 (2018).

32.1 Planned Unit Developments – Procedures. LUBA will affirm a governing body's interpretation of the phrase "designated common area" as used in a plan policy governing a resort community zone to mean something different than a definition of "common area" in an unrelated section of the comprehensive plan that cross-references the definition of "common property" as used in the Oregon Planned Communities Act at ORS 94.550(7), where the latter definition was adopted at a different time and to serve a different purpose than the plan policy governing the resort community zone. *Kine v. Deschutes County*, 75 Or LUBA 407 (2017).

32.1 Planned Unit Developments – Procedures. Where a major modification of a PUD may not be approved under local law if it would result in a "substantially new proposal," the previously approved 10-phase, 30-acre mixed-use development that includes an 82-unit senior assisted and independent living facility must be compared with a 10-phase, 30-acre mixed-use development that substitutes a smaller senior and assisted living facility for the 82-unit senior assisted and independent living facility. In applying the "substantially new proposal" standard, it is not appropriate to limit the comparison to the 82-unit senior assisted and independent living facility and the smaller senior and assisted living facility. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

32.1 Planned Unit Developments – Procedures. A one-half-acre size requirement threshold for requiring PUD approval is not a mere application requirement that can be overlooked to require PUD approval for proposals of less than one-half acre. Even if the city intended to delete that threshold for PUD proposals near transit stations, where the threshold clearly applies it cannot be overlooked to give effect to an intent that is inconsistent with the text of the zoning ordinance. *Mintz v. City of Beaverton*, 66 Or LUBA 118 (2012).

32.1 Planned Unit Developments – Procedures. Where a development code requires that PUD applicants prepare a "land use analysis" that establishes that specified minimum and maximum development levels in a particular zoning district will be met when all of the properties in that zoning district are developed, LUBA will not assume that without explicit direction about how to go about preparing such a "land use analysis," PUD applicants will be unable to do so. *Mintz v. City of Beaverton*, 66 Or LUBA 118 (2012).

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

32.1 Planned Unit Developments – Procedures. Where the "Decision" section of a land use decision expressly grants only "planned unit development subdivision plan" approval, but the decision read as a whole clearly also grants the zoning map amendment that was included in the planned unit development and subdivision plan application, LUBA will interpret the decision to grant all three of the requested approvals. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

32.1 Planned Unit Developments – Procedures. Where an application for city subdivision approval includes a request for planned unit development approval that allows the property to be divided in ways that the property could not be divided without planned unit development approval, the decision granting planned unit development subdivision approval is a land use decision, not a limited land use decision. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

32.1 Planned Unit Developments – Procedures. A city may not accept a revised planned unit development plan the day before an appeal without providing the local parties an opportunity to review and respond to the revised plan. *Baker v. City of Garibaldi*, 49 Or LUBA 437 (2005).

32.1 Planned Unit Developments – Procedures. A nonbinding preliminary PUD approval is equivalent to a tentative decision following a pre-application conference or review, and therefore does not trigger the statutory requirement under ORS 227.175(3) for a public hearing or the right of local appeal to challenge a permit decision rendered without a prior public hearing. *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 21 (2001).

32.1 Planned Unit Developments – Procedures. ORS 227.175 sets forth certain minimum procedural requirements for processing permit applications, but does not prohibit or regulate informal, nonbinding proceedings for preliminary approvals of PUDs that may precede the public hearing(s) required by statute. *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 21 (2001).

32.1 Planned Unit Developments – Procedures. A planned unit development (PUD) condition of approval that requires a future variance for a long cul-de-sac does not constitute an improper deferral of decision making to a later stage where the applicable variance procedures will provide substantially the same full opportunity for public involvement that would have been provided had the variance been adopted prior to or as part of the challenged PUD decision. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

32.1 Planned Unit Developments – Procedures. Challenges that are directed at a previously approved preliminary plat for a planned unit development in an appeal of final plat approval are an impermissible collateral attack on the prior decision. *Bauer v. City of Portland*, 38 Or LUBA 715 (2000).

32.1 Planned Unit Developments – Procedures. Where a local government approves a preliminary planned unit development application based on findings of current compliance with applicable criteria, an argument that the local government impermissibly deferred findings of compliance with applicable criteria to a second stage of review where notice and hearing requirements are not observed is more appropriately framed as an inquiry into whether the findings of current compliance are adequate and supported by substantial evidence. *Salo v. City of Oregon City*, 36 Or LUBA 415 (1999).

32.1 Planned Unit Developments – Procedures. A city commission is within its interpretative discretion under ORS 197.829 to determine that a requirement that planned unit development within a natural hazards zone be consistent with applicable comprehensive plan policies is satisfied

by a demonstration of compliance with ordinance standards implementing those comprehensive plan policies. *Salo v. City of Oregon City*, 36 Or LUBA 415 (1999).

32.1 Planned Unit Developments – Procedures. Absent local provisions to the contrary, only the preliminary plat approval, and not the entire record of the preliminary plat approval, is part of a final PUD plan record. *Santiam Properties v. City of Stayton*, 35 Or LUBA 790 (1998).

32.1 Planned Unit Developments – Procedures. Geotechnical studies are appropriately included in the record where reference to these studies in the final PUD plan approval order indicates that they were considered by the final decision maker. *Santiam Properties v. City of Stayton*, 35 Or LUBA 790 (1998).

32.1 Planned Unit Developments – Procedures. When the only decision appealed is a decision changing the required sequence of PUD phases, and the assignments of error provide no basis for reversing or remanding that decision, the decision will be affirmed. LUBA will reject assignments of error that challenge other related decisions that were not appealed. *Claus v. City of Sherwood*, 35 Or LUBA 120 (1998).

32.1 Planned Unit Developments – Procedures. The deadline for submitting a final plat is a "review procedure" rather than an "informational" or "other [subdivision] requirement" for purposes of choosing whether the two-year deadline imposed on subdivisions or the three-year deadline imposed on PUDs applies, where petitioner does not explain why the two-year time limit is informational or substantive and interpreting the requirement as being substantive would be inconsistent with the code's purpose of allowing concurrent processing of the final subdivision and PUD plans. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

32.1 Planned Unit Developments – Procedures. A code provision that requires that final subdivision and PUD plans be submitted within three years after preliminary approval is granted does not require that the versions of the final subdivision and PUD plans that are ultimately approved be submitted before the three-year deadline. Provided the subdivision and PUD plans are submitted before the deadline, the plans may be modified after the deadline in response to city review or public input. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

32.1 Planned Unit Developments – Procedures. Where a code contains both a provision governing the expiration of quasi-judicial land use approvals generally and a provision specifically governing the expiration of planned development approvals, the local governing body is within its discretion under ORS 197.829 and *Clark* in interpreting the code to mean the expiration of planned development approvals is governed *only* by the specific code provision. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

32.1 Planned Unit Developments – Procedures. If a code includes provisions for extending planned development approvals and for requesting changes in approved final development plans, the local governing body is within its discretion under ORS 197.829 and *Clark* in interpreting these provisions together to mean if a change in an approved final development plan is requested before the original approval expires, the approval does not expire while the modification application is

being processed, and a separate extension application is not necessary. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

32.1 Planned Unit Developments – Procedures. A code provision requiring that certain applications for changes to an approved planned development (PD) final development plan "shall be processed in the same manner as for a new PD" must be interpreted consistently with ORS 227.178(3) to mean that any standard which would be applicable to a new application for PD approval is applicable to such applications for changes to approved PDs. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

32.1 Planned Unit Developments – Procedures. Where the record shows the local government conducted the proceeding leading to the challenged decision modifying an approved PUD as a separate permit proceeding initiated by a separate PUD modification application, under OAR 661-10-025(1)(b), the record includes only those items that were placed before the local decision maker during the course of the proceedings initiated by the modification application. *ONRC v. City of Oregon City*, 28 Or LUBA 775 (1994).

32.1 Planned Unit Developments – Procedures. Where a decision approving a planned development states in one place that it grants detailed development plan approval, but it is clear from the decision and findings as a whole that it grants conceptual development plan approval, the single erroneous reference is a harmless error and provides no basis for reversal or remand. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

32.1 Planned Unit Developments – Procedures. Where petitioners argue a city cannot approve an amendment to a PUD development plan on remand from LUBA, because the underlying development plan approval expired *after* LUBA remanded the initial city decision approving the amendment, petitioners did not waive this issue. The issue was not ripe to be raised at the time of the city's initial proceedings on the amendment or during petitioners' first appeal to LUBA. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

32.1 Planned Unit Developments – Procedures. A letter sent by the planning director to the applicant, four months before a city decision granting PUD final development plan approval, does not constitute a final, appealable city decision with regard to the duration of the subsequent PUD final development plan approval. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

32.1 Planned Unit Developments – Procedures. Where the planning commission delegated to the city manager authority to grant extensions of PUD overall development plan approval, and neither the planning commission's decision nor the city manager's decision exercising that authority was appealed, LUBA will not consider arguments that the planning commission improperly delegated authority to the city manager in an appeal of a subsequent city decision granting final PUD approval. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

32.1 Planned Unit Developments – Procedures. A local code may provide a PUD process in which an approved PUD overall development plan, rather than the comprehensive plan standards

applied in approving the overall development plan, governs final PUD approval. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

32.1 Planned Unit Developments – Procedures. As long as comprehensive plan issues relating to the impact of an entire PUD on internal and external roadways were addressed in approving an overall development plan, under applicable local code provisions particular questions concerning those issues that were not raised in granting overall development plan approval may not be raised during final PUD approval. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

32.1 Planned Unit Developments – Procedures. Where a prior city decision approving a PUD preliminary development plan for a shopping center does not clearly identify the particular commercial uses it approves, but describes the applicant's proposal and states that the proposed uses are approved, submittal of a site plan proposing an entirely different mixture of commercial uses constitutes more than a minor modification of the approved development plan. *Owen Development Group, Inc. v. City of Gearhart*, 25 Or LUBA 88 (1993).

32.1 Planned Unit Developments – Procedures. Where the local code establishes a "two-step" process for approving PUDs which requires that (1) preliminary development plan approval be granted only if the PUD will fulfill all applicable code requirements, and (2) final development plan approval be granted if the final plan complies with the preliminary plan and any conditions imposed thereon, the local government has created a PUD master plan approval process which governs all further aspects of the PUD development process. *Gilson v. City of Portland*, 22 Or LUBA 343 (1991).

32.1 Planned Unit Developments – Procedures. A two-stage approval procedure for planned unit developments, with an initial determination of feasibility required for preliminary (first stage) approval, serves two competing public policies—the public policy that inordinate expense not be incurred prior to preliminary approval and the public policy favoring avoidance of the inordinate expense that would result where final approval must be denied because the project is ultimately determined to be unfeasible. *Bartels v. City of Portland*, 20 Or LUBA 303 (1990).

32.1 Planned Unit Developments – Procedures. Under code provisions for two stage approval of planned unit developments, the finding of "feasibility" required for first stage approval requires a finding that solutions to problems posed by the project are "possible, likely, and reasonably certain to succeed." Provided the required finding of "feasibility" is made at the first stage, where public hearings are provided, resolution of precise solutions and technical matters may occur as part of second stage approval without additional public hearings. *Bartels v. City of Portland*, 20 Or LUBA 303 (1990).

32.1 Planned Unit Developments – Procedures. Where the local code requires that a PUD application include a landscaping plan, and the landscaping plan is not available anywhere in the record and is necessary for the city to adequately address compliance with an applicable approval standard, the omission of the plan is not a harmless or procedural error. *Schryver v. City of Hillsboro*, 20 Or LUBA 90 (1990).

32.1 Planned Unit Developments – Procedures. Where the local code provides for the approval of an overall PUD development plan and allows approved PUDs to be developed in phases, and the local government addresses the public services impacts of an entire PUD and finds relevant plan policies satisfied in approving such an overall PUD plan, the local government is not required to readdress plan public services policies in subsequent approval of a development phase, provided the requested phase approval is consistent with the type and intensity of development in the approved overall PUD plan. *Hoffman v. City of Lake Oswego*, 20 Or LUBA 64 (1990).

32.2 Planned Unit Developments – Standards. Where an applicant proposes a planned development, and where a local code provision requires the local government to "seek to determine that the development * * * will not create a drainage or pollution problem outside the planned area," the local government errs by not adopting findings determining whether the construction of a road extension that is proposed as part of and that would provide access to the planned development will create a drainage or pollution problem outside the planned area. *Lundeen v. City of Waldport*, 80 Or LUBA 450 (2019).

32.2 Planned Unit Developments – Standards. Where the county approves an amendment to a planned development approval for a resort, golf course and aerial challenge course, and petitioner argues the county improperly construed the applicable provisions of the county's code, but petitioner has not ultimately challenged the board of county commissioners' interpretation, or otherwise explained why LUBA is not required to affirm that interpretation under ORS 197.829(1), petitioner has provided no basis for reversal or remand. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

32.2 Planned Unit Developments – Standards. When the purpose of a condition is to set a baseline to measure traffic impact throughout multiple phases of the development consistent with the "trip cap" imposed to meet Transportation Planning Rule, at OAR 660-012-0060 requirements without mitigation, a hearings officer does not err in concluding that the standards are to be interpreted based on the use of the same version of the Institute of Transportation Engineers Trip Generation Manual (ITE Manual). Additionally, the ITE Manual is a professional treatise that sets out methods for making evidentiary judgments regarding the traffic impacts of development, but it is not part of the city's acknowledged comprehensive plan or land use regulations, and therefore is not itself "standards and criteria" for purposes of ORS 227.178(3)(a) or 227.173(1), at least as applied in the present circumstance, thus compliance with the trip cap be determined by consistent applications of the same ITE Manual codes used to establish the trip cap. *Willamette Oaks LLC v. City of Eugene*, 78 Or LUBA 63 (2018).

32.2 Planned Unit Developments – Standards. When the city has a general track for requesting planned unit development (PUD) approval and a clear and objective track for requesting PUD approval, the city is not required to demonstrate that the applicant is able to gain approval for some development on the subject property under its needed housing track. ORS 197.307(6)(a) requires only that the city allow the applicant the "option of proceeding" under the needed housing track, and does not require a guarantee or demonstration of any kind that development is likely to be approved under the clear and objective approval standards in the needed housing track. *Dreyer v. City of Eugene*, 78 Or LUBA 391 (2018).

32.2 Planned Unit Developments – Standards. When petitioners do not seek relief from any conditions imposed or any aspect of the city's planned unit development (PUD) approval under the general track and LUBA's only option is to affirm, reverse, or remand, the petitioners are asking LUBA to issue what is essentially an advisory opinion regarding the present case. LUBA lacks express statutory or cited judicial authority to issue an advisory opinion on the legal matters presented in the petition and issuing such an advisory opinion would be contrary to one of the express statutory purposes of LUBA's review: that our review should be consistent with "sound

principles governing judicial review." ORS 197.805. *Dreyer v. City of Eugene*, 78 Or LUBA 391 (2018).

32.2 Planned Unit Developments – Standards. Pursuant to *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), where a planning commission initially finds a proposal complies with a planned unit development (PUD) approval standard without requiring transportation improvements, but on remand based on a different evidentiary record finds that some improvements are necessary to ensure compliance with the PUD approval standard, drawing a different conclusion based on a different evidentiary record does not mean that the planning commission changed its interpretation of the PUD approval standard. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

32.2 Planned Unit Developments – Standards. A condition of approval requiring the applicant to "improve" an existing street to provide 20 feet of "paving" is not ambiguous regarding whether the required improvements include only pavement or also include sidewalks, etc., where the city's finding that the condition is "roughly proportional" to the impacts of the proposed planned unit development clearly indicate that the required improvements include only paving. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

32.2 Planned Unit Developments – Standards. A condition of planned unit development (PUD) approval that requires the applicant to obtain a city engineer's public works permit to improve the pavement of a city street does not represent a deferral of findings of compliance with a PUD approval standard requiring that the PUD be supported by a "safe and adequate transportation system," where the public works permit process will not evaluate compliance with the PUD approval standard, but consider only compliance with whatever standards apply to a city engineer public works permit. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

32.2 Planned Unit Developments – Standards. A planned unit development (PUD) standard requiring that the applicant submit a traffic impact analysis if pedestrian or bicyclist safety is a "concern by the city that is documented" refers to documented safety concerns that predate the PUD approval process. The "document[s]" referred to cannot be interpreted to mean the findings that the city adopts in approving the PUD. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

32.2 Planned Unit Developments – Standards. Findings that a 20-foot paved width is necessary to provide a "safe and adequate" transportation system for purposes of one planned unit development (PUD) standard do not conflict with findings addressing a differently worded standard that a 14-foot paved width is sufficient to ensure that the PUD is not an "impediment to emergency response." *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

32.2 Planned Unit Developments – Standards. A reasonable person could conclude, based on expert testimony, that the 14-foot paved width of the only access street is sufficient to ensure compliance with a planned unit development (PUD) approval standard requiring that the PUD is not an "impediment to emergency response," where there is evidence that with adjoining paved or graveled parking areas to allow opposing traffic to pull over, the access street could allow emergency vehicle access in the same manner as a "queuing street," notwithstanding that the

access street does not possess all the characteristics of a queuing street. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

32.2 Planned Unit Developments – Standards. A hearings officer errs in interpreting a condition of approval for a multi-phase planned unit development (PUD), which requires that the applicant for final phase approval submit a traffic study to determine if additional improvements are necessary to comply with the Transportation Planning Rule, to effectively supersede a different condition of approval applicable to all phases of the PUD that limits maximum development on the site to produce no more than a specified number of vehicle trips, where the two conditions can instead be interpreted to give effect to both. *Willamette Oaks LLC v. City of Eugene*, 76 Or LUBA 187 (2017).

32.2 Planned Unit Developments – Standards. LUBA will reject an argument that, without a master plan map, a local government cannot determine exactly how many lots exist within the master plan area or whether existing development exceeds a maximum number of dwelling units imposed in the master plan, where the county adopted findings identifying how many dwellings currently exist within the master plan area, and the petitioner fails to challenge those findings. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

32.2 Planned Unit Developments – Standards. A local government does not violate the "goalpost" rule at ORS 215.427(3)(a) when it applies a 1983 master plan to govern development within the master planned community, consistent with a code provision providing that a master plan stays in effect until repealed, and rejects arguments that the master plan had been impliedly repealed, notwithstanding that the local government had not previously applied the master plan as a source of development standards. *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

32.2 Planned Unit Developments – Standards. A city errs in requiring an applicant seeking to create four lots within a planned unit development (PUD) as contemplated by the PUD approval to file an application to "modify" the PUD, where the proposed subdivision proposes no modification to the PUD. *Tokarski v. City of Salem*, 74 Or LUBA 124 (2016).

32.2 Planned Unit Developments – Standards. An applicant may file an application to modify a planned unit development (PUD), while also objecting to the need to file a PUD modification application, without thereby waiving the objection. *Recovery House VI v. City of Eugene*, 150 Or App 382, 946 P2d 242 (1997). *Tokarski v. City of Salem*, 74 Or LUBA 124 (2016).

32.2 Planned Unit Developments – Standards. LUBA will affirm a city council's interpretation of provisions of the city code's planned development chapter to apply to a lot with portions that contain steep slopes that, under the city's subdivision ordinance, make the lot developable at a lesser density than the zoning allows, where the city council's interpretation of the planned development chapter is not inconsistent with one of the purposes of the planned development chapter to provide the city with flexibility to consider proposals that "cannot be obtained through traditional lot-by-lot subdivision," and is not inconsistent with the express language of the planned development chapter. *Harrison v. City of Cannon Beach*, 72 Or LUBA 182 (2015).

32.2 Planned Unit Developments – Standards. Findings are inadequate to explain why a tentative planned unit development (PUD) and subdivision will not be a significant risk to public

health and safety, where evidence in the record demonstrates that the portions of the property that will be developed with roads, parking lots, and sewer, water and electrical lines contain loose soils. In that circumstance, where the findings do not conclude that the public health and safety standard does not apply to roads, parking lots, and sewer, electrical and water lines, and there is no finding that these aspects of the proposed PUD and subdivision can be constructed on those loose soils without causing unreasonable or significant public health and safety concerns, the findings are inadequate. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 33 (2013).

32.2 Planned Unit Developments – Standards. Where a development code requires that PUD applicants prepare a "land use analysis" that establishes that specified minimum and maximum development levels in a particular zoning district will be met when all of the properties in that zoning district are developed, LUBA will not assume that without explicit direction about how to go about preparing such a "land use analysis," PUD applicants will be unable to do so. *Mintz v. City of Beaverton*, 66 Or LUBA 118 (2012).

32.2 Planned Unit Developments – Standards. A PUD master plan map that is adopted as part of an amendment to an existing PUD Master Plan that imposed a 200-foot setback in a subarea of the PUD does not eliminate that 200-foot setback simply because the amended PUD master plan map does not show the 200-foot setback, where all of the PUD master plan maps that show the entire PUD also do not show the 200-foot setback and the entire basis for the 200-foot setback is found in text and maps that apply only to one subarea of the PUD. *Athletic Club of Bend v. City of Bend*, 63 Or LUBA 467 (2011).

32.2 Planned Unit Developments – Standards. An amendment to a PUD Master Plan does not eliminate a 200-foot setback that applies in one subarea of the PUD, where the amendment makes no mention of the 200-foot setback or the subarea of the PUD where the 200-foot setback applies. *Athletic Club of Bend v. City of Bend*, 63 Or LUBA 467 (2011).

32.2 Planned Unit Developments – Standards. ORS 227.173(1), which requires that city decisions on applications for permits be based on standards and criteria in the city's development ordinance, does not mandate that a PUD Master Plan also include "standards and criteria," as those words are used in ORS 227.173(1). *Athletic Club of Bend v. City of Bend*, 63 Or LUBA 467 (2011).

32.2 Planned Unit Developments – Standards. Whether language in a PUD Master Plan constitutes a mandatory requirement that will apply in approving future specific development within the PUD will depend on the text and context of the PUD Master Plan language and the nature of the future proposal. *Athletic Club of Bend v. City of Bend*, 63 Or LUBA 467 (2011).

32.2 Planned Unit Developments – Standards. A zoning ordinance PUD Master Plan modification criterion that requires that the modification not have significant additional impacts on surrounding properties applies at the time the PUD Master Plan is modified, and the required finding that the modification will not have such impacts must be made at the time the PUD is modified and that finding cannot be deferred to a later date even though the precise nature of development may be better known at that later date. *Athletic Club of Bend v. City of Bend*, 63 Or LUBA 467 (2011).

32.2 Planned Unit Developments – Standards. Where PUD modifications are subject to "the applicable criteria used for the initial approval," a city hearings officer errs in concluding that only the criteria that are specifically mentioned in the initial approval decision apply. Just because criteria are not specifically mentioned in the initial approval decision findings does not mean the unmentioned criteria were not "used" in granting the initial approval. *Athletic Club of Bend v. City of Bend*, 63 Or LUBA 467 (2011).

32.2 Planned Unit Developments – Standards. A county does not err in interpreting a standard that requires a finding that property have landscape features "whose preservation requires planned development rather than conventional lot-by-lot development" to require a comparison between planned development and conventional lot-by-lot development, instead of a comparison between proposed planned development and the existing development on the property. *Saddle Butte Residents' Association v. Douglas County*, 56 Or LUBA 269 (2008).

32.2 Planned Unit Developments – Standards. Notwithstanding code language that appears to describe zero lot line dwellings as conditionally permitted uses, where the underlying zone clearly provides that zero lot line dwellings are permitted uses in that zone and not conditional uses, such dwellings may be approved without applying conditional use standards. *Saddle Butte Residents' Association v. Douglas County*, 56 Or LUBA 269 (2008).

32.2 Planned Unit Developments – Standards. A code provision stating that where a planned development standard and the underlying zone conflict, the planned development standard controls does not resolve conflicts between planned development standards and other code provisions that are not part of the underlying zone. *Saddle Butte Residents' Association v. Douglas County*, 56 Or LUBA 269 (2008).

32.2 Planned Unit Developments – Standards. A county does not err in interpreting a planned development standard requiring that at least 50 percent of the development be open space "retained for common use by owners and residents of the development" to refer to both commonly owned open space and privately owned open space. *Saddle Butte Residents' Association v. Douglas County*, 56 Or LUBA 269 (2008).

32.2 Planned Unit Developments – Standards. A local government interpretation that construes a local code requirement for open space that requires either "open space" or "outdoor recreation area" in a manner that requires both open space and outdoor recreation area is not entitled to deference under ORS 197.829(1). *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387 (2008).

32.2 Planned Unit Developments – Standards. LUBA will affirm a city council's interpretation of a planned unit development standard authorizing septic tanks for individual lots where it is "impractical" to connect the development to the city sewer system, to govern only circumstances requiring permanent septic tank installations, not temporary septic tanks to be used until the city system is upgraded, followed by mandatory connection to the city system. *Coquille Citizens for Resp. Growth v. City of Coquille*, 55 Or LUBA 155 (2007).

32.2 Planned Unit Developments – Standards. LUBA will affirm a local government's interpretation of a planned unit development (PUD) standard prohibiting "clear-cutting" of trees,

that trees that must be removed for siting individual dwellings will be evaluated at the time of building permit application, not as part of the PUD approval, where the standard does not explicitly require evaluation of trees removed for dwellings, and it is impossible to determine at the time of PUD approval which trees must be removed for dwellings. *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006).

32.2 Planned Unit Developments – Standards. Whether language in a purpose statement of a land use regulation functions as an approval criterion or imposes additional affirmative duties on the local government in approving or denying proposed development depends on the text and context of that language. A prohibition in a recreational commercial zone purpose statement on "traditional residential uses" unless such uses are "necessary to support the primary recreationally-oriented uses" imposes an affirmative obligation on the local government in approving residential development in the zone. *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

32.2 Planned Unit Developments – Standards. Where the county code allows modification of any standards applied to a planned unit development, the county may modify any such standards, even city street width standards that are applied pursuant to county code. *Didzun v. Lincoln County*, 51 Or LUBA 19 (2006).

32.2 Planned Unit Developments – Standards. A county code provision that allows "modification" of any standard applied to a planned unit development allows modification not only of numerical standards such as street width, but also modification of standards that prohibit certain features, such as double frontage lots. *Didzun v. Lincoln County*, 51 Or LUBA 19 (2006).

32.2 Planned Unit Developments – Standards. LUBA will affirm a governing body's interpretation allowing residential units within a "recreational planned unit development," notwithstanding that "residential uses" are prohibited in the underlying zone, where the zone nonetheless allows a recreational planned unit development, and the code definition of that term includes residential units as a core component. *Oregon Shores Cons. Coalition v. Coos County*, 49 Or LUBA 1 (2005).

32.2 Planned Unit Developments – Standards. Where a city's Master Plan Development District simply allows the uses that are permitted in certain other districts, the city erroneously interprets its code to allow those uses without the minimum lot size, minimum lot width, limit on building coverage, front or rear setback requirements or building height or any other standards or regulations that are applied to those uses in the other zoning districts. Those limitations from the other zoning districts apply unless the city applies the Master Plan Development District provision that allows the city to apply alternative standards in certain circumstances. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

32.2 Planned Unit Developments – Standards. The requirements of OAR 660-012-0060 only apply to amendments "to functional plans, acknowledged comprehensive plans and land use regulations." Where a city took separate actions to approve a master plan of development and to amend its comprehensive plan to conform to the master plan of development and petitioners only appealed the master plan of development approval decision to LUBA, the requirements of OAR 660-012-0060 did not apply to the only decision that was before LUBA in that appeal. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

32.2 Planned Unit Developments – Standards. Where an applicant's expert and the United States Fish and Wildlife Service disagree about the adequacy of the expert's survey of endangered western lilies on the site of a proposed development, LUBA will defer to the city's choice to believe the applicant's expert. While the United States Fish and Wildlife Service may ultimately prevail in future federal permitting proceedings, a city's choice between conflicting testimony at the city's master plan of development approval stage presents no basis for reversal or remand. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

32.2 Planned Unit Developments – Standards. A local government is within its discretion under ORS 197.829(1) to interpret a planned unit development regulation requiring protection of "public safety" on sites with natural hazards "through clustering of development" on that portion of the site suitable for development as not requiring consideration of off-site impacts of proposed development. *Dinges v. City of Oregon City*, 49 Or LUBA 376 (2005).

32.2 Planned Unit Developments – Standards. A city code that requires planned development proposals to preserve trees "to the greatest degree possible" does not require that the applicant fundamentally change the nature of the application to maximize tree preservation. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

32.2 Planned Unit Developments – Standards. A city may not interpret a code exception for tree cutting permits to exempt a subdivision from a separate local code requirement for a tree protection plan, where the exemption for tree cutting permits has nothing to do with the separate tree protection plan requirement. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

32.2 Planned Unit Developments – Standards. A city does not err by interpreting a code requirement that 20 percent of the site for a planned development be landscaped to allow an applicant to include areas of the site that will be included in common open space and left in their natural state. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

32.2 Planned Unit Developments – Standards. A local planned unit development (PUD) requirement that development preserve "significant on-site resources" and "worthwhile natural features" does not impose an absolute requirement that significant vegetation and other natural resources must be preserved in all cases. A local government does not commit error by balancing such preservation requirements with other code requirements and explaining why in some cases the preservation requirement is sacrificed to achieve other code requirements. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

32.2 Planned Unit Developments – Standards. When the local government cannot show that a comprehensive plan policy requiring site-specific soil surveys and geologic studies when potential geologic problems exist is couched in mandatory terms and absent some indication that it has been fully implemented in the zoning code, the policy is decisional criteria for development applications. *Highland Condominium Assoc. v. City of Eugene*, 37 Or LUBA 13 (1999).

32.2 Planned Unit Developments – Standards. A finding that a proposed planned unit development will "reduce" site disturbance is inadequate to demonstrate compliance with a

standard that requires that the proposed development shall be designed to avoid unnecessary site disturbance. *Salo v. City of Oregon City*, 36 Or LUBA 415 (1999).

32.2 Planned Unit Developments – Standards. LUBA will not exercise its authority under ORS 197.835(11)(b) to affirm a decision notwithstanding inadequate findings, where the local government fails to adopt findings of compliance with a criterion requiring that planned unit development be designed to minimize the number and size of cuts and fills, and it is not obvious from evidence in the record that the PUD design minimizes cuts and fills. *Salo v. City of Oregon City*, 36 Or LUBA 415 (1999).

32.2 Planned Unit Developments – Standards. Where a local code provision requires that a proposed planned unit development employ progressive site designs that reduce major alterations of the site and the project by its nature does not require any major alterations to the site, the local provision is satisfied without a further finding that the project employs a progressive site design. *Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106 (1999).

32.2 Planned Unit Developments – Standards. Where the applicant for a planned unit development proposes to use an area to satisfy both open space and water quality facility requirements, and petitioner and a staff report raise concerns below that the proposed open space fails to comply with approval standards because it is unusable for any purpose other than for drainage, the county must adopt findings addressing that issue. *Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106 (1999).

32.2 Planned Unit Developments – Standards. Where a local government's modification of standards applicable to a planned unit development rests on independent alternative grounds, petitioner's demonstration of error in one alternative ground provides no basis to reverse or remand the challenged decision where petitioner fails to challenge the other alternative ground. *Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106 (1999).

32.2 Planned Unit Developments – Standards. A requirement that off-street parking be located "on or within 100 feet of the site of the primary use" is satisfied where the proposed off-street parking is not associated with individual dwellings within a proposed planned unit development, but is additional parking associated with the project as a whole. In that circumstance, the "site of the primary use" is the project as a whole, and the additional off-street parking need not be located within 100 feet of each individual dwelling. *Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106 (1999).

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

32.2 Planned Unit Developments – Standards. LUBA will not consider arguments that a city erred in approving a modified PUD Master Plan, where the LUBA appeal challenges a preliminary plat decision that is subject to the previously approved PUD Master Plan and petitioner does not

appeal a separate city decision that modifies the PUD Master Plan. *Claus v. City of Sherwood*, 35 Or LUBA 437 (1999).

32.2 Planned Unit Developments – Standards. Where preliminary subdivision and PUD approval is not modified, approval of the final subdivision and PUD plans is governed by the standard in effect when the application for preliminary approval was submitted. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

32.2 Planned Unit Developments – Standards. A code requirement that deeds to property in a PUD shall stipulate that no "private structure of any type" shall be constructed in common areas does not apply to and does not prohibit construction of drainfields by the "developer" in common areas. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

32.2 Planned Unit Developments – Standards. Where a code requires that the final subdivision and PUD plans be in "substantial conformance" with the preliminary approval and the city interprets the "substantial conformance" requirement by analogizing to the distinction drawn in the code between "major" subdivision/PUD amendments, which must be approved quasi-judicially, and "minor" amendments, which may be approved administratively, the city's interpretation will be upheld. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

32.2 Planned Unit Developments – Standards. LUBA will not defer to city's interpretation that a city code requirement for "usable outdoor recreation space * * * for the shared or common use of all the residents" is satisfied by balconies or by private patios and decks, where the code requires that such balconies, patios and decks be "designed to provide privacy." *Dodds v. City of West Linn*, 33 Or LUBA 470 (1997).

32.2 Planned Unit Developments – Standards. A zoning ordinance provision that states land use districts may "float" within the boundaries of a proposed planned development can be interpreted to mean that such districts may be dissolved and totally reconfigured, with densities reallocated. *Huntzicker v. Washington County*, 30 Or LUBA 397 (1996).

32.2 Planned Unit Developments – Standards. Allowing both the reconfiguration of zoning districts and density transfers is consistent with the concept of "floating zones," which are intended to promote flexibility in master planning. *Huntzicker v. Washington County*, 30 Or LUBA 397 (1996).

32.2 Planned Unit Developments – Standards. The provisions of ORS 358.920 to 358.950 and 97.740 to 97.760 concerning excavation of archaeological sites are not approval standards a local government must address in approving a planned development, so long as the local government does not approve the planned development in a way that obviates the applicant's responsibility to comply with those statues, without demonstrating (1) the statutes do not apply to the excavation or construction that may be carried out under the challenged decision, or (2) the statutory requirements have been met. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

32.2 Planned Unit Developments – Standards. LUBA will defer to a local government's interpretation of a code requirement, that a PUD tentative plan covering a portion of property under single ownership be accompanied by a statement proving the entire property can be developed and

used in accord with code standards, as requiring that the PUD not render the remainder of the property undevelopable. *McGowan v. City of Eugene*, 26 Or LUBA 9 (1993).

32.2 Planned Unit Developments – Standards. That a proposed partition of land within a PUD may violate private covenants, conditions and restrictions, provides no basis for reversal or remand of a challenged land use decision. *Long v. Marion County*, 26 Or LUBA 132 (1993).

32.2 Planned Unit Developments – Standards. Local code provisions which simply allow increased density for controlled income and rent housing do not eliminate the requirement that such housing comply with other requirements of the local code. *Langford v. City of Eugene*, 26 Or LUBA 60 (1993).

32.2 Planned Unit Developments – Standards. Findings supporting approval of a PUD that determine there are solutions available to various landslide, drainage and related problems affecting the subject property, and that those solutions are possible, likely and reasonably certain to succeed, are adequate to establish that the local government did not improperly defer compliance with relevant PUD standards. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

32.2 Planned Unit Developments – Standards. Determining compatibility is inherently subjective. Where there is conflicting believable evidence concerning a proposed PUD's compatibility with the surrounding neighborhood, LUBA will not disturb the local government's determination that the height of the proposed buildings is compatible with the surrounding neighborhood. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

32.2 Planned Unit Developments – Standards. Where a code chapter prohibiting vegetation disturbance in certain areas allows activities authorized by a land use decision made before the effective date of the chapter, the local government may interpret the code to allow activities authorized under a newly amended PUD development plan, if those *same* activities where authorized under an original PUD development plan approved prior to the effective date of the code chapter. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

32.2 Planned Unit Developments – Standards. Where a local code allows approval of a rural planned development (RPD) "in conjunction with" a land division, and establishes comprehensive standards for RPDs, including standards for lot line adjustments in an approved RPD, the local government's interpretation of a code provision allowing revisions to an approved land division as giving it authority to approve lot line adjustments in an approved RPD which are not otherwise allowable under the RPD provisions, is clearly wrong. *Reusser v. Washington County*, 25 Or LUBA 252 (1993).

32.2 Planned Unit Developments – Standards. A local code may provide a PUD process in which an approved PUD overall development plan, rather than the comprehensive plan standards applied in approving the overall development plan, governs final PUD approval. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

32.2 Planned Unit Developments – Standards. As long as comprehensive plan issues relating to the impact of an entire PUD on internal and external roadways were addressed in approving an

overall development plan, under applicable local code provisions particular questions concerning those issues that were not raised in granting overall development plan approval may not be raised during final PUD approval. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

32.2 Planned Unit Developments – Standards. Local government interpretations that particular PUD approval standards apply only at one stage of a multi-stage approval process will be sustained where the relevant code language supports that construction. However, LUBA will reject arguments that a local code should be interpreted in that manner, where the challenged decision does not interpret and apply the local code in that way and the local government's interpretation and application of its code is not clearly wrong. *DLCD v. Crook County*, 25 Or LUBA 98 (1993).

32.2 Planned Unit Developments – Standards. Where the challenged decision includes only a conclusory statement that detailed code criteria for PUD development plans are satisfied, and neither the decision itself nor the respondents' briefs explain how other findings addressing other code standards are adequate to demonstrate compliance with the PUD development plan criteria, LUBA cannot conclude the PUD development plan criteria are either satisfied or inapplicable to the subject proposal. *Davenport v. City of Tigard*, 25 Or LUBA 67 (1993).

32.2 Planned Unit Developments – Standards. Where a code provides that changes having significant impacts are major PUD amendments, and lists categories of changes that *might* result in significant impacts, whether a proposed amendment falls within a category on the list is not in itself determinative of whether the amendment is major. Because the categories are not independent bases for identifying a major amendment, a determination that a proposed PUD amendment is not major need not be supported by findings addressing each category. *Gage v. City of Portland*, 24 Or LUBA 47 (1992).

32.2 Planned Unit Developments – Standards. Where a county code contains a general PUD provision stating that individual lot size in PUDs is unrestricted, but is subsequently amended to include a prohibition against "flexible lot size developments" in a particular zone, the code is correctly interpreted to prohibit PUDs which would create individual lots smaller than the minimum lot size required by that particular zone. *Niedermeyer v. Clackamas County*, 23 Or LUBA 380 (1992).

32.2 Planned Unit Developments – Standards. A local code requirement for findings of preliminary PUD or subdivision plan feasibility does not require the kind of certainty or supporting evidence that may ultimately be required for approval of final construction plans. *Bartels v. City of Portland*, 23 Or LUBA 182 (1992).

32.2 Planned Unit Developments – Standards. Where a local government elects to limit the length of cul-de-sac streets, it may also establish how the length of such streets is to be measured. However, where no particular method of measuring the length of cul-de-sac streets is specified in its land use regulations, the local government must determine length applying the regulations as they are written and applying the plain and ordinary meaning of the operative term "length." *Sully v. City of Ashland*, 23 Or LUBA 25 (1992).

32.2 Planned Unit Developments – Standards. Under applicable city land use regulation definitions and general understanding the length of a cul-de-sac street is measured to the end of whatever turnaround is provided; not to the point at which the right-of-way widens to accommodate the turnaround. *Sully v. City of Ashland*, 23 Or LUBA 25 (1992).

32.2 Planned Unit Developments – Standards. A comprehensive plan standard establishing a minimum building site requirement of one acre is not inconsistent with plan and code requirements that subdivision lots in a zoning district allowing development at a density of one unit per five acres be clustered to provide not less than 30 percent common open space. Such a plan standard simply sets a minimum area requirement for each clustered lot. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

32.2 Planned Unit Developments – Standards. It is possible to interpret a comprehensive plan standard requiring that "the minimum percentage of common open space shall be 30 percent, excluding roads and property under water," as requiring that the exclusion apply only to the lands subject to the open space requirement, (2) only to the lands that may be used to satisfy the open space requirement, or (3) to both. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

32.2 Planned Unit Developments – Standards. A local code definition of common open space as space to be "used, maintained and enjoyed by the owners and occupants of the individual building units" does not require that for all common open space the owners and occupants have physical access to "use" such common open space. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

32.2 Planned Unit Developments – Standards. A local code provision which establishes minimum requirements for what must be included in a PUD preliminary development plan application does not establish or modify the approval standards for such plans set forth elsewhere in the code. *Gilson v. City of Portland*, 22 Or LUBA 343 (1991).

32.2 Planned Unit Developments – Standards. Where the height limitation for the underlying zone is a standard applicable to approval of a PUD preliminary development plan, under ORS 227.178(3) the preliminary development plan must comply with the building height limitation in effect when the preliminary development plan application was first submitted. *Gilson v. City of Portland*, 22 Or LUBA 343 (1991).

32.2 Planned Unit Developments – Standards. Where the language employed in the purpose statement of a code PUD chapter evidences only what the local government intends the consequences of application of the specific provisions of that PUD chapter to be, the purpose statement does not establish independent approval standards for individual PUD applications. *White v. City of Oregon City*, 20 Or LUBA 470 (1991).

32.2 Planned Unit Developments – Standards. Under code provisions for two-stage approval of planned unit developments, the finding of "feasibility" required for first stage approval requires a finding that solutions to problems posed by the project are "possible, likely, and reasonably certain to succeed." Provided the required finding of "feasibility" is made at the first stage, where public hearings are provided, resolution of precise solutions and technical matters may occur as part of

second-stage approval without additional public hearings. *Bartels v. City of Portland*, 20 Or LUBA 303 (1990).

32.2 Planned Unit Developments – Standards. Where the record of the local proceedings includes expert testimony identifying potential road and utility construction and fill problems and suggesting ways in which those problems may be resolved, the testimony is adequate to support a local government's findings that those aspects of a proposed planned unit development are "feasible." *Bartels v. City of Portland*, 20 Or LUBA 303 (1990).

32.2 Planned Unit Developments – Standards. Where a planned unit development is proposed on a site with steep slopes and unstable soils, unexplained expressions of confidence by experts concerning the feasibility of proposed residential construction are not sufficient to constitute substantial evidence supporting a finding that the proposed residential development is "feasible." This is particularly the case where the expert study primarily relied upon by the local government expressly states it does not address feasibility of residential construction. *Bartels v. City of Portland*, 20 Or LUBA 303 (1990).

32.2 Planned Unit Developments – Standards. Where the local plan requires that the increased density and smaller lots allowed in a PUD be offset by the provision of "useable open space," such open space must benefit the entire PUD, and cannot consist of the oversize private front and rear yards of the larger lots. *Schryver v. City of Hillsboro*, 20 Or LUBA 90 (1990).

32.2 Planned Unit Developments – Standards. Where a local government requires property designated as a significant natural area on its Goal 5 inventory to be developed through its PUD process, and a comprehensive plan provision requires PUD development proposals "to address preservation of wildlife habitat and natural vegetation," the local government has made an OAR 660-16-010(3)(c) "limit conflicting uses" decision, and a decision approving a PUD on such property must be supported by findings demonstrating how wildlife habitat and natural vegetation will be preserved. *Schryver v. City of Hillsboro*, 20 Or LUBA 90 (1990).

32.2 Planned Unit Developments – Standards. Where the local code provides for the approval of an overall PUD development plan and allows approved PUDs to be developed in phases, and the local government addresses the public services impacts of an entire PUD and finds relevant plan policies satisfied in approving such an overall PUD plan, the local government is not required to readdress plan public services policies in subsequent approval of a development phase, provided the requested phase approval is consistent with the type and intensity of development in the approved overall PUD plan. *Hoffman v. City of Lake Oswego*, 20 Or LUBA 64 (1990).

33.1 Land Divisions – Subdivisions. Where separate applications to partition two parcels under a single ownership into three parcels each receive final approval in the same calendar year, the resultant units of land are not "lawfully created" where state statute requires that divisions of "an area or tract of land into four or more lots within a calendar year when such area or tract of land exists as a unit or contiguous units of land under a single ownership" receive subdivision approval. *Landwatch Lane County v. Lane County*, 79 Or LUBA 65 (2019).

33.1 Land Divisions – Subdivisions. Traffic performance standards in the local government's transportation system plan (TSP) are not approval criteria applicable to a limited land use decision that were incorporated pursuant to ORS 197.195(1), where the applicable criteria either do not refer to the TSP at all or where they only generally "incorporate[] by reference the city's public facility master plans, including plans for domestic water, sanitary sewer, storm drainage, parks, and transportation." *Oster v. City of Silverton*, 79 Or LUBA 447 (2019).

33.1 Land Divisions – Subdivisions. When a lot is an unplatted remainder of a subdivision and is not depicted at all on the approved subdivision plat, its current configuration may have resulted from the subdivision but that does not indicate that the county approved the creation of the lot by applying subdivision approval standards. On remand, the hearings officer needs to determine if the lot was approved by applying subdivision standards. *Landwatch Lane County v. Lane County*, 78 Or LUBA 164 (2018).

33.1 Land Divisions – Subdivisions. A county does not err in failing to process an application to vacate a public easement as a modification of a condition of approval for the subdivision in which the easement is located, where the easement was not required as a condition of subdivision approval, but instead stemmed from a private agreement between the developer and others. *Neighbors for Smart Growth v. Washington County*, 76 Or LUBA 319 (2017).

33.1 Land Divisions – Subdivisions. Where the text of a county comprehensive plan policy limits redevelopment of areas developed as golf courses or designated open space or common area within a resort, but includes no language prohibiting redevelopment of other areas within the resort, interpreting the policy to implicitly prohibit new residential development anywhere within the resort would impermissibly insert what has been omitted pursuant to ORS 174.010, and may not survive even the deferential review required under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010). *Kine v. Deschutes County*, 75 Or LUBA 419 (2017).

33.1 Land Divisions – Subdivisions. Where the city code requires a "Type III" procedure for a land division that includes four or more lots, but defines "lots" to exclude "tracts," the city correctly rejects arguments that a division that creates three lots and two open space tracts must be processed under the "Type III" procedure. *Frewing v. City of Portland*, 74 Or LUBA 59 (2016).

33.1 Land Divisions – Subdivisions. LUBA will reject arguments that a hearings officer committed procedural error in not returning a subdivision application to the neighborhood association for additional review based on minor changes that staff requested to the subdivision plat, where the petitioner identifies nothing in the city code that requires additional review by the neighborhood association when the subdivision plat is amended during the proceedings before the hearings officer. *Frewing v. City of Portland*, 74 Or LUBA 59 (2016).

33.1 Land Divisions – Subdivisions. Arguments that future construction of a potential pedestrian trail within a subdivision tract will violate applicable environmental review standards are not a basis to reverse or remand the subdivision decision that creates the tract, where the subdivision decision before LUBA does not approve the pedestrian trail or conduct environmental review, but defers those determinations to a future application for environmental review, when and if the applicant proposes to construct the pedestrian trail. *Frewing v. City of Portland*, 74 Or LUBA 59 (2016).

33.1 Land Divisions – Subdivisions. A city errs in requiring an applicant seeking to create four lots within a planned unit development (PUD) as contemplated by the PUD approval to file an application to "modify" the PUD, where the proposed subdivision proposes no modification to the PUD. *Tokarski v. City of Salem*, 74 Or LUBA 124 (2016).

33.1 Land Divisions – Subdivisions. ORS 92.040 requires local governments to apply to development of subdivision lots only those approval standards in effect when the subdivision application was filed. Where a prior subdivision decision approved a flag lot under standards that contemplated locating development in the flag portion of the lot, a local government errs in applying post-subdivision standards that would force all development of the lot to be located in the pole portion of the flagpole, and effectively make the lot undevelopable. *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74 (2015).

33.1 Land Divisions – Subdivisions. Because it is common for a multi-phased tentative subdivision approval to include conditions of approval that apply only to certain phases of development, it is incumbent on a petitioner to raise at the local proceeding any issues involving a legal standard that requires either (1) independent approval of a particular phase of development or (2) the conditioning of construction of an earlier phase of development on fulfillment of conditions applicable to a subsequent phase. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

33.1 Land Divisions – Subdivisions. A petitioner does not establish that a hearings officer erred in failing to condition approval of the first phase of a multi-phase development on completion of the second phase, where the petitioner does not identify any code standard or condition governing Phase I that will be violated if Phase II is not completed. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

33.1 Land Divisions – Subdivisions. Where a local code provides that "Significant Natural Areas" are a subset of "Significant Natural Resources," a hearings officer does not err in failing to find that a proposed subdivision complies with a local code section that only applies to "Significant Natural Areas," absent a demonstration that the area in question is not only a "Significant Natural Resource," but also a "Significant Natural Area." *Carver v. Washington County*, 70 Or LUBA 23 (2014).

33.1 Land Divisions – Subdivisions. A local code provision authorizing a private street if the street is "not needed to provide access to other properties in the area" is not violated by a required pedestrian/bicycle connection between the proposed private street and offsite transit facilities,

because "other properties in the area" does not refer to transit facilities in a public right-of-way. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

33.1 Land Divisions – Subdivisions. Where a hearings officer provides two independent bases to approve a private street and a petitioner wishes to challenge both bases, it is improper for the petitioner to challenge one of the bases in a footnote to an assignment of error that challenges the other basis for approving the private street. LUBA generally does not consider arguments in footnotes that set out a different legal theory than that presented in the assignment of error itself. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

33.1 Land Divisions – Subdivisions. While a 4.4 units per acre maximum density standard may limit the number of lots that would otherwise be possible with a 5,000-square-foot minimum lot size without the maximum density standard, the minimum lot size and maximum density standards are not inconsistent. Therefore, there would be no textual inconsistency in interpreting the development code to impose a maximum density standard. *Greller v. City of Newberg*, 70 Or LUBA 499 (2014).

33.1 Land Divisions – Subdivisions. The procedure provided by ORS 92.234, which allows local governments to revise, replat, or eliminate undeveloped subdivisions through local ordinance, is not the exclusive process for "vacating" existing property lines for purposes of ORS 92.017. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.1 Land Divisions – Subdivisions. A partition or replat that has the effect of eliminating pre-existing property lines is a "specific process" for "vacating" property lines for both parcels and lots, for purposes of ORS 92.017. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.1 Land Divisions – Subdivisions. Even if it is legally possible to intentionally create a discrete parcel that consists entirely of nested, discrete lots or parcels without vacating those nested lots or parcels, LUBA will affirm a local government finding that a partition plat that creates a new parcel without depicting any nested lot lines has the effect of vacating the pre-existing lots, where there is nothing on the partition plat, description, or narrative that suggests an intent to preserve the pre-existing lots. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.1 Land Divisions – Subdivisions. An approved partition plat creating new parcels need not bisect the property lines of pre-existing lots to "vacate" those lots for purposes of ORS 92.017. Even if the boundaries of the new parcels follow the property lines of some pre-existing lots, the partition plat can have the effect of vacating or consolidating the pre-existing lots included within the newly established parcels. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.1 Land Divisions – Subdivisions. A property line adjustment cannot create new parcels. Where a property line adjustment depicts with dashed lines the interior property lines of lots vacated by a prior partition, the subsequent property line adjustment does not have the legal effect of re-

establishing the prior existing lots. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.1 Land Divisions – Subdivisions. For purposes of attorney fees under the "probable cause" standard in ORS 197.830(15)(b), no reasonable attorney would argue on appeal that a decision that reduces minimum residential density in a proposed five-lot subdivision violates a code provision that expressly authorizes reducing minimum residential density, without presenting some challenge to findings that address the code provision and conclude that reducing the density complies with the code provision. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

33.1 Land Divisions – Subdivisions. For purposes of attorney fees under the "probable cause" standard in ORS 197.830(15)(b), a reasonable attorney could argue that a Metro code provision mandating a minimum residential density is violated by a decision that approves less than the minimum density, where the Metro code provision directly applies on its face to city subdivision decisions, but is no longer applicable due to the effect of other Metro code provisions and the city's implementation of the Metro minimum residential density requirement. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

33.1 Land Divisions – Subdivisions. Where a petitioner notes a code provision below requiring that subdivisions comply with lot size and dimensions requirements, but does not argue that including internal roads in the calculation of lot size violates the five-acre minimum lot size, the issue of how internal roads affect calculation of lot size is not raised with the specificity required by ORS 197.763(1) and is waived. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

33.1 Land Divisions – Subdivisions. A reasonable person could conclude from the plat of a neighboring subdivision showing a spur road ending in turnaround bordering the common property line with the proposed subdivision, and a notation that the roads are intended to "benefit this plat," that the spur road is not intended to be a connecting road between the two subdivisions. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

33.1 Land Divisions – Subdivisions. A code provision requiring the "continuation" of existing streets in adjoining subdivisions is not properly interpreted to require that connections be made to internal roads in the adjoining subdivision, where such a connection would have to cross existing platted residential lots. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

33.1 Land Divisions – Subdivisions. An argument raised below that the application fails to address a general code section that includes a sub-section requiring that private roads be vested in a homeowner's association is insufficient to raise with the specificity required by ORS 197.763(1) the issue of whether proposed private roads located on easements must have the underlying fee vested in the homeowner's association. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

33.1 Land Divisions – Subdivisions. Attorney fees under ORS 197.830(15)(b) are not warranted where the petitioner argued that the county was required under its code to provide for continuation of existing streets in adjoining subdivisions and reasonable persons could disagree, based on the plat of the adjoining subdivision that showed a street apparently stubbed to the common property

line, whether the code provision required that street to be continued into the proposed subdivision. *Burness v. Douglas County*, 62 Or LUBA 555 (2011).

33.1 Land Divisions – Subdivisions. Under ORS 92.100(7), a city decision that approves or withholds approval of a final subdivision plat is not a land use decision or limited land use decision and is not reviewable by LUBA. *Calvary Construction v. City of Glendale*, 61 Or LUBA 50 (2010).

33.1 Land Divisions – Subdivisions. ORS 92.040(2) provides that "only those local government laws * * * that are in effect at the time of [subdivision] application shall govern subsequent construction on the property * * *." A local government does not violate ORS 92.040(2) by applying access standards that were adopted after a subdivision was recorded to deny a request for direct driveway access onto an arterial road adjoining one of the subdivision lots where the proposed driveway would be constructed in part "off" the property and the approved master plan showed access to the lot from an internal local roadway. *Athletic Club of Bend, Inc. v. City of Bend*, 61 Or LUBA 349 (2010).

33.1 Land Divisions – Subdivisions. When approving a subdivision where approval criteria must be applied in a proceeding where the public has participatory rights, a city may defer findings on a required approval criterion to a later proceeding, so long as that later proceeding is one in which the public has participatory rights. *Boucot v. City of Corvallis*, 61 Or LUBA 459 (2010).

33.1 Land Divisions – Subdivisions. Approving or denying a tentative subdivision plat within an urban growth boundary is a limited land use decision and therefore not a "permit" decision. Because the ORS 227.175(10)(a) directive that local appeal issues not be limited to those issues identified in the notice of appeal only applies to permit decisions, that statute does not apply to decisions involving the approval or denial of subdivisions. *Frewing v. City of Tigard*, 59 Or LUBA 23 (2009).

33.1 Land Divisions – Subdivisions. Even when an applicant forfeits the right to process a subdivision application under the limited land use provisions of a local code and processes the application under the procedures for permits, the decision approving or denying the subdivision is still a limited land use decision and the provisions of ORS 227.175(10)(a) do not apply. *Frewing v. City of Tigard*, 59 Or LUBA 23 (2009).

33.1 Land Divisions – Subdivisions. Absent a compelling reason to do so, LUBA will not overrule its holding in *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992), that the ORS 92.017 prohibition on consolidating discrete lots and parcels does not prohibit a local government from adopting regulations that limit development of contiguous, substandard-size lots and parcels and effectively consolidate them for development purposes. *Thomas v. Wasco County*, 58 Or LUBA 452 (2009).

33.1 Land Divisions – Subdivisions. A code provision stating that when it appears that the area of a proposed partition is to be ultimately divided into four or more lots or parcels the code provisions pertaining to subdivisions apply simply authorizes the city to apply subdivision procedures and standards to a partition application, and does not itself constitute "standard" or

"criteria" under which the city could deny the partition application. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

33.1 Land Divisions – Subdivisions. Where a city discovers late in a proceeding on a partition application that its code may require application of certain subdivision approval standards, the city should identify any applicable subdivision standards and give the applicant the opportunity to demonstrate compliance with them, even if that would require the city to make its decision after the statutory deadline for taking final action on the application has passed. However, it is inconsistent with ORS 227.178(3) for the city to summarily deny the partition and effectively force the applicant to submit a new application, where that denial is not based on any applicable standard or criteria. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

33.1 Land Divisions – Subdivisions. Reversal is not warranted under ORS 197.835(10)(a)(A) where a city denies a partition application three weeks prior to expiration of the 120-day deadline based on the city's belief that the proposed partition must be processed as a subdivision, where the city mistakenly believed that its only option was to deny the application and effectively require the applicant to submit a new application, but there is no indication in the record that the city denied the application to avoid the 120-day rule. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

33.1 Land Divisions – Subdivisions. A preliminary subdivision plat approval decision that post-dates a vested rights determination under Measure 49 is a land use decision subject to LUBA's review and is not a decision concerning the "nature and extent of [just] compensation" under Measure 49. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

33.1 Land Divisions – Subdivisions. Where applicable subdivision regulations provide that a subdivision applicant need not demonstrate a water supply is present to serve the proposed subdivision so long as the average lot size is equal to or larger than five acres, a county does not err by approving a proposal to subdivide a 217-acre parcel into a 92-acre lot and other lots that range between two acres and six acres in size, because the average lot size is equal to or greater than five acres. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

33.1 Land Divisions – Subdivisions. If subdivision applicants actually waived their right to submit a subdivision application without a hydrogeology review, they likely could not submit a subdivision application with the hydrogeology review and later insist that the application be considered without a hydrogeology review when the hydrogeology review or other evidence showed that a more detailed hydrogeology study is needed. But where the subdivision applicants did not waive that right, they are not barred from taking the position that a hydrogeology review is not required, simply because they voluntarily submitted one. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

33.1 Land Divisions – Subdivisions. A zoning regulation that neither authorizes nor prohibits road construction in exclusive farm use zones provides no basis for reversal or remand of a decision that approves a subdivision of exclusive farm use zoned land, pursuant to Ballot Measure 37 waivers, where that subdivision will require the construction of some roads. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

33.1 Land Divisions – Subdivisions. Where a city "overrides" code provisions requiring that a subdivision developer construct sidewalks without identifying a basis in the city's code or comprehensive plan to waive or vary the sidewalk requirement, LUBA will remand the decision for the city to adopt findings explaining what authority allows the city to override the sidewalk requirement. *Soares v. City of Corvallis*, 56 Or LUBA 551 (2008).

33.1 Land Divisions – Subdivisions. A county subdivision approval standard requiring that there is "an adequate quantity and quality of water to support the proposed use" is not preempted by state regulations and is a standard that the county must address in approving a subdivision application. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

33.1 Land Divisions – Subdivisions. Where the preliminary subdivision plat approval appears to defer a determination of compliance with a discretionary subdivision approval standard to the final plat decision, but does not explain why the standard does not apply at the time of preliminary plat approval, LUBA will remand the decision to the county to determine when the standard applies and, if it applies at the time of final plat approval, whether the proceedings that govern final plat approval are consistent with the county's statutory obligation to address discretionary land use standards as part of a public process that affords notice and opportunity for public input. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

33.1 Land Divisions – Subdivisions. A hearings officer's failure to address arguments that the applicant should improve transportation facilities affected by a proposed destination resort provides no basis for reversal or remand, where a prior development agreement and two earlier development approvals conclusively established the type and extent of transportation improvements the applicant is obligated to make in developing the resort, and the petitioners cite no authority for the hearings officer to require different improvements in approving a subdivision within that resort. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

33.1 Land Divisions – Subdivisions. The applicant's failure to provide a survey of individual trees on property to be subdivided is not a basis for reversal or remand, where the applicable approval standards do not require preservation of individual trees, and the information necessary to show compliance with those standards need not include that level of detail. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

33.1 Land Divisions – Subdivisions. Where subdivision approval criteria require consideration of competing goals or factors, such as contributing to orderly development and preserving natural features, it is permissible and even necessary to conduct a weighing or balancing process between development and preservation of natural features. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

33.1 Land Divisions – Subdivisions. A subdivision approval standard requiring preservation of natural features that is written to apply to circumstances where there have been no previous efforts to identify natural features plays a more limited role where the subdivision application is preceded by two final, binding land use decisions that have already largely determined which natural features will be preserved and which will be lost to development. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

33.1 Land Divisions – Subdivisions. Where a city's land use code defines the term "lot" but excludes a lot from that definition if "[t]he lot as originally platted is no longer whole and consists of individual property remnants," all remnants, large and small, are considered remnants and are no longer within the definition of "lot." *Jackson v. City of Portland,* 54 Or LUBA 138 (2007).

33.1 Land Divisions – Subdivisions. Absent some expression of intent in a deed that separately listed lots or parcels are to be merged into a single unit of land, the listing of multiple lots or parcels in a single paragraph or a single sentence of a deed does not operate to merge those lots or parcels into a single unit of land. The lots retain their separate identify following the transfer. *Jackson v. City of Portland*, 54 Or LUBA 138 (2007).

33.1 Land Divisions – Subdivisions. When the definitions of the relevant terms set out in ORS chapter 92 are read together, whether a division of land creates "parcels" or "lots" depends the number units of land that one or more divisions of land in a single year produce. If the division or divisions produce four or more units of land, they are lots; if they produce three of fewer, they are parcels. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.1 Land Divisions – Subdivisions. Applying the contextual analysis that is required by *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), *adh'd to as modified on recons*, 179 Or App 409, 40 P3d 532 (2002), even though ORS 215.750(1) does not expressly state that the references in that statute to "lots" are limited to lawfully created lots, and even though the relevant definitions in ORS 92.010 do not expressly require that a lot must be a lawfully created lot, if those statutes are read in context with ORS 92.012, 92.018(1), 92.025(1) and ORS 215.010(1)(a), it is sufficiently clear that when the legislature used the term "lot" in ORS 215.750(1) it did not mean to include unlawfully created lots. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.1 Land Divisions – Subdivisions. County authority to approve forest template dwellings derives from ORS 215.750(1). In exercising the authority granted by ORS 215.750(1), a county may not apply a county definition of "lot" to recognize lots that could not be recognized under ORS 215.750(1). The county may not set a lower standard for approving forest template dwellings under county legislation than the standard that is set by ORS 215.750. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.1 Land Divisions – Subdivisions. LUBA will reverse a county decision that approves a rural subdivision in a forest zone following a county Ballot Measure 37 waiver, where the owner has not obtained a waiver of applicable state regulations. The county has no authority to approve development inconsistent with state regulations, unless and until the state waives those regulations. *DLCD v. Jackson County*, 53 Or LUBA 580 (2007).

33.1 Land Divisions – Subdivisions. Under a preliminary subdivision approval standard requiring a finding, based on the preliminary grading plan, that it is feasible for the *final* grading plan to comply with code standards governing final grading plans, a finding to that effect is not a deferral of findings of compliance with the standards governing final grading plans. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

33.1 Land Divisions – Subdivisions. Absent some authority to the contrary, in approving a preliminary grading plan the local government is not required to determine what procedures will govern consideration of the final grading plan. Where the decision approving the preliminary grading plan does not determine and is not required to determine the procedures that govern the final grading plan, LUBA will reject arguments that the local government erred in failing to impose conditions requiring the county to provide notice and opportunity to request a hearing in considering the final grading plan. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

33.1 Land Divisions – Subdivisions. A hearings officer's findings are sufficient to explain why a proposed subdivision complies with criteria that require preserving existing natural drainage channels where those findings explain that drainage within the historic drainage area has largely been diverted and there is no evidence that more than a *de minimis* flow of drainage will cross a shallow swale on the property to be subdivided. *Kyle v. Washington County*, 52 Or LUBA 399 (2006).

33.1 Land Divisions – Subdivisions. Where LUBA remands a preliminary subdivision plat approval to the local government to address an issue, the local government may limit the hearing on remand to that issue, and need not address as part of the remand hearing other issues raised by petitioner regarding whether detailed development plans required by the preliminary plat approval are inconsistent with the approved conceptual plans approved. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

33.1 Land Divisions – Subdivisions. A petitioner fails to demonstrate that the decision maker is biased or improperly influenced to approve a subdivision by the possibility that the developer may donate open space land to the city, where the decision maker twice voted to approve the subdivision prior to learning that the developer and staff had discussed donation. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

33.1 Land Divisions – Subdivisions. Where neither the local government nor LUBA has jurisdiction to resolve the legality of a condition requiring necessary facilities to be constructed prior to obtaining final approval of a two-step subdivision approval process, the local government may (1) adopt findings establishing that fulfillment of the condition of approval is not precluded as a matter of law, and (2) ensure that the condition will be fulfilled prior to final subdivision approval or actual development. *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006).

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

33.1 Land Divisions – Subdivisions. ORS 223.930(1) does not require that a city, rather than a subdivision developer, construct public street improvements, in order to exercise its condemnation

authority to acquire the street right-of-way. *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006).

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

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

33.1 Land Divisions – Subdivisions. A hearings official does not improperly substitute state agency permit approval criteria for a local subdivision drainage criterion, where she denies subdivision approval based on a finding that the applicant failed to demonstrate that proposed drywells that would be needed for adequate drainage could be approved by the Oregon Department of Environmental Quality or that there were alternative methods of drainage if the drywells could not be approved. *Weiskind v. City of Eugene*, 52 Or LUBA 753 (2006).

33.1 Land Divisions – Subdivisions. A condition that purports to impose system development charges as a condition of approving conversion of a mobile home park to a manufactured dwelling subdivision is prohibited by ORS 92.845(1)(b), unless it falls within some exception to that statute. *D & B Home Investments v. City of Donald*, 51 Or LUBA 1 (2006).

33.1 Land Divisions – Subdivisions. ORS 92.845(1)(c) allows local governments to impose system development charges on conversion of a mobile home park to a manufactured dwelling subdivision only when such charges are "based on the prior approval" of the park. Where the prior park approval did not impose system development charges, ORS 92.845(1)(c) does not apply. *D & B Home Investments v. City of Donald*, 51 Or LUBA 1 (2006).

33.1 Land Divisions – Subdivisions. A city does not err in interpreting a code provision requiring that a subdivision plat provide access "that will allow its development in accordance" with the code to not require that the applicant provide additional access to a parcel that is already developed consistent with applicable zoning. The code does not require the applicant to provide access to allow for potential redevelopment of developed parcels. *Cutsforth v. City of Albany*, 51 OR LUBA 56 (2006).

33.1 Land Divisions – Subdivisions. Where it appears that providing access to phase 1 of a proposed subdivision is feasible, but the tentative plat application does not show how access will

be provided, a hearings officer does not err in imposing a condition of final plat approval requiring that the applicant provide a specific plan for access to phase 1. *Paterson v. City of Bend,* 49 Or LUBA 160 (2005).

33.1 Land Divisions – Subdivisions. In order to "incorporate" a comprehensive plan standard into a local government's land use regulations within the meaning of ORS 197.195(1) and thus apply that plan standard to a limited land use decision as an approval criterion, the local government must at least amend its land use regulation to identify specific plan policies or provisions that apply to a limited land use decision as approval criteria. A code requirement to "comply with the comprehensive plan" is insufficient to incorporate any comprehensive plan standard under ORS 197.195(1). *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

33.1 Land Divisions – Subdivisions. A general code standard requiring streets to be improved with curbs and other facilities "if required" is not properly interpreted to require curbs for a private street, where the specific standards governing private streets do not require curbs. *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

33.1 Land Divisions – Subdivisions. A hearings officer errs in approving a cul-de-sac under subdivision criteria that allow a cul-de-sac only where existing development on adjacent property prevents a street connection and a connected street pattern is not possible, where (1) the "existing development" is on the same property being subdivided, (2) there is evidence that a street connection is possible, and (3) there are no findings explaining why a street connection is not possible. *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

33.1 Land Divisions – Subdivisions. Where the approved tentative plat does not propose curbs on a private street, but the hearings officer's findings suggest that curbs will be provided to direct storm water to catch basins and there is expert testimony that curbs are necessary to direct storm water to catch basins, remand is necessary to address whether the decision requires curbs and, if not, how storm water will be directed to catch basins. *Paterson v. City of Bend*, 49 Or LUBA 160 (2005).

33.1 Land Divisions – Subdivisions. Where the decision approves a cul-de-sac that may be longer than 600 feet, depending on how the "block" is measured, remand is necessary to explain how the blocks created by the cul-de-sac comply with a subdivision approval standard prohibiting blocks longer than 600 feet as measured between the centerline of "through cross streets." *Paterson v. City of Bend,* 49 Or LUBA 160 (2005).

33.1 Land Divisions – Subdivisions. A subdivision approval standard that requires a subdivision street layout must "best balance needs for economy, safety, efficiency and environmental compatibility" does not require that one or more alternative street layouts necessarily must be evaluated in all cases. *Doob v. City of Grants Pass,* 48 Or LUBA 245 (2004).

33.1 Land Divisions – Subdivisions. A decision that allows modifications to an existing berm intended to protect a neighboring subdivision from sight and smells of the city sewage treatment plant is consistent with that subdivision's conditions of approval, where the conditions do not require a berm of any particular size, shape or height, and the decision allows only modifications

that do not degrade the function of the berm. *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1 (2004).

33.1 Land Divisions – Subdivisions. City planning staff cannot informally modify or void two earlier final, written decisions issued pursuant to code-required procedures that altered the deadlines for filing a final plat approval application. At a minimum, modification or revocation of those final, written decisions to restore the original deadline must be accomplished by a final, written decision. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282 (2004).

33.1 Land Divisions – Subdivisions. A final, written decision that effectively, if implicitly, restores the original deadline for filing the final subdivision plat application, and then extends that deadline, is properly viewed as a modification or revocation of an earlier decision that places the tentative plat approval on inactive status, subject to a different final plat application deadline. *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282 (2004).

33.1 Land Divisions – Subdivisions. The ORS 197.763(6)(b) right to request that a hearing be continued must be exercised prior to the close of the initial evidentiary hearing. Where the initial evidentiary hearing was held before the planning commission, a party has no right under ORS 197.763(6)(b) to request a continuance in a subsequent hearing before the city council, notwithstanding that the planning commission was evenly divided and could not reach a majority vote to approve or to deny an application for subdivision approval. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

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

33.1 Land Divisions – Subdivisions. Where property is zoned for minimum lot sizes of five acres, with smaller lots to be allowed when services become available, approval of a five-acre-lot subdivision is not a de facto zone change. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

33.1 Land Divisions – Subdivisions. Where a challenged decision approving a subdivision does not purport to adopt a zone change, grant a variance or grant conditional use approval, the county's failure to grant such approvals, even if required, does not convert the decision from a "limited land use decision" into a "land use decision." *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

33.1 Land Divisions – Subdivisions. A finding that a proposed dead-end street can exceed the code maximum grade because there are no turning movements on the street is inadequate, where the finding fails to take into account turning movements at the intersection of the local street and

the nearest public road, where the grade also exceeds the maximum. *McCulloh v. City of Jacksonville*, 46 Or LUBA 267 (2004).

33.1 Land Divisions – Subdivisions. Even if city adoption of the Uniform Fire Code (UFC) makes the UFC standards applicable approval standards, ORS 368.039(1) authorizes the city to adopt standards that supersede UFC requirements. *McCulloh v. City of Jacksonville*, 46 Or LUBA 267 (2004).

33.1 Land Divisions – Subdivisions. Where the local code requires that any "features explicitly included" in a subdivision application must comply with applicable development standards, a city errs in declining to consider whether existing houses and a proposed shared driveway easement shown on a subdivision application comply with applicable development standards. *McKeown v. City of Eugene*, 46 Or LUBA 494 (2004).

33.1 Land Divisions – Subdivisions. ORS 227.175(10)(a)(E)(ii), which was adopted in response to the Court of Appeals' decision in *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997), and specifically provides that a *de novo* appeal of a permit decision under 227.175(10)(a) may not be limited to issues raised in the local notice of appeal, does not apply to appeals of limited land use decisions. *McKeown v. City of Eugene*, 46 Or LUBA 494 (2004).

33.1 Land Divisions – Subdivisions. Where the definition of "lot width" in a local code is written with regularly shaped lots in mind, and city's interpretation and application of that definition to an irregularly shaped lot produces a lot width that is no stranger than the lot width that is produced by petitioner's interpretation and application of that definition, LUBA will defer to the city's interpretation. *McKeown v. City of Eugene*, 46 Or LUBA 494 (2004).

33.1 Land Divisions – Subdivisions. Proposed creation of 39 condominium units does not constitute a "subdivision" under a code definition that implements the Oregon Subdivision and Series Partition Control Law at ORS 92.305 to 92.495, which in relevant part defines "subdivision" to exclude property interests created pursuant to the Oregon Condominium statute. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004).

33.1 Land Divisions – Subdivisions. Where there is conflicting believable expert testimony regarding the efficacy of a subdivision applicant's proposed measures to ensure that construction of a road near large trees with intertwined roots can be accomplished without so damaging the roots that the trees will die, LUBA will defer to the city's choice of which expert to believe. *Miller v. City of Tigard*, 46 Or LUBA 536 (2004).

33.1 Land Divisions – Subdivisions. A city does not err in approving a subdivision applicant's tree protection plan with a condition that the applicant provide the city arborist with construction documents so that the arborist can determine whether additional trees must be removed. While that condition could be viewed as an improper deferral of a finding concerning the adequacy of the tree protection plan, it does not do so where the condition does not specify that the tree protection plan may be revised without additional public hearings and the condition simply creates a more structured approach for computing the mitigation that would be required in any event without the condition. *Miller v. City of Tigard*, 46 Or LUBA 536 (2004).

33.1 Land Divisions – Subdivisions. There is no inconsistency in a city council subdivision approval decision that (1) refuses to delay approval or require setbacks for a possible future freeway, (2) requires elimination of a proposed subdivision access to the existing roadway that might be displaced by the possible future freeway, and (3) eliminates a planning commission requirement for pedestrian access to the roadway that might be displaced by the possible future freeway where (a) the possible future freeway is not yet included in the city's comprehensive plan, (b) the decision to eliminate the proposed roadway connection is based on an Oregon Department of Transportation policy that would preclude approval of the roadway connection, and (c) a code provision excuses pedestrian connections where they are found to be "infeasible or inappropriate" and the city council adopts an unchallenged finding that the pedestrian connection is "not necessary." *Baida v. City of Medford*, 44 Or LUBA 473 (2003).

33.1 Land Divisions – Subdivisions. Although LUBA might be required to defer to a city interpretation of a subdivision criterion that requires that a proposed subdivision provide access to adjoining property as not applying where an adjoining property currently has access that it may lose in the future through condemnation, LUBA will not assume the criterion does not apply where the challenged decision does not adopt that interpretation. *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003).

33.1 Land Divisions – Subdivisions. Where a decision approving a subdivision that finds it is infeasible to extend a road from the proposed subdivision to an adjoining property and a petitioner at LUBA argues that the finding is not supported by substantial evidence, LUBA will remand where the respondent cites no evidence that supports the finding. *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003).

33.1 Land Divisions – Subdivisions. A city council decision approving a subdivision with modifications for required road access must be remanded where it is unclear which documents if any the city council adopted as part of its decision, and the city council decision includes no findings explaining the modification, or reducing the required road access to a condition of approval. petitioner's appeal is sufficient to allege prejudice to petitioner's substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

33.1 Land Divisions – Subdivisions. The record does not "clearly support" a finding that petitioner's property is undevelopable, relieving a subdivision applicant of the obligation to provide access to petitioner's property, where the record includes conflicting expert testimony on that point, and the city's decision can be read to agree with petitioner's evidence that his property is developable petitioner's appeal is sufficient to allege prejudice to petitioner's substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

33.1 Land Divisions – Subdivisions. Where no code, statute or condition of preliminary subdivision plat approval requires that the city resolve an issue regarding an alleged encroachment before granting final subdivision plat approval, the city's failure to resolve such issues do not provide a basis for reversal or remand. *Jordan v. City of Portland*, 44 Or LUBA 586 (2003).

33.1 Land Divisions – Subdivisions. An apparent discrepancy between the sidewalks depicted on the site plan submitted for design review approval and the sidewalk depicted on the approved final subdivision plat does not provide a basis for reversal or remand, where the design review decision did not address sidewalks or approve a particular sidewalk design. *Jordan v. City of Portland*, 44 Or LUBA 586 (2003).

33.1 Land Divisions – Subdivisions. A finding that a 1973 deed satisfied then existing subdivision regulations so as to legalize a parcel that was described in the 1973 deed is inadequate, where the finding does not address the terms of the subdivision ordinance nor explain why property described in a deed constitutes a "replat" or "resubdivision," as those terms are used in the subdivision ordinance. *Palaske v. Clackamas County*, 43 Or LUBA 202 (2002).

33.1 Land Divisions – Subdivisions. Under a standard requiring that a proposed subdivision not create a "significant hazard to life or property," a city may require evidence that development of property subject to flooding not present a significant flood hazard. That the subject is not mapped as a floodway on the city's hazard maps and therefore not subject to the city's flood hazard regulations does not mean that the city cannot address flood hazards under other applicable criteria. *Starks Landing, Inc. v. City of Rivergrove*, 43 Or LUBA 237 (2002).

33.1 Land Divisions – Subdivisions. A city has authority under ORS 92.040 and 92.180 to review and approve subdivision plats. Where a city requires an application for a subdivision replat to show revised easements and applies its land use regulations to approve the replat, the city's decision is a land use decision or limited land use decision subject to LUBA's review. *Haber v. City of Gates*, 39 Or LUBA 137 (2000).

33.1 Land Divisions – Subdivisions. LUBA owes no deference to a city's decision *requiring* replat of a previously approved subdivision to modify private easements where it is clear that the city's decision was based solely on the provisions of ORS chapter 92, notwithstanding that the city subsequently applied local code provisions to determine the relevant approval criteria for the replat and how those approval criteria should be applied. *Haber v. City of Gates*, 39 Or LUBA 137 (2000).

33.1 Land Divisions – Subdivisions. ORS 92.185 provides a specific requirement that *public* easements within a recorded plat must be reconfigured by replatting. However, the express reference in that statute to "public easements" and the absence of an express reference to "private easements" make it clear that reconfiguration of *private* easements within an existing subdivision plat does not require a replat under ORS 92.185. *Haber v. City of Gates*, 39 Or LUBA 137 (2000).

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

33.1 Land Divisions – Subdivisions. Petitioner fails to establish error in approving a subdivision without environmental review required for development in an environmental zone, where the

applicant proposes no development in an environmental zone and the only impact on an off-site environmental zone is the release of storm water at predevelopment rates. *Bauer v. City of Portland*, 38 Or LUBA 432 (2000).

33.1 Land Divisions – Subdivisions. Required findings that a variance is "necessary" due to "special conditions or circumstances peculiar to the property" are inadequate, where the findings are equivocal about whether the problems identified are present and fail to explain why the cited problems could not be eliminated by redesigning the proposed subdivision or by eliminating one or more lots. *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

33.1 Land Divisions – Subdivisions. A city's findings of compliance with a variance criterion that requires that the variance be "necessary for the proper development of the subdivision and the preservation of property rights and values," are inadequate where the findings do not identify any "property rights" or "property values" that would be threatened by the required 60-foot right-of-way or why the proposed subdivision could not be designed to accommodate the required 60-foot right-of-way. *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

33.1 Land Divisions – Subdivisions. LUBA will affirm a hearings officer's choice between conflicting expert testimony where a reasonable person could conclude, based on the testimony of applicant's expert, that a proposed intersection provides a sight distance exceeding that required by the code, notwithstanding the contrary testimony of opponents' engineer. *Mitchell v. Washington County*, 37 Or LUBA 452 (2000).

33.1 Land Divisions – Subdivisions. A decision approving a subdivision pursuant to county comprehensive plan and land use regulations is a land use decision under ORS 197.015(10)(a). That a subdivision approval decision is conditioned on construction of road access for the subdivision does not convert that decision or any part of the decision into the type of transportation facility decision that is excluded from the statutory definition of "land use decision" by ORS 197.015(10)(b)(D). *Warrick v. Josephine County*, 36 Or LUBA 81 (1999).

33.1 Land Divisions – Subdivisions. The property that is the "subject of the notice," within the meaning of ORS 197.763(2)(a), depends on the proposal being considered. Where an applicant for subdivision approval proposes construction of a right-of-way across a parcel that adjoins the parcel to be subdivided, the notice must be given to the properties within the distances specified by ORS 197.763(2)(a) from both the adjoining parcel and the subdivided parcel. *Warrick v. Josephine County*, 36 Or LUBA 81 (1999).

33.1 Land Divisions – Subdivisions. Where subdivision approval criteria do not require that the city determine whether a particular access route would be the "primary" access route, the city's failure to adopt such a finding and a lack of substantial evidence that the particular access route would be the primary access route provides no basis for reversal or remand. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

33.1 Land Divisions – Subdivisions. There is no applicable legal standard that requires a city to have a reasonable basis for refusing to impose a requested condition of approval that a subdivision

access road be blocked to all but emergency travel. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

33.1 Land Divisions – Subdivisions. A city does not err by failing to require that a subdivision access road be improved to particular city standards, where the applicable city criterion merely requires that the subdivision provide "paved" access. *Hunt v. City of Ashland,* 35 Or LUBA 467 (1999).

33.1 Land Divisions – Subdivisions. Where LUBA concludes on review that a local decision approving a proposed subdivision cannot be corrected unless the subdivision is first revised by modifying the original application or submitting a new application, reversal rather than remand is appropriate. *Angius v. Washington County*, 35 Or LUBA 462 (1999).

33.1 Land Divisions – Subdivisions. ORS 92.040(2) limits a city's authority to apply new land use regulations to construction of subdivisions approved after September 9, 1995. However, in considering an appeal of a city decision adopting new land use regulations, LUBA will not assume the city intends to apply those regulations in a way that is prohibited by ORS 92.040(2). *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

33.1 Land Divisions – Subdivisions. ORS 227.178(3) provides that the standards and criteria that are in effect when a subdivision application is submitted govern approval of the subdivision application, but ORS 227.178(3) does not limit a local government's authority to adopt construction or development standards that apply after the subdivision is approved. *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139 (1998).

33.1 Land Divisions – Subdivisions. A code provision that requires that final subdivision and PUD plans be submitted within three years after preliminary approval is granted does not require that the versions of the final subdivision and PUD plans that are ultimately approved be submitted before the three-year deadline. Provided the subdivision and PUD plans are submitted before the deadline, the plans may be modified after the deadline in response to city review or public input. *Rochlin v. City of Portland,* 34 Or LUBA 379 (1998).

33.1 Land Divisions – Subdivisions. Where a code requires that the final subdivision and PUD plans be in "substantial conformance" with the preliminary approval and the city interprets the "substantial conformance" requirement by analogizing to the distinction drawn in the code between "major" subdivision/PUD amendments, which must be approved quasi-judicially, and "minor" amendments, which may be approved administratively, the city's interpretation will be upheld. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

33.1 Land Divisions – Subdivisions. A city's denial of an application to *develop* a legally transferable lot has no bearing on the city's obligation to recognize that lot as legally transferable under ORS 92.017. *Eagle Point Development v. City of Shady Cove*, 33 Or LUBA 509 (1997).

33.1 Land Divisions – Subdivisions. That a parcel may be separately transferable under ORS 92.017 does not determine whether the parcel may be separately developed. *Eagle Point Development v. City of Shady Cove*, 33 Or LUBA 509 (1997).

33.1 Land Divisions – Subdivisions. In determining whether a previous local decision vacated lot lines, LUBA considers only what the record establishes the county did in that previous decision, not what the county should have done. *Koo v. Polk County*, 33 Or LUBA 487 (1997).

33.1 Land Divisions – Subdivisions. Where the city makes a determination that it is feasible to comply with a local code standard requiring that each lot in a proposed subdivision be buildable, it may defer addressing engineering details to a later date. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

33.1 Land Divisions – Subdivisions. Where a condition of approval requires that the developer shall provide a "turnaround" at the end of a platted street, and the existence of the turnaround will bring the street within the definition of a cul-de-sac under local code, the city's tentative plat approval must be remanded where it does not satisfy the applicable local criteria for a cul-de-sac. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

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

33.1 Land Divisions – Subdivisions. If a local government's comprehensive plan and land use regulations are acknowledged as being in compliance with the statewide planning goals, and the challenged decision approving a residential subdivision does not amend the local government's plan or land use regulations, the statewide planning goals to do not apply to the challenged decision. *McCrary v. City of Talent*, 29 Or LUBA 110 (1995).

33.1 Land Divisions – Subdivisions. A local governing body in considering an appeal of a planning commission decision approving a subdivision may not shift the burden of proof from the applicant to the opponents of the subdivision. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

33.1 Land Divisions – Subdivisions. A local governing body acts within its interpretive authority in construing a comprehensive plan provision employing nonmandatory language as not imposing a mandatory approval criterion for approval of a subdivision. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

33.1 Land Divisions – Subdivisions. A local governing body acts within its interpretive authority in construing a code provision stating local street design and construction cost provisions apply "unless otherwise approved in the tentative development plan," as allowing the local government to waive those local street standards when granting tentative subdivision plan approval. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

33.1 Land Divisions – Subdivisions. A hearings officer's interpretation of the local code is incorrect where the hearings officer determines a private easement that will be generally used by

members of the public and occupants of a proposed subdivision, is not an "area to be dedicated for new roads" to serve the proposed subdivision. *Ellison v. Clackamas County*, 28 Or LUBA 521 (1995).

33.1 Land Divisions – Subdivisions. Where the local code creates a process for the submittal and review of an applicant's "development impact statement" (DIS) as part of preliminary subdivision plat approval, the local governing body has considerable discretion in interpreting the role of the DIS process and must determine, in the first instance, whether the DIS content requirements are mere requests for information or impose substantive approval standards. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

33.1 Land Divisions – Subdivisions. If a city council decision approving a subdivision does not explain how the city interprets relevant comprehensive plan and code provisions to allow a 40-foot street right-of-way, the decision must be remanded for the city council to interpret the local provisions in the first instance. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

33.1 Land Divisions – Subdivisions. A local government does not exceed its authority under a code section authorizing it to control "the nature and scale of development" by prohibiting development of two lots, as configured in a proposed seven-lot subdivision. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

33.1 Land Divisions – Subdivisions. Even if a local code provision requiring that six percent of the gross area of a proposed subdivision be dedicated for open space is properly interpreted as a minimum rather than a maximum requirement, a decision requiring dedication of much more than six percent of the gross area of a proposed subdivision must be remanded so that the local government may adopt findings explaining that interpretation and showing the "rough proportionality" requirement of *Dolan v. City of Tigard* is satisfied. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

33.1 Land Divisions – Subdivisions. A decision approving a tentative subdivision plat for land within an urban growth boundary is a "limited land use decision." ORS 197.015(12)(a). *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

33.1 Land Divisions – Subdivisions. Where an application for subdivision tentative plan approval does not contain information on the location of driveways and easements required by the code, but petitioners fail to establish the missing information is relevant to any applicable approval standard, the error is harmless and does not provide a basis for reversal or remand. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

33.1 Land Divisions – Subdivisions. Code provisions which allow a local government to impose conditions of approval "reasonably calculated to fulfill public needs," and to require right-of-way dedication and road improvements, authorize the local government to require modification of a proposed subdivision plat to eliminate a one-foot "spite strip" separating a new street serving the subdivision from the adjoining property. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

33.1 Land Divisions – Subdivisions. The Statewide Planning Goals are not directly applicable to a local government decision that approves a subdivision without amending the local government's acknowledged comprehensive plan. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

33.1 Land Divisions – Subdivisions. Where a proposed subdivision will add traffic to an abutting arterial street, although direct access to the subdivision will be provided by local streets, a local government approval condition requiring that the developer construct sidewalks, storm sewers and other frontage improvements along the portion of the arterial abutting the subdivision is reasonably related to the impacts of the proposed subdivision and is not an unconstitutional taking. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

33.1 Land Divisions – Subdivisions. ORS 215.263 authorizes counties to approve *partitions* creating new parcels for farm uses and nonfarm uses in EFU zones. However, ORS 215.263 does not authorize *subdivision* of land zoned for exclusive farm use. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

33.1 Land Divisions – Subdivisions. Where one part of a comprehensive plan states it is implemented through legislative acts, but another part states that subdivisions must be in conformance with the plan and the code expressly states all subdivision decisions must be consistent with the plan, it is not contrary to the express words, purpose or policy of either the code or the plan for the city to apply certain plan housing policies to a subdivision application. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

33.1 Land Divisions – Subdivisions. A letter by a city planning director concerning the application of code provisions relevant to the validity of tentative plan approvals and approval of final plats, for certain subdivisions within an urban growth boundary, is a limited land use decision. *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

33.1 Land Divisions – Subdivisions. Where a city has created a two-stage (tentative plan and final plat) approval process for subdivision applications, under ORS 227.178(3), both subdivision tentative plan and final plat approvals must be based on the "standards and criteria" in effect when the subdivision application is initially filed. *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

33.1 Land Divisions – Subdivisions. Where petitioners contend certain information required by the local code "prior to the approval of subdivisions" must be in the record at the time of tentative plat approval, and the challenged tentative plat approval decision does not interpret the local code with regard to *at what stage* of the subdivision approval process the required information must be submitted to the county, LUBA must remand the decision for the local government to interpret its code in the first instance. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

33.1 Land Divisions – Subdivisions. Where a local government order granting subdivision preliminary plat approval defers a determination of compliance with a particular approval standard, and also allows final plat approval to occur in phases, the local government may interpret that

order as allowing it to grant final plat approval for a phase, so long as each lot in the phase for which final plat approval is sought has been found to comply with the deferred standard. *Perry v. Yamhill County*, 26 Or LUBA 73 (1993).

33.1 Land Divisions – Subdivisions. A local government may interpret a local subdivision approval standard requiring that each lot have "an adequate quantity and quality of water to support the proposed use of the land" as not requiring consideration of the impacts of providing water to the subdivision lots on the water supplies of adjacent properties. *Perry v. Yamhill County*, 26 Or LUBA 73 (1993).

33.1 Land Divisions – Subdivisions. Where the applicant submits a drainage plan for a proposed subdivision to a local government, and the local government relies on that drainage plan in determining compliance with a local drainage standard in its order granting subdivision approval, the drainage plan is effectively made part of the approved subdivision plat. In these circumstances, it is not necessary for the local government to adopt a separate condition of approval requiring compliance with the drainage plan. *Perry v. Yamhill County*, 26 Or LUBA 73 (1993).

33.1 Land Divisions – Subdivisions. A variance criterion requiring that there be no reasonably practical alternatives to granting the variance is met where the local government finds the subdivision roadway necessitating the variance is needed for compliance with the comprehensive plan, and petitioners do not challenge that finding. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

33.1 Land Divisions – Subdivisions. Although Goal 11 requires that local governments include schools in comprehensive plan provisions for public facilities and services, there is no legal requirement that subdivision approval decisions include a determination that schools are adequate, unless the acknowledged comprehensive plan or land use regulations impose such a requirement. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

33.1 Land Divisions – Subdivisions. A comprehensive plan policy requiring cooperative efforts among neighboring jurisdictions concerning public facilities and services, with no mention of schools, does not provide a basis for reversing or remanding a decision approving a subdivision despite allegedly inadequate schools. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

33.1 Land Divisions – Subdivisions. An erroneous finding that the local government cannot impose a condition of subdivision approval requiring measures to mitigate off-site traffic impacts, provides no basis for reversal or remand, where the local government adopts superseding findings explaining why it believes such measures are not warranted and the local government's authority to require such measures is permissive rather than mandatory. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

33.1 Land Divisions – Subdivisions. Where a challenged decision grants subdivision approval, petitioner's challenge to a finding that the property is located in two residential zones provides no basis for reversal or remand, where petitioner makes no attempt to explain why the zoning of the

property is critical to the decision and both zones impose the same minimum lot area. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

33.1 Land Divisions – Subdivisions. Where a challenged decision simply expresses a conclusion that the county court has discretion to act on a subdivision application without that application having first been acted on by the county planning commission, but does not identify the source of that discretion or interpret apparently relevant code provisions, the basis for the challenged decision is not sufficiently articulated for review, and the challenged decision must be remanded. *Larson v. Wallowa County*, 25 Or LUBA 537 (1993).

33.1 Land Divisions – Subdivisions. That an existing garage violates lot line setback requirements provides no basis for denial of a requested subdivision of the adjoining property to be served by a private roadway running along the lot line in front of the existing garage. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

33.1 Land Divisions – Subdivisions. Arguments that a proposed subdivision roadway alignment violates a Fire Bureau policy provides no basis for reversal or remand of the subdivision approval decision, where the Fire Bureau policy is not a mandatory subdivision approval standard. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

33.1 Land Divisions – Subdivisions. A comprehensive plan policy directed at how a city expends funds for public facilities and services is not an approval standard applicable to approval of individual subdivision requests. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

33.1 Land Divisions – Subdivisions. In the absence of a code provision to the contrary, a local government is not required to allow modifications to a subdivision application to enable its approval. *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

33.1 Land Divisions – Subdivisions. Where local subdivision approval standards adopted pursuant to ORS 92.044(1) specifically provide that a subdivision application may be approved with modifications, the local government may accept a modified application for subdivision approval following submittal of the initial application without requiring that the entire approval process be repeated. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

33.1 Land Divisions – Subdivisions. Although ORS 92.010 to 92.190 do not specifically envision a subdivision approval process that combines approval of a subdivision and a lot line adjustment, neither do those statutes prohibit such a process. Absent such a prohibition, a local government commits no error in following such a combined process. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

33.1 Land Divisions – Subdivisions. Where a local government's subdivision approval standards limit the length of cul-de-sac streets, as measured from through-traffic streets, and it is reasonable to interpret the limitation as being measured from either existing through-traffic streets or both existing and proposed through-traffic streets, LUBA will defer to the local government's selection of the latter interpretation. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

33.1 Land Divisions – Subdivisions. A school district letter rating schools as adequate to serve a proposed subdivision is adequate to demonstrate compliance with a code requirement for documentation of school facility adequacy, notwithstanding a subsequent letter from the school district raising questions about the earlier rating, where the executive director of school district facilities expressly reaffirms the earlier rating of the schools as adequate. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

33.1 Land Divisions – Subdivisions. A local government interpretation of a local code provision that prohibits direct access to major collectors by commercial, industrial and institutional uses with more than 150 feet of frontage as not applying to proposed residential subdivisions with more than 150 feet of frontage is reasonable. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

33.1 Land Divisions – Subdivisions. The text of ORS 92.017, and its legislative history, make it clear that the functions of ORS 92.017 are (1) to prevent local governments from refusing to recognize lawful divisions of land such that lots and parcels could not be sold to third parties, and (2) to establish that the property lines established by such land divisions remain inviolate, absent the employment of a specific process to eliminate such property lines. *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992).

33.1 Land Divisions – Subdivisions. Nothing in either the text of ORS 92.017 or its legislative history suggests that all lawfully created lots and parcels must be recognized by local government as being separately developable. *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992).

33.1 Land Divisions – Subdivisions. Where a local government determines that lots of less than one acre are not permissible under the density provisions of the applicable zoning district, it is error for it to approve a subdivision preliminary plat that includes lots smaller than one acre. *Larson v. Wallowa County*, 23 Or LUBA 527 (1992).

33.1 Land Divisions – Subdivisions. A local code requirement for findings of preliminary PUD or subdivision plan feasibility does not require the kind of certainty or supporting evidence that may ultimately be required for approval of final construction plans. *Bartels v. City of Portland*, 23 Or LUBA 182 (1992).

33.1 Land Divisions – Subdivisions. Where a subdivision ordinance provision limiting the length of blocks states that exceptions to the limitation may be granted where justified by topography or location of adjoining streets, a variance need not be granted to allow a block in excess of the length specified in the subdivision ordinance. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

33.1 Land Divisions – Subdivisions. Although a local government may not be oblivious to costs in satisfying its obligation to find that required subdivision improvements are feasible, it is not required to conduct an economic feasibility analysis. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

33.1 Land Divisions – Subdivisions. Nothing in ORS 92.044, 92.205, or 92.285 prevents a local government from imposing zoning restrictions on the uses that may occur within previously platted subdivisions. *Alexiou v. Curry County*, 22 Or LUBA 639 (1992).

33.1 Land Divisions – Subdivisions. A comprehensive plan standard establishing a minimum building site requirement of one acre is not inconsistent with plan and code requirements that subdivision lots in a zoning district allowing development at a density of one unit per five acres be clustered to provide not less than 30 percent common open space. Such a plan standard simply sets a minimum area requirement for each clustered lot. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

33.1 Land Divisions – Subdivisions. A code provision that developers "may be required to participate financially in improving [off-site] roadways sufficient to accommodate traffic generated by the development" applies to both improvement of existing off-site roads and construction of new off-site roads, and is directly applicable to the local government's imposition of a condition of preliminary subdivision plat approval requiring the subdivider to pay for construction of an off-site road. *J.C. Reeves Corp. v. Clackamas County*, 22 Or LUBA 360 (1991).

33.1 Land Divisions – Subdivisions. Where a local code requires a determination of compliance with applicable ordinance requirements at the time of subdivision outline plan approval and that the final plat be approved if it is "in substantial conformance with the outline plan," a petitioner may not fail to appeal the decision granting outline plan approval and thereafter, in an appeal of the final plan approval, challenge the subdivision's compliance with plan and code provisions found to be satisfied at the time of outline plan approval. *Sandler v. City of Ashland*, 21 Or LUBA 483 (1991).

33.1 Land Divisions – Subdivisions. Where a condition of subdivision outline plan approval requiring that driveway slopes not exceed 15 percent does not specify when the condition must be met, and the local code requires approval of the final plat if it is "in substantial conformance with the outline plan," the local government need not find the condition is or can be met at the time of final plat approval. *Sandler v. City of Ashland*, 21 Or LUBA 483 (1991).

33.1 Land Divisions – Subdivisions. Where a local code standard provides blocks may not exceed 1,000 feet unless topography or location of adjoining streets justifies an exception, and an issue is raised during the local proceedings concerning a proposed block in excess of 1,000 feet, the local government must adopt findings explaining why a block in excess of 1,000 feet is justified. *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

33.1 Land Divisions – Subdivisions. The evidence submitted in support of a request for tentative subdivision plan approval must be adequate to permit the local government to find (1) the applicable standards are met, or (2) it is feasible to meet such standards. Where the latter approach is appropriate, final technical solutions to development of the subdivision may be arrived at later without additional public hearings. *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

33.1 Land Divisions – Subdivisions. Where a local government's findings concede that a tentative plan does not comply with applicable lot-grading standards, the local government may not defer further consideration of the lot-grading standards to the final plat approval stage. The local government must either require that the tentative plan be revised to comply with the lot-grading standards or adopt findings explaining why the standards may be exceeded under local code provisions allowing such deviations. *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

33.1 Land Divisions – Subdivisions. Although a local government need not, under applicable code provisions, require a complete hydrologic analysis and storm drainage plan before granting tentative subdivision plan approval, it must adopt findings supported by substantial evidence that the general storm drainage plan proposed is feasible before granting approval. *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

33.1 Land Divisions – Subdivisions. Where governing land use standards are not amended or modified, the circuit court, not LUBA, has jurisdiction to determine whether an urban subdivision or partition decision violates applicable approval standards. *Sully v. City of Ashland*, 20 Or LUBA 428 (1991).

33.1 Land Divisions – Subdivisions. A local government commits harmless error by mischaracterizing and reviewing a "major partition" as though it were a "subdivision," as those terms are defined in the city's code, where petitioner fails to identify any approval criteria which impose different standards on major partitions and subdivisions. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

33.1 Land Divisions – Subdivisions. A city may rely on ORS 92.090(3), which states that a subdivision or partition may not be approved unless streets are "dedicated without any reservation," to require immediate, rather than future, dedication of required rights-of-way. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

33.1 Land Divisions – Subdivisions. To demonstrate county denial of lot of record status exceeds the authority granted under ORS 92.017, petitioner must establish an alleged lot or parcel was lawfully created and, therefore, is within the scope of ORS 92.017. *Atkins v. Deschutes County*, 19 Or LUBA 84 (1990).

33.1 Land Divisions – Subdivisions. Under ORS 92.100(1), a board of county commissioners' role in signing a final subdivision plat prior to recording is simply to determine that the plat is in proper form for recording and, therefore, county approval of a final subdivision plat pursuant to ORS 92.100(1) is not a statutory test land use decision. *Elliott v. Lane County*, 18 Or LUBA 871 (1990).

33.1 Land Divisions – Subdivisions. No purpose would be served by recognizing county approval of a final plat for a subdivision within city limits for recording as a "significant impact" test land use decision, when the same impacts are inherent in one or more city approvals which are statutory land use decisions. *Elliott v. Lane County*, 18 Or LUBA 871 (1990).

33.2 Land Divisions – Partitions. Under ORS 215.780(2)(e)(A), in determining whether to approve the creation of a forest-zoned parcel that is less than the 80-acre minimum parcel size, the county may consider only the parcel that is the subject of the partition application, not a tax lot or other property that the subject parcel was adjacent to but not part of on November 4, 1993. *Landwatch Lane County v. Lane County*, 80 Or LUBA 19 (2019).

33.2 Land Divisions – Partitions. Arguments that a city decision approving a partition affects "livability of [an] existing house" and that the city ignored "impact on the neighborhood" provide no basis for reversal or remand where none of the criteria applicable to land divisions require the city to consider "privacy or livability" in determining whether to approve the land division. *Bohan v. City of Portland*, 80 Or LUBA 263 (2019).

33.2 Land Divisions – Partitions. An unlawful division of land creates two unlawful units of land rather than an unlawful unit of land and a lawful remainder. *Landwatch Lane County v. Lane County*, 80 Or LUBA 415 (2019).

33.2 Land Divisions – Partitions. Where separate applications to partition two parcels under a single ownership into three parcels each receive final approval in the same calendar year, the resultant units of land are not "lawfully created" where state statute requires that divisions of "an area or tract of land into four or more lots within a calendar year when such area or tract of land exists as a unit or contiguous units of land under a single ownership" receive subdivision approval. *Landwatch Lane County v. Lane County*, 79 Or LUBA 65 (2019).

33.2 Land Divisions – Partitions. When a lot is an unplatted remainder of a subdivision and is not depicted at all on the approved subdivision plat, its current configuration may have resulted from the subdivision but that does not indicate that the county approved the creation of the lot by applying subdivision approval standards. On remand, the hearings officer needs to determine if the lot was approved by applying subdivision standards. *Landwatch Lane County v. Lane County*, 78 Or LUBA 164 (2018).

33.2 Land Divisions – Partitions. ORS 92.190(3) embodies a requirement that, where local governments choose to provide an alternative procedure for property line adjustments other than using replat procedures, that alternative procedure must include local government approval of some kind. However, ORS 197.190(3) does not specify any particular procedures or form of approval, and does not necessarily require that final approval be obtained prior to recordation of the adjustment deeds. Given the absence of more specific statutory requirements a county does not err in verifying property as a legal lot, notwithstanding that the property lines were adopted in 2007 without prior county approval, where following recordation of the deeds, the county preliminarily verified the adjustments as lawful and issued a final approval in 2017 when the property owner applied for, and the county approved, a development permit. This process, although partially post-hoc, is consistent with ORS 92.190(3). *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

33.2 Land Divisions – Partitions. Oregon Laws 2008, chapter 12, legislatively overruled the holding in *Phillips v. Polk County*, 53 Or LUBA 194, *aff'd*, 213 Or App 498, 162 P3d 338 (2007), which provided that it was unlawful to adjust property boundaries in a way that results in parcels

that fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, authorizes property line adjustments of substandard size lots and parcels, even if the resulting lots or parcels continue to fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, section 6 made that legislation retroactive to "property line adjustments approved before, on or after the effective date of this 2008 Act." Therefore, Oregon Laws 2008, chapter 12 applies to a property line adjustment that took place in 2007, because the property line adjustment was "approved * * * before, on or after" the effective date of the 2008 Act. *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

33.2 Land Divisions – Partitions. LUBA will affirm a finding that a 1985 quitclaim deed of a portion of a river meander channel from the state to an adjoining property owner represented a property line adjustment, rather than the unlawful creation of a new discrete parcel, where the petitioner identifies no statutory or local authority compelling the conclusion that the 1985 deed had the legal effect of creating a new parcel. *Landwatch Lane County v. Lane County*, 75 Or LUBA 473 (2017).

33.2 Land Divisions – Partitions. LUBA will affirm a governing body's interpretation of its lot of record provisions, to the effect that "partitioning" (one of the ways in which a parcel can be created to qualify as a lot of record) includes units of land created as undescribed remainders of a parent parcel divided by deed, at a time when county approval was not required to create a parcel by deed, where that interpretation is plausible and not inconsistent with the text and context of the lot of record provision. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 328 (2017).

33.2 Land Divisions – Partitions. A county does not err in examining the deed that originally created the subject parcel, or the deeds in the chain of title that conveyed and shaped the parcel between its creation and its current configuration, in determining whether the parcel is a "lot of record," defined under county code to include parcels created by deed prior to county partition laws, notwithstanding that circuit courts generally have the final say in the interpretation of ambiguous deeds or determining the grantor's intent. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 328 (2017).

33.2 Land Divisions – Partitions. Where a hearings officer approved a partition subject to a condition of approval requiring the developer to record, prior to the sale of any parcels, an agreement to maintain a common tract, but the condition does not identify the necessary parties to the agreement, a county does not err in interpreting the condition to be satisfied by allowing the county to enter into separate agreements with the owners of the common tract to ensure maintenance of the tract. *Kuhn v. Deschutes County*, 74 Or LUBA 190 (2016).

33.2 Land Divisions – Partitions. Where a local code provision provides that minimum lot width may be reduced if "[o]n balance, the proposed lots will have dimensions that are consistent with the purpose of this section," it is remandable error where the local code provides for nine purposes to be considered, but the decision maker considers only some of the nine purposes, and concludes without explanation, that "on balance, the applicant has not demonstrated that the proposal is consistent with the purpose of the lot dimension regulations." In this context, such findings are inadequate because an "on balance" determination requires the city to adopt findings explaining

how it balances the different purposes. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

33.2 Land Divisions – Partitions. Where a local code provision requires a determination that "[o]n balance, the proposed lots will have dimensions that are consistent with the purpose of this section," and the section provides for nine purposes to be considered, a city may be able to assign greater or lesser significance to a particular purpose based on direction from the city's code, comprehensive plan or other land use document. But a city errs to the extent that it interprets the "on balance" determination to allow denial based solely on a finding of inconsistency with one or two of the nine purposes, without considering consistency with all of the purposes. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

33.2 Land Divisions – Partitions. Where a local code provision regulating minimum lot size requires a determination of whether a proposal is consistent with purposes of the code section, and an applicable code section is intended to ensure that "[e]ach lot has enough room for a reasonably-sized attached or detached house[,]" a finding that the applicants have not demonstrated that "each parcel has enough room for a reasonably sized detached house[,]" is conclusory, because it fails to explain what constitutes a "reasonably-sized" house. *Sage Equities, LLC v. City of Portland*, 72 Or LUBA 163 (2015).

33.2 Land Divisions – Partitions. A county decision that approves an application to partition a 41-acre parcel located within a deer winter range overlay zone into two approximately 20-acre parcel, where the minimum parcel size for properties located in the deer winter range overlay zone is 80 acres, is "prohibited as a matter of law" under OAR 661-010-0071(1)(c). *ODFW v. Klamath County*, 66 Or LUBA 92 (2012).

33.2 Land Divisions – Partitions. A hearings officer errs in determining that a local code provision that requires that each parcel created by a partition is "suitable for the use intended considering access" is satisfied by a demonstration of satisfaction with a separate code provision that requires each parcel to have "legal access" to a public road, where the two criteria pose different questions. *Central Oregon Landwatch v. Deschutes County*, 63 Or LUBA 288 (2011).

33.2 Land Divisions – Partitions. A partition or replat that has the effect of eliminating pre-existing property lines is a "specific process" for "vacating" property lines for both parcels and lots, for purposes of ORS 92.017. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.2 Land Divisions – Partitions. Even if it is legally possible to intentionally create a discrete parcel that consists entirely of nested, discrete lots or parcels without vacating those nested lots or parcels, LUBA will affirm a local government finding that a partition plat that creates a new parcel without depicting any nested lot lines has the effect of vacating the pre-existing lots, where there is nothing on the partition plat, description, or narrative that suggests an intent to preserve the pre-existing lots. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.2 Land Divisions – Partitions. An approved partition plat creating new parcels need not bisect the property lines of pre-existing lots to "vacate" those lots for purposes of ORS 92.017. Even if the boundaries of the new parcels follow the property lines of some pre-existing lots, the partition plat can have the effect of vacating or consolidating the pre-existing lots included within the newly established parcels. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.2 Land Divisions – Partitions. A joint application for a conditional use permit by owners of illegally divided parcels cannot rectify an illegal partition under a local code provision that prohibits the approval of permits unless "the violation can be rectified as part of the proposed development," at least where the local government does not purport to validate unlawfully created parcels, pursuant to ORS 92.176. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

33.2 Land Divisions – Partitions. Where a maximum setback shown on a preliminary plat was not required by law but rather was voluntarily agreed to by the property owner as an accommodation to the Oregon Department of Fish and Wildlife prior to its and the county's adoption of a setback requirement to protect wildlife habitat, and there is no evidence that the setback was to be measured in any particular way from the county road, a county need not require that the setback be measured in precisely the way shown on the plat. In that circumstance, the county may look at the underlying purpose for the setback and not require that the setback be measured solely from a short segment of the partitioned property's county road frontage. *Kuhn v. Deschutes County*, 62 Or LUBA 165 (2010).

33.2 Land Divisions – Partitions. Where a road improvement condition is imposed on a two-phase subdivision and the county subsequently approves phase I without the required road improvement and approves a partition in place of phase II without requiring compliance with the road improvement condition, the road improvement condition may not be extended to apply to a partition of one of the parcels in the partition that was approved in place of phase II of the subdivision. *MEK Properties, LLC v. Coos County*, 61 Or LUBA 360 (2010).

33.2 Land Divisions – Partitions. A county's concerns that the roads that will be needed to provide access to the parcels that will be created by a series of partitions are not sufficient to authorize the county to condition final partition plat approval on the applicant agreeing to construct those roads and provide financial guarantees to construct those road, where the county code distinguishes between partitioners and subdividers and requires that subdividers construct or guarantee construction of roads prior to final plat approval. *Sperber v. Coos County*, 60 Or LUBA 44 (2009).

33.2 Land Divisions – Partitions. Where a county approves an application for partition approval but imposes conditions of approval and LUBA determines that the county lacks authority to impose the conditions of approval, remand is appropriate so that the county can reapprove the partition without the disputed conditions of approval. *Sperber v. Coos County*, 60 Or LUBA 44 (2009).

33.2 Land Divisions – Partitions. Absent a compelling reason to do so, LUBA will not overrule its holding in *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992), that the ORS 92.017

prohibition on consolidating discrete lots and parcels does not prohibit a local government from adopting regulations that limit development of contiguous, substandard-size lots and parcels and effectively consolidate them for development purposes. *Thomas v. Wasco County*, 58 Or LUBA 452 (2009).

33.2 Land Divisions – Partitions. Where a city denies a partition application based on a code provision that was not listed as an approval standard in the notice of hearing and not discussed until late in the hearing, the petitioner's failure to raise issues below regarding application of that code provision does not preclude petitioner from challenging denial under that code provision before LUBA. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

33.2 Land Divisions – Partitions. A code provision stating that when it appears that the area of a proposed partition is to be ultimately divided into four or more lots or parcels the code provisions pertaining to subdivisions apply simply authorizes the city to apply subdivision procedures and standards to a partition application, and does not itself constitute "standard" or "criteria" under which the city could deny the partition application. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

33.2 Land Divisions – Partitions. Where a city discovers late in a proceeding on a partition application that its code may require application of certain subdivision approval standards, the city should identify any applicable subdivision standards and give the applicant the opportunity to demonstrate compliance with them, even if that would require the city to make its decision after the statutory deadline for taking final action on the application has passed. However, it is inconsistent with ORS 227.178(3) for the city to summarily deny the partition and effectively force the applicant to submit a new application, where that denial is not based on any applicable standard or criteria. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

33.2 Land Divisions – Partitions. Reversal is not warranted under ORS 197.835(10)(a)(A) where a city denies a partition application three weeks prior to expiration of the 120-day deadline based on the city's belief that the proposed partition must be processed as a subdivision, where the city mistakenly believed that its only option was to deny the application and effectively require the applicant to submit a new application, but there is no indication in the record that the city denied the application to avoid the 120-day rule. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

33.2 Land Divisions – Partitions. Reversal is warranted under ORS 197.835(10)(a)(B) where a city denies a partition application based on a code provision that is not an approval standard and that does not authorize denial of the application, and where no other code provision cited by the city provides a basis for denial. Denial under such circumstances is "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

33.2 Land Divisions – Partitions. Under ORS 215.010(1), when the word "parcel" is used in ORS chapter 215, the parcel must be a lawfully created parcel, in the sense that the parcel's date of creation either predated any applicable laws governing partitions or the parcel was created in compliance with those laws. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.2 Land Divisions – Partitions. When the definitions of the relevant terms set out in ORS chapter 92 are read together, whether a division of land creates "parcels" or "lots" depends the number units of land that one or more divisions of land in a single year produce. If the division or divisions produce four or more units of land, they are lots; if they produce three of fewer, they are parcels. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.2 Land Divisions – Partitions. Applying the contextual analysis that is required by *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), *adh'd to as modified on recons*, 179 Or App 409, 40 P3d 532 (2002), even though ORS 215.750(1) does not expressly state that the references in that statute to "lots" are limited to lawfully created lots, and even though the relevant definitions in ORS 92.010 do not expressly require that a lot must be a lawfully created lot, if those statutes are read in context with ORS 92.012, 92.018(1), 92.025(1) and ORS 215.010(1)(a), it is sufficiently clear that when the legislature used the term "lot" in ORS 215.750(1) it did not mean to include unlawfully created lots. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.2 Land Divisions – Partitions. County authority to approve forest template dwellings derives from ORS 215.750(1). In exercising the authority granted by ORS 215.750(1), a county may not apply a county definition of "lot" to recognize lots that could not be recognized under ORS 215.750(1). The county may not set a lower standard for approving forest template dwellings under county legislation than the standard that is set by ORS 215.750. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.2 Land Divisions – Partitions. Even if a local government could recognize partial parcel annexations as sufficient to legally divide a parcel, where a local lot of record code definition does not recognize partial parcel annexation as sufficient to legally divide the annexed portion of a parcel from the portion of a parcel that is not annexed, the annexation does not have the effect of dividing the parcel. *Masson v. Multnomah County*, 48 Or LUBA 100 (2004).

33.2 Land Divisions – Partitions. The County Assessor's assignment of a new tax lot number to the part of a 5.45-acre parcel that was annexed, while retaining the prior tax lot number for the part of the 5.45-parcel that was not annexed, is not sufficient to divide the 5.45-acre parcel into two different parcels. *Masson v. Multnomah County*, 48 Or LUBA 100 (2004).

33.2 Land Divisions – Partitions. Where 3.63 acres of a 5.45-acre parcel are located outside a city and are conveyed improperly by deed to a new owner, the original owner's subsequent recording of a final plat for the 1.82 acres inside the city, which were retained by the original owner, does not have the effect of legally creating a 3.63-acre parcel. *Masson v. Multnomah County*, 48 Or LUBA 100 (2004).

33.2 Land Divisions – Partitions. Absent some demonstration that recording a partition plat with the county clerk requires the application of statewide planning goals, comprehensive plan policies or implementing regulations, a county clerk's act of recording a signed partition plat is not a land use decision or a limited land use decision. *Hammer v. Clackamas County*, 45 Or LUBA 32 (2003).

33.2 Land Divisions – Partitions. A city's application of general land division standards to a proposed minor partition provides no basis for reversal or remand, where it is clear from the

context of the provision that applications for minor partitions must satisfy more than just those requirements that apply to minor partitions alone. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

33.2 Land Divisions – Partitions. An earlier city decision that permitted access from a two-acre parcel via a 20-foot wide easement does not bar the city from requiring a 50-foot wide easement for two parcels subsequently created from that two-acre parcel. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

33.2 Land Divisions – Partitions. A city approval of a partition that creates three parcels does not constitute a "contract" that is breached when the city requires that additional access be provided for parcels created from one of those three parcels. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

33.2 Land Divisions – Partitions. A local ordinance that requires an applicant for a partition to improve the entire 3,500-foot length of a private road providing access to the property, including widening existing easements across private property and improving the road to full county road standards, is a possessory exaction requiring off-site improvements and is therefore subject to the "rough proportionality" requirement of *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *Dudek v. Umatilla County*, 42 Or LUBA 427 (2002).

33.2 Land Divisions – Partitions. A city's failure to respond to issues raised below regarding whether the "street frontage" of a flag lot is the same as its "front building line" provides no basis for remand, where it is clear under the city's land division ordinance that "street frontage" and "front building line" are not the same. *Webb v. City of Bandon*, 39 Or LUBA 584 (2001).

33.2 Land Divisions – Partitions. An ambiguous assertion that a driveway providing access to a proposed flag lot does not qualify as a street is insufficient to raise an issue that the proposed minor partition creates a street and therefore must be approved as a major partition and comply with the criteria applicable to major partitions. *Webb v. City of Bandon*, 39 Or LUBA 584 (2001).

33.2 Land Divisions – Partitions. Only those impacts that reasonably flow from the approval granted may be considered when imposing exactions to ameliorate those impacts. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

33.2 Land Divisions – Partitions. During its review of a proposed partition, a city may consider the impact that future dwellings may have on public infrastructure, where the partition approval is the last land use decision necessary to establish dwellings on the resulting parcels. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

33.2 Land Divisions – Partitions. An ordinance allowing a county to revoke otherwise final and unreviewable partition approvals is a "retroactive ordinance" within the meaning of ORS 92.285. *Church v. Grant County*, 37 Or LUBA 646 (2000).

33.2 Land Divisions – Partitions. Before 1973, ORS 92.014 subjected the creation of streets or ways to county approval only when the street or way was created for the purpose of partitioning

land. Creation of a 60-foot-wide parcel to provide access across a parent parcel to a separate, pre-existing parcel in different ownership is not "for the purpose of partitioning land" and thus did not require county approval under ORS 92.014. *Tarjoto v. Lane County*, 36 Or LUBA 645 (1999).

33.2 Land Divisions – Partitions. Where a county approves an application that creates a new parcel, that approval is a partition as defined by ORS 92.010 notwithstanding that the county also approved a lot line adjustment involving the parent parcel in the same proceeding. *Hartmann v. Washington County*, 36 Or LUBA 442 (1999).

33.2 Land Divisions – Partitions. The legal effect of a "partition," as defined at ORS 92.010, is to create new parcels as of the date the partition plat is approved. The parcels resulting from a partition are thus "created" as of the date the plat is approved, for purposes of the nonfarm dwelling provisions of OAR 660-033-0130 and ORS 215.284. *Hartmann v. Washington County*, 36 Or LUBA 442 (1999).

33.2 Land Divisions – Partitions. The definition of "Date of Creation" at OAR 660-033-0020(4) expands the circumstances in which parcels are "created" for purposes of siting a nonfarm dwelling to include lot line adjustments or similar reconfigurations that have the effect of qualifying the parcel for a dwelling. The definition does not impliedly narrow the set of circumstances that create a parcel to include only those events that have the effect of qualifying a parcel for a dwelling. *Hartmann v. Washington County*, 36 Or LUBA 442 (1999).

33.2 Land Divisions – Partitions. A partition, as defined by ORS 92.010, is not a "reconfiguration" of the boundaries of a parcel within the meaning of OAR 660-033-0020(4) because the legal effect of partition is to create new parcels. *Hartmann v. Washington County*, 36 Or LUBA 442 (1999).

33.2 Land Divisions – Partitions. Where a local land division ordinance mandates that the size of proposed parcels be greater than or equal to the size of the typical commercial agricultural enterprise in the area, a local government misconstrues that ordinance by requiring only that the size of the proposed parcel be similar to the size of other parcels in the area. *Wood v. Crook County*, 36 Or LUBA 143 (1999).

33.2 Land Divisions – Partitions. Where an existing parcel is divided into three new parcels with one of the new parcels containing an existing house, the new parcel containing the house is not properly considered an existing parcel simply because it contains the existing house. *Sunningdale-Case Heights Assoc. v. Washington Co.*, 34 Or LUBA 549 (1998).

33.2 Land Divisions – Partitions. A property line adjustment is limited to relocation of common property lines. Where a decision reconfigures property lines so that entire parcels are moved and property lines that are not common are moved, the decision does not approve a property line adjustment. *Goddard v. Jackson County*, 34 Or LUBA 402 (1998).

33.2 Land Divisions – Partitions. A decision that relocates property lines that are not common to abutting properties reconfigures the property in a manner that violates the definition of "property line adjustment" at ORS 92.010(11) and the statutory distinction between a property line

adjustment and replat, and such action is prohibited as a matter of law. *Goddard v. Jackson County*, 34 Or LUBA 402 (1998).

33.2 Land Divisions – Partitions. To establish implied acceptance of a road dedication: (1) the partition plat must include a dedication, and (2) parcels must have been sold with reference to the partition plat containing the dedication. Where petitioner fails to establish either the plat dedication or sales with reference to the partition plat dedication, there is no implied dedication. *Petersen v. Yamhill County*, 33 Or LUBA 584 (1997).

33.2 Land Divisions – Partitions. Where a hearings officer's interpretation that the county's street frontage requirement mandates street frontages be on a public road or street is contrary to the plain language of the county's zoning ordinance, a denial of a partition based solely on that interpretation will be reversed. *Miller v. Clackamas County*, 31 Or LUBA 104 (1996).

33.2 Land Divisions – Partitions. Where a county has never made a decision to partition a parcel, the county's approval of a lot line adjustment, which is premised on the assumption that a partition has occurred, must be reversed. *Higgins v. Marion County*, 30 Or LUBA 426 (1996).

33.2 Land Divisions – Partitions. Both the applicable county ordinance and ORS chapter 92 indicate reliance on plat recording as the event which establishes the finality and permanence of a land division. *Petree v. Marion County*, 29 Or LUBA 449 (1995).

33.2 Land Divisions – Partitions. Unless prohibited by a local ordinance, a property owner may apply for a second partition of land during the same calendar year as a first partition involving the same land is recorded. ORS chapter 92 is satisfied by a condition delaying tentative approval of the second partition to the following calendar year. *Petree v. Marion County*, 29 Or LUBA 449 (1995).

33.2 Land Divisions – Partitions. ORS 215.428(3), which states that approval or denial of an application shall be based upon the standards and criteria that were applicable at the time the application was first submitted, does not require a local government processing a partition application to proceed as if factual circumstances existing at the time of application remain unchanged. *Petree v. Marion County*, 29 Or LUBA 449 (1995).

33.2 Land Divisions – Partitions. If a local government approves a proposed partition with conditions requiring exactions, the local government must ensure that the requirement of *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 2319-20, 129 L Ed2d 304 (1994), for "individualized determination[s] that the required dedication is related both in nature and extent to the impact of the proposed development" is satisfied. *Neuman v. Benton County*, 29 Or LUBA 172 (1995).

33.2 Land Divisions – Partitions. Where the local code requires a local government to make a particular determination in acting on a partition application, the local government does not lack authority to make that determination. *Hilderbrand v. Marion County*, 28 Or LUBA 703 (1995).

33.2 Land Divisions – Partitions. Identifying the area to be considered and the overall land use pattern of that area are prerequisites to determining whether a proposed partition satisfies a code

requirement that it "not materially alter the stability of the land use pattern of the area." *McNamara v. Union County*, 28 Or LUBA 396 (1994).

33.2 Land Divisions – Partitions. A local government may not defer determinations of compliance with approval standards applicable to partition approval to the building permit approval stage. *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

33.2 Land Divisions – Partitions. Local government denial of proposed partitions because the ability of the school district to provide the level of school services required by certain plan policies has not been established does not constitute the imposition of a development moratorium prohibited by ORS 195.110(8). *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

33.2 Land Divisions – Partitions. Where an approval standard for partitioning timber zoned property into nonresource parcels requires that the subject property be "generally unsuitable land for the production of farm or forest products," and petitioner does not challenge a county determination that the subject property is generally suitable for *farm use*, that determination provides an independent basis for affirming the county's decision to deny the partition. *Newsome v. Clackamas County*, 27 Or LUBA 578 (1994).

33.2 Land Divisions – Partitions. ORS 215.263 authorizes counties to approve *partitions* creating new parcels for farm uses and nonfarm uses in EFU zones. However, ORS 215.263 does not authorize *subdivision* of land zoned for exclusive farm use. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

33.2 Land Divisions – Partitions. A condition of partition approval requiring consolidation of existing driveways into a single driveway to address comprehensive plan and local code policies concerning traffic safety is justified, even though the property is developed and new development is not proposed as part of the partition request, where the property could be developed more intensively in the future. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

33.2 Land Divisions – Partitions. A condition of partition approval requiring that three existing driveways presently serving property to be partitioned be consolidated into a single driveway does not "take" a cognizable property interest, within the meaning of the Fifth Amendment to the U.S. Constitution or Article I, section 18, of the Oregon Constitution. Such a condition simply requires that a property owner exercise the property right of access differently. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

33.2 Land Divisions – Partitions. Where there is a reasonable relationship between the development potential of a parcel to be divided and the impacts reasonably attributable to the divided parcel on the one hand, and the city's need to respond to legitimate traffic concerns on the other, and it would be more difficult to address such concerns when there are three parcels rather than a single parcel, notwithstanding the lack of current plans to develop the property further, a condition requiring consolidation of existing driveways is appropriate. *Kostenborder v. City of Salem*, 25 Or LUBA 440 (1993).

33.2 Land Divisions – Partitions. LUBA will not reverse or remand a local government decision refusing to issue a building permit for a structure to be placed on a parcel unlawfully divided, pursuant to a local code requirement that no building permit may be issued if the parcel of land on which a structure is to be placed or used is in violation of any local ordinance. *Woosley v. Marion County*, 24 Or LUBA 231 (1992).

33.2 Land Divisions – Partitions. Findings that a parcel is "an ideal size for a small roadside parcel" are inadequate to demonstrate compliance with a local code standard requiring that a parcel be no larger than necessary to accommodate the proposed use. *DLCD v. Curry County*, 24 Or LUBA 200 (1992).

33.2 Land Divisions – Partitions. A lot line adjustment is not a partition and cannot create additional units of land. ORS 92.015(7)(b). *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992).

33.2 Land Divisions – Partitions. The text of ORS 92.017, and its legislative history, make it clear that the functions of ORS 92.017 are (1) to prevent local governments from refusing to recognize lawful divisions of land such that lots and parcels could not be sold to third parties, and (2) to establish that the property lines established by such land divisions remain inviolate, absent the employment of a specific process to eliminate such property lines. *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992).

33.2 Land Divisions – Partitions. Nothing in either the text of ORS 92.017 or its legislative history suggests that all lawfully created lots and parcels must be recognized by local government as being separately developable. *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992).

33.2 Land Divisions – Partitions. Where county regulations establish different approval standards for major and minor partitions, a county's error in treating an application as being for a minor partition, rather than for a major partition, is not harmless. *Schrock Farms, Inc. v. Linn County*, 24 Or LUBA 58 (1992).

33.2 Land Divisions – Partitions. Where governing land use standards are not amended or modified, the circuit court, not LUBA, has jurisdiction to determine whether an urban subdivision or partition decision violates applicable approval standards. *Sully v. City of Ashland*, 20 Or LUBA 428 (1991).

33.2 Land Divisions – Partitions. While a decision to approve a zone change does not approve a "permit," within the meaning of ORS 227.160(2), a decision which approves both a variance and a minor partition does approve a "permit." *Harvard Medical Park, Ltd. v. City of Roseburg*, 19 Or LUBA 555 (1990).

33.2 Land Divisions – Partitions. A local government commits harmless error by mischaracterizing and reviewing a "major partition" as though it were a "subdivision," as those terms are defined in the city's code, where petitioner fails to identify any approval criteria which impose different standards on major partitions and subdivisions. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

33.2 Land Divisions – Partitions. A city may rely on ORS 92.090(3), which states that a subdivision or partition may not be approved unless streets are "dedicated without any reservation," to require immediate, rather than future, dedication of required rights of way. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

33.2 Land Divisions – Partitions. To demonstrate county denial of lot of record status exceeds the authority granted under ORS 92.017, petitioner must establish an alleged lot or parcel was lawfully created and, therefore, is within the scope of ORS 92.017. *Atkins v. Deschutes County*, 19 Or LUBA 84 (1990).

33.2 Land Divisions – Partitions. A county does not misapply its Lot of Record ordinance by failing to recognize units of land which (1) were not created under zoning regulations regulating partitions, (2) were not created pursuant to partition proceedings conducted under ORS Chapter 105, and (3) do not constitute a "partition" as that term is defined in ORS 92.010, as parcels created by partition. *Atkins v. Deschutes County*, 19 Or LUBA 84 (1990).

33.3 Land Divisions – Lot Line Adjustments. Remand is necessary where petitioners argue that a boundary line adjustment application is governed by a county ordinance addressing the "Sale or Transfer of Land to an Adjacent Owner * * *," under the section on nonconforming uses that apply to "Designated Resource Areas," where the subject parcels are designated for agricultural and forest uses and are zoned exclusive farm use – grazing (FG) and where respondents filed no response brief. Because there is no local interpretation of the applicability of the ordinance, LUBA will remand the decision for the county to interpret the ordinance in the first instance. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

33.3 Land Divisions – Lot Line Adjustments. Where the county found a boundary line adjustment application is in compliance with a county ordinance that requires that the "resulting parcel sizes do not change the existing land use" because before and after the boundary line adjustment there was one parcel conforming and one parcel non-conforming in size, LUBA will remand the decision. On remand, the county shall consider petitioners' argument and adopt any necessary findings regarding petitioners' argument that the ordinance could be interpreted to require the county to consider whether the "existing land use pattern" is changed when the subject parcel—that was previously deemed "generally unsuitable" for farm use due to its size and soil composition—qualifies for a nonfarm dwelling as a result of the boundary line adjustment because the parcel was expanded to include agricultural soils in a manner that possibly renders the resulting parcel suitable for farm use. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

33.3 Land Divisions – Lot Line Adjustments. Although the county's approval of the boundary line adjustment for the siting of a nonfarm dwelling could effectively undercut the factual predicate for compliance with a statutory-based standard pursuant to ORS 215.263(4) designed to minimize loss of productive resource lands in exclusive farm use zones to non-resource uses, where petitioner has not cited anything in the county ordinance that constitutes an approval standard for a post-partition boundary line adjustment, even if the adjustment undercuts a factual predicate for the partition approval, this argument provides no basis for reversal or remand. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

33.3 Land Divisions – Lot Line Adjustments. Approving a boundary line adjustment to a parcel under applicable standards does not "collaterally attack" a previous land partition decision that originally created the subject parcel under different standards, even assuming the adjusted parcel after the boundary line adjustment would not comply with the partition standards that were applied earlier when the parcel was created. *Friends of Douglas County v. Douglas County*, 78 Or LUBA 11 (2018).

33.3 Land Divisions – Lot Line Adjustments. When a lot is an unplatted remainder of a subdivision and is not depicted at all on the approved subdivision plat, its current configuration may have resulted from the subdivision but that does not indicate that the county approved the creation of the lot by applying subdivision approval standards. On remand, the hearings officer needs to determine if the lot was approved by applying subdivision standards. *Landwatch Lane County v. Lane County*, 78 Or LUBA 164 (2018).

33.3 Land Divisions – Lot Line Adjustments. ORS 92.190(3) embodies a requirement that, where local governments choose to provide an alternative procedure for property line adjustments other than using replat procedures, that alternative procedure must include local government approval of some kind. However, ORS 197.190(3) does not specify any particular procedures or form of approval, and does not necessarily require that final approval be obtained prior to recordation of the adjustment deeds. Given the absence of more specific statutory requirements a county does not err in verifying property as a legal lot, notwithstanding that the property lines were adopted in 2007 without prior county approval, where following recordation of the deeds, the county preliminarily verified the adjustments as lawful and issued a final approval in 2017 when the property owner applied for, and the county approved, a development permit. This process, although partially post-hoc, is consistent with ORS 92.190(3). *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

33.3 Land Divisions – Lot Line Adjustments. Oregon Laws 2008, chapter 12, legislatively overruled the holding in *Phillips v. Polk County*, 53 Or LUBA 194, *aff'd*, 213 Or App 498, 162 P3d 338 (2007), which provided that it was unlawful to adjust property boundaries in a way that results in parcels that fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, authorizes property line adjustments of substandard size lots and parcels, even if the resulting lots or parcels continue to fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, section 6 made that legislation retroactive to "property line adjustments approved before, on or after the effective date of this 2008 Act." Therefore, Oregon Laws 2008, chapter 12 applies to a property line adjustment that took place in 2007, because the property line adjustment was "approved * * * before, on or after" the effective date of the 2008 Act. *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

33.3 Land Divisions – Lot Line Adjustments. LUBA may take official notice of a county legal lot verification decision involving the same property at issue in an appeal of a county decision approving property line adjustments, for the limited purpose of resolving a dispute regarding LUBA's scope of review over the county decision approving property line adjustments. *Sarett v. Lane County*, 76 Or LUBA 308 (2017).

33.3 Land Divisions – Lot Line Adjustments. An appeal of a 2014 decision approving seven property line adjustments is not a "collateral attack" on a subsequent and unappealed 2017 decision verifying four of the seven properties adjusted as lawfully created lots, where the 2017 decision did not purport to approve the configuration or boundaries adjusted in the 2014 decision, but simply determined that four of the parcels at issue were lawfully created. *Sarett v. Lane County*, 76 Or LUBA 308 (2017).

33.3 Land Divisions – Lot Line Adjustments. Deeds that transferred title for property that is the subject of some but not all of the property line adjustments that are the subject matter of the challenged decision, but that nevertheless post-date the decision, were not "placed before" the planner who approved the property line adjustments within the meaning of OAR 661-010-0025(1)(b), where the deeds were not actually provided to the planner prior to the decision. Simply because other deeds that also post-date the decision were included in the record, possibly erroneously, does not mean the remainder of the post-decision deeds must also be included in the record. *Sarett v. Lane County*, 76 Or LUBA 470 (2017).

33.3 Land Divisions – Lot Line Adjustments. Absent a motion to take evidence outside the record pursuant to OAR 660-010-0045, LUBA has no basis for considering diagrams that illustrate an entire series of property line adjustments that are the subject matter of the challenged decision, but that nevertheless contain hand-drawn lines, text, and other information which indicate at least some of the notations post-date the decision, and therefore the diagrams could not have been "placed before" the planner who approved the property line adjustments. *Sarett v. Lane County*, 76 Or LUBA 470 (2017).

33.3 Land Divisions – Lot Line Adjustments. Where petitioner offers some additional deeds and diagrams from a 2017 legal lot verification proceeding, in a challenge to a 2016 application for multiple property line adjustments, LUBA may not consider the additional post-decision deeds and diagrams where the parties agree that the 2016 application approved more than a single property line adjustment, and thus the deeds and diagrams do not offer anything material as to a "disputed factual allegation in the parties' briefs" pursuant to OAR 661-010-0045(1). *Sarett v. Lane County*, 76 Or LUBA 485 (2017).

33.3 Land Divisions – Lot Line Adjustments. After 2005 statutory amendments, ORS chapter 92 does not preclude approving multiple property line adjustments in a single decision, provided the adjusted property lines are common property lines between abutting, existing properties. *Bowerman v. Lane County*, 75 Or LUBA 86 (2017).

33.3 Land Divisions – Lot Line Adjustments. A property line adjustment decision may not approve multiple property line adjustments, where the latter property line adjustments adjust property lines between parcels that were the subject of one of the earlier property line adjustments. To approve a property line adjustment and then approve an additional property line adjustment for one of the adjusted properties, the statutorily required conveyance to complete the first property line adjustment must first be recorded. *Bowerman v. Lane County*, 75 Or LUBA 86 (2017).

33.3 Land Divisions – Lot Line Adjustments. Where four pre-1993 parcels are combined through property line adjustments to meet a local minimum parcel size standard, under OAR 660-033-0020(4) the date the property line adjustments created the new combined parcel is the new "date of creation." Where that new date of creation post-dates 1993, a county decision approving a nonfarm dwelling on the combined parcel does not comply with the ORS 215.284(2)(c) requirement that a nonfarm dwelling must "be sited on a lot or parcel created before January 1, 1993." *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 186 (2017).

33.3 Land Divisions – Lot Line Adjustments. LUBA will affirm a hearings officer's interpretation of a code provision allowing a property line adjustment that does not result in a non-buildable parcel being made buildable as concerning only parcels that are not buildable due to an inability to meet required setbacks, regardless of whether the applicant in fact intends to build on the property, where nothing in the code provision requires the applicant to demonstrate or the county to determine the intended use of the property. *Lowell v. Jackson County*, 75 Or LUBA 251 (2017).

33.3 Land Divisions – Lot Line Adjustments. Remand is necessary where a code provision allows a property line adjustment as long as the adjustment does not result in an unbuildable parcel being made buildable, but the record includes no evidence regarding whether the adjusted parcel had one or more buildable sites prior to the adjustment, and the findings on that point are conclusory and not supported by substantial evidence. *Lowell v. Jackson County*, 75 Or LUBA 251 (2017).

33.3 Land Divisions – Lot Line Adjustments. LUBA will affirm a finding that a 1985 quitclaim deed of a portion of a river meander channel from the state to an adjoining property owner represented a property line adjustment, rather than the unlawful creation of a new discrete parcel, where the petitioner identifies no statutory or local authority compelling the conclusion that the 1985 deed had the legal effect of creating a new parcel. *Landwatch Lane County v. Lane County*, 75 Or LUBA 473 (2017).

33.3 Land Divisions – Lot Line Adjustments. A long-expired 1983 property line adjustment decision that required the consolidation of parcels, but that was never implemented by deeds actually consolidating the parcels, had no legal effect on the configuration of the parcels involved. *Grimstad v. Deschutes County*, 74 Or LUBA 360 (2016).

33.3 Land Divisions – Lot Line Adjustments. Petitioner's appeal of a decision approving several property line adjustments is not rendered moot by the applicant's reapplication for approval of the property line adjustments, where the decision on the reapplication is not yet final and the applicant could withdraw that reapplication at any time. *Bowerman v. Lane County*, 74 Or LUBA 644 (2016).

33.3 Land Divisions – Lot Line Adjustments. An appeal of a decision granting property line adjustments that was rendered without providing notice and an opportunity for a local appeal is not rendered moot by a reapplication followed by notice and an opportunity for appeal, where petitioner's petition for review is not limited to assigning error to the failure to provide notice and an opportunity for local appeal and also assigns error to the substance of the property line adjustment decision. *Bowerman v. Lane County*, 74 Or LUBA 644 (2016).

33.3 Land Divisions – Lot Line Adjustments. Where an application for property line adjustments is appealed to LUBA, while that appeal is pending at LUBA the local government lacks jurisdiction to accept a reapplication for those property line adjustments and render a modified decision on the application. *Bowerman v. Lane County*, 74 Or LUBA 644 (2016).

33.3 Land Divisions – Lot Line Adjustments. In determining that four applications to adjust the property lines of five properties, four of which are part of a platted subdivision, could be approved as property line adjustments rather than as a replat of a recorded subdivision, the county interpreted its land use regulations and exercised legal judgment, and therefore the challenged decision is not subject to the ministerial exception at ORS 197.015(10)(b)(A). *Balsly v. Benton County*, 73 Or LUBA 287 (2016).

33.3 Land Divisions – Lot Line Adjustments. In approving a property line adjustment between two EFU-zoned parcels to facilitate a proposed farm dwelling, under a standard that requires that

the adjusted parcel "qualifies for a homesite," a county may rely on a concurrent county decision approving a farm dwelling on the adjusted parcel to conclude that the "qualifies for a homesite" standard is met, and need not require farm income evidence or adopt findings as part of the adjustment decision that again demonstrate that the adjusted parcel qualifies for a farm dwelling. *Louks v. Jackson County*, 65 Or LUBA 58 (2012).

33.3 Land Divisions – Lot Line Adjustments. A hearings officer does not err in concluding that a county standard requiring a showing that the proposed "use" will not force a significant change in farm or forest practices or significantly increase costs of farm and forest practices does not apply to a property line adjustment, where the county standard applies to "uses" listed in the county's EFU zone, and property line adjustments are not listed as a use. *Louks v. Jackson County*, 65 Or LUBA 58 (2012).

33.3 Land Divisions – Lot Line Adjustments. A county code section that provides general standards for "adjustments" does not provide additional standards for a property line adjustment, where the relevant text and context indicates that "adjustment" as used in that code section means an adjustment or variance to a minimum lot size or similar standard, not a property line adjustment that requires no variance. *Louks v. Jackson County*, 65 Or LUBA 58 (2012).

33.3 Land Divisions – Lot line adjustments. A property line adjustment cannot create new parcels. Where a property line adjustment depicts with dashed lines the interior property lines of lots vacated by a prior partition, the subsequent property line adjustment does not have the legal effect of re-establishing the prior existing lots. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.3 Land Divisions – Lot Line Adjustments. A challenge to a property line adjustment that results in 106-acre and 23-acre parcels based on a compatibility standard provides no basis for reversal or remand, where the compatibility standard is really a compatibility "objective," and the objective only applies where a resulting parcel is five acres or less. *Lulay v. Linn County*, 60 Or LUBA 432 (2010).

33.3 Land Divisions – Lot Line Adjustments. An argument that a decision approving a boundary line adjustment under an acknowledged comprehensive plan and land use regulations violates Goal 4 provides no basis for reversal, where petitioner offers no legal theory for why Goal 4 applies to such a decision. Generally, unless a land use decision adopts new or amended comprehensive plan or land use regulation provisions, a post-acknowledgement land use decision is governed by the acknowledged comprehensive plan and land use regulations and need not apply the statewide planning goals directly. *Lulay v. Linn County*, 60 Or LUBA 432 (2010).

33.3 Land Divisions – Lot Line Adjustments. Oregon Laws 2008, Chapter 12, Section 2(b) does not compel a county to deny a proposed property line adjustment that results in substandard sized parcels where the original parcels did not meet the minimum parcel size, the resulting parcels do not meet the minimum parcel size, and no new parcels are created, even if one of the resulting parcels contains two different zoning designations. *Just v. Linn County*, 59 Or LUBA 112 (2009).

33.3 Land Divisions – Lot Line Adjustments. Notwithstanding LUBA's contrary conclusion in *Warf v. Coos County*, 43 Or LUBA 460 (2003), based on pre-2005 statutory language, after 2005 amendments to OAR 92.010(11), a local government may in a single decision approve more than one property line adjustment. *Kipfer v. Jackson County*, 58 Or LUBA 436 (2009).

33.3 Land Divisions – Lot Line Adjustments. The ORS 92.010(7) definition of "partition land" excludes property line adjustments "where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance." A property line adjustment where the parcel or lot that is reduced in size by the property line adjustment fails to comply with the minimum lot or parcel size established by the zoning ordinance is therefore a partition rather than a property line adjustment. *Phillips v. Polk County*, 53 Or LUBA 194 (2007).

33.3 Land Divisions – Lot Line Adjustments. A decision that merely relocates or eliminates a common property line between abutting properties is not a "permit" decision as that term is defined in ORS 227.160(2) and 215.402(4), even if the decision involves the exercise of discretion. *South v. City of Portland*, 53 Or LUBA 362 (2007).

33.3 Land Divisions – Lot Line Adjustments. A decision that relocates or eliminates a common boundary between two properties does not involve the "proposed development of land" and thus is not a "permit" as that term is defined in ORS 227.160(2) and 215.402(4). The statutory requirements for notice and hearing that govern "permit" decisions do not apply to a property line adjustment decision. *South v. City of Portland*, 53 Or LUBA 362 (2007).

33.3 Land Divisions – Lot Line Adjustments. Absent some code provision or law to the contrary, a local government need not determine that a lot was "legally created" in order to determine that the lot qualifies as a "lot of record" as that term is used in the code. *South v. City of Portland*, 53 Or LUBA 362 (2007).

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

33.3 Land Divisions – Lot Line Adjustments. A hearings officer does not err in determining that specific provisions governing property line adjustments of undersize lots in agricultural zones apply to an agriculturally zoned portion of a split-zoned parcel, rather than general provisions governing property line adjustments requiring that adjusted lots satisfy the minimum parcel size. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006).

33.3 Land Divisions – Lot Line Adjustments. A code standard prohibiting a property line adjustment on agricultural land where the adjustment is used to qualify a lot or parcel for the siting of a dwelling does not preclude an adjustment that would effectively separate a split-zoned parcel to allow residential development on the non-agriculturally zoned portion of the parcel, where the

adjustment will not qualify the agricultural portion of the parcel for a dwelling. *Bollam v. Clackamas County*, 52 Or LUBA 738 (2006).

33.3 Land Divisions – Lot Line Adjustments. Reversal, not remand, is the appropriate remedy where a challenged property line adjustment purports to reconfigure the lot lines of three adjacent lots of an existing subdivision to create two lots out of the pre-existing three lots, and the reconfiguration cannot be achieved through a single property line adjustment or through serial adjustments. *Borton v. Coos County*, 51 Or LUBA 478 (2006).

33.3 Land Divisions – Lot Line Adjustments. Where code standards for a lot line adjustment require submission of deeds, a survey drawing, proof that taxes are paid, and verification that the city has accepted any water or sewer line construction, and the petitioner fails to identify anything about those standards that requires interpretation or the exercise of policy or legal judgment, a decision approving a lot line adjustment under those standards is not a "land use decision" as defined at ORS 197.015(10). *Jewett v. City of Bend*, 48 Or LUBA 16 (2004).

33.3 Land Divisions – Lot Line Adjustments. A concern that a property line adjustment may facilitate future development of a 33-acre parcel and a 64-acre parcel does not render a decision approving the adjustment a "significant impact" land use decision, where the petitioner fails to demonstrate that the adjustment would allow a different kind or intensity of development, change the land use status quo of the area, or create an actual, qualitatively or quantitatively significant impact on present or future land uses. *Jewett v. City of Bend*, 48 Or LUBA 16 (2004).

33.3 Land Divisions – Lot Line Adjustments. Under ORS 92.017, a lawfully created lot or parcel remains a discrete lot or parcel, unless the lot lines are vacated or the lot or parcel is further divided. Consolidation of several lots into one tax lot does not consolidate or affect the discrete existence of those lots. Therefore, no process of "lot segregation" is necessary in order to adjust property boundaries within a tax lot that is composed of several discrete lots or parcels. *South v. City of Portland*, 48 Or LUBA 555 (2005).

33.3 Land Divisions – Lot Line Adjustments. Absent some statute or code authority, a local government cannot recognize the existence of only one internal lot line within a four-lot tract and move that lot line around within the tract in a manner that crosses or ignores the still existing lot lines of other discrete lots in the tract. A decision with that effect is arguably a "partition" or "replat" as those terms are defined in ORS chapter 92, and does not qualify as a "property line adjustment." *South v. City of Portland*, 48 Or LUBA 555 (2005).

33.3 Land Divisions – Lot Line Adjustments. A decision that approves a "property line adjustment" as that term is defined in ORS chapter 92 will usually fall within the ministerial exception to LUBA's jurisdiction. However, determining whether a particular lot configuration in fact qualifies as property line adjustment, as opposed to something else such as a partition or replat, may require interpretation and exercise of legal judgment. If so, the decision does not fall within the ministerial exception, and is subject to LUBA's jurisdiction. *South v. City of Portland*, 48 Or LUBA 555 (2005).

33.3 Land Divisions – Lot Line Adjustments. LUBA will reverse rather than remand a decision approving a property line adjustment, where the decision erroneously approves something other than a property line adjustment, and the decision and respondent offer no theory as to how the city could lawfully do what the decision purports to do. *South v. City of Portland*, 48 Or LUBA 555 (2005).

33.3 Land Divisions – Lot Line Adjustments. City approval of an adjustment to a maximum lot size requirement in advance of a lot line relocation that would create an oversized lot, rather than contemporaneously with that lot line relocation, provides no basis for remand, where nothing in the city's code requires that the adjustment and lot line relocation be approved contemporaneously. *South v. City of Portland*, 46 Or LUBA 558 (2004).

33.3 Land Divisions – Lot Line Adjustments. A city commits no error by processing a lot line adjustment as a quasi-judicial land use matter before the planning commission rather than as a ministerial matter before the planning department, where the lot line adjustment decision requires that the city exercise significant legal and factual judgment. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

33.3 Land Divisions – Lot Line Adjustments. Even if a city erroneously applied its zoning ordinance standards for lots or parcels to an applicant's request for a lot line adjustment, that error provides no basis for reversal or remand where the city's decision to deny the lot line adjustment request was not based on those standards. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

33.3 Land Divisions – Lot Line Adjustments. As defined by ORS 92.010(11), a property line adjustment is limited to relocating one common property line between two abutting properties. *Warf v. Coos County*, 43 Or LUBA 460 (2003).

33.3 Land Divisions – Lot Line Adjustments. Property line adjustments are limited to property lines separating existing lots or parcels; property line adjustments may not be approved for hypothetical lots or parcels that do not yet separately exist as lots or parcels. *Warf v. Coos County*, 43 Or LUBA 460 (2003).

33.3 Land Divisions – Lot Line Adjustments. Serial property line adjustments may be approved to reconfigure existing parcels. *Warf v. Coos County*, 43 Or LUBA 460 (2003).

33.3 Land Divisions – Lot Line Adjustments. Absent seeking approval of a replat or new partition plat, applicants who seek to achieve complex reconfigurations of existing parcels must seek and receive separate approvals for each of the property line adjustments that are needed to achieve the reconfiguration and must implement each of those approved property line adjustments before seeking approval of additional adjustments of an approved property line adjustment. *Warf v. Coos County*, 43 Or LUBA 460 (2003).

33.3 Land Divisions – Lot Line Adjustments. Where county road standards that apply when new lots are created by major partition or subdivision do not by their terms apply where lot lines are adjusted, the board of county commissioners is nevertheless within its interpretive discretion under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), where it interprets

separate code requirements for lot line adjustments as requiring that those county road standards be applied when providing access to lots for which lot lines have been adjusted. *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 476 (2002).

33.3 Land Divisions – Lot Line Adjustments. The illegality of previous lot line adjustments affecting land proposed for rezoning does not provide a basis for remand, where the adjustments do not affect the number of parcels or other required calculations under the applicable rezoning criteria, and those criteria do not otherwise require consideration of the legality of previous lot line adjustments. *Maxwell v. Lane County*, 39 Or LUBA 556 (2001).

33.3 Land Divisions – Lot Line Adjustments. Where a city code requires that a lot line adjustment may be approved only if adequate public facilities are available to serve the resulting parcels and the proposal is compatible with the comprehensive plan, the city errs in interpreting the code to limit its consideration to the lot line adjustment itself and not the uses proposed on the adjusted lots. *Mountain West Investment v. City of Silverton*, 39 Or LUBA 507 (2001).

33.3 Land Divisions – Lot Line Adjustments. A local government does not err in determining that a complicated land sale transaction that reconfigured the boundaries of several parcels was a property line adjustment rather than a partition, where five separate parcels existed before and after the transaction and a property line adjustment is a more plausible explanation of the transaction than a combination of partition and merger. *Tarjoto v. Lane County*, 36 Or LUBA 645 (1999).

33.3 Land Divisions – Lot Line Adjustments. Property line adjustments are not limited to adjustments in the boundaries of lots or parcels created by subdivision or partition plat, but also include adjustments in the boundaries of parcels created by metes and bounds conveyance. *Tarjoto v. Lane County*, 36 Or LUBA 645 (1999).

33.3 Land Divisions – Lot Line Adjustments. Where a county approves an application that creates a new parcel, that approval is a partition as defined by ORS 92.010 notwithstanding that the county also approved a lot line adjustment involving the parent parcel in the same proceeding. *Hartmann v. Washington County*, 36 Or LUBA 442 (1999).

33.3 Land Divisions – Lot Line Adjustments. The definition of "Date of Creation" at OAR 660-033-0020(4) expands the circumstances in which parcels are "created" for purposes of siting a nonfarm dwelling to include lot line adjustments or similar reconfigurations that have the effect of qualifying the parcel for a dwelling. The definition does not impliedly narrow the set of circumstances that create a parcel to include only those events that have the effect of qualifying a parcel for a dwelling. *Hartmann v. Washington County*, 36 Or LUBA 442 (1999).

33.3 Land Divisions – Lot Line Adjustments. A property line adjustment decision is a land use decision where complex factual and legal circumstances of the case require the exercise of legal judgment. *Goddard v. Jackson County*, 34 Or LUBA 402 (1998).

33.3 Land Divisions – Lot Line Adjustments. A decision that relocates property lines that are not common to abutting properties reconfigures the property in a manner that violates the definition of "property line adjustment" at ORS 92.010(11) and the statutory distinction between

a property line adjustment and replat, and such action is prohibited as a matter of law. *Goddard v. Jackson County*, 34 Or LUBA 402 (1998).

33.3 Land Divisions – Lot Line Adjustments. A property line adjustment is limited to relocation of common property lines. Where a decision reconfigures property lines so that entire parcels are moved and property lines that are not common are moved, the decision does not approve a property line adjustment. *Goddard v. Jackson County*, 34 Or LUBA 402 (1998).

33.3 Land Divisions – Lot Line Adjustments. The adjustment of a property line between existing parcels is not a "partition," where property is taken from one parcel and added to another. *Tarjoto v. Lane County*, 34 Or LUBA 124 (1998).

33.3 Land Divisions – Lot Line Adjustments. Where a petitioner challenges a county's authority to process an application for a lot line adjustment on the basis that there has never been a legal determination that the property consists of more than one parcel, such a challenge is an impermissible collateral attack on an earlier determination, if such a determination has been made. However, where the record does not reflect that any legal determination has been made, petitioner may challenge the county's authority to proceed with a lot line adjustment on the premise that the property consists of two parcels. *Higgins v. Marion County*, 30 Or LUBA 426 (1996).

33.3 Land Divisions – Lot Line Adjustments. Where a county has never made a decision to partition a parcel, the county's approval of a lot line adjustment, which is premised on the assumption that a partition has occurred, must be reversed. *Higgins v. Marion County*, 30 Or LUBA 426 (1996).

33.3 Land Divisions – Lot Line Adjustments. The definition of "farm use" in ORS 215.203 is not an independent approval criterion for a lot line adjustment in an exclusive farm use zone. *Wissusik v. Yamhill County*, 27 Or LUBA 94 (1994).

33.3 Land Divisions – Lot Line Adjustments. Where a local code allows approval of a rural planned development (RPD) "in conjunction with" a land division, and establishes comprehensive standards for RPDs, including standards for lot line adjustments in an approved RPD, the local government's interpretation of a code provision allowing revisions to an approved land division as giving it authority to approve lot line adjustments in an approved RPD which are not otherwise allowable under the RPD provisions, is clearly wrong. *Reusser v. Washington County*, 25 Or LUBA 252 (1993).

33.3 Land Divisions – Lot Line Adjustments. Although ORS 92.010 to 92.190 do not specifically envision a subdivision approval process that combines approval of a subdivision and a lot line adjustment, neither do those statutes prohibit such a process. Absent such a prohibition, a local government commits no error in following such a combined process. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

33.3 Land Divisions – Lot Line Adjustments. Where nothing in the caption, findings or decision itself suggests that the challenged decision approves a lot line adjustment, a lot line adjustment was not approved. *Barker v. City of Cannon Beach*, 24 Or LUBA 221 (1992).

33.3 Land Divisions – Lot Line Adjustments. A lot line adjustment is not a partition and cannot create additional units of land. ORS 92.015(7)(b). *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992).

33.4 Land Divisions – Generally. Arguments that a city decision approving a partition affects "livability of [an] existing house" and that the city ignored "impact on the neighborhood" provide no basis for reversal or remand where none of the criteria applicable to land divisions require the city to consider "privacy or livability" in determining whether to approve the land division. *Bohan v. City of Portland*, 80 Or LUBA 263 (2019).

33.4 Land Divisions – Generally. An unlawful division of land creates two unlawful units of land rather than an unlawful unit of land and a lawful remainder. *Landwatch Lane County v. Lane County*, 80 Or LUBA 415 (2019).

33.4 Land Divisions – Generally. Where separate applications to partition two parcels under a single ownership into three parcels each receive final approval in the same calendar year, the resultant units of land are not "lawfully created" where state statute requires that divisions of "an area or tract of land into four or more lots within a calendar year when such area or tract of land exists as a unit or contiguous units of land under a single ownership" receive subdivision approval. *Landwatch Lane County v. Lane County*, 79 Or LUBA 65 (2019).

33.4 Land Divisions – Generally If the law at the time that land was divided required local government approval, and the local government in fact approved the land division, then any procedural or substantive errors the local government might have made in issuing that approval are not a basis to conclude that the unit of land is not a lawful lot or parcel. *Landwatch Lane County v. Lane County*, 79 Or LUBA 65 (2019).

33.4 Land Divisions – Generally. Where a parcel is lawfully created, but later divided unlawfully under ORS 215.750(1)(a), a county may rely on the parcel as it existed prior to the unlawful division in determining whether a unit of land qualifies for a forest template dwelling on January 1, 2003. Under ORS 92.017, such parcel "remain[s] discrete" unless it is "further divided, as provided by law." *Landwatch Lane County v. Lane County*, 79 Or LUBA 111 (2019).

33.4 Land Divisions – Generally. When a lot is an unplatted remainder of a subdivision and is not depicted at all on the approved subdivision plat, its current configuration may have resulted from the subdivision but that does not indicate that the county approved the creation of the lot by applying subdivision approval standards. On remand, the hearings officer needs to determine if the lot was approved by applying subdivision standards. *Landwatch Lane County v. Lane County*, 78 Or LUBA 164 (2018).

33.4 Land Divisions – Generally. A legal lot verification decision cannot itself result in the creation of a unit of land. At most, a legal lot verification decision would recognize that a unit of land was lawfully created by some other process or event. *Wolcott v. Lane County*, 77 Or LUBA 165 (2018).

33.4 Land Divisions – Generally. Where the last paragraph of a legal lot verification decision states that it is a "preliminary" decision and that the "decision" on whether the property is a legal lot will be made when a development permit is approved, the legal lot verification decision is not a final, binding decision that determines that the property is a lawfully created lot. *Wolcott v. Lane County*, 77 Or LUBA 165 (2018).

33.4 Land Divisions – Generally. ORS 92.176 provides in certain circumstances for validation of illegally created lots or parcels. Where a parcel is validated under ORS 92.176, an adjoining parcel that was also illegally created is not thereby validated as a lawful "remainder" parcel. The adjoining parcel must itself be separately validated under ORS 92.176. *Wolcott v. Lane County*, 77 Or LUBA 165 (2018).

33.4 Land Divisions – Generally. ORS 197.830(6) is a statute of ultimate repose, providing that appeal periods to LUBA may not exceed either a three-year or 10-year period, depending on whether notice of the final decision is required but not provided. However, ORS 197.830(6) cannot be applied to require a county in 2016 to recognize property as a lawfully created parcel pursuant to a 2003 legal lot verification decision, on the theory that the 2003 decision was a "final," unappealed, and now unappealable decision under ORS 197.830(6), where the 2003 decision itself states that it was only a "preliminary" decision. Because only final decisions can be appealed to LUBA, the statute of ultimate repose is inapplicable. *Wolcott v. Lane County*, 77 Or LUBA 165 (2018).

33.4 Land Divisions – Generally. ORS 92.190(3) embodies a requirement that, where local governments choose to provide an alternative procedure for property line adjustments other than using replat procedures, that alternative procedure must include local government approval of some kind. However, ORS 197.190(3) does not specify any particular procedures or form of approval, and does not necessarily require that final approval be obtained prior to recordation of the adjustment deeds. Given the absence of more specific statutory requirements a county does not err in verifying property as a legal lot, notwithstanding that the property lines were adopted in 2007 without prior county approval, where following recordation of the deeds, the county preliminarily verified the adjustments as lawful and issued a final approval in 2017 when the property owner applied for, and the county approved, a development permit. This process, although partially post-hoc, is consistent with ORS 92.190(3). *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

33.4 Land Divisions – Generally. Oregon Laws 2008, chapter 12, legislatively overruled the holding in *Phillips v. Polk County*, 53 Or LUBA 194, *aff'd*, 213 Or App 498, 162 P3d 338 (2007), which provided that it was unlawful to adjust property boundaries in a way that results in parcels that fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, authorizes property line adjustments of substandard size lots and parcels, even if the resulting lots or parcels continue to fail to comply with applicable minimum parcel sizes. Oregon Laws 2008, chapter 12, section 6 made that legislation retroactive to "property line adjustments approved before, on or after the effective date of this 2008 Act." Therefore, Oregon Laws 2008, chapter 12 applies to a property line adjustment that took place in 2007, because the property line adjustment was "approved * * * before, on or after" the effective date of the 2008 Act. *Landwatch Lane County v. Lane County*, 77 Or LUBA 486 (2018).

33.4 Land Divisions – Generally. A hearings officer's erroneous statement that a portion of a meander channel that the State of Oregon quitclaimed to an adjoining property owner in 1985 was "in existence" prior to 1985 is harmless error, where the remainder of the hearings officer's findings make it clear that he was not finding that the quitclaimed portion of land existed as a

discrete and lawful unit of land prior to 1985, but that the meander channel as a whole existed as, or as part of, a discrete unit of land owned by the state since statehood in 1859. *Landwatch Lane County v. Lane County*, 75 Or LUBA 473 (2017).

33.4 Land Divisions – Generally. A one-half-acre size requirement threshold for requiring PUD approval is not a mere application requirement that can be overlooked to require PUD approval for proposals of less than one-half acre. Even if the city intended to delete that threshold for PUD proposals near transit stations, where the threshold clearly applies it cannot be overlooked to give effect to an intent that is inconsistent with the text of the zoning ordinance. *Mintz v. City of Beaverton*, 66 Or LUBA 118 (2012).

33.4 Land Divisions – Generally. The procedure provided by ORS 92.234, which allows local governments to revise, replat, or eliminate undeveloped subdivisions through local ordinance, is not the exclusive process for "vacating" existing property lines for purposes of ORS 92.017. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.4 Land Divisions – Generally. A partition or replat that has the effect of eliminating pre-existing property lines is a "specific process" for "vacating" property lines for both parcels and lots, for purposes of ORS 92.017. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.4 Land Divisions – Generally. Even if it is legally possible to intentionally create a discrete parcel that consists entirely of nested, discrete lots or parcels without vacating those nested lots or parcels, LUBA will affirm a local government finding that a partition plat that creates a new parcel without depicting any nested lot lines has the effect of vacating the pre-existing lots, where there is nothing on the partition plat, description, or narrative that suggests an intent to preserve the pre-existing lots. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.4 Land Divisions – Generally. An approved partition plat creating new parcels need not bisect the property lines of pre-existing lots to "vacate" those lots for purposes of ORS 92.017. Even if the boundaries of the new parcels follow the property lines of some pre-existing lots, the partition plat can have the effect of vacating or consolidating the pre-existing lots included within the newly established parcels. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.4 Land Divisions – Generally. A property line adjustment cannot create new parcels. Where a property line adjustment depicts with dashed lines the interior property lines of lots vacated by a prior partition, the subsequent property line adjustment does not have the legal effect of re-establishing the prior existing lots. *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393 (2011).

33.4 Land Divisions – Generally. Under *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992), where an approval criterion requires a determination that property is a legal or lawfully created parcel, the relevant question is whether any local government approvals required at the time were obtained, not whether the local government correctly applied the

applicable approval criteria to create the property. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

33.4 Land Divisions – Generally. Under *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), where the applicable criteria expressly or implicitly require a determination that a unit of land proposed for development is a legal or lawfully created "parcel" under code definitions that set out several ways to create a "parcel," the relevant question is whether the unit of land was in fact created in one of the ways set out in the definition, not whether substantive or procedural errors might have been made in the process of creating the parcel. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

33.4 Land Divisions – Generally. Under a code provision defining a lot or parcel as (1) a unit of land created by partition or subdivision, or (2) a unit of land under single ownership, which complies with all applicable laws at the time the lot or parcel was created, the phrase "complies with all applicable laws" modifies the immediately preceding phrase, units of land created by means other than partition or subdivision, and does not require a determination that a parcel created by partition complies with all applicable laws at the time it was created. *Brodersen v. City of Ashland*, 62 Or LUBA 329 (2010).

33.4 Land Divisions – Generally. When approving a subdivision where approval criteria must be applied in a proceeding where the public has participatory rights, a city may defer findings on a required approval criterion to a later proceeding, so long as that later proceeding is one in which the public has participatory rights. *Boucot v. City of Corvallis*, 61 Or LUBA 459 (2010).

33.4 Land Divisions – Generally. ORS 374.310(3), which prohibits denying reasonable access from property adjoining a public road, is not applicable where a property has access to a public road and the county is not denying the applicant for a three-parcel partition access from that public road. *Pelz v. Clackamas County*, 59 Or LUBA 219 (2009).

33.4 Land Divisions – Generally. A division of land that creates an EFU-zoned parcel that is smaller than the 80-acre minimum set forth in ORS 215.780(1) violates that statute, and the land division is prohibited as a matter of law. *Jouvenat v. Douglas County*, 58 Or LUBA 378 (2009).

33.4 Land Divisions – Generally. ORS 92.010 to 92.190 address the creation of new lots or parcels; there is no explicit prohibition in those statutes preventing a local government from making a determination regarding the legal or illegal status of lots or parcels that were not created in conformance with applicable county laws and regulations at the time they were initially created. *Porter v. Marion County*, 56 Or LUBA 635 (2008).

33.4 Land Divisions – Generally. A comprehensive plan policy that directs a county to "adopt large lot zoning to protect rural, agricultural and forest areas," does not apply directly to an application to subdivide rural agricultural land. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

33.4 Land Divisions – Generally. Where a city's land use code defines the term "lot" but excludes a lot from that definition if "[t]he lot as originally platted is no longer whole and consists of

individual property remnants," all remnants, large and small, are considered remnants and are no longer within the definition of "lot." *Jackson v. City of Portland*, 54 Or LUBA 138 (2007).

33.4 Land Divisions – Generally. Absent some expression of intent in a deed that separately listed lots or parcels are to be merged into a single unit of land, the listing of multiple lots or parcels in a single paragraph or a single sentence of a deed does not operate to merge those lots or parcels into a single unit of land. The lots retain their separate identify following the transfer. *Jackson v. City of Portland*, 54 Or LUBA 138 (2007).

33.4 Land Divisions – Generally. ORS 92.100(7), which provides that a decision approving a final subdivision or partition plat is not a land use decision or limited land use decision, effectively removes such decisions from LUBA's jurisdiction. Nothing in the text or legislative history of ORS 92.100(7) suggests that the exclusion applies only to nondiscretionary final subdivision or partition plat decisions. *Wagon Trail Ranch v. Klamath County*, 54 Or LUBA 654 (2007).

33.4 Land Divisions – Generally. Under *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), *adh'd to as modified on recons*, 179 Or App 409, 40 P3d 532 (2002), if directly applicable legislation expressly requires that an analysis of existing lots or parcels must be limited to an analysis of *legally created* lots or parcels, then it follows that only lawfully created lots or parcels can be considered. However, even if the directly applicable legislation does not expressly require that lots or parcels have been legally created, that requirement may be found in related enactments and the legislative context in which the directly applicable legislation appears. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.4 Land Divisions – Generally. Under ORS 215.010(1), when the word "parcel" is used in ORS chapter 215, the parcel must be a lawfully created parcel, in the sense that the parcel's date of creation either predated any applicable laws governing partitions or the parcel was created in compliance with those laws. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.4 Land Divisions – Generally. When the definitions of the relevant terms set out in ORS chapter 92 are read together, whether a division of land creates "parcels" or "lots" depends the number units of land that one or more divisions of land in a single year produce. If the division or divisions produce four or more units of land, they are lots; if they produce three of fewer, they are parcels. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.4 Land Divisions – Generally. Applying the contextual analysis that is required by *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), *adh'd to as modified on recons*, 179 Or App 409, 40 P3d 532 (2002), even though ORS 215.750(1) does not expressly state that the references in that statute to "lots" are limited to lawfully created lots, and even though the relevant definitions in ORS 92.010 do not expressly require that a lot must be a lawfully created lot, if those statutes are read in context with ORS 92.012, 92.018(1), 92.025(1) and ORS 215.010(1)(a), it is sufficiently clear that when the legislature used the term "lot" in ORS 215.750(1) it did not mean to include unlawfully created lots. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.4 Land Divisions – Generally. County authority to approve forest template dwellings derives from ORS 215.750(1). In exercising the authority granted by ORS 215.750(1), a county may not

apply a county definition of "lot" to recognize lots that could not be recognized under ORS 215.750(1). The county may not set a lower standard for approving forest template dwellings under county legislation than the standard that is set by ORS 215.750. *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006).

33.4 Land Divisions – Generally. Where the "Decision" section of a land use decision expressly grants only "planned unit development subdivision plan" approval, but the decision read as a whole clearly also grants the zoning map amendment that was included in the planned unit development and subdivision plan application, LUBA will interpret the decision to grant all three of the requested approvals. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

33.4 Land Divisions – Generally. Where an application for city subdivision approval includes a request for planned unit development approval that allows the property to be divided in ways that the property could not be divided without planned unit development approval, the decision granting planned unit development subdivision approval is a land use decision, not a limited land use decision. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

33.4 Land Divisions – Generally. As a general rule there is no reason why a local government could not interpret an "orderly development" land division criterion to impose a more stringent standard than Oregon Department of Transportation's standard that the performance of failing intersections not be worsened by a proposal. However, where such an interpretation appears to be inconsistent with other city criteria and those apparent inconsistencies are not addressed in the decision maker's findings, LUBA will reject the interpretation as incorrect. *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261 (2006).

33.4 Land Divisions – Generally. Where a local code provision is expressly directed at building permits and a hearing officer finds that the provision does not apply to a request for subdivision approval, and petitioners do not assign error to those findings, petitioners' assignment of error that the hearings officer should have applied the provision in approving the subdivision will be denied. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

33.4 Land Divisions – Generally. Where a hearings officer finds that a proposed subdivision complies with all approval criteria and imposes a condition of subdivision approval that requires preparation of a habitat enhancement plan at a later date, but says nothing about what procedures will be required to review and approve the habitat enhancement plan, opponent's arguments that a public hearing will be required to review and approve the habitat enhancement plan are premature. *Kyle v. Washington County*, 52 Or LUBA 399 (2006).

33.4 Land Divisions – Generally. The dedication of a mere easement or right to use a strip of land for roadway purposes is not sufficient to divide land. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

33.4 Land Divisions – Generally. Where a strip of land was transferred in fee title to the county for roadway purposes, the resulting units of land lying on either side of that strip do not violate the requirement in ORS 92.014 (1955) that "[n]o person shall create a street or way for the purpose of partitioning a parcel of land without the approval of the agency or body authorized to give approval

of plans for subdivision," where the record does not indicate that the roadway was created "for the purpose of partitioning land." Accordingly, the county does not err in determining that one of those resulting units of land is a lawfully created "parcel," and complies with the requirement in ORS 215.705(1)(a) that the lot or parcel on which a forest template dwelling is proposed was lawfully created. *Lovinger v. Lane County*, 51 Or LUBA 29 (2006).

33.4 Land Divisions – Generally. Where all parties believed that a two-variance subdivision proposal was before the planning commission, the planning commission voted to approve the two-variance subdivision, but the planning commission's final written decision approved a prior, withdrawn three-variance subdivision proposal with a slightly different lot configuration, remand is required so that the city can adopt a written decision that approves the two-variance subdivision that the planning commission intended to approve. *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006).

33.4 Land Divisions – Generally. For land use planning purposes "tracts" rather than "lots" or "parcels" may be the required unit of analysis if the relevant law so specifies. However, a legal requirement to consider "tracts" does not mean that the individual "lots" or "parcels" that make up those tracts lose their separate legal identity. *Just v. Lane County*, 50 Or LUBA 399 (2005).

33.4 Land Divisions – Generally. Even if a local government could recognize partial parcel annexations as sufficient to legally divide a parcel, where a local lot of record code definition does not recognize partial parcel annexation as sufficient to legally divide the annexed portion of a parcel from the portion of a parcel that is not annexed, the annexation does not have the effect of dividing the parcel. *Masson v. Multnomah County*, 48 Or LUBA 100 (2004).

33.4 Land Divisions – Generally. The County Assessor's assignment of a new tax lot number to the part of a 5.45-acre parcel that was annexed, while retaining the prior tax lot number for the part of the 5.45-parcel that was not annexed, is not sufficient to divide the 5.45-acre parcel into two different parcels. *Masson v. Multnomah County*, 48 Or LUBA 100 (2004).

33.4 Land Divisions – Generally. Where 3.63 acres of a 5.45-acre parcel are located outside a city and are conveyed improperly by deed to a new owner, the original owner's subsequent recording of a final plat for the 1.82 acres inside the city, which were retained by the original owner, does not have the effect of legally creating a 3.63-acre parcel. *Masson v. Multnomah County*, 48 Or LUBA 100 (2004).

33.4 Land Divisions – Generally. Under ORS 92.017, a lawfully created lot or parcel remains a discrete lot or parcel, unless the lot lines are vacated or the lot or parcel is further divided. Consolidation of several lots into one tax lot does not consolidate or affect the discrete existence of those lots. Therefore, no process of "lot segregation" is necessary in order to adjust property boundaries within a tax lot that is composed of several discrete lots or parcels. *South v. City of Portland*, 48 Or LUBA 555 (2005).

33.4 Land Divisions – Generally. Absent some statute or code authority, a local government cannot recognize the existence of only one internal lot line within a four-lot tract and move that lot line around within the tract in a manner that crosses or ignores the still existing lot lines of other

discrete lots in the tract. A decision with that effect is arguably a "partition" or "replat" as those terms are defined in ORS chapter 92, and does not qualify as a "property line adjustment." *South v. City of Portland*, 48 Or LUBA 555 (2005).

33.4 Land Divisions – Generally. A decision that approves a "property line adjustment" as that term is defined in ORS chapter 92 will usually fall within the ministerial exception to LUBA's jurisdiction. However, determining whether a particular lot configuration in fact qualifies as property line adjustment, as opposed to something else such as a partition or replat, may require interpretation and exercise of legal judgment. If so, the decision does not fall within the ministerial exception, and is subject to LUBA's jurisdiction. *South v. City of Portland*, 48 Or LUBA 555 (2005).

33.4 Land Divisions – Generally. A county's decision to accept a deed for a road easement is a land use decision, where the county has adopted procedures as part of its subdivision regulations that require the county to apply standards in those regulations and its zoning ordinance in accepting land for use as county roads. *Niederhof v. Deschutes County*, 48 Or LUBA 626 (2004).

33.4 Land Divisions – Generally. Where a county has not yet adopted land division regulations that apply to minor partitions, a minor partition nevertheless requires prior county approval of a variance under the zoning ordinance where one of the parcels created by the minor partition does not comply with the minimum parcel size that is required under the zoning ordinance. *DeBoer v. Jackson County*, 46 Or LUBA 24 (2003).

33.4 Land Divisions – Generally. In applying a standard that requires that development within 100 feet of a wetland minimize wildlife impacts, a county commits no error in finding that it is uncertain whether there are wetlands present and imposing a condition of approval that the subdivision applicant prepare a wetlands study and demonstrate that the standard is satisfied in a subsequent quasi-judicial administrative review before final plat approval. *Willhite v. Clackamas County*, 46 Or LUBA 340 (2004).

33.4 Land Divisions – Generally. Where the text of a local code standard does not require that an applicant establish that a proposed subdivision will not adversely affect nearby wells and does not require a finding that the applicant will be able to secure state agency approvals for its water supply, the local government is within its interpretative discretion under OAR 197.829(1) in interpreting that standard not to impose those obligations. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

33.4 Land Divisions – Generally. A local government's failure to adopt findings addressing the potential impacts a subdivision will have on nearby wells and whether the applicant will be able to secure required state permits for its water supply could only provide a basis for remand by LUBA if there is some legal requirement that the local government adopt such findings. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

33.4 Land Divisions – Generally. ORS 215.263(7), which provides for the division of land resulting from lien foreclosure, does not authorize a county to "legalize" an existing but illegally

created parcel that happens to be subject to foreclosure after its illegal creation. *Perkins v. Umatilla County*, 45 Or LUBA 445 (2003).

33.4 Land Divisions – Generally. Even assuming that a parcel formed without required local government approval has not been "created" in any meaningful sense, the legislature did not intend ORS 215.263(7), which provides for division of land resulting from lien foreclosure, to authorize counties to effectively legalize such parcels for development. *Perkins v. Umatilla County*, 45 Or LUBA 445 (2003).

33.4 Land Divisions – Generally. Vacation of a right-of-way attaches the portion of the vacated right-of-way between the centerline and adjoining parcels to those adjoining parcels. Such vacations do not create new, separate parcels between the former centerline and the adjoining parcels. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

33.4 Land Divisions – Generally. Where the property description in a deed fails to reference an adjoining vacated right-of-way, the deed nevertheless conveys the previously vacated right-of-way between the former centerline and the adjoining property that is described in the deed. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

33.4 Land Divisions – Generally. Where county code requires that "all owners" sign a subdivision application, a conclusion that that standard is met is supported by substantial evidence where the record includes a certificate signed by the applicant certifying that the applicant owns the property and other documents in the record name the applicant as the grantee or as a representative of the owner. *Neketin v. Washington County*, 45 Or LUBA 495 (2003).

33.4 Land Divisions – Generally. While statutory provisions governing land partitions were adopted in October 1973, they were not self-executing; the statutory requirements for land partitions did not apply to individual applications to partition land until after local governments adopted ordinances that implemented those statutory requirements. *Palaske v. Clackamas County*, 43 Or LUBA 202 (2002).

33.4 Land Divisions – Generally. Where a hearings officer concludes that a local code provision setting out seven potential methods of creating a parcel applies in determining whether a parcel was lawfully created, the hearings officer is obligated to consider each of the arguably applicable methods, notwithstanding that the applicant below did not specifically raise issues regarding which of the arguably applicable methods applies. *DeBoer v. Jackson County*, 43 Or LUBA 219 (2002).

33.4 Land Divisions – Generally. ORS 197.175 requires that land use decisions comply with the applicable comprehensive plan. However, whether a particular plan provision is an approval criterion for a particular quasi-judicial land division application depends on the language of the comprehensive plan and its implementing regulations, with appropriate deference to any explicit or implicit interpretations of the comprehensive plan and implementing regulations by the local government. *Donivan v. City of La Grande*, 43 Or LUBA 477 (2003).

33.4 Land Divisions – Generally. Under *McKay Creek Valley Assoc. v. Washington County*, 118 Or App 543, 848 P2d 624 (1993), the county need not inquire into the legality of parcels subject

to a rezoning application, where the applicable rezoning criteria do not expressly require a "lawfully created parcel" or a "legal parcel," or impose a similar requirement of legality. *Maxwell v. Lane County*, 39 Or LUBA 556 (2001).

33.4 Land Divisions – Generally. A local code provision allowing lots or parcels that "were conveyed by one deed and were subsequently consolidated" to be *recreated* does not set forth a specific process for *vacating* property boundaries, as contemplated by ORS 92.017. Therefore, that provision does not operate to consolidate several parcels that were conveyed in a single deed into a single parcel, absent some further process to vacate property lines. *Smith v. Jackson County*, 37 Or LUBA 779 (2000).

33.4 Land Divisions – Generally. Where an existing parcel is divided into three new parcels with one of the new parcels containing an existing house, the new parcel containing the house is not properly considered an existing parcel simply because it contains the existing house. *Sunningdale-Case Heights Assoc. v. Washington Co.*, 34 Or LUBA 549 (1998).

33.4 Land Divisions – Generally. The deadline for submitting a final plat is a "review procedure" rather than an "informational" or "other [subdivision] requirement" for purposes of choosing whether the two-year deadline imposed on subdivisions or the three-year deadline imposed on PUDs applies, where petitioner does not explain why the two-year time limit is informational or substantive and interpreting the requirement as being substantive would be inconsistent with the code's purpose of allowing concurrent processing of the final subdivision and PUD plans. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

33.4 Land Divisions – Generally. Where preliminary subdivision and PUD approval is not modified, approval of the final subdivision and PUD plans is governed by the standard in effect when the application for preliminary approval was submitted. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

33.4 Land Divisions – Generally. A code requirement that deeds to property in a PUD shall stipulate that no "private structure of any type" shall be constructed in common areas does not apply to and does not prohibit construction of drainfields by the "developer" in common areas. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

33.4 Land Divisions – Generally. A code requirement that each lot in a subdivision be approved with provisions for sewage disposal is reasonably interpreted as not applying to lots that are not to be developed. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

33.4 Land Divisions – Generally. Where the same person owns separate, adjoining parcels but the property line separating those parcels is not vacated, the two parcels remain separate and distinct parcels under ORS 92.017. *Tarjoto v. Lane County*, 34 Or LUBA 124 (1998).

33.4 Land Divisions – Generally. To establish implied acceptance of a road dedication: (1) the partition plat must include a dedication, and (2) parcels must have been sold with reference to the partition plat containing the dedication. Where petitioner fails to establish either the plat dedication

or sales with reference to the partition plat dedication, there is no implied dedication. *Petersen v. Yamhill County*, 33 Or LUBA 584 (1997).

33.4 Land Divisions – Generally. Unless a specific process is followed to eliminate lot lines, under ORS 92.107 lots remain discrete lots. *Koo v. Polk County*, 33 Or LUBA 487 (1997).

33.4 Land Divisions – Generally. A local government acts within its interpretational discretion in construing local code provisions that treat "contiguous" parcels in "common ownership" as a single unit of land as not including parcels in common ownership which meet only at a common corner and share no common sides. *Tognoli v. Crook County*, 28 Or LUBA 527 (1995).

33.4 Land Divisions – Generally. A local government commits error by approving a modified partition application after the local evidentiary hearing is closed and refusing petitioner an opportunity to comment on the modified application before approving it. *Tognoli v. Crook County*, 28 Or LUBA 527 (1995).

33.4 Land Divisions – Generally. The legal effect of recording an approved plat showing 50- and 60-acre parcels, originally created by deed, as a single 110-acre parcel is to vacate the line dividing the 50- and 60-acre parcels. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

33.4 Land Divisions – Generally. Allegations that a local code provision consolidating commonly owned parcels conflicts with ORS 92.017, which provides that a lawfully created lot or parcel shall remain a discrete lot or parcel, are rendered moot and provide no basis for reversal or remand, where the parcels in question were combined in an approved and recorded plat. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

33.4 Land Divisions – Generally. It is appropriate for a local government to interpret its code definition of the term "lot" consistently with ORS 92.017, so that individual legally established lots are recognized as such and may be individually conveyed, even though they are substandard under existing zoning regulations and are in common ownership with adjoining substandard lots. *Campbell v. Multnomah County*, 25 Or LUBA 479 (1993).

33.4 Land Divisions – Generally. Although ORS 92.017 requires that legally established lots continue to be recognized as individual, separately transferable lots, even where subsequent changes in land use regulations make those lots nonconforming, a local government may impose land use regulations requiring that two or more of such nonconforming lots be combined for development purposes. *Campbell v. Multnomah County*, 25 Or LUBA 479 (1993).

33.4 Land Divisions – Generally. A local government interpretation of a code "lot of record" provision as allowing legally created but now substandard lots to be separately developed if adjoining lots are held in separate ownership or if the lots were shown on a plat of record prior to the date the relevant zoning requirements took effect is reasonable, and LUBA will defer to that interpretation. *Campbell v. Multnomah County*, 25 Or LUBA 479 (1993).

33.4 Land Divisions – Generally. That a challenged decision granting subdivision approval fails to demonstrate feasibility of compliance with an approval condition requiring that a subdivision

street provide "no worse" access to an adjoining property than is currently provided to that adjoining property provides no basis for reversal or remand, where assuring "no worse" access is not required by any applicable approval standard. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

33.4 Land Divisions – Generally. Where a local code allows approval of a rural planned development (RPD) "in conjunction with" a land division, and establishes comprehensive standards for RPDs, including standards for lot line adjustments in an approved RPD, the local government's interpretation of a code provision allowing revisions to an approved land division as giving it authority to approve lot line adjustments in an approved RPD which are not otherwise allowable under the RPD provisions, is clearly wrong. *Reusser v. Washington County*, 25 Or LUBA 252 (1993).

33.4 Land Divisions – Generally. Where a parcel was created by deed, at a time when the local government interpreted its partitioning regulations to be inapplicable to parcels created in that manner, the local government may subsequently determine that a permit application complies with a code requirement that a proposed use be on a "parcel," without reexamining the applicability of its partitioning regulations when the parcel was created. *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992).

33.4 Land Divisions – Generally. Neither ORS 215.130 nor 215.215 authorizes the creation of new parcels for nonconforming uses. *DLCD v. Columbia County*, 24 Or LUBA 32 (1992).

33.4 Land Divisions – Generally. A local government is not required to allow use of existing roadways to provide access for newly created parcels, if those roadways do not also comply with the standards governing roadways providing access to newly created residential parcels. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

33.4 Land Divisions – Generally. That a recently constructed roadway stream crossing was built to create a pond to satisfy fire district requirements for stored water provides no basis for requiring that a county approve use of such a roadway to provide access to newly created parcels. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

33.4 Land Divisions – Generally. Where a local government elects to limit the length of cul-de-sac streets, it may also establish how the length of such streets is to be measured. However, where no particular method of measuring the length of cul-de-sac streets is specified in its land use regulations, the local government must determine length applying the regulations as they are written and applying the plain and ordinary meaning of the operative term "length." *Sully v. City of Ashland*, 23 Or LUBA 25 (1992).

33.4 Land Divisions – Generally. Under applicable city land use regulation definitions and general understanding the length of a cul-de-sac street is measured to the end of whatever turnaround is provided; not to the point at which the right-of-way widens to accommodate the turnaround. *Sully v. City of Ashland*, 23 Or LUBA 25 (1992).

33.4 Land Divisions – Generally. A subdivision ordinance standard requiring that cut and fill slopes not exceed one foot vertically to two feet horizontally "unless physical conditions demonstrate the propriety of other standards" allows two means of compliance. The local government may find either that the 2-to-1 slope limit will be met, or that physical conditions make a different slope standard proper. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

33.4 Land Divisions – Generally. Where a local government finds that a subdivision slope limitation will be satisfied, but the evidence in the record is that the required slope will be exceeded, the finding is not supported by substantial evidence in the record. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

33.4 Land Divisions – Generally. A zoning ordinance lot dimension requirement that lots in a particular zone be a certain width "at the front building line" is applicable to the creation of an undeveloped lot. *Ward v. City of Lake Oswego*, 21 Or LUBA 470 (1991).

33.4 Land Divisions – Generally. Where a code provision is specifically amended to provide that the amended code provision does not apply to "minor land divisions," LUBA will not apply that code provision to "minor land divisions" even though such divisions may also satisfy the unamended definitions of subdivision or partition, to which the amended code provision continues to apply. *Nicolai v. City of Portland*, 19 Or LUBA 142 (1990).

33.4 Land Divisions – Generally. Where an amended code provides discretionary criteria for approval of minor land divisions, it is error for the code to fail to require or provide for notice and hearing before the local government makes a final decision concerning a proposed minor land division. *Nicolai v. City of Portland*, 19 Or LUBA 142 (1990).

34. Variances. Findings are inadequate to explain how a proposed adjustment to the minimum lot size to allow a duplex on a corner lot will not "allow an increase in density in the [applicable] zone" under a local code provision where the findings merely conclude that the adjustment "does not result in an increase in density associated with the proposed use of the development site." *Hunt v. City of the Dalles*, 79 Or LUBA 265 (2019).

34. Variances. While a variance should not be used as a substitute for rezoning, a local government does not err in granting a variance without a showing that strict application of the zoning ordinance would cause "practical difficulties or unnecessary hardships because of exceptional or extraordinary circumstances or conditions affecting the applicant's property" in a zone which the local code specifically exempts from that standard. *City of Albany v. Linn County*, 79 Or LUBA 528 (2019).

34. Variances. Where the only variable between multiple Urban Growth Area-Urban Growth Management (UGA-UGM) zones is lot size, and where a county code provision provides that "[t]he density of one UGA-UGM zoning district is not interchangeable with the density of another UGA-UGM zoning district without prior review and approval by the affected city and * * * County," an interpretation by the county that the provision applies to zone changes of the subject property or changes to the underlying density of the zone in which the subject property is located, but that it does not apply to lot size variances, is inconsistent with the express language of the provision. In such cases, where the local code does not define "density" and the dictionary defines "density" as the quantity or number per unit of area, LUBA will make its own determination that a lot size variance in a UGA-UGM zone may qualify as an "interchange[]" with the density of another UGA-UGM zone, thereby requiring city review and approval. *City of Albany v. Linn County*, 79 Or LUBA 528 (2019).

34. Variances. Where a local code provision provides that "[a]pproval of [a] variance is limited to the minimum necessary to permit otherwise normal development of the property for the proposed use," an interpretation by the local government that the provision means a variance may be approved if it permits development consistent with the surrounding land use pattern and the uses permitted in the underlying zone, and that it does not mean a variance may only be approved if it is necessary to permit development that is allowed in the zone, is not inconsistent with the language of the code or the purposes or policies underpinning the provision. *City of Albany v. Linn County*, 79 Or LUBA 528 (2019).

34. Variances. LUBA will reject a county's interpretation of its code—that a code provision which sets forth approval criteria regarding an application for a variance to the minimum lot size requirements within the county's urban growth area may not apply to the county's decision because it only applies to decisions made by the county's planning director but not to decisions made by the planning commission or board of county commissioners—that was made for the first time in its response brief, because that interpretation is not reflected in the decision and is therefore not an interpretation by the local government. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

34. Variances. Where the county approved a proposed variance to the 20-acre minimum lot size for two one-acre parcels, pursuant to a county code provision that provides that the county planning

director may approve a variance for a proposed project if the city does not object to the variance, LUBA will reverse the county's decision as "prohibited as a matter of law" pursuant to OAR 661-010-0071(c) where the county approved the variance as "consistent with the * * * city's comprehensive plan," but the city objected to the proposed variance because of the proposal's inconsistency with the city's comprehensive plan. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

34. Variances. A hearings officer's finding that concentrating dwelling units on one area of a property is solely attributable to a density transfer provision is not entirely accurate where modifications (variances) are needed to construct a multi-family structure that is taller and closer to the front lot line than would be permitted in the zone. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

34. Variances. Where a prior version of the zoning ordinance only allowed modifications for setback and height standards, and the zoning ordinance was amended to allow a general category of standards, that lends some support to the local government's position that the general category of standards includes setback and height standards. *Patel v. City of Portland*, 77 Or LUBA 349 (2018).

34. Variances. Where a municipal code requires that the "front lot line" of a corner lot "must" be considered the narrower street frontage "except when [city staff] determine[] topographical or access problems make such a designation impractical," the city's decision was not supported by substantial evidence in the record pursuant to ORS 197.835(9)(a)(C) when it determined that the lack of sidewalks on the narrower frontage, and the absence of a door on the side of the house facing the narrower frontage were "access problems" that made designating the narrower street frontage the front lot line "impractical." *McMonagle v. City of Ashland*, 76 Or LUBA 1 (2017).

34. Variances. Where a standard requires public street connections at intervals of no more than 660 feet but authorizes variances where certain conditions exist, a finding that sight distance and existing development might preclude the required extension may be an adequate basis for granting a variance, but those conditions are not a basis for simply overlooking the street interval standard. *Martin v. City of Tigard*, 76 Or LUBA 85 (2017).

34. Variances. That a county commissioners' interpretation of a code variance standard is arguably inconsistent with language found on the county's variance application form does not demonstrate that the commissioners' interpretation is inconsistent with the express language, purpose or policy underlying the standard, under ORS 197.829(1). *Neil v. Columbia County*, 74 Or LUBA 442 (2016).

34. Variances. LUBA will affirm a county's finding that a high-voltage line that effectively divides a property into thirds is a condition "unique to the property" justifying a variance to a minimum parcel size, where there is no argument or evidence that nearby properties are similarly divided by the high-voltage line. *Neil v. Columbia County*, 74 Or LUBA 442 (2016).

34. Variances. A county is not bound to interpret its local variance standards in the same manner as traditional variance standards, and can plausibly interpret its "extraordinary hardship" standard

to include considerations beyond the physical characteristics of the subject property. *Neil v. Columbia County*, 74 Or LUBA 442 (2016).

34. Variances. A city council's interpretation that the "work" portion of live/work units will "equally or better" meet a plan purpose of achieving a compact commercial core than would a commercial use, because the work area is an office or commercial use in fact if not name, is plausible and a basis for granting an exception to a code standard that would otherwise prohibit ground floor residential development. A petitioner must do more that speculate that work portion of a live/work unit will not be put to office or commercial use. *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

34. Variances. Where a city council concludes that a proposed development that includes live/work units and an associated library and gym would be at least as supportive of a plan purpose of creating a high-density retail commercial core as a design that complied with a code "no ground floor residential" standard, by including a parking lot instead, that interpretation is plausible and a sufficient basis for granting an exception to the code "no ground floor residential" standard. *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

34. Variances. A local government errs in denying a request for a variance for failure to comply with an "adverse impacts" standard that permits the local government to require that adverse impacts be avoided and mitigated and only allows the local government to deny the variance implication based on adverse impacts in two specified circumstances that the city council found not to be present. *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

34. Variances. LUBA will reject an argument that a hearings officer errs in approving a variance from a 22-foot street width standard to allow an 18-foot width because the narrower width does not provide the same level of access as the required width, where the variance criteria do not require the varied road width to provide the same level of access. *Carver v. Washington County*, 70 Or LUBA 278 (2014).

34. Variances. A hearings officer does not err in concluding that the applicant for a road width variance had exhausted all practical methods to construct the road to code-required width, where the evidence shows that only one of several adjoining landowners was willing to sell the right-of-way necessary for the code-required width. *Carver v. Washington County*, 70 Or LUBA 278 (2014).

34. Variances. Where an adjustment (variance) criterion requires that an adjustment must equally or better meet the purpose of the regulation to be adjusted, granting a height adjustment to allow a house to be 30 feet tall rather than limited to 23 feet in height is not justified by aligning the front façade of the proposed house with houses that are set back further from the street than other houses. The shared dwelling alignment is unrelated to whether the height adjustment equally or better serves the purpose of the height limit and that shared alignment does nothing to explain how allowing a 30-foot residence next to a 23-foot residence equally or better meets the purpose of the height limit. *L'Heureux v. City of Portland*, 68 Or LUBA 90 (2013).

34. Variances. Where an adjustment (variance) criterion requires that an adjustment must equally or better meet the purpose of the regulation to be adjusted and the purpose of the regulation to be adjusted is to promote a reasonable building scale and relationship of one residence to another, a city erroneously grants a height adjustment based on a finding that the additional height would not be perceptible to a pedestrian on the street. The focus of the purpose is on the adjoining residences, not pedestrians on the street. *L'Heureux v. City of Portland*, 68 Or LUBA 90 (2013).

34. Variances. A city errs in relying on a large front setback to satisfy a mitigation criterion for granting a height variance to allow a residence to exceed the height limit where that large front setback may make the house look shorter to a pedestrian on the street, but it is the impact of the height adjustment on adjacent residences that must be mitigated. *L'Heureux v. City of Portland*, 68 Or LUBA 90 (2013).

34. Variances. Where a variance standard requires that the applicant demonstrate that the "hardship was not created by the person requesting the variance," and an issue is raised below that no "hardship" exists in reducing the number of required bicycle parking spaces, the decision maker must adopt findings identifying the hardship to the extent necessary to apply the variance criteria. *CRAW v. City of Warrenton*, 67 Or LUBA 263 (2013).

34. Variances. A county does not err in concluding that the skewed alignment of an existing foundation is not a "physical characteristic of [an] existing improvement * * * that is not typical of the area" that requires the county to grant a variance to allow an applicant to build an addition within setbacks, where a smaller addition could be built outside of the setbacks. *Nordlund v. Clackamas County*, 65 Or LUBA 67 (2012).

34. Variances. A county does not err in concluding that a .23-acre lot in a zoning district with a 5-acre minimum lot size is not a "physical characteristic of the land * * * that [is] not typical of the area" that requires a variance to setbacks, where evidence in the record shows that lots within the same subdivision are substandard sized lots similar to the applicant's lot. *Nordlund v. Clackamas County*, 65 Or LUBA 67 (2012).

34. Variances. A city variance "hardship" criterion requires that an applicant demonstrate that there is something about the "nature of the requested use, lot size or shape, topography, sensitive lands, or other similar circumstances related to the property" such that the applicant would suffer a "hardship" if the city required that the requested development comply with the special setback. *Zirker v. City of Bend*, 59 Or LUBA 1 (2009).

34. Variances. A variance criterion that requires the applicant to demonstrate that a hardship exists that is "peculiar to the nature of the requested use, lot size or shape, topography * * * or other similar circumstances related to the property" is not satisfied where the property to be developed is flat and has no significant development constraints. Development on nearby properties and substandard roadway improvements have no effect on the applicant's ability to develop such property in compliance with a setback requirement. *Zirker v. City of Bend*, 59 Or LUBA 1 (2009).

34. Variances. Where a variance may be granted "only if a required improvement is not feasible due to topographic constraints," a variance to city requirements that additional right-of-way be

dedicated and roadway improvements be made is not warranted for a flat lot with no significant development constraints. That the existing substandard roadway is sufficient and development on adjoining properties is located close to the exiting roadway may mean such dedication and improvement will serve no useful purpose, but it does not make such dedication and improvement infeasible. *Zirker v. City of Bend*, 59 Or LUBA 1 (2009).

34. Variances. A city errs by approving a variance to subdivision standards under its general zoning variance criteria, where a separate city ordinance provides variance standards for subdivisions, and the city's decision offers no reviewable interpretation or explanation why the subdivision variance standards do not apply. *Holbrook v. City of Rockaway Beach*, 58 Or LUBA 179 (2009).

34. Variances. Where the "rough proportionality" test in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d (1994), applies, it can function as a kind of variance, providing a basis under which a local government may choose not to exact property as a condition of development approval that it would otherwise be entitled to exact under its land use regulations, as an alternative to compensating the landowner for the taking. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

34. Variances. Even if the *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d (1994), "rough proportionality" test does not apply to exactions not requiring the dedication of a property interest, where a county road standard includes a provision prohibiting the county from requiring road improvements that are not "roughly proportional" to the impact of the proposed development on public facilities and services, the county may apply its local rough proportionality test in determining whether to grant requested variances from county road standards. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

34. Variances. Where an applicant seeks variances from road improvement standards, a county does not err in granting the variances based in part or whole on a county road standard that prohibits the county from requiring road improvements that are not "roughly proportional" to the impact of the proposed development on public facilities and services. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

34. Variances. A county does not err in concluding that requiring a development applicant to improve a substandard local street to full collector street standards is not roughly proportional to the impacts of a proposed Liquified Natural Gas terminal and therefore granting variances to some collector street standards, where in operation the terminal would produce only 150 daily trips, which combined with the existing 50 daily trips would fall below the threshold traffic range for a collector street. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

34. Variances. Where LUBA has affirmed a county's determination to waive certain road improvement standards under a local code provision prohibiting the county from requiring road improvements that are not roughly proportional to the impact of proposed development, any error the county may have made in also granting variances to those road improvement standards under general variance standards is harmless error. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

34. Variances. Requiring the applicant to construct 28-foot-wide roads rather than granting a variance for 12-foot roads does not impose an unnecessary hardship merely because the wider roads create an additional $300,000 cost. *Sperber v. Coos County*, 58 Or LUBA 588 (2009).

34. Variances. While steep terrain can be an exceptional or extraordinary circumstance which does not apply to other properties that may justify a variance, a local government may find that such terrain is not sufficient to justify a variance when surrounding properties also have steep terrain. *Sperber v. Coos County*, 58 Or LUBA 588 (2009).

34. Variances. A city is not required to interpret traditional variance language ("practical difficulty or unnecessary hardship") in accordance with the traditional strict meaning of that language, particularly when that language is not used as part of the city's variance code but instead was borrowed from the variance context to be used as a test for expanding nonconforming uses. *Azore Enterprises, LLC v. City of Hillsboro*, 56 Or LUBA 422 (2008).

34. Variances. Failure to provide views of the river and access to public spaces is not an unnecessary hardship to the city justifying a variance. While a development that would provide river views and access to the river could be considered a benefit to the city, the inability to obtain such a benefit does not constitutes suffering or privation. *Stricklin v. City of Astoria*, 56 Or LUBA 535 (2008).

34. Variances. An applicant's desire for a more creative design than that which could be built without a variance does not fall within the plain, ordinary, or natural meaning of unnecessary hardship. *Stricklin v. City of Astoria*, 56 Or LUBA 535 (2008).

34. Variances. Where the section of the zoning ordinance governing adjustments includes a purpose statement followed by adjustment approval criteria and a separate zoning section specifically states that the specified approval criteria for land use reviews establish "the bounds for the issues that must be addressed by the applicant," a city is not obligated to adopt findings to explain why a requested adjustment is consistent with the adjustment chapter purpose statement. *Pearman v. City of Portland*, 56 Or LUBA 570 (2008).

34. Variances. In applying an adjustment criterion that requires the city to find "granting the adjustment will equally or better meet the purpose of the regulation to be modified," a city does not err in finding that criterion is met where the purpose of the criterion recognizes that off-street parking may not be needed where property is in close proximity to transit and the property for which an adjustment to off-street parking requirements is requested is located in close proximity to three transit streets with frequent service and a bikeway and Flexcar locations. *Pearman v. City of Portland*, 56 Or LUBA 570 (2008).

34. Variances. A city does not err in finding that a proposed adjustment to allow development of a residence without off-street parking complies with an adjustment approval criterion that requires that "the proposal will not significantly detract from the livability or appearance of the residential area," where there was conflicting evidence about the availability of on-street parking in the area

and parking congestion is only one factor in assessing livability. *Pearman v. City of Portland*, 56 Or LUBA 570 (2008).

34. Variances. In finding that a proposed adjustment to allow residential development without off-street parking satisfies an approval standard that requires that the "impacts from the adjustment are mitigated to the extent practical," a city does not err by relying on the proximity of the site to transit streets and the elimination of possible curb cuts that would be needed to provide off-street parking and would eliminate existing on-street parking. *Pearman v. City of Portland*, 56 Or LUBA 570 (2008).

34. Variances. Absent some code requirement to the contrary, a variance application for a third story addition on an existing structure need not justify a variance for an existing external stairwell that will not be expanded or altered in any way. *McConnell v. City of Grants Pass*, 55 Or LUBA 280 (2007).

34. Variances. The existence of conflicting evidence in the record regarding whether an existing structure within a setback is 7.5 feet or one foot from the property boundary is not a basis for remand, as long as the city's choice between the conflicting evidence is one a reasonable person could make. *McConnell v. City of Grants Pass*, 55 Or LUBA 280 (2007).

34. Variances. Where county authority to grant a variance is limited to circumstances "where it can be shown that owing to special and unusual circumstances related to a specific lot, strict application of this chapter would cause an undue or unnecessary hardship," the county must find that granting the hardship is necessary to avoid a hardship, notwithstanding that a separate section of the county's code that sets out the "circumstances" in which the county can grant a variance does not mention the word "hardship." *Friends of Umatilla County v. Umatilla County*, 55 Or LUBA 330 (2007).

34. Variances. That it may be prohibitively expensive to establish a 160-acre vineyard is not a hardship that warrants a variance to a county's 160-acre minimum parcel size in its EFU zone, where the property is currently planted in winter wheat and could remain in wheat production. *Friends of Umatilla County v. Umatilla County*, 55 Or LUBA 330 (2007).

34. Variances. Variances are extraordinary remedies and are not a substitute for amending a zoning ordinance to achieve desired legislative ends. A zoning ordinance amendment, rather than case-by-case variances, is the appropriate way to allow EFU-zoned lands to be divided into smaller parcels than allowed under a county's existing EFU zoning. *Friends of Umatilla County v. Umatilla County*, 55 Or LUBA 330 (2007).

34. Variances. LUBA will affirm a city council interpretation of code variance and off-street parking standards, to the effect that a potential off-street parking site that would otherwise satisfy the code off-street parking standard need not be considered, because it would require patrons of a proposed restaurant to cross a four-lane highway with no crosswalks or pedestrian facilities. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

34. Variances. Findings concluding that a total variance from a code requirement to provide 10 off-street parking spaces is the "minimum necessary to alleviate the hardship" are inadequate, where the findings fail to address whether an adjacent site could provide at least some of the required 10 parking spaces. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

34. Variances. A reasonable person could rely on evidence that there are 25 on-street parking spaces in the area that are only partially occupied during peak hours, to conclude that parking in the area is adequate, and thus that a variance to off-street parking requirements will not be "materially detrimental" to the purpose of the off-street parking requirement. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

34. Variances. A code variance criterion requiring a finding that the "hardship is not self-imposed" does not require the variance applicant to demonstrate that there are no other properties that could be acquired that would allow the proposed development without a variance. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

34. Variances. A comprehensive plan goal that the city should "promote, on an equitable basis, the highest level of services the citizens will support" is too general and nonmandatory to function as an approval criterion for a permit application seeking a variance to off-street parking requirements. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

34. Variances. A comprehensive plan policy requiring the city to designate areas for *public* off-street parking facilities is not an applicable approval criterion with respect to an application for a variance to *private* off-street parking facilities. *Grant v. City of Depoe Bay*, 53 Or LUBA 214 (2007).

34. Variances. LUBA will affirm a city council interpretation that a "self-created hardship" exists for purpose of obtaining a variance to a street access standard, where the applicant has taken actions in the past that are inconsistent with the expectation of obtaining future access, by consolidating the subject property with an adjoining lot that already has access. *Krishchenko v. City of Canby*, 53 Or LUBA 232 (2007).

34. Variances. Even if a city were partly responsible for reducing access options to a parcel for which a variance is sought, by selling adjoining property that might have provided alternate access, that partial responsibility does not compel the city to grant the variance, where the applicant initially created the hardship by consolidating the subject parcel with property that already has access. *Krishchenko v. City of Canby*, 53 Or LUBA 232 (2007).

34. Variances. Where a city adjustment committee lacks authority to consider a legal issue, the adjustment committee does not err by failing to address that legal issue in its findings, even though petitioners raised the legal issue below. *O'Brien v. City of Portland*, 52 Or LUBA 113 (2006).

34. Variances. A local government interpretation that an applicant who sought a zone change that resulted in increased setback requirements did not create a "self-imposed" hardship when the zone change was imposed as a condition of approval of an earlier lot line adjustment decision is not

inconsistent with the express language, purpose, or policy of the local ordinance. *Sommer v. Josephine County*, 52 Or LUBA 209 (2006).

34. Variances. When an approval criterion requires that the property for which a variance is sought must have circumstances that do not apply to "other properties in the same vicinity or land use district," the findings must address whether the circumstances which allegedly support a variance exist on other properties in the same vicinity or land use district. *Butte Conservancy v. City of Gresham*, 51 Or LUBA 194 (2006).

34. Variances. A variance to a local code provision that limits the size of accessory structures to 1,000 square feet to allow a 2,100-square-foot accessory structure is not "reasonably necessary" to permit development for an otherwise lawful use where an accessory structure that complies with a 1,000-square-foot size limitation could have been constructed on the subject property. *Spooner v. City of Salem*, 51 Or LUBA 237 (2006).

34. Variances. Where an accessory structure that complies with a 1,000-square-foot size limitation could be built on the subject property, the "special conditions" cited by the city to justify a variance to that requirement, *i.e.*, the unusually large size of the property and excessive slopes, do not create the unreasonable hardship or practical difficulty that "can be most effectively relieved by the variance," as required by the local variance criteria. *Spooner v. City of Salem*, 51 Or LUBA 237 (2006).

34. Variances. Where a variance criterion allows a variance if topography makes strict compliance with the lot depth requirement an unreasonable hardship and the city's findings granting the variance for four lots do not explain why a proposed roadway could not be relocated slightly to make four lots comply with the lot depth requirement, remand is required. *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006).

34. Variances. Where a city's findings explain that the roadway required by a city's transportation system plan to satisfy connectivity objectives must traverse very steep slopes and the applicant's geologic experts' recommendation that cuts and fills be minimized leads to roads that exceed the city's 12 percent maximum grade, those findings are sufficient to demonstrate compliance with a "special conditions inherent in the property" variance standard. *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006).

34. Variances. A county is within its interpretive discretion under ORS 197.829(1) when it interprets a zoning ordinance prohibition on variances to relieve "willful or accidental violation" of the zoning ordinance not to apply where planning staff were responsible for the violation. *Doyle v. Coos County*, 51 Or LUBA 402 (2006).

34. Variances. A county is within its interpretive discretion under ORS 197.829(1) when it interprets a zoning ordinance provision that allows variances to relieve "practical difficulty and unnecessary hardship" that would otherwise result from "the location of existing structures" on the property to apply where the practical difficulty and unnecessary hardship would be the cost and effort that would be required to remove or move structures that were sited based on erroneous advice from planning staff. *Doyle v. Coos County*, 51 Or LUBA 402 (2006).

34. Variances. A county is within its interpretive discretion under ORS 197.829(1) where it interprets a variance criterion that there must be "exceptional or extraordinary circumstances or conditions * * * which do not apply to other properties" to be met where (1) structures were sited in violation of zoning setbacks based on erroneous advice from planning staff and (2) such erroneous advice is exceedingly rare. *Doyle v. Coos County*, 51 Or LUBA 402 (2006).

34. Variances. LUBA will reject a petitioner's challenge to a city decision granting variances to a cul-de-sac length limit and limit on the number of houses that may be served by a cul-de-sac, where the city's findings explain (1) the competing benefits and drawbacks in limiting the length of cul-de-sacs and why the city concluded that the cul-de-sac could safely exceed 200 feet given the existing street system and surrounding traffic facilities and (2) why allowing the cul-de-sac to serve three more houses than otherwise allowed under the code would not cause a detriment to public health, safety and welfare. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

34. Variances. Where an interpretation of an ambiguous code standard that bars variances in some circumstances is needed to explain why the local government believes that standard did not bar an approved variance, and the appealed decision does not include either an express or implied interpretation of the code standard, remand is required. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

34. Variances. If a local government wishes to interpret and apply traditional variance standards differently than those standards have traditionally been interpreted and applied, it must articulate an interpretation of those standards that is sufficient for review. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

34. Variances. A local government adequately explains why allowing a variance to permit dwelling that encroaches into a roadway easement setback is not "detrimental to the public health, safety or welfare," where the local government finds: (1) a gate on the easement already limits the width of vehicles that can travel on the easement, (2) large vehicles can cross the easement notwithstanding the encroachment, (3) the structures are 15 feet outside the edge of the easement, and (4) there is room within the easement to widen the existing roadway to accommodate wider vehicles. *Doyle v. Coos County*, 49 Or LUBA 574 (2005).

34. Variances. Where notice of the hearing on an application for a variance from required setback lists as an approval criterion the code provision from which applicants seek the variance, the code provision does not thereby become an applicable approval criterion, and the county's failure to adopt findings addressing it is not a basis for reversal or remand. *Papadopoulos v. Benton County*, 48 Or LUBA 600 (2005).

34. Variances. In granting a variance from a code prohibition against developing in wetlands to approve roads across the wetlands, where a variance standard requires the city to find that the public need that the roads would serve outweighs the potential adverse impacts of developing the wetlands, the city errs in failing to adopt findings that respond to arguments raised by opponents that there are alternative roadway alignments that would serve the identified public need without crossing wetlands. *Linstromberg v. City of Veneta*, 47 Or LUBA 99 (2004).

34. Variances. A city's findings that a city "hardship" variance criterion is satisfied where denying the variance would force a subdivision applicant to develop far more of the property with roads, resulting in a loss of approvable lots, is adequate to support its decision to grant variances to city cul-de-sac requirements. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

34. Variances. A city's findings that a variance to allow a curb-tight sidewalk is justified to minimize fill and wetland impacts are inadequate, where the city's findings do not explain why denial of the requested variance would result in a "hardship" for the applicant. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

34. Variances. City approval of an adjustment to a maximum lot size requirement in advance of a lot line relocation that would create an oversized lot, rather than contemporaneously with that lot line relocation, provides no basis for remand, where nothing in the city's code requires that the adjustment and lot line relocation be approved contemporaneously. *South v. City of Portland*, 46 Or LUBA 558 (2004).

34. Variances. Where approval of an adjustment to create an oversize tract of land must not significantly detract from the livability or appearance of the residential area, a city commits no error in limiting its analysis to the oversize tract and declining to consider the possible impacts of developing another proposed tract that does not require a maximum lot size adjustment. *South v. City of Portland*, 46 Or LUBA 558 (2004).

34. Variances. A local government could permissibly interpret local code to allow variance to minimum lot size standard where general variance standards were met. *Walker v. Josephine County*, 46 Or LUBA 777 (2004).

34. Variances. A parcel that does not meet minimum lot size standards for partition due to prior property line adjustment does not create a hardship that arises out of the land, but rather a hardship that arises because of the minimum lot size standard. *Walker v. Josephine County*, 46 Or LUBA 777 (2004).

34. Variances. A property owner's decision to agree to a property line adjustment that reduced the size of the property below the 10 acres needed to partition the property cannot be viewed as anything other than self-imposed. *Walker v. Josephine County*, 46 Or LUBA 777 (2004).

34. Variances. A city commits no error in denying a request for a fence height variance based on the application as submitted, without taking into account changes to the fence that the applicant stated he was willing to make, where the applicant was invited to submit an amended application and declined to do so. *Finkle v. City of Portland*, 44 Or LUBA 484 (2003).

34. Variances. A city governing body's interpretation of a variance criterion, which requires variances to "conform to the comprehensive plan," to be satisfied where a requested lot depth variance does not violate any identified comprehensive plan policy will be sustained on appeal, where no identified comprehensive plan policies expressly discourage or encourage lot depth variances. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

34. Variances. Where a local variance provision imposes on the applicant the burden of establishing the nonexistence of alternatives to the variance, the local government errs in interpreting its code to impose on opponents the burden of establishing the existence, costs and consequences of alternatives. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

34. Variances. A code interpretation to the effect that the county need not consider lesser height variances if the proposed additional height poses no conflicts with views is inconsistent with code language that (1) requires consideration of lesser or no variances, and (2) contains no exception for variances that do not pose conflicts with views. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

34. Variances. A code interpretation that limits the scope of alternative height variances that must be considered to those that provide the applicant with the same 35-foot height limitation allowed in a different regulatory zone is an impermissible amendment in the guise of interpretation, where the interpretation changes a rigorous alternatives analysis into a pro forma exercise and eliminates a regulatory distinction between zoning districts. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

34. Variances. A 1995 decision *denying* a request for a variance to build a house that exceeds zoning height limits by 6.5 feet does not constitute a decision *approving* construction of a house that is 6.5 feet shorter. An appeal challenging a subsequent building permit that approves construction of a house that is reduced in height is not a collateral attack on the 1995 variance decision and will not be dismissed as untimely filed. *Tirumali v. City of Portland*, 40 Or LUBA 565 (2001).

34. Variances. A stipulated agreement entered into by a variance applicant in a prior circuit court proceeding is not an exceptional or extraordinary circumstance over which the applicant has no control. *Georgeff v. Curry County*, 40 Or LUBA 101 (2001).

34. Variances. The granting of a variance to a particular standard does not, in itself, demonstrate material detriment to the purpose or objective of that standard. *Georgeff v. Curry County*, 40 Or LUBA 101 (2001).

34. Variances. Findings that a proposed road width variance will not be materially detrimental to other property owners in the area are not supported by substantial evidence when they are based on a comparison to other substandard roads rather than the effect of the proposed variance itself. *Georgeff v. Curry County*, 40 Or LUBA 101 (2001).

34. Variances. As the "extraordinary circumstances" variance criterion has traditionally been interpreted and applied, erroneous advice to a property owner about the approval criteria that might apply to a partition request in the future would not be sufficient to constitute extraordinary circumstances affecting the property. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

34. Variances. Where a city governing body expressly interprets a traditional "extraordinary circumstances" variance criterion as being met in a circumstance where it traditionally would not

be satisfied, that interpretation must nevertheless be affirmed under ORS 197.829(1) if the city governing body's interpretation is not inconsistent with the "express language" or the "purpose" of the variance criterion. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

34. Variances. Where a variance criterion provides that a variance is not available where the applicant's circumstances "merely constitute a monetary hardship or inconvenience," the applicants inability to create a second lot out of an existing lot without the variance would appear to "merely constitute a monetary hardship or inconvenience," absent a contrary interpretation of that criterion by the local governing body. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

34. Variances. When a variance approval is based on a specific finding that the proposed use is permitted in the underlying zone, the variance approval establishes a time frame for constructing the proposed use, and when the applicant applies for the building permit within the allotted time, the city is obligated by ORS 227.178(3) to apply the same "standards and criteria" that were applicable at the time the variance application was submitted. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000).

34. Variances. Where a variance criterion provides that the use of a structure may not change as a result of a variance, an interpretation that a variance may nevertheless be granted to convert a storage shed to a medical hardship dwelling is clearly wrong. *Puma v. Linn County*, 38 Or LUBA 762 (2000).

34. Variances. Where one of the factors that must be considered in determining whether a variance is "necessary to prevent a hardship to the applicant" is whether the alleged hardship was created by the applicant, and the applicant's difficulty in constructing a shed in accordance with city setback requirements is attributable to the locations that were selected by the applicant for his house, garden, septic field and landscaping, the self-created hardship factor does not support a finding that a variance is necessary to prevent a hardship. *Roberts v. City of Gearhart*, 38 Or LUBA 407 (2000).

34. Variances. Where the factors that must be considered in determining whether a variance is "necessary to prevent a hardship to the applicant" include the "physical circumstances related to the property," and whether the hardship is self-created, the physical circumstances factor does not support a finding that the variance is necessary to avoid a hardship where the lot is flat, rectangular and similar to other lots in the area and the "trees, shrubs, garden area and small structures" on the property were all sited by the applicant. *Roberts v. City of Gearhart*, 38 Or LUBA 407 (2000).

34. Variances. Even under the deferential standard of review required by *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), city interpretation of a variance criterion that requires that a variance be "necessary to prevent a hardship to the applicant" as being met because without the variance the applicant will be unable to construct as much storage as he would like to have on the property at his preferred location on the lot is erroneous. *Roberts v. City of Gearhart*, 38 Or LUBA 407 (2000).

34. Variances. The "exceptional or extraordinary circumstances" standard is a demanding traditional variance standard. Under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508,

836 P2d 710 (1992), a city may be able to interpret that standard in a more lenient manner than the courts and LUBA have, but the city must articulate that interpretation in its decision. *Bates v. City of Cascade Locks*, 38 Or LUBA 349 (2000).

34. Variances. LUBA and appellate court cases reviewing decisions involving traditional variance standards are of little or no assistance in considering a challenge to a decision that applies differently worded variance criteria, where petitioner makes no attempt to explain why those cases are relevant notwithstanding that the criteria are worded differently. *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

34. Variances. Required findings that a variance is "necessary" due to "special conditions or circumstances peculiar to the property" are inadequate, where the findings are equivocal about whether the problems identified are present and fail to explain why the cited problems could not be eliminated by redesigning the proposed subdivision or by eliminating one or more lots. *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

34. Variances. A city's findings of compliance with a variance criterion that requires that the variance be "necessary for the proper development of the subdivision and the preservation of property rights and values," are inadequate where the findings do not identify any "property rights" or "property values" that would be threatened by the required 60-foot right-of-way or why the proposed subdivision could not be designed to accommodate the required 60-foot right-of-way. *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

34. Variances. Where the zoning ordinance allows a variance from its standards when those standards create a hardship due to one or more defined conditions, a hearing officer errs in requiring the applicant to demonstrate hardship in addition to those stated in the defined conditions. *Kelley v. Clackamas County*, 35 Or LUBA 215 (1998).

34. Variances. The law of the case doctrine does not bar petitioner from arguing that the city's action on remand from LUBA so altered the proposed development that the city must revisit a variance granted in the original decision. *Dodds v. City of West Linn*, 35 Or LUBA 101 (1998).

34. Variances. A decision on remand that increases a variance from a maximum lot coverage standard is not inconsistent with the initial variance approval, where the initial decision did not specify the variance allowed from the maximum lot coverage. *Dodds v. City of West Linn*, 35 Or LUBA 101 (1998).

34. Variances. Where petitioner did not specifically raise the issue of compliance with the Fair Housing Act (FHA) in the proceedings below, statements that his clients are disabled and that the property needs to be identified for emergency response services are not sufficient under ORS 197.763 to raise an issue that denial of the requested variance would constitute a failure to make a "reasonable accommodation" under the FHA. *Andrusko v. Clackamas County*, 34 Or LUBA 493 (1998).

34. Variances. A finding that an "exceptional circumstances" variance criterion is met because an existing substandard road cannot be improved to comply with the road standard without expanding the right-of-way is conclusory and inadequate. *Elder v. Douglas County*, 33 Or LUBA 276 (1997).

34. Variances. Findings of compliance with a variance criterion requiring that the variance be consistent with "the purposes" of the zoning ordinance, are inadequate where the findings fail to identify or discuss any of the three potentially applicable purpose sections in the zoning ordinance. *Elder v. Douglas County*, 33 Or LUBA 276 (1997).

34. Variances. A finding that an unlawful partition occurred prior to the date the variance applicant took title to the property is not adequate to demonstrate that the hardship is not "self-created," where the county provides no interpretation of the term "self-created hardship" and the variance applicant knew the property had been unlawfully partitioned. *Elder v. Douglas County*, 33 Or LUBA 276 (1997).

34. Variances. Where a city's interpretation of a variance criterion is not inconsistent with the purpose and policy of the applicable chapter of the local code, as stated in that chapter's intent and purpose statement, the city's interpretation is not indefensible. *Shaffer v. City of Salem*, 33 Or LUBA 57 (1997).

34. Variances. Where a challenged decision does not discuss why granting a variance is the most effective method to relieve the special conditions of parcel size and shape, the findings do not establish that the variance meets local code requirements that special conditions apply to the subject property that "can be most effectively relieved by a variance." *Shaffer v. City of Salem*, 33 Or LUBA 57 (1997).

34. Variances. Where the city's comprehensive plan expressly requires that new subdivisions shall have sidewalks, the city may not use the variance procedures of its subdivision ordinance in order to grant an exception to the comprehensive plan sidewalk requirement. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

34. Variances. Neither the age nor the physical condition of a property owner (or his family) can justify a variance. *DeBardelaben v. Tillamook County*, 31 Or LUBA 131 (1996).

34. Variances. When a residential use is established on the subject property and the existing residence may be expanded without a variance, a requested height variance is not necessary under any colorable interpretation of the standard "necessary to accommodate a use or accessory use on the parcel which can be reasonably expected to occur within the zone or vicinity." *DeBardelaben v. Tillamook County*, 31 Or LUBA 131 (1996).

34. Variances. Development that has not occurred and that will be governed by the limitations of the applicable zone cannot be used to justify a variance on the basis that the property owner seeking the variance will otherwise be precluded from the enjoyment of substantial property rights enjoyed by the majority of landowners in the vicinity. *DeBardelaben v. Tillamook County*, 31 Or LUBA 131 (1996).

34. Variances. When a house already exists on the subject property, the fact it cannot be enlarged in precisely the manner desired by the property owner does not render the property incapable of reasonable economic use without a variance. *DeBardelaben v. Tillamook County*, 31 Or LUBA 131 (1996).

34. Variances. The county's interpretation of the "incapable of reasonable economic use" variance standard to mean "incapable of the property's highest and best use under its zoning and of an intensity of use consistent with other similarly situated properties" is clearly wrong. *DeBardelaben v. Tillamook County*, 31 Or LUBA 131 (1996).

34. Variances. Under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) and ORS 197.829(1), LUBA must defer to local government interpretations of traditional variance standards, including those made without reference to traditional strict interpretations. *DeBardelaben v. Tillamook County*, 31 Or LUBA 131 (1996).

34. Variances. The commencement of proceedings to amend a local code provision cannot justify a variance; a variance cannot be granted without reference to variance standards existing at the time the application is submitted. *Krieger v. Wallowa County*, 31 Or LUBA 96 (1996).

34. Variances. Where a city's variance criteria include a "self-imposed hardship" provision, which requires that the hardship necessitating the variance not result from actions of the applicant or the previous owner, and the restriction from which petitioner seeks a variance is the result of an agreement entered into by the previous owner, the city can find that petitioner did not satisfy the "self-imposed hardship" provision. *Gionet v. City of Tualatin*, 30 Or LUBA 96 (1995).

34. Variances. That a subdivision may have detrimental effects on adjacent property does not compel a finding that the variance which makes the subdivision possible will itself have such detrimental effects. *Williams v. City of Philomath*, 30 Or LUBA 5 (1995).

34. Variances. Even under the highly deferential review standard imposed by ORS 197.829 and *Clark v. Jackson County*, 313 Or 508, 514-15, 836 P2d 710 (1992), a local governing body cannot interpret an "exceptional or extraordinary circumstances * * * which do not apply generally to other properties in the same vicinity" variance standard to include any circumstance that does not apply uniformly to all, or nearly all, properties in the vicinity. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

34. Variances. There can be no possible rational dispute that an adjustment changing the number of parking spaces required for a proposed development does not violate a code prohibition against adjustments that are "exception[s] to the procedural steps of a procedure or to change assigned procedures." *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

34. Variances. LUBA will defer to a governing body's interpretation of a traditional local code "unnecessary hardship" variance standard, where the governing body determines that so long as some beneficial use of the subject property could be established, the unnecessary hardship standard is not satisfied. *Duck Delivery Produce v. Deschutes County*, 28 Or LUBA 614 (1995).

34. Variances. A city council's interpretation of a city code "unreasonable hardships or practical difficulties" variance standard, as requiring that it be "extremely difficult" to use the subject property for a proposed concrete operation without the requested variance, is not clearly wrong and, therefore, must be affirmed. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

34. Variances. Although the substance of particular objections by neighbors may lead to a conclusion that one or more local code adjustment criteria are violated, the *fact* that one or more neighbors object has no legal significance. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

34. Variances. Petitioners' allegations that an applicant cannot simultaneously seek the benefit of two separate local code provisions allowing deviations from code height and setback requirements provide no basis for reversal or remand, where nothing in the code precludes seeking approval under both provisions. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

34. Variances. To govern deviations from local code standards, a local government may adopt approval standards for "adjustments" which are less stringent than the standards typically adopted for "variances." *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

34. Variances. Even if petitioner has constitutional defenses against an action by a local government to enforce its code fence height limitation, that does not provide an independent basis upon which to compel the local government to grant a variance to its code fence height limitation. *Stern v. City of Portland*, 26 Or LUBA 544 (1994).

34. Variances. Where a local government has not adopted traditional, strict variance standards, it may interpret a variance approval standard requiring a variance to be "the minimum variance necessary to make reasonable use of the property" as requiring that (1) the proposed use be a reasonable use of the subject property, and (2) the requested variance be the minimum necessary to allow the proposed use. *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

34. Variances. Where a zoning ordinance variance provision includes three alternative standards for granting variances, and petitioner challenges the city's findings concerning only the traditional "unreasonable hardship" standard, petitioner's challenge provides no basis for reversal or remand where the city found all three variance standards were met. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

34. Variances. A variance criterion requiring that there be no reasonably practical alternatives to granting the variance is met where the local government finds the subdivision roadway necessitating the variance is needed for compliance with the comprehensive plan, and petitioners do not challenge that finding. *Eola-Glen Neighborhood Assoc. v. City of Salem*, 25 Or LUBA 672 (1993).

34. Variances. Where a local government denies a setback variance to allow a deck on the side of a dwelling, and petitioners cite no evidence in the record establishing that having such a deck on the dwelling is more than a personal preference or amenity, petitioners fail to show the evidence in the record establishes, as a matter of law, that enforcement of the setback requirement will cause

"practical difficulty or unnecessary hardship." *Thomas v. City of Rockaway Beach*, 24 Or LUBA 532 (1993).

34. Variances. The code provision that was in effect when the application for a variance was filed, and which states a variance "shall become void after the expiration of one (1) year if no substantial construction has taken place," must be interpreted and applied when the local government determines whether a previously approved variance remains valid. *Todd v. Columbia County*, 24 Or LUBA 289 (1992).

34. Variances. A local code standard for variance approval requiring it be established that without the requested variance the applicant would not have a reasonable use of his property, is not satisfied by establishing that in the absence of variance approval the applicant cannot make the maximum use of his property possible under applicable density regulations. *Roberts v. City of Lake Oswego*, 23 Or LUBA 302 (1992).

34. Variances. Where topographic conditions make it difficult, but not impossible, to both comply with required setbacks and maintain optimal transmission tower elevation, variance standards requiring a demonstration of "practical difficulties or unnecessary hardships" and "exceptional or extraordinary circumstances or conditions" are not satisfied. *Harris v. Polk County*, 23 Or LUBA 152 (1992).

34. Variances. Where a subdivision ordinance provision limiting the length of blocks states that exceptions to the limitation may be granted where justified by topography or location of adjoining streets, a variance need not be granted to allow a block in excess of the length specified in the subdivision ordinance. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

34. Variances. Where a local government approved a height variance in 1977, but at that time had no code provision authorizing density transfers or a master plan approval process, the 1977 height variance approval does not also authorize a density transfer or give master plan approval. *Terraces Condo Assoc. v. City of Portland*, 22 Or LUBA 151 (1991).

34. Variances. A code requirement that a variance be "necessary for the preservation of a property right of the applicant substantially the same as owners of other property in the same zone or vicinity possess" authorizes approval of a variance only when necessary to establish a use allowed by the applicable zoning regulations. *Schmaltz v. City of Hood River*, 22 Or LUBA 115 (1991).

34. Variances. Where one code variance approval standard requires that a variance be "the minimum variance which would alleviate the hardship," and a second such standard requires that a variance be "necessary for the preservation of a property right of the applicant substantially the same as owners of other property in the same zone or vicinity possess," the "hardship" referred to in the first standard is correctly interpreted to be the deprivation of a "property right" possessed by other property owners, referred to in the second standard. *Schmaltz v. City of Hood River*, 22 Or LUBA 115 (1991).

34. Variances. A local code variance approval standard that a variance must be necessary to modify the impact of exceptional or extraordinary circumstances applicable to the subject property, is not satisfied by findings that local government would rather preserve a particular view and a treed area on a parcel, than adhere to code height restrictions. *Hawkins v. City of Portland*, 22 Or LUBA 65 (1991).

34. Variances. Where a local code makes it clear that it does not intend to impose traditional stringent variance standards, LUBA will give effect to the more permissive variance standards specified in the code. *Wentland v. City of Portland*, 22 Or LUBA 15 (1991).

34. Variances. The traditional "exceptional or extraordinary circumstances or conditions" variance standard, like the traditional "practical difficulties or unnecessary hardships" variance standard, is a demanding one. A variance from code open-space requirements is not "required to modify the impacts of exceptional or extraordinary circumstances or conditions" in order to allow a facility to accommodate 60 clients rather than the 46 clients that could be accommodated without a variance to the code open-space requirements. *Wentland v. City of Portland*, 22 Or LUBA 15 (1991).

34. Variances. A code requirement that an applicant for an "extraordinary exception" for a boathouse demonstrate "an extraordinary and unreasonable hardship which can be relieved only by allowing the intensification of use" is a stringent standard traditionally applied to requests for variances. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

34. Variances. That the applicant's boat may be a tempting target for vandals, there is a maintenance problem due to nearby trees and there is a lack of available covered moorage space do not demonstrate "an extraordinary, unnecessary and unreasonable hardship," as that requirement has been interpreted by appellate courts and LUBA. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

34. Variances. An applicant is not entitled to extraordinary exception approval for a boathouse simply because boathouses may have been approved for nearby property owners. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

34. Variances. While a decision to approve a zone change does not approve a "permit," within the meaning of ORS 227.160(2), a decision which approves both a variance and a minor partition does approve a "permit." *Harvard Medical Park, Ltd. v. City of Roseburg*, 19 Or LUBA 555 (1990).

34. Variances. Findings showing a parcel is close to an urban growth boundary, has road access, has residences nearby and includes areas with steep slopes and poor drainage are inadequate to show the property is affected by unique conditions not generally applicable to other properties. *DLCD v. Columbia County*, 19 Or LUBA 125 (1990).

34. Variances. Where a zoning district is designed to protect small parcels for farm and forest use that are impacted by adverse physical features and other limiting factors, and the county's findings establish only that the property is small, includes soils that are marginal for farm and forest purposes and is impacted by steep slopes and poor drainage, the findings establish that the property

is appropriately zoned, *not* that a variance from that zone's minimum lot size is warranted. *DLCD v. Columbia County*, 19 Or LUBA 125 (1990).

34. Variances. Where findings explain that an alternative pathway would ultimately make possible a safe pedestrian connection to a controlled intersection, whereas the pathway that would otherwise be required by the code would encourage dangerous street crossings, the findings are adequate to demonstrate an "adjustment" to allow the alternative pathway is consistent with plan policies, as required by the city code. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 19 Or LUBA 1 (1990).

34. Variances. Where an existing plaza fully satisfies a code requirement for at least one plaza in excess of five percent of the area of the block, no "adjustment" was required to grant a requested development approval which includes a plaza of less than five percent of the block's area. Because no "adjustment" was required, even if the findings explaining the justification for the "adjustment" are inadequate, they provide no basis for remand. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 19 Or LUBA 1 (1990).

34. Variances. The fact that property is regulated in ways that reduce the amount of land that may be developed does not, by itself, justify a variance under traditional "practical difficulties or unnecessary hardships" and "exceptional or extraordinary circumstances or conditions" variance standards. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 19 Or LUBA 1 (1990).

34. Variances. The loss of 22 out of 155 possible parking spaces due to topographic constraints is insufficient, as a matter of law, to constitute a "practical difficulty or unnecessary hardship" or "exceptional or extraordinary circumstances." *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 19 Or LUBA 1 (1990).

34. Variance. An ordinance variance standard that there be "exceptional or extraordinary circumstances or conditions * * * which do not apply generally to other properties in the same zone" requires a strict interpretation, that the "exceptional or extraordinary circumstances "must arise out of the land itself. *Cope v. Cannon Beach*, 15 Or LUBA 546 (1986).

34. Variance. That the subject lots are the only lots in the vicinity which fail to meet an ordinance access requirement does not describe conditions inherent in the land which constitute exceptional or extraordinary circumstances justifying a variance from that access requirement. *Cope v. Cannon Beach*, 15 Or LUBA 546 (1986).

34. Variance. Circumstances which do not affect a lot's ability to comply with an ordinance access requirement do not constitute exceptional or extraordinary circumstances justifying a variance from that access requirement. *Cope v. Cannon Beach*, 15 Or LUBA 546 (1986).

34. Variance. That lots were previously excepted from an ordinance minimum lot size requirement cannot be a basis for granting a variance from an ordinance development restriction unrelated to lot size. *Cope v. Cannon Beach*, 15 Or LUBA 546 (1986).

34. Variance. Where city ordinance provides that variances "ordinarily" should not be granted if the special circumstances upon which the applicant relies are a result of actions of the applicant, owner or previous owner, the city may approve a variance even where the exceptional circumstances relied upon are self-created. *Cope v. Cannon Beach*, 15 Or LUBA 546 (1986).

35. Moratoria. A city's denial of an application for development of a road does not fall within the definition of a moratorium and is allowed under ORS 197.524(2), where the city concluded the application was not consistent with the applicable code provisions and petitioner has not had prior permit applications denied. *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339 (2016).

35. Moratoria. A county fails to demonstrate a "compelling need" under ORS 197.520(3)(a)(C) for a moratorium where the county takes the position that zoning regulations can address the irrevocable public harms that the county has identified. Administrative convenience for the county in avoiding duplicative amendments to its zoning regulations is not a sufficient justification to delay or avoid the normal planning process for planning and zoning land uses. *Kovash v. Columbia County*, 72 Or LUBA 132 (2015).

35. Moratoria. In reviewing a moratorium decision, pursuant to ORS 197.540(4) LUBA's scope of review is limited to determining whether the moratorium complies with the requirements of ORS 197.505 to 197.530. *Kovash v. Columbia County*, 72 Or LUBA 132 (2015).

35. Moratoria. The single-subject requirement of Article IV, section 20, of the Oregon Constitution limits every legislative act to one subject and renders the act void with respect to any subject embraced in the legislation that is not expressed in the title. ORS 197.522, which was adopted as part of an act the subject of which is "moratorium on land development," runs afoul of the single-subject requirement to the extent it is interpreted to apply to development permits outside the context of a declared or de facto moratorium. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

35. Moratoria. Where a decision concerning a subdivision was not adopted in the context of a moratorium or a de facto moratorium, a hearings official was not obligated under ORS 197.522 to consider whether the subdivision could be made approvable through imposition of reasonable conditions of approval. *Konrady v. City of Eugene*, 59 Or LUBA 466 (2009).

35. Moratoria. A local government is not obligated under ORS 197.522 to utilize a rough sketch of a possible subdivision configuration to impose conditions to grant subdivision approval where the sketch would only permit approval of a speculative subdivision that is only potentially consistent with other subdivision approval criteria. *Konrady v. City of Eugene*, 59 Or LUBA 466 (2009).

35. Moratoria. Under the Court of Appeals' decision in *Thunderbird Hotels, LLC v. City of Portland*, 218 Or App 548, 180 P3d 87 (2008), when a local government purports to amend an already adopted moratorium while adopting an extension to that moratorium, the purported extension is invalid as a matter of law. *Thunderbird Hotels, LLC v. City of Portland*, 56 Or LUBA 447 (2008).

35. Moratoria. An ordinance that clearly states that it is extending an already adopted moratorium is an extension of the original moratorium, not the adoption of a new moratorium. *Thunderbird Hotels, LLC v. City of Portland*, 56 Or LUBA 447 (2008).

35. Moratoria. A decision that falls within the exception at ORS 197.524(2)—for delay or stopping of the issuance of permits because they are inconsistent with the local government's comprehensive plan or land use regulations—is not an impermissible de facto moratorium subject to the requirements of ORS 197.524(1). *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

35. Moratoria. A decision that denies a site review application because streets serving the property do not meet the level of adequacy specified in the city's land use regulations falls within the exception at ORS 197.524(2) and is not a de facto moratorium. *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

35. Moratoria. Even if ORS 197.522 applies outside the context of a moratorium to require the city to approve development that can be made consistent with applicable criteria through reasonable conditions, the statute places on the applicant the burden of proposing reasonable conditions. A proposed condition requiring petitioner to share the cost of future signalization of an intersection if future conditions warrant is not sufficient to ensure that the development is consistent with a standard requiring that affected intersections function at or above a minimum level of service. *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

35. Moratoria. In reviewing a challenge to a moratorium, LUBA's scope of review is limited to determining whether the moratorium was adopted in violation of ORS 197.505 to 197.530. *Thunderbird Hotels, LLC v. City of Portland*, 54 Or LUBA 487 (2007).

35. Moratoria. A local government adequately identifies the public facilities on which a moratorium is based by relying on an adopted transportation system plan that encompasses the moratorium area, even if some of those facilities are also within the jurisdiction of the Oregon Department of Transportation. *Thunderbird Hotels, LLC v. City of Portland*, 54 Or LUBA 487 (2007).

35. Moratoria. A moratorium that is limited to certain zoning districts that have significant development and redevelopment potential and that, if developed, would exacerbate a shortage in a transportation facility meets the requirements of ORS 197.520(2)(b). *Thunderbird Hotels, LLC v. City of Portland*, 54 Or LUBA 487 (2007).

35. Moratoria. Where a moratorium contains exemptions for several types of property and developments that the evidence shows will affect the transportation facility, that is a de facto "program for allocating * * * remaining public facility capacity" under ORS 197.520(2)(c). *Thunderbird Hotels, LLC v. City of Portland*, 54 Or LUBA 487 (2007).

35. Moratoria. Where a property owner proposes a modification to language contained in an exemption to a moratorium ordinance and that modification appears to accommodate economic development without exacerbating the existing shortage of the transportation facility as required by ORS 197.520(2)(c), the city is required to explain in its findings why that proposed modification was rejected. *Thunderbird Hotels, LLC v. City of Portland*, 54 Or LUBA 487 (2007).

35. Moratoria. A city decision to deny a request for annexation and subdivision approvals, based solely on a city's refusal to consider annexation requests until its buildable lands inventory can be updated, constitutes a moratorium, as that term is defined in ORS 197.505(1). *Benchmark Enterprises v. City of Stayton*, 36 Or LUBA 433 (1999).

35. Moratoria. ORS 197.540 grants LUBA review authority over any moratorium, including any extension of a moratorium under ORS 197.530(2), and LUBA may invalidate any improperly extended moratorium. *Manning v. City of St. Paul*, 33 Or LUBA 193 (1997).

35. Moratoria. LUBA's authority to review and invalidate an improperly extended moratorium does not include authority to invalidate the initial adoption of a moratorium, where initial adoption was not appealed to LUBA within 21 days after the initial adoption became final. *Manning v. City of St. Paul*, 33 Or LUBA 193 (1997).

35. Moratoria. Petitioner cannot challenge a moratorium extension by asserting that the city lacked substantial evidence to justify the initial moratorium; the relevant question is whether the record includes substantial evidence to support the moratorium extension. *Manning v. City of St. Paul*, 33 Or LUBA 193 (1997).

35. Moratoria. A local agency's policy requiring evidence of a current building permit prior to water meter installation is not a moratorium on development because the policy does not delay or deny proposed development. *Marvin v. Eugene Water and Electric Board*, 32 Or LUBA 189 (1996).

35. Moratoria. The city's finding that its comprehensive plan contemplates a rationing of building permits through a traffic management ordinance does not satisfy inquiry into whether that rationing violates the state moratorium statute. *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

35. Moratoria. A pattern of delay in the issuance of building permits is sufficient to constitute a pattern of delay under the statutory definition of moratorium. *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

35. Moratoria. The fact that a city, in prior years, had an acknowledged ordinance rationing building permits does not excuse the city from seeking acknowledgement of a new rationing ordinance or from complying with the state moratorium statute. *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

35. Moratoria. Although ordinances implementing acknowledged comprehensive plan provisions need not be separately acknowledged for goal compliance, such ordinances must comply with the state moratorium statute. *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

35. Moratoria. "Deemed acknowledgment" under ORS 197.615 does not satisfy ORS 197.505 requirement that local ordinances establishing a moratorium be acknowledged under ORS 197.251. *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

35. Moratoria. An action engaged in or practice in accordance with an acknowledged comprehensive plan provision or implementing ordinance must be justified by an acknowledged provision that fully sets forth the essential structure, form and requirements for such action or practice. *Home Builders Assoc. v. City of Wilsonville*, 30 Or LUBA 246 (1995).

35. Moratoria. Local government denial of proposed partitions because the ability of the school district to provide the level of school services required by certain plan policies has not been established does not constitute the imposition of a development moratorium prohibited by ORS 195.110(8). *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

35. Moratoria. The moratoria subject to ORS 197.505 to 197.540 are, by definition, limited geographically to "urban or urbanizable land." *Price v. Arch Cape Service District*, 22 Or LUBA 592 (1992).

35. Moratoria. Land use decisions which allow urban intensity use of rural land convert such land to "urban uses" but do not convert such land to "urban or urbanizable land," subject to the limitations imposed on moratoria in ORS 197.505 to 197.540. *Price v. Arch Cape Service District*, 22 Or LUBA 592 (1992).

35. Moratoria. The moratorium findings requirement of ORS 197.520(2)(c) that "housing needs [be] accommodated as much as possible in any program for allocating any remaining key facility capacity" is not met by findings which simply establish that there are more residential lots available for development than can be served by the sewerage system. *Western Pacific Development v. City of Brookings*, 21 Or LUBA 445 (1991).

35. Moratoria. Where a moratorium is adopted and most of the remaining sewerage system capacity is allocated either (1) without any limitation on use by nonresidential users, or (2) according to the proportion of land zoned residential, commercial and industrial, the requirement of ORS 197.520(2)(c) that "housing needs [be] accommodated as much as possible in any program for allocating any remaining key facility capacity" is not met. *Western Pacific Development v. City of Brookings*, 21 Or LUBA 445 (1991).

35. Moratoria. Under ORS 197.520(2)(a), findings which conclude that a certain portion of remaining sewerage system capacity is "already committed to development" based on an intergovernmental agreement to allocate connections to a sanitary district and to a tract subject to a local improvement district, but which fail to explain why such capacity is committed due to development, are inadequate. *Western Pacific Development v. City of Brookings*, 21 Or LUBA 445 (1991).

35. Moratoria. In reviewing a moratorium decision, LUBA's scope of review is limited to determining whether the moratorium complies with the requirements of ORS 197.505 to 197.530. *Western Pacific Development v. City of Brookings*, 21 Or LUBA 445 (1991).

35. Moratoria. Statements that petitioners' interests in developing their property are substantially impaired by local government adoption of a corrective program which will not correct the problem justifying a previously adopted moratorium, and will create a situation in which there is no

foreseeable end to that moratorium, are adequate to allege petitioners have interests which are substantially affected by the adopted corrective program. *Schatz v. City of Jacksonville*, 21 Or LUBA 214 (1991).

35. Moratoria. The adoption of a "corrective program," subsequent to adoption of a key facilities moratorium pursuant to ORS 197.520(1) and (2), is governed solely by ORS 197.530. The only substantive standard imposed by ORS 197.530 is that the corrective program "seek to correct the problem creating the moratorium." *Schatz v. City of Jacksonville*, 21 Or LUBA 214 (1991).

35. Moratoria. A local government corrective program "seeks to correct the problem creating the moratorium," as required by ORS 197.530, if it demonstrates "a good faith initial attempt to begin to solve the problem" justifying a previously adopted key facilities moratorium. *Schatz v. City of Jacksonville*, 21 Or LUBA 214 (1991).

35. Moratoria. A corrective program adopted after adoption of a key facilities moratorium may include, as a first step, development and adoption of a key facilities master plan to guide subsequent corrective measures. *Schatz v. City of Jacksonville*, 21 Or LUBA 214 (1991).

35. Moratoria. Allegations that (1) petitioners have ownership interests in land which is subject to an adopted moratorium on new construction, and (2) the moratorium prevents petitioners from developing such land for purposes for which it is zoned, are sufficient to demonstrate that petitioners' interests are substantially affected by the moratorium and, therefore, petitioners have standing to appeal the adoption of the moratorium to LUBA. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

35. Moratoria. In reviewing a local government decision adopting a moratorium, LUBA's scope of review is limited to determining whether the moratorium was adopted in violation of ORS 197.505 to 197.530. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

35. Moratoria. A moratorium adopted pursuant to ORS 197.520(2) to prevent a shortage of water supply "key facilities" does not have to be based on an inadequate *source* of water. Water treatment, storage and distribution facilities are essential to a water supply system and, therefore, are also "key facilities" as that term is used in ORS 197.520(2). *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

35. Moratoria. Neither a local government's adoption of prior moratoria nor the intent of individual residents testifying in support of the challenged moratorium provides a basis for finding the challenged moratorium was adopted in violation of ORS 197.505 to 197.530. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

35. Moratoria. Uncontradicted engineering reports showing a water system's existing storage capacity is less than the required minimum water storage capacity for such a system constitute substantial evidence supporting the local government's determination that there is a current need beyond existing water storage capacity. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

35. Moratoria. The requirement of ORS 197.520(2)(c) that housing needs be accommodated as much as possible in any program for allocating any remaining key facility capacity is inapplicable where a moratorium is based on a finding that existing key facilities are inadequate to meet current needs, as there is no remaining key facility capacity. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

35. Moratoria. Where a *current* shortage of key facilities is demonstrated, there is no requirement in ORS 197.505 to 197.530 that a local government must demonstrate it has exhausted all possible alternatives before adopting a moratorium pursuant to ORS 197.520(2). *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

35. Moratoria. A local government may demonstrate the "need to prevent a shortage of key facilities" required by ORS 197.520(2) by relying on accepted *minimum* water system capacity standards to demonstrate that (1) its water system currently does not have adequate capacity to serve existing needs, and (2) any additional construction would result in further exceeding the water system's capacity, posing a greater danger to the health, safety and welfare of local residents. *Schatz v. City of Jacksonville*, 21 Or LUBA 149 (1991).

35. Moratoria. Where a local government conducts the proceeding culminating in the adoption of a corrective program under ORS 197.530 as a separate proceeding, not as a continuation of a proceeding leading to the adoption of a moratorium under ORS 197.520, the record of the decision to adopt a corrective program does not include the record of the decision to adopt a moratorium, unless the moratorium record was placed before the decision maker during the corrective program proceeding. *Schatz v. City of Jacksonville*, 20 Or LUBA 565 (1991).

35. Moratoria. "Appearance" is not a requirement for standing to appeal the adoption of a moratorium or corrective program to LUBA. *Schatz v. City of Jacksonville*, 20 Or LUBA 565 (1991).

35. Moratoria. ORS 197.520(3) *limits* a local government's obligation to collect evidence in support of its decision to declare a moratorium to information that is "reasonably available," as opposed to more detailed evidence that may be unreasonably difficult, expensive or time consuming to generate or collect. *Davis v. City of Bandon*, 20 Or LUBA 159 (1990).

35. Moratoria. Local government findings in support of a moratorium which neither refer to limitations imposed on residential development under the applicable land use regulations, nor explain why any residential development in accordance with existing land use regulations necessarily will result in irrevocable public harm, are insufficient to explain why existing land use regulations are inadequate to "prevent irrevocable public harm from residential development," as required by ORS 197.520(3)(a). *Davis v. City of Bandon*, 20 Or LUBA 159 (1990).

35. Moratoria. The "irrevocable public harm" referred to in ORS 197.520(3)(a) can be demonstrated by showing (1) the adverse effect residential development would likely have on the local government's ultimate goal of public purchase of the subject property for development of a park and interpretive center, and (2) the unusual suitability of the property for such purposes. *Davis v. City of Bandon*, 20 Or LUBA 159 (1990).

35. Moratoria. Findings that suggest the kinds of planning measures being considered, state additional staff has been hired to prepare needed regulatory changes and conclude the needed changes can be prepared and adopted while the challenged moratorium is in effect, are adequate to demonstrate that "sufficient resources are available to complete the development of needed [regulatory] changes" while the moratorium is in effect, as required by ORS 197.520(3)(e). *Davis v. City of Bandon*, 20 Or LUBA 159 (1990).

35. Moratoria. A local government decision that continues the development limitations imposed by a previous moratorium with almost no changes has "extended" the moratorium, within the meaning of ORS 197.520(4). *Davis v. City of Bandon*, 20 Or LUBA 159 (1990).

35. Moratoria. Under ORS 197.540, which limits LUBA's scope of review in appeals of moratoria, LUBA reviews a moratorium based on the record made during the local proceedings, and invalidates the moratorium if the local government failed to adopt findings, supported by substantial evidence, demonstrating that the relevant standards in ORS 197.520(2) and (3) are satisfied. *Davis v. City of Bandon*, 19 Or LUBA 327 (1990).

35. Moratoria. While the ORS 197.520(3) "compelling need" standard for adoption of a moratorium "not based on a shortage of key facilities" is stringent, the proper focus of LUBA's review is on the requirements of the statute, particularly the findings required by ORS 197.520(3)(a) through (e). *Davis v. City of Bandon*, 19 Or LUBA 327 (1990).

35. Moratoria. Unless the nature and magnitude of the threatened public harm is sufficient to allow the determinations required by ORS 197.520(3) to be made, damage to or even loss of a resource subject to the protection of one or more statewide planning goals does not justify a moratorium under ORS 197.520(3). *Davis v. City of Bandon*, 19 Or LUBA 327 (1990).

36.1 Nonconforming Uses – Generally. An applicant need not necessarily submit evidence of physical or visible changes to the land in order to demonstrate the existence or establishment of a nonconforming use before the relevant date, and nothing in ORS 215.130 authorizes a county to reject verification of a nonconforming use that was established prior to adoption of contrary zoning because the county deems the size or scope of the use to be too small. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.1 Nonconforming Uses – Generally. The scope of a nonconforming use is confined to the uses that occur on the subject property; off-site activities, i.e., those that occur on other properties, such as leaving the property to purchase supplies or inputs for the nonconforming use, play no role in verifying the existence, nature, etc. of the nonconforming use on the subject property and are not subject to analysis or regulation as part of the nonconforming use. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.1 Nonconforming Uses – Generally. A local government does not err by (1) treating the activities of bringing automobiles purchased off-site onto the subject property and storing them on-site until such time as they are repaired and then sold not as a separate and distinct land use but, instead, as the stockpiling and storage of raw inputs that are the first step in the larger nonconforming auto yard use operation or (2) concluding that a temporary hiatus in that first step, while the operator relies on existing stockpiles of automobiles to continue the nonconforming use, does not mean that the first step or any part of the nonconforming use has been discontinued. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.1 Nonconforming Uses – Generally. In verifying a nonconforming auto yard use, a local government errs in failing to describe the nature and extent of the auto yard use in a way that imposes an upper limit on the number of vehicles stored on-site, consistent with the upper number present at or approximate to the relevant date. Limiting the physical extent of the auto yard use to that which is visible in an aerial photograph from the relevant year and limiting annual sales of vehicles to the approximate number sold in the relevant year are not sufficient to prevent unauthorized expansion or alteration of the nonconforming use where the operator could stockpile more vehicles on-site, for example, by parking them at tighter intervals or stacking them, than were present in the relevant year. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.1 Nonconforming Uses – Generally. Where an applicant has conducted both festival-related uses and non-festival-related park and campground uses on property zoned Rural Residential and Impacted Forest, where the festival-related uses are verified nonconforming uses, and where the applicant applies for a special use permit to legalize the non-festival-related park and campground uses, LUBA will affirm the county's interpretation that its nonconforming use provisions do not apply to the special use permit application where the county expressly explains that the special use permit does not authorize festival-related uses and where the petitioners identify no law preventing the county from issuing permits that have the effect of legalizing special uses that have been occurring independent of a preexisting nonconforming uses. *Klein v. Lane County*, 80 Or LUBA 287 (2019).

36.1 Nonconforming Uses – Generally. When an opponent provides evidence sufficient to rebut the presumption under ORS 215.130(10)(a) regarding the existence, continuity, nature and extent

of the proposed nonconforming use, the applicant has the burden of demonstrating that the use proposed for verification has existed and continued in its current nature and extent from the date the use became nonconforming, or 20 years prior to the date of application, whichever date is applicable. *Morgan v. Jackson County*, 78 Or LUBA 188 (2018).

36.1 Nonconforming Uses – Generally. ORS 215.130(11) prohibits a challenge to the lawful establishment element of a nonconforming use which would compel the applicant to submit evidence regarding the nature and extent of the use during periods that are more than 20 years prior to the date of application. A hearings officer cannot adopt findings based on impermissible evidence. *Morgan v. Jackson County*, 78 Or LUBA 188 (2018).

36.1 Nonconforming Uses – Generally. A hearings officer's decision that an applicant has a nonconforming use right to grow up to 18 marijuana plants for medical purposes under the Oregon Medical Marijuana Act is supported by substantial evidence in the record, and LUBA will reject an assignment of error that argues that the hearings officer's decision is not supported by substantial evidence in the whole record, where (1) the record includes copies of at least twelve cards issued by the Oregon Health Authority (OHA), administrator of the medical marijuana program, some of which are expired, duplicates, or outside of the relevant consideration dates; (2) the hearings officer relied on some of those OHA cards to reach his conclusion about the number of plants allowed; (3) the hearings officer adopted eight pages of findings explaining his decision and his understanding of the evidence; and (4) petitioner fails to challenge those findings or explain why the evidence supports his application. *Feetham v. Jackson County*, 77 Or LUBA 296 (2018).

36.1 Nonconforming Uses – Generally. The ORS 215.130(5) requirement that a use protected as a nonconforming use be a "lawful use" at the time contrary zoning is applied refers not only to whether the use complies with state or local land use laws, but also concerns whether the use complies with state, federal, or local non-land use laws, regulations or licensing requirements that are either (1) integrally related to zoning or land use or (2) for some other reason must be satisfied for a use to be "lawful." *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.1 Nonconforming Uses – Generally. The ORS 215.130(5) "lawful use" requirement cannot be concerned only with whether the use complied with zoning and land use regulations at the time the use became nonconforming, because for uses that predate a local government's first application of zoning or land use regulations that would render the "lawful use" inquiry a nullity. *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.1 Nonconforming Uses – Generally. Where a statute applicable at the time an "auto yard" use became nonconforming required the operator to obtain a Department of Motor Vehicles (DMV) dealer license prior to selling cars, subject to criminal penalties, and it is undisputed that the operator failed to obtain a DMV license prior to the use becoming nonconforming, the use was not a "lawful use" within the meaning of ORS 215.130(5). *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.1 Nonconforming Uses – Generally. Where petitioner's assignment of error in an appeal of a county decision denying his request that the county reconsider a previously denied application for verification of a nonconforming use is directed at the merits of the original decision that denied

his application for verification of a nonconforming use, rather than the merits of the subsequent county decision that denied petitioner's request to reconsider the same application that had earlier been denied, the assignment of error provides no basis for reversal or remand where the decision whether to reconsider the original decision is governed by different criteria than the original denial decision. *Kartavykh v. Clackamas County*, 74 Or LUBA 518 (2016).

36.1 Nonconforming Uses – Generally. Where a development code permits an applicant to resubmit the same application for verification of a nonconforming use less than two years after it was denied if the denial decision was based on a material mistake of fact, a hearings officer does not misconstrue the code in concluding that a denial decision that is based on conflicting evidence is not the same thing as a decision that is based on a material mistake of fact. *Kartavykh v. Clackamas County*, 74 Or LUBA 518 (2016).

36.1 Nonconforming Uses – Generally. In attempting to determine the scope and nature of a concrete batch plant nonconforming use, a hearings officer does not err by failing to infer that the concrete batch plant operated at least between the hours of 6:00 a.m. and 5 p.m. based solely on evidence that the batch plant supplied construction work. While that might be a permissible inference, it is not an inference that is required by the fact that the concrete batch plant supplied construction sites when it was in operation. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.1 Nonconforming Uses – Generally. Where a hearings officer does not take the position that his inability to verify the nature and extent of certain aspects of a prior concrete batch plant makes it impossible to determine whether an application to alter that prior nonconforming concrete batch plant will result in a more intensive use or result in greater adverse impact on the surrounding neighborhood, but intervenor does not file a cross-petition for review to assign error to that aspect of the hearings officer's decision, LUBA will not consider whether that position could provide an independent basis for denying the requested alteration. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.1 Nonconforming Uses – Generally. It is likely that the Court of Appeals would not require that a land use hearings officer ruling on a request to alter a nonconforming use must apply the legal principle stated in *Parks v. Tillamook Co. Comm./Spliid*, 11 Or App 177, 196-97, 501 P2d 85 (1972), that nonconforming uses are disfavored and subject to strict scrutiny under state law. However, where it does not appear that the *Parks* principle played any role in the hearings officer's decision, the hearings officer's citation to *Parks* provides no basis for reversal or remand. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.1 Nonconforming Uses – Generally. Where an assignment of error itself can be read to allege that a hearings officer committed a particular analytical error in reviewing an application to alter a nonconforming use, but the arguments that are put forth in support of the assignment of error have nothing to do with that arguable analytical error, petitioners fail to adequately state and develop a challenge to the analytical error. In that circumstance, LUBA will limit its review to the arguments petitioners actually present. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.1 Nonconforming Uses – Generally. Where there is conflicting believable evidence regarding whether a proposal to replace a concrete batch plant with an asphalt batch plant would present a

greater risk of explosions and damage to surrounding properties, a hearings officer's conclusion that the asphalt batch plant poses a greater risk of explosions and damage is supported by substantial evidence. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.1 Nonconforming Uses – Generally. A hearings officer does not err in finding that a 1991 decision verifying a landfill as a lawful nonconforming use did not include a composting facility within the scope of verification for the landfill, where the 1991 decision does not mention composting or a composting facility, and the application to verify the landfill does not mention composting or seek to include a composting facility with the scope of verification. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.1 Nonconforming Uses – Generally. A county errs in granting a floodplain development permit for an existing asphalt batch plant before first responding to LUBA's remand of an earlier county decision declaring the scope and nature of asphalt batch plant that qualifies as a nonconforming use. *Rogue Advocates v. Jackson County*, 70 Or LUBA 163 (2014).

36.1 Nonconforming Uses – Generally. Even if a structure qualifies as a nonconforming structure with regard to a general 20-foot setback required in the applicable zoning district, that does not obviate a 30-foot setback requirement for schools, where the use of the structure is to be converted for the first time to a school. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.1 Nonconforming Uses – Generally. Even if a structure qualifies as a nonconforming structure with regard to a general 20-foot setback required in the applicable zoning district, that does not obviate a land use code off-street parking requirement for schools, where the use of the structure is to be converted for the first time to a school. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.1 Nonconforming Uses – Generally. Where LUBA concludes that applicable local nonconforming use law might not regulate a change from one conforming use to another conforming use in a nonconforming structure, but no party challenges a hearings officer's conclusion that local nonconforming use law does regulate such a change of use, LUBA will consider petitioner's challenge to the adequacy of the hearings officer's findings that an existing structure qualifies as a nonconforming use and that the proposal may be approved as an alteration of a nonconforming use. However, LUBA will not preclude the hearings officer from considering on remand whether the nonconforming use regulations apply in that circumstance. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.1 Nonconforming Uses – Generally. In applying a local nonconforming use standard that requires that a change in nonconforming use must have "no greater adverse impact to the neighborhood," a hearings officer errs in comparing the expected adverse impacts of the changed nonconforming use with the adverse impacts of other uses that are allowed in the zoning district. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.1 Nonconforming Uses – Generally. A hearings officer's decision to recognize an existing structure as a nonconforming structure and to approve a new school use of that structure as an alteration of a nonconforming use, where there was no prior notice that the local government's

nonconforming use regulations would be applied, constitutes a procedural error that prejudiced petitioner's substantial rights. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.1 Nonconforming Uses – Generally. A local government correctly construes its local code as not requiring an applicant for a plan amendment and zone change that would have the effect of legalizing some uses of the property to demonstrate compliance with code provisions governing nonconforming uses. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

36.1 Nonconforming Uses – Generally. ORS 197.015(10)(b)(H)(i) excludes from the definition of "land use decision" land use compatibility statements determining that a prior local government land use decision authorized a use that "encompasses" the proposed state agency action. However, that exclusion is not met where the proposed state agency action is to expand the septic system for a nonconforming manufactured dwelling park, and the prior local government decision merely verified a portion of the nonconforming use, but that verification did not authorize or "encompass" the proposed septic expansion. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.1 Nonconforming Uses – Generally. Nothing in the current language of ORS 215.130, governing non-conforming uses, prohibits a local government from authorizing an expansion of a lawful nonconforming use onto an adjacent property. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.1 Nonconforming Uses – Generally. A city correctly interprets its development code to permit a change of use, without requiring that the nonconforming development on the site be brought into conformance with current development code standards, where the land use code expressly distinguishes between nonconforming uses and nonconforming development and the permit applicant proposed no change in the nonconforming development, only a change from one permitted use to another permitted use. *Nielsen v. City of Gresham*, 66 Or LUBA 24 (2012).

36.1 Nonconforming Uses – Generally. A city does not err in finding that an existing development qualifies as a protected nonconforming development in the process of a permit proceeding, notwithstanding that no application specifically requesting approval as a nonconforming development was before the city, where there was no dispute that the development qualified as nonconforming development and the evidentiary record supports the city's finding. *Nielsen v. City of Gresham*, 66 Or LUBA 24 (2012).

36.1 Nonconforming Uses – Generally. Where a landfill is a permitted use in a Public Works zone subject to site design review, the portion of an existing landfill that was approved prior to the requirement for site design review is not a non-conforming use simply because it did not receive site design review, and therefore a proposed expansion of that landfill does not require review and approval as an alteration to a non-conforming use. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

36.1 Nonconforming Uses – Generally. Under Section 5(3) of Ballot Measure 49 (2007), a property owner may complete construction of a use that was authorized under a previously issued Ballot Measure 37 (2004) waiver, if the property owner can establish that he or she has a common law vested right to complete construction of a use that was authorized under a Ballot Measure 37

waiver. Under ORS 195.318(1), LUBA would likely not have jurisdiction to review a vested right determination under Subsection 5(3) of Measure 49, however, where the property owner claims to have a vested right based on a previously issued building permit, not a Ballot Measure 37 waiver, LUBA has review jurisdiction over a county decision that the property owner does not have a vested right under the building permit. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

36.1 Nonconforming Uses – Generally. Under the Court of Appeals' decision in *Fountain Village Development Co. v. Multnomah Cty.*, 176 Or App 213, 224, 31 P3d 458 (2001), statutory and local government regulations that specify that nonconforming use rights are lost if the nonconforming use is abandoned, interrupted or discontinued for the requisite period of time also apply to vested rights, which are properly viewed as inchoate nonconforming uses. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

36.1 Nonconforming Uses – Generally. Oregon Department of Environmental Quality documents about the number of recreational vehicle (RV) sites authorized to be connected to an RV park's septic system and the number of mobile homes on-site in the mid-1990s are sufficient to rebut a presumption under ORS 215.130(10)(a), based on more recent evidence, that the larger number of RV sites that are currently connected to the septic system and the larger number of mobile homes currently on the site were present when the RV Park first became nonconforming in 1980. *Resources Northwest Inc. v. Clatsop County*, 65 Or LUBA 313 (2012).

36.1 Nonconforming Uses – Generally. Where a hearings officer's finding that an applicant has a nonconforming use right to a recreational vehicle (RV) park fails to extend that nonconforming use right to a number of dry RV spaces (spaces that are not connected to the RV park septic system) that the evidence the hearings officer relies on shows were in existence shortly before the RV park became nonconforming, remand is required for the hearings officer to better explain his decision regarding the dry RV spaces. *Resources Northwest Inc. v. Clatsop County*, 65 Or LUBA 313 (2012).

36.1 Nonconforming Uses – Generally. Where a hearings officer finds that an applicant has a nonconforming use right to continue a recreational vehicle park in an area of the county where RV parks are now prohibited, but must bring all those RV sites into full compliance with current county regulations concerning RV site standards and occupancy, but the evidence the hearings officer relies on to make his nonconforming use finding indicates that some of those sites were used for periods of time that exceed current occupancy standards and did not fully comply with current RV site standards at the time they became nonconforming, remand is required so that the hearings officer can consider whether the applicant may have a nonconforming use right to continue to use any such sites without having to bring them into compliance with the current RV park standards. *Resources Northwest Inc. v. Clatsop County*, 65 Or LUBA 313 (2012).

36.1 Nonconforming Uses – Generally. The good faith *Holmes* factor considering whether a landowner acted in good faith in making expenditures prior to a change in zoning is intended to discourage the landowner from racing to establish the basis for a non-conforming use, after the landowner receives notice of the change in zoning, and is not concerned with actions taken after the use becomes non-conforming. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.1 Nonconforming Uses – Generally. When in reviewing an application to expand a nonconforming campground to permit installation of 13 new park model recreational vehicle (RV) units, a hearings officer also concludes that 22 park model RV units previously installed pursuant to county building permits require goal exceptions to be lawful, that conclusion is non-binding *dictum* and does not provide a basis for remand, where the decision does not purport to revoke or invalidate the building permits, or impose any conditions or make binding determinations with respect to the 22 previously installed RV units. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

36.1 Nonconforming Uses – Generally. An ordinance that applies a new Airport zone to an existing airport that is a nonconforming use in the former industrial zone may "significantly affect" nearby transportation facilities within the meaning of the Transportation Planning Rule (TPR), where under the former industrial zone it would be difficult to expand the nonconforming use airport and under the new zone an airport is an outright permitted use that can be easily expanded or intensified. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

36.1 Nonconforming Uses – Generally. ORS 215.130(5) applies where an "enactment or amendment of any zoning ordinance or regulation" has occurred that places the "lawful use of any building, structure or land" into doubt. Where there is no allegation that the enactment or amendment of any zoning ordinance or regulation has occurred that has created a question as to the lawful status of an existing manufactured dwelling under a previous permit, ORS 215.130(5) does not apply. *Just v. Linn County*, 59 Or LUBA 233 (2009).

36.1 Nonconforming Uses – Generally. A hearings officer does not err in concluding that residential use of recreational vehicles (RV) at an RV park is not a lawful part of the nonconforming use, where the applicant submitted evidence that residential RV use occurred during the 10-year period preceding the 2007 application, but evidence from the 20-year period preceding the application establishes by a preponderance of the evidence that residential use did not begin until 1990, thereby rebutting the presumption established under ORS 215.130(10)(a) based on the 10-year period preceding the application. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

36.1 Nonconforming Uses – Generally. ORS 215.130(11), which prohibits a county from requiring a nonconforming use application to prove the "existence, continuity, nature and extent" of the use for a period exceeding 20 years from the date of application, affects the evidentiary burden not only with respect to continuity but also "nature and extent." As a practical matter, any expansions or alterations that occurred more than 20 years prior to the date of application are part of the "nature and extent" of the use, even if such expansions or alterations were made without required approvals. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

36.1 Nonconforming Uses – Generally. A 1990 site plan that depicts areas with existing RV spaces and areas where RV spaces were to be abandoned is sufficient to rebut by a preponderance of the evidence that a number of the current RV spaces at a nonconforming RV park did not exist in 1990, and are therefore not a lawful part of the nonconforming use. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

36.1 Nonconforming Uses – Generally. Where a code provision prohibits development approval for property that is not in full compliance with all code requirements and prior approvals, unless the approval results in the property coming into full compliance, a hearings officer does not err in interpreting the code to require the applicant to apply for all permits and approvals necessary to correct all code or permit violations as part of the development application, and to reject as insufficient the applicant's willingness to seek future permit approvals. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

36.1 Nonconforming Uses – Generally. Where a city's code conditionally permits cellular antennae on existing buildings, a city decision that denies a request for conditional use approval to site cellular antennae on an existing water tower simply because the water tower is an existing nonconforming structure will be remanded, where there is no language in the city's code that would permit such a limitation and the city provides no explanation for reading such a limitation into its code. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

36.1 Nonconforming Uses – Generally. Where a city's code distinguishes between nonconforming uses and nonconforming structures and extinguishes the right to reinstate nonconforming uses that are discontinued but allows nonconforming structures to remain in place even though their use may be discontinued, a city errs in finding that ceasing to use a water tower as part of the city's water system had the effect extinguishing the legal right of the water tower to remain in place as a legal but nonconforming structure. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

36.1 Nonconforming Uses – Generally. A resolution that adopts a revised franchise agreement between the county and a landfill operator does not constitute a de facto nonconforming use determination subject to LUBA's jurisdiction, where the resolution makes no determination whatsoever about the lawfulness or status of the landfill. *Kamp v. Washington County*, 54 Or LUBA 717 (2007).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a city's code distinguishes between nonconforming uses and nonconforming structures and extinguishes the right to reinstate nonconforming uses that are discontinued but allows nonconforming structures to remain in place even though their use may be discontinued, a city errs in finding that ceasing to use a water tower as part of the city's water system had the effect extinguishing the legal right of the water tower to remain in place as a legal but nonconforming structure. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

36.1 Nonconforming Uses – Generally. A planning staff decision that a proposed crematory expansion to a nonconforming mortuary use is an outright permitted use in a residential zone will be remanded, where the decision does not explain the basis for that conclusion and the city's code appears to prohibit expansions of nonconforming uses. *Hallowell v. City of Independence*, 53 Or LUBA 165 (2006).

36.1 Nonconforming Uses – Generally. Like the statutes governing nonconforming uses, ORS 197.770 does not specify what period of discontinued use as a firearms training facility disqualifies

a facility from protection under the statute, but instead leaves it to the local government to determine. Where the local government's regulations provide a period of discontinuance for nonconforming uses but not a specific period for firearms training facilities, LUBA will assume the nonconforming use period of discontinuance applies. *Citizens for Responsibility v. Lane County*, 51 Or LUBA 588 (2006).

36.1 Nonconforming Uses – Generally. ORS 215.130(10)(a) authorizes counties to adopt a procedure whereby an applicant may limit its proof of the "existence, continuity, nature and extent" of an alleged nonconforming use to the 10 years that precede the application. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.1 Nonconforming Uses – Generally. The rebuttable presumption that is authorized by ORS 215.130(10)(a) applies to both parts of the inquiry that is necessary under ORS 215.130(5) to verify a nonconforming use, *i.e.*, that the use existed on that date and that its existence was lawful. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.1 Nonconforming Uses – Generally. When a nonconforming use application does not distinguish between commercial and noncommercial use of a nonconforming go-cart track, and the evidence submitted also does not make such a distinction, a decision maker does not err in considering both commercial and noncommercial use of the go-cart track in determining the scope of the nonconforming use. *Lawrence v. Clackamas County*, 46 Or LUBA 101 (2003).

36.1 Nonconforming Uses – Generally. The ORS 215.130(5) requirement that local governments allow alterations to a nonconforming use "necessary to comply with any lawful requirement for alteration in the use" applies to circumstances where a regulatory agency or similar authority requires changes to a nonconforming use in order to continue the use, not to circumstances where the operator of the nonconforming use is subject to general, open-ended statutory or regulatory obligations. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.1 Nonconforming Uses – Generally. A 1962 order from the Public Utility Commission granting a public utility its service area and statutes generally requiring that public utilities provide safe and reliable electrical service within their service areas do not constitute "lawful requirements for alteration of the use" under ORS 215.130(5) sufficient to mandate county approval of proposed alterations to upgrade the capacity of a nonconforming electrical transmission line. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.1 Nonconforming Uses – Generally. An appeal of a county decision verifying a nonconforming use is not necessarily moot simply because the subject property is annexed into a city after the appeal to LUBA is filed. Although city annexation means that the county loses jurisdiction over the subject property, annexation does not affect the validity of the county decision, and LUBA's review of the county decision will continue to have a practical effect on the parties. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.1 Nonconforming Uses – Generally. ORS 215.130(5) through (11) recognizes (1) "alterations" to a nonconforming use, (2) maintenance of existing structures associated with the use in good repair, and (3) restoration or replacement of a nonconforming use made necessary by

fire or other casualty. The statute does not include an implicit fourth category of changes to nonconforming uses that reduce adverse impacts from that use. Such changes are "alterations" that require county review and approval under ORS 215.130(9). *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.1 Nonconforming Uses – Generally. Maintenance of existing structures associated with a nonconforming use in good repair under ORS 215.130(5) includes incremental replacement of structural components, at least where the structure as a whole is not substantively replaced and the installed components are similar in function to those replaced. Such incremental replacements are not alterations that require county review and approval under ORS 215.130(9). *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.1 Nonconforming Uses – Generally. In determining that an applicant failed to carry his burden to demonstrate that a proposed home occupation would be carried out inside a building and in a manner that would not unreasonably interfere with other uses, the county did not err by considering existing and past conditions on the property. *Hick v. Marion County*, 43 Or LUBA 483 (2003).

36.1 Nonconforming Uses – Generally. A city does not err by applying its more stringent nonconforming use criteria to a portion of a property located within city limits and concluding that a nonconforming use on city property has been lost, notwithstanding a county decision that the portion of the property lying outside of city limits retains its nonconforming use status based on the application of county nonconforming use standards. *ODOT v. City of Mosier*, 41 Or LUBA 73 (2001).

36.1 Nonconforming Uses – Generally. Statutory nonconforming use provisions at ORS 215.130 do not prohibit rezoning land to allow uses that would not be allowed to continue as nonconforming uses. Nor is the statute violated or undermined by the county's consideration of a history of illegal commercial uses, in applying a plan provision that allows land that has an "historical commitment" to commercial uses to be rezoned for commercial use. *Huff v. Clackamas County*, 40 Or LUBA 264 (2001).

36.1 Nonconforming Uses – Generally. ORS 215.130(10) and (11) authorize a county to adopt a process to document a preexisting nonconforming use, within certain parameters. The statute does not prohibit persons other than the proponent of the nonconforming use from providing evidence regarding the existence of the nonconforming use. *Besseling v. Douglas County*, 39 Or LUBA 410 (2001).

36.1 Nonconforming Uses – Generally. A vested right based upon substantial expenditures toward construction of a building is properly viewed as an inchoate nonconforming use, not as a distinct entitlement immune from all limitations applicable to nonconforming uses. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.1 Nonconforming Uses – Generally. Vested rights, like nonconforming use rights, may be lost where the holder fails to diligently exercise those rights, *i.e.*, the holder must continue development of the nonconforming use and not abandon or discontinue efforts to complete development. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.1 Nonconforming Uses – Generally. The rebuttable presumption provided by ORS 215.130(10)(a) creates the possibility of verifying the lawful creation and continued existence of a nonconforming use by proving the continued existence of the use for the past 10 years only. However, once the presumption has been rebutted, the applicant must show the use existed at the time of zoning and has continued, uninterrupted, since that date. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

36.1 Nonconforming Uses – Generally. Nothing in ORS 215.130(10)(a) requires that the rebuttable presumption provided by that statute can only be rebutted by "clear and convincing" evidence. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

36.1 Nonconforming Uses – Generally. The rebuttable presumption provided by ORS 215.130(10)(a) does not shift the applicant's ultimate burden of proof to demonstrate compliance with all applicable approval criteria. Where a party produces sufficient evidence of the continued existence of a nonconforming use for the prior 10-year period, the statute then shifts the burden of going forward with countering evidence to the county or any party opposing the nonconforming use. When sufficient evidence is produced showing that the nonconforming use was interrupted during some period, the applicant may no longer rely on the presumption with regard to that period of interruption. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

36.1 Nonconforming Uses – Generally. Where provisions allowing enforcement of the city's ordinance only specifically authorize judicial remedies, the city's interpretation of the enforcement provisions as allowing the city to conduct quasi-judicial proceedings to determine nonconforming use status is inconsistent with the terms of that provision and not entitled to deference under *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992), or ORS 197.829(1). *Dept. of Transportation v. City of Mosier*, 35 Or LUBA 701 (1999).

36.1 Nonconforming Uses – Generally. LUBA owes no deference to a county's interpretation of ORS 215.130, governing nonconforming uses, or ordinance provisions that implement the statute. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. Where LUBA determined in an earlier appeal of the county's approval of a nonconforming use that the nonconforming use was not established by a prior county decision approving site design review for that use, the law of the case doctrine prohibits the county, on remand, from revisiting the issue decided by LUBA. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. Principles of *res judicata* do not prohibit petitioner from raising issues before LUBA regarding the nonconforming use status of a proposed dog kennel, even if those issues could have been raised in an earlier, unappealed county decision approving site design review for the kennel, because the nonconforming use status of the proposed use was not at issue during the site design review proceedings. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. A county is not equitably estopped from denying the nonconforming use status of a dog kennel because of the applicant's reliance on a previous county decision approving site design for a dog kennel. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. Demonstrating that one nonconforming use was legally established on a property does not automatically authorize other uses in the same use category that may subsequently have been established on the property. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

36.1 Nonconforming Uses – Generally. That a use is authorized under a zoning ordinance or granted building or zoning permits does not, alone, shield the use from later-adopted zoning ordinance amendments that prohibit the use or impose a requirement for additional permits. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

36.1 Nonconforming Uses – Generally. So long as a nonconforming use has not been abandoned or discontinued, as provided by local ordinance, the nonconforming use has a right to continue, regardless of whether it complies with local regulations that would govern a new, conforming use. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

36.1 Nonconforming Uses – Generally. The protected right to continue a nonconforming use is a right to continue the nature and extent of use that existed at the time the use became nonconforming. The proponents of a nonconforming use have the burden of producing evidence from which a local government can make an adequate determination of the nature and extent of the nonconforming use. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.1 Nonconforming Uses – Generally. Where applicants wish to establish the scope of a nonconforming use, they have the burden of producing evidence from which the local decision maker can determine the scope of the nonconforming use. If applicants present nonspecific information, they run the risk that reasonable people, including the local decision maker, will disagree with them concerning the scope of the nonconforming use. *Warner v. Clackamas County*, 25 Or LUBA 82 (1993).

36.1 Nonconforming Uses – Generally. Where the challenged decision characterizes an alleged nonconforming use as a "reprographics, blueprint and printing business," and petitioner does not challenge that characterization in his petition for review, petitioner may not challenge the characterization for the first time in post oral argument memoranda. *Rhine v. City of Portland*, 24 Or LUBA 557 (1993).

36.1 Nonconforming Uses – Generally. The statutory provisions set out at ORS 215.130 governing regulation of nonconforming uses apply to counties, not to cities. *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

36.1 Nonconforming Uses – Generally. Neither ORS 215.130 nor 215.215 authorizes the creation of new parcels for nonconforming uses. *DLCD v. Columbia County*, 24 Or LUBA 32 (1992).

36.1 Nonconforming Uses – Generally. Because a nonconforming use is tied to the land on which it was lawfully established, it essentially belongs to the property owner, and there is no inherent reason why a tenant, with the permission of the property owner, may not apply to the local government for permission to expand the nonconforming use. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.1 Nonconforming Uses – Generally. In reviewing a local government decision concerning a nonconforming use, LUBA may consider a letter which was not submitted to the decision maker during the local proceedings leading to adoption of the *initial* decision, but was submitted to and considered by the decision maker during *reconsideration* proceedings. *Warner v. Clackamas County*, 22 Or LUBA 220 (1991).

36.1 Nonconforming Uses – Generally. Where the local code distinguishes between, and imposes different criteria on, nonconforming uses and nonconforming structures, a change from one conforming use to another conforming use need not comply with the criteria applicable to changes in nonconforming uses, even though the existing structure may be nonconforming. *Tarbell v. Jefferson County*, 21 Or LUBA 294 (1991).

36.1 Nonconforming Uses – Generally. Whether a proposed dwelling (1) is permitted outright in an EFU zone, (2) is "accessory" to an underlying nonconforming use, and (3) complies with ORS 215.296(1), are determinations which require "interpretation or the exercise of factual, policy or legal judgment" within the meaning of ORS 197.015(10)(b)(A) and (C). *Komning v. Grant County*, 20 Or LUBA 481 (1990).

36.1 Nonconforming Uses – Generally. Since the reference in ORS 215.130(5) to the right to continue a lawful use after "the enactment or amendment of any zoning ordinance or regulation" refers to *county* regulations, ORS 215.130(5) does not apply to the continuation of nonconforming uses within *cities*. *Goodman v. City of Portland*, 19 Or LUBA 289 (1990).

36.2 Nonconforming Uses – Definition. A local government does not err by (1) treating the activities of bringing automobiles purchased off-site onto the subject property and storing them on-site until such time as they are repaired and then sold not as a separate and distinct land use but, instead, as the stockpiling and storage of raw inputs that are the first step in the larger nonconforming auto yard use operation or (2) concluding that a temporary hiatus in that first step, while the operator relies on existing stockpiles of automobiles to continue the nonconforming use, does not mean that the first step or any part of the nonconforming use has been discontinued. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.2 Nonconforming Uses – Definition. In verifying a nonconforming auto yard use, a local government errs in failing to describe the nature and extent of the auto yard use in a way that imposes an upper limit on the number of vehicles stored on-site, consistent with the upper number present at or approximate to the relevant date. Limiting the physical extent of the auto yard use to that which is visible in an aerial photograph from the relevant year and limiting annual sales of vehicles to the approximate number sold in the relevant year are not sufficient to prevent unauthorized expansion or alteration of the nonconforming use where the operator could stockpile more vehicles on-site, for example, by parking them at tighter intervals or stacking them, than were present in the relevant year. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.2 Nonconforming Uses – Definition. The ORS 215.130(5) requirement that a use protected as a nonconforming use be a "lawful use" at the time contrary zoning is applied refers not only to whether the use complies with state or local land use laws, but also concerns whether the use complies with state, federal, or local non-land use laws, regulations or licensing requirements that are either (1) integrally related to zoning or land use or (2) for some other reason must be satisfied for a use to be "lawful." *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.2 Nonconforming Uses – Definition. The ORS 215.130(5) "lawful use" requirement cannot be concerned only with whether the use complied with zoning and land use regulations at the time the use became nonconforming, because for uses that predate a local government's first application of zoning or land use regulations that would render the "lawful use" inquiry a nullity. *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.2 Nonconforming Uses – Definition. Where a statute applicable at the time an "auto yard" use became nonconforming required the operator to obtain a Department of Motor Vehicles (DMV) dealer license prior to selling cars, subject to criminal penalties, and it is undisputed that the operator failed to obtain a DMV license prior to the use becoming nonconforming, the use was not a "lawful use" within the meaning of ORS 215.130(5). *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.2 Nonconforming Uses – Definition. An asphalt batch plant that received a conditional use permit under the conditional use permit criteria that applied at the time the plant was approved is not a nonconforming use, and the local code provisions that govern discontinuance of a nonconforming use do not apply to an application that seeks a comprehensive plan text and zoning map amendment to add additional property that is adjacent to the conditional use to the county's inventory of significant aggregate sites. *Pioneer Asphalt, Inc. v. Umatilla County*, 71 Or LUBA 65 (2015).

36.2 Nonconforming Uses – Definition. Where a landfill is a permitted use in a Public Works zone subject to site design review, the portion of an existing landfill that was approved prior to the requirement for site design review is not a non-conforming use simply because it did not receive site design review, and therefore a proposed expansion of that landfill does not require review and approval as an alteration to a non-conforming use. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

36.2 Nonconforming Uses – Definition. A use that was established in contravention of any existing land use laws and therefore did not exist "lawfully" at the time the law changed is not saved by ORS 215.130(5), simply because it *existed* when the zoning or other regulation was first enacted or later amended. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.2 Nonconforming Uses – Definition. ORS 215.130(10)(a) authorizes counties to adopt a procedure whereby an applicant may limit its proof of the "existence, continuity, nature and extent" of an alleged nonconforming use to the 10 years that precede the application. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.2 Nonconforming Uses – Definition. The rebuttable presumption that is authorized by ORS 215.130(10)(a) applies to both parts of the inquiry that is necessary under ORS 215.130(5) to verify a nonconforming use, *i.e.*, that the use existed on that date and that its existence was lawful. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.2 Nonconforming Uses – Definition. Because ORS 215.130(11) does not unambiguously prohibit a county from requiring proof that a use was a lawful use when it came into existence more than 20 years ago or that it existed when the land use laws changed to prohibit the use, it is appropriate to consider legislative history of that statute. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.2 Nonconforming Uses – Definition. The legislative history of ORS 215.130(11) makes clear that the statute operates to apply a 20-year proof limitation to any requirement of proof of existence as an element of continuity but it does not apply the 20-year limitation to any requirement of proof of existence, as an element of lawfulness at the time the use became nonconforming. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.2 Nonconforming Uses – Definition. A county's determination that the nature and extent of a nonconforming dog kennel is a function of the kennel's capacity rather than its actual use is inconsistent with ORS 215.130(5), which defines the nature of the nonconforming use as a matter of how the structure is used, not the nature of the structure itself. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.2 Nonconforming Uses – Definition. The nature and scope of a nonconforming use is governed only by the *actual* use of the subject property when the use became nonconforming, not by the use that *would have been authorized* under applicable regulations. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.2 Nonconforming Uses – Definition. Where the county code defines "nonconforming use" to mean a use that was legally established prior to adoption of any code provision "with which the * * * use does not comply," the county may properly determine that a mobile home is no longer a nonconforming use because its owners obtained approval of a temporary permit, making use of the mobile home as a residence lawful under county zoning regulations. *Morris v. Clackamas County*, 27 Or LUBA 438 (1994).

36.2 Nonconforming Uses – Definition. Where a county code does not allow new dwellings as a permitted use in a particular zone, but allows "maintenance, repair or replacement of existing dwellings" as a permitted use in that zone, lawfully established existing dwellings are not nonconforming uses in that zone. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

36.2 Nonconforming Uses – Definition. ORS 215.130(5) and (9) provide a limited authorization for counties to approve the expansion of nonconforming uses which, by definition, are contrary to provisions of county plans and land use regulations and, therefore, must be construed narrowly. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.2 Nonconforming Uses – Definition. A use is "lawful," in the sense that term is used in ORS 215.130(5), and therefore eligible to be considered a nonconforming use when zoning or land use regulations change, only if it complies with applicable zoning and other land use regulations on the date they are changed. Where zoning and land use regulations do not themselves require that a structure be maintained in conformance with all building and fire code requirements, that a building may not have conformed in all respects with the building code and fire code does not mean the use is "unlawful," and therefore ineligible for the protections accorded by ORS 215.130(5). *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

36.2 Nonconforming Uses – Definition. That a nonconforming use is inconsistent with comprehensive plan provisions that did not exist or apply on the date the use became nonconforming provides no basis for reversal or remand, because ORS 215.130(5) provides the use may continue notwithstanding such inconsistency. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

36.2 Nonconforming Uses – Definition. Under *Polk County v. Martin*, 292 Or 69, 636 P2d 952 (1981), a sporadic and intermittent use may qualify as a nonconforming use and may continue to operate as a sporadic and intermittent use. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

36.2 Nonconforming Uses – Definition. A use that existed lawfully prior to enactment of restrictive regulations, and which may therefore be continued after such regulations become effective, although it does not comply with the applicable restrictions, is termed a nonconforming use. *Schmaltz v. City of Hood River*, 22 Or LUBA 115 (1991).

36.2 Nonconforming Uses – Definition. A nonconforming use is by definition a use that is contrary to provisions of a local government's comprehensive plan and land use regulations. *Scott v. Josephine County*, 22 Or LUBA 82 (1991).

36.2 Nonconforming Uses – Definition. The nature and extent of the lawful use in existence at the time the use became nonconforming are the reference points for determining the scope of permissible continued use. The proponent of a nonconforming use bears the burden of establishing whether the nonconforming use was lawfully established. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

36.3 Nonconforming Uses – Determination of Existence. An applicant need not necessarily submit evidence of physical or visible changes to the land in order to demonstrate the existence or establishment of a nonconforming use before the relevant date, and nothing in ORS 215.130 authorizes a county to reject verification of a nonconforming use that was established prior to adoption of contrary zoning because the county deems the size or scope of the use to be too small. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.3 Nonconforming Uses – Determination of Existence. The scope of a nonconforming use is confined to the uses that occur on the subject property; off-site activities, i.e., those that occur on other properties, such as leaving the property to purchase supplies or inputs for the nonconforming use, play no role in verifying the existence, nature, etc. of the nonconforming use on the subject property and are not subject to analysis or regulation as part of the nonconforming use. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.3 Nonconforming Uses – Determination of Existence. When an opponent provides evidence sufficient to rebut the presumption under ORS 215.130(10)(a) regarding the existence, continuity, nature and extent of the proposed nonconforming use, the applicant has the burden of demonstrating that the use proposed for verification has existed and continued in its current nature and extent from the date the use became nonconforming, or 20 years prior to the date of application, whichever date is applicable. *Morgan v. Jackson County*, 78 Or LUBA 188 (2018).

36.3 Nonconforming Uses – Determination of Existence. ORS 215.130(11) prohibits a challenge to the lawful establishment element of a nonconforming use which would compel the applicant to submit evidence regarding the nature and extent of the use during periods that are more than 20 years prior to the date of application. A hearings officer cannot adopt findings based on impermissible evidence. *Morgan v. Jackson County*, 78 Or LUBA 188 (2018).

36.3 Nonconforming Uses – Determination of Existence. The ORS 215.130(5) requirement that a use protected as a nonconforming use be a "lawful use" at the time contrary zoning is applied refers not only to whether the use complies with state or local land use laws, but also concerns whether the use complies with state, federal, or local non-land use laws, regulations or licensing requirements that are either (1) integrally related to zoning or land use or (2) for some other reason must be satisfied for a use to be "lawful." *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.3 Nonconforming Uses – Determination of Existence. The ORS 215.130(5) "lawful use" requirement cannot be concerned only with whether the use complied with zoning and land use regulations at the time the use became nonconforming, because for uses that predate a local government's first application of zoning or land use regulations that would render the "lawful use" inquiry a nullity. *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.3 Nonconforming Uses – Determination of Existence. Where a statute applicable at the time an "auto yard" use became nonconforming required the operator to obtain a Department of Motor Vehicles (DMV) dealer license prior to selling cars, subject to criminal penalties, and it is undisputed that the operator failed to obtain a DMV license prior to the use becoming nonconforming, the use was not a "lawful use" within the meaning of ORS 215.130(5). *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.3 Nonconforming Uses – Determination of Existence. Where a hearings officer does not take the position that his inability to verify the nature and extent of certain aspects of a prior concrete batch plant makes it impossible to determine whether an application to alter that prior nonconforming concrete batch plant will result in a more intensive use or result in greater adverse impact on the surrounding neighborhood, but intervenor does not file a cross-petition for review to assign error to that aspect of the hearings officer's decision, LUBA will not consider whether that position could provide an independent basis for denying the requested alteration. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.3 Nonconforming Uses – Determination of Existence. A hearings officer's error in identifying 1984 instead of 1962 as the date a composting operation became nonconforming, for purposes of verifying the lawful existence of the proposed nonconforming use, is harmless error, where the hearings officer concluded, based on substantial evidence, that a composting operation did not exist at all on the property until 1990. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.3 Nonconforming Uses – Determination of Existence. A hearings officer's error in identifying 1984 instead of 1962 as the date a composting operation became nonconforming did not prejudice the applicant's substantial rights to present evidence regarding the lawful existence of the use prior to the date the use became nonconforming. Any remand to correct the erroneous citation to 1984 would focus on the correct date of nonconformity, 1962, and the applicant had a full opportunity to present evidence that the operation lawfully existed in 1962. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.3 Nonconforming Uses – Determination of Existence. A reasonable decision-maker could infer from the lack of any mention of composting on the subject property in any contemporaneous documentation prior to the 1990s that composting did not occur on the property prior to the period, notwithstanding conflicting testimony from the applicant that composting occurred prior to 1962, the date a composting facility became nonconforming on the property. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.3 Nonconforming Uses – Determination of Existence. A hearings officer does not err in finding that a 1991 decision verifying a landfill as a lawful nonconforming use did not include a composting facility within the scope of verification for the landfill, where the 1991 decision does not mention composting or a composting facility, and the application to verify the landfill does not mention composting or seek to include a composting facility with the scope of verification. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.3 Nonconforming Uses – Determination of Existence. A declaration in a 2011 franchise authorization that a composting facility is a lawful nonconforming use is not binding or controlling in a later proceeding on a land use application filed to determine whether the composting facility is a lawful nonconforming use, where the applicant agreed in a subsequent 2014 franchise agreement to file a nonconforming use verification application to demonstrate that the composting facility is a lawful land use. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.3 Nonconforming Uses – Determination of Existence. Issuance of a Department of Environmental Quality (DEQ) permit to operate a composting facility does not preempt a county from later concluding, in an application to verify whether the composting facility is a lawful nonconforming use, that the facility is not lawful nonconforming use, where the DEQ permit was issued based on a franchise authorization decision that was on appeal and that did not definitely resolve the issue of whether the composting facility is a lawful nonconforming use. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.3 Nonconforming Uses – Determination of Existence. Because a vested right is a species of nonconforming use, the general principles of nonconforming use (including discontinuance) apply to vested rights determinations, at least in counties subject to ORS 215.130. Under ORS 215.130, to determine whether a nonconforming use or vested right to complete a nonconforming has been lost through discontinuance, the local government must look back in time. Depending on the facts, it is possible that a nonconforming use or vested right could be lost through discontinuance prior to the date that the applicant seeks verification of the nonconforming use or vested right. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

36.3 Nonconforming Uses – Determination of Existence. LUBA will deny a motion to take evidence outside the record, intended to establish that a nonconforming compost facility was operating on the property in 1984 when the property was zoned EFU, where the basis for the motion to take evidence is an argument that the hearings officer committed a "procedural irregularity" not shown in the record in finding that the date the EFU zone was applied is the relevant date for determining whether the nonconforming use was in existence. If the hearings officer erred in determining the relevant date that contrary zoning was applied, that error might provide a basis for remand, but would not constitute a "procedural irregularity" not shown in the record that would allow the movant to submit new evidence to LUBA intended to establish that the use existed in 1984. *Grabhorn v. Washington County*, 72 Or LUBA 443 (2015).

36.3 Nonconforming Uses – Determination of Existence. Where findings explain that a 1996 flood destroyed some county permit records, but staff testifies that the flood did not destroy older building permit records because the older records were stored above the flood damage area, substantial evidence exists to support the finding that the county permit records are complete through that period, as well as the inference that the absence of a building permit for a second dwelling means that the dwelling was constructed without a building permit approval, and therefore was not lawfully established. *Macfarlane v. Clackamas County*, 70 Or LUBA 126 (2014).

36.3 Nonconforming Uses – Determination of Existence. A county errs in granting a floodplain development permit for an existing asphalt batch plant before first responding to LUBA's remand of an earlier county decision declaring the scope and nature of asphalt batch plant that qualifies as a nonconforming use. *Rogue Advocates v. Jackson County*, 70 Or LUBA 163 (2014).

36.3 Nonconforming Uses – Determination of Existence. A 1996 decision verifying a nonconforming manufactured dwelling park is properly understood to also verify all portions of the existing septic system that supports the park, even those portions that extend onto an adjoining parcel, where the 1996 decision clearly intended to verify the park's septic system, and there is no

indication that the decision intended to verify only the portion of the septic system on the same parcel as the nonconforming use. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.3 Nonconforming Uses – Determination of Existence. Oregon Department of Environmental Quality documents about the number of recreational vehicle (RV) sites authorized to be connected to an RV park's septic system and the number of mobile homes on-site in the mid-1990s are sufficient to rebut a presumption under ORS 215.130(10)(a), based on more recent evidence, that the larger number of RV sites that are currently connected to the septic system and the larger number of mobile homes currently on the site were present when the RV Park first became nonconforming in 1980. *Resources Northwest Inc. v. Clatsop County*, 65 Or LUBA 313 (2012).

36.3 Nonconforming Uses – Determination of Existence. Where a hearings officer's finding that an applicant has a nonconforming use right to a recreational vehicle (RV) park fails to extend that nonconforming use right to a number of dry RV spaces (spaces that are not connected to the RV park septic system) that the evidence the hearings officer relies on shows were in existence shortly before the RV park became nonconforming, remand is required for the hearings officer to better explain his decision regarding the dry RV spaces. *Resources Northwest Inc. v. Clatsop County*, 65 Or LUBA 313 (2012).

36.3 Nonconforming Uses – Determination of Existence. Where a hearings officer finds that an applicant has a nonconforming use right to continue a recreational vehicle park in an area of the county where RV parks are now prohibited, but must bring all those RV sites into full compliance with current county regulations concerning RV site standards and occupancy, but the evidence the hearings officer relies on to make his nonconforming use finding indicates that some of those sites were used for periods of time that exceed current occupancy standards and did not fully comply with current RV site standards at the time they became nonconforming, remand is required so that the hearings officer can consider whether the applicant may have a nonconforming use right to continue to use any such sites without having to bring them into compliance with the current RV park standards. *Resources Northwest Inc. v. Clatsop County*, 65 Or LUBA 313 (2012).

36.3 Nonconforming Uses – Determination of Existence. The good faith *Holmes* factor considering whether a landowner acted in good faith in making expenditures prior to a change in zoning is intended to discourage the landowner from racing to establish the basis for a non-conforming use, after the landowner receives notice of the change in zoning, and is not concerned with actions taken after the use becomes non-conforming. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.3 Nonconforming Uses – Determination of Existence. A use that was established in contravention of any existing land use laws and therefore did not exist "lawfully" at the time the law changed is not saved by ORS 215.130(5), simply because it *existed* when the zoning or other regulation was first enacted or later amended. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.3 Nonconforming Uses – Determination of Existence. ORS 215.130(10)(a) authorizes counties to adopt a procedure whereby an applicant may limit its proof of the "existence,

continuity, nature and extent" of an alleged nonconforming use to the 10 years that precede the application. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.3 Nonconforming Uses – Determination of Existence. The rebuttable presumption that is authorized by ORS 215.130(10)(a) applies to both parts of the inquiry that is necessary under ORS 215.130(5) to verify a nonconforming use, *i.e.*, that the use existed on that date and that its existence was lawful. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.3 Nonconforming Uses – Determination of Existence. Because ORS 215.130(11) does not unambiguously prohibit a county from requiring proof that a use was a lawful use when it came into existence more than 20 years ago or that it existed when the land use laws changed to prohibit the use, it is appropriate to consider legislative history of that statute. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.3 Nonconforming Uses – Determination of Existence. The legislative history of ORS 215.130(11) makes clear that the statute operates to apply a 20-year proof limitation to any requirement of proof of existence as an element of continuity but it does not apply the 20-year limitation to any requirement of proof of existence, as an element of lawfulness at the time the use became nonconforming. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.3 Nonconforming Uses – Determination of Existence. When a nonconforming use application does not distinguish between commercial and noncommercial use of a nonconforming go-cart track, and the evidence submitted also does not make such a distinction, a decision maker does not err in considering both commercial and noncommercial use of the go-cart track in determining the scope of the nonconforming use. *Lawrence v. Clackamas County*, 46 Or LUBA 101 (2003).

36.3 Nonconforming Uses – Determination of Existence. An argument that a county must verify the existence of alleged nonconforming uses, with specific reference to the location of certain structures within a setback, in the course of approving a site plan to expand an existing tourist facility, is insufficient to raise issues regarding (1) the alleged need to follow a separate procedure for verifying nonconforming uses and (2) alleged nonconforming commercial activities on the property. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004).

36.3 Nonconforming Uses – Determination of Existence. Minor relocations of nonconforming electrical transmission line poles that do not alter the nature or geographic extent of the line are not "alterations" for purposes of a code provision that requires the applicant for verification of a nonconforming use to demonstrate that alterations made since the date the use became nonconforming complied with applicable criteria. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.3 Nonconforming Uses – Determination of Existence. Where a distribution line was added to a nonconforming electrical transmission line, the hearings officer must consider whether that additional line is an "alteration" of the nonconforming use, under a code provision that requires the applicant for verification of a nonconforming use to demonstrate that alterations made since

the date the use became nonconforming complied with applicable criteria. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.3 Nonconforming Uses – Determination of Existence. A decision verifying the scope and intensity of a nonconforming racetrack operation is not supported by substantial evidence, where no party identifies supporting evidence in the record, and the decision's recitation of facts indicates that the use as verified exceeds the scope and intensity of the racetrack on the date it became nonconforming in at least some particulars. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.3 Nonconforming Uses – Determination of Existence. Combining two smaller service areas on the subject property into one larger service area does not constitute an alteration or expansion of a nonconforming use, absent evidence that the combined area significantly exceeds the total geographic extent or intensity of the former separate areas. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.3 Nonconforming Uses – Determination of Existence. Tearing a structure down to the foundations and rebuilding it does not constitute maintaining an "existing structure" in "good repair" for purposes of verifying a nonconforming structure unde r ORS 215.130(5), even if a few original timbers are reused. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.3 Nonconforming Uses – Determination of Existence. Noise from a nonconforming racetrack use is an adverse impact of that use, not part of the use itself. Reductions in noise due to technological improvements since the time the racetrack became nonconforming cannot be applied to offset increases in the intensity of racetrack operations, for purposes of verifying the scope and intensity of the nonconforming use at the time it became nonconforming. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.3 Nonconforming Uses – Determination of Existence. ORS 215.130(5) through (11) recognizes (1) "alterations" to a nonconforming use, (2) maintenance of existing structures associated with the use in good repair, and (3) restoration or replacement of a nonconforming use made necessary by fire or other casualty. The statute does not include an implicit fourth category of changes to nonconforming uses that reduce adverse impacts from that use. Such changes are "alterations" that require county review and approval under ORS 215.130(9). *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.3 Nonconforming Uses – Determination of Existence. Maintenance of existing structures associated with a nonconforming use in good repair under ORS 215.130(5) includes incremental replacement of structural components, at least where the structure as a whole is not substantively replaced and the installed components are similar in function to those replaced. Such incremental replacements are not alterations that require county review and approval under ORS 215.130(9). *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.3 Nonconforming Uses – Determination of Existence. A decision that analyzes numerous aspects of a proposed alteration of a nonconforming use compared to the historic use of the property is sufficient to establish the scope and nature of the nonconforming use where the

petitioner does not challenge that analysis. *Ankarberg v. Clackamas County*, 41 Or LUBA 504 (2002).

36.3 Nonconforming Uses – Determination of Existence. The 20-year look-back provision of ORS 215.130(11) limits the time period for which an applicant must prove the continuous operation of a nonconforming use to no more than 20 years before the date of application. Any evidence of abandonment or discontinuance that may have occurred more than 20 years before the date of application is irrelevant. *Lawrence v. Clackamas County*, 40 Or LUBA 507 (2001).

36.3 Nonconforming Uses – Determination of Existence. A presumption that the intensity of a nonconforming use at the time the use became nonconforming is the same as the intensity of the use in the 10 years preceding the nonconforming use verification proceeding is rebutted where a preponderance of the evidence shows that the nonconforming use at the time the use became nonconforming was significantly less intense. *Hal's Construction, Inc. v. Clackamas County*, 39 Or LUBA 616 (2001).

36.3 Nonconforming Uses – Determination of Existence. The burden of proof to show the legitimacy of a nonconforming use rests with the party asserting the existence of the use. LUBA will not substitute its judgment for that of the local decision maker where a reasonable person could find a beach house is not a valid nonconforming use. *Crook v. Curry County*, 38 Or LUBA 677 (2000).

36.3 Nonconforming Uses – Determination of Existence. Even though the city initiated the enforcement proceedings that gave rise to the issue of a nonconforming use, the burden of proving the existence of a nonconforming use will fall on the party asserting it. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

36.3 Nonconforming Uses – Determination of Existence. When considering whether a nonconforming use right was lost because the nonconforming use was discontinued, the city must consider the entirety of the nonconforming use rather than only the small portion of the nonconforming use that is located within the city limits. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

36.3 Nonconforming Uses – Determination of Existence. When determining the existence of a nonconforming use on land that lies partially within city limits, the city must apply the statutes and regulations applicable to the county for that portion of property lying outside the city limits. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

36.3 Nonconforming Uses – Determination of Existence. The nature and extent of the nonconforming use do not depend on whether the entity performing the activity is a landowner, permittee or licensee, but rather on the nature and extent of the nonconforming activities themselves. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

36.3 Nonconforming Uses – Determination of Existence. The rebuttable presumption provided by ORS 215.130(10)(a) creates the possibility of verifying the lawful creation and continued existence of a nonconforming use by proving the continued existence of the use for the past 10

years only. However, once the presumption has been rebutted, the applicant must show the use existed at the time of zoning and has continued, uninterrupted, since that date. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

36.3 Nonconforming Uses – Determination of Existence. A county's determination that the nature and extent of a nonconforming dog kennel is a function of the kennel's capacity rather than its actual use is inconsistent with ORS 215.130(5), which defines the nature of the nonconforming use as a matter of how the structure is used, not the nature of the structure itself. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.3 Nonconforming Uses – Determination of Existence. A property owner may not decrease the scope and intensity of a nonconforming use to minimal levels for 20 years, and then resume the nonconforming use at the scope and intensity that existed at the time it became nonconforming, absent evidence that fluctuations in scope and intensity are a product of seasonal or other business changes rather than a decrease in scope and intensity for other reasons that remained relatively constant for a long period of time. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.3 Nonconforming Uses – Determination of Existence. A county is not equitably estopped from denying the nonconforming use status of a dog kennel because of the applicant's reliance on a previous county decision approving site design for a dog kennel. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.3 Nonconforming Uses – Determination of Existence. Demonstrating that one nonconforming use was legally established on a property does not automatically authorize other uses in the same use category that may subsequently have been established on the property. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

36.3 Nonconforming Uses – Determination of Existence. A local government's decision regarding the scope of an alleged nonconforming use is supported by substantial evidence, where the evidence the local government relies on is credible, and the opposing evidence does not so undermine the evidence relied upon as to render the local government's reliance on supporting evidence unreasonable. *Aman v. City of Tigard*, 35 Or LUBA 353 (1998).

36.3 Nonconforming Uses – Determination of Existence. Where a hearings officer's decision on a previous application for design review on the subject property determined that no nonconforming use existed, but specifically left the door open for intervenors to establish such a legal use, the hearings officer in a subsequent proceeding is not bound by the earlier determination. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

36.3 Nonconforming Uses – Determination of Existence. Although it may be more difficult in most cases to establish the nature and extent of a nonconforming use that existed years ago, the requirement is not reduced in proportion to the difficulty one has in satisfying it. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

36.3 Nonconforming Uses – Determination of Existence. The proponent of a nonconforming use carries the burden to demonstrate the use was lawfully established and continued without interruption. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996).

36.3 Nonconforming Uses – Determination of Existence. The city's affirmation of the status of an existing use as a nonconforming use requires the application of the city's zoning ordinance and is therefore a land use decision over which LUBA has jurisdiction. *Smith v. City of Phoenix*, 31 Or LUBA 358 (1996).

36.3 Nonconforming Uses – Determination of Existence. Where the city's zoning code requires a structure or use be lawfully existing at the time the ordinance making it nonconforming was adopted, the city may not find an existing use to be nonconforming until it determines, based on substantial evidence, that the use was lawfully existing at the time the ordinance making it nonconforming was adopted. *Smith v. City of Phoenix*, 31 Or LUBA 358 (1996).

36.3 Nonconforming Uses – Determination of Existence. A local government decision that states it "reflects the historic use of" the subject property, and imposes certain limitations on the operation of a nonconforming use on that property, is not the equivalent of a determination regarding the nature and extent of the use existing on the property when restrictive zoning was first applied. *Suydam v. Deschutes County*, 29 Or LUBA 273 (1995).

36.3 Nonconforming Uses – Determination of Existence. Identifying a nonconforming use as a "variety of commercial enterprises," without identifying the nature and extent of the particular commercial enterprise that existed on the subject property at the time restrictive zoning was applied, is not an adequate determination regarding the nature and extent of the nonconforming use. *Suydam v. Deschutes County*, 29 Or LUBA 273 (1995).

36.3 Nonconforming Uses – Determination of Existence. Where, during a local government proceeding regarding the existence of a nonconforming use, specific issues were raised concerning whether a complete or partial interruption or abandonment of any nonconforming use of the subject property had occurred, findings that simply state use of the property has not been interrupted or abandoned are impermissibly conclusory. *Suydam v. Deschutes County*, 29 Or LUBA 273 (1995).

36.3 Nonconforming Uses – Determination of Existence. The actual use of the subject property when restrictive regulations were applied determines the extent of the protected nonconforming use right, not the owner's intent in purchasing the property. Any alteration in the nature or extent of the nonconforming use must satisfy applicable statutory and local standards for the alteration of a nonconforming use. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

36.3 Nonconforming Uses – Determination of Existence. When determining whether a nonconforming use exists, a local government's findings must determine whether the use of the subject property existing when restrictive regulations were applied was lawfully established, and the nature and extent of such use. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

36.3 Nonconforming Uses – Determination of Existence. Where the current uses of property are different from those described and approved by an earlier local decision determining the existence

of a nonconforming use on the property, in that the applicant added a number of log trucks to his business and began hauling logs for others for hire, the city correctly determined the new activities are not allowed by or within the scope of the earlier decision. *Larson v. City of Warrenton*, 29 Or LUBA 86 (1995).

36.3 Nonconforming Uses – Determination of Existence. Where the local code gives the planning director authority to make an initial determination on the existence of a nonconforming use, that the planning director made a previous determination on the existence of the nonconforming use does not mean he lacks authority to adopt a subsequent determination, pursuant to an agreement of the parties. *Huiras v. Clackamas County*, 28 Or LUBA 667 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where a local government's zoning ordinance establishes a process for administrative actions to determine the existence of nonconforming uses, and another local ordinance gives a compliance hearings officer jurisdiction over complaints regarding violations of the zoning ordinance, it is reasonable and correct to interpret these ordinances to require that the existence of a nonconforming use be determined through an administrative action, not raised as a defense in a compliance proceeding. *Watson v. Clackamas County*, 28 Or LUBA 602 (1995).

36.3 Nonconforming Uses – Determination of Existence. In determining whether to approve a proposed use as an alteration of a nonconforming use, where the local government has not previously determined that a nonconforming use exists, the local government must determine (1) whether the use was lawfully established when restrictive zoning was first applied; (2) the nature and extent of such use when it became nonconforming; (3) whether the use has been discontinued or abandoned; and (4) whether any proposed alteration of the nonconforming use complies with standards governing alterations of nonconforming uses. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.3 Nonconforming Uses – Determination of Existence. A code definition of "nonconforming use," together with a code provision that a "nonconforming use may be continued," embody the standards applicable to determining the existence of a protected nonconforming use sufficiently to satisfy ORS 215.416(8). A county may consider relevant legal principles concerning the existence of nonconforming uses set out in the opinions of LUBA and the Oregon appellate courts, without having to adopt such principles as county regulations. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.3 Nonconforming Uses – Determination of Existence. The protected right to continue a nonconforming use is a right to continue the nature and extent of use that existed at the time the use became nonconforming. The proponents of a nonconforming use have the burden of producing evidence from which a local government can make an adequate determination of the nature and extent of the nonconforming use. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where a local government determines a nonconforming use of the subject property exists together with approving an alteration of that nonconforming use, the local government's description of the nature and extent of the nonconforming use must be specific enough to provide an adequate basis for determining which

aspects of the proposal constitute an alteration of the nonconforming use and for comparing the impacts of the proposal to the impacts of the nonconforming use. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where the code regulates mobile home parks and RV facilities as separate and distinct uses, any nonconforming use determination that the subject property was used as both a mobile home park and an RV facility at the time restrictive zoning was applied must include determinations regarding the extent the property was used for each use. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.3 Nonconforming Uses – Determination of Existence. Past use of property adjacent to the subject property as part of a nonconforming use would not establish a right to continue, on the subject property, the part of the nonconforming use that was located on other property. Where such issue is raised during local proceedings to determine the nature and extent of the nonconforming use of the subject property, it must be addressed in the local government's findings. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.3 Nonconforming Uses – Determination of Existence. A local government generally must make four inquiries in determining if an existing use has a right to continue as a nonconforming use. Did the use lawfully exist when restrictive zoning was first applied? What was the nature and extent of the use when it became nonconforming? Has the use since been discontinued or abandoned? If the nature and extent of the present use represents an alteration of that in existence when the use became nonconforming, does the alteration comply with the standards governing alteration of nonconforming uses? *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where the code does not specifically require that the county hearings officer make the initial interpretation concerning whether a nonconforming use exists and the nature and extent of that nonconforming use at the time restrictive zoning was applied, the board of commissioners is not clearly wrong in interpreting the code to grant the planning director authority to make such initial determinations. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.3 Nonconforming Uses – Determination of Existence. The burden of showing an alleged nonconforming use was lawfully established at the time it became nonconforming rests with the proponent. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.3 Nonconforming Uses – Determination of Existence. At a minimum, a county's determination of the scope and nature of a nonconforming use must be precise enough to avoid improperly limiting the right to continue that use or improperly allowing an alteration or expansion of the nonconforming use without subjecting the alteration or expansion to any standards which restrict alterations or expansions. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.3 Nonconforming Uses – Determination of Existence. The nature and scope of a nonconforming use is governed only by the *actual* use of the subject property when the use became nonconforming, not by the use that *would have been authorized* under applicable regulations. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where applicable rules regulating personal use airports would have allowed far more flights than the evidentiary record shows historically occurred at an airstrip when it became nonconforming, the county cannot use the administrative rule definitions as a surrogate descriptor of the nature and scope of the use at the time it became nonconforming. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where a code standard for determining nonconforming use status requires that the use "would have been allowed" under the zoning applicable when the use became nonconforming, it is reasonable and correct to interpret the code standard to require that at the time the use became nonconforming, it complied with an applicable code provision prohibiting objectionable off-site impacts. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where the city code established no process or procedure for city determinations of compliance with a provision prohibiting permitted uses from having objectionable off-site impacts, the city cannot interpret a code nonconforming use standard to require that a city determination of compliance with the impacts provision was obtained *before* the use became nonconforming. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

36.3 Nonconforming Uses – Determination of Existence. When a local government determines a use is a nonconforming use, it must establish the parameters of the nonconforming use. Any changes in the nonconforming use after it became nonconforming, are governed by the code provisions controlling changes of nonconforming uses, not by former code performance standards applicable to the use before it became nonconforming. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where the county code defines "nonconforming use" to mean a use that was legally established prior to adoption of any code provision "with which the * * * use does not comply," the county may properly determine that a mobile home is no longer a nonconforming use because its owners obtained approval of a temporary permit, making use of the mobile home as a residence lawful under county zoning regulations. *Morris v. Clackamas County*, 27 Or LUBA 438 (1994).

36.3 Nonconforming Uses – Determination of Existence. A county can establish procedures for determinations concerning nonconforming uses as part of its zoning ordinance and, if it does so, can require parties to seek a determination regarding the existence or expansion of a nonconforming use through such zoning ordinance procedures, rather than allowing such issues to be initially determined in the county's code enforcement process. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where petitioners questioned how much of the subject property was utilized for rock quarrying purposes and how much rock was quarried during the relevant period of time, during local proceedings to determine whether a rock quarry qualifies as a nonconforming use, this is adequate to enable a reasonable decision maker to

understand issues were raised concerning the size and scope of quarrying activities and the adequacy of the evidence relating to those issues. *Mazeski v. City of Mosier*, 27 Or LUBA 100 (1994).

36.3 Nonconforming Uses – Determination of Existence. A determination that a nonconforming quarry occupied five acres at the time it became nonconforming is not supported by substantial evidence in the whole record where the only evidence cited by the parties as establishing the size of the quarry operation at the relevant time is an undated aerial photograph. *Mazeski v. City of Mosier*, 27 Or LUBA 100 (1994).

36.3 Nonconforming Uses – Determination of Existence. That a DOGAMI permit was not obtained does not establish that at the time a quarrying operation became nonconforming, it was removing up to 5,000 cubic yards of rock per year (the level of activity at which a DOGAMI permit is required). *Mazeski v. City of Mosier*, 27 Or LUBA 100 (1994).

36.3 Nonconforming Uses – Determination of Existence. Evidence that a person may have intended to maintain the nonconforming residential use of the subject property does not, alone, establish a nonconforming residential use. *Cemper v. Clackamas County*, 25 Or LUBA 486 (1993).

36.3 Nonconforming Uses – Determination of Existence. It is appropriate for a local government to interpret its code definition of the term "lot" consistently with ORS 92.017, so that individual legally established lots are recognized as such and may be individually conveyed, even though they are substandard under existing zoning regulations and are in common ownership with adjoining substandard lots. *Campbell v. Multnomah County*, 25 Or LUBA 479 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where the evidence in the record is insufficient to establish a zoning inspector's representation concerning nonconforming use status was made with knowledge of the material facts that present and certain past commercial uses of the subject property occurred without required local government approvals, the local government is not estopped from denying petitioners' application for the establishment of a nonconforming use. *Pesznecker v. City of Portland*, 25 Or LUBA 463 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where a local government correctly determines that a parking lot is a nonconforming use, and was not automatically made an approved conditional use under applicable code provisions, it commits no error in failing to apply plan and code provisions that would apply to expansion of the parking lot if it were correctly viewed as a conditional use. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

336.3 Nonconforming Uses – Determination of Existence. Where applicants wish to establish the scope of a nonconforming use, they have the burden of producing evidence from which the local decision maker can determine the scope of the nonconforming use. If applicants present nonspecific information, they run the risk that reasonable people, including the local decision maker, will disagree with them concerning the scope of the nonconforming use. *Warner v. Clackamas County*, 25 Or LUBA 82 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where the local decision maker determines the existence of a nonconforming personal use airport, but the evidence concerning the scope of that nonconforming use is nonspecific, LUBA will affirm the local decision maker's determination that the scope of the nonconforming use amounts to no more than one four-hour flight per year from such airport. *Warner v. Clackamas County*, 25 Or LUBA 82 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where a local government determines that a recreational cattle roping use was lawfully established on the date restrictive zoning was applied, because it constituted a farm use allowed outright by the subject zone, LUBA will defer to that interpretation so long as it is not clearly contrary to the express words, policy or context of the ordinance. *Smith v. Lane County*, 25 Or LUBA 1 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where the characterization of an alleged nonconforming use is the primary issue during the local proceedings, to preserve for eventual appeal to LUBA the issue of whether the alleged nonconforming use includes sales of equipment, a petitioner must do more than state in passing during the local proceedings that he maintained equipment he had a right to sell. *Rhine v. City of Portland*, 24 Or LUBA 557 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where determining whether an existing quarry qualifies as a nonconforming use under applicable city code provisions requires a city to determine whether the existing quarry lawfully existed at the time the existing zoning was last amended and whether the use has been discontinued for a year, the nonconforming use determination involves the exercise of significant legal and factual judgment and is a "permit" as that term is used in ORS 227.160(2). *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where storage is part of a lawful nonconforming use, and such storage use continues after other business operations which may be connected with the storage use cease, in the absence of the discontinuation of the storage use, such storage use may itself be a nonconforming use. *Hendgen v. Clackamas County*, 24 Or LUBA 355 (1992).

36.3 Nonconforming Uses – Determination of Existence. It is the nature and extent of the prior lawfully established use which determines the boundaries of permissible continued nonconforming use after the application of a restrictive zoning ordinance. *Hendgen v. Clackamas County*, 23 Or LUBA 285 (1992).

36.3 Nonconforming Uses – Determination of Existence. In determining whether a nonconforming use has been established, the decision of the Supreme Court in *Polk County v. Martin* requires a local government to (1) ascertain the scope and nature of the use occurring on the property at the time restrictive zoning was applied, and (2) determine whether those uses were lawful at the time the restrictive zoning was imposed. Thereafter, those uses may be continued at the level established, unless interrupted or abandoned. *Warner v. Clackamas County*, 22 Or LUBA 220 (1991).

36.3 Nonconforming Uses – Determination of Existence. Where, at the time of the imposition of restrictive zoning, there was a lawful intermittent airport use of property, it is incorrect for a

local government to conclude such use cannot constitute a nonconforming use because it was recreational, intermittent and did not involve the investment of substantial sums of money. *Warner v. Clackamas County*, 22 Or LUBA 220 (1991).

36.3 Nonconforming Uses – Determination of Existence. A use is "lawful," in the sense that term is used in ORS 215.130(5), and therefore eligible to be considered a nonconforming use when zoning or land use regulations change, only if it complies with applicable zoning and other land use regulations on the date they are changed. Where zoning and land use regulations do not themselves require that a structure be maintained in conformance with all building and fire code requirements, that a building may not have conformed in all respects with the building code and fire code does not mean the use is "unlawful," and therefore ineligible for the protections accorded by ORS 215.130(5). *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

36.3 Nonconforming Uses – Determination of Existence. Under *Polk County v. Martin*, 292 Or 69, 636 P2d 952 (1981), a sporadic and intermittent use may qualify as a nonconforming use and may continue to operate as a sporadic and intermittent use. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

36.3 Nonconforming Uses – Determination of Existence. Evidence submitted by an applicant regarding the nature and scope of activities occurring on his property during a particular period of time can constitute substantial evidence, unless other evidence in the record so undermines his evidence that a reasonable person would not rely upon it. *Smith v. Lane County*, 21 Or LUBA 228 (1991).

36.3 Nonconforming Uses – Determination of Existence. Where the applicant for a nonconforming use determination represents that current use of the subject property is substantially identical to the scope of the use existing at the time of imposition of restrictive zoning, opponents' evidence of events occurring on subject property after restrictive zoning was imposed is relevant to show the current use is more intense than the use of the property on the date the use became nonconforming. *Smith v. Lane County*, 21 Or LUBA 228 (1991).

36.3 Nonconforming Uses – Determination of Existence. Where the applicant for a nonconforming use determination presents evidence that is inconsistent and vague, such evidence is not substantial evidence to establish the existence of a nonconforming use. *Smith v. Lane County*, 21 Or LUBA 228 (1991).

36.3 Nonconforming Uses – Determination of Existence. Where a county adopted no findings, and the parties fail to identify evidence clearly supporting a determination that there was a nonconforming park use occurring on the subject parcel when the restrictive zoning was imposed, the county erred in determining a lawful nonconforming park use of the parcel exists. *Komning v. Grant County*, 20 Or LUBA 355 (1990).

36.3 Nonconforming Uses – Determination of Existence. The proponent of a nonconforming use bears the burden of proving that the nonconforming use was lawfully established. *J and D Fertilizers v. Clackamas County*, 20 Or LUBA 44 (1990).

36.3 Nonconforming Uses – Determination of Existence. In order to overturn a county determination that a nonconforming use does not exist on evidentiary grounds, it is not sufficient for petitioner to show there is substantial evidence in the record to support its position, rather the evidence must be such that a reasonable trier of fact could only say petitioner's evidence should be believed. *J and D Fertilizers v. Clackamas County*, 20 Or LUBA 44 (1990).

36.3 Nonconforming Uses – Determination of Existence. Where testimony in support of the existence of a nonconforming use is nonspecific with regard to the dates, nature and extent of the alleged use, LUBA will not conclude that a reasonable trier of fact could only find that this evidence is adequate to establish the existence of a nonconforming use. *J and D Fertilizers v. Clackamas County*, 20 Or LUBA 44 (1990).

36.3 Nonconforming Uses – Determination of Existence. Where the issue of the existence of a nonconforming use was raised below, and the appealed local government order states a position on that issue adverse to petitioners, the order includes a decision on the merits of the nonconforming use issue presented. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

36.3 Nonconforming Uses – Determination of Existence. The nature and extent of the lawful use in existence at the time the use became nonconforming are the reference points for determining the scope of permissible continued use. The proponent of a nonconforming use bears the burden of establishing whether the nonconforming use was lawfully established. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

36.3 Nonconforming Uses – Determination of Existence. Neither the fact of a particular kind of property tax assessment nor that petitioners had paid taxes on the basis of a particular kind of property tax assessment, of itself, establishes that petitioners have demonstrated a nonconforming residential use of the subject property that has not been discontinued. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

36.3 Nonconforming Uses – Determination of Existence. A zoning clearance approval that requires determinations on whether a proposed use is incidental and subordinate to an existing use, and whether and the extent to which an existing use is a lawful nonconforming use, requires interpretation and the exercise of judgment within the meaning of ORS 197.015(10)(b)(A) and (C) and, therefore, is a "permit" under ORS 215.402(4). *Komning v. Grant County*, 20 Or LUBA 481 (1990).

36.4 Nonconforming Uses – Abandonment/Interruption. A local government does not err by (1) treating the activities of bringing automobiles purchased off-site onto the subject property and storing them on-site until such time as they are repaired and then sold not as a separate and distinct land use but, instead, as the stockpiling and storage of raw inputs that are the first step in the larger nonconforming auto yard use operation or (2) concluding that a temporary hiatus in that first step, while the operator relies on existing stockpiles of automobiles to continue the nonconforming use, does not mean that the first step or any part of the nonconforming use has been discontinued. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a county suspends operation of a verified nonconforming use based on notice of noncompliance with DEQ rules, and subsequently lifts that suspension based on notice that corrective actions have been taken, the county is not required to apply land use regulations relating to the discontinuation of nonconforming uses where those land use regulations apply only in the context of an application for development of a nonconforming use or a code enforcement proceeding. Because the county is not required to apply land use regulations, lifting the suspension is not a "land use decision" for purposes of ORS 197.015(10)(a)(A) and LUBA therefore lacks jurisdiction under ORS 197.825(1). *Campbell v. Columbia County*, 79 Or LUBA 56 (2019).

36.4 Nonconforming Uses – Abandonment/Interruption. Like ORS 215.130(5), ORS 215.130(7)(a) imposes statutory standards regarding "interruption or abandonment" of a nonconforming use. But unlike ORS 215.130(5), ORS 215.130(10)(b) expressly delegates to counties the authority to "[e]stablish[] criteria to determine when a use has been interrupted or abandoned under" ORS 215.130(7). Accordingly, the adopted local criteria provide the applicable standards for determining whether a nonconforming use has been "interrupt[ed] or abandon[ed]" as those words are used ORS 215.130(7)(a). *Landwatch Lane County v. Lane County*, 77 Or LUBA 213 (2018).

36.4 Nonconforming Uses – Abandonment/Interruption. Because a vested right is a species of nonconforming use, the general principles of nonconforming use (including discontinuance) apply to vested rights determinations, at least in counties subject to ORS 215.130. Under ORS 215.130, to determine whether a nonconforming use or vested right to complete a nonconforming has been lost through discontinuance, the local government must look back in time. Depending on the facts, it is possible that a nonconforming use or vested right could be lost through discontinuance prior to the date that the applicant seeks verification of the nonconforming use or vested right. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

36.4 Nonconforming Uses – Abandonment/Interruption. ORS 215.750 and OAR 660-006-0027(3) authorize local governments to approve forest template dwellings if at least three dwellings existed within a specified 160-acre area and those dwellings continue to exist at the time forest template dwelling approval is requested. Where the record supports a hearings officer's finding that a dwelling that was constructed in 1906 has been unoccupied for many years prior to an application for approval of a forest template dwelling, the hearings officer correctly found that the 1906 dwelling was a nonconforming use in the county's forest zone that was first applied long after the 1906 dwelling was constructed. And the hearings officer correctly found that under local laws adopted to implement ORS 215.750 and OAR 660-006-0027(3), the forest template dwelling

applicant must establish that the right to continue residential use of the 1906 dwelling was not lost through interruption or abandonment for two years or more before the 1906 dwelling could be counted as a dwelling that "continues to exist" at the time the application for approval of a forest template dwelling was filed. *West v. Multnomah County*, 70 Or LUBA 235 (2014).

36.4 Nonconforming Uses – Abandonment/Interruption. Under the Court of Appeals' decision in *Fountain Village Development Co. v. Multnomah Cty*., 176 Or App 213, 224, 31 P3d 458 (2001), statutory and local government regulations that specify that nonconforming use rights are lost if the nonconforming use is abandoned, interrupted or discontinued for the requisite period of time also apply to vested rights, which are properly viewed as inchoate nonconforming uses. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. While the maintenance activities that are actually taken to maintain a nonconforming use could have some indirect bearing on whether a property owner has abandoned, discontinued or interrupted a nonconforming use, it does not follow that *any* maintenance of a nonconforming use will be sufficient to establish that the property owner has not abandoned, discontinued or interrupted a nonconforming use. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. The right that the holder of a vested right has is the right to continue "construction" of a proposed use until construction of that proposed use is complete and the vested right (an inchoate nonconforming use) is converted to a nonconforming use that is fully established. It is the continued "construction" of an inchoate nonconforming use that must not be abandoned, discontinued or interrupted for more than the time specified for nonconforming uses, to avoid losing a vested right to continue construction of that vested right. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a county finds that a property owner discontinued construction of a house for at least one year during a 30-year period, even if the property owner is given the benefit of the doubt in his contentions that over that 30-year period at unspecified times he repaired concrete scaling and did some plumbing work, framing, grading and road construction, the county's finding is supported by substantial evidence where other evidence shows there was almost no construction activity during that 30-year period. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. To preserve an issue under the particular terms of a superseded ordinance governing nonconforming uses, it is insufficient to make general arguments that the right to expand the nonconforming use had been lost through abandonment or discontinuance. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. A petitioner adequately raises the issue of whether a vested right to construct an expansion of a nonconforming use was lost through discontinuance based on common law and local code provisions, notwithstanding that most of petitioner's arguments below were based on a statute that applies only to counties, where the petitioner's discontinuance argument was not limited to the statute, and the applicant understood

petitioner to be raising discontinuance under other authorities and responded to the issue. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. Remand is necessary where a city concludes that an applicant has a vested right to construct an expansion of a nonconforming use, but the city fails to resolve issues fairly raised below regarding whether the vested right has been lost through discontinuance under the common law cases that the city's vested right conclusion rests upon, or through the city's nonconforming use code. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. ORS 215.130(11), which prohibits a county from requiring a nonconforming use application to prove the "existence, continuity, nature and extent" of the use for a period exceeding 20 years from the date of application, affects the evidentiary burden not only with respect to continuity but also "nature and extent." As a practical matter, any expansions or alterations that occurred more than 20 years prior to the date of application are part of the "nature and extent" of the use, even if such expansions or alterations were made without required approvals. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

36.4 Nonconforming Uses – Abandonment/Interruption. Where LUBA concludes that the evidence in the local government record regarding whether use of a nonconforming dwelling was abandoned for more than one year was "hardly overwhelming" but was nevertheless such that a reasonable decision maker could either find that the use was discontinued or find that the use was not discontinued, the hearings officer's finding that the nonconforming use was discontinued is supported by substantial evidence. *Bradley v. Washington County*, 47 Or LUBA 11 (2004).

36.4 Nonconforming Uses – Abandonment/Interruption. Where the evidence concerning whether a dwelling had been abandoned or interrupted before 1995 is conflicting and the hearings officer relies heavily on photographs of the dwelling that he mistakenly believed were taken in 1995 rather than years later to conclude that use of the dwelling use was abandoned or interrupted for more than one-year before 1995, the hearings officer's decision is not supported by substantial evidence and must be remanded so that the hearings officer can render a decision with a correct understanding of the date the photographs were taken. *Bradley v. Washington County*, 44 Or LUBA 36 (2003).

36.4 Nonconforming Uses – Abandonment/Interruption. A hearings officer's finding that use of a nonconforming dwelling was "abandoned" for more than one year without requiring proof that there was intent to relinquish a known right provides no independent basis for remand where the hearings officer also found that use of the dwelling was discontinued for more than one year. A local discontinuance standard, like the statutory nonconforming use "interruption" standard, does not require proof of intent to relinquish a known right. *Bradley v. Washington County*, 44 Or LUBA 36 (2003).

36.4 Nonconforming Uses – Abandonment/Interruption. A county hearings officer did not err in determining that a nonconforming wrecking yard business was discontinued where the evidence showed that (1) the last lessee operating the wrecking yard business ceased all business operations on the property for more than a year; (2) only incidental files and vehicle parts were left on the

property after the lessee ceased operations; and (3) vehicles that were abandoned in front of the locked gates on the property and were later pulled onto the property by the property owner were not part of an inventory used to reactivate the wrecking yard business. *Cory v. Clackamas County*, 44 Or LUBA 733 (2003).

36.4 Nonconforming Uses – Abandonment/Interruption. Once restoration or replacement of a nonconforming use is begun, ORS 215.130(7)(a) requires that restoration or replacement not be interrupted for a period of more than one year. *Jordan v. Columbia County*, 42 Or LUBA 341 (2002).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a nonconforming clubhouse is destroyed by fire and restoration or replacement is commenced within 10 years is periodic fundraising activity to complete the restoration, the right to restore or replace the nonconforming clubhouse is lost under ORS 215.130(7)(a). *Jordan v. Columbia County*, 42 Or LUBA 341 (2002).

36.4 Nonconforming Uses – Abandonment/Interruption. A prior local government decision that a nonconforming use had not been discontinued may constitute substantial evidence in support of a subsequent land use decision that, as of the date of the prior decision, the nonconforming use had not been discontinued. *Ankarberg v. Clackamas County*, 41 Or LUBA 504 (2002).

36.4 Nonconforming Uses – Abandonment/Interruption. A city does not err by applying its more stringent nonconforming use criteria to a portion of a property located within city limits and concluding that a nonconforming use on city property has been lost, notwithstanding a county decision that the portion of the property lying outside of city limits retains its nonconforming use status based on the application of county nonconforming use standards. *ODOT v. City of Mosier*, 41 Or LUBA 73 (2001).

36.4 Nonconforming Uses – Abandonment/Interruption. The 20-year look-back provision of ORS 215.130(11) limits the time period for which an applicant must prove the continuous operation of a nonconforming use to no more than 20 years before the date of application. Any evidence of abandonment or discontinuance that may have occurred more than 20 years before the date of application is irrelevant. *Lawrence v. Clackamas County*, 40 Or LUBA 507 (2001).

36.4 Nonconforming Uses – Abandonment/Interruption. Statutory provisions governing nonconforming uses at ORS 215.130 also govern vested rights, including the delegation of authority to counties to establish criteria under which such rights have been interrupted or abandoned. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.4 Nonconforming Uses – Abandonment/Interruption. Abandonment of a vested right, like abandonment of a nonconforming use, requires evidence of intent to relinquish a known right. Where the only evidence relevant to intent shows that the landowner maintained the uncompleted structure during the relevant period, the county errs in determining that the landowner has abandoned the right to complete and use the structure. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.4 Nonconforming Uses – Abandonment/Interruption. Where the county views a vested right to be discontinued under its code if there is discontinuance of substantial effort to finish the development for any reason for more than two years, evidence that the landowner maintained an uncompleted structure but made no effort to finish the structure for three years was sufficient to support a finding of discontinuance. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.4 Nonconforming Uses – Abandonment/Interruption. When considering whether a nonconforming use right was lost because the nonconforming use was discontinued, the city must consider the entirety of the nonconforming use rather than only the small portion of the nonconforming use that is located within the city limits. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

36.4 Nonconforming Uses – Abandonment/Interruption. When determining the existence of a nonconforming use on land that lies partially within city limits, the city must apply the statutes and regulations applicable to the county for that portion of property lying outside the city limits. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

36.4 Nonconforming Uses – Abandonment/Interruption. The nature and extent of the nonconforming use do not depend on whether the entity performing the activity is a landowner, permittee or licensee, but rather on the nature and extent of the nonconforming activities themselves. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

36.4 Nonconforming Uses – Abandonment/Interruption. The rebuttable presumption provided by ORS 215.130(10)(a) creates the possibility of verifying the lawful creation and continued existence of a nonconforming use by proving the continued existence of the use for the past 10 years only. However, once the presumption has been rebutted, the applicant must show the use existed at the time of zoning and has continued, uninterrupted, since that date. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

36.4 Nonconforming Uses – Abandonment/Interruption. Evidence of stockpiled rock in an otherwise unused and unmaintained quarry does not constitute an ongoing quarry operation, but supports a conclusion that the site has been discontinued or interrupted for the purposes of ORS 215.130. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

36.4 Nonconforming Uses – Abandonment/Interruption. Because abandonment is established through an active intent to discontinue the use, petitioner's lease of a quarry site to an unrelated business is evidence of intent to abandon the site as a quarry. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

36.4 Nonconforming Uses – Abandonment/Interruption. To demonstrate a nonconforming use was not interrupted under ORS 215.130, the evidence must establish that the business was operational on an ongoing basis. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

36.4 Nonconforming Uses – Abandonment/Interruption. A decision denying a requested nonconforming use determination is supported by substantial evidence, where the applicant's evidence had gaps and inconsistencies and the opponent's evidence was uniform. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

36.4 Nonconforming Uses – Abandonment/Interruption. LUBA will remand the county's expansion of a nonconforming use where the county fails to make the requisite findings regarding the level of intensity of use that existed when the use became nonconforming, and the level of intensity that has continued, uninterrupted, since that time. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

36.4 Nonconforming Uses – Abandonment/Interruption. Where the county's interpretation of a local ordinance regarding nonconforming uses allows an abandoned nonconforming dog kennel use to be reinstated, that interpretation violates OAR 660-33-120, which prohibits new kennels on high-value farmland. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

36.4 Nonconforming Uses – Abandonment/Interruption. That a nonconforming use was interrupted or abandoned during a period when the subject property was in receivership has no bearing on whether it may be resumed. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996).

36.4 Nonconforming Uses – Abandonment/Interruption. Where, during a local government proceeding regarding the existence of a nonconforming use, specific issues were raised concerning whether a complete or partial interruption or abandonment of any nonconforming use of the subject property had occurred, findings that simply state use of the property has not been interrupted or abandoned are impermissibly conclusory. *Suydam v. Deschutes County*, 29 Or LUBA 273 (1995).

36.4 Nonconforming Uses – Abandonment/Interruption. So long as a nonconforming use has not been abandoned or discontinued, as provided by local ordinance, the nonconforming use has a right to continue, regardless of whether it complies with local regulations that would govern a new, conforming use. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

36.4 Nonconforming Uses – Abandonment/Interruption. In determining whether to approve a proposed use as an alteration of a nonconforming use, where the local government has not previously determined that a nonconforming use exists, the local government must determine (1) whether the use was lawfully established when restrictive zoning was first applied; (2) the nature and extent of such use when it became nonconforming; (3) whether the use has been discontinued or abandoned; and (4) whether any proposed alteration of the nonconforming use complies with standards governing alterations of nonconforming uses. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.4 Nonconforming Uses – Abandonment/Interruption. A local government generally must make four inquiries in determining if an existing use has a right to continue as a nonconforming use. Did the use lawfully exist when restrictive zoning was first applied? What was the nature and extent of the use when it became nonconforming? Has the use since been discontinued or abandoned? If the nature and extent of the present use represents an alteration of that in existence

when the use became nonconforming, does the alteration comply with the standards governing alteration of nonconforming uses? *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a county and a property owner agree the owner will not conduct a disputed nonconforming use until the issue is resolved through appropriate county proceedings, and the agreement specifically provides the owner's nonconforming use rights will not be lost as a result of complying with the agreement, nonuse pursuant to that agreement cannot extinguish the nonconforming use. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.4 Nonconforming Uses – Abandonment/Interruption. Where the local code provides that nonconforming use rights are lost if the site of a nonconforming use is "vacant" for two continuous years, and also provides that words used in the code have their normal dictionary meaning, the local government may interpret "vacant" to mean "free from activity" consistent with the nonconforming use rights, but cannot embellish that definition by adding a requirement for the absence of "a bona fide effort to provide goods and services for profit." *Rhine v. City of Portland*, 27 Or LUBA 86 (1994).

36.4 Nonconforming Uses – Abandonment/Interruption. A local government determination that occasionally staying on the subject property in a travel trailer is not residential use of the property for purposes of determining whether a nonconforming residential use has been "discontinued," is not a clearly wrong interpretation of the code, and LUBA will defer to it. *Cemper v. Clackamas County*, 25 Or LUBA 486 (1993).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a nonconforming use is a business, and that business ceases operations during bankruptcy proceedings for more than the period of time specified in the local code for discontinuance of a nonconforming use and is liquidated by the bankruptcy trustee, the nonconforming use is lost. *Hendgen v. Clackamas County*, 23 Or LUBA 285 (1992).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a nonconforming use is significantly reduced in scope by relocating significant aspects of the use to another location for two years, the relocation represents a partial interruption or discontinuance of the nonconforming use, and the property owner may not, five years later, unilaterally resume the nonconforming use at its former scope and intensity. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

36.4 Nonconforming Uses – Abandonment/Interruption. Where the local code provides that a nonconforming use cannot be resumed if it has been "discontinued" for more than a specified period of time, a nonconforming use is lost if not used for that period of time, regardless of whether the use was "abandoned" or there was a subjective intent to continue the use at sometime in the future. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

36.4 Nonconforming Uses – Abandonment/Interruption. Neither the fact of a particular kind of property tax assessment nor that petitioners had paid taxes on the basis of a particular kind of property tax assessment, of itself, establishes that petitioners have demonstrated a nonconforming

residential use of the subject property which has not been discontinued. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

36.5 Nonconforming Uses – Alteration/Change. In verifying a nonconforming auto yard use, a local government errs in failing to describe the nature and extent of the auto yard use in a way that imposes an upper limit on the number of vehicles stored on-site, consistent with the upper number present at or approximate to the relevant date. Limiting the physical extent of the auto yard use to that which is visible in an aerial photograph from the relevant year and limiting annual sales of vehicles to the approximate number sold in the relevant year are not sufficient to prevent unauthorized expansion or alteration of the nonconforming use where the operator could stockpile more vehicles on-site, for example, by parking them at tighter intervals or stacking them, than were present in the relevant year. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.5 Nonconforming Uses – Alteration/Change. Where an applicant has conducted both festival-related uses and non-festival-related park and campground uses on property zoned Rural Residential and Impacted Forest, where the festival-related uses are verified nonconforming uses, and where the applicant applies for a special use permit to legalize the non-festival-related park and campground uses, LUBA will affirm the county's interpretation that its nonconforming use provisions do not apply to the special use permit application where the county expressly explains that the special use permit does not authorize festival-related uses and where the petitioners identify no law preventing the county from issuing permits that have the effect of legalizing special uses that have been occurring independent of a preexisting nonconforming uses. *Klein v. Lane County*, 80 Or LUBA 287 (2019).

36.5 Nonconforming Uses – Alteration/Change. An alteration to a nonconforming use is, in essence, a permissible continuation of the original nonconforming use. The alteration analysis under ORS 215.130(9) requires a comparison between the proposed alteration and the original nonconforming use, to which the right to continue is attached, and subsequent lawful alterations. *Underwood v. Clackamas County*, 80 Or LUBA 542 (2019).

36.5 Nonconforming Uses – Alteration/Change. While a circuit court has exclusive authority to modify a 1976 decree recognizing a vested right to development, where in 2013 the applicant seeks county approval to alter or expand that vested right and the county enters into a stipulation with the applicant approving the proposed alteration or expansion, that the circuit court agrees to modify the 1976 decree to reflect the stipulation does not change the fact that the stipulation itself is an alteration or expansion of a nonconforming use, and hence a land use decision subject to LUBA's exclusive jurisdiction. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

36.5 Nonconforming Uses – Alteration/Change. A stipulation entered into between a vested rights holder and a county that (1) revives a right to construct several buildings that had otherwise expired, (2) authorizes development in a different part of the property than formerly authorized, (3) approves a 200-unit hotel as a previously authorized "lodge with bunkhouse," and (4) declares that all development allowed under the stipulation is allowed notwithstanding county land use regulations to the contrary is, in effect, a decision to approve alterations or expansions to a nonconforming use, and therefore the county must apply the statutory and code standards applicable to alterations and expansions to a nonconforming use. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

36.5 Nonconforming Uses – Alteration/Change. LUBA will remand rather than reverse a county decision that erroneously concludes that a 2005 permit is still valid to authorize issuance of building permits for what is now a nonconforming use, where the applicant originally filed for a vested rights determination, and planning staff originally evaluated the application as one for alteration of a nonconforming use, but those theories were not addressed in the county's final decision. *Landwatch Lane County v. Lane County,* 74 Or LUBA 299 (2016).

36.5 Nonconforming Uses – Alteration/Change. Where there is conflicting believable evidence regarding whether a proposal to replace a concrete batch plant with an asphalt batch plant would present a greater risk of explosions and damage to surrounding properties, a hearings officer's conclusion that the asphalt batch plant poses a greater risk of explosions and damage is supported by substantial evidence. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.5 Nonconforming Uses – Alteration/Change. Where a hearings officer concludes that an application for nonconforming use verification does not include a request to approve alterations to the nonconforming use, but the hearings officer also observes that future applications for alterations are unlikely to be approved under the county code standards that apply to alterations, the observation is dicta, and not a basis for reversal or remand. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.5 Nonconforming Uses – Alteration/Change. A stipulation between a county and a property owner to modify the location of development allowed as a vested right and nonconforming use is in all but name an alteration of a nonconforming use, and as such the stipulation concerns the application of land use regulations governing nonconforming uses, and is therefore a "land use decision" as defined at ORS 197.015(10)(a). *Rogue Advocates v. Jackson County*, 73 Or LUBA 382 (2016).

36.5 Nonconforming Uses – Alteration/Change. The statutory framework governing nonconforming uses and alteration of those uses makes clear that an alteration of a nonconforming use amounts to a continuation of the use, and therefore cannot be a discontinuance of the same use. *Rogue Advocates v. Jackson County*, 71 Or LUBA 148 (2015).

36.5 Nonconforming Uses – Alteration/Change. In applying a local nonconforming use standard that requires that a change in nonconforming use must have "no greater adverse impact to the neighborhood," a hearings officer errs in comparing the expected adverse impacts of the changed nonconforming use with the adverse impacts of other uses that are allowed in the zoning district. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.5 Nonconforming Uses – Alteration/Change. A hearings officer's decision to recognize an existing structure as a nonconforming structure and to approve a new school use of that structure as an alteration of a nonconforming use, where there was no prior notice that the local government's nonconforming use regulations would be applied, constitutes a procedural error that prejudiced petitioner's substantial rights. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.5 Nonconforming Uses – Alteration/Change. ORS 197.015(10)(b)(H)(ii) excludes from the definition of "land use decision" any land use compatibility statements determining that the proposed state agency action is "allowed without review" under local comprehensive plan and regulations. However, that exclusion is not met where the proposed state agency action is to expand the septic system for a nonconforming manufactured dwelling park, and the expansion is accomplished by verifying and altering the scope of the nonconforming use, which necessarily requires discretionary review. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.5 Nonconforming Uses – Alteration/Change. Nothing in the current language of ORS 215.130, governing non-conforming uses, prohibits a local government from authorizing an expansion of a lawful nonconforming use onto an adjacent property. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.5 Nonconforming Uses – Alteration/Change. ORS 215.130(5) provides that a county shall approve an alteration of a nonconforming use that is necessary to comply with any lawful requirement for alteration in the use, and prohibits counties from conditioning an alteration that is necessary to comply with state or local health or safety requirements. Where the Department of Environmental Quality (DEQ) threatens enforcement against a nonconforming manufactured dwelling park and requires the park to fix its failing septic system to avoid health hazards, the alteration qualifies as both a "lawful requirement" and "health and safety" type of alterations. That the applicant has some choice in how the required septic improvements are designed does not disqualify the alterations as "lawful requirement" or "health and safety" types of alterations. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.5 Nonconforming Uses – Alteration/Change. A condition of a 1996 decision verifying a nonconforming manufactured dwelling park that prohibits "further expansion" of the park is not intended to prohibit expansion of the septic system that serves the existing approved dwellings, where the number or type of dwellings or uses served by the septic system is not expanded. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.5 Nonconforming Uses – Alteration/Change. A city correctly interprets its development code to permit a change of use, without requiring that the nonconforming development on the site be brought into conformance with current development code standards, where the land use code expressly distinguishes between nonconforming uses and nonconforming development and the permit applicant proposed no change in the nonconforming development, only a change from one permitted use to another permitted use. *Nielsen v. City of Gresham*, 66 Or LUBA 24 (2012).

36.5 Nonconforming Uses – Alteration/Change. An assignment of error that a decision maker erroneously characterized a nonconforming use application as an application to "change" rather than "expand" the nonconforming use does not provide a basis for reversal or remand, where the local approval criteria for both changes and expansions require a finding of no greater adverse impacts, and petitioner does not challenge findings that the proposed change/expansion results in greater adverse impacts. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

36.5 Nonconforming Uses – Alteration/Change. It is harmless error to rely on new evidence that is accepted after the close of the record regarding water quality impacts of a proposed alteration to

a nonconforming use, where the hearings officer also denied the proposed alteration based on fire safety impacts, and the petitioner/applicant does not challenge that basis for denial. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

36.5 Nonconforming Uses – Alteration/Change. A hearings officer does not err in concluding that residential use of recreational vehicles (RV) at an RV park is not a lawful part of the nonconforming use, where the applicant submitted evidence that residential RV use occurred during the 10-year period preceding the 2007 application, but evidence from the 20-year period preceding the application establishes by a preponderance of the evidence that residential use did not begin until 1990, thereby rebutting the presumption established under ORS 215.130(10)(a) based on the 10-year period preceding the application. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

36.5 Nonconforming Uses – Alteration/Change. ORS 215.130(11), which prohibits a county from requiring a nonconforming use application to prove the "existence, continuity, nature and extent" of the use for a period exceeding 20 years from the date of application, affects the evidentiary burden not only with respect to continuity but also "nature and extent." As a practical matter, any expansions or alterations that occurred more than 20 years prior to the date of application are part of the "nature and extent" of the use, even if such expansions or alterations were made without required approvals. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

36.5 Nonconforming Uses – Alteration/Change. A 1990 site plan that depicts areas with existing RV spaces and areas where RV spaces were to be abandoned is sufficient to rebut by a preponderance of the evidence that a number of the current RV spaces at a nonconforming RV park did not exist in 1990, and are therefore not a lawful part of the nonconforming use. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

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

36.5 Nonconforming Uses – Alteration/Change. Merely because some aspects of a proposed expansion/alteration of a nonconforming use are necessary to comply with Americans with Disabilities Act (ADA) requirements and thus allowed without nonconforming use review does not mean that other aspects of the proposal that are not related to ADA requirements are exempt from nonconforming use review. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

36.5 Nonconforming Uses – Alteration/Change. The ORS 215.130(5) requirement that local governments allow alterations to a nonconforming use "necessary to comply with any lawful requirement for alteration in the use" applies to circumstances where a regulatory agency or similar authority requires changes to a nonconforming use in order to continue the use, not to

circumstances where the operator of the nonconforming use is subject to general, open-ended statutory or regulatory obligations. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.5 Nonconforming Uses – Alteration/Change. A 1962 order from the Public Utility Commission granting a public utility its service area and statutes generally requiring that public utilities provide safe and reliable electrical service within their service areas do not constitute "lawful requirements for alteration of the use" under ORS 215.130(5) sufficient to mandate county approval of proposed alterations to upgrade the capacity of a nonconforming electrical transmission line. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.5 Nonconforming Uses – Alteration/Change. Minor relocations of nonconforming electrical transmission line poles that do not alter the nature or geographic extent of the line are not "alterations" for purposes of a code provision that requires the applicant for verification of a nonconforming use to demonstrate that alterations made since the date the use became nonconforming complied with applicable criteria. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.5 Nonconforming Uses – Alteration/Change. Where a distribution line was added to a nonconforming electrical transmission line, the hearings officer must consider whether that additional line is an "alteration" of the nonconforming use, under a code provision that requires the applicant for verification of a nonconforming use to demonstrate that alterations made since the date the use became nonconforming complied with applicable criteria. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.5 Nonconforming Uses – Alteration/Change. Combining two smaller service areas on the subject property into one larger service area does not constitute an alteration or expansion of a nonconforming use, absent evidence that the combined area significantly exceeds the total geographic extent or intensity of the former separate areas. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.5 Nonconforming Uses – Alteration/Change. Tearing a structure down to the foundations and rebuilding it does not constitute maintaining an "existing structure" in "good repair" for purposes of verifying a nonconforming structure under ORS 215.130(5), even if a few original timbers are reused. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.5 Nonconforming Uses – Alteration/Change. Noise from a nonconforming racetrack use is an adverse impact of that use, not part of the use itself. Reductions in noise due to technological improvements since the time the racetrack became nonconforming cannot be applied to offset increases in the intensity of racetrack operations, for purposes of verifying the scope and intensity of the nonconforming use at the time it became nonconforming. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.5 Nonconforming Uses – Alteration/Change. ORS 215.130(5) through (11) recognizes (1) "alterations" to a nonconforming use, (2) maintenance of existing structures associated with the use in good repair, and (3) restoration or replacement of a nonconforming use made necessary by fire or other casualty. The statute does not include an implicit fourth category of changes to

nonconforming uses that reduce adverse impacts from that use. Such changes are "alterations" that require county review and approval under ORS 215.130(9). *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.5 Nonconforming Uses – Alteration/Change. Maintenance of existing structures associated with a nonconforming use in good repair under ORS 215.130(5) includes incremental replacement of structural components, at least where the structure as a whole is not substantively replaced and the installed components are similar in function to those replaced. Such incremental replacements are not alterations that require county review and approval under ORS 215.130(9). *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.5 Nonconforming Uses – Alteration/Change. A decision that analyzes numerous aspects of a proposed alteration of a nonconforming use compared to the historic use of the property is sufficient to establish the scope and nature of the nonconforming use where the petitioner does not challenge that analysis. *Ankarberg v. Clackamas County*, 41 Or LUBA 504 (2002).

36.5 Nonconforming Uses – Alteration/Change. A proposal to reconstruct a 35,987-square-foot fruit processing facility with a 46,856-square-foot facility, with extensive new paving, driveway and septic facilities, is properly regarded as an expansion or alteration rather than replacement of the smaller facility. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

36.5 Nonconforming Uses – Alteration/Change. A determination by a hearings officer that, based on conflicting testimony and evidence, the impacts from a proposed alteration to a nonconforming use would be greater than the allowed nonconforming use does not allow opponents to "effectively veto" the alteration, where the decision identifies the evidence considered by the hearings officer and articulates the reasons why the hearings officer found certain testimony more credible than other testimony. *Hal's Construction, Inc. v. Clackamas County*, 39 Or LUBA 616 (2001).

36.5 Nonconforming Uses – Alteration/Change. The county may not rely on a previous decision approving design review for a 50-dog kennel to establish the existence of nonconforming use rights for intervenors' current kennel operations. Under ORS 215.130, before the county may grant intervenors an alteration to a nonconforming use, intervenors must satisfy their burden of establishing the existence of that nonconforming use. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

36.5 Nonconforming Uses – Alteration/Change. The actual use of the subject property when restrictive regulations were applied determines the extent of the protected nonconforming use right, not the owner's intent in purchasing the property. Any alteration in the nature or extent of the nonconforming use must satisfy applicable statutory and local standards for the alteration of a nonconforming use. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

36.5 Nonconforming Uses – Alteration/Change. In determining whether to approve a proposed use as an alteration of a nonconforming use, where the local government has not previously determined that a nonconforming use exists, the local government must determine (1) whether the use was lawfully established when restrictive zoning was first applied; (2) the nature and extent of

such use when it became nonconforming; (3) whether the use has been discontinued or abandoned; and (4) whether any proposed alteration of the nonconforming use complies with standards governing alterations of nonconforming uses. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.5 Nonconforming Uses – Alteration/Change. Where a local government determines a nonconforming use of the subject property exists together with approving an alteration of that nonconforming use, the local government's description of the nature and extent of the nonconforming use must be specific enough to provide an adequate basis for determining which aspects of the proposal constitute an alteration of the nonconforming use and for comparing the impacts of the proposal to the impacts of the nonconforming use. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.5 Nonconforming Uses – Alteration/Change. It is unreasonable for a local hearings officer to interpret a code provision prohibiting "unit enlargements or expansions" of existing mobile home parks unless they are "made to conform substantially with all requirements for new construction" as inherently inapplicable to any proposed alteration of a nonconforming mobile home park, because such an interpretation would make this code provision a nullity. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.5 Nonconforming Uses – Alteration/Change. A local government generally must make four inquiries in determining if an existing use has a right to continue as a nonconforming use. Did the use lawfully exist when restrictive zoning was first applied? What was the nature and extent of the use when it became nonconforming? Has the use since been discontinued or abandoned? If the nature and extent of the present use represents an alteration of that in existence when the use became nonconforming, does the alteration comply with the standards governing alteration of nonconforming uses? *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.5 Nonconforming Uses – Alteration/Change. At a minimum, a county's determination of the scope and nature of a nonconforming use must be precise enough to avoid improperly limiting the right to continue that use or improperly allowing an alteration or expansion of the nonconforming use without subjecting the alteration or expansion to any standards which restrict alterations or expansions. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.5 Nonconforming Uses – Alteration/Change. When a local government determines a use is a nonconforming use, it must establish the parameters of the nonconforming use. Any changes in the nonconforming use after it became nonconforming, are governed by the code provisions controlling changes of nonconforming uses, not by former code performance standards applicable to the use before it became nonconforming. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

36.5 Nonconforming Uses – Alteration/Change. It is within a county's authority under ORS 215.130(5), (6) and (9) to adopt code provisions treating "replacement" of a nonconforming structure as a potentially allowable alteration of a nonconforming use, so long as the code requires that the replacement reasonably continues the nonconforming use and has no greater adverse impact on the neighborhood. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 283 (1993).

36.5 Nonconforming Uses – Alteration/Change. Where petitioners referred several times during local proceedings to a nonconforming parking lot as having only 22 spaces, petitioners did not waive their right to challenge a city decision approving changes in the nonconforming parking lot to allow 32 spaces. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

36.5 Nonconforming Uses – Alteration/Change. Where a city decision includes findings suggesting the city thought it was allowing a change in a nonconforming parking lot without increasing the number of parking spaces, and those findings are not supported by substantial evidence, but the decision makes it clear that the city's basis for concluding the criteria governing changes in nonconforming uses were met did not depend on the number of parking spaces when the parking lot first became nonconforming, the decision will be affirmed. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

36.5 Nonconforming Uses – Alteration/Change. Adding an additional fuel storage facility to an airport fuel farm is a *type* of alteration which reasonably continues the existing nonconforming fuel farm use. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.5 Nonconforming Uses – Alteration/Change. Under ORS 215.130(5) and (9) and similarly worded local regulations, if a proposed alteration (including an expansion) of a nonconforming use is of a type that "reasonably continues" the nonconforming use, it may be allowed so long as it will have no greater adverse impact on the surrounding neighborhood than the existing nonconforming use. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.5 Nonconforming Uses – Alteration/Change. ORS 215.130(5) and (9) provide a limited authorization for counties to approve the expansion of nonconforming uses that, by definition, are contrary to provisions of county plans and land use regulations and, therefore, must be construed narrowly. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.5 Nonconforming Uses – Alteration/Change. That a proposed alteration or expansion of a nonconforming use will increase the potential for fire and explosion constitutes a "greater adverse impact on the neighborhood" within the meaning of ORS 215.130(9). *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.5 Nonconforming Uses – Alteration/Change. Business related changes in the volume or intensity of a use generally do not constitute an impermissible change in a nonconforming use, where such changes are attributable to market growth or fluctuation in business conditions and are not accompanied by changes in the nature of the use or structural alterations. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

36.5 Nonconforming Uses – Alteration/Change. Where a nonconforming use is significantly reduced in scope by relocating significant aspects of the use to another location for two years, the relocation represents a partial interruption or discontinuance of the nonconforming use, and the property owner may not, five years later, unilaterally resume the nonconforming use at its former scope and intensity. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

36.5 Nonconforming Uses – Alteration/Change. Where a previous local decision approved alteration of a nonconforming use for only two years, a request to remove that limitation is a request for a new approval for alteration of a nonconforming use, and the local government must apply its code criteria for alteration of a nonconforming use to such a request. *Scott v. Josephine County*, 22 Or LUBA 82 (1991).

36.5 Nonconforming Uses – Alteration/Change. ORS 215.130, and county regulations adopted pursuant thereto, provide limited authorization for counties to approve alterations to nonconforming uses which are contrary to provisions of their comprehensive plans and land use regulations. Therefore, plan policies are not approval standards for alteration of a nonconforming use. *Scott v. Josephine County*, 22 Or LUBA 82 (1991).

36.5 Nonconforming Uses – Alteration/Change. The nature of a city's obligation to adopt findings in support of its approval of a modification of a "nonconforming situation" depends on the scope of the modification approved. *Strawn v. City of Albany*, 21 Or LUBA 172 (1991).

36.5 Nonconforming Uses – Alteration/Change. A city is not required to adopt findings explaining why structural modifications to a "nonconforming situation" are consistent with standards governing such structural modifications, where the disputed structural modifications are neither proposed by the applicant nor approved by the city. *Strawn v. City of Albany*, 21 Or LUBA 172 (1991).

36.5 Nonconforming Uses – Alteration/Change. Expansion of the lawful nonconforming park use of a four-acre parcel to an adjoining 11-acre parcel not already subject to such nonconforming use does not "reasonably continue" the park use of the four-acre parcel and cannot be considered an "alteration" of the existing nonconforming use. *Komning v. Grant County*, 20 Or LUBA 355 (1990).

36.5 Nonconforming Uses – Alteration/Change. Where the local code provides that any change in a nonconforming use which results in emissions having greater adverse impacts constitutes an alteration of such nonconforming use and, therefore, requires a conditional use permit, it is error for the local government to decide that a proposed change to an existing nonconforming use does not require a conditional use permit without finding that the resulting emissions will not have greater adverse impacts. *Bloomer v. Baker County*, 19 Or LUBA 319 (1990).

36.6 Nonconforming Uses – Expansion. In verifying a nonconforming auto yard use, a local government errs in failing to describe the nature and extent of the auto yard use in a way that imposes an upper limit on the number of vehicles stored on-site, consistent with the upper number present at or approximate to the relevant date. Limiting the physical extent of the auto yard use to that which is visible in an aerial photograph from the relevant year and limiting annual sales of vehicles to the approximate number sold in the relevant year are not sufficient to prevent unauthorized expansion or alteration of the nonconforming use where the operator could stockpile more vehicles on-site, for example, by parking them at tighter intervals or stacking them, than were present in the relevant year. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.6 Nonconforming Uses – Expansion. While a circuit court has exclusive authority to modify a 1976 decree recognizing a vested right to development, where in 2013 the applicant seeks county approval to alter or expand that vested right and the county enters into a stipulation with the applicant approving the proposed alteration or expansion, that the circuit court agrees to modify the 1976 decree to reflect the stipulation does not change the fact that the stipulation itself is an alteration or expansion of a nonconforming use, and hence a land use decision subject to LUBA's exclusive jurisdiction. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

36.6 Nonconforming Uses – Expansion. A stipulation entered into between a vested rights holder and a county that (1) revives a right to construct several buildings that had otherwise expired, (2) authorizes development in a different part of the property than formerly authorized, (3) approves a 200-unit hotel as a previously authorized "lodge with bunkhouse," and (4) declares that all development allowed under the stipulation is allowed notwithstanding county land use regulations to the contrary is, in effect, a decision to approve alterations or expansions to a nonconforming use, and therefore the county must apply the statutory and code standards applicable to alterations and expansions to a nonconforming use. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

36.6 Nonconforming Uses – Expansion. ORS 197.015(10)(b)(H)(ii) excludes from the definition of "land use decision" any land use compatibility statements determining that the proposed state agency action is "allowed without review" under local comprehensive plan and regulations. However, that exclusion is not met where the proposed state agency action is to expand the septic system for a nonconforming manufactured dwelling park, and the expansion is accomplished by verifying and altering the scope of the nonconforming use, which necessarily requires discretionary review. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.6 Nonconforming Uses – Expansion. Nothing in the current language of ORS 215.130, governing non-conforming uses, prohibits a local government from authorizing an expansion of a lawful nonconforming use onto an adjacent property. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.6 Nonconforming Uses – Expansion. ORS 215.130(5) provides that a county shall approve an alteration of a nonconforming use that is necessary to comply with any lawful requirement for alteration in the use, and prohibits counties from conditioning an alteration that is necessary to comply with state or local health or safety requirements. Where the Department of Environmental Quality (DEQ) threatens enforcement against a nonconforming manufactured dwelling park and

requires the park to fix its failing septic system to avoid health hazards, the alteration qualifies as both a "lawful requirement" and "health and safety" type of alterations. That the applicant has some choice in how the required septic improvements are designed does not disqualify the alterations as "lawful requirement" or "health and safety" types of alterations. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.6 Nonconforming Uses – Expansion. A condition of a 1996 decision verifying a nonconforming manufactured dwelling park that prohibits "further expansion" of the park is not intended to prohibit expansion of the septic system that serves the existing approved dwellings, where the number or type of dwellings or uses served by the septic system is not expanded. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.6 Nonconforming Uses – Expansion. To preserve an issue under the particular terms of a superseded ordinance governing nonconforming uses, it is insufficient to make general arguments that the right to expand the nonconforming use had been lost through abandonment or discontinuance. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.6 Nonconforming Uses – Expansion. A petitioner adequately raises the issue of whether a vested right to construct an expansion of a nonconforming use was lost through discontinuance based on common law and local code provisions, notwithstanding that most of petitioner's arguments below were based on a statute that applies only to counties, where the petitioner's discontinuance argument was not limited to the statute, and the applicant understood petitioner to be raising discontinuance under other authorities and responded to the issue. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.6 Nonconforming Uses – Expansion. Remand is necessary where a city concludes that an applicant has a vested right to construct an expansion of a nonconforming use, but the city fails to resolve issues fairly raised below regarding whether the vested right has been lost through discontinuance under the common law cases that the city's vested right conclusion rests upon, or through the city's nonconforming use code. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.6 Nonconforming Uses – Expansion. For purposes of applying the expenditure/project ratio test in *Clackamas County v. Holmes*, comparing actual expenditures to date to total project cost, it is unnecessary for the applicant to submit evidence of the actual amount of expenditures to construct a 72,000-square-foot retail store or evidence of the cost to complete the expanded 102,000-square-foot store, because by any measure the actual expenditures to date to construct the 72,000-square-foot store would far exceed the expenditures to complete the 102,000-square-foot store. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.6 Nonconforming Uses – Expansion. Even if a prior conditional use permit implicitly approved reconstruction of the first floor of an existing building used for a nonconforming use, failure to appeal the prior decision would not necessarily preclude petitioner from arguing on appeal of a subsequent building permit to reconstruct the first floor that the building permit requires nonconforming use review, where the first floor plan authorized in the building permit approval

proposes expansions and alterations not depicted on the first floor plan submitted as part of the prior conditional use application. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

36.6 Nonconforming Uses – Expansion. Merely because some aspects of a proposed expansion/alteration of a nonconforming use are necessary to comply with Americans with Disabilities Act (ADA) requirements and thus allowed without nonconforming use review does not mean that other aspects of the proposal that are not related to ADA requirements are exempt from nonconforming use review. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

36.6 Nonconforming Uses – Expansion. A city is not required to interpret traditional variance language ("practical difficulty or unnecessary hardship") in accordance with the traditional strict meaning of that language, particularly when that language is not used as part of the city's variance code but instead was borrowed from the variance context to be used as a test for expanding nonconforming uses. *Azore Enterprises, LLC v. City of Hillsboro*, 56 Or LUBA 422 (2008).

36.6 Nonconforming Uses – Expansion. Findings that there is no practical commercial use of an isolated portion of a parcel, absent expansion of a nonconforming use on the parcel, are sufficient to demonstrate that the expansion is justified based on "practical difficulty" or "unnecessary hardship." *Azore Enterprises, LLC v. City of Hillsboro*, 56 Or LUBA 422 (2008).

36.6 Nonconforming Uses – Expansion. A city is not required to find that the practical difficulty or unnecessary hardship that justifies expansion of a non-conforming use is not "self-inflicted," where nothing in the applicable code provisions requires such a finding. *Azore Enterprises, LLC v. City of Hillsboro*, 56 Or LUBA 422 (2008).

36.6 Nonconforming Uses – Expansion. A planning staff decision that a proposed crematory expansion to a nonconforming mortuary use is an outright permitted use in a residential zone will be remanded, where the decision does not explain the basis for that conclusion and the city's code appears to prohibit expansions of nonconforming uses. *Hallowell v. City of Independence*, 53 Or LUBA 165 (2006).

36.6 Nonconforming Uses – Expansion. Combining two smaller service areas on the subject property into one larger service area does not constitute an alteration or expansion of a nonconforming use, absent evidence that the combined area significantly exceeds the total geographic extent or intensity of the former separate areas. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.6 Nonconforming Uses – Expansion. Noise from a nonconforming racetrack use is an adverse impact of that use, not part of the use itself. Reductions in noise due to technological improvements since the time the racetrack became nonconforming cannot be applied to offset increases in the intensity of racetrack operations, for purposes of verifying the scope and intensity of the nonconforming use at the time it became nonconforming. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.6 Nonconforming Uses – Expansion. A proposal to reconstruct a 35,987-square-foot fruit processing facility with a 46,856-square-foot facility, with extensive new paving, driveway and

septic facilities, is properly regarded as an expansion or alteration rather than replacement of the smaller facility. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

36.6 Nonconforming Uses – Expansion. A finding that a proposed church expansion doubling the capacity of the church will not have greater adverse traffic impacts is inadequate, where the finding relies solely on the church's current plan to consolidate multiple daily services into a single service, and fails to explain why concentrating traffic from multiple services will not result in greater impacts or to address the possibility that future growth in church membership associated with the expansion may require additional services. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

36.6 Nonconforming Uses – Expansion. A code standard requiring that expansion of existing structures be supported by the "same improvements" is not reasonably interpreted to allow expansion only where the original *unimproved* septic system supports the structure. The standard is more reasonably read to allow expansion supported by an upgraded septic system, as long as it is not a different septic system. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

36.6 Nonconforming Uses – Expansion. A property owner may not decrease the scope and intensity of a nonconforming use to minimal levels for 20 years, and then resume the nonconforming use at the scope and intensity that existed at the time it became nonconforming, absent evidence that fluctuations in scope and intensity are a product of seasonal or other business changes rather than a decrease in scope and intensity for other reasons that remained relatively constant for a long period of time. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.6 Nonconforming Uses – Expansion. At a minimum, a county's determination of the scope and nature of a nonconforming use must be precise enough to avoid improperly limiting the right to continue that use or improperly allowing an alteration or expansion of the nonconforming use without subjecting the alteration or expansion to any standards that restrict alterations or expansions. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.6 Nonconforming Uses – Expansion. A county can establish procedures for determinations concerning nonconforming uses as part of its zoning ordinance and, if it does so, can require parties to seek a determination regarding the existence or expansion of a nonconforming use through such zoning ordinance procedures, rather than allowing such issues to be initially determined in the county's code enforcement process. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

36.6 Nonconforming Uses – Expansion. Where a city decision includes findings suggesting the city thought it was allowing a change in a nonconforming parking lot without increasing the number of parking spaces, and those findings are not supported by substantial evidence, but the decision makes it clear that the city's basis for concluding the criteria governing changes in nonconforming uses were met did not depend on the number of parking spaces when the parking lot first became nonconforming, the decision will be affirmed. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

36.6 Nonconforming Uses – Expansion. LUBA will defer to a local government's interpretation of its own ordinance, that expansion of a nonconforming use onto property not currently utilized by the nonconforming use is not authorized, where that interpretation is not contrary to the express words or policy of the ordinance. *Leopold v. City of Milwaukie*, 24 Or LUBA 246 (1992).

36.6 Nonconforming Uses – Expansion. Because a nonconforming use is tied to the land on which it was lawfully established, it essentially belongs to the property owner, and there is no inherent reason why a tenant, with the permission of the property owner, may not apply to the local government for permission to expand the nonconforming use. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.6 Nonconforming Uses – Expansion. Under ORS 215.130(5) and (9) and similarly worded local regulations, if a proposed alteration (including an expansion) of a nonconforming use is of a type that "reasonably continues" the nonconforming use, it may be allowed so long as it will have no greater adverse impact on the surrounding neighborhood than the existing nonconforming use. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.6 Nonconforming Uses – Expansion. Whether a proposed expansion of an existing nonconforming use would have fewer adverse impacts than uses which are permitted in the zoning district is irrelevant to determining compliance with the requirement of ORS 215.130(9) that the proposed expansion will have no greater adverse impact on the surrounding neighborhood than the existing nonconforming use. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.6 Nonconforming Uses – Expansion. ORS 215.130(5) and (9) provide a limited authorization for counties to approve the expansion of nonconforming uses which, by definition, are contrary to provisions of county plans and land use regulations and, therefore, must be construed narrowly. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.6 Nonconforming Uses – Expansion. That a proposed alteration or expansion of a nonconforming use will increase the potential for fire and explosion constitutes a "greater adverse impact on the neighborhood" within the meaning of ORS 215.130(9). *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.6 Nonconforming Uses – Expansion. Business related changes in the volume or intensity of a use generally do not constitute an impermissible change in a nonconforming use, where such changes are attributable to market growth or fluctuation in business conditions and are not accompanied by changes in the nature of the use or structural alterations. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

36.6 Nonconforming Uses – Expansion. Expansion of the lawful nonconforming park use of a four-acre parcel to an adjoining 11-acre parcel not already subject to such nonconforming use does not "reasonably continue" the park use of the four-acre parcel and cannot be considered an "alteration" of the existing nonconforming use. *Komning v. Grant County*, 20 Or LUBA 355 (1990).

36.7 Nonconforming Uses – Restoration/Replacement. Where a city's zoning ordinance allows damaged nonconforming structures to be restored, the city does not err in interpreting its zoning ordinance not to allow a damaged nonconforming carport to be entirely removed and replaced with a taller bulkier carport that occupies the same footprint as the old carport. *Hatton v. City of Eugene*, 53 Or LUBA 583 (2007).

36.7 Nonconforming Uses – Restoration/Replacement. Where a nonconforming clubhouse is destroyed by fire and the county requires a replacement structure to include a new septic system, installation of a new septic system is sufficient to commence "restoration" or "replacement" of the nonconforming use, within the meaning of ORS 215.130(6). *Jordan v. Columbia County*, 42 Or LUBA 341 (2002).

36.7 Nonconforming Uses – Restoration/Replacement. A building permit is not an absolute requirement for commencing replacement or restoration of a nonconforming use within one year under ORS 215.130(6), where installation of a septic system is sufficient to commence replacement or restoration of a nonconforming clubhouse that was destroyed by fire and the county does not require a building permit to install a septic system. *Jordan v. Columbia County*, 42 Or LUBA 341 (2002).

36.7 Nonconforming Uses – Restoration/Replacement. Once restoration or replacement of a nonconforming use is begun, ORS 215.130(7)(a) requires that restoration or replacement not be interrupted for a period of more than one year. *Jordan v. Columbia County*, 42 Or LUBA 341 (2002).

36.7 Nonconforming Uses – Restoration/Replacement. Where a nonconforming clubhouse is destroyed by fire and restoration or replacement is commenced within 10 years is periodic fundraising activity to complete the restoration, the right to restore or replace the nonconforming clubhouse is lost under ORS 215.130(7)(a). *Jordan v. Columbia County*, 42 Or LUBA 341 (2002).

36.7 Nonconforming Uses – Restoration/Replacement. A decision that approves the rebuilding of a 13,000-square-foot building with a 15,000-square-foot building in a different location is not a "replacement" of a nonconforming use, as that word is used in ORS 215.130(6), even though the new building will require fewer workers to perform the same tasks that were performed in the smaller building. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

36.7 Nonconforming Uses – Restoration/Replacement. Application of a local zoning ordinance to allow a nonconforming use that has been interrupted or abandoned to be resumed, violates ORS 215.130(7) and must be reversed. *Moore v. Coos County*, 31 Or LUBA 347 (1996).

36.7 Nonconforming Uses – Restoration/Replacement. It is within a county's authority under ORS 215.130(5), (6) and (9) to adopt code provisions treating "replacement" of a nonconforming structure as a potentially allowable alteration of a nonconforming use, so long as the code requires that the replacement reasonably continues the nonconforming use and has no greater adverse impact on the neighborhood. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 283 (1993).

36.7 Nonconforming Uses – Restoration/Replacement. Where, under the county code, a lawfully established existing dwelling is not a nonconforming use in a particular zone, even though a new dwelling is not a permitted use in that zone, replacement of an existing dwelling is not the replacement of a nonconforming use subject to the restrictions of ORS 215.130(6). *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

36.8 Nonconforming Uses – Regulation. The scope of a nonconforming use is confined to the uses that occur on the subject property; off-site activities, i.e., those that occur on other properties, such as leaving the property to purchase supplies or inputs for the nonconforming use, play no role in verifying the existence, nature, etc. of the nonconforming use on the subject property and are not subject to analysis or regulation as part of the nonconforming use. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.8 Nonconforming Uses – Regulation. In verifying a nonconforming auto yard use, a local government errs in failing to describe the nature and extent of the auto yard use in a way that imposes an upper limit on the number of vehicles stored on-site, consistent with the upper number present at or approximate to the relevant date. Limiting the physical extent of the auto yard use to that which is visible in an aerial photograph from the relevant year and limiting annual sales of vehicles to the approximate number sold in the relevant year are not sufficient to prevent unauthorized expansion or alteration of the nonconforming use where the operator could stockpile more vehicles on-site, for example, by parking them at tighter intervals or stacking them, than were present in the relevant year. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.8 Nonconforming Uses – Regulation. Even if a structure qualifies as a nonconforming structure with regard to a general 20-foot setback required in the applicable zoning district, that does not obviate a 30-foot setback requirement for schools, where the use of the structure is to be converted for the first time to a school. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.8 Nonconforming Uses – Regulation. Even if a structure qualifies as a nonconforming structure with regard to a general 20-foot setback required in the applicable zoning district, that does not obviate a land use code off-street parking requirement for schools, where the use of the structure is to be converted for the first time to a school. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.8 Nonconforming Uses – Regulation. Where LUBA concludes that applicable local nonconforming use law might not regulate a change from one conforming use to another conforming use in a nonconforming structure, but no party challenges a hearings officer's conclusion that local nonconforming use law does regulate such a change of use, LUBA will consider petitioner's challenge to the adequacy of the hearings officer's findings that an existing structure qualifies as a nonconforming use and that the proposal may be approved as an alteration of a nonconforming use. However, LUBA will not preclude the hearings officer from considering on remand whether the nonconforming use regulations apply in that circumstance. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.8 Nonconforming Uses – Regulation. A city correctly interprets its development code to permit a change of use, without requiring that the nonconforming development on the site be brought into conformance with current development code standards, where the land use code expressly distinguishes between nonconforming uses and nonconforming development and the permit applicant proposed no change in the nonconforming development, only a change from one permitted use to another permitted use. *Nielsen v. City of Gresham*, 66 Or LUBA 24 (2012).

36.8 Nonconforming Uses – Regulation. Where a local government decision appears to authorize a nonconforming use and additional dwelling without notice or findings to support those approvals, LUBA will remand the decision. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

36.8 Nonconforming Uses – Regulation. When a local government determines a use is a nonconforming use, it must establish the parameters of the nonconforming use. Any changes in the nonconforming use after it became nonconforming, are governed by the code provisions controlling changes of nonconforming uses, not by former code performance standards applicable to the use before it became nonconforming. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

36.8 Nonconforming Uses – Regulation. Although ORS 92.017 requires that legally established lots continue to be recognized as individual, separately transferable lots, even where subsequent changes in land use regulations make those lots nonconforming, a local government may impose land use regulations requiring that two or more of such nonconforming lots be combined for development purposes. *Campbell v. Multnomah County*, 25 Or LUBA 479 (1993).

36.8 Nonconforming Uses – Regulation. A local government interpretation of a code "lot of record" provision as allowing legally created but now substandard lots to be separately developed if adjoining lots are held in separate ownership or if the lots were shown on a plat of record prior to the date the relevant zoning requirements took effect is reasonable, and LUBA will defer to that interpretation. *Campbell v. Multnomah County*, 25 Or LUBA 479 (1993).

36.8 Nonconforming Uses – Regulation. Where a local government correctly determines that a parking lot is a nonconforming use, and was not automatically made an approved conditional use under applicable code provisions, it commits no error in failing to apply plan and code provisions that would apply to expansion of the parking lot if it were correctly viewed as a conditional use. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

36.8 Nonconforming Uses – Regulation. The statutory provisions set out at ORS 215.130 governing regulation of nonconforming uses apply to counties, not to cities. *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

36.8 Nonconforming Uses – Regulation. Where a challenged ordinance requires discontinuation of a use after expiration of a five-year amortization period, but also allows a property owner to apply for hardship relief if such property owner can substantiate that an investment made exclusively in the nonconforming use cannot be adequately amortized within the five-year period specified by such ordinance, property owners have no basis to contend their property has been taken until they have applied for and been denied the hardship relief. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

37. Vested Rights. Where LUBA concludes that a local government's conclusion that an application did not meet an applicable approval criterion was a valid basis for denial, although any error committed with respect to alternative or independent bases for denial would generally not provide a basis for reversal or remand, remand is nonetheless required where LUBA also concludes that the local government failed to address a threshold argument from the applicant that, if correct, would prevent the local government from applying criteria that would prohibit approval of the application. *M & T Partners, Inc. v. City of Salem*, 80 Or LUBA 221 (2019).

37. Vested Rights. A county decision determining vested rights involves the "discretionary approval of a proposed development of land," and is therefore a "permit" decision under ORS 215.402(4). Such decisions must be processed under procedures consistent with ORS 215.416, regardless of whether a party's request for the "permit" decision is accompanied by requests for non-"permit" decisions, whether the request is labeled or easily identifiable as an "application" for a "permit," or whether the party affirmatively requests the required procedures. *Gillette v. Lincon County*, 79 Or LUBA 549 (2019).

37. Vested Rights. LUBA will not resolve assignments of error challenging an alternative theory of approval, vested rights, that the parties argued about below, but which the final decision maker did not consider. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

37. Vested Rights. LUBA will remand rather than reverse a county decision that erroneously concludes that a 2005 permit is still valid to authorize issuance of building permits for what is now a nonconforming use, where the applicant originally filed for a vested rights determination, and planning staff originally evaluated the application as one for alteration of a nonconforming use, but those theories were not addressed in the county's final decision. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

37. Vested Rights. Where the applicant for a vested right determination argued below that it had not lost its vested right and argued for an interpretation of the vested rights standard that would result in a conclusion that the vested right had not been discontinued, on appeal to LUBA the applicant has not waived the ability to challenge the interpretation the local government adopted to support its conclusion that the vested right had been discontinued, even if the applicant's specific arguments against that interpretation were not raised below. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

37. Vested Rights. Because a vested right is a species of nonconforming use, the general principles of nonconforming use (including discontinuance) apply to vested rights determinations, at least in counties subject to ORS 215.130. Under ORS 215.130, to determine whether a nonconforming use or vested right to complete a nonconforming has been lost through discontinuance, the local government must look back in time. Depending on the facts, it is possible that a nonconforming use or vested right could be lost through discontinuance prior to the date that the applicant seeks verification of the nonconforming use or vested right. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

37. Vested Rights. LUBA will affirm a city governing body's code interpretation to the effect that a vested right to complete what will be a nonconforming use is lost through discontinuance, if the

applicant makes no effort toward completion of the use during a 12-month period, where that interpretation is consistent with the express language, purpose and policy underlying the code provision. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

37. Vested Rights. Under Section 5(3) of Ballot Measure 49 (2007), a property owner may complete construction of a use that was authorized under a previously issued Ballot Measure 37 (2004) waiver, if the property owner can establish that he or she has a common law vested right to complete construction of a use that was authorized under a Ballot Measure 37 waiver. Under ORS 195.318(1), LUBA would likely not have jurisdiction to review a vested right determination under Subsection 5(3) of Measure 49, however, where the property owner claims to have a vested right based on a previously issued building permit, not a Ballot Measure 37 waiver, LUBA has review jurisdiction over a county decision that the property owner does not have a vested right under the building permit. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

37. Vested Rights. Under the Court of Appeals' decision in *Fountain Village Development Co. v. Multnomah Cty.*, 176 Or App 213, 224, 31 P3d 458 (2001), statutory and local government regulations that specify that nonconforming use rights are lost if the nonconforming use is abandoned, interrupted or discontinued for the requisite period of time also apply to vested rights, which are properly viewed as inchoate nonconforming uses. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

37. Vested Rights. The right that the holder of a vested right has is the right to continue "construction" of a proposed use until construction of that proposed use is complete and the vested right (an inchoate nonconforming use) is converted to a nonconforming use that is fully established. It is the continued "construction" of an inchoate nonconforming use that must not be abandoned, discontinued or interrupted for more than the time specified for nonconforming uses, to avoid losing a vested right to continue construction of that vested right. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

37. Vested Rights. It is not inconsistent with ORS 215.130(5) to interpret the ORS 215.130(5) requirement that a nonconforming use not be abandoned or discontinued for a longer period than specified under local law to apply in the context of a vested right to complete construction of a use to require that "substantial efforts to finish the development" of the use not be abandoned or discontinued for the specified period. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

37. Vested Rights. Where a county finds that a property owner discontinued construction of a house for at least one year during a 30-year period, even if the property owner is given the benefit of the doubt in his contentions that over that 30-year period at unspecified times he repaired concrete scaling and did some plumbing work, framing, grading and road construction, the county's finding is supported by substantial evidence where other evidence shows there was almost no construction activity during that 30-year period. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

37 Vested Rights. A site plan decision that approves (1) a building and (2) a "future expansion" of that same building is a single building, not separate phases or components of a multi-phase development, for purposes of determining whether there is a vested right to construct the

expansion. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

37 Vested Rights. To preserve an issue under the particular terms of a superseded ordinance governing nonconforming uses, it is insufficient to make general arguments that the right to expand the nonconforming use had been lost through abandonment or discontinuance. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

37 Vested Rights. A petitioner adequately raises the issue of whether a vested right to construct an expansion of a nonconforming use was lost through discontinuance based on common law and local code provisions, notwithstanding that most of petitioner's arguments below were based on a statute that applies only to counties, where the petitioner's discontinuance argument was not limited to the statute, and the applicant understood petitioner to be raising discontinuance under other authorities and responded to the issue. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

37 Vested Rights. Remand is necessary where a city concludes that an applicant has a vested right to construct an expansion of a nonconforming use, but the city fails to resolve issues fairly raised below regarding whether the vested right has been lost through discontinuance under the common law cases that the city's vested right conclusion rests upon, or through the city's nonconforming use code. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

37 Vested Rights. For purposes of applying the expenditure/project ratio test in *Clackamas County v. Holmes*, comparing actual expenditures to date to total project cost, it is unnecessary for the applicant to submit evidence of the actual amount of expenditures to construct a 72,000-square-foot retail store or evidence of the cost to complete the expanded 102,000-square-foot store, because by any measure the actual expenditures to date to construct the 72,000-square-foot store would far exceed the expenditures to complete the 102,000-square-foot store. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

37. Vested Rights. A preliminary subdivision plat approval decision that post-dates a vested rights determination under Measure 49 is a land use decision subject to LUBA's review and is not a decision concerning the "nature and extent of [just] compensation" under Measure 49. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

37. Vested Rights. Under *Clackamas County v. Holmes*, 265 Or 193, 197, 508 P2d 190 (1973), and the appellate court cases that have followed and elaborated on *Holmes*, where a property owner commences development of his or her property at a time when there are no land use laws or at a time when the development is permitted under existing land use laws, that property owner can achieve a right to continue and complete that development, notwithstanding that land use laws that would preclude that development are enacted during the development process and before development is complete. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

37. Vested Rights. A common law vested right under subsection 5(3) of Measure 49 will shield a claimant from land use laws that were waived under Measure 37; but that common law vested

right will not shield a claimant from land use laws that were not waived under Measure 37 and therefore remain applicable to the claimant's development. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

37. Vested Rights. Measure 37 claimants who on December 6, 2007 had already received all required permits and approvals under land use laws that remained applicable after his or her Measure 37 waiver decision was issued must seek a vested rights determination under subsection 5(3) of Measure 49. If they are successful in that regard, then they may proceed to complete the development that was begun under Measure 37. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

37. Vested Rights. Measure 37 claimants who on December 6, 2007 had not yet received all required permits and approvals under land use laws that remained applicable after his or her Measure 37 waiver decision was issued must seek a vested rights determination under subsection 5(3) of Measure 49. If they are successful in that regard, they must still obtain any permits or other approvals that are required under land use laws that were not waived by their Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

37. Vested Rights. A vested right based upon substantial expenditures toward construction of a building is properly viewed as an inchoate nonconforming use, not as a distinct entitlement immune from all limitations applicable to nonconforming uses. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

37. Vested Rights. Vested rights, like nonconforming use rights, may be lost where the holder fails to diligently exercise those rights, *i.e.*, the holder must continue development of the nonconforming use and not abandon or discontinue efforts to complete development. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

37. Vested Rights. Statutory provisions governing nonconforming uses at ORS 215.130 also govern vested rights, including the delegation of authority to counties to establish criteria under which such rights have been interrupted or abandoned. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

37. Vested Rights. Abandonment of a vested right, like abandonment of a nonconforming use, requires evidence of intent to relinquish a known right. Where the only evidence relevant to intent shows that the landowner maintained the uncompleted structure during the relevant period, the county errs in determining that the landowner has abandoned the right to complete and use the structure. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

37. Vested Rights. Where the county views a vested right to be discontinued under its code if there is discontinuance of substantial effort to finish the development for any reason for more than two years, evidence that the landowner maintained an uncompleted structure but made no effort to finish the structure for three years was sufficient to support a finding of discontinuance. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

37. Vested Rights. That a use is authorized under a zoning ordinance or granted building or zoning permits does not, alone, shield the use from later-adopted zoning ordinance amendments that prohibit the use or impose a requirement for additional permits. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

37. Vested Rights. The judicial doctrine of vested rights does not apply to development allowed under a conditional use permit, where the permit is approved under an ordinance obligating the user to commence construction within six months or request an extension from the city. *Heidgerken v. Marion County*, 35 Or LUBA 313 (1998).

37. Vested Rights. Prior to the creation of LUBA, circuit courts had jurisdiction to declare the existence of vested rights to develop land under previously existing land use regulations. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

37. Vested Rights. Claim preclusion applies to preclude relitigation of a claim that has been litigated. Where a party's claim of a vested right to residential use of certain property was determined in a circuit court judgment, to which the local government and other parties to the LUBA appeal were also parties, the local government is precluded from making a new determination on that vested right claim, even if it would otherwise have jurisdiction to do so. *Joines v. Linn County*, 24 Or LUBA 456 (1993).

37. Vested Rights. In the absence of a code requirement to the contrary, a provision in a local code authorizing the development of a parcel to proceed to completion so long as "substantial construction" occurs within a certain period of time does not require the application of a traditional vested rights analysis. *Columbia River Television v. Multnomah County*, 24 Or LUBA 82 (1992).

37. Vested Rights. Where the issue on appeal is whether petitioner has a vested right to develop property in a manner inconsistent with current zoning regulations, and the resolution of that issue requires the application of city land use regulations from 1973 to the present, the challenged decision is a land use decision subject to LUBA's jurisdiction. *Terraces Condo Assoc. v. City of Portland*, 22 Or LUBA 151 (1991).

37. Vested Rights. Where a local government approved a height variance in 1977, but at that time had no code provision authorizing density transfers or a master plan approval process, the 1977 height variance approval does not also authorize a density transfer or give master plan approval. *Terraces Condo Assoc. v. City of Portland*, 22 Or LUBA 151 (1991).

37. Vested Rights. To establish a vested right to construct 150 units on a particular lot, a local government must determine that qualified expenditures were made toward development of that particular lot at a time when the construction of 150 units on that lot did not require approval from such local government, or were made at a time when the required approvals were given. *Terraces Condo Assoc. v. City of Portland*, 22 Or LUBA

(1991).

37. Vested Rights. The lawful uses protected from newly enacted regulations include those which do not yet exist, but have proceeded towards completion to a significant degree. In such instances, the property owner is said to have a *vested right* to complete and continue the development. *Schmaltz v. City of Hood River*, 22 Or LUBA 115 (1991).

37. Vested Rights. Expenditures considered in determining the existence of a vested right must have been made at a time when the proposed development did not require approvals, or at a time when required approvals were given. *Lung v. Marion County*, 21 Or LUBA 302 (1991).

37. Vested Rights. Where property owners have not applied for and obtained a required conditional use permit prior to a change to a more restrictive zone, they cannot acquire a vested right to complete development of a use which required conditional use approval under the original zoning. *Lung v. Marion County*, 21 Or LUBA 302 (1991).

37. Vested Rights. The expenditures considered in determining the existence of a vested right must be made at a time when the proposed development did not require approvals, or at a time when required approvals were given. Where no local partition approval was given prior to the adoption of an ordinance requiring such approval, the only expenditures which may be considered in a vested rights determination are those made before the effective date of such ordinance. *Crone v. Clackamas County*, 21 Or LUBA 102 (1991).

37. Vested Rights. Evidence that at a time when development was allowed, a landowner placed two homes on the parent parcel and obtained two septic, plumbing and well drilling permits for such parcel, at best, establishes that the landowner contemplated creating two parcels from the parent parcel. However, these expenditures are not "substantially and directly" related to further dividing the parent parcel. *Crone v. Clackamas County*, 21 Or LUBA 102 (1991).

37. Vested Rights. Under *Holmes* factor (7) ("ratio of expenditures"), a local government is required to identify and compare the total project cost with only those expenditures that are properly considered in determining the existence of a vested right. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

37. Vested Rights. Distinguishing those expenditures *properly* considered in a determination of the "ratio of expenditures" under *Holmes* factor (7) requires (1) identification of the time at which the expenditures were made, (2) an analysis of whether the expenditures were made in good faith and lawful when made, and (3) a determination regarding whether the expenditures are directly related to the proposed use of the property. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

37. Vested Rights. Expenditures considered in determining the existence of a vested right must be made at a time when the proposed development did not require approvals, or at a time when approvals were given. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

37. Vested Rights. After the Oregon Supreme Court issued a decision determining that Goal 14 must be complied with before the existing zoning of the subject property could be considered lawfully applied, any expenditures made in contemplation of dividing and developing the subject

property, consistent with the existing zoning, could not properly be considered in a vested rights determination. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

37. Vested Rights. There is no general rule that all expenditures relating to development of land in Oregon, made in furtherance of a vested right, must have been made before promulgation of the Statewide Planning Goals. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

37. Vested Rights. In the absence of findings, or evidence in the record, which establishes that the price paid for purchase of a 10,000-square-foot parcel was a "premium" or an otherwise unreasonable price to pay to enlarge the parent parcel for the division and development which has already occurred, the purchase price for the 10,000-square-foot lot should not be included in the qualified expenditures used to determine existence of a vested right to create additional parcels developable with three residences. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

37. Vested Rights. Where the total qualified expenditures are at most 2,480.68 dollars, total development cost is 126,000 dollars, and the ratio of expenditures to cost is, therefore, at most 1:50, this expenditure total and "ratio of expenditures" under *Holmes* factor (7) are, as a matter of law, insufficient to demonstrate that the amount of expenditures is "substantial," and do not establish the existence of a vested right. *DLCD v. Curry County*, 19 Or LUBA 249 (1990).

37. Vested Rights. Under *Holmes* factor (7) ("ratio of expenditures"), a local government is required to identify and compare the total project cost with only those expenditures which are properly considered in determining the existence of a vested right. *DLCD v. Curry County*, 19 Or LUBA 237 (1990).

37. Vested Rights. Distinguishing those expenditures *properly* considered in a determination of the "ratio of expenditures" under *Holmes* factor (7) requires (1) identification of the time at which the expenditures were made, (2) an analysis of whether the expenditures were made in good faith and lawful when made, and (3) a determination regarding whether the expenditures are directly related to the proposed use of the property. *DLCD v. Curry County*, 19 Or LUBA 237 (1990).

37. Vested Rights. Expenditures considered in determining the existence of a vested right must be made at a time when the proposed development did not require approvals, or at a time when approvals were given. *DLCD v. Curry County*, 19 Or LUBA 237 (1990).

37. Vested Rights. After the Oregon Supreme Court issued a decision determining that Goal 14 must be complied with before the existing zoning of the subject property could be considered lawfully applied, any expenditures made in contemplation of dividing and developing the subject property, consistent with the existing zoning, could not properly be considered in a vested rights determination. *DLCD v. Curry County*, 19 Or LUBA 237 (1990).

37. Vested Rights. There is no general rule that all expenditures relating to development of land in Oregon, made in furtherance of a vested right, must have been made before promulgation of the Statewide Planning Goals. *DLCD v. Curry County*, 19 Or LUBA 237 (1990).

37. Vested Rights. In order to determine the "ratio of expenditures" under *Holmes* factor (7), a local government must adopt a finding concerning total project cost. *DLCD v. Curry County*, 19 Or LUBA 237 (1990).

38.1 State Agencies – Generally. Land use regulations that set out approval criteria for commercial composting operations and also state "[a]dditionally, these facilities shall be subject to" DEQ and Metro rules simply advise applicants for county approval of commercial composting facilities that there are other legal requirements that must be satisfied before a composting facility can commence operation. That language does not obligate the county to apply DEQ and Metro rules and find the proposed facility complies with those rules. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

38.1 State Agencies – Generally. In considering an application to modify an existing conditional use permit for a commercial composting facility under county land use regulations, there is no generally applicable principle that a county must in all cases deny the application unless it can find that the composting facility will be able to comply with existing state standards for such facilities. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

38.1 State Agencies – Generally. Where an interchange area management planning effort was a joint Oregon Department of Transportation (ODOT)/city effort, in satisfying its OAR 734-051-0155(5)(c) obligation to coordinate with affected property owners ODOT is not required to repeat the public outreach effort that was made before the city adopted the interchange area management plan. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

38.1 State Agencies – Generally. Oregon Division of State Lands (DSL) cease and desist orders cannot be categorically dismissed as mere attention-getting devices. However, where a DSL cease and desist order indicates the presence of a "threatened violation," rather than a "violation" of state fill and removal laws, the DSL cease and desist order does not establish the presence of a "documented" violation of state fill and removal laws. *Kipfer v. Jackson County*, 58 Or LUBA 436 (2009).

38.1 State Agencies – Generally. Under *Ashland Drilling Inc. v. Jackson County*, 168 Or App 624, 7 P3d 748 (2000), direct county regulation of wells, water quality and water quantity is preempted, but county land use regulations that simply limit land uses based on their impacts on water resources are not preempted. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

38.1 State Agencies – Generally. ORS 374.310 provides a very broad grant of authority to the Oregon Department of Transportation (ODOT) to condition access permits that are "in the best interest of the public for the protection of the highway or road and the traveling public." Under this broad grant of authority, ODOT's actions may have the indirect effect of delaying local government development approvals, but that delay does not impermissibly encroach on a local government's planning authority. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

38.1 State Agencies – Generally. LCDC has authority to adopt administrative rules that limit types of nonfarm uses otherwise allowed by statute. Therefore, OAR 660-033-0020(4), which establishes November 4, 1993, as the date a county must use for determining whether a dwelling exists on a tract for purposes of lot-of-record dwelling, is valid, notwithstanding that it prohibits

some lot-of-record dwellings otherwise allowed by ORS 215.710. *Bruggere v. Clackamas County*, 37 Or LUBA 571 (2000).

38.1 State Agencies – Generally. Under the county's comprehensive plan, ODOT's initiation of eminent domain proceedings gave it the requisite "ownership" interest in property to file an application for a plan amendment regarding the property, and that interest was not affected, for purposes of the plan amendment, by dismissal of the eminent domain proceeding after the agency's application was deemed complete. *Schrock Farms, Inc. v. Linn County*, 31 Or LUBA 57 (1996).

38.1 State Agencies – Generally. The coordination obligation imposed by Statewide Planning Goal 2 (Land Use Planning), and similarly worded local government comprehensive plan provisions, does not require that a local government accede to every concern expressed by a state agency, but does require that a local government adopt findings responding to legitimate concerns expressed by a state agency. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

38.1 State Agencies – Generally. With regard to siting a lot of record dwelling on high-value farmland, a county does not have authority to require that an Oregon Department of Agriculture hearings officer make determinations other than those specified in ORS 215.705(2)(c). *DLCD v. Josephine County*, 28 Or LUBA 459 (1994).

38.1 State Agencies – Generally. That state agencies may recognize and regulate "combination parks" which include both recreational vehicles and mobile homes occupied on a long-term basis does not mean a local government must adopt comprehensive plan and zoning provisions allowing such combination parks. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

38.1 State Agencies – Generally. Where a document was originally drafted by state agency staff, but was never adopted by that agency as an administrative rule, and is applicable to a challenged local government decision only because it is incorporated by reference into the local code, under ORS 197.829 LUBA is neither required nor allowed to give deference to an interpretation of that document by an agency staff member. *Furler v. Curry County*, 27 Or LUBA 546 (1994).

38.2 State Agencies – Permits. Where a liquefied natural gas terminal requires both county and federal permits, and the county approves the local permit based on findings that rely on the applicant receiving federal permit approval, but the record indicates that applicant has been denied the federal permit at time of the county approval, the county errs in failing to consider whether the applicant is precluded from obtaining the required federal approval. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

38.2 State Agencies – Permits. Issuance of a Department of Environmental Quality (DEQ) permit to operate a composting facility does not preempt a county from later concluding, in an application to verify whether the composting facility is a lawful nonconforming use, that the facility is not lawful nonconforming use, where the DEQ permit was issued based on a franchise authorization decision that was on appeal and that did not definitely resolve the issue of whether the composting facility is a lawful nonconforming use. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

38.2 State Agencies – Permits. Land use regulations that set out approval criteria for commercial composting operations and also state "[a]dditionally, these facilities shall be subject to" DEQ and Metro rules simply advise applicants for county approval of commercial composting facilities that there are other legal requirements that must be satisfied before a composting facility can commence operation. That language does not obligate the county to apply DEQ and Metro rules and find the proposed facility complies with those rules. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

38.2 State Agencies – Permits. In considering an application to modify an existing conditional use permit for a commercial composting facility under county land use regulations, there is no generally applicable principle that a county must in all cases deny the application unless it can find that the composting facility will be able to comply with existing state standards for such facilities. *Tolbert v. Clackamas County*, 70 Or LUBA 388 (2014).

38.2 State Agencies – Permits. Under OAR 660-031-0040 when renewing a state agency permit the agency is not required to make a determination of compliance with the statewide planning goals, unless the renewal involves a substantial modification or intensification of the permitted activity. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

38.2 State Agencies – Permits. Under OAR 660-018-0050(2), the Department of Environmental Quality's state agency coordination rule, a land use compatibility statement (LUCS) is the primary vehicle to ensure that agency permits are consistent with the statewide planning goals. In circumstances where the state agency coordination rules exempt permit renewals from the requirement to obtain a LUCS, the rules also exempt the agency from the requirement to make a determination that the renewed permit complies with the applicable goals. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

38.2 State Agencies – Permits. In renewing a discharge permit pursuant to the Department of Environmental Quality's state agency coordination rule, the agency is not required to re-evaluate activities allowed under the existing permit; rather, the agency is required to determine only whether the renewed permit involves a substantial modification or intensification of the permitted activity. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

38.2 State Agencies – Permits. In renewing a discharge permit under the Department of Environmental Quality's state agency coordination rules, nothing in those rules requires the agency to determine that the renewed permit complies with the statewide planning goals in circumstances where it is unclear that such determinations were made regarding the original permit. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

38.2 State Agencies – Permits. For purposes of state agency coordination programs, substantial intensification of the permitted activity refers to the regulated activity, not increasing complexity or intensification of the regulatory scheme or program. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

38.2 State Agencies – Permits. A state agency permit renewal decision that concludes, based on substantial evidence, that the renewed permit does not involve a substantial modification to or intensification of the permitted activity, and thus no land use compatibility statement is required from the affected local government, is not a land use decision subject to LUBA's jurisdiction under ORS 197.015(11)(a)(B), because it is not an agency decision with respect to which the agency is required to apply the goals. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

38.2 State Agencies – Permits. In order to satisfy a local code provision that requires compliance with state agency codes, the city must find which state codes contain approval criteria, and also find that as a matter of law, the applicants are not precluded from obtaining such state agency permits. *Miller v. City of Joseph*, 31 Or LUBA 472 (1996).

38.2 State Agencies – Permits. Although OAR 660-31-035(1), which governs Class A permits, does not require that an affected local government's compatibility determination either be in writing or be supported by written findings in order to be relied upon by a state agency issuing a permit, the absence of a writing raises the question of whether there actually is a local government determination. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

38.2 State Agencies – Permits. Two factors govern whether a local government's determination of compatibility with its acknowledged plan and regulations, made as part of a state agency approval process, is a "final" decision applying the local government's plan and regulations: (1) the state agency must be required by statute, rule or other authority, to assure that the proposal is compatible with the local government plan and regulations; and (2) the state agency must be authorized by statute, rule or other legal authority to rely on the local government's determination. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

38.2 State Agencies – Permits. Petitioner's sole remedy on appeal from a DSL approval of a fill permit, stated in ORS 196.835, is to request a contested case hearing and, if desired, to appeal to the Court of Appeals from the order issued following the hearing. *Citizens for Pub. Accountability v. City of Eugene*, 31 Or LUBA 395 (1996).

38.2 State Agencies – Permits. Conditioning approval on the satisfactory outcome of a separate administrative process does not preclude a finding of compliance with a zoning code standard, as long as compliance is found to be feasible and that finding is based on substantial evidence. *McArthur v. Lane County*, 31 Or LUBA 309 (1996).

38.2 State Agencies – Permits. A local government's determination of compatibility with its acknowledged comprehensive plan and land use regulations, made as part of a state agency permit approval process, is a "final" decision applying the local plan and regulations if (1) the state agency is required, by statute, rule or other legal authority, to assure the permit is compatible with the local plan and regulations; and (2) the state agency is authorized to rely on the local government's determination of compatibility. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

38.2 State Agencies – Permits. Where a local government's statements on a state agency permit land use compatibility form identify the code provisions relied on by the local government and explain the basis for the local government's determination that the subject facility is an outright permitted use, the statements constitute written findings which, under OAR 661-31-035(2), entitle a state agency to rely on the local government's compatibility determination. *Knee Deep Cattle Company v. Lane County*, 28 Or LUBA 288 (1994).

38.2 State Agencies – Permits. ORS 517.890 provides that appeals of provisional surface mining permits are governed by the provisions of "ORS 183.310 to 183.550 for appeals from orders in contested cases." Therefore, regardless of whether contested case procedures were observed in all respects during DOGAMI proceedings governed by ORS 183.480(2) and 183.482, jurisdiction to review DOGAMI's decision lies with the court of appeals, not LUBA. *Hood River Sand, Gravel & Readi-Mix v. DOGAMI*, 25 Or LUBA 668 (1993).

38.2 State Agencies – Permits. ORS 196.825(6) explicitly provides that Division of State Lands removal-fill permit decisions are contested case orders and that appeals of such orders are to the court of appeals, pursuant to ORS 183.482. LUBA does not have jurisdiction to review state agency contested case orders. ORS 197.825(2)(d). *Stewart v. Division of State Lands*, 25 Or LUBA 565 (1993).

38.2 State Agencies – Permits. Where a local government finds that approval criteria will be met if certain conditions are imposed, and those conditions are requirements to obtain state agency permits, a decision approving the subject application simply requires that there be substantial evidence in the record that the applicant is not precluded from obtaining such state agency permits as a matter of law. *Bouman v. Jackson County*, 23 Or LUBA 628 (1992).

38.3 State Agencies – Local Gov't Compatibility Determinations. The Land Conservation and Development Commission has adopted OAR 660-031-0026, which identifies state agency permits that must be compatible with local land use regulations, and OAR 660-031-0035, which authorizes state agencies to rely on local land use compatibility statements when issuing such permits. Oregon Liquor Control Commission decisions regarding returnable bottle redemption centers are not listed at OAR 660-031-0026, and therefore a local government planner's checkmark on an OLCC form indicating a redemption center is allowed in the applicable zone is not a land use compatibility statement. *Glenwood 2006, LLC v. City of Beaverton*, 76 Or LUBA 162 (2017).

38.3 State Agencies – Local Gov't Compatibility Determinations. Where a previously executed OLCC form with a box checked is not a final, binding land use decision, it was not appealable to LUBA and in granting design review approval for a returnable bottle redemption center, a city may not rely on that OLCC from to establish that a redemption center is a permitted use in the applicable zone. *Glenwood 2006, LLC v. City of Beaverton*, 76 Or LUBA 162 (2017).

38.3 State Agencies – Local Gov't Compatibility Determinations. A 1997 land use compatibility statement (LUCS) concluding that a dwelling on forest land is compatible with the county's acknowledged comprehensive plan is not a land use decision that "approves" a dwelling on forest land under the applicable land use standards. A LUCS decision, in itself, does not approve development. At most, it informs a state agency that a proposed use *can be* approved consistent with the county's comprehensive plan and applicable land use regulations. *Eng v. Wallowa County*, 76 Or LUBA 432 (2017).

38.3 State Agencies – Local Gov't Compatibility Determinations. LUBA may consider documents outside the record, including copies of earlier land use decisions regarding the subject property, that are useful in resolving a jurisdictional challenge to the appeal of a land use compatibility statement (LUCS), even in the absence of a motion to take evidence under OAR 661-010-0045. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

38.3 State Agencies – Local Gov't Compatibility Determinations. An accurate and complete response to a state agency request for a land use compatibility statement may require several determinations, including: (1) characterization of the nature and scope of the proposed land use, (2) whether and how local land use regulations categorize and govern the proposed land use, and (3) whether and what local land use reviews are necessary to construct or operate the proposed use. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

38.3 State Agencies – Local Gov't Compatibility Determinations. A land use compatibility statement (LUCS) concluding that a county's land use regulations do not regulate the use of groundwater does not answer the question posed by the state agency's LUCS request, which is whether the county's land use regulations govern the *land use* to be served by the proposed use of groundwater for which the applicant seeks a state agency permit. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

38.3 State Agencies – Local Gov't Compatibility Determinations. Where a land use compatibility statement does not identify the land use to be served by proposed storage of groundwater in two reservoirs, and on appeal the applicant does not identify what land use is served

by the groundwater, LUBA cannot resolve the dispute over whether the decision is excluded from LUBA's jurisdiction under ORS 197.015(10)(b)(A), for decisions applying land use regulations that do not require interpretation or the exercise of legal judgment, because it is not clear what land use regulations apply. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

38.3 State Agencies – Local Gov't Compatibility Determinations. Where a landowner seeks a state agency permit to store groundwater in two reservoirs recently constructed without county approval, and the state agency requests the county to provide a land use compatibility statement (LUCS) to determine whether the land use served by the groundwater complies with county land use regulations, the scope of the land use to be evaluated under the LUCS includes the legal status of the two reservoirs that the applicant proposes to fill with groundwater. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

38.3 State Agencies – Local Gov't Compatibility Determinations. Where on appeal of a land use compatibility statement (LUCS) concluding that no county land use regulations apply to the proposed storage of groundwater in two reservoirs, the applicant fails to demonstrate that the decision is excluded from LUBA's jurisdiction under ORS 197.015(10)(b)(A) (for decisions applying land use regulations that do not require interpretation or the exercise of legal judgment), by arguing that the county's land use regulations should be interpreted to exempt construction of the two reservoirs from county approval. Even if that argument is correct, that the applicable land use regulations require interpretation defeats application of the exclusion at ORS 197.015(10)(b)(A). *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

38.3 State Agencies – Local Gov't Compatibility Determinations. A county is not obligated to accept an applicant's characterization of its proposed use and scope of use for purposes of issuing a land use compatibility statement. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

38.3 State Agencies – Local Gov't Compatibility Determinations. A governing body's code interpretation made in the course of rendering a decision on a request for a land use compatibility statement is subject to the deferential standard of review at ORS 197.829(1). Even without that deferential standard of review, the county correctly concluded that a proposal to store irrigation water in two newly excavated but unapproved reservoirs is not an outright permitted use as the operation of an "existing irrigation system," but rather a use that requires conditional use approval as the "excavation" for "reservoirs" in conjunction with an irrigation system. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

38.3 State Agencies – Local Gov't Compatibility Determinations. Where an interchange area management planning effort was a joint Oregon Department of Transportation (ODOT)/city effort, in satisfying its OAR 734-051-0155(5)(c) obligation to coordinate with affected property owners ODOT is not required to repeat the public outreach effort that was made before the city adopted the interchange area management plan. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

38.3 State Agencies – Local Gov't Compatibility Determinations. Under OAR 660-018-0050(2), the Department of Environmental Quality's state agency coordination rule, a land use compatibility statement (LUCS) is the primary vehicle to ensure that agency permits are consistent

with the statewide planning goals. In circumstances where the state agency coordination rules exempt permit renewals from the requirement to obtain a LUCS, the rules also exempt the agency from the requirement to make a determination that the renewed permit complies with the applicable goals. *Tualatin Riverkeepers v. ODEQ*, 55 Or LUBA 569 (2008).

38.3 State Agencies – Local Gov't Compatibility Determinations. A county's statement in a state agency land use compatibility certification of facts about a property's zoning and the status of a subdivision of that property falls under the ORS 197.015(11)(b)(A) exception to the definition of land use decision because the compatibility statement did not require interpretation or the exercise of policy or legal judgment. *Wolfgram v. Douglas County*, 54 Or LUBA 54 (2007).

38.3 State Agencies – Local Gov't Compatibility Determinations. Whether the Oregon Department of Environmental Quality properly issued a permit in reliance on a local government land use compatibility statement has no bearing on whether that land use compatibility statement is a land use decision as defined in ORS 197.015(11). *Wolfgram v. Douglas County*, 54 Or LUBA 54 (2007).

38.3 State Agencies – Local Gov't Compatibility Determinations. A county's certification in a state agency land use compatibility statement that the activities proposed in the related state agency permit application are consistent with all local land use requirements is necessarily a land use decision, as defined in ORS 197.015(11)(a), if it is a final decision and not subject to any of the exceptions set out at ORS 197.015(11)(b). *Wolfgram v. Douglas County*, 52 Or LUBA 536 (2006).

38.3 State Agencies – Local Gov't Compatibility Determinations. An ambiguous finding that is included in a 23-page findings document supporting a subdivision approval decision is not sufficient to provide actual or constructive notice of a prior county decision that approved a land use compatibility statement concerning grading related to that subdivision. *Wolfgram v. Douglas County*, 52 Or LUBA 536 (2006).

38.3 State Agencies – Local Gov't Compatibility Determinations. Where a county signs a land use compatibility statement certifying that a state agency permit applicant's proposal complies with all applicable local land use regulations, but fails to include any findings to support that certification, LUBA will remand the decision so that the county can adopt the required findings. *Wolfgram v. Douglas County*, 52 Or LUBA 536 (2006).

38.3 State Agencies – Local Gov't Compatibility Determinations. Under OAR 731-015-0075, an ODOT Class 3 project to improve a highway interchange must comply with any affected local government's comprehensive plan and, if the project does not comply, any comprehensive plan amendments that are necessary to bring the project into compliance must be adopted *before* ODOT issues its Revised Environmental Assessment for the interchange project. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

38.3 State Agencies – Local Gov't Compatibility Determinations. A development code provision that prohibits consideration of a permit application where a federal or state law violation exists on the property does not apply where a permit opponent alleges federal or state law violations but there is no final adjudication by a court or state or federal agency finding that such

violations exist. Such a code provision does not require a local government to independently consider such allegations or make its own findings concerning the alleged violations. *Farrell v. Jackson County*, 41 Or LUBA 1 (2001).

38.3 State Agencies – Local Gov't Compatibility Determinations. Whether a National Pollutant Discharge Elimination System permit renewal application qualifies for the exception to the land use compatibility determination requirement recognized by OAR 660-31-040 is an issue properly determined by DEQ, as part of its permit renewal process, not by a local government that is requested to make such a determination. *Sparacino v. Klamath County*, 18 Or LUBA 804 (1990).

38.3 State Agencies – Local Gov't Compatibility Determinations. OAR 660-31-025(2)(c) (use is "allowed by the plan but subject to standards regarding siting, design, construction and/or operation") includes instances where required local reviews are discretionary and could result in denial of the subject use. *Sparacino v. Klamath County*, 18 Or LUBA 804 (1990).

38.3 State Agencies – Local Gov't Compatibility Determinations. Determining that an activity or use that is the subject of a state agency permit application falls under OAR 660-31-025(2)(c) merely establishes that compatibility with the acknowledged comprehensive plan, as provided in ORS 197.180(10), must be determined. If required local government approvals have not been obtained, the use cannot be determined to be "allowed under the plan" and, therefore, cannot be determined to be compatible with the plan. *Sparacino v. Klamath County*, 18 Or LUBA 804 (1990).

39.1 Boundary Changes – Generally. Under the "island annexation" statute, ORS 222.750, which authorizes a city to annex territory that is not within the city but that is surrounded by the city's boundaries without the affected property owners' consent, a city may include phased annexation effective dates in its annexation proclamation, even if, as a consequence, part of the annexed territory will abut land that is not within the city on the effective date of its annexation. *WKL Investments Airport, LLC v. City of Lake Oswego*, 80 Or LUBA 310 (2019).

39.1 Boundary Changes – Generally. Where a right-of-way vacation process was initiated by a city council and could be abandoned at any time after initiation, the first *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), factor, which is whether the process is bound to result in a decision, suggests the decision is legislative rather than quasi-judicial. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

39.1 Boundary Changes – Generally. Where a right-of-way vacation decision was bound to "apply preexisting criteria to concrete facts,' the second *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), factor suggests the decision is quasi-judicial rather than legislative. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

39.1 Boundary Changes – Generally. The third *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979), factor is whether the action is directed at a closely circumscribed factual situation or a relatively small number of persons. Where a decision vacates a vacant alley right-of-way over a small, 673-square-foot area with a handful of adjoining property owners, the third *Strawberry Hill 4 Wheelers* factor suggests the decision is quasi-judicial rather than legislative. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

39.1 Boundary Changes – Generally. A regional government code provision that requires local government comprehensive plans to include a legal requirement that property be annexed before the property is allowed to urbanize has no bearing on whether a local government may annex property before completing legally required concept planning for the annexed area. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

39.1 Boundary Changes – Generally. A city comprehensive plan policy that a concept plan should be adopted to guide zoning does not require that the concept plan be adopted before the property that will be the subject of that concept plan can be annexed. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

39.1 Boundary Changes – Generally. A city does not err by interpreting a comprehensive plan policy that requires the city to "annex lands to the city through a process that considers the effects on public services" to allow it to defer such consideration to an ongoing but unfinished concept planning process where: (1) the concept plan will precede actual urbanization of the annexed areas, (2) the plan will provide the basis for planning and zoning of annexed areas for urban development, and (3) the concept plan will determine how public facilities are extended to annexed areas as they urbanize. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

39.1 Boundary Changes – Generally. A city does not err by interpreting a code requirement that "adequacy and availability of public facilities and services" be "considered" as a "factor" in

reviewing annexation proposals to allow it to defer needed public facility planning to an ongoing but incomplete concept planning process where: (1) annexation, in and of itself, authorizes no additional urban development of the annexed property, (2) no urban development of the annexed property could be allowed under the zoning that will remain in place following annexation, (3) no urban development would be allowed until the concept plan is adopted to allow urbanization of the annexed area, and (4) the concept plan will be required to address the public facilities and services that will be needed for urbanization of the annexed area. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

39.1 Boundary Changes – Generally. No legal authority supports an assignment of error alleging that filing a tax assessor's form with the tax assessor's office had the legal effect of vacating parcel lines to create a single parcel of land. *Chaves v. Jackson County*, 56 Or LUBA 643 (2008).

39.1 Boundary Changes – Generally. A city decision to defer making a decision about whether a recently enacted statute operates retroactively to invalidate an annexation ordinance while the property owner's appeal of that annexation ordinance is pending before the Court of Appeals is not a final decision, and, because it is not a final decision, it is not a land use decision subject to review by LUBA. *Leupold & Stevens, Inc. v. City of Beaverton*, 53 Or LUBA 203 (2007).

39.1 Boundary Changes – Generally. A property owner's request that a city apply a statute to invalidate a previously enacted annexation ordinance is not an application for a boundary change, which would require that the city adopt a land use decision. *Leupold & Stevens, Inc. v. City of Beaverton*, 53 Or LUBA 203 (2007).

39.1 Boundary Changes – Generally. ORS 268.347(1) is ambiguous in providing that a metropolitan service district has jurisdiction over boundary changes "within the boundaries of the district," because it is not clear whether the legislature intended that the district has jurisdiction only if the entire territory affected by the boundary changes is within the district, or if the district has jurisdiction if any part of the territory affected by the change is within the district. *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

39.1 Boundary Changes – Generally. Under ORS 268.347(1), a metropolitan service district has jurisdiction over boundary changes "within all territory designated as urban reserves" prior to June 30, 1997, even if the decision establishing those urban reserves was subsequently overturned and the territory affected by the boundary change is no longer designated as an urban reserve. *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

39.1 Boundary Changes – Generally. Absent some textual or contextual reason to conclude otherwise, LUBA will not presume that a special district boundary change regulation listing certain "urban services" is intended to incorporate the distinctions between "urban," "urbanizable" and "rural" lands articulated in *1000 Friends of Oregon v. Curry County*, 301 Or 447, 724 P2d 268 (1986). *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

39.1 Boundary Changes – Generally. Intergovernmental agreements concerning the provision of water service are "agreement[s] for provision of an urban service" for purposes of establishing who is a necessary party to a boundary change under special district regulations, even if those

agreements do not qualify as ORS 195.065 urban service agreements. *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

39.1 Boundary Changes – Generally. While ORS 195.065 envisions that the focus of required urban service agreements will be on providing urban services inside UGBs, nothing in that statute precludes including provisions in the agreement for providing urban services to lands lying just beyond the UGB. That a service agreement includes such provisions does not mean that it does not qualify as an ORS 195.065 urban service agreement, for purposes of establishing who is a necessary party to a boundary change under special district regulations. *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

39.1 Boundary Changes – Generally. The requirement in ORS 199.462(1) that boundary changes be based on consideration of economic, demographic and sociological trends does not implicitly authorize denial of a proposed water district boundary change for failure to consider whether one provider of water services is preferable to another. *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

39.1 Boundary Changes – Generally. ORS 268.354(1), which provides that in addition to other statutory requirements "boundary changes within a metropolitan service district are subject to the requirements established by the district," is an adequate statutory grant of authority to allow the district to adopt legislation that delays the effective date of an annexation ordinance while the annexation ordinance is on appeal to the district. *City of Happy Valley v. City of Damascus*, 51 Or LUBA 141 (2006).

39.1 Boundary Changes – Generally. Where a Metro Committee would be required to apply land use standards to approve a city annexation ordinance on appeal, its decision to deny the annexation ordinance is a land use decision subject to review to LUBA, notwithstanding that the denial was based on non-land use standards. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

39.1 Boundary Changes – Generally. Where a city annexation ordinance must be reviewed by Metro under its code to determine if the annexation is consistent "with other applicable criteria * * * under state and local law," Metro does not exceed its interpretive discretion by interpreting that requirement to allow it to determine if the city's annexation ordinance is inconsistent with two Oregon Supreme Court decisions concerning annexation. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

39.1 Boundary Changes – Generally. Where a review criterion that applies to a city boundary change on review by Metro unambiguously requires that the boundary change must be consistent with agreements between the city and other necessary parties, a memorandum of understanding to which the city is not a party could not provide a basis for Metro to deny the annexation ordinance under that review criterion. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

39.1 Boundary Changes – Generally. Where a city is required by the Metro Code to prepare and release a report prior to annexation that describes how the annexation is consistent with agreements that the city is not a party to, but the Metro Code review criteria that govern review of the annexation on appeal do not require that the annexation be consistent with agreements the city is not a party to, Metro may not deny the annexation ordinance based on the city's failure to comply

with the report requirement without explaining why that violation of the report requirements has the same status as a violation of one of the review criteria and provides a basis for denial. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

39.1 Boundary Changes – Generally. An acknowledged city code provision that replaces county comprehensive plan and zoning designations with functionally equivalent city comprehensive plan and zoning designations upon annexation may dramatically reduce the city's obligation to address the statewide planning goals when annexing property. But the new city comprehensive plan and zoning designations may not be sufficient to maintain statewide planning goal requirements where special purpose county planning and zoning requirements are repealed by annexation and special purpose city planning and zoning are not made applicable by the annexation. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

39.2 Boundary Changes – Incorporation/Formation. Where the formation of a People's Utility District (P.U.D.) is for the purpose of providing water service to the same developed area where water service is currently provided by an existing domestic water supply district distribution system, the only significant effect of the creation of the P.U.D., and its potential acquisition of the assets of the water district, is on the manner in which a city wanting to annex and withdraw from the water district territory in the subject area may obtain ownership of the water distribution facilities in that area, not on the present or future uses of land in the area. *City of Portland v. Multnomah County*, 19 Or LUBA 468 (1990).

39.3 Boundary Changes – Annexation. Under the "island annexation" statute, ORS 222.750, which authorizes a city to annex territory that is not within the city but that is surrounded by the city's boundaries without the affected property owners' consent, a city may include phased annexation effective dates in its annexation proclamation, even if, as a consequence, part of the annexed territory will abut land that is not within the city on the effective date of its annexation. *WKL Investments Airport, LLC v. City of Lake Oswego*, 80 Or LUBA 310 (2019).

39.3 Boundary Changes – Annexation. A city councilor's social media communications with constituents regarding an application for an annexation pending before the city council are *ex parte* communications that must be disclosed under ORS 227.180(3). *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

39.3 Boundary Changes – Annexation. Where during deliberations on an application for an annexation under a new state statute, a city councilor mentions a city attorney letter discussing the costs of joining litigation to challenge the statute, the letter is exempt from disclosure as an *ex parte* communication under ORS 227.180(4), and the city commits no procedural error in failing to include the letter in the record of the annexation proceeding. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

39.3 Boundary Changes – Annexation. Where city procedure on an annexation proposal provides a first evidentiary hearing before the planning commission, followed by a second evidentiary hearing before the city council, the planning commission hearing is the "initial evidentiary hearing" for purposes of ORS 197.763(6)(a), which requires the local government to grant a request for a continuance or open record period that is made prior to the conclusion of the initial evidentiary hearing. The local government is not required to grant such a request made at subsequent evidentiary hearings. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

39.3 Boundary Changes – Annexation. A finding that city streets have adequate capacity to accommodate traffic generated on annexed land is not supported by substantial evidence, where the finding cites and relies only upon extra-record street capacity data found in the transportation system plans of three nearby cities, rather than any evidence in the record. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

39.3 Boundary Changes – Annexation. Findings regarding the adequacy of urban services to serve annexed property are inadequate, where the findings cite only hearsay statements from providers, and fail to address issues raised below regarding delayed response times to service the subject property and an engineer's testimony that the electrical system cannot serve the property without impacting other portions of the city. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

39.3 Boundary Changes – Annexation. Under an annexation requirement that the city must find that "sufficient planning and engineering data is available" and "all necessary studies and reviews have been completed such that there are no unresolved issues," a city's conclusory finding of compliance is inadequate in the face of detailed and unrebutted testimony that studies are required regarding impacts of proposed development on traffic, pedestrian and bicycle facilities, storm

water drainage, flooding, electrical infrastructure, and emergency access. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

39.3 Boundary Changes – Annexation. It would be inconsistent with sound principles of judicial review, ORS 197.805, for LUBA to resolve a constitutional challenge to the procedure a city uses to approve an annexation, in a direct appeal of the city decision approving the annexation, when the same issue is pending before a circuit court in a writ of mandamus proceeding between the same parties, seeking to compel the city to approve the annexation under a different procedure. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

39.3 Boundary Changes – Annexation. A city is not obligated to apply city plan and zoning designations to the annexed portion of a county road where the county road did not have a county plan and zoning designation prior to annexation. *Altamont Homeowners' Assoc., Inc. v. City of Happy Valley*, 73 Or LUBA 126 (2016).

39.3 Boundary Changes – Annexation. Where the challenged decision annexed both a parcel and a portion of a county road, and the notice of public hearing that the city provided described the application for annexation as including only the parcel and did not reference in any way the portion of the county road that was annexed, the notice of public hearing did not reasonably describe the city's final action, and ORS 197.835(4)(b) allows petitioner to raise new issues. *Altamont Homeowners' Assoc., Inc. v. City of Happy Valley*, 73 Or LUBA 126 (2016).

39.3 Boundary Changes – Annexation. A city errs in approving an annexation request under ORS 222.125 without receiving the written consent of all owners of property in the territory to be annexed. *Altamont Homeowners' Assoc., Inc. v. City of Happy Valley*, 73 Or LUBA 126 (2016).

39.3 Boundary Changes – Annexation. The "separated by a right of way" criterion in ORS 222.111(1) does not apply where a city annexes both a parcel and the road connecting the parcel to the city limits. *Altamont Homeowners' Assoc., Inc. v. City of Happy Valley*, 73 Or LUBA 126 (2016).

39.3 Boundary Changes – Annexation. The shape of a parcel alone does not demonstrate that the annexation is unreasonable under the "reasonableness" test that was first employed by the Oregon Supreme Court in *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952). *Altamont Homeowners' Assoc., Inc. v. City of Happy Valley*, 73 Or LUBA 126 (2016).

39.3 Boundary Changes – Annexation. Where a local government adopts alternative findings to address disjunctive statutory requirements for annexation, any inconsistency between the alternative findings is not a basis for remand. *Oregon Coast Alliance v. City of Brookings*, 71 Or LUBA 14 (2015).

39.3 Boundary Changes – Annexation. ORS 222.750(5) requires that annexation of "property that is zoned for * * * residential use" must be delayed for at least three years" from the date of approval. Property is zoned for residential use, within the meaning of ORS 222.750(5), if the applicable zone allows residences as a permitted use. *Knaupp v. City of Forest Grove*, 67 Or LUBA 398 (2013).

39.3 Boundary Changes – Annexation. A zoning ordinance standard that requires that zoning map amendments must be consistent with relevant comprehensive plan policies provides no basis for reversal or remand, where petitioners appealed an annexation ordinance and failed to appeal the ordinance that rezoned the annexed properties. *Knaupp v. City of Forest Grove*, 67 Or LUBA 398 (2013).

39.3 Boundary Changes – Annexation. A city is not required to apply Goal 5 to a decision to annex property, where the annexation decision does not change the county planning and zoning designations of the property and does not make any of the changes specified in OAR 660-023-0250(3)(a) to (c) that would require application of Goal 5. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

39.3 Boundary Changes – Annexation. Where petitioner makes no attempt to identify specific or general vacation rental dwelling licensing requirements that might have Goal 9 implications, and any Goal 9 impacts of applying those licensing requirements to annexed property appear to be highly speculative and indirect, LUBA will reject petitioner's argument that it was error for the city to fail to adopt findings addressing Goal 9 to support its legislative annexation decision. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

39.3 Boundary Changes – Annexation. A legislative annexation decision that leaves existing county comprehensive plan and land use regulations in place, including county residential comprehensive plan and zoning map designations, does not implicate Goal 10. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

39.3 Boundary Changes – Annexation. Where a city has made it clear in its comprehensive plan and in dealings over the years with a water district and a sanitary district that as a condition of the city providing city water and sewer services to water and sanitary district customers the properties receiving such services would have to annex to the city in the future, and the districts have no plans to provide water or sewer service to the disputed area, the city's decision to annex and withdraw that territory from the districts was adequately coordinated under Goal 2, although the city and the districts may dispute the desirability of that annexation. *Roads End Water District v. City of Lincoln City*, 67 Or LUBA 452 (2013).

39.3 Boundary Changes – Annexation. General expressions of support or opposition to a proposed annexation are not *ex parte* contacts within the meaning of ORS 227.180(3), because they include no factual or legal assertions that bear on approval criteria or on any issue material to approval of the annexation that could possibly be rebutted. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

39.3 Boundary Changes – Annexation. ORS 222.120, which permits cities to dispense with an election on a proposed annexation and instead hold a public hearing, does not require cities to decide, on a case-by-case basis, whether to dispense with an election. It is consistent with the statute for the city to adopt a general resolution providing that the city elects to dispense with all annexation elections and to rely on that resolution to dispense with all future annexation elections. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

39.3 Boundary Changes – Annexation. While an annexation must be made in compliance with a city's acknowledged comprehensive plan, no statute or administrative rule requires that in annexing territory the city must contemporaneously amend its comprehensive plan map to depict the new city boundaries. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

39.3 Boundary Changes – Annexation. A decision annexing new territory to a city in order to extend city sewer to the new territory is not a "modification" of a project in a public facilities plan for purposes of the Goal 11 rule, and therefore OAR 660-011-0045 does not require an amendment to the public facilities plan, where the annexation decision does not make any modification to existing sewer projects in the plan or make any decisions regarding such projects. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

39.3 Boundary Changes – Annexation. A city governing body does not err in interpreting comprehensive plan policies that govern "development" to be inapplicable to a proposal to annex and extend sewer service to fully developed property. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

39.3 Boundary Changes – Annexation. Under ORS 222.111(1) a city may annex territory that is (1) contiguous to the city or (2) separated from the city only by a public right-of-way or body of water. Where the city annexes both territory and a public right-of-way that connects the city and the territory, that annexation territory as a whole is "contiguous" to the city and therefore the city need not rely on the "separated by a public right of way" element of ORS 222.111. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

39.3 Boundary Changes – Annexation. That an annexation may ultimately lead to a city extending sewer service to urbanizable lands along a different route than contemplated in the city's public facilities plan does not demonstrate that the annexation is "unreasonable" under *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952). *Link v. City of Florence*, 58 Or LUBA 348 (2009).

39.3 Boundary Changes – Annexation. Where a city readopts an earlier land use decision that authorized an election on a proposed annexation so that the proposed annexation would be sent to the voters for a second time, petitioners are entitled to challenge that readopted land use decision at LUBA, notwithstanding that an earlier LUBA appeal of the first land use decision was dismissed as moot after the voters rejected the annexation proposal. But where the voters reject the proposed annexation at the second election, before LUBA issues its decision on the merits, the second appeal must also be dismissed as moot. *Kehoe v. City of Oregon City*, 58 Or LUBA 552 (2009).

39.3 Boundary Changes – Annexation. ORS 197.752(1) does not mandate that all urban services and facilities must be available to a property at the time of annexation. *Bowler v. City of Cave Junction*, 56 Or LUBA 152 (2008).

39.3 Boundary Changes – Annexation. A regional government code provision that requires local government comprehensive plans to include a legal requirement that property be annexed before the property is allowed to urbanize has no bearing on whether a local government may annex

property before completing legally required concept planning for the annexed area. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

39.3 Boundary Changes – Annexation. A city comprehensive plan policy that a concept plan should be adopted to guide zoning does not require that the concept plan be adopted before the property that will be the subject of that concept plan can be annexed. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

39.3 Boundary Changes – Annexation. A city does not err by interpreting a comprehensive plan policy that requires the city to "annex lands to the city through a process that considers the effects on public services" to allow it to defer such consideration to an ongoing but unfinished concept planning process where: (1) the concept plan will precede actual urbanization of the annexed areas, (2) the plan will provide the basis for planning and zoning of annexed areas for urban development, and (3) the concept plan will determine how public facilities are extended to annexed areas as they urbanize. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

39.3 Boundary Changes – Annexation. A city does not err by interpreting a code requirement that "adequacy and availability of public facilities and services" be "considered" as a "factor" in reviewing annexation proposals to allow it to defer needed public facility planning to an ongoing but incomplete concept planning process where: (1) annexation, in and of itself, authorizes no additional urban development of the annexed property, (2) no urban development of the annexed property could be allowed under the zoning that will remain in place following annexation, (3) no urban development would be allowed until the concept plan is adopted to allow urbanization of the annexed area, and (4) the concept plan will be required to address the public facilities and services that will be needed for urbanization of the annexed area. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

39.3 Boundary Changes – Annexation. A city may rezone property prior to annexation, so long as the effective date of the rezoning is delayed until the date the property is annexed. *Citizens Against Annexation v. City of Florence*, 55 Or LUBA 407 (2007).

39.3 Boundary Changes – Annexation. The property owner has the burden of proof to establish that it qualifies for the statutory prohibition against nonconsensual annexation provided by Oregon Laws 1987, chapter 737, section 3. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

39.3 Boundary Changes – Annexation. The Oregon Laws 1987, chapter 737, section 3, standard requiring that property have "sewer and water lines paid for and installed by the property owner" is not correctly interpreted to require that the property have a "significant amount" of sewer and water lines paid for and installed by the property owner. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

39.3 Boundary Changes – Annexation. The Oregon Laws 1987, chapter 737, section 3, standard requiring that property have "sewer and water lines paid for and installed by the property owner" is not correctly interpreted to require that the sewer and water lines also be installed off-site. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

39.3 Boundary Changes – Annexation. Oregon Laws 1987, chapter 737, section 3, does not unambiguously provide that lateral sewer and water lines may qualify as "sewer and water lines paid for and installed by the property owner" and thus satisfy one of the law's requirements to qualify for protection from nonconsensual annexation. Therefore, resort to legislative history is appropriate. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

39.3 Boundary Changes – Annexation. The Oregon Laws 1987, chapter 737, section 3, standard requiring that property have "sewer * * * lines paid for and installed by the property owner" is not satisfied where the property owner merely relocated sewer lines that were originally installed and paid for by a special district. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

39.3 Boundary Changes – Annexation. The ORS 222.750 statutory authority for annexing islands of unincorporated land surrounded by cities or water or a combination of cities and water does not require that the entire island be annexed at one time. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

39.3 Boundary Changes – Annexation. Where the Metro Code provides that when a necessary party appeals a city boundary change decision to Metro the city boundary change decision is not final until the appeal is resolved, LUBA does not have jurisdiction to review that city boundary change decision while the Metro appeal is pending, because LUBA's review jurisdiction is limited to "final" decisions. *City of Happy Valley v. City of Damascus*, 51 Or LUBA 141 (2006).

39.3 Boundary Changes – Annexation. Under Oregon Supreme Court precedent, a city "institutes" annexation proceedings, and thereby secures jurisdiction to complete that annexation proceeding to the exclusion of other municipal bodies, when it adopts a resolution that sets a date for a public hearing on the proposed annexation. *City of Damascus v. City of Happy Valley*, 51 Or LUBA 150 (2006).

39.3 Boundary Changes – Annexation. An urban growth management agreement between a city and county that identifies an area of interest for city annexation and provides that the county will not oppose city annexations in that area of interest is not sufficient to "institute" annexation so that other cities that are not a party to the urban growth management agreement would be precluded from instituting annexation within that area of interest. *City of Damascus v. City of Happy Valley*, 51 Or LUBA 150 (2006).

39.3 Boundary Changes – Annexation. City voter approval of a measure that waives a city charter requirement for a city vote on annexation proposals for five years in a designated area is not sufficient to "institute" annexation proceedings in that area so that other cities would be precluded from instituting annexation proposals in that same area. *City of Damascus v. City of Happy Valley*, 51 Or LUBA 150 (2006).

39.3 Boundary Changes – Annexation. LUBA need not decide whether receipt of petitions and consents to annexation is sufficient to "institute" annexation proceedings, and thereby preclude other cities from attempting to annex those properties until the city receiving the petitions and consents can complete its annexation proceedings, where another city "initiated" annexation

proceedings before the petitions and consents were filed with the first city. *City of Damascus v. City of Happy Valley*, 51 Or LUBA 150 (2006).

39.3 Boundary Changes – Annexation. An acknowledged city code provision that replaces county comprehensive plan and zoning designations with functionally equivalent city comprehensive plan and zoning designations upon annexation may dramatically reduce the city's obligation to address the statewide planning goals when annexing property. But the new city comprehensive plan and zoning designations may not be sufficient to maintain statewide planning goal requirements where special purpose county planning and zoning requirements are repealed by annexation and special purpose city planning and zoning are not made applicable by the annexation. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

39.3 Boundary Changes – Annexation. There is no overarching "informed consent" requirement under ORS 222.170, as such. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

39.3 Boundary Changes – Annexation. A consent to annexation under ORS 222.120(4) and 222.170 that is obtained by multiple material misrepresentations would be of questionable validity. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

39.3 Boundary Changes – Annexation. Where a city is authorized under agreements with a county and water district to provide planning and water service in certain areas near the city, the city is properly viewed as the provider of those services and can withhold services from properties unless the property owners consent to annexation and sign a contract to that effect under ORS 222.115. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

39.3 Boundary Changes – Annexation. A city's mistaken understanding of the legal effect of a development code provision upon annexation is not a material misrepresentation of fact or law that would call into question the validity of consents to annexation that were given based on that understanding. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

39.3 Boundary Changes – Annexation. ORS 222.111 provides two ways to initiate city annexation of contiguous territory. The city's legislative body may initiate annexation on its own motion, and the owner of real property in the territory to be annexed may initiate such annexations. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. With several exceptions, ORS 222.111(5) requires that the city council submit the proposed annexation to (1) the voters of the city and (2) the voters living in the area to be annexed. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. Once a city initiates an annexation under ORS 222.111, unless a city's charter requires a vote by city voters on a proposed annexation, the city council may simply dispense with submitting the proposed annexation to the city voters and instead schedule a public hearing on the annexation. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. While an ordinance or resolution that approves an island annexation pursuant to ORS 222.750 is subject to referendum, a prior vote by the city electorate

or by the voters in the annexed territory is not required. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. ORS 222.840 to 222.915, which authorize city annexations to abate health hazards, do not require approval of such annexations by city voters or by the voters in the territory to be annexed. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. Under ORS 222.125, if a double majority consisting of (1) all the owners of land in the territory to be annexed and (2) 50 percent of the electors in that territory consent to a proposal to annex contiguous territory, no election is required in either the city or the territory to be annexed. ORS 222.170(2) authorizes a second type of double majority annexation (majority of electors and majority of landowners in the area to be annexed), under which an election within the territory to be annexed is not necessary. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. Under ORS 222.170(1), a city may annex contiguous territory without an election in the area to be annexed if a triple majority of "more than half of the owners of land in the territory, who also own more than half of the land in the contiguous territory and of real property therein representing more than half of the assessed value of all real property in the contiguous territory consent in writing to the annexation." *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. There is no right under either the federal or Oregon constitution to vote on questions of incorporation or annexation. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. Where a right to vote in a general election is extended by statute, any classification restricting that franchise on grounds other than residence, age, and citizenship must be shown to serve a compelling state interest. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. In analyzing annexation statutes, if those statutes are viewed as restricting a statutory right to vote, strict scrutiny is generally applied under the Equal Protection Clause; but if those statutes are viewed as merely presenting alternative annexation methods, where some provide for elections and some do not, rational basis scrutiny is generally applied under the Equal Protection Clause. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. The more clearly and cleanly statutes that authorize different annexation methods segregate the annexation methods that do not require elections from those that do, the more likely the statutes will not be subject to strict scrutiny as statutes that restrict voting rights. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. When statutes do not make it clear at the time an annexation is initiated whether the annexation will ultimately be subject to an election before the annexation can take effect, or the statutes appear to grant a right to vote on an annexation but also allow the election to be foreclosed at some later point in the annexation process, those statutes are

likely to be subject to strict scrutiny under the Equal Protection Clause as statutes that restrict voting rights. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. The right to an election that ORS 222.111(5) grants is not an absolute right. There is no right to vote in health hazard, double majority, island or triple majority annexations. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. Unlike annexation statutes that have been subject to strict scrutiny and found to violate the Equal Protection Clause as an improper restriction on voting rights, the triple majority method of annexation authorized by ORS 222.170(1) does not have the have the legal effect of "nullifying a vote," "preventing an election" or "halting an election." ORS 222.170(1) simply makes an election unnecessary; it does not foreclose an election or prohibit the city from submitting the proposed annexation to the voters in the territory to be annexed, notwithstanding that a triple majority of the property owners in the territory to be annexed consent to the annexation. *Morsman v. City of Madras*, 50 Or LUBA 1 (2005).

39.3 Boundary Changes – Annexation. A city does not misinterpret the term "surrounded" for purposes of determining whether certain annexations qualify as "island" annexations pursuant to ORS 222.750, where the city chooses to annex only part of the unincorporated territory within the island. *Costco Wholesale Corporation v. City of Beaverton*, 50 Or LUBA 476 (2005).

39.3 Boundary Changes – Annexation. A city's decision to annex property as an "island" annexation pursuant to ORS 222.750 is supported by substantial evidence although the record does not include ordinances approving previous annexations, or an explanation of how the territories being annexed are "surrounded" under ORS 222.750, where the record includes an annexation map depicting the city limits and the previously annexed properties that create the island. *Costco Wholesale Corporation v. City of Beaverton*, 50 Or LUBA 476 (2005).

39.3 Boundary Changes – Annexation. A city's annexation of unincorporated territory within an "island" is reasonable, for purposes of the "reasonableness" test under *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952), where the city has a policy to ultimately annex all of the territory identified in its "urban services area," and the territory to be annexed falls within that urban services area. *Costco Wholesale Corporation v. City of Beaverton*, 50 Or LUBA 476 (2005).

39.3 Boundary Changes – Annexation. OAR 660-014-0060 requires that local governments apply acknowledged comprehensive plans and ordinances to annexation decisions in lieu of the statewide planning goals, unless the plan and ordinance do not "control the annexation." A comprehensive plan policy need not be a mandatory approval criterion to "control the annexation" for purposes of OAR 660-014-0060; it is sufficient that the policy provides relevant guidance with respect to annexations. *Costco Wholesale Corporation v. City of Beaverton*, 50 Or LUBA 476 (2005).

39.3 Boundary Changes – Annexation. Where two cities have both adopted ordinances annexing the same property and both of those ordinances have been appealed to LUBA, some jurisdictional uncertainty is unavoidable until those appeals are completed. That temporary uncertainty does not

amount to a substantial or unreasonable injury that justifies a stay of the annexation ordinance in one of the LUBA appeals. *City of Happy Valley v. City of Damascus*, 50 Or LUBA 711 (2005).

39.3 Boundary Changes – Annexation. A finding that annexation is necessary to protect significant natural features on a site under more protective city regulations is a sufficient explanation for why there is a "public need" annexation, notwithstanding a plan policy indicating a preference for infill and redevelopment over annexation. No amount of infill or redevelopment could preserve significant natural features on the site. *Mason v. City of Corvallis*, 49 Or LUBA 199 (2005).

39.3 Boundary Changes – Annexation. A comprehensive plan policy stating that the city should "work toward" development of vacant lands before annexing additional lands does not mandate anything and therefore is not an approval standard governing an annexation proposal. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

39.3 Boundary Changes – Annexation. ORS 222.750, which allows a city to annex an "island" of territory without consent or a vote of the residents or landowners within the island, does not distinguish between classes of persons based on a "suspect" classification, for purposes of Article I, section 20 (Privileges and Immunities), of the Oregon Constitution. Therefore, the statute must be upheld if the differential treatment between persons residing or owning property within such islands and those residing or owning property in other types of unincorporated territory has a "rational basis," *i.e.*, bears some relationship to a legitimate end. *Kane v. City of Beaverton*, 49 Or LUBA (512).

39.3 Boundary Changes – Annexation. Reducing jurisdictional confusion and administrative and service inefficiencies created by "islands" of unincorporated territory surrounded by a city are legitimate legislative ends. A statute that makes it easier to incorporate such islands by eliminating the requirement to obtain the consent or electoral majority of residents or landowners within such islands furthers those legislative ends, and therefore the statute survives rational basis scrutiny under Article I, section 20 (Privileges and Immunities), of the Oregon Constitution. *Kane v. City of Beaverton*, 49 Or LUBA (512).

39.3 Boundary Changes – Annexation. It is entirely reasonable for a city to annex territory for which it has assumed, or obligated itself to assume, the responsibility of providing and maintaining urban services, for purposes of the "reasonableness" test under *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952), even if city urban services are no better than the services the county provides. *Kane v. City of Beaverton*, 49 Or LUBA (512).

39.3 Boundary Changes – Annexation. Arguments that an "island" annexation under ORS 222.750 must be remanded because the record does not include consents necessary to establish the validity of previous annexations that rendered the subject area an "island" are essentially collateral attacks on annexation decisions not before the Board, and therefore do not provide a basis for reversing or remanding the challenged island annexation. *Kane v. City of Beaverton*, 49 Or LUBA (512).

39.3 Boundary Changes – Annexation. While ORS 222.750 allows a city to annex an "island," defined as unincorporated territory that is surrounded by city limits or city limits and a body of water, it does not require the city to annex all of the island in one decision, and the city's choice to annex only a part of the island does not disqualify the city from proceeding under ORS 222.750. *Kane v. City of Beaverton*, 49 Or LUBA (512).

39.3 Boundary Changes – Annexation. A resolution adopted pursuant to ORS 222.111(2) to initiate annexation proceedings that sets a date for an election in the area to be annexed, but dispenses with a separate vote within the city to approve the annexation, is not the city's "final" decision regarding the annexation, and for that reason such a resolution is not a land use decision. Following adoption of such a resolution, ORS 222.120(4) requires that the city provide a public hearing and thereafter the city must adopt an ordinance to declare that the territory is annexed provided a majority of voters in the territory to be annexed approve. *City of Happy Valley v. City of Damascus*, 49 Or LUBA 553 (2005).

39.3 Boundary Changes – Annexation. Findings that an annexation area is adjacent to a long-developed urban neighborhood with full public services that can be readily extended to the annexed territory area are sufficient to demonstrate compliance with a code criterion requiring that "an adequate level of urban services and infrastructure is available or will be made available in a timely manner." *Cutsforth v. City of Albany*, 49 Or LUBA 559 (2005).

39.3 Boundary Changes – Annexation. A city is not required to demonstrate that annexation of an open space area that includes Goal 5 resources is consistent with Goal 5, where the annexation decision does not rezone the area, amend the plan designation, or otherwise affect the uses allowed in the territory or the protection of open space and natural resources. *Cutsforth v. City of Albany*, 49 Or LUBA 559 (2005).

39.3 Boundary Changes – Annexation. Arguments that application of a city zoning district to an annexed area will conflict with Goal 12 are misdirected, where the challenged decision merely annexes the area but does not rezone it. *Cutsforth v. City of Albany*, 49 Or LUBA 559 (2005).

39.3 Boundary Changes – Annexation. A city's desire to annex an island of unincorporated territory to reduce jurisdictional confusion and to ensure that those who benefit from city services share the cost of such services is sufficient to satisfy the requirement that annexations be "reasonable" and not arbitrary under *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952). *Cutsforth v. City of Albany*, 49 Or LUBA 559 (2005).

39.3 Boundary Changes – Annexation. Under OAR 660-014-0060, which requires that local governments apply acknowledged comprehensive plans and ordinances to annexation decisions in lieu of the statewide planning goals, unless the plan and ordinance do not "control the annexation," whether the plan and ordinances control the annexation depends on whether the plan and ordinances include substantive standards guiding a city's determination whether or not to annex land, not whether the plan and ordinances include procedures specific to annexations. *Patterson v. City of Independence*, 49 Or LUBA 589 (2005).

39.3 Boundary Changes – Annexation. Which substantive comprehensive plan and ordinance standards that local governments apply to annexation decisions under OAR 660-014-0060 depend in part on the nature of the annexation. The considerations governing annexation of right-of-way will differ from those that govern annexation of a parcel for industrial, commercial or residential uses. *Patterson v. City of Independence*, 49 Or LUBA 589 (2005).

39.3 Boundary Changes – Annexation. Given the limited nature of a proposed annexation of a city-maintained right-of-way, comprehensive plan policies implementing Goals 12 and 14 that provide general guidance regarding annexation decisions are sufficient to "control the annexation" of the right-of-way for purposes of OAR 660-014-0060, and thus make it unnecessary to apply the goals directly. *Patterson v. City of Independence*, 49 Or LUBA 589 (2005).

39.3 Boundary Changes – Annexation. Annexation of a small stretch of city-maintained and city-patrolled road that begins and ends within city limits is clearly reasonable under the test in *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952). *Patterson v. City of Independence*, 49 Or LUBA 589 (2005).

39.3 Boundary Changes – Annexation. Even if a local government could recognize partial parcel annexations as sufficient to legally divide a parcel, where a local lot of record code definition does not recognize partial parcel annexation as sufficient to legally divide the annexed portion of a parcel from the portion of a parcel that is not annexed, the annexation does not have the effect of dividing the parcel. *Masson v. Multnomah County*, 48 Or LUBA 100 (2004).

39.3 Boundary Changes – Annexation. A city correctly construes a policy that conditions connection to or extension of city water and sewer service upon annexation or consent to annexation not to prohibit the city from requiring consents to annexation in other circumstances. *Roads End Sanitary District v. City of Lincoln City*, 48 Or LUBA 126 (2004).

39.3 Boundary Changes – Annexation. A city-initiated annexation involving an area of 310 acres consisting of 97 parcels that is neither bound to result in a decision, nor an action directed at a closely circumscribed factual situation or relatively small number of persons is a legislative rather than quasi-judicial decision under *Strawberry Hill 4 Wheelers v. Washington Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979). *Cutsforth v. City of Albany*, 48 Or LUBA 304 (2004).

39.3 Boundary Changes – Annexation. A city does not err in failing to follow comprehensive plan amendment procedures in approving an annexation, where the annexation decision does not amend the city's comprehensive plan. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004).

39.3 Boundary Changes – Annexation. A city's improper representation to property owners that they would only be entitled to phased-in city property taxes upon annexation if they signed a consent to annexation is not cured by the city's subsequent decision to extend phased-in property taxation to all property owners in the annexed area, because it cannot be known whether those property owners would have consented to annexation if they knew their right to receive phased-in city property taxation would be unaffected by their decision not to sign a consent to annexation. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004).

39.3 Boundary Changes – Annexation. Valuable promises to only some property owners of future planning and zoning upon annexation, as inducements to sign consents to annexation, constitute improper quid pro quos affecting the property owners' constitutionally protected right to vote. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004).

39.3 Boundary Changes – Annexation. A property owner's consent to annex is not affected by a later decision to delete some of the territory proposed for annexation, because consents to annex are consents to annex the property owner's property and are not dependent on annexation of the entire area that was originally proposed. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004).

39.3 Boundary Changes – Annexation. Findings that address a city requirement that a proposed annexation must be a "natural extension" of city limits are adequate, where the findings explain that the area to be annexed will provide contiguity between existing city boundaries and commercially zoned property located outside city limits that will require annexation and the extension of urban services when they are developed. *West Side Rural F.P.D v. City of Hood River*, 46 Or LUBA 451 (2004).

39.3 Boundary Changes – Annexation. An amending order that merely corrects a property description included in a prior annexation order does not replace the prior order and therefore petitioners did not have to appeal the amending order rather than the prior order. *Miner v. Clatsop County*, 46 Or LUBA 467 (2004).

39.3 Boundary Changes – Annexation. A decision to annex property owned by more than 60 property owners and encompassing more than 125 acres is not directed at a "closely circumscribed factual situation" or "a relatively small number of persons," and thus is not subject to notice requirements and hearing procedures prescribed by ORS 197.763 for a quasi-judicial land use decision. *Miner v. Clatsop County*, 46 Or LUBA 467 (2004).

39.3 Boundary Changes – Annexation. When a local code defines a "minor boundary change" as an annexation, a local government does not err in processing an annexation request as a "minor" rather than "major" boundary change, regardless of the amount of territory being annexed. *Cape v. City of Beaverton*, 46 Or LUBA 750 (2004).

39.3 Boundary Changes – Annexation. When a local code does not require a public hearing, the fact that public officials from other local governments request additional procedures does not obligate a local government to provide additional procedures. *Cape v. City of Beaverton*, 46 Or LUBA 750 (2004).

39.3 Boundary Changes – Annexation. Annexation decisions are governed by comprehensive plan annexation criteria or, if no such comprehensive plan criteria have been adopted, by the statewide planning goals. Where a city annexation decision is adopted without applying either its comprehensive plan or the statewide planning goals, the decision must be remanded. *Morsman v. City of Madras*, 45 Or LUBA 16 (2003).

39.3 Boundary Changes – Annexation. A decision to annex adjacent industrially planned, zoned and developed land that includes the city's airport and sewerage treatment plant is not unreasonable

under *Portland Gen. Elec. Co. v. City of Estacada*, 194 Or 145, 241 P2d 1129 (1952). *Morsman v. City of Madras*, 45 Or LUBA 16 (2003).

39.3 Boundary Changes – Annexation. If a city makes valuable promises to property owners regarding future planning and zoning of their property that (1) are conditioned on their consent to annexation, and (2) are not extended to all other property owners in the annexed territory, such promises are impermissible under *Hussey v. City of Portland*, 64 F3d 1260 (9th Cir 1995). *Morsman v. City of Madras*, 45 Or LUBA 16 (2003).

39.3 Boundary Changes – Annexation. Findings that explain that a property's locational characteristics are ideal to support airport-related light industrial uses and that other properties located within city limits are not as well suited for those uses are adequate to explain why an annexation is consistent with city annexation policies that require a demonstration that the annexation is "needed." *Just v. City of Lebanon*, 45 Or LUBA 162 (2003).

39.3 Boundary Changes – Annexation. Neither Goal 11 nor Goal 14 identifies annexation or application of city zoning as the decision points at which (1) a specific development proposal must be approved and (2) any public service or facility inadequacies at the property must be corrected. *Just v. City of Lebanon*, 45 Or LUBA 179 (2003).

39.3 Boundary Changes – Annexation. ORS 197.752 and 197.754 concern the provision of public facilities to "urban development" located within urban growth boundaries. Those statutes do not mandate approval of a specific development proposal and provision of all urban services and facilities at the time of annexation and application of city zoning that would allow urban uses. *Just v. City of Lebanon*, 45 Or LUBA 179 (2003).

39.3 Boundary Changes – Annexation. Where a city annexation policy requires a demonstration that the annexation territory is "needed," findings concluding that the territory to be annexed helps to address a 390-acre deficit in residential land are inadequate, where there is evidence that the city has a net 900-acre surplus of residentially zoned land within its UGB and there is no evidence as to how much of that surplus is currently located within city limits. *Just v. City of Lebanon*, 45 Or LUBA 179 (2003).

39.3 Boundary Changes – Annexation. Where a city annexation policy requires that a development proposal accompany a request to annex vacant land "unless otherwise approved by the city," and the city has a process where a development proposal may be considered and approved by the city prior to annexation, a city errs in interpreting the annexation policy to allow the city to defer consideration of a development proposal until after the property is annexed. *Just v. City of Lebanon*, 45 Or LUBA 179 (2003).

39.3 Boundary Changes – Annexation. LUBA will remand a city's zoning designation decision, where the decision is dependent on the validity of a concurrent annexation decision that LUBA has concluded does not comply with applicable law. *Just v. City of Lebanon*, 45 Or LUBA 179 (2003).

39.3 Boundary Changes – Annexation. A city may dispense with an annexation election within annexation territory if at least 50 percent of the landowners owning at least 50 percent of the land area and at least 50 percent of the assessed value within annexation territory consent to the annexation. If a public landowner fails to consent or object to an annexation conducted pursuant to ORS 222.170, the city is not required to include that public land in order to satisfy ORS 222.170. *Friends of Linn County v. City of Lebanon*, 45 Or LUBA 204 (2003).

39.3 Boundary Changes – Annexation. A city does not violate an annexation policy that gives priority status to the annexation of territory that must be serviced by city facilities in order to avoid a potential health hazard, where there is evidence that at least a portion of the annexed territory has a failing septic system, and there is no prohibition against including nonpriority property with a request to annex priority property. *Friends of Linn County v. City of Lebanon*, 45 Or LUBA 204 (2003).

39.3 Boundary Changes – Annexation. A city's findings that a proposed annexation is consistent with applicable annexation policies that require a showing that (1) adequate public facilities are available to serve the property; (2) the proposed annexation is needed; and (3) the annexation will result in a compact growth pattern, are not adequate when they fail to address petitioner's arguments that (1) not all of the needed public facilities have been determined to be available; (2) that the annexation is not needed because there is an abundance of available land within city limits; and (3) the annexation will not result in a compact growth pattern because it will result in a bulge in city limits that is almost entirely surrounded by unincorporated territory. *Friends of Linn County v. City of Lebanon*, 45 Or LUBA 204 (2003).

39.3 Boundary Changes – Annexation. LUBA will defer to a city council interpretation of its zoning ordinance as not requiring a separate zoning amendment application where city zoning is applied to property inside the city's urban growth boundary as part of the annexation process. *Barton v. City of Lebanon*, 45 Or LUBA 214 (2003).

39.3 Boundary Changes – Annexation. Notices of changes to annexation boundaries that are required to be sent pursuant to ORS 198.730 are properly included in the record in an appeal of that annexation decision to LUBA. *Miner v. Clatsop County*, 45 Or LUBA 748 (2003).

39.3 Boundary Changes – Annexation. The combined effect of ORS 197.175(1) and OAR 660-001-0300 and 660-001-0310 is to make all city annexation decisions land use decisions. Either (1) the city's comprehensive plan or land use regulations have criteria that govern the annexation, in which case the annexation decision is a land use decision under ORS 197.015(10)(a)(A)(ii) or (iii), or (2) the comprehensive plan and land use regulations do not have criteria that govern annexation decisions, in which case under ORS 197.175(1) and OAR 660-001-0310 the statewide planning goals continue to apply directly and make the annexation decision a land use decision under ORS 197.015(10)(a)(A)(i). *Cape v. City of Beaverton*, 43 Or LUBA 301 (2002).

39.3 Boundary Changes – Annexation. An annexation must include a land use decision that addresses relevant land use criteria and that land use decision must become final prior to or at the same time as any separate decision that is adopted to make the annexation final. *Cape v. City of Beaverton*, 43 Or LUBA 301 (2002).

39.3 Boundary Changes – Annexation. Where statutory and Metro provisions permit annexation without a public hearing or an election if the owners of all property to be annexed consent to the annexation, and property is annexed pursuant to those provisions without the consent of all property owners, the annexation decision will be remanded. *Cape v. City of Beaverton*, 43 Or LUBA 301 (2002).

39.3 Boundary Changes – Annexation. A decision that annexes property into city limits using quasi-judicial land use processes set out in the local code for such annexation decisions is reviewable as a quasi-judicial land use decision. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 546 (2003).

39.3 Boundary Changes – Annexation. A city's failure to enter into an urban services agreement with a rural fire protection district prior to annexing property located within the fire district does not violate either Goal 2 or Goal 11. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 546 (2003).

39.3 Boundary Changes – Annexation. A city decision to annex a Y-shaped parcel is not an impermissible "cherry stem" annexation, because the property (1) is contiguous to city limits in two places; (2) is located within the city urban growth boundary, and (3) is developed with an urban street interchange that serves the city and its environs. *West Side Rural F.P.D v. City of Hood River*, 43 Or LUBA 546 (2003).

39.3 Boundary Changes – Annexation. Where petitioner argues the city erred by approving an expedited annexation while failing to "(1) publish public notice, (2) notify adjacent property owners, (3) post a notice on the properties, (4) notify property owners within created 'service islands,' or (5) notify the community in time for this issue to be included on public agendas to be discussed," but petitioner identifies no legal requirement for any of these kinds of notice, petitioner fails to provide a basis for reversal or remand. *Cape v. City of Beaverton*, 41 Or LUBA 515 (2002).

39.3 Boundary Changes – Annexation. Where a city provides notice that it will provide a hearing to comment on a proposed expedited annexation if a hearing is requested, and petitioner requested a hearing, the city errs in approving the expedited annexation without providing the requested hearing. *Cape v. City of Beaverton*, 41 Or LUBA 515 (2002).

39.3 Boundary Changes – Annexation. Notwithstanding a city's procedural error in failing to provide a hearing on a proposed expedited annexation, petitioner's substantial rights were not thereby violated where petitioner was nevertheless allowed to appear before the city council and present his comments before the city council approved the expedited annexation. *Cape v. City of Beaverton*, 41 Or LUBA 515 (2002).

39.3 Boundary Changes – Annexation. A code provision allowing the city to annex property as long as conditions imposed in previous decisions adopting annexation agreements are satisfied does not require the city to revisit those previous decisions, nor does it require that the record of the annexation decision contain the studies that supported the previous decisions accepting the annexation agreements. *Troy v. City of Grants Pass*, 41 Or LUBA 112 (2001).

39.3 Boundary Changes – Annexation. Reference to "a portion of Sunset Highway" in a notice of proposed annexation decision is likely insufficient to provide reasonable notice of the decision under applicable code and statutory requirements. However, where a petitioner nevertheless was able to determine the nature and scope of the proposal and submit written opposition to the proposal, the petitioner may not successfully assert possible injury to other persons' substantial rights as a basis for reversal or remand. *Cape v. City of Beaverton*, 40 Or LUBA 78 (2001).

39.3 Boundary Changes – Annexation. A city cannot rely on the existence of its urban growth boundary to provide the "annexation plan" required by *Skourtes v. City of Tigard*, 250 Or 537, 444 P2d 22 (1968), and ORS 222.175 as necessary for informed consent to annexation. *Johnson v. City of La Grande*, 39 Or LUBA 377 (2001).

39.3 Boundary Changes – Annexation. Under *Skourtes v. City of Tigard*, 250 Or 537, 444 P2d 22 (1968), an annexation plan must be provided to parties prior to obtaining their consents to annexation. *Johnson v. City of La Grande*, 39 Or LUBA 377 (2001).

39.3 Boundary Changes – Annexation. An annexation decision that includes findings of compliance with local land use standards is a land use decision subject to LUBA review. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. If an annexation decision includes the application of and findings of compliance with local land use regulations, it is a land use decision, notwithstanding that, in the absence of the application of land use standards, a city's discretionary decision to annex property is not a land use decision. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. An annexation is a quasi-judicial decision if (1) the initiation of the annexation is bound to result in a decision; (2) the local government is bound to apply pre-existing criteria to concrete facts; and (3) the action is directed at a closely circumscribed factual situation or a relatively small number of persons. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. An annexation decision is not a quasi-judicial decision when the initiation of the annexation does not require that the city complete the process, and where the annexation applies to 155 parcels owned by 127 different persons. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. The fact that property subject to an annexation is located within an urban growth boundary does not obviate the requirement that the city obtain informed consents to annexation by providing a copy of an annexation plan to those persons from whom consents are solicited. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. Consents to annexation pursuant to ORS 222.173 and petitions for annexation are valid only if the consenting parties or signatories to the petition are provided an annexation plan prior to giving their consent. *Skourtes v. City of Tigard*, 250 Or 537, 444 P2d 22 (1968). *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. A local government need not provide an annexation plan to obtain valid, informed consents to annexation with respect to consents given in exchange for the extra-territorial provision of city services. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

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

39.3 Boundary Changes – Annexation. Consents to annexation obtained pursuant to ORS 222.115, where the consent is given in exchange for the city's provision of extra-territorial services, are constitutional. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. Consents to annexation that are obtained pursuant to ORS 222.115, where the consents are given in exchange for the city's provision of extra-territorial services, are not subject to the one-year limitation on consent under ORS 222.173. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. Consents to annexation obtained in exchange for the provision of city services are not valid if they were obtained prior to the enactment of ORS 222.115, the statute authorizing the city to enter into such contracts. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. ORS 222.115 does not prohibit the inclusion of nonconsenting owners into an annexation territory. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. Consents to annexation that are obtained pursuant to ORS 222.115 must be recorded before they can be effective against third-party successors in interest. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. When a city's decision to annex territory is also a land use decision, the city must be able to demonstrate that the annexation decision complies with the statutory annexation requirements and is supported by substantial evidence in the record. A failure to demonstrate such compliance requires a remand. *Johnson v. City of La Grande*, 37 Or LUBA 380 (1999).

39.3 Boundary Changes – Annexation. A city decision to deny a request for annexation and subdivision approvals, based solely on a city's refusal to consider annexation requests until its buildable lands inventory can be updated, constitutes a moratorium, as that term is defined in ORS 197.505(1). *Benchmark Enterprises v. City of Stayton*, 36 Or LUBA 433 (1999).

39.3 Boundary Changes – Annexation. A 1975 county decision to prohibit access to a street is not automatically nullified by a later city annexation and rezoning of the street. ORS 215.130 does not preclude the city from continuing the access restriction originally imposed by the county. *Applegate Estates v. City of Klamath Falls*, 35 Or LUBA 112 (1998).

39.3 Boundary Changes – Annexation. ORS 215.130(2) authorizes a city to process and approve a zone change contingent on future annexation to the city. *Lodge v. City of West Linn*, 35 Or LUBA 42 (1998).

39.3 Boundary Changes – Annexation. Where an intergovernmental agreement authorizes a city to grant conditional use and design review approval provided a pre-annexation agreement has been recorded, the city may grant such conditional use and design review approval subject to a condition of actual annexation. *Lodge v. City of West Linn*, 35 Or LUBA 42 (1998).

39.3 Boundary Changes – Annexation. ORS 222.170(4) applies only to annexations conducted under ORS 222.170(1) and is not applicable to annexations conducted under ORS 222.125. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

39.3 Boundary Changes – Annexation. ORS 222.170 does not require that property owners who are also electors submit separate consent forms as property owners and as electors. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

39.3 Boundary Changes – Annexation. A determination of whether an annexation is reasonable requires a case-by-case analysis of several factors, including whether the contiguous territory represents the actual growth of the city beyond its city limits, whether it is valuable by reason of its adaptability for prospective town uses, whether it is needed for the extension of streets or to supply residences or business for city residents, and whether the territory and city will mutually benefit from the annexation. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

39.3 Boundary Changes – Annexation. The reasonableness test for approval of an annexation has a low threshold and is satisfied by a showing that the territory is suitable for annexation and represents the city's current and future direction for commercial growth. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

39.3 Boundary Changes – Annexation. A comprehensive plan provision that requires a city to jointly review annexation procedures with the county is satisfied where the decision explains that the city's efforts to involve the county in the proceeding, and the county's choice to minimally participate, satisfy the policy. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

39.3 Boundary Changes – Annexation. Where a local code requires that sewer facilities be "available" as a condition of approval for annexation, the local government's interpretation of the "available" criterion as being met where extension of sewer services is feasible within the current planning period is not clearly wrong. *Northwest Aggregates Co. v. City of Scappoose*, 34 Or LUBA 498 (1998).

39.3 Boundary Changes – Annexation. Under ORS 12.270, a boundary alteration, initiated and purported to be effective, is conclusively presumed effective one year after the purported effective date, notwithstanding procedural defects in adoption. *Carlson v. City of Dunes City*, 30 Or LUBA 129 (1995).

39.3 Boundary Changes – Annexation. ORS 222.111(1) cannot be interpreted to allow "cherry stem annexations," which annex a road as a means to connect and annex an otherwise noncontiguous parcel to a city, on the basis that such roads "separate" the noncontiguous parcel from the city. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

39.3 Boundary Changes – Annexation. "Cherry stem annexations," which annex a road as a means to connect and annex an otherwise noncontiguous parcel to a city, frustrate the contiguity requirement of ORS 222.111(1) and are inherently unreasonable. *DLCD v. City of St. Helens*, 29 Or LUBA 485 (1995).

39.3 Boundary Changes – Annexation. ORS 222.173(1) imposes a time limit on the effectiveness of certain consents to annexation, (2) provides an exception to the time limit, and (3) makes such consents to annexation public records. Neither ORS 222.173 nor ORS 222.115 authorizes a city to condition provision of sewer service by a provider other than the city on execution of consents to annexation by property owners. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

39.3 Boundary Changes – Annexation. ORS 197.175(2), Goals 11 and 14 and OAR chapter 660, division 11, provide authority for a city and county to adopt a comprehensive plan policy requiring that owners of unincorporated property within an urban growth boundary sign consents to annexation in order to receive sewer service. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

39.3 Boundary Changes – Annexation. Neither ORS 222.173 nor ORS 222.115 purports to preempt local government use of consents to annexation in circumstances other than those identified in ORS 222.173(1). Statements by individual legislators during legislative proceedings leading to adoption of ORS 222.115 expressing general hostility towards involuntary annexation do not establish a legislative intent to preclude city or county legislation concerning consents to annexation. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

39.3 Boundary Changes – Annexation. City and county ordinances requiring that owners of certain unincorporated property either annex or sign a consent to annexation before receiving sewer connection permits do not improperly infringe on such property owners' statutory right to vote on annexations. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

39.3 Boundary Changes – Annexation. Ordinances requiring consents to annexation as a condition of receiving sewer service do not improperly coerce property owners to give up their right to vote on annexations simply because an objecting property owner may be forced to pay a LID benefit assessment for the cost of extending sewer service that the objecting property owner does not wish to receive. Any such benefit assessments may be challenged on that basis in a proper

forum and will either be invalidated or sustained. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

39.3 Boundary Changes – Annexation. A city and county may conclude the consequences of allowing sewer service to be provided without first securing consents to annexation outweigh any difficulties requiring such consents to annexation will pose for a sanitary district's use of local improvement districts to pay the cost of providing sewer service. Coordination under Goal 2 does not require that all affected governmental units agree on the proposal. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

39.3 Boundary Changes – Annexation. Where LUBA has remanded a city decision annexing certain property, a subsequent city decision amending the comprehensive plan and zoning designations for that property, in reliance on the annexation, exceeds the city's authority. *Roloff v. City of Milton-Freewater*, 27 Or LUBA 256 (1994).

39.3 Boundary Changes – Annexation. Under ORS 197.175(1), city decisions to annex unincorporated territory concern the application of the statewide planning goals and, therefore, satisfy the statutory definition of a "land use decision." *Roloff v. City of Milton-Freewater*, 27 Or LUBA 80 (1994).

39.3 Boundary Changes – Annexation. An annexation of contiguous property with the written consent of the property owners, pursuant to ORS 222.125, is subject to the requirement of ORS 197.175(1) that the annexation be determined to be consistent with applicable land use requirements, and the recognized procedural requirements for such quasi-judicial land use decision making. *Roloff v. City of Milton-Freewater*, 27 Or LUBA 80 (1994).

39.3 Boundary Changes – Annexation. Where a city comprehensive plan expressly recognizes that the county has jurisdiction to issue land use permits prior to annexation of unincorporated areas, the city must annex an unincorporated area before it has jurisdiction to grant land use permits for such unincorporated areas. *Recht v. City of Newport*, 26 Or LUBA 316 (1993).

39.3 Boundary Changes – Annexation. Where property is annexed and it is not clear whether a plan policy and implementing measure governing annexations applies in the particular circumstances, a remand is required so that the local government may either apply the plan policy and implementing measure or explain why it does not apply. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

39.3 Boundary Changes – Annexation. ORS 197.752(1) imposes a general planning obligation on local governments; it is not an approval standard directly applicable rezoning or annexation decisions. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

39.3 Boundary Changes – Annexation. A city may establish compliance with a code provision which specifically requires a determination of a public need before additional land may be annexed by adopting findings demonstrating that a determination of public need to annex the subject property is supported by relevant plan provisions and explaining why other relevant plan policies

not supportive of such a determination may be disregarded. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

39.3 Boundary Changes – Annexation. To show a public need for a 10-acre "community shopping center," of which the property proposed to be annexed would be a part, the city's findings must establish a nexus between the stated "need" to have additional retail businesses within the city and to stop retail leakage to a neighboring city, and the "need" for a "community shopping center" requiring a 10-acre vacant retail zoned site within the city. *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

40. Wetlands. Where a local code provides that "Significant Natural Areas" are a subset of "Significant Natural Resources," a hearings officer does not err in failing to find that a proposed subdivision complies with a local code section that only applies to "Significant Natural Areas," absent a demonstration that the area in question is not only a "Significant Natural Resource," but also a "Significant Natural Area." *Carver v. Washington County*, 70 Or LUBA 23 (2014).

40. Wetlands. A hearings officer correctly concludes that an isolated wetland is not a "riparian corridor," where the code defines riparian corridor as "an area, adjacent to a water area," and the isolated wetland is not "adjacent to a water area." *Carver v. Washington County*, 70 Or LUBA 23 (2014).

40. Wetlands. Where the Court of Appeals interpreted similar operative language in a county's code to determine that "riparian zones" are areas adjacent to water areas designated in a community plan, a hearings officer correctly interprets the term "riparian corridor" in that code to apply only to riparian areas that are proximate to designated water areas. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

40. Wetlands. Where a county has an acknowledged Goal 5 program, which includes an acknowledged inventory, and rural wetlands are included in a special category that is not part of that inventory, amendments to the county's ordinance that modify protections to rural wetlands do not change the county's procedures for inventorying Goal 5 resources and do not conflict with Goal 5 because they continue to provide interim protection of resources in a special category. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 33 Or LUBA 152 (1997).

40. Wetlands. City's interpretation of local wetland mitigation policy to "preserve wetland habitat" as allowing replacement of .05 acres of existing wetland with a larger wetland area is not clearly wrong and must be affirmed. *Noble v. City of Fairview*, 30 Or LUBA 180 (1995).

40. Wetlands. Where a local code requires a "recreation/open space area" as part of a mobile home park, it is reasonable for the local government to interpret "recreation/open space area" to include wetlands. *Burghardt v. City of Molalla*, 29 Or LUBA 223 (1995).

40. Wetlands. Where post-acknowledgment legislative land use regulation amendments make portions of a county's acknowledged program for wetlands protection inapplicable to rural wetlands, the county must demonstrate, either in the decision or through argument and citations to the record in its brief, that with regard to rural wetlands, the amendments result in a program that complies with Goal 5 and the Goal 5 rule. *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

40. Wetlands. If a county implements ORS 215.418(1) by providing in its code that it will notify DSL of "developments" in wetlands identified on the Statewide Wetlands Inventory, it must interpret "developments" consistently with the types of development applications and approvals for which such notice is required by ORS 215.418(1)(a) to (e). *Redland/Viola/Fischer's Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

40. Wetlands. Where the local code prohibits residential, but not commercial or industrial, development in certain wetlands, and includes density transfer provisions for residential

developments limited by wetlands, but not for commercial or industrial developments, there is a rational basis to justify the disparate code treatment of residential versus commercial or industrial developments. *J.C. Reeves Corp. v. Clackamas County*, 27 Or LUBA 318 (1994).

40. Wetlands. Where petitioner fails to identify applicable legal standards regarding wetlands or explain why the proposal violates such applicable legal standards, petitioner supplies no basis for reversal or remand of the challenged decision. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

40. Wetlands. That an approved wetland mitigation plan includes property that was not within the development application, does not mean that a local government may not rely upon the wetland mitigation plan as a condition of approval of the development application. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

40. Wetlands. Where a comprehensive plan policy specifically refers to wetlands identified in "future inventorying processes," it is reasonable for the local government to interpret that plan policy as inapplicable to individual permit decisions not involving wetlands identified on the local government's acknowledged plan inventory. *Frankton Neigh. Assoc. v. Hood River County*, 25 Or LUBA 386 (1993).

40. Wetlands. ORS 197.279(2) establishes the procedures required for adoption of a wetland conservation plan. A local government's failure to adopt a wetland conservation plan, provides no basis for reversal or remand of a challenged decision, because local governments are not required to adopt such plans. *Clarke v. City of Hillsboro*, 25 Or LUBA 195 (1993).

40. Wetlands. Where the local code includes an exception to the term "wetland" for wetlands created by "human activity as part of an approved development project," and there is no dispute that the subject wetland was created with the knowledge and consent of the local government, it is clearly wrong for the local government to fail to consider whether the wetland is within the local code exception. *Annett v. Clackamas County*, 25 Or LUBA 111 (1993).

40. Wetlands. Where a local decision maker relies on prior nonspecific and equivocal testimony concerning the location and presence of wetlands, in place of a well documented specific expert study, and adopts no findings explaining that choice, the challenged decision is not supported by substantial evidence. *Reeder v. Clackamas County*, 23 Or LUBA 583 (1992).

40. Wetlands. A local government decision adopting a proposed wetlands conservation plan for subsequent submittal to the director of Division of State Lands is not a final decision. *Blatt v. City of Portland*, 21 Or LUBA 510 (1991).

40. Wetlands. An ordinance which adopts a natural resources management plan (NRMP) pursuant to local code provisions is a *final* decision with regard to adoption of a NRMP, even though the NRMP is also a *proposed* wetlands conservation plan and is submitted to the DSL for approval as such. *Blatt v. City of Portland*, 21 Or LUBA 510 (1991).

41. Urban Renewal Plans. ORS 457.010(1) broadly defines "blighted area" to include unproductive land, potentially including vacant, unimproved land. *Friends of Urban Renewal v. City of Portland*, 58 Or LUBA 148 (2009).

41. Urban Renewal Plans. The apparent purpose of ORS 457.085(2)(j), which requires that for an urban renewal plan that includes a public building, the urban renewal plan must explain how the building serves or benefits the urban renewal area, is to ensure that cities do not fund public buildings with urban renewal revenues unless those buildings benefit or serve the privately owned portions of the urban renewal area. That purpose is not served by a public building that benefits only the publicly owned property on which the building is located. *Friends of Urban Renewal v. City of Portland*, 58 Or LUBA 148 (2009).

41. Urban Renewal Plans. Even if it is permissible under ORS Chapter 457 to create an urban renewal area and later add a geographically noncontiguous addition to the original renewal area, where the addition consists entirely of a publicly owned parcel on which a public building is proposed, ORS 457.085(2)(j) requires a finding supported by substantial evidence that the public building serves or benefits at least some portion of the original urban renewal area. *Friends of Urban Renewal v. City of Portland*, 58 Or LUBA 148 (2009).

41. Urban Renewal Plans. Substantial evidence does not support a city's finding that constructing a new elementary school on a parcel 10 miles from the original urban renewal area will benefit or serve that original urban renewal area, where there is no evidence that the school would serve any current or displaced residents of the renewal area. *Friends of Urban Renewal v. City of Portland*, 58 Or LUBA 148 (2009).

41. Urban Renewal Plans. ORS Chapter 457 authorizes cities to use urban renewal revenue to fund construction of public buildings, as long as such buildings benefit or serve the urban renewal area. However, the statute does not require that the public buildings increase economic productivity or increase tax revenues. *Friends of Urban Renewal v. City of Portland*, 58 Or LUBA 148 (2009).

41. Urban Renewal Plans. The ORS 457.085(1) requirement that an urban renewal agency provide for public involvement in all stages in the development of an urban renewal plan is not violated when a city council adopts a resolution directing the urban renewal agency to develop a proposed urban renewal plan amendment. That the city council initiated the urban renewal process and ultimately approved the amended plan prepared by the urban renewal agency after a public process does not demonstrate that the city council prejudged the merits or were biased. *Friends of Urban Renewal v. City of Portland*, 58 Or LUBA 148 (2009).

41. Urban Renewal Plans. There is no requirement under ORS 457.095(1) that every single property in a proposed urban renewal area be blighted; it is the area as a whole that must be blighted in one or more of the ways described in ORS 457.010(1). *Abeel v. City of Portland*, 58 Or LUBA 247 (2009).

41. Urban Renewal Plans. In substantially amending an existing urban renewal area, a local government may be required under some circumstances to demonstrate that the newly proposed

urban renewal area, as a whole, is blighted in one of the ways described in ORS 457.010(1). *Abeel v. City of Portland*, 58 Or LUBA 247 (2009).

41. Urban Renewal Plans. A local government may not automatically rely on its original findings of blight where 10 years have passed since the original urban renewal area plan was adopted and there is no dispute that significant changes within the original plan boundary have occurred during that time period. *Abeel v. City of Portland*, 58 Or LUBA 247 (2009).

41. Urban Renewal Plans. ORS 457.010(1)(a) requires a conclusion that identified buildings or structures are either "unfit" for their intended purpose or "unsafe to occupy" for those purposes because of the existence of one or more of the listed conditions. That explicit causal element means that the mere existence of one or more conditions listed in ORS 457.010(a)(A) through (E) is not sufficient, in itself, to demonstrate that the area including such buildings is blighted. *Abeel v. City of Portland*, 58 Or LUBA 247 (2009).

41. Urban Renewal Plans. Where a single-story building on a parcel proposed to be added to an urban renewal area could be redeveloped with a six-story building under current regulations, findings that the property is underutilized are sufficient to explain why that constitutes blight under ORS 457.010(1)(h). *Abeel v. City of Portland*, 58 Or LUBA 247 (2009).

41. Urban Renewal Plans. ORS 457.020 is the declaration of necessity and purpose for the urban renewal statutes and does not provide specific approval criteria or requirements for urban renewal plans or amendments to those plans. *Abeel v. City of Portland*, 58 Or LUBA 247 (2009).

41. Urban Renewal Plans. Where a county adopts a resolution approving an urban renewal plan under ORS 457.105 and in approving the plan finds that the plan conforms to the county's comprehensive plan, the resolution is a land use decision as defined in ORS 197.015(1)(a)(A). *Granada Land Co. v. City of Albany*, 56 Or LUBA 475 (2008).

41. Urban Renewal Plans. ORS 457.105 does not require a county to take action to approve or disapprove urban renewal plans that are located entirely within incorporated cities. *Granada Land Co. v. City of Albany*, 56 Or LUBA 475 (2008).

41. Urban Renewal Plans. ORS 457.085 and 457.095 require a local government to allow testimony on a revised draft of a proposed urban renewal plan. *Granada Land Co. v. City of Albany*, 56 Or LUBA 475 (2008).

41. Urban Renewal Plans. ORS 457.085(5) does not require a local government to re-notice affected taxing districts after a draft urban renewal plan that is initially provided to those taxing districts is revised. *Granada Land Co. v. City of Albany*, 56 Or LUBA 475 (2008).

41. Urban Renewal Plans. ORS 457.120(1) does not require a new notice to be mailed when a governing body considers revisions to a proposed urban renewal plan that has not yet been adopted. *Granada Land Co. v. City of Albany*, 56 Or LUBA 475 (2008).

41. Urban Renewal Plans. Findings adequate to demonstrate that an urban renewal plan "conforms to the comprehensive plan as a whole" pursuant to ORS 457.095(3) must at least (1)

set forth the applicable comprehensive plan provisions and (2) express the local government's judgment as to the relationship between the renewal plan and the pertinent plan provisions. While the phrase "as a whole" in ORS 457.095(3) may allow the local government to balance competing plan policies, it does not allow the local government to address only some policies it identifies as being applicable and, without explanation, fail to address others also identified as applicable. *Zimmerman v. Columbia County*, 40 Or LUBA 483 (2001).

41. Urban Renewal Plans. A comprehensive plan policy that the county restrict rural industrial development to uses that will not require improvements at public expense is not necessarily inconsistent with adoption of an urban renewal plan that will provide publicly funded improvements to support future rural industrial development, where the policy can be read in context to allow such improvements. In that circumstance, rather than interpret the policy in the first instance, LUBA will remand a decision approving the urban renewal plan to the county to explain why the urban renewal plan conforms to the policy. *Zimmerman v. Columbia County*, 40 Or LUBA 483 (2001).

41. Urban Renewal Plans. The assumptions underlying the county's revenue projections and its conclusion that an urban renewal plan is "feasible" under ORS 457.095(6) and 457.085(3)(g) must be supported by substantial evidence, *i.e.*, evidence a reasonable person would rely upon. The local government need not demonstrate that projected new development is presently committed and certain to occur. *Zimmerman v. Columbia County*, 40 Or LUBA 483 (2001).

41. Urban Renewal Plans. A reasonable person could conclude that revenue projections for an urban renewal plan are feasible for purposes of ORS 457.095(6) and 457.085(3)(g), where expert evidence in the record shows that the total debt can be retired if four new industrial developments locate in the industrial park improved under the renewal plan, that three new industrial developments have advanced plans to locate in the park, and that the park, once improved, is likely to attract at least one other new industrial development over the relevant time period. *Zimmerman v. Columbia County*, 40 Or LUBA 483 (2001).

41. Urban Renewal Plans. In adopting an amendment to an urban renewal plan, a city commits no error in relying on the report adopted two years earlier in support of the original urban renewal plan, where there have been only relatively minor changes in the urban renewal district since the urban renewal plan was originally adopted. *Holladay Investors, Ltd. v. City of Portland*, 22 Or LUBA 90 (1991).

41. Urban Renewal Plans. In amending its urban renewal plan, a city is not required to adopt a financial analysis for an unsubsidized headquarters hotel or find that an unsubsidized headquarters hotel is financially feasible under ORS 457.085(3)(g) and 457.095(6) where (1) the original urban renewal plan included a subsidized headquarters hotel as an authorized project, and (2) the amendment to the urban renewal plan does not presently withdraw authorization for a public subsidy for the headquarters hotel. *Holladay Investors, Ltd. v. City of Portland*, 22 Or LUBA 90 (1991).

41. Urban Renewal Plans. Where a property tax limitation constitutional amendment renders uncertain an urban renewal agency's authority to collect property taxes outside the constitutional limit, an urban renewal agency's conclusion that it has such authority is supported by substantial

evidence where that conclusion is based on an opinion of the state attorney general. *Holladay Investors, Ltd. v. City of Portland*, 22 Or LUBA 90 (1991).

42. Wrecking Certificates. The factors listed in ORS 822.140(3)(a) to (f) are considerations for the adoption of ordinances regulating the siting or expansion of wrecking yards. These factors are not approval standards for applications for local approval of individual Department of Motor Vehicles wrecking certificates. *Bradbury v. City of Independence*, 22 Or LUBA 398 (1991).

42. Wrecking Certificates. A local governing body's findings that an applicant for a wrecking certificate is not "suitable" under ORS 822.140(2)(a) are inadequate if such findings simply state the applicant owns an unidentified wrecking yard in another jurisdiction that fails to comply with unspecified regulations. *Bradbury v. City of Independence*, 22 Or LUBA 398 (1991).

42. Wrecking Certificates. A local governing body is required by ORS 197.175(2)(d) to apply applicable provisions of its comprehensive plan and land use regulations in determining whether a wrecking certificate should be approved, notwithstanding that it has not adopted regulations as authorized by ORS 822.140(3). *Bradbury v. City of Independence*, 22 Or LUBA 398 (1991).

42. Wrecking Certificates. In the absence of a local or other regulation making provisions of ORS chapter 468, pertaining to pollution control, applicable to an application for a wrecking certificate as independent approval standards, that statute does not govern local approval of a wrecking certificate. *Bradbury v. City of Independence*, 22 Or LUBA 398 (1991).

43. Special Districts. ORS 268.347(1) is ambiguous in providing that a metropolitan service district has jurisdiction over boundary changes "within the boundaries of the district," because it is not clear whether the legislature intended that the district has jurisdiction only if the entire territory affected by the boundary changes is within the district, or if the district has jurisdiction if any part of the territory affected by the change is within the district. *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

43. Special Districts. Under ORS 268.347(1), a metropolitan service district has jurisdiction over boundary changes "within all territory designated as urban reserves" prior to June 30, 1997, even if the decision establishing those urban reserves was subsequently overturned and the territory affected by the boundary change is no longer designated as an urban reserve. *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

43. Special Districts. Absent some textual or contextual reason to conclude otherwise, LUBA will not presume that a special district boundary change regulation listing certain "urban services" is intended to incorporate the distinctions between "urban," "urbanizable" and "rural" lands articulated in *1000 Friends of Oregon v. Curry County*, 301 Or 447, 724 P2d 268 (1986). *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

43. Special Districts. Intergovernmental agreements concerning the provision of water service are "agreement[s] for provision of an urban service" for purposes of establishing who is a necessary party to a boundary change under special district regulations, even if those agreements do not qualify as ORS 195.065 urban service agreements. *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

43. Special Districts. While ORS 195.065 envisions that the focus of required urban service agreements will be on providing urban services inside UGBs, nothing in that statute precludes including provisions in the agreement for providing urban services to lands lying just beyond the UGB. That a service agreement includes such provisions does not mean that it does not qualify as an ORS 195.065 urban service agreement, for purposes of establishing who is a necessary party to a boundary change under special district regulations. *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

43. Special Districts. The requirement in ORS 199.462(1) that boundary changes be based on consideration of economic, demographic and sociological trends does not implicitly authorize denial of a proposed water district boundary change for failure to consider whether one provider of water services is preferable to another. *Clackamas River Water v. Metro*, 52 Or LUBA 710 (2006).

43. Special Districts. Where a county approves formation of a special district and the county's comprehensive plan is acknowledged, the statewide planning goals do not apply, notwithstanding language in ORS 199.462(1) governing formation of special districts that requires consideration of the statewide planning goals. *Kneeland v. Douglas County*, 48 Or LUBA 347 (2005).

43. Special Districts. ORS 195.020(1) does not give a special district land use planning responsibilities. Rather, it limits a special district's exercise of its land use planning responsibilities

if, in fact, the special district has been given such responsibilities by other legal authority. *Churchill v. Neahkahnie Water District*, 29 Or LUBA 354 (1995).

43. Special Districts. Where petitioner cites no comprehensive plan policies limiting the development allowed in a special district's territory, the development allowed by the plan in the district's territory is determined by the acknowledged plan map designations applied to such land and the local government's acknowledged implementing measures. *Churchill v. Neahkahnie Water District*, 29 Or LUBA 354 (1995).

43. Special Districts. A special district ordinance stating the district will provide service to all existing residences and all residences "hereafter constructed pursuant to a valid [county] building permit" is not inconsistent with the county comprehensive plan, because the county may issue building permits only if such permits are consistent with its acknowledged plan and implementing regulations. *Churchill v. Neahkahnie Water District*, 29 Or LUBA 354 (1995).

43. Special Districts. Where LUBA has affirmed a special district's decision repealing its water allocation program, the district's decision authorizing the provision of domestic water service to property designated and zoned for residential use under an acknowledged county plan and regulations is not a land use decision subject to LUBA review. *Churchill v. Neahkahnie Water District*, 29 Or LUBA 354 (1995).

43. Special Districts. A special district's *repeal* of a program affecting land use, like its adoption or implementation of such a program, is an "action * * * with respect to programs affecting land use" that must be in accordance with the goals pursuant to ORS 195.020(1) and, therefore, is a land use decision subject to review by LUBA. *Churchill v. Neahkahnie Water District*, 27 Or LUBA 721 (1994).

43. Special Districts. Where a school district concludes a proposed school site complies with a city's comprehensive plan in a school district proceeding in which the city participates, the city council nevertheless may reach a contrary conclusion concerning the proposed site's compliance with the city comprehensive plan in a subsequent city proceeding. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

43. Special Districts. A sanitary district's obligation to provide sewer service, and a person's right to receive such sewer service, are subject to county comprehensive plan and land use regulation limitations on the provision of such sewer service. *Bear Creek Valley San. Auth. v. City of Medford*, 27 Or LUBA 328 (1994).

43. Special Districts. An intergovernmental agreement between a city and a special district relating to city provision of sewage treatment service to the district, which interprets various provisions of the city's comprehensive plan and determines no plan provisions govern the proposal, applies comprehensive plan provisions and, therefore, is a land use decision subject to LUBA review. *DLCD v. City of Donald*, 27 Or LUBA 208 (1994).

43. Special Districts. Although Goal 2 requires that special district plans and actions related to land use must be consistent with city and county comprehensive plans, the goal does not establish

any hierarchy for consistency between city and county plans. *City of Portland v. Washington County*, 27 Or LUBA 176 (1994).

43. Special Districts. A special district decision that finally determines policy questions concerning how the district will provide sewerage service to an area, where that service will occur, and the level of that service, is an exercise of the district's planning duties and responsibilities under ORS 195.020(1) that must comply with the Statewide Planning Goals and is a land use decision subject to LUBA review. *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150 (1994).

43. Special Districts. A school district boundary change under ORS chapter 330 is not a boundary change "as defined in ORS 197.175(1)," to which ORS 197.185(1) requires that the Statewide Planning Goals be applied. *J.C. Reeves Corp. v. Sherwood Education Dist. 88J*, 26 Or LUBA 220 (1993).

43. Special Districts. A school district decision refusing to adjust its boundaries is not an exercise of the school district's planning duties, powers and responsibilities to which ORS 197.185(1) requires that the Statewide Planning Goals be applied, because there is no statutory or other legal requirement that a school district make such decisions as part of its land use planning responsibilities. *J.C. Reeves Corp. v. Sherwood Education Dist. 88J*, 26 Or LUBA 220 (1993).

43. Special Districts. Where the challenged decision simply refuses to change school district boundaries, and petitioner does not demonstrate that any of the impacts it alleges will result from the decision are likely to occur, the challenged decision is not a significant impact test land use decision. *J.C. Reeves Corp. v. Sherwood Education Dist. 88J*, 26 Or LUBA 220 (1993).

43. Special Districts. Interpreting ORS 198.805(1) and 199.462(1), together with ORS 197.175 and 197.835, establishes that prior to acknowledgment the statewide planning goals are applicable to a county decision to approve formation of a special district under ORS 198.705 to 198.955, but after acknowledgment the acknowledged county comprehensive plan applies. *Price v. Clatsop County*, 25 Or LUBA 341 (1993).

43. Special Districts. Where a water district has adopted a water allocation program that significantly limits the development of land in the district otherwise allowable under the applicable acknowledged county comprehensive plan and land use regulations, under ORS 197.185(1) a district decision made under such a program is "an action * * * with respect to a program affecting land use" to which the statewide planning goals apply and, therefore, is a "land use decision." *Olson v. Neahkahnie Water District*, 25 Or LUBA 776 (1993).

43. Special Districts. A special district decision is a "land use decision" subject to LUBA review if it meets either (1) the statutory definition in ORS 197.015(10), or (2) the significant impact test. *Keating v. Heceta Water District*, 24 Or LUBA 175 (1992).

43. Special Districts. In the absence of an adopted district program regulating the approval of water hookups for land use purposes, a water district action to approve an individual water hookup for a use consistent with the applicable acknowledged county plan and land use regulations is *not*

an "action with respect to a program affecting land use" under ORS 197.185(1), to which the statewide planning goals apply. *Keating v. Heceta Water District*, 24 Or LUBA 175 (1992).

43. Special Districts. A water district decision authorizing the provision of domestic water service to property designated and zoned for residential use by an acknowledged county plan and land use regulations is not a "significant impact test" land use decision. *Keating v. Heceta Water District*, 24 Or LUBA 175 (1992).

43. Special Districts. Where a comprehensive plan policy specifically provides for formation of service districts within one of three types of designated rural areas, and there is nothing inconsistent with the language of that policy, its context or its purpose in interpreting it as having nothing to do with service districts in the other two types of rural areas, the local government's interpretation of that policy as not precluding formation of service districts in the other two types of rural areas will be sustained. *DLCD v. Marion County*, 23 Or LUBA 619 (1992).

43. Special Districts. Comprehensive plan provisions that govern the circumstances warranting formation of service districts, the permissible scope of sewerage facilities and whether such facilities are to be provided by public or private entities, are correctly interpreted as not prohibiting the formation of service districts to provide sewerage services. *DLCD v. Marion County*, 23 Or LUBA 619 (1992).

43. Special Districts. Where a local government decision forming a service district to provide sewerage services discusses, but does not authorize, a particular means of sewage treatment, petitioner's challenge of the decision on the basis that the particular means of treatment violates a plan policy concerning extension of urban services outside UGBs is premature. *DLCD v. Marion County*, 23 Or LUBA 619 (1992).

43. Special Districts. The specific reference in ORS 197.175(1) to formation of service districts, and the requirement that such actions comply with the statewide planning goals, do not mean the goals continue to apply to such actions after acknowledgment. After acknowledgment, the standards in the acknowledged comprehensive plan and land use regulations control such actions, unless a plan or land use regulation amendment is adopted or required. *DLCD v. Marion County*, 23 Or LUBA 619 (1992).

43. Special Districts. Where no cooperative agreement has been entered into by a district and the applicable county pursuant to ORS 197.185(2), pursuant to ORS 197.185(1) the goals continue to apply to the district's actions with respect to programs affecting land use. *Adkins v. Heceta Water District*, 23 Or LUBA 207 (1992).

43. Special Districts. A domestic water supply district's adoption of water hookup standards which will significantly affect development activity is an action with respect to a program affecting land use to which the statewide planning goals apply under ORS 197.185(1) and, therefore, is a land use decision subject to LUBA review. *Adkins v. Heceta Water District*, 23 Or LUBA 207 (1992).

43. Special Districts. Where a county has never entered into any cooperative agreements with special districts pursuant to ORS 197.185(2), what such a cooperative agreement might contain is entirely speculative and, therefore, the lack of such an agreement between the county and a district does not render inapplicable the ORS 197.830(6)(b)(B) "appearance" requirement for intervention in an appeal of a district decision. *Adkins v. Heceta Water District*, 22 Or LUBA 840 (1992).

43. Special Districts. ORS 197.185(1) requires that special districts make land use decisions in accordance with the statewide planning goals, and Goal 2 requires that special district land use decisions be consistent with the relevant county comprehensive plan. *Price v. Arch Cape Service District*, 22 Or LUBA 592 (1992).

43. Special Districts. A service district is not required to approve sewer and water hookups on a first come, first served basis, where none of the applicable comprehensive plan provisions adopted pursuant to Goal 11 limit the manner in which such hookups must be approved. *Price v. Arch Cape Service District*, 22 Or LUBA 592 (1992).

44. Marginal Lands. "In-home commercial activities" are not authorized by right in resource zones, even where (1) such activities are accessory to residential uses and would have minimal to no impact on resource lands, (2) such an approach would streamline local permitting by avoiding the conditional use process required for home occupations, and (3) such activities are consistent with a model ordinance prepared by DLCD. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

44. Marginal Lands. Where certain activities are allowed as accessory to a home occupation use, they may not be allowed through a Type I process (i.e., ministerial review of an application based on clear and objective standards and criteria) that does not provide the review that is required by ORS 215.448(1) and (4). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

44. Marginal Lands. Where local code amendments allow accessory uses and structures in an EFU zone, arguments that (1) the amendments improperly exempt such structures from a local code requirement that steps be taken to minimize adverse impacts on farm and forest uses and (2) the provisions governing such uses are inconsistent with ORS 215.213(3)(b) provide no basis for reversal or remand where the amended code is comparable to the prior code and where the petitioner does not develop any argument explaining why the amendments are substantive instead of technical. *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

44. Marginal Lands. A marginal lands county is not required to include in its code a requirement to consider the cumulative impacts from existing or potential lot-of-record dwellings in approving dwellings under OAR 660-033-0130(4)(a)(D)(ii) and (iii). *Landwatch Lane County v. Lane County*, 80 Or LUBA 80 (2019).

44. Marginal Lands. Where a neighbor describes observing, from their living room view, minimal orchard, meadow, and garden-related activity on the property and, other than horses belonging to some of the owners of the property, never seeing any livestock or other animals on the property between 1970 and 2004, and where the neighbor subsequently reiterates that there was no farm use, such as cattle or crops, between 1978 and 1983 and that, during the 1980s, owners of the property kept their show horses on the property, a local government may reasonably conclude that the property was "not managed for three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced $20,000 or more in annual gross income" for purposes of *former* ORS 197.247(1)(a) (1991), even where the record includes (1) aerial photos from 1979 and 1982, (2) a 1979 permit for a new barn, (3) a 1987 farm dwelling approval, and (4) testimony from other area residents contradicting the neighbor's testimony, where the record does not disclose the proximity of the other area residents' properties to the subject property or whether those area residents had made firsthand observations of the subject property during the relevant statutory period. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

44. Marginal Lands. Under *former* ORS 197.247(1)(b)(A) (1991), an applicant is not required to show that at least 50 percent of the proposed marginal land is made up of lots or parcels that are 20 acres or less in size *and* that 50 percent of the land within one-quarter mile of the perimeter is made up of lots or parcels that are 20 acres or less in size; rather, the statute requires only one calculation, and an applicant is required to show that at least 50 percent of the proposed marginal

land *combined with* the land within one-quarter mile of the perimeter is made up of lots or parcels that are 20 acres or less in size. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

44. Marginal Lands. For purposes of designating marginal lands under *former* ORS 197.247 (1991), it is not enough for an applicant to provide a list of the allegedly qualifying lots or parcels; the applicant must provide foundational evidence that the lots or parcels are lawful and that lots or parcels that were in common ownership on July 1, 1983, are not overcounted. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

44. Marginal Lands. In redesignating and rezoning protected habitat from forest land to marginal land under *former* ORS 197.247 (1991), a local government errs by excluding adjacent forest land from the impact area under OAR 661-023-0040(3) without establishing that it is not also protected habitat. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

44. Marginal Lands. An attorney-land-use-consultant-prepared ESEE analysis including numerous plans, reports, and other documents supporting the redesignation and rezoning of protected habitat from forest land to marginal land under *former* ORS 197.247 (1991) is not sufficient to rebut expert testimony including (1) a letter authored by an ODFW biologist that generally discusses the cumulative impact of development on habitat and (2) general ODFW guidance related to levels of residential density in areas of peripheral big game habitat absent evidence of the attorney land use consultant's expertise. *Landwatch Lane County v. Lane County*, 80 Or LUBA 205 (2019).

44. Marginal Lands. The "gross income" test under ORS 197.247(1)(a) requires a finding that the subject property was "not managed during three of the five calendar years preceding January 1, 1983, as part of a farm operation that produced $20,000 or more in annual gross income or a forest operation capable of producing an average, over the growth cycle, of $10,000 in annual gross income[.]" Sworn affidavits may be relied on to demonstrate that the gross income test is satisfied where the county commissioners concluded that the sworn affidavits were credible and where the petitioner has not shown why a sworn affidavit does not constitute substantial evidence. *Landwatch Lane County v. Lane County*, 75 Or LUBA 258 (2017).

44. Marginal Lands. ORS 197.247(1)(b)(B) requires that marginal land must be "located within an area of not less than 240 acres of which at least 60 percent is composed of lots or parcels that are 20 acres or less in size on July 1, 1983[.]" In applying the statute, a county need not determine whether the subject property includes lawfully created "lots" or "parcels." *Landwatch Lane County v. Lane County*, 75 Or LUBA 258 (2017).

44. Marginal Lands. In applying the 60 percent "parcelization test" described in ORS 197.247(1)(b)(B), the county's decision that the proposed marginal land was located within an area at least 60 percent of which is composed of "lawfully created parcels" that were 20 acres or less in size on July 1, 1983, is supported by substantial evidence in the record where the record includes copies of assessors' records, deeds and legal lot verifications for the parcels. *Landwatch Lane County v. Lane County*, 75 Or LUBA 258 (2017).

44. Marginal Lands. A study area that is 680 acres in size is not disqualified under the 197.247(1)(b)(B) "parcelization" portion of the "marginal land" statute, which requires the proposed marginal land be located within an area not less than 240 acres, where the legislative history supports a conclusion that it was the legislature's intent to allow an applicant wide latitude in meeting the test. *Landwatch Lane County v. Lane County*, 75 Or LUBA 258 (2017).

44. Marginal Lands. OAR 660-006-0010, which requires that a forest land inventory include a mapping of forest site class, applies both to a local government's initial inventory of forest lands and to subsequent county decisions that modify that inventory, such as designating forest land as "marginal lands" under ORS 197.247 (1991). *Herring v. Lane County*, 54 Or LUBA 417 (2007).

44. Marginal Lands. A county's conclusion that OAR 660-010-0010 does not apply to a decision designating forest land as marginal lands under ORS 197.247 (1991) is harmless error, where the decision is supported by an analysis that is based on objective, empirical measurements of forest productivity consistent with the rule's requirements. *Herring v. Lane County*, 54 Or LUBA 417 (2007).

44. Marginal Lands. Because the legislature adopted the marginal lands statute in 1983, it is reasonable to assume that the $10,000 threshold in ORS 197.247 (1991) for forest productivity is expressed in 1983 dollars, in which case it is also reasonable to assume that the legislature did not intend to preclude use of 1983 log prices in determining whether the subject property is capable of producing an average of $10,000 in annual gross income over the growth cycle. *Herring v. Lane County*, 54 Or LUBA 417 (2007).

44. Marginal Lands. LUBA will affirm a county's choice to rely on expert testimony that a 50-year rotation or growth cycle is the predominant forest practice west of the Cascades in applying the forest productivity prong of the marginal lands test, over contrary evidence submitted by non-experts that does not conclusively establish that it is error to use a 50-year growth cycle. *Herring v. Lane County*, 54 Or LUBA 417 (2007).

44. Marginal Lands. A county's erroneous finding that designating forest land as marginal lands under ORS 197.247 (1991) is not subject to OAR 660-006-0010, which governs the inventory of forest lands, is harmless error, where the county's decision nonetheless complies with the substantive requirements of the rule. *Anderson v. Lane County*, 54 Or LUBA 669 (2007).

44. Marginal Lands. A county reasonably relies on a forester's opinion that Ponderosa pine is a more valuable species to grow on certain soils than Douglas fir, over conflicting opinions by persons who are not soil or forestry experts. *Anderson v. Lane County*, 54 Or LUBA 669 (2007).

44. Marginal Lands. A local government errs in geographically limiting its inquiry regarding what constitutes a "farm operation" for purposes of ORS 197.247(1)(a) to only lands "adjacent to" or "contiguous with" the property that is the subject of the marginal lands application. *Walker v. Lane County*, 53 Or LUBA 374 (2007).

44. Marginal Lands. ORS 197.247(1)(a) and 197.247(5)(1991) allow a county to rely on an assumption of a 50-year growth cycle in calculating the production capability of property. *Walker v. Lane County*, 53 Or LUBA 374 (2007).

44. Marginal Lands. Evidence of actual stocking rates for the property, when taken in conjunction with evidence that actual production was reflective of potential production for the property, is substantial evidence that the property is not capable of generating $10,000 in annual gross income as required by ORS 197.247(1)(a) (1991). *Walker v. Lane County*, 53 Or LUBA 374 (2007).

44. Marginal Lands. ORS 197.247(1)(a) (1991), which allows counties to designate as marginal land property that was not managed during three of the five years preceding January 1, 1983 as part of a forest operation producing an average of $10,000 in annual gross income, implicitly requires that counties use 1983 timber prices in estimating the annual timber revenue derived from the property. *Just v. Lane County*, 49 Or LUBA 456 (2005).

44. Marginal Lands. ORS 197.247(1)(b)(C) requires that counties use the agricultural classification system in use by the Soil Conservation Service on October 15, 1983, in determining whether proposed marginal lands are predominantly composed of Class VI soils. A county is entitled to rely upon a 1987 Soil Conservation Service soil survey that is a product of the classification system in use on October 15, 1983. *Just v. Lane County*, 49 Or LUBA 456 (2005).

44. Marginal Lands. ORS 215.316(1) (1993) expresses a legislative intent to retroactively prohibit counties from designating resource lands as marginal lands, and from adopting plan and code provisions allowing additional nonresource uses on such marginal lands, after January 1, 1993. ORS 215.316(1) (1993) does not express an intent to retroactively prohibit counties that have *not* designated marginal lands from applying either ORS 215.283 (1991) or the supposedly stricter provisions of 215.213(1) to (3) (1991) to their exclusive farm use zones. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

44. Marginal Lands. The language in ORS 197.247(1)(a) that "[t]he proposed marginal land was not managed, during three of the five calendar years preceding January 1, 1983 * * *" applies to forest as well as farm operations. *DLCD v. Lane County*, 23 Or LUBA 33 (1992).

44. Marginal Lands. ORS 197.247(1)(a) requires a two-part inquiry to determine whether a forest parcel may be designated as "marginal" land. First, a county must determine whether the land was managed as part of a forest operation during three of the five years from 1978 through 1982. Second, a county must determine whether the forest operation in question is "capable of producing an average of 10,000 dollars in annual gross income." *DLCD v. Lane County*, 23 Or LUBA 33 (1992).

44. Marginal Lands. Under ORS 197.247(1)(a), in determining whether a forest operation is capable of producing an average of 10,000 dollars in annual gross income over the growth cycle, what occurred on a particular parcel during the 1978-1982 time period is not the sole determinant of the "capability" of the subject parcel to produce trees, because the growth cycle of trees may greatly exceed the specified five-year period. *DLCD v. Lane County*, 23 Or LUBA 33 (1992).

44. Marginal Lands. The requirement of ORS 197.247(1)(a) that land be "capable" of producing the specified annual income "over the growth cycle" requires an evaluation of the income potential of the property, assuming the use of reasonable forest management practices over the growth cycle. *DLCD v. Lane County*, 23 Or LUBA 33 (1992).

44. Marginal Lands. Under ORS 197.247(1)(a), the classification of the soils on a particular parcel is not dispositive of such parcel's capability to produce income over the growth cycle. *DLCD v. Lane County*, 23 Or LUBA 33 (1992).

45.1 Conditions of Approval – Generally. In verifying a nonconforming auto yard use, a local government errs in failing to describe the nature and extent of the auto yard use in a way that imposes an upper limit on the number of vehicles stored on-site, consistent with the upper number present at or approximate to the relevant date. Limiting the physical extent of the auto yard use to that which is visible in an aerial photograph from the relevant year and limiting annual sales of vehicles to the approximate number sold in the relevant year are not sufficient to prevent unauthorized expansion or alteration of the nonconforming use where the operator could stockpile more vehicles on-site, for example, by parking them at tighter intervals or stacking them, than were present in the relevant year. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

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

45.1 Conditions of Approval – Generally. A condition of approval requiring an applicant that has applied to site a solar facility in an area currently used for growing Christmas trees to offer a fire safety training course to the local fire district is inadequate to establish that "[t]he proposed use will not * * * significantly increase risks to fire suppression personnel" for purposes of OAR 660-006-0025(5)(b) and local code provisions implementing that rule. *Chang v. Clackamas County*, 80 Or LUBA 321 (2019).

45.1 Conditions of Approval – Generally. Local governments are not required to condition approvals rather than deny noncompliant applications. *H2D2 Properties, LLC v. Deschutes County*, 80 Or LUBA 528 (2019).

45.1 Conditions of Approval – Generally. Where a city's code lists a number of "factors" to be considered in approving an annexation, including "[a]dequacy and availability of public facilities and services to service potential development," but the city's code does not require that the city identify how infrastructure will be paid for, or by whom, as part of an annexation decision, and the city's findings suggest the city's capital improvement program (CIP) will be amended prior to development to list the new water main as a public facility, although the city does not intend to rely upon the CIP as a source of funding or authority for the new water main, petitioners have not established a CIP amendment must be required as a condition of approval or that the city otherwise erred in assigning a positive value to this factor in approving the proposed annexation. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

45.1 Conditions of Approval – Generally. Where a city rezones a portion of a property designated mixed use corridor (MUC) on the city's comprehensive plan, from FU-10 (future urban 10-acre) to NC (neighborhood commercial), and petitioners argue that the NC zone is inconsistent with the city's comprehensive plan which directs the city to "[f]ocus transit-oriented, higher

intensity, mixed-use development along selected transit corridors," because the subject property is not near a transit corridor, petitioners' premise—that the MUC plan designation is used only where the city intends to promote transit-oriented development along transit corridors—is incorrect. The MUC plan designation is implemented by four commercial zoning districts: one of which is the NC zone, which is not a transit-oriented zone, and is clearly not intended to be placed along transit corridors. Therefore, the city's decision to rezone its property to NC is not inconsistent with the property's MUC comprehensive plan designation. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

45.1 Conditions of Approval – Generally. In determining that a landfill does not "[f]orce a significant change" in accepted farm practices on surrounding lands devoted to farm use under ORS 215.296(1)(a), a county errs in relying on a condition of approval requiring the landfill to install a second fence between the working face of the landfill and an adjacent farm to capture more trash that escapes the landfill before it enters onto the adjacent farm, where there is no quantification in the record of how effective the existing fence is at intercepting landfill trash. *Stop the Dump Coalition v. Yamhill County*, 79 Or LUBA 459 (2019).

45.1 Conditions of Approval – Generally. When the purpose of a condition is to set a baseline to measure traffic impact throughout multiple phases of the development consistent with the "trip cap" imposed to meet Transportation Planning Rule, at OAR 660-012-0060 requirements without mitigation, a hearings officer does not err in concluding that the standards are to be interpreted based on the use of the same version of the Institute of Transportation Engineers Trip Generation Manual (ITE Manual). Additionally, the ITE Manual is a professional treatise that sets out methods for making evidentiary judgments regarding the traffic impacts of development, but it is not part of the city's acknowledged comprehensive plan or land use regulations, and therefore is not itself "standards and criteria" for purposes of ORS 227.178(3)(a) or 227.173(1), at least as applied in the present circumstance, thus compliance with the trip cap be determined by consistent applications of the same ITE Manual codes used to establish the trip cap. *Willamette Oaks LLC v. City of Eugene*, 78 Or LUBA 63 (2018).

45.1 Conditions of Approval – Generally. A zone verification is a limited tool and only those issues actually addressed in the zone verification decision are protected from collateral attack. *Richardi v. City of Eugene*, 89 Or LUBA 299 (2018).

45.1 Conditions of Approval – Generally. That a county's amended Transportation System Plan (TSP) includes language recommending that the county acquire property to develop a transportation facility does not mean that whatever land use permits are required to actually construct the facility under the local code or state law are thereby waived. The county could choose to approve whatever land use permits are required under law at the same time it approves an amendment to its TSP, but the latter is not a substitute for the former, or vice versa. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

45.1 Conditions of Approval – Generally. A project applicant is not required to file and win a quiet title action in circuit court as a condition precedent to filing the application simply because another party disputes the applicant's title to the property on which the proposed development is to occur. When a party disputes the applicant's title under a legal theory that can only be resolved

in circuit court, neither the county nor LUBA is in a position to resolve the legal dispute over whether the applicant/deed owner's title is good. For that reason, the county is also not obligated to adopt findings resolving the title dispute. In circumstances where consent or lack of ownership has a bearing on an approval criteria, we have held that the decision maker may be required to impose conditions to ensure that the required consent is obtained prior to construction. However, where ownership of the subject property is not an approval criterion, we have never held that the applicant has the obligation to quiet title in the subject property where some doubt is raised during the proceedings below as to the legality of that title, or that the decision maker is obliged to adopt findings addressing the likelihood that the applicant will prevail in a quiet title action. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

45.1 Conditions of Approval – Generally. A condition of approval requiring the applicant to "improve" an existing street to provide 20 feet of "paving" is not ambiguous regarding whether the required improvements include only pavement or also include sidewalks, etc., where the city's finding that the condition is "roughly proportional" to the impacts of the proposed planned unit development clearly indicate that the required improvements include only paving. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

45.1 Conditions of Approval – Generally. A hearings officer errs in failing to include a condition approval limiting mining activities to five acres at any one time and requiring reclamation of each five-acre area prior to mining the next five-acre area, given the importance of the proposed five-acre limit to the hearings officer's conclusion that the mining activities would not have a significant impact on wildlife habitat. *Martucci v. Jackson County*, 77 Or LUBA 252 (2018).

45.1 Conditions of Approval – Generally. A hearings officer errs in interpreting a condition of approval for a multi-phase planned unit development (PUD), which requires that the applicant for final phase approval submit a traffic study to determine if additional improvements are necessary to comply with the Transportation Planning Rule, to effectively supersede a different condition of approval applicable to all phases of the PUD that limits maximum development on the site to produce no more than a specified number of vehicle trips, where the two conditions can instead be interpreted to give effect to both. *Willamette Oaks LLC v. City of Eugene*, 76 Or LUBA 187 (2017).

45.1 Conditions of Approval – Generally. Where a city council has clear authority under a development code to impose conditions of approval to address potential land use conflicts and traffic congestion, and the city council appears to fail to impose conditions requested by project opponents because it was advised by county staff that it lacked authority to impose such conditions of approval, remand is required to the city council to consider imposition of any conditions of approval that it finds are warranted to mitigate any such potential land use conflicts or traffic congestion. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

45.1 Conditions of Approval – Generally. A city council does not err by failing to impose a condition requiring that a hotel be reduced in height to address potential land use conflicts, where the city council finds a shorter hotel is not needed to avoid potential land use conflicts. Whether a hotel of the height proposed will present land use conflicts with neighboring properties is a subjective determination, and where LUBA concludes the record establishes the city council's decision not to impose a condition was within its discretion, LUBA will deny an assignment of

error that challenges the city council's failure to impose the condition. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

45.1 Conditions of Approval – Generally. A reasonable decision maker could conclude that a 3,050-square-foot Event Center that is marketed to both hotel patrons and to the general public would generate larger events, with far more event attendees, and more traffic and parking demand from off-site than an Event Center that is conditioned to limit the Event Center use to hotel patrons and their guests only. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

45.1 Conditions of Approval – Generally. A county does not err in failing to process an application to vacate a public easement as a modification of a condition of approval for the subdivision in which the easement is located, where the easement was not required as a condition of subdivision approval, but instead stemmed from a private agreement between the developer and others. *Neighbors for Smart Growth v. Washington County*, 76 Or LUBA 319 (2017).

45.1 Conditions of Approval – Generally. LUBA owes no deference to a governing body's interpretation of a condition of approval imposed by a hearings officer in a prior decision, although deference may be required for any code interpretations the governing body adopts in the course of interpreting the condition of approval. *Kuhn v. Deschutes County*, 74 Or LUBA 190 (2016).

45.1 Conditions of Approval – Generally. A county decision interpreting a condition of approval to be satisfied by an agreement between the county and only one of two owners of a common tract is not a "collateral attack" on a prior LUBA decision, in which LUBA assumed, but did not decide, that the same condition of approval would be satisfied by an agreement between the two current owners of the common tract. *Kuhn v. Deschutes County*, 74 Or LUBA 190 (2016).

45.1 Conditions of Approval – Generally. A circuit court order that requires the two owners of a common tract to enter into an agreement with each other to pay taxes and maintenance costs does not preclude a county from interpreting a partition condition of approval to require one or both tract owners to enter into separate agreements with the county to ensure maintenance of the common tract, or obligate the county to interpret the condition of approval to require the two owners to enter into an agreement with each other. *Kuhn v. Deschutes County*, 74 Or LUBA 190 (2016).

45.1 Conditions of Approval – Generally. Where a hearings officer approved a partition subject to a condition of approval requiring the developer to record, prior to the sale of any parcels, an agreement to maintain a common tract, but the condition does not identify the necessary parties to the agreement, a county does not err in interpreting the condition to be satisfied by allowing the county to enter into separate agreements with the owners of the common tract to ensure maintenance of the tract. *Kuhn v. Deschutes County*, 74 Or LUBA 190 (2016).

45.1 Conditions of Approval – Generally. LUBA will affirm an interpretation of a condition of approval requiring an "agreement" to maintain a common tract, such that the required agreement is not limited to Covenants, Conditions and Restrictions (CC&Rs), where the condition does not expressly limit the agreement to CC&Rs. *Kuhn v. Deschutes County*, 74 Or LUBA 190 (2016).

45.1 Conditions of Approval – Generally. Where a hearings official initially expresses concern that use of an accessory structure for monthly gatherings of over 40 people could not be viewed as "accessory" to the residential use of a forest zoned property, but after the applicant proposed to limit those large parties to no more than four per year concluded that the use qualified as "accessory," the hearings official was required to impose a condition of approval to limit the proposed accessory use to no more than four large parties per year. *Kaplowitz v. Lane County,* 74 Or LUBA 386 (2016).

45.1 Conditions of Approval – Generally. Where an applicant obtains from the city a zoning classification decision concluding that a specific type of housing development is an allowed use, but noting that if the use is changed to provide services to persons other than residents of the development, the development must be approved as a conditional use, and the applicant thereafter seeks and the city approves building permits based on the same specific housing development proposed in the zoning classification decision, the city is not required to impose conditions to preclude the applicant from changing the use to one that requires conditional use approval. *McCollough v. City of Eugene,* 74 Or LUBA 573 (2016).

45.1 Conditions of Approval – Generally. Where petitioners concede that a hearings officer was not legally obligated to develop conditions of approval that would make an application for alteration of a nonconforming use approvable, and petitioners proposed no conditions of approval themselves that would have permitted the hearings officer to approve the alteration, petitioners fail to demonstrate error in the hearings officer's decision. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

45.1 Conditions of Approval – Generally. Applicants for quasi-judicial land use permit approval have the burden of proposing any conditions of approval that might be necessary for approval. Local governments frequently develop and impose conditions of approval that they conclude are necessary to approve such applications, but local governments are not obligated to do so. *J. Conser and Sons, LLC v. City of Millersburg*, 73 Or LUBA 57 (2016).

45.1 Conditions of Approval – Generally. Where a local government is relying on a particular development or a particular limitation on development to find a relevant approval standard is satisfied, there must be something in place to ensure the relied upon development or limitation will become a reality. That reality could be achieved through a condition of approval or it could be achieved because the desired development or development limitation is part of the approved proposal. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

45.1 Conditions of Approval – Generally. Where there are applications pending for permits to construct the redevelopment that will replace a historic resource that is to be demolished, and a demolition permit to carry out a demolition review approval decision may not be approved until those permits have been issued, the redevelopment that the city relied on to find that demolition review criteria are satisfied is adequately guaranteed. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

45.1 Conditions of Approval – Generally. Where an ordinance that modified access spacing standards was conditioned so that it would not become effective until a development agreement

for construction of roadway improvements specified in the ordinance was executed, execution of a development agreement for improvements that vary significantly from the improvements called for in the ordinance is not sufficient to make the ordinance effective. *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92 (2015).

45.1 Conditions of Approval – Generally. An assignment of error that argues that the county erred in failing to impose the same conditions of approval that it imposed more than five years earlier in a decision approving the same proposal that has since become void provides no basis for reversal or remand of the decision, where the petitioner does not identify any requirement in the county code or state law or regulation that obligates the county to carry over previously imposed conditions of approval simply because they were imposed five years earlier. *Devin Oil Co., Inc. v. Morrow County*, 72 Or LUBA 240 (2015).

45.1 Conditions of Approval – Generally. Any inadequacy in conditions that are not adopted to ensure compliance with any approval criterion is harmless error and does not provide a basis for reversal or remand of the decision. *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

45.1 Conditions of Approval – Generally. Because it is common for a multi-phased tentative subdivision approval to include conditions of approval that apply only to certain phases of development, it is incumbent on a petitioner to raise at the local proceeding any issues involving a legal standard that requires either (1) independent approval of a particular phase of development or (2) the conditioning of construction of an earlier phase of development on fulfillment of conditions applicable to a subsequent phase. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

45.1 Conditions of Approval – Generally. A petitioner does not establish that a hearings officer erred in failing to condition approval of the first phase of a multi-phase development on completion of the second phase, where the petitioner does not identify any code standard or condition governing Phase I that will be violated if Phase II is not completed. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

45.1 Conditions of Approval – Generally. Modifying a condition of approval to change the source of water used for irrigating landscaping does not obligate the local government to also review and approve a landscaping plan as part of the hearing on the modification, where an unmodified condition provides for review and approval of the landscaping plan as an administrative decision to be issued prior to building permits, and the petitioner's argument that review of the landscaping plan will be discretionary and must be made under proceedings providing notice and hearing is a collateral attack on the unmodified condition. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

45.1 Conditions of Approval – Generally. A condition of approval requiring "substantial compliance" with a detailed list of specific design features for a proposed commemorative garden is adequate to ensure that the purpose of the condition will be met, notwithstanding that "substantial compliance" gives the applicant some latitude in fulfilling the condition. *Rushing v. City of Salem*, 70 Or LUBA 448 (2014).

45.1 Conditions of Approval – Generally. Remand is required where city code limits a home occupation to 600 square feet in size in an accessory structure, the undisputed evidence is that the home occupation will occupy more than 600 square feet, but the city's decision simply imposes a condition of approval limiting the home occupation to 600 square feet. *Stevens v. City of Island City*, 68 Or LUBA 112 (2013).

45.1 Conditions of Approval – Generally. A zone change applicant's voluntary representations regarding the density and number of parking spaces that could be constructed under the new zoning are not binding on that applicant's subsequent design review application that proposes a higher density and fewer parking spaces, where nothing in the zone change criteria required submittal or approval of development plans, and the hearings officer did not consider or rely upon the applicant's voluntary representations in approving the zone change. *Sellwood-Moreland Improvement League v. City of Portland*, 68 Or LUBA 213 (2013).

45.1 Conditions of Approval – Generally. A county does not err in imposing a condition of approval that requires an applicant for a conditional use airport to obtain approval from the Oregon Department of Aviation, where the decision makes clear that the requirement to obtain ODA approval is not intended as a substitute for analyzing whether the airport is compatible with the surrounding neighborhood. *Yih v. Linn County*, 68 Or LUBA 412 (2013).

45.1 Conditions of Approval – Generally. A condition that prohibits an airplane from flying at low altitudes over houses or animals is not impermissibly vague when it is read in context with other related conditions that require take offs and landings to occur only over the Santiam River and prohibit take offs and landings over dwellings. *Yih v. Linn County*, 68 Or LUBA 412 (2013).

45.1 Conditions of Approval – Generally. Even if a county is not required to issue Willamette Greenway approvals at the same time it issues a use permit to retroactively approve a wedding event business within the Greenway, a county must nonetheless impose conditions or other measures sufficient to ensure that required Greenway permits will be obtained. *White v. Lane County*, 68 Or LUBA 423 (2013).

45.1 Conditions of Approval – Generally. A development code that provides that a permit is void if "conditions of a permit or approval" are not substantially or completely satisfied within two years is properly interpreted to refer to conditions of approval in the permit that are enumerated as such, and the development code need not be interpreted to require substantial or complete construction of other aspects of the development approved under the permit that are not reflected in the conditions of permit approval. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

45.1 Conditions of Approval – Generally. Where a development code requires that conditions of permit approval be satisfied within two years after the permit approval becomes final to avoid having the permit approval become void, and satisfying those 38 conditions within two years will be difficult because satisfying some of those conditions of approval would require the applicant to first secure additional approval decisions, a hearings officer is not permitted to interpret the code to require that the applicant only satisfy those conditions of approval that do not require additional approval decisions. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

45.1 Conditions of Approval – Generally. Where a development code requires that permit conditions of approval must be substantially satisfied and that "any failure to fully comply with the conditions is not the fault of the applicant," for a county hearings officer to find that the permit is not void, the hearing hearings officer must be able to find both that all conditions of approval, viewed as a whole, have been substantially exercised *and* that, for any of the conditions of approval where there has been a failure to fully exercise the condition, the applicant is not at fault. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

45.1 Conditions of Approval – Generally. Where a development code requires that conditions of permit approval be satisfied within two years after the permit becomes final and provides that the permit approval is void unless the conditions of approval are satisfied "within the time period," a permit opponent's argument that the applicant may not rely on actions that were taken to satisfy the condition before the permit was approved is textually plausible. Nevertheless, where LUBA cannot identify any reason why the enactor of the code would have intended that the actions that satisfied the condition of approval must be duplicated "within the time period," LUBA will not interpret the code to impose such a requirement. *Gould v. Deschutes County*, 67 Or LUBA 1 (2013).

45.1 Conditions of Approval – Generally. Failure to impose a condition of approval requiring the applicant to modify a settlement agreement with neighbors to allow a second dwelling on a rural residential property is not a basis for remand, where the petitioner fails to establish that the settlement agreement limits the number of dwellings allowed on the property. *Purtzer v. Jackson County*, 67 Or LUBA 205 (2013).

45.1 Conditions of Approval – Generally. A county does not improperly substitute a condition of approval for a finding that the proposed home occupation will be conducted "primarily in buildings," where the county finds based on testimony below that the home occupation will be conducted primarily in buildings and the county imposes a condition of approval that no more than 20 percent of any home occupation event may be conducted outside a building. *Green v. Douglas County*, 67 Or LUBA 234 (2013).

45.1 Conditions of Approval – Generally. A condition of approval that no more than 20 percent of any home occupation event may be conducted outside a building is not impermissibly imprecise, notwithstanding that neighbors and the county may have different understandings regarding how to analyze and apply that 20 percent limitation. *Green v. Douglas County*, 67 Or LUBA 234 (2013).

45.1 Conditions of Approval – Generally. Where a county has authority to impose conditions of approval, a condition that requires a sworn annual report that demonstrates that a farm stand complied with the 25 percent limit on the percentage of sales from a farm stand that are attributable to retail and promotional activity, and that records be kept that confirm the accuracy of the report, is permissible under ORS 215.283(1)(o) and OAR 660-033-0130(23). *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

45.1 Conditions of Approval – Generally. A farm stand permit that authorizes multiple food carts to sell a variety of prepared food at up to 24 events per year cannot be characterized as

"incidental retail sales," and exceeds the authority granted by ORS 215.283(1)(o) and OAR 660-033-0130(23). *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

45.1 Conditions of Approval – Generally. ORS 215.283(1)(o) and OAR 660-033-0130(23) do not categorically prohibit food carts in all circumstances. If a permit authorizing a farm stand appropriately limited food carts so that they could be characterized as "incidental retail sales," they could be authorized at a farm stand. *Greenfield v. Multnomah County*, 67 Or LUBA 407 (2013).

45.1 Conditions of Approval – Generally. Where the local government relied on the applicant's proposal to use a retrenching method to determine that dewatering from the mining operation will not affect groundwater levels of nearby wells and therefore not conflict with agricultural irrigation practices, but no condition of approval requires the retrenching method to be used, remand is required in order for the local government to condition its approval on use of the retrenching method. *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291 (2012).

45.1 Conditions of Approval – Generally. A condition specifying future use of a reclaimed mining site is not inconsistent with OAR 660-023-0180(5)(f), which limits post-mining uses to farm uses under ORS 215.203, uses listed under ORS 215.283(1), and fish and wildlife habitat uses, where the condition requires reclamation for "fish and wildlife habitat" and eventual use "as a public park, if allowed by law." While ORS 215.203 and 215.283(1) do not currently allow public parks, the condition would only call for use as a public park if the statutes are amended to allow such a use. *Protect Grand Island Farms v. Yamhill County*, 66 Or LUBA 291 (2012).

45.1 Conditions of Approval – Generally. An argument below that the challenged ordinance should be conditioned to require rededication of vacated rights-of-way as proposed by the applicant is sufficient to raise the issue of whether a condition requiring rededication is necessary to ensure that the rights-of-way are rededicated. *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

45.1 Conditions of Approval – Generally. The failure to impose an express condition requiring that the applicant dedicate a replacement pathway does not warrant remand, where the text of the challenged ordinance states that the applicant will dedicate a replacement pathway, and that text functions as an implicit requirement or condition of approval. *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

45.1 Conditions of Approval – Generally. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), precludes a petitioner from challenging the terms of a condition imposed on remand that is identical to a condition imposed in the original decision, whose terms were not challenged in the initial appeal to LUBA. That the identical terms were embodied in a nominally "new" condition does not allow the petitioner to advance challenges to the decision on remand that could have been, but were not, advanced in the initial appeal. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

45.1 Conditions of Approval – Generally. Where the county's decision on remand and supporting findings state that a condition is imposed requiring the applicant to construct a left-turn lane, a condition to that effect has been adequately imposed, notwithstanding that the county did

not expressly amend the list of conditions imposed in its initial decision to include the requirement to construct a left-turn lane. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

45.1 Conditions of Approval – Generally. A county is not required to impose a condition prohibiting use of a farm dwelling if the tract on which it is located is no longer used for farm use at a commercial scale. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

45.1 Conditions of Approval – Generally. On appeal of a planning commission decision, the issue of the city's failure to impose a condition is waived under the reasoning in *Miles v. City of Florence*, 190 Or App 500 (2003), where the underlying hearings official's decision also failed to impose the disputed condition, and petitioner did not specify that failure as a ground for appeal in the local notice of appeal to the planning commission. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

45.1 Conditions of Approval – Generally. A condition requiring an aggregate company's trucks to avoid a particular intersection is likely to be effective, where the employer has sufficient authority to require its employees and contract haulers to avoid the intersection and, despite some economic incentives for noncompliance, a reasonable decision maker could rely on the condition to be effective to prevent impacts on the intersection. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

45.1 Conditions of Approval – Generally. An applicant bears the burden of proof to demonstrate that an application complies with applicable approval standards, and a local government is not required to approve a noncomplying development proposal, even if conditions of approval might be imposed that would render the proposal consistent with the applicable criteria. *Wilson v. Washington County*, 63 Or LUBA 314 (2011).

45.1 Conditions of Approval – Generally. Well reports generated when wells were dug decades ago are substantial evidence that a reasonable decision maker could rely upon to conclude that the wells can supply sufficient water for a proposed destination resort, where there is no countervailing evidence in the record, and the county addresses the possibility that the well reports are no longer accurate by imposing a condition requiring prior to final master plan approval that the applicant conduct pump tests and, if necessary, dig new wells, to ensure sufficient water. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

45.1 Conditions of Approval – Generally. Where there is uncertainty regarding the exact location of the jurisdictional line between the Department of State Lands (DSL) and Department of Geology and Mineral Industries (DOGAMI), but agency representatives agree that a proposed mining area is upland of the jurisdictional line and therefore subject to DOGAMI's jurisdiction, and as a precaution the county imposes a condition requiring that the applicant obtain any permits required by either DSL or DOGAMI, any uncertainty regarding the location of the jurisdictional line does not undermine the county's finding that DOGAMI has jurisdiction. *Oregon Shores Cons. Coalition v. Curry County*, 61 Or LUBA 8 (2010).

45.1 Conditions of Approval – Generally. A hearings officer does not err in concluding that modifying a condition of approval imposing a 20-year deadline to complete development, to allow

an additional three years to complete development, is not "materially inconsistent" with the original condition of approval, where the additional time represents only a 15 percent increase and nothing in the original permit approval suggests that the original 20-year completion deadline was intended to be inflexible. *Connecting Eugene v. City of Eugene*, 61 Or LUBA 439 (2010).

45.1 Conditions of Approval – Generally. When a local government decides to defer a determination of compliance with an applicable criterion to a later proceeding, the local government cannot escape providing the public processes that would be required if the criterion were applied at the time required by the city's development code by claiming that the deferred criterion is nondiscretionary or clear and objective. *Boucot v. City of Corvallis*, 60 Or LUBA 57 (2009).

45.1 Conditions of Approval – Generally. When relying on a condition of development under OAR 660-012-0060(2)(e) to approve development that would significantly affect a transportation facility, a local government cannot rely on a suggestion in a letter from ODOT when the suggestion is not reflected as a condition of approval. *Walker v. Josephine County*, 60 Or LUBA 186 (2009).

45.1 Conditions of Approval – Generally. When a petitioner does not challenge a finding that a right-of-way bisects his property into two non-contiguous units of land, a condition of approval requiring a fence along the right-of-way does not violate a local code provision requiring fences to be along the perimeter of lots or parcels. *King v. Washington County*, 60 Or LUBA 253 (2009).

45.1 Conditions of Approval – Generally. If a condition of approval was imposed to ensure compliance with all applicable approval criteria, then a decision modifying that condition of approval must explain why that condition is no longer needed to ensure such compliance. Absent such an explanation, the decision must be remanded. *Oh v. City of Gold Beach*, 60 Or LUBA 356 (2010).

45.1 Conditions of Approval – Generally. Where there is substantial evidence in the record that an applicant is not precluded as a matter of law from obtaining state and federal permits, a local government does not err in finding that an applicable comprehensive plan provision that has the legal effect of requiring the applicant to secure state and federal permits is satisfied by imposing a condition of approval that the applicant secure such permits. *Citizens for Responsible Development v. City of The Dalles*, 59 Or LUBA 369 (2009).

45.1 Conditions of Approval – Generally. A condition requiring that the applicant for mining restrict rock blasting for up to three days after being notified of Native American cultural or religious visits to a nearby site is sufficient to ensure that noise from blasting will not conflict with such visits. *Walker v. Deschutes County*, 59 Or LUBA 488 (2009).

45.1 Conditions of Approval – Generally. When a local government avoids finding compliance with an applicable approval criterion by deferring determination of compliance to a later proceeding, while the later proceeding must provide for notice and a hearing, the later stage need not have the identical process that was provided during the earlier stage. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009).

45.1 Conditions of Approval – Generally. When an applicable local provision requires that road improvements associated with a partition be constructed or bonded for "before a dwelling may be authorized," the local governments errs by requiring the improvements to be constructed or bonded for as a condition of approval of the partition itself. *Sperber v. Coos County*, 58 Or LUBA 570 (2009).

45.1 Conditions of Approval – Generally. When an approval criterion requires a partition map to show "other features affecting development," a local government does not misinterpret the applicable law by requiring an applicant to show areas designated as less and least suitable by the comprehensive plan. "Other features affecting development" can encompass physical features themselves as well as comprehensive plan designations based on those features. *Sperber v. Coos County*, 58 Or LUBA 570 (2009).

45.1 Conditions of Approval – Generally. Where LUBA reverses a denial under ORS 197.835(10)(a) and orders the local government to approve the "application," the application includes any (1) applicant-proposed conditions of approval and (2) conditions imposed in an initial decision that the applicant has not objected to or attempted to appeal to the final decision maker. However, the "application" does not include conditions of approval that the applicant objected to or attempted to appeal to the final decision maker. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

45.1 Conditions of Approval – Generally. When a condition of approval was not imposed to ensure compliance with any approval criterion and the condition of approval is not needed to comply with any current approval criterion, a local government may approve a request to modify the condition of approval. *Woodard v. Yamhill County*, 56 Or LUBA 141 (2008).

45.1 Conditions of Approval – Generally. A city does not err in imposing a condition of approval limiting the size of an accessory structure in circumstances where an applicant submits a site plan that the applicant freely admits is not visually representative of the actual proposed development. *Caster v. City of Silverton*, 56 Or LUBA 250 (2008).

45.1 Conditions of Approval – Generally. A city errs in imposing a condition of approval requiring removal of a structure after a certain specified time period where the existence or removal of that structure is not a relevant issue on review and the applicant does not consent to the condition that the city imposed. *Caster v. City of Silverton*, 56 Or LUBA 250 (2008).

45.1 Conditions of Approval – Generally. Where a land use regulation approval standard requires a "minimum of two points of access," a hearings officer errs by approving a permit application without imposing a condition of approval that the second access that is needed to comply with the land use regulation requirement must actually be provided. *Central Oregon Landwatch v. Deschutes County*, 56 Or LUBA 280 (2008).

45.1 Conditions of Approval – Generally. A warning that subdivision approval could become void in the future if certain owners of the subdivided property who have been granted Ballot Measure 37 waivers cease to own the property is a legally insufficient substitute for a condition of

approval that the holders of the needed Ballot Measure 37 waivers must retain their ownership interest until the final plat is recorded. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

45.1 Conditions of Approval – Generally. Where a county engineer testifies that the applicant may need to acquire "vision easements" if necessary and the county imposes a condition of approval to that effect, the county is not required to adopt a finding that it is "feasible" for the applicant to obtain such easements from neighbors, absent some indication that there is a legal or practical impediment to obtaining the easements. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

45.1 Conditions of Approval – Generally. A local government is not obligated to impose a condition of approval requiring that a broadcast tower operator comply with federal radio frequency exposure limitations that the applicant must comply with in any event. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

45.1 Conditions of Approval – Generally. Provided local law does not dictate a different result, local governments generally may approve a proposed development of land after providing any required notice and hearings−without finding that the proposal complies with all relevant approval criteria−so long as the local government defers the required findings to a later stage and ensures that a second opportunity for any required notice and public hearing is provided before the required findings are adopted at that later stage. *Meadow Neighborhood Assoc. v. Washington County*, 55 Or LUBA 472 (2007).

45.1 Conditions of Approval – Generally. It may not be appropriate to grant conditional approval while deferring required findings to a subsequent approval stage, even where there will be a full public right to participate in the subsequent approval stage, where the initial decision has the effect of rendering the subsequent review moot or prevents meaningful review. However, where the initial decision has no legal or preclusive effect on the subsequent review, such conditional approval provides no basis for reversal or remand. *Meadow Neighborhood Assoc. v. Washington County*, 55 Or LUBA 472 (2007).

45.1 Conditions of Approval – Generally. Even if ORS 197.522 applies outside the context of a moratorium to require the city to approve development that can be made consistent with applicable criteria through reasonable conditions, the statute places on the applicant the burden of proposing reasonable conditions. A proposed condition requiring petitioner to share the cost of future signalization of an intersection if future conditions warrant is not sufficient to ensure that the development is consistent with a standard requiring that affected intersections function at or above a minimum level of service. *Vista Construction LLC v. City of Grants Pass*, 55 Or LUBA 590 (2008).

45.1 Conditions of Approval – Generally. Where the Oregon Department of Transportation (ODOT) recommends that conditions of approval be imposed requiring the improvements identified in a traffic impact analysis, and the city's decision states that it will impose the conditions but in fact does not, the petitioner may assign error to the city's failure to impose the conditions, notwithstanding that the petitioner raised no issues below regarding the improvements

or the conditions, because ODOT adequately raised the issue. *Nygaard v. City of Warrenton*, 55 Or LUBA 648 (2008).

45.1 Conditions of Approval – Generally. The absence of explicit conditions of approval mandating that a rezoning applicant construct necessary transportation improvements is not necessarily reversible error, where the local government expressly incorporates the traffic analysis that requires the improvements, and thus the decision itself requires the improvements. However, remand is necessary to adopt conditions of approval where the decision does not purport to incorporate the traffic analysis or require the necessary improvements to be constructed. *Nygaard v. City of Warrenton*, 55 Or LUBA 648 (2008).

45.1 Conditions of Approval – Generally. Remand is necessary where the rezoning decision relies on conditions of approval to comply with OAR 660-012-0060(4)(b)(B), which requires that the city ensure that necessary transportation improvements are actually funded, but fails to impose any such conditions. *Nygaard v. City of Warrenton*, 55 Or LUBA 648 (2008).

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

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

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

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

45.1 Conditions of Approval – Generally. Where a city's code does not expressly authorize a city to impose a condition requiring annexation on its decision approving an application to partition unincorporated land, but the code only authorizes the city to approve partitions of unincorporated lands that are subject to an annexation agreement and the city's only other option would be to deny

the partition application, the city correctly interprets its code to approve the application with the annexation agreement condition. *Wickham v. City of Grants Pass*, 53 Or LUBA 261 (2007).

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

45.1 Conditions of Approval – Generally. Where neither the local government nor LUBA has jurisdiction to resolve the legality of a condition requiring necessary facilities to be constructed prior to obtaining final approval of a two-step subdivision approval process, the local government may (1) adopt findings establishing that fulfillment of the condition of approval is not precluded as a matter of law, and (2) ensure that the condition will be fulfilled prior to final subdivision approval or actual development. *Butte Conservancy v. City of Gresham*, 52 Or LUBA 550 (2006).

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

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

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

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

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

45.1 Conditions of Approval – Generally. A local government is not obligated to impose of site plan approval that prohibits a use that is not in fact proposed or approved, simply because it is possible that at some future date the structures authorized by the site plan might be used in a manner prohibited by the code. *Friends of the Metolius v. Jefferson County*, 51 Or LUBA 188 (2006).

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

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

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

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

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

45.1 Conditions of Approval – Generally. A city may approve a master plan of development for 1000 dwelling units that could damage wetlands or threaten recovery of endangered western lilies on the site, provided the city imposes a condition of approval that requires the city to revisit the legal requirements to protect the wetlands and western lilies, at the time of detailed development

plan approval, when the hydrologic assessment necessary to evaluate each phase of the proposed development against those legal standards will be available. *Oregon Shores Cons. Coalition v. City of Brookings*, 49 Or LUBA 273 (2005).

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

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

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

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

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

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

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

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

45.1 Conditions of Approval – Generally. Where a non-duplicative plat name is a criterion for preliminary plat approval, a city does not err by granting preliminary plat approval without a plat name and imposing a condition of approval that the applicant submit a non-duplicative plat name prior to final plat approval. For such an approval criterion, it is at most harmless error that the city failed to find that it is feasible for the applicant to submit the required non-duplicative plat name. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

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

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

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

45.1 Conditions of Approval – Generally. Where it is not apparent that a county adopted one or more conditions of approval to address the impacts described in ORS 215.296(1), petitioner's argument that the county's conditions of approval are not "clear and objective," as is required by ORS 215.296(2), provides no basis for reversal or remand. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

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

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

challenging the adequacy or validity of the condition in a subsequent LUBA appeal of the decision on reconsideration. *DLCD v. City of Warrenton*, 40 Or LUBA 88 (2001).

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

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

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

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

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

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

45.1 Conditions of Approval – Generally. A finding that a proposed subdivision will be connected to the city's storm drainage system is not supported by substantial evidence, where the proposed drainage system stops short of the city's storm drainage system and a condition of approval requiring paved access to the subdivision is not adequate to ensure that the storm drainage connection will be constructed along with that paved access. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

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

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

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

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

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

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

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

45.1 Conditions of Approval – Generally. Where an issue is raised below whether a condition imposed in a prior land use decision supplies an applicable approval standard in subsequent land use decisions, the local government must determine whether the condition is an applicable criterion for approval and, if so, whether it is satisfied. *Bradbury v. City of Bandon*, 33 Or LUBA 664 (1997).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45.2 Conditions of Approval – Authority to Impose. That a county's amended Transportation System Plan (TSP) includes language recommending that the county acquire property to develop a transportation facility does not mean that whatever land use permits are required to actually construct the facility under the local code or state law are thereby waived. The county could choose to approve whatever land use permits are required under law at the same time it approves an amendment to its TSP, but the latter is not a substitute for the former, or vice versa. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

45.2 Conditions of Approval – Authority to Impose. A project applicant is not required to file and win a quiet title action in circuit court as a condition precedent to filing the application simply because another party disputes the applicant's title to the property on which the proposed development is to occur. When a party disputes the applicant's title under a legal theory that can only be resolved in circuit court, neither the county nor LUBA is in a position to resolve the legal dispute over whether the applicant/deed owner's title is good. For that reason, the county is also not obligated to adopt findings resolving the title dispute. In circumstances where consent or lack of ownership has a bearing on an approval criteria, we have held that the decision maker may be required to impose conditions to ensure that the required consent is obtained prior to construction. However, where ownership of the subject property is not an approval criterion, we have never held that the applicant has the obligation to quiet title in the subject property where some doubt is raised during the proceedings below as to the legality of that title, or that the decision maker is obliged to adopt findings addressing the likelihood that the applicant will prevail in a quiet title action. *VanDyke v. Yamhill County,* 78 Or LUBA 530 (2018).

45.2 Conditions of Approval – Authority to Impose. Where a city council has clear authority under a development code to impose conditions of approval to address potential land use conflicts and traffic congestion, and the city council appears to fail to impose conditions requested by project opponents because it was advised by county staff that it lacked authority to impose such conditions of approval, remand is required to the city council to consider imposition of any conditions of approval that it finds are warranted to mitigate any such potential land use conflicts or traffic congestion. *Hagan v. City of Grants Pass,* 76 Or LUBA 196 (2017).

45.2 Conditions of Approval – Authority to Impose. Where the local code allows the local government to impose conditions of approval to ensure that a proposal conforms to applicable development standards, and nothing cited by the petitioner prohibits the local government from approving an application for development subject to conditions of approval or relying on those conditions to find that the proposal, as conditioned, complies with applicable development standards, the petitioner's arguments that the city should not have imposed conditions of approval provide no basis for reversal or remand of the decision. *Von Clemm v. City of Portland*, 66 Or LUBA 379 (2012).

45.2 Conditions of Approval – Authority to Impose. Where the applicant appeals a hearings officer's decision, challenging a condition of approval under a local appeal standard that limits the planning commission's review to the issues raised in the appeal, the planning commission's authority to impose new conditions is limited to conditions necessary to ensure that the application, with the challenged condition eliminated, continues to comply with applicable approval criteria. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

45.2 Conditions of Approval – Authority to Impose. Where the applicant appeals a hearings officer's decision challenging a condition of approval limiting building height, under a local appeal standard that limits the planning commission's review to the issues raised in the appeal, the planning commission errs in imposing a new condition requiring additional setbacks, where the condition requiring additional setback is unrelated to the building height condition. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

45.2 Conditions of Approval – Authority to Impose. When the applicable local code provision allows a hearings officer to impose buffering and screening requirements as determined by the "review authority," that grant of discretion is very broad, and a hearings officer is permitted to impose buffering and screening conditions that apply in analogous situations. *King v. Washington County*, 60 Or LUBA 253 (2009).

45.2 Conditions of Approval – Authority to Impose. When a distance buffer and sight-obscuring fence already exist to buffer and screen an industrial use from nearby residential uses, the stated rationale to reduce noise and visual impacts on the residential uses is insufficient to justify a condition of approval requiring a second sight-obscuring fence. *King v. Washington County*, 60 Or LUBA 253 (2009).

45.2 Conditions of Approval – Authority to Impose. A condition of approval requiring a fence to prevent a use from expanding into the area on the other side of the required fence and reduce noise impacts does not further a legitimate planning objective when the decision already precludes expanding the use beyond the area of the proposed fence, and there is no evidence in the record of noise impacts. *King v. Washington County*, 60 Or LUBA 253 (2009).

45.2 Conditions of Approval – Authority to Impose. ORS 227.175(4) allows a city to condition its approval of an application for a zone change consistent with ORS 227.215 or any city legislation. *Willamette Oaks, LLC v. City of Eugene*, 59 Or LUBA 60 (2009).

45.2 Conditions of Approval – Authority to Impose. Where LUBA reverses a denial under ORS 197.835(10)(a) and orders the local government to approve the "application," the application includes any (1) applicant-proposed conditions of approval and (2) conditions imposed in an initial decision that the applicant has not objected to or attempted to appeal to the final decision maker. However, the "application" does not include conditions of approval that the applicant objected to or attempted to appeal to the final decision maker. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

45.2 Conditions of Approval – Authority to Impose. Absent some basis in the city code, a city does not have the authority to approve or deny a broadcast tower application based on the terms of the current lease agreement between the tower owner and the property owner. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

45.2 Conditions of Approval – Authority to Impose. A federal statute prohibiting local governments from prohibiting the provision of wireless telephone service does not authorize local governments to condition approval of a broadcast tower to require filters to reduce radio frequency

interference with nearby wireless facilities. Even if a local code provision authorized such a condition, federal law would preempt the local government from applying it. *Curl v. City of Bend*, 56 Or LUBA 746 (2008).

45.2 Conditions of Approval – Authority to Impose. Where an application to remove a Planned Development Overlay meets all of the applicable criteria, a local government errs in requiring the applicant's property to be rezoned as a condition of approval in approving the application. *7th Street Station LLC v. City of Corvallis*, 55 Or LUBA 321 (2007).

45.2 Conditions of Approval – Authority to Impose. A hearings officer's failure to address arguments that the applicant should improve transportation facilities affected by a proposed destination resort provides no basis for reversal or remand, where a prior development agreement and two earlier development approvals conclusively established the type and extent of transportation improvements the applicant is obligated to make in developing the resort, and the petitioners cite no authority for the hearings officer to require different improvements in approving a subdivision within that resort. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

45.2 Conditions of Approval – Authority to Impose. A county code provision that authorizes a county to impose conditions designed to address the adverse impacts of the proposed use or development does not authorize a county to impose conditions to remediate zoning violations on the property that are unrelated to the proposed use or development. *Applebee v. Washington County*, 54 Or LUBA 364 (2007).

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

45.2 Conditions of Approval – Authority to Impose. Where a local government's only claimed basis for imposing an exaction that requires off-site road improvements is that a subdivision would otherwise violate a code standard regarding street system impacts, and LUBA finds that the local government has not established that the subdivision would violate the code standard, there is also no basis to impose the exaction. *PacWest II, Inc. v. City of Madras*, 53 Or LUBA 241 (2007).

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

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

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

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

45.2 Conditions of Approval – Authority to Impose. A condition of approval requiring an applicant to acquire adjacent property either by sale or eminent domain does not violate a code provision requiring the signatures of all property owners on an application where the application did not propose use of adjacent property. *Kurahashi Partners v. City of Beaverton*, 46 Or LUBA 791 (2004).

45.2 Conditions of Approval – Authority to Impose. Even if ORS 197.522 can be read to apply to a city decision to approve a partition and can be read to limit the types of conditions that may be imposed to "reasonable conditions," ORS 197.522 does not place a burden on a local government to demonstrate that its conditions are reasonably necessary to address particular circumstances presented in the proposed partition. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

45.2 Conditions of Approval – Authority to Impose. Even if ORS 197.522 is applicable to a decision to approve a minor partition, ORS 197.522 does not require a city to modify its minimum right-of-way requirements to respond to arguments that the right-of-way requirements are excessive in a particular case. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

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

45.2 Conditions of Approval – Authority to Impose. Conditions of approval requiring Tri-Met to install restrooms and drinking fountains for the westside corridor project are not "reasonable and necessary" within the meaning of Oregon Laws 1991, chapter 3, section 7(1)(b), because those improvements are not required by the final environmental impact statement, and the project can be completed and operate without the required improvements. *Tri-County Metro Trans. Dist. v. City of Beaverton*, 31 Or LUBA 214 (1996).

45.2 Conditions of Approval – Authority to Impose. Conditions of approval requiring Tri-Met to install an enhanced trackway and esplanade for the westside corridor project are not "reasonable and necessary" within the meaning of Oregon Laws 1991, chapter 3, section 7(1)(b), because the project can be completed and operate without the required improvements. *Tri-County Metro Trans. Dist. v. City of Beaverton*, 31 Or LUBA 214 (1996).

45.2 Conditions of Approval – Authority to Impose. Whether or not a local government has authority to design and construct a road owned by another jurisdiction has no bearing on whether the local government can condition development approval upon a finding that the road be able to accommodate a proposed development. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

45.2 Conditions of Approval – Authority to Impose. Assignments of error that contend disputed conditions of approval either exceed a local government's authority under, or improperly construe, applicable law, if sustained, provide a basis for reversal or remand of a challenged decision, regardless of whether the challenged decision is a land use decision or limited land use decision. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

45.2 Conditions of Approval – Authority to Impose. If a condition is *necessary* for consistency with a final order approving a light rail transit (LRT) facility, under Oregon Laws 1991, chapter 3, section 7(1)(b), a local government is *required* to impose such a condition in approving a local permit for the LRT facility, and the limitations in the second sentence of that section do not apply. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

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

45.2 Conditions of Approval – Authority to Impose. Under Oregon Laws 1991, chapter 3, section 7(1)(b), a "necessary" condition is a condition required for a light rail transit project to meet applicable permit criteria in a local government's comprehensive plan or code. However, such a condition cannot be imposed if by itself, or together with other conditions, it would prevent implementation of the approved light rail transit project. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

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

45.2 Conditions of Approval – Authority to Impose. A code section authorizing conditions "requiring design features which minimize environmental impacts * * *" is sufficient authority to impose a condition that an identified wetland be crossed by a bridge rather than a road placed on

fill. Where the record includes testimony expressing concern about placing fill in the wetland, the record is sufficient to show such a condition furthers a valid planning purpose. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

45.3 Conditions of Approval – Exactions. The *Dolan* rough proportionality requirement operates as a *limit* or ceiling on a city's authority to impose exactions. If a proposed exaction is less than the exaction that could be imposed under the *Dolan* rough proportionality limit, *Dolan* does not require that the exaction be increased so that it is roughly proportional. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

45.3 Conditions of Approval – Exactions. Where the "rough proportionality" test in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d (1994), applies, it can function as a kind of variance, providing a basis under which a local government may choose not to exact property as a condition of development approval that it would otherwise be entitled to exact under its land use regulations, as an alternative to compensating the landowner for the taking. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 235 (2009).

45.3 Conditions of Approval – Exactions. An agreement by a property owner to establish a walkway from a vacated street west of the property to an existing street east of the property, in order to provide pedestrian access to a building on the property, does not necessarily constitute a voluntary agreement to deed a public easement for a sidewalk connecting the vacated street with the existing street. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

45.3 Conditions of Approval – Exactions. Where a city requires that a property owner grant an easement across its property to provide pedestrian access between a vacated street and an existing street as a condition of development approval, and determines that the easement will satisfy city requirements for connectivity, the city has established a nexus between the exaction and the city's legitimate governmental interest in ensuring adequate transportation connectivity. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

45.3 Conditions of Approval – Exactions. In requiring an easement for a pedestrian walkway as a condition of development approval, a city may consider the impacts that reasonably flow from the approval granted, including the possible use of the walkway by employees of the development to access adjoining streets and by residents of neighboring properties to access the development on foot or by bicycle. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

45.3 Conditions of Approval – Exactions. A city adequately quantifies the impact of a proposed development on the area's bicycle and pedestrian transportation system and establishes that an exaction for a pedestrian walkway across the subject property is roughly proportional to the impact of the development where the city: (1) considers the types of uses in the vicinity and concludes that the walkway is necessary to allow access to a transit stop and other neighborhood amenities; (2) explains that persons working at or patronizing the development would be impeded from accessing a neighborhood attraction to the west of the subject property without the walkway; and (3) explains that the subject property could be developed as six individual lots, with sidewalks required for each, and the decision to combine the lots into one development has impacts on the city's transportation system that the required easement ameliorates. *Hallmark Inns v. City of Lake Oswego*, 43 Or LUBA 62 (2002).

45.3 Conditions of Approval – Exactions. Incremental impacts on a transportation facility attributable to a proposed development may support an exaction. *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

45.3 Conditions of Approval – Exactions. LUBA will uphold an exaction requiring the dedication of right-of-way where the city's findings demonstrate that the exaction is roughly proportional to the impacts caused by the development, including any benefits the development receives by virtue of the exaction. *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

45.3 Conditions of Approval – Exactions. Where a city fails to establish a relationship between vehicular and nonvehicular impacts of a proposed development and a required dedication for sidewalks, the exaction is not supportable under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

45.3 Conditions of Approval – Exactions. A waiver of remonstrance to the formation of a local improvement district is not subject to the analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), because it, by itself, does not result in the loss of property. *McClure v. City of Springfield*, 39 Or LUBA 329 (2001).

45.3 Conditions of Approval – Exactions. Only those impacts that reasonably flow from the approval granted may be considered when imposing exactions to ameliorate those impacts. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

45.3 Conditions of Approval – Exactions. During its review of a proposed partition, a city may consider the impact that future dwellings may have on public infrastructure, where the partition approval is the last land use decision necessary to establish dwellings on the resulting parcels. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

45.3 Conditions of Approval – Exactions. It is appropriate to include some consideration of the benefits to the parcels created by a partition, as well as the impacts from the new parcels, in the rough proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

45.3 Conditions of Approval – Exactions. In reviewing findings adopted to support the imposition of exactions, LUBA first determines if any identified impacts or benefits are not relevant for the purposes of the rough proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). LUBA then looks at whether the remaining findings adequately quantify the benefits to the development or the impacts of the development on public facilities, and whether those findings suffice to demonstrate that the city's exactions are "roughly proportional" to those benefits and impacts. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

45.3 Conditions of Approval – Exactions. The fact that an exaction is required by city ordinance is irrelevant to whether an exaction imposed pursuant to that ordinance is in fact roughly proportional to the impacts of development. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

45.3 Conditions of Approval – Exactions. The fact that a portion of the property subject to dedication for transportation improvements will be used for transportation access whether it is privately or publicly owned is not relevant under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), because that consideration is neither a benefit to the property owner nor an impact of development on the public infrastructure. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

45.3 Conditions of Approval – Exactions. Benefits to the larger community resulting from the imposition of exactions, as opposed to specific benefits to the subject property, are not appropriate considerations under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

45.3 Conditions of Approval – Exactions. In some cases, the impacts resulting from the development may be so great, and the exactions imposed so small, that it is readily apparent without additional explanation that the exactions are roughly proportional to the expected impact. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

45.3 Conditions of Approval – Exactions. The impacts resulting from the approval of two residential parcels are not so great as to make it self-evident that the imposition of a 20-foot dedication of right-of-way requirement is roughly proportional to the impacts of the proposed development. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

45.3 Conditions of Approval – Exactions. Unless a local government makes some effort to quantify the benefits accruing to a particular development, those benefits will be of limited assistance in applying the rough proportionality analysis required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994). *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

45.3 Conditions of Approval – Exactions. If the extent of safety impacts caused by a proposed partition justifies some or all of the city's exactions, the local government may impose those additional conditions that are roughly proportional to the safety impacts caused by the approval. *McClure v. City of Springfield*, 37 Or LUBA 759 (2000).

45.3 Conditions of Approval – Exactions. To the extent *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), is applicable to a facial takings challenge to legislative adoption of a local ordinance, petitioner must establish from the face of the challenged ordinance that no set of circumstances exist under which the ordinance can be applied in a constitutional manner. *Lincoln City Ch. of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

45.3 Conditions of Approval – Exactions. The requirement in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), that the local government establish "rough proportionality" between a proposed exaction and the impacts of development does not mean that the local government must assume the burden of producing the evidence on which the rough proportionality determination is based. *Lincoln City Ch. of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

45.3 Conditions of Approval – Exactions. Depending on the facts of the case, a local government's demonstration of rough proportionality required by *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), may require up to three distinct sets of analyses: (1) the extent to which the proposed exaction will benefit the development; (2) the extent to which the proposed exaction will mitigate the development's impacts on the public infrastructure; and (3) whether the benefits and impacts analyzed in (1) and (2), considered together, demonstrate that the proposed exaction is roughly proportional to the impacts of development. *Lincoln City Ch. of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

45.3 Conditions of Approval – Exactions. Even assuming *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994), addresses whether the local government must originate the analysis used to demonstrate rough proportionality between a proposed exaction and the impacts of development, an ordinance requiring that an applicant submit a "rough proportionality report" is not facially unconstitutional, where nothing on the face of the ordinance requires the local government to adopt or use in whole or part the conclusions contained therein. *Lincoln City Ch. of Comm. v. City of Lincoln City*, 36 Or LUBA 399 (1999).

45.3 Conditions of Approval – Exactions. A condition requiring an applicant for site plan approval for a fast-food restaurant to design street improvements for hundreds of feet beyond the subject property boundaries does not meet the "rough proportionality" test established in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994). *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

45.3 Conditions of Approval – Exactions. Under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed2d 304 (1994), and *J.C. Reeves Corp. v. Clackamas County*, 131 Or App 615, 887 P2d 360 (1994), findings in support of a condition requiring an applicant for site plan approval for a fast-food restaurant to construct certain street and frontage improvements must compare traffic and other effects of development to required improvements. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

45.3 Conditions of Approval – Exactions. When an applicant's own site plan for a fast-food restaurant provides for a nondriving area, the local government's imposition of a condition requiring the nondriving area be retained is not an exaction. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

45.3 Conditions of Approval – Exactions. A condition requiring an applicant to provide a plan for satisfying the local government's storm drainage requirements prior to issuance of a land use permit is not an exaction. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

45.3 Conditions of Approval – Exactions. Advisory statements labeled as "conditions" are not exactions. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

45.3 Conditions of Approval – Exactions. If a local government approves a proposed partition with conditions requiring exactions, the local government must ensure that the requirement of *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 2319-20, 129 L Ed2d 304 (1994), for

"individualized determination[s] that the required dedication is related both in nature and extent to the impact of the proposed development" is satisfied. *Neuman v. Benton County*, 29 Or LUBA 172 (1995).

45.3 Conditions of Approval – Exactions. Conditions of land use approval requiring uncompensated dedication of land constitute "exactions." Where a condition of land use approval imposes an exaction, the local government must make an individualized determination that the exaction is roughly proportional in nature and extent to the impact of the proposed development. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

45.3 Conditions of Approval – Exactions. Even if a local code provision requiring that six percent of the gross area of a proposed subdivision be dedicated for open space is properly interpreted as a minimum rather than a maximum requirement, a decision requiring dedication of much more than six percent of the gross area of a proposed subdivision must be remanded so that the local government may adopt findings explaining that interpretation and showing the "rough proportionality" requirement of *Dolan v. City of Tigard* is satisfied. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

45.4 Conditions of Approval – Consents to Annexation. Where a city's code lists a number of "factors" to be considered in approving an annexation, including "[a]dequacy and availability of public facilities and services to service potential development," but the city's code does not require that the city identify how infrastructure will be paid for, or by whom, as part of an annexation decision, and the city's findings suggest the city's capital improvement program (CIP) will be amended prior to development to list the new water main as a public facility, although the city does not intend to rely upon the CIP as a source of funding or authority for the new water main, petitioners have not established a CIP amendment must be required as a condition of approval or that the city otherwise erred in assigning a positive value to this factor in approving the proposed annexation. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

45.4 Conditions of Approval – Consents to Annexation. Where a city rezones a portion of a property designated mixed use corridor (MUC) on the city's comprehensive plan, from FU-10 (future urban 10-acre) to NC (neighborhood commercial), and petitioners argue that the NC zone is inconsistent with the city's comprehensive plan which directs the city to "[f]ocus transit-oriented, higher intensity, mixed-use development along selected transit corridors," because the subject property is not near a transit corridor, petitioners' premise—that the MUC plan designation is used only where the city intends to promote transit-oriented development along transit corridors—is incorrect. The MUC plan designation is implemented by four commercial zoning districts: one of which is the NC zone, which is not a transit-oriented zone, and is clearly not intended to be placed along transit corridors. Therefore, the city's decision to rezone its property to NC is not inconsistent with the property's MUC comprehensive plan designation. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

45.4 Conditions of Approval – Consents to Annexation. Petitioners fail to establish that the city erred in concluding that rezoning a property to neighborhood commercial is consistent with Statewide Planning Goal 5 when the rezoning the subject property constitutes a PAPA for purposes of applying Goal 5, which provides that local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource by allowing new uses that "could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list." The city's PAPA is a very limited one, that in relevant part simply applies the zones implementing the city's comprehensive plan designations that the acknowledged comprehensive plan has already designated for the corresponding uses. Because the challenged PAPA simply implements that acknowledged plan designation choice with the exercise of little or no discretion, the PAPA does not authorize any "new uses" for purposes of OAR 660-023-0250(3) and Goal 5. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

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

45.5 Conditions of Approval – Waivers of Remonstrance. Where a city code provides that a property owner must, as a condition of permit or partition approval, either provide the improvements or pay into an improvement fund if a street adjoining property without direct access to the street does not have standard full-width improvements, and petitioner argues that the code provision is not applicable to his proposed property partition, LUBA will sustain, in part, petitioner's challenge upon remand from the Court of Appeals, where the arguments on appeal have evolved and it is apparent that remand is necessary for the hearings officer to adopt findings regarding LUBA's underlying conclusion that the hearings officer was correct in concluding that the condition requiring a waiver of remonstrance against a street or stormwater facility improvement was justified under *Clark v. City of Albany*, 31 Or LUBA 375, 380, *aff'd*, 144 Or App 192, 924 P2d 877 (1966), and did not constitute a takings. *Hill v. City of Portland*, 78 Or LUBA 334 (2018).

45.5 Conditions of Approval – Waivers of Remonstrance. A waiver of remonstrance to the formation of a local improvement district (LID) is not subject to the constitutional exaction analysis because it, by itself, does not result in a loss of petitioner's property. Conditions of approval, such as a waiver of remonstrance, may be applied by a local government to ensure that a development proposal conforms to the applicable approval criteria or to ensure the enforcement of other local government regulations. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

45.5 Conditions of Approval – Waivers of Remonstrance. Where there is substantial evidence in the record to justify a city's finding that there is a need for a local improvement district and that petitioner's development will both contribute to the need for those improvements and be benefited by them, the city may require petitioner to sign a waiver of remonstrance for future street improvements. *Clark v. City of Albany*, 31 Or LUBA 375 (1996).

46. Outdoor Mass Gatherings. Where a county makes a single decision to approve an outdoor mass gathering as defined in ORS 433.735, that decision is excluded from LUBA's jurisdiction under ORS 197.015(10)(d), even if the decision authorizes access roads and other development and that authorization, but for being embodied in a decision approving an outdoor mass gathering, arguably might constitute a land use decision. *Thomas v. Wasco County*, 68 Or LUBA 102 (2013).

46. Outdoor Mass Gatherings. Even if a hearings officer's assumption that the applicant could legally conduct both an outdoor mass gathering and a smaller gathering during the same three-month period is erroneous, any error is harmless and not a basis to reverse or remand the decision, where a proposal for outdoor gatherings was not part of the application, and the hearings officer's statement was merely *dicta*, not binding on the parties in any way. *Horning v. Washington County*, 51 Or LUBA 303 (2006).

46. Outdoor Mass Gatherings. Local government decisions authorizing outdoor mass gatherings as defined at ORS 433.735(1) that will last fewer than 120 hours are not subject to local land use regulations and are not land use decisions subject to LUBA review. *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

46. Outdoor Mass Gatherings. Local government decisions authorizing the large outdoor gatherings defined at ORS 433.763(1) that will last more than 120 hours are subject to local land use regulations and are land use decisions subject to LUBA review. *Landsem Farms v. Marion County*, 44 Or LUBA 611 (2003).

46. Outdoor Mass Gatherings. Even if ORS 197.015(10)(d) does prohibit county regulation of gatherings of fewer than 3,000 persons on a site, it would only do so if those gatherings occurred no more frequently than once every three months on the site. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

46. Outdoor Mass Gatherings. ORS 433.750 completely occupies the field of regulation of outdoor mass gatherings of less than 120 hours' duration. There is no room for more restrictive local regulation of such gatherings. However, ORS 433.735(1) authorizes a county to adopt a more expansive definition of outdoor mass gatherings of less than 120 hours' duration. *Fence v. Jackson County*, 29 Or LUBA 147 (1995).

46. Outdoor Mass Gatherings. Under ORS 433.735(1), a county may define "outdoor mass gatherings" to include gatherings of *500 or more* persons for 24 hours' to 120 hours' duration, and may include the time necessary to set up, take down and clean up after a gathering in determining whether a particular gathering is of less than 120 hours' duration. *Fence v. Jackson County*, 29 Or LUBA 147 (1995).

46. Outdoor Mass Gatherings. ORS 433.750(1) does not allow a county to require that an outdoor mass gathering of less than 120 hours' duration be a permitted use in the applicable zoning district or otherwise subject to zoning regulations. *Fence v. Jackson County*, 29 Or LUBA 147 (1995).

46. Outdoor Mass Gatherings. ORS 433.750(6) authorizes a county to charge applicants for an outdoor mass gathering permit a fee calculated to reimburse the county only for "reasonably necessary costs in receiving, processing and reviewing applications for [such] permits," not for costs of providing services, such as law enforcement, to the gathering. *Fence v. Jackson County*, 29 Or LUBA 147 (1995).

46. Outdoor Mass Gatherings. ORS 433.750(6) requires a county to waive payment of an outdoor mass gathering permit fee if it finds that the applicant is unable to reimburse the governing body. A county ordinance adopted to implement ORS 433.750 must provide for an outdoor mass gathering permit fee waiver, in the circumstances described in ORS 433.750(6). *Fence v. Jackson County*, 29 Or LUBA 147 (1995).

46. Outdoor Mass Gatherings. ORS 433.735 to 433.770 allow a county to require that an application for an outdoor mass gathering permit be filed at least 60 days before the proposed gathering is to occur. *Fence v. Jackson County*, 29 Or LUBA 147 (1995).

46. Outdoor Mass Gatherings. Under ORS 433.755(1), a county may not require all applicants for an outdoor mass gathering permit to obtain one million dollars of insurance. ORS 433.755(1) requires an individualized determination concerning the insurance risks posed by a particular gathering, with one million dollars being the maximum amount of insurance a county may require. *Fence v. Jackson County*, 29 Or LUBA 147 (1995).

46. Outdoor Mass Gatherings. Under ORS 433.770(1), the only remedy for specific violations of the outdoor mass gathering statute or its implementing local regulations is injunctive relief authorized by a court. Therefore, a county ordinance that purports to authorize the county sheriff to order dispersal of an outdoor mass gathering, if he believes such gathering is not in "compliance with all applicable state and local laws," is overly broad. *Fence v. Jackson County*, 29 Or LUBA 147 (1995).

46. Outdoor Mass Gatherings. Under ORS 433.763(1)(c), a county may subject outdoor mass gatherings of more than 120 hours' duration to conditional use permit land use regulations. *Fence v. Jackson County*, 29 Or LUBA 147 (1995).

46. Outdoor Mass Gatherings. Where a challenged county ordinance regulating outdoor mass gatherings of more than 120 hours' duration makes such gatherings subject to comprehensive plan and code provisions, but LUBA cannot determine which plan and code provisions apply to such gatherings, or how any such provisions are satisfied with regard to gatherings of a religious nature, LUBA cannot determine whether the challenged ordinance uses the least restrictive means to achieve a compelling state interest, as required by the Federal Religious Freedom Restoration Act of 1993. *Fence v. Jackson County*, 29 Or LUBA 147 (1995).

47.1 Ballot Measure 37 – Generally. A decision that grants subdivision approval based on Measure 37 waivers after Measure 49 has taken effect must be reversed under *Corey v. DLCD*, 344 Or 457, 184 P3d 1109 (2008), and *Pete's Mountain Homeowners Assn. v. Clackamas County*, 227 Or App 140, 204 P3d 802, *rev den*, 346 Or 589 (2009). *Walker v. Josephine County*, 60 Or LUBA 333 (2010).

47.1 Ballot Measure 37 – Generally. Prior to the passage of Ballot Measure 49 (2007), Ballot Measure 37 (2004) allowed the holder of a waiver to seek approval to develop property in ways that would otherwise be prohibited by law, in lieu of receiving compensation for loss in property value. *DLCD v. Jackson County*, 59 Or LUBA 101 (2009).

47.1 Ballot Measure 37 – Generally. Petitioners do not waive their right to argue that a second subdivision approval decision that relies on Ballot Measure 37 waivers and post-dated Ballot Measure 49 was precluded by Ballot Measure 49 by failing to make that argument in their appeal of an earlier subdivision decision that predated Ballot Measure 49. The subject of that earlier appeal was the county's pre-Ballot Measure 49 subdivision approval decision, not the county's post-Ballot Measure 49 subdivision approval decision. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

47.1 Ballot Measure 37 – Generally. An issue may be waived so that it cannot be raised in a second appeal regarding the same land use application where the issue is "plainly cognizable." The possibility that a county might adopt a second decision approving a subdivision based on Ballot Measure 37 waivers after Ballot Measure 49 takes effect was not plainly cognizable in a LUBA appeal of an earlier subdivision that pre-dated Ballot Measure 49. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

47.1 Ballot Measure 37 – Generally. As a general rule a county may limit its proceedings following a remand to the issues that provided the basis for the LUBA remand. However, a county may not refuse to consider the effect of Ballot Measure 49 on a subdivision applicant's Ballot Measure 37 waivers, where that issue is squarely presented in the second appeal and was not decided and did not need to be decided in the first appeal. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

47.1 Ballot Measure 37 – Generally. If an applicant for subdivision approval has a vested right under Section 5(3) of Ballot Measure 49, it is because the applicant satisfies the vested rights criteria set out in *Clackamas County v. Holmes*, 265 Or 193, 198-99, 508 P2d 190 (1973), not because the proposed subdivision complies with land use laws that were not waived by intervenors Ballot Measure 37 waivers. After Ballot Measure 49 took effect, Ballot Measure 37 waivers are no longer effective. Therefore, until the subdivision applicant receives a vested rights determination, a county decision to grant preliminary subdivision approval must stand on its own, and without a legally effective Ballot Measure 37 waiver such a preliminary subdivision approval decision cannot stand on its own. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

47.1 Ballot Measure 37 – Generally. Measure 37 claimants who on December 6, 2007, had already received all required permits and approvals under land use laws that remained applicable after his or her Measure 37 waiver decision was issued must seek a vested rights determination

under subsection 5(3) of Measure 49. If they are successful in that regard, then they may proceed to complete the development that was begun under Measure 37. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

47.1 Ballot Measure 37 – Generally. Measure 37 claimants who on December 6, 2007, had not yet received all required permits and approvals under land use laws that remained applicable after his or her Measure 37 waiver decision was issued must seek a vested rights determination under subsection 5(3) of Measure 49. If they are successful in that regard, they must still obtain any permits or other approvals that are required under land use laws that were not waived by their Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

47.1 Ballot Measure 37 – Generally. Under ORS 197.352(9) (2005), LUBA does not have jurisdiction to review a challenge to a final state Ballot Measure 37 Order determining the identity of the "owner" of property for purposes of ORS 197.352 (2005). *Welch v. Yamhill County*, 56 Or LUBA 166 (2008).

47.1 Ballot Measure 37 – Generally. Where a county fails to determine in the decision whether a provision of its local code applies to the proposed subdivision, the county's silence on the matter in the subdivision decision will not be construed as a decision "not to apply" the provision pursuant to ORS 197.352(8)(2005). *Welch v. Yamhill County*, 56 Or LUBA 166 (2008).

47.1 Ballot Measure 37 – Generally. A warning that subdivision approval could become void in the future if certain owners of the subdivided property who have been granted Ballot Measure 37 waivers cease to own the property is a legally insufficient substitute for a condition of approval that the holders of the needed Ballot Measure 37 waivers must retain their ownership interest until the final plat is recorded. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

47.1 Ballot Measure 37 – Generally. That both the holder of a Ballot Measure 37 waiver and the trustee for her revocable trust signed the subdivision application does not mean that the waiver holder transferred rights granted to her by the waivers to the trust, or that the county erred in granting approval to the trust instead of the waiver holder. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

47.1 Ballot Measure 37 – Generally. LUBA will not affirm a local government's decision based on a vested rights theory where the county did not address or adopt that theory in its decision. *Dunn v. Yamhill County*, 55 Or LUBA 206 (2007).

47.1 Ballot Measure 37 – Generally. Where a board of county commissioners previously waived a subdivision approval standard under Ballot Measure 37 (ORS 197.352), that approval standard does not apply to a subsequent proposal to subdivide the property. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

47.1 Ballot Measure 37 – Generally. Where a subdivision approval criterion was waived under Ballot Measure 37 (ORS 197.352), in a subsequent application for subdivision approval an opponent may not argue for the first time that the waived approval criterion is a public health and

safety regulation that cannot be waived under Ballot Measure 37. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

47.1 Ballot Measure 37 – Generally. Whether the county tax assessor in 1971 applied preferential tax assessment to properties that were zoned to allow for agricultural use has little bearing on whether that zone was an "exclusive farm use" zone subject to the limitations of ORS 215.203(1971). Rather, the text and context of the county's zoning ordinance in 1971 is the best evidence. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

47. 1 Ballot Measure 37 – Generally. LUBA will affirm a county's determination that the Agriculture-A zone adopted in 1971 was not an "exclusive farm use" zone subject to the limitations of ORS 215.203 (1971), for purposes of determining whether proposed dwellings under a Ballot Measure 37 waiver must be "in conjunction with farm use," where the 1971 ordinance included a separate "exclusive farm use" zone that permitted only the uses allowed under ORS 215.203 (1971), the Agriculture-A zone in contrast permitted a large number of nonfarm uses that bore no relationship to the uses allowed in the statute, and the obvious inference is that the county did not intend the Agriculture-A zone to implement ORS 215.203 (1971). *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

47.1 Ballot Measure 37 – Generally. The petitioner's speculation that the Ballot Measure 37 claimants might transfer the property to a third party before the right to complete development allowed to the claimants under the Ballot Measure 37 waiver is perfected not a basis for reversal or remand. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

47.1 Ballot Measure 37 – Generally. A county is under no affirmative obligation to inquire into the terms of private contracts between Ballot Measure 37 claimants and third-party developers to ensure that the claimants have not transferred their interest in the property during the pendency of the development application. Where the claimants sign the application as owners and some issue regarding continued ownership arises during the proceedings, the county may rely upon the claimants' representations that they still own the property or on publicly available documents, such as deeds, and need not inquire further. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

47.1 Ballot Measure 37 – Generally. LUBA will remand a decision approving a subdivision pursuant to a Ballot Measure 37 waiver where the county fails to address arguments raised below that the subdivision is inconsistent with a 1959 subdivision ordinance that predated the claimants' date of acquisition and that was not waived under the state and local waivers. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

47.1 Ballot Measure 37 – Generally. If the Ballot Measure 37 claimant's interest in the property is transferred by sale or by operation of law to a third person not named in the Ballot Measure 37 waiver, any entitlement to development approval based on waivers of regulations granted to the claimant is lost. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. While the probable intent of the "goal-post" statute at ORS 215.427(3)(a) is to prevent local governments from approving or denying a permit based on legislative amendments that post-date the application, the statute is not expressly limited to

legislative amendments. The goal-post statute arguably also operates to prevent local governments from approving or denying a permit application based on state or local regulations that were initially waived under Ballot Measure 37 (ORS 197.352) but later become "applicable" when the claimant dies, the property is transferred, and the right to seek development approval free of the waived regulations is lost. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. The drafters of Ballot Measure 37 (ORS 197.352) limited development or use rights to the claimant, and that limitation is a central feature of the measure. LUBA will not presume that the voters intended that limitation to be avoided by operation of the goal-post statute at ORS 215.427(3)(a), which if given full effect would allow the local government to grant development approvals based on ORS 197.352 waivers to persons who are not the claimant. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. Where Ballot Measure 37 (ORS 197.352) and the goal-post statute at ORS 215.427(3)(a) operate together, they come into conflict and cannot both be given full effect. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. In circumstances where the goal-post statute at ORS 215.427(3)(a) conflicts with Ballot Measure 37 (ORS 197.352), the latter prevails, because ORS 197.352 is the more specific and later-adopted statute. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. Where the Ballot Measure 37 claimant dies prior to receiving development approval and the property is transferred by operation of law to his heirs, the county errs in approving development on land no longer owned by the Ballot Measure 37 claimant, pursuant to waivers that grant only the claimant the right to develop the property free of the goals, statutes and rules specified in the waiver. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. A statement in s state waiver under Ballot Measure 37 (ORS 197.352) that the state authorizes the claimant to use the property for the proposed use, subject to standards in effect on the date of acquisition, is not properly understood to operate as a blanket waiver of all state regulations adopted after the acquisition date, where other sections of the state waiver limit the waiver to the requirements of Goal 3 and related statutes and administrative rules. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. Where the state specifically waives only Goal 3 and related statutes and administrative rules, an argument that the state should also have waived Goals 7, 11 and 14 is beyond LUBA's scope of review and must be asserted in a different forum. The only question LUBA may decide is which goals and regulations the state actually waived. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. ORS 197.352(10), which provides that if a claim is not paid within two years, the owner shall be allowed to use the property as permitted at the time the owner acquired the property, does not apply where the state and local government have issued waivers of state and local regulations. Even if ORS 197.325(10) applies in that circumstance, any rights under

that subsection are lost when the property is transferred from the claimant's ownership. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.1 Ballot Measure 37 – Generally. A local government's decision determining that a subdivision application complies with all applicable land use regulations is not a decision under ORS 197.352(9) that is exempt from LUBA's jurisdiction; rather, the decision is a land use decision subject to LUBA's jurisdiction. *Welch v. Yamhill County*, 55 Or LUBA 697 (2007).

47.1 Ballot Measure 37 – Generally. Farms are part of the "existing commercial agricultural enterprise" as that phrase is used in Goal 3 if they contribute to the overall agricultural economy in the area in a substantial way. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

47.1 Ballot Measure 37 – Generally. Under ORS 197.352(9), LUBA does not have jurisdiction to review challenges to waivers of land use laws granted to petitioners by the Department of Land Conservation and Development or by the local government. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

47.1 Ballot Measure 37 – Generally. Nothing in the language of ORS 197.352(8) requires a local government to condition approval of a partition application that is submitted following a Ballot Measure 37 waiver on the continued ownership of the subject property by the Ballot Measure 37 claimant. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

47.1 Ballot Measure 37 – Generally. OAR 660-041-0030, which requires notice to the Department of Land Conservation and Development (DLCD) of an application for or decision on a permit pursuant to a Ballot Measure 37 waiver, is not inconsistent with ORS 197.763(2)(c), which requires a local government if requested by the applicant to notify DLCD of a hearing on a land use application. *DLCD v. Deschutes County*, 54 Or LUBA 799 (2007).

47.1 Ballot Measure 37 – Generally. LUBA will reverse a county decision that approves a rural subdivision in a forest zone following a county Ballot Measure 37 waiver, where the owner has not obtained a waiver of applicable state regulations. The county has no authority to approve development inconsistent with state regulations, unless and until the state waives those regulations. *DLCD v. Jackson County*, 53 Or LUBA 580 (2007).

47.2 Ballot Measure 37 – Local Waivers. A Ballot Measure 37 waiver is not a "license" and the remedies that are available to certain license holders are not available to Ballot Measure 37 claimants. Ballot Measure 37 claimants are limited to the remedies set out in Ballot Measure 49. *Hoffman v. Jefferson County*, 60 Or LUBA 101 (2009).

47.2 Ballot Measure 37 – Local Waivers. Where a board of county commissioners previously waived a subdivision approval standard under Ballot Measure 37 (ORS 197.352), that approval standard does not apply to a subsequent proposal to subdivide the property. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

47.2 Ballot Measure 37 – Local Waivers. Where a subdivision approval criterion was waived under Ballot Measure 37 (ORS 197.352), in a subsequent application for subdivision approval an opponent may not argue for the first time that the waived approval criterion is a public health and safety regulation that cannot be waived under Ballot Measure 37. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

47.3 Ballot Measure 37 – State Waivers. A Ballot Measure 37 waiver is not a "license" and the remedies that are available to certain license holders are not available to Ballot Measure 37 claimants. Ballot Measure 37 claimants are limited to the remedies set out in Ballot Measure 49. *Hoffman v. Jefferson County*, 60 Or LUBA 101 (2009).

47.3 Ballot Measure 37 – State Waivers. Where the Ballot Measure 37 claimant dies prior to receiving development approval and the property is transferred by operation of law to his heirs, the county errs in approving development on land no longer owned by the Ballot Measure 37 claimant, pursuant to waivers that grant only the claimant the right to develop the property free of the goals, statutes and rules specified in the waiver. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.3 Ballot Measure 37 – State Waivers. A statement in s state waiver under Ballot Measure 37 (ORS 197.352) that the state authorizes the claimant to use the property for the proposed use, subject to standards in effect on the date of acquisition, is not properly understood to operate as a blanket waiver of all state regulations adopted after the acquisition date, where other sections of the state waiver limit the waiver to the requirements of Goal 3 and related statutes and administrative rules. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.3 Ballot Measure 37 – State Waivers. Where the state specifically waives only Goal 3 and related statutes and administrative rules, an argument that the state should also have waived Goals 7, 11 and 14 is beyond LUBA's scope of review and must be asserted in a different forum. The only question LUBA may decide is which goals and regulations the state actually waived. *DLCD v. Jefferson County*, 55 Or LUBA 625 (2008).

47.3 Ballot Measure 37 (ORS 197.352) — State Waivers. LUBA will reverse a county decision that approves a rural subdivision in a forest zone following a county Ballot Measure 37 waiver, where the owner has not obtained a waiver of applicable state regulations. The county has no authority to approve development inconsistent with state regulations, unless and until the state waives those regulations. *DLCD v. Jackson County*, 53 Or LUBA 580 (2007).

48.1 Ballot Measure 49 – Generally. A decision that approves the adjustment of a property line between two existing parcels that were previously created by partition authorized by a Ballot Measure 49 DLCD Final Order is not a decision "under" Section 11 of Measure 49, because the county did not review the property line adjustment application under the authority of Section 11. Rather, it reviewed the application under the county zoning ordinance criteria applicable to property line adjustments. *Friends of Yamhill County v. Yamhill County*, 74 Or LUBA 268 (2016).

48.1 Ballot Measure 49 – Generally. Section 11(3)(a)(A) of Ballot Measure 49 prohibits the approval of a property line adjustment to adjust the size of a parcel that was created pursuant to a DLCD Final Order if the size of the adjusted parcel exceeds the maximum lot size set out in that section. *Friends of Yamhill County v. Yamhill County*, 74 Or LUBA 268 (2016).

48.1 Ballot Measure 49 – Generally. ORS 92.192 (2008) authorizes local governments to approve property line adjustments for undersized parcels in the exclusive farm use zone, while Measure 49, Section 11(3)(a)(A) imposes a maximum parcel size of two acres for certain parcels authorized by Measure 49. ORS 92.192 cannot be used to authorize through a property line adjustment an undersized parcel that exceeds the maximum lot size specified in Section 11(3)(a)(A). *Friends of Yamhill County v. Yamhill County*, 74 Or LUBA 268 (2016).

48.1 Ballot Measure 49 – Generally. County decisions approving an application to partition a property pursuant to final order issued under Ballot Measure 49 into three parcels and an application for a variance to the county's minimum design standards for private roads for access to the new parcels are decisions "under" Section 11 of Measure 49, where the county's denial of the requested variance to the road access standards would require the county to deny the requested partition to create the parcels authorized by the DLCD Final Order. In that circumstance, LUBA does not have jurisdiction to review either of the decisions. *Woodward v. Jackson County*, 73 Or LUBA 164 (2016).

48.1 Ballot Measure 49 – Generally. A county's partition approval decision based on a DLCD Final Order under Ballot Measure 49 is a decision made "under" Section 11 of Measure 49, and pursuant to ORS 195.318(1) the decision is not a "land use decision" subject to LUBA's jurisdiction. *Lenahan v. Wallowa County*, 72 Or LUBA 69 (2015).

48.1 Ballot Measure 49 – Generally. A county's conclusory finding that a subdivision applicant does not have a vested right to complete a subdivision under Section 5(3) of Ballot Measure 49 provides no basis for reversal or remand, where the county had adopted a decision that reached the same conclusion over one month earlier and that separate decision had not been judicially challenged and was therefore final. *Hoffman v. Jefferson County*, 60 Or LUBA 101 (2009).

48.1 Ballot Measure 49 – Generally. A decision that grants subdivision approval based on Measure 37 waivers after Measure 49 has taken effect must be reversed under *Corey v. DLCD*, 344 Or 457, 184 P3d 1109 (2008), and *Pete's Mountain Homeowners Assn. v. Clackamas County*, 227 Or App 140, 204 P3d 802, *rev den*, 346 Or 589 (2009). *Walker v. Josephine County*, 60 Or LUBA 333 (2010).

48.1 Ballot Measure 49 – Generally. Prior to the passage of Ballot Measure 49 (2007), Ballot Measure 37 (2004) allowed the holder of a waiver to seek approval to develop property in ways

that would otherwise be prohibited by law, in lieu of receiving compensation for loss in property value. *DLCD v. Jackson County*, 59 Or LUBA 101 (2009).

48.1 Ballot Measure 49 – Generally. Under Measure 49, a positive vested rights determination pursuant to subsection 5(3) of Measure 49 now provides the sole basis under Oregon law for a local government to approve a use of a property without having to apply standards and criteria governing the property. *DLCD v. Jackson County*, 59 Or LUBA 101 (2009).

48.1 Ballot Measure 49 – Generally. Where the holder of a Measure 37 waiver has not obtained a positive vested rights determination under Measure 49 on the date a local government approves a land use application under which the use would otherwise not be permitted, the local government is obligated to apply the state and local laws that were waived by the Measure 37 waiver in considering the application. *DLCD v. Jackson County*, 59 Or LUBA 101 (2009).

48.1 Ballot Measure 49 – Generally. Petitioners do not waive their right to argue that a second subdivision approval decision that relies on Ballot Measure 37 waivers and post-dated Ballot Measure 49 was precluded by Ballot Measure 49 by failing to make that argument in their appeal of an earlier subdivision decision that predated Ballot Measure 49. The subject of that earlier appeal was the county's pre-Ballot Measure 49 subdivision approval decision, not the county's post-Ballot Measure 49 subdivision approval decision. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

48.1 Ballot Measure 49 – Generally. An issue may be waived so that it cannot be raised in a second appeal regarding the same land use application where the issue is "plainly cognizable." The possibility that a county might adopt a second decision approving a subdivision based on Ballot Measure 37 waivers after Ballot Measure 49 takes effect was not plainly cognizable in a LUBA appeal of an earlier subdivision that pre-dated Ballot Measure 49. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

48.1 Ballot Measure 49 – Generally. As a general rule a county may limit its proceedings following a remand to the issues that provided the basis for the LUBA remand. However, a county may not refuse to consider the effect of Ballot Measure 49 on a subdivision applicant's Ballot Measure 37 waivers, where that issue is squarely presented in the second appeal and was not decided and did not need to be decided in the first appeal. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

48.1 Ballot Measure 49 – Generally. If an applicant for subdivision approval has a vested right under Section 5(3) of Ballot Measure 49, it is because the applicant satisfies the vested rights criteria set out in *Clackamas County v. Holmes*, 265 Or 193, 198-99, 508 P2d 190 (1973), not because the proposed subdivision complies with land use laws that were not waived by intervenors Ballot Measure 37 waivers. After Ballot Measure 49 took effect, Ballot Measure 37 waivers are no longer effective. Therefore, until the subdivision applicant receives a vested rights determination, a county decision to grant preliminary subdivision approval must stand on its own, and without a legally effective Ballot Measure 37 waiver such a preliminary subdivision approval decision cannot stand on its own. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

48.1 Ballot Measure 49 – Generally. When Measure 49 took effect, its effectiveness created a great deal of legal uncertainty regarding the continuing legal relevance of Measure 37 waivers, actions that may have been taken under those waivers and decisions that may have been issued pursuant to those waivers. *Biggerstaff v. Yamhill County*, 58 Or LUBA 476 (2009).

48.1 Ballot Measure 49 – Generally. A county decision that Measure 49 claimants have a vested right to continue with their effort to subdivide and develop their property is the county's final decision regarding the "nature and extent of [just] compensation" that the claimants will receive under Measure 49. The "nature" of the just compensation is a vested right to continue under the claimant's Measure 37 waiver, rather than under the more limited options available under Oregon Laws 2007, chapter 424, subsection 5(1). The "extent" of that just compensation is specified number of lots and dwellings. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

48.1 Ballot Measure 49 – Generally. A preliminary subdivision plat approval decision that post-dates a vested rights determination under Measure 49 is a land use decision subject to LUBA's review and is not a decision concerning the "nature and extent of [just] compensation" under Measure 49. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

48.1 Ballot Measure 49 – Generally. A common law vested right under subsection 5(3) of Measure 49 will shield a claimant from land use laws that were waived under Measure 37; but that common law vested right will not shield a claimant from land use laws that were not waived under Measure 37 and therefore remain applicable to the claimant's development. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

48.1 Ballot Measure 49 – Generally. Subsection 5(3) of Measure 49 includes two requirements. First, claimants must comply with their Measure 37 waiver. Second, claimants must establish that they have a common law vested right to the use described in the Measure 37 waiver. Under the first requirement, Measure 37 claimants remain subject to and must comply with any land use laws that were not waived by the Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

48.1 Ballot Measure 49 – Generally. Measure 37 claimants who on December 6, 2007, had already received all required permits and approvals under land use laws that remained applicable after his or her Measure 37 waiver decision was issued must seek a vested rights determination under subsection 5(3) of Measure 49. If they are successful in that regard, then they may proceed to complete the development that was begun under Measure 37. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

48.1 Ballot Measure 49 – Generally. Measure 37 claimants who on December 6, 2007, had not yet received all required permits and approvals under land use laws that remained applicable after his or her Measure 37 waiver decision was issued must seek a vested rights determination under subsection 5(3) of Measure 49. If they are successful in that regard, they must still obtain any permits or other approvals that are required under land use laws that were not waived by their Measure 37 waiver. *DLCD v. Clatsop County*, 58 Or LUBA 714 (2009).

49. Marijuana Laws. While a local government's authority to regulate land use and development is generally broad under Oregon law, a local government's authority to regulate land use on exclusive farm use (EFU)-zoned land is governed by state law. Land that is planned and zoned for exclusive farm use must be used exclusively for defined farm uses or limited listed exceptions provided by state law. Production of marijuana is an outright permitted farm use on land zoned EFU. While state law controls permitted uses on farm land and the regulation of marijuana production, local governments may adopt reasonable "time, place, and manner" regulations for marijuana production. *MJAI Oregon 5, LLC v. Linn County*, 78 Or LUBA 366 (2018).

49. Marijuana Laws. A county's decision is "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances," pursuant to ORS 197.835(10)(a)(A), where petitioner's application for marijuana production meets a county's clear and objective standards for marijuana production on EFU-zoned land, no evidence was submitted that contradicted petitioner's assertion that it could and would meet the county's marijuana production standards, and the county relied upon factors and considerations in denying petitioner's application that are not contained in the applicable approval criteria. Accordingly, the proper disposition of the county's denial is reversal with an order instructing the county to grant approval of the application. *MJAI Oregon 5, LLC v. Linn County*, 78 Or LUBA 366 (2018).

49. Marijuana Laws. Where a city adopts an ordinance prohibiting marijuana businesses in the city pursuant to ORS 475B.968(1), the ordinance is not a de facto amendment of the city's land use code provisions governing "agriculture," and therefore is not a "land use" decision. *Caudle v. City of Dunes City*, 77 Or LUBA 230 (2018).

49. Marijuana Laws. Where a city adopts an ordinance prohibiting marijuana businesses in the city pursuant to ORS 475B.968(1), the city is not required to apply its comprehensive plan provisions or adopt findings addressing those policies. ORS 475B.968 allows the city to enact a prohibition on marijuana businesses and refer that prohibition to the city's electors for approval, and nothing within that broad grant of authority suggests the legislature intended to subject that grant of authority to review for compliance with local governments' comprehensive plans. *Caudle v. City of Dunes City*, 77 Or LUBA 230 (2018).

49. Marijuana Laws. When a city adopts an ordinance prohibiting marijuana businesses in the city pursuant to ORS 475B.968(1), the city's decision is not a significant impacts land use decision because any provisions of ORS 475B.968 that arguably could contain what would qualify as standards have no bearing on or relationship to the use of land or to the city's planning and zoning responsibilities. *Caudle v. City of Dunes City*, 77 Or LUBA 230 (2018).

49. Marijuana Laws. Ballot Measure 56 (codified at ORS 215.503) requires a county to provide advance, individual, written notice by mail of the first hearing on an ordinance to property owners whose property could be "rezoned" by the proposed ordinance. Where an ordinance amending a county's land use and development code "limits" the size of, or in some cases "prohibits" entirely, a use – the growing of cannabis – that was previously allowed in the applicable zone, Measure 56 notice is required. *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

49. Marijuana Laws. Ballot Measure 56 (codified at ORS 215.503) contains mandatory language and is specific regarding what is required to be included in the notice of a land use change. Where

a county's notice does not: identify the date of the first hearing or even reference a hearing regarding the ordinance, reference any proposed ordinance or identify an ordinance by number, and was not sent at least 20 days but not more than 40 days before the date of the first hearing on the ordinance, the notice is defective. *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

49. Marijuana Laws. Where a county failed to provide petitioners adequate Ballot Measure 56 (codified at ORS 215.503) notice of a proposed ordinance that proposed to limit the size of, or in some cases prohibit entirely, a use – the growing of cannabis – that was previously allowed in the applicable zone, causing some petitioners to only be able to participate at the final hearing before the board of county commissioners on the proposed ordinance by submitting written comments prior to the record closing, such last-minute participation at the last of many hearings is not "an adequate opportunity to prepare and submit their case and a full and fair hearing" and therefore "prejudiced the substantial rights" of the petitioners. ORS 197.835(9)(a)(B). *Cossins v. Josephine County*, 77 Or LUBA 240 (2018).

49. Marijuana Laws. A hearings officer's decision that an applicant has a nonconforming use right to grow up to 18 marijuana plants for medical purposes under the Oregon Medical Marijuana Act is supported by substantial evidence in the record, and LUBA will reject an assignment of error that argues that the hearings officer's decision is not supported by substantial evidence in the whole record, where (1) the record includes copies of at least twelve cards issued by the Oregon Health Authority (OHA), administrator of the medical marijuana program, some of which are expired, duplicates, or outside of the relevant consideration dates; (2) the hearings officer relied on some of those OHA cards to reach his conclusion about the number of plants allowed; (3) the hearings officer adopted eight pages of findings explaining his decision and his understanding of the evidence; and (4) petitioner fails to challenge those findings or explain why the evidence supports his application. *Feetham v. Jackson County*, 77 Or LUBA 296 (2018).

49. Marijuana Laws. Where county code requires a building in which marijuana is grown to be "equipped with an effective odor control system" which must "prevent unreasonable interference of neighbors' use and enjoyment of their property," and the odor control system is deemed permitted only after the applicant submits "a report by a [licensed] mechanical engineer * * * demonstrating that the system will control odor so as not to unreasonably interfere with neighbors' use and enjoyment of their property," a board of county commissioners' conclusion that the application satisfies these requirements is supported by substantial evidence where it relies upon an engineers' report which demonstrates that the applicant's proposed odor control system "will control" odor as designed. The odor control system need not be actually built prior to the project receiving approval. *King v. Deschutes County*, 77 Or LUBA 339 (2018).

49. Marijuana Laws. LUBA will deny a petitioner's challenges to a county board of commissioners' conclusion that a project application satisfies the county code requirement that "[s]ustained noise" generated from a building in which marijuana is grown "shall not exceed 30 dB(A)," based upon statements made in the applicant's engineers' report where petitioner argues the engineer reports failed to adequately describe the system as built, did not consider site-specific characteristics or address allegations that the odor control systems will generate noise in excess of 30 dB(A), but petitioner failed to point to any evidence in the record that calls into question the engineer's statements that the operation will not produce "sustained" noise that exceeds permissible levels. *King v. Deschutes County*, 77 Or LUBA 339 (2018).

49. Marijuana Laws. LUBA will deny a petitioner's challenge to a county board of commissioners' conclusion that a marijuana production project applicant had satisfied the requirement to provide proof that water is available to the property by providing a "statement that water is supplied from a public or private water provider," by providing a letter from a private company stating it would supply water to the property where petitioner argues the letter is insufficient because the private water provider does not hold a water right. Based on its plain language, the county code does not require such a statement, but only requires a statement from a "private water provider" that they will provide water for the operation. *King v. Deschutes County*, 77 Or LUBA 339 (2018).

49. Marijuana Laws. LUBA will deny petitioner's challenge that the provider of water must have "an authorized source of water under Oregon Water Law" where county code requires an applicant for marijuana production to provide proof that water is available to the property by providing a statement that "water is supplied from a public or private water provider," the county code does not further define "provider of water," and the county imposed a condition of approval requiring "the use of water from any source for marijuana production shall comply with all applicable state statutes and regulations including ORS 537.545 and OAR 690-340-0010." *King v. Deschutes County*, 77 Or LUBA 339 (2018).

49. Marijuana Laws. For purposes of determining whether land is agricultural land under OAR 660-033-0020(1)(a)(B), a county's findings are not deficient when they do not address whether marijuana production is a viable farm use or crop on the subject property. The analysis under OAR 660-033-0020, which gives effect to Statewide Planning Goal 3, focuses on the land and its suitability for farm use, not on whether a particular crop can be grown on the site regardless of the qualities of the land. Such an analysis would be entirely removed from an analysis of the agricultural qualities of the land, which is contrary to the plain text of the rule, and therefore a county's failure to adopt findings addressing that issue does not provide a basis for reversal or remand. *Landwatch Lane County v. Lane County*, 77 Or LUBA 368 (2018).

49. Marijuana Laws. An amendment to the county's zoning ordinance that prohibits marijuana production in a rural residential zone is not "inconsistent with" a provision of the county's comprehensive plan that describes the predominant farm uses in the county and describes small scale agriculture on parcelized lands as one of those farm uses. That general language does not require the county to allow marijuana production on rural residential-zoned land. *Diesel v. Jackson County*, 74 Or LUBA 286 (2016).

49. Marijuana Laws. LUBA will deny an assignment of error that challenges findings that cite a newly enacted statute as additional support for its decision to prohibit marijuana production in a rural residential zone, where petitioner does not explain why any faulty interpretation of that newly enacted statute compels the conclusion that the county is required by the statute or its comprehensive plan to allow marijuana production in a rural residential zone. *Diesel v. Jackson County*, 74 Or LUBA 286 (2016).

49. Marijuana Laws. ORS 475B.340(2) and ORS 475.500(2) allow local governments to adopt "reasonable regulations" on marijuana production, processing, and sales. Absent any argument that establishes a protected First Amendment interest in marijuana production, cases that address

the reasonableness of restrictions on protected First Amendment activity have no relevance to interpreting the phrase "reasonable regulation" used in ORS 475B.340(2) and ORS 475.500(2). *Diesel v. Jackson County*, 74 Or LUBA 286 (2016).

49. Marijuana Laws. ORS 475B.340(2) and ORS 475.500(2) allow local governments to adopt "reasonable regulations" on marijuana production, processing, and sales. A county zoning ordinance that prohibits marijuana production in a rural residential zone while allowing marijuana production in an exclusive farm use zone and on lands zoned farm and forest, which together include more than one million acres in the county, is a "reasonable regulation" within the meaning of the statutes. *Diesel v. Jackson County*, 74 Or LUBA 286 (2016).